[2018] UKFTT 386 (TC)

TC06553

Appeal numbers: TC/2017/03224
TC/2017/04551

PROCEDURE – MTIC – ALCOHOL WHOLESALERS APPROVAL SCHEME - Application for consolidation of MTIC appeal with two already consolidated appeals dealing with Alcohol Wholesalers Approval Scheme - Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) MORGAN DRINKS LIMITED **Appellants**
(2) EXETER DRINKS LIMITED

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at Manchester on 15 June 2018

Mr Stephen Chinnery, a Solicitor-Advocate, of Olliers Solicitors for the Appellant

Ms Joanna Vicary, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. These are my directions and reasons following a case management hearing.

2. At a hearing on 4 September 2017, the Tribunal (Judge Cannan) directed (in directions released on 13 September 2017), with the parties' consent, that Exeter Drinks' appeal (which was late, and for which Judge Cannan gave permission) was to proceed and be heard together with the appeal of Morgan James Limited: '**the Extant Appeals'**

3. On 8 February 2018, the Appellants applied for specific disclosure in the Extant Appeals. That application was listed to be heard on 15 June 2018. In the meanwhile, and prompted by that application, HMRC furnished some additional disclosure and witness evidence from Officer Paschal.

4. On 31 May 2018, HMRC denied a claim by Exeter Drinks Limited for an input tax credit deduction of £108,885. That decision was expressed to be founded, at least in part, on HMRC's conclusion that the transactions referred to were connected to the fraudulent evasion of VAT, and that Exeter Drinks Ltd knew or should have known that this was the case.

5. By way of a Notice of Appeal filed on 12 June 2018 (but not yet given a number by the Tribunal's Registry) the Appellant sought to challenge that decision: '**the June 2018 Appeal'**.

6. The Grounds of Appeal:

(1) Seek to rely on *'the fundamental right to deduct input tax arising inter alia under Article 17(2)(a) of the Sixth Directive'*;

(2) Deny *'direct, implied or constructive knowledge of an overall scheme to defraud the revenue'*;

(3) Challenge the decision as *'predicated upon an unlawful prior decision to discriminate against the Appellant as domestic traders and is unlawful pursuant to Article 22(8) Sixth VAT Directive'*;

(4) Challenge the decision as ultra vires HMRC's powers under section 77 of the Value Added Tax Act 1994; and

(5) Put HMRC to proof as to the fact of a VAT loss *'either directly or indirectly in chains of supply to which the Appellant was a party'*.

7. On 13 June 2018, the Appellants decided to withdraw the application for specific disclosure, and it was not renewed or pursued before me. Hence, I need say no more about it except that the parties were in broad agreement that the time allocated for the hearing should not be thrown away, but should be used for case management.

8. The Appellants' position was that it wished to seek an order for the joinder of the June 2018 June with the Extant Appeals since all appeals *'as the decisions arise from the same facts'*.

9. HMRC's position was that the Extant Appeals are 'trial ready', and all that now remains to be done is to give listing directions leading to a two day final hearing between 13 August 2018 and 31 December 2018 (this being some modest slippage in the timetable directed by Judge Cannan, who anticipated a trial window from 1 May 2018 to 30 September 2018).

Discussion

10. Whether the June 2018 Appeal should be consolidated or joined with the two Extant Appeals is a matter of case-management. Rule 5(1) gives the Tribunal a general power to regulate its own procedure. Without restricting that general power, Rule 5(3)(b) provides that the Tribunal may '*consolidate or hear together two or more sets of proceedings … raising common issues.*' I also remind myself that Rule 2(3) requires the Tribunal to seek to give effect to the overriding objective when it exercises any power under the Rules, or interprets any rule or practice direction. That includes (Rule 2(3)(e)) *'avoiding delay, so far as compatible with proper consideration of the issues'*.

11. Whilst Rule 5 confers a discretion, this is not 'at large', but must be exercised in a structured way. In this regard, I was referred to and have considered the helpful guidance given by Judge Mosedale in *Manhattan Systems Ltd v HMRC* [2017] UKFTT 0862 (TC), and especially at Paragraphs [27] and [28].

12. It is clear to me that the Extant Appeals and the June 2018 Appeal do not fundamentally involve the same questions of fact. Hence, there is little genuine risk of two successive Tribunals reaching inconsistent findings of fact so as to generate the potential mischief identified by Judge Mosedale (*'witnesses whose evidence was believed in one case in relation to the same evidential matters were not believed in the other'*) thus bringing the administration of justice by the Tribunal into disrepute.

13. I also take into account the fact that the Tribunal's jurisdiction in relation to the extant appeals is of a supervisory character (Finance Act 1994 section 16(4)) whilst its jurisdiction in relation to the decision to deny an input tax credit is fully appellate. The evidence in the Extant Appeals, which emerged in early 2018, is necessarily predicated on the Tribunal's supervisory jurisdiction and its task in assessing the decisions against well-established and understood principles of public law. That evidence does not deal with the issue in the Extant Appeals as if the Tribunal is hearing the matter entirely afresh. The evidence does not deal with MTIC since, in January 2018, there was no denial of input tax credit under appeal.

14. To bolster her submission, Ms Vicary has disavowed any suggestion that the Extant Appeals are ones in which fraud is alleged against the Appellants.

15. This is not a case which will involve the same witnesses having to give the same evidence twice. Officer Paschal (whose evidence was filed in response to the specific disclosure application) may perhaps have to give evidence twice, but his evidence may well deal with different matters in the MTIC.

16. I do not regard that having two hearings presents any significant risk of inconvenience to any witnesses. I do not regard there to be appreciable scope for similar fact evidence. In reaching this conclusion, I am persuaded by HMRC's position, set out in her Skeleton Argument, that "the decision to refuse AWRS was not simply based upon evidence of [Exeter Drinks] having made purchases from companies connected to the fraudulent evasion of VAT" which in turn relies on evidence from Officer Weston (the decision maker for Exeter Drinks) and Officer Woods (the decision maker for Morgan James) that they would each have made the same decision even if tax loss letters had not been in place.

17. The hearing of the Extant Appeals has not yet been listed, but is estimated by HMRC to be 2 days and the Appellants do not challenge that estimate. No-one can presently say, even vaguely, how long the hearing of the June 2018 Appeal is likely to take. That is understandable. The new appeal raises MTIC type issues. Presently, on the Grounds which I have summarised above, more or less all the issues which can be in dispute are in dispute. Whilst this may change over the course of time, and the dispute may narrow, the true extent of the dispute between the parties is not yet ascertained, and may not be unless and until Fairford-type directions are given and complied with.

18. It seems inherently likelier than not that ‘bolting-on’ the June 2018 Appeal to the Extant Appeals will add both to the length of the eventual hearing, and to the costs, and to its complexity. Cross-checked, nothing was put before me to indicate that any time or costs savings would flow from having the June 2018 Appeal heard alongside the Extant Appeals, or that a hearing of the MTIC alongside the Extant Appeals would be no more complex than the hearing of the Extant Appeals alone.

19. It seems to me that consolidation of the June 2018 Appeal would make it difficult to expedite the Extant Appeals in the way which the existing case management directions for those Extant Appeals contemplate.

The 'new' Notice of Appeal

20. A further difficulty stands in the way of the Appellants’ proposed course of action. The June 2018 Notice of Appeal is in Form T240. That is the ‘new’ style Notice of Appeal which, introduced earlier this month, which, by the use of ‘prompts’, directs the appellant through all the questions appropriate to their particular appeal, and in the right sequence.

21. Question 10 asks 'What is your dispute about?'. Four choices are given: 'The amount HMRC claim I owe'; 'I want HMRC to repay'; 'Penalty or surcharge of'; and 'Other'. Each option leads to different prompts. If the dispute is one of indirect tax which HMRC claims the Appellant owes, then the Appellant is prompted to Question

11 - 'Have you paid the amount HMRC claim you owe'. If the answer to this is 'No', the Question 12 refers: 'Did you ask HMRC if you could appeal without paying the amount first'. If the answer to that is 'No', then the Form says "STOP - you must ask HMRC before proceeding". This marries up with Rule 22 ('Hardship Applications').

22. The Notice of Appeal does not treat the letter of 31 May 2018 as a demand for money but as 'other'. The effect of this, following the prompts, is that the Appellant has not treated this as a case in which Questions 11-14 have to be answered, and hence has not said anything about payment of the tax or hardship.

23. Although Mr Chinnery originally contended that the letter of 31 May 2018 was not a demand for payment, he conceded (realistically) that the letter, on its own terms, constitutes a Notice of Assessment. On that footing, he also conceded that the Notice of Appeal as presently drawn did require amendment. The letter of 31 May 2018 would have to be given its correct characterisation as a demand for payment. Following the prompts would necessitate confirmation either that the disputed tax had been paid, or that the hardship provisions were to be called upon. Mr Chinnery pointed out that the Appellant is still within the appeal window, and hence could, rather than amend, withdraw the present Notice and resubmit it.

24. That seems to me a still further good reason why the June 2018 appeal should not be consolidated. It is – on its own terms – not properly constituted. Hardship may be in issue and, if it is, will have to be dealt with – whether by HMRC or the Tribunal. That will inevitably introduce further delay. There is a real likelihood that binding the progress of the extant appeals to the June 2018 appeal will serve only to decelerate the former, rather than to accelerate the latter.

25. Mr Chinnery himself proffered and in exchange sought from HMRC reciprocal undertakings as to expeditious conduct of the June 2018 Appeal. Ms Vicary was not in a position to give any such undertaking. Whilst the June 2018 appeal has been lodged with the Registry, it has not yet even acquired a case number, , or been formally served by the Tribunal on HMRC.

26. There is simply no material before me even to suggest (let alone to compel a conclusion) that the June 2018 Appeal could realistically be case-managed so as to 'synchronise' it with the Extant Appeals, permitting all three appeals, if consolidated, to be heard in an expedited timescale.

27. My firm view is that the best way of ensuring that the MTIC appeal is dealt with fairly and justly and in accordance with the overriding objective is simply to let it run the usual course - that is to say, to be dealt with by the Tribunal's administration, with directions including allocation being made a Judge or the Registrar.

28. Mr Chinnery suggested a three-week adjournment of the case management hearing, but it was not clear what useful purpose, if any, this would serve. The parties were before me. I heard full argument, and I did not apprehend that HMRC's position in relation to consolidation of the June 2018 Appeal was likely to soften over time.

The Consent Order in the Administrative Court

29. Other factors were pressed on me, but I have not given these weight. I mention them for the sake of completeness.

30. HMRC complained that the Appellants' position was tactical, and that it was simply trying to buy time, driven by the provisions of a Consent Order entered into in early 2017 in proceedings in the Administrative Court between Exeter Drinks and HMRC. In that consent order, HMRC agreed to authorise Exeter Drinks to sell controlled liquor wholesale, and agreed that its authority should cease to have effect 14 days after the determination of Exeter Drinks' appeal before this Tribunal.

31. Even if the Appellants' approach before me were tactical (being a matter upon which I express no view) it is nonetheless a step too far to suggest that the Tribunal, if allowing the consolidation, would be tacitly endorsing it. The situation complained of is one of HMRC's own making. HMRC was in a position to advance its own interests in any negotiations which led to the consent order. HMRC entered into that Consent Order freely and with its eyes open. In those circumstances, HMRC cannot be heard to complain before this Tribunal that the agreement which it reached with the opposing party in compromising the judicial review is being unfairly exploited by the Appellant for some partisan advantage.

32. Similar considerations apply to the argument that the registration scheme is an important one. That is uncontroversial. But HMRC nonetheless decided to compromise the judicial review in the terms which it did.

33. Part of the express background, recited the Consent Order, was the decision of the Court of Appeal in *ABC Ltd* [2017] EWCA Civ 956. Unfortunately, at the hearing, no-one was in a position to give me any information as to the progress of this appeal. However, my own inquiries (using the Supreme Court's own public-facing website) show that the Supreme Court heard the appeal on 12 June 2018 and judgment has been reserved.

Outcome

34. For the above reasons, I make directions in terms of Paragraphs (2), (3), (4), (5), (6), (7), and (8) of HMRC's draft Directions. HMRC shall, within 7 days of the issue of this Decision, draw and file with the Tribunal a clean copy of directions in those terms.

35. I am not minded to make a direction in terms of Paragraph (1) of HMRC's draft directions, which is an order debarring any party from relying on any witness evidence save that already served, and I will not do so. I was not addressed specifically on this draft clause but it seems to be actuated by the Witness Statement of the Appellants' sole director, Mr Julian Packer, dated 19 January 2018, which (on its own terms) was filed in ostensible compliance with Paragraph (3) of the directions approved by Judge Cannan in September 2017. I make no comment as to the content of that witness statement.

36. Nor am I minded to adopt the recitals in HMRC's draft order. They are not necessary.

37. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 22 JUNE 2018