



TC08262

Application for permission to appeal out of time by Appellant following the Respondent's permission to appeal application being granted in full – Court of Appeal judgment in HMRC v SSE Generation Limited [2021] EWCA Civ 105 considered – Application granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/01157

**DECISION
ON A LATE APPLICATION FOR PERMISSION TO APPEAL
IN THE CASE OF**

EUROMONEY INSTITUTIONAL INVESTOR PLC

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

1. On 4 March 2021, the First-tier Tribunal ('FTT') issued the decision allowing this appeal ('the Decision'). On 29 April 2021, the Respondents ('HMRC') made an in-time application to appeal the Decision. On 10 May 2021, I granted HMRC permission to appeal to the Upper Tribunal ('UT') on their first ground of appeal but refused permission on their second ground. HMRC made an in-time renewal of their application for permission to appeal on their second ground to the UT on 10 June 2021, which was granted on 18 June 2021. The UT issued a direction requiring service of any response on behalf of the Appellant ('Euromoney') by 19 July 2021. Euromoney served a Respondent's Notice on the UT on 19 July 2021 and made a late application to the FTT for permission to appeal on the same date.
2. I considered in accordance with Rule 40 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 whether to review the Decision but decided not to undertake a review as I was not satisfied that there was an error of law in the Decision.
3. Euromoney's application refers to the Court of Appeal judgment in *HMRC v SSE Generation Limited [2021] EWCA Civ 105* ('SSE'), in particular, with regard to the remarks of Rose LJ at [79]:

“A respondent in the position of SSE which, once an appeal is on foot, wants to reverse a point decided against it in the FTT must apply for permission to the FTT. If the time limit for doing so has expired, it must request an extension of time, giving the reasons why the application notice was not provided in time: see FTT Rule 39(4). At that stage the FTT will consider whether the proposed appeal meets the test for the grant of permission and whether time

should be extended. The latter point will require consideration of how far the respondent's appeal will enlarge the scope of the appeal and whether it is consistent with the overriding objective to grant permission. The fact that the respondent's application would open up several new fronts in the appeal leading to a longer and more complicated hearing, does not rule out the grant of permission. The original appellant is not entitled to insist that the scope of the appeal remains within the limited compass of the grounds that it has raised. The fact that a late application for permission may widen the scope of the appeal is a risk that the appellant takes, if the respondent has properly arguable issues that could result in the appellant being worse off than if they had let the FTT's decision lie. A similar issue was considered by the Upper Tribunal (Nugee J and Judge Nowlan) in *Price and others v HMRC* [2015] UKUT 164 (TCC), [2015] STC 1975. I respectfully agree entirely with the analysis and reasoning set out there."

4. Euromoney contends that time should be extended to allow permission to appeal for the following reasons:

"First, allowing Euromoney's application for permission to appeal will not enlarge the Upper Tribunal appeal on the basis Euromoney has in any case put the same grounds forward in its respondent's notice.

Second, even if (contrary to the above) it did enlarge the appeal, this would not be a basis to refuse an extension of time, since an appellant runs the risk that a respondent will seek to include in the appeal the points on which the respondent was unsuccessful below.

Third, prior to the decision of the Court of Appeal in *SSE*, there was no suggestion by the Upper Tribunal that a party in Euromoney's position might need permission to appeal to raise the arguments he intends to raise in the present appeal. In particular, that was not suggested in *Steven Price & Others v HMRC* [2015] UKUT 164 (TCC) ("Price") nor in the Upper Tribunal's judgment in *SSE*; on the contrary, both decisions – and in particular *Price*, which now has the approval of the Court of Appeal in *SSE*, paragraph [79] – indicated that a party in Euromoney's position did not need permission to appeal. It is only the recent decision of the Court of Appeal in *SSE* which has potentially cast doubt on this approach.

Fourth, Euromoney has applied for permission to appeal promptly after it was notified of HMRC's appeal to the Upper Tribunal.

Fifth, and in all the circumstances, it is in the interests of justice and the overriding objective to grant Euromoney an extension of time."

5. HMRC contends that the three-stage test for determining an application for permission to appeal out of time, as set out by the UT in *Martland v HMRC* [2018] UKUT 180 (TCC), is not affected by the Court of Appeal's decision in *SSE*. I agree with that contention, which I consider to be consistent with the comment of Rose LJ that "the FTT will consider whether the proposed appeal meets the test for the grant of permission and whether time should be extended".

6. With regard to the first stage of this test, concerning the length of the delay, I consider the delay to be significant, as the deadline for appealing the Decision was 29 April 2021 and Euromoney's application was filed on 19 July 2021.

7. With regard to the second stage, concerning the reason for the delay, I accept Euromoney's contention that an appeal by them, in the absence of an appeal by HMRC, would have served no practical purpose and been purely academic. HMRC also accepts this point but argue that, to accord with the *SSE* judgment, Euromoney's permission must be applied for

“once an appeal is on foot”. HMRC contend that the natural meaning of an appeal being on foot is when the process of appealing a decision is commenced by applying for permission to appeal before the FTT, as they did on 29 April 2021, and not after the UT had granted permission on their second ground of appeal on 18 June 2021. HMRC further contend that as the decision in *SSE* was handed down on 1 February 2021, Euromoney would have been aware of its implications at the time HMRC applied for permission to appeal.

8. I disagree with HMRC’s submission that there does not appear to be any good reason for the delay in these circumstances. It seems to me to be reasonable for Euromoney to determine whether it wants to reverse a point decided against it in the FTT once the final position regarding HMRC’s application for permission to appeal is established. Euromoney could not know before that time how far their appeal would enlarge the scope of the appeal, which is a matter that the FTT is required to consider in respect of Euromoney’s application. On that point, I do not consider Euromoney’s application enlarges the scope of this appeal by opening up new fronts, as the matters raised by Euromoney’s appeal are directly relevant to the subject matter of the appeal before the UT. I also do not consider it to be in the interests of fairness and justice, or consistent with the FTT’s overriding objective, to restrict relevant arguments being considered by the UT in these circumstances.

9. With regard to the third stage, which requires a consideration of all the relevant circumstances, I find that Euromoney had a good reason for the delay in making their application. I consider any prejudice which would be caused to HMRC by the delay in making this application, and by HMRC having to respond to Euromoney’s arguments, to be outweighed by the prejudice faced by Euromoney if unable to rely on their grounds of appeal before the UT.

10. For the reasons I have set out above, Euromoney’s application for permission to appeal out of time is granted and, as I consider Euromoney’s grounds of appeal to be arguable, Euromoney’s application for permission to appeal is therefore granted.

**KIM SUKUL
TRIBUNAL JUDGE**

Release date: 6 SEPTEMBER 2021