Neutral Citation: [2022] UKFTT 195 (TC)

Case Number: TC08520

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: LON/2008/1746

PROCEDURE – application for expert evidence to be permitted – Deloitte and Singleton considered – whether pleadings support application, in particular relevance in context of pleadings – yes – prima facie case for argument to be advanced –- yes – permit application to be received de bene esse – application allowed

Heard on: 20 May 2022
Judgment date: 20 June 2022

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

CCLA INVESTMENT MANAGEMENT LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Scorey, QC, instructed by Pinsent Masons LLP

For the Respondents: Andrew Macnab, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This hearing concerned the appellant's application dated 16 August 2021 in terms of Rule 15(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules"), for expert evidence to be permitted in the appeal and for the existing Directions in the appeal to be set aside and replaced. The appellant withdrew its application for Directions dated 2 July 2021 which is superseded by the application.

2. I understand why the appellant has very prudently made this application. I say that because there are a number of conflicting First-tier Tribunal (FTT) decisions on whether or not it is necessary to make an application to admit expert evidence. In *Singleton Birch Ltd & Another v HMRC*[1] ("Singleton") Judge Williams reviewed a number of those FTT cases.

3. In *Singleton,* HMRC had served its expert report without permission from the Tribunal and its application was to adduce evidence from its expert. The appellant's position was that Rule 15(1)(c) of the Rules requires that a party seeks the permission of the Tribunal before serving an expert report. Judge Williams preferred the appellant's submissions. That decision is not binding on me and neither are the other decisions such as, for example, the Tribunal in *Megantic Services Ltd v HMRC*[2] where the Tribunal said at paragraph 51:-

> "The tribunal is given power to intervene and make directions as to evidence, including expert evidence, but there is no requirement (and it is not possible in our view to infer one) that expert evidence can be served only if the tribunal gives permission".

My view is that permission is not required in all cases.

4. In this instance, I am not required to decide whether an application must be made before expert evidence is served since in this case no such evidence exists, as yet. In all of the cases to which I was referred, the evidence existed. This did not assist me.

The hearing

5. I had lengthy Skeleton Arguments for both parties, a hearing bundle extending to 272 pages and an Authorities Bundle extending to 543 pages.

The context

6. The appellant and its wholly owned subsidiary (hereinafter simply referred to as the appellant) are each authorised and regulated by the Financial Conduct Authority ("FCA") under the Financial Services and Markets Act 2000 ("FSMA"). The appellant provided Fund Management Services to:

(a) Six Charities Official Investment Fund ("COIF") Charities collective investment funds;

(b) Six investment funds for the Central Board of Finance of the Church of England ("the Church"); and

(c) The Local Authorities' Property Fund ("LAPF").

7. The COIFs and the LAPF are Alternative Investment Funds within the meaning of Article 4 of Directive 2011/61/EU ("AIFMD"). Under the AIFMD regime, the funds which fall within its scope are not regulated by the FCA; however, their managers must be FCA regulated. The COIFs are also regulated by the Charity Commission.

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[1] [2021] UKFTT 0400 (TC)

[2] 2013 UKFTT 492 (TC)

8. The Church funds fall outside the scope of the AIFMD regime but are managed by the appellant in the same way as it manages the COIFs and the LAPF.

9. The appeal concerns HMRC's rejection of claims under Section 80 of the Value Added Tax Act 1994 ("VATA"). The central issue in the appeal is whether supplies of Fund Management Services by the appellant should have been treated as exempt supplies on the basis that they were "the management of special investment funds as defined by Member States" referred to as the "EU SIF Exemption" provided by Article 135(1)(g) of Directive 2006/112/EC ("the PVD"), formerly Article 13B(d)(6) of Directive 77/388/EEC.

10. Those supplies were treated as taxable. It is not disputed that the supplies were not within the exemption in Group 5 of Schedule 9 to VATA and were standard rated as a matter of UK law without reference to EU law.

11. The appellant now contends that the proper classification of all three types of funds is that they are Special Investment Funds ("SIFs") and therefore fall within the EU SIF Exemption.

12. It is not in dispute that:-

(a) Not all investment funds qualify as SIFs for the purposes of the EU SIF Exemption.

(b) Funds which constitute Undertakings for Collective Investment in Transferrable Securities ("UCITS") within the meaning of Article 1 of Directive 2009/65/EC as amended ("the UCITS Directive") qualify as SIFs.

(c) A fund that does not qualify as a UCITS within the meaning of the UCITS Directive may nonetheless qualify as a SIF for the purposes of the EU SIF Exemption if it has

(i) characteristics identical to those of a UCITS, or

(ii) at least has features that are sufficiently comparable for it to be in competition with a UCITS.

13. In considering whether a fund is sufficiently comparable, amongst other factors, the fund must be subject to State supervision and subject to the same conditions of competition and appeal to the same circle of investors as UCITS.

14. Both parties are agreed that when looking at the phrase "specific State supervision", that has to be considered within the meaning of the decision of the CJEU in *Staatssecretaris Van Financiën de Fiscale Eenheid X NV cs* ("Fiscale")[3]. The parties disagree as to what constitutes State supervision.

The Law

15. The appellant relies on paragraph 37 of *Fiscale* which reads:-

> "Furthermore, funds which, without being collective investment undertakings within the meaning of the UCITS Directive, display characteristics identical to theirs and thus carry out the same transactions or, at least, display features that are sufficiently comparable for them to be in competition with such undertakings must also be regarded as special investment funds …".

16. HMRC rely on paragraph 48 of *Fiscale* and the relevant section of that reads:-

> "…. only investment funds that are subject to specific State supervision can be subject to the same conditions of competition and appeal to the same circle of investors. Those other types of investment funds may therefore, in principle, be eligible for the exemption

[3]

in Article 13B(d)(6) of the Sixth Directive if the Member States provide for specific State supervision of those funds also."

17. The appellant also relies on paragraph 47 of *ATP Pension Service A/S v The Skattemimisteriet*[4] ("ATP") at paragraph which reads:-

> "Furthermore, funds which – without being UCITS within the meaning of Directive 85/611 – display characteristics identical to those of UCITS and thus carry out the same transactions or, at least, display features that are sufficiently comparable for them to be in competition with such undertakings must also be regarded as special investment funds …".

18. Rule 15 of the Rules provides where relevant that:-

> (1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—
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> (a) issues on which it requires evidence or submissions;
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> (b) the nature of the evidence or submissions it requires;
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> (c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;
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> (d) any limit on the number of witnesses whose evidence party may put forward, whether in relation to a particular issue or generally;
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> …
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> (2) The Tribunal may—
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> (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or
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> (b) exclude evidence that would otherwise be admissible where—
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> …
>
> (iii) it would otherwise be unfair to admit the evidence."

19. Rule 2 of the Rules provides for the overriding objective and parties' obligation to cooperate with the Tribunal. Rule 2(1) provides that the overriding objective is to enable the Tribunal to deal with cases fairly and justly. Rule 2(2)(a) states that that means "… dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the parties …". Rule 2(2)(c) states that also means ensuring that parties are able to participate fully in the proceedings. Rule 2(3) stipulates that the Tribunal must seek to give effect to the overriding objective when it exercises any power under the Rules or interprets any rule or practice direction.

20. Both parties relied on paragraph 22 in *Deloitte LLP v HMRC*[5] ("Deloitte") where Judge Raghavan set out the principles which should be considered in considering an application to admit expert evidence under Rule 15(1)(c). That reads as follows:-

> "22. Taking account of the above case law I note the following:

[4] C-464/12

[5] [2016] UKFTT 479 (TC)

(1) Relevant evidence should be admitted unless there are compelling reasons not to. The prejudice to each party of respectively admitting/not admitting the evidence should be weighed. *(Mobile Export 365* and *Atlantic Electronic*).

(2) An expert's evidence of opinion is admissible because it is the product of a special expertise which the tribunal does not possess, or even if it does, which is not its function to apply *(Hoyle)*.

(3) Expert reports are not rendered inadmissible because they refer to legislation, matters of law or indeed the very issue before the court or tribunal. Tribunal panels (who are not lay finders of fact) can be credited with the ability to distinguish between inadmissible/admissible matters in a report and to know that they have to reach their own view on the legal question before them. *(JP Morgan Chase Bank*, and *Kennedy)*

(4) Even if reports contain inadmissible expert evidence of fact they can be admitted and should be admitted without requiring excision particularly if the admissible/inadmissible evidence of fact is intertwined *(Hoyle)*.

Overview of the appellant's arguments

21. One of the appellant's arguments in the substantive appeal is that the relevant funds are functionally subject to State supervision as SIFs and must therefore be treated the same under the principle of fiscal neutrality. However, the UCITS and AIFMD regimes target different types of investor, are articulated differently and therefore, before comparability can be proven, or not, there is a requirement for evidence as to how the obligations imposed by those regimes work in practice.

22. The appellant argues that regulation of the fund itself is not a necessary condition but rather that State supervision of funds, which are not in the UCITS regime, need only be "sufficiently comparable" to that which applies in regard to UCITS. That criterion of comparability combined with the principle of fiscal neutrality means that one has to look at functional rather than formal equivalence. That is a qualitative assessment.

23. Because the principle of fiscal neutrality requires functional rather than formal equivalence, then the issue is <u>how</u> the funds and their managers meet their regulatory obligations in practice. The Tribunal should not merely be comparing the legislative provisions applicable to the different types of funds.

24. Expert evidence is relevant to the question of whether the requirement for specific State supervision and/or sufficient comparability is made out.

25. The substantive issue, which is not before this Tribunal, is not solely a matter of law but requires a functional and qualitative analysis of the nature and operation of the funds.

26. An expert would assist by setting out the application and effect of the relevant regulatory rules explaining how the regulatory regime works in practice and in the industry generally.

27. The appellant is <u>not</u> seeking a ruling on the admissibility of any expert evidence that it seeds to adduce. The appellant simply wishes to serve a witness statement. If so minded, HMRC would be at liberty to lodge objections as to admissibility, weight and relevance of that witness statement thereafter.

Overview of HMRC's arguments

28. A fund that is not in the UCITS regime may be a SIF for the purpose of the EU SIF Exemption if, but only if, the fund itself (and not simply the fund manager) is subject to

"specific State supervision" *qua* investment fund, as is the case for UCITS. It is common ground that none of the appellant's funds are UCITS.

29. The question whether any of the funds in question is to be treated as a SIF for the purposes of the EU SIF Exemption is simply a matter of law only, as applied to the facts as found, and therefore expert evidence would not be relevant.

30. The appellant has not established how or why expert evidence would be relevant to any issue in this appeal.

31. Admissibility depends on relevance and relevance turns on the requirements of EU law, which is the central substantive issue to be determined by the FTT.

Discussion

32. I had detailed argument from both Counsel and, at their request, albeit I would certainly have done so anyway, I have read both the Bundle and the Authorities to which I was referred. As can be seen I have also considered other authorities.

33. The first point that I do not accept is HMRC's argument that it is rare to have expert evidence in the FTT. Each case turns on its own facts and expert evidence is regularly adduced in a wide range of cases. Some is admissible; some is not.

34. I consider this application to be more straightforward than it first appeared. HMRC are adamant that the appellant has not made out a case for expert evidence not least because this concerns only a matter of law. I am not persuaded by that. I am also wholly unpersuaded by the argument that the appellant should have lodged, or provided HMRC with, a draft report. In my view that is entirely inappropriate. An expert report is either admissible in whole or in part, or not. It is not an iterative process.

35. Both parties are agreed that the regulatory regimes are complex. The factual matrix is not uncomplicated. Paragraph 24 of HMRC's Amended and Consolidated Statement of Case reads:-

> "… for the avoidance of doubt, and save as otherwise expressly admitted in this document, HMRC put CCLIM to strict proof of all facts and matters on which it based its claim, including all and any allegations that any given fund or investment vehicle is sufficiently comparable to a UCITS to be required to be considered in competition with the latter for the purposes of the EU SIF exemption."

36. In my view, the crucial word is "comparable". I find it very hard to understand how, where parties both accept that the issue of being comparable is crucial, that the only arguments would be on the law. A primary function of the Tribunal is to find the facts and then apply the law.

37. I observe that Lord Reid and Lord Hodge in *Kennedy v Cordia (Services) LLP*[6] at paragraph 40 made the point that:-

> "Experts can and often do give evidence of fact as well as opinion evidence. A skilled witness, like any non-expert witness, can give evidence of what he or she has observed if it is relevant to a fact in issue".

38. Mr Scorey argues that although the appellant has the evidence of Mr Smith, and it is indeed very detailed, what the appellant needs is a witness who can compare the appellant's funds, and how they are managed, with those of others. Whether that would be successful

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[6] [2016] UKSC 6

evidence is not a matter for decision by me. It is certainly arguable that such evidence might assist the appellant.

39. I can readily understand that evidence from an expert, who would be an individual with experience in both the operation, and the regulatory supervision, of funds under both the UCITS regime and the AIMFD regime, would be of assistance both to the appellant and to the Tribunal. It seems that to me that that would be *prima facie* relevant to the appellant's arguments.

40. A recurrent theme in Mr Macnab's argument was that there was no adequate foundation for the appellant's application in the pleadings. I disagree. I was not referred to the case but Lord Woolf MR in *McPhilemy v Times Newspapers Ltd and Others* [7] stated:-

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules. The Practice Direction to CPR 16, paragraph 9.3 requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a *concise* statement of those facts is required."

41. The Bundle includes not only the pleadings but also Mr Smith's lengthy witness statement and various documents. Not only the parameters, but the broad detail of the case is indeed obvious. Mr Scorey accurately stated that the detail in the pleadings is refreshingly complex and detailed. It is. The appellant now needs to produce evidence to buttress those pleadings. Expert evidence may, or may not, assist but it has the potential to assist.

42. The dispute between the parties is equally obvious. As can be seen from the overview of the arguments, the appellant wishes to run an argument on comparability and functionality in that context. It is for that that the appellant wishes to produce an expert witness and if the appellant is to participate fully then it should have the right to run arguments whether they are successful or not. I agree with Mr Scorey's argument that permitting expert evidence will enable the appellant to argue its case. If the application is refused the appellant will not be able to participate as fully as it should be enabled to do. If the expert evidence is successfully challenged in due course that would be at a cost to the appellant; that is a risk that it understands. It is prepared to bear the, presumably, not inconsiderable cost of commissioning the evidence; that is its choice.

43. In this particular case, at a minimum, my view is that expert evidence should be lodged *de bene esse*. It may or may not be admissible. That is for another Tribunal to decide. HMRC, if so advised, can then lodge such objections as they deem necessary. The decisions on relevance and admissibility (or indeed whether it constitutes expert evidence) can then be taken in an appropriate context.

Decision

44. The appellant is permitted to provide expert evidence. The application to do so is therefore granted.

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[7] [1999] EWCA Civ 1464

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 21 JUNE 2022