Appeals Numbers:
FTC/02/2009
FTC/22/2009

PROCEDURE: whether to order preliminary issue; appeal from decision refusing to order preliminary issue; appeal allowed; stay of proceedings pending determination of County Court proceedings; appeal from decision refusing stay; appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Between:

GOLDMAN SACHS INTERNATIONAL

Appellant (1)

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents (1)

Between:

GOLDMAN SACHS SERVICES LIMITED

Appellant (2)

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents (2)

Tribunal: Mr Justice Norris

Sitting in private in London on 21 October 2009

Mr David Goldberg QC (instructed by Freshfields Bruckhaus Deringer LLP) for the Appellant (1) and (2)

Mr Malcolm Gammie QC (instructed by General Counsel and Solicitor to Her Majesty's Revenue and Customs) for the Respondents (1) and (2)

APPROVED DECISION

1. MR JUSTICE NORRIS: I will give judgment. I will begin with some background which is to be taken as descriptive and not as determinative of the issues between the parties. It is necessary because I am being asked to review case management decisions taken by two experienced judges of the first tier tribunal.

2. Goldman Sachs Services Limited ("GSSL") is described by HMRC as a company providing the service of supplying staff to Goldman Sachs International ("GSI"), and other affiliated entities. Its principal office address is in the British Virgin Islands and its partner-directors are said to have been resident in New York where its fundamental management is said to have been exercised. It was the formal employer of staff who worked for GSI, although GSI funded GSSL's payments to its employees. To the extent that its operations in the United Kingdom raised liabilities to taxes and duties, GSSL is said to have complied with or procured compliance with the ordinary PAYE and NIC obligations that arose from its payment of salaries and bonuses.

3. GSI had an established employee benefit trust. In 1997 it awarded options over shares in another company, ("X"), to employees of GSSL. At the time when the options were granted, all of the grantees were employees of GSSL though they worked for GSI. The shares were redeemable at the option of company X. When the options were granted they were not valuable: but company X was fed with various payments which made its shares accrue value. Most, but not all, of the options were exercised by the relevant employees, and those shares were redeemed by company X. The vast majority of the redeemed shares belonged to employees of GSSL. But in June 1999 certain GSSL employees became employees of GSI. So some of the options were in the end granted to employees of GSSL but exercised by employees of GSI and redeemed to employees of GSI. I will call these employees "the GSI employees".

4. It is GSSL's position (and indeed that of GSI) that the operation of these transactions did not give rise to any liability to make NIC contributions. It is HMRC's position that this was simply a scheme marketed to a number of companies, (of whom 22 accepted the scheme), which provided a mechanism for making cash payments to employees, and that, if one looks at the underlying nature of the transaction, it is merely a means of paying bonuses. That is the substantial issue which arises between HMRC, GSI and GSSL.

5. If there were NICs payable, the question arises who would be liable to make the payment? Very briefly, under the Social Security Contributions and Benefits Act 1992, where earnings are paid, the statute requires a primary and a secondary NI contribution to be payable. The primary contribution is the liability of the earner: but the secondary contribution is the liability of "the secondary contributor". Section 7 of the Act explains who the "secondary contributor" is. In relation to employed earners who work under the general control or management of a person other than their immediate employer, there are detailed regulations contained in the Social Security (Categorisation of Earners) Regulations 1978 to enable the "contributor" to be identified. By considering the 1978 Regulations and reading across to the provisions which they incorporate or to which they refer, the question that emerges is whether for the purposes of those regulations GSSL was a "foreign employer". If GSSL was a "foreign employer", then the person who is liable to contribute would be GSI as the "host" employer. The question whether GSSL is a "foreign employer" is answered by reference to Regulation 119 of the Social Security Contributions Regulations, Regulation 119(1)(b) of which identifies the question as being whether the employer is "resident or present in Great Britain when such contributions become payable or then has a place of business in Great Britain".

6. If GSSL, the actual employer, was not "present" within the terms of Regulation 119, then the person liable to pay the contributions was GSI as the host employer. If GSSL, the actual employer, was present, then it is liable to pay the contributions. There is one qualification to that broad statement, relating to the GSI employees. In relation to them, there can be no dispute that GSI is liable to pay any contribution because, from June 1999, the GSI employees were employed by GSI.

7. From that background, the issues for decision arising out of these events were identified by Mr Gammie QC for HMRC as being three in number. First, what he called "the liability issue": whether HMRC are correct to say that the scheme did not achieve its purpose so that an NIC liability does arise in relation to each scheme year. Second, "the contributor issue": that is to say whether and to what extent any liability falls in any scheme year on GSI or GSSL as the secondary contributor. Thirdly, there is a "limitation issue": that is whether HMRC can recover any national insurance contributions shown to be the liability of GSSL, assuming that GSSL refuses to discharge its liability. I agree with that analysis and will address the significance of the limitation issue later. As to the first question, namely liability, HMRC's position is as follows: it assumes that GSI or GSSL will, by appropriate documentary and oral evidence, prove to the tribunal's satisfaction the true nature of the employees' bonus entitlements and the precise manner in which the scheme was actually implemented in each of the years in question. It puts both GSI and GSSL to proof accordingly. In the absence of any such evidence, HMRC will say that the character of the payments made to employees as earnings was unaffected by the operation of the scheme, because the employees were contractually entitled to a bonus, in satisfaction of which they received cash or; alternatively, that the scheme did not involve any real exercise of discretion by the Trustees of the EBT as to what to do with the money and that everything was organised on a pre-arranged basis.

8. In the further alternative, HMRC says that if GSI and GSSL prove to the tribunal's satisfaction that the scheme was properly implemented in each year, then there

is a question whether it was effective to strip out the cash which the employees were to receive as part of their annual bonus.

9. A clue as to the nature of the evidence that will be required to establish the true position on these issues is afforded by a letter which HMRC wrote to GSI in September 2002 when the issues arose. A schedule attached to the letter sets out the documents which HMRC say are relevant. It would be excessive to read the entirety of all ten paragraphs but I can summarise the position in this way: HMRC say that to decide the liability issue it is necessary to see copies of all presentation papers used by the company to demonstrate how the scheme worked; a copy of the trust deed; copies of minutes of all board meetings setting up the trust; copies of all agreements between GSI and the Trustees in relation to the arrangements; copies of minutes of all board meetings and correspondence relating to every recommendation or expression of preference in respect of share awards to employees; copies of all correspondence or other documents relating to how the trustees decided on share awards; copies of all correspondence or documents relating to the transfer of funds into the EBTand then from the EBT to company X and then from company X to the employees, copies of all correspondence between the trustees and the employees in relation to the arrangements, copies of all promotional literature and so forth. This material and an examination of the individual dealings of individual employees is relevant, because of the invocation of the Ramsay doctrine as an approach to the assessment of liability. The evidence on the liability issue is accordingly very extensive.

10. As to the contributor issue, the question is whether GSSL was present in Great Britain at the relevant times, that is to say between 1997 and 2000. Mr Goldberg QC says that that question can be identified and answered by reference to a single bundle of documents which is already prepared, most of which emanate from the Inland Revenue itself, and that on that question he at present intends to call only one live witness.

11. For its part, HMRC does not submit that there is a vast quantity of other material to be deployed. They of course observe that the fact that GSSL may have had a correspondence address in Great Britain does not demonstrate that it is “present” and HMRC also points out that the legal meaning of being "present" will have to be established before the evidence is assessed. But the only additional material to which my attention was drawn in HMRC's submissions was material which shows that GSSL said that it did not carry on a trade or, in that context, have an office in Great Britain. The material, in short, seems to lie within a fairly narrow compass.

12. As I have said, the arrangements adopted by GSSL appear to have been a scheme operated by a number of other employers. Between 2002 and 2005, HMRC selected certain test cases which it litigated: but those cases all collapsed when the operators of the scheme accepted HMRC's terms. Those terms were fairly stringent; they involved the payment of 100 per cent of the NIC outstanding but a release from payment of interest. All of the other scheme operators eventually accepted the Revenue's terms; only GSI and GSSL now hold out.

13. I will look first at the position of GSI. GSI is said by HMRC to be the liable contributor. This is a deliberate and reasoned choice on the part of HMRC which has, on sundry occasions, been stated in correspondence; in particular in a letter dated 12 October 2007

(which was actually addressing a telephone call from GSI made in October 2006 to point out that there was an issue as to who was the correct contributor). On 12 December 2002, HMRC issued notices of determination in respect of the NIC liability which it said was due from GSI. On 13 December 2002, GSI appealed those determinations and that is one of the appeals now before the tribunal.

14. On 10 December 2003, HMRC commenced proceedings in the Central London County Court seeking repayment of some £30.81 million of unpaid NIC and interest. The reason for commencing proceedings, whilst the appeal was outstanding is explained in paragraph 4 of the Particulars of Claim which reads as follows:

    14.1. "The defendant GSI was sent a final letter before action dated 24 November 2003 by the claimant advising that although the matter of the final determination for the liability is under appeal the claimant is bound in the collection of its arrears by the Limitation Act 1980."

15. I must return to that topic later. The proceedings so commenced were governed by the Social Security Administration Act 1992. Section 117A(4) says that:

    15.1. "Where an appeal has been brought or not determined or where an appeal has not been brought but the time for so doing has not expired, then the court shall adjourn the County Court proceedings until such time as the final decision is known and that decision shall be conclusive for the purposes of the proceedings."

16. Accordingly, on 4 February 2004, the proceedings against GSI were adjourned. As at October 2009, that remains the position with the action not having progressed. It is lamentable to record that the question of final liability on which the proceedings depend is no nearer determination.

17. The appeal brought on 13 December 2002 was brought to life by GSI in November 2008 by its request for a listing. On 9 December 2008, GSI then made an application in the restored appeal for a direction concerning a preliminary hearing. The preliminary issue which was sought was "whether GSI is the secondary contributor in respect of employees of GSSL for the purposes of the 1992 Act and the 1978 Regulations". The preliminary hearing was sought on the basis that its determination should be dispositive of appeals in relation to tax years 1997 and 1998 and largely dispositive of the appeal in relation to tax year 1999. (The reason for that was that, the GSI employees were transferred from GSSL to GSI so that there would be a period in the tax year ending 1999 when the question of GSI's liability would have still to be determined). The application said that witnesses (note the plural) were likely and that it was anticipated that two days would be required for the hearing of the preliminary issue.

18. Now, the question whether GSSL was present in Great Britain, (and so meaning that it and not GSI was the contributor), is entirely distinct from the question whether the scheme worked. If it established by the preliminary issue that GSSL was the contributor, then the question of liability of GSI (i.e whether the scheme worked) only arises in relation to the GSI employees for the nine months following June 1999. That liability represents only about 25 per cent of the total liability to NIC sought to be imposed by HMRC.

19. Mr Goldberg QC for GSI says that at that level, namely £10 million instead of £40 million in rough figures, the claim is likely to be settled. Therefore if there is a preliminary issue about the identity of the contributor then there is bound to be a saving in costs because the issues that will eventually have to be determined by the tribunal will be narrower or, alternatively, will in fact be resolved.

20. The merits of these arguments fell to be assessed by reference to some guidelines laid down by Mr Justice Neuberger in an unreported decision: Steele v Steele, 27 April 2001. The hearing came before Tribunal Judge Dr Avery Jones CBE who was referred to Steele. He gave a careful, reasoned judgment considering the facts from various perspectives as directed in Steele and he decided not to order a preliminary issue. GSI was dissatisfied with that outcome. Dr Avery Jones decided not to review his decision but decided that he would give permission to appeal to the Upper Tribunal and that has led to the present appeal.

21. I ought now to advert to the jurisdiction regarding appeals to the Upper Tribunal. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 says that there is a right to appeal to the Upper Tribunal on any point of law arising from a decision made by a first tier tribunal, with certain exceptions. Section 12 sets out what the Upper Tribunal may do. Section 12(1)requires that the Upper Tribunal should find that the making of the decision of the lower tribunal involved the making of an error on a point of law. If it so finds, then the Upper Tribunal "may, (but need not), set aside the decision of the first tier tribunal" and, if it does, "must either remit the case to the first tier tribunal with directions for its reconsideration or remake the decision".

22. On this appeal, the questions which I therefore have to address are whether in the first tier tribunal there is an error of law in its decision; secondly, whether that error vitiates the decision or undermines it to such a degree that in pursuance of the overriding objective it ought to be set aside; thirdly, to decide whether to remit or to remake any such decision. Without seeking to gloss what are the plain words of the statute, because these are early days in the relationship between the first tier and the upper tribunal I should perhaps emphasise two principles which I have endeavoured to adopt in approaching the appeal.

23. First, I think the Upper Tribunal should exercise extreme caution in entertaining appeals on case management issues. Mr Gammie QC for HMRC drew my attention to the decision of the Court of Appeal in Walbrook Trustee v Fattal & Others [2008] EWCA Civ 427, not as establishing any novel proposition but as containing in paragraph 33 the following convenient statement from the judgment of Lord Justice Lawrence Collins:

    23.1.1. "I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

24. I am clear that that principle applies with at least as great, if not greater, force in the tribunals' jurisdiction as it does in the court system.

25. The second observation I would make is that I do not consider that there is any substantial difference between "reviewing" the decision and "remaking" the decision of the first tier. That is because, in remaking the decision, the decision of the judge of the first tier tribunal is to be accorded respect. That judge was a judge appointed for his specialist knowledge; that judge was one who daily deals with cases of the type under appeal and who, in making an assessment, can draw upon a depth of practical experience in the conduct of such cases. I have endeavoured to adopt those principles in my approach to the GSI and to the GSSL appeals.

26. Before I address them, I ought just to stand back and summarise the overall picture. First, the issue of liability turns on the question of whether the scheme works. This entails a consideration of extensive detailed evidence of what took place between 1997 and 2000 in order to understand the adoption and execution of the scheme. It involves a scrutiny of the affairs of individual employees, at least those who are representative of particular classes of employee, if not all of them. The issue about the identity of the contributor from whom any NIC liability may be collected turns on much narrower evidence and is the subject of County Court proceedings against GSI. GSI says that the correct contributor is GSSL. There are no recovery proceedings extant against GSSL. If such recovery proceedings were commenced, they would be in relation to NIC which should have been paid between 1997 and 2000 and, as Mr Gammie QC indicated in his summary of issues, there is a question about limitation.

27. I now turn to consider the GSSL appeal. In October 2006, HMRC was informed explicitly of the existence of the employer point, (that is to say who was the correct contributor). On 13 March 2009, HMRC issued notices of decision that GSSL had a liability to pay NIC for periods between 1997 and 2000. That was the subject of an appeal by GSSL. The GSSL grounds of appeal are several in number but I will identify four of them as relevant. In its letter of 6 April 2009, GSSL appealed on the following grounds: (1), the assessments were out of time; (2), HMRC was unable to recover the amount of NIC claimed to be due because of the expiry of applicable statutory time limits; (3), no national insurance contributions were in any event due in respect of the operation of the scheme; (4), GSSL was not liable for national insurance contributions in respect of individuals employed by GSI. In response to this appeal, HMRC is obliged effectively to state a case and GSSL will have the opportunity to respond to it. But this process cannot in fact address the issue of recoverability in the event that GSSL is found liable to make the contributions.

28. GSSL says there is a real issue about recoverability. It points out that the rules of limitation in relation to ordinary tax and duty are set out under the Limitation Act 1980, S.37(2)(a) (as supplemented by the specific provisions to be found in the Taxes Management Act and the Finance Act 1998 as to the date by which assessments must be made). NIC is not a tax or duty but a contribution; as such, it is subject to the limitation rules set out in Section 9 of the Limitation Act 1980. So limitation points can be taken in relation to HMRC's letters of decision if recoverability is sought against GSSL in the County Court. GSSL points out that in HMRC's Debt Management and Banking Manual at paragraph 527160 published in January 2009, the following guidance is given:

    28.1. "Where national insurance debt over six years old is already included in a time-to-pay arrangement, debt management offices should continue pursuit of the debt. If the debtor refuses to pay national insurance liability that is over six years old from its original due date on the grounds of limitation, do not commence enforcement of the debt or commence proceedings if a defence of limitation would be successful."

29. As I have indicated, HMRC have not in fact commenced proceedings against GSSL. What HMRC say is that they intend to do so and that they have an answer to the limitation points. First, they say that Section 35 of the Limitation Act 1980 and CPR Part 19 provide a mechanism for the addition or substitution of parties and that they will apply in the County court to add or to substitute GSSL along with or in place of GSI. Attempts to use these rules can be problematic. As the Court of Appeal explained in Adelson [2007] EWCA Civ 701, at paragraph 29, “most of the problems in the area arise out of the difference, sometimes elusive, between an error of identification and an error of nomenclature. An error of identification occurs where the claimant identifies an individual as the person [liable to him] and intends to sue that person, describing him in the action by the correct name, but then discovers that he has identified the wrong person [as the person liable]. An error of nomenclature occurs when the claimant identifies the correct person [as being liable to him] but describes him in the statement of case by the wrong name”.

30. I express no view about the prospects of success of the argument founded on Section 35 and CPR 19. I say only that there is obviously a genuine argument about how HMRC came to choose GSI as the defendant in the proceedings which were commenced in the County Court and that that argument can only be addressed by reference to post-transaction evidence.

31. The second answer which HMRC proffers to the limitation difficulty arises under Section 32 of the Limitation Act 1980, namely an allegation of deliberate concealment in respect of which the limitation period will only begin to run when the deliberate concealment is discovered or could with reasonable diligence have been discovered. The issue here will be whether there was in fact any deliberate concealment or whether (if so) it could with reasonable diligence, have been discovered before October 2006. Once again, the attempt to invoke this section can be problematic, not least because it is impossible for anyone deliberately to conceal that which is in fact already known to the other party. The availability of the Section 32 argument therefore depends about what was known about GSSL and its “presence" in this country, an issue to be determined by reference to what has been called “the presence bundle” already prepared to address that issue. Again I express no view on the outcome of the argument, simply observing that it is a genuine argument and again to be determined by reference to post-transaction evidence.

32. Now, GSSL applied for a stay of the appeal which it had brought against the notices of determination until the question of whether HMRC could in fact recover any NIC determined to be payable. The argument was that, if the liability is irrecoverable from GSSL, there is no point in working out whether GSSL is liable in the first place (with all the enquiry that that entails). The position here is that HMRC could, just as it did with GSI, commence proceedings in the County Court. The fact that there is a current appeal before the tribunal would not prevent determination of the limitation question. That is apparent from the decision of the Court of Appeal in HMRC v Hyde Industrial Holdings [2006] EWCA Civ 502, at paragraph 47 of the decision, where it is pointed out by Lord Justice Waller that the stay under section 117A would apply "unless the proceedings were issued outside the limitation period and the taxpayer chose to seek dismissal of the same as opposed to an adjournment". So HMRC could bring the issue of recoverability into the arena; but it has chosen not to do so. The basis of the application for the stay was that it would avoid GSSL incurring substantial potentially unnecessary costs, and that it would lead to a definition of the real issues between GSSL and HMRC which would facilitate a settlement. However, HMRC's publicly stated position is that it is opposed to a settlement of any sort. HMRC will contemplate only capitulation to its present demands. It says that there is no question of settling with GSI in respect of GSI's liability for the GSI employees because it has already settled with 21 other taxpayers and to settle with GSI would not be consistent with the terms it offered those other 21 taxpayers. There is accordingly no question of a settlement, even a settlement on harsher terms than those put upon the other 21 taxpayers. What is required is complete capitulation. Mr Goldberg QC's publicly stated position in relation to GSI is that GSI is certainly willing to settle and that, if it wins the preliminary issue, it may well, though no decision has been taken and no offer is made, capitulate on that issue because it is only £10 million out of £40 million.

33. HMRC also say that, even if GSI win the preliminary issue and capitulate on it, there is still the question of whether GSSL is liable, whether the present proceedings can be amended so as to bring GSSL in or whether a fresh action can be commenced which would not be faced with any successful limitation argument. It says that any settlement of course cannot avoid the existence of that possibility so it says that it requires complete capitulation by GSSL in respect of the unissued proceedings with their potential limitation flaw and will not contemplate any form of settlement. It is therefore clear, on the stance that the HMRC is adopting, that the recoverability issue is going to have to be litigated out. The question is when it should be litigated out and whether there is any way of keeping costs under control and court resources used prudently in resolving this inevitable issue. At the hearing before tribunal Judge Berner he refused to grant a stay.

34. It is now necessary to consider the two appeals which are now before me. I approach the task cautiously and respectfully, seeking to avoid the temptation simply to substitute my own view for that of the first tier tribunal judges, for that is not my function on an appeal.

35. The first question for decision is whether or not Dr Avery Jones's refusal to order a preliminary issue involves an error of law. In the skeleton argument which was placed before him, Dr Avery Jones was told by Mr Goldberg QC that there were two questions which had to be decided. First, was GSI the employer of the relevant employees? Secondly, if GSI was not their employer, were they employed by a foreign employer so that GSI was the host employer? Mr Goldberg said that these two questions raised straightforward issues. The judge took as his starting point Mr Goldberg's formulation of the nature of the preliminary issue. He directed himself in accordance with the decision in Steele v Steele. He successively asked himself the correct questions. First, would the determination of a preliminary issue dispose of at least one aspect of the case? He answered that in the affirmative and I agree, because it would dispose of all of the issues against GSI in relation to the first period leaving open only those relating to the GSI employees. Secondly, might the determination of the preliminary issue significantly cut down the cost and time of the trial? He answered that one in the negative. Thirdly, he asked how much effort would be involved in identifying the relevant facts and concluded that it would be considerable. Fourthly, he asked to what extent the preliminary issue could be determined on agreed facts; he decided that it could not. Fifthly, he asked whether the point that the facts were not agreed impacted on the value of the preliminary issue, and he held that the value was reduced if the same witnesses needed to be called both on the preliminary issue and the substantive appeal. Sixth, he asked whether the hearing of the preliminary issue would fetter the court in achieving a just result and said that he did not think so. Seventh, he asked whether the determination of the preliminary issue would increase costs or delay the trial; he said that it might reduce some costs but it would delay the substantive appeal until after the preliminary issue had been determined and he said that he thought that the material by reference to which the substantive issue as to liability fell to be determined was old and it was important that the evidence should remain available. Eighthly, he asked to what extent the determination of the preliminary issue would be irrelevant and he held that it might well be because either GSI or GSSL must be liable. Ninthly, he held the consideration as to an amendment to the pleadings to be irrelevant to the issue before him. Lastly, he stood back and asked whether it was just to order a preliminary issue and he held that it was not; first because the substantive issue would still have to be determined in relation to the GSI employees; secondly, because he felt there was an overlap between the evidence required on the preliminary issue and that

required on the substantive appeal; and, thirdly, because it might not matter which of GSI or GSSL was liable, a point that remained to be determined. He hoped that the parties would proceed quickly with the substantive appeal and avoid any further delay.

36. I have reached the view that the judge erred in law because he took into account considerations that were not relevant to the case that was actually being run and he did not appear to take into account one matter which it was material to take into account. Just running through his grounds and indicating those on which I differ. Ground two was whether the determination of the preliminary issue would cut down the cost and time of trial; the judge thought it would not because "if the same employees have to give evidence at both the hearing of the preliminary issue and the appeal, the total court time might not be reduced". I respectfully think that this embodies two errors. First, the proposition that the same witnesses would have to give evidence at the preliminary issue and on the substantive hearing was not warranted. It appears to have arisen because the judge thought that there would be an argument about whether GSI, although not formally the employer, was the “implied employer” and that would involve an examination of lots of individual contracts of employment. But that was not an issue and is not an issue in the case which is being run. It is agreed for the purposes of the appeal that the employer is GSSL. The question is whether GSSL was a foreign employer so as to make GSI the host employer. There is no question of implied employment. The evidence on the liability issue is very different from the evidence on the contributor issue and the same employees will not have to be called. Secondly, that paragraph also assumes that the substantive question relating to the GSI employees will have to be determined as an issue. But that is not so if one takes account of the real possibility of a settlement in relation to the GSI employees.

37. The third ground which the judge considered was how much effort would be involved in identifying the relevant facts for the preliminary issue. He thought that was considerable because "the factual compass includes whether the appellant is an implied employer"; but that was an error, it did not. The question at issue is whether GSSL has a presence in Great Britain.

38. The fifth ground was whether the fact that the underlying facts were not agreed would impact on the value of the preliminary issue. Again, the judge decided that the value would be reduced "if the same witnesses need to be called in both the preliminary issue and the substantive appeal". But if the preliminary issue is confined to the question of the presence of GSSL in Great Britain, the same evidence does not have to be called. It is contained, apparently, in one bundle of documents and in the evidence of one witness to be called.

39. The seventh ground was whether the determination of the preliminary issue would increase costs or delay the trial. The judge felt that there would have, inevitably, to be an examination of the substantive issue whatever way the preliminary issue was determined, but this is incorrect. There will be no examination of the substantive issue if the issue is determined in the sense contended for by GSI, and GSI then settles its reduced liability, even if that requires surrender.

40. The eighth ground was whether the determination of the preliminary issue would be irrelevant. The judge held that it might well be; but I do not see how the determination of

the preliminary issue can be irrelevant. It must be relevant to decide who is responsible for what contributions to NIC. That is an issue which will inevitably have to be decided in order to effect recovery.

41. I therefore consider that there is an error of law which underlies the decision not to grant a preliminary issue. I am satisfied that the error is of such significance that it undermines the conclusion on case management which has been reached. Essentially, what the judge was saying was that there was such an overlap in the evidence to be adduced on the preliminary issue and at the substantive hearing that costs would be wasted and delay occasioned by separating out the evidence. That is not, in my judgment, correct.

42. Ought I then to remake the decision? I consider that I should. In doing so, I must pay respect to the principal grounds which concerned Dr Avery Jones. They were, firstly, the sensible deployment of evidence in relation to the relevant issues and, secondly, avoiding delay. Now, delay is not something of which the parties themselves can complain having regard to their conduct. It is something which is of independent concern to the tribunal; and I share it. But I believe that delay can be accommodated by setting both a strict timetable for the conduct of the preliminary issue (in weeks rather than any longer period) accompanied by a tight timetable for the conduct of the appeal following the disposal of the preliminary issue. There is no need for delay to be a significant factor.

43. In considering my approach to remaking the decision, I have tried to avoid being seduced by the blandishments of one side as to its willingness to settle (as to which it has yet made no concrete offer) or by the blustering intransigence of the other and its determination to litigate everything to the bitter end. I think I should approach the prospect of settlement by reference to how responsible parties ought to behave in discharge of their duty to the tribunal. It seems to me that the question of settlement ought to figure in that approach, as the tribunal rules themselves demonstrate is necessary. I therefore consider that I ought to do whatever is necessary to facilitate a settlement whilst not compelling the parties to enter into any process.

44. I consider that the grant of the request for a preliminary issue will identify the ultimate issues for decision, will do so in an economic and expeditious way and will facilitate concentration on where the real risks in the litigation lie as between HMRC, GSSL and GSI. I therefore propose to allow the appeal, direct the preliminary issue and set down a tight timetable for its determination. I believe that the preliminary issue is capable of being disposed of in two months.

45. I turn to the appeal that is brought by GSSL in relation to its application for a stay. The key paragraph in the judgment of Judge Berner is paragraph 26. In that paragraph the judge held (a) that the proceedings in the tribunal have priority over County Court recovery proceedings (b) that recovery the proceedings must be deferred until such time as there has been a final determination of the appeal proceedings and (c) that, accordingly, it would be wrong to grant a stay of the appeal pending the determination of the question of recoverability.

46. In this I think the judge erred in law. I do not think that the mere fact that County Court proceedings are stayed pending the determination of liability (as set out in Section 117A) compels the conclusion that in all respects all issues must be determined before the tribunal before any issue can be determined in the County Court. Recoverability seems to

me to be a key case in point. A determination in the County Court that the debt, even if liability is proved, is irrecoverable would provide a useful short cut to the resolution of the issues. There is no point in examining the effectiveness of the scheme used by GSSL and GSI if at the end of the day GSI settles and no NIC contributions can be recovered from anybody else.

47. I consider the error of law made in relation to Section 117A (and in particular the fact that the Court of Appeal decision in Hyde shows that the adjournment is not automatic or complete) undermines the judgment made by the judge. I would emphasise that Hyde was not drawn to his attention as it has been to mine and so the error of law is understandable. I would remake the decision.

48. In remaking the decision, I would again pay respect to the basis on which the judge below proceeded. He was concerned to avoid delay. I agree that avoiding delay is desirable but, for my part, I would grant a stay. The purpose of a stay of the appeal would be to permit HMRC, if so minded, to apply in the County Court and for GSSL then to raise its limitation arguments and those arguments to be addressed and dealt with. I would make any stay conditional on HMRC having permission to apply to lift it if GSSL unreasonably delayed the prosecution of its limitation defence in the County Court, for one must beware of kicking these points "into the long grass". I would therefore allow the appeal and grant a stay subject to that permission.

49. If HMRC is right that the determination of the GSI employees' claim is inevitable (because there will be no settlement) and will proceed to a full hearing notwithstanding the outcome of the preliminary issue, then it seems to me that the material necessary to determine *that* question is essentially the same as the material that is relevant to establish the liability of GSSL. Thus, if it is established that recoverability proceedings can be pursued against GSSL (and the limitation points are bad) there will be relatively little catching up to do in the GSSL appeal and the course I have taken should not occasion delay.

50. For those reasons, I would allow both appeals.

Mr Justice Norris

Upper Tribunal Judge

Release date: 23 December 2009