Appeal number FTC/43/2010

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

(1) MR NRJ TAYLOR
(2) MR N HAIMENDORF

Respondents

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DECISION ON PERMISSION TO APPEAL AND COSTS

TRIBUNAL: Mr Justice Roth

Ms Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellant

Mr Ben Staveley, representative for the Respondents

DECISION

1. By a decision released on 23 November 2010, the Upper Tribunal allowed the appeal of Her Majesty's Revenue and Customs against the decision of the First Tier Tribunal (Tax Chamber). The Respondents have applied for permission to appeal. Pursuant to section 13(11) of the Tribunal, Courts and Enforcement Act 2007, I specify that the Court of Appeal in England and Wales is the relevant appellate court. In this decision I use the same abbreviations as in the substantive decision.

2. Appeals from the Upper Tribunal are governed by the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (2008 No 2834). Article 2 provides that the Upper Tribunal shall not grant permission unless it considers that:

> "(a) the proposed appeal would raise some important point of principle or practice: or
>
> (b) there is some other compelling reason for the relevant Appellate Court to hear the appeal."

3. For the purpose of their application, the Respondents do not seek to challenge the decision insofar as it held that the issued share capital for the purpose of sub-section 291B(1)(b) of the ICTA should be computed at the nominal value.

4. By their application, the Respondents first state that there is an error in the example given in paragraph 26 of the decision. They are indeed correct in submitting that there is an arithmetical mistake which unfortunately was not pointed out by either party when the decision was circulated in draft. The second sentence of that paragraph should read:

> "To express the matter in specific terms by reference to the facts of this case, if Mr Haimendorf had acquired not 300,000 but 850,000 shares by the end of 2005 he would have held on their nominal value less than 21% of the shares in the Company…"

However, although the hypothetical example needs correction, this does not affect the reasoning in the decision that in such a situation it would be consonant with the purpose of the statutory provision to regard Mr Haimendorf as a connected person. Indeed, the Respondents do not base their application on this error.

5. The main ground on which permission to appeal is sought is that there are many anomalous results which flow from holding that paragraph (b) constitutes an aggregate test rather than a dual test. However, the decision indeed recognises that there are anomalous results in certain circumstances: see at paras 19-20. The application further submits that therefore "it is at least clearly arguable" that the construction urged by the taxpayers is correct.

6. I have no doubt that the Respondents' construction is well arguable. The fact that a very experienced FTT favoured that construction establishes this. However, that is not the test for a second level appeal under Article 2 of the Appeal Order. I do not see that the proposed appeal on the grounds set out would raise an important point of principle or practice. This is not a case where the construction adopted in the decision always has capricious results. On the contrary, it is a case where there are potential anomalies whichever of the two alternative constructions is adopted, depending on the circumstances. Having regard to the language and purpose of the section as a whole, the construction adopted in the decision is to be preferred for the reasons given, but no important point of principle is involved.

7. It is not suggested that there is some other compelling reason for an appeal. Accordingly, the application for permission to appeal is refused.

Costs

8. HMRC apply for their costs of the appeal pursuant to rule 10(5) of the Tribunal Procedure (Upper Tribunal) Rules. By letter dated 29 December 2010, they enclosed a schedule of costs seeking summary assessment.

9. The Respondents sought additional time to submit observations on the matter of costs due to absence abroad, which I permitted. Their observations were finally received on 11 February 2011 and HMRC commented on those observations by letter dated 18 February 2011.

10. Much of the concern raised in the Respondents' observations is directed to the conduct by HMRC leading up to the hearing in the FTT. However, the costs for which HMRC now apply relate only to the appeal in this Tribunal. HMRC have confirmed that they are not seeking their costs of the hearing below.

11. The other two points taken on behalf of the Respondents are, first, that the amount claimed in the statement of costs as regards attendance on documents, put at over 38 hours amounting to £8010, is disproportionate for a case where the relevant documents were few in number. Secondly, they contend that as this was an area of ambiguity in the statutory provisions, it is not right that they should have to pay all HMRC's costs of a case that clarifies the law.

12. I think there is force in the first point. This was a case where the facts were not in dispute and were readily ascertainable from the decision of the FTT and the two sides' written submissions before the FTT. HMRC, in their response of 18 February 2011, have not explained how so much time was required. For HMRC to have spent over 38 hours on documents purely for the appeal, and over 17 hours of that time at the level of a grade A lawyer, was in my view disproportionate and unreasonable. I propose to substitute five hours at grade C level and one hour at grade A level which I consider is appropriate in all the circumstances of this appeal. In other respects, the costs have not been challenged and in general seem to me proportionate. The result is that there is a deduction in the amount claimed by £7085.

13. As regards the second point, although I have some sympathy with the Respondents, the position is that HMRC have clearly won and this is not a case were I consider that the point is of such public importance that it would be right not to follow the usual practice that the losing party should pay the other side's costs. I also note that the Respondents have not sought to place evidence of their means before the Tribunal under Rule 10(5)(b) and contend that an order for costs in the amount applied for would cause them financial hardship.

14. Accordingly, I award HMRC their costs of the appeal, summarily assessed at £10,905.41.

15. The Respondents also indicate that they consider it unreasonable for them to pay interest on the tax which is due as a result of the appeal being allowed, because of the time spent by HMRC in dealing with this case prior to the hearing before the FTT.

However, this Tribunal is not determining the amount to be paid by the Respondents in respect of tax and that is accordingly not a matter for me to decide.

MR JUSTICE ROTH
TRIBUNAL JUDGE

RELEASE DATE: 4 March 2011