[2017] UKUT 75 (TCC)

Appeal number: UT/2016/0115

PROCEDURE - application by Applicant to set aside decision refusing application extension of time to provide notice of appeal to Upper Tribunal - refused - application for permission to appeal to the Court of Appeal – refused

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN

ROBERT HUITSON

Applicant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 9 February 2017

Alison Graham-Wells, counsel, instructed by Montpelier Group (Tax Consultants) Limited for the Applicant

Kieron Beal QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to an application by Mr Huitson to set aside my decision ('the EOT decision') refusing his application for an extension of time to provide a notice of appeal to the Upper Tribunal ('UT'). The application also asks me to re-make the EOT decision so as to extend the time for Mr Huitson to provide the notice of appeal. If I refuse to set aside the EOT decision, Mr Huitson applies for permission to appeal to the Court of Appeal against the EOT decision and my decision refusing to set it aside.

2. For the reasons set out below, I have decided that the EOT decision should not be set aside and that permission to appeal to the Court of Appeal is refused.

Background

3. The background to Mr Huitson's application for an extension of time to provide a notice of appeal to the UT is set out in the EOT decision. I reproduce only so much of the background in this decision as is necessary to place the applications in context. I also include some further detail relevant to the application to set aside the EOT decision, which is not included in that decision.

4. In April 2001, Mr Huitson entered into a marketed tax avoidance scheme that purported to rely on exemption from UK tax under the UK - Isle of Man Double Taxation Arrangements on the profits of a Manx partnership distributed through an Isle of Man resident trust. Having opened an enquiry in December 2003, the Respondents ('HMRC') refused Mr Huitson's claim for relief from UK tax in a letter dated 16 May 2007. Mr Huitson instituted judicial review proceedings challenging the retrospective amendment of section 858 of the Income Tax (Trading and Other Income) Act 2005('ITTOIA'), on which HMRC relied, which were ultimately unsuccessful. On 14 February 2013, Mr Huitson filed a Notice of Appeal with the First-tier Tribunal ('FTT').

5. In a decision released on 3 September 2015, the FTT decided that section 858(4) of ITTOIA applied to treat Mr Huitson as entitled to (and taxable on) a share of the income of the partnership and dismissed his appeal. The FTT also recorded its decision to refuse Mr Huitson's application to amend his grounds of appeal to rely on Article 56 of the European Community Treaty on the ground that it was made too late and an abuse of process.

6. On 17 November 2015, Mr Huitson applied to the FTT for permission to appeal against the decision on four grounds. In a decision issued on 21 December, the FTT granted Mr Huitson permission to appeal on all four grounds. The FTT sent the decision to Mr Huitson's advisers, Montpelier Group (Tax Consultants) Ltd ('Montpelier') on the same day. Montpelier received the decision. Under the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the UT Rules'), Mr Huitson was required to provide a notice of appeal to the UT by no later than 5:00 pm on 23 January 2016. No notice of appeal was received by the UT by that deadline.

7. In late May 2016, HMRC wrote to Montpelier giving notice of HMRC's intention to issue Follower Notices and/or Accelerated Payment Notices to taxpayers using the

same or a similar tax avoidance scheme to Mr Huitson and which had been determined in his appeal which was now a final decision under section 205(3)(c) Finance Act 2014.

8. On 6 June 2016, Montpelier telephoned the FTT and asked about Mr Huitson's permission to appeal application. The FTT told Montpelier that the decision had been issued in December 2015. Montpelier then located the documents and wrote to the FTT on 8 June about the apparent contradiction between the decision and the letter as follows:

> "We refer to your letter dated 21 December 2015 which states that permission to appeal the Tribunal judgement dated 3 September 2015 is refused. The letter refers to the decision of Judge Cannan dated 21 December 2016 (*sic*).
>
> Unfortunately we took your letter at face value to say that the application for permission to appeal dated 17 November 2015 was refused but on further examination this is not true. …
>
> [The letter then sets out paragraph 4 in which Judge Cannan granted permission]
>
> …
>
> As we believed that permission was refused no appeal was submitted to the Upper Tribunal in time. We would therefore respectively (*sic*) ask the First Tier Tribunal to consider in these exceptional circumstances, if the time limit can be extended or to advise us whether such an application to appeal out of time should be made to the Upper Tribunal."

9. Montpelier were wrong to say that the FTT's letter of 21 December said that permission to appeal had been refused. The letter actually stated that the FTT refused to review the decision released on 3 September 2015. It then went on to say that Mr Huitson had the right to apply to the UT for permission to appeal but must do so within one month. That sentence was inappropriate because, as Montpelier's letter acknowledges, the FTT's decision enclosed with the letter actually granted permission to appeal and so there was no need for Mr Huitson to apply to the UT for permission to appeal. The letter of 6 June 2016 did not explain why, if Montpelier had taken the view that permission to appeal had been refused, Mr Huitson did not make an application to the UT for permission within one month of the FTT's letter of 21 December 2015.

10. On 20 June, the FTT replied saying that:

> "The time limit for providing a notice of appeal to the Upper Tribunal is set out in Rule 23 of the Upper Tribunal rules. The First-tier Tribunal has no jurisdiction to extend that time limit. Any application must be made to the Upper Tribunal."

11. On 22 June, Montpelier wrote to the FTT stating:

> "… We are unable to properly make an application to the Upper Tribunal without the First Tier Tribunal confirming to us whether their letter refusing permission stands or the Judges (sic) decision which says permission granted stands."

12. As I have stated above, the FTT's letter of 21 December did not say that permission to appeal had been refused nor did the letter refuse permission to appeal.

The FTT replied on 30 June 2016 confirming the judge's decision that permission to appeal was granted.

13. On 6 July 2016, Montpelier filed an application on behalf of Mr Huitson for permission to appeal out of time with the UT. The application repeated the assertion that the letter dated 21 December 2015 from the FTT stated that the application for permission to appeal had been refused whereas the actual decision, attached to the letter, granted permission. The application stated that, whether because of the Christmas and New Year break or for some other reason, the permission to appeal decision was not brought to the attention of the Montpelier consultant dealing with the matter. There was, however, no repetition of the suggestion, made in the letter of 8 June, that Montpelier had taken the FTT's letter at face value. Enclosed with the application of 6 July were:

> (1) the FTT's decision of 3 September 2015, together with the covering letter from the FTT and information about making an appeal;
>
> (2) a letter dated 27 October 2015 from Montpelier enclosing an application to suspend the normal time limit for permission to appeal and the application together with another copy of the FTT's decision of 3 September 2015;
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> (3) a copy of the FTT's letter of 21 December 2015 enclosing the FTT's decision granting permission to appeal; and
>
> (4) the correspondence between Montpelier and the FTT of 8 June, 20 June, 22 June and 30 June referred to above.

The letter of 6 July and enclosures did not constitute a notice of appeal because they did not include the grounds of appeal relied on by Mr Huitson which were contained in his application to the FTT and in respect of which the FTT had granted permission (see rules 23(3) and 21(4)(e) of the UT Rules). Even if the application of 6 July had constituted a notice of appeal, it would have been late as it was submitted 165 days after the expiry of the one month time limit on 23 January.

14. The UT acknowledged receipt of Mr Huitson's application by email dated 13 July. In an email dated 15 July to a member of HMRC's Solicitor's Office, and copied to Montpelier, the UT asked HMRC to make any comments on the application within 14 days and stated that the UT proposed to deal with the application on the papers unless either party requested a hearing. Neither Montpelier nor HMRC requested a hearing in response or at any point.

15. HMRC filed their response to the application and a request for an expedited decision by email received at 16:32 on 29 July. The response took the form of a formal response settled by counsel (Mr Kieron Beal QC, who appeared before me) dated 28 July and a letter dated 29 July from the member of HMRC Solicitor's Office who had been sent the application. The formal response noted that, as the FTT had already given permission to appeal and Mr Huitson had failed to act upon it, HMRC had assumed that Mr Huitson no longer wished to appeal against the FTT's decision. The response then stated that, as permission had already been granted, it was not appropriate for Mr Huitson to apply for permission to appeal but rather that he should seek an extension of time within which to provide his notice of appeal to the UT. In relation to such an application, the response drafted by counsel stated that:

> "It will be for the Appellant to satisfy the UT that its discretion to extend time for compliance with the requirements of rule 23 should be exercised in his favour, notwithstanding the delay that has occurred. The Commissioners do not formally oppose such application as may be made. They do ask for their costs of and occasioned by the application made by the Appellant, to be subject to a detailed assessment if not agreed."

16. HMRC's letter dated 29 July 2016 stated that, in addition to what was stated in the enclosed response, the UT was asked to decide the application expeditiously because the late application for permission to appeal prejudiced HMRC. The letter repeated the assertion made in the response that HMRC had assumed that Mr Huitson no longer wished to appeal against the FTT's decision when the time limit expired without any notice of appeal being served on the UT. In the absence of a notice of appeal being provided to the UT by the due date, HMRC had commenced work preparing follower notices. It stated that HMRC had written to Montpelier and to taxpayers in June 2016 (in fact, it appears to have been in late May) putting them on notice that HMRC would be issuing follower notices and accelerated payment notices. The letter stated that HMRC intended to issue follower notices to approximately 8,000 taxpayers who used the IR35 avoidance scheme. The letter continued to say that preparing follower notices for that number of taxpayers was an onerous and ongoing task which would take many months to complete. The letter pointed out that there is a strict statutory time limit for issuing follower notices, namely 12 months from the date on which the judicial ruling became final which, in this case, was the expiry of the time limit for lodging a notice of appeal, ie 23 January 2016. The letter stated that Mr Huitson's subsequent late application for permission to appeal prejudiced HMRC as it cast doubt on the finality of the FTT's decision and could prejudice HMRC's ability to issue the follower notices within the statutory time limits.

17. I determined the application on the basis of the parties' written submissions on 4 August 2016 and the UT released the EOT decision on 9 August 2016. The decision included referred to the number of taxpayers affected by the FTT's decision becoming final, using the figure of 8,000 given in HMRC's letter of 29 July.

18. On 11 August, the Deputy Director of HMRC's A4 Strategic Litigation Team sent an email attaching a letter to the UT. The email was copied to the member of HMRC Solicitor's Office who had written the letter of 29 July and to two persons at Montpelier. The letter stated that the figures given in the letter of 29 July and used in the EOT decision of 9 August were wrong and gave the correct figure for the number of taxpayers affected and some further figures. In an email in reply later the same day, Montpelier asked HMRC to forward a copy of the response of 29 July and confirm whether a copy had previously been sent to Montpelier. The Deputy Director responded later the same day saying that HMRC would check the files to see if a copy of the response and covering letter had been sent to Montpelier previously.

19. Accordingly, I reviewed the EOT decision of 9 August and corrected the figures under rule 42 (the slip rule) of the UT Rules. I made the changes on 12 August and the UT released the decision on 15 August. References in this decision to the EOT decision are to the corrected version except where the context requires otherwise. I instructed the UT staff to inform the parties that the accurate revised figures for the number of taxpayers affected and notices to be issued given by HMRC in their letter of 11 August had no effect on my decision. This was done in the covering email from the UT serving the revised decision on the parties.

20. On 19 August, Montpelier chased HMRC for a reply to its email of 11 August asking whether it had been sent a copy of the response of 29 July. Shortly after, the member of the Solicitor's Office who had written the letter of 29 July responded by saying:

> "HMRC's response was filed with the Tribunal for service by the Tribunal on Montpelier."

21. Mr Beal stated in his skeleton for the hearing that HMRC were not in a position to confirm or deny whether or not the letter of 29 July was sent to Montpelier or Mr Huitson or received by either of them. At the hearing, he stated that he had not been aware of the email from the Solicitor's Office on 19 August referred to above. On the basis of the email of 19 August, I find that HMRC did not copy the letter dated 29 July and formal response to Mr Huitson or Montpelier and I accept that they were not aware of its existence until they read the EOT decision released on 9 August.

22. The failure to copy HMRC's letter and response to Montpelier or Mr Huitson was extremely regrettable because, as will be seen, the fact that neither Mr Huitson nor Montpelier saw HMRC's submissions until after I had made the EOT decision formed the principal ground of Mr Huitson's application to set aside that decision. That ground would have had no basis if HMRC had copied their email of 29 July to Montpelier. There was no reason, in my view, why HMRC should not have copied the email of 29 July to Montpelier as they did in the case of their email of 11 August.

23. In his skeleton, Mr Beal stated that it is HMRC's understanding that the UT would ordinarily serve any submissions received from one party on the other. I do not know where this "understanding" came from and Mr Beal could not enlighten me. It is not the practice of the UT to act as a post box for the parties' submissions and correspondence nor does the UT serve documents on one party on behalf of another. Of course, if the UT spots that a material piece of correspondence has inadvertently not been copied to the other party then the UT will often simply forward the relevant item by email to that party. However, parties should not assume that the UT staff or the judge reviewing the papers will necessarily check that a particular document has not been served on the other side. Rule 2(4) of the UT Rules provides that the parties must help the UT to further the overriding objective and cooperate with UT generally. The overriding objective is to deal with cases fairly and justly and that includes ensuring, so far as practicable, that the parties are able to participate fully in the proceedings and avoiding delay. It seems to me that, by not copying the letter of 29 July and formal response to Montpelier, HMRC failed to have proper regard to their obligation to help the UT further the overriding objective in this case. Further, if HMRC expect the UT to serve their documents on appellants as a matter of course rather than serving the documents themselves, I consider that HMRC are failing to cooperate with UT generally. I doubt, however, that HMRC really have any such expectations as, in my experience, HMRC are generally conscientious in copying submissions, applications and correspondence with the UT to appellants and their advisers.

Application to set aside the EOT Decision

24. By application dated 16 September 2016, Mr Huitson applied for the EOT decision to be set aside on the grounds that, in summary, he had not been given copies of relevant documents submitted by HMRC, had been deprived of the right to request an

oral hearing and because it was unclear whether the UT had full and proper regard to his application to the FTT for permission to appeal dated 17 November 2015.

25. There is no general power under which the UT can set aside a decision or re-open proceedings in the interests of justice. Rule 43 of the UT Rules confers a discretionary power on the UT to set aside a decision which disposes of proceedings, or part of such a decision, and re-make it but only in prescribed circumstances. Rule 43(1) states that the UT may set aside a decision if the UT considers that it would be in the interests of justice to do so and one of four conditions in rule 43(2) is met. Rule 43(3) states that the party seeking to have a decision set aside must make an application in writing to the UT so that it is received within one month of the date on which the UT sent notice of the decision to the party. Mr Huitson's application to set aside the EOT was received by the UT on 7 September and, therefore, within one month of the date on which the UT sent notice of the decision to Montpelier.

26. The relevant conditions in rule 43(2) for the purposes of Mr Huitson's application are the first, second and fourth conditions. The first condition is that a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative. The second condition is that such a document was not sent to the UT at an appropriate time. The fourth condition is that there has been some other procedural irregularity in the proceedings.

27. In relation to the first condition, Miss Graham-Wells, who appeared for Mr Huitson, submitted that neither the letter of 29 July 2016 nor the formal response enclosed with it were copied to Mr Huitson or Montpelier which deprived them of the opportunity to address the facts and submissions stated therein or request a hearing. Ms Graham-Wells said that this was the primary argument relied on by Mr Huitson in support of his application to set aside the EOT decision. She contended that the misstatement of the number of taxpayers affected in the letter of 29 July was a material error. She also pointed out that only the follower notices were time critical and the letter did not state how many such notices would be issued. As the letter had not been copied to him, Mr Huitson had been deprived of the chance to raise questions about the figures and make representations on the issue of prejudice. Ms Graham-Wells said that this point also showed that it was in the interests of justice to set aside the EOT decision and remake it in the light of further submissions. I do not accept that the fact that the letter of 29 July and formal response were not served on Mr Huitson or Montpelier requires or justifies setting aside the EOT decision. The UT had already indicated, in the email of 15 July, that I would decide the application on the papers unless either party requested a hearing which neither did. In view of the importance of the application to Mr Huitson and the fact that HMRC were likely to oppose it vigorously, it may be thought surprising that Montpelier did not request a hearing. I am not satisfied that Mr Huitson would have requested a hearing if he had received the letter of 29 July. It is, however, unfortunate that Mr Huitson did not see the representations made by HMRC in the letter and formal response before I issued the EOT decision but, having heard the submissions by Miss Graham-Wells, I do not consider that further submissions would have caused me to reach a different decision. In particular, the issue of the number of taxpayers who would be subject to follower notices and accelerated payment notices is something of a red herring in this case. Whether the number was, as first stated by HMRC, 8000 or, as is the case, 1724, I regard it as a significant number which represented a significant amount of work on the part of HMRC. Accordingly, I

do not consider that it would be in the interests of justice for the EOT decision to be set aside on the ground that HMRC did not send a copy of the letter of 29 July and the formal response to Mr Huitson or Montpelier.

28. In relation to the second condition, Ms Graham-Wells submitted that if Mr Huitson's application to the FTT of 17 November 2015 for permission to appeal against the decision was not before me when I decided the application then that was an error because I could not have been aware of the seriousness, complexity and significance of the issues in his appeal. I acknowledged at the hearing that I did not have Mr Huitson's application or grounds of appeal available to me when I decided the application. Montpelier had not included those documents in their application to the UT on 6 July 2016. In my view, the fact that I did not have the grounds did not have any material impact on the EOT decision. Montpelier had made some submissions about the importance of the case which I referred to in paragraph 14 of the EOT decision. In any event, the seriousness and wider significance of the case were obvious from the figures for affected taxpayers and numbers of notices provided by HMRC and stated in paragraphs 15 and 29. Further, I stated in paragraph 31 that I had assumed, for the purposes of the application, that Mr Huitson had a good case. In my view, the fact that I did not have the application to the FTT available to me does not meet the condition or form any basis for setting aside the EOT decision.

29. In relation to the fourth condition, Mr Huitson contended in his application that the finding in the EOT decision, at paragraph 30, that HMRC had already suffered prejudice as a result of Mr Huitson's failure to provide the notice of appeal within the time limit and would suffer further prejudice, in the sense that work already undertaken would be wasted, if the application were to be granted was not one that I was entitled to make on the evidence available to me. This submission was not pressed at the hearing and, if it had been, I would have rejected it on the ground that I deal with the issue of prejudice in paragraph 15 of the EOT decision which describes the material on which I formed my view. Ms Graham-Wells also submitted that the EOT decision contained an error of law in that it did not consider *R (Hysaj) v Home Secretary* [2015] 1 WLR 2472 ('*Hysaj'*). I acknowledged that I was not aware of *Hysaj* at the time but had become familiar with it in relation to another case since then. I put it to Miss Graham-Wells that *Hysaj* merely said that the principles set out by the Court of Appeal in *Denton v TH White Ltd (Practice Note)* [2014] 1 WLR 3926 applied when considering whether to extend the time for making an appeal and I had applied those principles in the EOT decision. Miss Graham-Wells did not disagree but stated that the *Hysaj* provided an interesting comparison between two cases with different facts considered by the Court of Appeal. In *Hysaj*, the Court allowed an appeal against a refusal of an extension of time to appeal where the appellant was 42 days late and there was no good reason for the delay. Miss Graham-Wells submitted that Mr Huitson's case was closer on its facts to that of *Hysaj* than to one of the other cases. In my opinion, it is clear from the authorities that each case must be looked at in the light of its own particular facts. I do not consider that the facts of *Hysaj* are so close to those of Mr Huitson's as to indicate that that my decision not to extend time in his case amounts to "some other procedural irregularity". Accordingly, I do not accept that the fourth condition for setting aside the EOT decision has been satisfied.

30. Even if one or more of the conditions in rule 43(2) is met, I must consider whether it would be in the interests of justice to set aside the EOT decision. It seems to me that

it would not be in the interests of justice to set aside the EOT decision on the basis of the submissions made to me. None of the submissions satisfied me that there was any good reason or explanation for the delay in making the application for an extension of time to provide a notice of appeal or that HMRC and affected taxpayers would not suffer prejudice if I were to grant the extension.

31. For completeness, I should record that, if I had set aside the EOT decision and considered it again, I would have reached the same conclusion and refused to extend time for Mr Huitson to provide a notice of appeal to the UT. The additional factors urged by Miss Graham-Wells in her skeleton are not such as to cause me to revise the reasons given in the EOT decision or change my decision.

Application for permission to appeal

32. I gave my decision to refuse the application to set aside the EOT decision at the hearing and Miss Graham-Wells applied for permission to appeal to the Court of Appeal against the EOT decision and this one. For the purposes of section 13(11) and (12) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA'), I specify the Court of Appeal in England and Wales as the relevant appellate court for any appeal from the decisions.

33. Having received an application for permission to appeal, I may review the EOT decision, under rule 45(1) of the UT Rules, but only if:

> (1) in the decision, I have overlooked a legislative provision or binding authority which could have had a material effect on the EOT decision; or
>
> (2) since the decision, another court has made a decision which is binding on the Upper Tribunal and which could have had a material effect on the EOT decision.

In my view (and Miss Graham-Wells agreed), neither circumstance applied in this case and, thus, I could not review the EOT decision.

34. Under paragraph 2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008, permission to appeal to the Court of Appeal in England and Wales must not be granted unless the Upper Tribunal (or, if the Upper Tribunal refuses permission, the Court of Appeal) 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 Court of Appeal to hear the appeal. Irrespective of whether there is an important point of principle or practice, permission should not be granted unless the appeal has a real prospect of success, or there is some other compelling reason for the appeal to be heard by the appellate court.

35. Essentially the grounds of appeal put forward by Miss Graham-Wells are a restatement of the submissions made in support of the application to set aside the EOT decision. I have already given my reasons for not accepting those submissions and I do not consider that the submissions show that it is arguable that I made any error of law in the EOT decision. Further, I do not consider that the proposed appeal raises an important point of principle or practice and I am not able to see any other compelling reason for an appeal to the Court of Appeal in this case. Accordingly, I refuse permission to appeal against the EOT decision and this decision.

Disposition

36. For the reasons given above, I have decided that the EOT decision should not be set aside and permission to appeal to the Court of Appeal is refused.

37. Mr Huitson has a right to make an application to the Court of Appeal for permission to appeal against the EOT decision and this decision. Such application must be made within 21 days of service of the decision of the Upper Tribunal refusing permission to appeal.

38. At the end of the hearing, Mr Beal applied for an order that Mr Huitson pay the costs incurred by HMRC in opposing the applications. I refused that the application on the ground that HMRC's failure to copy their letter of 29 July and formal response to Mr Huitson or Montpelier gave rise the application and hearing. In my opinion, if HMRC had copied the documents to Mr Huitson or Montpelier then the application to set aside the EOT decision would probably not have been made or, if made, would probably have been dealt with on the papers without the need for a hearing. I considered that it would not be fair or just to require Mr Huitson to pay HMRC's costs in those circumstances.

JUDGE GREG SINFIELD
UPPER TRIBUNAL JUDGE

RELEASE DATE: 22 FEBRUARY 2017