TC02288

Appeal number: TC/2009/09778

TYPE OF TAX – Tribunal Procedure – application for substitution of Appellant - has there been a change of circumstances due to assignment of claim – assignment invalid for reasons of champerty – application refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SKYWELL (UK) LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in public at Bedford Square on 14 August 2012

Paul O'Doherty of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

The Appellant did not appear

DECISION

1. On 15 August 2012 the Tribunal directed inter alia that:

> The Appellant's application for the substitution of Recovery Debts Limited as the Appellant in this appeal is refused. The Tribunal will provide full reasons for its decision shortly.

2. I now provide full reasons for the refusal of the application for substitution.

Background

3. This appeal concerns HMRC's decision to refuse to allow a claim for VAT input tax for the period 3/06 on the basis that the Appellant company knew or ought to have known of the fraudulent nature of transactions connected to the supply of goods in relation to which the input tax arose. HMRC's decision to deny the input tax claim is dated 19 March 2009 and the Notice of Appeal was submitted to the Tribunal on 16 April 2009. The appeal was allocated to the complex track and there has been no notification of an opt out from the costs regime by the Appellant.

4. The appeal has had a somewhat chequered history. There was a change of legal representation by the Appellant and an issue as to hardship which together resulted in the Tribunal granting a stay of proceedings. The appeal was apparently struck out but then reinstated by the Tribunal. Directions have subsequently been issued with the intention of bringing the appeal to a final hearing.

The Application

5. The Tribunal received an application from Recovery Debts Limited (the Applicant but not the Appellant) dated 11 July 2011, asking for the Tribunal to order the substitution of Recovery Debts Limited as the Appellant, on the grounds that the Appellant company had assigned its claim to Recovery Debts Limited on 31 March 2011. HMRC lodged a notice of objection to the application for substitution dated 12 August 2011, on the basis that the deed of assignment was void and further that Recovery Debts Limited did not have any standing to make the application in any event. The Appellant then sent HMRC a draft supplemental deed of assignment, on which HMRC declined to comment. The matter was listed for directions with a requirement for both parties to file skeleton arguments in relation to the substitution issue.

6. The matter eventually came before me in August 2012. The Tribunal was satisfied that the Appellant had received notice of the hearing and proceeded in the Appellant's absence, taking account of the skeleton argument which the Applicant had supplied. The Tribunal notes that the Respondent's skeleton had been served on the Appellant prior to the hearing so that the Appellant had notice of the arguments that HMRC relied upon and had had an opportunity to respond to them in its own skeleton.

The Issue for the Tribunal

7. I accept Mr O'Doherty's submission that the issue for the Tribunal is whether there has been a change of circumstances since the start of proceedings so as to make the substitution necessary pursuant to rule 9 (1) (b) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. It follows that, if the deed of assignment is void for reasons of champerty, then there will have been no change of circumstances necessitating the substitution.

The Arguments

8. The brief skeleton submitted on behalf of Recovery Debts Limited asserts that HMRC's objection to the deed of assignment has been satisfactorily addressed by the execution of the supplemental deed. The Applicant also referred me to *Grovewood Holdings plc v James Capel and Co Ltd* [1995] BCC 760.

9. Mr O'Doherty on behalf of HMRC submitted that the execution of the supplemental deed made no difference to the objection, which was not based on its wording but rather on more fundamental issues of principle, as follows. He submitted that the deed in this case was intended to assign a mere "right to litigate" and was unsupported by any collateral interest sufficient to justify the pursuit of the proceedings by the assignee for its own benefit. As such, he submitted that it was void for reasons of champerty and consequently ineffective to bring about the change of circumstances required for the substitution to be directed.

10. Mr O'Doherty helpfully referred me to the Court of Appeal's decision in *Midlands Co-operative Society v HMRC* [2008] EWCA Civ 305 and also to the recent decision of the First-tier Tribunal (Tax) in *Re New Miles Limited, Beverley Hilton-Foster v HMRC* [2012] UKFTT 33 (TC) which relied upon *Midland Co-op*. He submitted that in *Midland Co-op*, the cause of action arose as incidental to the transfer of property rights on merger and so was held validly to have been assigned so as to protect the property rights acquired. He also pointed to the fact that the assignment of all the rights in the *Midlands Co-op* case took place before the commencement of litigation and not afterwards.

11. He also referred me to the House of Lords' decision in *Trendex Trading Corporation v Credit Suisse* [1981] All ER 520, in which the assignment of a cause of action was held to be ancillary to the genuine commercial interests of the bank in view of its security (although the assignment failed for other reasons). He pointed out that in cases where the Appellant was in administration, the trustee in bankruptcy has a statutory right to substitution. This was the case in *Grovewood* (the authority relied on by the Applicant) where the liquidator was the assignee, but is not the case here.

12. Mr O'Doherty accepted that public policy in relation to maintenance and champerty is a developing area, referring me in particular to the Court of Appeal's recent decision in *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2012] 1 All ER 1423 in which Moore-Bick LJ at [15] commented (in considering *Trendex*):

> I think it is clear from what was said by both Lord Wilberforce and Lord Roskill that the law will not recognise on the grounds of public policy an assignment of a bare right to litigate, that is, a right to litigate unsupported by an interest of a kind sufficient to justify the assignee's pursuit of proceedings for his own benefit. Moreover, as the decision in the *Trendex Trading* case itself demonstrates, the assignment of a cause of action for the purposes of enabling the assignee or a third party to make a profit out of the litigation will generally be void as savouring of champerty.

13. In *Simpson*, the Court of Appeal concluded at [28] that

> The assignment of this case plainly savours of champerty, given that it involves the outright purchase by Mrs Simpson of a claim which, if it is successful, would lead to her recovering damages in respect of an injury that she has not suffered…In my view this is a case of an assignment of a bare right of action, in the sense that it is an assignment of a claim in which the assignee has no legitimate interest, and is therefore void.

14. In the absence of any evidence or argument as to an independent interest by Recovery Debts Limited in the outcome of these proceedings, despite being put on notice as to the issues, Mr O'Doherty asked me to find that the deed was ineffective to transfer the right of appeal of Skywell UK Limited to Recovery Debts Limited, because it was void for reason of champerty and unenforceable as contrary to public policy. For these reasons he asked me to dismiss the application.

Conclusion

15. Halsbury's Laws of England comments on champerty as follows:

> Maintenance[1] may be defined as the giving of assistance or encouragement to one of the parties to litigation[2] by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty[3] is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action[4].
>
> Since 1967 both criminal[5] and tortious[6] liability for maintenance and champerty have been abolished[7]; but the abolition of these forms of liability does not affect any rule of law as to the cases in which a contract involving maintenance or champerty is to be treated as contrary to public policy or otherwise illegal.[8]

16. I am satisfied that in both the *Midlands Co-operative Society* and the *Trendex* decisions, there was an independent interest by the assignee in the outcome of the proceedings. In *Midland Co-operative Society,* the Societies had merged some years previously so that the assets transferred in the merger agreement included the s. 80 VATA claim which later arose - see Arden LJ at [31]. In *Trendex*, the independent interest was identified by reason of the bank's security over the Appellant's assets.

17. I have considered Judge Kempster's recent decision in *New Miles Limited* referred to above. Although that decision is one of the First-tier Tribunal and so not binding upon me, I found it most useful in its analysis of the principles relevant to the exercise of the power of substitution. However, the issue of champerty was not argued in that case, presumably because, as appears from Judge Kempster's ruling at [23] the existence of an independent interest in the proceedings was apparently conceded by HMRC as it did not dispute that the assignment in question was capable of being made. He comments at [24] that the "s 78 interest claim is assignable for the same reasons as a s 80 repayment claim was held to be assignable in *Midland Co-op*". However, the question of whether there is a bar to the assignment of any particular cause of action is of course always subject to the question of whether, on the facts of the case, the assignment is of a bare right to litigate because there is no parallel interest of the assignee. This was not the case in the *Midland Co-op* case, for the reasons I have described, and the point was clearly not at issue in *New Miles Limited* either. It is very much at issue in the application now before me.

18. I note that both the deed (executed in March 2011) and the supplemental deed (executed in June 2012) in this appeal were executed after the commencement of the appeal. The deeds do not refer to any prior dealings between the parties. I also note that that the initial deed refers to the "assignment of the rights of appeal to the VAT Tribunal" and the supplemental deed refers to the assignment of "the right to litigate" in respect of three cases identified by their Tax Chamber numbers (two of which have been struck out so that this is the only live appeal remaining of the three). There is no identification in the recitals or in the deed itself of the Applicant as having an interest in these proceedings separate and independent from the right of appeal, and none has been pleaded. Despite being on notice of the arguments raised by HMRC in its skeleton and the authorities relied upon, neither the Appellant nor the Applicant have addressed these issues in written argument, and they did not attend the hearing to make oral submissions.

19. I conclude that this is not a case where the assignment of the cause of action is intended to protect some independent interest previously acquired by Recovery Debts Limited but that the deeds (taken together, as the second does not revoke the first) purport to assign a bare right to litigate. As such, and in reliance upon the authorities referred to above, I conclude that the agreement between the Applicant and the Appellant is void on the grounds that it is champertous and unenforceable for reasons of public policy. Accordingly I find that there has been no change in circumstances necessitating a direction for substitution and the application is refused. Skywell UK Limited remains the Appellant. Recovery Debts Limited has no standing in these proceedings. I have issued directions aimed at encouraging the parties to agree how to progress this appeal to a hearing, in default of which it will be re-listed for directions shortly.

20. 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.

ALISON MCKENNA
TRIBUNAL JUDGE

RELEASE DATE: 15 August 2012