[2016] UKFTT 429 (TC)

TC05182

Appeal number: TC/2015/06554

PROCEDURE – Application to stay 2007-08 appeal behind appellant's 2006-07 appeal due to be heard by Court of Appeal in June 2017 – Whether Court of Appeal decision would be of "material assistance" to Tribunal determining 2007-08 appeal – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PATRICK DEGORCE **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice, Strand, London on 15 June 2016

Jolyon Maugham QC, instructed by Reynolds Porter Chamberlain LLP, for the Appellant

Michael Gibbon QC and Michael Jones instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by HM Revenue and Customs ("HMRC"), opposed by the appellant Mr Patrick Degorce, for his appeal against an amendment to his 2007-08 self-assessment tax return, to be stayed until 60 days after the release of the judgment by the Court of Appeal in the matter of *Patrick Degorce v HMRC* (A3/2015/3547) and all time limits be extended accordingly".

2. The matter before the Court of Appeal concerns an appeal against an amendment to Mr Degorce's 2006-07 self-assessment tax return in relation to what is commonly referred to as a "film scheme". The primary issue in that appeal, as it is in the 2007-08 appeal, is whether Mr Degorce was carrying on a trade. The Court of Appeal is due to hear the 2006-07 appeal in June 2017.

The 2006-07 appeal

3. The appeal against the 2006-07 amendment was dismissed by the First-tier Tribunal ("FTT") in March 2013. Its decision was upheld by the Tax and Chancery Chamber of the Upper Tribunal ("UT") on 25 August 2015 notwithstanding its view that "some criticism of the detail of the FTT's decision is justified". Permission to appeal to the Court of Appeal was granted by the Upper Tribunal on 5 October 2015.

4. The grounds of appeal as stated in the Appellant's Notice include the fact that the Upper Tribunal held (in essence):

> "… that it was permissible for the First-tier Tribunal to treat the composite transaction entered into by Mr Degorce as involving a simple purchase of an income stream. The UT recorder [63] but did not engage with Mr Degorce's key argument that not does not follow from (a) the fact that his acquisition of the rights and his disposal of them for an income stream were part of a composite transaction in which Mr Degorce began with money and ended with an income stream and (b) one can ignore for all purposes the intermediate step of purchasing and disposing of the rights. To do so is (c) to misconstrue the so-called *Ramsay* line of cases. And (d) there is nothing antithetical to trading in either purchasing and disposing of an asset in a single transaction or disposing of an asset for an income stream. To approach Mr Degorce's transaction as the purchase of an income stream is to err in law."

5. In his skeleton argument for the Court of Appeal, on behalf of Mr Degorce's 2006-07 appeal, Mr Jolyon Maugham QC (who also appears for Mr Degorce in this application) submits that:

> "The First-tier Tribunal has not taken a consistent approach to the question when a composite transaction is a trade; that question arises with great frequency; and there is a need for guidance."

6. The Appellant's Notice to the Court of Appeal also requested an order that the appeal "be heard no earlier than the Michaelmas Term in 2016" for the following reason:

> "… the Supreme Court is due to hear (in a rolled up permission and appeal hearing) argument on points equivalent to the Jones issue and the Trade issue … in April 2016, and it is considered that it would assist the parties and the Court of Appeal to have the benefit of any such decision of the Supreme Court in advance of the Court of Appeal hearing of this appeal."

The case before the Supreme Courts was *Eclipse 35 v HMRC* which, like the present case, concerned the trade issue, ie whether the appellant, which had utilised a "film scheme", was trading.[1] The Supreme Court dismissed Eclipse's application for permission to appeal on 13 April 2016.

7. In their skeleton argument in respect of the 2006-07 appeal for the Court of Appeal on behalf of HMRC, Mr Michael Gibbon QC and Michael Jones (who also appear for HMRC in this application) submit that:

> "… it is HMRC's case in the CA that the UT Decision discloses no error of law. Reduced to its essentials, App's appeal to the CA is an *Edwards v Bairstow* challenge to the FTT Decision."

The 2007-08 appeal

8. The amendment to Mr Degorce's 2007-08 return was made by a closure notice issued by HMRC on 13 March 2015. Mr Degorce appealed to the Tribunal on 3 November 2015 and on 6 November 2015 his solicitors wrote to HMRC enclosing proposed draft directions. On 27 November 2015 the Tribunal wrote to both parties stating that HMRC was required to provide its Statement of Case within 60 days, ie by 26 January 2016.

9. However, notwithstanding the clear instruction from the Tribunal, on 26 January 2016 HMRC did not provide a Statement of Case but, by email, made this application for the appeal to be stayed. Having referred to the 2006-07 appeal the email continued:

> "The tax year 2007-08 year under appeal in [the present case] also concerned the same … scheme the appellant entered into in the tax year 2006-07. Given the clear overlap in terms of facts and issues in the Appellant's continuing activities HMRC respectfully submit that the outcome of the appeal to the Court of Appeal should assist the parties' stance in relation to [the present appeal]. The requirement for HMRC to produce a statement of case is thus premature given the similarity of the issues in dispute in both appeals."

---

[1] the "Jones issue" refers to the role of the Upper Tribunal following the comments of Lord Carnwath SCJ in *R (Jones) v First-tier Tribunal* [2013] 2 AC 48 and *HMRC v Pendragon Plc* [2015] 1 WLR 2838

Law

10. Under its case management powers, particularly rule 5(3)(j) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, the Tribunal may stay proceedings. In doing so it is necessary to have regard to the overriding objective which includes dealing with case "in ways which are proportionate to its importance and complexity and the anticipated costs and resources of parties (rule 2(2)(a)) and "avoiding delay" (rule 2(2)(e)).

11. In *Peel Investments (UK) Limited and Others v HMRC* [2013] UKFTT 404 (TC) the Tribunal (Judge Herrington) said:

> 9. The parties were agreed that the proper approach to be adopted as regards an application for a stay in the absence of agreement between the parties in a case in this Tribunal was that set out in *Coast Telecom Limited v HMRC* [2012] UKFTT 307 (TC) where Judge Berner stated at paragraph 5:
>
> > "I start by reminding myself of the proper approach to be adopted in considering whether to grant a stay in the absence of agreement between the parties. Although neither party referred to it, I consider that the correct approach is to be derived from *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2007] STC 814 where the Court of Session as the Court of Exchequer in Scotland held (at [22]) that a tribunal or court might sist, or stay, proceedings against the wish of a party if it considers that a decision in another court would be of material assistance (not necessarily determinative) in resolving issues before the tribunal or court in question, and that it is expedient to do so."
>
> The Court of Session in *RBS Deutschland Holdings* had held at paragraph 22 of its judgment as follows:
>
> > "Furthermore, at page 8 of the decision, the Tribunal made a pronouncement to the effect that it would sist proceedings against the wish of one of the parties pending a decision in another court only where that decision would be determinative of the issues before the Tribunal. We do not recognise that proposition as one reflecting normal practice in relation to the exercise of a discretion to sist. As we would see it, a Tribunal or court might sist proceedings against the wish of a party if it considered that a decision in another court would be of material assistance in resolving the issues before the Tribunal or court in question and that it was expedient to do so."
>
> 10. The Tribunal in *Coast Telecom* went on to stress that it was not enough that another court's determination might provide answers of relevance and that this put the test in *RBS Deutschland* too low (at paragraph 21):

> "The question is not whether the determination of another court might provide assistance, but whether it will provide material assistance."

11. The Tribunal also considered that different factors can apply to a fact-finding Tribunal as referred to in paragraph 22 of its decision:

> "Where issues of law alone remain in dispute it can be seen that the imminent consideration of the position under EU law could justify a stay of the appeal proceedings. But the same does not hold good where the facts remain to be determined. Many of the questions raised in the references are themselves fact-specific. Accordingly, I do not consider that it would be expedient to order a stay in circumstances where the facts remain to be found by the first instance tribunal."

12. It is important to note that *Coast* was an MTIC case with complex factual issues to determine and witnesses on both sides where it is fair to say that the findings of fact are paramount. This is reflected in paragraph 23 of the decision as follows:

> "Mr Watkinson [counsel for HMRC] submitted that it would not be just and equitable to order a stay where a case involved consideration of a complex matrix of fact that concerned events as long ago as 2006. There was a risk of prejudice to witness evidence as memories faded. I agree. I also agree that this is a prejudice that affects both parties; *Coast* requires all HMRC's witnesses to attend for cross-examination, so the memories of HMRC witnesses, in particular those who dealt with Coast at the relevant time, will be a material factor. The memories of *Coast's* own witnesses will also be important. The ascertainment of the facts before recall becomes more difficult will assist both the parties and the Tribunal."

12. It was common ground that I should adopt such an approach in the present case.

Discussion and conclusion

13. Mr Gibbon, for HMRC, contends that the 2007-08 transactions are "materially identical" to those undertaken by Mr Degorce in 2006-07, that the scheme was a "package" bought by Mr Degorce and that the 2007-08 closure notice covers the same issues raised in the 2006-07 closure notice. Mr Gibbon also refers to the questions for the Court of Appeal in the Appellant's Notice and Mr Maugham's submission that there is a "need for guidance" from the Court of Appeal (see paragraphs 4 and 5, above). In essence he says that a stay should be granted for the same reason as the Court of Appeal was requested to wait for the Supreme Court to determine *Eclipse 35*.

14. Additionally Mr Gibbon contends that the danger of witness evidence becoming stale should not prevent a stay as there is contemporaneous documentation in relation to the 2007-08 transactions. He referred to the observations of Leggat J at [15] to [23]

in *Gestmin SGPS S A v Credit Suisse (UK) Ltd and another* [2013] EWHC 3560 (Comm) in which he considered evidence based on recollection concluding, at [22]:

> "… the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

15. For Mr Degorce, Mr Maugham, who fully accepts that the decision of the Court of Appeal in the 2006-07 appeal may possibly assist the Tribunal in considering the 2007-08 appeal, submits that it is clear from *Peel Investments* that this is not enough. He says that there will always cases that could provide assistance but that this should not delay the finding of facts. Mr Maugham also contends that if HMRC succeed before the Court of Appeal, as it did before the FTT and UT, there would be no guidance for the Tribunal unless there was a further application for permission to appeal to the Supreme Court which, if granted, could lead to a further delay measured in years not months.

16. It is accepted that the transactions entered into by Mr Degorce in 2007-08 were structurally identical to those of 2006-07. However, Mr Maugham, pointing to the UT's difficulties with the fact finding exercise of the FTT, contends that it does not follow that the Tribunal hearing the 2007-08 appeal will form an identical view as to the factual characterisation of those transactions. He also says that there are facts which are different in the 2007-08 appeal to that in 2006-07, giving as an example the fact the films in 2007-08 were, in contrast to the losses of the films in 2006-07, highly profitable. As such, he says, it is possible that different facts would be found and he would be making submissions to that effect before the Tribunal. Mr Maugham also raised the possibility that by the time the 2007-08 appeal is ready for hearing that the Court of Appeal would have given its decision.

17. Unlike the position with regard to *Eclipse 35* which concerned a point of law and involved a relatively short delay this application concerns what is essentially a question of fact. As the UT in the 2006-07 appeal stated, at [93]:

> "… The question whether a person is carrying on a trade is, as we have indicated, essentially a question of fact and, as Sales J pointed out in *Eclipse Film Partners*, at [47], there is already copious guidance at the highest level, to which it would be presumptuous of us to seek to add, on the approach which must be adopted."

18. Judge Herrington recognised in *Peel Investments*, that the question is not whether the determination of another court might provide answers of relevance but whether it will provide material assistance. Although there is no doubt that what the Court of Appeal may have to say about the 2006-07 appeal might be of assistance to Mr Dergorce's 2007-08 appeal, I am not convinced that it will provide sufficient material assistance so as to justify a stay in the 2007-08 appeal.

19. In addition, although the 2006-07 appeal is listed to be heard by the Court of Appeal in June 2017 it is feasible that by the time the 2007-08 appeal is listed by the Tribunal, taking into account the availability of counsel and witness, the Court of Appeal would have heard the 2006-07 and handed down its decision. Even if that were not the case there would be nothing to prevent the Tribunal having heard the evidence (which relates to matters arising some ten or so years ago) on which to make its findings of fact receiving further submissions from the parties, after the judgment of the Court of Appeal in the 2006-07 appeal is known, before reaching its own decision on the 2007-08 appeal. It is not uncommon for the Tribunal having concluded a hearing, but before releasing its decision, to invite further written representations from the parties in respect of a relevant decision that was not available at the time of the hearing.

20. Accordingly, for the above reasons, HMRC's application for a stay is dismissed.

Direction

21. I therefore direct that HMRC shall send or deliver its Statement of Case to The Tribunal and the appellant within 42 days following which further directions shall be made.

Appeal rights

22. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 17 JUNE 2016