[2017] UKFTT 876 (TC)

TC06271

Appeal number: TC/16/4972

PROCEDURE – whether to order reference on basic agreed facts before hearing takes place when remaining factual matters in dispute will be resolved – not in this case – application for disclosure of HMRC policy documents – refused on basis not satisfied of relevance and, separately, application too late.

FIRST-TIER TRIBUNAL
TAX CHAMBER

HEALTHSPAN LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 17 November 2017

Ms N Shaw, QC, for the Appellant

Mr S Singh, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. I make no findings of fact. Without making any such findings, I set out what I understand the outline position to be. And that is that the appellant is a Guernsey registered company whose business is to sell vitamins and health food supplements to customers residing in the UK. Since 1 April 2012, it has arranged for its goods to be stored in the Netherlands at a warehouse operated by PostDirect, an independent company. Any goods purchased online are despatched to its customers from that warehouse by PostDirect.

2. The parties are agreed that the legal dispute between them in the substantive hearing is the meaning of:

> 'the removal of the goods ... by or under the directions of the person who supplies them'

in s 7(4)(a) Value Added Tax Act 194 ('VATA'). The significance of that phrase was that if the goods in issue were delivered to the UK customer 'by or under the directions of' the appellant, then the place of supply of the goods was the UK and the appellant should have been registered for VAT in the UK since 1 April 2012 and would be liable to the assessment of approximately £27million against which it appealed. But if the goods were not so delivered, then the place of supply would be the Netherlands and not the UK, and the appellant would have no liability to be registered for VAT in the UK nor to pay the assessment.

3. But the parties were not agreed to the extent that the meaning of 'by or under the directions of the person who supplies them' would be influenced by the meaning of the EU law which s 7(4)(a) purported to implement. The relevant EU law was contained in Article 33 of the Principle VAT Directive 2006 ('PVD') and used the phrase:

> ....goods dispatched or transported by or on behalf of the supplier....

4. HMRC applied for the Tribunal to make a reference to the Court of Justice of the European Union ('CJEU') and to postpone the hearing of the appeal until the CJEU's answer to the reference had been received. The sought-for reference would be on the meaning of that phrase in Art 33.

5. The parties were agreed on what was the legal test for a reference to be made; they did not agree on whether the case met those criteria nor on how the Tribunal should exercise its discretion in the matter.

The legal test for a reference

6. Art 267 of the Treaty on Functioning of the European Union provides that tribunals may make references to the CJEU

> ‘if it considers that a decision on the question is necessary to enable it to give judgment’

7. It was clear that while it was unusual for a question to be referred to the CJEU before the substantive hearing in the appeal, it was not unheard of, and was (in the right circumstances) a proper way of proceeding.

8. In *Dr Reddy’s Laboratories Ltd v Warner-Lambert Co LLC* [2012] EWHC 1971 Roth J said

> [6(4)] A reference may be made at any stage of the proceedings: [citing the CPR]. Although it is often desirable for the court first to find the facts if they are not agreed, this is not necessarily the case: a reference may be made on assumed facts eg C-453/99 *Courage v Crehan*...

9. The CJEU’s *Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings* 2016/C 439/01 state:

> [12] A national court or tribunal may submit a request for a preliminary ruling to the court as soon as it finds that a ruling on the interpretation or validity of EU law is necessary to enable it to give judgment. It is that court or tribunal which is in fact in the best position to decide at what stage of the proceedings such a request should be made.
>
> [13] Since, however, that request will serve as the basis of the proceedings before the Court and the Court must therefore have available to it all the information that will enable it both to assess whether it has jurisdiction to give a reply to the questions raised and, if so, to give a useful reply to those questions, it is necessary that a decision to make a reference for a preliminary ruling be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define, in sufficient detail, the legal and factual context of the case in the main proceedings, and the legal issues which it raises. In the interests of the proper administration of justice, it may also be desirable for the reference to be made only after both sides have been heard.

All were agreed that even if the a ruling by the CJEU on a point of law would be ‘necessary’ that did not mean a reference would have to be made. There is a discretion not to make a reference.

Summary of the legal position as it applies in this case

10. I have to decide now whether I can say for certain that it will be <u>necessary</u> for the CJEU to rule on the meaning of that phrase in Art 33 in order for this Tribunal to determine the appeal. It is agreed that the CJEU has not yet made a ruling on Art 33, and it is agreed that the Tribunal will have to determine the meaning of s 7(4)(a), so whether it will be ‘necessary’ for the CJEU to rule on Art 33 depends on:

(a) Whether it is unrealistic to expect the Tribunal hearing the substantive hearing to decide that the relevant phrase in s 7(4)(a) could be interpreted without reference to the meaning of the relevant phrase in Art 33;

5 (b) Whether the findings of fact could be such that it is clear that the meaning of Art 33 is not relevant to the determination of the appeal.

11. Further, even if a CJEU ruling is 'necessary, I have to consider whether I should in my discretion decide to make a reference now. In this instance, would it be better to leave the decision until after the substantive hearing has taken place? In favour of 10 doing so, all findings of fact will be made on the disputed as well as agreed evidence and the substantive hearing may serve to define the legal issue between the parties. Against doing so, a ruling now may serve to make a substantive hearing unnecessary, or at least shorter, thus saving costs.

(a) is it possible the appeal could be determined without knowing the meaning of 15 Art 33?

12. The appellant's case is that the meaning of delivery 'by or under the directions of the person who supplies' the goods should be the literal meaning of the words and that that literal meaning would exclude the possibility of PostDirect being seen to make the delivery under the directions of the appellant, when its contract was with the 20 customer. HMRC, as the tax collector, could not rely on the PVD: the appellant as taxpayer could elect to rely on either the PVD or VATA.

13. However, while I recognise the theoretical possibility that the Tribunal hearing the appeal might decide that the meaning of the relevant phrase in s 7(4)(a) VATA should be interpreted without reference to the meaning of Art 33, which it was meant 25 to implement, it seems unrealistic to me. Statutes must be interpreted with Parliament's intention in mind and Parliament must be supposed to have intended to implement Art 33 as it was bound to do so. Whether they actually did so is a question for the Tribunal but in order to decide that question the Tribunal will almost certainly want to know the proper interpretation of Art 33.

30 14. My conclusion is that realistically speaking it will be necessary for the Tribunal hearing the substantive appeal to have a ruling on the interpretation of Art 33.

(b) could the findings of fact in the substantive appeal be such that a ruling on the meaning of Art 33 becomes irrelevant?

15. The parties have agreed a basic statement of agreed facts. But the appellant's 35 witnesses will be giving extensive oral evidence as HMRC do not accept all the evidence on which the appellant relies. It is probably accurate to say – but without making any findings of fact – that both parties accept that the appellant *indirectly* had some influence on the manner of delivery of the goods and that the dispute between them on the facts is precisely the extent to which the appellant had a say in the 40 delivery of the goods.

16. I do not in these circumstances, where it is clear there was some connection between the appellant and PostDirect, consider it realistic to say that the precise findings of fact in the substantive hearing could be such that the application of s 7(4)(a) to those facts would be so clear that the meaning of Art 33 would be entirely irrelevant. My conclusion is that it will be necessary for there to be a ruling on the meaning of Art 33 in order for this appeal to be determined.

Exercise of discretion

17. But that does not determine whether there should be a reference as I have a discretion not to refer even where a ruling on Art 33 is 'necessary'.

The hearing

18. The substantive hearing is listed for 19-23 February 2018. That is so close that my inclination is that unless there is a real possibility that a reference now will make unnecessary, or at least significantly shorten, the substantive hearing, such an early reference, by leading inevitably to the adjournment of that hearing, will actually extend rather contract resolution of these proceedings.

19. I can see that the CJEU ruling might significantly shorten the hearing: it might be such that the remaining factual disputes between the party become irrelevant and/or that its interpretation of Art 33 makes clear the proper interpretation of s 7(4)(a). I think it more likely, however, that the factual issue between the parties, as described in §15, is such that it will need to be resolved in order to apply the CJEU ruling.

The draft reference

20. I have considered HMRC's draft reference. While it would be unnecessary for the reference to be made in exactly these terms, agreeing the terms of the reference could be time consuming. It is also telling that HMRC's draft postulates only four fact patterns, two of which could not apply to the appellant in this appeal. And of the two which could, until the final findings of fact are made it is uncertain whether either is a correct description of the legal position or something different to either.

21. It seems to me that it would be advantageous before making the reference if the precise nature of the appellant's indirect connection to the delivery of the goods is determined, so that the CJEU have the precise facts in front of them.

22. My concern would be that HMRC's draft reference, or any reference that could actually be made by the Tribunal at this time, would be so non-specific to the facts of the case that there is a risk the CJEU's reply would be similarly so general that it would leave the Tribunal in doubt of the correct answer, or worse, lead to a second reference.

Conclusion

23. On balance, having taken all the above points into account, I consider that it will be best for the substantive hearing to proceed as listed, and for the Tribunal hearing that appeal, having made the findings of fact, to determine the precise terms of the reference (assuming, as I consider very likely, that a reference is made).

24. HMRC's application for an immediate reference and adjournment of the hearing is dismissed. The hearing will take place as listed. It will be for the hearing judge to determine whether to make an reference and if so on what terms.

Disclosure application

25. On 26 September 2017, the appellant applied for disclosure of:

> Copies of all HMRC documents and any other recorded information held which considers HMRC's policy and approach to the application of S 7 and Sch 2 to the Value Added Tax Act 1994 in respect of both inbound and outbound sales of goods to and from the UK for the period 1 April 2012 to 1 September 2016.

26. The application is made only a short time before the hearing, listed to take place in February 2018. The appellant's explanation for this is that it made a Freedom of Information Act request to HMRC for the documents on 20 June 2016. It was notified that that application was refused in August 2017. Shortly after that, it made this application for disclosure.

27. The appellant's case is that the documents are relevant because (it says):

(a) HMRC have relied on views expressed by the EU VAT Committee following a meeting on 4-5 June 2015; the appellant thinks that those views were influenced by what the UK said, and also thinks that what the UK said was inconsistent with views it had expressed earlier;

(b) The appellant thinks that HMRC will allege that its arrangements were abusive in the *Halifax* sense; and therefore the appellant seeks to show that at the time they were consistent with HMRC's internal policy;

(c) The appellant also seeks to show that if it was said to have a place of supply in the UK, there will be a breach of fiscal neutrality because (if HMRC's 2012 internal policy is shown to be consistent with what the appellant did in 2012) it will mean other inward distance sellers doing the same thing would have been treated more favourably than the appellant is now being treated;

(d) The Upper Tribunal decision in *Sports Direct* [2016] UKUT 716 (TCC) made it clear that the destination member state's views on the application of the distance selling rules is relevant to determination of place of supply: the UK was the member state of destination in this appeal.

28. HMRC do not accept that the documents are relevant: they do not really dispute the disclosure on any other grounds. The appellant stated that it would be happy for HMRC to self-certify any relevant documents which should not be disclosed because they were subject to legal professional privilege. In the hearing, HMRC also objected on the grounds that the disclosure request as worded is very onerous, as it does not require any identified section of documents to be searched, but could require a search of virtually everything held by HMRC. Bearing in mind the scope of the requested disclosure, I find it surprising that they had not made this point in advance.

29. In the event it does not matter as I was not satisfied that HMRC's policy was relevant. So far as the first three grounds on which the appellant based its case of relevance were concerned, they all were based on the allegation that HMRC's policy was relevant because it had changed since the appellant had commenced its arrangements with PostDirect in the Netherlands in 2012, when (said the appellant) HMRC had not considered the appellant liable to register for VAT in the UK, until sometime later, when HMRC had changed its mind (said the appellant) and decided that the appellant was liable to register for VAT in the UK.

30. Even if the appellant was right about HMRC having changed its policy, I accept that that is not relevant.

(1) So far as the VAT Committee views are concerned, they are of no legal effect. What matters is what the CJEU says about the meaning of Art 33. It seems to me that, at best, if the appellant is right about the change in policy, it might have a case that HMRC acted improperly if it misled the VAT Committee. But such an action (assuming the appellant could show damage) would have to be taken by way of judicial review.

(2) So far as allegations of abuse are concerned, HMRC do not allege abuse. A change in policy would only become relevant if HMRC were to amend its statement of case and allege abuse.

(3) A change in HMRC's policy make the provisions of VATA breach fiscal neutrality and therefore such a change would be irrelevant to the Tribunal's interpretation of VATA: what the appellant is really complaining of here is that HMRC may have treated other taxpayers more favourably than itself. But if that is true, it is solely a matter for judicial review: it is not something over which this tribunal has jurisdiction.

31. In any event, even if a change of policy was relevant to the appellant's case, I am not persuaded that there are reasonable grounds for thinking that the documents recording HMRC's policy would record *a change* of policy between 2012 and the date of the assessments. Yet there would have to be some grounds for thinking the documents will record a change in policy else it is just a fishing expedition and disclosure ought to be refused.

32. The only reason put forward by the appellant as its basis for alleging that there has been a change of policy is that, even though at some point in 2013, after entering into its new business arrangement in April 2012, HMRC were made aware of the appellant's arrangements with PostDirect, HMRC did nothing for several years.

However, it seems to me that there is no reason to consider that HMRC's failure to take immediate action reflects anything more than the disclosure was overlooked, or there was inertia or simply uncertainty. It is not the case that the appellant asked for a ruling and was given clearance of its arrangements: HMRC simply failed to take any action at all. Failure to disapprove does not amount to approval. I note that HMRC deny that there was a change of policy: by itself that is not conclusive but it supports the entire absence of evidence that there was a change of policy. I consider that the application is a fishing expedition.

33. That entirely disposes of the first three reasons given by the appellant for considering the policy documents relevant.

34. The last reason given for the appellant's application was the relevance of the destination member state's views to the liability of the appellant's distance supplies. However, the Dutch tax authority's view that the appellant's supplies were made in the Netherlands could only have been influenced, if at all, by public statements by HMRC or a specific advice to them from HMRC in response to a specific enquiry. The Dutch tax authority would not have had access to HMRC's policy papers so the contents of HMRC's internal policy papers must have been irrelevant to the Dutch tax authority's decision that the place of supply was in the Netherlands.

35. This ground of application also fails because (as with the others) it is predicated on the basis that HMRC's policy changed, but, as I have said, there is nothing to suggest that there has been a change in policy and therefore the policy papers are not relevant.

36. And lastly, even if the Dutch tax authority's decision that the supplies were taxable in the Netherlands was influenced by HMRC, it would not alter the VAT status of the appellant's supplies under the PVD and VATA. At best, if HMRC's policy had changed, and HMRC had given advice to the Dutch tax authorities based on its earlier policy, the appellant might have an action in judicial review against HMRC for damages. But it is not relevant in this Tribunal, which must decide the place of supply based on the PVD and VATA.

37. I am not satisfied, for the above reasons, that the appellant has made out a case that HMRC's policy papers are relevant to this appeal. I refuse the application for disclosure.

38. In any event, even though this was not a specific ground of objection, I consider the application made far too late, particularly bearing in mind the scope of the requested disclosure. Ordering such disclosure would necessarily lead to an adjournment as HMRC would not have time to carry out such an extensive search before the hearing. The application should have been made much earlier. It is no excuse to say that the appellant was seeking access to the papers by a different means: if the application was for the purpose of the litigation (which it says it was) it ought to have made the application to the Tribunal. The Tribunal can control the timing of disclosure and trial date thus ensuring that the former has a sufficient gap before the latter. By choosing to pursue an FOIA request, outside the control of the Tribunal,

without at the same time asking for disclosure, carried the risk that there would be too little time left to approach the tribunal for disclosure if the FOIA approach failed. And in my view, that is what has happened here.

39. For all these reasons, the application for disclosure is dismissed.

40. 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.

Barbara Mosedale
TRIBUNAL JUDGE

RELEASE DATE: 18 December 2017