



TC06849

Appeal number: TC/2016/06360

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AOZORA GMAC INVESTMENT LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE GREG SINFIELD
(CHAMBER PRESIDENT)**

Sitting in Chambers on 3 December 2018

DECISION

Having considered the parties' joint application of 21 November 2018 and attachments, I have decided not to direct that this appeal be transferred to the Upper Tribunal for determination.

REASONS

1. Rule 28 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the 'FTT Rules) provides as follows:

28 Transfer of Complex cases to the Upper Tribunal

(1) If a case has been allocated as a Complex case the Tribunal may, with the consent of the parties, refer a case or a preliminary issue to the President of the Tax Chamber of the First-tier Tribunal with a request that the case or issue be considered for transfer to the Upper Tribunal.

(2) If a case or issue has been referred by the Tribunal under paragraph (1), the President of the Tax Chamber may, with the concurrence of the President of the Tax and Chancery Chamber of the Upper Tribunal, direct that the case or issue be transferred to and determined by the Upper Tribunal.

2. This appeal has been allocated as a Complex case, the parties have made a joint request for the appeal to be transferred to the Upper Tribunal and that request has been referred to me, so the requirements of Rule 28(1) are met. The question, therefore, is whether I should seek the concurrence of the President of the Tax and Chancery Chamber of the Upper Tribunal for the appeal to be transferred. In deciding whether to exercise that discretion, I have been guided by the authorities that the parties have referred to and the overriding objective set out in Rule 2 of the FTT Rules.

3. In *Capital Air Services Ltd v HMRC* [2010] UKUT 373 (TCC), the Upper Tribunal said, at [21], of the power to transfer cases under rule 28:

“We wish to emphasise the obvious point that not every case allocated as Complex is suitable for transfer to the Upper Tribunal. For instance, a very long Missing Trader Intra-Community case taking many weeks to hear may be inappropriate for transfer (even if it is very complex in nature) for the very reason that its length makes it inappropriate to be heard by the Upper Tribunal having regard to its judicial, estate and financial resources. It would not, therefore, be right to say that before a case could be allocated as a Complex case it must be one which is suitable for transfer to the Upper Tribunal.”

4. I consider that this indicates that transfer under rule 28 is an exception which should only be applied where a case falls outside the ordinary run of cases allocated to the Complex case category under rule 23 of the FTT Rules and does not have features that make it inappropriate to be heard by the Upper Tribunal.

5. The First-tier Tribunal is the primary fact finder (see Jacob LJ in *Procter & Gamble v HMRC* [2009] EWCA Civ 407; [2009] STC 1990 at [7]), but the Upper Tribunal can make findings of fact in appropriate cases. Nevertheless, it is obvious that a case will rarely if ever be transferred if there is a substantial dispute about the facts. I understand that determining this appeal will not involve much finding of facts since the facts are largely agreed. That is not, by itself, a sufficient reason for bypassing the first stage of the tax appeal process.

6. I accept that the appeal raises issues of pure law relating to the statutory regime giving relief for overseas tax and the double tax treaty between the UK and the US. That is a reasonably specialist area of taxation. However, the First-tier Tribunal is a specialist tribunal and its judges have experience in practice or as judges of dealing with complicated matters of fact and complex issues of law in relation to tax matters. I am confident that the First-tier Tribunal has the expertise necessary to determine this appeal fairly and justly. I do not, therefore, regard the nature of the issue to be decided in this case as a reason to transfer the case to the Upper Tribunal to be determined.

7. I also accept the parties' assurances that whichever is the losing party will seek to appeal the decision on the legal questions in dispute. However, any such appeal would require permission and, while permission may be forthcoming if the legal issue is genuinely debatable, it cannot be known at this stage whether an appeal is inevitable. Therefore, while I understand that the parties would like to “cut out” the First-tier

Tribunal and have their question of law determined by the Upper Tribunal, I do not consider that preference to be a particularly strong factor in deciding how I should exercise my discretion.

8. The parties have submitted that there would be a benefit in the Upper Tribunal providing a decision on the disputed legal issues that is binding on the First-tier Tribunal. However, whenever a question of law is regarded as unclear, it can always be said that a binding decision will be of benefit. The parties have not suggested that there is any particularly pressing reason why a binding statement of the law is needed in the short term. Moreover, while a decision of the First-tier Tribunal would not be binding in law in other cases, the parties' arguments before the First-tier Tribunal and the Tribunal's approach to those arguments may help a higher court or tribunal to formulate its decision on the issues. Therefore, a hearing before First-tier Tribunal in the first instance is not incompatible with the objective of producing a binding precedent in a case such as this: rather it may be a helpful first step in the production of that precedent.

9. I note the points the parties have made about the current judicial review proceedings in the Court of Appeal. Cases before the First-tier Tribunal have been transferred to the Upper Tribunal where the appellant is also the claimant in judicial review proceedings in the Upper Tribunal and both proceedings arise from common facts (*Ryanair Limited v HMRC* [2013] UKUT 176 (TCC) was such a case). Applications in such cases are made at the commencement of the proceedings so that both the appeal and the judicial review can proceed together. This application is said to be, in part, to enable the tax appeal to catch up with the appeal in relation to the judicial review proceedings in the Court of Appeal. I understand that the appeal is now listed to be heard by the Court of Appeal in July 2019. If this appeal were transferred to the Upper Tribunal, it is highly unlikely that it could be heard much before then. Indeed, issues with the availability of the parties' counsel have meant that the scheduled hearing before the First-tier Tribunal can only take place in October 2019. Moreover, for an appeal against an Upper Tribunal decision to be joined with the proceedings in the Court of Appeal, the Upper Tribunal's decision would need to be released and any permissions to appeal granted well before July 2019 to enable the parties to apply to join the current proceedings before the Court of Appeal. Overall, I see little realistic prospect of this appeal being joined with proceedings in the Court of Appeal given the timescales involved.

10. Standing back and considering all the points made above, my overall conclusion is that this appeal should not be transferred to the Upper Tribunal for determination. As I have reached that conclusion, I do not need to ask the President of the Upper Tribunal (Tax and Chancery Chamber) for his approval of a transfer to the Upper Tribunal and I have not, therefore, sought that approval.

11. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's 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.

GREG SINFIELD
PRESIDENT OF THE FIRST-TIER TRIBUNAL (TAX CHAMBER)

RELEASE DATE: 07 DECEMBER 2018

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