[2021] UKFTT 151 (TC)

TC08120

PROCEDURE - Application for a stay pending resolution of preliminary issues in another case by Upper Tribunal - Application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER **Tribunal reference: TC/2018/06467**

BETWEEN

(1) BARCLAYS SERVICES LIMITED
(2) BARCLAYS SERVICES CORPORATION **Appellants**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Hearing conducted on 29 April 2021 by video

Andrew Hitchmough QC and Barbara Belgrano, of Counsel, instructed by Simmonds and Simmonds, for the Appellants

Hui Ling McCarthy QC, Michael Ripley and Edward Waldegrave, of Counsel, instructed by General Counsel and Solicitors' Office to the Respondent Commissioners

DECISION

1. This is my case-management decision in relation to HMRC's application dated 13 January 2021 for an order staying the appeal until 60 days after the Upper Tribunal releases its decision in *HSBC Electronic Data Processing (Guangdong) Limited and others v HMRC* (UT/2020/0107) ('the HSBC Appeals'). The Appellants oppose that application.

2. For the reasons which are set out in more detail below, I have decided to grant HMRC's application and to order a stay as requested.

3. At the outset, I wish to record my thanks to leading counsel and to their respective teams for the well-focussed oral and written submissions which I received. I also wish to commend those who prepared an excellent electronic hearing bundle which allowed the hearing of this application to proceed smoothly.

4. If I do not deal with an argument, written or oral, in this decision, it does not mean that I have not considered it. I am mindful that the parties need to know, as soon as reasonably practicable, where they stand. Against that background, I am striving for concision.

BACKGROUND

5. The overarching dispute concerns the correct VAT treatment of what are known as 'General Service Companies' ('GSC's) and (i) whether these have a fixed establishment in the UK and/or (ii) even if they do have a fixed establishment, whether HMRC are entitled to remove GSCs from VAT groups (which are the HSBC Appeals) or refuse to register them (which is the Barclays Appeal) in the exercise of their powers for the protection of the revenue under section 43C(1) of the Value Added Tax Act 1994.

6. Barclays is not the only financial institution which is in dispute with HMRC in this regard.

7. In a decision released on 12 October 2020, reported with neutral citation [2020] UKFTT 0402 (TC), Judge Sinfield CP considered an application made by the Appellants in the HSBC Appeals that certain issues should be treated as preliminary issues. The parties had identified three issues which formed the substance of the HSBC Appeals:

> "(1) Are the GSCs, or any of them "established" or have a "fixed establishment" in the United Kingdom within the meaning of those expressions in section 43A VATA?
>
> (2) Are section 43C(1) and (2) VATA 1994 ultra vires?
>
> (3) Were HMRC entitled to remove the GSCs from the HSBC VAT group on the grounds that this was necessary for the protection of the Revenue": see Para [2] of his Decision".

8. In the Annex to his decision, Judge Sinfield CP sets out four "Agreed Preliminary Issues". In full, these are:

> "1. How is the concept of two or more bodies corporate being "established" or having a "fixed establishment" in section 43A of the Value Added Tax Act 1994 ('VATA'), which it is common ground purports to implement the words "any persons established in the territory of that Member State" in Article 11 of Council Direction 2006/112/EC ('the Principal VAT Directive') to be interpreted?
>
> 2. Is the question of whether the UK discharged its obligation to consult the VAT Committee relevant? If it is relevant what would be the consequences of any breach of the obligation to consult?

3. Are the measures which a Member State may adopt under the second subparagraph of Article 11 of the Principal VAT Directive to prevent tax evasion and avoidance caused by an abusive practice under Halifax principles, or any concept of avoidance arising from Direct Cosmetics Limited and Laughtons Photographs Ltd v Customs and Excise Commissioners C-138 and C-139/86?

4. Is section 84(4D) VATA engaged in relation to these appeals and, if so, what are the factors that the Tribunal must take into account in considering whether or not HMRC decided on an appropriate date?" ('the HSBC Issues', and which I shall number HSBC Issue 1 etc in this decision)

9. Judge Sinfield decided that there should be a preliminary hearing of those issues. He was satisfied (applying the principles set out by the Upper Tribunal in *Wrottesley v HMRC* [2015] UKUT 637 (TCC)) that this was suitable for hearing as a preliminary issue: see Paras [24] and [31] of his decision. He decided that all the HSBC Issues were "succinct 'knockout' points" and, in relation to HSBC Issue 1, he specifically held that to be a question of law which turns on the interpretation of legislation and case law.

10. Having thereby approved the treatment of those issues as preliminary issues, Judge Sinfield and Mr Justice Zacaroli (the President of the Tax and Chancery Chamber of the UT) agreed that the preliminary issues in the HSBC Appeals were suitable for transfer to the UT.

11. That hearing is listed to commence in the UT between 5 and 7 October 2021.

12. On 1 December 2020, the present parties agreed a list of issues in the present appeal. In full:

"1. Does the UK Branch of Barclays Services Corporation ('BSC') constitute a 'fixed establishment in the UK' for the purpose of section 43A of the Value Added Tax Act 1994 ('the Act')?

2. If BSC does have a fixed establishment in the UK for the purpose of section 43A of the Act, is it the case that HMRC could not reasonably have been satisfied that, in accordance with section 43B(5)(c) of the Act, it was necessary for the protection of he revenue to refuse the Appellants' application for BSC to be treated as a member of the Barclays Execution Services Limited VAT group": 'the Barclays Issues'.

13. On 22 January 2021, the present Appellants' representatives applied to the UT to be added to the HSBC Appeals as interested parties, and asked that they be permitted to make written and oral submissions at the preliminary issues hearing. One of the bases of the application was that 'the determination of the HSBC Preliminary Issues will have an impact far beyond the determination of the HSBC Appeals'.

14. The Appellants submitted that there was a real risk of prejudice to them and other taxpayers if the UT "is led to determine general principles of law with only the specific and unrepresentative facts of the HSBC Appeals before it (which HMRC will then seek to apply to other cases that are not comparable)."

15. The self-evident and powerful inference, from the very fact of that application, was that Barclays wanted a say in relation to the preliminary issues in the HSBC Appeals because Barclays apprehended that their own interest in their own appeal would stand to be affected by whatever happened in the HSBC Appeals.

16. On 12 February 2021, HSBC responded, inviting the UT to refuse Barclays' application, albeit accepting that the HSBC and Barclays appeals "share a common legal issue of legal principle" (also described as 'a high-level issue') - "namely whether it is legitimate to import the concept of a fixed establishment from the place of supply regime into the VAT grouping regime".

17. On 18 February 2021, HMRC responded, inviting the UT to refuse the application, on the basis that the UT did not have the jurisdiction to do what Barclays had asked for.

18. In its decision released on 26 February 2021, the Upper Tribunal (Judge Thomas Scott) refused Barclays' application. As far as I am aware, there is no appeal from his decision. He noted that Barclays had not applied to be joined as appellants, nor were they applying for their appeals to be transferred to the UT.

19. He concluded that the UT did not have jurisdiction to join Barclays as interested parties but went on (necessarily, and as he identified, obiter) to consider whether, if the jurisdiction were to exist, he would have joined Barclays as an interested party. He remarked that he would not have done. He noted that Judge Sinfield had considered whether separate determination of the preliminary issues could adversely affect the determination of the other issues in the appeals by HSBC to the FtT and had concluded it could not. Judge Scott remarked: "If that separate determination could not adversely affect the determination of the other issues in the HSBC appeals to the FtT, it is not evident from the Application why it could adversely affect the determination of the other issues in the appeals by Barclays to the FtT" (at Para [29]).

20. Finally, and by way of brief coda, this is not my first encounter with this dispute. I made an earlier case-management decision in these appeals, released on 19 March 2020 (following a hearing on 7 December 2019), dealing with some points of disclosure: [2020] UKFTT 149 (TC). It is now suggested (but I do not recall) that I, learning of the existence of other appeals by other financial institutions on the same or similar points, inquired whether anyone had considered using this Tribunal's procedure to join cases and then (for example) to nominate a lead case (the same point which Judge Scott latterly touched on).

21. It is a fair point that I did not make any order along those lines in March 2020, and neither party seems to have taken up my suggestion (if that indeed is what it was). But hindsight is easy, and no-one can now say what would have happened had such an application been made (whether to me, or to anyone else, and whether by HSBC, or by Barclays).

THE LAW

22. There is broad consensus that the proper test to apply is the one set out by the Court of Exchequer in Scotland in *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2006] CSIH 10; [2007] STC 814 at [22]:

> "... a tribunal or court might sist [stay] proceedings against the wish of a party if it is 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."

23. Successive judges of this Tribunal have treated this as setting out a two-stage test, where both limbs must be satisfied, and I do the same.

24. In a very recently released decision, Upper Tribunal Judge O'Connor, sitting in the General Regulatory Chamber in *Ticketmaster UK Ltd v The Information Commissioner* [2021] UKFTT 83 (GRC) considered RBS and remarked that "the dual considerations of material assistance and expediency, identified in RBS, are simply a rewrapping of the overriding objective ... The phraseology of 'material assistance' and 'expediency' logically reflect those

matters to which due weight should be attached, but, ultimately, the Tribunal must ensure that the case is dealt with fairly and justly".

25. I respectfully agree. I do not see any relevant difference between the jurisdiction of that Chamber and this one. The task which Judge O'Connor was performing was, by and large, the same task which Judge Sinfield undertook in HSBC, which ultimately is to look at whether the case management decision is consistent with the overriding objective of the FtT Rules to deal with cases fairly and justly, including dealing with the case in ways that are proportionate to the complexity of the issues, and avoiding delay so far as compatible with proper consideration of the issues.

DISCUSSION

"Material Assistance"

26. I am reminded that the decision on the preliminary issues need not be 'determinative' (which was the first-instance position resiled from by the Court of Exchequer in *RBS Deustchland)*, but must simply provide 'material' assistance: see the discussion by Judge Roger Berner in *Coast Telecon Ltd v HMRC* [2012] UKFTT 307, at Paras [21]-[25].

27. There is a difference between cases which involve questions of law, and cases which involve questions of fact insofar as questions of law are inherently likelier to be determinative.

28. In my view, the resolution of preliminary issues as set down for consideration by the Upper Tribunal in the HSBC Appeals will be of material assistance to the Tribunal which eventually hears these appeals.

29. I consider that there is significant overlap between the preliminary issues in the HSBC Appeals and in these appeals. This is for the following reasons.

30. Naturally, one has to consider the issues as they are articulated, but I do not think that much assistance is ultimately derived from close linguistic or syntactic analysis of the way in which the issues in the respective appeals are framed. In my view, the right approach is to stand back, and to look at the substance of the issue rather than the form.

31. As Judge Sinfield remarked, HSBC Issue 1 is a pure point of law. It goes to the definition of 'fixed establishment'. So, in my view, is Barclays Issue 1. Those two issues, although expressed using different language, are substantively the same. In consequence, the UT's resolution of HSBC Issue 1 (absent any appeal from the UT) will also play a part in governing the FtT's resolution, in due course, of Barclays Issue 1. That conclusion holds good even though Barclays say that, regardless of where the legal position eventually ends up, they nonetheless will still satisfy, as a matter of fact, the requirements for a fixed establishment. To that extent, Barclays says that Barclays Issue 1 will involve the assessment of some fact. But, and even if, for the sake of argument, that is entirely correct (and no-one will know until this Tribunal deals with the Barclays appeals) it still does not extinguish the need for the legal issues inherent in HSBC Issue 1/Barclays Issue 1 to be resolved.

32. The position in relation to HSBC Issue 3 is slightly (but not very) different. HSBC Issue 3 is, on the face of it, framed in a linguistically different way to Barclays Issue 2. HSBC Issue 3 mentions artificiality, and Barclays Issue 2 does not. HSBC Issue 3 is couched in quite sophisticated (even convoluted) terms, whereas Barclays Issue 2 is put in more straightforward terms. But, in my view, the gist is sufficiently similar. Both are seeking to grapple with the circumstances in which, if there is a fixed establishment, HMRC is nonetheless entitled to exercise its revenue protection powers. The focus on whether concepts of abuse play a part is always going to be an important part of the picture.

33. Although in HSBC the issue was described by Judge Sinfield as one of law, and, in Barclays, the issue is (perhaps) a mixed question of fact and law (reflecting the Tribunal's supervisory, quasi-Wednesbury, jurisdiction as opposed to a fully appellate jurisdiction), and hence there is arguably a mismatch, I do not consider that this analysis should stand in the way of a stay. Even if the question is a mixed one of law and fact, there is nonetheless still relevant law to be dealt with, and it seems to me that is going to be dealt with by the UT. Nor am I particularly troubled by Judge Scott's obiter remarks when refusing Barclays' application to intervene. Moreover, the application was dealt with by the UT on the papers, and so Judge Scott did not - unlike me - have the advantage of full oral submissions.

34. In driving her argument home, Ms McCarthy QC takes me to Barclays' Statement of Case, and its Grounds of Appeal in Paragraphs 13.1 to 13.12 (with 13.12 is broken down into two parts). 13.1-13.5 inclusive (and perhaps 13.12(1)) relate to fixed establishment. 13.7 to 13.2(2) (but excluding 13.1(2)) relate to protection of the revenue. She invites me to find that, of Barclays Grounds, 5 and a half (say) relate to fixed establishment, and are captured within the scope of HSBC Issue 1, and five (say) are within the legal (and not factual) scope of the protection of the revenue.

35. Although Mr Hitchmough QC challenged this approach, I have found it helpful in the task of cross-checking my sense of the degree of overlap between the HSBC Appeals and this appeal. In my view, Ms McCarthy's analysis make it plain that a significant proportion of Barclays' actual Grounds of Appeal will inevitably end up having to be measured against whatever conclusions are reached by the UT (or any appeal from it). Even in relation to the fixed establishment issue, without more, that demonstrates that the decision of the UT will be of material assistance.

36. The same can be said in relation to HSBC Issue 3/Barclays Issue 2: the UT's treatment is also going to be of material assistance.

37. I must thereby reject Barclays' position that the assistance to be derived from the UT is "likely to be relatively limited".

38. It is not really relevant whether there will or may still end up being any other issue or issues (whether or fact or law) to be decided by the FtT once the preliminary issues are determined. Even if such issues do actually exist (and Ms McCarthy QC challenges Paragraph 17(f) of Barclays' Skeleton, on the basis that it seeks to raise a point which is not in the Grounds of Appeal - but that is not a point which for present purposes I need to decide) this does not escape the existence of HSBC Issue 1, and its anticipated treatment by the UT.

"Expediency"

39. I must go on to consider what is "expedient". It is an interesting word. In the course of argument, Ms McCarthy QC essayed "efficient, sound, convenient, practical". Mr Hitchmough QC had resort to 'Google' (as did I) which says "convenient and practical although possibly improper or immoral" (as in, "it was expedient for him to break the contract").

40. In my view, the former - narrower - definition is what must have been meant by the Court of Exchequer. There is no notion of impropriety or immorality in this case (nor was there in RBS Deutschland). This brief discussion simply cautions me against over-slavish adherence to a single word which is not part of a legislative text. I must unpack it.

41. In my view, here and now, a stay is expedient. This is for the following reasons.

42. As Upper Tribunal Judge O'Connor explicitly recognised in *Ticketmaster*, the exercise is a balancing exercise, and the striking of the balance is always inherently fact-sensitive.

43. I acknowledge that the grant of a stay should be the exception and not the norm and that good reasons must be shown for granting a stay.

44. Here, if there is no stay, then the substantive hearing (not yet listed, although a window has been identified, and availability within the window provided) will be listed. For the purposes of this discussion and decision, it does not really matter whether that substantive hearing were to be of everything in dispute, or whether it could be set up to deal only with some of the things in dispute, or whether it could be convened on the footing that if anything came up which needed to be dealt with subsequently, it could be. The latter were all options canvassed with me by Mr Hitchmough QC, and are things which are potentially possible (in the sense that they are not outright impossible).

45. But none of those options are intuitively attractive. Standing back, all are just different versions of the same basic picture: a hearing of at least some days' duration (whether four days, or more, does not really matter) would go into the Tribunal's diary, and those of the parties. In doing so, the Tribunal would have allocated time, and would continue to allocate resources, to this appeal: a courtroom (whether physical or virtual) and a judge, and perhaps also a member. There would be directions hanging over the parties - bundles, skeleton arguments, and the like - and the Tribunal would need to invigilate compliance with these.

46. Insofar as those are the Tribunal's time and resources, they would all be things appropriated, from the Tribunal's finite resources, to this appeal, and thereby, inevitably, would not be available to be applied to some other appeal(s).

47. Plainly, my decision as to a stay will lead to delay, and I remind myself that the overriding objective mandates me to avoid delay, but only "insofar as compatible with proper consideration of the issues": Rule 2(2)(e). The rider is important. There is no general prohibition of delay, and delay may itself, on occasion, nonetheless serve the core overriding objective of dealing with a case fairly and justly: Rule 2(1).

48. In my view, this is a case where the delay which a stay will cause serves the ultimate objective of allowing these appeals to be dealt with fairly and justly.

49. It seems to me with that fairness is not all one-way but is distributed between the parties. Neither party has, in the immediate future, to spend time and money preparing on the footing that there will be an appeal hearing next February or March which may still end up falling a victim to factors beyond their control.

50. There is just too much which could still happen, realistically and not fancifully, which would stand to derail any substantive hearing of these appeals. This goes wider than the issue of any potential delay on the part of the Upper Tribunal handing down its judgment in HSBC. Even if the Upper Tribunal handed down its judgment very promptly (and I am working on the basis, most favourable to the Appellants here, that it will: but in any event there is no reason to suppose that the Upper Tribunal will not dispose of the preliminary issues with expedition) the substance of the GSC dispute (regardless of the identity of the appellant) is important. There are very large amounts of money at stake, and resolution of the dispute will involve the determination of novel points of law. There is, on the face of it, a real possibility that the matters in HSBC may not rest with the Upper Tribunal and may go further.

51. But if there were delay, or an onward appeal from the UT, then it is easy to contemplate a renewed application for a stay in this present appeal. But, by that time (say, mid to late October at the earliest, and if the Upper Tribunal hearing goes ahead as contemplated) this appeal will have been listed, and in the diary for months, and up to ten days of Tribunal time will have been booked out. Any judge faced with such an application would be in the unenviable position of having to decide between vacating a long hearing, at relatively short

notice, or leaving it in the diary and at the mercy of other events (including events which could render the whole appeal otiose, such as a higher court setting out a different reading of the law).

52. It is better for all concerned to grasp the nettle now because, if a hearing goes into the diary and is then vacated, it may well prove (at the very least) extremely difficult (indeed, if not just simply impossible) for the Tribunal to engage in an exercise whereby it seeks to identify another appeal or appeals which could be heard or made ready to be heard in that slot. In and of itself, any such exercise would be something which the Tribunal would not otherwise have to do, and it would thereby disrupt the ordinary work-flow of getting appeals ready to be heard and heard.

53. Mr Hitchmough QC presses me energetically that the Appellants bear the burden, and that I should not make a decision which materially interferes with their ability to discharge that burden. In principle, I accept that point, but I do not consider that it is made out in the circumstances of these appeals.

54. I have carefully considered the fact that this appeal is now ready to be listed, in that the parties have filed and exchanged witness statements (unlike the HSBC Appeals, which, procedurally, are at a much earlier stage). But this is a point which does not unequivocally point in either direction - whether in favour of a stay, or against one.

55. He cautions me as to the availability of the Appellants' witnesses if the matter is stayed. He reminds me that one witness has already had to withdraw, due to medical reasons, and he draws attention to the effect of the passage of time on witness recollection.

56. As to the latter, I agree with the remarks of Judge Sarah Falk (as she then was) in *Waverton Property LLP v* HMRC [2017] UKFTT 0853 (TC) at Para [36] that the risk of deterioration of witness recollection and evidence can never be ignored. But, in my view, nor must it be given undue weight or overstated.

57. In my view, none of these features carry much weight in my overall evaluative exercise:

(1) This present appeal is not ones involving dishonesty, or vindication of character, where it is possible to see that a person would want to clear their name as soon as possible;

(2) I am told that the witness evidence already filed is in large part a commentary on documents;

(3) Even if, contrary to the above, this were an appeal which ended up turning on oral evidence, it does not seem to me inherently likely that the witness' recollection a year or so (say) down the line will be significantly affected;

(4) Except for the unavailability of one witness, already referred to, there is no evidence of any particular problem with any particular witness, whether now or in the foreseeable future;

(5) The prospect of an employed witness leaving a party's employ is commonplace, is capable of being managed, and is not sufficient to prevent a stay;

(6) It is common ground that Barclays have agreed to a stay of two other appeals behind this one, but have not yet filed evidence (from other witnesses) in those stayed appeals. This does at least support the impression (i) that the GSC appeals are not ones which do critically turn on oral evidence, and (ii) where Barclays, institutionally, has not been concerned about the possible degradation of evidence in its other appeals;

(7) This appeal is not, in the overall scale of things, very old, especially in the context of tax where timescales (because of the extended time limits for raising assessments)

can be significantly longer than in civil proceedings (which have to be brought (albeit not heard) within the time limits afforded by the Limitation Act 1980).

58. I am not persuaded by the Appellants' argument that they will suffer serious financial loss as a result of the delay in the resolution of this dispute. As put, and without evidence in support, or any degree of particularity, it does not amount to more than the barest assertion. It is not clear to me whether financial loss has already been sustained but (and in common with all taxpayers faced with a liability if their appeal is dismissed) the issue of whether the Appellants choose to put any arrangements in place to hedge against an adverse outcome are matters entirely for the commercial judgment of the Appellants and not for this Tribunal.

59. Nor I am persuaded by the Appellants' argument that a stay will mean that unnecessary costs will be incurred due to delay and relisting. Again, it is bare assertion. As matters stand, availability has been notified, but no hearing has been listed. I do not readily see - and there is no evidence, or particularisation - as to what those costs would be, or why a stay would cause them to be incurred.

OUTCOME

60. For the above reasons, I grant HMRC's application in the terms sought.

CASE MANAGEMENT

61. The parties agree that I should vary the Tribunal's case management directions released on 16 November 2020 so that, in advance of the hearing of these appeals, when that eventually happens, HMRC's Skeleton should be served 28 days in advance, and the Appellants' Skeleton 14 (and not 21) days in advance. I direct accordingly.

62. HMRC have intimated that they may apply for disclosure during the currency of the stay. It may be helpful to the parties if I indicate, albeit in an interlocutory and non-binding way, and without hearing any submissions on the point, that the existence of the stay should not necessarily be viewed as an impediment to such an application. But I am anxious that the Tribunal's resources should be allocated proportionately to this dispute, and, bearing in mind that Judge Scott dealt with Barclays' application on paper, and without a hearing, it may well be appropriate for any further applications to this Tribunal to be dealt with on the papers as well, if they fairly and justly can be.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. 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.

DR CHRISTOPHER MCNALL
RELEASE DATE: 11 MAY 2021