[2021] UKFTT 0264 (TC)

TC08210

APPLICTION – rule 8 debarring of HMRC – preliminary issue – direction - costs

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/04490

BETWEEN

LAURENCE SUPPLY CO (LEATHER GOODS) LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE AMANDA BROWN QC

The hearing took place on 22 June 2021. With the consent of the parties, the form of the hearing was a V (video) hearing using the Tribunal video platform. A face to face hearing was not held because of the continued pandemic the nature of the hearing. The documents available to the Tribunal were: a skeleton argument from each party, a bundle of documents consisting of 545 pages and an authorities bundle of 525 pages.

Mr George Rowell of counsel, instructed by Kuit, Steinhart Levy LLP for the Appellant

Ms Joanna Vicary of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This was a complex and composite application bought by Laurence Supply Co (Leather Goods) Ltd ("**the Appellant**"). The application sought firstly to strike out (or more correctly debar HM Revenue & Customs ("**HMRC**") from the proceedings; in the alternative the Appellant sought a direction as to the hearing of a preliminary issue; in the further alternative case management directions; and, in any event, an order for costs.

THE ISSUE UNDER APPEAL

2. Briefly, the appeal concerns the decision of HMRC to issue a C18 Post Clearance Demand Notice for the period 6 May 2014 to 4 May 2017 in the total sum of £603,548.58 ("**the Decision**") and associated civil penalty in the sum of £2,500.

3. The Appellant's business is the import of fashion handbags and purses made to the Appellant's specification, from China which are sold by the Appellant to high street fashion retailers.

4. The Appellant had been importing handbags and purses ("**the Goods**") under Community Code 4202 22 9090: handbags with an outer surface of textile materials at a 3.7% duty rate ("**9090**"). The basis of the Decision is that the correct classification of the Goods is 4202 22 1000 ("**1000**"): handbags with an outer surface of plastic sheeting at a duty rate of 9.7%.

5. HMRC commenced enquiries into the importations undertaken by the Appellant. Initially import documentation was requested; some information was provided but other information was not with the consequence that HMRC uplifted two sample products which were sent to the Tariff Classification Service ("**TCS**"). The TCS examined the sample items one was classified under code 9090 and one as 1000.

6. The Appellant was invited to identify which imports had been correctly classified as 9090 and which should have been 1000. Absent any meaningful response HMRC issues assessments on the basis that all imports other than the specific product identified by the TCS as properly 9090 should have been subject to duty at 9.7%.

7. By way of amended grounds of appeal the Appellant contends that the material used in the production of the Goods is not correctly classified under code 1000 on the basis that (A) they are not made of plastic sheeting ("**Ground A**") and/or (B) that a number of imports of the Goods were not made of the PU leatherette which had been classified by the TCS as plastic sheeting ("**Ground B**").

8. The Appellant's amended grounds reference two particular FTT appeals (*Optoplast Manufacturing Company Ltd* [2003] UKVAT C00179 ("**Optoplast**") and *Euro Packaging UK Ltd* [2017] UKFTT 0160 ("**Euro Pckaging**")). The Appellant contends that HMRC have failed to adequately consider the similarity of the goods which were the subject matter of those appeals when compared to the Goods and to the approach taken in those cases by the Tribunal. In particular, the Appellant criticises HMRC for not answering the question "did the particular material in question, namely PU leatherette, have the appearance of plastic sheeting?". The amended grounds set out, at some length, the Appellant's submission on the correct approach to be taken when determining the correct classification of the Goods.

9. HMRC's amended statement of case (issued consequent upon the amended grounds) sets out at paragraph 36 the liability ruling of each of the products examined. For the item considered to be 1000 the statement of case notes "as the outer surface as made predominantly from plastic sheeting". At paragraphs 55 – 73 the statement of case sets out the approach to be

adopted when determining the correct classification of the Goods by reference to the customs classification code, the general rules of interpretation, principles of classification derived from case law, the relevant provisions of the combined nomenclature and the associated guidance. In particular, they note that the test applied in determining that the Goods were made from plastic sheeting was by reference to the "outer layer being visible to the naked eye" having the same visual appearance as an applied layer of manufactured plastic sheeting. Case law on the approach to be adopted is cited. At paragraph 75 HMRC, correctly, note that the Tribunal's jurisdiction is a full appellate jurisdiction and the burden of proof rests with the Appellant to satisfy the Tribunal as to the correct classification of the Goods. Paragraph 76 states that HMRC formed the view that the Goods were classified as 1000. HMRC explain the basis on which the conclusions on classification were applied to the Goods and the conclusions reached regarding the assessable duty (and associated import VAT and penalties). They do so by reference to the examination and conclusions reached by the TCS. HMRC assert that the Appellant produced no information to demonstrate that the conclusion reached by the TCS as to classification was incorrect.

10. Following service of the statement of case, on 5 October 2020 the Appellant made the present application. The application was supported by a document purporting to be a witness statement prepared in accordance with Rule 35 CPR and thereby an expert statement.

APPROACH TO THE APPLICATION

11. The Tribunal gave its judgment in respect of this application at the hearing. The Appellant requested a full decision. This decision deals independently with the five components of the composite application briefly setting out the submissions of the parties and the reason for the decision reached.

12. It is to be noted that where the Tribunal does not deal with any specific argument, whether written or oral, it does not mean that it has not been considered.

Strike out application

13. The application is made pursuant to rule 8 FTT Rules which provides:

> "(3) The Tribunal may strike out the whole or a part of the proceedings if … (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding. …
>
> (7) This rule applies to the respondent as it applies to the appellant except that: (a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings …
>
> (8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issued against that respondent."

Appellant's position

14. The Appellant invites the Tribunal to exercise its powers under rules 8(3)(c) and (7) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**FTT Rules**") to debar HMRC from further involvement in the proceedings on the basis that there is no reasonable prospect of HMRC's case succeeding. The Appellant refers to *Fairford Group plc* [2015] STC 156, *The First De Sales Ltd Partnership* [2019] STC 805 and *Munir* [2021] EWCA Civ 799.

15. The Appellant contends that HMRC is not entitled to simply plead its case by reference to the burden of proof resting with the Appellant and that having failed to plead a response to Ground A fully and by reference to Optoplast and Euro Packaging HMRC have no basis on which to oppose which the Appellant applies is the irrefutable conclusion when those cases are

applied, that their appeal must succeed and that HMRC thereby have no reasonable prospect of succeeding.

16. Supported by the approach taken in those cases (as they relate to tax appeals) the Appellant relies on CPR rule 3.4(2) and the Practice Direction on Striking Out a Statement of Case (PD 3A) to contend that HMRC should be debarred on the basis that HMRC's defence in respect of Ground A on three grounds:

(1) HMRC have no pleaded case:

(2) No grounds to distinguish Optoplast and Euro Packaging

(3) By reference to the evidence available from Professor Bush

17. With regard to HMRC having no pleaded case the Appellant contends that in the section of the Amended Statement of Case entitled "The Respondent's Case" there is simply a repeat of the facts and "insofar as it has any discernible analytical purpose, it appears to be concerned£ only with Ground B. The Appellant considers that HMRC's case is predicated on an unsubstantiated (and unsubstaniatable) assumption that because the Goods are made of PU leatherette/suedette they are classifiable as plastic sheeting.

18. The Appellant contends that HMRC's failure to plead in respect of Ground A carries the consequence that the Amended Statement of Case discloses no reasonable ground for defending the appeal and as such is fanciful and entirely without substance representing, as per PD 3A, "a bare denial and setting out no coherent statement of the facts". The Appellant, by its skeleton argument went as far as to state that HMRC's failure to address Ground A indicated that HMRC was aware that they had no reasonable case as, had there been one, it would have been pleaded.

19. On Optoplast and Euro Packaging the Appellant contends that there is such a high degree of factual similarity between the material under consideration in each of those cases and the present appeal (which in the case of Optoplast was, as here, based on the evidence of Professor Bush) that HMRC's failure to even seek to distinguish the cases provides further support for the application to debar them.

20. The Appellant contends that Ground A represents a short point of law which can be determined on the basis of Professor Bush's evidence as, so it is asserted, HMRC had failed to produce any contrary evidence prior to this application hearing and otherwise has not substantive evidence on which to support its classification decision.

21. By reference to the contentions summarised above the Appellant invites the Tribunal not only to debar HMRC from the proceedings but also to summarily determine the appeal in its favour by "quashing" the Decision.

HMRC's position

22. HMRC's position is that any application to strike out or debar is a high hurdle by reference to CPR 3.5 and PD 3A, as accepted in *Fairford*.

23. Further, HMRC highlight that the burden of proof rests with the Appellant to establish that the C18 was wrongly issued, and in the context of Ground A that the Goods should be properly classified as under heading 9090 with the Tribunal having a full appellate jurisdiction to remake the classification decision on the evidence before it. Implicitly, HMRC's position in such an appeal is not a positive one – the Appellant must satisfy the Tribunal as to the correct classification of the Goods.

24. HMRC contended that they had, in any event, pleaded their position in relation to Ground A. HMRC's position is that following an inspection of the Goods they had been classified

under heading 1000. The basis on which the relevant classification principles have been applied have been articulated both by reference to the Officer's decision and the view of the TCS as set out in the Amended Statement of Case.

25. On this basis HMRC contend that there is no basis on which the Tribunal should debar them from the proceedings. Further, they contend that even if they were debarred (thereby excluding the evidence of the deciding officer and the TCS) that would not permit the Tribunal to summarily determine the appeal or quash the Decision as, without a hearing and fill consideration of the Appellant's case and evidence, the Appellant has not met the burden of proof which rests on it.

Tribunal's Analysis and decision

26. Underpinning the Decision HMRC concluded, following an evaluation of two samples of the Goods, that they were to be classified under heading 1000. The Amended Statement of Case (and the Statement of Case before it) clearly set out the basis on which that conclusion was reached by reference to the required approach to determining the correct classification of the Goods. The Amended Statement of Case does not engage with the more detailed submission made in the Amended Grounds of Appeal as to previous FTT case law but it does not need to do so. HMRC's position and the basis on which the Decision was made is clear. The role of the statement of case is as a pleading, setting out the legal basis on which the Decision was made and thereby maintained. It is not a skeleton argument.

27. As HMRC contend, this is an appeal in which it is for the Tribunal to consider the evidence before it and determine the correct classification of the Goods. That position will be assisted by the Tribunal undertaking its own physical examination of the samples (particularly given the relevance of the "naked eye" test and by reference to such additional evidence as the Appellant may seek to adduce (including the report prepared by Professor Bush, once admitted as evidence). The Tribunal will also be assisted by the evidence of Officer Wilkes and a representative from the TCS. By reference to the statement of case, the standing and relevance of the TCS view is made plain.

28. The Tribunal considers that an application for a summary decision in this matter was entirely misconceived. Even were the Tribunal to deprive itself of access to the evidence from Officer Wilkes and the TCS on the (unfounded) conclusion that there was some failure in pleading by HMRC the Appellant must still prove its case. The submission of a witness statement in support of its position does not make the conclusion as to classification which might be reached by the Tribunal certain.

29. For these reasons the applications to debar and for summary determination of the appeal are refused.

Preliminary issues hearing application

30. In the event that the debarring application was refused the Appellant's alternative application was for the Tribunal to direct that Ground A be considered as a preliminary issue.

31. This application was procedurally complex.

32. The Appellant had made a similar application by email on 26 February 2020. HMRC were invited to address their position on the application when they served their Amended Statement of Case. As the matter was not addressed at that time the Appellant reiterated the application by email dated 4 August 2020. In a response of the same date HMRC apologised for the oversight in response on the preliminary issue but indicated that they considered it to be disproportionate and objected to the application. HMRC's objection then prompted an application to the Tribunal for the preliminary issues application to be heard at an oral hearing.

33. The matter was placed before Judge Fairpo and on 19 September 2020 a decision by letter was issued refusing the application on the basis that "it is not unusual for alternate grounds of appeal to be considered in a single hearing and, … no clear reason has been given for departing from the usual practice and for extending the appeal process in the event that the appellant's Ground A does not succeed".

34. On 5 October 2020 the Appellant made the current application which recognised that as regards the application for a preliminary issues hearing, Judge Fairpo's decision would need to be set aside. HMRC objected to the question of a preliminary issues hearing being considered again by the Tribunal on the basis that the Appellant had not appealed Judge Fairpo's decision. The Appellant provided a further response that the Tribunal had the power to consider the application.

35. The matter was referred to Judge Bailey who directed that the Tribunal communicate to the parties on 16 November 2020 that the application of 5 October 2020 was to be heard by way of a video hearing. As regards the preliminary issues hearing application Judge Bailey stated:

> ""no application has been made for Judge Fairpo's decision to be set aside or for permission to be granted to appeal it. Therefore, Judge Fairpo's decision stands. The Appellant is not able to file a further application as if Judge Fairpo's decision had not been made unless the Appellant can show that circumstances have changes to such an extent that it is fling the same application but against a different backdrop. The Appellant will need t make submissions concerning its entitlement to make another application for a preliminary hearing as part of its application for a preliminary hearing…"

36. Undoubtedly because of an inability for Judge Baily to access the full file and because of the nature of the present application by the Appellant, some confusion arose as to the chronology and status of the preliminary issue application.

37. Entirely reasonably HMRC's position was that the preliminary issue application had been determined by Judge Fairpo and should only be opened in the circumstances identified by Judge Bailey.

38. However, the position taken by Judge Bailey as communicated on 16 November 2020 did not recognise that the Appellant, by a slightly convoluted route, did appear to have made an application for Judge Fairpo's decision to be set aside. Ordinarily that application should have been considered by Judge Fairpo however, as it had not, and as Judge Bailey had not recollected when making her directions on 16 November 2020 that the application had been made, the Tribunal considered it in accordance with the overriding objective to consider merits of the application afresh.

Appellant's position

39. By the application the Appellant briefly applied the principles derived from *Wrottesley v HMRC* [2018] STC 1123:

(1) Power to be exercised with caution and used sparingly – the Appellant contends that this is case where it is appropriate because Ground A is a "simple clear-cut issue".

(2) Succinct knockout point – the Appellant contends that if successful on Ground A Ground B falls away.

(3) Can the point be decided after a relatively short hearing – the Appellant contends that that Ground A does not involve any dispute of primary fact and that reliance on Professor Bush's statement together, as appropriate, with a similar statement from HMRC and thus the hearing for Ground A would be shorter than a full hearing which

would require extensive evidence regarding 259 individual entries in order to determine quantum.

(4) Risk of hindering just result of subsequent hearing – the Appellant contends that there is not legal or factual overlap between Grounds A and B.

(5) Potential for delay – the Appellant contends that any delay would be modest.

(6) Possibility for no further nearing – the Appellant contends that is Ground A succeeds there is no question of quantum.

(7) Significant saving of time and cost in pre-trial preparation – the Appellant repeats the submission that Ground A is a discrete issue requiring only expert evidence as compared to extensive evidence gathering which will be required for Ground B.

(8) Overriding objective – the Appellant contends a preliminary issues hearing is required by application of the overriding objective.

HMRC's position

40. By contrast HMRC contend that the correct classification of the Goods lies at the heard of both Grounds A and B and thus cannot realistically or proportionately be dealt with as a separate issue. The Appellant contends that which Goods were imported and their correct classification is the only substantive issue in the appeal and for that reason alone a preliminary issue is inappropriate. Inherent in the determination of the correct classification will be the evidence of Professor Bush (if admitted) and all the documentary evidence concerning product specification and pertaining to the imports more generally. HMRC contend, and the Appellant accepts, that documents evidencing specification have not yet been disclosed.

41. On the Wrottesley tests HMRC contend that none are met because there is essentially no means of extracting classification to consider it separately from the wider issues in the case (arising under both Ground B and Ground A).

Tribunal's analysis and decision

42. The Tribunal notes that a preliminary issue should be granted only sparingly where it is in the interests of justice to do so, usually because in so doing there is a very real possibility that the remaining issues in the appeal will fall away (knock out point) and where the issue is substantively one of law.

43. In the Tribunal's view none of the Wrottesley principles are met in the present appeal.

44. A substantial C18 has been issued in respect of handbags and purses imported by the Appellant issued on a best judgement basis because of a complete failure by the Appellant to produce critical documentation, particularly the specifications which the Appellant produces for the manufacturers in China. The Appellant has, to date, not complied with HMRC's reasonable document requests. At the hearing Mr Rowell submitted that the Appellant's list of documents is not complete because of difficulties communicating with the manufacturers in China. The Tribunal does not understand this asserted difficulty as the Tribunal understands that it is the Appellant itself which provides the full specification for manufacture, and it is inconceivable that such critical documentation is not retained by the Appellant.

45. In order to determine whether the correct classification has been applied to the Goods imported the Tribunal will need to understand the various lines of product which are the subject of the C18 and whether they have the visual appearance of being made of plastic sheeting or other material. That decision cannot be taken in an abstract factual vacuum and by reference only to expert evidence.

46. The Tribunal is concerned that the foundation of this application is an unwillingness by the Appellant to engage with the obligations that rest with it in order to substantiate its own case. The Appellant needs to focus on what is required to present a case on which the Tribunal can conclude what the correct classification each of the lines imported was by reference to the product specifications and the evidence as to the relevant criterial applied to the materials from which they are made.

47. For the above reasons the application for a preliminary issue application is refused.

Expert evidence application

48. The Tribunal is somewhat uncertain as to whether there is an application for admission of the expert evidence of Professor Bush.

49. By the application which was listed the Appellant asserts: "A party does not require the Tribunal's permission before serving expert evidence" and reference is made to two 2013 authorities (*Libra Graphics International v HMRC* [2013] UKFTT 180 and *Megantic Service Ltd v HMRC* [2013] UKFTT 492). No further reference was made in their skeleton argument and at the hearing Mr Rowell indicated that he had not come prepared to argue whether permission was required.

50. HMRC, by their skeleton argument simply state that permission has not been given.

51. As identified in *Libra Graphics* and *Megantic* rule 15(1)(c) of the FTT rules is a permissive power: the Tribunal may give directions as to whether the parties are permitted or required to provide expert evidence. The provisions of CPR 35 regarding experts requires that permission be obtained before an expert report may be adduced. With respect to the judges in *Libra* and *Megantic* the relationship between CPR 35 and rule 15(1)(c) appears to have been misconceived. Under CPR 35 a party seeking to adduce expert evidence must seek permission to do so, whether to grant permission is a matter for the court, there is no obligation on the court to grant or not grant permission it will do so in accordance with the overriding objective. The Tribunal rule is similar.

52. Increasingly since 2013 the Tribunal has been invited to make directions as to the provision of expert evidence such that the standard directions of the Tribunal explicitly contemplate and provide for such applications to be made. The standard directions for the production of expert evidence are made by reference to CPR 35.

53. That this is the case is reinforced by the need to determine whether both parties will call experts, whether there is a single joint expert or experts from both sides, the procedure for production of a joint report and whether the witnesses give evidence concurrently or by way of "hot tubbing". These matters are all within the discretion of the Tribunal to be determined in accordance with the overriding objective.

54. The Appellant has provided the statement of Professor Bush but has not sought permission to adduce it. So far as the Tribunal is aware, HMRC have not indicated any objection to its admission.

55. It appears to this Tribunal that the evidence of Professor Bush is likely to be of assistance to the Tribunal in determining the substantive appeal and the Tribunal is minded to permit it to be adduced subject to the directions made and attached as Appendix 1.

Case management

56. By way of alternative submission, of which HMRC was given no warning save for its inclusion in the Appellant's skeleton argument (which was served late), the Appellants seek case management directions requiring HMRC to set out reasons for opposing Ground A and to

state whether they dispute the witness statement of Professor Bush and if so why and in what respects.

57. The Appellant makes the application on the basis that it considers HMRC's statement of case to be non-compliant with the provisions of rule 25.

58. No extemporary judgment was given in respect of the case management direction application. By reference to the summary of the Amended Statement of Case in the introduction and for the reasons given above in respect of the strike out application the Tribunal does not consider that HMRC's Amended Statement of Case is defective. They have pleaded the legal basis on which they consider the Goods to be classified by reference to the analysis undertaken by the TCS.

59. The Tribunal therefore refuses the application that HMRC particularise their case any further.

60. With regard to the application regarding Professor Bush's evidence the Tribunal refuses the application in the form in which it is made. See Appendix 1 for the directions for the future conduct of the appeal.

Costs

61. The Appellant made an application for an unreasonable costs order. On the basis that all applications have been refused there is no basis for any costs application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 13 JULY 2021