[2018] UKUT 188 (TCC)

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Reference: UTJR/2015/005

IN THE MATTER OF AN APPLICATION FOR JUDICAL REVIEW

B E T W E E N:

THE QUEEN (ON THE APPLICATION OF THE DURHAM COMPANY LIMITED (Trading as MAX RECYCLE)) — **Claimant**

- and -

1) THE COMMISSIONERS FOR HM REVENUE & CUSTOMS
2) HM TREASURY — **Defendants**

TRIBUNAL: MR JUSTICE NUGEE

Sitting in public at The Rolls Building, London, EC4A 1NL

MR ALAN BATES (instructed by Tilly Bailey & Irvine LLP) appeared on behalf of the Claimant.

MR GEORGE PERETZ QC (instructed by Government Legal Department) appeared on behalf of the Defendants.

DECISION

1 I have before me an application for permission to appeal to the Court of Appeal against a decision in this tribunal, which is the Upper Tribunal (Tax and Chancery Chamber), made by Warren J sitting as the tribunal, the release date for his decision being as long ago as 19 September 2016. The application for permission was made in time but has been adjourned for reasons I do not need to go into.

2 It is a requirement of section 13(11) of the Tribunals, Courts and Enforcement Act 2007 that before the Upper Tribunal considers an application for permission to appeal, it must specify the relevant appellate court as respects the proposed appeal and I specify the Court of Appeal of England and Wales. Under The Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008 No. 2834), by Article 2:

> "2. Permission to appeal to the Court of Appeal in England and Wales ... shall not be granted unless the Upper Tribunal or, where the Upper Tribunal refuses permission, the relevant appellate court, considers that—
>
> (a) the proposed appeal would raise some important point of principle or practice; or
>
> (b) there is some other compelling reason for the relevant appellate court to hear the appeal."

3 It is not disputed by the respondent, HMRC, that the proposed appeal does raise important points of principle or practice. So that pre-condition is satisfied. Nevertheless, it is I think not disputed that even in a case which does raise an important point of principle of practice, permission should not as a matter of practice be granted unless the appeal has a real prospect of success, or there is some other compelling reason for the appellate court to hear the appeal, and it is not suggested that there is any other compelling reason. What I have to decide therefore is whether the proposed grounds of appeal do have reasonable prospects of success.

4 I am not in this decision going to go into the detail of what Warren J decided. It is a lengthy and complex decision running to 109 paragraphs and anybody who needs to can read the decision for themselves. However, in essence, what he decided was that local authorities who are Waste Collection Authorities and collect commercial waste from businesses and other non-domestic users in non-domestic premises in their local authority areas may be doing so in performance of their duties under section 45(1)(b) of the Environmental Protection Act 1990 ("EPA 1990") and that that would be a "special legal regime" for the purpose of Article 13(1) of the Principal VAT Directive and section 41A(1) of the Value Added Tax Act 1994 and hence that those supplies would be activities in which it is engaged as a public authority. He also decided (see [109] of his decision) that whether a local authority is in fact providing its commercial waste collection services under section 45(1)(b) EPA 1990 is a matter to be determined on the facts of each case.

5 The proposed grounds of appeal were originally four but are I think now only three because it is accepted that Ground 4, which challenged a particular statement in [104] of the decision, was put in to avoid it being suggested that that paragraph had made a decision which bound the Tribunal in the remainder of these proceedings. It has been accepted today in unqualified terms by Mr Peretz QC, who appears for HMRC, that what was said by Warren J in [104] was not binding or determinative in any way but was an obiter comment and that he would not

seek to suggest the contrary hereafter. In those circumstances, I think Ground 4 becomes unnecessary.

6 There are therefore three grounds. They are set out in considerable detail in an annexe to the skeleton argument to Mr Alan Bates who appears for the claimant and I will take them in turn. The first, Ground 1, is that the Upper Tribunal erred in law in concluding that Waste Collection Authorities that chose to engage in providing trade waste collection services in competition with private sector providers are (or at least may be) performing their duty under section 45(1)(b) of the EPA 1990.

7 It is pointed out in support of this ground that section 45, as I will refer to it, does not require local authorities to collect waste themselves. All that it requires of them is, on request, to arrange for the collection of commercial waste and it is then under a statutory duty to levy a reasonable charge for doing so. Mr Bates says that what local authorities are doing when they are going into competition with private sector providers is something quite different from that statutory regime.

8 I have had great difficulty in understanding this point. It does seem to me, and I think Mr Bates accepted this, that it is a possible response to the section 45 duty for a Waste Collection Authority not only to wait until it is requested on each occasion to arrange for the collection of waste, but to arrange in advance with a business that wants its commercial waste collected to do so under a contract for, say, the next 12 months and that there is nothing incompatible with section 45 for the local authority to specify in the contract the reasonable charge that it proposed to charge under that contract. That seems to me to be an example of premises within the local authority area requesting the local authority to collect its waste for the next 12 months and the local authority making a charge for doing so. The fact that it chooses to do that through the means of a contract does not, I think, and I did not understand Mr Bates to suggest it necessarily would, take the matter outside section 45. Once that is accepted, it is difficult to see why the sort of arrangements which are referred to in the decision could not be arrangements by which the local authority was discharging its statutory duty under section 45.

9 Mr Bates also said that there were other legal powers by which local authorities could provide such services, but the ones identified before Warren J, which were the Local Government Act 2003 and the Localism Act 2011 were comprehensively considered by Warren J and he found neither of them applicable. I have not been shown anything to suggest that his analysis was wrong and although Mr Bates suggested that there might be other powers under which local authorities were acting, none have been identified.

10 Finally, on this ground, Mr Bates placed considerable reliance on the fact that it is common ground that some Waste Collection Authorities collect waste outside their own area, what have been referred to as 'out of area collections', and nobody suggests now, if they ever did, that the local authority's source of its power to do that is section 45, which only applies within its own area. Indeed, as I understand it, HMRC now takes the position that any out of area activities are properly subject to VAT.

11 Mr Bates asks how can it be right to ignore the out of area collections and not consider what powers the local authorities have to carry out out of area collections, because if they can do that, then that suggests that there are other sources of power for in area collections. I agree with Mr Peretz's analysis that the question of *ultra vires* or not, and what powers local authorities are acting under when making out of area collections, does not assist in resolving the question whether what they are doing in their area is being done under section 45 or not. I see no error in Warren J's conclusion that local authorities who provide collection services in their area may, depending on the facts, be operating under section 45 and since that is what

he decided, I do not myself see that there is a reasonable prospect of success in challenging that in the way that Ground 1 seeks to do.

12 Ground 2 is as follows: Even if and insofar as the Upper Tribunal was correct that local authorities' supplies of waste collection services constitute a discharge of the duty imposed by section 45, the Upper Tribunal erred in law in deciding that authorities providing such supplies were doing so under a "special legal regime". In relation to this ground, Mr Bates's argument was that what the European jurisprudence requires is an analysis of the way in which the activities are carried out.

13 I do however, for my part, think that Warren J was entirely right and that there is no real prospect of challenging the analysis he adopted which is that if local authorities are operating under section 45, then that is a special legal regime which is applicable to them in their capacity as public authorities exercising public duties and which is different from the legal regime which applies to private sector businesses such as the claimant even though, from the point of view of the consumer, the services provided may be indistinguishable. That is because, as Warren J sets out, the section 45 power is hedged around by a number of constraints.

14 The ones he identified were that, firstly, a local authority is obliged to make an arrangement in relation to any commercial waste from any premises within its area, an obligation which does not apply to those who are operating in the private sector; secondly, that there are constraints in the charges that can be made because section 45(4) imposes the limitation that the charge must be reasonable, which does not apply to private sector operators; and thirdly, that there are obligations in relation to disposal under section 48; see what he says as to the flexibility available to a private operator in this regard at [41], which refers to some evidence which he had which I have not seen and which is not set out in his decision. Mr Peretz also relied on one other matter, the environmental obligations, which Warren J deals with at [39] of his decision.

15 Mr Bates says that none of these things necessarily has any practical impact on the way in which local authorities are able to compete with his client and other operators and therefore they do not amount to a special legal regime, but they do seem to me to be exactly what the European jurisprudence is referring to, namely, that the legal conditions under which the local authorities are providing services are different, because of their function as public authorities, from the legal conditions under which their private sector counterparts are providing what may, as I say, from the point of view of the consumer, be indistinguishable services. In those circumstances, I do not regard Ground 2 as having a reasonable prospect of success either.

16 Ground 3 is that the Upper Tribunal erred in law in deciding that the question of whether a local authority's trade waste collection services are being provided under a "special legal regime" had properly to be determined on a case by case basis by reference to the specific facts of the authority's provision of such services. Mr Bates's point is that what should have been focused on was the category of services that were being provided. Again, however, it does seem to me that if, as I have been persuaded, Grounds 1 and 2 do not have a reasonable prospect of success, it necessarily follows that there is nothing left in Ground 3 because the basis for Warren J's decision was precisely that what local authorities were doing when providing waste collection services might or might not fall within section 45. Once it is decided that they might or might not fall within section 45, it seems to me to inevitably follow that the question of whether they do in any particular case fall within section 45 or not must depend on the facts with regard to that particular local authority and that was all that Warren J was saying.

17 In those circumstances, I do not regard Ground 3 as having a separate life from Grounds 1 and 2, and having rejected the proposed challenges in Grounds 1 and 2, I think it must follow that Ground 3 will also fall into the category of grounds with no reasonable prospect of success.

18 In those circumstances, I regard myself as obliged to refuse permission to appeal and to leave it to the Court of Appeal to decide whether this is a case where, contrary to my views, the matters should be allowed to proceed to appeal. I say that acknowledging that it was really common ground between Mr Bates and Mr Peretz that the question of precisely what powers local authorities have is not something either within the expertise of HMRC or within the expertise of the claimants and is, in itself, in principle quite a difficult question. However, given the analysis adopted by Warren J and my inability to see any arguable flaws in that analysis which have a real prospect of success, as I have said, I regard myself as obliged to refuse permission to appeal.

MR JUSTICE NUGEE

RELEASE DATE: 8 June 2018