



**TC03433**

**Appeal number: TC/2013/01278**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SPACE MAKER STORAGE 2 LIMITED – IN LIQUIDATION      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHARLES HELLIER**

**DIRECTIONS**

**Sitting in public at 45 Bedford Square WC1 on 11 March 2014**

**Nicola Shaw QC instructed by Macfarlanes on behalf of former Directors of the  
Appellant**

**Philip Woolfe, counsel, instructed by the General Counsel and Solicitor to HM  
Revenue and Customs, for the Respondents**

## DECISION ON PRELIMINARY ISSUES AND DIRECTIONS

### Background.

5 1. This decision relates to preliminary issues in an appeal initially brought by the liquidator of the appellant against a decision of HMRC to assess VAT on the company in relation to the transfer of a number of property interests to a subsidiary. The decision rested in part on a conclusion that the property interests had been transferred at an undervalue. The amount assessed was some £2.94 million.

10 2. The company was put into liquidation in June 2010. In 2012 liquidator commenced a claim in the High Court against Mr Hicks and Mr McLauchlan (the "Directors") who had been directors of the company at the time of the transfer of the property interests, claiming that, in permitting the transfer that they had been in breach of their duty of care to the company inter alia because the property interests  
15 had been transferred at an undervalue, and as a result the transfer had exposed the company to a substantial VAT liability which it was unable to pay. The liquidator has also brought a claim against the company's accountants in relation to their VAT advice on the transfers.

20 3. The two directors (and the accountants) plainly have an interest in the outcome of this appeal. If the result is that VAT was due on the transfer there will be a substantial sum on which the High Court claims may bite. The High Court proceedings have been stayed pending the outcome of this appeal.

25 4. The hearing before me was listed to consider whether the appeal should be struck out on the grounds either (i) that the tribunal had no jurisdiction to hear it, or (ii) that there was no reasonable prospect of the appeal succeeding.

30 5. These questions were raised by the tribunal after its consideration of paragraphs 21 to 23 of HMRC's statement of case which (i) asked whether the appeal was a proper use of the tribunal's process, and (ii), noting that the grounds of appeal were those advanced by the company's accountants (whom the liquidator was suing for negligent advice), asked whether the liquidator genuinely disputed the claim, or whether, as one letter from the liquidator's advisers put it, he was "neutral" in the proceedings.

### *The Deed.*

35 6. On 7 March 2014, five days before the hearing, the liquidator and the Directors entered into a deed which recognised that it was in the interests of both the company and the Directors to ensure that the company's position was represented effectively in the appeal and concluded that it was "agreed that the Directors should take over contact of the Dispute on the terms set out in [the] Deed."

40 7. Clause 1 of the Deed provides that the Directors shall have exclusive conduct of the Dispute including the hearing before me and any other hearings in this or any

other tribunal or court. For these purposes "conduct" included compromising the dispute.

8. Clause 2 provided that the liquidator should not take any action prejudicing the Directors' conduct (although clause 3 provided an exception in relation to any  
5 inaccurate or misleading information provided by the Directors).

9. Clauses 4, 5 and 6 dealt with the mutual provision of information, documents and correspondence.

10. Clauses 7 and 8 make the Directors liable for costs including any costs awarded against the company.

10 *The Rule 9 application.*

11. In her skeleton argument Mr Shaw, acting on behalf of the Directors, made an application that the Directors be joined as appellants under Rule 9 of the tribunal's rules.

### **Discussion.**

15 *The Deed.*

12. Mr Woolfe argued that the Deed was a purported assignment of the right to appeal, and so, on the authority of *In re GP Aviation Ltd* [2014] 1WLR166, unenforceable.

13. In that case Judge Pelling QC said, at [10] that the power to conduct an appeal is  
20 not itself capable of assignment, and held that it was not open to a liquidator in a compulsory liquidation to assign the right to appeal against tax assessments. He so held because he concluded that the bare right of appeal was not property for the purposes of the Insolvency Act 1986 and so not capable of being sold by the liquidator under the powers given to him by schedule 4 of that Act to deal with the  
25 company's property. (He also expressed doubts about whether, absent the agreement of the liquidator, he would have sanctioned the assignment were the right of appeal assignable since it would remove from the liquidator the ability to compromise the appeal and might be affected by conflicts of interest between the directors and the creditors of the company.)

30 14. Mr Woolfe says that the exclusion of the company from any participation in this appeal means that the Deed acts as a (purported) assignment the right to appeal.

15. Miss Shaw says that the Deed merely confers conduct of the appeal of the Directors.

16. It also appeared from the particulars of the claim in the liquidator's action  
35 against the Directors that, contrary to my supposition during the hearing, the company was being wound up by the Court. As a result the power to compromise any claim against the company (such as that of HMRC for the VAT) may, by reason of section

167 and paragraph 2 Schedule 4, be exercisable only with the sanction of the Court. If that is right a question must also arise in relation to whether the delegation to the Directors of the entitlement to compromise the appeal in clause 1 of the Deed should have been sanctioned by the Court.

5 17. However, it did not seem to me to be necessary to decide on these issues for the purposes of this decision. The Deed, whether enforceable in whole, in part or not at all, evinces a clear and in the circumstances sensible and pragmatic intention that the Directors conduct the appeal. I have no doubt that the Directors, the liquidator and their advisers will consider the issues raised in relation to the Deed, and, if necessary,  
10 take steps to ensure that the Directors have the requisite authority to enable them to ensure the appointment of representatives for the company in the appeal and the prosecution of the appeal, if necessary subject to the ultimate control of the liquidator. That conclusion is sufficient for the reasoning in the following paragraphs.

*Striking out.*

15 18. In so far as relevant Rule 8 provides that the tribunal must strike out proceedings if it "does not have any jurisdiction in relation to the proceedings", and that it may strike out proceedings if it considers that "there is no reasonable prospect of the appellant's case, or part of it, succeeding".

No reasonable prospect of success.

20 19. It was plain, and Mr Woolfe did not suggest otherwise, that the arguments raised in the grounds of appeal and by Miss Shaw were substantial and could not be described as having no reasonable prospect of success.

20. It does not seem to me that the fact that the liquidator's a claim against the Directors is based on a claim that VAT is in fact due, means that there is no  
25 reasonable prospect of the arguments succeeding that the VAT is not due. This is not a case of the liquidator facing different ways at the same time, but of facing different ways in relation to different proceedings.

21. (I must also express some surprise that the liquidator might consider himself neutral - that is to say in the same position whether or not he wins or loses this appeal.  
30 That is because I suspect that the Directors might seek to dispute liability in respect of VAT which they might be able to say would not have been payable had the appeal in diligently pursued.)

22. If, because the liquidator was confident that he would win the High Court action if he lost this appeal, he had indicated that he would take no part in the  
35 prosecution of this appeal, then such passivity, in a case requiring evidence and factual findings, could indicate that the appeal had no prospect of success. But if, even though the liquidator might not mind whether he wins this appeal, he has taken steps (or is likely to take) which ensure its reasonable prosecution, his "neutrality" as to the outcome does not affect the prospect of success.

23. If the Deed is effective to give the Directors control or conduct of the appeal on behalf of the company then that appointment, having regard to their interest in the pursuit of the appeal, is sufficient to ensure a reasonable prosecution of the appeal. But even if the Deed does not have that effect, the willingness of the liquidator to cede conduct in some form to the Directors, and their interest in the pursuit of the appeal, means that it is likely that the appeal will in fact be robustly pursued.

24. I conclude that the appeal cannot be struck out on the basis that the appellant's case has no reasonable prospect of succeeding.

#### Jurisdiction

25. The appeal is against the decision of HMRC that VAT was chargeable on the transfer of the property interests, and implicitly (at least) against the assessments that decision gave rise to. The tribunal is given jurisdiction in relation to these matters by section 83 VAT Act 1994. It does not seem to me that such jurisdiction is affected by:

(1) the appointment of the liquidator. The liquidator brings the appeal as an agent of the company;

(2) any appointment by the liquidator of someone to conduct the litigation. It remains an appeal by the company, and in appeal over which the tribunal has jurisdiction

(3) any ceding of power over the appeal as the result of the Deed. The appeal remains an appeal brought by the company.

26. As Miss Shaw pointed out the ability to strike out under this rule is more limited than that in the CPR, and in particular does not include the power to strike at claim as an abuse of the tribunal's process.

27. However I do not believe that the granting of the conduct of appeal to the Directors (whether in the form of the Deed or otherwise) is an abuse of the process of this tribunal. There is a serious dispute over a large amount of VAT. The Directors are likely to be the persons best able to give evidence of the transactions and the persons most interested in the determination of the appeal. The only forum in which that VAT liability may be determined is this tribunal. The making of that determination is the use, rather than the abuse, of the tribunal's process.

#### *The Rule 9 Application.*

28. The application is to add the Directors as appellants to the appeal.

29. Rule 9 provides:

"(1) The Tribunal may give a direction substituting a party if –

(a) the wrong person has been named as a party; or

(b) the substitution has become necessary because of a change in circumstances since the start of proceedings.

(2) The Tribunal may give a direction adding a person to the proceedings as a respondent.

(3) A person who is not a party to proceedings may make an application to be added as a party under this rule.

5 (4) If the Tribunal refuses an application under paragraph (3) it must consider whether to permit the person who made the application to provide submissions or evidence to the Tribunal.

(5) If the Tribunal gives a direction under paragraph (1) or (2) it may give such consequential directions as it considers appropriate.

10 30. Mr Woolfe says that paragraph (3) merely permits a party to be heard in an application for the tribunal to exercise its powers under paragraph (1) or (2) - ie to be substituted, or to be added as a respondent; it does not permit a person to be added as an appellant. The limitation in paragraph 5 to paragraphs (1) and (2) shows that the power of addition is not freestanding and that paragraph (3) merely permits an  
15 application to be heard.

31. Rule 5(3)(b) provides that a tribunal may permit or require a party or another person to provide documents, information or submissions to the tribunal or a party. Thus even if rule 9(3) does not permit the addition of a person as an appellant, the tribunal is not barred from making the type of direction envisaged by rule 9(4) but in  
20 respect of a person who wishes to support the appeal. Thus a person who is not an appellant may be permitted or required to play a significant role in an appeal. Mr Woolfe makes no objection to a direction in relation to the Directors under rule 9(5)(b).

32. Miss Shaw relies on subparagraph (3). She says that paragraphs (1) and (2)  
25 relate to actions which the tribunal may make take of its own motion whereas paragraph (3) relates to actions which the tribunal may take if an application is made. She says that if Mr Woolfe is right then paragraph (3) is otiose because it confers no extra power on the tribunal. Paragraph (3) therefore confers a wider discretion on the tribunal, giving it a power not only to add a party as a respondent, but also to add a  
30 party as an appellant where an application is made to that effect. The language of paragraph (3) in speaking of "adding" a party is not limited to the substitution of a party or its addition as a respondent.

33. I note that in *MCashback Software 6 LLP v HMRC* 2013 UKFTT 679 Judge Cannan regarded the effect of the rule as being that for which Mr Woolfe contends  
35 but in *Ryan Sampson* [2014] UKFTT 179 Judge McKenna added a party to an appeal as an appellant. However the latter case related to an appeal against a letter of review addressed to two people whose property had been seized. It appeared that the tribunal administration had treated the appeal as being by one of them only. This was a case either of the correction of an administrative mistake under paragraph (1)(a) – the  
40 wrong person being named as a party – or where an alternative would have been to consolidate to appeal the appeals of the two persons affected.

34. I have come to the conclusion that rule 9 does not confer on this tribunal a power to add a person as an appellant. That is for the following reasons:

5 (1) Paragraph (3) permits a party to make an application "to be added as a party under this rule". The words "under this rule" appear to me to limit the nature of the application to a request for the exercise of jurisdiction under paragraph (1) or (2).

(2) It seems to me that the purpose of paragraph (3) is to make clear that a non party has standing to apply to the tribunal: it serves that purpose and is not otiose.

10 (3) As Mr Woolfe says, paragraph (5) indicates that paragraph (3) confers no power other than that to consider an application for addition under paragraph (1) or (2): that does not include addition as an appellant.

(4) Rule 9 of the Upper Tribunal Rules provides:

15 "(1) The Upper Tribunal may give a direction adding, substituting or removing a party as an appellant, a respondent or an interested party.

(2) If the Upper Tribunal gives a direction under (1) it may give such consequential directions as it considers appropriate.

20 (3) A person who is not a party may apply to the Upper Tribunal to be added or substituted as a party."

The contrast between this rule and rule 9 of the First tier tribunal's rules is indicative of the limited scope of paragraph (3).

(5) Rule 1(2) of the First tier tribunal's rules defines an "appellant" for the purposes of the Rules as:

25 "(a) the person who starts proceedings (whether by bringing or notifying an appeal, by making an originating application, by reference, or otherwise), and

(b) in proceedings started jointly by more than one person such persons acting jointly or each such person as the context requires;

30 (c) a person substituted as an appellant under rule 9 ..."

35 It seems to me that this definition is inconsistent with the possibility that a person might be added as an appellant under rule 9 because: (i) even though such a person might make an application under rule 9(3) the proceedings would not be "started" by that application - whether or not it was an "originating application"; and (ii) paragraph (c) concerns substitution, not addition. If the meaning of "appellant" in the rules is limited by this definition then the effect of a purported addition of a person as an appellant under rule 9(3) would not bring into effect those parts of the rules which bite on an "appellant". In other words the addition would be confusing and, at least to some extent, nugatory.

40 35. Further, given the wide case management powers given to the tribunal by rule 5(2) and the power to make a direction under rule 9(5)(b), it seemed to me that only

the following rules would affect a party differently from a person who was not a party but in respect of whom a rule 5(3)(d) direction had been made; and that those differences were not, for the reasons which also follow, indicative that rule 9(3) should be regarded as having greater scope.

5 (1) Costs. Section 29 TCEA 2007 gives the tribunal power, subject to its rules, to determine “by whom” costs should be paid. It does not seem to me that that general power is affected by whether the tribunal formally adds a person as a party.

10 In this context I note that in relation to the costs of a Complex Case (such as this appeal) the "taxpayer" may opt out of the costs transfer regime by giving notice within 28 days of the appeal's allocation as a Complex Case. The "taxpayer" is defined as the person whose liability to pay the tax is at issue in proceedings. Neither an added appellant nor a rule 5(3)(b) applicant who is not a taxpayer is afforded any opportunity to opt out of this regime, and thus may be subject to  
15 whatever regime has in effect been chosen by the taxpayer.

The power to award “unreasonable” costs in rule 10(1)(b) is limited to the unreasonable acts of a “party”. “Wasted costs” are also defined in section 29 by reference to a party. But to a large extent the behaviour of a non party acting under rule 5(3)(d) is subject to greater control by the tribunal.

20 (2) Representatives. Rule 11 deals with the appointment of a representative by a party. No permission is given in this article for a person in respect of whom a rule 5(3)(d) direction is made to appoint a representative. In general however this seems to me to be a matter which may be dealt with under the management powers in rule 5: justice and fairness may mean in some cases that it is right for  
25 a non party to be represented in its submissions to the tribunal

(3) Evidence. Rule 15 permits the tribunal to give directions in relation to evidence. Paragraph (1)(c) and (d) are phrased by reference to the evidence of a "party". However it seems to me that similar constraints to those in those paragraphs may be attached in a permission given under rule 5(3)(d) in relation  
30 to the information which the person is permitted to provide to the tribunal, since such information may include evidence.

(4) Appeals. Perhaps the most notable effect of being a party is that a party may have a right of appeal against the decision of the tribunal. That right arises from section 11(2) Tribunals, Courts & Enforcement Acts 2007 which provides that "any party to a case has a right of appeal subject to subsection (8) [which provides that the Lord Chancellor may make provision for a person to be treated as being or not being a party although it appears that no such provision has yet  
35 been made]". The word “party” is not defined in that Act. But whether a person is a party for the purpose of that Act does not seem to me to depend upon  
40 whether or not he has been so treated by this tribunal.

36. Miss Shaw gave the example of a decision by HMRC as to the VAT treatment of a particular supply. Both the supplier and the recipient might have standing to appeal against the decision. It was clearly sensible to permit the supplier to be added as a party if the action had been brought by the recipient. But it seems to me that if the

supplier disagrees with the recipient he may be added as a respondent, and that if he agrees with the supplier he may make a separate appeal which may be consolidated with that made by the recipient. No injustice follows from not being able to add the supplier as an appellant.

5 37. Miss Shaw referred me to *Gurtner v Circuit* 1978 2 QB 587 in which the Court of Appeal considered the effect of RSC Ord 15 r 6(2)(b) which permitted the court to add as a party person:

10 "whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectively and completely determined and adjudicated upon."

Lord Denning gave that rule a wide interpretation, saying that where in an action between two parties a third party will be directly affected "in his legal rights or in his pocket" by the determination of the dispute, the court could allow him to be added on such terms as it saw fit.

15 38. But this tribunal is not in the same position as the High Court. Not only do its rules not contain this provision, but it is not able to ensure that "all matters in dispute ... be effectively and completely determined" because it has no jurisdiction over the action between the Directors and company. The reasoning in that case is not transferable.

20 *Rule 5(3)(d)*

39. On the other hand it would not be in the interests of the efficient administration of justice for the tribunal to promote, or participate in, a procedure which might admit the effective re litigation of the VAT liability if the Directors could later say in the High Court action "well, if you had brought *this* evidence or advanced *that* argument,  
25 the result would have been different". Having regard to the interests or at least the arguments and evidence of the Directors must, for this reason if for no other, be just and fair.

40. Dealing with this appeal justly and fairly must in my judgement take into account:

- 30 (1) the interests of justice in the proper determination of any VAT liability  
(2) the interests of HMRC and the company in avoiding unnecessary costs, wasted time or duplication of effort which might arise if additional parties take part in the hearing, and  
(3) the interest, arguments and evidence of the Directors in the appeal.

35 41. I conclude that it is just and fair to permit, subject to conditions, the Directors to participate in the appeal by making submissions, providing information and documents, and being informed of the progress of the appeal.

42. I therefore DIRECT (using the word "conduct" to mean organising, arranging, and paying for the appeal whether or not having ultimate control over the appeal):

(1) that each Director be permitted to make submissions and to provide information and documents to the tribunal;

5 (2) that the Directors exercise the permission granted in (1) only to the extent that such submissions, information or documents are not provided to the tribunal by or on behalf of the company;

(3) that the Directors shall give notice to the other parties and the tribunal if they are not, or cease to be, the persons conducting the appeal on behalf of the company; and

10 (4) that, if the Directors are not at any time the persons conducting the appeal on behalf of the company, documents required to be sent by any party or the tribunal to the company should at the same time also be sent to the Directors;

(5) that the Directors shall send a copy of any documents they send to the tribunal to HMRC and the company; and

15 (6) that the consideration of separate representation for any Director be considered by the tribunal if the Directors cease to have conduct of the appeal, and that until then they should not be separately represented at a hearing.

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**CHARLES HELLIER  
TRIBUNAL JUDGE**

**RELEASE DATE: 24 March 2014**