TC04991

Appeals numbers: TC/2011/8708, TC/2011/8713, TC/2011/9703, and TC/2013/3771

VAT – application to strike out on basis appellant's legal argument that the 'fish and chips' tax was an unlawful narrowing of the UK's food zero rating because the UK failed to consult with the Commission – appeals struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

KOON CHUNG AND YUK FONG LAM
T/A LAKE AVENUE FISH BAR

THE CHIP INN LIMITED

AROMA RESTAURANTS LIMITED

NORTHHOW LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at the Royal Courts of Justice, London on 21 March 2016

Mr L Allen, Solicitor of Mishcon de Reya, for the Appellant

Mr E West, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Procedural background

1. The various appeals lodged by the appellants were lodged between 2011 and 2013. All four appellants sought repayment of output tax which they claimed they had overpaid HMRC. At the time, the FTT had given its decision in *Sub One Limited t/a Subway ('Sub One')* but there was an appeal by the appellant in that case pending, first to the Upper Tribunal and then to the Court of Appeal. All four appellants asked the Tribunal to stand their appeals over behind the outcome of this litigation and HMRC did not object: the appeals were immediately stayed and remained so for some years.

2. The Court of Appeal decided the *Sub One* appeal in favour of HMRC: [2014] EWCA Civ 773. The Supreme Court refused permission to appeal on 17 December 2014 thus bringing the proceedings to an end.

3. In March 2015, HMRC lodged an application with the Tribunal seeking to strike out many of the appeals lodged with the Tribunal and stayed behind *Sub One*, including the four appeals in this hearing. In April 2015 the Tribunal wrote to many of the appellants, including the four in this hearing, asking if they intended to pursue their appeals and if so what were their 'grounds of appeal taking into account the law as explained in the Court of Appeal's decision in *Sub One'*.

4. Many appellants, including those in this hearing did not reply. In July 2015, the Tribunal issued an 'unless' order on these and other appeals which stated that the Tribunal would strike out the appeals unless (by a given date) the appellant stated an intention to pursue the appeal and that it might strike them out unless the appellant 'notifies...its revised grounds of appeal following the Court of Appeal's decision in *Sub One'*.

5. In August 2015, the new representative of the four appellants, Mishcon de Reya, did notify the Tribunal within the stated time that the four appellants wished to pursue their appeals and stated their revised ground of appeal. The Tribunal clearly did accept that this was compliance as its response (albeit extremely belated due to a failure in its administrative centre) was not to strike out the appeals but to ask HMRC for its statement of case. HMRC, after a short extension to which the appellants had consented, did not provide their statement of case but applied for the appeals to be struck out.

Issues

6. It was accepted by all four appellants in this appeal that their original grounds of appeal, stated in their Notices of Appeal, raised the same legal issues as were decided by the Upper Tribunal and Court of Appeal in *Sub One* against the appellant in that appeal. They accept that these issues were decided against them by the Upper Tribunal and Court of Appeal and those grounds cannot now succeed. I will refer to

these as their original, or Sub One, grounds of appeal. Their new ground of appeal, which I describe in detail below when considering its prospects of success, is an entirely new ground of appeal which was not raised or decided in the *Sub One* litigation.

7. There is some debate between the parties whether the Tribunal has permitted the four appellants to amend their grounds of appeal and, if it has, whether it should have done so: it is HMRC's position that the appellant ought not to be allowed to amend its grounds of appeal. It was also HMRC's position that the appellants' new ground of appeal had no reasonable prospect of success, so the appeals ought to be struck out even if the new ground of appeal had been admitted.

8. There were two other matters before the Tribunal but which were uncontentious. Firstly, the appellants accepted that their original grounds of appeal ought to be 'struck out' on the basis that they accepted that the original grounds of appeal has no prospect of success in light of the Court of Appeal's ruling in *Sub One* and they did not intend to pursue these grounds. So I consider that these grounds are withdrawn.

9. Secondly, there are other appeals in which some 30 or so appellants seek to raise as a new ground of appeal the new ground of appeal raised by the four appellants in this hearing. Both parties agree that if as a result of today's hearing the appellants' four appeals continue then it would be sensible to make a Rule 18 lead case direction: they were also agreed that the Tribunal was unable to consider whether to make such a direction today as no notice of the application had yet been given to those other appellants.

New ground of appeal should be permitted or excluded?

10. The Tribunal's overriding objective as set out in Rule 5(2)(b) includes avoiding unnecessary formality. There is no rule which specifically requires an appellant to formally seek consent of the Tribunal to amend its grounds of appeal; and the Tribunal's approach to whether consent is required varies from permitting an unheralded amendment during the course of the hearing (eg in a 'basic' penalty appeal) to requiring a formal application for permission in more formal standard and complex cases. Fundamentally, it seems to me, the reason why an amendment to the grounds of appeal (or HMRC's grounds of defence) may not be permitted after the time pleading has closed is that litigation by ambush is unfair. So parties ought to set out their case in sufficient time to enable the other side to prepare to meet it: to this end, the Rules effectively require both parties' grounds (notice of appeal and statement of case) to be served before the evidence and long before the hearing. So while there are some cases (such as some 'basic' penalty appeals) where the issues are so straightforward that it may in some cases be appropriate to permit the appellant or HMRC to raise a new ground of appeal/defence during the hearing, in cases raising more complex issues, it will rarely be appropriate to do so. So while the Tribunal should avoid unnecessary formality, in such cases requiring parties to seek the Tribunal's permission before they introduce a new ground of appeal/defence is a necessary formality.

11. The question is then whether the Tribunal dispensed with that requirement in this case. The appellant's position here is that the Tribunal *invited* it to amend its grounds of appeal and it does not therefore need to seek permission. HMRC do not agree that there was any such invite. The Tribunal's letters of April 2015 and its 'unless' directions issued in July 2015 were intended to identify which appellants desired to carry on with their appeals despite the failure of the *Sub One* litigation and to elucidate on what grounds they intended to do so. In retrospect, those letters and directions should more properly have asked the appellants, not what were their revised grounds of appeal, but whether they intended to apply to amend their grounds of appeal and if so what were the proposed revised grounds of appeal.

12. I agree with the appellant that at the very least when the Tribunal asked HMRC to provide a statement of case, it gave the appearance that the Tribunal had accepted the appellants' amended ground of appeal. This was an error by the Tribunal. The tribunal ought to have given HMRC to the opportunity to object to the new ground of appeal before requesting the statement of case in response. Nevertheless, I do not accept that the Tribunal's error means that it is no longer open to HMRC to effectively object to the admission of the new grounds of appeal.

13. As HMRC have objected to the revision of the grounds of appeal, this Tribunal must treat the provision of the revised grounds by the appellant as an application to admit them, and decide whether it is appropriate to do so.

Appropriate test for admitting new grounds of appeal/defence?

14. I was not cited any authority on what is the appropriate test for allowing one or other party to amend their grounds of appeal or statement of case. My view is that the default position is very like that for evidence. So far as evidence is concerned, Mr Justice Lightman in *Mobile Export 365 Limited* [2007] EWHC 1737 (Ch) said, as is often cited:

> "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary" (paragraph 20).

So far as new grounds of appeal or defence are concerned, I consider that the Tribunal would wish to admit them in order that the outcome of the dispute is decided after the fullest possible consideration of the relevant facts and applicable law, and that therefore it would admit new grounds of appeal unless there is a compelling reason not to do so.

15. So far as I understand HMRC's position, they consider that there are compelling reasons to refuse to admit this new ground of appeal, irrespective of whether it has a reasonable prospect of success, and that is that they say (a) it is too late in the day, (b) procedurally unfair and prejudicial to HMRC to admit the new ground four years after the appeals were lodged, and (c) no good reason for the delay has been given.

Too late?

16. By itself I do not think there is anything in this objection. The appeals were lodged slightly less than 4 years (or in one case 2 years) before the revised ground of appeal were lodged with the Tribunal. But elapse of time without more is not a compelling reason. Looked at properly, these cases are procedurally young. The appellants have done no more than file their notices of appeal and then (after a long delay due to the stay) applied to amend their grounds of appeal. HMRC had not filed its statement of case, let alone either party filed its evidence (should any be required).

17. While I accept that the overall length of time taken to resolve a dispute should be as short as possible consistent with justice, neither party suggested the stay was inappropriate or inconsistent with justice and I do not think the mere fact these appeals have been stayed for years by itself would justify keeping out a new ground of appeal.

18. I dismiss this objection.

No good reason given for delay?

19. I was given no reason for the delay although it was implied in submissions that once the cases were stayed behind *Sub One*, no one applied their minds to the question of whether the appellants might have additional grounds of appeal. I do not know the reason for the delay and have to assume it was not a good excuse for the delay. On the other hand, there was no suggestion that the delay was deliberate.

20. By itself the lack of a good reason for a delay I do not think would justify keeping out an arguable ground of appeal: it would need to be coupled with other factors.

Procedurally unfair and prejudicial to HMRC

21. As I understood it, Mr West's position on this was that HMRC may have been prejudiced if the new ground of appeal is admitted now. His position is that HMRC might have acted differently had the new ground of appeal formed part of the appellant's original grounds of appeal. He suggested that HMRC might not have consented to the stay behind *Sub One* but might have wanted these cases to proceed to hearing on the new ground of appeal, although presumably stayed behind *Sub One* on their original grounds of appeal.

22. I accept that it is possible (especially in light of what I say below) that this new ground of appeal could have been resolved between 2011 and the end of 2014 when the *Sub One* litigation concluded, thus shortening the overall length of time that these appeals would have been live. So I accept that there may be some prejudice to HMRC in allowing in the new ground of appeal now, particularly as it would be likely not only to delay the resolution of these four appeals but also resolution of 100s of other 'Sub One' appeals, as those which were stayed behind *Sub One* may seek to now be stayed behind these appeals.

23. It is a balancing exercise: should the appellant be prevented from putting a good arguable case to the Tribunal (if I were to find it to be so) on the basis its failure to include it in its grounds of appeal means extending, possibly by several years, the time taken to resolve the Sub One group of appeals?

24. If there were no other matters in favour of keeping out the new ground of appeal, I am not persuaded that this prejudice to HMRC would be sufficient to justify keeping it out. However, for the reasons explained below at §§28-29 it is not the only relevant factor.

Collective proportionality

25. HMRC did not refer to collective proportionality, a phrase used by the Court of Appeal in their recent decision in *BPP* [2016] EWCA Civ 121. While this phrase may be new in this context, the principle I understand it enshrines is not. It means that in taking case management decisions, the Tribunal must have an eye to the impact of its decision on the case management of other cases. In other words, a lax attitude to compliance in one case only encourages lack of compliance in other cases. Some case management decisions may justifiably be made 'pour encourager les autres'.

26. While no reason was given for the failure of the notice of appeal to include this new ground of appeal, there was no suggestion that it was an intentional omission, designed to catch out HMRC. I do not think collective proportionality has any relevance here: refusing to allow parties to introduce new grounds once the pleadings are closed punishes them for not exercising their legal ingenuity earlier but does not really encourage better behaviour. A litigant can't include in their notice of appeal a ground of appeal which does not occur to them (or their new representatives) until later in proceedings, and so punishing a litigant for failing to include it at the right time will not mean other litigants are less likely to make this mistake.

27. I do not consider collective proportionality to have any relevance here.

Conclusions on amendment to grounds of appeal

28. While I accept that there has been delay in identifying the new ground of appeal and that that delay may have prejudiced HMRC in that these appeals will take longer to resolve that if the appellants had acted promptly, I do not think that would justify keeping out a good arguable point of law which had not been considered by the Court of Appeal in *Sub One*. But that begs the question of whether the new ground of appeal has a reasonable prospect of success.

29. If it does, I consider that I should permit the amendment; if it does not, I should refuse the amendment. This is because the prospects of success of a new ground of appeal which the appellants seek leave to plead are obviously relevant: keeping out unarguable cases and thus saving costs is obviously a compelling reason to exclude a new ground of appeal.

30. This ground cuts across HMRC's strike out application and I reach my conclusion on it below.

Reasonable prospect of success?

31. As this is a strike out application and not a preliminary hearing of the new ground of appeal, it was not argued in full before me. Nevertheless, its essence is as follows.

32. In 1967, the EEC, which is now the EU, adopted the Second Council Directive on VAT (67/228/EEC) ('2VD'). It provided in so far as relevant as follows:

> **Article 17**
>
> With a view to the transition from the present system of turnover taxes to the common system of VAT, Member States may:
>
> - [not relevant]
> - [not relevant]
> - [not relevant]
>
> and, subject to the consultations mentioned in Article 16:
>
> - [not relevant]
> - provide for reduced rates or even exemptions with refund, if appropriate, of the tax paid at the preceding stage, where the total incidence of such measures does not exceed that of the relief's applied under the present system. Such measures may only be taken for clearly defined social reasons and for the benefit of the final consumer…. (my emphasis)

33. The parties were agreed that the UK provisions in Schedule 8 Group 1 of the Value Added Tax Act 1994 and its predecessors which permitted the zero rating of certain supplies of food were 'exemptions with refund' which at the time the UK joined the EU on 1 January 1973 could only have been authorised under Article 17 2VD. The consultations mentioned in Article 17 as contained in Article 16 were as follows:

> **Article 16**
>
> Where a Member State must, in accordance with the provisions of this Directive, enter into consultations, it shall refer the matter to the Commission in good time, having regard to the application of Article 102 of the Treaty.

34. It was not part of the appellant's case that the food zero rate was unauthorised when originally introduced. Both parties appeared agreed that the precondition in Article 17, which (via Article 16) makes it compulsory for the member State to refer to the Commission for the purpose of consultation before introducing an exemption with refund, was fulfilled when the UK joined the EU and included the food zero rating in its legislation.

35. The appellant's case is the Article 16 consultation requirement:

> (a) continued to be a part of EU law when the 2VD was replaced by the 6VD;
>
> (b) applied to the reduction in scope of a zero rate as much as it applied to the introduction of a zero rate;
>
> (c) and that the UK failed to consult when in 1984 it amended the definition of catering (always excluded from the zero rate) to include hot takeaway food; in other word,s the UK failed to consult with the EU Commission when hot takeaway food ceased to be zero rated.

36. So far as the point (c) was concerned, it was common ground between the parties that the UK had not consulted the Commission in 1984 when this so called 'fish and chips' tax, the tax on hot takeaway food, was introduced. The hearing therefore concerned points (a) and (b).

37. The appellants' case was that the reduction in scope of the zero rate when hot take away food was removed from it was unlawful because there was no consultation. The appellant does not suggest that there was anything in the 'fish and chips tax' that was inherently unlawful. While Mr Allen's skeleton argument refers to fiscal neutrality, he clarified in the hearing that it was not the appellants' case that there was a breach of fiscal neutrality. Indeed, the Court of Appeal appeared to consider there was no breach of fiscal neutrality in distinguishing between hot and cold take away food, although that was not an issue argued in the *Sub One* case:

> "[3] The broad approach in the UK has been to apply the zero rate to food, except as supplied in the course of 'catering'. In broad terms, this has meant food supplied in restaurants or as hot 'take away' food is 'standard rated'; other food is 'zero rated'. The policy seems clear: as Arnold J put it, human being have to eat, but they don't have to eat in restaurants or have their food cooked by others…

Mr Allen clarified that his point was that because there was a *potential* for a reduction in a zero rate to breach fiscal neutrality, article 28 should be read as if there was a requirement to consult before zero rates were reduced but not entirely abolished, and that because there was no consultation before the 'fish and chip' tax was introduced in the UK, even though it does not actually breach fiscal neutrality, it was nevertheless unlawful.

The appropriate test for striking out?

38. The parties were agreed that the reference to 'no reasonable prospect of success' in Rule 8(3)(c) meant that the appellant's case must have a 'real' prospect of success and not merely a false, fanciful or imaginary one and that it must be better than merely arguable. I am not called on to actually decide the proposed new ground of appeal as a point of law, but to decide whether it amounts to a good arguable case which would justify having a full hearing of it, in other words to decide if a Tribunal hearing the case might reasonably decide in favour of the appellants.

39. It seems to me that to strike out on the basis of no reasonable prospect of success I would have to have substantial certainty that the case would fail at full hearing: if it might succeed I should leave it to go to trial.

40. Striking out under Rule 8(3)(c) is like summary judgment and (while not cited to me) cases on the test for summary judgment are relevant. In *De Molestina v Ponton* [2002] 1 Lloyds LR 280 Colman J said that where strike out was sought in an evidentially complex matter the judge would have to:

> [3.4]….conduct a careful investigation of the evidence to ascertain whether, in spite of the intrinsic complexity, there is obviously no substance in the claim…..Where, in a complex case, as may often be the situation, the frontier between what is merely improbable and what is clearly fanciful is blurred, the case or issue should be left to trial."

41. In *Berezovsky v Abramovich* [2010] EWHC 647 (Comm) Colman J said:

> [146] …For the court to be satisfied that the claim has no real prospect of success it must entertain such a high degree of confidence that the claim will fail at trial as to amount to substantial certainty….That high degree of confidence is required in order to deal with each case justly and consistently with Art 6.1 of the European Convention on Human Rights…"

42. The test is in my view the same whether looking at the evidential or legal case, and whether or not the appellant puts forward a simple or legal case. The test is whether that case has no real prospect of success.

43. To succeed on this ground, the appellant would have to win on points (a), (b) and (c). Point (c) above was conceded by HMRC; points (a) and (b) were not. As the appellant would have to establish both in a full hearing in order to succeed, the question is whether I am satisfied that it has no real prospect of success on either (a) or (b). I move on to consider them below.

Other issues

44. I note, in passing as the point was not raised at the hearing, that both parties assumed that the new ground of appeal should not be struck out if the appellant could establish a good arguable case on both points (a) and (b). But that is not to say that the appellant would win its case even if it could make out a case on (a) and (b). It was also a necessary part of the appellants' new ground of appeal that if the UK acted unlawfully when reducing the scope of a zero rate then the appellant could rely on the zero rate enacted as it was before it was reduced in scope: in other words, it was the appellant's case that if the UK acted unlawfully when taking the zero rate away from hot takeaway food, then its supplies of hot take away food remained zero rated.

45. However, it is far from certain that this is correct as a matter of law. There is no directly effective right to a zero rate. Nevertheless, it is an interesting point which is perhaps not entirely clear and one which was not argued in front of me so I do not reach the conclusion that on this point the appellant has no reasonable prospect of

success. If the case is not struck out, this point must be decided following a full hearing.

46. So the question remains whether the appellant has a reasonable prospect of success on both points (a) and (b).

(A) Did the consultation requirement of 2VD remain a part of the 6VD?

47. From the date on which the various Member States brought into effect the 6VD, the 2VD ceased to have effect:

> **Article 37 of the 6VD**
>
> Second Council Directive 67/228/EEC of 11 April 1967 on VAT shall cease to have effect in each Member State as from the respective dates on which the provisions of this Directive are brought into application.

While I was not addressed on the exact date on which the UK brought into effect the 6VD, it was not in dispute that 6VD had come into effect in the UK and that this clause 37 was operational. The 2VD was therefore repealed and no longer of effect in the UK.

48. The appellant's case relied on art 28 of the 6VD: its case was that this provision incorporated the 2VD's provisions on consultations into the 6VD:

> **Article 28**
>
> **1.** [not relevant]
>
> **2.** Reduced rates and exemptions with refund of the tax paid at the preceding stage which are in force on 31 December 1975, and which satisfy the conditions stated in the last indent of Article 17 of [the 2VD], may be maintained until a date which shall be fixed by the Council……

49. Reading Article 28, however, makes it clear that it did not incorporate article 17 of the 2VD wholesale into the 6VD. All that was incorporated were the:

> 'conditions stated in the last indent of Article 17'.

The last indent is clearly the fifth indent of Article 17. I have set this out above (§32): it commences with the words 'provide for reduced rates or even exemptions…'

50. There can be no sensible argument on this to the contrary. While I have not set out Article 28(1) of the 6VD, it deals with 'the first four indents of Article 17 of' the 2VD. I have not set out the text of those either as the contents are not relevant. But the text which commenced 'provides for reduced rates or even exemptions…' was indented and was the fifth and last part of Article 17 to be indented. So the conditions stated 'in' the last indent of Article 17 were the conditions stated <u>within</u> that indent. There were three conditions as can be seen from reading that indent and they were concerned with (a) not extending relief beyond the immediately preceding laws, (b) clearly defined social reasons and (c) benefit of the final consumer. This last indent contained no conditions about consultation.

51. The consultation condition was, on the contrary, contained in the main body of Article 17, as set out above: it applied to both the fourth and fifth indents. So while it did qualify the fifth indent, it was not contained within the fifth indent. Therefore, on a literal reading, it was not incorporated into Art 28 of the 6VD.

52. So I do not consider the appellant to even have an arguable case based on a literal construction of Art 28 as it is clear that the requirement to consult was not carried over into Art 28 of the 6VD. It was not a condition 'stated in the last indent of Article 17'.

53. So far as a purposive interpretation is concerned, there is also little logic in the appellant's position. Article 17 2VD was concerned with the introduction of exemptions and zero rates where previously there were none (as a harmonised EU—wide VAT system was only just being introduced). Art 17 required consultation before exemptions and zero rates were introduced.

54. Article 28 6VD, some ten years' later, on the other hand, was concerned with permission to maintain the zero and super reduced rates introduced in 1967. There was no logical need to provide for consultation prior to their adoption (as the 2VD did) because the zero and super reduced rates already existed, and it was clear that Member States were not being permitted to introduce new ones. So a purposive construction would not read Article 28 as referring to all the preconditions which affected the fifth indent of Article 17: no logical purpose would be served by going beyond the literal words used. It makes sense that the consultation precondition to the introduction of zero rates was no longer relevant by the time of the 6VD, when instead of giving Member States permission to introduce new ones, the intention was to make it clear that only pre-existing zero rates were sanctioned. Member States could not introduce new zero rates so the consultation process was no longer required.

55. While the CJEU's decision in *EC Commission v UK* C-416/85 [1988] STC 456 might not be decisive on this point, as the question of consultation was not raised, it strongly indicates that the CJEU considered that the consultation pre-condition in Art 17 2VD was not carried across to the 6VD. This is because it considered 'the criteria contained in the last indent of Article 17 of the [2VD]' [5] and assumed they were as I have outlined:

> "[10] [the commission] submits, however, that the requirements laid down in the last indent of Art 17 of the [2VD], which provides that exemptions may be made only 'for clearly defined social reasons and for the benefit of the final consumer', are not met…."

The case went on to consider those conditions and whether they were met. In paragraph [35] it referred to the 'clearly defined social reasons' as the *first criterion* laid down in the last indent of Art 17. I agree with HMRC that while this case is not conclusive, it would be a very strange result if the CJEU were now to say there were additional criteria imported into the 6VD from the 2VD.

56. I am firmly of the opinion that for the reasons I have given in §54 had the CJEU been asked (and assuming it was relevant, which it was not) in the *UK* case whether

the consultation precondition survived into the 6VD their answer would have been negative.

57. I do not think that the appellant has a reasonable prospect of success in its case that consultation precondition is in, or must be read into, Art 28 6VD. That conclusion is enough to decide that their case overall has no prospect of success but for the sake of completeness I consider (b).

(B) Did Article 17 2VD require consultation before reduction in a zero rate?

58. Interpretation of Art 17 2VD: The appellants' case is that consultation was required by the 6VD before the scope of an existing zero rate was reduced. To make out that case it must show, as I have already discussed, that Article 28 6VD incorporated the consultation requirement from Article 17 2VD. But even if right, that presupposes that the Article 17 consultation condition required consultation before zero rates were not only introduced but before they were reduced.

59. That does not appear to be arguable on a literal or purposive interpretation of 2VD. Article 17 clearly literally applied the consultation condition to the introduction of zero/super reduced rates as it refers to 'provide' for reduced rates and zero rates. And so far as a purposive interpretation is concerned, the purpose of Article 17 was to allow Member States to introduce zero/super reduced rates once they had consulted with the Commission, There was no need for the consultation pre-condition to cover reduction in zero/super reduced rates as all zero rates were new in the new EU VAT system. Reducing a zero/super reduced rate was not a relevant consideration when they were being first introduced. So when Art 17 was enacted with its consultation pre-condition, it was not intended to apply to reductions in zero/super reduced rates.

60. Put simply, Art 17 was concerned solely with the *introduction* of zero/super reduced rates in a new harmonised VAT system and therefore the consultation pre-condition was not intended to apply to the later *reduction* in such rates some time after they were introduced; Art 28 6VD, ten years later, permitted such zero/super reduced rates to remain but no new ones to be introduced, so it did not incorporate a consultation pre-condition before the introduction of a new such rate.

61. Interpretation of Art 28 6VD: Moreover, Article 28 itself clearly states that there is no requirement for a member state to retain a zero rate as it provides merely that they 'may' be maintained. There was nothing in Art 28 itself to suggest any restriction on the abolition in whole or part of a zero rate. To read such a restriction in would go against the grain of the 6VD which was (amongst other things) to move towards harmonisation by abolition of Member State-specific zero rates.

62. In *Norbury Developments* C-136/97 the UK reduced an exemption and the taxpayer said that was unlawful. The CJEU disagreed:

> "[19] … Whilst [Art 28(3)(b)] precludes the introduction of new exemptions or the extension of the scope of existing exemptions following the entry into force of the [6VD], it does not prevent a

> reduction of those exemptions, since their abolition constitutes the objective pursued by Art 28(4) of the [6VD]."

This case concerned Art 28(3)(b) (exemptions) and not Art 28(2) (zero/super reduced rates) and by itself is not a complete answer to the appellant's case as Art 28(3)(b) did not incorporate any part of the 2VD. It does show that partial reduction is lawful and indicates how extremely unlikely it is that the CJEU would adopt a very strained interpretation of the 6VD in order to impose a brake on the partial abolition of a zero rate. Why would the CJEU adopt a strained, virtually unsustainable, interpretation of Art 28 6VD in order to support a position that goes against the grain of the 6VD? I do not think it would.

63. Partial or total abolition: Mr Allen accepted that a member State could abolition an entire zero rate without consultation. Indeed, to suggest otherwise would have been to run entirely counter to the 6VD's objective of harmonisation. Nevertheless, it was a necessary part of his case that Art 28, by incorporating the conditions in the fifth indent of Art 17 2VD, imported a condition that partial abolition must be consulted on in advance to be lawful.

64. It was very hard to see how the consultation pre-condition in art 17 2VD could be said to apply to a partial but not total abolition of a zero rate. On its face it applied only to the introduction of a zero rate: if somehow it was to be read as applying to changes to a zero rate there was no logical reason why that construction would exclude abolition.

65. Need for consultation: So far as I understood it, the appellant's position is that Art 17 2Vd and Art 28 6VD should be interpreted in this way because, while no purpose consistent with the 6VD would be served by requiring consultation before total abolition, there was a risk with partial abolition that fiscal neutrality or some other principle of EU law, would be breached. Prior consultation would reduce the risk of this. Therefore, said the appellants, a member state ought to consult before it reduced the scope of a zero rate.

66. Wishing does not make it so. The appellant could as easily have said that any change in any domestic VAT provision ought to be consulted on before becoming law because there is always the possibility it could breach an EU principle, such as fiscal neutrality. But the EU has, no doubt for good reason, not made it a legal requirement for Member States to consult before changing their VAT laws. If a member State does breach the principles of 6VD (now PVD) when changing its VAT laws, the remedy is to challenge the legality of the change.

67. There is simply no basis in the 2VD for saying that the consultation precondition in Art 17 was intended to apply not only on the introduction but the later partial (but not total) repeal of a zero/super reduced rate. There is no reason to suppose this was intended. I simply cannot see how the appellant could possibly succeed in its case on this and I do not think it has a reasonable prospect of success.

68. Mr Allen introduced into the hearing a phrase, new so far as I am aware, of a 'consulted zero rate' by which I understood him to mean that it would (in his opinion)

be unlawful under the 2VD or 6VD without consultation, to introduce or amend, but not abolish, a zero or super reduced rate. Giving the appellants' proposition a name, however, does not alter the legal position that the 6VD gave a Member State no power to introduce a zero rate and no obligation to consult with the Commission before reducing or abolishing any already in existence.

69. Case law: Mr Allen referred me to *Commission v France* (the French medicines case) (C-481/98) and in particular paragraph [21]. It is difficult to see how this assists the appellants' case. France introduced under Art 17 2VD two different reduced rates on medicines. The Commission later challenged the legality of this alleging it was a breach of fiscal neutrality, as treating similar medicines differently. On the facts applicable to that particular case, the CJEU held that there was no such breach. There was no suggestion that the introduction of the 'super-reduced' rate of VAT was unlawful because France had failed to consult in advance: so far as I can see consultation was not mentioned at all in the decision. As France, having introduced it, had never altered the supper-reduced rate, there was no discussion of whether it was lawful until Art 28 to amend it. So as far as I can see, this case contains nothing relevant to the appellants' proposition.

70. Mr Allen also referred me to *Ideal Tourisme SA* (C-36/99) as supporting his proposition of a 'consulted zero rate', any alteration to which without consultation is automatically unlawful (he says) even if it breaches no principles enshrined in the 6VD. That case concerned Belgian law which exempted international air transport of passengers but not international road transport of passengers, which was instead charged at a reduced rate of VAT. In that case the CJEU cited at [32] its own decision in *Norbury Developments* (above) to the effect that Art 28(3)(b)

> 'does not prevent a reduction of existing exemptions, especially as their abolition constitutes the objective pursued by Art 28(4) of the [6VD]'

It went on to rule that Art 28(3)(b) in permitting exemptions to be retained was permitting Member States to that extent to be non-compliant with the 6VD:

> "[37]…the Community system of VAT is the result of a gradual harmonisation of national laws …this harmonisation, as brought about by successive directive and in particular by the [6VD], is still only partial….
>
> [38] …the harmonisation envisaged has not yet been achieved, in so far as the Sixth Directive, by virtue of Art 28(3)(b), unreservedly authorises the Member States to retain certain provisions of their national legislation predating the [6VD] which would, without that authorisation, be incompatible with that directive. Consequently, in so far as Member States retains such provisions, it does not transpose the [6VD] and thus does not infringe either that directive or the general Community principles which Member States must… comply with when implementing Community legislation."

71. The appellants appear to rely on this case as supporting their proposition that zero rates or super reduced rates referred to in Art 28(2) could not be reduced without

consultation because the ruling in *Ideal Tourisme* only concerned the maintenance of a reduced rate. Their case depends on inferring that the CJEU must have meant (although it did not say this) that *reductions* in zero or super reduced rates must comply with the 6VD and general Community principles: it is only the maintenance unchanged of such rates which does not.

72. Putting aside that *Ideal Toursime* concerned Art 28(3)(b) (exemptions) and not Art 28(2) (zero and super reduced rates) and is not directly relevant, there are two clear answers to this. Firstly, no such inference can be made as the case concerned the maintenance unchanged of an exemption. The CJEU did not address the question of a reduction in scope of an exemption. Secondly, even if the appellant is correct about the inference, it does not help its case. Even if it is the law that reductions in scope of exemptions, zero and super reduced rates must comply with EU principles such as fiscal neutrality, there is absolutely nothing in this case that requires a Member State to *consult* before making a reduction.

73. In conclusion, the appellants referred me to no case law which supported their propositions. As there is nothing in the Directives which gives them an arguable case, and nothing in the CJEU cases interpreting those Directives to suggest otherwise, I remain of the view that the appellants do not have a reasonable prospect of success on either (a) or (b).

Conclusion

74. I have the discretion to strike out if I have been satisfied that the appellants have no reasonable prospect of success. Having reviewed the legislation provisions, I am quite satisfied that it would only be an aberrant Tribunal decision that could favour the appellants' position. The appellants have no reasonable prospect of success either that the consultation requirement survived into the 6VD or that it ever applied to a reduction in a zero rate. In my view, its case on this is bound to fail.

75. If I permit the appellants to amend their grounds of appeal and the case proceeds on this single legal issue, it therefore seems inevitable to me that the appellant will lose. So I should either refuse to admit the amendment (and strike out the appeals on the basis the appellant has no surviving grounds of appeal) or, admit it but strike out the appeals on the basis that they have no reasonable prospect of success. The effect is the same. As logically the question of amendment of the grounds of appeal comes first, I will opt to refuse permission to amend the grounds of appeal; to bring the matter to a close, however, I also strike out the appeals on the basis that they have no prospect of success as the appellants now advance no grounds of appeal. But if I am wrong to conclude that they needed permission to amend their grounds of appeal (as per §13 above), then I strike them out on the basis that the new ground of appeal has no reasonable prospect of success. Either way, the appeals are hereby struck out under rule 8(3)(c).

76. I recognise I am not bound to strike out the appellants even though I am satisfied that their appeals have no reasonable prospect of success: Rule 8(3)(c) is only a discretion to strike out. But I can see no reason why I would not strike them

out in these circumstances and none was suggested to me at the hearing. The appeals have no real prospect of success and it is right to bring the proceedings to an end.

77. In conclusion, I am satisfied it is right to exercise my discretion to strike out these four appeals under Rule 8(3)(c) and I so do.

78. 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.

Barbara Mosedale
TRIBUNAL JUDGE

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