[2017] UKFTT 0143 (TC)

TC05637

Appeal number: TC/2015/05207

PROCEDURE – Application to join additional appeals and admit further evidence – non-compliance with previous directions – Application allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ELBROOK (CASH AND CARRY) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice, Strand, London on 24 January 2017

Geraint Jones QC and Christopher Snell, instructed by Rainer Hughes, for the Appellant

Christopher Hall QC and Will Hays, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The purpose of this decision is to explain my reasons for the directions which have been issued to the parties separately from, but at the same time as, this decision.

Background

2. On 20 August 2015 the appellant, Elbrook (Cash and Carry) Limited ("Elbrook") appealed to the Tribunal against a decision of HM Revenue and Customs ("HMRC") to revoke its registration as an owner of duty suspended goods under the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR"). Under directions, endorsed by the Tribunal on 30 June 2016 and made on the joint application of the parties, Elbrook was required to serve any further evidence on which it intended to rely by 1 August 2016.

3. On 27 July 2016 this appeal (the "WOWGR appeal") was listed for a hearing over five days between 6 and 10 February 2017.

4. HMRC, by an application dated 16 December 2016, sought permission to adduce further evidence in the WOWGR appeal.

5. On 19 December 2016 Elbrook made an application for the hearing of the WOWGR appeal to be vacated and re-listed to be heard contemporaneously with its appeals against HMRC's decisions to deny input tax credits of £771,430.20 for its 01/13 to 04/15 accounting periods (under reference TC/2015/02184 – the "First VAT appeal") and £502,309.35 for its 04/12 to 07/13 accounting periods (under reference TC/2016/02974 – the "Second VAT appeal") on the grounds that it knew or should have known that transactions it had entered into were connected to the fraudulent evasion of VAT. A hardship application in the First VAT appeal was allowed by the Tribunal on 21 March 2016 and an appeal against that decision is due to be heard by the Tax and Chancery Chamber of the Upper Tribunal on 30 March 2017. The Second VAT appeal is currently stayed behind the First VAT appeal.

6. Elbrook's application, which was for the main part opposed by HMRC, also sought permission for the admission of additional witness evidence including expert accounting evidence and a direction for a site visit to Elbrook's premises in Surrey.

7. The witness statement of Mr Amrit Johal, the solicitor with conduct of this matter for Elbrook, in support of its application explained that leading counsel, with whom a conference had taken place on 16 December 2016, had advised that there was "little or no prospect of the [WOWGR] appeal being accommodated within a five-day hearing" and had estimated that eight days was necessary.

8. Unfortunately, because of the Christmas and New Year holidays, I was not made aware of these applications until 5 January 2017. Although Elbrook did not oppose HMRC's application, given the differences between the parties in relation to Elbrook's application, I considered that a hearing was necessary.

9. However, it was not possible to accommodate such a hearing before 24 January 2017. Because of the proximity of the WOWGR appeal to that hearing and taking account of the view of leading counsel for Elbrook that five days would not be sufficient (although leading counsel for HMRC did not agree) and to avoid the appeal going part heard with the inevitable difficulties that would arise as a result, I reluctantly came to the conclusion that the WOWGR appeal should be vacated and directed accordingly.

Issues

10. The following issues arise out of Elbrook's application:

(1) whether the First and Second VAT appeals should be heard contemporaneously with the WOWGR appeal;

(2) whether further witness evidence should be admitted;

(3) whether a site visit should be directed.

Contemporaneous hearing of appeals

11. HMRC's decision revoking Elbrook's WOWGR registration letter was contained in a letter, dated 15 March 2015, written by HMRC Senior Officer Jane Humphrey, to Elbrook's directors. After setting out in some detail under the headings 'First Reason' and 'Second Reason' why the WOWGR registration had been revoked the letter continued under the heading 'Other considerations':

> "HMRC also noted their concern … letter that:
>
> - …
> - in 2014 you were refuse an input tax deduction in the sum of £771,430.20 on transactions for the purchase of soft drinks that the Commissioners have concluded were connected to the fraudulent evasion of VAT.
>
> …
>
> So far as the soft drinks input tax claim is concerned, it has been stated on your behalf that this matter is closed and does not relate to your registration. For the avoidance of doubt, and as you are aware, a statutory review upheld he assessment against you and the proper route of challenge is by way of an appeal to the Tribunal. In the particular circumstances of this case this assessment which we understand is challenged by you, is not advanced by HMRC to demonstrate your lack of fitness as a registered owner, save that again it diminishes to some extent the significance that can be attached to the general representations made on your behalf as to the conduct as a business"

12. On 29 July 2015 Angela Stewart of HMRC's Appeals and Reviews team wrote to Elbrook's directors upholding the decision to revoke Elbrook's WOWGR licence following a review. Her letter adopted the same format as the original decision letter – setting out the First and Second reasons for the revocation of the registration before, under 'Other considerations', stating:

> "I am also of the view that the disputed decision to reject an input tax deduction in the sum of £771,430.20 in respect of transactions for the purchase of soft drinks that the Commissioners have concluded were connected to the fraudulent evasion of VAT, which is currently under appeal to the Tribunal, may be taken into account when considering whether revocation is appropriate."

This is clearly a reference to what I have described as the First VAT appeal.

13. Mr Geraint Jones QC, who appeared with Mr Christopher Snell, for Elbrook contends that because the issues arising in the First VAT appeal were matters that were considered by the HMRC officer who originally made the decision to revoke the WOWGR registration and the officer who upheld that decision on a review, it would be necessary for the Tribunal in the WOWGR appeal to consider these issue and make appropriate findings of fact to determine whether there was any substance to them. Although Mr Jones accepts that the Second VAT appeal was not referred to in the WOWGR letters, as it raises the same issue as the in the First VAT appeal it should, he says, be heard together with the First VAT and WOWGR appeals.

14. He submits that that if the appeals were heard separately there is a real danger that differently constituted Tribunals could come to different conclusions leading to further litigation with time and cost consequences for both parties contrary to the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 to deal with cases "fairly and justly". In contrast, he says, there would also be a saving of Tribunal time and resource if the appeals were heard together.

15. For HMRC, Mr Christopher Hall QC, who appeared with Mr Will Hays, contends that the issues in the First VAT appeal were not greatly relied on by HMRC, rather it was "supporting evidence" for the decision to revoke the WOWGR registration. As such, he says that it is not necessary to reach a conclusion on that appeal to determine the WOWGR appeal.

16. The issue for the Tribunal in the WOWGR appeal is, under s 16 Finance Act 1994, whether, having regard to the facts as found by the Tribunal, the decision taken by HMRC to revoke Elbrook's registration was one that could reasonably have been reached. As Judge Jonathan Richards explained in *Charles Miller Ltd v Home Office* [2015] UKFTT 556 (TC), at [34]:

> "In *Balbir Singh Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that, the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal."

17. Clearly the issue in the First VAT appeal was a matter that was taken into account by HMRC even if, as Mr Hall contends, only as supporting evidence.

Whether or not there is any foundation to this matter is something that will need to be taken into account by the Tribunal in the WOWGR appeal when considering whether the decision to revoke the registration was reasonable. The same issue is also at the heart of the Second VAT appeal.

18. There would be obvious duplication if this issue were to be litigated twice or three times with the potential for inconsistent decisions by differently constituted Tribunals and subsequent further appeals. Having regard, as I must, to the overriding objective, especially in dealing with cases in ways which are proportionate to the complexity of issues, anticipated costs and resources of the parties (see rule 2(2)(a) Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009) I consider that it would be possible to eliminate or at least reduce the likelihood of such problems arising if the WOWGR, First and Second VAT appeals are heard contemporaneously by the same Tribunal.

19. I have therefore directed accordingly.

Additional witness evidence

20. HMRC, in the application of 16 December 2016, sought permission to rely on the second witness statement of Jane Humphrey, the officer who made the decision to revoke Elbrook's WOWGR registration. In that statement she refers to Pascal Burgraeve, Natalie Kulesza and Fernandes Alvaro and HMRC do not object to evidence from these individuals being admitted. Neither does Elbrook oppose the admission of Ms Humphrey's second statement. I have therefore directed that such evidence be admitted.

21. I should also record that although HMRC do not intend to call her to give evidence Mr Jones asked that the reviewing officer, Angela Stewart, be available for cross-examination and intimated that if she were not called he would be making submissions in relation to the inferences to be drawn by her absence. Mr Hall confirmed that HMRC were content to rely on the evidence of Ms Humphrey.

22. Turning to whether the further witness evidence of Amjad Khalid and evidence of Fukhera (Frank) Khalid should be admitted, Mr Hall, referring to the Tribunal's directions of 30 June 2016 (see paragraph 2, above) contends that, in the light of the comments of the Senior President in *BPP Holdings v HMRC* [2016] STC 841 and the approach in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3926, that it should not. He says the failure to comply with the directions of 30 June 2016 is a serious breach, especially as the possibility of Fukhera Khalid being called as a witness had been proposed in an email of 21 June 2016. He also points to lack of any explanation for breach and the absence of any draft statements appended to the application.

23. While I agree and am minded to exclude this evidence it is necessary to consider the third stage of the *Denton* approach and avoid what was described by the Master of the Rolls and Vos LJ at [31] of *Denton* as:

> "The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in *Mitchell*: see para 37. Rule 3.9(1) requires that, in every case, the court will consider "all the circumstances of the case, so as to enable it to deal justly with the application". We regard this as the third stage."

24. Having regard to all the circumstances of the case it is apparent from the submissions of Mr Jones that the evidence of Fukhera Khalid and Amjad Khalid, both directors of Elbrook, would give the Tribunal a greater understanding of how the company operates. As there is no doubt that they would be able to give evidence in relation to the First and Second VAT appeals and given my decision that these appeals should be heard contemporaneously with the WOWGR appeal, I consider it would be impractical to restrict the evidence of Fukhera Khalid and Amjad Khalid to the VAT appeals especially as there are matters in those appeals that are common to the WOWGR appeal. Also, the appeals are listed to be heard in August 2017, I consider the admission of such evidence unlikely to be prejudicial to HMRC if it is served in sufficient time before the hearing to enable it to be properly considered.

25. I have therefore directed that the evidence of Fukera Khalid and the additional evidence of Amjad Khalid, if it is served by 28 February 2017, can be admitted.

26. In relation to the issue of expert accounting evidence, Mr Jones says that Elbrook seeks to rely on this to make good its amended grounds of appeal relying on Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1") in connection with the effect of the revocation of the WOWGR registration on the value of its goodwill. He says this evidence, which could be contained in a short witness statement of only two or three paragraphs is necessary as, in the absence of an admission by HMRC, it is for Elbrook to establish that it has suffered a loss of goodwill as a result of the WOWGR revocation.

27. However, Mr Hall contends that such evidence is not needed and that this is a non-issue. He says even if there is a loss of goodwill HMRC are entitled to have a WOWGR registration system. He also refers to the failure by Elbrook to comply with the directions of 30 June 2016, a serious or significant breach for which no explanation has been proffered.

28. I agree that there has been a significant breach of the 30 June 2016 directions for which no explanation has been provided other than the lack of involvement by Mr Jones between drafting the amended grounds of appeal in December 2015 and his conference with Elbrook's solicitors a year later. However, this is not, in my view, a sufficient explanation for the delay when Elbrook has been professionally represented throughout the period concerned and made a joint application for directions under which it was required to serve all evidence to be relied on by 1 August 2016.

29. Having regard to all the circumstances, in particular that the amended grounds of appeal relying on the A1P1 provisions are dated 5 December 2015 when it would have been known whether Elbrook needed to rely on expert evidence, and adopting

the *BPP* approach to compliance with directions I refuse permission for Elbrook to rely on expert accounting evidence.

Site visit

30. I agree with Mr Hall that, given that its case is that its trade in duty suspended goods took place entirely within France and that the events with which the WOWGR appeal is concerned took place between 2012 -2015, a site visit to Elbrook's premises in Surrey in 2017 would not be a productive use of the Tribunal's time. I did not understand Mr Jones to seriously contend otherwise although he did suggest that the Tribunal might derive some assistance, as he had done, by seeing the premises from which Elbrook administered its business.

31. I therefore did not direct a site visit

Appeal Rights

32. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 27 JANUARY 2017