[2016] UKFTT 652 (TC)

TC05395

Appeal number: TC/2012/09138

PROCEDURE – Claim for VAT repayment supplement – Application by Respondents to strike out appeal – Whether witness summons appropriate for strike out hearing – No – Whether appeal has reasonable prospect of success – No – Appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

IAN CHARLES
t/a BOSTON COMPUTER GROUP EUROPE **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Eastgate House, Newport Road, Cardiff on 26 September 2016

The Appellant in person

Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. There are two applications before me. The first, from HM Revenue of Customs ("HMRC"), dated 3 May 2016, that the appellant's appeal be struck out as it has no reasonable prospect of success. The second, dated 20 July 2016 and amended on 19 August 2016, is from the appellant, Mr Ian Charles, for the Tribunal to issue witness summonses requiring an officer of HMRC and a caseworker from HMRC's Solicitor's Office to give evidence and be available for cross-examination in the hearing to determine HMRC's application.

2. Having heard from Mr Charles and Mr Howard Watkinson of counsel, who appeared for HMRC, I dismissed the application for the issue of witness summonses and proceeded to hear argument in relation to HMRC's strike out application on which I reserved my decision. I explained that I would give my reasons for not issuing witness summonses in writing together with my decision on the strike out application in due course. However, before I do so it is convenient, at this stage, to set out the background to this case.

Background

3. On 3 October 2006 HMRC received a VAT return from Mr Charles in respect of his VAT accounting period ended 30 September 2006 (09/06). An input tax claim in the sum of £92,784.90 was shown on the return. Although Mr Charles questions whether there was strict compliance with the process described in HMRC's *VAT Notice 700/58: treatment of VAT repayment returns and supplement*s (see below) the 09/06 return was selected by HMRC for extended verification. HMRC wrote to Mr Charles on 30 January 2009 notifying him that all but £293.90 of the claim for input tax had been disallowed because the transactions on which he had sought to recover input tax were connected to missing trader intra-community ("MTIC") fraud and that he knew or should have known of that connection.

4. Mr Charles appealed to the First-tier Tribunal against HMRC's decision to disallow his input tax claim (the "MTIC Appeal"). In a decision released on 12 June 2012 the Tribunal held that, because HMRC had not established that there had been a fraudulent loss of tax in relation the transactions he had entered into with Maystar Enterprises Limited during 09/06, Mr Charles was entitled to be repaid input tax of £35,134.75. However, the Tribunal found that Mr Charles should have known the other transactions for which input tax had been claimed on the 09/06 return were connected to the fraudulent evasion of VAT. Therefore, there was no right to deduct input tax incurred as a result of these transactions.

5. HMRC repaid £35,134.25 to Mr Charles on 21 July 2012. The balance of £0.50 was credited to a later VAT return and statutory interest of £498.83 paid to Mr Charles on 18 September 2012. Mr Charles had claimed repayment supplement on 21 August 2012 and this claim was refused by HMRC on the basis that the claim did not meet the condition in s 79(2)(c) of the Value Added Tax Act 1994 ("VATA").

6. This decision was upheld on 13 September 2012 following a review.

7. On 25 September 2012 Mr Charles appealed to the Tribunal (the "Repayment Supplement Appeal") on the basis that there was no error in his 09/06 VAT return.

8. The Repayment Supplement Appeal was stayed pending an appeal to the Tax and Chancery Chamber of the Upper Tribunal in the MTIC Appeal. The Upper Tribunal dismissed his appeal on 24 July 2014. Permission to appeal against that decision was refused by the Court of Appeal after an oral application on 15 July 2015.

9. On 3 May 2016 HMRC filed and served an application for the Repayment Supplement Appeal to be struck out. On 20 July 2016 Mr Charles made his application for witness summonses to be issued requiring the Officer responsible for the extended verification of the 09/06 VAT return and the Tribunal caseworker in HMRC's Solicitors Office to give evidence and be cross-examined. He amended his application on 19 August 2016 providing further details in support.

Witness Summons Application

10. Mr Charles questions whether, following his submission of the 09/06 VAT return, HMRC had complied with paragraph 2.1 of their VAT Notice 700/58. This states:

> **2.1 What happens when I submit a repayment return?**
>
> Once we have received your repayment return it will go through the following process:
>
> **Step**
>
> 1. Claim return received at VAT Central Unit (VCU) - The date of receipt is recorded. The information on the return is keyed into our computer system and accounts are updated for each VAT registration. Any errors or omissions are corrected before the information is keyed.
> 2. Automated credibility checks - These tests are applied to all claims. The majority of returns pass these tests and proceed immediately for payment.
> 3. Credibility queries - Returns that fail the automated tests are checked manually and are either resolved by the credibility staff, or sent to the local offices that deal with VAT for further investigation.
> 4. Returns sent for further checks - High priority is given to these checks and any queries are answered with the minimum involvement or inconvenience to your business. If we need to visit you, we will arrange it for a mutually convenient date and time.
> 5. Credibility queries returned to credibility staff - Results of local action are returned with a certificate detailing the amount of time taken and any undue official delay. Any corrections to errors are completed and the claims are passed for payment.

> 6. Payment of the claim - Once a claim has been accepted, repayment is made by direct payment to your bank. Our computer checks if repayment supplement is applicable and this is paid automatically at the same time as your repayment. You can find further information about repayment supplement in section 3 of this notice.

11. He says that as no error was corrected by HMRC under step one it is necessary to ask the officer concerned about what he did to ensure that Notice 700/58 was properly followed and applied. This, says Mr Charles, is central to his Repayment Supplement Appeal because if the 09/06 VAT return was not corrected there cannot be have an error in that return. For that reason, he wishes a summons to be issued requiring the officer who undertook the extended verification of the 09/06 return to give evidence.

12. However, it is clear from the decision of the Tax and Chancery Chamber of the Upper Tribunal in case of *HMRC v Hok Ltd* [2012] UKUT 363 (TCC), which is binding on me, that as this Tribunal, the Tax Chamber of the First-tier Tribunal, was created by statute its jurisdiction is defined and limited by legislation and it does not extend to the power to supervise the conduct of HMRC.

13. Even if that were not the case, VAT Notice 700/58 does not set out the law in relation to repayment supplement but provides HMRC's interpretation of it (the relevant statutory provision is s 79 VATA – see below). As *VAT Notice 700: the VAT guide* explains, at paragraph 2.4 (with emphasis added):

> **2.4 VAT law**
>
> VAT law in the EU is governed by various Directives, notably the Principal VAT Directive (2006).
>
> The Directives are given effect in the UK mainly by the Value Added Tax Act 1994 as amended by subsequent Finance Acts. But there are many detailed rules in Statutory Instruments. These are either orders made by the Treasury or regulations made by HMRC. Copies of the Act and of Statutory Instruments are available from Stationery Office bookshops.
>
> **Generally speaking, this notice and the other VAT notices explain how HMRC interprets the VAT law.** However, sometimes the law says that the detailed rules on a particular matter will be set out in a notice or leaflet published by HMRC rather than in a Statutory Instrument. When this is done, that part of the notice or leaflet has legal force, and that fact will be clearly shown at the relevant point in the publication.

There is no statement in Notice 700/58 that it has legal force.

14. In the circumstances, as the Repayment Supplement Appeal has to be determined on the application of the relevant statutory provisions rather than Notice 700/58 and the actions or otherwise of the officer concerned, it is not appropriate to issue a witness summons requiring him to give evidence.

15. Mr Charles also says he wants a caseworker from the HMRC's Solicitors Office to be required to give evidence in relation to a comments she made about VAT Notice 700/58 when discussing the Repayment Supplement Appeal during a telephone conversation with him. However, any comment that the caseworker might have made in relation to the Notice, which as noted above does not have legal force, cannot have any bearing on the decision, made years before, to refuse repayment supplement.

16. As the caseworker cannot give any evidence relevant to the Repayment Supplement Appeal it is clearly not appropriate to issue a witness summons requiring her to give evidence.

17. The application for witness summonses are therefore dismissed.

Strike Out Application

18. Under rule 8(3) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009:

> The Tribunal may strike out the whole or part of proceedings if–
>
> …
>
> (c) The Tribunal considers there is no reasonable prospect of the appellant's case, or part of it succeeding.

19. Guidance on the exercise of this power was given by the Upper Tribunal (Simon J (as he then was) and Judge Bishopp in *HMRC v Fairford Group plc and Another* [2015] STC 156 at [41]:

> "In our judgment an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). The tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and Three Rivers [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all."

20. As noted above the present case concerns an appeal by Mr Charles against the decision of HMRC to refuse his claim for repayment supplement in respect of the VAT repayment of £35,134.75 VAT for the 09/06 period which he had received on 21 July 2012.

21. The entitlement to repayment supplement is contained in s 79 of the Value Added Tax Act 1994 ("VATA") which, insofar as it applies for present purposes, provides:

> **79 Repayment supplement in respect of certain delayed payments or refunds**
>
> (1) In any case where—
>
> (a) a person is entitled to a VAT credit,
>
> …
>
> and the conditions mentioned in subsection (2) below are satisfied, the amount which, apart from this section, would be due by way of that payment or refund shall be increased by the addition of a supplement equal to 5 per cent of that amount or £50, whichever is the greater.
>
> (2) The said conditions are—
>
> (a) that the requisite return or claim is received by the Commissioners not later than the last day on which it is required to be furnished or made, and
>
> (b) that a written instruction directing the making of the payment or refund is not issued by the Commissioners within the relevant period, and
>
> (c) that the amount shown on that return or claim as due by way of payment or refund does not exceed the payment or refund which was in fact due by more than 5 per cent of that payment or refund or £250, whichever is the greater.
>
> …

22. This case is particularly concerned with the condition in s 79(2)(c) VATA and whether it has been met.

23. The amount shown of input tax shown on the 09/06 return as a claim due by way of refund was £92,984.90. Following the hearing of the MTIC appeal the Tribunal held that the amount Mr Charles was in fact due by way of repayment was £35,134.75 Clearly the difference between the two amounts (which is greater than £250) exceeds 5%. As such, unless Mr Charles can establish that he is entitled to the £92,094.90 input tax claim (as shown on the 09/06 return) the Repayment Supplement Appeal must fail as the condition in s 79(2)(c) VATA has not been met.

24. However, he cannot do so as the input tax shown claim in his 09/06 was the subject of an appeal to the Tribunal and was upheld on appeal to the Upper Tribunal. The Court of Appeal refused permission for a further appeal. That decision is therefore final and cannot be re-opened.

25. In *Foneshops Ltd v HMRC* [2015] UKFTT 410 (TC) Judge Mosedale observed that:

> "29 … the doctrine of ***abuse of process*** is not part of the doctrine of ***res judicata,*** and it is still applicable to tax cases. In ***Littlewoods,*** Henderson J held that HMRC were unable to advance the position that the tax was not due in defending the claim for interest because to do so would be an abuse of process, irrespective of the non-application of issue estoppel to tax cases: [250]. So the fact that issue estoppel does

not apply to tax cases appears to be no bar to a court concluding that re-opening a decided issue is an abuse of process.

30. HMRC relied on *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 for a statement of what abuse of process was:

> "… [abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people" page 536 C per Lord Diplock.

31. The statement in *Hunter* is very general and there might be room for doubt whether it extends to the circumstances in this case. However, the authorities of *Littlewoods* at §250 and *SCF Finance Co Ltd v Masri* [1987] 1 QB 1028 are more specific. Abuse of process appears to be very like issue estoppel save perhaps for flexibility where there are special circumstances:

> "a litigant who has had an opportunity of proving a fact in support of his claim or defence and has chosen not to rely on it is not permitted afterwards to put it before another tribunal….
>
> … it would be an abuse of process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings…" page 1049 C-F, per Ralph Gibson LJ delivering the unanimous judgment of the Court of Appeal, also citing Lord Kilbrandon in the Privy Council that abuse of process "'is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule.' "
>
> And unlike issue estoppel, abuse of process applies to tax cases. So I find that abuse of process does prevent previously litigated issues being re-tried between the same parties in tax cases unless there are special circumstances."

26. Therefore, unless Mr Charles is able to establish that there are any special circumstances, that is the end of the matter. Mr Charles made it clear that there were no special circumstances but contends that the Tribunal should rely on and apply VAT Notice 700/58 rather than VATA. As I have previously explained VAT Notice 700/58 does not have legislative effect. It merely sets out HMRC's view of the law which for the purposes of this appeal are contained in s 79 VATA.

27. It is clear that the sum reclaimed in the 09/06 return exceeds the amount actually repaid to Mr Charles by more than 5%. In the circumstances the Repayment Supplement Appeal does not have any prospect of succeeding.

28. It is therefore struck out.

Appeal Rights

29. 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: 3 October 2016