[2018] UKFTT 93 (TC)

TC06351

Appeal number: TC/2016/02522

PROCEDURE – discovery assessment – whether HMRC should open their case on discovery – yes – whether appellant should be "put to her election" if she wishes to make a submission of "no case to answer" – to be determined by Tribunal panel hearing substantive appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

JANET ADDO **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at Taylor House, Rosebery Avenue, London on 9 February 2018

James Ramsden QC and Conrad McDonnell, instructed by Reynolds Porter Chamberlain for the Appellant

Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. This is my decision on one of the case management issues raised at the hearing on 9 February 2018. The parties are discussing the other issues between themselves and a further hearing on those issues may be needed if agreement cannot be reached.

Background and Ms Addo's application

2. In December 2013, HMRC made discovery assessments under s29 of the Taxes Management Act 1970 ("TMA 1970") on Ms Addo in relation to the tax years 2009-10 and 2010-11. It was common ground between the parties that HMRC have the burden of showing that those discovery assessments were validly made pursuant to s29. That issue (the "discovery issue") requires HMRC to establish two matters: first that an officer of HMRC made a discovery of an insufficiency of tax pursuant to s29(1) of TMA 1970; second that a hypothetical officer of HMRC could not have been reasonably expected, on the basis of a defined corpus of information, to have been aware of that insufficiency when the enquiry windows for the relevant tax years closed.

3. If HMRC cannot discharge their burden on the discovery issue, then Ms Addo's appeal will necessarily succeed. If HMRC can satisfy their burden, Ms Addo would have the burden of establishing the amount of her taxable income for the years in question.

4. On 5 May 2016, Ms Addo applied to the Tribunal for the discovery issue to be determined as a preliminary issue. On 28 November 2016, the Tribunal refused that application, and gave reasons, in a decision that was reported as *Janet Addo v HMRC* [2016] UKFTT 787 (TC) (the "Preliminary Issue Decision").

5. Following the Preliminary Issue Decision, the parties proceeded to comply with the Tribunal's case management directions. Documentary evidence and witness evidence has now been exchanged, although some issues of disclosure remain outstanding. The appeal is not far away from being ready for listing.

6. Ms Addo has now applied for a case management direction that, at the substantive hearing, HMRC should be required to open and put their case on the discovery issue first. Ms Addo's application clearly envisages that she may wish, at the conclusion of HMRC's case on the discovery issue, to make a submission to the Tribunal that HMRC have not discharged their burden so that her appeal should be allowed without any requirement that she present her own case and evidence. I will refer to this as a "submission of no case to answer".

The parties' submissions

7. HMRC objected to Ms Addo's application. In her skeleton argument Ms Nathan made some points as to why it was not appropriate for HMRC to open. However, during the hearing, Ms Nathan confirmed that HMRC's objection was not to the principle of whether they were asked to present their case first. Rather, HMRC's concern was that, if they presented their case on the discovery issue first and on conclusion of that case Ms Addo made a submission of no case to answer, there would be scope for the following procedural prejudice to HMRC:

(1) First, if Ms Addo could use this procedural device, she would be obtaining a determination of a preliminary issue (which the Tribunal had already refused) by the "back door".

(2) Second, it would be unfair, and contrary to the approach applied in the courts, for Ms Addo be permitted to make a submission of no case to answer unless she first confirmed formally that she would not be relying on any evidence in the appeal. In short, to use an expression familiar in the courts, Ms Nathan submitted that Ms Addo should not be permitted to make a submission of no case to answer without first being "put to her election".

8. Mr Ramsden outlined Ms Addo's position as follows:

(1) The Court of Appeal had, in *Hargreaves v HMRC* [2016] EWCA Civ 174 specifically confirmed that it would be appropriate, in a case such as this, for HMRC to present their case first and for a taxpayer who thought that case was inadequate to make a submission of no case to answer.

(2) There is no reason why, if Ms Addo did make a submission of no case to answer, she should be put to her election. Alternatively, putting her to her election would only preclude her from relying on any evidence on the discovery issue. She should not lose her right to present evidence as to the amount of her tax liability (the issue on which she bears the burden) as the price of making a submission of no case to answer on the discovery issue (on which HMRC bear the burden).

(3) Ms Addo is not asking for the determination of a preliminary issue "by the back door". If the Tribunal denied her submission of no case to answer, the hearing would go on. If the Tribunal felt that it needed to hear Ms Addo's evidence before deciding whether HMRC had discharged their burden on the discovery issue, Ms Addo would present that evidence and the hearing would go on. At no point would the Tribunal be under any obligation to determine whether HMRC had discharged their burden on the discovery issue before hearing the entirety of Ms Addo's evidence. Therefore, the matter was entirely within the control of the Tribunal and the well-known risk associated with preliminary issues (of protracted litigation following an appeal on the preliminary issue before full facts had been found in the substantive appeal) would not be present.

Discussion

9. I believe that this issue can be disposed of quite briefly. HMRC do not object to the principle of presenting their case first. I think that they were right not to object to that in principle since ultimately one party has to open and, in circumstances where they both bear a burden of proof on different issues, the order in which cases are presented cannot be determined by reference to burden of proof alone.

10. Moreover, in *Hargreaves v HMRC*, Arden LJ said:

> 41.Mr Goldberg submits that, even if HMRC begin, there is a risk that Mr Hargreaves will be required to open his case on all matters which he has to prove or adduce evidence, including the substantive issues, at one and the same time because his appeal challenges the assessment not only on compliance with the conduct/officer condition but also on a substantive basis. Again he submits that the purpose of the legislation is

> to give the taxpayer the right not to have to present his case under section 29(2) until HMRC has proved that the conduct/officer condition is met.
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> 42.I do not accept either of these submissions. Even though the appeal raises other issues, Mr Hargreaves could at the end of HMRC's case, if HMRC open, submit that there was no case to answer on the conduct/officer condition. If he won on that, there would be no valid [discovery assessment]. If he lost on that, he could then call his evidence on the substantive issues in his appeal, including section 29(2). Of course he would have to plead his case and comply with any directions as to the service of witness statements and disclosure of documents but there is no suggestion that Mr Hargreaves could have some evidence or documents that he could hold back from HMRC in the course of its inquiry or otherwise. As to the purpose of the legislation, that depends on its true interpretation and Mr Goldberg cannot point to any provision which establishes a rule as to which party is to begin in every case.
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> 43.Mr Goldberg then submits that Mr Hargreaves might be directed to open in which case he might have to give evidence on the issues in the substantive appeal first, and the burden on HMRC might have been subverted by the order in which the case had been taken. It is more than a matter of case management. I do not accept this submission. Mr Hargreaves would only be directed to begin where the FTT considered that this was the just way of proceeding, and, while this is a matter for the FTT, my provisional view is that it is difficult to see how it would reach that conclusion in the present case.

11. Those statements are not binding authority as to how I should determine this particular question of case management as Arden LJ was expressing a "provisional view" and makes it clear that ultimately this Tribunal has to decide the most just way of proceeding in the context of this appeal specifically.

12. A case can certainly be made for asking Ms Addo to open the case on the basis that her evidence on what transactions were actually implemented will help to put HMRC's evidence on the discovery issue in context. That was the view taken by this Tribunal in *William Blumenthal v HMRC* [2012] UKFTT 497 (TC). However, this approach runs the risk of diluting the practical effect of the fact that HMRC bear the burden of proof on the discovery issue since, if Ms Addo opens, she has no alternative but to present all of her evidence and submissions (and run the risk of bolstering HMRC's case) even if HMRC's case on the discovery issue is weak. I therefore respectfully agree with Arden LJ that it is appropriate to direct HMRC to open so that Ms Addo at least has the option of making a submission of no case to answer if HMRC's case is obviously weak. I am fortified in that conclusion by the fact that HMRC evidently do not object to the principle of presenting their case first (but focus their objection on what might happen if Ms Addo chooses to make a submission of no case to answer).

13. I agree with Mr Ramsden that merely requiring HMRC to present their case first does not, of itself, amount to the Tribunal determining a preliminary issue by the back door for the reasons he outlined in his submissions summarised at [8(3)] above. I will, therefore, direct that HMRC should open at the hearing by presenting their case on the discovery issue.

14. That, therefore, leaves the question of what, if anything, the Tribunal should do to identify the concerns that Ms Nathan expressed should Ms Addo make a submission of no case to answer on conclusion of HMRC's case on the discovery issue. Again, I think this point can be dealt with briefly. The Tribunal does not need to make any direction at this stage in connection with a submission of no case to answer (which Ms Addo may, or may not, make) in connection with evidence that the Tribunal has not yet seen or heard. I agree with Ms Nathan that there will be some degree of overlap between the evidence on the discovery issue and evidence that Ms Addo might wish to present as to the amount of her tax liability and indeed that was one of the reasons why the Tribunal refused to determine the discover issue as a preliminary issue. I accept, therefore, that the Tribunal may feel that it would be unfair or wrong in principle to determine whether HMRC have discharged their burden on the discovery issue without hearing the totality of the evidence. In addition, I acknowledge the possibility that a Tribunal may not wish to consider a submission of no case to answer without putting Ms Addo to her election. However, I see no reason why I need to make determinations on this issue now when the Tribunal panel hearing the appeal will, having seen much more of the evidence than I have, be better placed to consider the potential difficulties to which Ms Nathan alludes.

15. Ms Nathan submits that irrespective of the detail of the evidence that is presented, it would be procedurally highly irregular for Ms Addo to make a submission of no case to answer without being first required to confirm that she will not be presenting any evidence at all in the appeal (whether related to the discovery issue or otherwise). She therefore asks me to make a direction now that, if Ms Addo makes a submission of no case to answer, she must inevitably be put to her election. In making that submission, she relies heavily on the decision of the Court of Appeal in *Benham Limited v Kythira Investments Limited and another* [2003] EWCA Civ 1794. I do not, however, consider that *Kythira* supports the broad proposition that Ms Nathan advanced in the context of an appeal such as this where HMRC bear the burden on the discovery issue and Ms Addo bears the burden on other issues.

16. *Kythira* considers a situation where, in civil proceedings, a claimant is seeking a remedy which a defendant is resisting, and the claimant bears the burden of proving it is entitled to the remedy. In such a case, the claimant would open proceedings and the defendant may wish to argue that the claimant's case has not disclosed a case to answer. The Court of Appeal identify at least two potential problems that might arise if the claimant makes such a submission without being put to its election by confirming formally that it will not rely on any evidence:

> (1) If the court agrees that there is no case to answer and so dismisses the appeal, that decision might go on appeal. If the decision is reversed (so that a higher court decides that there was a case to answer after all), the appeal would need to be remitted back and, if the defendant retained the option of presenting evidence, the result would be a complete re-hearing with corresponding delay and expense.
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> (2) If the court decides that there is a case to answer (and so goes on to hear the defendant's case and evidence), it is in the invidious position of having expressed an initial conclusion on the case without hearing all the evidence.

17. The requirement that a defendant making a submission of no case to answer is put to its election avoids both these difficulties. It means that the court can determine the matter simply by reference to the claimant's evidence and produce a clear and definitive answer. If the submission of no case to answer succeeds, then the claim is dismissed. If the submission of no case to answer fails it will mean that the claimant has succeeded in establishing a prima facie case and, since the defendant, having been put to its election is not relying on evidence to rebut that prima facie case, the appeal is necessarily allowed. Thus, in the civil courts, following a submission of no case to answer with a defendant being put to its election, the outcome is binary: the claim either succeeds or fails without any requirement for consideration of further evidence. Even if the court's conclusion is reversed on appeal, there will be no need for a further hearing to consider additional evidence. If a superior court's conclusion is that there was a case to answer, the claim will be allowed; if the conclusion is that there was no case to answer it will be dismissed.

18. The Court of Appeal indicate that some exceptions might be appropriate. However, I agree with Ms Nathan that, in a civil claim in the courts that involves a single issue on which one party alone bears the burden of proof, the general rule is that a defendant making a submission of no case to answer must be put to its election. However, the decision in *Kythira* does not answer how, if at all, that principle translates into the present proceedings where HMRC have the burden on the discovery issue, but Ms Addo bears the burden on other issues.

19. The discovery issue is conceptually different from issues on which Ms Addo bears the burden. To succeed on the discovery issue, HMRC will need to show that a particular inspector "discovered" an insufficiency of tax. They will also need to show that a reasonable HMRC officer could not have been aware of that insufficiency on the basis of a set corpus of information provided to HMRC. By contrast Ms Addo would have the burden of demonstrating that the arrangements she entered into did, as a matter of both fact and law, reduce her tax liability in the manner claimed.

20. While the issues on which HMRC bear the burden are conceptually different from those on which Ms Addo bears the burden, there will be some overlap in evidence. The Tribunal gave some examples of possible overlap in the Preliminary Issue Decision and I will not repeat those examples. I can quite accept those areas of overlap might make a Tribunal reluctant to express a view on whether HMRC have discharged their burden on the discovery issue without seeing the totality of both sides' evidence. However, I do not think it follows from this that the Tribunal must necessarily extract from Ms Addo an agreement not to rely on any evidence (including as to issues on which she bears the burden) as the price of making a submission that HMRC have not discharged their burden on the discovery issue. *Kythira* may well be authority for the proposition that Ms Addo must agree not to put forward any evidence on the discovery issue as the price of making a submission that she has no case to answer on that issue. However, I am not satisfied that *Kythira* necessarily requires Ms Addo to forgo her right to rely on any evidence at all (including on matters on which she has the burden) if she wants to submit that HMRC have not discharged their burden on the discovery issue.

21. I do not, therefore, consider that there is binding authority that requires me to make a direction of the kind summarised at [15]. Even if *Kythira* did apply in the way that Ms Nathan suggests, that decision itself indicates that some exceptions are possible. The Tribunal that hears HMRC's case and evidence on the discovery issue will be much

better placed than me to decide whether an exception is appropriate. It will also be much better placed to decide whether there would be procedural unfairness in hearing a submission of no case to answer and whether (and if so to what extent) Ms Addo should be put to her election before making it. For all those reasons, I will not make the direction that Ms Nathan has requested at [15].

Decision and conclusion

22. I direct as follows:

(1) At the hearing of the substantive appeal, HMRC must open by presenting their case on the discovery issue.

(2) On conclusion of HMRC's case on the discovery issue Ms Addo may, if she wishes, submit that HMRC have not discharged their burden of proof on the discovery issue. It will be a matter for the Tribunal hearing the appeal to decide how, procedurally, any such application should be dealt with and whether, and if so how, Ms Addo should be put to her election before making it.

(3) Both parties should proceed on the basis that, following the conclusion of HMRC's case on the discovery issue, Ms Addo must present her case and lead her evidence on issues on which she bears the burden. It will be a matter for the Tribunal hearing the appeal to decide how, if at all, this requirement should be varied in the light of any application of the kind referred to at [(2)] above.

(4) Once Ms Addo has presented her case and evidence on those issues on which she has the burden, HMRC may then lead their evidence on those other issues and both parties may make closing submissions (with the final word going to Ms Addo) in the usual way.

23. I recognise that the directions set out at [22] above may necessitate some changes to the existing case management directions for skeleton arguments and other related matters. I also recognise that my directions set out a high-level principle that may need to be varied because of the particular circumstances of this appeal. Therefore, within 21 days of release of this decision, the parties should write to the Tribunal with their proposals (which they should first seek to agree between themselves) as to further case management directions that are needed to give effect to this decision.

24. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 23 FEBRUARY 2018