TC07879

PROCEDURE - application for agreed issues to be determined at preliminary hearing – Wrottesley v HMRC considered - application granted and preliminary issues set transferred to be determined by the Upper Tribunal

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00786
TC/2019/00787
TC/2019/00788
TC/2019/00789
TC/2019/00791
TC/2019/00798

BETWEEN

HSBC ELECTRONIC DATA PROCESSING (GUANGDONG) LTD
HSBC ELECTRONIC DATA PROCESSING (INDIA) LTD
HSBC ELECTRONIC DATA PROCESSING (LANKA) PRIVATE LTD
HSBC ELECTRONIC DATA PROCESSING (MALAYSIA) LTD
HSBC ELECTRONIC DATA PROCESSING (PHILIPPINES) INC
HSBC BANK PLC **Appellants**

-and-

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

TRIBUNAL: JUDGE GREG SINFIELD

Application decided without a hearing on the papers

DECISION

INTRODUCTION AND BACKGROUND

1. The Appellants (together 'HSBC') have appealed to the First-tier Tribunal ('FTT') against decisions of the Respondents ('HMRC'), dated 22 December 2017, that removed the first five Appellants (together the 'GSCs') from the HSBC VAT Group with effect from 1 October 2013 or, alternatively, with effect from 1 January 2018. HMRC's primary case is that the GSCs have not been established or had a fixed establishment in the UK since at least 1 October 2013 and accordingly, ceased to be eligible to be members of the HSBC VAT Group from that date. HMRC's alternative case is that they had made decisions to remove the GSCs from the HSBC VAT group with effect from January 2018 in exercise of their powers for the protection of the revenue under section 43C(1) of the Value Added Tax Act 1994 ('VATA').

2. The parties have produced an agreed statement of facts and issues. It is not necessary to set out the facts that have been agreed but it is sufficient to note that it is clear that several matters of fact remain to be found by the FTT before it can determine the outcome of the appeals. In the agreed statement, the parties set out the following issues which form the substance of HSBC's appeals and will have to be decided by the Tribunal:

> (1) Are the GSCs, or any of them, "established" or have a "fixed establishment" in the United Kingdom within the meaning of those expressions in section 43A VATA?
>
> (2) Are section 43C(1) and (2) VATA 1994 ultra vires?
>
> (3) Were HMRC entitled to remove the GSCs from the HSBC VAT Group on the grounds that this was necessary for the protection of the revenue?

3. This decision does not determine HSBC's appeals but concerns an application, dated 16 July 2020, by HSBC for the FTT to make directions for the hearing of certain preliminary issues in the appeals on an urgent basis. That application proposed that the FTT should consider two issues. In the course of correspondence, HMRC suggested changes to the descriptions of the issues and proposed two issues in addition to the two originally put forward by HSBC. The parties agreed the wording of four preliminary issues which are set out in an annex to this decision.

4. Although they have agreed the wording of the four issues, HMRC oppose HSBC's application for a preliminary hearing. HMRC also contend that there are no grounds for treating the case as urgent but ask that, in the event that there is to be a preliminary hearing, the case be transferred to the Upper Tribunal ('UT') on the ground that it would minimise any delay. HSBC support that application and seek an expedited hearing before the UT.

5. I set out my reasons below but, in summary, I have decided that there should be a preliminary hearing of the issues identified and agreed by the parties. Further, I have consulted with the President of the Tax and Chancery Chamber of the UT and we both agree that this is a suitable case for transfer to the UT. Whether the hearing of the preliminary issues should be expedited is now a matter for the UT and I make no further comment about it.

6. HSBC also applied to amend their grounds of appeal. HMRC do not object to HSBC's application and, if it is granted, ask for permission to amend their own pleadings in response. In the circumstances, I can see no reason why the parties should not be permitted to amend their pleadings and I grant permission accordingly. HSBC have already served amended grounds of appeal and I direct that HMRC should serve their amended pleadings in response within seven days of the date of release of this decision.

LEGAL PRINCIPLES AND APPROACH

7. The Tribunal is able to direct that an issue in proceedings can be dealt with as a preliminary issue by rule 5(3)(e) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules'). The relevant parts of rule 5 are as follows:

> "(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction
>
> …
>
> (e) deal with an issue in the proceedings as a preliminary issue …"

8. There is no dispute between the parties about the relevant legal principles and the approach to be taken in deciding whether a matter should be determined as a preliminary issue. The parties disagree, however, as to the application of those principles to this case. HSBC's application refers to the decision of the UT in *Wrottesley v HMRC* [2015] UKUT 637 (TCC) ('*Wrottesley'*) which discusses the proper approach to the question of whether to order a hearing of a preliminary issue. HSBC contend that the agreed preliminary issues satisfy the criteria set out by the UT in *Wrottesley*. HMRC also refer to *Wrottesley* but contend otherwise and submit that it is more appropriate for the issues to be addressed at the substantive hearing of the appeals.

9. In *Wrottesley*, the Upper Tribunal set out, at [28], eight key principles to be considered by a tribunal when dealing with an application for a preliminary hearing as follows:

> "(1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.
>
> (2) The power should only be exercised where there is a 'succinct, knockout point' which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a 'knockout' one.
>
> (3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.
>
> (4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way - (3)(a) above.
>
> (5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.

> (6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.
>
> (7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.
>
> (8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly."

10. Rule 28 of the FTT Rules provides for the transfer of cases categorised under rule 23 as Complex cases (which these appeals have been) to the UT as follows:

> "(1) If a case has been allocated as a Complex case the Tribunal may, with the consent of the parties, refer a case or a preliminary issue to the President of the Tax Chamber of the First-tier Tribunal with a request that the case or issue be considered for transfer to the Upper Tribunal.
>
> (2) If a case or issue has been referred by the Tribunal under paragraph (1), the President of the Tax Chamber may, with the concurrence of the President of the Tax and Chancery Chamber of the Upper Tribunal, direct that the case or issue be transferred to and determined by the Upper Tribunal."

PROCEDURAL HISTORY

11. HSBC provided written submissions, dated 21 July 2020, in support of their application of 16 July for a preliminary issue

12. hearing. In those submissions, HSBC only deal with the two issues originally put forward (which are the first and third issues in the annex to this decision). HSBC have never made any submissions in relation to the two further preliminary issues proposed by HMRC.

13. Despite having proposed two issues and agreed the formulation of the other two, HMRC have always maintained that a preliminary issues hearing is not appropriate in this case although their position seems to have shifted during the course of correspondence. As a result, it is necessary to set out the course of the correspondence in order to try to understand HMRC's final position in relation to the application.

14. In their letter of 3 August to the FTT, HMRC stated that they did not consider that the application met the criteria in *Wrottesley* and were not persuaded that this case was suitable for a preliminary hearing. However, HMRC suggested that two other issues (now the second and fourth issues in the annex to this decision) should be considered at any preliminary hearing. HMRC justified the proposed further questions by stating:

> "If heard at a preliminary hearing, these questions would become 'knockout' points; as discussed above, the Appellants intend to put the 'Consultation' and s.84(4D) questions forward in the event the preliminary questions are not decided in their favour. Obtaining a decision on whether these questions are relevant to these proceedings now, will therefore constitute a 'knockout' questions and will spare the parties the additional work of reviewing significant volumes of evidence.
>
> In the event that the Tribunal were minded to refer the case to the Upper Tribunal to hear the preliminary issue, we [HMRC] would be content to discuss further refinement of the questions with the Appellants' representatives."

15. I inferred from their letter of 3 August that HMRC considered that the second and fourth issues in the annex to this decision satisfied the criteria in *Wrottesley* and were suitable for a preliminary hearing.

16. In their email to the FTT of 5 August, HMRC said that they objected to HSBC's application for a preliminary issue in "the terms currently formulated" but considered that a preliminary hearing might be useful and were willing to discuss the re-formulation of the issues among other things. HSBC's advisers welcomed this suggestion in an email of 5 August and said they would seek to agree the two further issues to be considered at a preliminary hearing.

17. In a letter of 17 August to the FTT, HMRC stated that they were continuing to review the revised preliminary issues but, due to leave and non-availability of leading counsel, needed more time to respond. In the letter, HMRC suggested that the FTT could decide whether HSBC's application met the *Wrottesley* tests and, if appropriate, grant time for the parties to agree the final form of those questions. I regarded this as further evidence that HMRC were concerned that, as originally drafted, HSBC's proposed issues did not meet the criteria in *Wrottesley* but that the re-formulated issues might do so. I also noted that there was no suggestion in HMRC's latest letter that the issues proposed by them did not do so. I did not accept HMRC's suggestion that the FTT could reach any concluded view on whether the *Wrottesley* criteria were satisfied and there should be a preliminary hearing before the precise terms of the issues to be considered had been defined.

18. The preliminary issues were subsequently agreed by the parties and submitted to the FTT by HSBC on 18 September. The FTT asked HMRC whether they wished to make any further submissions because, as already explained, HMRC had appeared to accept that the issues that they had proposed met the *Wrottesley* tests and were suitable for a preliminary hearing.

19. In their letter of 25 September, HMRC seemed to row back from their previous position. HMRC stated that, in their view, the FTT would be significantly assisted in determining the issues by having the relevant factual background, rather than dealing with them in the abstract. HMRC also stated that there was a real likelihood that the dispute would not be resolved by identifying preliminary issues of law to be argued about and determined in a vacuum with the result that there would be a duplication of time and costs. I considered it strange, if that were HMRC's position, that they had previously put forward two issues as 'knockout' points for the FTT to consider.

20. In the same letter, HMRC said that if the FTT directed a preliminary issue hearing then HMRC's position was that it should be transferred to the UT (thereby cutting out a layer of appeal) in order to save time and costs. The letter stated that HMRC was not making an application for a transfer of the proceedings to the UT at that stage. HMRC had clearly overlooked the fact, that a transfer to the UT under rule 28 of the FTT Rules is not made on application of a party but on the initiative of the FTT with the consent of the parties. It is clear from the letter that, in the event that the FTT directs a preliminary issue hearing, HMRC has consented to the transfer to the UT. Such a transfer is, however, subject to the Presidents of the FTT and UT agreeing that it would be right to transfer the case or issue.

DISCUSSION

21. Bearing in mind the UT's view in *Wrottesley*, with which I respectfully agree, that the power to order the hearing of a preliminary issue should be exercised with caution and used sparingly, I now consider each principle in *Wrottesley* in relation to the proposed issues.

22. As I have already explained, I have not been provided with any submissions by either party in relation to the second and fourth issues in the annex to this decision which were proposed by HMRC and agreed by HSBC apart from HMRC's view that they are 'knockout' points. In the circumstances, I can only assume that both HSBC and HMRC consider that those issues satisfy the *Wrottesley* criteria and are suitable for preliminary hearing. Nevertheless, I have considered those criteria in relations to all the proposed issues.

Is the issue a succinct knockout point?

23. The question is whether there is a 'succinct, knockout point' which will dispose of the case or an aspect of the case, ie a separate issue in the appeal. HSBC say the first and third issues are succinct 'knockout' points of law involving the interpretation of the legislation and case law which do not require consideration of any evidence. HSBC contend that determination of these issues at a preliminary issue will dispose of or narrow central aspects of the case. HMRC say that HSBC's proposed two preliminary issues will only be knockout points if resolved against HMRC and so will only save the time and costs in the event that HSBC is successful. HMRC accept that, however the issues are resolved, aspects of the case may be simplified if the issues are appropriately formulated.

24. I consider that this *Wrottesley* criterion is satisfied. The parties have agreed four preliminary issues in the appeal. I infer from HMRC's agreement of two issues and proposal of a further two that HMRC considers the issues are all appropriately framed so as to, at best, dispose of aspects of the case or, at least, narrow the issues to be decided at the substantive hearing. Having considered the four issues in the context of the subject matter of the appeal, I agree that they are succinct 'knockout' points of law.

25. I do not accept HMRC's submission that an issue can only be a knockout point if it disposes of the case or an aspect of the case whichever party succeeds on it. In any event, HMRC accept that the issues to be considered at the substantive hearing can be simplified by the findings at a preliminary hearing. I regard such simplification of issues as disposing of some aspects of the case and that is sufficient (subject to materiality) to meet this condition.

Can the point be dealt with quickly?

26. There are two aspects to this question. The first is whether determination of the point will require only a relatively short hearing (as compared to the rest of the case). The second is whether the preliminary issue hearing can be listed without significant delay. As I have already indicated, the question of whether to order expedition of the listing of the hearing is a matter for the UT. Whether or not the hearing is expedited, I see no reason why any hearing of the preliminary issues should not be listed relatively quickly.

27. HSBC have only made specific submissions on this point in relation to the first issue. HSBC submit that the first issue requires no evidence and involves a pure point of interpretation which will be short, relative to the substantive hearing. HMRC have made no submissions at all in relation to this *Wrottesley* criterion.

28. I consider that the four issues, which are all points of law only, are all capable of being decided after a relatively short hearing when compared to the substantive hearing. The parties have not provided any estimate of the likely length of any preliminary issues hearing. It seems to me that it might take more than one day but should not take more than two at the most. Nor have I been given any estimate for the likely length of the substantive hearing with and without any preliminary hearing. From what I know of the issues, it seems to me (and my estimate is necessarily imprecise) that, without a preliminary hearing, the substantive hearing would last at least five days and possibly more. I consider that determining the four issues has the potential to reduce the number of days required for the substantive hearing by at least two days. I also consider that a preliminary hearing should lead to further savings,

which I cannot quantify, in the time required to prepare evidence for the substantive hearing. I consider that such savings are worth having in a case such as this.

Could separate determination of the issue adversely affect determination of the other issues?

29. I must also consider whether determination of the point might constrain the ability of the FTT to determine the remaining issues.

30. HSBC contend that the first and third preliminary issues are free-standing points of principle and there is thus no risk that their separate determination would hinder the FTT in arriving at a just result at a subsequent hearing. HMRC submit that there is a substantial risk that determination of the first preliminary issue could hinder the FTT in arriving at a just result at a subsequent hearing of the remainder of the case because divorcing the facts from the issue will make it more difficult for the FTT. HMRC say that, in order for HMRC's case on the first issue to be properly understood, the Tribunal needs to know the relevant factual context of the arrangements. However, that was HMRC's view before the wording of the first issue was reformulated and agreed. There are no submissions by the parties on this *Wrottesley* criterion in relation to the other preliminary issues.

31. My view is that the first issue is a question of law which turns on the interpretation of legislation and case law. It seems to me to be clear that an early decision on the interpretation would be of great assistance to the parties in preparing for the substantive hearing and to the FTT in reaching a decision on the application of the concept of fixed establishment to the facts. Accordingly, I conclude that this *Wrottesley* criterion is satisfied in relation to all the proposed issues.

Is there a risk of greater delay over all?

32. This is a concern of HSBC which is why they seek an expedited hearing of the preliminary issues. HMRC are also concerned that a preliminary hearing before the FTT will delay the appeal. HMRC say that if the FTT directs that there should be a preliminary hearing then these delays would be minimised if any preliminary issues hearing were transferred to the UT.

33. The substantive appeals have not yet been listed for hearing by the FTT. It is inconceivable that the appeals will be heard before 2021 and probably, given present difficulties, not before the spring or early summer. I acknowledge that it is important to minimise delay in fully disposing of the appeals, however, it seems to me that a preliminary issues hearing would not be likely to delay that by more than a few months. There is, of course, the possibility of an appeal of the preliminary issue decision but that possibility also exists if there is a full hearing without a preliminary issue hearing so the length of proceedings over all is unlikely to be extended by much, if at all. Accordingly, I agree with HSBC that this is a neutral point, which in any event needs to be balanced against the benefits of a preliminary issues hearing. In my view, the possibility of delay is outweighed by the advantages that should accrue from a preliminary issue hearing especially if that takes place in the UT.

Could a preliminary hearing mean no further hearing will be required?

34. The parties acknowledge that determination of a preliminary issue is unlikely to dispose of all the issues in the appeals so a further (but shorter) hearing will be required. It is clear from [28(6)] of *Wrottesley* that there is no requirement that a preliminary hearing must be determinative of the entire proceedings. The UT only stated that the FTT must consider whether there was any possibility that determination of the preliminary issue could mean that

there was no need for a further hearing. That is theoretically possible but unlikely in this case, however, I do not consider that is fatal to HSBC's application.

Would a preliminary hearing reduce time required for preparation or substantive hearing?

35. HSBC contend that a preliminary issue on the first issue would significantly cut down the cost and time required for both pre-trial preparation and the substantive hearing itself. HMRC do not make any submissions in relation to this point.

36. I have already noted that that the substantive hearing might be shortened by one or perhaps two days by having a preliminary hearing. I also agree with HSBC that a significant amount of time in preparation for the substantive hearing should be saved. I accept that this *Wrottesley* criterion is met.

Is a preliminary hearing consistent with the overriding objective?

37. In considering whether to deal with an issue as a preliminary issue, the FTT must seek to give effect to the overriding objective of the FTT Rules to deal with cases fairly and justly (rule 2(1)). That objective includes dealing with the case in ways that are proportionate to the complexity of the issues and avoiding delay so far as compatible with proper consideration of the issues. Neither party has suggested that directing that there should be a preliminary hearing in this case would be inconsistent with the overriding objective and I cannot see how any such suggestion could be made. I consider that, in the circumstances of this case, directing that the four issues which are set out in the annex to this decision be dealt with as a preliminary issue is consistent with the overriding objective in the FTT Rules in that it is proportionate and should not unduly delay the final resolution of the whole appeal.

CONCLUSION AND DIRECTION

38. Having weighed up the various factors above, I consider that there should be a preliminary hearing of the four issues which are set out in the annex to this decision. I also consider that this is a suitable case for transfer to the UT because the parties seem to agree that an appeal from any decision of the FTT on these points would be inevitable and the UT's binding guidance on the law and its application should be of great assistance and save time in any further substantive hearing by the FTT. The President of the Tax and Chancery Chamber of the UT, Mr Justice Zacaroli, concurs that the preliminary issues should be transferred to the UT. Accordingly, I direct, under rule 28(2) of the FTT Rules, that the preliminary issues set out in the annex to this decision be transferred to and determined by the UT.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

39. 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.

JUDGE GREG SINFIELD

CHAMBER PRESIDENT

RELEASE DATE: 12 OCTOBER 2020

ANNEX
AGREED PRELIMINARY ISSUES

1) How is the concept of two or more bodies corporate being "established" or having a "fixed establishment" in section 43A of the Value Added Tax Act 1994 ('VATA'), which it is common ground purports to implement the words "any persons established in the territory of that Member State" in Article 11 of Council Directive 2006/112/EC (the 'Principal VAT Directive'), to be interpreted?

2) Is the question of whether the UK discharged its obligation to consult the VAT Committee relevant? If it is relevant what would be the consequences of any breach of the obligation to consult?

3) Are the measures which a Member State may adopt under the second subparagraph of Article 11 of the Principal VAT Directive to prevent tax evasion or avoidance through the use of Article 11 limited to those needed to prevent tax evasion and avoidance caused by an abusive practice under *Halifax* principles, or any concept of avoidance arising from *Direct Cosmetics Limited and Laughtons Photographs Limited v Customs and Excise Commissioners* C-138 and C-139/86?

4) Is section 84(4D) VATA engaged in relation to these appeals and, if so, what are the factors that the Tribunal must take into account in considering whether or not HMRC decided on an appropriate date?