Neutral Citation: [2023] UKFTT 00107 (TC)

Case Number: TC08724

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/18705

Procedure - Application by Respondents to amend Statement of Case – Quah Su-Ling v Goldman Sachs International applied - Application dismissed

Heard on: 1 February 2023
Judgment date: 03 February2023

Before

TRIBUNAL JUDGE BROOKS

Between

THE CBD FLOWER SHOP LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Max Schofield of counsel, instructed by Nicholls and Nicholls

For the Respondents: Natasha Barnes of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing system.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND

3. This appeal concerns sales of CBD products by the appellant, The CBD Flower Shop Limited, and whether these sale should be zero-rated as food products[1] as the appellant contends or standard-rated for VAT as the respondents, the Commissioners for His Majesty's Revenue and Customs ("HMRC") argue.

4. That question was initially raised by the appellant in a letter, dated 28 February 2020, to HMRC in which it explained that it sold cannabinoid products, commonly referred to as CBD products, and that the EU Novel Food Catalogue listed CBD products as a Novel Food. The letter continued:

> "Based on the above, we believe that the sale of this product should for VAT purposes be regarded as the sale of Food and in consequence should be Zero Rated."

The letter concluded by asking HMRC whether this was agreed.

5. Further correspondence between HMRC and the appellant followed concluding in a decision by HMRC, on 8 October 2021, to issue assessments in the sum of £430,473.36 (which were upheld on 17 November 2021 following a review) on the basis that the CBD products by the appellant sold should be standard-rated.

6. The appellant appealed to the Tribunal on 29 November 2021 and, in accordance with the Tribunal's direction of 10 March 2022, HMRC filed and served its statement of case on 5 May 2022. On 27 May 2022 the appellant filed its list of documents along with a witness statement from its director Shirley Wood. HMRC filed its list of documents on 15 June 2022.

7. Case Management Directions were issued by the Tribunal on 26 July 2022 under which the parties were required to provide statements of witnesses on whose evidence they wished to rely by 26 August 2022 and listing information with a view to fixing the date of the substantive hearing between 24 October 2022 and 24 February 2023. Although no hearing date has been fixed a hearing bundle has been provided by HMRC in accordance with those Case Management Directions under which it was due by 23 September 2022.

8. On 18 August 2022 HMRC applied to amend its statement of case attaching a draft of the amended statement of case on which it now seeks to rely. This includes a new section titled "Illegality" which is introduced at amended paragraph 45. This also refers to arguments in the new section titled "Law relating to making supplies of cannabis" at amended paragraph 21.

9. The appellant opposes the application and contends that it has been ambushed with a substantive new argument, which I shall refer to as the illegality issue, encapsulated, the

[1] Pursuant to Item 1 of Group 1 of Schedule 8 to the Value Added Tax Act 1994 (see in particular the excepted items 3 and 4 and items 4 – 7 overriding the those exceptions)

appellant says, by the amended paragraph 24.5 of the draft statement of case attached to the application.

10. This states:

> "24.5: "zero-rating does not apply to illegal supplies as the power to enact zero-rating could only be exercised for "clearly defined social reasons" which would not include conferring a tax benefit on illegal acts. It is for the Appellant to demonstrate that its supplies are legal."

LAW

11. There is no doubt the Tribunal has the power, under rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, to grant HMRC permission to amend the statement of case.

12. Rule 5 provides:

> (1) Subject to the provisions of the 2007 Act [ie the Tribunals, Courts and Enforcement Act 2007] 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—
>
> (a) …
>
> (c) permit or require a party to amend a document; …

13. Under rule 2(3) of the Procedure Rules the Tribunal must, when exercising any power under the FTT Rules, "seek to give effect to the overriding objective" to deal with cases "fairly and justly".

14. The principles to be applied in considering an application to amend were summarised by Carr J (as she then was) in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) ("*Quah*") as follows:

> "36. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.
>
> 37. Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities: *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.
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> 37. Drawing these authorities together, the relevant principles can be stated simply as follows:

> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

15. *Quah* was applied by the Upper Tribunal (Newey J and Judge Bishopp) in *Denley v HMRC* [2017] UKUT 340 (TCC). In *Asiana Limited v HMRC* [2019] UKFTT 267 (TC) ("Asiana") the Tribunal (Judge Mosedale), having referred to the principles summarised in *Quah* said, at [15]:

> "… the law on pleadings is clear: the appellant must state what are its grounds of appeal. If it does not, it cannot rely on those grounds. And if it wants to rely on a new grounds of appeal, as it does here, it must apply for permission to amend. And *Quah* and *Denley* set out the principles the Tribunal will consider in determining such an application."

16. With regard to lateness and prejudice, in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd & Ors* [2015] EWHC 1345 (TCC) Coulson J observed, at [19], that:

> "(a) The lateness by which an amendment is produced is a relative concept (*Hague Plant*). An amendment is late if it could have been advanced earlier,

> or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.
>
> …
>
> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (*Swain-Mason*). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (*Archlane*)."

17. Clearly the principles set out in the above authorities apply equally to an application by HMRC to amend its statement of case as they do to an appellant wishing to amend its grounds of appeal.

DISCUSSION AND CONCLUSION

18. Ms Natasha Barnes, for HMRC, contends that the application to amend should be allowed as it was made promptly and the amendments raise both an important issue and have a real prospect of success. She further contends that the proposed amendments cause no prejudice to the appellant in circumstances when the final hearing has not been listed, rather it is HMRC who would be prejudiced if prevented from raising the illegality issue

19. For the appellant, Mr Max Schofield contends that the application, which he says does not have real prospect of success, is late and prejudicial to appellant, should be dismissed with costs.

20. It is therefore necessary to consider whether the amendments sought have a real prospect of success, the timing of the application and whether it was late and if so why in addition to any prejudice to HMRC if the application does not succeed and to the appellant if it does.

Real Prospect of Success

21. As Carr J noted, at [36] in *Quah*, an application to amend will be refused if it is clear that the proposed amendment has no real prospect of success, with the applicable test being that for summary judgment under CPR Part 24, ie the applicant has to have a case which has a realistic, as opposed to "fanciful", prospect of success and is better than merely arguable.

22. In essence the argument advanced by Ms Barnes in support of the amendment is that the Misuse of Drugs Act 1971 provides that all parts of the cannabis plant, save for the mature stalk, fibre produced from the mature stalk, and seed, are treated as a controlled drug. This includes the flowers of the cannabis plant regardless of their content of tetrahydrocannabinol. The supply of those parts of the cannabis plant that are treated as a controlled drug is unlawful unless authorised by a licence issued by the Secretary of State for the Home Department, or unless a medical exemption applies. She points out that the appellant has never stated that it is in receipt of such a licence or that an exemption applies.

23. Mr Schofield contends that HMRC is seeking to introduce an entirely new case by way of an amendment to the statement of case. However, I consider that this is something more properly addressed in relation to the timing of the application or whether it is prejudicial to the appellant rather than in regard to the merits. Moreover, even if Mr Schofield is right it does not necessarily follow that the amendment does not have a realistic prospect of success especially, as Ms Barnes pointed out, the illegality issue is something that could have been raised by the Tribunal at the hearing.

24. Having heard argument on the merits of the amendment, I consider that on balance, their prospects can properly be described as being more than fanciful and better than merely arguable.

Timing

25. The application to amend the statement of case was made after HMRC had made its decision, issued the assessment and filed and served its original statement of case. It also post dates the Case Management Directions and the provision of witness evidence by the appellant although this was provided sooner than required by the Case Management Directions.

26. The "good reason" advanced by Ms Barnes to explain why the application to amend was made three months after the original statement of case was filed and served was that the law surrounding making supplies of parts of the cannabis plant, and the circumstances in which such supplies are legal, is not within the normal expertise of HMRC. For HMRC to properly consider the position it was necessary to speak with colleagues in the Drugs Licensing and Firearms Unit within the Home Office having who were first approached on 1 June 2022. It took time for those enquiries to be concluded and for HMRC to amend its statement of case in light of the limited availability of the parties (including counsel) over the summer.

27. However, this does not explain why HMRC did not make such enquiries of the Home Office before reaching its decision and issuing the assessment in October 2021 or drafting the original statement of case which it filed and served on 5 May 2022. In the absence of such an explanation it would seem that there was no reason to prevent HMRC from seeking advice from its Home Office colleagues sooner.

28. As such although no hearing date has been lost, so the present case cannot be described as "very late" as described by Carr J in *Quah*, given that the amendment could have been advanced earlier and lead to the appellant revisiting its evidence and having to provide additional witness statements, it is clearly late, in the sense envisaged by Coulson J in *CIP Properties* with the result that the appeal cannot be listed within the hearing window stated in the Case Management Directions.

Prejudice

29. Ms Barnes contends that there will be prejudice to HMRC if it is not permitted to amend its statement of case and argue the illegality issue but that the appellant would not be prejudiced if the amendment allowed. She submits that there is no reason why this discrete issue cannot be determined on the basis of the existing evidence which has already been filed by the appellant about the nature of the products.

30. Mr Schofield submits that the amendment advances a new case which the appellant has to answer at a late stage in proceedings and, unlike the appellant, HMRC have had the benefit of the statutory framework for assessments, reviews and statements of case in the normal course for appeals and ought, but have failed to comply with this thereby prejudicing the appellant.

31. In relation to prejudice, as with the application itself, as Carr J observed in *Quah*, it is necessary to strike a balance between injustice to the appellant and other litigants if the amendment is allowed and injustice to HMRC if the application is refused. But, as Coulson J observed in *CIP Properties* prejudice to HMRC is just one factor to be considered and will be a "much less important element of the balancing exercise" where it has come about as a result, as it has in this case, of its failure to obtain advice in relation to the illegality issue sooner.

CONCLUSION

32. Having carefully considered the application, I have come to the conclusion that, on balance and for the reasons above, particularly its timing and resulting prejudice to the appellant the application must be dismissed.

DIRECTION

33. Given my conclusion it is necessary, for this matter to progress to a hearing without further delay, to amend the Case Management Directions issued by the Tribunal on 26 July 2022 (the "Directions"). To that end I direct:

(1) Direction 3 of the Directions be deleted and replaced as follows:

> By no later than 28 days from the date hereof, the parties shall submit to the Tribunal an agreed statement detailing:
>
> (1) The expected number of persons attending the hearing for each party, to assist the Tribunal in identifying an appropriate venue;
>
> (2) Confirmation that all participants for that party will attend the hearing centre for the face to face hearing of the appeal or, if not, the party will submit an application with reasons for a participant to be allowed to join the proceedings by video and complete a video hearing attendance form for that participant;
>
> (3) Where are participant is a witness, whether the witness will attend entire hearing only attend to give his or her evidence;
>
> (4) Whether permission is sought for transcript writers to attend the hearing (parties should note that permission is only normally given if the transcripts will be provided to all parties and to the panel);
>
> (5) How long the hearing is expected to last (together with a draft timetable if the hearing is expected to last four days or more);
>
> (6) Whether reading time should be allocated to the panel in addition to the time estimated for the hearing in (5) above, and if so how long; and
>
> (7) Two or three **agreed** periods of time for the hearing which are within or shortly after a hearing window starting **11 April 2023 to 31 December 2023** and each of which is at least as long as the longest time estimate for the hearing provided under (5) above) **OR** if the parties are unable to agree such periods then each party must provide their dates to avoid for a hearing in the same hearing window.
>
> Shortly after the date for compliance with this direction, the Tribunal will fix the date of the hearing despite any non-compliance with (7) above. A request for postponement on the grounds that the date of the hearing is inconvenient is unlikely to succeed if the applicant did not comply with (h) above or if, having provided dates for the hearing, the applicant then failed to keep the dates clear of other commitments.

(2) All remaining Directions of the Directions remain extant.

COSTS

34. The appellant sought its costs in this application in any event which was resisted by HMRC.

35. Although CPR PD17 provides that "a party applying for an amendment will usually be responsible for the costs of and arising from the amendment", this appeal was categorised as a standard case under rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. As such the Tribunal may only make an award for costs, under rule 10(1)(b) of

the Procedure Rules, if it "considers that a party or their representative has acted unreasonably in bringing defending or conducting the proceedings."

36. Mr Schofield contends that by failing to obtain specialist advice before making its decision and producing the original statement of case HMRC have acted unreasonably in the conduct of the proceedings. However, I agree with Ms Barnes that even though I have concluded after hearing argument that the statement of case should not be admitted, I do not consider that it was unreasonable for it to have made the application.

37. I therefore dismiss the appellant's application for costs.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

38. 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: 03rd FEBRUARY 2023