Appeal numbers: FTC/38/2010
[2010] UKUT 458 (TCC)

RIGHT TO APPEAL TO UPPER TRIBUNAL – Error on point of law – Reinstatement of withdrawn appeal – Whether appeal had in fact been withdrawn – Consequence of First-tier Tribunal's refusal to reinstate

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ST ANNES DISTRIBUTORS LTD **Appellant**

- and -

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

TRIBUNAL: SIR STEPHEN OLIVER QC

Sitting in public in London on 13 October 2010

Prem Sharma, Director, for the Appellant

Philip Moser, counsel, instructed by the general counsel to HMRC, for the Respondents

DECISION

1. This appeal by St Annes Distributors Ltd ("St Annes") is brought with the permission of Judge Demack ("the Judge"). It is against his direction of 16 February 2010 ("the February Direction"). The February Direction described the matter as "an application by St Annes Distributors Ltd for the reinstatement of the appeals, both having been withdrawn by e-mail of 7 September 2009." St Annes had made two appeals against decisions of HMRC, one in 2006 and the other in 2008: both are the subject matter of this Upper Tribunal hearing. The decision appealed against is the Judge's refusal to reinstate following a message from St Annes dated 24 September 2009.

2. I have formed the view that the e-mail of 7 September 2009 was not "a written notice of withdrawal" as required by rule 17(1)(a) of the Tribunal Procedure Rules. Consequently the subsequent message from St Annes of 24 September 2009 confirming that they "still wished to proceed with the above Tribunal reference", should not have been treated as an application "for their case to be reinstated" for the purposes of rule 17(3) and (4).

3. Mr Sharma, the present sole director of St Annes, represented St Annes at the hearing before the Judge and at the present hearing before the Upper Tribunal. He had written the message of 24 September 2009 to the First-tier Tribunal which that Tribunal took to have been an application to reinstate. It has not been his case that the 7 September e-mail did not operate as a notice of withdrawal. My view is that it obviously did not; it was a without prejudice offer to withdraw if HMRC would make no claim for costs.

Short summary of the events leading to the appeal to the Upper Tribunal

4. In 2006 and 2008 St Annes appealed against decisions of HMRC: the former was against an assessment in the sum of some £59,000 and the latter appeal was against HMRC's refusal of a £4.2m claim for input tax. The decisions of HMRC were taken on the grounds that both matters concerned Missing Trader Intra-Community frauds about which St Annes knew or ought to have known.

5. As and when HMRC issued their Statement of Case they notified St Annes that costs would be sought if the appeal in question was dismissed.

6. On 7 September 2009 the legal representatives to St Annes informed the Tribunal that they were no longer able to act.

7. The e-mail of 7 September 2009 (taken by the First-tier Tribunal to have been a written notice of withdrawal under rule 17) was sent by a Mr Kuldip Singh, the then sole director of St Annes. The e-mail reads as follows:

> "Dear Sirs
>
> WITHOUT PREJUDICE SAVE AS TO COSTS
>
> To purpose that these appeals to be withdrawn with no directions as to costs under Rules 17 Tribunal Procedure rules.
>
> We look forward to receiving your response to this proposal as soon as possible. Please respond to the above e-mail thank you.
>
> Yours faithfully
>
> Kuldip Singh
> Director"

That e-mail is reproduced exactly as written. I read it as saying - "To propose that these appeals be withdrawn with no directions as to costs under Rule 17 … . We look forward to receiving your response to this proposal … ."

8. Within six days Kuldip Singh had resigned as director and his place was taken by Mr Prem Sharma, the principal shareholder in St Annes.

9. Eight days later (on 24 September 2009) Mr Sharma wrote to the Tribunal confirming that St Annes wished to proceed. The message reads as follows:

> "I am writing to you to confirm that we still wish to proceed with the above Tribunal references."

10. The Tribunal treated Mr Sharma's letter of 24 September as an application for reinstatement of the appeals and the application was listed before the Judge for hearing on 25 January 2010. HMRC were represented by counsel and Mr Sharma represented St Annes.

11. On 16 February the Tribunal issued a reasoned Direction refusing St Annes' "application". That was the February Direction.

12. On 15 March St Annes applied in writing to have the February Direction set aside.

13. On 13 April, following a sitting on 26 March, the Judge issued a further Direction ("the April Direction") dismissing the set aside application, deciding not to review the February Direction and, treating the set aside application as an application for permission to appeal against the February Direction, granted that application for permission to appeal. The April Direction was released on 13 April 2010. There is no record of who, if any one, attended the sitting. The Direction reads as follows:

"Of its own motion THIS TRIBUNAL DIRECTS THAT the Appellant's application for the Direction of 16 February 2010 to be set aside is dismissed.

BUT, after deciding not to review the direction as no error of law is apparent, exercises the power contained in rule 2 of the Tribunal Procedure Rules and directs that its said application be treated as an application for permission to appeal against the said direction.

AND the Tribunal grants that application."

The positions of the parties at the Upper Tribunal hearing

14. HMRC contended that the Judge had had no authority to grant permission to appeal. The Judge elected not to review its original decision on the basis that "no error of law is apparent". It followed from section 11(5)(d)(i) of Tribunals Courts and Enforcement Act 2007 (TCEA) that he had hereby made an "excluded decision" which, by reason of section 11(1) TCEA, was subject to no further right of appeal. Moreover the Judge's reliance on rule 2 of the Tribunal Procedure Rules as the power enabling him to grant permission to appeal was misplaced. Rule 2 could not, said HMRC, supersede the specific provisions of the TCEA, section 9(5) of which grants the power to refer applications to review to the Upper Tribunal, but only in circumstances where the original decision has been set aside and not where it has expressly not been set aside (as in the present case).

15. HMRC contended in the further alternative that, even if the Upper Tribunal were to rule that it had jurisdiction to hear the appeal, it could only be an appeal under section 11 TCEA, which refers only to "any point of law arising from a decision made by the First-tier Tribunal". Here however the Judge found expressly in the April Direction that no error of law was apparent. Thus, it was argued, the last possible avenue of appeal, being section 11(1), was also unavailable in any event, regardless of whether or not the decision were properly to be characterised as "excluded" under section 11(5).

16. Mr Sharma attacked the February Direction on various grounds. The Judge, he asserted, had wrongly taken into account a claim (made by HMRC but subsequently withdrawn) that he had been the director of the supplier company in the chain. And he emphasised that the Judge's reliance on St Annes' delay in prosecuting the appeal as a reason for dismissing the application to withdraw was misplaced; HMRC had been responsible for a large part of the delay. Mr Sharma admitted that he had known that Mr Singh was sending a message of 7 September 2009. (I note though that Mr Sharma was not copied into the e-mail addressed to the Tribunal.)

17. I will deal with those arguments later. At this stage I shall focus on the question of whether the 2006 and the 2008 appeals were withdrawn and, if not, what is the status of the February and April Directions.

18. Withdrawal of an appeal has immediate consequences. Where the appeal is against an assessment or an amendment to a self-assessment, the amount assessed thereupon becomes a recoverable debt due to HMRC. Where the appeal is against a refusal of a claim., withdrawal permanently deprives the Appellant the benefit of the claim. Those consequences may affect the Appellant, its other creditors, its shareholders (if it is a company) and anyone with some other interest in the outcome of the appeal (e.g. a party seeking to recover costs). The Rules recognise the significance of withdrawals. Rule 17(1) and (2) cover the procedure for withdrawal; rule 17(3) and (4) give a right to apply for reinstatement. Rule 17(1) and (2) read as follows:

> "(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case –
>
> > (a) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or
> > (b) orally at a hearing.
>
> (2) The Tribunal must notify each of the party in writing of a withdrawal under this rule."

Withdrawal by written notice (such as the case here) is made by a two stage process. The withdrawing party is required to serve a "written notice of withdrawal". The Tribunal must then notify "each other party" in writing of the withdrawal. In tax appeals the "other party", if it is HMRC, will immediately be put on notice of the recoverable debt or the abandoned claim. And where withdrawal "ends the proceedings", rule 10(4)(b) gives the other party the right to make a costs application.

19. The circumstances surrounding Mr Singh's e-mail of 7 September 2009 were these. St Annes' solicitor representatives had, as already noted, withdrawn and notified the Tribunal of this on 7 September. St Annes were at risk at having to pay HMRC's past and future costs of the appeals, not to mention their own costs. Mr Singh, according to paragraph 21 of the February Direction, "had withdrawn the appeals because he was not being paid by [St Annes] and did not want to be involved in them".

20. The costs burden was potentially large and no doubt with that in mind Mr Singh set about getting a message through to HMRC via the Tribunal. He was no lawyer but seems to have understood the significance of a "without prejudice" offer. The phrase "to purpose that these appeals to be withdraw" must (as already observed) have meant "to propose that these appeals be withdrawn with no direction as to costs" and "we look forward to receiving your response to this proposal". There is no mention of any response from HMRC, being the only party with an interest in claiming costs from St Annes.

21. The 7 September 2009 e-mail cannot therefore be construed as "a written notice of withdrawal" within rule 17(1)(a): still less can it be read as a "notice of a withdrawal made under rule 17 … which ends the proceedings" (within the meaning of rule 10(4)(b)).

22. That reading of the 7 September 2009 e-mail is wholly consistent with Mr Sharma's message of 24 September which says – "I am writing to you to confirm that we still want to proceed with the above Tribunal references". Mr Sharma (the major shareholder in St Annes) had, it will be recalled, been appointed director on 16 September following Mr Singh's resignation the previous day. Rule 17(3) and (4) entitle a withdrawing party to apply for the case to be reinstated so long as the application is in writing and received by the Tribunal within the 28 day "cooling off" period. Mr Sharma's letter does not read as a reinstatement application; it reads as a confirmation to the Tribunal that the appeals are still being prosecuted.

23. The non-existence of any withdrawal and the First-tier Tribunal's failure to recognise this has, I think, flawed every purported step in the "proceedings" since September 2009.

The Tribunal Proceedings

24. Following receipt of Mr Sharma's message of 24 September 2009, the Tribunal listed the matter as an application to reinstate both appeals.

25. On 25 January 2010 the Judge heard the listed application. Mr Sharma represented St Annes and HMRC were represented by counsel. In his reasoned Direction dated 16 February the Judge recited the history of the two appeals, pointing out the applications for extensions of time made by HMRC and the delays occasioned by St Annes. He recorded HMRC's arguments that St Annes' application had no merit: that the Tribunal could have had no confidence in St Annes' diligence in pursuing the appeal: that St Annes had neither served any evidence nor lodged accounts with Companies House: and that St Annes was now insolvent on account of HMRC's non-payment of the amounts claimed by St Annes. Regarding the chances of success, the Judge observed that the appeal could only succeed if Mr Singh were willing to attend the hearing and give evidence of knowledge and means of knowledge. He noted that HMRC had said that Mr Sharma had been a director of one of St Annes' suppliers; that, HMRC's counsel had said, amounted to a situation of a supplier taking over a customer's appeal and was something the Tribunal should look at with care.

26. The reasons for the February Direction are contained in paragraphs 27-30 and I will return to these later.

The set aside application

27. On 15 March 2010 St Annes applied to have the February Direction set aside. The application emphasised that delays in both appeals had been occasioned by both

St Annes and HMRC. The application pointed out that HMRC had been wrong to rely on Mr Singh's statement that Mr Sharma had been a director of the supplier companies; that had not been the case. Moreover, it was pointed out that Mr Sharma had been advising on the transactions giving rise to the repayments to them. His evidence would therefore have a bearing on the outcome of the appeal.

28. St Annes' application pointed to rule 6(5) of the Rules. This tells the user to whom a direction has, as here, been made (i.e. the February Direction) to apply for a direction which sets aside the first direction. Reliance on rule 6(5) explains, I infer, why St Annes did not apply to appeal against the February Direction.

Does the Upper Tribunal have jurisdiction in this matter?

29. The April Direction granted permission to appeal "against the said direction". The "said" direction was the February Direction refusing St Annes' application to reinstate. The April Direction recites that the Judge has considered whether to review the February Direction. This follows the procedure in rule 40(1) of the Rules which reads:

> "(1) On reviewing an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 41 (review of a decision)."

The Judge decided not to undertake a review of the February Direction "as no error is apparent". This follows the procedure in rule 41(1) which directs that "the Tribunal may only undertake a review of a decision … (b) if it is satisfied that there was an error of law in the decision". The Judge then gives permission to appeal against the February Direction.

30. The section 11(1) TCEA provides:

> "(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from the decision made by the First-tier Tribunal other than an excluded decision."

An excluded decision, for present purposes, is defined in section 11(5)(d) namely –

> "A decision of the First-tier Tribunal under section 9 –
>
> (i) to review, or not to review, an earlier decision of the tribunal."

Section 9(1) provides that the First-tier Tribunal may review a decision made by it on a matter in the case other than an excluded decision and, by subsection (5), it may in the light of the review set the decision aside.

31. Reverting to the April Direction, the first thing it does is to dismiss St Annes' application (made in their letter of 15 March 2010) for the February Direction (not to reinstate the appeals) to be set aside. Section 38(1) enables the Tribunal to set aside a decision which disposes of proceedings (which was the effect of the February Direction) if this is in the interests of justice and one of the conditions in paragraph (2) is satisfied. Condition (c) is that "there has been some other procedural irregularity in the proceedings." I have already explained why, in my view, the reinstatement application was inappropriate and had no legal validity from the start. I am aware that Mr Sharma has not taken the point that in law St Annes never withdrew its appeal. But his implied acceptance of the withdrawal of the act of applying for reinstatement cannot correct fundamental error, i.e that Mr Singh's e-mail of 7 September 2009 was "a written notice of withdrawal". I am satisfied therefore that the February Direction contained an error of law. The error was the procedural irregularity of refusing the application to reinstate the two appeals that had never been withdrawn. It follows that the dismissal, in the April Direction, of the set aside application was also wrong in law.

32. Because the Judge was not satisfied that there had been an error of law in the February Direction, he did not undertake a review; consequently the set aside power given by section 9(4)(c) TCEA was not available to him.

33. This brings me to two questions. First, does this Tribunal (the Upper Tribunal) have jurisdiction on the strength of section 11(1) TCEA on grounds that a point of law arises from the relevant decision? Second, was the relevant decision an excluded decision?

34. The April Direction does not relate the grant of permission to appeal to an issue of law. HMRC say that the decision not to review the February Direction because no error of law appeared means that the Judge ruled himself to be "functus" and therefore without authority to grant permission to appeal. Whether that be technically right or not is, I think, beside the point. The point is that St Annes has been given permission to appeal. The absence of a point of law may mean that the Upper Tribunal is bound to reject the appeal; but it does not destroy the permission to appeal.

35. There being jurisdiction over St Annes' appeal, this Tribunal may address the legality of the proceedings before the First-tier Tribunal. And, for reasons I have already given, the decision of the First-tier Tribunal is wrong.

36. The April Direction contains a decision not to review the February Direction. That, taken in isolation, is an unappealable excluded decision within section 11(5)(d) TCEA. The present appeal, however, is against the February Direction refusing the reinstatement application. So long as that is "on a point of law" (see section 11(2)), it is appealable.

37. Section 12(2)(b) enables the Upper Tribunal to remake the decision where it finds that a decision involved the making of an error on a point of law. The First-tier

Tribunal erred in law in dismissing the application to reinstate where, as here, no withdrawal of the appeal had been made and consequently the message regarded by the Tribunal as a reinstatement application (Mr Sharma's message of 24 September 2009) was really a confirmation that St Annes would continue with the appeals. The correct decision is that the February Direction is to be set aside because the appeals had never been withdrawn.

38. Assuming everything I have said so far is wrong and that the issue before the Tribunal is whether the February Direction refusing the reinstatement application is wrong in law, I think it was. The Judge applied the wrong test. He identified three factors to be taken into account in determining whether to allow an application to reinstate. These were the past conduct of the Appellant in dealing with the appeals, the chances of the appeals succeeding and the degree of prejudice to HMRC if the application to reinstate were allowed. The Judge wound up his reasoning for refusing the reinstatement application with these words:

> "… I have to balance the fact that the Tribunal Rules are devised in the public interests to promote the expeditious despatch of litigation and must be observed. In my judgment, the public interests would not be served if I were to grant this particular application."

It is a fact that St Annes had, at earlier stages of both appeals, failed to comply with any directions and had given no reasons for non-compliance. That behaviour, said the Judge, did not support the application. He observed that the chances of St Annes succeeding would depend on the evidence they produced and Mr Singh (the director in position when the transactions took place) was understood to be reluctant to be involved. Regarding the prospect of success, he assessed these "at best evens and probably less".

39. Those tests may well be applicable in the context of an exercise of discretion whether to extend time for appealing or to allow the lodging of evidence out of time or to strike out an appeal for want of prosecution. There are powers in the rules of the First-tier Tribunal that were installed in the public interest "to promote the expeditious despatch of litigation" – to quote the Judge. But rule 17 was not devised for that purpose. I have already observed that the withdrawal of an appeal has serious implications; where, as here, it involves a company giving up a monetary claim, there could be implications for the company's creditors. The scheme of rule 17(1) and (2) is to give an Appellant the unilateral right to withdraw the appeal without permission of the Tribunal and without the intervention of HMRC. The formalities for withdrawal are required to enable the Tribunal and anyone with an interest in the outcome of the proceedings to satisfy themselves that a notice describing itself as a "notice of withdrawal" means what it says. Rule 17(3) and (4) are there to protect the Appellant who for some reason has, deliberately and in good faith, withdrawn his appeal but, for an acceptable reason (e.g. because he has insufficient funds to continue the fight or has come to see the implications of withdrawal), has applied to reinstate the appeal within the 28 day cooling off period. Rule 17 is not a weapon to enable the Tribunal to cull unmeritorious appeals of non-cooperative traders. That may be a

subsidiary consideration in refusing the application to reinstate; but it cannot be the principal reason.

40. The right approach to a rule 17(3) reinstatement application is to proceed on the basis that the Rules give an Appellant who has withdrawn his appeal the right to apply for reinstatement. If the Appellant is using the right to apply for an abusive purpose then the Tribunal may refuse it. It may, for example, be part of a delaying strategy on the part of an appellant to withdraw and then to apply for reinstatement.

41. Here, a Judge with wide experience of missing trader intra-community-related appeals has assessed the chances of success at quite a high level. Mr Singh might be a reluctant witness, but according to Mr Sharma Mr Singh was acting under Mr Sharma's instructions and Mr Sharma could himself give evidence. Mr Sharma said that he knew from 7 September 2009 that Mr Singh had submitted the application. But to judge from the wording of Mr Singh's message, it seems unlikely that he had written it under the eye of Mr Sharma.

42. In my view the events of 7-24 September 2009 should (if the 7 September message really was a notice of withdrawal) be understood as a misplaced withdrawal which, as soon as Mr Sharma saw the implications, he took steps to put right. Both Mr Singh and Mr Sharma were acting in good faith. Their action came within the spirit of rule 17 and the Tribunal's exercise of its power to allow the application to reinstate falls well within the object that rule 17(3) was designed to achieve.

43. For those reasons also, I would allow the appeal.

SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL

RELEASE DATE: 21 December 2010