TC03922

Appeal number: TC/2010/07613, TC/2010/07615 & TC/2010/07617

Procedure – application to be added as party under Rule 9(3) of Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 by Her Majesty's Government of Gibraltar on grounds it was uniquely placed to assist Tribunal on issue in proceedings relating to application of European Treaty rights as between Gibraltar and the UK – application to be added as party refused – directions made allowing written submissions to be filed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANNE FISHER **Appellants**
STEPHEN FISHER
PETER FISHER

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at Bedford Square, London on mornings of 29 and 30 January 2013

Michael Llamas QC, chief legal adviser to Her Majesty's Government of Gibraltar ("HMGoG"), and Oliver Marre, Counsel, for the applicant

Stephen Brandon QC, Rory Mullan and Harriet Brown, Counsel, instructed by James Cowper for the Appellants

David Ewart QC, Oliver Connolly and Barbara Belgrano, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

1. HMGoG made its application to become a party to the proceedings on 24 January 2013 shortly before the substantive proceedings in the above referenced appeals were due to begin. Those proceedings were heard by a Tribunal panel of two. The decision on the substantive matter (which concerned the application of anti-avoidance legislation in s739 ICTA 1988 to a transfer of a betting business to Gibraltar) contains the full background to the appeals and is set out in a separate document which is released to the parties and published on the same date as this decision.

2. HMGoG's interest in the proceedings is limited to only one of the issues which arises in the appeals which is whether the freedom of establishment set out in Article 49 of the Treaty on the Functioning of the European Union is engaged by UK nationals seeking to exercise their rights of establishment in Gibraltar ("the Gibraltar question").

3. The application was heard over the course of two half hour sessions on the mornings of 29 and 30 January before the start of the substantive hearing (29 January was a reading day). I also heard submissions from the appellants, who supported HMGoG's application to become a party on the basis that HMGoG would be in better position to address the wider aspects of the relationship between Gibraltar and the UK, and from HMRC, who objected to the application. The applicant also applied for permission to make written submissions to the Tribunal. HMRC had indicated they did not object to this application and a draft direction had been prepared by the parties to that effect. Before the start of the second day of the substantive hearing I gave an oral direction that HMGoG's application to be joined as a party to the above proceedings was refused. This decision sets out the reasons as at that time for that direction.

4. In accordance with Rule 9(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("Tribunal Procedure Rules") I considered whether to permit HMGoG to provide submissions or evidence. Taking account of the draft direction agreed between the parties I made a separate direction which permitted HMGoG to make written submissions.

5. As a matter of broad principle it is not in contention that it is possible for someone other than the parties to the original litigation to intervene in proceedings and there are ample case-law examples of persons being allowed to participate in proceedings as an intervenor. HMGoG referred to the examples of *Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicasiones de Cuba SA (British Telecommunications plc intervening)* [2007] EWCA Civ 662, *R v The Department of Health ex parte Source Informatics Limited* which contemplated interventions by trade associations, and *B.F Cadman v Health & Safety Executive* (Case C-17/05) where the Equal Opportunities Commission submitted observations to the ECJ.

6. The context in which HMGoG's proposed intervention arises is under Rule 9 of the Tribunal Procedure Rules and whether the Tribunal should exercise its discretion to add HMGoG as a party.

7. The First-tier Tribunal's ability to direct the substitution or addition of parties is set out in Rule 9. This provides so far as is relevant:

> "…
>
> (3) A person who is not a party to proceedings may make an application to be added as a party under this rule.
>
> (4) If the Tribunal refuses an application under paragraph (3) it must consider whether to permit the person who made the application to provide submissions or evidence to the Tribunal.
>
> …"

8. HMGoG argue they are uniquely placed to help with the Gibraltar question and that its intervention is necessary in the interests of justice. It argues that the interests of Gibraltar may be directly affected to a significant degree by the decision of the Tribunal, and that it has a fundamental financial, constitutional and economic interest because of the implications of finding that Gibraltar is a part of or is deemed to be part of the UK. Its concern was that if it was not added as a party to these proceedings it would not have a right of appeal should the appellants or HMRC decide not to appeal the decision. Furthermore HMGoG's concern is that if it is not a party to these proceedings, then should a reference to the CJEU be made, HMGoG would not be able to be represented in those proceedings before the CJEU.

9. The appellants support the application in that HMGoG would be in better position to address the wider aspects of the relationship between Gibraltar. HMRC object to it. In contrast to other sorts of cases (e.g. VAT supply cases where the recipient as well as the supplier has an interest in the taxability of the supply) HMGoG does not have an interest in the tax dispute. Becoming a party raises various procedural implications. It means that various documents have to be provided to the party and more importantly that the applicant could appeal the decision even if neither the appellants nor HMRC wanted to appeal it. If it turned out that a reference was necessary, the Tribunal could consider making HMGoG a party at that stage.

10. I was not persuaded that the applicant had a sufficient interest in the proceedings between the appellants and HMRC to become a party to the proceedings in the substantive matter before the Tribunal.

11. If the substantive decision was not appealed, the prejudice to the applicant at worst would be that a Tribunal decision would be published with propositions of law with which the applicant disagreed. The decision would not be binding on anyone but the parties. It would be of only persuasive value in other First-tier tribunal tax cases raising similar issues (of which none were known to engage the point) and at best persuasive in any other courts or tribunals which had to consider the issue of EU free movement rights as between the Gibraltar and the UK. The situation is to be contrasted I think with situations where the party seeking to be added has a direct

financial interest in the outcome of the proceedings such that it would be unjust not to allow them to participate in the proceedings and to appeal the decision even if the other parties did not.

12. If the substantive decision were appealed by HMRC or the appellants it would in principle be open to the applicant to make an application to become a party to the appeal. (Rule 9(3) of the Upper Tribunal's rules (The Tribunal Procedure (Upper Tribunal) Rules 2008) as subsequently amended) provides an identical route to becoming a party to the First-tier Tribunal Procedure Rules).

13. The fact that the question of whether submissions or evidence should be directed to be filed is a mandatory point for the Tribunal to consider under Rule 9(4) in the event of a refusal to join the applicant as a party serves to highlight that there are alternative and more proportionate tools for making use of the applicant's expertise and insights and that is something I take into account in weighing up whether the applicant should be made a party. I do not agree with the applicant's argument to the effect that because HMRC had indicated that they were open to written submissions being filed this amounts to an admission that an application to become a party should be granted. The status and functions entailed with being a party and of being allowed to make written submissions are quite distinct under the rules.

14. As at this point in the proceedings it was not necessarily clear that the Tribunal would need to engage with the issue of the Gibraltar question in order to make its decision. To the extent the applicant's concern was about participating in a reference to the CJEU it was not clear that a reference would be necessary, or that even if it were, that by virtue of not being a party to the proceedings from the outset as opposed to at a later stage the applicant would, as it argues, thereby be precluded from making observations before the CJEU.

15. I also observe that even if it were to prove the case that the CJEU did not allow observations where the person seeking to make them was not a party right at the outset of the proceedings, without further examination of the issue, it would not be clear why that would be a reason in and of itself to make the applicant a party to proceedings. If it was the case that the CJEU did not allow observations where someone was not a party at the outset then it must be assumed that there was a reason for this. Making an applicant a party when they would not otherwise have sufficient interest to be a party would appear to me to run the risk of subverting whatever rule or practice gave rise to any limitations imposed on the CJEU on limiting who could make observations in the first place.

16. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 14 August 2014