



TC05108

Appeal number: TC/2015/04983

VAT – Application for a direction that an appeal should be sisted (stayed) pending the outcome of a final decision of the High Court or the final decision of another Tribunal case -Tribunal Rules 2 and 5 - The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 - Application refused.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FIRST STATE INVESTMENT MANAGEMENT (UK) LTD Appellant

- and -

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

TRIBUNAL: JUDGE RUTHVEN GEMMELL WS

Sitting in public at George House, 126 George Street, Edinburgh on 6 May 2016

Adam Rycroft, Solicitor, for the Appellant

Mr Andrew Young QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. By application dated 6 October 2015, First State Investment Management (UK) Ltd (“FSIM”) sought to have their appeal dated 14 August 2015, against a decision by HMRC on 30 January 2013, confirmed on review on 17 July 2015, sisted, or stayed, for a period ending the earlier of six months from the date of the application or 56 days after the date of the final decision in *United Biscuits (Pension Trustees) Ltd and Another v The Commissioners of Her Majesty’s Revenue & Customs* (“UBPT”) which has been raised in the High Court Of Justice, Chancery Division, (“the High Court”) under claim number HC14A01221. The application is opposed by HMRC.

2. HMRC’s decision was to reject a claim of £5,091,813 of output tax charged on supplies of investment management services provided by FSIM to defined benefit pension funds covering the period 1 April 2009 to 30 June 2012.

3. The application came before the Tribunal with a request by FSIM that the direction, if granted, should set the period of six months as commencing on the date of the Tribunal’s direction and not from the date of the application.

4. FSIM also made a “secondary application” seeking an alternative direction that their appeal and any directions relating to it be sisted/stayed pending the outcome of, what FSIM say is “a substantially similar” application made by the taxpayer in, *Wheels Common Investment Fund Trustees Ltd and Others v Revenue and Customs Commissioners* (C-424/11) (“WCIF”).

5. Of relevance to the parties’ submissions, was that the UBPT case may be determined by reference to some issues, thought to be similar, which are to be considered by the Supreme Court in *Investment Trust Companies (in liquidation) v HMRC* [2015] EWCA Civ 82 (“ITC”). ITC is listed for hearing before the Supreme Court on 17-19 May 2016 which based on recent precedent may result in a final judgement being available by end July or early August 2016.

Legislation

6. See Appendix 1

Cases referred to

7. See Appendix 2

Background

8. FSIM’s claim arose from a decision of the Court of Justice of the European Union (“CJEU”) in *JP Morgan Fleming Claverhouse Investment Trust Plc v Revenue and Customs Commissioners* [2008] STC 1180 (“Claverhouse”) which considered that fund management services provided to a particular collective investment vehicle, in the form of an investment trust company (a closed-ended investment company),

should benefit from the exemption, contained in the UK legislation, applying to other collective investment vehicles in the form of authorised unit trusts and open-ended investment companies.

5 9. The issue in FSIM’s claim is whether the reasoning in Claverhouse applied also to occupational pension funds and whether those funds or, more particularly, supplies to those funds, should fall within the scope of the exemption applying to “special investment funds” in Article 135(1)(b). That issue was decided on 7 March 2013 in WCIF when the CJEU determined that occupational pension funds do not fall within the definition of “special investment funds” in terms of Article 135(1)(b).

10 10. On 18 March 2014, UBPT issued proceedings in the High Court seeking repayment of the VAT charged on supplies of pension fund management services received by them during the period from 1974 to 2014 inclusive. UBPT claimed that the supplies at issue were exempt from VAT pursuant to the exemption contained in Article 135(1)(a) of the VAT Directive and/or by virtue of the European law principle of fiscal neutrality. The exemption at issue, referred to in Article 135(1)(a) and in UBPT, applies to “insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents”. Part of UBPT’s claim is that the UK statute law charged VAT on supplies of investment management to pension funds by persons other than those carrying on insurance business, whilst treating those same supplies by persons carrying on insurance business as being exempt from VAT (hereafter the “neutrality/insurance issues”).

15 11. By the time FSIM lodged its notice of appeal, following the CJEU decision in WCIF, it was clear that the basis on which their claim was put forward, namely relying on similar reasoning to that accepted in Claverhouse, could not be maintained and, accordingly, FSIM in its notice of appeal challenged HMRC’s decision to reject the claim on different grounds which essentially rely on the neutrality/insurance issues in UBPT.

30 12. At the hearing it was confirmed that the UBPT case had not yet been decided by the English High Court nor by the Tribunal judiciary and may be determined by reference to different reasoning which itself is to be considered in ITC, including amongst other issues whether restitution can only be claimed by an immediate payee.

35 13. Following the CJEU judgement on 7 March 2013, WCIF made an application to stay their case pending the outcome of UBPT. This was objected to by HMRC on the same grounds put forward before this Tribunal in FSIM save for one additional ground. That additional ground is that such application is premature until or if WCIF has been granted permission to amend its grounds to bring it into line with those relied upon by UBPT.

40 14. That application came before Judge Sinfield on 22 January 2016 who concluded that there was insufficient information before him to enable him to determine the application either for a stay or any direction relating to the grounds of appeal.

15. The judgement by Judge Sinfield was not produced at the hearing but it was said by the parties that the essential information sought by Judge Sinfield concerned the current status of UBPT, including details of the case as currently pleaded and the directions currently applying. HMRC agreed to provide further information to the Tribunal and to WCIF in relation to the current status of UBPT by 4 April 2016 but WCIF and HMRC have now agreed to stay proceedings and extend the time limit of the direction concerning the provision of information for a further three months. None of the information requested by Judge Sinfield to be produced by 4 April 2016 was produced to this Tribunal.
16. Accordingly, whereas FSIM had amended their notice of appeal to take account of the CJEU decision in WCIF, WCIF have not yet amended its claim or notice of appeal before the Tribunal and HMRC are “likely” to oppose such an amendment being made.

FSIM’s Submissions

17. FSIM say that the Tribunal, in exercising its discretion to issue a direction, is to have regard to the overriding objective contained at Paragraph 2(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) which requires the Tribunal to deal with cases fairly and justly. Paragraph 2(2) of the Rules recognises that dealing with cases fairly and justly includes: “(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the party; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; and (e) avoiding delay, so far as compatible with the proper consideration of the issues”.
18. FSIM say the Tribunal is required, on that basis, to balance issues such as the possibility that a direction issued, in the terms requested, will cause delay, which is they say in essence the principal ground for HMRC’s objection, against other considerations such as the requirement for proper consideration of the issues and dealing with the case in ways which are proportionate to the importance of the case, which is what FSIM principally relies on in support of applications.
19. FSIM say that a proper consideration of the issues requires the Tribunal to acknowledge that the issue in UBPT is whether or not the UK is in breach of the requirements of EU law in its application of the exemption Article 135(1)(a). FSIM say that the proceedings in UBPT issued in March 2014 are, it is assumed, well advanced in having put forward detailed reasoning in connection with this issue and having identified the evidence necessary to support the claim. FSIM say that a decision of the High Court on the issue will be binding on this Tribunal and at the very least highly persuasive. Accordingly, it is in the interests of justice for the Tribunal to allow FSIM’s application for stand over, pending the outcome of UBPT.
20. FSIM say that the complexity and cost proportionality considerations will not be met if the issue is progressed in both the High Court and the Tribunal and that if the

Tribunal proceed to hear the issue there is a real likelihood of the issue being progressed before the High Court has progressed UBPT.

21. FSIM say it would be “improper for the Tribunal to make a determination that the Tribunal has exclusive jurisdiction in connection with the issue to the exclusion of the High Court”. The proper course, they say, would be to proceed with the issue only if the High Court refuses jurisdiction at which time the Tribunal ought properly to list a hearing of all affected appeals with a view to identifying the party most suitable to be identified as a lead case. The Tribunal should not hear the High Court case “by proxy”.

22. FSIM say “it is clear that UBPT could be resolved if the Supreme Court overturns the decision in ITC and any delay whilst awaiting the outcome of ITC is unlikely to be significant as it is listed to be heard in May 2016. Accordingly, they say, it will not be long before it is known whether UBPT will be derailed by ITC or not.

23. In relation to the “secondary application”, FSIM say that the application has previously come before a differently constituted Tribunal; that there is “a high degree of similarity” between the FSIM and WCIF appeals and that both cases arise from “essentially the same claims”. The only real difference, which FSIM say is not, in any case, material is that WCIF has not yet amended its claim through the terms of its notice of appeal. FSIM say the reason for this is because of the timing of FSIM’s appeal which had the knowledge of the CJEU judgement in WCIF whereas, obviously, the WCIF appeal predated that CJEU judgement.

24. FSIM say that there is no reason why HMRC should not accept amendments to the WCIF’s claim and notice of appeal, as they did not object to FSIM having made amendments between notice of their claim and their notice of appeal. FSIM say that the distinction between two circumstances would “appear to be a thin point”.

25. FSIM say that Judge Sinfield required further information in order to identify whether WCIF should be stood over pending the outcome of UBPT and if this Tribunal is not minded to allow a stand over behind UBPT it should issue case management directions such as those in WCIF so as to ensure a coherent approach to those whose claims are, or could be, determined.

26. FSIM say that HMRC are “getting ahead of themselves” by their contention that if the High Court determined that the First-tier Tribunal has exclusive jurisdiction to determine the issue of VAT exemption, the UBPT case would require to be sisted/stayed pending the First-tier Tribunal determining that issue. FSIM say that is a decision for the High Court to make.

27. FSIM say there may be a requirement for factual evidence, particularly in a case dealing with fiscal neutrality to show and establish the similarity of services, in addition to legal submissions. They say to allow the issue to progress concurrently before the High Court and before the Tribunal creates a real risk that if the Tribunal

proceeds to hear the issue in FSIM, there is a real likelihood that the issue will also be progressed before the High Court in UBPT.

HMRC's Submissions

28. HMRC say that the appeal in UBPT is by pension trustees who pay VAT on services supplied to them by non-insurers and who seek restitution and/or damages from HMRC with reference to various legal formulations. HMRC's defences include amongst other things that (a) the pension trustees, as end customers, have no direct claim against HMRC; (b) in the event that the customers have a potential direct claim against HMRC, the pension trustees must establish that their suppliers made a Section 80 of the Value Added Tax Act 1994 claim before the First-tier Tribunal and have failed to recover the amounts now claimed by the pension trustees; (c) the relevant supplies were standard rated for VAT purposes, and (d) the pension trustees claims for the period prior to Q2 2010 are time-barred. HMRC say that there is a fundamental difference between FSIM, which is a claim by a taxpayer, and UBPT, which is not raised by a taxpayer but by an end user. In addition, any claim of restitution and/or damages requires to be based on English common law.

29. HMRC say that there is some commonality as to the extent of the applicability of an exemption from VAT but that UBPT also has a number of complex issues and is in any event dependent on the ITC case which does not deal with the common issue. A decision from ITC may not be available within the next few months and although there is no reference to CJEU in the ITC case at this time, it may be that the Supreme Court may be bound to make such a referral.

30. HMRC said that even if the ITC case judgement is released within the next three months it would need to be considered by the parties in UBPT to chart its effect and may or may not resolve the issues between them.

31. HMRC say no substantial further progress has been made in UBPT because the parties are waiting for the ITC decision. HMRC say that when and if HMRC revisit the pleadings in UBPT, it is likely they will introduce a challenge to the jurisdiction of the High Court to determine the VAT liability of supplies made to the pension trustees on the basis that such matters are within the exclusive jurisdiction of the First-tier Tribunal.

32. HMRC say that UBPT involves a number of distinct and complex legal issues relating to title to sue, jurisdiction, time-bar, restitution and damages which are not present in the FSIM appeal and that any of the UBPT issues may cause delay to the progress of that case.

33. HMRC say that the High Court may determine that the First-tier Tribunal has exclusive jurisdiction in which case the UBPT case in the High Court would require to be stayed pending the First-tier Tribunal determining that issue. In any event, that issue is not currently before the High Court and whether or not it will be may depend on the outcome of ITC.

34. HMRC say that FSIM's submissions rely on a number of hypothetical outcomes and when looking at time and cost factors for progressing FSIM, costs are not likely to be as great and progress may be quicker if the FSIM case is heard in the First-tier Tribunal.

5 35. HMRC say that WCIF is not on all fours or the same as the FSIM case. HMRC are likely to oppose the WCIF claim to amend its notice of appeal and if WCIF are prevented from amending their notice and grounds of appeal, that will be the end of the matter. That is not the position with FSIM.

10 36. HMRC say that the issue in FSIM is relatively straightforward and that is whether or not there is an exemption under Article 135(1)(a), which is essentially a point of law. There is likely to be very limited factual evidence required in the FSIM appeal as it would be primarily determined on legal submissions. Consequently, the legal issues can be determined by the First-tier Tribunal with a minimum of legal costs incurred and that the issue would be more effectively determined than in UBPT
15 which covers many other issues.

37. HMRC say the decision by the High Court on a VAT exemption issue would not be binding on a Scottish tribunal, being a First-tier Tribunal sitting in Scotland. Such a first instance decision would be persuasive on such a Tribunal but less so than an appellate decision.

20 38. HMRC say that it would be premature to sist the FSIM appeal on the chance that WCIF might catch up with it; that FSIM can always make a subsequent application if WCIF or UBPT or ITC provide any major changes. At this time there is uncertainty in WCIF because of UBPT, and uncertainty in UBPT because of ITC, so that it is inappropriate to sist/stay FSIM at this time.

25 **Decision**

39. Each of the parties' submissions depend on a number of assumptions of what the Supreme or High Courts may or may not decide in relation to the UBPT and ITC cases and whether or not the Tribunal in WCIF will allow WCIF to "catch up" with FSIM.

30 40. The notice of appeal FSIM is based on a claim against HMRC based on Article 135(1)(a). The appeal in UBPT has, as one of its grounds, also an appeal against Article 135(1)(a). Notwithstanding that FSIM may have started out on the same basis as WCIF, and no evidence of either basis was submitted, the fact is that at this time the FSIM appeal is under Article 135(1)(a) and WCIF's appeal is not.

35 41. The parties in UBPT are Scottish companies, with Scottish Companies House registered numbers, with their registered offices in Edinburgh who have brought the claim in the High Court in England against HMRC. FSIM is also a Scottish company, with a Scottish Companies House registered number, with a registered office in Edinburgh and its appeal is to the First-tier Tribunal in Scotland.

42. The Scottish registered companies being the parties in UBPT have made multiple claims which, unless there is a change in jurisdiction, will, by virtue of where the claim has been lodged, be decided by the law of England and Wales at the first instance. WCIF's appeal is before the First-tier Tribunal in London and the relationship and rules of precedent of courts in England and Wales differ from a case before a First-tier Tribunal sitting in Scotland, as was stated by HMRC pleadings.

43. UBPT, may, therefore, be viewed differently by a First-tier Tribunal sitting in England, from one sitting in Scotland.

44. Judge Sinfield's assessment of whether or not to stay proceedings in WCIF was, it is assumed, based on the Notice of Appeal before him, which is different to FSIM's, and in light of the status of a High Court decision on a First-tier Tribunal sitting in England, behind which he was asked to stay the WCIF appeal.

45. One issue the High Court may consider is whether it has jurisdiction to determine the VAT liability of supplies made to UBPT, or whether they should decline to exercise any jurisdiction, or whether some matters fall within the exclusive jurisdiction of the Tribunal, which in turn might result in the UBPT case being stayed in the High Court.

46. FSIM is a case where the Notice of Appeal is clear and which has been accepted by HMRC. I can see no relevance as to whether HMRC should or should not be prevented, as FSIM suggests, from objecting to a change of the grounds or claim contained in the Notice of Appeal of WCIF because they did not object to a change in the claim of FSIM prior to lodging a Notice of Appeal. In any event WCIF have not changed their claim in the Notice of Appeal at this time.

47. The Rules ask the Tribunal to also consider avoiding delay and I am not persuaded that awaiting a decision on UBPT with a number of very complex issues, albeit that one of them relates to the issue of Article 135(1)(a), and which in turn depends on the decision in another case, ITC, which may "derail" UBPT, will avoid delay.

48. In considering the complexity of the issues in FSIM and UBPT and the likely issues in ITC, the issue in FSIM appear, as HMRC suggests, relatively straightforward which is whether FSIM benefits as a supplier, and not an end user as in the case of UBPT, from the neutrality/insurance issue? Taking the claims in UBPT as a whole, they seem sufficiently different to FSIM and it is not known with any certainty that WCIF will have similar grounds of appeal to FSIM.

49. Investment management requires principally the provision of a service based on agreed investment principles, objectives, attitude to risk and often tax considerations. I tend towards HMRC's submission that the FSIM appeal is likely to be determined largely on legal issues, rather than issues of fact, which could be dealt with by the Tribunal with a minimum of legal costs and avoid delay. One of the principal tasks of the First-tier Tribunal in the structure of tax appeals is to establish the facts, if that became necessary to any large extent.

50. The UBPT case is for all reasons noted above a more complex case than FSIM. It deals with the issue from the position of an end user, rather than a taxpayer; is a first instance case before the English High Court which may have implications as to its binding or persuasive authority on a First-tier Tribunal sitting in Scotland; is currently delayed awaiting the decision of the Supreme Court, when it is by no means certain it will be decided and a judgement published within the timescales suggested by FSIM, and the UBPT case may or may not be referred to the First-tier Tribunal depending on the High Court's decision on jurisdiction. All these factors lead to a great deal of uncertainty which may cause delay and given the lack of overall similarity in the appeals of UBPT and FSIM, there is likely to be no detriment to the proper consideration of the issue in FSIM if it proceeds to the First-tier Tribunal.

51. FSIM is not dealing with the same issue, at this time, as WCIF and there is no certainty that a change of claim will be allowed in WCIF. In any event, WCIF has a different relationship with any UBPT decision, which is yet to be made, to those of FSIM and this Tribunal sitting in Scotland.

52. Accordingly, the application to have a direction that the appeal in FSIM is sisted/stayed for a period of six months from the date of this direction or up to the date of the final decision in UBPT is refused. Similarly, the application to seek a direction that the appeal and any directions relating to the FSIM appeal be sisted/stayed pending the outcome of WCIF, which I do not consider to be a substantially similar application at this stage, is also refused.

53. As this decision can be appealed, as stated below, I am not making any directions at this time.

54. 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 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.

W RUTHVEN GEMMELL WS

TRIBUNAL JUDGE
RELEASE DATE: 19 MAY 2016

Appendix 1

Council Directive 2006/11EC

- 5 Chapter 3
Exemptions for other activities
Article 135

1. Member States shall exempt the following transactions:
- (a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents;
 - (g) the management of special investment funds as defined by Member States;

Appendix 2 - Cases – not all referred to

- 15 *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners and the Attorney General* [2006] UKHL49; [2007] STC1
- Wheels Common Investment Fund Trustees Ltd and Others v Revenue and, Customs Commissioners* Case C-424/11
- 20 *Fiscale eenheid PPG Holdings BV cs te Hoogezand v Inspecteur van de Belastingdienst/Noor/kantor Groningen* (Case c-26/12), [2014] STC 175
- ATP Pensions Service A/S v Skatteministeriet* (Case c-0464/12) STC 2145
- 25 *Investment Trust Companies (in Liquidation) and Others v The Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ 82