[2018] UKFTT 552 (TC)

TC06726

Appeal number: TC/2016/03030

VALUE ADDED TAX – Procedure – Application by appellant to postpone – Application by HMRC to strike out on basis that no reasonable prospect of success because none of the arguments in appellant skeleton served late were in original grounds of appeal and no application made to amend the grounds – appellant seeking to show that one original ground was encompassed by argument in skeleton – appeal struck out.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAINPAY LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
DEREK ROBERTSON

Sitting in public at City Exchange, Leeds on 1 August 2016

Mr Gary Brothers of Independent Tax & Forensic Services LLP for the Appellant

Ms Jennifer Newstead Taylor, instructed by the Solicitor and General Counsel, HM Revenue & Customs, for the Respondents

DECISION

1. This was an application by Mainpay Ltd ("the appellant") to seek a postponement of the hearing of its appeal against an assessment made on the appellant of Value Added Tax in the sum of £164,886 covering the quarterly periods 01/11 to 01/13.

2. The hearing was set down for the 1 and 2 August in Leeds. The postponement sought was that the case should start on 2 August and continue into 3 August. As a result of directions made by Judge Morgan on 27 July the hearing date was not changed and any applications were to be made at the start of the hearing.

3. We therefore sat on 1 August, heard the parties, and with their consent issued a "short" decision in accordance with Rule 35(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules").

4. The appellant then requested a "full" decision which this is.

Facts

5. In view of the nature of the hearing it is unnecessary to give more than a brief outline of the facts, which we take from the skeletons.

6. The appellant is an employment bureau in the business of placing temporary workers with clients.

7. The Accident and Emergency Agency ("AEA") was a customer of the appellant.

8. In the course of a COP 8 investigation the appellant's agents provided documentation relating to the appellant's workers, and the respondent ("HMRC") asked why there was no VAT shown on invoices to AEA.

9. The first enquiry letter on that topic was sent on 3 July 2013 and the first response was received on 28 July 2014. After further exchanges, HMRC raised a "best judgment" assessment in the sum of £164,866 for the period 01/11 to 01/13. The assessment was upheld in a review and on 27 July 2015 the appellant, acting through Mr Gary Brothers of Independent Tax and Forensic Services LLP, appealed to the Tribunal against the decision to assess. For a reason we do not understand and do not need to go into, the appeal was not registered by the Tribunal until 2016.

Grounds of Appeal

10. It is important to set out the grounds of appeal put forward in that notice drafted by Mr Brothers.

11. The first ("best judgment") ground was that assessment was not made to "best judgment" and, as such, the assessment raised is inaccurate.

12. The second ("*Rapid Sequence*") ground was that the assessment is not "competant" (*sic*) "because it ignores the clarity given to the matter subject to assessment afforded from the "Rapid Sequence" Tribunal case". That is a reference to *Rapid Sequence Ltd v HMRC* [2013] UKFTT 432 (TC) (Judge Herrington and Mrs Gable).

13. The third ("out of time") ground was that the assessment was out of time as it appeared that HMRC had raised their assessment more than one year after "sufficient evidence of fact" was available to them.

Subsequent events

14. On 2 March 2017 HMRC issued their Statement of Case. This responded to all three grounds of the appellant's grounds of appeal.

15. On 28 March 2017 the Tribunal Registrar issued directions in standard from for a standard case. This required, among other things, skeletons with details of statute and authorities to be exchanged and sent to the Tribunal, no later than 14 days before the date fixed for the hearing.

16. On 24 May 2018 the Tribunal listed the appeal for a two day hearing in Leeds on 1 and 2 August 2018.

17. On 10 July 2018 the appellant, through Mr Brothers' firm, made an application to postpone the commencement of the hearing to 2 August, or if not possible, to the next available date. The reasons were said to be that the appeal raised important and difficult questions on (1) the scope and application of the EU law principle of legitimate expectation (2) the scope of the exemption for medical services and (3) the relevance of HMRC providing exemption for the supply of qualified nurses but not doctors, and whether that concession is consistent with EU law.

18. The appellant had attempted to find counsel for the hearing, but the one they had found (Mr Michael Firth) was unavailable on 1 August.

19. On 13 July 2018 HMRC objected to any postponement on the grounds that:

(1) A previous listing for 20 and 21 June 2018 followed the parties' supply of available dates to the Tribunal, but the appellant applied for a postponement due to a family bereavement. Following this cancellation available dates were supplied on 11 April which included 1 and 2 August, and the case was listed on 8 May 2018. No explanation was supplied why appellant's counsel was unavailable or why 1 and 2 August was no longer suitable when the appellant had previously agreed to those dates.

(2) HMRC's counsel was not available on 23 August and had started preparation of the case.

20. In a direction of 20 July 2018 Judge Harriet Morgan declined to allow the postponement, as the appellant had had ample time to organise representation and she agreed with HMRC that no reasons had been provided. She directed skeletons to be served by 23 July 2018.

21. On 23 July 2018 HMRC served their skeleton and a witness statement of an officer of HMRC, Mr Reilly. The skeleton dealt with, and only with, the three grounds of appeal in the Appeal Notice.

22. Following the service by the appellant of its skeleton argument on 25 July 2018 HMRC said that in view of the arguments being put forward in the skeleton for the first time the appellant should apply to amend its grounds of appeal.

23. On the same day Mr Brothers pointed out that the appellant had abandoned two of its original grounds of appeal ("best judgment" and "out of time") and said that the case would only last one day so the appeal could be heard on and finish on 2 August.

24. The appellant's request was referred to Judge Morgan who asked for HMRC's response. On 26 July HMRC replied. They objected to the new argument being included and pointed out that the appellant had not applied to amend the grounds of appeal.

25. If the appellant did apply to amend, HMRC would need time to consider the new grounds and would probably need an adjournment so could not agree that one day was sufficient.

26. HMRC also applied to a direction that HMRC should not be permitted to rely on its skeleton because:

(1) It was served only 5 working days before the date listed for the start of the hearing, later than even the extended date the appellant had sought.

(2) No explanation has been given for the abandonment of its original grounds and the substitution of completely new ones which HMRC had not had time to consider.

(3) The new grounds included "legitimate expectation" which was not within the jurisdiction of the First-tier Tribunal.

(4) Nothing in the skeleton dealt with the original grounds of appeal and the appellant should not be permitted to rely on it.

(5) HMRC would object to any application to amend the grounds of appeal.

27. The application was made by the trainee solicitor in HMRC who pointed out that counsel was not in chambers that week and HMRC reserved the right to expand and supplement their points.

28. On 27 July Judge Morgan refused to vary her previous direction on the grounds it was clear that one day may not suffice.

The hearing

29. Mr Brothers made it clear that he did not apply to amend the grounds of appeal and relied on one ground, "*Rapid Sequence*", as it was his contention that this ground encompassed what was argued in the skeleton.

30. For HMRC, Ms Newstead Taylor argued that we should strike out the appeal either on the basis of lack of jurisdiction (so far as the only remaining ground covered the reasonable expectation of the appellant) or on the basis that the appeal, based now only on the one remaining original ground, had no reasonable prospect of success.

31. She disagreed that the second new ground of appeal (on the scope of the exemption for medical services) had anything in common with the original *Rapid Sequence* ground save for one thing, the *Rapid Sequence* case. But in the original ground, the appellant appeared to be saying that it relied on obiter dicta in *Rapid Sequence*, whereas in the new ground it was accepting that *Rapid Sequence*, at, in particular, [48], would point against the appellant's supplies being exempt. It was

instead attempting to show that in *Rapid Sequence* the Tribunal had misinterpreted *Moher v HMRC* [2012] UKUT 260 and had made a "fatal error" in [48].

32. In our view HMRC were correct to say that the arguments in the skeleton were not encompassed in the original ground of appeal remaining. The new ground is, as Ms Newstead Taylor said, a *volte face* not an extension or further development of the original *Rapid Sequence* ground. It follows that the appellant was not seeking to make good the only remaining argument in the grounds of appeal and cannot rely on the argument in the skeleton to do so.

33. We therefore strike the appeal out under Rule 8(3)(c) of the Rules.

34. We think that by suggesting that either the *Rapid Sequence* ground or the second argument in the skeleton, which Mr Brothers said was essentially the *Rapid Sequence* ground, encompassed a legitimate expectation argument, Ms Newstead Taylor was erring very much on the side of the caution. We cannot find any trace of that argument ourselves, but for what it is worth we would have struck out under Rule 8(2)(a) (lack of jurisdiction) of the Rules any part of the proceedings that did seek to rely on any legitimate expectation on the part of the appellant.

Costs

35. Ms Newstead Taylor intimated that HMRC wished to apply for its costs, not just for the hearing but for the whole of the appeal period on the basis that the skeleton was really the start of a new appeal. We said that HMRC should make an application in writing under Rule 10(3) of the Rules, and that if they did we would give the appellant an opportunity to make representations under Rule 10(5) before deciding whether to award costs.

36. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 25 SEPTEMBER 2018