[2019] UKFTT 485 (TC)

Procedure – Application for appeals to be stayed indefinitely – loss of evidence due to effluxion of time – Whether 'fair' hearing possible – Yes – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07288

Appeal numbers: TC/2016/06017
TC/2016/07243

BETWEEN

(1) BRIAN ABRAMS
(2) ERIC ABRAMS **Appellants**

-and-

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in chambers at Taylor House, 88 Rosebery Avenue, London EC1 on 23 July 2019

DECISION

BACKGROUND

1. I summarise the background facts which I have taken from the application and correspondence only to put the applications and my decision in context. Nothing in what I say below should be taken as a finding of fact for the purposes of the substantive appeal

2. The appeals of Mr Brian Abrams and his brother Mr Eric Abrams concern claims for tax relief on the gift of Taskcatch Plc ("Taskcatch") shares to charity in which the 2003 valuation of those shares is in issue. Appeals by other taxpayers who have made gifts of Taskcatch are also before the Tribunal (the "Taskcatch Appeals"). Following a case management hearing in Manchester on 8 March 2019, directions were issued under which it was directed that, in the absence of an "lead" case, the appeals of Mr Brian Abrams and Mr Eric Abrams would proceed with, and be heard at the same time, as the other Taskcatch Appeals.

3. On 19 March 2019 Mr Brian Abrams, who is 89, wrote to the Tribunal objecting to the directions and requesting that his appeal and that of Mr Eric Abrams, aged 91, be "infinitely suspended and effectively cancelled" on the grounds that because of HMRC's actions and delay it was impossible, because of their ages, for them to take part in the proceedings.

4. On my instructions the Tribunal wrote to Mr Brian Abrams, on 8 April 2019, explaining that the appeals were to proceed to a hearing as it was for a taxpayer to satisfy the Tribunal upon sufficient evidence that the decision appealed against was wrong (see s 50 of the Taxes Management Act 1970 and, eg, *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)* (1927) 11 TC 657)).

5. On 3 May 2019 Mr Brian Abrams responded to the Tribunal's letter raising concerns that the evidence that was still available was no longer "fresh" and that much evidence had been lost for which, in his view "HMRC are clearly culpable". In that letter Mr Brian Abrams reiterated his request that the case should "infinitely suspended, in effect cancelled."

6. On 10 May 2019, again on my instructions, the Tribunal wrote to Mr Brian Abrams. The letter explained that while I understood his concerns at the obvious difficulties that had arisen because of the delay in progressing this matter it was clear from the binding decision of the Upper Tribunal in *HMRC v Hok Limited* [2013] STC 225 that the jurisdiction of the Tribunal did not extend to the power to override a statute or supervise the conduct of HMRC to consider whether it was fair or reasonable. As such I was unable to accede to the request to infinitely suspend and in effect cancel the hearing of the appeal.

7. On 9 June 2019, having considered the Tribunal's letter of 10 May 2019, Mr Brian Abrams wrote to the Tribunal setting out why he considered his and his brother's appeal to be different to *Hok*. However, this related to the effect of the effluxion of time on the quality and quantity of the available evidence rather than the jurisdiction of the Tribunal. The letter concluded by repeating his request for his, and Mr Eric Abram's, appeal be "infinitely suspended, in effect cancelled".

8. As it is not possible, or indeed appropriate, for the Tribunal to enter into prolonged correspondence with a party to litigation, and as Mr Brian Abrams maintained his application for his and Mr Eric Abrams appeals to be "infinitely suspended, in effect cancelled", I decided to treat the letter, dated 9 June 2019, from Mr Brian Abrams as a formal application for an indefinite stay and dealt with it accordingly by requesting representations from HMRC and directing that Mr Abrams be given an opportunity to respond.

9. Representations were received from HMRC on 9 July 2019 to which Mr Abrams replied on 19 July 2019.

LAW

10. The Tribunal has, under its general case management powers contained in Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the ability to grant a stay.

11. It is also clear that when exercising any power under the Rules, such as to grant a stay, the Tribunal must seek to give effect to the overriding objective of the Rules to "deal with cases fairly and justly" under Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009). Rule 2(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides:

> Dealing with a case 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 the resources of the parties;
>
> (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 proper consideration of the issues.

12. Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), which is incorporated into domestic legislation by s 1 and schedule 1 of the Human Rights Act 1998, provides:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

DISCUSSION AND CONCLUSION

13. In essence Mr Abrams, on behalf his brother and himself, contends that because of HMRC's conduct and delay a fair hearing is not possible as much of the evidence on which they could have relied is no longer available and that which remains is no longer "fresh".

14. In his letter of 3 May 2019 Mr Abrams described their position in the following terms:

> "When a company is floated, generally there is enthusiasm and optimism for the company's future by the directors, shareholders, employees and those who are closely involved with the company, where these feelings will naturally vary from company to company. The actual degree of such moods within the marketplace can have a minor or major influence on the flotation price within the stock market, which price of course will also be subject to actual market conditions.
>
> If this Taskcatch case had its flotation price investigated and valued just a few years after the flotation, it would have been easily possible to have thoroughly investigated the necessary detail and the rationale of the flotation and its share

price, by communicating with those closely involved, of which there would have been quite a number.

Furthermore, the memories of those closely involved would have been fresh. Such communication must be a necessity to precisely obtain a vividly clear view of Taskcatch at the relevant date, because nuances of difference can and do make a material difference in the valuation. By adhering to these basic principles, the reality, accuracy and truth of the situation could have then emerged.

I have difficulty in believing that there was not a relevant amount of valuable information that could have been gleaned from people within or very close to the business, much of which would not be in written form, had this matter been dealt with on a more timely basis. It is highly likely that such information could therefore have well influenced the valuation positively.

This information is now completely unavailable and lost forever as it has been destroyed by that which ultimately destroys everything including all of us, namely time. Because of these circumstances, I am severely disadvantaged and handicapped, as fully in tandem with the destruction of highly probable evidence is the fact that– as you state – "HMRC are not required to establish that their decision is correct."

Despite the inevitable loss of evidence for which HMRC are clearly culpable, nevertheless it is demanded of me that I must prove the incorrectness of HMRC's assumptions, whilst simultaneously, they will have been directly responsible for the destruction of the very probable evidence, that is a part of the vital balance to the justice that is so needed.

The two coupled together, is in my view, a direct assault on natural justice. Without rules with firm red lines on HMRC's part, there is a built in incentive for extreme delay and this has undoubtedly occurred. Effectively, I am told to play the game from the bottom end of a 45° tilted playing field.

So what is now in place of that which should have been? There is a valuation that is dated some 11 years after the date of the gifting of the shares. It is so late that it is effectively an archaeological exploration, for it is inevitable that evidence will be missing and it is only missing because of the time lapse for which HMRC are directly responsible.

It seems inevitable that the consequence of such a time lapse is that the valuation has long passed its "sell-by-date" and is not fit for purpose, for it is little more than an archaeological exploration. I must hasten to add that I give no disrespect to the valuer, for he cannot in any way be responsible for the lateness of the instructions given to him.

The problem with archaeological findings is that one only knows what one finds, but one does not know and never will know about what is unknown and not found, for in this case it is the missing evidence that can be so vital. That is now unobtainable, which is a serious disadvantage to me, but a great advantage to HMRC and they surely must well know it.

Continuing the archaeological analogy, speaking to the people in that archaeological era indisputably would have automatically created a far greater measure of truth rather than picking up the incomplete findings so many years later.

Of course, it is possible to obtain another valuer when they could slug it out between themselves and have a contested valuation, for there will be much to argue about, but all we would be doing at great expense, given the massive time lapse, is having a contest between two archaeologists, where the

> unknown truth is forever buried in time and therefore unproveable and irrecoverable. In consequence, I cannot see how it can ever be possible to reasonably exercise justice, given the circumstances as described.
>
> With great respect, I reiterate my appeal that this case should be infinitely suspended, in effect cancelled."

15. HMRC oppose the application for an indefinite stay on the basis that it is based on public law arguments for which the Tribunal does not have an inherent jurisdiction citing the decision of the Upper Tribunal in *HMRC v Hok Limited* [2013] STC 225 (which is binding on the Tribunal) in support, in which it was observed, at [56]:

> "… that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither source is within its jurisdiction. As we explain at paragraphs 36 and 43 above the [Tribunals, Courts and Enforcement Act 2007] gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include – whatever one chooses to call it – a power to override a statute or supervise HMRC's conduct."

16. HMRC additionally contend that if the application was allowed it would, in effect, allow the appeals without the appellants being required to prove their cases before the Tribunal. It is also said that the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 are not designed to indefinitely suspend an appeal which should only be stayed for a temporary or fixed amount of time (eg to await the decision of a higher court or tribunal in a relevant case).

17. Although Mr Abrams attempts to distinguish *Hok* from his and his brother's appeals on the facts, contending that the essential evidence was available in *Hok* whereas it is not in the present appeals, it is clear from that case, and others, that the Tribunal does not have the jurisdiction to supervise the conduct of HMRC. As such, even if misconduct by HMRC is established it does not necessarily follow that an appeal should effectively be allowed as would be the case if an indefinite stay were granted. However, that is not necessarily the end of the matter.

18. It appears to me, and is the reason that this application merits serious consideration, that the issue to be determined is whether it is fair or just, or indeed compliant with Article 6(1) ECHR, for the appeal to proceed in circumstances if, because of the effluxion of time, evidence is no longer available.

19. First, is it fair or just to proceed with the appeals?

20. Mr Abrams contends that there would have been evidence beneficial to his case which would indicate the "atmosphere and flavour of the market" in March 2003 when the shares were gifted. However, the issue between the parties concerns the value of the shares at that time. As Mr Abrams recognised in his letter of 3 May 2019, it is possible to obtain a valuation of the shares at that time and it would be for the Tribunal to determine whether it is that or HMRC's valuation that is most applicable. Indeed, it is not uncommon for courts and tribunals to make findings on such a basis.

21. When compared with the alternative, which is effectively allow the appeal, I consider that although the evidence which has been lost over time may have been of some assistance it is not vital to the appeal and its absence will not, subject to any ECHR considerations, preclude the Tribunal from fairly determining the appeal.

22. Turning to the ECHR position, in the context of a person's civil rights and obligations and in accordance with Article 6(1) ECHR, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal".

23. In *Ferrazzini v Italy* [2001] STC 1314 there had been a delay of ten years between the appeal and it being listed for a hearing which the taxpayer contended breached his right to a hearing "within a reasonable time". In its decision the European Court of Human Rights held that Article 6(1) was not applicable having observed, at [29], that:

> "In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the convention was adopted, those developments have not entailed a further intervention by the state into the 'civil' sphere of the individual's life. The court considers that tax matters still form part of the hard core of public authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant. Bearing in mind that the convention and its protocols must be interpreted as a whole, the court also observes that art 1 of Protocol 1, which concerns the protection of property, reserves the right of states to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, mutatis mutandis, *Gasus Dosier-und Fördertechnik GmbH v Netherlands* (1995) 20 EHRR 403 at 434, para 60). Although the court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer."

24. *Ferrazzini* was applied by the Special Commissioners in *Fullarton and others v Inland Revenue Commissioners (The MV Endeavour)* [2004] STC (SCD) 207 in which an argument by the taxpayer that he had not had a hearing within a reasonable time was dismissed.

25. In the opening paragraph of his decision in *R & J M Pooley v HMRC* [2006] UKSPC SPC 525, which was heard in November 2005, the Special Commissioner noted:

> "This decision concerns a series of appeals about assessments of the personal income of Mr Roland Pooley, and of the business profits of the partnership carried on by him and his wife Mrs Joan Mary Pooley. The appeals start in the year of assessment 1985-86 and come forward from that to 1994-95. That is obviously in part a long time ago. But some of the contentions made for Mr and Mrs Pooley would take the beginning of the facts relevant to the case back a further twenty years. It is the culmination of a long history of unfortunate disagreement and misunderstanding between the two parties."

However, he rejected an application that such a delay was contrary to Article 6 ECHR saying, at [16]:

> "The only issue that I could see being brought into play by the European Convention on Human Rights but not by the common law is the question of unreasonable delay. I indicated at the hearing that I had formed no view about whether there was any unreasonable delay in the sense protected by the Convention. I also indicated that I could not take the point any further as a result of that hearing if the procedure followed was statutory procedure laid down by Act of Parliament. I have no authority under the Human Rights Act 1998 to challenge a procedure imposed in this way. That can only be done, if at all, by the judges of the higher courts. And, in addition, I have no powers as a Special Commissioner under the Human Rights Act 1998, or any other legislation, to provide any practical remedy for a breach of a protected right, even granted both that the right applies in law and that the facts show that it

> applies in fact. It is no remedy to a delay to allow an appeal because I must still make an assessment of the Appellants' profits, and I cannot make that assessment by reference to extraneous issues such as compensation for delay. So I see no purpose in examining to what extent, if any, the delays in this case are unreasonable and, if so, how far that is the responsibility of one party rather than the other."

26. Therefore, given that the appeals of Mr Brian Abrams and Mr Eric Abrams are clearly "tax disputes" and outside the scope of civil rights and obligations, Article 6(1) ECHR cannot assist them in their application for an indefinite stay. It therefore follows, for the reasons above, that the applications cannot succeed.

27. The applications are dismissed and the appeals shall proceed together with the other Taskcatch appeals in accordance with the Tribunal's directions

RIGHT TO APPLY FOR PERMISSION TO APPEAL

28. 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: 27 July 2019