[2019] UKFTT 715 (TC)

TC07487

PROCEDURE – application for further and better particulars – principles – application allowed in part – directions made

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2014/06668

BETWEEN

ECKO LIMITED
T/A
SUBWAY **Appellant**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Decided on the papers after written submissions by both parties

DECISION

INTRODUCTION

1. HMRC applied for further and better particulars of the appellant's grounds of appeal on 18 June 2019; the appellant gave a partial response on 9 July 2019 but in large part took the stance that it had already provided sufficient detail and HMRC should now provide its statement of case. HMRC amended its application to take account of the limited response and re-submitted it on 21 August 2019. The Tribunal indicated it would call a hearing to decide the matter but the parties preferred the determination to be on the papers. The Tribunal agreed and I now determine the matter on the papers.

2. The parties were given the opportunity to make further submissions in order that the Tribunal could determine the matter on the papers; and on 25 October 2019 HMRC elected to do so and provided more detailed objections and a bundle of papers; the appellant elected to provide no further submissions on the basis, in its view, that HMRC's October submissions added nothing to what had already been said.

THE BACKGROUND TO THE APPEAL

3. The appellant has appealed a number of assessments made in respect of periods going back to 2006 and its various appeals, save this one, have been consolidated under number LON/09/713. I am not concerned with that appeal in this application. This application relates solely to its appeal TC/2014/6668 which is an appeal against an assessment to VAT from 1/1/11 to 31/3/14 for just under £1million and a related penalty.

4. Without wishing to make findings of fact which must be left to the substantive hearing, it appears to be the case that at least some of the appellant's supplies at the relevant time were of hot takeaway food and in particular toasted sandwiches. Back in 2011- 2014, it appears it did not consider such supplies to be subject to VAT and did not account for VAT on them. It appears to have adopted this view because of the CJEU's decision in *Bog* [2011] ECR I-0000. HMRC's position at that time and now was that such supplies of hot takeaway food were standard rated. After a visit from HMRC, in 2014 the appellant, at HMRC's request, supplied HMRC with computations period by period of the value of certain supplies from 1/1/11 to 31/3/14. The supplies covered by this computation were intended to be its hot takeaway food supplies which it had treated as zero rated but which HMRC considered were standard rated.

5. On 1 December 2014, HMRC assessed the appellant to VAT on the basis of these figures and on 27 February 2015 the appellant was also assessed to a penalty. While the original appeal against that assessment was lodged on 12 December 2014 it appears that the Tribunal may have permitted the appellant to amend its appeal on 25 March 2015 to include an appeal against the penalty: properly the appellant should have lodged a new appeal. In June 2015, HMRC consented to the appeal progressing without payment of the tax on the basis of hardship. It seems the appeal was then repeatedly stayed as the parties then sought to negotiate a settlement of it but by June 2016 it was clear ADR had failed.

6. In September 2016, HMRC applied for further and better particulars of the appellant's grounds of appeal. It is not surprising that they did so. The appellant's original grounds of appeal in December 2014 and March 2015 were that its hot takeaway food was properly zero rated in line with the decision of the Court of Appeal in *John Pimblett & Sons Ltd* [1988] STC 358. As the Court of Appeal had not followed that decision in its June 2014 decision in *Sub One Ltd* [2014] EWCA Civ 773, but on the contrary clearly stated it was inconsistent with EU law (see §74), it was perhaps surprising the *Pimblett* case had been the basis of the appellant's appeal.

7. By 2016 the appellant had new advisers. It did not fully comply with the order for further and better particulars, although, however deficient its attempt, it was by then clear that the appellant no longer pursued a case based on *Pimblett* but was pursuing the appeal on the basis the quantum of the assessment was wrong. In the next year or so, there were various orders by the Tribunal and two hearings, the object of which was to get the appellant to state why it was appealing the quantum of an assessment which was based on figures the appellant itself had provided. The Tribunal did not succeed in getting the appellant to clarify its grounds of appeal.

8. Instead, by the end of 2017, the appellant changed its advisers again and the appeal was once more stayed for ADR. Negotiations had failed by the start of 2019. Agreed directions were issued for the appellant to file its new, amended grounds of appeal. I mention in passing that this appeal, which had been joined with the 713 appeal, was at this point separated on the basis the appeals were legally and factually distinct in that 713 was a best judgement challenge to assessments raised in earlier periods while 6668 was only a challenge on quantum relating to later periods.

9. The appellant filed its grounds of appeal on 6668 on 26 April 2019 but on 18 June 2019, instead of filing its statement of case, HMRC made the application the subject of this hearing, and I have summarised at paragraphs 1 and 2 above what happened then.

THE GROUNDS OF APPEAL

10. As I have said, it appears accepted by the appellant that the assessment was raised on the basis of figures provided to HMRC by the appellant. Its new grounds of appeal stated that part of that assessment related to five items which the appellant considers were properly zero rated. Those items were: cookies, bear yoyo, extras for cold subs, Doritos chips and donuts. (I note in passing that I do not know with respect to this last item whether 'donuts' is a tradename for a particular product or whether, like 'cookies', it is simply a description of a type of food, and therefore that it should actually be spelt as 'doughnuts'. I will refer to it as 'donuts' on the assumption it is a tradename for a particular packaged product as it makes no difference to this application although the exact nature of the product might well be relevant to the substantive dispute and should be explained in its grounds of appeal).

11. The appellant's understanding was that HMRC now accept that cookies and Doritos crisps were correctly zero rated so it considered that the dispute on quantum fell into two parts:

> (1) What is the correct VAT liability of the 3 remaining items (bear yoyo, extras for cold subs and donuts;
>
> (2) Quantification of the VAT on the 5 items in order to correct the assessment.

The appellant went on to say that it would disclose in its evidence its workings and computations, but that it did not understand the computation on which HMRC's assessment was based and wanted it explained in their statement of case.

HMRC'S APPLICATION

12. In response to this, HMRC made the application the subject of the appeal. They sought further and better particulars of the new grounds of appeal in four respects which were:

> (a) A statement of whether VAT on those 5 items had been accounted for by the appellant or was said to be included in HMRC's assessment;
>
> (b) An explanation of the circumstances which led to the sales of these items being treated as standard rated;
>
> (c) Computation of the amount which the appellant considered was over-declared or over-assessed; and

(d) The appellant's business records to support any claim that VAT on these items were over-declared

HMRC's narrative stated that the appellant had told HMRC on 2 July 2018 that it had made errors in respect of its VAT accounting on cookies and Doritos chips but had failed to explain the errors; and that HMRC had been unaware of any claimed error in respect of the other three items until received the amended grounds of appeal.

13. It seems apparent that at this stage HMRC was uncertain whether the appellant was challenging the quantum of the assessment on the basis it wrongly included (claimed) zero rated items, or whether the appellant was saying VAT wrongly accounted for on other (claimed) zero rated items should be off-set against the assessment in respect of hot takeaway food.

APPELLANT'S RESPONSE

14. On 9 July 2019, the appellant responded by answering HMRC's first question. The appellant stated that output tax on the five items was a part of HMRC's assessments. In other words, it became clear at that point that the appellant was not seeking an off-set against the assessment based on other errors, but was saying that the assessment incorrectly assessed some zero rated items. The appellant's narrative put its case that even though the assessment was based on the appellant's own figures, that did not prevent the appellant appealing the assessment on the basis the quantum was wrong.

15. The appellant went on to say that they considered it was now for HMRC to state its case; in particular, HMRC had not said what it considered the correct VAT treatment of those five items was; the appellant refused to provide the information on computation which it thought irrelevant at the stage of pleadings; it thought the application for its computations amount to asking for disclosure before the appropriate time. The appellant also said they were not obliged to explain how it made the original computational errors until HMRC had pleaded their case on liability, and in any event the reason for the error was, in the appellant's opinion, irrelevant.

HMRC'S RESPONSE

16. On 21/8/19, HMRC modified its application and so that then they only asked the appellant to state:

(1) why it disagrees with the assessments;

(2) the factual and legal basis for the dispute;

(3) what it considers the correct quantum to be.

The narrative made it clear that HMRC wanted the appellant to provide a full explanation of the circumstances in which the error arose, including an itemised analysis of the figures provided to HMRC in 2014 and the business records in support. It said it could not understand how the error could have occurred bearing in mind that the appellant's tills were pre-programmed and that it was meant to have provided HMRC just with the value of its hot takeaway food. HMRC said it wanted the appellant's computation in order to consider settlement.

17. As I have said above at §2, the appellant chose not to respond to this on the basis it contained no new arguments.

DECISION

Principles

18. It is well established that, while the Tribunal is not bound by, it is certainly guided by the practice of the High Court. Certainly, in my view, it is guided by the general principles on what used to be called 'pleadings'. I set out citations from some of these authorities below, but it is useful to bear in mind that what the High Court refers to as the statement of case is referred to as the grounds of appeal in this Tribunal. And the defence or reply of the defendant is referred to as the statement of case in this Tribunal. So the 'pleadings' in the FTT are the grounds of appeal for the appellant and the statement of case for the respondent.

> [20] Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case. We were told that by the time that skeleton arguments for trial were served each party would know what points were in issue. We do not regard that as sufficient. ….
>
> Per Lewison LJ in *Prudential Assurance Company v HMRC* [2016] EWCA Civ 376

> "the pleadings will help the court to determine the range and scale of material required to progress the case and the extent of discovery, witness statements and the use of experts."
>
> Per Lord Woolf in *Prudential Assurance Company v HMRC* [2016] EWCA civ 376

> "It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other…..
>
> *Al-Medinni v Mars UK Ltd* per Dyson LJ

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. .... This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."
>
> Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, 792J-793A

> '…[75] It remains a basic principle of our system of civil procedure that the factual case the parties wish to assert at trial must ordinarily be set out in their statements of case ('pleadings'). That is not a principle based on mere formalism. It is essential to the conduct of a fair trial that each side should know in advance what case the other is making, and thus what case it has to

> meet and prepare for. It is the function of the pleadings to provide that information…'
>
> *Per Lord Justice Rimer in Lombard North Central PLC v Automobile World (UK) Ltd* [2010] EWCA Civ 20

19. The principles I take from these cases are that each party, starting with the appellant, must set out in its pleadings its legal and factual case in sufficient detail for the other party to understand it and in particular to know what evidence and legal arguments it must advance in order to answer it. A party is not, however, at the stage of pleadings, actually required to advance its evidence, nor put forward the submissions in the detail it will make at the hearing.

20. And a party's pleaded case must be one that is capable of succeeding if the appeal is not to be struck out. In order to have a case capable of succeeding where an appellant challenges quantum, it is clear that the appellant must not only establish that an assessment is wrong, but must establish by how much it is wrong:

> "The element of guesswork and the almost unavoidable inaccuracy in a properly made best of judgement assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right. It is also relevant, when considering the sufficiency of evidence to displace an assessment, to remember that the facts are peculiarly within the knowledge of the taxpayer."
>
> Per Lord Lowry in *Biflex v Carribbean Ltd* [1990] UKPC 35 at page 10

21. Therefore, the appellant's grounds of appeal in such an appeal should both (a) seek to show that the assessment is wrong and (b) engage with the figures to show by how much it is said to be wrong. The appellant is required to set out in its grounds of appeal its case on these matters on both law and facts in sufficient detail for them to be understood. And while the appellant is not required to set out its evidence, it is nevertheless obliged to provide a summary of what it will seek to prove. It must therefore describe its factual case in outline.

22. It is also the position that it must set out its case on all issues; there was some suggestion in the appellant's objections (see paragraph §15) that it thought that it only needed to address quantum when the issue of liability was resolved. That is not right. It must set out its entire case in its grounds of appeal; HMRC must then respond to its entire case in HMRC's statement of case. Otherwise, pleadings would become very drawn out and delay efficient resolution of appeals.

Application of principles to interim dispute

23. What is clear from the pleadings so far is that the appellant's grounds of appeal are that the assessment (albeit based on the appellant's own figures) was wrong because it included VAT on some 5 items which the appellant considers were correctly zero rated. But that bare explanation is insufficient by itself to amount to properly pleaded grounds of appeal.

Legal case

24. The appellant must set out its legal case. And while the appellant's further and better particulars do set out its legal case on why it is not bound by the figures which it itself provided to HMRC, it does not set out its legal case on why the five items are properly zero rated. I consider that it must identify the exact legal provision and/or case law under which it says these items were properly zero rated.

Factual case

25. The appellant fails to make out almost any factual case in its existing grounds of appeal or further particulars of them.

26. I consider that its grounds of appeal ought to relate its factual case to its legal case; so, firstly, it ought to explain why the five items it identified, as a matter of fact, actually meet the criteria for zero rating it identifies as applicable. I recognise that it seems the appellant has already formed the view (see §11) that HMRC has conceded that 'cookies' and 'Doritos chips' are zero rated, but so far HMRC has not confirmed that, so the appellant's grounds of appeal need to explain its view why in law all five of these items are zero rated.

27. Secondly, the appellant needs to explain its factual case that its 2014 figures actually did (mistakenly) include the value of the sales of these five items. It is essential it can prove this because otherwise it will be irrelevant whether the sales of those five items should have been zero rated. And it seems to me inevitable that in addressing this factual issue, the appellant will have to offer an explanation for the error in its own computation: it needs to explain how it mistakenly included cold items in a computation for hot takeaway food, because if it cannot do this, it is difficult to understand its case that its computation was wrong.

28. Thirdly, it should explain by how much it considers the assessment to be excessive. It should explain how it arrived at that conclusion. This will require it to engage with the figures and in particular to explain its calculation for hot takeaway food which it now appears it accepts it should have standard rated.

29. I am aware that the appellant stated that it did not understand how HMRC arrived at the assessment and required HMRC to explain it in its statement of case (see §11). I consider that that its lack of understanding of HMRC's case makes no difference at this stage. It is the appellant's appeal and it is for the appellant to first explain in its grounds of appeal its entire case, in sufficient detail for it to be understood and responded to. That includes explaining what it considers to be the actual amount it underdeclared. Only then will it be HMRC's turn in its statement of case to explain, in sufficient detail for it to be understood, why it thinks the assessment is correct.

What the appellant does not need to do

30. But the appellant is not required at this stage to disclose its evidence; to some extent in providing its grounds of appeal and in particular in setting out its factual case, it is bound to *describe* the evidence that it intends to rely upon. But it is not at this stage required to produce it. So HMRC's application goes too far in requiring the appellant to produce:

(1) all its computations;

(2) its supporting business records.

Therefore, I do not order the appellant to produce either of these. It must engage with the figures as set out above in sufficient detail for HMRC to understand by how much its case is that the assessment is excessive, but HMRC are not entitled to its evidence at this stage.

31. I note in passing that HMRC's explanation for its request for the computations and business records is that it hopes that these will enable the parties to settle the matter. Certainly the Tribunal ought to encourage settlement; our Rules require this but the interests of justice in any event dictate that a tribunal should facilitate negotiation. And at first glance this would appear to be a case that might be settled: the Tribunal is rarely asked to resolve pure issues of quantum, rather than legal principles, as quantum is something that lends itself to resolution by the parties.

32. But having said that, a desire by one party to negotiate a settlement does not, in my mind, justify the Tribunal ordering disclosure of evidence at the stage of pleadings. Negotiation is a two way process and the parties cannot be compelled to engage. If the appellant wishes to settle this appeal, it will no doubt consider meeting HMRC's request for disclosure. But it would not be right to order disclosure at this stage. The Tribunal cannot compel parties to negotiate. Moreover, bearing in mind that the parties have already twice entered into ADR on this matter, I am sceptical that a third attempt will be successful in doing anything other than further delaying resolution of this long-outstanding appeal. Disclosure would normally only be ordered after exchange of evidence.

33. Lastly, I note that the appellant's unorthodox method of seeking to appeal its penalty does not appear to have previously been addressed. Assuming that the appellant does still seek to appeal the penalty, its grounds of appeal should explain its case on why it makes that appeal. Its original grounds of appeal included the same *Pimblett* grounds that it has now stepped away from, although they also included a bare statement that the appellant had not been reckless or careless and had a reasonable excuse. It needs to provide more detail on these grounds. It is not an answer to say that in part the burden of proof lies on HMRC: cases need to be pleaded irrespective of where the burden of proof lies.

DIRECTIONS

34. **Grounds of appeal:** Not later than 10 January 2020, the appellant must provide to HMRC (and copy to the tribunal) the information I have outlined above at §§24-29 and §33 in the form of amended particulars of its appeal.

35. **Statement of case:** Not later than 14 February 2020, HMRC must send or deliver to the appellant and copy to the Tribunal their statement of case.

36. **List of documents:** Not later 6 March 2020 each party shall:

> (1) send or deliver to the other party and the Tribunal a list of documents in its possession or control which that party intends to rely upon or produce in connection with the appeal ("documents list"); and
>
> (2) send or deliver to the other party copies of any documents on that documents list which have not already been provided to the other party and confirm to the Tribunal that they have done so.

37. **Witness statements:** Not later than 3 April 2020 each party shall send or deliver to the other party statements from all witnesses on whose evidence they intend to rely at the hearing setting out what that evidence will be ("witness statements") and shall notify the Tribunal that they have done so.

38. **Listing information:** Not later than 17 April 2020 both parties shall send or deliver to the Tribunal and each other a statement detailing:

(a) the expected number of persons attending the hearing for each party, to assist the Tribunal in identifying an appropriate venue;

(b) the preferred location for the hearing (London, Birmingham, Manchester, Edinburgh or Belfast);

(c) the names of all witnesses who will give evidence on their behalf;

(d) how long the hearing is expected to last (together with a draft trial timetable if the hearing is expected to last four days or more);

(e) two or three agreed periods of time for the hearing which are within or shortly after a hearing window starting 1 June 2020 and ending 31 December 2020 and each of which is at least as long as the longest time estimate for the hearing provided under (d) above OR if the parties are unable to agree such periods, then each party must provide their dates to avoid for a hearing in the same hearing window.

Shortly after 17 April 2020 the Tribunal will fix the date of the hearing despite any non-compliance with (e) above. A request for postponement on the grounds that the date of the hearing is inconvenient is unlikely to succeed if the applicant did not comply with (e) above or if, having provided dates for the hearing, the applicant then failed to keep the dates clear of other commitments.

39. **Bundles for hearing:** Not later than 1 May 2020 the appellant shall send or deliver to the respondents an indexed, paginated and bound bundle of documents ("documents bundle") to include:

(a) the full particulars of appeal as provided above;
(b) the statement of case as provided above;
(c) all documents on the lists of documents provided;
(d) the witness statements provided as directed above;
(e) all directions issued by the Tribunal in the appeal; and
(f) correspondence with the Tribunal which is to be referred to in the hearing.

The appellant shall ensure that the copy in the documents bundle of the witnesses' statements shall, where there is a reference to an exhibit in the text, have added in its margin a cross-reference to the exhibit by its place in the documents bundle.

40. **Outline of case:** Not later than 14 days before the hearing both parties shall send or deliver to each other an outline of the case that they will put to the Tribunal (a skeleton argument) including the details of any legislation and case law authorities to which they intend to refer at the hearing.

At the same time both parties will file with the Tribunal an electronic copy of their skeleton argument together with electronic copies of the witness statements on which they rely and any agreed pre-reading material.

41. **Authorities bundle:** Not later than 7 days before the hearing the appellant shall send or deliver to the respondents one copy of a bundle of authorities (comprising the authorities mentioned in both parties' skeleton arguments).

42. **Delivery of bundles to Tribunal:** The appellant shall bring three copies of the documents bundle and two copies of a bundle of authorities to the hearing centre on the morning of the hearing no later than 9:30 am unless the Tribunal notifies the appellant to deliver them at an earlier date. Bundles delivered before the due date will be rejected.

43. **Witness attendance at hearing:** At the hearing any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute).

44. **Right to request new directions:** Either party may apply at any time for Directions 36 to 43 to be amended, suspended or set aside, or for further directions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 02 DECEMBER 2019