Neutral Citation: [2024] UKFTT 00562 (TC)

Case Number: TC09218

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2023/00848

PROCEDURE – application for preliminary issues hearing – application of Wrottesley *factors – permission refused*

Heard on: 5 June 2024
Judgment date: 19 June 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

JELLY VINE PRODUCTIONS LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Keith Gordon of Counsel instructed by inTAX Ltd

For the Respondents: Christopher Stone KC of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

FORUM

1. With the consent of the parties, the form of the hearing was a video hearing using the Tribunal video hearing system. A face to face hearing was not held because it was expedient not to do so. The documents to which I was referred were contained in a bundle of documents of 114 pages.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

INTRODUCTION

3. This is an application for a preliminary issues hearing made by Jelly Vine Productions Ltd (**Appellant**) pursuant to rule 5(3)(e) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**Tribunal Rules**) in respect of an appeal notified to the Tribunal on 9 February 2023.

4. The Appellant is a personal services company which has been assessed to income tax and national insurance contributions as a consequence of HM Revenue & Customs (**HMRC**) having concluded, in accordance with sections 48 – 61 Income Tax (Earning and Pensions) Act 2003 and Social Security Contributions (Intermediaries) Regulations 2000, that Jeremy Vine (the sole shareholder and director of the Appellant) personally performed services for the BBC under arrangements involving the Appellant and should therefore be treated for the purposes of income tax and national insurance contributions (**NICs**), as an employee. Having so concluded, HMRC issued decisions in respect of each tax year 2013/14 – 2015/16 to collect income tax (pursuant to regulation 80 Income Tax (Pay as you Earn) Regulations 2003 (**Reg 80**)) (**Determinations**) and NICs (section 8 Social Security Contributions (Transfer of Functions etc) Act 1999 (**s8**)) (**Notices**) (together **Decisions**).

5. Decisions were originally also issued for the tax year 2016/17. However, HMRC no longer defend those decisions as, in that year, Mr Vine was not engaged by the Appellant company in respect of the BBC contract.

RELEVANT FACTS

6. It is not necessary to set out the facts leading to HMRC's Decisions; it is however, significant to note that the contract between the Appellant and the BBC concerned the period 1 July 2013 to 30 December 2015 in respect of four productions: the Jeremy Vine Show a weekday programme on radio 2, election coverage, Eggheads (quiz show) and Points of View. All apart from Eggheads are produced by BBC Studios with Eggheads produced by 12 Yard Studios.

7. More significantly for the purposes of this application is the chronology leading to the Decisions. HMRC presented the chronology, but I do not understand it to be in dispute and it was, in any event, largely discernible from the correspondence made available to me.

8. I do not know (and was not told) when the employment status enquiry began; but know that the Appellant provided letters dated 4 September 2017 and 10 November 2017 in relation to the enquiry.

9. On 16 February 2018 HMRC wrote to the Appellant. The letter stated:

> "My review of the contractual arrangements between [the Appellant] and the BBC to determine whether or not the intermediaries legislation … applies is ongoing. Although I am not yet in a position to issue a formal opinion I am

> conscious that the contractual arrangements currently being reviewed will cover the tax year 2013/14. As the time limit under [Taxes Management Act 1970 section 34] … for making an assessment for this year expires on 5 April 2018 I have arranged for the following determination to be issued: … [Determination for 2013/15].
>
> Although the time limit for National Insurance does not expire until 19 April 2020 … in order to provide clarity on the potential liability for each year I will also make a section 8 decision for the same year.
>
> …
>
> As I have already mentioned I do not have sufficient facts at present upon which I can issue an opinion on your employment status and these assessments are not an indication of where we are in that process. When the fact finding process is complete the position will be reviewed as necessary."

10. Those Decisions were appealed to HMRC on 23 February 2018 on grounds that the intermediaries, legislation does not apply, and the amounts are estimated and excessive.

11. On 12 October 2018, HMRC issued their employment status opinion. Having reviewed the relationship between the BBC and the Appellant, HMRC considered that "had there been a contract between the BBC and Jeremy Vine it would be considered to be a contract of service" (i.e. an employment contract). The letter set out, over four pages, the basis of that conclusion by reference to the contract and other information provided by the Appellant.

12. The Appellant provided information and analysis countering the opinion by letter of 9 January 2019.

13. The Decisions relating to tax year 2014/15 were issued on 18 January 2019. This letter again confirmed that HMRC's review of the arrangements was ongoing and the Decisions were said to be issued "conscious" of the time limit in which the 2014/15 Determination needed to be issued and that the Notice was to be issued "in order to provide clarity on the potential liability for the year" as time limits were not pressing in that regard. The letter notes:

> "Discussions are continuing after the issue of the opinion of your employment status and no formal decision has yet been made on this. The assessments are not an indication of where we are in that process. When the discussions are complete the position will be reviewed again and the determinations and decision reviewed as necessary."

14. I must assume that the Decisions for 2014/15 were appealed but I do not have a copy of the appeal and do not know when the appeal was made. On the basis that the Appellant consistently appealed the other Decisions within the required 30-day time limit in which to bring an appeal I conclude it was on or before 17 February 2019.

15. HMRC provided a 6-page detailed response to the Appellant's letter of 9 January 2019 on 5 June 2019. In that letter HMRC confirmed that penalty warning notifications had been issued to the Appellant in accordance with the policy of issuing such notifications when the "caught" opinion letter was issued.

16. It appears that there were further letters and information sent by the Appellant on 20 September, 31 October and 4 November 2019 (I did not have copies of this correspondence).

17. A new HMRC officer was appointed to the enquiry who, I assume at the request of the Appellant, reviewed the contract and all other evidence as to the operation of the contract provided by the Appellant going back to first principles and undertaking her own analysis.

That officer wrote to the Appellant on 17 February 2020, she confirmed that she had reached the same conclusion as the first officer as communicated on 12 October 2018.

18. On 31 March 2020 the Determination for tax year 2015/16 was issued. The letter continued to reference the ongoing review of employment status and that the Determination was "a purely precautionary measure" calculated using HMRC's "best judgment based on information we hold and this may change as more facts and information are gathered."

19. That Determination was appealed on 22 April 2020.

20. The Appellant provided further correspondence on 24 March 2021. In response, and by email dated 25 June 2021, HMRC notified that they had concluded their review and would issue a view of the matter letter confirming HMRC's view as to Mr Vine's employment status.

21. On 3 September 2021 the Notice for 2015/16 was issued. It was appealed on 17 September 2021.

22. I have not seen the view of the matter letter but from the correspondence I have seen it was only issued after the appeal against the final Notice was received and was issued in respect of them all. A view of the matter letter is HMRC's response to an appeal made to them. The view of the matter will then offer a departmental review or set the time limit running for notification of an appeal to the Tribunal. It will reflect HMRC's concluded position (pending review) but cannot, because it requires a prior decision and appeal, represent the conclusion of the enquiry which must have predated the view of the matter itself.

23. From the above I find:

(1) The Decisions for 2013/14 were issued prior to the issue of any formal opinion by HMRC as to Mr Vine's employment status vis a vis the contract between the Appellant and the BBC but after correspondence received from the Appellant.

(2) The Decisions for 2014/15 were issued after the first communication of an employment status opinion which was issued despite an ongoing review of Mr Vine's employment status vis a vis the contract between the Appellant and the BBC.

(3) The Determination for 2015/16 was issued after a second and independently considered employment status opinion. This Determination was expressly stated to be a precautionary measure and as part of an ongoing review.

(4) The Notice for 2015/16 was issued after HMRC had communicated that they had concluded the status review.

24. The Decisions have been appealed by the Appellant on three grounds. Two of the grounds address the substance of the conclusion that Mr Vine should be taxed as an employee for some, or all, of the payments made under the contract between the Appellant and the BBC. Those grounds are not the subject matter of the Appellant's application for a preliminary issues hearing.

25. The ground of relevance to the present application is ground 1 which the Appellant contends is suitable and should be dealt with by way of a preliminary issue hearing:

> "The decisions are all premature and therefore invalid. The decisions have all been issued on a protective basis only and the requisite knowledge/belief has not been formed by the officer effecting the decision."

DIRECTIONS FOR PRELIMINARY HEARINGS

26. The Tribunal has been granted the express power to direct the hearing of a preliminary issue pursuant to rule 5(3)(e) of the Tribunal Rules.

27. As with all Tribunal powers that express power is to be exercised in accordance with the overriding objective set out in rule 2 Tribunal Rules which requires me to deal with cases "fairly and justly" and 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."

28. The Upper Tribunal (**UT**) has provided a framework of factors to be considered when determining whether to direct that an issue be heard as a preliminary issue in the case of *Rt Hon Baron Wrottesley v HMRC* [2015] UKUT 637 (TCC) (***Wrottesley***) which I summarise as follows:

(1) The power to determine an issue by preliminary hearing should be exercised with caution and the power used sparingly.

(2) It is only to be exercised where there is a "succinct, knockout point" disposing of the case or a discrete aspect of it.

(3) The point should be capable of being decided at a comparatively short hearing i.e. it is a point entirely divorced from the evidence and submissions relevant to the rest of the case. Preliminary issues will usually be points of law.

(4) Regard should be had to ensuring that the point is properly severable such that determining it does not then hinder the subsequent determination of the remaining issues if necessary.

(5) Account should be taken of the risk of overall delay (including the potential for appeal).

(6) As an alternative way of expressing the "knockout" point, consideration should be given to the possibility that the preliminary issue may avoid the need for a further hearing,

(7) Considerations should be given to whether directing the preliminary issue will reduce or increase the overall costs of the trial.

(8) Always subject to the overriding objective.

AREAS OF AGREEMENT AND DIFFERENCE BETWEEN THE PARTIES

29. The parties were agreed that I should apply the *Wrottesley* guidance but there was some difference between them as to what was precisely required in respect of some of the factors.

30. In particular, the Appellant contended that the need for caution should only be used as a "tie breaker" where factors indicating a preliminary hearing were equally balanced with those against. In so submitting it relied on *Coast Telecom Ltd v HMRC* [2019] UKFTT 596 (TC).

The Appellant submitted that *Wind Energy Renewables LLP v Revenue Scotland* [2022] FTSTC 5 confirmed that the need for caution did not mean that preliminary hearings should be rare.

31. HMRC effectively contend that caution is the starting point. Mr Stone described the question of caution as a mindset issue.

32. On the question of caution I asked each of the parties how satisfied I needed to be: 51% (on balance), 60% content or 90% convinced that directing a preliminary issue represented a reasonable course for the appeal. Whilst Mr Stone would not be drawn on percentages, he accepted that the requirement for caution did not require me to be satisfied, only sufficiently satisfied. Mr Gordon indicated that 60% represented a suitable satisfaction level.

33. There was a dispute between the parties as to whether ground 1 did represent a succinct knockout point which could be readily separated from the substantive issue of employment status.

34. In this regard, the Appellant contends that the Tribunal need only assess the status of the enquiry (which in all correspondence apart from the final Notice for 2015/16 was confirmed as ongoing) and what the relevant officer of HMRC knew at the time to determine if the relevant threshold test for the issue of the Decisions was met. The Appellant submits that if the Decisions were premature and therefore invalid, then HMRC would be unable to issue further Determinations as they would be outside the time limit to do so provided in Taxes Management Act 1970 section 34 and although no such time limit would apply in respect of the Notices there was no statutory basis for replacing the premature Notices either on the terms of regulation 6 of The Social Security Contributions (Decisions and Appeals) Regulations 1999 (**Reg 6**) or on the basis that it would be an abuse of power to do so (as *per Johnson v Gore Wood & Co* [2002] 2 AC 1 (***Gore Wood***)).

35. The Appellant notes that whilst Reg 6 permits HMRC to "make a decision superseding an earlier decision … which has become inappropriate for any reason" there is no power of supersession, by reference to Reg 6(2), unless there is a change of circumstances which render the original, valid decision, inappropriate. Where a decision is invalid because it was made prematurely there is not a decision which has become inappropriate due to a change in circumstances.

36. By reference to *Gore Wood* the Appellant contends that for HMRC to use the provisions of Reg 6 to have a second bite of the cherry offended against the public and private interest that HMRC not act in a way that misuses or abuses their powers and "vexes" the Appellant twice by facing substantively the same litigation.

37. HMRC accept that if the Determinations were invalid as being premature there would be no basis on which they could be reissued as any such Determination would be outside the statutory time limits. However, they contend that whilst it is not for me to determine the preliminary issue at this hearing, I am entitled to consider whether the prospects of it succeeding are sufficiently low that it militates against dealing with it as a preliminary issue. As such, where it is all but obvious that an argument will lose it is a factor (albeit not one listed in *Wrottesley*) which I can consider.

38. When considering the prospects of success HMRC point to the legislative bar set for the issue of a Determination as provided for in Reg 80 and for a Notice in s8. In each case respectively all that is required is for it to appear to HMRC that there may be tax payable, and in which case that the amount may be determined to the best of HMRC's judgment (Reg 80) and for an officer to decide to the best of their knowledge and belief whether a person is or was liable to pay contributions of any particular class (s8). HMRC contend that all that is

required is some information on which it can be reasonably concluded that tax or NICs are due, and they are entitled to assess for it (by way of determination and/or notice).

39. It is submitted that by reference only to the correspondence available to me I can determine that there was plainly some material available in the form of the BBC contract and that other information had been provided to HMRC before any of the Determinations and Notices were issued. They accept that their position is weaker regarding the 2013/14 Determination and Notice but that all those following the employment status opinion dated 12 October 2018 were plainly and obviously issued having reached the low bar set by Reg 80 and s8.

40. Specifically regarding the Notices HMRC contend that the Notice for 2015/16 cannot have been premature as it was issued after the review of Mr Vine's employment status had concluded.

41. HMRC contend that even if, contrary to their submission that there is a low bar to meet when issuing a s8 Notice, it was concluded that the Notices for 2013/14 an 2014/15 were premature they have the power under Reg 6 to simply make a decision superseding the earlier decision on the grounds that it had become inappropriate "for any reason".

42. There was also some, though less, debate between the parties as to the length of hearing required to resolve the preliminary issue verses the trial. Both parties were broadly agreed that there was some overlap in the documentary evidence that would need to be considered in determining ground 1 and the remaining grounds and that some marginal presentational efficiencies would arise if the Tribunal were hearing all grounds together. But, in substance, they were agreed that the combined hearing would be 6.5 days with 1.5 attributed to ground 1 and the remaining 5 to grounds 2 and 3.

43. The Appellant contended that spending 1.5 days to establish whether the majority (if for these purposes it was accepted that the 2015/16 Notice was not premature) or all of the Decisions were invalid such that the associated tax and NICs was not due represented a potential cost and time saving which justified the preliminary issues hearing. The Appellant also contends that as it is the party which would suffer prejudice in consequence of any delay, it is prepared to bear any such prejudice. The Appellant further notes that obtaining a listing for 1.5 days should be significantly swifter than one for 6.5 days on the basis that there would be fewer witnesses (just the issuing officers), the Tribunal might list before a judge sitting alone and Counsel's diaries should be more accommodating of a shorter hearing.

44. HMRC suggested that there was insufficient saving to warrant the unquestionable delay it would cause to the ultimate resolution of the appeal. That was particularly so if, as a matter of statutory interpretation, the Tribunal were to determine the bar to meet when issuing Determination and Notices was higher than they consider it to be as an appeal to the UT would be likely. HMRC consider the position taken by the Appellant to be one which is entirely novel.

45. In their skeletons the parties both referenced a parallel to the question whether the validity of a discovery assessment is appropriately dealt with by way of preliminary issue.

46. The parties accepted that no prejudice would be caused to the trial of grounds 2 and 3 by having ground 1 considered separately and by way of preliminary issues hearing.

DISCUSSION

47. Whilst the parties forcibly presented their respective positions there really seemed to be little between them in the approach I should take. Having read the authorities and the cases of competent jurisdiction to which I was referred it is plain to me that the principal question to be determined is whether it is in accordance with the overriding objective for ground 1 to

be determined as a preliminary issue. The UT has provided a list of factors it is relevant to consider when assessing all the circumstances when exercising my discretion.

48. As noted by Hildyard J in *Wentworth Sons Sub-Debt SARL v Lomas and others* [2017] EWHC 3158 "preliminary issues often look more appealing and definitive in the early days of a case than when they come on later to be adjudicated". However, and as noted by Judge Malek in *Kashif Mehrban v HMRC* [2021] UKFTT 0053 (TC) where there is an issue in the case which is suitable to be dealt with by way of preliminary issues hearing it is appropriate to order such a hearing. Judge Malek expressed the view that a preliminary issues hearing may be appropriate where it narrows the issues to be dealt with at a later hearing.

49. The critical issue here therefore is whether the dispute in this case can be more fairly and justly determined by severing ground 1 and dealing with it independently from grounds 2 and 3. If it can be then a preliminary issue hearing should be directed.

50. I start by noting that I do not consider that difficulties associated with listing a hearing due to unavailability of counsel is a matter to which any real weight should be given. Where there are significant difficulties in listing because one side's counsel has limited availability, the Tribunal can, and has previously, required the party causing the difficulty to appoint alternative counsel. To do so to prevent perpetual delays in listing is in accordance with the overriding objective but often miraculously causes listing difficulties to disappear.

51. This case concerns three Determinations and three Notices seeking to assess for income tax and NICs in respect of sums paid to Mr Vine by the Appellant in consequence of arrangements made between the Appellant and the BBC. Ground 1 is framed as a question whether the Decisions have been issued prematurely. However, in order to succeed as a point substantively capable of disposing of the appeal, or even part of it, and thereby suitable for a preliminary issue hearing, the argument advanced under ground 1 needs to be capable of speedy resolution and result in a conclusion that one or more of the Determinations or Notices are invalid/unenforceable because HMRC did not have the power to issue the Determinations at the time they were issued. Whether or not HMRC could reissue the Notices is not a relevant concern as this appeal concerns the Decisions in fact issued and not what might or might not replace them.

52. Reg 80(1) empowers HMRC to issue a determination "if it appears to [them] that there may be tax payable for a tax year … by an employer which has neither been paid note certified by HMRC". Where the regulation applies HMRC "may determine the amount of that tax to the best of their judgment and serve a notice of their determination on the employer".

53. There can be no dispute that if, as a consequence of the application of the intermediaries' legislation, Mr Vine is to be treated as an employee in relation to the services provided to the BBC under its contract with the Appellant then the associated tax will neither have been paid nor certified. As such, if, on 12 October 2018 in respect of the tax year 2013/14, 18 January 2019 in respect of tax year 2014/15, and 31 March 2020 in respect of tax years 2015/16, it appeared to HMRC that such tax may be payable then they had the power to determine the tax so due to the best of their judgment.

54. The parties agree that no case has previously considered how it is to be determined whether it appeared to HMRC that tax may be due or, in that context, what the exercise of best judgment looks like.

55. As indicated HMRC contend that the bar is a very low one and, even only on the basis of the chronology set out above, the prospects of the Appellant articulating a legal interpretation of the statutory words against which it can be shown that on the respective

issue dates it did not "appear to HMRC that tax may be payable" is impossibly small such that it cannot justify the resources associated with a preliminary issues hearing.

56. It is my view that the strength of the possible argument is a factor which could be taken into account when applying my discretion. If I considered that the argument had good prospects of success and was therefore more likely to deliver the knockout point asserted, it is a factor I would weigh more significantly in the balance in favour of a direction for a preliminary issues hearing. However, I do not consider the converse to be as compelling. In a case where there has been no rule 8 Tribunal Rules application for strike out on the basis of no reasonable prospects of success it must be assumed to be the case that HMRC consider the point at least arguable. Here HMRC appeared to indicate that the argument might not be entirely hopeless for the 2013/14 Determination because that Determination was issued prior to any opinion having been issued. Where therefore there is an arguable, but not a strongly arguable case, I consider the strength of the case to be a neutral circumstance.

57. The Appellant contends that the meaning of the statutory language can be determined as a question of law and the validity of the Determinations issued in this case can be assessed by reference to the terms of the Determinations themselves (which all state that they have been issued whilst the review of Mr Vine's employment status was ongoing) as confirmed by the testimony of the officers issuing the Determinations without any significant consideration of the underlying facts and circumstances of the contractual relationship and how Mr Vine's services were performed.

58. I am not satisfied that is the case.

59. Although the threshold test for a discovery assessment is different, and may be considered to represent a higher bar for HMRC to overcome requiring a closer investigation of the underlying facts and circumstances, the Tribunal has reasonably consistently determined that a preliminary issue hearing is not appropriate in discovery assessment cases (see for example *Hargreaves v HMRC* [2014] UKUT 395 (TCC) at paragraph 43 in which the UT considered that the discovery threshold could not be divorced from the underlying facts).

60. The question of limitation, referred to by Judge Malek, may be different where the facts relevant to limitation are "entirely divorced" from the underlying facts justifying an assessment. However, in my view, ground 1 cannot be equated to a limitation issue. A time limit expires on a fixed date or by reference to a calculation. The test here is evaluative – did it <u>appear</u> that tax <u>may</u> be payable.

61. In my view a strong parallel can be drawn to the process by reference to which HMRC determine that it "appears that VAT returns are incorrect or incomplete" justifying a best judgment assessment. In that context it has been definitively concluded that a preliminary issues hearing would usually be inappropriate. In *Pegasus Birds Ltd v HM Customs & Excise* [2004] EWCA Civ 1015 the Court of Appeal, citing from *Rahman v HM Customs & Excise* [1998] STC 826 stated:

> "In principle there is nothing wrong in the Tribunal considering the validity of an assessment as a separate and preliminary issue, when that is raised expressly or implicitly by the appeal, and, as part of that exercise, applying the *Van Boekel* test. *There is a risk, however, that the emphasis of the debate before the Tribunal will be distorted. If I am right in my interpretation of Van Boekel, it is only in a very exceptional case than an assessment will be upset because of a failure by the Commissioners to exercise best judgment. … The danger of the two stage process is that it reverses the emphasis…"* (original emphasis)

62. The Court then provided guidance to the Tribunal as follows:

> "… There may be a few cases where a "best of their judgment" challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to be to allow the hearing to proceed on the issue of amount, and leave any submissions on failure of their best judgment, and its consequences, to be dealt with at the end of the hearing."

63. Whilst it is clear that the focus of ground 1 is not identical to a best judgment challenged in VAT as ground 1 seeks to establish the minimum information HMRC must have before they are entitled to issue Determinations of tax based on an appearance that there may be tax payable I consider that the challenges identified in *Pegasus Bird* are similar. As with a VAT assessment, unless there is some pleaded allegation of vindictiveness or dishonesty on the part of HMRC, the evaluation of whether it appeared to HMRC that tax may have been payable is going to be entirely intertwined with the evidence of liability to tax and require an assessment of what the officers were entitled to reasonably conclude on the evidence available to them.

64. Whilst the statutory test for a decision to issue a Notice under s8 is differently framed it is substantively similar in that a decision that a person is liable to pay contributions must be made to the best of the officer's information and belief. Accordingly, an understanding of the evidence on which the decision is made will be necessary.

65. In my view, the most effective and thereby just and fair means of determining this appeal taking account of all the factors listed in rule 2(2) Tribunal Rules, in particular the requirement to act proportionately and avoid delay, is for the appeal to progress towards a single hearing of all issues.

66. As Mr Gordon accepted, it may be that once HMRC have adduced their evidence addressing the information available to them when each of the Decisions was taken and the basis on which it appeared, to the best of their information and belief, that income tax and NICs had not been paid, the Appellant concedes ground 1. To set a course for progression of the appeal to a destination which sees ground 1 abandoned and the clock for resolution then reset would certainly be entirely contrary to the overriding objective.

67. For the sake of completeness and addressing the factors identified in *Wrottesley*:

(1) In the circumstances of this case, to direct a preliminary issue would be contrary to a cautious approach whether such an approach is the starting point or as a tie breaker.

(2) HMRC have not applied under rule 8 for ground 1 to be struck out on the basis that there is no reasonable prospect of it succeeding and appeared to acknowledge that as the Determination for 2013/14 predates the opinion ground 1 is not entirely fanciful for that year. However, even if successful for 2013/14 its prospects diminish as HMRC progressed with their review of Mr Vine's employment status to the point of conclusion. The review being by reference to a single contract spanning all tax years under appeal. As such, ground 1 is unlikely to represent a knockout point avoiding consideration of the contract and its operation in practice.

(3) The proportion of the overall hearing which would address ground 1 was agreed to represent approx. 25% of the overall time and thus might have been capable of being decided at a short hearing. But as, in my view, it is not an issue which can be "entirely divorced" from the evidence and submissions relating to grounds 2 and 3 it is not appropriate to deal with it as a preliminary issue.

(4) There was agreement that determination of ground 1 was unlikely to hinder the consideration of grounds 2 and 3.

(5) If a preliminary issue were directed, together with appropriate directions for the discrete disclosure of documents and evidence relating to it, for it then to be conceded, on that evidence, there would have been an unnecessary delay. It is far better that the standard directions relating to the disclosure of evidence including witness statements proceeds in the normal way and ground 1 be dealt with at trial.

(6) It is almost inconceivable that no hearing of grounds 2 and 3 would be required. Mr Gordon indicated that if the 2015/16 Notice were left standing, having been issued after the conclusion of the employment status review, the Appellant may concede the appeal on cost benefit grounds (there being of the order of £20k NICs at stake for that year alone). But, in my view, given such an equivocal indication of concession and given at least the possibility that the ground 1 outcome may be different on the facts across the years, it is almost inconceivable that no hearing of grounds 2 and 3 would be required.

(7) The cost of preparing for two hearings and for one are unlikely to be materially different: two hearings would cost more because of the duplication and requirement to refresh that would be necessitated. It is not however, a significant factor.

(8) For the reasons given this was not a marginal decision the interests of dealing justly and fairly with this appeal require that it now be progressed.

DISPOSITION

68. The application for a direction that ground 1 be dealt with as a preliminary issue is refused.

69. The parties are directed to agree the timetable for compliance with the Tribunal's standard directions for exchange of lists of documents, witness statement and otherwise for the progression of the appeal. I do not consider it appropriate to order reversed or staged directions requiring HMRC to disclose their evidence on ground 1 first as to do so necessarily incorporates delay in the process. Once agreed the parties are to adhere to the terms of the directions without waiting for them to be endorsed by the Tribunal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 19th JUNE 2024