



Neutral Citation: [2024] UKFTT 00637 (TC)

Case Number: TC09242

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Location: Decided on the papers

Appeal reference: TC/2022/11560

*PROCEDURE – Appellant’s applications for a stay in proceedings pending foreign arbitration decision and for permission to amend its grounds of appeal – Respondent’s application for a declaration as to whether the Appellant had complied with the Tribunal’s direction for it to give further and better particulars of its application to amend its grounds of appeal.*

**Judgment date:** 26 June 2024

**Decided by:**

**TRIBUNAL JUDGE MARK BALDWIN**

**Between**

**SCRIMSHAW WEALTH MANAGEMENT LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

## DECISION

### INTRODUCTION

1. On 29 February 2024 Judge Bailey directed that there should be a hearing on the papers to determine the application of the Appellant for a stay of these proceedings and to amend its grounds of appeal and the application of the Respondents (“HMRC”) for a declaration as to whether the Appellant has complied with the Tribunal’s direction for it to give further and better particulars of its application to amend its grounds of appeal.
2. At the request of HMRC (made because “similar unparticularised applications have been made in numerous other cases in multiple different contexts including others relating to companies, as well as in relation to self-employed individual taxpayers”), Judge Bailey further directed that a decision should be produced for publication.
3. I have considered:
  - (1) HMRC’s skeleton argument for this hearing dated 24 February 2024;
  - (2) submissions filed by the Appellant on 6 February 2024; and
  - (3) all the papers in the Tribunal’s file for this appeal (including all submissions etc made to date by HMRC or the Appellant).

### DECISION

4. For the reasons set out below, I have decided that:
  - (1) the Appellant has not complied with the FBP Direction (as defined below);
  - (2) UNLESS the Appellant complies with the FBP Direction in full no later than 5pm on the day which falls 14 days after the issue of this decision, its Variation Application (as defined below) will be DISMISSED with no further reference to the parties; and
  - (3) the Appellant’s Stay Application (as defined below) is dismissed.

### BACKGROUND

5. On 1 April 2022 the Appellant appealed against corporation tax closure notices for the accounting periods ending on 31 December 2012, 2013, 2014, 2015 and 2017, determinations under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 for the years ending 5 April 2012-2017 (inclusive) and decisions under section 8 of the Social Security (Transfer of Functions etc) Act 1999 for the years ended 5 April 2012-2017 (inclusive).
6. These liabilities are said to arise as a result of the Appellant’s involvement in what HMRC say is “a tax avoidance scheme devised by Baxendale Walker”, which was designed to have the effect of reducing the Appellant’s taxable trading profits in circumstances where its directors have the use of the money (contributed by the Appellant to a remuneration trust) which was loaned to them.
7. The scheme required the Appellant to adhere to an existing remuneration trust (“the Trust”) and make contributions to the Trust, deducting these contributions in its accounts as business expenses on the grounds that they had been paid to the Trust because they “reflect part of the economic cost to the [Appellant] of earning its profits”.
8. HMRC’s position is that the Appellant’s taxable profits are not reduced by reason of the contributions it claims to have made (over £1.25m in aggregate) and that the way the scheme was implemented gave rise to liabilities under section 455 Corporation Tax Act 2010. HMRC also say that the scheme gave rise to charges under Part 7A of the Income Tax (Earnings and Pensions) Act 2003 and regulation 22B of the Social Security (Contributions) Regulations 2001.

9. It is not necessary for me to outline the scheme in greater detail or to make any comment on whether it achieved its objectives.

10. This appeal has been the subject of several stays to facilitate settlement discussions between the parties. I do not need to set these (or certain other procedural steps) out, but I do need to summarise the two applications with which I have been instructed to deal. These are:

(1) On 18 May 2023 the Appellant made an application for:

(a) these proceedings to be stayed pending the outcome of arbitral proceedings in the BVI which (it is said) would determine the beneficial ownership of the assets which had been supposed to be subject to the (now void) Trust. It was said that this would result in “relevant court orders” (including in the High Court in this country) which would bind HMRC and this Tribunal. HMRC’s assertions of tax liabilities were said to be based on the assumption that contributions had been made to a valid trust, but “That premise is necessarily wrong in law. That the said premise is wrong in law is the prospective subject of binding determination by the High Court Order.” I refer to this as the “Stay Application”.

(b) permission to amend its grounds of appeal to reflect its assertion that the Trust was void ab initio and, in consequence, there “cannot have been any contributions made to a void trust and there cannot have been any loans/fiduciary receipts made from a void trust”. I refer to this as the “Variation Application” and that definition includes all the proposed amendments which the Appellant applied for permission to make on 18 May 2023.

(2) On 14 June 2023 HMRC objected to the Stay Application and the Variation Application and made an application for further and better particulars of the Appellant’s assertions that the Trust was void, its reasons for asserting that in consequence of the Trust being void it had no liabilities to corporation tax or PAYE/NIC or that HMRC could not collect any liabilities and details of the arbitral proceedings. On 4 July 2023 Appellant objected to HMRC’s application for further and better particulars. Also, on 4 July 2023 (seemingly crossing with the Appellant’s reply) the Tribunal directed the Appellant to provide these further and better particulars (I refer to this as “the FBP Direction”). I have set out the clarifications HMRC sought, and the matters the FBP Direction directed the Appellant to address, in the Annex to this decision.

## **REASONS FOR THE DECISION**

### *The Stay Application*

11. The Appellant states that “The trust was void ab initio. That matter has been expressly recognised by the corporate settlor and trustee.” But it has not given any detail of the “arbitral proceedings in the British Virgin Islands” which are the basis for the Stay Application. It does not explain who the parties to the application are nor the legal basis for the proceedings. It does claim that the proceedings will result in a High Court order binding on this Tribunal. However, in response to a question from this Tribunal it conceded that “no relevant proceedings have been issued in the High Court. The stay is requested only until such time as the Arbitral proceedings in the British Virgin Islands have been finalised, and that there is no intention for the stay to be indefinite. The Appellant undertakes that it will confirm to the Tribunal when the attendant High Court Order is being sought and to provide the High Court reference.”

12. HMRC object to the Stay Application for this reason, i.e. that the nature of the proceedings is unclear. More importantly, they assert that their submissions are unaffected

by the validity of the Trust, and the Appellant has never explained why any finding that the Trust was void ab initio will make HMRC's position "fall away" (as the Appellant put it). HMRC say that the actual contributions/payments have tax implications irrespective of the validity of the Trust. This is particularly clear with the tax charges which arise under Part 7A ITEPA, which applies irrespective of the correctness of the void trust arguments; see *CIA Insurance Services Ltd v HMRC*, [2022] UKFTT 144 (TC) at [239]-[245], applying *Clark v HMRC*, [2020] EWCA Civ 204.

13. In its submissions, the Appellant said that English courts recognise and enforce foreign arbitration awards and referred to section 36 (Effect of foreign awards) of the Arbitration Act 1950, which provides that a foreign award is enforceable to the extent that the award of an arbitrator is enforceable under section 66 of the Arbitration Act 1996 (which provides that an arbitral award may, by leave of the court, be enforced in the same manner as a judgment or order of the court) and that an award which is enforceable under the Act "shall be treated as binding for all purposes on the persons as between whom it was made" and can be relied on by those persons.

14. HMRC submit that only those who are party to an arbitration agreement are bound by or can rely on the arbitral award; *Vale v Steinmetz*, [2021] EWCA Civ 1087 at [31].

15. In addition any arbitral award will not be enforceable (in the UK or elsewhere) if it does not arise out of a genuine dispute between the parties (see the discussion of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which refers to awards "arising out of differences between persons") in Russell on Arbitration (2<sup>nd</sup> edition at 6-183)), which does not appear to be the case here (it is said that the original settlor and trustee are all in agreement that the trust was void and appear to agree (or be indifferent) as to the ownership of the trust assets).

16. Before setting out my reasons for dismissing the Stay Application, it may be worthwhile setting out some of what Males LJ (with whom Bean and Lewis LJ agreed) in *Vale v Steinmetz* at [30]-[31]:

"[30] Arbitration is a consensual process by which the parties agree to resolve disputes between them by accepting the decision of a tribunal chosen by them or in accordance with a procedure which they have agreed. An award thus produced is final and binding on them: section 58 of the Arbitration Act 1996. For this purpose it makes no difference whether the arbitrators' decision is right or wrong. Although section 69 of the 1996 Act permits an appeal to the court on a question of law arising out of an award, it is open to the parties to exclude any such appeal and the LCIA Rules contain such an exclusion agreement. Accordingly, when parties agree to arbitrate their differences under LCIA Rules, they agree to be bound by the arbitrators' decision even if the arbitrators get the law or the facts wrong. The only bases on which such an award can be challenged are that the arbitrators acted without jurisdiction (section 67) or that a serious irregularity of the limited kind listed in section 68 resulted in substantial injustice. In the present case the arbitrators' award may have been wrong in the sense indicated above, but there was no scope for Vale to challenge the dismissal of its restitutionary claim.

[31] However, while the award is final and binding as between Vale and BSGR, it is not binding on third parties. It is elementary that an arbitrator cannot make an award which is binding on third parties who have not agreed to be bound by his decision (Mustill & Boyd, *Commercial Arbitration*, 2nd Ed (1989), pages 149-150; Russell on Arbitration, 24th Ed (2015), para 6-183). ... Accordingly, it is common ground that as third parties the

appellants are not bound by the arbitrators' decision that Vale was the victim of a fraud.”

17. Although some of the information the Appellant was directed to produce by the FBP Direction is relevant to the Stay Application, I consider that the Stay Application can and should be dismissed in any event. This is because:

18. Any arbitral award will not bind HMRC as it was not a party to the arbitration.

19. If the question of the validity of the Trust arises in the appeal, it can be decided by the Tribunal. If foreign law is relevant to that question, the Tribunal can deal with foreign law issues as questions of fact. The best recent example of that is *Anson v HMRC*, [2015] UKSC 44, where the Tribunal made findings of fact as to US law and on that basis determined the UK tax liabilities of a UK resident member of a US LLC. There is no need to wait for foreign arbitration proceedings to be completed before the appeal can be heard in the Tribunal.

20. In my judgment, dismissing the Stay Application and dealing with any questions around the validity of the Trust in the appeal hearing is the best way of avoiding unnecessary delay, whilst securing proper consideration of the issues, and minimising cost and complexity. It is, therefore, the best way to give effect to the overriding objective of the Tribunal's Rules; see rule 2 of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”).

#### *The Variation Application and the FBP Direction*

21. The FBP Direction was made by the Tribunal in response to HMRC's objection to the Appellant's Stay Application and Variation Application. The FBP Direction directed the Appellant to provide HMRC with “the clarification sought in paragraph 17(b) of HMRC's submission of 14 June 2023” within 14 days.

22. Having reviewed the contents of the Tribunal file, I agree with HMRC's submission that the Appellant has not provided the information the Tribunal directed it to. This was drawn to the Appellant's attention by HMRC in their submission to the Tribunal on 19 July 2023, and the Appellant has done nothing to remedy this. Most importantly, the Appellant has not provided “a full explanation of how and on what basis” its void trust arguments mean that the Appellant has no tax liability (item (iii) in the list in the Annex).

23. I agree with HMRC's submission that this failure is serious (it has gone on for nearly a year) and the Appellant has not provided any explanation for its failure.

24. The FBP Direction was prompted by HMRC's objection to the Stay Application and the Variation Application. The Appellant has confirmed that its proposed amended grounds of appeal are intended to replace its current grounds of appeal. HMRC say that, absent anything which might be divulged in response to the FBP Direction, the Appellant's argument seems to be that the Trust is void ab initio and so HMRC's assertions of tax liabilities on the part of the Appellant must fail as they “were premised on contributions to a Remuneration Trust that ‘never existed’”. I have noted (see [12] above) that the validity of the Trust is not necessarily a determining factor so far as all the relevant liabilities are concerned. Permission to amend grounds of appeal will usually be given if the point to be pleaded has a real prospect of success; *HMRC v AG Villodre SL*, [2016] UKUT 166 (TCC). In the absence of further details of the Appellant's arguments and given the points referred to in [12] above, it is not possible to conclude that the Appellant's proposed new grounds of appeal have a real prospect of success.

25. HMRC invited the Tribunal to strike out the Appellant's appeal because of its serious failure to comply with the FBP Direction, which it suggested fell within rule 8(3)(b) of the

Tribunal Rules. Whilst the Appellant has clearly failed to cooperate with the Tribunal, I am not satisfied that the Appellant's behaviour means that the Tribunal cannot deal with the case fairly or justly. In order to enable the Tribunal to deal with the Variation Application (which, we should remember, is the Appellant's application, not HMRC's), the Appellant must comply with the FBP Direction, so that HMRC can decide what position it wishes to take in relation to the Variation Application and the Tribunal can then decide whether the proposed grounds of appeal have a reasonable prospect of success and whether (and to what extent) the Variation Application should be allowed. Accordingly, I propose to make an "unless" order, under which the Variation Application will be struck out automatically unless the Appellant has complied with the FBP Direction in full (including the parts which are more relevant to the Stay Application, even though I have dismissed that) within 14 days (the time the Tribunal originally gave for complying with the FBP Direction) of the release of this decision.

26. I would just remind the Appellant that this is its last chance to comply with the FBP Direction and its response to the FBP Direction must set out its position/answers comprehensively (even if it considers it is making a point which is obvious or which it considers it has touched on before) and clearly, so that there can be absolutely no doubt at all about its position, and so that HMRC and the Tribunal can decide whether it has a real chance of success with its proposed amended grounds of appeal.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

27. 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.

**MARK BALDWIN  
TRIBUNAL JUDGE**

**Release date: 26 June 2024**

## Annex

“(b) ... the Appellant is directed to provide the following further and better particulars to HMRC and the Tribunal:

- (i) In relation to the assertion that the Remuneration Trust “did not meet one or more of the 3 certainties required for valid formation of an express trust”, particularise in full the uncertainty / uncertainties relied upon;
- (ii) In relation to the assertion that the Remuneration Trust is void for impossibility, particularise in full the impossibility relied upon;
- (iii) A full explanation of how and on what basis the consequence of the void trust arguments is said to be that the Appellant has no liability for corporation tax, income tax and/or National Insurance contributions and/or that HMRC is unable to assess and/or collect the sums due;
- (iv) A description of the nature of the arbitral proceedings referred to (including details of the issues for determination; of the identity of the parties; and of the terms of the arbitration agreement giving rise to the proceedings);
- (v) A description of the nature and content of the arbitral award that is expected (including whether it is expected to be by consent);
- (vi) In relation to the “relevant court orders in [BVI]” that the Appellant states “will issue upon such arbitral ruling”, describe what orders are referred to, by what court and pursuant to what jurisdiction; and
- (vii) Details of the legal instrument referred to at paragraph 10 of the filed Grounds of Appeal as having already affirmed that the trust is void (as this seems to conflict with reference now to ‘prospective’ award and court orders).

Such further and better particulars should take the form of consolidated amended grounds of appeal that sets out, the Appellant’s existing grounds of appeal, the grounds of appeal set out in the Application and the further and better particulars sought.”