TC04278

Appeal number: TC/2014/01165

PROCEDURE – application for stay of appeal against decision refusing repayment pending appeal to Upper Tribunal of decision in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

DPAS LTD (NO. 2) **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Royal Courts of Justice, the Strand, London on 4 February 2015

John Walters QC and Conrad McDonnell, Counsel, for the Appellant

A Bates, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. DPAS Ltd ("DPAS") considered that its supplies as dental payment plan administrator were exempt. HMRC issued it with a decision in April 2012 that its supplies were entirely standard rated, although HMRC subsequently restricted their decision to supplies on or after 1 January 2012. DPAS appealed. In the meantime DPAS accounted for VAT on its supplies.

2. On 22 November 2013 this Tribunal issued the decision of Judge John Brooks in DPAS' appeal (*DPAS Limited* [2013] UKFTT 676 (TC)) determining that DPAS did make exempt supplies to its dental patients. Immediately following that decision, DPAS submitted a claim under s 80 Value Added Tax Act ("VATA") to HMRC to recover VAT paid on its supplies since 1 January 2012. HMRC, in the meanwhile, lodged an appeal with the Upper Tribunal against the Tribunal's decision, which I shall refer to as "DPAS no.1". HMRC also refused the appellant's s 80 claim and the appellant lodged another appeal with this Tribunal. I shall refer to that appeal as the DPAS no.2 Appeal.

3. Directions were issued in the DPAS no.2 appeal and in accordance with these the appellant has served its list of documents and witness evidence. HMRC has not served any witness evidence yet but instead applies for a stay of proceedings until 60 days after the Upper Tribunal issues its decision in the DPAS no.1 appeal.

Timing

4. The Upper Tribunal is due to hear DPAS no.1 on 6-7 May 2015 which is in 13 weeks' time. HMRC's position is that if they are forced to prepare DPAS no.2 for hearing, the work would be wasted if they are successful in their appeal to the Upper Tribunal. They say only a short stay is requested and is justified by the potential saving in costs.

5. Of course, any stay in reality will be for longer than 13 weeks. It will be for approximately 8 weeks after the Upper Tribunal's decision is released which is unlikely to be before late June or July 2015, so the requested stay in practice is likely to last until about September this year.

6. But it seems to me that it is appropriate to bear in mind, when judging whether the stay should be granted, the day it was requested, which was 26 August 2014. I think this because otherwise the inevitable delay between the application and the hearing of it would mean that to an extent the matter goes by default. So in considering the matter, I need to bear in mind whether it would have been appropriate to stay the proceedings from August of last year until about September of this year.

7. But, as I explain below, I think that principles, rather than timing, resolve the issue of whether a stay is appropriate.

A question of quantum

8. Both parties were agreed, it seemed to me, that the effect of DPAS no.2 proceeding to hearing would be that the Tribunal would determine the quantum of the appellant's claim. Both were agreed that DPAS no.1 had only determined the matter in principle. While the appellant maintained that the entirety of the sum retained by DPAS from the payments it received from patients and passed on to the dentists was exempt from VAT, it recognised that HMRC did not agree that the entire sum was exempt even assuming that DPAS no.1 was correctly decided. So in DPAS no.2 quantum was in dispute.

9. The appellant accepted that quantum had not been in dispute in DPAS no.1 and that therefore it was not entitled to a payment following the release of the Tribunal's decision in 2013. But DPAS no.2 put quantum in dispute, and, the parties appeared agreed, that the effect of DPAS no.2 determining quantum would be that an amount would be determined as re-payable to the appellant so that under S85A(2)(b) VATA HMRC would be bound to make a payment to the appellant.

A question of payment

10. The appellant's position was that a stay of DPAS no.2 would therefore prevent it receiving a payment until (at the earliest) resolution of the appeal in DPAS no.1 in the Upper Tribunal. It pointed out that if this Tribunal thought a stay appropriate, this would suggest that the stay should be continued until final resolution of any appeal to higher courts in DPAS no.1 thus preventing it getting payment (if it ultimately won) potentially for years.

11. It accepted that DPAS no.2 was in practice (it now being February 2015) unlikely to be heard, and certainly unlikely to be determined, before the Upper Tribunal decision in DPAS no.1. Its position was that a stay was wrong in principle and at least refusing the say would mean that DPAS no.2 was close to determination not long after the resolution by the Upper Tribunal in DPAS no.1. Assuming the Upper Tribunal upheld the FTT decision, a stay of DPAS no.2 would mean many more months before the appellant was paid than if DPAS no.2 had not been stayed.

12. I agree with the appellant that the matter is really one of principle and that the proximity of the Upper Tribunal hearing does not really justify a stay if one is not justified in principle.

13. So what are the applicable principles?

Policy of payment following FTT decisions?

14. The appellant's position is that the policy apparent from s 85A and s 85B(1) Value Added Tax Act 1994 ("VATA") is that the losing party to the appeal should pay out following decisions in the First Tier irrespective of appeals to higher courts. While it accepted that ss 85A and 85B did not apply in DPAS no.1 (as there was no determination that a particular sum was due), it considered the policy evident from ss 85A and 85B should influence my exercise of discretion on whether to order a stay.

15. The appellant also drew my attention to CPR Part 52 Rule 7 which provides that in the courts an appeal from a lower court should not operate as a stay of any order of that lower court. In other words, in most cases effect should be given to the decision of the lower court. This appears consistent with the policy behind s 85B(1) VATA.

16. There was a caveat to Rule 7 which was that a stay might be ordered where there was some 'irremediable harm' and if the court decided it was justified in all the circumstances of the case. This was again reflected to some extent in VATA which provided for an application to withhold repayment or require security for it: s 85B(3).

17. The appellant's position is that the CPR provided a guide to the Tribunal in exercising its discretion (citing *Data Select Ltd* [2012] UKUT 187 (TCC) and *Leeds City Ccouncil* [2014] UKUT 350 (TCC)*)* and I did not understand that Mr Bates disagreed with that.

18. HMRC's position was that I should not compare this to a case where a s 80 claim was made and determined in favour of the appellant, both in principle and on quantum, but I should compare it to a case which had been determined in principle only. He said that the way in which this dispute with HMRC had led to two different appeals, one against a decision in principle and one claiming repayment under s 80 VAT, was really immaterial. It was as if a s 80 claim had been made and refused and the parties had decided only to resolve issues of principle in a preliminary hearing.

19. His point was that a determination of the preliminary issue in favour of the appellant would not give the appellant the benefit of s 85A and s 85B. He considered that there would be an inevitable stay on the determination of quantum until the preliminary issue was finally resolved on appeal. This case should be no different.

20. I am unable to agree. The purpose of calling a preliminary hearing is to save costs in that resolution of the preliminary issue ought to have the possibility of resolving the dispute without a full hearing. So I agree it is normal to have a preliminary hearing to resolve issues of principle, leaving quantum to be decided later if necessary. If HMRC win the preliminary hearing, a quantum hearing becomes unnecessary. If the appellant wins the preliminary hearing, the quantum hearing needs to take place if the parties cannot settle the matter. Mr Bates' assumption was that in such a case the quantum hearing would not take place until any appeal against the preliminary hearing was resolved. But I do not agree that is a correct assumption.

21. There seems no reason in principle why the FTT would not proceed with determining the quantum appeal while an appeal against the preliminary ruling was pending. The policy behind s 85B would suggest that it should. The policy behind ordering the preliminary hearing was to save wasted costs: but that was to save the wasted costs of determining quantum if HMRC won in principle. Once HMRC has lost in principle, that policy would no longer apply.

22. Mr Bates' case is saying that the same policy should apply in a situation such as the appellant's where there are two appeals in respect of the same matter (one against a decision in principle and one against a refusal of a repayment) *and* where there is a

single appeal but the Tribunal has directed the issue of principle to be decided in a preliminary hearing. And his case is that that policy should be that the issue of principle must be finally decided and without possibility of further appeal (either because it reaches the Supreme Court or the time to appeal to the next court has expired) *before* the first instance tribunal or court decides matters of quantum.

23. Such a policy would of course save both parties costs if the final outcome is in HMRC's favour; on the other hand if the final outcome is not in HMRC's favour, the costs are not saved but the appellant is kept out of its money for longer, potentially for years if it also won at earlier stages.

24. I agree with the appellant that there is a general policy in favour of effect being given to first instance decisions, even where there is an appeal which could reverse that decision. I do not see why that policy would not apply in a situation such as that in this present case where the manner in which the dispute with HMRC arose led to two separate appeals (one against a decision in principle and one against a decision refusing repayment). I do not see that the factor of saving the costs of the quantum hearing (a factor which would not arise with s 85B case where quantum would have been part of the original hearing) should make a difference.

25. In any event I take into account what was said in the case of *DEFRA v Downs* [2009] EWCA Civ 257 This was a case on Rule 7, and therefore can only be relevant by analogy as the question was whether the first instance decision should be given effect pending an appeal against it, which is not exactly the same issue as here. The first instance decision was that DEFRA must re-take a policy decision. Doing so was going to put DEFRA to considerable expense. It had appealed the court's determination and asked for stay on that judgment pending the appeal under Rule 7. It lost the stay application. Sullivan LJ commented that the costs of implementing the Administrative Court's decision could not 'conceivably' be a solid basis for making the stay ([15]). The Court of Appeal took into account that waiting for the appeal could be a lengthy process (albeit the hearing was then only 11 weeks away) and that the appellant suffered harm in the meantime from the continuation of the old policy.

26. The Tribunal has two factors to weigh: if the stay is not granted, both the appellant and HMRC's costs in preparing and taking DPAS no.2 to hearing will be wasted if the decision in DPAS no.1 on appeal goes against them; but if the stay is granted, and the appeal unsuccessful, DPAS is kept out of its money for longer than it would otherwise be. I consider that there is clear policy that first instance decisions should be given effect and that is the case even if the giving effect to them involves parties in some expense.

27. HMRC press the case that the stay is only for a short time but for reasons already given I do not consider that particularly relevant; in any event if in principle the stay should be granted, that would suggest (although HMRC do not ask for this) that the stay should be until ultimate resolution of the appeal, which potentially could be years away.

Stay to be justified

28. In any event, it is for HMRC to make out the case for the stay. I am satisfied that they have not done that. They have not satisfied me that the risk of costs being wasted justifies keeping the appellant out of its money which it has been found in principle to be entitled to.

Safeguards in S85B avoided?

29. Mr Bates suggested that I should not apply any policy from s 85A in this case, because in s 85 HMRC had the option, already mentioned, to ask for security or even refuse repayment where revenue was at risk: S 85B(3). Section 85B(3) did not apply in this case.

30. That is true, of course, but a stay is discretionary. If repayment to the appellant was considered to be a risk to the revenue (in other words, that the appellant, once repaid, would be unable to repay HMRC if it subsequently lost DPAS no.1 in the Upper Tribunal), then that would be a reason to grant the stay on the quantum hearing. It would also be comparable to 'irremediable harm' in Rule 7 and a reason to grant the stay. So I do not consider that this is a reason why the policy evident from s 85B should not apply.

31. I note that in this particular case HMRC did not apply for the stay on the grounds that they considered revenue to be at risk, so I do not need to consider this aspect when weighing the competing factors in the exercise of my discretion. But I consider that risk to the revenue, if shown, would have been a relevant factor in the exercise of my discretion.

Unable to serve evidence without decision in DPAS no.1?

32. Mr Bates did suggest that even if HMRC lost the appeal in DPAS no.1, HMRC would be better able to serve relevant evidence in DPAS no.2 if they first knew the outcome of DPAS no.1. The Upper Tribunal's decision might not be on the same basis as that of the FTT, said Mr Bates, and that might affect what evidence they served.

33. Mr Bates rather reduced the force of this submission by later agreeing that HMRC would have little evidence to serve in DPAS no.2. The appellant had the relevant evidence and HMRC's approach to DPAS no.2 would be more about challenging that evidence than serving competing evidence.

34. In any event, I don't see any force in the submission. The point of not staying DPAS no.2 is to give effect to the *FTT* decision in DPAS no.1; it is not to give effect to the forthcoming Upper Tribunal decision. And as a matter of practice, the Upper Tribunal decision is likely to be out before the FTT decision in DPAS no.2 even if it is not stayed, so submissions can be made after the event.

Res judicata and abuse of process

35. One issue which did not arise in the hearing before me, although it was skirted around, was whether it would be permissible for HMRC in the FTT hearing of DPAS no.2 to re-open the issues of law decided in DPAS no.1. Mr Bates pointed out that there was no doctrine of res judicata in tribunal decisions: be that as it may, there is a principle that there should be no abuse of process.

36. I am refusing HMRC's application for a stay of DPAS no.2 and so the parties will need to consider this matter, and I have made directions (issued separately) to ensure that this matter is resolved before the hearing takes place.

Directions to progress the case to hearing

37. As the appeal is not stayed, the directions governing this appeal need to be updated. I have therefore issued revised directions in a separate document, as mentioned above. HMRC wanted six weeks to serve their evidence: I have not granted them this. Their evidence should have been served months ago particularly as Mr Bates agreed that it was unlikely to be voluminous. The case officer may be on holiday but HMRC ought to have anticipated the possibility that their application would be unsuccessful and taken appropriate steps before he went away.

38. 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: 9 February 2015