[2019] UKFTT 124 (TC)

TC06990

Appeal number: TC/2017/8378

PROCEDURE – application to set aside direction refusing to admit new grounds of appeal – procedural error did not give rise to injustice as new ground of appeal does not have reasonable prospect of success – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SYMBIOSIS IMEDIA SYSTEMS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 29 January 2019

Having heard Mr T Brown, Counsel, for the Appellant and Mr Pritchard, counsel, for the Respondents

DECISION

1. The appellant applied on 29 May 2018 to amend its grounds of appeal to include as a new ground of appeal a challenge to the legal validity of Commission Implementing Regulation 2017/1166. The application was heard before me on 29 January 2019 and I reserved my decision. This written notice therefore records my decision.

Can a previous direction be set aside?

2. I found that the application before me (dated 29 May 2018) was effectively the same application as before Judge Bailey (dated 20 February 2018). More detailed reasons were given to support it, but it was the same application, which was to permit the appellant to amend its grounds of appeal to include as a ground the alleged invalidity of the Regulation 2017/1166.

3. Judge Bailey had refused the application on the papers on 27 April 2018. That refusal was not appealed. Instead the appellant had simply lodging a renewal of the application a month after the refusal. In effect, the appellant is asking me to reverse Judge Bailey's decision and allow the amendment.

4. While the Rules contemplate that parties can apply to the FTT to set aside an earlier direction, it is well established that the Tribunal should only exercise its discretion in certain circumstances: see *Tibbles v SIG plc* [2012] EWCA Civ 518 at [39] and they are:

> (a) Directions were given in the absence of representations (such directions normally expressly give the parties leave to make applications for variation, sometimes phrased as 'liberty to apply' or 'subject to objection');
>
> (b) There has been a change in circumstances.
>
> (c) Obvious error in law in the directions;
>
> (d) Directions given after misstatement of relevant circumstances;
>
> (e) Procedural irregularity in relation to the directions or hearing in which they were made; or
>
> (f) Other circumstances 'out of the ordinary'

Leave to renew application?

5. A I understood it, the appellant's application here was on the basis of (a): it considered that Judge Bailey had given leave for it to make a renewed application. This is because at §20 of her decision (unpublished), Judge Bailey stated:

> 'the appellant's new ground as currently framed has no real prospects of success….'

The appellant considered this implied that the appellant could re-frame its new ground of appeal and re-apply to add it to its grounds of appeal.

6. HMRC did not consider that the Judge meant anything of the sort. They considered that the Judge's decision was final, subject to an appeal, which the appellant was now out of time to make.

7. I do not consider that the Judge did intend to give the appellant leave to renew its application and so (a) is inapplicable, but I do recognise that there was some ambiguity in the wording which I refer to again below.

Procedural irregularity?

8. I make the comment in passing that there was no irregularity in the Judge's decision not to hold a hearing before deciding the application; the Tribunal is not required to hold a hearing before determining an interim application: Rule 29 and the requirement to hold a hearing only applies to (certain) hearings which bring proceedings to an end. Moreover, it would be procedurally fair to dispense with a hearing (as it saves time and money) where the Judge considered the answer to the interim application to be clear, and it appears that the judge did consider the answer to be clear in this case.

9. So what procedure should the judge have followed when determining a matter on the papers? In my view, if an application is made which clearly has no merit, a Judge can dismiss it immediately without asking the other party to respond to it. There is no procedural irregularity in doing so.

10. However, if the judge thinks the application may have some merit, the Judge must give the other party the opportunity to respond to it. It seems to me that if that response fails to persuade the judge that the application should be dismissed, the Judge should then, normally, allow the application. There is no need to give the applicant a right to reply to the response as the Judge is already persuaded that the response is inadequate.

11. But if the response persuades the judge that the application should be dismissed, it seems to me that, at that point, the interests of justice requires the appellant to be given the opportunity to reply. Otherwise, the appellant is not being given the opportunity to make its representations in the knowledge of the other party's representations, which is a requirement of open justice (see *Al Rawi* [2011] UKSC 34).

12. In this case, the Tribunal did not dismiss the application out of hand. It gave HMRC the opportunity to respond to it. The judge read HMRC's response of 12 April 2018 (having given directions for it to be provided on that date) as this is recorded in her decision on the front page. She then decided the matter in favour of HMRC. The appellant was given no opportunity to reply to what HMRC said.

13. HMRC do not consider this a procedural irregularity, or, if it was, do not consider it one which merits a set aside of the direction. They say there was no procedural irregularity because (a) the appellant had consented to the directions, which did not provide for the appellant to reply to HMRC's representations; and (b) the appellant could have made a reply, even though this was not provided for in the directions, but did not do so.

14. I think it was a procedural irregularity not to give the appellant a right to respond, even in circumstances where the appellant had agreed to forgo that right. But that does not necessarily mean that I should set aside the Judge's decision. If the irregularity did not in fact lead to injustice it should probably not be set aside; or, if, having heard both parties in an oral hearing where both parties have now had the opportunity to make submissions in full knowledge of the other side's, I consider the Judge reached the correct answer, again her direction should not be set aside.

15. I consider these two matters in turn.

Injustice?

16. Was there real injustice? The appellant did not actually apply for the Judge's decision to be set-aside on the grounds of procedural irregularity; so the appellant did not apparently consider itself disadvantaged by the manner in which the Tribunal resolved the application. However, having said that, I also have to take into account that the appellant did 'challenge' the decision by renewing the application fairly promptly (on 29 May 2018); and, while I do not think that the judge did consider her decision invited a renewal of the application, I can understand why the appellant may have read §20 as inviting renewal, particularly in circumstances where it had not been given the opportunity to reply to HMRC's response. So I think that there was some minor procedural injustice to the appellant but for the reasons given below I do not think it affected the outcome.

17. I note that after the hearing, HMRC submitted further evidence about the sequence of events surrounding the determination of the original application to amend. The appellant was copied in but made no comment. Neither have I sought the appellant's views on this. I do not consider that a procedural irregularity on my part because, despite HMRC's submissions, for the reasons given in the immediately preceding paragraph, I am satisfied that there was minor procedural injustice to the appellant. The reason I refuse the application is because, for the reasons given below, I would have reached the same conclusion as the judge on the application.

Merits of application?

18. The most that the appellant can achieve on its new ground of appeal in this Tribunal is a referral to the CJEU on the basis that the appellant has shown an arguable case that the Commission made a 'manifest error' in making Regulation 2017/1166 (see *Vtech* [2003] EWHC 59 (Ch)).

19. The parties were agreed that, to be given permission to amend its ground of appeal, the appellant had to establish that it has a real prospect of success in establishing that there is an arguable case that the Commission exceeded its powers when making Regulation 2017/1166. But establishing a real prospect of an arguable case is the same as establishing a real prospect of success in the case; so, in reality, the appellant does have to establish in this application that it has a real prospect of establishing that the Commission exceeded its powers.

20. Both parties appeared agreed that this was a question of law; the appellant intended to bring no new evidence other than the dictionary definitions of 'transmission'.

The Regulation

21. So what was the issue raised in this draft new ground of appeal? It turned on Regulation 2017/1166. The effect of the regulation was to classify a defined machine to code 8543 70 90. The machine classified was defined as:

> An electrical apparatus (so called 'video converter'), rectangular shaped, with dimensions of approximately 17 x 14 x 4 cm. The apparatus has the following sockets:
>
> - A serial digital interface (SDI);
> - A high definition multimedia interface (HDMI),

- An RJ-45 interface, and
- A power connector.

The apparatus is designed to convert video signals from SDI format to HDMI format. The RJ-45 interface serves to connect the apparatus ot the Ethernet only for the software updates and to get electric power needed for those updates (Power over Ethernet ('PoE')).

22. The reasons given for this classification were as follows:

> The RJ-45 interface (communication function via Ethernet) is ancillary to the principal function (video conversion), as it serves only to receive updates while no video signals are transmitted via that interface. Classification under heading 8517 is therefore excluded. Consequently, the apparatus is to be classified under CN code 8543 70 90 as other electrical machines and apparatus, having individual functions, not specified or included elsewhere in Chapter 85.

23. The appellant described its machines at issue in this appeal as ones which convert HDMI video input to SDI video input and vice versa. In other words, its machines converted video signals of one type into video signals of another type. The appellant accepted that the machines' only internet/network connection (ie ethernet cable connection) was for the purpose of software updates and could not be used to transmit the converted data. The converted data was in the form of a video signal which was carried on other (non-ethernet) cables.

24. Therefore, by Regulation 2017/1166, the Commission appears to have classified machines similar to the appellant's to 8543 70 00; the appellant's case is that alters the subject matter of the headings as it takes an item appropriate to 8571 and classifies it as appropriate to 8543.

25. But this argument only has a prospect of success if the appellant has a real prospect of showing that its products would be classified to 8571 in the absence of the Regulation. It was accepted that HMRC had so classified them in the past, but that does not by itself mean that it was right to do so or that the Commission had made a manifest error in the Regulations.

26. The appellant had three grounds for saying the Regulations were a manifest error by the Commission and I deal with each in turn:

27. *First point:* The appellant considers the products at issue in this appeal should be categorised under subheading 8571 62 00 and not to 8543 70 00 (to which the BTI under appeal classifies them). Its case relies on the description of 8571 62 00 'machines for the …conversion and transmission or regeneration of …images….'.

28. However, while SDI/HDMI conversion machines might appear to fall within this, I accept that HMRC are right to say that it is the section headings (8571 and 8543) which matter when considering whether a different heading is more appropriate; one does not compare sub-headings.

29. I reject the appellant's case on the 8571 62 00 description on the grounds it does not have a reasonable prospect of success in showing that the Commission made a manifest error.

30. *Second point:* The appellant's case is that its products are '…machines for the transmission or reception of ..images….' under 8571. The Commission, it appears from the

explanation given in the Regulations, does not treat them as such because the machines do not have the capability of transmitting the images over a computer network or the internet:

> …'the [ethernet] interface…is ancillary to the principle function (video conversion), as it serves only to receive updates while no video signals are transmitted via that interface. Classification under heading 8571 is therefore excluded.'

The appellant's case is that the Commission is wrong because it is enough for 8571 that the machines do transmit the images (presumably to other machines) via other (non ethernet) cables.

31. HMRC considers this case hopeless as the purpose of the machines is to convert the data it receives from one format to another, and the transmission of the converted data at the end of the process is simply a necessary step without which the conversion of the data would be pointless. There would be no point in the machine converting the data if the data could not be transmitted out of the machine. HMRC points out that the section notes (3) say that a machine which performs complementary functions is categorised by its principle function. The principle function of the products in issue was, in HMRC's view, conversion and not communication. Indeed, the appellant's witness statement records:

> The primary function of all the Decimator Design converters is to change the communication standard (signal type) and/or format of a video signal……

32. It seemed to me that this was the most significant argument put forward by the appellant, but I agree with HMRC that it cannot succeed. Even the appellant accepts that the machines' principle function is conversion of image data from one form to another; that relevant section of the Code requires them to be categorised by reference to their principle function. Their principle function does not appear in the heading to 8517 (which refers to image transmission and reception) and therefore it is not arguable that the Commission made a manifest error in concluding that they could not be categorised to 8517.

33. *Third point:* The appellant also criticises the Regulation because it refers to the approximate dimensions of the thing classified. The appellant does not think dimensions are a relevant objective characteristic of a machine which has a technical purpose which has no connection with its size. HMRC's view is that, even if this criticism is justified, it does not mean that the Commission has made a manifest error and/or altered a subject heading. HMRC does not accept that it was wrong in any event; it was merely a description.

34. I agree with HMRC; the inclusions of dimensions do not mean the Commission made a manifest error. If the description of the machines in the Regulation excludes machines which perform an identical function but of significantly different dimensions, all it means is that the Commission has failed to categorise as many machines by these Regulations as it would have done had it omitted the dimensions; the categorisation of those of or near the specified dimensions is not a manifest error if they are proper to 8543.

35. As it is the appellant's case that its machines are all about 3 times the size of the machines described in the Regulations, it may have an argument that the Regulations do not apply to its machines; but that is a different ground of appeal and one which (it appears) HMRC accept already forms a part of its grounds of appeal.

Conclusion

36. Even if there was a procedural error, I will not set aside Judge Bailey's direction. Any procedural error has been corrected by the appellant having the opportunity at an oral hearing to persuade me that its new ground of appeal has a reasonable prospect of success. I am not persuaded. I do not give it leave to amend its ground of appeal.

37. If it wishes to challenge this decision, it must do so by way of applying for permission to appeal.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 16 FEBRUARY 2019