Neutral Citation: [2022] UKFTT 00397 (TC)

Case Number: TC08625

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: George Street, Edinburgh

Appeal reference: TC/2021/11337

PROCEDURE – application to sist - refused

Heard on: 4 October 2022
Judgment date: 28 October 2022

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

GAP GROUP LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Philip Simpson, KC, instructed by KPMG LLP

For the Respondents: Ben Hayhurst, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This was a case management hearing to consider the respondents' ("HMRC's") Application ("the Application") dated 17 May 2022 for a sist of these proceedings until 60 days after the final determination of the appeal in *Generator Power Limited v HMRC* TC/2021/00389 ("Generator"). The Application was made pursuant to Rules 2 and 5(3)(j) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules").

2. In fact, HMRC sought a stay but as the appellant is headquartered in Scotland and this hearing is in Scotland, the appropriate terminology in terms of the Rules is a sist.

3. On 26 May 2022, the appellant lodged a Notice of Objection to the Application.

4. I had a hearing bundle extending to 264 pages and an authorities bundle extending to 313 pages. In addition there was lodged with the Tribunal:-

   (a) A redacted copy of the Statement of Case, dated 22 September 2022, in *Generator*.

   (b) Draft Directions.

   (c) A copy of *Connell v Grierson* (1865) 3 M 1166. ("Connell")

   (d) A copy of *288 Group Limited and Others v HMRC* [2013] UKFTT 659 (TC).

Background

5. The appellant is a long established plant hire company and operates a nationwide network utilising over 175 depots across the UK from which it makes a number of supplies including plant hire. In the period with which the appeal is concerned, the appellant made one-off supplies of red diesel at the end of the hire period if the customer chose to return the plant with less fuel in the tank than was present at the point of hire. If the appellant did make a supply of fuel then the customer paid for the fuel via a single separate payment which was separately invoiced at the end of the hire period.

6. On 22 October 2021, the appellant lodged an appeal with the Tribunal in respect of a Notice of Assessments dated 6 April 2021 for undercharged VAT in the total sum of £1,440,141 in relation to the fuel supplied between the periods 06/17 to 12/20 inclusive. That was subsequently reduced to £1,028,672 by way of HMRC's review decision letter dated 22 September 2021.

7. HMRC state that the basis for the assessments was that the appellant's supplies of red diesel fuel formed part of its main supply of plant hire, as a single composite supply, and therefore were required to follow the VAT liability of the supply of plant hire, which is a single standard rate of supply.

8. The appellant argues that its supplies of plant hire and its supplies of red diesel fuel constituted multiple supplies for VAT purposes and that these multiple supplies should be afforded their own VAT treatment. Accordingly, the appellant contents that its supplies of plant hire should be standard rated, and its supplies of fuel should be reduced rated because the quantity of the supplies fell below the *de minimis* threshold set out in Note 5(c) to Item 1 of Group 1 of Schedule 7A of the Value Added Tax Act 1994 ("VATA").

9. Accordingly, the issue for the Tribunal to determine in this appeal in the substantive hearing is whether the appellants supplies of plant hire and its supplies of fuel constitute a single composite supply or multiple supplies for the purposes of VAT.

10. HMRC served their Statement of Case on 18 March 2022. On 7 April 2022, HMRC intimated to the appellant that there was potentially a second appeal concerning, what they described as, similar issues and that they were considering whether to make an application to the Tribunal to stay this appeal behind the other. There is another appeal currently stayed behind this appeal.

11. On 29 April 2022, HMRC intimated that they had not served the Statement of Case in the other appeal but that case management directions were expected to be filed with the Tribunal by 13 May 2022. At that juncture the appellant had no further details as regards the facts or issues in dispute in the other appeal.

12. The parties agreed to a short sist until 6 May 2022 but the appellant's representative confirmed that it wished to proceed with the appeal and agree case management directions.

13. On 11 May 2022, HMRC provided the appellant with some details regarding the appeal in *Generator*. That was to the effect that the *Generator* appeal was concerned with the VAT due on supplies of generator hire and whether those constituted separate supplies to *Generators'* supplies of fuel.

14. The appellant's understanding from *Generator's* website is that its supplies of fuel are often done under fuel management arrangements and that the supplies are made and invoiced consistently throughout the customer's period of hire which is quite different to the appellant's operating model.

15. On 13 May 2022, the appellant's representative contacted HMRC highlighting the key differences between the two business models and their respective supplies of fuel arguing that the two businesses are materially different in terms of their operations. They stated that, therefore they wished to proceed with the appeal.

16. On 17 May 2022, the appellant served draft case management directions which provided for the service of the List of Documents and the appellant's witness statements by 16 June 2022. HMRC refused to agree the case management directions and lodged the application with which I am concerned. The appellant's witness statements have been served.

The Law

17. The relevant provision in Rule 5(3)(j) of the Rules reads:-

> "… the Tribunal may by direction - …
>
> (j) stay (or, in Scotland, sist) proceedings …".

18. It was not in dispute that the test to apply is the one set out in *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2006] CSIH 10 at paragraph 22 which reads:-

> "… a tribunal or court might sist proceedings against the wish of a party if it considered that a decision in another court would be of material assistance in resolving the issues before the tribunal or court in question and that it was expedient to do so". (emphasis added)

19. I have highlighted the word "might" because, of course, that reflects the wording in Rule 5(3)(j).

20. I have added emphasis as both parties were agreed that the Tribunal must consider whether a decision in *Generator* would be of material assistance and, if it would be, whether it would be expedient to sist this appeal.

21. A decision whether or not to sist proceedings is an exercise of the Tribunal's discretion and therefore I must have in mind at all times the provisions of Rule 2 of the Rules which read:-

> **2.—Overriding objective and parties' obligations to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly 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.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.

22. The procedural history with *Generator* is that the Notice of Appeal in *Generator* was lodged after the Notice of Appeal in this case. Alternative Dispute Resolution ("ADR") collapsed. The parties could not agree the wording of the exit agreement. On 8 August 2022, in the *Generator* appeal, HMRC wrote to the Tribunal requesting a stay of the Direction to furnish the Statement of Case until the exit agreement was signed. That was apparently granted.

23. On 16 September 2022, *Generator* wrote to HMRC stating that the appeal should proceed in the absence of any signed exit agreement.

24. HMRC served the Statement of Case on 22 September 2022 and has written to the Tribunal requesting that the stay be withdrawn and Case Management Directions issued.

25. The Statement of Case, with which I have been provided, has been significantly redacted but confirms that, on 4 August 2022, *Generator's* representatives set out what they considered to be the different fuel supply scenarios which applied to *Generator's* business and there are six, namely:-

> (a) A customer rents a generator and provides their own fuel.
>
> (b) A customer rents a generator and asks *Generator* to undertake "fuel management" where regular fuel drops are undertaken.
>
> (c) A customer rents a generator and provides their own fuel but asks for a one-off delivery during the hire.

(d) A customer rents a generator and provides their own fuel and when the machine is returned at the end of the hire, the tank is not full. In that scenario the customer is charged for the discrepancy.

(e) The customer owns their own generator and engages *Generator* to top up with fuel.

(f) There are examples of other suppliers charging 5% fuel.

Generator argue that there are two distinct and therefore separate supplies in each of those scenarios.

Discussion

26. HMRC argue that the issue to be determined in this appeal is "significantly similar" to the issue to be determined in *Generator* and that:

> "Whilst it may not be determinative, a decision in *Generator Power Limited* as to the correct VAT treatment of supplies of red diesel fuel, in the context of equipment hire, will be very persuasive and provide material assistance to the Tribunal in the determination of the Appellant's appeal".

27. It is trite law that the highest that could be said of any other FTT decision is that it might be persuasive. It certainly does not set any precedent. I note that HMRC have not made an application, in terms of Rule 18 of the Rules, for *Generator* to be a lead case and Mr Heyhurst confirmed that they do not intend to do so.

28. As I have indicated, the issue to be determined in this appeal is whether the appellant's supplies of plant hire and its supplies of fuel constitute a single composite supply for the purposes of VAT, as HMRC maintain, or multiple supplies, as the appellant maintains. There is extensive jurisprudence going back many years in regard to what constitutes a single or multiple supply. Each appeal turns on its own facts.

29. It is certainly the case that in both Statements of Case under the heading "The Law" HMRC have cited exactly the same legislation and case law.

30. However, the Statement of Case in this appeal records that the appellant also has an alternative argument and relies on *Talacre Beach Caravan Sales Ltd v HMRC* C-251/05 and *European Commission v France* C-94/09.

31. In *Generator's* Statement of Case, HMRC record that *Generator* also relies on *RLRE Tellmer Property sro v Finanční ředitelství v Ústí nad Labem* C-572/07.

32. Clearly that alone is a distinction.

33. Furthermore, although HMRC argue that both appellants' primary arguments revolve around the fact that customers have choices and that separate invoices are issued, that is not the end of the matter. There are a number of, what I consider to be, significant differences recorded in the two Statements of Case.

34. Firstly, it appears from *Generator's* Statement of Case that they simply provide generators and fuel whether together or separately. In this case the appellant maintains a catalogue of plant items which is available for hire. That includes tele-handlers, excavators, dumpers and diggers, hydraulic packs and breakers, compaction and concreting equipment, power generation and lighting, pressure washers and power tools. These are tools/equipment which may be required for a wide variety of construction products ranging from utilities to telecoms to construction. The hire periods for each plant item varies depending on the project and the period of hire may last for many months or years.

35. As can be seen, *Generator* provides fuel during the period of hire, as required or indeed separately from the hire. The appellant does not.

36. In this appeal it is argued that the appellant does not market its supplies of plant items as being supplied inclusive of fuel and so customers do not have an expectation that when hiring the plant, the supply of the plant is being made inclusive of a supply of fuel. It is also argued that the cost of the supply of plant hire is determined by the nature of the plant and machinery and the length of the hire. Fuel would not be a component when quoting the price for the hire.

37. At the point at which the contract is concluded there is no certainty as to whether or not the appellant will be required to make a supply of fuel. Since plant items may be hired for very long periods of time, including several years, the question of a supply of fuel is separately agreed between the appellant and the customer at an entirely different point in time to the supply of the plant hire.

38. By contrast, *Generator* rely on the fact that the fuel and generators are priced and advertised separately, fuel may be supplied at a later date, or it may be delivered on an ongoing basis and therefore supplied separately.

39. Of course, both appellants, also have other arguments.

40. Mr Hayhurst recognised, fairly, that the Application was to sist until *Generator's* appeal is "finally determined" and that in their Notice of Objection, the appellant had pointed out that that meant until any appeal to the Upper Tribunal, and indeed beyond, had been determined. The appellant argued that it should not be put at risk of having to wait years before its dispute with HMRC is determined. Mr Hayhurst then suggested that HMRC would concede that a sist would only be sought until the determination of *Generator's* appeal to the First-tier Tribunal ("FTT").

41. I agree with Mr Simpson that I do not understand the logic in that. If the underlying thinking is that *Generator* would be unlikely to go beyond the FTT, then that does support the proposition that *Generator* raises really only questions of fact. In any event there could be many reasons why a decision is not appealed.

42. I had difficulty in understanding Mr Hayhurst's argument that because there was a wider range of issues in dispute in *Generator* then it made common sense for that appeal to proceed first, although lodged with the FTT later. He said that it would be of material assistance to have reasoned argument on the other issues as different arguments would be ventilated. Undoubtedly different arguments would be ventilated but equally there may be a failure to advance arguments that could be advanced for this appellant. Certainly, it is unlikely that there would be an argument based on this appellant's alternative argument.

43. Mr Hayhurst argued that, as a matter of expediency, a considered decision in *Generator* would make for a shorter hearing in this appeal. I do not accept that. VAT classification appeals are by no means uncommon. The legal principles are well established and clearly identified. They simply have to be applied to the facts. The Tribunal will have to make Findings in Fact and there may, or may not, be what Mr Simpson describes as a plethora of evidence as to the specific facts of the appellant's business. Undoubtedly a fact finding exercise will be required.

44. As Mr Simpson pointed out, the appellant's 6,000 customers are divided into four groups with different contractual arrangements. The law will have to be applied to those contractual arrangements.

45. I agree with Judge Falk, as she then was, in *Waverton Property LLP v HMRC* [2017] UKFTT 0853 (TC) ("Waverton") when she stated at paragraph 31:

> "The fact that HMRC have framed their legal arguments on particular points in the same way in each Statement of Case is hardly surprising (it merely indicates, as one would hope is the case, that a consistent approach has been taken). It does not demonstrate that a conclusion reached by a judge in one of the cases will necessarily indicate the conclusion that should be reached in the other, on what may well be different facts. A number of the points made by Mr Thomas effectively assume that the underlying factual issues are the same. This rather prejudges the position."

46. Mr Hayhurst argued that Judge Falk had rejected that application to stay because the issues were mixed fact and law. The Tribunal's first requirement is to find the facts and then apply the law.

47. One of the issues in this case is that in the draft Directions provided by Mr Hayhurst in the event that the sist was not granted, he had sought Directions that HMRC would provide a list of questions for the appellant's witnesses and that those witnesses would be required to answer them before HMRC served their witness statements. Mr Hayhurst explained that at paragraph 22 in the Notice of Objection that the appellant had argued that:-

> "… many of the Appellant's customers never engaged the Appellant to supply fuel at all. Between April and September 2021, for example, only 14% of the Appellant's customers chose to refuel the equipment with the Appellant. The other 86% chose to refuel with third party fuel suppliers or via their own bowsers."

48. HMRC had noted from the witness statements that 50% of the appellant's revenue was from the hire of plant which did not require fuel. He said that the need to pose questions was in order to ascertain the facts. That is not consistent with his argument that the facts are broadly the same for both *Gap* and *Generator*. As in *Waverton* I find that rather prejudges the position.

49. I agree with Judge Berner in *Coast Telecom Limited v HMRC* [2012] UKFTT 307 (TC) where he stated at paragraph 21 that "The question is not whether the determination of another court might provide assistance, but whether it will provide material assistance". I am not persuaded that HMRC have established that in this instance. In case I am wrong in that I turn to the issue of expediency.

50. I agree with Judge O'Connor in *Ticket Master UK Limited v The Information Commissioners* [2021] UKFTT 83 (GRC) who stated that "… the dual considerations of material assistance and expediency, identified in *RBS*, are simply a rewrapping of the overriding objective … The phraseology of 'material assistance' and 'expediency' logically reflect those matters to which due weight should be attached, but, ultimately, the Tribunal must ensure that the case is dealt with fairly and justly".

51. I have set out the terms of Rule 2 of the Rules, which is the overriding objective, at paragraph 21 above. As can be seen, I must act fairly and justly to both parties. I must also avoid "delay, so far as compatible with proper consideration of the issues". I understand that HMRC would prefer to litigate only one case on single or multiple supplies. However, there would still have to be litigation in this appeal to establish the facts and depending on those, the application of the relevant legal principles may not result in the same outcome as in *Generator*.

52. Although it is indeed a very old case, Lord Deas in *Connell* stated: "*Prima facie* it is a matter of right to either party to insist upon the cause going on, and the *onus* lies on him who wishes to stop". In that case he found no sufficient grounds had been shown. It is indeed the case that the general rule is that parties are entitled to insist upon the cause being litigated continuously to a conclusion.

53. In this case I have weighed all the factors that have been brought to my attention in the balance. The appellant is entitled to proceed with its appeal without delay. There will be no

prejudice to *Generator's* appeal if this appeal is not sisted. This appeal is already further advanced. If this appeal were to be sisted there would be prejudice and additional cost to the appellant. I have difficulty in discerning any material prejudice to HMRC if this appeal is not sisted; indeed it might assist in one element of the *Generator* appeal.

Decision

54. For all these reasons I refuse the application to sist this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

55. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 28th October 2022