Neutral Citation: [2024] UKFTT 846 (TC)

Case Number: TC09295

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2017/05756

Case Management – very late application to amend Statement of Case – suggested December 2023 application July 2024 – no reason given for delay – Invest Bank followed – application refused – standard case – no costs opt out – consolidated with another opted out appeal – first appeal remains in costs regime – possible late application to opt out – Martland applied – very late application to submit second witness statement – allowed.

Heard on: 6 September 2024
Judgment date: 25 October 2024

Before

TRIBUNAL JUDGE ALASTAIR J RANKIN MBE

Between

THE BEST CONNECTION GROUP LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Akash Nawbatt KC

For the Respondents: Mr Richard Vallat KC instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The form of the hearing, with the consent of the parties, was by video using Teams. The documents to which I was referred were an electronic Application/Case Management Hearing Bundle containing 690 pages, an electronic Authorities Bundle containing 504 pages, an electronic Skeleton Argument dated 30 August 2024 prepared by Mr Nawbatt and two electronic Skeleton Arguments prepared by Mr Vallat dated 30 August 2024 and 2 September 2024.

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.

3. This was a Case Management hearing to deal with five separate matters:

3.1 An application by the Respondents dated 4 July 2024 for permission to amend their Consolidated Respondents' statement of Case dated 30 April 2019; (application refused)

3.2 The question of the allocation of costs following the consolidation of appeal number TC/2019/00824 with appeal number TC/2017/05756;

3.3 An application by the Respondents dated 5 September 2024 for permission to rely on a second witness statement from Ms Nicola Jane Briggs; (application granted)

3.4 A verbal application by the Respondents at the commencement of the hearing that there should be a transcript of the substantive hearing at the Respondent's own expense but made available to the Appellant; (application granted) and

3.5 A verbal application by the Respondents that their colleagues be allowed to observe the substantive hearing remotely (application granted).

BACKGROUND

4. During the relevant period, the Appellant carried on a business of supplying temporary workers to clients e.g. a transport company that required temporary additional heavy goods vehicle drivers. The Appellant employed the workers and placed them with its clients. The Appellant was paid a fee by the client for providing the worker and paid the wages of its employees.

5. The employees worked at the clients' premises and for this purpose had to arrange and pay for their own travel to and from the relevant temporary workplace and pay for their own subsistence whilst travelling to and from and working at the workplace.

6. This appeal concerns the treatment for income tax and National Insurance Contributions ("NICs") of salary sacrifice payment arrangements ("BSS") operated by the Appellant. BSS was operated by the Appellant in the period April 2012 to March 2016.

7. With effect from 28 September 2010, the Appellant had the benefit of a dispensation which permitted it to exclude from PAYE the reimbursement of certain expenditure by its employees, including expenditure incurred on business travel and subsistence ("the Dispensation"). In the case of subsistence, the amount of expenditure was calculated by reference to 'Benchmark Scale Rates'. The Dispensation was granted after the Respondents reviewed the contractual and other policy documents that the appellant proposed to use in the BSS.

8. The BSS operated as a form of salary sacrifice. The employees received a lower wage (which was subject to deductions on account of income tax and NICs) and reimbursement of

expenditure relating to travel and subsistence (which, in accordance with the terms of the Dispensation was not subject to such deductions). A separate company, BestEx Limited, carried out checks and verifications of expenditure that employees claimed that they had incurred.

9. The Respondents concluded that notwithstanding the Dispensation, the BSS operated by the Appellant was not a valid salary sacrifice scheme. The Appellant has appealed

9.1 a Regulation 80 Determination issued on 22 February 2017, concerning income tax for the year 2012/13;

9.2 a Regulation 80 Determination issued on 3 April 2018, concerning income tax for the years 2013/14 to 2015/16;

9.3 Section 8 Notices relating to NICs; andhe refusal by the Respondents to issue a direction under Regulation 72A of the Income Tax (Pay As You Earn) Regulations 2003 for the tax years 2012/13 to 2014/15.

LEGAL PRINCIPLES RELEVANT TO THE APPLICATION TO AMEND THE CONSOLIDATED RESPONDENTS' STATEMENT OF CASE

10 It is well established that:

10.1 HMRC are required to set out their "position in relation to the case" in a Statement of Case: rule 25(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

10.2 This means that "HMRC should explain its position in sufficient detail to enable the appellant to properly prepare its case for hearing. Anything less may lead to injustice": *Allpay Limited v HMRC* [2018] UKFTT 273 (TC) at [14].

10.3 The Civil Procedure Rules (CPR) are not directly applicable in this Tribunal, but they are a guide to what is appropriate in a tribunal, particularly when dealing with issues of procedural fairness.

10.4 Under the CPR, statements of case are "required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties": *Three Rivers District Council v Bank of England* [2003] 2 AC 1 at [50].

10.5 The date on which the amendments become "active" if the application is successful is the date of the hearing not the date of the application. *Invest Bank P.S.C. v Ahmad Mohammad El-Husseini and others* [2024] 1235 (Comm) at [45] ("Invest Bank").

11. In *Shinelock v HMRC* [2023] STC 976 at [118] the Upper Tribunal confirmed that the principles applicable to late amendments under the CPR should be taken into account by the First-tier Tribunal when considering late amendments to statements of case. *Shinelock* itself represents an application of the principle that the exercise by the Tribunal of the power to allow late / new arguments and issues to be raised has to be balanced against the need to ensure procedural fairness and to prevent one side from "ambushing" the other.

12 The relevant principles under the CPR were set out in *Invest Bank* where Bryan J said:
"45. A consideration of whether or not amendments are permissible is one that takes place at the date of the hearing of the amendment application – the question is not

when the amendments were first foreshadowed or applied for – see Holding [2018] EWHC 852 (TCC) at 41(3): "Even after the application was made… where it was being opposed there was no reason, in my judgment, then for the claimant to take steps to meet the case that was being advanced in a proposed amended pleading, in respect of which no consent had been given and no permission provided by the court". That makes clear that the correct position as a matter of law is that a responding party is not obliged to divert themselves from their trial preparation to prepare to meet a case which is the subject of a contested application for permission to amend.

46. Lateness of an amendment is a relevant factor which should be weighed in the balance. Lateness is a relative concept; an amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the opposing party to revisit any of the significant steps in the litigation (e.g. disclosure, witness statements and expert reports) - see CIP Properties at [19(a)]. Even if an amendment is merely "late" rather than "very late" there is a "heavy burden" on the claimant to justify – see Nesbit Law Group v Acasta European Insurance [2018] EWCA Civ 268 at [41].

47. An application to make substantive amendments to a statement of case in the immediate lead up to a trial is, at the very least, a late amendment, and if it threatens the trial date itself it is a very late amendment (this is so even if, in contrast to the present case, the trial is still some way off).

48. A useful statement of the applicable principles in this regard was set out by Coulson J (as he then was) in CIP Properties, supra, in which Coulson J stated at [19] as follows:

> "(a)… An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) ...
>
> (b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason.
>
> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise. In essence, there must be a good reason for the delay…
>
> (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around', to the disruption of and additional pressure on their lawyers in the run-up to trial and the duplication of cost and effort at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments.
>
> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise.""

13. In *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 Mrs Justice Carr stated:

> "38. Drawing these authorities together, the relevant principles can be stated simply as follows :

a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

14. Mr Vallat on behalf of the Respondents argued that most of the proposed amendments were "tidying up" and that most of the Appellant's objections were of no substance or were simply clarifications. However, Mr Nawbatt did specifically object to nine proposed amendments of which three were, he claimed, new arguments.

15. The Tribunal informed the parties by letter dated 18 December 2023 that the substantive face to face hearing would commence on 23 September 2024 and was expected to last for 10 days. During a telephone conversation on 10 November 2023 the Respondents' solicitor informed the Appellant's solicitor that the Respondents were still intending to amend their Statement of Case. Correspondence ensued between the two solicitors in which the Respondents suggested the Appellant should amend their Grounds of Appeal but there was no mention of the Respondents amending their Statement of Case until 1 July 2024 when the Respondent's solicitor sent the Appellant's solicitor a draft of their proposed amendments to their Statement of Case. The formal application to this Tribunal followed on 4 July 2024.

DECISION ON APPLICATION TO AMEND

16. Applying the principles set out in *Invest Bank* the application to amend the Consolidated Statement of Case is very late. The original Statement is dated 30 April 2019, the Respondents' solicitor indicated they were considering applying for amendments in December 2023 but did not do so until 4 July 2024 over eight months later. No reason for the delay has been forthcoming either in the Respondents' skeleton argument or by Mr Vallat during the hearing despite the Tribunal asking him on more than one occasion for a reason for the delay.

17. While many of the amendments are "tidying up" and clarifying matters some of them are new and would require the Appellant to seek an adjournment to enable it to adequately prepare to argue the substantive matters in the amendments. Mr Vallat claimed that he will be able to refer to most, if not all, of the amendments during the substantive hearing.

18. As there would be significant prejudice to the Appellant if the proposed amendments were allowed, as no good reason has been forthcoming for the delay in making the application and as there are only ten working days before the start of the substantive hearing the application to amend the Consolidated Respondents' Statement of Case is refused.

COSTS

19. On 18 July 2017 the Appellant filed an appeal against a determination made by the Respondents under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 in relation to the year ended 5 April 2013 for £3,353,520, The appeal was allocated reference number TC/2017/05756. The Tribunal allocated the appeal to the complex category on 10 August 2017. The Appellant did not opt out of the costs regime within 28 days from the date of the Tribunal's letter.

20. On 6 February 2019 the Appellant filed a further appeal against determinations made by the Respondents concerning the years ended 5 April 2014, 5 April 2015, 5 April 2016 for £2,577,631.60, £2,484,856.60 and £808,261.80 respectively, a NICs decision and the Respondents' refusal to issue a direction under Regulation 72 of the Income Tax (PAYE) Regulations 2003. The appeal was allocated reference number TC/2019/00824.

21. By letter to the Tribunal dated 14 February 2019 the Appellant stated inter alia that:
"It would seem sensible and likely to be a considerable saving of Tribunal time and costs if the two sets of appeals are heard together. Please take this letter as an application for the hearing together of all appeals for the tax years 2012 to 2016 inclusive."

22. The Respondents responded on 15 February 2019 stating inter alia that:
"HMRC have no objection to the appeals for the tax years 2012-16 being heard together. We agree that this would be in line with the overriding objective of the Tribunal as managing the appeals together is likely to save time and costs for all concerned.
HMRC have not yet been formally notified of the appeals or directed to provide their statement of case in relation to the Notice of Appeal filed on 6 February 2019. In the event that the Tribunal is minded to consolidate the appeals, HMRC would respectfully request the Tribunal to allow HMRC 60 days, from the date of the Tribunal's decision, to file and serve their consolidated statement of case."

23. By letter dated 1 March 2019 the Tribunal informed the parties that the Appellant's second appeal (TC/19/00824) had been categorised as complex. The Tribunal consolidated the two appeals despite the fact that the Appellant had requested that the two appeals be heard together rather than consolidated though the Respondents referred to both hearing together and consolidation.

24. On 25 March 2019 the Appellant wrote to the Tribunal stating:

> "Thank you for your letter of 1 March 2019 in which you acknowledged our client's notice of appeal dated 6 February 2019 and informed us that the Judge had directed that both appeals be consolidated. Please take this letter as the Appellant's application to opt out of the costs regime in relation to the appeals which have been categorised as complex."

25. The Appellant was out of time to opt out of the costs regime in respect of the first appeal, the parties having received notice of the categorisation of the first appeal as complex on 10 August 2017. Pursuant to Rule 10(1)(c)(ii) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the Appellant was required to inform the Tribunal of its wish to opt out within 28 days of receiving notice of the allocation, i.e. by 7 September 2017. It did not do so.

26. Accordingly, the Respondents submitted that the first appeal was within the costs regime but acknowledged that the costs regime would not apply to the Appellant's second appeal (TC/2019/0084)).

27. By letter dated 27 April 2019 the Tribunal stated inter alia that:

> "Costs regime
> The Tribunal's preliminary view is to agree with HMRC's letter of 29 March 2019 in that (a) the appellant's costs opt out is effective in relation to that part of consolidated appeal TC/17/5756 which was originally lodged as appeal TC/2019/824 but (b) ineffective in relation to that part of consolidated appeal TC/17/5756 which was originally lodged under that appeal number. The reason for that is that the Tribunal notified the appellant that appeal TC/17/5756 was categorised as complex on 10 August 2017 and no opt out was received within 28 days of that date. However, on TC.19.824 the categorisation as complex was notified on 1 March 2019 and the opt out was received within 28 days (i.e., 25.3.19). If the appellant does not agree with this analysis, then it must object within 14 days with reasons so that the Tribunal can make a determination."

28. The Appellant indicated its objection on 10 May 2019 and later explained that it disagreed with the Respondents's (and the Tribunal's) position and that its position is that:

> "whilst the costs regime applied to the first appeal and that the award of costs is a matter for the Tribunal's discretion, in the interests of consistency, and to avoid unnecessary additional costs, the consolidated appeal ought to sit outside the costs regime as from the date of the Tribunal's order to consolidate. This would meet the overriding objective of dealing with the case fairly and justly; as going forward both parties would know where they stand and avoid them having to consider an apportionment every time work is undertaken on the appeals."

29. The Appellant maintains that their letter to the Tribunal dated 25 March 2019 informed the Tribunal that it opted out of the costs regime "in relation to the appeals which

have been categorised as complex". This was a valid request under Rule 10(1)(c)(ii) as at that date there was only one consolidated appeal under reference TC/2017/05756.

30. The Appellant maintains that the position was summarised by Judge Richards in *Aquarius Film Company Ltd v HMRC* [2016] UKFTT 0702 (TC) at paragraph 26:

> "It is important to keep in mind the difference between the "consolidation" of appeals and a direction that appeals be heard together, a distinction that is made in Rule 5(3)(b) of the Tribunal Rules. Under the Tribunal's procedure, when two appeals are consolidated, they become a single appeal with a single appeal reference and lose their identity as separate appeals."

31. The appeals were consolidated by the Tribunal. If either party wished to keep the 2012/13 tax year under a separate costs regime, they should have applied for the appeals to be heard together but not consolidated. The Appellant maintained it would in any event be impractical to seek to split out the costs incurred after the consolidation order between the two sets of appeals as all costs incurred would have been incurred in any event for the 2013/14 to 2015/16 appeals.

32. The Appellant accepts that the letter dated 25 March 2019 was not effective as a retrospective opt-out of the costs regime for the original 2012/13 appeal prior to consolidation. The costs incurred solely in relation to that appeal and solely in the period prior to 1 March 2019 and solely relating to the BSS (because the settlement of the BTR precluded the recovery of costs in respect of that travel scheme) remain subject to the complex costs regime. In other words all costs incurred after consolidation are outside the costs regime.

33. The Respondents on the other hand claim the Tribunal should adopt the approach in *Manhattan Systems Limited v HMRC* [2017] UKFTT 0862 (TC) that two appeals with different costs regimes can be consolidated but the consolidation would not change the respective costs regimes:

> "50. The appellant pointed out that the Kittel appeals were categorised as complex while the de-registration appeal was categorised as standard: it considered this a bar to consolidation. I do not agree: categorisation is a decision made by the Registrar at the outset of the appeal and can be re-considered at any time, whether or not a party applies for re-categorisation. It seems clear to me that the de-registration appeal must be (as it depends on the same allegations) at least as complex as the Kittel appeals; in any event, the effect of consolidation into appeal Ref TC/16/2753 will be that all appeals take on the complex categorisation of that case. To the extent I am wrong on that, I re-categorise the de-registration appeal as complex because its nature is complex.
>
> 51. In any event, it is not impossible to consolidate appeals with different costs regimes. It just makes the decision on costs at the end of the appeal more complicated."

34. In the present case, the Respondents propose the following approach:

> 34.1. The first appeal remains in the costs regime;
>
> 34.2 Since BTR was settled, the costs in the first appeal that will fall to be awarded are limited to the costs referable to BSS;
>
> 34.3 For the period before the second appeal, the level of recovery will fall to be determined by the Tribunal if not agreed between the parties;

34.4 For the period after the second appeal and up to the settlement of BTR, there shall be no award of costs (on the basis that substantially all the costs between the second appeal and the settlement of BTR were attributable to BTR); and

34.5 For the period from the settlement of BTR, the level of recovery will be 50% on the basis that HMRC consider that the appeals take broadly equal time and resources.

35. If the Tribunal decides not to adopt this approach then the Respondents suggest it should treat the Appellant's claim that the letter dated 25 March 2019 was a late application to opt out of the costs regime in relation to the first appeal and accordingly apply the test in *Martland v HMRC* [2018] UKUT 178 (TCC) and in particular the three stage approach.

36. First the delay was considerable – from 10 August 2017 (when the Tribunal notified the Appellant of the first appeal being categorised as complex) and 25 March 2019 (when the Appellant applied to opt out following consolidation).

37. Secondly, no reason has been put forward by the Appellant why it did not opt out of the costs regime within the time limit specified in the Tribunal's rules.

38. Thirdly, in all the circumstances of this appeal it should be possible to apply different costs regimes to the consolidated appeal.

39. The Tribunal favours the approach suggested by the Respondents in paragraph 34 above and will include directions to this effect at the end of this decision.

APPLICATION FOR PERMISSION TO FILE A SECOND WITNESS STATEMENT

40. Although the second witness statement was prepared in order to explain how the Respondents arrived at the tax assessment figures contained in their Amended Consolidated Respondents' Statement of Claim (which application I have not allowed) Mr Vallat explained that he would be asking the Tribunal at the substantive hearing to increase the estimated assessments to actual assessments and despite opposition from Mr Nawbatt he believed he was entitled to do so even without the amended Statement. As this second witness statement was giving advance notice of what Mr Vallat intended to raise at the substantive hearing I could see no reason not to allow the application.

41. Accordingly the Tribunal grants the Respondent's application dated 5 September 2024 for permission to rely on the second witness statement of Ms Briggs.

TRANSCRIPT OF THE SUBSTANTIVE HEARING

42. Although Mr Nawbatt did not think a transcript was necessary and as the Respondents were proposing to be responsible for the costs, I granted permission for the Respondents to arrange for a transcript of the proceedings to be made and for it to be made available to the Appellant and the Tribunal.

OBSERVERS

43. Mr Vallat requested permission for some of the Respondent's staff to observe the substantive hearing remotely. I granted permission.

DIRECTIONS

44. As I issued Directions immediately after the Case Management hearing on 6 September 2024, having reserved my decision on the question of costs I now **DIRECT:**

44.1 The first appeal remains in the costs regime;

44.2 Since BTR was settled, the costs in the first appeal that will fall to be awarded are limited to the costs referable to BSS;

44.3 For the period before the second appeal, the level of recovery will fall to be determined by the Tribunal if not agreed between the parties;

44.4 For the period after the second appeal and up to the settlement of BTR, there shall be no award of costs (on the basis that substantially all the costs between the second appeal and the settlement of BTR were attributable to BTR); and

44.5 For the period from the settlement of BTR, the level of recovery will be 50% on the basis that HMRC consider that the appeals take broadly equal time and resources; and

44.6 All other matters contained in my Directions dated 6 September 2024 shall continue to have effect.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

ALASTAIR J RANKIN MBE
TRIBUNAL JUDGE

Release date: 25th OCTOBER 2024