



TC06832

Appeal number: TC/2017/06395, 06397, 06396, 06394

Bank Payroll Tax – application for the hearing of a preliminary issue in relation to whether notice of enquiry had been given under para 23(1) Sch 23 FA 2010.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**CREDIT SUISSE SECURITIES (EUROPE) LIMITED Appellants
CREDIT SUISSE INTERNATIONAL
CREDIT SUISSE AG – LONDON BRANCH
CREDIT SUISSE (UK) LIMITED**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public at Taylor House, EC1R 4QU on 31 October 2018

David Yates, instructed by Slaughter and May, for the Appellants

Kate Balmer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The Nature of, and background to, this Decision

5 1. The Appellants have appealed against closure notices in which HMRC stated
their conclusion that their bank payroll tax (“BPT”) returns should be amended so as
to increase the amount of tax payable by the Appellants by some £63m in aggregate.
The amendments assessed additional BPT by reference to payments of remuneration
10 made by the Appellants under an employee incentive scheme known as the APPA
scheme.

2. The live grounds of appeal at the date of the hearing before me were:

(i) that the closure notices were invalid because HMRC had not given notice
of their intention to enquire into the BPT returns within the time permitted (the
“Enquiry Issue”); and
15 (ii) that the APPA remuneration had not been “awarded” during the period
relevant to the operation of BPT, and that as a result it was not liable to the tax
(the “BPT Issue”).

3. This decision relates to the Appellants application for the first of these issues to
be heard as a preliminary issue. HMRC oppose the application.

20 BPT

4. BPT was created by Sch 1 FA 2010. It was charged at 50% on chargeable
relevant remuneration which had been "awarded" to a bank's employees in the period
9 December 2009 to 5 April 2010 (the "chargeable period"). Sch 1 contains provisions
for the calculation of the tax and for its collection and management.

25 5. So far as the calculation of the tax is concerned, the parties are divided only as
to the correct interpretation and application of paragraphs 6 and 12 Sch 1, which deal
with the determination of when remuneration is "awarded" and in particular when it is
"awarded" if payments are to be made outside the chargeable period pursuant to
obligations or arrangements in existence during that period. The APPA scheme
30 involved the making of payments outside the chargeable period and the dispute
between the parties is whether, or the extent to which, it gave rise to the the
"awarding" of remuneration within the chargeable period.

6. Schedule 1 also provided for the collection and management of BPT. Paragraph
18 required every bank to deliver a BPT return and paragraph 23 provided for the
35 making of enquiries into such a return:

"(1) HMRC may enquire into a bank payroll tax return if they give notice to the
taxable company of their intention to do so within the time allowed."

Later subparagraphs of paragraph 23 incorporated some of the provisions of Schedule 18 FA 1998 (which deal with the collection and management of corporation tax) into Sch 1.

5 **The nature of the issues to be determined by the tribunal in the substantive appeal**

A. The BPT Issue.

7. In relation to the meaning and application of paragraph 6 and 12 schedule 1 tribunal will need to determine:

10 (a) whether, as a matter of law, paragraph 12 is precluded from applying if the effect of paragraph 6(2) or (3) is that relevant remuneration was not awarded in the chargeable period;

(b) whether, as matters of mixed in law and fact:

- 15 (i) a contractual obligation to pay arose during the chargeable period;
- (ii) any amount which was to be paid was "fixed" for the purposes of paragraph 5(3)(a) so that paragraph (6)(2) applied;
- (iii) the condition in para 6(3) was satisfied; and
- (iv) there was an arrangement which was within paragraph 12 as regards the APPA.

20 8. The matters under (b) will involve consideration of documentary evidence and the evidence of employees of the banks; HMRC may also tender the evidence of its officers as to what was said to them at meetings with representatives of the companies.

B. The Enquiry Issue.

25 9. In relation to this issue HMRC say that notice of their intention to enquire into the BPT returns was given either:

- (i) at a meeting with representatives of the Appellants on 2 November 2010;
- (ii) in a letter of February 2011; or
- (iii) by the totality of their interaction with the Appellants in the relevant period;

30 and that in each case notice was given before 31 August 2011 (which was the relevant deadline).

10. Thus in relation to the Enquiry Issue the tribunal will need to determine:

- (i) as a matter of law, what is required for HMRC to have "give[n] notice ... of their intention to" enquire into a BPT return, and
- 35 (ii) as a matter of mixed fact and law whether what HMRC did and intended satisfied the legal test decided in (i).

11. So far as the issue in 10(i) above is concerned, Mr Yates indicated that the Appellants do not contend that notice under para 23 had to be given in writing. That was because neither section 1119 CTA 2010 nor section 898 ITA (which expressly require notice to be in writing) were incorporated into Sch1 whereas limited parts of Sch 18 FA 1998 had been (and perhaps that, unlike provisions such as section 8 TMA, paragraph 23 refers to the giving of notice, not to giving “a” notice). As a result the questions of pure law under 10(i) were limited to the nature of intention to enquire and what constituted the giving of notice of that intention for the purposes of para 23(1).

12. The factual issues, or issues of mixed fact and law under 10(ii) were accordingly: (a) whether HMRC had held the requisite intention, and (b) whether, and if so when, such notice as the tribunal concludes was necessary had been given.

13. As regards both (a) and (b) the evidence of HMRC’s officers in relation to their intentions and their discussions with the Appellants would be relevant, and, depending upon the nature of the officers’ evidence, evidence from the Appellants’ employees and advisors of those discussions.

14. To the extent that the discussions concerned the proper application of paras 6 and 12 Sch 1 there would be a degree of overlap with the evidence the tribunal would receive in relation to para [7(b)] above, but it seems to me very unlikely that the tribunal would, or would be called upon to make findings in relation to these issues which would affect its ability to make findings in relation to the BPT Issue.

15. In addition to that witness evidence there would be a small volume of documentary evidence containing correspondence between the parties and meeting notes and the few pages of internal emails disclosed by HMRC earlier in the progress of this appeal. Mr Yates said this volume would be thin; Miss Balmer did not expressly dissent from that description.

The Test to be applied

16. In considering whether to direct a preliminary hearing the tribunal is exercising a power under Rule 5(3)(a) of the tribunal’s Rules: it must do so with regard to the overriding objective of dealing with cases justly and fairly which includes dealing with them in a way which is proportionate to cost and avoids delay. Whilst the parties emphasised different aspects they were agreed on the key principles to be applied in considering this issue, citing the Decision of the Upper Tribunal in *Wrottesley v HMRC* [2015] UKUT 637 (TCC), namely:

“(1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.

(2) The power should only be exercised where there is a 'succinct, knockout point' which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a

conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a 'knockout' one.

5 (3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.

15 (4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way—see (3)(a), above.

20 (5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.

(6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.

25 (7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.

30 (8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly.

Applying the tests

17. I therefore turn to these criteria

(1) cautiously and sparingly

35 18. Miss Palmer emphasises this particular part of the guidance, Mr Yates accepts the need for caution but says that other factors overwhelm that need.

19. I accept the need for caution and particularly the need to guard against any "treacherous shortcut" :the danger that "what looks at first sight to be a shortcut turns out to be productive of more delay and costs" (*Boyle*: Lord Hope).

40 20. In this appeal the danger of delay (and in some circumstances additional cost) arises in my opinion mainly from the possibility that if the Enquiry Issue is heard as a

preliminary issue the decision of this tribunal on that point might be subject to appeal to the Upper Tribunal, or further, and, if the result of that process were a finding that the enquiry had been validly started, then the BPT issue would come back to the FTT probably some years later when recollections were even less clear and witness evidence less good. On the other hand this seemed to me not to be the kind of important issue of principle or practice which would normally warrant an appeal from the Upper Tribunal to the Court of Appeal.

21. Mr Yates said an appeal was unlikely given that the decision would be on a mixture of fact and law; but Miss Palmer said that HMRC would definitely appeal if they lost.

22. It seems to me that an application for permission to appeal against the FTT's decision so far as it related to the legal issue at B(i) - what constitutes giving notice of intention - is likely to be granted. I accept, however, that an appeal on the ground that the tribunal, having applied the right tests, concluded that the facts did or did not fulfil the necessary formulation was likely to be more difficult to pursue successfully and therefore less likely. Nevertheless large sums are at stake and the threshold for obtaining permission to appeal is not a high one.

(2) a knockout point.

23. There is no doubt that the Enquiry Issue is a knockout point: if the closure notices were invalid the appeals must succeed. There is no risk that the determination of the issue may prove irrelevant (save, of course, if the FTT's decision is reversed on appeal or if the FTT were to decide against the Appellants on the Enquiry Issue but in their favour on the BPT Issue).

(3) a succinct point.

24. Mr Yates thought that a preliminary hearing on the Enquiry Issue would require one, perhaps one and a half, days: there would be a small file of written material (letters, minutes, and the disclosure HMRC had of made internal e-mails) and some witness evidence addressing the narrow issue of whether intention to enquire was notified. He did not expect the cross-examination of HMRC's witnesses to take more than three quarters of the day and submissions on the law and its application should take no more than a couple of hours for each side the most. But he did not suggest that no witness would be called by the Appellants.

25. Mr Yates noted that the critical events took place some 8 years ago. Witnesses' recollections would be sparse and less reliable at that distance save to the extent they were refreshed by the limited written material. The documentary evidence was likely to be preferred thus the time given and importance of witness evidence need not be great – a contention opposed by Miss Balmer who said that the novelty of BPT kept the events fresh in the minds of HMRC's witnesses. On this issue I incline to Mr Yates view: recollections of past events become fixed and limited with age.

26. Miss Balmer on the other hand said that at least 2 perhaps 2 1/2 or even 3 days would be needed. There was, she said, disagreement between the parties about the

statements made at and after the meeting of 2 November 2010 and about what was discussed following 15 February 2011 letter and later emails. The evidence on these matters related to a period of years and to a number of discussions. Resolution of these matters would involve fairly lengthy evidence; HMRC would tender the evidence of at least one witness. It was clear, she said, that the Appellants intended to produce witness evidence as well and HMRC would wish to cross examine any such witness..

27. Miss Balmer also suggested that the tribunal would be offered evidence relating to (i) what the Appellants understood about HMRC's intention to enquire and (ii) HMRC's internal views on whether and enquiry had been opened. I do not consider that such evidence is relevant to whether notice of intention to enquire was given, but if tendered it would prolong the hearing (both of the Enquiry Issue and of a combined hearing).

28. I accept Miss Balmer's point that a proper understanding of the evidence on the Enquiry Issue will require the tribunal to be given some understanding of the nature of the APPA and of paragraphs 6 and 12 of Schedule 1, but I do not think that it should take any more than half an hour or so to bring the tribunal up to speed.

29. Overall it seems likely that the evidence and submissions on the Enquiry Issue could be heard within two days. I do not consider that the consideration of the point would involve what the Upper Tribunal described as a "substantial body of evidence", and given the Appellant's acceptance of the possibility that notice under paragraph 23 need not be given in writing, the legal issue is limited to the nature of the notice of intention that has to be given.

30. HMRC accepted that the BPT issue was more complex and estimated 2½ to 3 days; Mr Yates thought 3½ or 4 days. By contrast with these estimates, the time needed for the hearing of the Enquiry Issue would be relatively shorter but not significantly so.

31. In *Wrottesley*, in principle (3), the Upper Tribunal advise particular caution in relation to matters of mixed fact and law. The reasons for such particular caution are, in my view, that the evidence and submissions on such matters may overlap with the remaining matters, and that the time required for their investigation could be substantially more than for the exposition of a pure point of law. But I do not consider that these are particular risks in this case. The issues and the factual findings needed are distinct and the evidence is relatively limited.

35 (4) overlap.

32. I do not see any substantial overlap between the Enquiry Issue and the BPT Issue even though some of the same witnesses might give evidence. I have accepted that the tribunal would require some understanding of the BPT issue to comprehend the evidence on the Enquiry Issue but as I have said it seems unlikely that more than about half an hour would be occupied with such (potentially duplicated - particularly if a different tribunal panel heard the BPT Issue) explanation and in particular it

seems to me very unlikely that findings could be made in a consideration of the Enquiry Issue which could hinder tribunal in arriving at a just result in subsequent hearing of the remainder of the case.

(5) the potential for delay.

5 33. The parties had already given the tribunal inconvenient dates for a 5 day full
hearing in 2019. Miss Balmer says that if a preliminary hearing were directed it is
unlikely that the substantive hearing (on the BPT Issue) would be heard before the
end of 2019 and that this is already an old case. Mr Yates argues that if there were to
be a preliminary hearing of the Enquiry Issue the BPT Issue could still be heard
10 during 2019. It seems to me that any extra delay caused by splitting the hearings into
the Enquiry Issue and the BPT Issue is unlikely to be relatively great - at least in
comparison to the progress of the dispute to date - and unlikely to affect the quality of
the evidence. That would not be the case, however, if there were an appeal against the
tribunal's findings on the Enquiry Issue.

15 (6) the possibility that no further hearing is necessary.

34. If the FTT determined the Enquiry Issue in the Appellants' favour and if no
appeal was successful then there would be no need for a hearing on the BPT Issue.

(7) savings of cost and time.

20 35. Were the Appellants successful on the Enquiry Issue and/or any later appeal, the
cost of arguing the BPT issue would be saved. This is not a case however where the
costs of the preliminary issue will be very much less than the costs of the deferred
issue: although the BPT issue appeared to be the larger more complex issue, the
parties' time estimates for the two parts of the appeal suggested that the cost of the
BPT issue before the FTT would be about 60% or more of the total cost of the appeal
25 (it was likely that the BPT Issue would require greater time spent in preparation) .
Thus, were the Appellants so successful, those costs would be avoided. But if the
Appellants were unsuccessful I accept that the cost of the two stages appeal heard
separately would be somewhat, although not hugely, greater than the cost of a single
combined hearing.

30 36. Mr Yates argues that to deny the Appellant a preliminary hearing would cause
then irremediable prejudice. But it seems to me that if they won the Enquiry Issue at
a full hearing they would have a good case for their costs of both that and the BPT
issue even if they lost the latter issue.

35 37. There is one other consideration which may be conveniently addressed under
this heading and that is the prima facie strength of a party's case on a preliminary
issue. If, for example, it appeared to be fairly clear that party had a particularly weak
case on a particular issue so that it was unlikely that the issue would be determined in
its favour, that would mean that if a preliminary issue were directed it would be likely
that the hearing of the substantial issue would still be required with the extra time and
40 cost necessary occasioned as a result of the split hearing. In this appeal however I was
not able to come to the conclusion that either parties case fell into that category.

Conclusion.

38. I must now stand back and ask what, in view of these factors is just and fair. In reaching that balance the discussion of the key criteria above indicates that the most significant considerations are delay and cost.

5 39. It seems to me that directing a preliminary issue will not substantially reduce delay – for it is likely that a hearing to deal with both issues could be fixed before the end of 2019 and the hearing of a the Enquiry Issue would take place in the first half of 2019, and if needed the hearing of the BPT Issue could be heard close to the end of 2019.. But it may lead to serious delay if there are appeals from the FTT’s decision on
10 the point. Such appeals do not seem to me to be unlikely. Overall consideration of delay points against the direction of a preliminary issue.

40. There is a possibility that directing a preliminary issue may save cost if the Appellants are (eventually) successful on the Enquiry point. Further the lack of substantial overlap between the Enquiry and the BPT issue indicates to me that if a
15 preliminary issue were directed and if the eventual finding was against the Appellants the overall additional cost would not be significantly more than what it would have been if the issues had been heard together. Although this is not a case where the costs of the deferred part of the appeal would be disproportionately larger than the costs of the preliminary issue, saving costs points in favour of directing a preliminary issue.

20 41. Although finely balanced, in my judgment the dangers of delay outweigh the potential costs saving. As a result I decline to direct that the Enquiry Issue be heard as a preliminary issue.

Rights of onward Appeal

42. This document contains full findings of fact and reasons for the decision. Any
25 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)”
30 which accompanies and forms part of this decision notice.

CHARLES HELLIER
TRIBUNAL JUDGE

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