

NCN: [2021] UKFTT 218 (TC)

**TC08167**



*PROCEDURE - Application for a stay of one issue in an appeal pending resolution of preliminary issues in another case by Upper Tribunal - Application granted in limited terms - stay on the legal aspects of the issue, but not on the facts and the evidence*

**Tribunal reference: TC/2018/04165**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BETWEEN**

**DOLLAR FINANCIAL UK LIMITED**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL**

**Determined on the papers on 14 June 2021**

## DECISION

1. This is a case-management decision in relation to HMRC's application dated 5 February 2021 for an order staying some or all of this appeal until 60 days after the Upper Tribunal releases its decision in *HSBC Electronic Data Processing (Guangdong) Limited and others v HMRC* (UT/2020/0107) ('the HSBC Appeals'). The HSBC Appeals are due to be heard by the Upper Tribunal in early October 2021.

2. The substantive appeal challenges HMRC's decision to refuse to backdate Dollar Financial Group Inc's ('DFGI's) membership of the Appellant's VAT group from 27 June 2013 to 1 July 2012 and to repay allegedly overpaid VAT relating to management services received in the period 2 August 2012 to 27 June 2013. The amount of tax in dispute is approximately £2.2m. A substantive hearing of this appeal is listed to begin on 23 June 2021 - i.e., in just over a week's time - with an estimated length of hearing of three days. I am told that trial preparations are completed.

3. There is no formal list of agreed issues, but the issues are described by HMRC (albeit I note the Appellant's lack of agreement with those issues in its letter of 30 March 2021) as follows:

- (1) Whether section 43B VATA 1994 allows an application to be made to vary the date on which an existing member of a VAT group became a member;
- (2) If so, whether the effect of HMRC's failure to refuse the application within 90 days means that section 43B(4) applies so that the application is deemed to have been granted with effect from the date it was received;
- (3) If not, whether DFGI had a fixed establishment in the UK from 1 July 2012 to 27 June 2013 (which I shall refer to as 'the Fixed Establishment Issue');
- (4) If so, whether HMRC were nevertheless entitled to refuse to backdate membership of the VAT group.

4. It will be seen that the issues, as put, will arise for consideration sequentially. For example, (1) leads to (2). If the Appellant were to fail in relation to Issues (1) or (2), then its appeal would fail, in its entirety, at that stage, regardless of the Fixed Establishment Issue. If (3) is answered in the Appellant's favour, then (4) still arises. On their face, Issues (1) and (2) are pure issues of law. Issue (3) is a mixed issue of fact and law. Issue (4) also seems to me to be a mixed issue of fact and law.

### TWO PRELIMINARY POINTS

5. I need to deal with two preliminary points which have come to assume prominence through several rounds of submissions and counter-submissions.

6. The first is the scope of the stay which is sought. There was some dispute between the parties as to whether HMRC's application was one seeking to stay the Fixed Establishment Issue only or staying the whole appeal. This was not entirely clear to me in the application as originally drawn. However, HMRC latterly makes it clear that its position that the issue of whether DFGI had a fixed establishment in the UK is "distinct and separable", so the Commissioners call only for a stay of the Fixed Establishment Issue, and not the whole appeal.

7. The second is an ongoing dispute, being litigated energetically by correspondence, as to whether that issue, as between *these* parties in *this* appeal, is one of fact only (ie., with the law agreed) or is one of fact and law (ie, with the law not agreed).

8. Paragraphs 16 and 17 of the Appellant's Grounds of Appeal refer respectively to Article 11 of the EU Implementing Regulation 282/2011, and a short passage from the decision of the CJEU in *Gunter Berkholz v Finanzamt Hamburg-Mitte-Aldstadt* (1985) (C-168/84).

9. HMRC's case in response is in its Statement of Case dated 8 October 2018, and especially at Paragraphs 41-43. HMRC refer to the Regulation and to Berkholz, as well as to several others: Paragraph 43, footnotes 15 and 16 and accompanying text.

10. The Appellant's present position is that HMRC, in its submission dated 19 March 2021, have admitted the Appellant's view of the law governing fixed establishment. If right, that would mean that only the facts of the Fixed Establishment Issue would remain to be determined.

11. Paragraph 7 of HMRC's submission said:

"Although Paras 16 to 17 of the Appellant's Grounds of Appeal are not a complete statement of the law and do not contain all the relevant legal principles, HMRC acknowledges that they are not inconsistent with Paras 41-43 of HMRC's Statement of Case. On that basis ... HMRC formally admits the propositions of law in paragraphs 16 to 17 of the Grounds of Appeal"

12. HMRC qualifies that by saying that if the Appellant 'similarly confirms clearly and unequivocally that it accepts Paras 41-43 of HMRC's Statement of Case, HMRC will withdraw its application for a stay'. HMRC sought the Appellant's signature to a document described as a "Formal Concession" as to the legal principles set out in some of the paragraphs of HMRC's Statement of Case 'together with corresponding footnotes'. However, the Appellant has not conceded in those terms.

13. On 25 March 2021, the Tribunal wrote to the Appellant's representatives as follows:

"It is unclear ... whether, following HMRC's formal admission, there will remain any issues of law between the parties relevant to the legal test for fixed establishment that require the Tribunal to consider HMRC's application to stay the appeal pending the outcome of the UT decision in the HSBC appeal. Accordingly, the Appellant is directed to confirm to the Tribunal and the Respondent ...

(a) Whether there remains any issue of law between the parties relevant to the legal test for fixed establishment

(b) In the event of the Appellant confirming in (a) that issues of law remain, confirm what are the issue(s) of law that remain; and

(c) Confirm whether or not it accepts all the legal propositions in paragraphs 41-43 of HMRC's Statement of Case.

14. On 30 March 2021, the Appellant's representatives responded as follows:

"(a) To the extent that the Respondents regard paragraph 43 of their Statement of Case as containing propositions of law these are disputed by the Appellant. Submissions on the correct legal test will be made at the substantive hearing listed for 23-25 June 2021 in the ordinary manner.

(b) The Tribunal is referred to point (a) above.

(c) The legal propositions in paragraphs 41-42 of the Respondents' Statement of Case are on the face of matters agreed (they reflect Paragraphs 16 and 17 of the Appellant's Grounds of Appeal). However the correspondence with the Tribunal in the context of the Respondents' instant application for a stay has indicated that the Respondents' interpretation of those legal principles (as identified in paragraph 43 of the Respondents' Statement of Case) differs from the Appellant's interpretation of those principles. Paragraph 43 of the Respondents' Statement of Case is therefore not accepted"

15. As to (a) and (b), this is not an entirely productive response because it does not squarely engage with the questions which the Tribunal had asked, as part of its endeavour to case-manage this dispute appropriately. (c) is clearer - there is still a dispute as to the relevant law.

16. I therefore disagree with the Appellant's position, set out as step (e) of its suggested course of action in its letter of 30 March 2021, that HMRC have accepted the test for fixed establishment to be applied in this appeal. With respect to the Appellant's representatives, and as is clear from reading the above materials, HMRC have not done that. On the face of it, HMRC have made a limited concession, but HMRC's case is not confirmed to the Regulation and *Berkholz*, but refers to other matters and cases as well. Hence, the parties have not mutually agreed *the entirety* of the relevant law. Accordingly, the legal aspects of the Fixed Establishment Issue remain at large between these parties which means that, in relation to that issue, their dispute is not one which is limited to the facts alone.

#### **THE LAW**

17. The test to apply is the one set out in *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2006] CSIH 10; [2007] STC 814 at [22]:

"... a tribunal or court might sist [stay] proceedings against the wish of a party if it is 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."

18. Ultimately, I must ensure that the case is dealt with fairly and justly.

#### **DISCUSSION**

##### **"Material Assistance"**

19. The Fixed Establishment Issue is one which involves both fact and law. As already set out, the law is not agreed. Although I do not know the precise extent of the factual dispute, I do not consider that I need to in order to resolve this present application.

20. HSBC Issue 1 is:

"1. How is the concept of two or more bodies corporate being "established" or having a "fixed establishment" in section 43A of the Value Added Tax Act 1994 ('VATA'), which it is common ground purports to implement the words "any persons established in the territory of that Member State" in Article 11 of Council Directive 2006/112/EC ('the Principal VAT Directive') to be interpreted?"

21. The decision on HSBC Issue 1 need not be 'determinative' but must simply provide 'material' assistance: see the discussion by Judge Roger Berner in *Coast Telecon Ltd v HMRC* [2012] UKFTT 307, at Paras [21]-[25].

22. To my eyes, and without descending into over-forensic analysis of the degree of overlap between HSBC Issue 1 and the Fixed Establishment Issue in this appeal, it is my view that the resolution of HSBC Issue 1 in the HSBC Appeals will be of material assistance to the Tribunal in this appeal. Put simply, standing back and looking at the substance, HSBC Issue 1 involves

consideration of what a fixed establishment is, within the proper meaning and effect of the legislation. So does the Fixed Establishment Issue in this appeal.

23. I do not think that it makes any difference that Judge Sinfield identified HSBC Issue 1 as a pure point of law. Even if it is, there is - as already described - no agreement as to the relevant law in this appeal.

**"EXPEDIENCY"**

24. This is more challenging because there is a short menu of unattractive options.

25. The Appellant invites me to refuse the stay. However, the effect of this would be to go on with the whole appeal. That would be wrong, not least because the President of this Tribunal (in a decision endorsed by the President of the Tax and Chancery Chamber) has already decided to winnow out the law on fixed establishment. Leaving the present Tribunal to decide the law on fixed establishment undermines the case-management decisions already made in relation to the HSBC Appeals, duplicates work, and creates avoidable risk including the risk of inconsistent decisions.

26. Nor would it be appropriate to stay the whole appeal. It is now far too late to take a multi-day hearing out of the list. Moreover, the parties, their teams, and the Tribunal are ready to go, including on Issues 1, 2 and 4.

27. This leaves me with whether or not to stay the whole of the Fixed Establishment Issue.

28. I do not consider it right to stay the whole issue. It would not be right to stand in the way of the Tribunal next week hearing factual evidence. In my view, the overriding objective is self-evidently served by getting on and hearing all the evidence, including the evidence to that issue, in one go, and making findings of fact, including about the Fixed Establishment Issue. That avoids both having to stand witnesses down now, and the need to recall any witnesses. Hearing the evidence next week also puts paid to all arguments about the possible degradation of the quality of oral evidence, bearing in mind that the dispute already concerns events quite a long time ago.

29. The Appellant suggests that the Tribunal should hear evidence and submission in relation to all four issues, making findings of fact in relation to all four, and determining Issues 1, 2 and 4, but making its own decision at the hearing as to whether to stay Issue 3 pending the outcome of the HSBC Appeal, with the parties at liberty to make written representations to the Tribunal.

30. Although this approach is imaginative, and commendably seeks to preserve the valuable Tribunal time and resources already appropriated to the appeal, I am not attracted by it. It simply kicks the can a week or so down the road, leaving the Tribunal on 23 June 2021 to decide the very thing which I am now being asked to decide. That would inevitably eat into the time which the Tribunal has available to it, and would leave the parties in suspense in the meanwhile. They would have to prepare (or continue to prepare) on the footing that the law on the Fixed Establishment Issue might still be at large. That could end up being a waste of their time and resources.

31. That approach also leaves unclear what sort of decision the Tribunal would be asked to make, or when it would be able to make it. One possibility is that a hearing in June would lead to a decision on Issues 1, 2 and 4, but Issue 3 would, to some extent, be left in limbo - certainly for some months. That is unattractive.

32. Those features are unfair to the parties, and unfair to the Tribunal hearing this appeal. I must grasp the nettle here and now.

33. I acknowledge that the grant of a stay should be the exception and not the norm and that good reasons must be shown for granting a stay. But, although the Tribunal can and should

hear evidence on all the issues, including the Fixed Establishment Issue, I otherwise stay the Fixed Establishment Issue (by which I mean all matters of law appertaining to that issue).

34. There is good reason to do so. It is also expedient to do so.

35. It would not be appropriate for the Tribunal to make any findings as to the relevant law on the Fixed Establishment Issue, or to decide it, whilst the Upper Tribunal is seized of the HSBC Appeals. I simply do not see that there is any good reason why the Tribunal next week should consider the law on that issue at this time because there is no way of knowing what the Upper Tribunal will decide - and, whatever it decides, it will bind this Tribunal. The parties and the Tribunal could end up being put to much work which turns out to be unnecessary.

36. My decision keeps the hearing, and still allows the Tribunal and the parties to get on with Issues 1, 2 and 4, both on the facts and on the law. Although this may end up leading to some delay in relation to Fixed Establishment Issue, it is possible that the Tribunal may reach a decision on Issue 1 or 2 which is resolute of the entire appeal anyway. Taking all the competing factors into account, it seems to me that proceeding in this way is the best solution which can realistically and practically be fashioned.

37. I wish to be clear that I do not mean to fetter the ability of the Tribunal next week to consider, as it sees fit, how, procedurally, to eventually resolve the Fixed Establishment Issue if that issue remains live - e.g. whether (once the Upper Tribunal's decision emerges) it wants to have submissions, and, if so, in what form. Decisions of that kind are entirely for the Tribunal next week.

#### **OUTCOME**

38. For the above reasons, I grant a stay, but limited so that it shall be a stay only in relation to the legal aspects of the Fixed Establishment Issue.

39. The Tribunal will hear and decide the factual aspects of that issue.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

40. 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.

**DR CHRISTOPHER MCNALL**

**RELEASE DATE: 18 JUNE 2021**