[2021] UKUT 58 (TCC)

Appeal number: UT/2020/0107

PROCEDURE—Application under Rule 9(3) of the Upper Tribunal Rules to be joined as an interested party to a hearing of preliminary issues which has been transferred to the Upper Tribunal under Rule 28 of the FTT Rules

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

HSBC ELECTRONIC DATA PROCESSING (GUANGDONG) LIMITED AND OTHERS	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

BARCLAYS EXECUTION SERVICES LIMITED BARCLAYS SERVCES CORPORATION	**Applicants**

TRIBUNAL: JUDGE THOMAS SCOTT

DECISION

1. This is the decision on the application by Barclays Execution Services Limited and Barclays Services Corporation (the "Applicants") to be added as interested parties to a hearing of certain preliminary issues by the Upper Tribunal.

The Hearing

2. By its decision in *HSBC Electronic Data Processing (Guangdong) Ltd and others v HMRC* [2020] UKFTT 402 (TC) (the "FTT Decision"), the FTT granted an application that certain agreed issues should be determined at a preliminary hearing. The Appellants (together "HSBC") had appealed to the FTT against certain decisions by HMRC relating to VAT grouping and the hearing before the FTT related to preliminary issues in that appeal.

3. The FTT also exercised its power under Rule 28 of the FTT Rules in relation to Complex cases (which the HSBC appeals were) to direct, with the consent of the parties and the Presidents of the FTT and this Tribunal, that the preliminary issues hearing (the "Hearing") be transferred to and determined by this Tribunal.

4. The Annex to the FTT Decision set out the agreed preliminary issues as follows:

> 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?
>
> 2) Is the question of whether the UK discharged its obligation to consult the VAT Committee relevant? If it is relevant what would be the consequences of any breach of the obligation to consult?
>
> 3) Are the measures which a Member State may adopt under the second subparagraph of Article 11 of the Principal VAT Directive to prevent tax evasion or avoidance through the use of Article 11 limited to those needed to prevent tax evasion and avoidance caused by an abusive practice under *Halifax* principles, or any concept of avoidance arising from *Direct Cosmetics Limited and Laughtons Photographs Limited v Customs and Excise Commissioners* C-138 and C-139/86?
>
> 4) Is section 84(4D) VATA engaged in relation to these appeals and, if so, what are the factors that the Tribunal must take into account in considering whether or not HMRC decided on an appropriate date?

The Application and Chronology

5. In their application of 22 January 2021 (the "Application"), the Applicants applied under Rule 9(3) of the Upper Tribunal Rules (the "Rules") "to be added to [the

Hearing] as interested parties under Rule 9(1) of the UT Rules and permitted to make written and oral submissions at the preliminary hearing".

6. Following receipt of the Application, the Tribunal invited submissions from HSBC and HMRC as parties to the preliminary hearing. In a letter of 28 January 2021 HMRC asserted that the Tribunal lacked jurisdiction to grant the Application. On 29 January 2021 the Applicants were invited by the Tribunal to respond to that assertion. That response was received from the Applicants on 8 February 2021. The Tribunal then invited further responses (including as to the substantive issues raised by the Application) from HSBC and HMRC. HSBC's response was received on 12 February 2021, and HMRC's response on 18 February 2021.

7. On 24 February 2021, the Applicants filed without leave a Reply to the Parties' Responses.

8. The decision below takes into account the arguments and submissions in all the documents received from the parties.

Jurisdiction of this Tribunal

9. The first question is whether the Tribunal has jurisdiction to grant the Application.

10. The Application made clear that the Applicants were not applying to be joined as appellants in the Hearing, and were not applying for the Barclays' appeals to be transferred to this Tribunal under Rule 28 of the FTT Rules: see 2.3 and 6.7 of the Application.

11. The Application is for the Applicants to be joined as "interested parties" to the Hearing. Rule 9(1) of the Rules states that the Tribunal "may give a direction adding, substituting or removing a party as an appellant, a respondent or an interested party". The term "interested party" is defined by Rule 1(3) as follows:

> "interested party" means –
>
> (a) a person who is directly affected by the outcome sought in judicial review proceedings, and has been named as an interested party under rule 28 or 29 (judicial review), or has been substituted or added as an interested party under rule 9 (addition, substitution and removal of parties);
>
> (b) in judicial review proceedings transferred to the Upper Tribunal under section 25A(2) or (3) of the Judicature (Northern Ireland) Act 1978 or section 31A(2) or (3) of the Supreme Court Act 1981, a person who was an interested party in the proceedings immediately before they were transferred to the Upper Tribunal;
>
> (c) in a financial services case or a wholesale energy case, any person other than the applicant who could have referred the case to the Upper Tribunal and who has been added or substituted as an interested party under rule 9 (addition, substitution and removal of parties);

> (d) in a financial sanctions case, any person other than the appellant upon whom the Treasury has imposed a monetary penalty under Part 8 of the Policing and Crime Act 2017 in connection with the same matters as led to the decision that is the subject of the appeal and who has been added or substituted as an interested party under rule 9 (addition, substitution and removal of parties); and
>
> (e) in a trade remedies case, any person other than the appellant who could have appealed to the Upper Tribunal and who has been added or substituted as an interested party under rule 9 (addition, substitution and removal of parties).

12. The definition in Rule 1(3) clearly applies for the purposes of Rule 9. The question is this. Do the words beginning with "or" in Rule 1(3)(a) create a separate category for the purposes of the definition, encompassing any party substituted or added under rule 9 in any proceedings before the Tribunal, or do they merely expand the definition solely in relation to judicial review proceedings (other than those transferred within Rule 1(3)(b)) before the Tribunal?

13. The Applicants and HSBC say the former is the case and HMRC say the latter. All of the parties have produced detailed arguments, for which I am grateful.

14. There is no authority to which I have been referred which deals directly with this question. I must therefore decide it as matter of construction, applying the normal principles.

15. The arguments of the parties on this issue include discussion of whether or not the FTT has jurisdiction to add a party as an interested party in an appeal or other proceedings before it, and what the FTT has or has not done in previous proceedings. I do not deal with all of those arguments in detail, as I have not found that they shed any useful light on the construction of Rule 1(3)(a) of the Rules.

16. The Applicants submit that HMRC's interpretation of the definition "is contradicted by the authorities and is inconsistent with the public position adopted in litigation by HMRC". The second limb of Rule 1(3)(a) is a "freestanding power" and is "unqualified".

17. However, decisions of the FTT do not inform the ambit of Rule 1(3)(a), which has no analogue in the FTT Rules. The Applicants point to certain FTT decisions which were not cases involving judicial review, financial services, wholesale energy, financial sanctions or trade remedies. That is nothing to the point, because the FTT (unlike this Tribunal) has no jurisdiction in those areas. The only decision of this Tribunal referred to by the Applicants is *Lobler v HMRC* [2015] UKUT 152 (TCC), but that related to a direction by the Tribunal under Rule 5(3)(d) of the Rules, not an application Rule 9(3). While the Court of Appeal in *BPP Holdings v HMRC* [2016] EWCA Civ 121 did indeed say that only an express limitation limits the powers of this Tribunal, that entirely begs the question of whether the definition in Rule 1(3)(a) is such an express limitation.

18. HSBC, while opposing the Application on the merits, also submit that the Tribunal does have jurisdiction. Their submission (explicitly) divides Rule 1(3)(a) into two parts, with the second part being entirely independent of the first. HSBC also argue that "the regime" under which a party might be specified as an interested party under Rule 28 or 29 is distinct from that applying where a party is added under Rule 9. An analysis is put forward of the different categories of potential "interested party" under Rule 1(3) which is said to prove this construction.

19. The interpretation put forward by the Applicants and HSBC is a strained and unnatural construction, and is not supported by a careful reading of Rule 1(3), for a number of reasons.

20. The authorities cited by the Applicants miss the point, and any HMRC conduct in other hearings is irrelevant to the question of statutory construction.

21. As to that construction, Rule 1(3) is clearly, and conventionally, structured so as to define in relation to a number of distinct types of proceedings in which the Tribunal has jurisdiction (at (a) to (e)) who can and cannot be an interested party. It would be extremely surprising if a freestanding category had been bolted by the draftsman onto the definition applying in non-transferred judicial review proceedings. The standard drafting approach would have been to create a separate category, either by way of an additional sub-paragraph in Rule 1(3), or by way of introductory wording, if the Applicants' construction were correct. There would seem to be no good reason why a freestanding definition should be included in (1)(a) and not in another sub-paragraph. Secondly, the comma after "proceedings" is a clear indication that both Rule 28/29 and Rule 9 situations are those arising "in judicial review proceedings". Thirdly, if the construction proposed by the Applicants and HSBC were correct, then either the references to Rule 9 in sub-paragraphs (c), (d) and (e) would be otiose or those sub-paragraphs would naturally have been expressed as limitations to a "freestanding" Rule 9 power. Finally, although I afford this less weight in reaching my conclusion, the construction proposed by the Applicants would mean that in all situations other than those referred to in (a) to (e) where the Upper Tribunal has jurisdiction the Tribunal has an unfettered discretion to add anyone at all as an interested party. I think it unlikely that that can have been the intention of the draftsman.

22. I therefore conclude that this Tribunal does not have jurisdiction in this case to add the Applicants as interested parties.

23. However, in case I am wrong on that, I have considered whether the Application should be granted on its merits.

Should the Application be granted?

24. The Application states that the Applicants' appeal before the FTT is currently scheduled to be heard between November 2021 and April 2022: 1.8. The Hearing is currently scheduled to begin in early October 2021.

25. The basis for the Application is stated to be as follows:

(A) the transfer of a preliminary issues hearing to the UT from the FTT is, as far as the Applicants are aware, unprecedented;

(B) there are a number of appeals, including the BSC Appeal, that are before the FTT that concern whether the taxpayers have a fixed establishment in the UK for the purposes of s43A of the Act, or alternatively whether it was necessary to terminate the membership of a UK VAT group for protection of the revenue;

(C) consequently, and abnormally, the determination of the HSBC Preliminary Issues will have an impact far beyond the determination of the HSBC Appeals;

(D) the facts and circumstances of the HSBC Appeals are not representative of the BSC Appeal, or other cases;

(E) the Respondents knowingly proposed the transfer of the HSBC Preliminary Issues to the UT despite there being no compelling reason why this should happen to the detriment of other taxpayers with current appeals;

(F) despite considering that the FTT would be significantly assisted in "determining these complicated and important legal issues with the relevant factual background, rather than in the abstract", the Respondents have made plain that they will seek to establish points of binding principle in the HSBC Preliminary Hearing that they will seek to use to dispose of the BSC Appeal and deny the Applicants the opportunity to put their case to the FTT;

(G) the Overriding Objectives of the FTT Rules and the UT Rules and basic principles of justice require that the Applicants be allowed to put their case on the law on their facts in their own proceedings;

(H) there is a real danger that in being asked to determine points of wider legal application in the abstract, without due consideration of an appropriate range of facts, the UT may be led to determine the HSBC Preliminary Issues in a way that has ramifications beyond the proceedings with which it is seized;

(I) it is only through joinder as interested parties that the Applicants can assist the UT in understanding the way in which the submissions of the parties would have implications beyond the HSBC Appeals and thereby preserve their entitlement to an untainted hearing of their case; and

(J) it is inappropriate for the Respondents as a public body, and contrary to their duties to assist the FTT and the UT in pursuing the Overriding Objectives of the FTT Rules and the UT Rules, to seek to use tribunal procedure to cherry pick cases through which they seek to create precedent in order to avoid well advanced proceedings from being heard.

26. Although of no great relevance, a Rule 28 transfer, while rare, is not unprecedented. In fact, the first appeals to be heard in the current Tax and Chancery Chamber were the result of such a transfer: *John Wilkins (Motor Engineers) Ltd v HMRC* [2009] UKUT 175 (TCC).

27. Many of the points raised by the Applicants are criticisms (strongly disputed by both HMRC and HSBC) of either the decision to make the Rule 28 referral or the process around that decision, or the conduct of the Barclays' FTT appeals. However, the transfer direction in the FTT Decision was made with the consent of the parties, by the Presidents of the FTT and this Tribunal in consultation, and the FTT Decision has not been appealed. Those criticisms are therefore of little or no relevance to the substantive merits of the Application. Similarly, any issues which the Applicants might have in relation to their own appeals are matters for the FTT.

28. These points aside, the Applicants' essential case is that the facts in their appeals, and other unspecified appeals, are materially different to those of HSBC, meaning that it is only by being joined as an interested party, and making submissions, that the Applicants can avoid the Hearing determining preliminary issues which will be binding in the Barclays' appeals to the FTT notwithstanding the different factual matrix.

29. I do not consider that this would be a prudent or justifiable basis for being added to the Hearing as an interested party if jurisdiction existed to do so. The preliminary issues set out in the Annex to the FTT Decision are questions of law. The FTT considered (in accordance with the established criteria in *Wrottesley v HMRC* [2015] UKUT 637 (TCC)) whether separate determination of the preliminary issues could adversely affect the determination of the other issues in the appeals by HSBC to the FTT, and concluded that it could not: [29]-[31] of the FTT Decision. If that separate determination could not adversely affect the determination of the other issues in the HSBC appeals to the FTT, it is not evident from the Application why it could adversely affect the determination of the other issues in the appeals by Barclays to the FTT.

30. The Applicants seek to be added as interested parties because the Hearing will "abnormally" have an impact beyond the determination of the HSBC appeals. In fact, there is nothing abnormal about that state of affairs. The fact that a Rule 28 transfer may be abnormal, in the sense that it is unusual, is not justification for the Applicants to be added as interested parties. The decision of this Tribunal in relation to the Hearing will carry the same precedential weight as any other decision of the Tribunal. Its impact, for both taxpayers and HMRC, will then depend on its application to the facts and circumstances of any particular appeal. The Application states (at 3.2) that "although…there is some overlap between the HSBC Preliminary Issues and the issues in the BSC Appeal, the facts of the two cases and the questions of law to which they give rise are substantially different". If that is so, as to which I express no view, then Barclays can make those submissions in their appeals to the FTT, and the need for Barclays to be added as an interested party in the Hearing is not made out. I agree with the statement made by HMRC in their Response to the Application (at paragraph 18) that:

> Barclays has no direct interest and is not directly affected by the outcome of the HSBC Appeals. Barclays' only interest is in the reasoning of the UT. Put simply, Barclays should not be added as a party because it has no more standing in relation to HSBC's Appeals

than any other person that might have a collateral interest in the principles of law to be determined by the UT.

31. I also consider that it would not further the overriding objective to grant the Application. The Hearing is currently scheduled for early October 2021, and allowing Barclays to make written and oral submissions at the Hearing, even assuming their representatives and counsel would be available for the necessary dates[1], risks prejudicing both the timetable and the well-advanced case management of the Hearing. That would not be dealing with the Hearing fairly or justly from the perspective of HSBC, HMRC, the Tribunal or other parties interested in the timely outcome of the Hearing. Further, adding Barclays as a party to the Hearing would result in Barclays having numerous rights under the Rules, which would also need to be factored into the timetable and efficient case management.

32. In their Reply to the Parties' Responses, the Applicants assert that HSBC and HMRC have misunderstood the reasons for the Application and mischaracterised their intentions in seeking to participate in the Hearing. Several of the points made reassert previous complaints regarding HMRC's alleged intentions in relation to the conduct or outcome of the Hearing, or to HMRC conduct, or to the decision to hold the Hearing and in particular the FTT's omission to designate a lead case. A further complaint is made that the parties' responses "reveal an unsatisfactory lack of clarity as to whether the UT will be asked to determine the Preliminary Issues in the abstract or on the basis of HSBC's facts". None of those issues, even if well founded, provide a valid reason for the Grant of the Application.

33. For all these reasons, even if I am wrong that the Tribunal lacks jurisdiction to grant the Application, this would not be an appropriate case in which the Tribunal should exercise its discretion to do so.

Rule 5(3)(d)

34. Although it was not referred to in the Application, the Applicants subsequently suggested that the Tribunal could "of its own motion" make a direction under Rule 5(3)(d) of the Rules to permit Barclays to provide documents, information, evidence or submissions to the Tribunal in relation to the Hearing.

35. Although the point is not explained by the Applicants, I assume that the reference to the Tribunal acting "of its own motion" arises from the wording of Rule 6(1) of the Rules. This states that the Tribunal "may give a direction on the application of one or more of the parties or on its own initiative". If Barclays were not to be added as an interested party , it would not be a "party" capable of making any application for a direction, including a direction as referred to under Rule 5(3)(d), so it would be necessary for any direction to be made on the initiative of the Tribunal.

36. It is not clear from the documents filed by the Applicants whether the Tribunal is being asked to consider this as an alternative if the Application is not granted. I will in

[1] The Applicants' Reply of 24 February 2021 states that the Applicants are committed to ensuring no disruption to the timetable.

any event set out my conclusions as to whether such a direction would be appropriate and in accordance with the overriding objective.

37. On the face of it, there is no restriction on the discretion of the Tribunal to direct that a person other than a party to the proceedings is permitted or required to make submissions. That discretion is but one specific example of the Tribunal's general power in Rule 5(1) to regulate its own procedure.

38. HMRC's Response asserts that the power is similar to the power of intervention in the Supreme Court:

> The power to invite submissions from a non-party is analogous to the power of intervention in the Supreme Court, which was itself recognition of the assistance that the courts have on occasion received from non-parties. The following guidance from Lord Hoffmann's judgment in *E v The Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission intervening)* [2008] UKHL 66, [2009] 1 AC 536 indicates the sort of circumstances where it may be appropriate:
>
> "2. It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human Rights Commission. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.
>
> 3. An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way."

39. In *Lobler v HMRC* [2015] UKUT 0152 (TCC) the Chartered Institute of Taxation had made submissions in relation to the legislation relevant in that appeal. The CIOT was gathering information in relation to that legislation from interested parties and professional bodies with a view to making representations to the Treasury as to a possible change in law. The Tribunal directed under Rule 5(3)(d) that it should hear written and oral submissions from counsel for the CIOT.

40. While the power in Rule 5(3)(d) may be relevant in circumstances similar to those in which a party applies to a court to be an intervener, I am not persuaded that it

should necessarily be construed by reference to the same restrictions. Barclays is not applying to be an intervener, the position of an intervener in the courts is well-established, and tribunal rules are designed to be more flexible in their operation. Having said that, *Lobler* was an example of a situation of the sort described by Lord Hoffman.

41. In this case, I do not consider that the Tribunal should of its own initiative make a direction under Rule 5(3)(d) of the Rules permitting written or oral submissions from the Applicants. The reasons I have given above for refusing the Application militate against a decision to exercise discretion so as to make such a direction. It is apparent from the documents filed by the Applicants what submissions they would wish to make. Such submissions would not assist the Tribunal to understand the issues raised by the preliminary issues to be determined at the hearing. The position of the Applicants in making any submissions is far removed, for example, from the position of the CIOT in *Lobler*. The Applicants' motivation is to have a say in the conduct and ambit of the Hearing and the terms of the Tribunal's decision, for the reasons they give, and their status is that they are parties to another appeal before the FTT. I would decline to issue a direction permitting them to make submissions.

Decision

42. The Application is refused.

Signed on Original

JUDGE THOMAS SCOTT

RELEASE DATE: 26 February 2021