



TC07984

Procedure – application for amendment of grounds of appeal – further detail of pleadings requested by Respondents – application allowed – directions issued

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/02830

BETWEEN

SILVERDOOR LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE PHILIP GILLETT

The hearing took place on 22 December 2020. With the consent of the parties, the form of the hearing was a video hearing, with all parties attending remotely, using the Tribunal video platform. A face to face hearing was not held because this was not considered appropriate during the coronavirus pandemic.

I was referred to an electronic hearing bundle of 517 pages, the Appellant's application to amend their grounds of appeal, the Respondents' objection to the application, a Position Statement from the Appellant dated 18 December 2020 and a skeleton argument from the Respondents dated 18 December 2020.

The Respondents also provided me with draft directions.

David Southern QC, instructed by Cripps Pemberton Greenish LLP, for the Appellant

Barbara Belgrano, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This was a hearing of the Appellant's ("Silverdoor's") application dated 5 August 2020 to amend its grounds of appeal to insert the following words: "In particular, Silverdoor does not acquire, transmit or retransmit credit card data from the Customer or authorisation codes from the merchant acquirer or card issuer."
2. HMRC have objected to this request on the grounds that:
 - (1) Silverdoor's amended grounds of appeal of 5 August 2020 do not set out its case either on the facts or on the law. The grounds of appeal, in and of themselves, do not allow HMRC to understand what Silverdoor's case will be either as to why (on Silverdoor's case) its supplies of card handling services are exempt or as to why it is said that there has been "no carelessness" in relation to penalties.
 - (2) The amendments to the grounds of appeal are broadly, a blanket denial that Silverdoor's activities include any of the components pleaded in HMRC's Statement of Case. Furthermore, that denial is (as set out below) inconsistent with the evidence of Silverdoor's witness, Mr Buckley, which evidence has already been served.
 - (3) Mr Buckley filed and served a witness statement dated 3 July 2019 in related judicial review proceedings which includes details of what Silverdoor did, on the facts, in providing the card handling services. Accordingly, HMRC's Statement of Case that was filed and served on 9 January 2020 took account of Mr Buckley's evidence at that time.

BACKGROUND FACTS

3. The broad underlying facts are not in dispute between the parties. I am not required as part of this case management hearing to make any findings of fact, and I do not do so. It may however be helpful to the reader to outline the basic points at issues.
4. Silverdoor's substantive appeal concerns:
 - (1) two assessments to Value Added Tax ("VAT") issued on 25 January 2019 and 12 February 2019 pursuant to s73 Value Added Tax Act 1994 ("VATA 1994") in a total amount of £109,305.00; and
 - (2) penalties assessed pursuant to Sch 24 Finance Act 2007 ("FA 2007") on 8 April 2019 in an amount of £29,890.08.
5. The assessments and penalties relate to the VAT treatment of supplies of card handling services made by Silverdoor during VAT periods 01/15 to 10/18 ("the relevant periods") in respect of which Silverdoor did not account for VAT. In its appeal, Silverdoor argues that the card handling services it supplies fall to be treated as exempt supplies ("the Card Handling Services") pursuant to Item 1, Group 5, Sch 9 VATA 1994.
6. Importantly, Silverdoor claims that, in not accounting for VAT on the Card Handling Services, it was following HMRC Business Brief 18/06.
7. In 2019, following the decision of the CJEU in *Bookit Limited v Revenue and Customs Commissioners* Case C-607/14, HMRC decided that the fees for Silverdoor's Card Handling Services did not fall to be treated as exempt and therefore assessed Silverdoor retrospectively

for the VAT which they say Silverdoor should have accounted for during the VAT accounting periods 01/15 to 10/18.

8. In response, Silverdoor filed an application for judicial review, which is now stayed awaiting the outcome of this appeal. As part of that judicial review application Silverdoor also filed a witness statement from Mr Buckley, Silverdoor's Finance Director. This witness statement has given rise to some dispute in the current appeal in that Silverdoor has also filed a witness statement from Mr Buckley in relation to the current appeal which differs from the judicial review witness statement in certain key respects.

9. This second witness statement makes reference to the judicial review witness statement, at para 7, where it says "I repeat what I said in my earlier witness statement in a related judicial review matter." However, this second statement contains what I will refer to as a clarification of the earlier witness statement in that it says that when customers opt to pay by credit card they are redirected by a hyperlink to a website which is maintained by a Merchant Acquirer, such as American Express or Barclaycard Smartpay, although these websites are "branded" with the Silverdoor name and appear to the customer as a Silverdoor site. In the earlier judicial review witness statement no reference was made to the fact that these websites were in fact owned and operated by a Merchant Acquirer rather than Silverdoor itself.

10. Silverdoor stated that this clarification was a result of its looking at the strict legal position surrounding the Merchant Acquirer's website more carefully than it had done previously, but it does raise some interesting questions which I consider should be more fully explored at the hearing of the substantive appeal.

11. HMRC's position is that the Card Handling Services gave rise to taxable supplies and that Silverdoor's VAT returns in the relevant periods contained "careless" inaccuracies. Accordingly, HMRC consider the following amounts of VAT and penalties to be due:

- (1) VAT in respect of the relevant period - £109,305.00 (plus interest).
- (2) Penalties in respect of the relevant period - £29,890.08 (plus interest).

12. Silverdoor's business model is broadly as follows:

- (1) Silverdoor acts as a disclosed agent for various suppliers of serviced apartments. In essence, it acts as a reservation agent for providers of serviced apartments, who advertise their apartments on its website.
- (2) The supply of accommodation is made by the provider of the serviced apartment, as principal, to the customer. Silverdoor, however, makes its own supply of agency services to the apartment provider and receives commissions as consideration for these supplies of services. Silverdoor, accordingly, is required to account for output tax, as appropriate, on the supplies of its agency services, and the VAT treatment of those services is not disputed.
- (3) Silverdoor also makes supplies of Card Handling Services, which are provided to customers in that customers who wish to book accommodation through Silverdoor are given a choice whether to make payment for the accommodation by BACS or by credit card. When payments are made by credit card, Silverdoor charges a payment handling/card processing charge of 2.95% to the customer who has booked the accommodation.

13. The principal issue between the parties is whether these Card Handling Services constitute exempt supplies made by Silverdoor (as Silverdoor argues) or taxable supplies (as HMRC argue).

DISCUSSION

HMRC Submissions

14. Ms Belgrano helpfully provided me with some draft directions which, for the most part, I consider presented a sensible way forward. In addition Silverdoor had presented a “Position Statement” to the Tribunal which might be considered to have addressed the requirement on Silverdoor to set out the facts that it intends to rely on and the legal basis on which it claims that the Card Handling Services are exempt.

15. However, Ms Belgrano also made some submissions suggesting that further information and clarification was required from Silverdoor, in addition to the Position Statement, as follows:

(1) The Position Statement dated 18 December 2020 did not contain sufficient detail of Silverdoor’s arguments as regards the penalties.

(2) Mr Buckley’s witness statement needed to be amended to clarify the possible inconsistencies between his witness statement for this appeal and that for the judicial review proceedings,

(3) Ms Belgrano asked that I record formally that Mr Buckley’s second witness statement represented a change of facts compared to what Silverdoor had argued previously, both in the judicial review proceedings and in previous correspondence with HMRC.

16. I have no problem with points (1) and (2) above and trust that Silverdoor will bear these points in mind when it responds to the Tribunal’s Directions. Point (3) however gives me more difficulty.

17. This point is of course very important. Silverdoor’s main defence against the assessment of penalties is that it was simply following Business Brief 18/06. However, in considering this defence, the Tribunal at the substantive hearing will have to decide if these “clarified” facts were in accordance with the conditions for exemption set out in Business Brief 18/06. If Silverdoor was relying on inaccurate facts, or at least facts which required subsequent clarification, the Tribunal hearing the substantive appeal may need to decide whether or not this amounted to carelessness.

18. There is in addition the question as to whether or not this “clarification” makes any real difference to the correct analysis of the transactions for VAT purposes.

19. However, as I have stated above, the purpose of this hearing was not the finding of facts in relation to the substantive appeal. I do not have the benefit of full submissions on this point, nor of seeing all the underlying evidence. It is simply not possible therefore, even if I considered it appropriate, to record formally that Mr Buckley’s second witness statement represents a change of facts when compared with his witness statement in the judicial review proceedings. I therefore decline to do so.

Amendment to Grounds of Appeal

20. As is well established, it is normal practice for this Tribunal to permit an amendment to grounds of appeal to be made as long as there is no prejudice to either party or to the trial date in doing so. In the absence of any such prejudice it is clearly in line with the over-riding objective contained in Rule 2 of The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 that an appellant should be allowed to amend its grounds of appeal.

21. Ms Belgrano accepted that in this case there was no such prejudice and I have therefore decided to agree to Silverdoor's application to amend its grounds of appeal.

DIRECTIONS

22. I therefore make the following DIRECTIONS:

IT IS DIRECTED THAT:

- (1) **Grounds of Appeal:** Not later than 19 January 2021 the Appellant shall amend its grounds of appeal to set out the facts that it relies on in this appeal and to set out the legal basis on which it says the supplies at issue are exempt under Item 1, Group 5, Schedule 9 VATA 1994 in the light of those facts.
- (2) **Statement of Case:** Not later than 28 days after compliance with Direction 1, HMRC may file and serve an amended Statement of Case.
- (3) **List of documents:** Not later than 9 March 2021 each party shall:
 - (a) send or deliver to the other party and the Tribunal a list of documents in its possession or control which that party intends to rely upon or produce in connection with the appeal ("documents list"); and
 - (b) send or deliver to the other party copies of any documents on that documents list which have not already been provided to the other party and confirm to the Tribunal that they have done so.
- (4) **Appellant's witness statements:** Not later than 30 March 2021 the Appellant shall send or deliver to the Respondents statements from any additional witnesses of fact on whose evidence it intends to rely at the hearing setting out what that evidence will be ("witness statements") and shall notify the Tribunal that it has done so.
- (5) **Respondents' witness statements:** Not later than 20 April 2021 the Respondents shall send or deliver to the Appellant statements from all witnesses of fact on whose evidence they intend to rely at the hearing setting out what that evidence will be ("witness statements") and shall notify the Tribunal that they have done so.
- (6) **Hearing of the appeal:** The appeal is to be listed as a video hearing. The video hearing will be conducted on the Tribunal's own video hearing system requiring no special software to access.

On or before 27 April 2021 the parties are to provide the following information:

- (a) the name and role of each person who will participate in the hearing on behalf of that party. Where a participant is a witness, it should be stated whether the witness will attend the entire hearing or only attend to give his or her evidence;

- (b) the telephone number and email address of each participant;
 - (c) confirmation that each participant possesses the necessary IT equipment to participate in the hearing; at a minimum this will require a reliable broadband connection, webcam, microphone, loudspeaker or headphones and either a large screen or two screens such as a laptop and a tablet to facilitate the use of electronic bundles during the hearing);
 - (d) confirmation that each participant has access to a quiet room for the duration of the hearing so that the hearing will not be disturbed by noise made by other persons in the vicinity of each participant;
 - (e) confirmation that each participant understands that:
 - (i) they should act and dress as if in a court room; and
 - (ii) it is contempt of court to record proceedings without the consent of the Tribunal;
 - (iii) how each party's participants intend to communicate with each other during the hearing (e.g. text messages/email/WhatsApp).
- (7) Also on or before 27 April 2021 both parties shall send or deliver to the Tribunal and each other a statement detailing:
- (a) whether permission is sought for transcript writers to attend the hearing (parties should note that permission is only normally given if the transcripts will be provided to all parties and the panel);
 - (b) how long the hearing is expected to last (together with a draft trial timetable if the hearing is expected to last four days or more);
 - (c) whether reading time should be allocated to the panel in addition to the time estimated for the hearing above and, if so, how long; and
 - (d) two or three agreed periods of time for the hearing which are within or shortly after a hearing window starting 1 September 2021 and ending 1 April 2022 and each of which is at least as long as the longest time estimate for the hearing provided under (b) above OR if the parties are unable to agree such periods, then each party must provide their dates to avoid for a hearing in the same hearing window.

Shortly after 27 April 2021 the Tribunal will fix the date of the hearing despite any non-compliance with (d) above. A request for postponement on the grounds that the date of the hearing is inconvenient is unlikely to succeed if the applicant did not comply with (d) above or if, having provided dates for the hearing, the applicant then failed to keep the dates clear of other commitments.

(8) **Index for hearing bundle:** Not later than 63 days before the commencement of the hearing, the Appellant shall serve on the Respondents (and notify the Tribunal that it has done so) a draft index to the bundle of documents.

(9) **Additions to index:** Not later than 56 days before the commencement of the hearing the Respondents shall serve on the Appellant (and notify the Tribunal that they have done so) any additions to the draft index to the bundle of documents.

If the parties cannot reasonably agree on the inclusion of certain documents, the party wishing to include those documents shall prepare a separate additional bundle containing those documents.

(10) **Bundle for the video hearing:** Not later than 42 days before the date fixed for the video hearing, the Appellant shall deliver to the Tribunal and to the Respondents an electronic bundle (“the documents bundle”) containing:

- (a) the notice of appeal;
- (b) the statement of case;
- (c) all documents on the lists of documents provided;
- (d) all documents on the agreed draft index for hearing bundle;
- (e) any witness statements already provided;
- (f) all directions issued by the Tribunal in the appeal; and
- (g) correspondence with the Tribunal which is to be referred to in the hearing.

The documents bundle and its delivery shall comply with the guidance and principles set out in the Tribunal’s guidance note entitled “General guidance on PDF bundles” issued by Judge Sinfield on 23 June 2020.

If the Tribunal directs that the appeal is to be heard in a physical hearing rather than remotely, then the Appellant shall also provide one printed copy of the documents bundle to HMRC not later than 42 days before the date fixed for the hearing.

(11) **Appellant's outline of case:** Not later than 28 days before the hearing the Appellant shall send or deliver to the Respondents an outline of the case that it will put to the Tribunal (a skeleton argument) including the details of any legislation and case law authorities to which it intends to refer at the hearing.

At the same time the Appellant will file with the Tribunal, in electronic form, a copy of its skeleton argument.

(12) **Respondents' outline of case:** Not later than 14 days before the hearing the Respondents shall send or deliver to the Appellant an outline of the case that they will put to the Tribunal (a skeleton argument) including the details of any legislation and case law authorities to which they intend to refer at the hearing.

At the same time the Respondents will file with the Tribunal, in electronic form, a copy of their skeleton argument.

(13) **Authorities bundle:** Not later than 7 days before the hearing the Appellant shall send or deliver to the Respondents and to the Tribunal one copy of a bundle of authorities (comprising the authorities mentioned in both parties' skeleton arguments).

(14) **Witness attendance at hearing:** At the hearing any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement or report shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute).

(15) **Physical Hearing:** If the Tribunal decides that the appeal should be heard in a live “face to face” hearing rather than by video link, further Directions will be issued

for delivery of printed copies of the documents bundle (to the Tribunal) and of the authorities bundle (to the Tribunal and to HMRC).

(16) **Right to request new directions:** Either party may apply at any time for these Directions to be amended, suspended or set aside, or for further direction.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

23. 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.

**PHILIP GILLETT
TRIBUNAL JUDGE**

Release date: 31 DECEMBER 2020