Neutral Citation: [2024] UKFTT 00842 (TC)

Case Number: TC09291

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2016/03803

ADR – application to enforce ADR exit agreement following mediation – whether there was an operative mistake – no – whether the agreement constitutes a valid and binding contract – yes

Heard on: 25 June 2024
Judgment date: 19 September 2024

Before

TRIBUNAL JUDGE KIM SUKUL

Between

ANDREW QUAY HULL LLP

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant did not appear

For the Respondents: Joanna Vicary of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an application by the Respondents ('HMRC') to enforce an alternative dispute resolution ('ADR') exit agreement.

2. The hearing was held on the Tribunal's video hearing platform. 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. The documents to which I was referred were contained within a 357-page hearing bundle, 111-page bundle of authorities and HMRC's skeleton argument for this application. The hearing bundle included witness statements, appeal documents, correspondence between the parties and correspondence between the parties and the Tribunal.

ABSENCE OF THE APPELLANT

4. The Appellant was not in attendance at the hearing.

5. The Appellant made an application on 15 May 2024 to postpone this hearing for six months on the grounds that their only witness, Mr Akrill, was medically unfit to attend the hearing. No supporting evidence (such as a medical certificate) was provided by the Appellant and HMRC did not dispute the evidence set out in Mr Akrill's witness statement. This matter was initially listed for a hearing to take place on 9 December 2021 and has since been postponed on three previous occasions following applications made by the Appellant.

6. I was not satisfied that it was in the interests of fairness and justice for these proceedings to be further delayed to accommodate the attendance of a witness when their evidence was not in dispute. In such circumstances, I did not consider there to be any prejudice to the Appellant's case which could be caused by their witness not attending the hearing and I therefore refused the application.

7. The Appellant renewed their application for a six-month postponement on 3 June 2024 on the grounds that Mr Akrill is not only the Appellant's sole witness, but he is also acting as their advocate because they have no resource with which to employ counsel. I refused that application and issued a decision which included the following remarks:

> "The Tribunal Rules provide that I must deal with cases fairly and justly, including avoiding delay so far as compatible with a proper consideration of the issues. The Rules also provide that, if a party fails to attend a hearing, the Tribunal may proceed with the hearing if the Tribunal is satisfied that the party has been notified of the hearing and considers that it is in the interests of justice to proceed with the hearing.
>
> The hearing has been listed to consider HMRC's application of 2 June 2021 for enforcement of an ADR exit agreement and the Appellant's application dated 22 June 2021 for the reinstated appeal to proceed to full hearing. There has been a 3-year delay so far in determining the applications and it is not in the interests of justice for this matter to continue to be subjected to significant, lengthy delays.
>
> The Appellant submits that Mr Akrill is currently unable to attend a hearing (although no supporting evidence, such as a recent medical certificate, has been provided detailing why Mr Akrill is unable to attend, and no evidence or detailed information has been provided as to why no other representative is able to appear on the Appellant's behalf). However, I do not consider Mr Akrill's attendance to be necessary for a proper consideration of the issues

> raised in these applications, considering that HMRC have confirmed that his evidence, given by way of his witness statement dated 29 November 2023, is not in dispute, and that a 357-page hearing bundle and a 111-page bundle of authorities have been lodged, setting out the position of the parties and the relevant documents and authorities. I therefore do not consider it to be in the interests of fairness and justice for the Tribunal and the parties to incur the additional delay and costs associated with postponement of the hearing at this late stage, in these circumstances.
>
> The Appellant's renewed postponement application is therefore REFUSED, and the hearing will proceed as listed.
>
> Should the Appellant wish to do so, they may serve on HMRC and the Tribunal, by no later than 20 June 2024, a document containing any further written submissions the Appellant wishes the Tribunal to consider when determining the applications before the Tribunal, including a statement detailing whether the evidence of HMRC's witness is in dispute or whether their witness statement shall be taken as setting out the agreed factual position. Any further written submissions made by the Appellant in respect of the applications will be considered by the Tribunal during the hearing."

8. No further submissions have been received from the Appellant.

9. I decided to proceed with the hearing, pursuant to rule 33 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('Tribunal Rules'), because the Appellant had been notified of the hearing and, considering the length of the delay so far and that the documents before me sufficiently set out the Appellant's position so that the application could be dealt with fairly and justly (in accordance with the overriding objective in rule 2 of the Tribunal Rules), I was satisfied that it was in the interests of justice to proceed even though the Appellant was not present at the hearing.

CIRCUMSTANCES OF THE AGREEMENT

10. There are no factual matters in dispute which require determination by this Tribunal.

11. Having considered the documents set out in the hearing bundle, including the unchallenged witness statements of Mr Akrill for the Appellant and HMRC's Officer Hainsworth, I find the following were the surrounding circumstances of the agreement.

12. The background to the agreement concerns a series of appeals relating to various HMRC decisions in respect of five connected appellants. The parties agreed to settle matters in dispute, including the issue of VAT and penalty assessments relating to the Appellant, following a 'shuttle mediation', which took place between the parties on 3 February 2020. The mediation was conducted on a 'without prejudice' basis. After the mediation, all written notes were required to be destroyed.

13. There were two ADR mediators present at the mediation, as well as five HMRC officers and four representatives for the Appellant. The representatives for the Appellant included the partner of a firm of accountants and a VAT consultant.

14. 'Shuttle mediation' is a form of ADR that involves the mediator facilitating communication between the disputing parties. The mediator shuttles back and forth between the parties in separate rooms conveying proposals and counterproposals to resolve the dispute. As such, the parties did not communicate directly.

TERMS OF THE SETTLEMENT

15. The terms of the settlement, as set out in the ADR Exit Document signed by the parties on 3 February 2020, included the following:

> "Andrew Quay Hull LLP:
>
> The appeal against the VAT assessment appealed under reference TC/2016/03806 is withdrawn.
>
> HMRC will reverse the output tax due from Andrew Quay LLP under the bad debt provisions with the result that no VAT will be payable.
>
> The appeal against the penalty determination appealed under reference TC/2016/03803 is withdrawn."

16. The appeal against the VAT assessment under reference TC/2016/03806 relates to HMRC's decision dated 19 February 2014 to assess the Appellant to VAT in the sum of £750,000. The appeal against the penalty determination under reference TC/2016/03803 relates to HMRC's decision dated 16 February 2015 to issue to the Appellant a penalty in the sum of £472,500 for a deliberate inaccuracy in its VAT returns.

POSITION OF THE PARTIES

17. HMRC's position is, put simply, that the expressly stated words of this agreement should be enforced, and the appeal stands withdrawn.

18. The Appellant's position, as set out in Mr Akrill's witness statement, is:

> "The agreement was signed on the basis that "no VAT was payable" that there would be no penalty due to HMRC. The agreement to withdraw the appeal against the penalty was solely on the basis that no penalty would be due. These were the terms that were put forward by the appellant in writing at ADR and this was agreed with HMRC by the mediator. The VAT assessment was to be withdrawn and in order to conclude matters by Bad Debt Relief. There was not any discussion invited to revisit the penalty position as the appellant had been informed that the penalty would be withdrawn by HMRC. The ADR exit agreement was signed by the appellant on that basis. We do not dispute the wording of the agreement. The appellant would not have agreed to pay a penalty of £472,500 if there was not any VAT due."

JURISDICTION

19. I agree with HMRC's submission that this Tribunal has the jurisdiction to determine the question of whether or not the exit agreement is a binding contract concluded between the parties which thereby compels the withdrawal of the appeal (see *Serpentine Trust Ltd v HMRC* [2018] UKFTT 535 at [98-102] and *Southern Cross Employment Agency Ltd v HMRC* [2015] UKUT 122 at [38]).

BINDING CONTRACT

Validity

20. The parties do not dispute that there was a process of negotiation and an intention to enter into a contractual settlement. I am satisfied that the requirements for a valid contract existed on the basis that there was an agreement, an intention to create legal relations and consideration.

Wording of the agreement

21. The agreement provides that: "The appeal against the VAT assessment… is withdrawn. HMRC will reverse the output tax due… under the bad debt provisions with the result that no VAT will be payable." There is no mention of the *penalty* being withdrawn or the *penalty* not being payable. The disputed provision simply states: "The appeal against the penalty determination… is withdrawn." HMRC's contention is that in the absence of any further provision, the consequence of the withdrawal is that the penalty becomes due and payable.

This is because the agreement to withdraw the appeal against the VAT assessment means the VAT assessment remains valid and only the Appellant's liability to pay the VAT assessment is altered by virtue of the bad debt relief provisions. Accordingly, this has no impact on the Appellant's liability to a penalty. The Appellant contends that they do not dispute the wording of the agreement but would not have agreed to pay the penalty if there was no VAT due.

22. I have considered the legal principles for interpreting a contractual provision as set out in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 ('*Rainy Sky*') and I am mindful that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant (see *Rainy Sky* at [14]). I find the wording of the exit agreement to be clear and explicit and, in my view, it would have been apparent to a reasonable person in the Appellant's situation what the disputed provision meant. In such circumstances, it is not possible for the Appellant to go behind the agreement. Having found the language used by the parties to be unambiguous, I must apply it. (See *Rainy Sky* at [23]).

Unilateral mistake

23. A mistake by one party of which the other knew or ought reasonably to have known is capable of displacing the agreement (see *OT Africa Line Ltd v Vickers plc* [1996] 1 Lloyd's Rep 700 at 726).

24. I accept, on the basis of Mr Akrill's unchallenged evidence, that the Appellant signed the exit agreement under the misapprehension that the penalty would not be payable. I also accept, on the basis of Mr Hainsworth's unchallenged evidence, that HMRC was unaware of the Appellant's mistake. Having regard to the circumstances of the agreement, I do not consider that the Appellant's misapprehension ought reasonably to have been apparent to HMRC or that there was any real reason to suppose the existence of a mistake.

25. I therefore do not consider the Appellant's unilateral mistake to have been an operative mistake which affected the formation of the contract.

Conclusion

26. Taking the matters set out above into consideration, I have concluded that the ADR exit agreement is a valid and binding contract entered into by the parties.

DECISION

27. I therefore allow HMRC's application for the Tribunal to issue a direction to enforce the ADR exit agreement. Consequently, the Appellant's application dated 22 June 2021 for their reinstated appeal to proceed to full hearing is refused.

28. I have issued separate directions to the effect that the Appellant's appeals stand withdrawn.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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.

KIM SUKUL

TRIBUNAL JUDGE

Release date: 19th SEPTEMBER 2024