[2019] UKFTT 452 (TC)

TC07257

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02378

DECISION
ON AN APPLICATION FOR PERMISSION TO APPEAL
IN THE CASE OF

SIMON HURST **Appellant**

-and-

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

1. On 1 May 2019, the Tribunal issued full findings of fact and reasons for the decision in this appeal (the "Decision"). In a notice of appeal dated 26 June 2019, the Respondents ("HMRC") made an in-time application to appeal the Decision.

2. I considered in accordance with Rule 40 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 whether to review the Decision but decided not to undertake a review as I was not satisfied that there was an error of law in the Decision.

3. The Decision allowed the appeal on the basis of the case law of the First-tier Tribunal relied upon by the Appellant in his notice of appeal and in his reply. HMRC have not sought to dispute that the Decision would be correct in law, if the case law on which the Appellant relied was correct in law. Rather, HMRC argue that the case law on which the Appellant relied was incorrect as a matter of law. HMRC state in particular that they have been granted permission to appeal in two of those earlier cases, *Goldsmith v Revenue and Customs* [2018] UKFTT 5 (TC) ("*Goldsmith*") and *Lennon v Revenue and Customs* [2018] UKFTT 220 (TC) ("*Lennon*"), and that HMRC have applied for permission to appeal in a third of those cases, *Groves v Revenue & Customs* [2018] UKFTT 311 (TC) ("*Groves*").

4. It is accepted for present purposes that the proposed HMRC appeal would have a real prospect of success. Normally, that of itself would suffice for permission to be granted. However, the Tribunal has a discretion whether or not to grant permission, and countervailing considerations also need to be considered.

5. The circumstances of the present case were as follows.

6. The 19 February 2018 letter from the Appellant's agent to HMRC requesting a review expressly referred to the decision in *Goldsmith*. However, there is no reference to *Goldsmith* in the 9 March 2018 HMRC review decision.

7. The Appellant's notice of appeal to the Tribunal contains an express reference to the decision in *Goldsmith*. However, there is no reference in the HMRC statement of case either to *Goldsmith* or otherwise to the substance of what was decided in *Goldsmith*.

8. The Appellant's reply (consisting of a letter dated 2 October 2018, incorporating earlier letters dated 11 July 2018 and 30 July 2018) expressly relied also on *Lennon* and *Groves*.

9. HMRC did not at that stage object to the Appellant relying for the first time in his reply on these two new cases, or seek permission to file an additional submission addressing these cases. Thus, in the proceedings before the Tribunal, HMRC never sought to call into question the correctness of *Goldsmith*, *Lennon* and *Groves* and never addressed the substance of what was decided in those cases.

10. The Decision noted that *Goldsmith*, *Lennon* and *Groves*, as well as additional cases, *Mansoor v Revenue & Customs* [2018] UKFTT 288 (TC) and *Griffiths v Revenue & Customs* [2018] UKFTT 527 (TC), all reached similar conclusions. The Decision took into account that there was one case that reached a contrary conclusion: *Crawford v Revenue and Customs* [2018] UKFTT 392 (TC).

11. The Decision concluded that in circumstances where an appellant relies on previous case law of the Tribunal without presenting detailed submissions on the reasoning in those previous decisions, and where HMRC does not present any arguments as to why the previous case law of the Tribunal is incorrect, then the Tribunal, particularly in default paper cases, will be entitled to follow a previous line of Tribunal case law. The Decision stated at [24] that "where a legal point has already been considered in some depth in previous case law, the Tribunal should not be expected to undertake its own comprehensive analysis of the previous case law and the competing views on the law, when the parties themselves have not done so in their submissions".

12. The approach described in the previous paragraph is underlined by important considerations of principle.

13. First, it would be hugely inefficient if the Tribunal were required, without the assistance of counsel or the parties, to undertake its own detailed analysis of the reasoning in all previous relevant case law of the Tribunal on a particular issue, in circumstances where one party simply invokes a previous decision of the Tribunal and the other has simply remained silent on the point. If HMRC consider that a case relied on by the Appellant was incorrectly decided, then HMRC should be expected to say so, and to assist the Tribunal in dealing with the issues thereby put in dispute.

14. Secondly, fairness requires that each of the parties should know what is the other party's case, and that each party has an opportunity to respond to the other party's case. The Appellant expressly relied on *Goldsmith* in his notice of appeal. If HMRC contended that *Goldsmith* was not correctly decided, then the Appellant was entitled to be given notice of the HMRC arguments in that respect, and to have an opportunity to respond to those arguments.

15. The HMRC contention that *Goldsmith*, *Lennon* and *Groves* were incorrectly decided, and the HMRC arguments in support of that contention, are now raised for the first time in the HMRC notice of appeal. If permission to appeal were granted, these arguments would be heard and determined for the first time by the Upper Tribunal in an appeal against this Tribunal's Decision. It is well established that normally a party will not be permitted to raise a new point for the first time on appeal. An exception to the general principle may be made where the new

point is a pure point of law. However, even in those circumstances, permission will not be given where there is any possibility of an injustice occurring. See *Eynsham Cricket Club v Revenue and Customs* [2019] UKUT 47 (TCC) at [40]-[53]; *GDF Suez Teesside Ltd v Revenue and Customs* [2017] UKUT 68 (TCC) at [46]-[47].

16. The HMRC notice of appeal simply presents arguments as to why *Goldsmith*, *Lennon* and *Groves* were incorrectly decided, and why the Decision was incorrectly decided. It does not engage with the reasoning in the Decision itself, summarised in paragraph 11 above. It does not acknowledge that it is seeking to raise a point for the first time on appeal, and does not set out any justification for this. Importantly, it does not address the question whether there would be any prejudice to the Appellant if permission to do this were granted.

17. There is one obvious potential prejudice to the Appellant if permission were granted. Under the First-tier Tribunal Rules, the normal rule is that no order for costs would be made against him if he is unsuccessful in his appeal. On the other hand, under rule 10(1)(a) of the Upper Tribunal rules, the Appellant would potentially face costs consequences if he were unsuccessful in an appeal to the Upper Tribunal. The Appellant's one opportunity to argue issues without facing costs consequences is therefore in an appeal before the First-tier Tribunal. The Appellant loses that opportunity if an issue is argued for the first time before the Upper Tribunal. Therefore, even in a case involving a pure issue of law, there is a possibility of an injustice occurring if the issue is raised for the first time on appeal to the Upper Tribunal.

18. It may well be that this prejudice would not actually arise in practice, but it may well also be that there would be other potential prejudice to the Appellant if permission to appeal were granted. The issue has simply not been addressed in the HMRC notice of appeal.

19. Having weighed all of the considerations above, the Tribunal decides that permission to appeal is refused.

20. If the applicant is dissatisfied with the outcome of the application for permission to appeal the decision in this appeal, the applicant has a right to apply to the Upper Tribunal for permission to appeal the decision in this appeal. Such an application must be made in writing to the Upper Tribunal at 5th Floor, Rolls Building, 7 Rolls Building, Fetter Lane, London EC4A 1NL no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet Appealing to the Upper Tribunal (Tax and Chancery Chamber).

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 10 JULY 2019