[2017] UKFTT 0597 (TC)

TC06039

Appeal number: TC/2016/06165

PROCEDURE – HMRC's applications to admit expert evidence, to exclude documentary evidence and disclosure – Whether relevant – Whether of assistance to Tribunal – Applications dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RAJESH GILL **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, Rosebery Avenue, London EC1 on 24 July 2017

Imran Afzal, Counsel, instructed by Gordon Dadds LLP, for the Appellant

Patrick Boch of HM Revenue and Customs Solicitor's Office, for the Respondents

DECISION

1. In 2010-11 the appellant, Mr Rajesh Gill, claimed losses totalling approximately £5.4m in relation to, what he says are, trading losses incurred as a result of transactions in stocks and other financial instruments which he is entitled to carry back and relieve against general income. However, HM Revenue and Customs ("HMRC") have denied his claim, under s 64 Income Tax Act 2007 ("ITA"), on the basis that his activity is not a trade and contend that even if it was the loss relief is not available, under s 66(1) ITA, as such a trade is not commercial.

2. On 10 November 2016 Mr Gill appealed to the Tribunal against HMRC's decision to deny him loss relief.

Applications

3. HMRC have made the following application:

(1) By letter, dated 25 April 2017, for permission to adduce expert evidence essentially on the grounds that it would support their arguments that Mr Gill's activities were not characteristic of the way in which financial trading was carried on and that, being too speculative they cannot amount trading. Also, that trading on a "commercial basis" means a business-like manner, ie a trader must trade as a professional not an amateur or dilettante (see *Wannell v Rothwell* (1996) 68 TC 719);

(2) By letter dated 30 May 2017, to exclude documentary evidence on the grounds of it being inadmissible. The documents concerned include the judgment of the *High Court in Parabola & Aria v Browalia Cal, MF Global and Bomford* [2009] EWHC 901 (Comm) (a case in which, as is apparent from the judgment of Flaux J at [5], the claimant companies, which were are in effect special purpose vehicles set up by their ultimate beneficial owner Mr Gill for the purposes of trading, succeeded in a claim in deceit, the essence of which was that it was fraudulently misrepresented to Mr Gill that the trading he conducted was profitable, whereas in truth it was not), transcripts and witness statements (including that of experts) from that case and press articles about the litigation; and

(3) By letter, dated 10 July 2017, for disclosure of data on a different format to that produced by Mr Gill which would allow HMRC or their expert to analyse the data provided "more meaningfully".

4. Mr Imran Afzal of counsel appeared for Mr Gill. HMRC were represented by Mr Patrick Boch, of their Solicitor's Office.

5. As in the hearing, because they are linked, I shall consider the first and third applications, for the admission of expert evidence and disclosure of data, and then the application for the exclusion of evidence.

6. However, before doing so it is convenient to set out relevant provisions of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. First, rule 2 'Overriding objective and parties' obligations to co-operate with the Tribunal' provides:

> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) ...
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.

Having considered the Tribunal file and noted the distinct lack of co-operation between the parties in their dealing with the Tribunal to date, I have included rule 2 to remind the parties of their obligation to assist the Tribunal in furthering the overriding objective and its application, particularly in relation to its case management and progression to a substantive hearing.

7. Insofar as applicable to the applications, rule 15 'Evidence and submissions" provides

> (1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—
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> ...
>
> (c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;
>
> (2) The Tribunal may—
>
> (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or
>
> (b) exclude evidence that would otherwise be admissible where—

> (i) the evidence was not provided within the time allowed by a direction or a practice direction;
>
> (ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
>
> (iii) it would otherwise be unfair to admit the evidence.

8. Although not cited by either party the issue of the admissibility of evidence, particularly expert evidence was considered by Judge Raghavan in *Deloitte LLP v HMRC* [2016] UKFTT 479 (TC) who, having considered the relevant authorities provided the following helpful summary, at [22]:

> "(1) Relevant evidence should be admitted unless there are compelling reasons not to. The prejudice to each party of respectively admitting/not admitting the evidence should be weighed. (*Mobile Export365 v HMRC* [2007] EWHC 2664 (Admin), and *Atlantic Electronic v HMRC* [2013] EWCA Civ 651).
>
> (2) An expert's evidence of opinion is admissible because it is the product of a special expertise which the tribunal does not possess, or even if it does, which is not its function to apply (*Hoyle v Rogers* [2014] EWCA Civ 257).
>
> (3) Expert reports are not rendered inadmissible because they refer to legislation, matters of law or indeed the very issue before the court or tribunal. Tribunal panels (who are not lay finders of fact) can be credited with the ability to distinguish between inadmissible/admissible matters in a report and to know that they have to reach their own view on the legal question before them. (*JP Morgan Chase Bank v Springwell* [2006] EWHC 2755 (Comm), and *Kennedy (Appellant) v Concordia (Services) LLP (Respondent)(Scotland)* [2016] UKSC 6).
>
> (4) Even if reports contain inadmissible expert evidence of fact they can be admitted and should be admitted without requiring excision particularly if the admissible/inadmissible evidence of fact is intertwined (*Hoyle*)."

9. I now turn to the applications.

Admission of expert evidence

10. For HMRC, Mr Boch contends that only an expert can meaningfully analyse the data provided by Mr Gill to explain why his trading fell short of a professional trader. He says that this would be extremely helpful to the Tribunal as an expert would be able to comment on whether the operations in which Mr Gill was involved, his approach to the transactions concerned and his "trading" strategy were of the same type and carried on in the same way as those which are characteristic of ordinary trading in the line of business in question (see *IRC v Livingston and others* (1926) 11 TC/536). Additionally, Mr Gill submits, the expert would also be able give an opinion on the explanation given by Mr Gill for the loss and whether the quantitative easing programme caused the markets to behave in unprecedented ways.

11. Although the issue is whether a person was trading is, as Oliver J recognised in *Salt v Chamberlain* (1979) 53 TC 143 at 154 a question of "fact and degree" or "overall impression", Mr Boch submits that expert evidence should be admitted to assist the Tribunal in reaching its conclusions as it did in *BNP Parisbas SA (London Branch v HMRC* [2017] UKFTT 487 (TC).

12. Mr Afzal, for Mr Gill, submits that expert evidence is unnecessary. He says that the Tribunal is quite capable of determining the issue of fact of whether Mr Gill was trading. It does not matter, he contends, if Mr Gill's approach, strategy or organisation were different to others engaged in similar activities as this could not assist the Tribunal in reaching its determination on whether Mr Gill was trading and doing so commercially. He refers to the observation of Robert Walker J in a case concerning a person dealing in commodity futures and shares, *Wannell v Rothwell (Inspector of Taxes)* [1996] STC 450 at 460-461:

> "...out of numerous reported decisions on profitable transactions which have been held to be taxable as trading activities I was not shown any (with the possible exception of *Graham v Green* (*Inspector of Taxes*)) in which a lack of commercial approach or organisation has enabled the taxpayer to escape liability as a trader. In *Graham v Green* (*Inspector of Taxes*) (the betting case) Rowlatt J did refer (see [1925] 2 KB 37 at 41–42, 9 TC 309 at 313–314) to the appellant's not being organised in the way in which a bookmaker was organised, but those remarks must be read in their context. In general a substantial degree of organisation (a very imprecise term, especially across the whole range of trading activities) is neither a necessary not a sufficient condition for carrying on a trade (for the first limb see the observations of Lord Radcliffe in *Edwards* (*Inspector of Taxes*) *v Bairstow* [1956] AC 14 at 37, 36 TC 207 at 230 and for the second those of Lord Wilberforce in *Ransom* (*Inspector of Taxes*) *v Higgs* [1974] STC 539 at 556, [1974] 1 WLR 1594 at 1613). So far as organisation is a matter of externals, it could hardly be suggested that the taxpayer in this case would have been more commercial (in the sense of more likely to make a profit) if he had installed a full screen service costing £15,000 a year, or rented an office, or engaged a salaried bookkeeper. For him to have acquired such an external organisation would, on the contrary, almost certainly have ensured that he made much bigger losses. As Pennycuick J pointed out in *Emanuel* (at 378–379), the trade of a dealer in quoted securities requires no organisation beyond a telephone and some basic bookkeeping (and, I would venture to add, some capital or credit)."

13. It is also apparent, from their respective submissions, that the parties dispute the extent to which expert evidence, if permitted, would assist the Tribunal. Mr Boch contends that it would be "very difficult" to understand the data provided by Mr Gill without the assistance of such evidence. However, I agree with Mr Afzal that, as the burden is on Mr Gill to establish he is trading and doing so commercially, any difficulty the Tribunal has in understanding the data he has provided will be to his detriment and will not assist him in meeting that burden. Also, contrary to Mr Boch's submission, I do not consider that the absence of expert evidence will prevent HMRC from advancing a positive case.

14. Although I accept that a person can have expertise in relation to financial markets I agree with Mr Afzal that it would be unlikely that he could comment with authority on every possible strategy that a financial trader could adopt. Even if this were not the case, it does not necessarily follow that if an expert has not encountered the strategy utilised by Mr Gill it could not be trading or trading commercially. Additionally, neither party showed any enthusiasm to my suggestion of the joint appointment of a single expert, Mr Boch particularly so, emphasising the difficulties in finding someone who was acceptable to both parties and the preference of appointing an expert who understood HMRC's approach although recognising that, as an independent expert, he would reach his own conclusions.

15. Having carefully considered the submissions, while recognising that expert evidence is potentially relevant, I have come to the conclusion that, on balance, given the inevitable delay and cost associated with the provision of such evidence particularly if it were necessary to instruct two (or more) experts, which, for the reasons above, may be of limited value and assistance to the Tribunal in any event, it would be disproportionate to direct that expert evidence be admitted.

16. I therefore refuse HMRC's application to admit expert evidence.

Disclosure of data

17. Mr Boch made it clear that this application was not dependent on the application for the admission of expert evidence as the disclosure of data in a format that would identify whether a "long" or "short" position was taken, the number of "winning" and "losing" trades, the magnitude of wins and losses and the amount of time trades were held would enable a more meaningful analysis by HMRC and consequently assist the Tribunal.

18. Although Mr Boch suggested that such information would be "relatively straight-forward" for Mr Gill's broker to provide, an email, dated 19 July 2017, from Mr Gill's broker to him explains:

> "I have read the application from HMRC sent to your lawyers on 11 July 2017.
>
> I have spoken to my IT team in regard to HMRC's request.
>
> Unfortunately we are not able to generate a report such as the one requested.
>
> The data requested was for trades executed on our previous system which was switched off in July of 2014"

After referring to the change in name and systems the email continues:

> "We can as previously discussed provide you with the raw data for the time period (as we provided to HMRC in 2016) but cannot provide a custom report to the scale HMRC have requested."

19. The apparent difference in dates, HMRC's application was dated 10 July 2017 and the email refers to the application sent on 11 July 2017, appears to have arisen as the application, although dated 10 July 2017, was filed and served as an attachment to an email sent to the Tribunal and Mr Gill's solicitors at 14:17 on 11 July 2017. It is therefore, in my view, abundantly clear that, despite the doubts raised by Mr Boch, the email from Mr Gill's broker was referring to HMRC's disclosure application.

20. It is also clear that the broker is not able to produce the data in the format sought by HMRC in their application. As it would be futile direct the impossible, it follows that HMRC's application must fail.

Exclusion of evidence

21. In *Mobile Export 365 Ltd v HMRC* [2007] EWHC 1727 (Ch), to which Judge Raghavan referred in *Deloitte* (see paragraph 9, above) Lightman J said, at [20(2)]:

> "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary."

22. Mr Boch accepts that the documentary evidence concerned is contextually relevant but because of its volume, it fills 12 lever arch files, it should not be admitted. Mr Boch suggests that it would be possible to deal with the matters contained in this evidence more concisely and gives the example of a witness statement with exhibits. However, Mr Afzal contends that it is necessary to include all of these documents in their entirety so as to prevent any allegations of "cherry picking" the evidence to the advantage of Mr Gill.

23. Given that it is accepted that the evidence is relevant, the appeal has not yet been listed for hearing and that the parties will have an opportunity to make submissions on the weight to be attached (if any) to it, I consider that it should be admitted. I and therefore dismiss HMRC's application for its exclusion.

Summary of Conclusions and Directions

24. For the reasons above, HMRC's applications to admit expert evidence, for disclosure of data in a particular format and the exclusion of documentary evidence are dismissed.

25. The parties (who I again remind of their obligation to co-operate and assist the Tribunal in furthering the overriding objective) are directed to use their best endeavours to agree directions for the further progress of the appeal to a hearing and make a joint application to the Tribunal, not later than 28 days from the date of the release of this decision, for a direction that the proposed directions adopted. However, in the event of the parties being unable to agree each party shall, not later than 35 days from the date of this decision, provide the Tribunal with their proposed draft directions for the progress of the appeal. In the meantime the current case management directions are stayed.

Appeal rights

26. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 02 AUGUST 2017