[2017] UKUT 0116 (TCC)

Appeal number: UT/2016/0049

PROCEDURE – withdrawal of case by respondent – Rule 17, Tribunal Procedure (Upper Tribunal) Rules 2008 – effect of withdrawal – whether tribunal should make a reasoned decision on the merits – whether tribunal, if allowing the appeal, should re-make the FTT decision

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

TGH (COMMERCIAL) LIMITED **Respondent**

TRIBUNAL: JUDGE ROGER BERNER

Sitting in chambers at The Royal Courts of Justice, Strand, London WC2 on 14 March 2017

Having considered the written submissions of Marika Lemos of counsel for the Appellants and of Indirect Tax Services Ltd for the Respondent

DECISION

1. This decision considers the important procedural question of the effect of the withdrawal of a respondent of the case made by it in an appeal to this Tribunal from the First-tier Tribunal (Tax Chamber).

2. Withdrawal is provided for by Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules") as follows:

> "(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it—
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> (a) by sending or delivering to the Upper Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) Notice of withdrawal will not take effect unless the Upper Tribunal consents to the withdrawal except in relation to an application for permission to appeal.
>
> (3) A party which has withdrawn its case may apply to the Upper Tribunal for the case to be reinstated.
>
> (4) An application under paragraph (3) must be made in writing and be received by the Upper Tribunal within 1 month after—
>
> (a) the date on which the Upper Tribunal received the notice under paragraph (1)(a); or
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> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b).
>
> (5) The Upper Tribunal must notify each party in writing that a withdrawal has taken effect under this rule.
>
> (6) Paragraph (3) does not apply to a financial services case other than a reference against a penalty."

Background

3. The Respondent, TGH (Commercial) Limited ("TGH"), is a wholly-owned subsidiary of a charity, The Great Hospital, which was established in 1249 to provide relief for the poor and needy of the City of Norwich. The charity now provides affordable accommodation to persons in need who are over the age of 65 in the case of men and 60 in the case of women.

4. The question before the First-tier Tribunal ("FTT") from which this appeal is brought was whether certain works associated with the construction of a workshop, garage and store which had been constructed at the same time and on the same site as a building, Holme Terrace, which was a building used for a relevant residential purpose, and which were used together with Holme Terrace as well as providing facilities for other such buildings constructed at an earlier time, were zero-rated supplies for VAT purposes by virtue of Note (5) of Group 5 of Schedule 8 to the Value Added Tax Act 1994 ("VATA"). In its decision released on 1 February 2016

the FTT found, in favour of TGH, that the works were zero-rated and allowed its appeal.

5. Permission to appeal to this Tribunal was given by the FTT to HMRC on 15 April 2016, and the appeal was notified to this Tribunal on 21 April 2016.

6. On 1 August 2016 TGH applied to this Tribunal for a Protective Costs Order ("PCO"). That application was considered on the papers by Judge Sinfield and refused for the reasons given in the decision ("the PCO decision") released on 24 November 2016, and which has been published under reference [2016] UKUT 0519 (TCC).

7. Following that decision, on 7 December 2016 TGH's representatives wrote to HMRC in the following terms:

> "As previously indicated, I have been awaiting instructions from my clients. I have now received these instructions, which are that TGH (Commercial) Ltd will no longer offer a defence against the Commissioners' appeal. In short, my clients are not prepared to underwrite the Commissioners' further costs of testing their analysis in front of yet another tribunal, and this decision not to offer a defence should in no way be taken to represent any agreement with the technical arguments put forward by the Commissioners.
>
> Do you have stock format of wording you would prefer we use to record this outcome and notify the Tribunal? If so, please provide it for our consideration …"

8. By an email dated 12 December 2016 to the Tribunal, HMRC referred to that correspondence and stated that they maintained that the FTT had made an error of law in its decision, and that as it was HMRC's appeal they considered that it remained necessary for them to demonstrate that error in order that the appeal might be allowed. As a result, HMRC's view was that the hearing, which had been listed for 20 March 2017, would have to proceed in the absence of TGH, and that HMRC would continue to comply with the Tribunal's procedural directions.

9. On 31 January 2017, TGH's representatives wrote to the Tribunal giving notification under Rule 17 of the UT Rules of the withdrawal of TGH from the case, with an express reservation in respect of costs. Having been given the opportunity to respond to the Tribunal, HMRC wrote on 20 February 2017 referring simply to its earlier email of 12 December 2016.

10. The file was referred to me, and on my instructions the Tribunal wrote to the parties on 23 February 2017, referring to TGH's notice of withdrawal and the associated correspondence and saying:

> "… the proper course in the case of withdrawal by a respondent of the whole of its case is that the appeal should simply be allowed. That may be by consent, or as a matter of course consequent upon the withdrawal. There is no longer any dispute between the parties which is capable of being adjudicated by the Tribunal.

> Judge Berner accordingly consents to the withdrawal of its case by TGH, and invites the parties, within 7 days of this letter to consent to the appeal being allowed. That in any event will be the Order of the Tribunal, which will be issued (by consent or of its own motion) at the end of the 7-day period. The hearing on 20 March 2017 has been cancelled. This letter is formal notification that TGH's withdrawal has taken effect."

HMRC's position

11. HMRC's position is set out in a Response to the Tribunal's letter of 23 February 2017, accompanied by a skeleton argument for the substantive appeal, each of which were settled by Marika Lemos of counsel and dated 1 March 2017. HMRC submit that notwithstanding the withdrawal by TGH from the proceedings, first that this Tribunal retains jurisdiction to hear the appeal, secondly that there is a live issue to be determined by this Tribunal, and thirdly that the point under consideration involves an issue of general importance, which HMRC consider merits a reasoned decision by this Tribunal, even if the Tribunal is minded to allow the appeal.

12. As to the importance of the issue, that is not a matter in dispute. In argument in relation to the PCO, the parties accepted that was the case, and that the issues in the case "should be resolved because they will clarify the true construction of Note (5) of Schedule 8 to the VATA" (PCO decision, at [31]).

13. As Ms Lemos has rightly submitted, the jurisdiction of this Tribunal on an appeal from the FTT derives from sections 11 and 12 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"). Under s 11, there is a right of appeal to the Upper Tribunal on any point of law arising from a decision of the FTT other than an excluded decision (which is not relevant here). That right may only be exercised with permission of either the FTT or this Tribunal.

14. By s 12 TCEA:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
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> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.
>
> (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also—
>
> (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;

(b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.

(4) In acting under subsection (2)(b)(ii), the Upper Tribunal—

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate."

15. Ms Lemos submits that the Upper Tribunal does not lose its jurisdiction under s 12 TCEA following the withdrawal of a respondent from the proceedings. She cites in support a case in another chamber of this Tribunal, the Immigration and Asylum Chamber, in *SM v Secretary of State for the Home Department* [2014] UKUT (00064) (IAC). It is submitted, relying by analogy on *SM* at [27], that withdrawal does not deprive the Upper Tribunal of the function of determining whether the decision of the FTT involved the making of an error of law.

Discussion

16. As Ms Lemos rightly recognises, the issue in *SM* was not concerned with the withdrawal of a respondent's case on an appeal to this Tribunal. It was concerned with the question whether, by the Secretary of State withdrawing the original decision which had been the subject of the appeal to the FTT (and which was the subject of appeal in the Upper Tribunal), the appeal by the Secretary of State to the Upper Tribunal had been rendered academic. The Upper Tribunal in *SM* held that it had not. Ms Lemos submits that exactly the same analysis applies in circumstances where the respondent withdraws its case. She argues that it does not follow from withdrawal by a respondent that the appeal is allowed; by virtue of s 12 TCEA, it is said, the Upper Tribunal remains under a mandatory duty either to remit the decision to the FTT or to re-make it.

17. That submission cannot be accepted. There is no proper analogy with a case, such as *SM*, where an immigration decision that is the subject of the appeal is withdrawn by the Secretary of State. A clear distinction was drawn in *SM* between cases of withdrawal of the underlying appealable decision, and withdrawal under Rule 17 of the UT Rules.

18. At [27], in the passage most particularly relied upon by Ms Lemos, the Tribunal in *SM* said, in considering whether the withdrawal of the underlying decision brought an appeal to the Upper Tribunal to an end in a jurisdictional sense:

> "There is a measure of agreement between the parties on this issue. In its initial task under section 12 of the 2007 Act, the Upper Tribunal plainly does not lose jurisdiction, following the respondent's withdrawal of the decision against which a person appealed to the First-tier Tribunal. Section 12(1) concerns the making by the Upper Tribunal of a finding as to whether the decision of the First-tier Tribunal 'involved the making of an error on a point of law'. Although the Tribunal's discharge of that function may be affected by the reasons why the respondent withdrew the decision, such a withdrawal does not deprive the Upper Tribunal of that function."

19. The Tribunal reached the same conclusion as regards what it considered to be the more challenging issue of the effect of the withdrawal of the underlying decision on the Tribunal's jurisdiction under s 12(2) TCEA. But in doing so it drew a clear distinction between cases of withdrawal of the underlying decision and cases where an appeal is "finally determined, withdrawn or abandoned", which, by virtue of s 104(1)(b) of the Nationality, Immigration and Asylum Act 2002, would result in the appeal ceasing to be a pending appeal. The Tribunal said, at [29] – [30]:

> "29 We find that, at the re-making stage, there is, again, jurisdiction in the Upper Tribunal to proceed pursuant to section 12(2)(b)(ii) of the 2007 Act. The key provision is section 104 of the 2002 Act. Section 104 is plainly intended by the legislature to be a comprehensive statement of the ways in which appeals brought under section 82 may be brought to an end. As can be seen, such an appeal ceases to be pending when it is 'finally determined, withdrawn or abandoned (or when it lapses under section 99)' (section 104(1)(d)). There is no indication in that section (or elsewhere in the 2002 Act) that the withdrawal of the decision appealed is one of the ways in which the appeal is brought to an end. On the contrary, the existence of section 104(4B) and 4(C) strongly indicates to the contrary. Those provide for an exception to statutory abandonment of an appeal on the grant of leave, insofar as the appeal is brought on Refugee Convention or discrimination grounds. Since the grant of leave to enter or remain must, in practice, have either followed, or else impliedly include, the withdrawal of the "adverse" immigration decision under section 82(2), against which the person concerned appealed, it cannot be contended that "mere" withdrawal of the decision appealed automatically deprives the Tribunal of jurisdiction under the 2002 Act.
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> 30 Neither party in the present proceedings sought to rely upon the Upper Tribunal's determination in *EG and NG (rule 17: withdrawal; rule 24: scope)* [2013] UKUT 143 (IAC). There is nothing in that determination which holds that the withdrawal of the decision against which a section 82 appeal was brought has the effect of depriving the Upper Tribunal of jurisdiction. The Tribunal in EG and NG was concerned with the effect of the Secretary of State's withdrawal of her appeal against the determination of the First-tier Tribunal, which had allowed the appellants' section 82 appeals on human rights grounds. The effect of permitting the Secretary of State's withdrawal of her case before the Upper Tribunal (that is to say, her appeal to it) was to cause the appellants' section 82 appeals to be finally determined for the purposes of section 104(1)(b) because the restriction in section 104(2)(b) was thereby lifted."

20. The decision to which the Tribunal in *SM* referred, that of *EG and NG*, is in my respectful view instructive. The case concerned the effect on an appeal in the Upper Tribunal (IAC) of the withdrawal by the Secretary of State of an appeal to that Tribunal against a decision of the First-tier Tribunal. The claimants, who were the respondents to the appeal in the Upper Tribunal, sought to continue the proceedings on grounds on which the claimants had been unsuccessful in the First-tier Tribunal.

21. The Tribunal in *EF and NG* first considered whether any distinction could be drawn between the withdrawal of an appeal (which was how the Secretary of State

had expressed the withdrawal), and the withdrawal of a party's case, as provided for by Rule 17 of the UT Rules. It held, at [23], that there was not. It followed therefore that the withdrawal of a case disposed of proceedings in a way analogous to "discontinuance" in the Civil Procedure Rules (CPR) (at [21]). The Tribunal referred, at [26], to the practice in other Chambers of the Upper Tribunal to treat withdrawal as final disposal, and adopted that characterisation in the immigration and asylum context for the purpose of s 104(1)(b) of the Nationality, Immigration and Asylum Act 2002.

22. The Tribunal went on to say, at [27], that it was reinforced in its view by the fact that Rule 17(3) of the UT Rules contemplates the reinstatement of a withdrawn appeal. As the Tribunal noted, that rule would not make sense if withdrawal, properly understood, was intended to precipitate a determination allowing or dismissing the appeal. It was held that the Tribunal was not required to determine an appeal when an appellant's case has been withdrawn and the respondent has not been given permission to appeal. For administrative purposes an appeal is disposed of by recording that a party's case has been withdrawn.

23. Subject to what I shall say later about the proper course to be adopted in the particular case of the withdrawal by a respondent of its case on an appeal, I respectfully agree with the conclusion of the Upper Tribunal in *EF and NG* on this matter. Although that tribunal was concerned with the withdrawal by an appellant of its case, there is no principled distinction between that and the case of a respondent withdrawing its case. The Tribunal in *EF and NG* inferred as such by referring, at [27], to both the allowing and dismissing of an appeal. A reference to an appeal being allowed can only have relevance to a case where it is the respondent's case, rather than that of the appellant, that has been withdrawn under Rule 17.

24. I do not consider that the fact that courts and tribunals might exceptionally entertain academic appeals, even in private law cases, has any bearing upon a case where a party has withdrawn, and there is no remaining dispute. The position in such cases is well-summarised in *KF and others v Birmingham and Solihull Mental Health NHS Foundation Trust and another* [2010] UKUT 185 (AAC), at [4] – [6], a case referred to in *SM*. In that case there was a considerable degree of consensus among the various parties on most, but not all, of the main issues. The Tribunal, mindful of the important issues of principle to be determined, which raised narrow points of construction on which the parties had a legitimate interest in seeking clarification and guidance (and noting that the giving of guidance was one of the functions of the Upper Tribunal), decided to hear the appeals.

25. The notable factor in *KF* is that, by contrast to this case, none of the parties had withdrawn its case. The first respondent, the hospital, had taken no active part in the proceedings, but the three appellants and the second respondent, the Secretary of State for Health were before the Tribunal. A similar position obtained in a case where, in unusual circumstances, the Court of Appeal entertained an appeal even where the issues were more appropriately dealt with by an employment tribunal, and there was no immediate dispute between the parties. In that case, *Rolls-Royce plc v Unite the Union* [2010] 1 WLR 318, the conclusion was reached that the appeal was not academic in the sense that, although there was no immediate claim of age

discrimination, there was a dispute between the parties as to provisions in the collective agreements before them. The point at issue was of some importance and one likely to affect a large number of people employed by the company and beyond. But neither party had withdrawn, and the court was being asked by both parties to hear the appeal. That was also the position in another appeal, *Birmingham City Council v R* [2007] Fam 41, entertained on an academic issue by the Court of Appeal.

26. In this case, therefore, it is not a question of determining whether there are exceptional circumstances why an issue that has become academic should nonetheless continue to be entertained on appeal. It is not a case where all relevant parties maintain their cases in the appeal; the opposite is the case as the respondent, TGH, has withdrawn, and no substantive disputed matter remains to be determined on the appeal. The natural consequence is that the substantive proceedings are brought to an end, a consequence implicitly recognised in the UT Rules by the reference, in Rule 10(6)(b), to the timing of an application for costs in the case of a withdrawal being determined by reference to the sending by the Tribunal of the notice under Rule 17(5) that "a withdrawal *which ends the proceedings* has taken effect" (emphasis supplied). Even if the issue might be one of general importance to taxpayers and HMRC generally, that is not a reason for the Tribunal to adjudicate on the merits of an appeal where there are no continuing proceedings in that sense.

Conclusion and determination

27. I conclude therefore that the effect of the withdrawal of TGH's case and the consent of the Tribunal to that withdrawal under Rule 17 is to bring the dispute between the parties to an end. The substantive appeal will not proceed and it remains only to resolve the question of how the appeal is to be determined in a formal sense.

28. In *EF and NG*, the Tribunal considered, at [56], that it was sufficient, in the context of that case, to conclude that there was no appeal before the Tribunal to which the claimants could respond and that there was therefore no need for the Tribunal to decide points that had been raised by the notice of appeal of the Secretary of State.

29. That was the position on the withdrawal of its case by the appellant in the Upper Tribunal. The effect of such withdrawal is simply that the decision of the First-tier Tribunal stands good. There is nothing further required to do justice to the respondent. The position is not the same where it is the respondent in the Upper Tribunal who has withdrawn its case. In such a case justice will not be done merely by recording the discontinuance. In my view, in such a case, the proper course is for there to be a formal determination of the appeal, by it being allowed.

30. That does not in my view, contrary to the submission of Ms Lemos, necessitate any more than that the appeal is allowed in the formal sense. It is not necessary, in order formally to resolve the dispute between the parties, for the decision of the FTT to be set aside or re-made. Although HMRC have asserted that the decision of the FTT renders the relevant provisions in issue in the substantive appeal prone to an overly narrow construction in certain circumstances and renders those provisions open to abuse, and as I have recorded there is no dispute that the issues are of general importance, the fact is that the FTT's decision is of no precedent value, and there is

accordingly no bar on HMRC making its substantive case in other proceedings when there is a proper dispute before a tribunal for determination.

31. Nor is there any statutory requirement on the Upper Tribunal to re-make the decision of the FTT. Ms Lemos submitted that if the tribunal was minded to allow the appeal, it must also re-make the FTT's decision. I do not agree. The re-making of the FTT's decision by the Upper Tribunal itself, or remittal to the FTT for reconsideration, is dependent on the Upper Tribunal having first set aside the decision of the FTT (see s 12(2)((b) TCEA). There is no requirement on the part of the Upper Tribunal to set aside the FTT's decision. There is only a discretion (s 12(2)(a)), and indeed it is a discretion that arises only in circumstances where the Upper Tribunal has itself made a finding that the FTT's decision involved an error on a point of law (s 12(1)).

32. No such finding is required to dispose of this appeal. A formal determination that the appeal is allowed involves no finding on the merits. The powers of the Tribunal under s 12(2) TCEA do not arise in those circumstances. The decision of the FTT may not be set aside, and it may not be re-made by this Tribunal. The effect of allowing the appeal, however, is that the FTT decision is of no effect as regards the liability to tax in this case, and the original decision of HMRC against which TGH appealed is effectively restored.

Decision

33. HMRC's appeal is allowed.

Costs

34. Any application for costs must be made, in accordance with Rule 10 of the UT Rules, not later than one month after the date of this decision.

ROGER BERNER
UPPER TRIBUNAL JUDGE

RELEASE DATE: 21 March 2017