[2021] UKFTT 0359 (TC)

TC08293

Appeal number: TC/2017/00964
TC/2017/00966

CORPORATION TAX – claims for cross border group relief – expert evidence required as to the law in two other jurisdictions – whether joint experts to be appointed against the wishes of one party – yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

EUROPCAR GROUP UK LIMITED **Appellants**
PREMIER FIRST VEHICLE RENTAL FRANCHISING

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the application for expert evidence on 14 September 2021 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 having first read the Appellant's application dated 16 April 2021, the First Appellant's Notice of Appeal, the Amended Statement of Case, and the parties' submissions filed in accordance with the Tribunal Directions of 10 May 2021.

DECISION

Introduction

1. The application before the Tribunal is an application by the Appellants for directions regarding the use of expert witnesses. The parties are agreed that expert evidence is required and agreed in principle about the two issues upon which it is required. The Appellants' position is that jointly instructed experts should be appointed, leading to two experts being instructed, whereas the Respondents contend that the parties should each appoint separate expert witnesses, leading to four experts being instructed.

Relevant background

2. The factual background to these appeals can be set out briefly. The Appellants are claiming cross border group relief on the trading losses suffered by two subsidiaries, P1 Holland and P1 Germany. In the Netherlands, P1 Holland sold its trade and some assets, and then ceased to trade. P1 Holland subsequently became UK resident for tax purposes and was then liquidated. In Germany, P1 Germany was the sole limited partner of a loss-making partnership. The partnership was dissolved with all assets and liabilities passed to P1 Germany. P1 Germany was subsequently liquidated. The Appellants' position is that P1 Holland's pre-sale losses could not be utilised under Dutch law, and that P1 Germany's losses could not be utilised under German law. The Respondents put the Appellants to proof of the Dutch and German tax law treatment of losses, and to proof of the computation of the losses claimed.

3. A number of accounting periods are in dispute. There are also procedural issues surrounding the claims made by the Appellants. The Respondents' position on the substantive issues is that none of the claims for any of the accounting periods satisfy the "no possibilities test" set down by the CJEU in *Marks & Spencer v Halsey* (C-446/03). The parties are at odds over whether the date on which the no possibilities test should be applied is the end of the relevant accounting period or the date on which the claim was filed. In respect of this issue, the Appellant relies upon *Marks and Spencer v HMRC* [2014] UKSC 11 which they say is decisive in respect of claims for periods prior to the coming into force of the Finance Act 2006. The Respondents preferred date comes from their analysis of *Commission v UK* Case C-172/13.

4. From this brief background it is clear that there are a number of issues between the parties for the Tribunal to determine at a substantive hearing. The Appellants cannot be successful unless they establish that there was no possibility of the losses that arose in the Netherlands and Germany being utilised in those respective countries. It is this issue that both parties agree will require expert evidence, to set out the relevant tax law in the Netherlands and in Germany at the (yet to be determined) relevant times (the "local law issues"). Neither party has yet instructed an expert, and so neither has yet provided argument setting out their construction of the relevant Dutch or German law. In addition to putting the Appellants to proof that there was no possibility of the losses

being utilised, the Respondents argue that the Appellants have yet to make a positive case so they (the Respondents) do not know what case they are required to meet.

This application

5. The current application is made by the Appellants. They seek directions permitting expert evidence in respect of the local law issues but on condition that a joint expert is instructed for each jurisdiction, and for the partis to have permission to apply for further directions in the event that further matters relating to the expert evidence cannot be agreed. In response, the Respondents seek directions requiring the sequential exchange of expert evidence.

6. The parties are agreed that the Tribunal has the power to make directions permitting expert evidence and that it has the power to require the joint appointment of experts. Both parties refer to Part 35 of the Civil Procedure Rules ("CPR") and Rules 15 of the First-tier Tribunal (Tax Chamber) Rules (the "Tribunal Rules"). Although there is some agreement on the relevance of certain factors to be taken into account, the parties differ on the conclusions to be drawn. The Respondents argue that the relevant factors do not provide any obvious grounds for instruction of joint experts in this case, and that it would be inappropriate for joint experts to be appointed. The Appellants argue that it would be unnecessarily time consuming and costly for both experts to instruct their own experts.

Discussion and decision

7. The direction of travel of the courts over the past twenty years has been the increasing requirement that jointly instructed experts be appointed rather than parties being permitted to instruct and rely upon their own experts. As stated in the introduction to the Practice Direction that supplements Part 35:

> … where possible, matters requiring expert evidence should be dealt with by only one expert.

8. This preference for one expert is in order to save resources and time as, in addition to the obvious cost-saving in respect of the witness instruction, it is generally possible for a hearing to be listed and concluded more quickly when there is only one expert witness in respect of each issue, rather than two. Where there is a single expert, the parties are permitted to put written questions to the joint expert, and (exceptionally) can also cross-examine a joint expert. This is, generally, still more efficient than each party appointing their own expert and those experts being examined and cross-examined at the hearing. There are, of course, some exceptions, and the reported authorities show the difficulties that can arise when, after a joint expert has provided an expert report, one party seeks permission to appoint their own expert to further examine issues or to challenge the joint expert's conclusions. This can lead to losing the hearing date, and/or both parties eventually starting afresh by instructing their own experts.

9. As the Respondents correctly note, the CPR do not apply in the Tax Chamber of the First-tier Tribunal which is governed by its own procedural rules, the Tribunal

Rules. Nevertheless, as both parties agree, the CPR can provide useful guidance to the Tribunal, especially when there is more limited guidance in the Tribunal Rules.

10. It is also relevant to note that the Tax Chamber of the First-tier Tribunal appears to have progressed much more slowly along the path taken by the courts. Expert evidence is given in only a very small percentage of tax appeals, and in most of these cases, the parties' joint preference has been to instruct their own experts. Despite the wording of Rule 15(1)(c) of the Tribunal Rules clearly anticipating the possibility of jointly appointed experts, and despite the desire to progress litigation efficiently being as relevant to tax litigation as to other types of litigation, it is unusual for joint experts to be appointed in the Tax Chamber.

11. However, the practice of each party instructing their own expert is not always helpful in the resolution of the issues before the Tribunal. Although expert witnesses are required to be objective and unbiased, there can be a range of opinions, and it is not uncommon to find that each party has selected an expert witness whose views along that range sit closest to their preferred outcome. The Tribunal is then in the position of choosing between experts rather than being assisted by them. This has occasionally led to comments by the Tribunal that, having heard both parties' experts, the appointment of a single joint expert would have been preferable (see, for example, *Foundation Partners v HMRC* [2021] UKFTT 0018 (TC) at paragraph 13).

The relevant factors to be taken into account

12. Paragraph 7 of Practice Direction 35 provides guidance to the higher courts on the factors to be taken into consideration when deciding whether a single joint expert should be instructed. This provides:

> 7. When considering whether to give permission for the parties to rely on expert evidence and whether that evidence should be from a single joint expert the court will take into account all the circumstances in particular, whether:
>
> (a) it is proportionate to have separate experts for each party on a particular issue with reference to –
>
> (i) the amount in dispute;
>
> (ii) the importance to the parties; and
>
> (iii) the complexity of the issue;
>
> (b) the instruction of a single joint expert is likely to assist the parties and the court to resolve the issue more speedily and in a more cost-effective way than separately instructed experts;
>
> (c) expert evidence is to be given on the issue of liability, causation or quantum;
>
> (d) the expert evidence falls within a substantially established area of knowledge which is unlikely to be in dispute or there is likely to be a range of expert opinion;

(e) a party has already instructed an expert on the issue in question and whether or not that was done in compliance with any practice direction or relevant pre-action protocol;

(f) questions put in accordance with rule 35.6 are likely to remove the need for the other party to instruct an expert if one party has already instructed an expert;

(g) questions put to a single joint expert may not conclusively deal with all issues that may require testing prior to trial;

(h) a conference may be required with the legal representatives, experts and other witnesses which may make instruction of a single joint expert impractical; and

(i) a claim to privilege makes the instruction of any expert as a single joint expert inappropriate.

13. In considering these factors, I do not start from the basis of neutrality between the two options. In *Peet v Mid-Kent Healthcare Trust Practice Note* [2001] EWCA Civ 1703, Lord Woolf CJ stated (at paragraph 28):

> The starting point is: unless there is reason for not having a single expert, there should be only a single expert.

14. With that instruction in mind, I consider the factors set out in PD 35.

Is it proportionate to have separate experts?

15. PD 35 provides that the relevant factors to consider under this heading are the amount at stake, the importance to the parties and the complexity of the issue. There is some overlap with Rule 2(2) of the Tribunal Rules which requires me, when making any decision, to have regard to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties.

16. The tax in dispute is approximately £4.5m. I agree with the Respondents that this is a substantial amount. Many of the appeals to the Tribunal, perhaps the majority, are against £100 penalties for the late filing of personal tax returns or other small penalties. However, I bear in mind that this appeal has been assigned to the Complex category and almost all (if not all) appeals in which expert evidence will be relied upon will also be assigned to the Complex category. The overwhelming majority of appeals in the Complex category concern disputes over amounts in excess of £1m. That does not lessen the amount at stake in this appeal – it remains substantial – but it puts the tax in dispute in this appeal into some context. £4.5m is not an unusually large amount when compared to other appeals before the Tax Chamber in which expert evidence is required. By way of comparison, the reported substantive decisions of the Tax Chamber from this year in which expert evidence was led and the tax at stake was reported, concerned amounts of £2.8m, £1.6m, £740k, £2m, £10.8m and £36.3m. £4.5m is not particularly large when considered against the background of these other appeals.

17. In considering the importance of the appeal, I bear in mind that all litigation is important to those involved. Therefore, I proceed from the assumption that this joined appeal is of importance to the Appellants. The Respondents are involved in the majority of appeals brought before the Tax Chamber. Although the Respondents have not explicitly stated that this appeal is of particular importance to them, I note that the Respondents have instructed leading and junior counsel, indicating that this appeal is one of the more important appeals in which they are involved, and one which they prioritise. There is no suggestion by either party that this appeal would set a precedent for any other appeal.

18. The Respondents have argued that the local law issues are complex as the expert evidence must cover hypothetical scenarios as well as considering the possibilities available to P1 Holland and P1 Germany. The Appellants argue that the local law issues are not excessively technical or difficult, and that expert evidence is required only because it is not UK rules that will be considered. I agree with the Appellants. It is difficult to be certain in advance of the experts reporting but there is no reason to believe that the relevant legislation in the Netherlands or Germany is inherently more complicated or technical than the corresponding rules in the UK or that considering hypothetical scenarios will cause additional issues.

19. Neither the Appellants nor the Respondents have unlimited resources to progress this appeal. The anticipated costs of these proceedings will depend on a number of factors, including the number of witnesses instructed and the length of the appeal hearing. It is clear that the hearing of this appeal will be longer if four expert witnesses give evidence, rather than two, and so it is likely that the hearing would be shorter (and the costs lower) if two joint experts were instructed. One point made by the Respondents is that, if joint experts are appointed and the Appellants' case is hopeless, then they will have had to bear half of the costs of those experts and (as the Appellants have opted out of costs) will not be able to recover those costs. I agree that is the case, and the Respondents are entitled to be wary of incurring unnecessary expenses to be met out of the public purse. However, if singly appointed experts are appointed who differ, and the Tribunal subsequently prefers the Respondents' experts and concludes that the no possibilities test is not met, then the Respondents will still be unable to recover their costs of instructing expert witnesses. The only difference will be that, in the latter case, the Respondents will bear the whole cost of their singly appointed experts whereas in the former they will bear only half the costs of jointly appointed experts.

20. Although not explicitly put forward as an option, I have taken into account the possibility that, if the parties were permitted to instruct their own experts with sequential exchange of reports, the Respondents might choose not to rely upon any expert evidence. In *Esso Exploration v HMRC* [2020] UKFTT 139 (TC), a recent appeal concerning very similar issues but with £228m at stake, the Respondents did not call expert evidence. If the application for joint experts is refused, that may result in the Appellants instructing two expert witnesses, both of whom are cross-examined by the Respondents, but in the Respondents not calling any expert evidence. Such a hearing would be longer but not significantly longer, than a hearing with two expert witnesses, jointly instructed by the parties.

Will a joint expert be more likely to lead to a speedy and cost effective resolution?

21. The Appellants' contention is that the use of a joint expert would be more likely to lead to a speedy and cost effective resolution, not least because if the experts' conclusions were that it was possible for the relevant losses to be used in either the Netherlands or Germany, then the Appellants appeal would fail. The Appellants also argue that the parties are more likely to accept the conclusions of an expert that both parties have instructed.

22. The Respondents argue that the joint instruction of an expert is unlikely to lead to a speedy and cost effective resolution due to the difficulties in progressing through the various stages of case management. The Respondents also argue that it is highly unlikely that the instruction of a joint expert would save time or costs because of the likely volume of pre-hearing questions. This is because, the Respondents argue, the parties are starting from the point almost of not knowing what they should ask in their initial instructions due to their lack of knowledge of the local law. I cannot see that this would differ whether there is one expert per jurisdiction or two. If anything, the input of both parties into the initial instructions is likely to favour a more comprehensive initial set of instructions. The number of questions following the initial report depends on what is contained in that report. (If the experts conclude that there were multiple ways in which the losses could have been utilised in the Netherlands and Germany, then it seems unlikely that the Respondents would have multiple follow up questions.) It is not likely to be more time consuming for both parties to revert to a joint expert with follow up questions than it would be for the parties each to revert to a singly appointed expert with follow up questions. The Respondents also argue that it is rare to cross-examine a jointly appointed expert. I agree that cross-examination of a joint expert is rase, and that it usually occurs only when a party wishes to challenge an unexpected conclusion (the joint expert has, in essence, become a hostile witness for that party). But that rarity does not prevent an application being made if it is considered necessary, and the parties can expect that any such application will be given appropriate consideration by the Tribunal.

Will the expert evidence be given on the issue of liability, causation or quantum?

23. Both parties appear to agree that this is not a relevant factor in the circumstances of this case.

24. One additional aspect which can conveniently be considered at this point is the Respondents' argument that the issues upon which expert evidence will be given are matters that are required to be proved by the Appellants, as the onus is upon them. As part of this argument, the Respondents make the point that the Appellants have yet to plead a positive case in respect of the local law issues, and so they do not know the case they are required to meet. The Respondents argue that, as a matter of EU law, it is inappropriate for joint experts to be appointed in such circumstances. The Respondents suggest these points make it appropriate for the Appellants to file both their factual evidence and their expert evidence before they are obliged to serve their expert evidence.

25. I am not persuaded that this point is as conclusive as the Respondents seek to argue. The Appellants accept that they bear the burden of demonstrating that there was no possibility of the losses being utilised. I am not persuaded that the fact that the Appellants bear the burden of proof makes this appeal different from many other types of litigation where the claimant will be required to demonstrate a specific aspect that is critical to the claim in order to be successful, and yet the courts have directed joint expert evidence. For example, in *Hospice of St Mary of Furness v Howard* [2007], the burden was on the claimant to show that she suffered from a disability at the time she was dismissed. This was a fundamental aspect of her claim; the defendants did not accept that the Appellant suffered from any disability. The court did not direct the claimant to instruct her own expert to provide evidence that she suffered from a condition that could be classed as a disability, and for this evidence to be filed before the defendants were obliged to provide their evidence in response. Instead, the court directed a joint expert to report on the Claimant's back condition.

26. The parties' submissions regarding expert evidence are that the experts would be asked to given an opinion about whether the law in the Netherlands or Germany provides any possibility of the Appellants using the relevant losses in the Netherlands or Germany respectively. It is clear that the Appellants' case is that there was no possibility of the losses being utilised. There does not appear to be any dispute about the underlying facts of the Appellants' appeal. Therefore, the only detail that it seems could be added by the Appellants is their analysis of the relevant Dutch and German law, and it is difficult to see how that could be achieved prior to expert evidence being sought. If the Appellants were directed to instruct their own expert, and they did so, subsequently setting out a very detailed case with full analysis of the relevant Dutch and German law, then that would shorten the Tribunal proceedings only if the Respondents accepted the Appellant's expert evidence and analysis in full, and chose not to instruct their own expert. While I have considered that as a possibility, I do not know if that is likely given it is not an option that the Respondents have put forward.

27. If the Respondents consider that the Appellant's case is insufficiently pleaded at present then they were (and still are) able to make an application seeking further and better particulars of the Appellants' grounds of appeal. However, two months before the Appellants made their application for a joint expert to be directed, the Respondents considered the Appellant's case sufficiently clear that they were able to file an Amended Statement of Case in response. That Amended Statement of Case put the Appellants to proof on the local law issues, but it did not refer to any uncertainty about the case that the Appellants were making. So, while I agree with the Respondents that the Appellants should be clear about the case they are making, particularly with regard to any elements on which they bear the burden of proof, I do not agree that the Appellants' current case is so uncertain that an expert in Dutch tax law and an expert in German tax law could not be jointly instructed.

Is there likely to be a range of expert opinion?

28. The Respondents have suggested that there is likely to be some areas of uncertainty and dispute, and that these would be better resolved by cross-examination of the parties' own experts. Almost any issue can produce a range of legitimate expert

opinion, and yet that does not prevent the instruction of joint experts in the majority of cases.

29. I consider that expert opinion in respect of the local law issues in issue here is not likely to span a wider range than any other issues upon which expert evidence is sought. In part that is because the expert will be required to look back at the situation at the possible relevant dates, rather than being required to speculate as to future circumstances. However, more significantly, the Appellants' must take the stark position that there was no possibility at all of the losses being used in the Netherlands or Germany, however their affairs were arranged. Therefore, there is significantly less scope for areas of uncertainty and dispute. If there was any possibility of the losses being used in either jurisdiction then the Appellants' claim in that jurisdiction will fail. Uncertainty does not favour the Appellants.

Has either party already instructed an expert?

30. Although both parties accept that expert evidence is required, neither party has yet instructed an expert. Therefore, neither will have wasted costs on that instruction.

Will the expert evidence deal with all issues that need testing?

31. There are a number of issues between the parties, including the date at which the no possibilities test should be applied. The expert evidence will not cover this point. However, the Appellants' submission is that the local law issues upon which expert evidence is required could determine the appeals. This is on the basis that if either expert's opinion is that it was possible for the Appellants to use the losses in the country in which they arose, then the Appellants' claims in respect of that country cannot succeed.

32. It is important to remember that the role of an expert, whether jointly instructed or not, is to provide an expert opinion upon certain matters to assist the Tribunal to reach its own conclusions about the issues in dispute. An expert witness does not decide issues, and it is open to a Tribunal to disregard expert evidence if there are good reasons for doing so. Nevertheless, if there is a possibility that a party would be more likely to accept the verdict of a joint report, and so withdraw if a joint report was unfavourable, then that is a good reason for a joint expert to be appointed. If the parties instruct separate experts, who do not agree, the parties may be encouraged to continue.

33. If the experts' opinions are that it was not possible for the Appellants to use the losses in the country in which they arose then, say the Appellants, this would (at least) narrow the issues between the parties. I agree that is the case, but a similar conclusion would be reached if singly appointed experts reached the same conclusions

Is a conference with either party's lawyers or witnesses likely to be required?

34. The Respondents have argued that the issues are complex, and that it is likely that both sides will require follow up discussion in order to understand the complexities of Dutch and German law. The Appellants suggest that the relevant rules are unlikely to be excessively technical or complex.

35. I agree that Dutch and German law is no more or less likely to be complex than the law in the UK. The instructions to each expert are likely to be extensive whether joint or single experts are instructed. However, neither of those points means that there is likely to be a greater requirement for follow up discussions than there would be with expert witnesses in any other area, or that any questions that arise could not be dealt with by way of pre-hearing written questions or (if required) by way of cross-examination at the hearing.

Whether there is likely to be a claim to privilege?

36. Neither party has made a claim to privilege. The Appellants consider that the background facts are likely to be agreed, and that the dispute arises from the application of the relevant law (German, Dutch and UK) to those facts. This does not appear to be disputed by the Respondents.

Conclusion

37. I have found this to be a difficult decision as I consider that the factors are very finely balanced. I am conscious that the Respondents do not wish to appoint joint experts and, ultimately, they might prefer not to instruct any expert. I am also aware that there is very limited experience of joint expert appointment in the Tax Chamber. However, I have eventually concluded that the Respondents have not provided a sufficiently good reason why I should depart from the starting point that, unless there is reason for not having a jointly appointed single expert on each issue, then there should be only a single expert.

38. The Respondents have not persuaded me that there would be more difficulties agreeing joint instructions, more difficulties with pre-hearing questions or more delay or other complications than there would be in any other litigation where there are jointly appointed experts. The appointment of joint experts should not impact on either party's ability to participate fully in the proceedings.

39. I have concluded that it would be appropriate for the parties to instruct jointly appointed experts on the local issues. While there is £4.5m at stake, that sum is not exceptionally large in the context of tax appeals where expert evidence is required, and I do not consider it is so large that it would be inappropriate for joint experts to be appointed. The litigation is important to both parties, but it also remains an important principle that the costs of litigation are kept within check. The joint instruction of expert witnesses will assist in reducing the costs of this appeal, both in the costs of instruction and also in reducing the length of the hearing.

40. I am conscious that the Respondents will be disappointed with this decision, and that they may be apprehensive about proceeding down an unfamiliar route. However, I consider that the litigation as a whole will proceed more quickly, efficiently and at more proportionate cost by the appointment of joint experts than it would if each party appointed its own experts and those experts were cross-examined at the hearing. The benefits of appointing a joint expert, experienced in the civil courts, apply equally to the Tax Chamber.

41. Therefore, I DIRECT:

> The parties are granted 56 days to agree Directions to enable a timetable for the appointment of two joint experts (one in Dutch tax law and one in German tax law) and to submit those draft Directions to the Tribunal or, failing such agreement, to submit to the Tribunal a draft of their preferred Directions for the remaining progress of this appeal.

42. 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.

JANE BAILEY

TRIBUNAL JUDGE
RELEASE DATE: 07 OCTOBER 2021