

**TC07063**



*PROCEDURE- application for stay by one appellant subject to COP9 enquiry the scope of which might encompass matters the subject of this appeal – whether real risk of serious prejudice which might lead to injustice if these appeals proceed – no – stay refused – directions for resolution of appeals given*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal numbers: TC/2017/7343,  
TC/17/7327 and TC/17/8071**

**BETWEEN**

**SHAMIR PRAVIN BUDHDEO**

**-and-**

**AMARJIT SINGH HUNDAL**

**-and-**

**JOSHY MATHEW**

**Appellants**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE BARBARA MOSEDALE**

**Sitting in public at Taylor House, Rosebery Avenue, London on 12 December 2018 with written submissions received later.**

**Mr Budhdeo in person  
Mr K Koonjah for Mr Mathe w  
Mr Hundal in person**

**Mr S Foxwell, HMRC officer, litigator of HM Revenue and Customs' Solicitor's Office,  
for the Respondents**

## DECISION

### INTRODUCTION

1. In late 2017, Mr Budhdeo, Mr Hundal and Mr Mathew filed individual notices of appeal against decisions of HMRC which imposed personal liability on them for PAYE which was allegedly underpaid by a company, Intercare Homecare Limited ('Intercare') of which they were directors. At a case management hearing in July 2018, I directed that the three cases be joined for case management and hearing. All parties were due to serve their lists of documents by 28 September 2018. HMRC did so but the appellants did not.

2. When chased by the Tribunal for his list of documents, Mr Budhdeo responded to ask for the appeal to be stayed on the basis (a) he was a party to a judicial review proceedings against HMRC and (b) he was subject to a COP9 enquiry which amounted to a criminal charge and engaged his right not to self-incriminate. HMRC objected to the application and the matter was set down for hearing.

3. While the other two appellants did not make a similar application, they were notified of the hearing and given a right to make representations as their appeals had been directed to be joined and heard with Mr Budhdeo's. They chose to make such representations.

4. Mr Hundal's position was that the cases should be heard together; so if Mr Budhdeo's appeal was stayed, he thought his should be stayed with it. However, he did not advance a positive case that Mr Budhdeo's appeal should be stayed.

5. Mr Mathew's position was that he wanted his case heard as soon as possible and did not want his appeal stayed whatever happened with Mr Budhdeo's. HMRC considered that, whether or not Mr Budhdeo's appeal was stayed, Mr Hundal's and Mr Mathew's appeals should continue to be joined with Mr Budhdeo's.

6. I ordered a hearing at which the application for a stay would be considered; at the hearing it became apparent (surprisingly) that none of the parties had come prepared to make submissions on the law relating to when the courts should stay civil proceedings pending criminal proceedings. For that reason I ordered post-hearing submissions on the issues considered in the cases of *Dong* [2016] UKFTT 116 (TC) and *FM Conway Ltd v Suggett and others* [2018] EWHC 3173 (QB). Mr Budhdeo and HMRC supplied such submissions and I have taken them into account in this decision.

### FINDINGS OF FACT

7. It was accepted that HMRC had commenced a so-called COP9 enquiry against Mr Budhdeo in 2013. That meant that HMRC had told him that they suspected him of tax fraud but would agree not to prosecute if he agreed to full disclosure. He was warned if he did not, HMRC might carry out a criminal investigation into the suspected tax fraud. Mr Budhdeo did not agree to full disclosure and denied any wrongdoing.

8. There were a few further factual matters that the parties were able to agree. They were:

- (1) Mr Budhdeo did not know the full scope of the COP9 enquiry;
- (2) HMRC had given no assurance that information disclosed in the appeals the subject of this hearing would not be used in that enquiry;

(3) Mr Budhdeo and HMRC were also parties to current proceedings in the High Court. The subject matter was a claim by Mr Budhdeo that his human rights have been breached in the COP9 enquiry. HMRC have applied to have the action struck out and it remains a pending matter.

(4) Mr Budhdeo and a number of other companies, not including Intercare, had brought unsuccessful appeals in this Tribunal against the issue of information notices to them and against penalties imposed for their non-compliance with the notices. The case was reported as *Gold Nuts Ltd and others* [2016] UKFTT 82 (TC) and I will refer to it as *Gold Nuts Ltd*. It was a finding in that case, which HMRC had not appealed, and did not challenge in this hearing, that Mr Budhdeo was charged with a criminal offence by HMRC at the moment that he had refused to cooperate with the COP9 enquiry: see [116] of that decision.

9. I find those matters above not to be in contention and were therefore proved.

10. However, Mr Budhdeo had served a witness statement for the hearing. It was quite long and seemed to me to contain a number of statements of fact which HMRC were unlikely to agree with but the determination of which were not relevant to this hearing, however much they might be relevant to the substantive hearing or other disputes between the parties.

11. I suggested at the outset of the hearing that the witness statement would effectively be ignored for the purposes of the hearing in so far as it contained statements of fact; Mr Budhdeo should make his submission orally and if he gave evidence on a matter of fact which was relevant to the hearing and with which HMRC did not agree, I would deal with the matter at that point.

12. The hearing proceeded on that basis but, in the event, Mr Budhdeo did make a number of factual allegations with which HMRC did not agree but again which did not appear relevant for me to determine. For instance, he alleged HMRC were abusing their powers with the COP9 enquiry. I did not consider this relevant to determine in this hearing. He also alleged that HMRC were abusing their powers to issue information notices in order to fish for evidence against him. Again, I did not consider that matter relevant to determine in this hearing. I therefore make no rulings on either of these matters.

13. None of the other factual allegations made by Mr Budhdeo appeared relevant and I make no finding in relation to them.

14. In their written submissions, HMRC's position was that the factual overlap between these proceedings and the COP9 investigations was limited. In particular, they stated that the company at the root of these appeals (Intercare) was not a part of the COP9 investigation and was not a company in respect of which the disputed information notices were issued so any overlap would be limited.

15. In the hearing, Mr Budhdeo had agreed that the disputed information notices had not been issued to Intercare (and that is clear from the reported decision in *Gold Nuts Ltd* as it does not refer to the company). He also appeared to accept that Intercare was not the main focus of the investigation. However, Mr Foxwell had agreed that Mr Budhdeo did not know the scope of the COP9 investigation and he did not give evidence about what its scope was. So while I am prepared to accept that the affairs of Intercare were not the main focus of the COP9 investigation at least at the time the information notices were issued, I cannot accept HMRC's position that any overlap between the affairs of Intercare and the COP9 investigation would be necessarily limited. There was no evidence from which I could draw that conclusion. It was merely an assertion made by HMRC.

16. The second potentially relevant factual assertion which HMRC made in their written reply was that they had not yet initiated a criminal investigation into Mr Budhdeo. I did not accept this evidence. It was clear from the hearing that Mr Budhdeo did consider himself the subject of a criminal investigation and he would have challenged this statement: by making it in subsequent written submissions, HMRC deprived him of the possibility of challenge. In any event, the opportunity to make subsequent written submissions was confined to submissions on the law and HMRC should not have made further statements of fact.

17. Apart from that, there were no disputed matters of fact over which I make a ruling.

#### THE LAW

18. None of the parties referred me to any particular test for when it was correct to stay an appeal. Fundamentally, the objective is to resolve the three appeals fairly and justly. Therefore, in considering whether or not to stay the appeal I have to consider all relevant matters, such as:

- (a) the public and the parties' interest in resolving appeals without unnecessary delays;
- (b) the fact that these three appeals have been directed to be heard together because they concern the same facts so that it follows that separate determinations would risk different outcomes, with the potential for bringing the administration of justice into disrepute;
- (c) HMRC as well as one of the appellants opposes the stay.

19. But I also need to consider whether there is potential unfairness to Mr Budhdeo and/or a breach of his right not to self-incriminate in requiring him to prosecute this appeal now while the COP9 enquiry is hanging over his head. And I drew to the parties' attention to the above mentioned cases (see ¶6), which applied the test deriving from *Alcine Bendrover Bankas Snoras v Antonov & anor* [2013] EWHC 131 (Comm) that the Tribunal should only stay pending criminal proceedings where 'there is a real risk of serious prejudice which may lead to injustice'.

#### **Right not to self-incriminate**

20. Mr Foxwell said that HMRC accepted the Tribunal's ruling in *Gold Nuts Ltd* that Mr Budhdeo's refusal to cooperate with the COP9 enquiry was to be treated for the purpose of the ECHR as if he was the subject of a criminal charge. That meant that Mr Budhdeo had the right to refuse to answer questions in any civil case.

21. This right may well not matter because, ordinarily, no one is compelled to give evidence in this Tribunal: nevertheless, the Tribunal has power to do make such an order (Rule 16(1)(b)) and the power to refer a person to who refuses to do comply with such an order to the Upper Tribunal (Rule 7(3)(d)) which has the power to hold a person in contempt of court.

22. Compelling Mr Budhdeo to answer questions in this appeal, therefore, might be a breach of his rights under the ECHR, particularly as HMRC have accepted that they have given no assurances that the scope of the COP9 enquiry does not cover the matters the subject of this hearing. However, Mr Budhdeo's right not to self-incriminate is easily protected in that the Tribunal will simply not exercise its powers under Rule 16 to compel Mr Budhdeo to give evidence. His right not to self-incriminate can be protected without any stay.

23. I comment in passing that it would be extremely unusual for a Tribunal to require an appellant to give evidence in his own appeal. The appellant bears the burden of proof: if he

declines to give evidence, it might make it difficult for him to succeed in his appeal but that is his choice; and, as HMRC do not rely on his evidence, there are no grounds to compel his evidence.

24. Documentary evidence is a different matter. The right not to self-incriminate does not extend to documents. This is clear from *Saunders v UK* [1996] (APP19817/91) where the European Court of Human Rights said the right not to self-incriminate did not extend to documentary material obtained through the use of compulsory powers. That ruling applies in the UK: see *A-G's Ref (no 7 of 2000)* [2001] WLR 1879. A stay is not indicated on these grounds.

25. I comment in passing that Mr Budhdeo has only been ordered to produce such documents as he relies on in this appeal: so he is not bound to produce any documents at all, But if he does not produce them in advance, he cannot normally rely on them at the hearing. However, even if the Tribunal were to make an order for disclosure, it would not conflict with his right not to self-incriminate because that right does not extend to documents.

### **Fairness**

26. The real issue is fairness: Mr Budhdeo can exercise his right not to self-incriminate by refusing to give evidence. The question is whether it is fair to continue with the appeal and put him in a position where he may have to choose between answering a question in order to support his appeal or refusing to answer in order not to self-incriminate.

27. Indeed, it appears he has already made his choice. He has not served a witness statement and he says, unless and until the COP9 enquiry is closed, he will not do so nor will he give oral evidence in the hearing.

28. Not only will a failure to give relevant evidence potentially prejudice his appeal because the Tribunal will be lacking potentially relevant evidence, the failure to give evidence can lead to adverse inferences being drawn.

29. As I have said, the test applied is that the Tribunal should only stay pending criminal proceedings where 'there is a real risk of serious prejudice which may lead to injustice'.

30. The cases show that there are various considerations.

(1) The appellant is more likely to succeed in an application for a stay of the civil proceedings if he can identify specific prejudice rather than just make a general claim that giving evidence now might hamper his ability to defend himself later;

(2) the appellant is more likely to succeed in an application for a stay if he can explain why his defence in the civil appeal could potentially prejudice his defence in the criminal appeal: the normal expectation would be the reverse (ie a good defence to a civil appeal would be a good defence to a criminal appeal);

(3) The length of the required stay is relevant – a long or indefinite stay is harder to justify;

(4) Whether there are safeguards which protect the appellant in the subsequent criminal trial.

### ***Mr Budhdeo's submissions***

31. Mr Budhdeo's submissions on the *Conway v Suggett* and *Dong* cases were long but the significant submissions made in them in my mind were as follows.

32. Firstly, he said that the two cases were of no application because in those the prosecuting authority was not a party to the civil case, but here the 'prosecuting authority' under the COP9 procedure was HMRC, which was a party to the civil proceedings. HMRC

ought to be compelled to go the civil or criminal route and not both. Moreover, he said that HMRC had declined to give any assurance that the COP9 investigation would not extend to the matters the subject of these appeals. This made it impossible for the FTT to work out the extent of potential overlap and therefore the extent of potential prejudice.

### ***HMRC's written submissions***

33. HMRC consider that the appropriate course is to permit the civil proceedings to continue, accepting that if and when criminal proceedings commence, the criminal courts may impose restrictions on the use of evidence gained in these civil proceedings and might go so far as to stay (in the sense of strike out) the criminal proceedings if they did not think that it would be fair to prosecute.

### ***Decision***

34. Any stay in this matter would be for an uncertain period; indeed, a stay pending the criminal proceedings might prove to be indefinite as HMRC has not charged Mr Budhdeo and might never do so. This factor indicated a stay should not be granted as it was inconsistent with justice to put off determination of a dispute pending a matter that might never happen.

35. Moreover, it has already been decided for good reasons that the three appeals should proceed together; Mr Hundal and Mr Mathew are not subject to COP9 investigations and there is no reason why their appeals should be stayed. Staying Mr Budhdeo's appeal indefinitely would have the effect of staying these appeals indefinitely for no reason connected with those two appellants.

36. Further, Mr Budhdeo was unable to identify any specific prejudice to him if he gave oral evidence in the civil proceedings but was later prosecuted. His complaints were general. He did not outline how a good defence in the Intercare proceedings might amount to an admission of liability in any criminal hearing. However, I also accept that the appellant did not know the scope of the COP9 enquiry and it might be difficult to explain any prejudice without revealing what (if anything) he did not want to reveal.

37. But having said that, I also took into that it was certainly not obvious that a good defence in this case could prejudice him in any COP9 enquiry; on the contrary, it seemed a good explanation for the affairs of Intercare would either assist him in defending the COP9 enquiry or simply be completely irrelevant.

38. Lastly, there should be no procedural prejudice to Mr Budhdeo in these proceedings by refusing the stay. While he could continue with his refusal to give evidence, he did not need to do so in order to protect his position in any subsequent proceedings. Firstly, that was because to the extent that evidence given in these appeals actually led to prejudice to Mr Budhdeo in any subsequent criminal enquiry, the judge presiding over those proceedings would be best placed to exclude evidence unfairly obtained or even stay (in the sense of strike out) the proceedings. Secondly, in any event, it was far from obvious that giving evidence in these appeals would prejudice his defence in any subsequent criminal proceedings.

39. I took into account Mr Budhdeo's case that it was significant that the respondent in these appeals were HMRC, who would also be the prosecutor in any criminal trial arising out of the COP9 enquiry. I did not see how that added to any prejudice: if evidence was unfairly obtained and excluded from any criminal trial, it was irrelevant that HMRC would know of it: they would be unable to rely on it in the criminal hearing.

40. Finally, I note that the main reason Mr Budhdeo advanced for the stay was the potential unfairness to him should he later be prosecuted; but he also said that the current judicial

review proceedings gave good cause for a stay. He did not explain why and I see no obvious prejudice to him in the proceedings running concurrently.

41. In conclusion, I found a stay was not justified. I was not satisfied, for the above reasons, that there was a real risk of serious prejudice to Mr Budhdeo which may lead to injustice. On the contrary, I considered that the balance of fairness to all parties was in the three appeals proceeding jointly without any stay.

42. The application for a stay is REFUSED.

43. Having refused the stay, there is no need to consider whether it is appropriate to reverse the joinder of these three appeals. They remain joined for case management and hearing.

**DIRECTIONS**

44. The due date for serving lists of documents and witness statements passed some months ago. The appellants have filed their witness statements with the exception of Mr Budhdeo. As Mr Budhdeo has indicated that he does not wish to serve a statement, there is no need to hold up proceedings to give him time to do so.

45. Nevertheless, he is warned that it may harm his case if he does not give evidence, and that unless he serves a written witness statement well in advance of the hearing and is given permission to rely on it, the hearing judge may well not permit him to give any oral evidence at the hearing and may well refuse to adjourn the hearing to allow him to serve a witness statement (and even if there was an adjournment for this purpose, it would likely be ordered to be at Mr Budhdeo's expense)

46. All parties should therefore now serve their listing information. They must comply with direction 3 of the directions dated 31 July 2018 no later than 14 days after the release date of this decision, but with the amendment that the hearing window is now July- October 2019.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

47. 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.

**BARBARA MOSEDALE  
TRIBUNAL JUDGE**

**RELEASE DATE: 29 MARCH 2019**