A DISCOVERY CASE BEFORE THE COMMISSIONERS

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A recent unreported interlocutory decision of a Special Commissioner has shed some light on the procedural rules relating to joinder of parties and discovery in tax appeals. The decision was given by Mr D A Shirley, sitting alone, in March 1996. As the hearing was private, the parties involved (apart from the Revenue) will be designated by letters.

This was an interlocutory hearing in capital gains tax appeals arising out of the sale of shares in a private company. There were three taxpayers, A, B and C. Each had held shares in the company as at 31st March 1982, but had subsequently sold them. The Revenue assessed each taxpayer to tax on gains realised on the sales, and each appealed. The question in issue at the full hearing would be the value of those shares as at 31st March 1982. This mattered for the purposes of calculating the indexation allowance. Subsequently the Presiding Special Commissioner made a direction under reg. 7 of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 that all three appeals be heard concurrently by the same Tribunal.

As is not uncommon in such cases, the taxpayers considered whether to instruct an expert share valuer to prepare a report and give expert evidence as to value on the hearing of the appeal. A and B decided to instruct a particular valuer and invited C to join with them and share the cost. C declined to share the cost, and hence the valuer was instructed only on behalf of A and B.

The Revenue and A and B agreed, pursuant to reg. 12 of the 1994 Regulations, that they would exchange experts' valuation reports on a certain date before the hearing. This regulation, as is well-known, requires that, to render expert evidence admissible before the Commissioners on the hearing of an appeal, *either* the substance of the intended evidence must have been communicated in advance to the other party or parties to the appeal, or the Commissioners must give leave.

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The exchange of reports between the Revenue and A and B duly took place, and the provisions of reg. 12 were accordingly satisfied, *as between them.*

The Revenue also served on C a copy of their expert valuation evidence. Of course, C had none to serve on the Revenue. Nor, indeed, did he have a copy of the report which A and B had served on the Revenue. He considered that it would be useful to him to see this, as it would deal with the value of the same company as a whole, and might contain useful material for dealing with the question whether it was appropriate in this case to discount from the pro rata value of the share for a minority holding, and, if so, by how much.

C therefore sought a copy of their expert's report from A and B. Understandably enough, A and B declined, since C had refused to share in the cost of its production. C then sought a direction from the Special Commissioners, either under reg. 12 or reg. 4 of the 1994 Regulations, that A and B should make a copy available to him, and indeed of every other witness statement which they might have prepared. A and B responded that they objected to the directions sought but, in any event, argued that, strictly speaking, there were *three* appeals, not one, even though directed to be heard simultaneously. Each taxpayer was party to his own appeal (the Revenue being the respondent in each case), but no taxpayer was party to any *other* taxpayer's appeal. C's reply to that was in the alternative to seek an additional order from the Special Commissioner pursuant to reg. 8 of the Capital Gains Tax Regulations 1967, joining C into A's and B's appeals. Although such an order would not of itself give C what he wanted, it would (if made) overcome the objection based on lack of jurisdiction, i.e., that regs. 4 and 12 of the 1994 Regulations only applied as between parties to the same appeal.

Both A and B on the one hand, and C on the other, were represented by counsel at the directions hearing. The Revenue, who were not directly concerned with the outcome of C's applications, were represented by a solicitor from the Inland Revenue Solicitor's Department. The argument before the Special Commissioner lasted half a day.

C argued that he was a party to A's and B's appeals, either anyway, or because of the direction made by the Presiding Special Commissioner under reg. 7. And if he was *not* a party, then he said he should become one by direction under reg. 8 of the 1967 Regulations. On the substantive question, he said that he could not properly prepare for the full hearing without sight of A's and B's expert's report. Moreover, reg. 12 meant that he was entitled to see it, and the Commissioner could order A and B to disclose it to him.

A and B resisted each of C's arguments, a position upheld by the Special Commissioner. In summary form, he held:

(1) that the direction made by the Presiding Special Commissioner did not amount to a consolidation of the appeals, but merely as a direction that the

three appeals should be heard concurrently; thus A, B and C were all in separate "proceedings" within the Regulations;

(2) that reg. 12 had no application to the case, since C was not a person seeking to adduce the evidence of the valuer, and only such a person (i.e., A or B) could seek a direction for service of the report on other parties;

(3) that the general power under reg. 4 did not enable him to give a direction for disclosure of experts' reports, since they are expressly dealt with under reg. 12;

(4) that he could not order general discovery as between A and B, on the one hand, and C on the other, since there was no issue between them to which such discovery could go (he also added that, had he had a discretion in the matter, he would not have exercised it to order discovery in this case);

(5) that there was no power under reg. 21 of the 1994 Regulations to make costs orders as between A and B, on the one hand, and C on the other;

(6) that, as C's appeal was being heard concurrently with A's and B's, there was no point in joining C into their appeals under reg. 8 of the 1967 Regulations; C's application amounted to an attempt to obtain indirectly what he could not obtain directly from A and B, i.e., discovery, and was refused.

So A and B were successful in resisting C's application for a copy of their expert's report. In the event C did not see it even at the full hearing of the appeals, for reasons which need not detain us. What this case does demonstrate, however, is that the rules of discovery, developed in ordinary civil litigation, do have a role to play even in tax appeals. First, discovery is only available as between parties to litigation. Second, it is an abuse of the process to seek to be joined in proceedings merely to obtain discovery. Third, discovery when available will only be ordered where it goes to an issue between the parties concerned. And fourth, rules concerning advance disclosure of expert evidence fall outside the normal discovery rules, and must be specifically construed in each case.

Of course, no-one would suggest that tax litigation involves as many interlocutory applications as, say, construction cases before the Official Referees. But what this case illustrates is that the grasp of the basic principles of discovery is still an asset before the Special Commissioner.