[2015] UKFTT 635 (TC)

TC04768

Appeal number: TC/2015/02023 & others

VAT GROUPS – scope of section 83(1) VATA 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

ECO ENERGY SALES LIMITED AND OTHERS — **Appellants**

- and -

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

TRIBUNAL: JUDGE J. BLEWITT
MRS CHRISTINE OWEN

Sitting in public at Manchester on 2 September 2015 with further written submissions filed on 30 September 2015 and 12 October 2015.

Mr S. Suffield, the Director of the Appellant company for the Appellant

Mr B. Haley, officer of HM Revenue and Customs, for the Respondents

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DECISION

The application

1. In an application dated 12 June 2015 HMRC applied to have the following appeals struck out:

- Eco Energy Sales Limited (TC/2015/02023)
- Freedom Electricity Limited (TC/2015/02026)
- Inspire Insulation Limited (TC/2015/02027)
- Freedom Energy Group Limited (TC/2015/02029)
- GDA Surveys Limited (TC/2015/02080)
- Freedom Gas Limited (TC/2015/02081)
- Freedom Renewables (North West) CIC (TC/2015/02082)

2. The grounds for the application are that HMRC consider the companies to be members of a Group registration, with the representative member being Freedom Renewables Limited (now in Administration). The companies have appealed on the basis that they were not members of a Group which HMRC does not consider is an appealable matter within the parameters of section 83 (1) VATA 1994.

3. The Appellants' grounds of appeal set out in their respective Notices dated 26 February 2015 can be summarised as follows: the tax in dispute (a VAT debt of approximately £300,000) is that of Freedom Renewables Limited. HMRC consider that the Appellants are jointly and severally liable for the disputed tax liability however the Appellants submit that they were not members of that VAT group and therefore cannot be held jointly and severally liable. The application by which the Appellants were admitted to a VAT group registration was submitted to HMRC on or about 15 January 2014. The Form VAT 51 was signed by an employee in the capacity of "Finance Manager"; that individual was not a director or shareholder of the Appellants at the relevant time. HMRC requested but was never provided with written authority for the employee to act on behalf of the Appellants in respect of their VAT matters. HMRC therefore acted incorrectly by admitting the Appellants to a VAT group registration.

4. The case for HMRC is that on 6 March 2014 the VAT group allocation was processed at which point the individual responsible for submitting the application was a director. Furthermore on 14 February 2014 Mr Suffield signed a reply to an enquiry letter from HMRC which named all of the companies intended to be included in the VAT Group. The letter confirming the Group registration was issued on 5 March 2014 and not challenged or disputed by the Appellants.

The Appellant's case

5. Mr Suffield explained that he had attended the hearing at short notice and that whilst he had the benefit of a skeleton argument prepared by Mr Lovell of DTE Business Advisers Limited, he had also received additional legal advice on this matter. Mr Suffield explained that he was disadvantaged by his lack of knowledge as to the detail of the legal arguments and, in those circumstances we allowed an additional 28 days for any further written submissions to be sent to the Tribunal.

6. Mr Suffield stated that the application for Vat Group registration had been made by an individual without the authority of the directors. The company now in liquidation is owed approximately £2,000,000 which HMRC should seek to recover, rather than pursuing the Appellants on a joint and several liability basis. The debt owed to the company in liquidation is currently being litigated. If HMRC's application to strike out these appeals is successful approximately 40 employees will be affected and a wind-up petition may result.

7. The skeleton argument on behalf of the Appellants contained additional arguments as to the Tribunal's jurisdiction. It was submitted that section 83(1)(a) VATA 1994 refers to "the registration or cancellation of registration of any person under this Act". The following companies became registered for VAT for the first time as a consequence of the application for VAT Group treatment:

- Eco Energy Sales Limited (TC/2015/02023)
- Freedom Electricity Limited (TC/2015/02026)
- Freedom Energy Group Limited (TC/2015/02029)
- Freedom Gas Limited (TC/2015/02081)
- Freedom Renewables (North West) CIC (TC/2015/02082)

8. The appeals of these companies relate to their registration under VATA as a result of the purported VAT Group registration. On this basis the appeals fall within section 83(1)(a) VATA.

9. The remaining two Appellants, Inspire Insulation Limited (TC/2015/02027) and GDA Surveys Limited (TC/2015/02080) were registered for VAT in their own right prior to the application for Group treatment. The consequence of the purported VAT Group registration was that their respective VAT registrations were cancelled. As their appeals relate to the cancellation of existing registrations followed by their re-registration the appeals fall within section 83(1)(a) VATA.

10. In further written submissions prepared by Mr Lovell dated 30 September 2015 the Appellant reiterated the arguments summarised above. It added that there is no precedent to support HMRC's contention that the matters appealable under section 83(1) VATA should be narrowly interpreted. The interpretation urged by HMRC has the effect that section 83(1)(a) would not include the registration or cancellation of registration of any person within the context of a group registration. However, the

relevant provision does not expressly exclude this category or persons and had Parliament intended the legislation to have such an effect it would have added the required wording to achieve that objective.

11. The consequence of the narrow interpretation imported by HMRC is that a standalone company would have the right to appeal to the Tribunal in respect of its registration but a company which formed part of a VAT group would have no such right. As regards the reliance of HMRC on section 83(1)(k) and (ka), the Appellant submitted that these sub-sections, while dealing with group registrations, do nothing to limit the generality of section 83(1)(a).

HMRC's case

12. By way of background, Mr Haley explained that the Group registration was effective from 1 February 2014 and VAT returns had been submitted on this basis since that date. The representative company entered into Administration with effect from 22 May 2015 with a VAT debt of approximately £300,000.

13. Section 83 (1) (a), (k) and (ka) VATA 1994 provides:

"Subject to section 84, an appeal shall lie to a tribunal with respect to any of the following matters—

(a) the registration or cancellation of registration of any person under this Act;

(k) the refusal of an application such as is mentioned in section 43B(1) or (2);

(ka) the giving of a notice under section 43C(1) or (3)"

14. HMRC do not agree that section 83(1)(a) is relevant to this appeal as the registration of the representative company is not in dispute. Mr Haley highlighted sub-sections (1)(k) and (1)(ka) which specifically cover group applications and termination of membership of a group by reference to sections 43B and 43C. Mr Haley noted that eligibility to be treated as a group is provided for by section 43A which is not included within section 83. The absence of any express reference to section 43A in circumstances where sections 43B and 43C are specifically referred to makes it clear that the legislation is to be interpreted strictly and in doing so it cannot be deemed to cover the Appellant's situation.

15. In written closing submissions dated 12 October 2015 Mr Haley set out the consequences of group treatment as a facilitation method which allows two or more corporate bodies to be treated as a single taxable person. One of the companies applying for group treatment is nominated as the representative member and the registration is made in the name of that member.

16. Mr Haley submitted that as the request for Group registration emanates from the companies themselves rather than HMRC it cannot lie within the scope of section 83(1)(a) VATA 1994.

Discussion and Decision

17. In our view this application concerns matters of legal construction and the FTT's jurisdiction. We found the submissions we received, both oral and written, provided limited assistance as a result of their brevity in determining how to approach these issues.

18. We noted that group registration was applied for, and became effective in early 2014. The Appellants did not challenge their membership at that stage or indeed thereafter. Moreover, the Appellants tended to their tax affairs on the basis that of that group registration.

19. The Appellants now seek to challenge that registration indirectly by appealing against HMRC's decision to hold the Appellants joint and severally liable for the VAT debt of the representative member.

20. The issue for us to determine is whether the Appellants' contention that they were not members of a group is an appealable matter under section 83(1)(a) VATA 1994. HMRC contend that the Appellant's appeal falls outside the statutory regime of section 83 VATA 1994 and as a result the FTT has no jurisdiction to consider it.

21. We were not referred to any authorities by the parties. However following the hearing the decisions in *Portland Gas Storage Ltd and Customs Commissioners* [2014] STC 2589 ("*Portland Gas*") and *Dr Vasiliki Raftopoulou* [2015] UKUT 579 (TCC) ("*Raftopoulou*") came to our attention. Although those cases involved different types of taxes to this appeal, they nevertheless provided helpful observations on the issues of appealable decisions and construction of statutes.

22. In *Portland Gas* the tribunal said (at [33] – [35]):

"We do, however, accept that ultimately the FTT only has such jurisdiction that Parliament has through the relevant statutory provisions conferred on it and there can be anomalies where certain decisions can possibly through oversight fall through the net. There can be other situations where it is clear from the legislation that Parliament did not intend there to be a right of appeal, and in those circumstances it is not for this Tribunal to "fill in the gaps" by giving a strained construction to clear language regardless as to whether the failure to give an appeal right appears to be an oversight or not.

Ms Choudhury referred us to section 83 of the Value Added Tax Act 1994, which in a similar fashion to paragraph 35 of Schedule 10 FA 2003 sets out a list of decisions (lengthy in that case) in respect of which an appeal can lie, the clear scheme of the legislation being that if the decision does not come within any of the specified categories no appeal lies. Ms Choudhury referred us to observations of the VAT and Duties Tribunal in Olympia Technology Ltd v Revenue and Customs Commissioners (No.3) VTD 19784) as follows:

> *"The tribunal is not in the position of an umpire in a game of cricket to whom a bowler appeals for a catch. The tribunal exists to adjudicate on a*

dispute following a ruling or determination by Customs … in order for the tribunal to have jurisdiction there must be an issue between the parties which has been sufficiently crystallised to constitute a decision falling within one of the paragraphs of section 83."

She referred to examples of appeals which were struck out as not being within section 83 (or its predecessor) including Strangewood Ltd v CCE (1988) VTD 2599 (unreported), where the VAT Tribunal concluded that it did not have jurisdiction to hear an appeal even though HM Customs & Excise (as it then was) had deliberately failed to make an appealable decision and Oldhams Leisure Group Ltd v CCE [1992] STC 332, where the appeal was struck out insofar as it concerned the liability to VAT on a supply that had not yet been made.

We accept that these authorities show that the relevant statute conferring jurisdiction on the Tribunal cannot be construed so widely that the Tribunal is regarded as having jurisdiction to hear appeals against decisions by HMRC that do not fall within the words of the statute in question. Nevertheless, in our view there is nothing in the authorities to preclude us construing the words in question so as to give them a broad rather than narrow construction where to do so will result in the whole of the dispute between the parties relating to the correct amount of tax to be charged being resolved by the body on whom the prime responsibility for determining such disputes has been conferred."

23. In *Raftopoulou*, the UT referring to *Portland Gas* said (at 32] and [33]):

"It is clear that the tribunal had in mind both cases where the absence of an appeal right might properly be regarded as an oversight (and thus aptly described as an anomaly), and those cases, which we accept exist, where there can be discerned the intention of Parliament that no such right should be available. In neither case, however, was it suggested that any perceived gap could be filled judicially.

We accept that there are cases where no right of appeal will arise. But that does not resolve the question whether in any particular case there is or is not such a right. That will depend on the construction of the statute as well as the particular facts and circumstances."

24. In response to our request for observations on the authorities referred to in this Decision but which were not cited by either party, the Tribunal received correspondence from Mr Lovell on behalf of the Appellant dated 27 November 2015. Mr Lovell highlighted paragraph 32 at which it is stated:

"*Our starting point is that we accept Mr Thomas's submission that we should not give paragraph 35(1) (b) a narrow construction and that it should be construed against the underlying philosophy that the FTT is the body in whom Parliament has vested the jurisdiction to deal with disputes between the taxpayer and HMRC as to the correct amount of tax to be paid."*

25. Mr Lovell agreed with our conclusion as to the FTT's jurisdiction and reiterated the Appellant's submission that these appeals concern the Appellants' VAT registration and cancellation (the latter in respect of Inspire Insulation Ltd and GDA Surveys Ltd) as a result of their inclusion in the purported VAT group. Mr Lovell submitted that it is unnecessary to apply a strained construction to the legislation in order to find for the Appellants nor does it require the Tribunal to fill a gap of uncertainty between matters for which an appeal lies to the Tribunal and those which do not.

26. We took these submissions into account, however in our view the difficulty for the Appellants is that these appeals are not appeals against registration or cancellation for VAT; any such appeals would now be out of time. The appeals are, in reality, against the potential pursuit of the Appellants on a joint and several liability basis. The initial registrations and subsequent cancellations were not appealed, nor indeed did was the registration as a group.

27. The FTT can only exercise the jurisdiction conferred by statute, which in this matter is exhaustively provided by section 83 VATA 1994. Our starting point was to consider the ordinary meaning of section 83(1)(a) which provides for an appeal against the cancellation or registration of any person under the Act.

28. The provisions of section 83(1)(a) and its reference to "any person" can be contrasted with sections 83(1)(k) and 83(1)(ka) which expressly provide for appeals concerning VAT groups. In our view this is an important distinction; section 83(1)(a) does not refer to groups and in order to accept the Appellants' arguments we would have to interpret the term "person" sufficiently widely to encompass groups. In considering whether it would be appropriate to do so, we considered the process of VAT registration.

29. A person is entitled to register for VAT voluntarily but must do so if taxable supplies in the previous year cross the threshold for registration. Failure to register when the threshold is crossed can lead to compulsory registration by HMRC. A person can de-register for VAT voluntarily but HMRC also have the power to de-register and re-register a person. In those situations it is clear how an appeal under section 83(1)(a) might arise, for instance where a person disputes compulsory registration by HMRC.

30. By comparison, as we understand the position in order to register a group, an application must be made in the name of the representative member. HMRC may refuse that application in specific circumstances and it also has the power to terminate a group membership. In such situations it is clear that sections 83(1)(k) and (ka) would have effect. In our view the specific absence of reference to section 43A (eligibility for VAT group) in section 83(1) must have been deliberate; it must logically follow that as the request for membership of a group is instigated by companies rather than HMRC, the only circumstances in which a challenge to such membership would arise would be from refusal of an application or termination of

membership, both of which are specifically provided for in section 83(1)(k) and (ka) VATA.

31. We bore in mind the UT's comment in *Raftopolou* at [67] that:

"Novelty is no bar to the section having wider application than may have been assumed in practice to date."

32. Nevertheless we took the view that to "fill the gap" in section 83(1)(a) by adding or reading into the section VAT groups would have the effect, as here, of effectively allowing a VAT group, which has enjoyed the benefits of its group registration, to appeal against joint and several liability by, to put it colloquially "the back door." Having made express provision for groups elsewhere within section 83(1) VATA we concluded that the omission of groups from section 83(1)(a) was deliberate. It follows by their exclusion that any right of appeal by a group can only fall within those sections which intended and expressly provide for them.

33. In those circumstances we grant HMRC's application to strike out the appeals on the basis that there is no appealable matter before the Tribunal.

34. 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.

TRIBUNAL JUDGE
RELEASE DATE: 7 December 2015