[2019] UKFTT 611 (TC)

TC07394

Appeal numbers: TC/2016/06385 (Cafe Brio)
TC/2016/06387 (Richmond)
TC/2016/06401 (Kar)

VALUE ADDED TAX - Operation of aged creditor rules - Rule 8(3) Application by one of the Appellants to strike-out the Respondents' case - Discussion of the nature of a 'mini trial' - Identification of triable issues not amenable to summary disposal relating to existence of inter-company debt, the timing and formalities of assessments - Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) CAFE BRIO (LIVERPOOL) LIMITED **Appellants**
(2) RICHMOND LUXURY LIVING LIMITED
(3) KAR CHESTER LIMITED
(4) MR NIGEL KEVIN RUSSELL

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at the Tribunals Service, Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 15 March 2019, and by telephone on 18 September 2019

Mr Iain Lundie, a tax adviser, of HannawayCA Ltd, Belfast, on behalf of the First Appellant (*Cafe Brio (Liverpool) Limited*), and the Third Appellant (*Kar Chester Limited*), and the Fourth Appellant, Mr Nigel Russell

Mr Gareth Hilton, an Officer of HMRC, for the Respondents

DECISION

1. Richmond Luxury Living Limited ('Richmond') went into creditors' voluntary liquidation on 23 May 2016. Its liquidator is David Hines of Absolute Recovery Limited, Insolvency Practitioners.

2. Its appeal first came before me on 18 April 2018 for case management, when I gave directions (which were varied by Judge Poole on 13 November 2018). Insofar as my directions affected Richmond, they were designed to ascertain the liquidator's intentions with relation to the appeal and in particular whether the liquidator intended to pursue the appeal. HMRC has granted a hardship application in relation to Richmond's appeal, allowing its appeal to proceed without payment of the disputed tax.

3. The directions, as varied, provided that the liquidator was to inform the Tribunal by 13 July 2018 as to whether the liquidator intended, or did not intend, to pursue the appeal made by Richmond, with provision that, in default of compliance, Richmond's appeal would stand as automatically struck-out. On 14 August 2018, Judge Kempster directed that the liquidator had decided to continue the proceedings.

4. The present Application was lodged on 11 July 2018. It is advanced only by Richmond. It invites the Tribunal to consider exercising its discretion to strike-out parts of HMRC's case pursuant to Rule 8(3)(c) of the Tribunal's Rules, on the basis that there is no reasonable prospect of HMRC's case, or part of it, succeeding. There is no application under Rule 8(2) (mandatory striking-out).

5. The effect of such an order would be to debar HMRC was taking further part in the proceedings (Rule 8(7)(a)), albeit subject to HMRC's right to apply for the bar to be lifted (Rule 8(7)(b)). If HMRC is debarred, and the bar is not lifted, then the Tribunal 'need not consider any response or other submissions made by that Respondent, and may summarily determine any or all issues against that Respondent': Rule 8(8).

6. No application is advanced by Cafe Brio (Liverpool) Limited, or Kar Chester Limited. It is accepted by Mr Lundie (who represents them) that their appeals, as well as that of Mr Russell, who was a director of all the companies, cannot be disposed of summarily, but should proceed to a full hearing. I say no more about them.

7. When the present application came before me for hearing on 15 March 2019, there was no appearance by the liquidator. In the absence of express authority from the liquidator, I was concerned as to whether Mr Lundie was entitled to represent Richmond. That situation could not be resolved on the day. Having spoken to the liquidator, Mr Lundie's position was that the liquidator was not prepared to give Mr Lundie express authority for the purposes of the hearing without the liquidator taking advice.

8. However, subsequently (and the same, unfortunately, not having been drawn to my attention at the hearing) I became aware that Judge Kempster, on 14 August 2018, had directed that Mr Lundie's firm be appointed as Rule 11 representatives for all the Appellants, including Richmond. Therefore, I convened a further hearing, by telephone, to allow Mr Lundie to make oral submissions in support of the

Application. Due to diary conflicts, that hearing could not take place until 20 September 2019.

9. The parties had set out their factual and legal positions fully in well-composed documents:

(1) The liquidator in his long letter of 11 July 2018 (of which Mr Lundie was the draftsman) and Mr Lundie's 'Points of Note' in respect of HMRC's Skeleton Argument;

(2) HMRC's position was set out in its Skeleton Argument, dated 7 March 2019, which the liquidator had seen and responded to.

10. Before going on to consider Richmond's application in more detail, it is important for me to set out the nature of its underlying appeal. Richmond challenges HMRC's decisions, made by Officer Mike Holden, a VAT Assurance Officer, of Individual and Small Business Compliance:

(1) On 8 September 2015, to disallow input VAT of £240,000 claimed by Richmond in period 05/13 in relation to invoices received from Middle England Developments Ltd ('Middle England') unless proof of the supplies was made available (I take the date 8 September 2015 from the papers, but the assessment is not before me);

(2) On 22 October 2015, to issue a Schedule 24 penalty against Richmond of £168,000 (being 70% of the Potential Lost Revenue, calculated on the basis that the VAT return contained an inaccuracy of £240,000, which was deliberate and prompted).

11. On 30 October 2015, HMRC issued a Personal Liability Notice against Mr Russell in relation to 100% of Richmond's liability. That Personal Liability Notice is subject to appeal by Mr Russell.

12. Some further explanation of the decision to disallow the input tax is called for. Input tax of £240,000 claimed (and originally allowed) in relation to period 05/13 and an invoice or invoices for supplies said to have been made to Richmond by an associated company, Middle England, in relation to the fitting-out of a hotel, was subsequently disallowed by HMRC.

13. HMRC's position was that there was insufficient evidence to establish that the invoices had in fact been paid, and accordingly, applying the aged creditor rules (VAT Act 1994 section 26A) Richmond should have made an adjustment so as to pay back the relevant input tax at the end of six months from the supply: see VAT Regulations 1995 Part XIXB Regulations 172F to 172H (Repayment of Input Tax where consideration not paid).

14. On 28 April 2015 (that is to say, some months before the assessment) HMRC had written to Mr Russell, drawing his attention to Public Notice 700/18 1.4 which states "You are required to repay input tax if you do not pay for the supplies within 6 months of the relevant date. Your suppliers will not be required to issue a notification so you will need to monitor the time you take to pay your supplies."

15. That fits together with Regulation 172H (2) which provides that a person shall make a negative entry in the VAT allowable portion of that part of his VAT account

which relates to the prescribed accounting period of his in which the end of the relevant period falls.

16. It is common ground that no adjustment was made by Richmond to its VAT returns in relation to the £240,000.

17. The gist of the reasoning behind the Schedule 24 penalties was that if (as argued) Richmond had failed to pay for supplies received from Middle England within 6 months of supply, then that would have been clear from outstanding balances on the internal supplier ledgers.

18. A meeting took place on 29 April 2016 between Mr Russell, Mr Lundie, and HMRC's Officer Holden. I have not seen any note of that meeting.

19. The assessment, penalty, and personal liability notice were upheld at departmental review on 21 October 2016, but re-issued by way of a letter dated 11 November 2016. The only amendment was to alter the period from 05/13 to 11/13. The status of that letter is a matter which is in dispute.

The parties' arguments

20. The Application, in summary, argues as follows:

(1) The invoice from Middle England to Richmond (£1.2m plus £240,000 VAT) had in fact been paid, with the payment being achieved by way of set-off or contra-trading. As such, the invoiced amount did not remain outstanding, there was no inter-company debt as between Richmond and Middle England, Richmond was not a creditor of Middle England, there was no cause for Richmond to adjust the return, and no reason for HMRC to assess;

(2) Middle England is also in liquidation, and Richmond argues that Richmond's position is supported by the administrators' statement for Middle England, dated 4 December 2013 and lodged with Companies House on 6 December 2013, which does not record any inter-company indebtedness owed by Richmond to Middle England as at 25 October 2013 (but which is said to show the opposite: Middle England owing Richmond about £1.492m);

(3) Any assessment made in September 2015 in relation to the period 05/13 was too late: section 73 of the VAT Act 1994;

(4) The amended assessment purported to have been made on 11 November 2016, but which only amended the assessment period from 05/13 to 11/13 (being 6 months after 05/13), was also out of time;

(5) HMRC's letter of 11 November 2016 to Mr Russell is not an assessment at all;

(6) But, even if it is capable of constituting an assessment, the letter of 11 November 2016 is not a valid issued assessment since it was not sent to the liquidators, but only to Mr Russell personally.

21. HMRC's response, in summary, is as follows:

(1) Neither the liquidator nor the company have provided satisfactory evidence that payment was made;

(2) Points about the timing of the 05/13 assessment are irrelevant, given that it was withdraw and re-issued, on 11 November 2016, for 11/13;

(3) The 11/13 assessment was in time. It was issued within 4 years after the end of the period (i.e., by 30 November 2017) (VAT Act s 77) and within one year "after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of an assessment, comes to their knowledge": VAT Act s 73(6)(b);

(4) HMRC had an expectation at the meeting on 29 April 2016, arising from Mr Russell, that evidence of payment would be provided;

(5) The letter of 11 November 2016 is an assessment, and is a valid assessment.

Discussion

22. In relation to the legal test to apply, I am bound by the Upper Tribunal's guidance in *HMRC v Fairford Group plc and other* [2015] STC 156 where, at Para [41], Simon J and Judge Bishopp said:

> "In our judgment an application to strike out in the FTT under Rule 8(3)(c) should be considered in a similar way to application under CPR 3.4 ... The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing ... A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable... The Tribunal must avoid conducting a 'mini-trial'."

23. HMRC argues that resolution of these issues would propel me into conducting a mini trial. But I must nonetheless ask - what is a 'mini-trial'? The exhortation against conducting a 'mini-trial' is primarily directed at any attempt to evaluate disputed evidence or rival versions of events, but does not mean is that it is impermissible to examine how any party puts its case or the material it relies on in support of it to see whether such a case has any real prospect of success: see *Dutia v Geldof and others* [2016] EWHC 547 (Ch) per Nugee J at Paras 111-113.

24. In *Easyair Limited (Trading As Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch), Lewison J gave the following guidance as to the meaning of 'mini-trials' (adapting the wording to suit the Tribunal context):

(1) The Tribunal must not conduct a “mini-trial”;

(2) But this does not mean that the Tribunal must take at face value and without analysis everything that a party says. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents;

(3) However, in reaching its conclusion, the Tribunal must take into account not only the evidence actually placed before it, but also the evidence that can reasonably be expected to be available at trial;

(4) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible at an interlocutory stage. Thus the Tribunal should hesitate about making a final decision without a trial, even

where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case;

(5) But if, on the other hand, the Tribunal is satisfied that it has before it all the evidence necessary for the proper determination of a short question of construction or law, and is satisfied that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

(6) If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the Tribunal, such material is likely to exist and can be expected to be available at trial, it would be wrong to summarily dispose of an issue.

25. In my discussion of the separate issues below, I keep the above guidance firmly in mind.

The inter-company debt

26. Not all the relevant documents have not been placed before me.

27. I give due regard to the Joint Administrators' Report and Statement of Proposals for Middle England, dated 4 December 2013. Middle England's books, as at 25 October 2013, did not apparently show any debt owed by Richmond (reference is made to the Table of Inter Company Debtors at §5.2 of the Administrators' Statement) but instead showed £1.492m owed to Richmond: see Appendix B of that Report.

28. Insofar as it may be material, I also take into account that Richmond was not listed in the Settlement Deed entered into between Middle England and its debtor companies (i.e., companies owing Middle England money).

29. But it seems to me that the following features of the Report are also relevant:

(1) It refers to a complaint by a creditor that an earlier CVA contained inaccurate information, and did not fully disclose the financial position: §3.10; and

(2) It expressly qualifies the Quickbook figures at §§4.1 and 4.2 of the Proposals, saying that those accounts for the period ending 25 October 2013 'should not be regarded as agreed', and 'so no real reliance should be placed on those figures at this time';

(3) The administrators had not, as at 4 December 2013, received a statement of affairs as at 25 October 2013 from the directors: §4.4;

(4) Middle England's financial position was only estimated;

(5) The inter-company creditor figures were extracted from Middle England's records and the Report says that they 'should not be regarded as agreed amounts': see Note 13

30. In my view, I should therefore be cautious about placing too much reliance - at least, at this stage - on this Report.

31. As such, I cannot regard the paper position as conclusive for the purposes of this application.

32. There is another reason. The Appellant's case is that the invoices had been paid by way of set-off or contra.

33. The Appellant asserts (in its post-application letter of 8 October 2018) that payment by set-off is valid (citing, but not placing before me, the decision of the VAT and Duties Tribunal in *Pentex Oil Ltd* and the High Court in *Enron Europe Ltd)* and I have, for present purposes, taken that as the position.

34. The Appellant's case, as presently put, is too sketchy for me to assess whether it enjoys the requisite prospects of success. It is simply not clear to me, as matters stand, in what manner, or by what means, and when, this payment by set-off or contra is said to have happened. Nothing is said about the large sum apparently owing by Middle England to Richmond.

35. The Judge hearing the substantive appeal will have to assess the reliability and integrity of what is said on behalf of Richmond. That is something in relation to which Mr Russell - who was a director both of Richmond and Middle England - could well have useful factual evidence to give, which may need to be tested by way of cross-examination.

The timing of the assessment

36. HMRC relies on its amended assessment notified by way of a letter on 11 November 2016. This relates to the period ending 11/13.

37. HMRC does not seek to place any reliance at all on the amended assessment for 05/13, issued on 8 September 2015 (therefore issued, unless falling within VAT Act 1994 section 73(6)(b), out of time).

38. Nonetheless, I cannot ignore the fact that the 05/13 assessment was made - and, between 8 September 2015 and 11 November 2016, reflected HMRC's position. Its withdrawal does not mean that it had never existed in the first place. It is at least evidentially relevant both as to the circumstances pertaining in September 2015, and HMRC's state of knowledge at the time, and whether, if at all, those changed afterwards.

39. If the prescribed accounting period was 11/13, then, as HMRC accepts, the 11/13 assessment issued in November 2016 was not issued within 2 years of the end of that period, and therefore can only be in-time only if issued within 4 years (which it was) and within 'one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge': see VAT Act 1994 section 73(6)(b).

40. HMRC's position is that the one year for the purposes of section 73(6)(b) did not begin to run until 29 April 2016, which was the date of the meeting between the Appellant and HMRC. This appears at Paragraphs 11 and 12 of its Statement of Case dated 18 September 2018:

> "A meeting took place on 29 April 2016 between the Respondents, Mr Russell, and his representative Iain Lundie. The reasons for the assessments and

penalties were clarified and it was agreed that Mr Russell and Mr Lundie would provide a formal response in order to request a statutory review, as well as evidence of payment for the Respondents to consider.

The required evidence was not submitted and the amounts of the assessments and penalties were upheld..."

41. The Appellant's position is that time began to run against HMRC earlier than 29 April 2016 and had run out by 11 November 2016. In this regard, the Appellant relies heavily on the 05/13 assessment. That assessment, being made more than two years after the end of the prescribed accounting period (which ended 31 May 2015) prima facie contravenes VAT Act 1994 section 73(6)(a) and hence can only have been lawfully made under the one year rule in section 73(6)(b).

42. I accept that the Appellant makes a forceful argument that HMRC was in possession of the same facts and knowledge in November 2016 as it had been in September 2015.

43. Ultimately, that may or may not turn out to be correct. But I simply do not have enough information to reach a conclusion on the point, at this stage, one way or the other. I have not heard from the assessing officer as to why the 05/13 assessment was made as it was, and why it was made in relation to 05/13 and not 11/13.

44. In my view, and standing back, both parties' positions as they presently stand expose that this is, to a more than inconsequential degree, a fact-sensitive exercise, requiring the hearing and testing of oral evidence.

45. The issue of the latest date of knowledge for the purposes of s 73(6)(b) cannot be satisfactorily answered only on the papers. It is triable issue which will have to be explored at trial. It is not suitable to be dealt with summarily at an interlocutory stage.

46. In my view, a further reason why it is inappropriate to decide this issue summarily is that the parties have not really grappled with the substantive and/or evidential status of the original 05/13 assessment, and whether HMRC could amend the assessment 13 months later by simply changing the prescribed accounting period from 05/13 to 11/13. It is not for the Tribunal, at an interlocutory stage, to act as a detective to piece together the true position from hints and scraps of evidence and submission.

The letter of 11 November 2016

47. HMRC seeks to rely on the guidance given by the Upper Tribunal in *Queenspice Ltd v HMRC* [2011] UKUT 11 at Para [25], citing a decision of May J in *House (trading as P & J Autos) v Customs and Excise Commissioners* [1994] STC 211, as to the form of the notification of an assessment.

48. There, it was said section 73(1) of the VAT Act 1994 lays down no particular formalities in relation to the form, or timing, of the notification of the assessment, and "in judging the validity of the notification, the test is whether the relevant documents contain between them, in unambiguous and reasonably clear terms, a notification to the taxpayer containing (a) the taxpayer's name; (b) the amount of tax due; (c) the reason for the assessment; and (d) the period of time to which it relates.

49. The letter of 11 November 2016 did state that 'a formal notification will be issued in due course'. No such 'formal notification' was issued. But HMRC characterises this as 'a semantic issue' (sic).

50. To some extent, the argument is parasitic, since, if the assessment is indeed out of time, then this argument falls away.

51. I am not dismissing the argument, but I do not consider that this argument can properly be dealt with at this interlocutory stage. The wording of the letter may or may not be significant. My first (and non-binding) impression is that the letter of 11 November 2016 is a sufficient notification, within the four corners of *Queenspice*, but it is nonetheless possible that other matters of fact or law may emerge at the final hearing which have some bearing on that first impression. To be fair to the Appellant, the issue will have to be resolved at a final hearing.

Addressee of the Notice

52. The Appellant challenges this notice on the footing that the notice dated 11 November 2016 was sent to Mr Russell and not to the company (which was then in liquidation). That argument goes further, in the sense that, if no notice of assessment was sent to Richmond (which was then in liquidation) then no penalty can be imposed, and no Personal Liability Notice can be imposed on Mr Russell.

53. HMRC invite me to consider Regulations 9(1) and (3) of the Value Added Tax Regulations 1995 ('Death, bankruptcy or incapacity of taxable person'), which, read together, and insofar as material, provide that if a company goes into liquidation, the Commissioners may, from that date, "treat as a taxable person any person carrying on that business until some other person is registered in respect of the taxable supplies made or intended to be made."

54. The issue here is therefore whether, on 11 November 2016, Mr Russell was a person 'carrying on that business.' That expression deserves notice given that Richmond had gone into liquidation. HMRC also point to the the absence of registration of the liquidators with HMRC.

55. In my view, this is an issue which cannot be satisfactorily resolved at an interlocutory stage and is most appropriately dealt with at a trial. There is arguably some uncertainty in the wording of the Regulation which causes me to consider, without deciding it now, that this is an issue which should be dealt with at an interlocutory stage.

No penalty issued to the company

56. The Appellant's position is that Queenspice draws a distinction between the valid *raising* of an assessment and the valid *issue* of an assessment.

57. HMRC's position is that a penalty issued in relation to the 11/13 return was notified in the letter of 11 November 2016, for the same reasons given in relation to the above argument.

58. The parties' respective positions give the appearance - rightly, or wrongly - of an emergent degree of legal complexity as to the correct application of Queenspice

which leads me to conclude that this is an argument which is appropriately dealt with at a substantive hearing, and not at this interlocutory stage.

59. I should add that the Statement of Case refers to HMRC withdrawing one of the other penalties imposed on Mr Russell, in relation to the affairs of Kar Chester Limited, 'due to a technical reason', although I do not know what that reason was, and whether, if at all, it has any connection with the matters which I am called upon to consider here.

The conduct was neither careless nor deliberate.

60. This involves assessment of a degree of culpability, if any. That is an inherently fact-sensitive exercise, which calls for the hearing and testing of oral evidence from Mr Russell.

61. Whilst some panels of the Tribunal have been prepared to deal with issues of this kind on the papers, and without a hearing, those are in cases where the sums in dispute are relatively modest. It is simply neither fair nor appropriate, nor in accordance with the overriding objective, to decide a dispute concerning £168,000 summarily, without hearing oral evidence.

62. I should add that a person in Mr Russell's position can challenge a Personal Liability Notice even if the limited company does not itself appeal: see the Tribunal's decision in *Jason Andrew v HMRC* [2016] UKFTT 295 (TC) (Judge Kempster and Mrs Tanner) at Paragraphs 35-38:

> " We have considered carefully whether the wording on appeal rights in Schedule 24 entitles the officer to challenge the company penalty – at least insofar as aspects relevant to the personal liability notice which he or she is appealing. Our concern is that where a company penalty has crystallised without any challenge by the company, that may be not because the company has actively considered the matter and decided not to appeal to the Tribunal but simply because events such as liquidation or dissolution overtake the company, or because the issue of personal liability notice(s) totalling the entire company penalty render the company with no remaining interest in contesting the company penalty (because para 19(2) prevents double recovery of penalties). Any officer of the company who faces an apportionment of that penalty (by way of a personal liability notice) would, on HMRC's analysis, be faced with an unchallengeable company penalty. We think that (at least in cases more complicated than the current appeal) that could give rise to problems for the Tribunal in achieving a fair and just result on the officer's appeal against the personal liability notice....
>
> We conclude that the Tribunal has jurisdiction to consider relevant points concerning the company penalty in an appeal against a personal liability notice that apportions part or all of that company penalty to an officer."

63. A differently constituted panel of the Tribunal (Judge Dean and Mrs Wilson) arrived at the same conclusion in *Bell and Hovers v HMRC* [2018] UKFTT 272 (TC) at Para [160]. It cannot have been the intention behind the legislation to leave an unchallengeable company penalty. The overriding objective and the interests of

justice require the Tribunal to consider the company penalty in order to achieve a fair conclusion on the Personal Liability Notice.

64. The matter of Personal Liability Notices, and the statutory conditions attaching to them, has also recently been considered by me and Mr Farooq in *Kamraan Hussain v HMRC* which makes observations on the use of such notices as a species of personal guarantee for a company's liability.

Further directions

65. These appeals now need to be heard. The companies are legal persons, but Mr Russell is not. His appeal against the £168,000 penalty imposed in relation to the VAT affairs of Richmond cannot be left hanging over him.

66. Therefore, the parties are directed, within 7 days of the release of this decision, to liaise and for HMRC to them provide the Tribunal with dates of joint availability in the window 1 February 2020 to 31 July 2020 for a two-day hearing, to be listed in Manchester, if possible.

67. By no later than 14 days of the release of this decision, the parties shall provide the Tribunal with draft directions, agreed if possible, leading to that final hearing.

Decision

68. Richmond's application is dismissed.

69. 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.

DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 01 OCTOBER 2019