



**TC07799**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/01641**

*VAT – application for hardship – whether valid appeal before Tribunal – assessment under VATA s 73(1) – VATA 83(1)(p) gives appeal right only if a return has been filed – if no valid appeal, no jurisdiction to determine hardship application – directions issued*

**BETWEEN**

**YUN HE  
T/A NEW CHINA RESTAURANT**

**Appellant**

**-and-**

**HM REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE ANNE REDSTON**

**The Tribunal decided this interlocutory issue on 24 July 2020 without a hearing with the consent of both parties. Having considered all relevant matters, including the requirements of Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, I found that it was in the interests of justice to do so.**

## DECISION

### Summary and directions

1. This application was listed on the basis that Ms Yun He had made an application for hardship which HMRC had refused. However it is only possible to make a hardship application if the trader has a right of appeal against the related assessment.

2. Ms Yun He's appeal was against an assessment of £48,011.98 made on 6 March 2019 for the period from 1 July 2014 and 30 April 2017 under Value Added Taxes Act 1994 ("VATA") s 73(1). An assessment made under that section is only appealable to the Tribunal if Ms Yun He has filed a VAT return for that period, see VATA s 83(1)(p)(i).

3. From the information before the Tribunal, it appears that Ms Yun He has not filed a VAT return for that period. If so, she has no right to appeal to the Tribunal, and the Tribunal has no jurisdiction (broadly speaking, this means the power) to decide her dispute with HMRC about that assessment or the related hardship application. Instead, the Tribunal is required by Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") to strike out her appeal for want of jurisdiction.

4. However, Rule 8(4) provides that an appeal must not be struck out under Rule 8(2) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

5. I therefore issue the following directions:

(1) By 1 September 2020, Ms Yun He is to provide any evidence or submissions which she wishes the Tribunal to consider as to whether the appeal should be struck out under Rule 8(2), and in particular:

- (a) whether she has filed a VAT return for the period 1 July 2014 and 30 November 2017, and if so,
- (b) a copy of that return; and
- (c) copies of any related correspondence with HMRC.

(2) By 1 September 2020, HMRC are to provide any evidence as to whether Ms Yun He filed a VAT return for that period, and any submissions on whether the appeal should be struck out under Rule 8(2).

(3) If either party does not respond within those time limits, the Tribunal will proceed on the basis that the party is not exercising its right to make submissions.

6. After having considered any evidence and/or submission provided in response to the above directions, I will decide whether to strike out Ms Yun He's appeal, and notify the parties accordingly. If the appeal is not struck out, I will make further directions.

7. This decision notice explains why the Tribunal has issued the directions set out above.

### The evidence

8. The Tribunal was provided with a Bundle of documents by HMRC. On the basis of those documents, I make the findings of fact set out in the following part of this decision notice.

## **The facts about the business and the assessments**

9. Ms Yun He set up a restaurant and registered for VAT with effect from 29 July 2012. She applied to deregister with effect from 30 May 2014 on the basis that her turnover was below the relevant threshold, and the deregistration was effected.

10. On 12 October 2016, HMRC carried out a test purchase to establish how sales were recorded, and noted that Ms Yun He did not operate a till. HMRC subsequently identified that:

- (1) Ms Yun He had two accounts with her supplier, AMB Foods, one of which was always settled in cash; and
- (2) the transactions relating to that account were not declared in her records, with the onward sales being suppressed.

11. On 16 July 2018, HMRC issued her with an assessment under VATA s 73(1) covering 16 VAT periods between 07/13 through to 04/17 for £58,897.74. In addition, they issued a penalty of £45,641 under Finance Act (“FA”) 2007, Sch 24 on the basis that her behaviour had been “prompted” and “deliberate and concealed”. The penalty was 77.5% of the VAT.

12. Following a statutory review, on 28 December 2019 HMRC issued a letter which:

- (1) confirmed that periods 07/13 through to 04/14 should be assessed to VAT for the same amounts as had previously been decided. The VAT for these periods totalled £10,650.52;
- (2) stated that the assessment was invalid in relation to later periods because it was not possible to issue that type of assessment to an unregistered trader, and Ms Yun He had been deregistered during that time;
- (3) confirmed the penalty percentage as 77.50% of the VAT, and applied it to the £10,648, giving a penalty of £8,252.20.
- (4) stated that “the evidence of suppression of purchases has been accepted” by Ms Yun He by way of a disclosure agreement submitted by Mr Feng; and
- (5) warned Ms Yun He that, although the assessment was invalid in relation to periods 07/14 through to 04/17 because it was not possible to issue that type of assessment when a person was not registered, HMRC might take further action in relation to those periods.

13. On 15 January 2019, HMRC issued a revised VAT assessment for £10,648, slightly less than the £10,650.52 calculated by the Review Officer. On or around the same date, HMRC issued a revised penalty assessment of £8,252.20, and Ms Yun He instructed Mr Feng to be her representative.

14. On 6 March 2019, HMRC issued another decision letter, which stated that Ms Yun He was required to be registered during the periods from 07/14 through to 04/17 and assessed her to VAT of £48,011.98 under VATA s 73(1) on the basis that she had a liability to VAT during that time but had not notified HMRC of this liability. In ordinary language, having recognised that the original assessment was technically invalid, HMRC were now following a different route to arrive at essentially the same outcome.

15. HMRC’s decision letter informed Ms Yun He that she should either pay the £48,011.98 immediately, or in the alternative:

“you can make a single return and pay any tax shown on the return as being due. You can do this by getting the appropriate form from this office...if you

make a return but we do not consider it satisfactory, you will be told accordingly.”

16. There is no document in the Bundle which shows that Ms Yun He took the option of completing and filing a VAT return, but I make no finding of fact on that point. Instead, the directions issued at the beginning of this decision notice require the parties to provide further information to the Tribunal in order to clarify the position.

17. HMRC’s letter of 6 March 2019 also said that Ms Yun He would, in addition, be issued with penalties for failure to notify under FA 2008, Sch 41. The Bundle also contains no information about any such further penalty.

18. On 11 March 2019, Mr Feng emailed HMRC saying “paying the £46,011 [sic] she would suffer hardship. Please confirm in writing that you would waive that requirement”.

19. On the same day, Mr Feng appealed to the Tribunal on behalf of Ms Yun He. The Notice of Appeal stated that:

- (1) the amount in dispute was £46,011. I find as a fact that this was an error for the figure of £48,011.98 on the assessment made on 6 March 2019;
- (2) he had made a hardship application to HMRC and was awaiting the result; and
- (3) the appeal was not late.

20. Under the heading “grounds of appeal” Mr Feng submitted that the appeal should be allowed because the Review Officer had previously agreed “there was no VAT due in that period” and “therefore the matter was settled”. He attached both the letter of 6 March 2019 (which related to the assessment of £48,011.98), and the review letter of 28 December 2018, which said that the original assessment was invalid because it included periods from 07/13 to 04/14.

#### **What decisions/assessments are extant?**

21. From the above facts, I find that the following decisions/assessments remain extant:

- (1) a VAT assessment following the review decision of 28 December 2018 for £10,648 for periods 07/13 through to 04/14;
- (2) a related penalty assessment of £8,252.20 for deliberate and concealed behaviour;
- (3) a decision that she was liable to be registered for VAT for the periods from 07/14 through to 04/17; and
- (4) a VAT assessment for £48,011.98, being the VAT which HMRC estimated was due for those periods.

22. I make no finding on whether Ms Yun He received a further penalty assessment under FA 2008, Sch 41 for failure to re-register for VAT.

#### **Ms Yun He’s appeal rights in relation to those decisions/assessments**

23. In relation to each of those decisions/assessments, the appeal position is as set out below.

##### *The VAT assessment for £10,648*

24. Ms Yun He had a right of appeal to the Tribunal against the VAT assessment following the review decision of 28 December 2018 for £10,648, but only if:

- (1) she either paid the £10,648, or had made an application for hardship which had been accepted by HMRC, or by the Tribunal on application; and
- (2) she had made that appeal within 30 days of the date of the decision, or the Tribunal had given permission for her to make a late appeal.

*The penalty of £8,252.20*

25. Ms Yun He had the right to appeal against the penalty of £8,252.20 without first needing to pay the penalty or to show that she would suffer hardship.
26. However, she had to make the appeal to the Tribunal within 30 days of the date of the decision, unless the Tribunal were to give permission for the appeal to be made late.

*The decision that she was liable to be registered*

27. Ms Yun He had the right to appeal against HMRC's decision that she was required to be registered for periods from 07/14 through to 04/17. There is no attached "hardship" requirement. However, any such appeal had to be made within 30 days of the decision letter, unless the Tribunal were to give permission for it to be made late

*The VAT assessment of £48,011.98*

28. This assessment was issued under VATA s 73(1), which reads:

"Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

29. A person only has a right of appeal an assessment made under VATA s 73(1) "in respect of a period for which the appellant has made a return", see VATA, see s 83(1)(p)(i).
30. HMRC gave Ms Yun He the option of making a return, see §15, but there is nothing in the Bundle which indicates that she did so. Unless or until a return is filed, there is no right of appeal.
31. The Tribunal notes that Reg 25(1) of the VAT Regs 2005 provides that VAT returns must be filed "not later than the last day of the month next following the end of the period to which it relates", but para (c) of that Reg reads:

"where the Commissioners consider it necessary in any particular case to vary the length of any period or the date on which any period begins or ends or by which any return shall be made, they may allow or direct any person to make returns accordingly, whether or not the period so varied has ended."

*Penalty for failure to notify?*

32. As already noted, the Tribunal has no information as to whether this penalty was issued. If it was, Ms Yun He had a right to appeal without first needing to pay the penalty or showing she would suffer hardship.
33. Any such appeal had to be made within 30 days of the date of the penalty assessment, unless the Tribunal were to give permission for the appeal to be made late.

### **What was appealed to the Tribunal**

34. Having considered Ms Yun He's Notice of Appeal and the attached documents, together with the other information in the Tribunal Bundle and in particular in the Review letter of December 2018, I find that:

- (1) Mr Feng appealed to the Tribunal, on Ms Yun He's behalf, against the *amount* of the assessment made on 6 March 2019 for £48,011.98;
- (2) he did not appeal to the Tribunal against HMRC's decision that Ms Yun He was *liable to be registered* during the periods 07/14 through to 04/17;
- (3) he also did not appeal against the assessment of £10,648 issued on 15 January 2019 following the review decision, or the related penalty of £8,252.20. Although Mr Feng attached the review decision to the Notice of Appeal, this was to support his submission that HMRC should not have issued the assessment of £48,011.98 because the review letter had said that the original assessment was invalid in so far as it related to the same periods.

35. The only matter appealed to the Tribunal was therefore the assessment for £48,011.98.

### **The Tribunal's jurisdiction**

36. The Tribunal only has the jurisdiction to decide VAT disputes if the party seeking to challenge HMRC's decision has a legal right to appeal to the Tribunal. If there is no such right, then Rule 8(2) of the Tribunal Rules applies. This says that (emphasis added) that:

“the Tribunal **must strike out** the whole or a part of the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings”.

37. Ms Yun He only has a right to appeal if she has made a return for the period from 07/14 to 04/17. If she has not done so, the Tribunal has no jurisdiction to decide her appeal.

38. However, Rule 8(4) says that:

“The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2)...without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

39. I have therefore issued the directions which are set out at the beginning of this decision notice. These give both parties an opportunity to make representations about the proposed striking out.

### **Hardship?**

40. I now explain why the parties (and until now the Tribunal) had treated Ms Yun He as making a hardship application, even though that application cannot be considered unless she has a valid appeal before the Tribunal.

#### *The starting point*

41. On 11 March 2019, Mr Feng had emailed HMRC saying “paying the £46,011 [sic] she would suffer hardship. Please confirm in writing that you would waive that requirement”. In the Notice of Appeal, he told the Tribunal that he had applied for hardship and was waiting for a response.

42. On 8 October 2019, HMRC wrote to Mr Feng, saying that the only decision they had made where hardship was relevant was the assessment of £10,648<sup>1</sup>. However, as already noted above, Ms Yun He had not appealed to against that assessment.

43. In other words, both parties misunderstood the position:

(1) Mr Feng wrongly thought that hardship was relevant to the assessment of £48,011.98; and

(2) because Mr Feng had referred to hardship, HMRC focused on the only decision to which that concept was relevant, namely that for £10,648. They overlooked the absence of an appeal against that assessment.

#### *What happened next*

44. In the same letter of 8 October 2019, HMRC asked Ms Yun He to provide the following information by 10 November 2019 so that they could consider her hardship application:

(1) Copies of her bank statements for the last three months for each and every account held with any bank or financial institution with a copy of the facility letter of any overdraft as applicable, and any third party loan or investment agreements.

(2) A copy of her latest accounts.

(3) A breakdown of her monthly income and expenditure.

(4) Details of, and statements for, any savings accounts, saving products or investments she held (for example shares or ISAs).

(5) Details of any other businesses in which she was involved in as a partner, director or company secretary.

(6) Information on any assets she held (such as properties, vehicles, machinery) as well as details of her liabilities.

(7) Details of current debtors and creditors (if appropriate).

(8) An explanation as to what steps or action she had taken to make arrangements for settlement of the tax amount under appeal, supported by the relevant evidence as applicable.

45. Ms Yun He did not respond by the specified date, and on 20 November 2011, HMRC determined that she did not qualify for hardship.

46. On 28 November 2019, the Tribunal informed the parties that if no response was received in relation to hardship within 30 days, the appeal was likely to be struck out, but that if Ms Yun He wanted the Tribunal to consider her hardship application, she must comply with directions which were attached.

47. Mr Feng replied on the same day, providing two pages from the online version of a bank account for the period from 26 July 2019 to 22 October 2019, and stating that Ms Yun He would give oral evidence at the hearing.

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<sup>1</sup> The letter mistakenly refers to the assessment as being for £10,450.52; this was the figure originally calculated by the Review Officer, but the amount actually assessed was £10,468.

48. On 16 January 2020, HMRC applied for the appeal to be struck out unless the amount of £10,650.52 was paid to HMRC, or in the alternative, Ms Yun He provided a fully evidenced hardship application.

49. On 21 January 2020, Mr Feng sent an email saying “here are her last three months of bank statements” and enclosing pages for September to October 2018 (not October 2019), and November 2019 to January 2020.

50. At some point during February 2020, the Tribunal decided to list the application for a hearing, and notified the parties that it would take place on 27 May 2020. This was not possible because of the coronavirus pandemic.

51. Mr Feng said that Ms Yun He no longer intended to give oral evidence, and the parties agreed that a paper hearing was appropriate. On 31 March 2020, Mr Feng sent the Tribunal an email in which he made various unsupported statements as to Ms Yun He’s financial position, but those submissions are not evidence.

52. On 25 April 2020 Mr Feng provided a copy of a P45 dated 20 April 2020 in the name of Ms Yun He from an employer called “Southwold Chinese Ltd”. On 13 May 2020, Ms Brown, HMRC’s litigator for the appeal, responded by saying that HMRC’s records show that Ms Yun He remained an employee.

53. On 4 May 2020, the parties were directed to provide any further information and submissions by specified dates. Mr Feng and Ms Yun He did not comply with those directions, and the Tribunal decided that the application would be decided on the documents provided by HMRC. These included all the correspondence referred to earlier in this decision notice. Ms Brown also provided a skeleton argument which submitted that Ms Yun He had not provided sufficient information for the Tribunal to allow her hardship application.

54. As is now clear from my detailed review of the documents, and as explained above, unless or until Ms Yun He files a VAT return for the period from 07/14 to 04/17, there can be no valid appeal and thus no valid application for hardship.

### **Appeal rights**

55. 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.

**ANNE REDSTON**

**TRIBUNAL JUDGE**

**RELEASE DATE: 4 AUGUST 2020**