[2020] UKFTT 365 (TC)

TC07843

PROCEDURE – Appeal notified to Tribunal February 2018 – Appellant's application dated 17 August 2020 to re-amend grounds of appeal dismissed – Application by HMRC that appeal be struck out allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/01165

BETWEEN

GB FLEET HIRE LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE BROOKS

Christopher McNall, counsel, instructed by LSGA Solicitors, for the Appellant

Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

The hearing took place on 20 August 2020 by way of a video hearing on the Tribunal Video Platform

DECISION

INTRODUCTION

1. On 12 February 2018 the appellant, GB Fleet Hire Limited (the "Company"), notified the Tribunal of its appeal against assessments and amendments, made by the respondents, HM Revenue and Customs ("HMRC") under s 73 of the Value Added Tax Act 1994, in the sums of £1,686,905 and £19,682, "for output tax due in the absence of export evidence to support the zero-rating for VAT of supplies of cars in periods 01/16 to 06/17".

2. Following receipt of various applications (some of which are described below), on 29 January 2020 the Tribunal wrote to the parties to explain that I was:

> "… concerned at the apparent lack of progress in this matter notwithstanding the agreed directions endorsed by the Tribunal on 9 January 2020."

The letter continued:

> "In the circumstances [Judge Brooks] considers that a ½ day case management hearing should be listed to ensure the appeal can progress without undue delay."

3. The parties were directed to provide their dates to avoid for such a hearing for the first available date after 2 March 2020 within ten days and, following exchanges of correspondence a case management conference was listed to be heard in Manchester on 14 April 2020. However, following the statement from the Prime Minister on 23 March 2020, the country went into lockdown.

4. On 24 March 2020 the Chamber President issued a Practice Statement "to give guidance to the Tax Chamber and to Tribunal users in relation to the way the Tax Chamber will deal with proceedings during the Covid-19 pandemic." This explained that:

> "Until further notice, there will be no hearings at which persons are physically present in any proceedings in the Tax Chamber of the First-tier Tribunal. A hearing involving physical attendance may take place only with the permission of the Chamber President or his delegate. …
>
> All applications and substantive appeals will be dealt with on papers/email as far as possible and decided by a judge sitting alone.
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> If a matter cannot be dealt with on papers, a hearing by telephone (or video, if available) will be arranged as soon as possible."

As a result the 14 April 2020 case management conference was vacated and, as explained below, this video hearing was listed.

5. As at 20 August 2020, the date of this hearing, the following applications remained outstanding:

(1) the Company's application, dated 13 May 2020, that HMRC be required to amend parts of a witness statement of Officer Mills and/or that parts of that witness statement be struck out;

(2) HMRC's application, dated 10 August 2020, that the appeal be struck out; and

(3) the Company s application, dated 17 August 2020 to re-amend its grounds of appeal and for consequential directions.

6. Mr McNall, who appeared for the Company, agreed that the 13 May 2020 application fell away if the appellant succeeded in its application to re-amend its grounds of appeal. Clearly this would also be the case if the appeal was struck out. As such it has not been necessary to

consider that application further. However, before turning to the two remaining applications, to put the applications in context it is convenient to first describe the procedural background leading to this hearing.

Procedural background

7. The Company's grounds in its Notice of Appeal of 12 February 2018 state:

> "HMRC have refused to accept zero rating for export of vehicles which is contrary to statue and HMRC's internal guidance. More than adequate evidence of export has been provided to HMRC and input tax has been wrongly and/or unreasonably withheld by HMRC.

8. On 28 August 2018 HMRC made an application for further and better particulars of these grounds of appeal. This was listed for a hearing on 28 May 2019 before Judge Fairpo and, although there was no written decision, the outcome of that hearing was that the Company agreed to file revised grounds of appeal by 11 June 2019. These were to clarify what exactly was being appealed and, if relevant, the basis on which the assessments/amendments were disputed on "best judgement" grounds.

9. The Company filed its "Amended and Supplemental Grounds of Appeal" on 10 June 2019. These stated:

> "1. The Appellant appeals against the following decisions:
>
> (i) the decision of 7 September 2017 (as amended on 21 November 2017) to notify the Appellant of VAT assessments in the sum of £1,686,905 for output tax said to be due for the period 01/16 to 03/17, and a further decision of 28 November 2017 to notify the Appellant of an assessment in the sum of £19,682 for output tax said to be due for the period 07/16. All the output tax was said to be payable on sales of vehicles claimed by the Appellant to be zero-rated; and
>
> (ii) the related decision not to refund input tax paid in respect of certain purchased and imported vehicles in the sum of £310, 803.61. (Also outstanding is the sum of £805.53 in respect of a VAT reclaim for August 2017.
>
> …
>
> 7. The Grounds of Appeal are as follows:
>
> (i) The decision to notify output tax – ie VAT – assessments was based on a wrong overall appreciation of, as well as a failure to take into account adequately or at all, the detailed, copious and compelling evidence provided by the Appellant as to the export and destinations of the vehicles concerned;
>
> (ii) In fact, that evidence conclusively demonstrated that the vehicles in question had been exported as claimed and therefore that the VAT assessments were entirely unfounded;
>
> (iii) In any event, leaving the issue of export aside, the Appellant does not understand and has never understood the basis of the VAT assessments notified to the company (which remains to be explained), as acknowledged in correspondence from the legal representatives of HMRC;

(iv) … [1]

10. On 28 June 2019 HMRC made an application for parts of the Amended and Supplemental Grounds of appeal, including paragraph 7(i) and 7(iii), which were understood to be a challenge to "best judgment", to be struck out on the grounds that paragraph 7(i) was:

> "… hopelessly inadequately pleaded as a "best judgment" Ground of Appeal, it therefore has no reasonable prospect of success and should be struck out pursuant to r 8(2)(c) of the [Tribunal Procedure] Rules."

As for 7(iii), HMRC contended:

> "This is not a Ground of Appeal that has any prospect of success. The Tribunal cannot discharge an assessment because the taxpayer does not understand the basis for it. Such a Ground of Appeal has no reasonable prospect of success and therefore should be struck out pursuant to r 8(2)(c) of the [Tribunal Procedure] Rules."

11. The application was considered by Judge Poole initially on 5 August 2019 and then again on 30 August 2019 after having considered the Company's objection to HMRC's application which he had not previously seen. He agreed with HMRC in relation to that paragraph 7(iii) and directed that the paragraph be struck out. However, with regard to paragraph 7(i), he said:

> "… HMRC seek to strike out paragraph 7(i) of the amended and supplemental grounds of appeal, on the basis that [it] is "hopelessly inadequately pleaded as a "best judgment" ground of appeal". It is HMRC's own characterisation of this appeal which founds their argument for it to be struck out. I do not agree with this view. Paragraphs 7(i) and 7(ii), taken together, clearly show arguable grounds of appeal based on the Appellant's assertion that "evidence conclusively demonstrated that the vehicles in question had been exported as claimed and therefore the VAT assessments were entirely unfounded." The basis of this assertion is that "the decision to notify output tax … assessments was based on a wrong overall appreciation of, as well as a failure to take into account adequately or at all, the detailed, copious and compelling evidence provided by the Appellant as to the export and destinations of the vehicles concerned." This is not a suppression case where there are substantive arguments about whether the officer's calculation of liability has been carried "to best judgment": the disputed amounts seem to be clear and the issue to be decided by the Tribunal is whether the Appellant is entitled to the benefit of specific sums of input tax claimed or not. I therefore refuse this part of HMRC's application."

12. On 26 September 2019 LSGA Solicitors, the Company's present solicitors, filed a Notice of Acting with the Tribunal.

13. On 4 October 2019, as directed by Judge Poole, HMRC filed and served their statement of case. Paragraph 9 sets out HMRC's position:

> "9. The Respondents' position, by reference to VAT periods 12/16, 04/17 and 05/17, is set out in the Schedule to the Statement of Case. In summary, [the Company's] export evidence either prima facie fails to comply with the force of law requirements in VAT Notice 703 as set out above …, or there is inadequate supplementary evidence as is also required by VAT Notice 703. Further, there is evidence contradicting the export evidence provided. HMRC is not aware that GB's evidence for the other VAT periods is of a different level of compliance. There is no appeal against that exercise of best judgment.

[1] Ground (iv) challenged views expressed by HMRC officers that the Company was established to perpetrate fraud.

> GB cannot therefore discharge the burden upon it of proving that the transactions as assessed for were zero-rated and its appeal should be dismissed.

14. On 28 November 2019 the parties made a joint application to the Tribunal for case management directions. However, on 6 December 2019 the Tribunal issued its own case management directions. This led to correspondence from the Company's solicitors, on 6 December 2019, and HMRC, on 23 December 2019, questioning why the "more suitable" directions proposed in joint application had not been adopted. This was resolved when, on 9 January 2020, Judge Dean endorsed and issued the directions proposed by the parties and set aside those issued by the Tribunal on 6 December 2019.

15. In the meantime, on 5 December 2019, the Company filed and served the witness statement of Keith Patterson, a former police officer in CID's Major Investigation Team who had been from 2009 until his retirement in 2017 a Serious Crime Investigator in the Serious Crime Investigation Unit with Merseyside Police. Having analysed the evidence in this appeal his witness statement concludes:

> "29. To assist the Tribunal and the Respondents, I share full details of my checks as regards to the objective evidence in GB Fleet's appeal which supports GB Fleet's rights to exempt cars exported in VAT accounting periods ending 01/16 to 06/17. Furthermore, to establish the legitimacy of the shipping agents and the purchaser, HMRC Officer Mills, HMRC Solicitor's [sic] and Counsel acting for the Respondents must consider the objective evidence that the cars have physically left the United Kingdom and that those supplies are exempt from VAT, by virtue of zero-rating.
>
> 30. GB Fleet has fulfilled their obligations relating to providing the evidence in relation to export of cars out of the United Kingdom."

16. On 17 January 2020 the Company made an application to the Tribunal for a direction that unless HMRC complied with directions to provide witness statements with exhibits within 14 days it would be barred from taking further part in the proceedings. HMRC also made an application to the Tribunal on 17 January 2020 to extend the time for provision of witness statements by ten weeks. The reason given for the application was that further time was required to consider the approximately 10,800 pages of documentary evidence that the Company had provided. The Company filed its objection to HMRC's application also on 17 January 2019.

17. As a result of these applications, and as noted above (in paragraph 2), on 29 January 2020 the Tribunal wrote to the parties directing them to provide their dates to avoid for a case management hearing. However, further applications, particularly from the Company, continued to be made. These included:

(1) On 5 February 2020 the Company applied for an expedited hearing to enable Officer Mills, who had issued the assessments/amendments which are the subject of the appeal, to give evidence before he retired from HMRC.

(2) On 10 March 2020, when it appeared likely that, because of the increasing concern over Covid-19, a physical hearing might not be possible, the Company applied for the outstanding applications to be dealt with on the papers without a hearing.

(3) On 19 March 2020 further applications were received from the Company which proposed alternative case management directions and a directions that unless HMRC served its evidence by 14 April 2020 they be barred from participating in proceedings;

18. Following the cancellation of all physical hearings, including the case management conference listed in Manchester for 14 April 2020, on 24 March 2020 the Tribunal wrote to the parties to inform them that the various applications would be determined on the papers and issued the following directions requiring the parties to:

> "1. Set out their written proposals, in a single document, to be provided to the Tribunal and the other party within 14 days of this letter setting out how they consider that the appeal should be progressed including whether it is considered suitable for determination on the papers.
>
> 2. Within 7 days of the receipt of the proposals by the other party, either provide their written representations in response or confirm that no representations are to be made (in the absence of a response it will be assumed that there is no objection to the other party's proposals).
>
> These will then be forwarded to a judge to make appropriate directions on the basis of the proposals and representations (and nothing else) and any further/additional applications/representations will be disregarded."

19. Responses were received from both parties on 30 March 2020. Each provided proposals for case management directions although those proposed by the Company were a re-statement of those contained in its application of 19 March 2020. Although similar in many respects the differences between the proposed directions were that:

(1) Direction 1 of those proposed by the Company included an unless direction requiring HMRC to produce witness statements by 30 March 2020. However, as the witness statement of Officer Mills had been filed and served on 30 March 2020 the unless direction was not necessary;

(2) Direction 6 of the Company's proposed directions included the provision of information on whether a transcript would be taken and the arrangements for this whereas HMRC's directions did not refer to these matters (which were left to be ascertained nearer the hearing); and

(3) Although directions 8 – 10 of the directions proposed by the Company and HMRC deal with the provision of bundles, the Company's proposed directions required HMRC to produce these whereas HMRC's proposed directions adopted the usual practice of requiring the appellant to do so.

20. Having considered the directions proposed by both parties, I endorsed HMRC's proposed directions which were issued by the Tribunal on 31 March 2020. These directions remained extant at the time of this hearing.

21. On 13 May 2020 the Company made several further applications including the following:

(1) to set aside the existing directions;

(2) that HMRC be required to amend parts of a witness statement of Officer Mills and/or for parts of that witness statement to be struck out;

(3) that HMRC file evidence dealing with the appellant's case, backed with an unless order: and

(4) for further case management directions (leading to a remote hearing).

22. On 12 June 2020, in a notice opposing the Company's applications, HMRC noted that:

> "… having reviewed the Appellant's documents, that in cases where the port of loading for the relevant vehicle is said to be Bremerhaven or Rotterdam the place of supply rules in s.7(2) VATA 1994 may mean that there was never an

> export from the UK at all such that there was never any need to claim zero-rating. The Appellant is asked to confirm the position since if the supply did not attract UK VAT zero-rating should never have been claimed and no assessment to UK VAT could stand."

23. On 15 June 2020, given the increased experience of conducting hearings remotely by video, the Tribunal wrote to the parties to notify them that in the light of these further applications a video case management conference would be listed to consider how progress could best be made in this case. On 14 July 2020 this hearing was listed for 20 August 2020.

24. In a letter, dated 5 August 2020, to HMRC the Company's solicitors wrote:

> "For periods 09/16 to 03/17 inclusive, GB Fleet did not claim Zero Rating on its exports. For those periods (monthly accounting) our client claimed Input Tax on its exports"

And further in the letter that:

> "Our client has never claimed zero rated exports of cars."

25. On 10 August 2020 HMRC made an application to the Tribunal that the Company's appeal be struck out on the grounds that:

> "All of the Appellant's invoices in the transactions that remain in dispute showed VAT at a zero-rate. The Appellant has now abandoned any claim that the transactions were zero-rated but has put forward no alternative basis for why VAT should not have been charged on all the supplies that remain in dispute. The VAT on the transactions that remain in dispute is therefore due and the Appellant has no reasonable prospect of showing otherwise. The Appellant's appeal in relation to the transactions that remain in dispute must therefore be struck out [as no reasonable prospects of success under r 8(3)(c)]."

26. This was followed on 17 August 2020 by an application from the Company to re-amend grounds of appeal and for consequential directions. The amendment sought was, as set out below, essentially to add a "best judgment" challenge to the assessment on the grounds that "None of the assessments issued (including those made for 01/16, 04/16, and 07/16) were made to best judgment by Officer Mills." HMRC filed and served a notice of objection to the Company's application on 18 August 2020.

27. I now turn to the outstanding applications. As in the hearing, I shall first consider the Company's application to re-amend its ground of appeal.

Application to Re-amend Grounds of Appeal

28. Having referred, in Ground 1, to the "withdrawn assessments" for 01/16, 04/16 and 07/16 which had been identified by HMRC from their analysis of the Company's documents (see HMRC's letter dated 12 June 2020, at paragraph 23, above) the re-amended grounds of appeal on which the Company seeks to rely continued:

> "**Ground 2: Best judgment**
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> 2. None of the assessments issued (including those made for 01/16, 04/16 and 07/16 were made to best judgment by Officer Mills.
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> 3. The [Company] relies (inter alia) on the following circumstances:
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> ***The now withdrawn assessments for 01/16, 04/16 and 07/16***
>
> 3.1 The assessments made for 01/16 to 03/17 were all made even though Officer Mills, having examined the evidence for export, was satisfied that 'on balance this meets the requirements for zero rating' (which must

mean that he was also satisfied that the Appellant's claims to recover input tax were properly due).Nonetheless - and contrary to his own position in relation to the evidence of export - he raised assessments, on the non-evidential footing that the vehicles 'were still in the United Kingdom';

3.2 The Original Assessments (for 01/16, 04/16 and 07/16) were ostensibly made by Officer Mills in relation to the disallowance of input tax, and notwithstanding earlier repayments by HMRC (which in turn followed, in some instances, verification);

3.3 The Original Assessments for 01/16, 04/16 and 07/16 were then amended by Officer Mills so as to in fact allow the Appellant's input tax reclaims in their entirety (despite maintaining, wrongly, on the face of the Amended Assessments, that these were assessments of input tax) but whilst (without explanation) increasing the amount of output tax;

3.4 Given that the assessments for 01/16, 04/16, and 07/16 were made as part of a single exercise of purported best judgment, by a single officer (Officer Mills), HMRC has failed to explain why Officer Mills did not realise that those assessments could not be maintained;

The assessed figures

3.5 None of the assessed figures are explained in the Statement of Case or in Officer Mills' evidence;

3.6 None of the sums notified in any of the assessments (the Originally Assessments in September 2017, the Amended Assessments in November 2017, or latterly as purported to be amended in a schedule on July 2020) are readily explicable by reference to the Appellant's VAT returns;

3.7 HMRC itself (through Solicitors' Office) accepted as early as 21 August 2018 (ie, almost a year after the assessments) that “a further examination" of the transactions giving rise to the sums assessed would have to be undertaken, and that the sums may be subject to “significant reduction";

The reasons/basis of the assessments

3.8 On the basis of HMRC's SOC and Officer Mills’ evidence, the assessments were made capriciously, were spurious estimates or guesses, or were wholly unreasonable;

3.9 HMRC has failed, whether with any or any adequate particularity, to state any case in relation to any of the assessed periods (except 12/16) (but has instead stated a case in relation to 04/17 and 05/17, which have not been assessed);

3.10 Officer Mills has failed, in his witness statement of 30 March 2020, to set out at all how he (the sole assessing officer) formed the view that assessments should be raised at all and/or his reasons for the same and/or how he arrived at the sums originally assessed, or amended;

3.11 Officer Mills has failed to set out a swathe of relevant matters, including the information or materials which he considered, rejected and/or rejected (as the case may be) for the periods in relation to which he issued (and then amended) the assessments;

3.12 Despite HMRC's recent provision (13.7.20) of a detailed Schedule (which cannot have been available to Officer Mills when he signed his

witness statement, 30.3.20) Officer Mills has failed to set out in any evidentially admissible form (and HMRC has failed to state), in relation to each disputed deal, the particular limb(s) of the "Force of Law" provisions in VAT Notice 703 which are alleged not to have been met by the taxpayer;

Absence of rationality

3.13 Following Officer Mills' retirement (on a date, and in circumstances presently unknown to the Appellant) HMRC tasked another officer to revisit Officer Mills' work. That is to say, HMRC tasked another officer to speak to, and give evidence to the Tribunal as to the assessments which Officer Mills had caused to be notified (which would not be unusual in a case where an assessing officer had retired or otherwise left the service of HMRC). However, HMRC was unable to find another officer who understood Officer Mills's reasoning sufficiently well so as to be able to speak to the assessments which he had caused to be notified, or to give evidence to the Tribunal about them (including signing a Statement of Truth in their regard);

Capricious or unexplained rejection of HMRC evidence

3.14 Officer Mills has wrongly, and otherwise than to best judgment, failed to give any or any proper consideration to HMRC's own information and materials as to the exportation of the vehicles in question, including but not limited to the 'Goods Departed Message' (GDM, also known as a DTI-S8) generated by HMRC's **C**ustoms **H**andling **I**mport and **E**xport of **F**reight ('CHIEF') system, and/or has wrongly refused to treat the GDMs on CHIEF as conclusive evidence that a vehicle has been exported and/or has failed to set out in any way which can fairly be interrogated by the Appellant taxpayer (or the Tribunal) why Officer Mills individually and/or HMRC institutionally should consider the GDMs on CHIEF as inconclusive evidence;

Capricious or unexplained rejection of the Appellant's evidence of export

3.15 Officer Mills has wrongly, and otherwise than to best judgment, failed to give any or any proper consideration to the information and material provided by the taxpayer to HMRC as to the exportation of the vehicles in question and/or has failed to set out, in any way which can fairly be interrogated by the taxpayer (or the Tribunal) why he has rejected the evidence of export;

3.16 Further or in the alternative, and without prejudice to the foregoing, Officer Mills has wrongly, and otherwise than to best judgment, failed to consider and treat other evidence provided by the taxpayer as demonstrating that the vehicles had been exported;

Confusion with fraud/overlap with the decision to deregister the Appellant

3.17 The assessments in issue are ostensibly on the sole basis of insufficient evidence of export and non-compliance with (as yet unexplained) 'Force of Law' provisions of VAT Notice 703. Hence, and on the face of it, the assessments are not ones related to fraud, or tax loss. However, Officer Mills also, at the same time (and without clearly articulating in advance that this was his intention) deregistered the Appellant for VAT on the basis that the Appellant's business was established primarily or solely for abusive purposes;

3.18 As such, the Appellant suspects, reasonably, that Officer Mills (for reasons yet unknown) formed the view (wrongly) that the Appellant

was engaged in VAT fraud, and that view wrongly affected or tainted Officer Mills' judgment in relation to the assessments and/or played a part (albeit not expressed) in Officer Mills' decision to issue the assessments.

Ground 3: The assessed sums are wrong

4. Without prejudice to the other grounds, the sums assessed are wrong. The foregoing is repeated."

29. Mr McNall, for the Company, contends that it should be permitted to re-amend its Grounds of Appeal as this would give the appeal the "hard reset" it requires. This, he says is consistent with the overriding objective of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 to deal with cases fairly and justly especially given what he describes as an "imperfect" statement of case provided by HMRC which, Mr McNall says does not comply with rule 25 of the Procedure Rules 2009.

30. For HMRC, Mr Watkinson, submits that the statement of case does adequately respond to the original Grounds of Appeal as, in a case such as the present, it is for an appellant to establish that it had met the legislative requirements for zero-rating. In relation to the application to re-amend he contends that on any application of the relevant principles it should be dismissed, particularly in view of its extreme lateness for which there was no cogent explanation. However, he accepts that the proposed re-amendment to the Grounds of Appeal would, if permitted, satisfy the requirements identified by Carnwath LJ (as he then was) in *Pegasus Birds Limited v Commissioners of HM Customs & Excise* [2004] STC 1509, in which he said at [38]:

> "(ii) Where the taxpayer seeks to challenge the assessment as a whole on "best of their judgment" grounds, it is essential that the grounds are clearly and fully stated before the hearing begins.
>
> (iii) In particular the tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the Commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the Commissioners. The tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done. …"

31. The principles to be applied in considering an application were summarised by Carr J (as she then was) in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) ("*Quah*") as follows:

> "36. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.
>
> 37. Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities : *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608

(Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.

37. Drawing these authorities together, the relevant principles can be stated simply as follows :

> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
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> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.

32. *Quah* was applied by the Upper Tribunal (Newey J and Judge Bishopp) in *Denley v HMRC* [2017] UKUT 340 (TCC). In *Asiana Limited v HMRC* [2019] UKFTT 267 (TC) ("*Asiana*") the Tribunal (Judge Mosedale), having referred to the principles summarised in *Quah* said, at [15]:

> "… the law on pleadings is clear: the appellant must state what are its grounds of appeal. If it does not, it cannot rely on those grounds. And if it wants to rely on a new grounds of appeal, as it does here, it must apply for permission to amend. And *Quah* and *Denley* set out the principles the Tribunal will consider in determining such an application."

33. Clearly, as no hearing date has been lost, the present case cannot be described as "very late" in the sense described by Carr J. However, in my judgment, the delay cannot be described as anything other than very significant and serious. The application was made on 17 August 2020 over 30 months after the Company filed its Notice of Appeal and more than a year after it had first amended its Grounds of Appeal. As such, I find myself in a similar position to Judge Mosedale in *Asiana*, who said at [27], albeit that in *Asiana* there was an even greater delay than in the present case:

> "… while raising a new ground of appeal now is not 'very late' in the sense of jeopardising a hearing date, it is extremely late in all other senses as the appeal has been running many years …"

34. Like the appellant in *Asiana* which, as Judge Mosedale noted at [27] in that case, the Company has had "many opportunities" to raise the issue of best judgment at an earlier stage of the proceedings but, despite the valiant efforts of Mr McNall to persuade me otherwise, did not do so as is clear from the observation of Judge Poole when considering the application by HMRC to strike out the Company's "Amended and Supplemental Grounds of Appeal" in August 2019 (see paragraph 11, above).

35. In the present case Mr McNall, who accepted that the statement of case had not previously been challenged, pointed out that this was the first case management hearing since the present representatives assumed conduct of the proceedings and explained that, given his criticism of the statement of case the Company was right to wait for the witness statement of Officer Mills rather than take a procedural point on the statement of case sooner. However, this does not adequately explain why the Company seeks to re-amend its grounds of appeal now when it must, or at the very least should, have been aware of the nature of its case and whether it was raising a best judgement challenge, as opposed to whether there was sufficient evidence to support its zero-rating claim which it now seems to have abandoned, even before it commenced these proceedings.

36. Although its present solicitors came on the record on 29 September 2019, the Company has had the benefit of professional legal representation from the commencement of these proceedings. Insofar as the Company seeks to blame its previous advisers for the delay, as Ward LJ observed, at 1675, in *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666, when considering the question of whether a litigant's case should be struck out for breach of an "unless" order that was said to be the fault of counsel rather than the litigant itself:

> "Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself."

37. Additionally, HMRC would clearly be prejudiced if the application to re-amend was allowed as this would effectively lead to the appeal being re-commenced or, as Mr McNall put it, given a "hard reset". As such HMRC will need to provide a new statement of case and a further witness statement from Mr Mills, who has now retired from HMRC, to answer the new case the Company seeks to advance by re-amending its grounds of appeal.

38. I accept that, given the sums involved (approximately £1.7m), the Company would suffer hardship if it lost the appeal for procedural reasons. But, as the Upper Tribunal (Mann J and Judge Jonathan Richards) recognised in *HMRC v Katib* [2019] STC 2106 at [60] in allowing HMRC's appeal against the conclusion of the First-tier Tribunal ("FTT") to allow Mr Katib to appeal out of time as the financial consequences of him not being able to appeal were very serious as his means were limited such that he would lose his home, saying, at [60]:

> "We have considered this factor anxiously for ourselves. However, again, when properly analysed, we do not think that this factor is as weighty as the FTT said it was. The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them."

39. Therefore, having regard to all the circumstances of the case, particularly the inadequate explanation for the delay and the prejudice to HMRC, I have come to the conclusion that the application to re-amend the grounds of appeal should not be allowed.

40. Accordingly I dismiss the application to re-amend the grounds of appeal.

Strike Out Application

41. Given my conclusion to dismiss the application to re-amend the grounds of appeal to include a "best judgment" challenge the extant grounds of appeal are as stated in the Company's Amended and Supplemental Grounds of Appeal dated 10 June 2019 (see paragraph 9, above). I have already concluded (at paragraph 34, above) that these grounds do not include a best judgment challenge but are limited to the assertion by the Company that its evidence was sufficient to support its claim for zero-rating on the basis that the vehicles concerned had been exported. However, as Mr Watkinson submits, in the light of the letter of 5 August 2020 (see paragraph 24, above) in which it is stated that the Company "never claimed zero-rated export of cars" it is clear that any appeal on these grounds cannot succeed.

42. Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that the Tribunal may strike out the whole or a part of the proceedings if it "considers there is no reasonable prospect of the appellant's case, or part of it, succeeding." Mr McNall contends that it would be disproportionate to strike out the Company's case. However, given its distinct lack of prospects it would appear that this is the only option open to me.

43. HMRC's application is therefore allowed and the appeal struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

44. 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.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 16 September 2020