[2021] UKFTT 129 (TC)

TC08110

VAT – striking out – abuse of process – Rule 8(c), Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/03005/V

BETWEEN

GB FLEET HIRE LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ALEKSANDER

The hearing took place on 27 November 2020. The form of the hearing was V (video) using the Tribunal's video platform. A face to face hearing was not held because the impact of the COVID-19 pandemic made it impractical. The documents to which I was referred are a hearing bundle of 242 pages, skeleton arguments of the Appellant and the Respondents (together with the Appellant's chronology), and a note of the Appellant's submissions.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Kieron Beale QC, counsel, instructed by Withers LLP, for the Appellant

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

DECISION

INTRODUCTION

1. This is an application by HMRC to strike-out GB Fleet Hire Limited's ("GBFH") appeal against their decision of 5 August 2020 to refuse to register GB Fleet Hire for VAT.

2. GBFH applied for the striking out application to be determined "on the papers" because of the risk of delay due to the pandemic if a face-to-face hearing was held. The Tribunal directed that the application be determined after a video hearing.

3. At the hearing, Mr Beale represented GBFH, and Mr Watkinson represented HMRC.

BACKGROUND FACTS

4. The background facts are not in dispute and I find them to be as follows.

5. In September 2017, HMRC notified GBFH of their decision to assess VAT for the periods 01/16 to 03/17 on the grounds that supplies made by GBFH did not qualify for zero rating as exports.

6. By a decision letter dated 18 October 2017, HMRC notified GBFH of their decision to cancel its VAT registration with effect from 31 August 2017. HMRC's grounds for de-registering GBFH were that it was "using its VAT registration principally or solely for abusive purposes." The letter set out the following as the grounds for cancellation:

> I consider that the following factors indicate that you are principally or solely registered for VAT for abusive purposes:
>
> - Company seems to be registered to facilitate fraud.
> - DVLA check shows vehicles still registered in UK.
> - No credible evidence of export.
> - Payments not always coming from customers.
> - Failure to apply for road tax refunds.
> - No evidence of vehicles being insured when transporting. Refusal to provide bank statements.
> - Checks found no credible evidence of customers in Far East.
> - Payments were not made until car has been shipped.

7. The letter concluded by setting out GBFH's right to seek a statutory review and to appeal against HMRC's decision to this Tribunal. GBFH did not exercise its right of appeal.

8. On 12 February 2018, GBFH filed an appeal against the VAT assessments (TC/2018/01165). GBFH's grounds of appeal included the following:

> 5. The Appellant does not make a free-standing appeal against the decision of Stephen Mills (an officer of HMRC), communicated by letter dated 18 October 2017, to deregister the Appellant company for VAT as of 31 August 2017. That is because if the conclusions formed by Mr. Mills were correct, he was left with no alternative as a matter of law but to de-register the company.
>
> 6. However, since Mr. Mills' conclusions are the subject of strenuous challenge, it follows that, if the Appellant's appeal is allowed in respect of the matters set out in Paragraph 4 above, the de-registration decision must also fall away.

9. Those grounds were struck out by Judge Poole in a direction dated 5 August 2019 which stated:

> The Appellant is wrong in law in saying this. The decision to de-register stands alone as an appealable matter and will not automatically "fall away" if the Tribunal decides the remainder of the appeal in favour of the Appellant. As the Appellant has specifically stated it does not wish to appeal against the de-registration, I consider the argument raised in paragraph 6 of the amended and supplemental grounds has no reasonable prospects of success and must therefore be struck out.

10. On 16 September 2020, Judge Brooks dismissed GBFH's application to re-amend its grounds of appeal.

11. As (in the light of correspondence) it was clear that GBFH's appeal could not succeed on the grounds that remained after the partial striking-out by Judge Poole in August 2019, Judge Brooks struck out the appeal altogether: [2020] UKFTT 365 (TC). Mr Beale submits that HMRC subsequently accepted that GBFH was entitled to repayment of substantial amounts of input tax, and approximately £435,000 of VAT assessments were withdrawn.

12. On 3 July 2020, GBFH applied to register for VAT on the basis that its taxable supplies in May 2020 exceeded the registration threshold. GBFH made two supplies in May 2020. The first was the sale of a Lamborghini on 21 May 2020 to Autobell (whose address on the invoice was in Japan) for £170,000, which was exported to Kuala Lumpur in Malaysia. The second was the sale of a Ford Transit minibus on 6 May 2020 to the West Lancs Freemasons Charity for £20,600, which was donated by the charity to a scout troop in Blackpool. Documentary evidence of these supplies (and of the export of the Lamborghini) was included in the bundles, and HMRC do not dispute that these supplies were actually made.

13. The VAT registration application was rejected by HMRC in a letter dated 5 August 2020. The grounds given in the letter were that GBFH:

> […] has previously been registered for VAT under number 106 9706 10 which has been cancelled by HMRC on the basis that the VAT registration was being utilised solely or principally for abusive purposes. The letter issued to you by Stephen Mills dated 18 October 2017 refers (A copy of which can be forwarded on request). As that compulsory cancellation is currently under appeal the application to register G B Fleet Hire Ltd is refused. I refer you to your discussion with HMRC Visiting Officer.
>
> If your circumstances change and you start to make taxable supplies or the value of your taxable supplies exceeds the registration threshold, you should inform HMRC promptly.

14. I note that the reference to the "compulsory cancellation" being "currently under appeal" was incorrect. Although appeal TC/2018/01165 had challenged the cancellation, those aspects of the appeal had been struck out in August 2019. The only matters under appeal as at the date of HMRC's decision were the VAT assessments.

15. GBFH's solicitors issued a letter before claim on 18 August 2020 requesting a statutory review of HMRC's decision to refuse registration and threatening judicial review of HMRC's decision. HMRC responded on the same day stating that statutory review and appeal to this Tribunal provided GBFH with a remedy in respect of HMRC's decision. The request for a review was then renewed by an email from GBFH's solicitors dated 19 August 2020. However, on the same date (19 August 2020) GBFH filed a notice of appeal against HMRC's decision with the Tribunal.

16. On 23 September 2020, HMRC wrote to GBFH stating that because of a delay in passing the case to the review team, it would not be possible to complete the review by 1 October 2020, further the review officer had been unable to contact GBFH or its representatives by telephone. The review officer suggested that the review period be extended to 14 November by consent. But clearly the appeal to this Tribunal had overtaken the review process, and the review was discontinued.

17. GBFH's grounds of appeal are as follows:

> The Decision [to refuse to register GBFH] was wrong in law and/or in fact:
>
> 1. The Appellant is entitled to be registered for the purposes of VAT. It is a taxable person, carrying on economic activity within the proper meaning and effect of the PVD and of the VAT Act 1994. Its turnover on taxable transactions has exceeded and/or has been shortly likely to exceed the threshold for compulsory registration .
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> 2. The Decision wrongfully unlawfully impedes the Appellant's lawful right to deduct input VAT, thereby placing the Appellant (without good reason) at a commercial disadvantage and/or unlawfully and/or disproportionately interfering with the Appellant's right to conduct its business without interference (including its right to lawfully participate in the VAT system) contrary to the PVD and/or ECHR Protocol 1 Article 1.
>
> 3. The Decision ostensibly relies upon the following features:
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> "(open quote)
>
> - C*ompany seems to be registered to facilitate fraud*
> - *DVLA check shows vehicles still registered in UK*
> - *No credible evidence of export*
> - *Payments not always coming from customers*
> - *Failure to apply for road tax refunds*
> - *No evidence of vehicles being insured whilst transporting*
> - *Refusal to provide bank statements*
> - *Checks found no credible evidence of customers in Far East*
> - *Payments were not made until car has been shipped* (end quote)"
>
> However, the Decision does not particularise the said reasons (whether adequately, or not all) and therefore, on the face of it, is capricious and/or arbitrary.
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> 4. The Respondents have failed to provide any or adequate evidence giving objective grounds for concluding that it is probable that any VAT number assigned to the Appellant will be used fraudulently. In the absence of detailed explanation for the basis of the Decision, the Appellant is in the (invidious) position of not being able to identify the nature of the allegations against it, except to the extent that these (on the face of it) seem to be allegations of serious past and/or prospective wrongdoing.
>
> 5. The Respondents purport to allege a belief that the Appellant will, if registered, engage in fraudulent conduct, without any or adequate evidence to support the same. An allegation of fraud must be properly particularised, so that the Appellant can have the fair opportunity of engaging with it.

> 6. The Decision is irrational because HMRC has already (by virtue of the Tribunal's directions in appeal TC/2018/01165, released on 5 August 2019 and 30 August 2019) accepted the validity of input tax reclaims made by the Appellant company (when it was previously registered for VAT).
>
> 7. The Decision wrongly purports to state that the Appellant is already appealing an earlier decision to deregister it. There is no such appeal.
>
> 8. The Decision is contrary to the registration provisions set out in Schedule 1 of the VAT Act 1994.

HMRC'S SUBMISSIONS

18. Mr Watkinson submits that the present appeal to this Tribunal is an abuse of process and should therefore be struck out. He submits that this appeal amounts to an abuse of process because:

(1) GBFH are seeking to litigate the same issue that it deliberately failed to appeal in relation to in 2017,

(2) in circumstances where the indirect attempt to appeal the issue has already been struck out, and

(3) where there has been no identified material change of circumstance such as a change of director.

19. Mr Watkinson submits that if the Tribunal fails to strike out this appeal, GBFH would have *carte blanche* to make repeated appeals against decisions resulting in it not having a VAT registration number, all of which are made on the basis of identical factual matrices, whether those are deregistration decisions, or refusals to register. This, he submits, would bring the administration of justice into disrepute.

20. Mr Watkinson notes that GBFH's response that HMRC's grounds for the initial deregistration (namely that it was principally or solely registered for VAT for abusive purposes and appeared to be registered to facilitate fraud) is "an extremely serious allegation to make" since it "not only impeaches past conduct but seeks to impeach future conduct too." Mr Watkinson submits that this is the very point that makes attempts to relitigate the issue an abuse, as GBFH had the opportunity to appeal that "serious allegation" and deliberately decided not to. He submits that HMRC should not be repeatedly put to the same task of defending that decision on GBFH's whim.

21. Mr Watkinson submits that the HMRC's decision to deregister GBFH was made in order to address the risk of future VAT abuses by GBFH – it was prospective as to risk. And GBFH made a deliberate decision at that time not to appeal HMRC's decision. Mr Watkinson submits that GBFH's grounds of appeal in this case seek to litigate matters that should have been raised in an appeal against HMRC's original decision to de-register it. This therefore amounts to an abuse of process, and the appeal should therefore be struck out.

22. Mr Watkinson accepts that HMRC would be under an obligation to re-register GBFH if there were a change in circumstances, such that the risk of VAT abuse no longer existed. That might occur if, for example, there was a change in the composition of GBFH's board of directors. But submits Mr Watkinson, all GBFH have done is to seek to side-step HMRC's decision by undertaking two "clean" transactions. This (even if repeated *ad nauseam*) does not amount to a change in circumstances that would justify re-registration. Whilst it might be possible, says Mr Watkinson, for a leopard to change its spots, it takes more than just taking its toe out of a mucky pool, and dipping it tentatively into a clean pool for just a few moments.

23. Further, Mr Watkinson submits that a decision to strike-out cannot be an infringement of any principles of EU law, as EU law cannot override an abuse of process – otherwise abuse of process could never arise in relation to a decision governed by EU law. Mr Watkinson submits that GBFH's rights under EU law, including its rights to effective protection and right of effective access to the courts, have not been infringed as GBFH's has exercised its right of access to this Tribunal. But he submits, it has no right to abuse the Tribunal's processes.

24. Mr Watkinson submits that any error in HMRC's August 2020 decision letter as to the description of the grounds for refusal to register GBFH is irrelevant, as it would be open to HMRC to clarify the grounds on which they refused registration in their Statement of Case.

GBFH'S SUBMISSIONS

25. Mr Beale submits that HMRC are wrong to submit that the grounds for the decision to refuse registration are the same as the grounds for the decision to de-register. He submits that this is not what the letter refusing registration says - the only reason given in the 5 August 2020 letter for refusing the application was that GBFH had an extant appeal against the cancellation its previous VAT registration. It is not disputed that no such appeal was ever made. Further, the letter recognised that circumstances could change, and that has what has happened here.

26. Mr Beale submits that HMRC cannot now add or amend the reasons given in their 5 August 2020 decision letter by setting out additional grounds for non-registration (and he referred me to the decision of the Court of Appeal in *R v Westminster City Council ex p Ermakov* [1996] 2 All ER 302). Mr Beale acknowledged that wider issues might be raised during the course of a "full merits" substantive hearing, but he submits that the hearing of an application to strike out is not such a hearing.

27. In any event, he submits that HMRC have not pleaded with sufficient particularity their case that the registration of GBFH for VAT would lead to its VAT registration being used for fraudulent or abusive ends. Given the gravity of the allegations being made, it is incumbent on HMRC to give reasons for their decision and properly to plead their case. As they have not done so, their application to strike-out is not capable of fair determination. He referred me to the decision of the Court of Appeal in *HMRC v Citibank* [2017] EWCA 1416 in which the Hallett LJ said:

> [103] It is common ground that HMRC does not need to allege or plead dishonesty in order to deny the trader its claims to repayment of input VAT. The Kittel test does not require proof of dishonesty. However, if it does allege dishonesty, HMRC is obliged to plead the facts, matters and circumstances relied upon to show that the trader is dishonest. This is to ensure the trader knows in advance the case it must meet and to ensure a court or tribunal does not make a finding of dishonesty, with all the serious consequences that such a finding entails, on an inappropriate basis. Where serious allegations of fraud are made, cogent evidence commensurate with the gravity of the allegations made must be adduced.

28. Mr Beale acknowledged that HMRC has (following the jurisprudence of the CJEU in *Ablessio* (C-527/11)) the right to refuse to register a trader in order to prevent abuse of the VAT system (following the *Halifax* decision). However, the issue of abuse has to be kept under periodic consideration so as to ensure that effective rights under EU law are respective. In *Littlewoods Retail v HMRC* [2014] EWHC 868 (Ch) at [197] Henderson J referred to the jurisprudence of the CJEU that:

> held, in terms, that *res judicata* (in the sense of *issue estoppel*) cannot prevent application of the EU doctrine of abuse of rights in the field of VAT on a year by year basis. In such circumstances, the principle of legal certainty is trumped by the principle of effectiveness.

29. Mr Beale submits that the obligation under EU law to respect a trader's entitlement to deduct input tax is strong, and the exercise of HMRC's power to refuse registration cannot go beyond what is necessary to prevent abuse and cannot systematically undermine the entitlement to deduct input tax. HMRC's decision had to be based on sound evidence with objective reasons. I was referred to the decision of the CJEU in *Schmeink & Cofreth and others* (C-454/98). The taxpayers in that case had raised VAT invoices in respect of supplies which they had never made (but the taxpayer voluntarily admitted to having issued bogus invoices, and the input tax involved was either never claimed, or was repaid). The issue was whether the taxpayer could adjust its output tax liability on the bogus invoices, and whether it needed to show good faith in order to make the adjustment. The CJEU held:

> 57. It should be observed that, unlike the situation in *Genius Holding*, in the cases in the main proceedings the risk of any loss in tax revenues has been completely eliminated in sufficient time either because the issuer of the invoice has retrieved and destroyed the invoice before its recipient used it or because, although the invoice has been used, the issuer of the invoice has settled the amount shown separately on the invoice.
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> 58. In such circumstances, where the issuer of the invoice has in sufficient time wholly eliminated the risk of any loss in tax revenues, the principle of the neutrality of VAT requires that VAT which has been improperly invoiced can be adjusted without such adjustment being made conditional by the Member States upon the issuer of the relevant invoice having acted in good faith.
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> 59. It should be noted in that respect that the measures which the Member States may adopt under Article 22(8) of the Sixth Directive in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than is necessary to attain such objectives (Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others v Agencia Estatal de Administración Tributaria* [2000] ECR I-1577, paragraph 52). They may not therefore be used in such a way that they would have the effect of undermining the neutrality of VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation.
>
> 60. It must be noted that the requirement that the issuer of the invoice should demonstrate his good faith when he has in sufficient time wholly eliminated any risk of lower tax yields is not necessary to ensure the collection of VAT or to prevent tax evasion (see, to this effect, Case C-361/96 *Grandes Sources d'Eaux Minérales Françaises v Bundesamt für Finanzen* [1998] ECR I-3495, paragraphs 29 and 30).

30. The supplies undertaken by GBFH in May 2020 were new transactions in a different year undertaken in different circumstances. There is no suggestion that these transactions were fraudulent or abusive. They amount to economic activity for VAT purposes, in respect of which an entitlement to register arises.

31. Mr Beale submits that the reasons given by HMRC for GBFH's deregistration cannot apply for time immemorial without cutting across GBFH's rights under EU law to be registered for VAT and to be entitled to deduct input VAT. GBFH are not seeking reinstatement of their previously cancelled registration, nor are they impugning HMRC's October 2017 decision to deregister. Rather they are making a fresh application for registration based on new commercial transactions. The burden of proof falls on HMRC to show that the requirements for registration have not been met. HMRC have to exercise their discretion to refuse registration anew and cannot merely rely on an earlier decision made in different circumstances.

32. Mr Beale submits that to strike out GBFH's appeal would have the effect of infringing GBFH's entitlement to be registered in circumstances where no objective basis for denying registration has been proved and so the criteria in *Ablessio* for denying registration have not been met.

33. Mr Beale also submits that if the Tribunal exercised its discretion to strike-out the appeal, it would be infringing GBFH's rights under EU law, including its rights to effective protection and right of effective access to the courts, and he referred me to the decisions of the CJEU in *HMRC v. FTI* (C-384/04) *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v. Germany* (Case C-279/09), and *WebMind Licences* (Case C-419/14).

DISCUSSION

Striking out for abuse of process

34. The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") gives the Tribunal discretion to strike out an Appellant's case if it has no reasonable prospect of success. Rule 8(3)(c) states as follows:

> 8(3) The Tribunal may strike out the whole or a part of the proceedings
>
> if—
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> […]
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

35. The Court of Appeal in *Shiner and Sheinman v HMRC* [2018] EWCA Civ 31 at [19] held that Rule 8(3)(c) extends to striking out on the grounds that the proceedings amount to an abuse of process.

36. The approach taken by the courts in relation to striking-out was considered by the High Court in *Toshiba Carrier v KME Yorkshire* [2011] EWHC 2665, which cited the judgment of (then) Lewinson J in *Easyair Limited v Opal Telecom* [2009] EWHC 339 at [15]:

> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91 ;
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> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable*: ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
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> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
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> vi) 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 on summary judgment. Thus the court 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: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
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> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. 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 court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

37. This passage from *Easyair* was cited with approval in the judgment of Floyd LJ in the Court of Appeal in *TFL Management v Lloyds Bank* [2013] EWCA Civ 1415. In his judgment Floyd LJ then went on to say at [27]:

> I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in *Partco v Wragg* [2002] EWCA Civ 594; [2002] 2 Lloyds Rep 343 at 27(3) and cases there cited. Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; see *Partco* at 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example *Hudson and others and HM Treasury and another* [2003] EWCA Civ 1612.

38. Both Mr Watkinson and Mr Beale referred me to the decision of the Upper Tribunal in *HMRC v Fairford Group plc and Another* [2014] UKUT 329 (TCC), which addressed the approach that should be taken in the First-tier Tribunal when dealing with an application to strike out. The *Fairford Group* appeal related to an MTIC fraud, and Judge Brooks in the First-tier Tribunal declined to strike-out the appeal as he could not conclude that the taxpayers had no reasonable prospect of challenging HMRC's evidence without a detailed examination of that evidence. Although

> [41] In our judgment an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). 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, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 *per* Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all.

39. I was referred by Mr Watkinson to the decision of the High Court in *Littlewoods v HMRC* [2014] EWHC 868 (Ch), which held that the doctrine of abuse of process applies to this Tribunal. That doctrine prevents the re-litigation of matters either already decided by litigation between the parties, or that could and should have been decided as part of earlier litigation (referred to as "*Henderson v Henderson*" abuse of process). In *Johnson v Gore Wood & Co* [2002] 2 AC 1, HL at 31B Lord Bingham of Cornhill said:

> The underlying public interest is…that there should be finality in litigation and that a party should not be twice vexed in the same matter. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse maybe found, to identify any additional element such as collateral attack on a previous decision or some dishonesty, but where those elements are present the latter proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

40. Mr Watkinson also referred me to the decisions of this Tribunal which applied that doctrine, including *Foneshops Ltd v HMRC* [2015] UKFTT 410 (TC); *Hackett v HMRC* [2016] UKFTT 781 (TC); and *Kishore v HMRC* [2018] UKFTT 759 (TC). Mr Beale submitted that I should treat the decision in *Foneshops* with some care, as the appeal concerned penalties arising directly as a result of the earlier VAT appeal and covered the same periods, and the judge acknowledged in her later decision in *Kishore* that her approach in *Foneshops* had been incorrect. As regards *Hackett*, Mr Beale noted that the decision drew a distinction between periods in respect of which the Tribunal had previously ruled, and the those for which it had not.

41. I find that I have discretion under the Tribunal's rules to strike out an appeal if I find that the making of the appeal by the Appellant amounts to an abuse of process. An abuse of process includes bringing an appeal in circumstances where the matter should have been raised in earlier proceedings (if it was to be raised at all). However (per Lord Donaldson in *Johnson v Gore Wood*), it would be wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

42. In exercising my discretion, I must take account of the seven points flagged by Lewinson J in *Easyair Limited v Opal Telecom*. Although Mr Watkinson would distinguish *Toshiba* on grounds that it related to summary judgement, I consider that the principles outlined in Lewinson J's seven points in *Easyair* are of general application and apply in this matter.

Reasons set out in 5 August 2020 letter

43. I am not persuaded by Mr Beale that I should restrict my consideration of whether this appeal is abusive solely to the reason given in HMRC's 5 August 2020 letter that the reason for refusal was that the cancellation of GBFH's registration was under appeal. GBFH's grounds of appeal against the VAT assessments (TC/2018/01165) did include a challenge to the cancellation of GBFH's VAT registration, although those grounds had been struck out before 5 August 2020.

44. The 5 August 2020 letter refers back to the underlying reasons for the cancellation – namely that the registration was being used solely or principally for abusive purposes, so the underlying basis on which registration was refused was never in doubt (as is clear from the fact that GBFH's grounds of appeal refer to the reasons given by HMRC for the original cancellation of their registration). I find that it was clear of the face of the letter that the underlying reason why HMRC refused to register GBFH was because it its previous VAT registration had been cancelled as it was being utilised solely or principally for abusive purposes.

45. In any event this appeal is a "full merits" appeal and HMRC would be able to clarify the grounds on which they refused the VAT registration in their Statement of Case. I would distinguish *R v Westminster City Council ex p Ermakov*, as it relates to a judicial review, rather than an appeal against the local authority's decision on the merits. It may be that *Westminster* would have relevance to a decision in which the Tribunal was exercising a supervisory jurisdiction, but that is not the case for this appeal, where the Tribunal has jurisdiction to substitute its own decision for that of HMRC based on the evidence placed before it.

Grounds of appeal

46. GBFH's grounds of appeal can be grouped under the following four broad headings:

(1) GBFH is entitled to be registered for VAT under both the PVD and the VAT Act as it is undertaking economic activities (grounds 1, 2, 8)

(2) HMRC does not sufficiently particularise the reasons why they consider that GBFH will use the VAT registration in an abusive manner (grounds 3, 4, 5)

(3) HMRC has previously accepted that GBFH has made lawful claims for credit for input tax (ground 6)

(4) HMRC's stated reason (that the prior deregistration was under appeal) is wrong (ground 7).

Entitlement to registration under the PVD and VAT Act

47. I agree with Mr Beale that the right of a trader to be registered for VAT if it is undertaking economic activities carries heavy weight. I agree with him that the obligation under EU law to respect a trader's entitlement to deduct input tax is strong, and the exercise of HMRC's power to refuse registration cannot go beyond what is necessary to prevent abuse and cannot systematically undermine the entitlement to deduct input tax. HMRC's decision has to be based on sound evidence with objective reasons. And the same principles apply to the cancellation of a registration as much as they apply to the refusal to register. I also agree with Mr Beale that the reasons given by HMRC for GBFH's deregistration cannot apply for time immemorial without cutting across GBFH's rights under EU law to be registered for VAT and to be entitled to deduct input VAT.

48. But there is no suggestion by GBFH that HMRC's decision to cancel GBFH's registration in 2017 was wrong, nor does Mr Beale challenge HMRC's submission that GBFH made a considered decision not to appeal against the cancellation. In doing so, GBFH must have accepted that the cancellation was necessary to prevent abuse and was based on sound evidence with objective reasons. Indeed, by submitting that HMRC's reasons for deregistering GBFH cannot apply forever, Mr Beale implicitly accepts that those reasons correctly justified the cancelation of GBFH's registration. I find that GBFH made a considered and deliberate decision not to appeal against the cancellation, and I find that by doing so, it must have accepted that HMRC had an objective basis for cancelling its registration, and that the criteria in *Ablessio* for denying registration had been met.

49. I agree with Mr Watkinson, and find, that cancellation of registration to prevent abuse is prospective in its nature. It has the effect of ensuring that the trader cannot (amongst other things) make abusive claims for credit for input tax in the future. The cancellation does not address historic abuse – that is addressed through assessments to recover wrongly claimed input tax, and penalties for abusive behaviour.

50. I therefore find that Mr Watkinson is correct in his submission that for GBFH to be able to register again for VAT, it will need to be able to demonstrate that the risk of abuse identified in 2017 is no longer present. And in making this submission, Mr Watkinson accepts that the reasons for cancelling GBFH's registration may not necessarily apply forever - it is possible for a leopard to change its spots. But I find that the mere fact that GBFH is engaging in economic activities amounting to the supply of two vehicles is not enough to justify registration in circumstances where its registration was previously cancelled because of its abusive behaviours.

51. The only basis on which GBFH's appeal could succeed on grounds 1, 2 and 8, is if either (a) the risk of abuse was no longer present, or (b) the risk of abuse was never present (in other words, HMRC's original decision to cancel GBFH's registration was wrong).

52. If GBFH is arguing that the risk of abuse was no longer present, I find that any application for registration would need to have been supported by objective evidence that the risk of abuse is no longer present – this might include (but is not limited to) a change in the individuals running the business. There is no submission by Mr Beale that GBFH has taken any steps which might remove the risk of abuse – and no such ground is pleaded.

53. Any argument by GBFH that HMRC's original decision to cancel the registration was wrong forms, in essence, the basis of grounds 3, 4, and 5. And I find that this amounts to an abuse of process for the reasons I give below.

54. I therefore find that there is no realistic prospect of GBFH's appeal succeeding on grounds 1, 2, and 8.

HMRC does not sufficiently particularise its reasons why they consider that GBFH will use the VAT registration in an abusive manner

55. I find that this ground, in substance, seeks to reopen the basis on which their registration was cancelled in 2017.

56. I find that GBFH know why its registration was cancelled previously and acknowledged and accepted the cancellation by its deliberate decision not to appeal against it. The reason why their registration was cancelled provides the reasons why the application for registration was refused.

57. I find that grounds 3, 4, and 5, in essence, seek to reopen the basis on which HMRC originally cancelled GBFH's registration, in circumstances where GBFH had made a deliberate and considered decision not to appeal against the cancellation. Demanding now that HMRC

particularise the reasons why the registration was cancelled in 2017, when GBFH (a) chose not to appeal against that cancellation, and (b) stated in the course of appeal TC/2018/01165 that they did not wish to appeal against the de-registration, amounts to an abuse of process. I find that this amounts to a "*Henderson v Henderson*" abuse of process, as GBFH are bringing an appeal in circumstances where the issue could and should have been raised in earlier proceedings (if it was to be raised at all).

58. I acknowledge that it would be wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. But in reaching my finding that GBFH's appeal amounts to an abuse of process, I take into account the fact that this is not the first time that GBFH has sought to dispute the basis on which their registration was cancelled. They sought to challenge the basis on which their registration was cancelled indirectly in their appeal TC/2018/01165, but this ground was struck out. And I note that in his strike-out decision, Judge Poole states that GBFH specifically stated that it did not wish to appeal against the de-registration, and I note also that Mr Beale has said much the same in his submissions.

59. Finally, I find that the requirement to "properly particularise" an allegation of fraud applies to pleadings. The decision of the Court of Appeal in *Citibank* relates to the manner in which HMRC pleaded in their Statement of Case the knowledge of the appellants of the connection of transactions to fraud. As HMRC have yet to file their Statement of Case in this appeal, I find that HMRC are therefore not yet under any obligation to provide "proper particulars" of the abusive purpose for which GBFH used its VAT registration.

HMRC has previously accepted that GBFH has made lawful claims for credit for input tax

60. This ground is irrelevant to this appeal. The fact that HMRC accepted that GBFH had made some legitimate supplies justifying input tax credits does not mean that it was not also using its VAT registration in an abusive way – indeed, by making a deliberate decision not to appeal against the cancellation of its registration, GBFH have acknowledged that abuse.

61. I find that there is no prospect of GBFH's appeal succeeding on this ground.

HMRC's reason that GBFH are appealing the prior deregistration is wrong

62. This ground may be true, but it is irrelevant, as HMRC can clarify their reasons in their Statement of Case.

63. I find that there is no prospect of GBFH's appeal succeeding on this ground.

Conclusions

64. The background facts in this appeal are not in dispute. HMRC do not dispute that GBFH has made the two supplies that are the economic activities that GBFH say justify its registration. There is therefore no need for a substantive hearing insofar as it would enable the Tribunal to undertake an investigation of the facts, as these facts are not in doubt. I am able to accept the facts pleaded by GBFH, namely that the supply of the two vehicles are economic activities that potentially justify its entitlement to be registered.

65. This application therefore gives rise only to short points of law on which I have all the evidence necessary of the proper determination of the question before the Tribunal. I do not consider that these points of law are of such difficulty that would justify a substantive hearing.

66. Although Mr Beale makes out an arguable case in relation to GBFH's entitlement to register on the basis of its economic activities (grounds 1,2 and 8), I find that this appeal has no realistic prospect of success on these grounds. HMRC's entitlement to protect the revenue from abuse (which GBFH must have accepted was based on sound evidence and had objective reasons) "trumps" any entitlement of GBFH to be registered for VAT on the basis of its

economic activities. GBFH would be entitled to be re-registered if it can show that the risk of future abuse (being the reason why its registration had been cancelled) had been addressed and mitigated, but no such ground has been pleaded in its notice of appeal.

67. Mr Beale in his submissions sought to distinguish between the prior accounting periods (in respect of which the GBFH had undertaken abusive behaviours), and the recent periods in which it had made the supplies on which its application for registration was based. In essence, his submission is that GBFH's application for registration is not an abuse of process, because the deregistration decision related to previous accounting periods, whereas the economic activities justifying registration occur in subsequent accounting periods. The decision not to appeal against the deregistration therefore does not, he says, impact the requirement for registration arising in the subsequent accounting periods. I am not persuaded by this argument. I agree with Mr Watkinson that deregistration is prospective in its nature – its purpose is to prevent abuse in the future. This is why I have found that in order to register for VAT, GBFH must be able to demonstrate that the risk of it engaging in abusive behaviours is no longer present.

68. I find that grounds 3,4 and 5 of GBFH's notice of appeal in essence seek to reopen the basis on which its registration was originally cancelled. I find that this amounts to an abuse of process.

69. I find that grounds 6 and 7 are irrelevant to the issues under appeal, and there is no prospect of GBFH's appeal succeeding on either of these grounds.

70. I do not consider that there is any merit in Mr Beale's submissions that the Tribunal would infringe GBFH's rights under EU law (including its right to effective protection and effective access to the courts), as any decision I make to strike out the appeal would have been made after a hearing at which GBFH has been represented by leading counsel and has had a full opportunity to set out its case. Nor do I consider that GBFH's rights under EU law prevent the Tribunal from striking out its appeal as being an abuse of process, for the reasons given by Mr Watkinson. There is, I find, no right under EU law to abuse the process of the courts (or this Tribunal).

DISPOSITION

71. I find that this appeal has no reasonable prospect of success, and I therefore strike it out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

72. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 30 APRIL 2021