Neutral Citation: [2022] UKFTT 287 (TC)

Case Number: TC08569

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2022/00221

VAT – strike out – appealable decision – no returns submitted

Heard on: 15 August 2022
Judgment date: 19 August 2022

Before

TRIBUNAL JUDGE MCGREGOR

Between

MR PHILIP OAG

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

DECISION ON PRELIMINARY ISSUE

INTRODUCTION

1. The Tribunal determined the application on 15 August 2022 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal, dated 6 January 2022, with enclosures, the Respondent's partial strike out application dated 21 April 2022; the Appellant's objection to the Respondent's application dated 27 May 2022; the Respondent's response to the objection dated 27 June 2022; the Appellant's application for the matter to be determined without a hearing, dated 28 July 2022, which included an appendix containing additional representations; and the Respondent's response to those additional representations, dated 5 August 2022.

BACKGROUND

2. I set out some background facts, based on the information in the documents outlined above, to aid in understanding of this decision.

3. Mr Oag made an outline disclosure under COP9 using the contractual disclosure facility on 8 March 2019.

4. There was a meeting with HMRC on 26 June 2019.

5. A formal disclosure report was provided by Mr Oag and his advisers, BDO, on 28 August 2020.

6. HMRC issued a VAT assessment on 14 July 2021, assessing Mr Oag to £101,541 in VAT in relation to two periods:

   (1) 1 April 2005 – 31 March 2006;

   (2) 1 April 2011 – 31 March 2018.

7. The assessment offered a review, which Mr Oag took up, on 26 July 2021.

8. HMRC's review was completed on 8 December 2021.

9. Mr Oag appealed to this Tribunal on 6 January 2022. In that appeal, Mr Oag does not dispute the amount of the assessment. The appeal is based on the assertion that HMRC was out of time to raise the assessment because it had sufficient information on which to base the assessment by, at the latest, the end of the meeting on 26 June 2019 and, under section 73(6)(b), HMRC had only 12 months after that evidence of facts comes to their knowledge to make the assessment.

10. HMRC made an application to strike out the appeal in respect only of the second period, i.e. 1 April 2011 – 31 March 2018.

11. It is this application for partial strike out that I am considering.

PARTIES ARGUMENTS

12. HMRC submits that this Tribunal does not have jurisdiction to hear Mr Oag's appeal against the 2011-2018 VAT assessment on the following basis.

13. The Respondents issued the VAT assessment for this period on 14 July 2021. Section 77(1)(a) VATA 1994 permits an assessment under sections 73 or 76 of the VATA to be made within four years of the end of the prescribed accounting period.

14. Accordingly, the VAT assessment for this period was issued under section 73(1) VATA 1994 based on the time limits contained within section 77(1) VATA 1994. This means that any appeal rights against this part of the assessment would lie under section 83(1)(p)(i) VATA

1994. This section is specific in saying that, where an appeal concerns an assessment issued under section 73(1), it shall only be made in respect of a period for which the Appellant has made a return under the VATA 1994.

15. The Appellant has not made a return under the VATA 1994 in respect of the period from 1 April 2011 to 31 March 2018.

16. There are no alternative appeal rights in relation to this period of the VAT assessment.

17. In response to the Appellant's emphasis on the final seven words of section 83(1)(p) VATA 1994 (see below) which are the following: "or the amount of such an assessment", the Respondents consider this emphasis to be misplaced.

18. The Respondents understand that the location of the final seven words of section 83(1)(p) VATA 1994, being subsequent to the two subparagraphs (i) and (ii), indicate that these words should be included in a reading of either or both of these subparagraphs, with the result that a discrete reading of section 83(1)(p)(i) VATA 1994 would be as follows:

> "Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to an assessment under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act or the amount of such an assessment."

19. HMRC submit that the function of the word "such" in section 83(1)(p) VATA 1994 is to specify that the amount referred to is the quantum of an assessment of the type referred to in either subparagraph (i) or (ii).

20. HMRC also submits that the intention of the legislation is to allow taxpayers to appeal both the making of an assessment where a return has been made and the quantum of such an assessment.

21. Finally, HMRC submit that it would not be practicable to treat the inclusion of this final line as allowing taxpayers to dispute the quantum of any and all assessments, regardless of whether a return was submitted for such a period.

22. BDO, on behalf of Mr Oag, submitted (in their original objection) that HMRC's arguments appeared to be based on the repealed section 84(2), which had provided, until April 2009, that an appeal shall not be entertained unless the appellant had made all the returns which he was required to make.

23. HMRC confirmed it their response that the application did not rely on this section at all.

24. In support of their appeal, the appellant submitted the following (which I quote verbatim for reasons explained below): "grounds for appeal made under the provisions of section 73(6)(b) VATA 1994 applies where, and in accordance to section 71(1) VATA 1994 "Where a person has **failed to make any returns** required under this Act (or under any provision repealed by this Act)" [emphasis added]."

25. In HMRC's response to this that section 71(1) VATA 1994 does not contain those words and is in fact related to reasonable excuse and therefore does not have any relevance to the question of appealable decisions.

26. In the additional representations, the Appellant asserts that section 83(1)(p) VATA 1994 does not restrict the right of appeal only to 'a period for which the appellant has made a return' as the section also provides the right of appeal against the amount of such an assessment, as follows:

> "83(1) (p) an assessment—

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or

(ii) under subsections (7), (7A) or (7B) of that section;

or the amount of such an assessment;" [emphasis added by the Appellant]

DISCUSSION

27. Under Rule 8(2) of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009, SI 2009/273, I must strike out the whole or part of the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings or part of them and I do not exercise the Tribunal's power to transfer the proceedings to another Court of Tribunal.

28. The focus of the parties' arguments is the interpretation of section 83(1)(p)(i) of VATA 1994.

29. Firstly I must establish whether section 83(p) is the correct provision. In order to do that I must be satisfied that the 2011-2018 assessment was issued under section 73(1) or (2). There is no suggestion that 83(1)(p)(ii), which refers to subsections 7, 7A and 7B of section 73, is relevant

30. HMRC submitted in their response to objection that this "appears to be an agreed fact".

31. On the face of the letter of assessment dated 14 July 2021, HMRC explicitly refers to exercising "the powers given us by the Value Added Tax Act 1994, s 73".

32. Section 73(1) reads as follows:

> (1) 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.

33. While I am not considering the substantive appeal, the documents in front of me show that the assessment raised falls squarely within this paragraph, in particular the first clause: "Where a person has failed to make any returns required under this Act".

34. Therefore I find that the assessment was issued under section 73(1) of VATA 1994.

35. Having established that section 83(1)(p)(i) is therefore the correct potential provision under which an appeal may be brought, I must now turn to the interpretation of it.

36. Put simply, HMRC says that it must be read as requiring returns to have been submitted before an appeal can be brought.

37. The Appellant argues instead that the words at the end of section 83(1)(p) regarding appealing against the amount of an assessment mean that no returns are required.

38. There is a further argument made by the appellant which involves a little untangling. The argument put forward (quoted verbatim in paragraph 24 above) should, I believe, refer not to VATA 1994, s 71, but rather to the opening words of VATA 1994, s 73.

39. The Appellant appears to be highlighting that assessments under section 73(1) may only be made where a person has failed to make a return. While there is no further elaboration of the point, I interpret this as suggesting an argument along the following lines: If the assessment under section 73(1) can only be made where no return has been submitted, how can section 83(1)(p)(i), which provides the appeal rights against these assessments, be predicated on the submission of the same returns.

40. As I have said, this argument is not set out in any detail in the written submissions from the Appellant, but I can see the point.

41. However, I do not agree with either of the Appellant's submissions.

42. The words at the end of section 83(1)(p) cannot be interpreted as meaning that the amount of any assessment made under section 73(1) can be appealed. The words in sub-sections (i) and (ii) are limiting the types of assessment that can be appealed; and the words at the end allow not only the fact of the assessment being issued to be appealed, but also the amount of them. I agree with HMRC that the use of "such" in those final words is intended to refer back to those two types of assessment that fall within the provision.

43. While the Appellant has correctly identified that the assessment issued under section 73(1) is issued because there has been no return, it does not automatically follow that an appeal must lie to the Tribunal. There are a number of unappealable matters. Parliament has decided that a VAT assessment reached by HMRC on a best judgment basis can only be appealed where a return is submitted.

44. Although they are not binding on me (and were not referred to by either party), this conclusion has also been reached in two earlier FTT decisions, *Yun He v HMRC* [2020] UKFTT 317 (TC) at paras [2]–[3] and [28]–[31] and *Withington KFC Services v HMRC* [2020] UKFTT 319 (TC) at paras [120]–[126]. The conclusion in these cases was also that, where an assessment is issued because no return has been filed, there is no right of appeal unless or until a return is filed.

45. I therefore must strike out the appeal brought by Mr Oag against the VAT assessment in relation to the period 2011-2018. The assessment relating to 2005-06 remains under appeal.

46. I make one final observation. Both the original assessment letter and the review outcome letter expressly refer to Mr Oag's right to bring an appeal to the Tribunal against the assessment. While, the contents of the letters from HMRC cannot introduce a right of appeal and it is not within the jurisdiction of this Tribunal to change HMRC's procedure, I do observe that it is not helpful or an efficient use of resources for HMRC to send letters to taxpayers telling them that they can appeal only then to make an application to strike out the appeal that the taxpayer has, not surprisingly, then brought. I would hope that HMRC would now change their correspondence in relation to assessments raised under section 73(1) to make it clear that an appeal may only be brough if a return is submitted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

Release date: 19 AUGUST 2022