



Neutral Citation: [2023] UKFTT 621 (TC)

Case Number: TC08862

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

In public by remote video hearing

Appeal references: TC/2021/19758
TC/2021/04694

VAT- hardship application by the first appellant – granted – late appeal application in respect of a PLN by the second appellant – premature appeal – directions made

Heard on: 6 July 2023

Judgment date: 13 July 2023

Before

**TRIBUNAL JUDGE NIGEL POPPLEWELL
MR JAMES ROBERTSON**

Between

MASSALA EXOTIC LIMITED

First Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

KHOSRU MIAH

Second Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Mr Khosru Miah as director of the First Appellant and on his own behalf

For the Respondents: Ms Olivia Donovan litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This decision relates to two applications. The first, by the first appellant (“**the company**”) is that it should be permitted to prosecute its appeal without having to pay the VAT in question to the respondents (or “**HMRC**”) under section 84 Value Added Tax Act 1994 (“**VATA**”). An appeal can be entertained if HMRC are satisfied that the requirement to pay or deposit the amount of VAT would cause the appellant to suffer hardship. If HMRC are not so satisfied, then an appellant may apply to the tribunal, and if the tribunal is satisfied that the appellant would suffer hardship, the tribunal may allow the appeal to proceed.

2. In this case, that is exactly what has happened. The company has seemingly been assessed for VAT of £280,903 (“**the assessment**”) by way of an assessment dated 22 November 2019. It claims that it is unable to pay or deposit that VAT with HMRC and had applied to HMRC for hardship. This was denied, and accordingly the appellant made an application to the tribunal. The question which we must decide, based on the evidence before us on the day of the hearing, is whether the company would suffer hardship if it was required to deposit the VAT. For the reasons given below, we have decided that it would. We therefore allow the company’s application.

3. The second application is by the second appellant (“**Mr Miah**”). Following the assessment, HMRC visited a penalty for a deliberate inaccuracy on the company. They then issued a personal liability notice (“**the PLN**”) to Mr Miah alleging that he is personally liable to pay the penalty which amounts to £176,966.37. Mr Miah appealed against this PLN, but both HMRC and the tribunal considered that this appeal had been made late. On a close examination of the documents, it seems that Mr Miah’s appeal was in fact premature. Following the issue of the PLN, Mr Miah’s agent requested an independent review. There has, however, been no review conclusion letter issued to Mr Miah. And so, his appeal right has never crystallised. We deal with this by way of directions later in this decision.

POSTPONEMENT

4. Two working days before the date of the hearing, the appellants’ accountants made an application for the hearing to be postponed on the grounds that the individual who was due to represent the appellants at the hearing had suffered a medical emergency and was unavailable. He was said to be “crucial” to the appellants’ case. No medical evidence was provided at the time of the application but, we were told, a letter from a suitably qualified medical practitioner had been sent to the tribunal on the morning of the hearing. It explained that the representative was suffering from mental health issues. We did not see a copy of that letter but took it at face value. The postponement application was opposed by HMRC. Having considered the issues in this case, we decided that we would reject the application to postpone and continue with the hearing. As we explained to Mr Miah, it was our view that the issues which we had to decide would not be affected by the absence of his preferred representative. The issues largely turned on the evidence which was to be given by Mr Miah and on the documents in the bundle. This tribunal is well versed in dealing with litigants in person and we did not think that the appellants would be prejudiced by the absence of that representative. As things turned out, this was indeed the case.

THE LAW

Hardship

5. There is no dispute about the law which we set out below.

Statute

6. Section 84 VATA:

“84 Further provisions relating to appeals

(1) References in this section to an appeal are references to an appeal under section 83.

(2) ...

(3) Subject to subsections (3B) and (3C), where the appeal is against a decision with respect to any of the matters mentioned in section 83(1) ... (p)..., it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.

(3A) Subject to subsections (3B) and (3C), where the appeal is against an assessment which is a recovery assessment for the purposes of this subsection, or against the amount of such an assessment, it shall not be entertained unless the amount notified by the assessment has been paid or deposited with HMRC.

(3B) In a case where the amount determined to be payable as VAT or the amount notified by the recovery assessment has not been paid or deposited an appeal shall be entertained if-

(a) HMRC are satisfied (on the application of the appellant), or

(b) The tribunal decides (HMRC not being so satisfied and on the application of the appellant), that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship”.

Case law

7. In the case of *NT ADA Limited v HMRC* [2019] UKFTT 0333 Judge Poole undertook a comprehensive review of the relevant legislation and caselaw. In particular he summarised the pertinent legal principles confirmed in the case of *HMRC v Elbrook (Cash & Carry) Limited* [2017] UKUT 181 (TCC) at [16] to [31] (references are to paragraphs in the Upper Tribunal’s decision):

8. The purpose of the provisions is to strike a balance between the abuse of the appeals mechanism by employing it to delay paying disputed tax and the stricture of having to pay or deposit the disputed sum as the price of entering the appeal process; the relief afforded by the “hardship” provisions should not be applied so as to operate as a fetter on the right of appeal ([19]).

(1) The Tribunal should not concern itself with the merits of the underlying appeal ([20]).

(2) The test is an “all or nothing” one, in which it is not relevant that the appellant might be able to pay or deposit some amount less than the whole disputed sum ([31]).

(3) The test is to be applied to the position at the date of the hearing ([26]). This means that the Tribunal should not “speculate as to what might become available to the appellant in the future” ([22] & [26]). It should focus on “immediately or readily available resources” ([21]).

(4) The fact that the appellant may have the necessary cash or other readily available resources may not be determinative, if hardship would result from using it (or them) in paying the disputed sum ([22]).

(5) Available borrowing resources may be considered, but generally only from existing sources, e.g. unused facilities or new facilities immediately available with minimal formality ([23]).

(6) Potentially available borrowing from new sources, for example if the appellant owns property capable as acting as security for a new loan, will only exceptionally be considered as “immediately or readily available”, for example where arrangements for borrowing are at an advanced stage ([24]).

(7) The potential sale, outside the ordinary course of business, of assets properly purchased for the purposes of the appellant’s business, might cause hardship even if the assets are not currently

being used in the business ([25]).

(8) There is no hard and fast rule that “regard can never be had to the resources of connected (but legally independent) entities where... there is common control and the evidence suggests a free flow of resources to meet the needs or requirements of any one entity at the expense of the other or others of them from time to time” ([25]).

(9) Although the test is to be applied by reference to the circumstances at the date of the hearing (see [33(4)] above), that does not mean that events leading up to that time are necessarily ignored. The Tribunal can take into account “whether the appellant is himself responsible for putting himself in a position where he cannot pay..., and that would include by delaying the hearing so that at the time of the hearing he cannot pay... without hardship” ([27] and [28]). The basis for this is that the “real cause” of the appellant’s inability to pay without hardship may be his own prior actions.

(10) The Tribunal should make its assessment on the basis of the most up-to-date available information. The burden lies on the appellant to establish hardship, so it is normally incumbent on the appellant to adduce the necessary evidence to satisfy the Tribunal ([29]). Absence of contemporaneous accounting evidence may justify the Tribunal in placing little, if any, weight on an oral assertion that the appellant is unable to afford to pay.

(11) Within the above parameters, the decision of the Tribunal is a value judgment on the basis of the evidence before it ([16]).

9. Although we are not bound by Judge Poole’s synopsis, we agree with it and gratefully adopt it for the purpose of this decision.

Late appeal

10. Under section 83C VATA, where HMRC have issued an appealable decision to an appellant, and that appellant has been offered a review which has been taken up within 30 days, HMRC must review that decision.

11. Under section 83G VATA, an appellant who has requested a review may not make an appeal to the tribunal until the “conclusion date”, but any such appeal must be made within 30 days of that date. Conclusion date means the date of the document notifying the appellant of the conclusions of the review.

THE EVIDENCE AND FINDINGS OF FACT

12. We were provided with a bundle of documents which included a number of authorities. Mr Miah gave oral evidence. From this evidence we make the following findings of the relevant fact:

(1) Following an enquiry into the company’s VAT position, HMRC issued the assessment on 22 November 2019. The assessment related to VAT periods falling between September 2013 and September 2019. It is worth noting that although the tribunal has treated the assessment as the appealable decision, there appears to have been notice of assessment issued to the company on 7 July 2020 in an amount of £280,899 together with interest of £9,590.75. We are not clear which is the correct assessment, but for the purposes of this decision, it does not matter.

(2) At some unknown date following the issue of the assessment, HMRC raised a penalty assessment on the company for a deliberate penalty in an amount of £176,966.37.

(3) In January 2020 the company ceased trading. Mr Miah’s unchallenged evidence, which we accept, was that the business had been struggling before that and he had considered ceasing to trade before it actually did so in January 2020. Whilst at the date of cessation the company had a bank account, it no longer has one as it is no longer trading. The company has received no income since it stopped trading in January 2020. In any event, when it ceased trading, it was not making any money. He has tried to liquidate the company but has not been able to do so.

- (4) The unaudited financial statements for the company for the year ended 30 September 2018 show a profit for that year of £1,565. They also show that the company made a loss in the year to 30 September 2017 of £9,630. The draft financial statements for the year ended 30 September 2019 showed that the company made a loss of £11,020.
- (5) The most up-to-date bank statement in the bundle shows that at 1 July 2019, the company had a positive balance of £164.87.
- (6) There is no more recent financial information. The reason for this is because the company ceased trading in January 2020.
- (7) On 14 September 2020 HMRC issued the PLN to Mr Miah. The PLN explained that if the appellant wanted a review of the decision, he should write to HMRC by 14 October 2020 telling HMRC why he thought the decision was wrong.
- (8) By way of a letter dated 13 October 2020, Mr Miah's accountants requested a review of the decision to issue the PLN.
- (9) The appellants via their agent submitted a number of further documents to HMRC, who, on 30 June 2021, wrote to those accountants with the letterhead "Massala Exotic Ltd". That letter was written in response to a letter from the accountants dated 26 March 2021 which was not in the bundle. It goes on to deal with two companies run by seemingly related parties: Mr A Miah (Spicemaster Trading Ltd) and Mr J Miah (Bayview Services Cardiff Ltd). Somewhat delphically thereafter there is a sentence "therefore the penalty will remain, please refer back to the penalty letter which was issued to your client on 14 September 2020". It offered a further review of that decision.
- (10) That offer was taken up by the accountants on 26 July 2021. However, on 13 October 2021, HMRC wrote to the accountants telling them that, as far as they were concerned, the accountants had no authority to request a review on behalf of Mr Miah.
- (11) By letter dated 29 October 2021, the accountants challenged this assertion.
- (12) In a letter dated 24 November 2021 to the company, HMRC explained that they were not prepared to undertake an independent review in respect of the company's assessment and penalties, but also recognised that on 14 October 2020 a request had been made for an independent review in respect of the PLN. The reason given for not providing an independent review was because the independent review team had rejected the application as it was out of time.
- (13) On 23 December 2021 the company and Mr Miah appealed to the tribunal, the former in respect of the assessment and the penalty and the latter in respect of the PLN.
- (14) On 31 May 2022, the company made an application for hardship.
- (15) In a letter dated 28 November 2022, HMRC rejected the company's application for hardship.

DISCUSSION

Hardship

13. The burden of establishing hardship lies with the company. It must show, on the balance of probabilities, that it would suffer hardship if it were required to pay £280,903 (or thereabouts) to HMRC. We must consider the position as at the date of the hearing.

14. The focus of our enquiry should be on the immediately or readily available resources to which the company has recourse.

15. It is clear from the evidence that the company has no such resources. Its financial position in 2019 was parlous and this is no doubt the reason why Mr Miah had considered closing the business before he actually did so in January 2020.

16. At the date of the hearing, the company has no resources. It is not, therefore, so much a question of hardship. The company simply has nothing from which it can pay the VAT at stake in its appeal.

Decision

17. It is our decision therefore that the company would suffer hardship if it were required to pay that VAT, and we therefore allow the company's application for hardship.

Late appeal

18. We now turn to Mr Miah's application that he should be permitted to submit a late appeal against the PLN.

19. Mr Miah submitted his notice of appeal to the tribunal on 23 December 2021. As a matter of law, once Mr Miah had asked for an independent review, he had no right of appeal against the PLN until HMRC had notified the conclusions of that review to him.

20. Having scrutinised the documents, it is clear to us that the appellants' accountants asked for such an independent review in their letter of 13 October 2020. This is in response to the indication in the PLN that if Mr Miah wanted such an independent review, he had to notify HMRC by 14 October 2020. HMRC appear to accept this position since in their letter of 24 November 2021, they state that "there was no further engagement from you or your client until 14 October 2020..... when a request was made by you for an Independent Review after receiving a Personal Liability Notice issued to Mr K Miah."

21. So, Mr Miah is unable to appeal against the PLN unless and until HMRC have concluded that review and notified that conclusion to him.

22. It is our view, and this was endorsed by Ms Donovan, that no such review conclusion has been notified to the appellant.

23. There appear to be two candidates for a review conclusion letter. Firstly, the letter dated 24 November 2021 in which the foregoing statement was made. It is our view, and indeed that of Ms Donovan, that this is not a review conclusion letter. It does not set out the results of the independent review or HMRC's conclusion of that review. And in any event, if it was a review conclusion letter, it is clear that the appeal was made within 30 days of its date.

24. The second is HMRC's letter of 30 June 2021. But this is ambiguous in the extreme. The first page deals with the company, and the associated companies mentioned at [11 (9)] above. There is no heading identifying Mr Miah. Our experience of review conclusion letters is that they are normally headed as such. This letter does not do so. Furthermore, the letter goes on to offer the appellant a further review (as well as explaining that if the recipient disagrees with the decision there is a right of appeal to the tribunal). There is no such statutory right to a further review following an independent review. The only sentence that could be construed as a review conclusion is that "the penalty will remain, please refer back to the penalty letter which was issued your client on 14 September 2020". Whilst this is the date of the PLN, it could also be the date on which the penalty was visited on the company.

25. Our view therefore is that there is no sufficiently clear evidence that HMRC have issued a review conclusion letter to Mr Miah for us to be able to say that his right of appeal has crystallised.

26. Having discussed this with Ms Donovan at the hearing, we concluded that the most straightforward way of dealing with this is for us to direct that HMRC issue a review conclusion letter in respect of the independent review sought by the appellant's accountants on 13 October 2020. This will generate an appeal right for Mr Miah which he can then take up if he so chooses.

Directions

27. I therefore Direct that within 30 days from the date of the release of this decision, HMRC will notify Mr Miah of their conclusion of the review of their decision to issue Mr Miah with the PLN as requested by his accountants on 13 October 2020.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

28. 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.

**NIGEL POPPLEWELL
TRIBUNAL JUDGE**

Release date: 13th JULY 2023