



Neutral Citation: [2023] UKFTT 710 (TC)

Case Number: TC 08901

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: **TC/2022/12619**

VAT - hardship application - application granted

Heard on: 31 May 2023

Judgment date: 8 August 2023

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

WAYNEFLEET LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: John Walker

For the Respondents: Kelly Clark, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This case concerns VAT, and in particular whether the appellant should be permitted to prosecute its appeal without having to pay the VAT in question to HMRC under section 84 Value Added Tax Act 1994 (“VATA”). An appeal can be entertained if the respondents (“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 appellant claims that it is unable to pay or deposit the VAT of £170,344.78 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 I must decide, based on the evidence about the financial status of the appellant as at the date of the hearing, is whether the appellant would suffer hardship if it was required to deposit the VAT. For the reasons given below, I have decided that it would. I therefore allow the application.

Form of the Hearing

3. With the consent of the parties, the form of the hearing was V (Video) using the HMCTS video hearing system. 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.

4. I had a document bundle extending to 89 pages. I heard evidence from Mr Walker.

5. Of consent, on 6 June 2023, I issued a Direction to the effect that the appellant should lodge with HMRC and the Tribunal, the most recent accounts for the company, bank statements evidencing the appellant’s financial position as at the date of the hearing and any other information relating to the financial status of the appellant, a response to which HMRC would lodge a submission if so minded.

6. On 28 June 2023, HMRC lodged a submission in response. On the same day the appellant lodged an email submission in response. On 10 July 2023, I issued further Directions with which the appellant complied on 18 July 2023.

7. On 27 July 2023, HMRC confirmed that they wished to make no further submissions.

Background facts

8. The appellant was incorporated on 13 January 1987 as a private company limited by shares. It registered for Value Added Tax (“VAT”) on 1 October 1987 and enrolled in HMRC’s online submission service on 21 October 2009.

9. Since incorporation, the principal business activities have comprised journalism and writing, business and project management, marketing consultancy and, since 2000, the purchase of game shooting.

10. Following an enquiry by HMRC, a Review Conclusion letter was issued on 8 June 2022. That upheld:

- (a) a decision that the supply of pheasant shooting was a commercial activity and therefore subject to VAT, and

- (b) the assessments covering the periods 03/18 to 09/21 in the sum of £161,012 issued on 30 March 2022.
11. On 1 June 2022, HMRC had issued a statement of the appellant's VAT account showing the tax due of £161,012 plus interest of £9,332.78 making a total of £170,344.78.
 12. On 4 July 2022, the appellant appealed to the Tribunal stating that the dispute with HMRC related to £170,344.78.
 13. On the same date, the appellant wrote to HMRC requesting that they apply the hardship provisions to the VAT assessment.
 14. On 14 and 30 September 2022, HMRC requested the appellant to provide evidence in support of the application for hardship by 15 October 2022. They incorrectly stated that the VAT assessment was in the sum of £170,344.78 albeit they pointed out that the hardship provisions did not apply to interest.
 15. On 5 October 2022, the appellant responded stating that if the VAT had to be paid then that would render the business "inoperable".
 16. On 14 October 2022, HMRC replied quoting section 84 VATA, pointing out that that assertion was not evidence and requesting further information by 10 November 2022.
 17. On 18 November 2022, HMRC wrote to the appellant intimating that, in the absence of financial records or information, HMRC were not satisfied that the company would suffer hardship if required to pay or deposit the amount of tax in dispute (again stated to be £170,344.78).
 18. In response to Tribunal Directions in relation to documents upon which the appellant wished to rely, on 16 January 2023, the appellant lodged a Statement of Facts, a copy email, copies of five letters and a photocopy of a diary entry for 30 October 2012 all of which related to HMRC's enquiry.
 19. Copies of two bank statements for the appellant's two bank accounts were also lodged. One showed a balance of £943.49 as at 1 December 2022 (the opening balance one month earlier had been £4,174.31). The other showed a balance of £198.86 as at 2 January 2023 (the opening balance one month earlier had been £247.86). The total cash balance was therefore £1,142.35.
 20. The application for hardship was listed for hearing.
 21. Since the Hearing, the appellant has provided:-
 - (1) A balance sheet as at 30 June 2022 showing net liabilities of £549,405. The Notes to the Accounts recorded that and stated that the appellant had a trading loss of £5,185.
 - (2) Copy bank statements for the first bank account for the period 1 July 2022 to 1 May 2023. For the first account the opening balance on 1 July 2022 was £2,789.42. As at 1 August 2022 the opening balance was £76,382.04. By 12 August 2022 it had risen to £116,600.37. In the following nine days, as HMRC have observed, ten cheques totalling £102,706.78 were issued reducing the balance to £13,875.74. Thereafter it steadily reduced to a low of £9.03 on 1 March 2023. It rose again to reach £3,663.40 on 1 May 2023.
 - (3) Copy bank statements for the second bank account for the period 1 July 2022 to 1 May 2023. The opening balance was £1,439.38 and there has never been a higher balance. At its lowest it was £101.60 and the closing balance was £731.72.

(4) As at 1 July 2023, the balance on the first account was £98.15 and on the second it was £269.45.

(5) The company accounts to 20 June 2022 dated 30 September 2022 and approved by the Board on 4 October 2022. Those included the balance sheet and Notes to the Accounts referred to at paragraph 21(2) above. The turnover was £239,999 with costs of sales being £214,868. The trading loss was £5,185 which was an improvement on the previous year when it had been £16,233.

The Law

Statute

22. 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

23. In the course of the hearing, I told the parties that I agreed with Judge Poole in *NT ADA Limited v HMRC* [2019] UKFTT 0333 where he set out a review of the relevant case law in relation to VAT and hardship. That decision is not binding on me but it sets out what are known as the “*Elbrook Principles*” and I agree with that review and adopt it and set it out as follows:-

“33. In *HMRC v Elbrook (Cash & Carry) Limited* [2017] UKUT 181 (TCC) at [16] to [31], the Upper Tribunal recently provided a useful review of the legal principles in this area. From it, I derive the following points (references are to paragraphs in the Upper Tribunal’s decision):

(1) 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’ provision should not be applied so as to operate as a fetter on the right of appeal ([19]).

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

(3) 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]).

(4) 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]).

(5) 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]).

(6) 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]).

(7) 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]).

(8) 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]).

(9) 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]).

(10) 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]), endorsed at [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.

(11) 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.

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

24. In addition, I quote in full these two paragraphs from the decision of the Upper Tribunal in *Elbrook*:-

“21. In the same passage in *ToTel 1*, Simon J also approved two further principles derived from a decision of the VAT and Duties Tribunal, *Seymour Limousines Limited v Revenue and Customs Commissioners* [2009] UKVAT V20966. He said:

‘ ...

ii) The test is one of capacity to pay without financial hardship, and must be applied in a way which complies with the principle of proportionality in order to comply with Community law, see *Seymour Limousines Ltd* (above) at [57].

iii) The hardship enquiry should be directed to the ability of an appellant to pay from resources which are immediately or readily available. It should not involve a lengthy investigation of assets and liabilities, and an ability to pay in the future, see *Seymour Limousines Ltd* (above) at [58]. This is a reflection of the broader principle that the issue of hardship ought to be capable of prompt resolution on readily available material.’

22. Whether resources are immediately or readily available to pay the tax without hardship is a value judgment. The test is not simply of capacity to pay, but capacity to pay without financial hardship. Thus, the mere existence of cash or other readily realisable resources will not necessarily suffice, if the employment of those resources in paying the disputed cash would have consequences that would cause financial hardship. The requirement that the resources be immediately or readily available is a reflection of the structure of s 84(3B), which looks to the existing financial position of the appellant, and does not require enquiry as to possible future action or any potential resources that might become available in the future (see *Buyco Limited and Sellco Limited v Revenue and Customs Commissioners* [2006] UKVAT V19752, at [8].”

25. The *ToTel 1* referred to above is in fact the Court of Appeal in *R* (on the application of *ToTel Limited*) *v* *First-tier Tribunal (Tax Chamber) and Another* [2011] EWHC 652.

Discussion

26. HMRC rightly agree that the *Elbrook* Principles apply. They asked me to consider whether the appellant had put itself in a position of not being able to pay the tax due.

27. The burden of proof in establishing hardship lies with the appellant.

28. Mr Walker explained that the appellant was unable to trade because if it did so then it would be trading whilst insolvent. He explained that the payments made by the appellant in August 2022 were to honour ongoing contractual obligations to creditors that predated the original assessment by HMRC.

29. In order to discharge its burden of proof the appellant must show, on the balance of probabilities, that it would suffer hardship if it were required to pay the £161,012. I have to consider the position as at the date of the hearing.

30. It is clear from the evidence that the company had no immediately or readily available resources. Its financial position in 2021 and 2022 was parlous.

31. As at the date of the hearing the company had no resources. It is not really a question of hardship. The appellant simply has nothing from which it can pay the VAT at stake in its appeal.

Decision

32. It is therefore my decision that the appellant would suffer hardship if it were required to pay that VAT and I therefore allow the appellant’s application for hardship.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

33. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The

application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ANNE SCOTT
TRIBUNAL JUDGE**

Release date: 8 August 2023