



Neutral Citation: [2023] UKFTT 00224 (TC)

Case Number: TC08745

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Decided on the papers

Appeal reference: TC/2021/04604

VALUE ADDED TAX – appeal against HMRC decision to change effective date of registration – HMRC had made two unsuccessful applications in the proceedings (for the appeal to be struck out on basis that hardship had not been established, and then for additional grounds of appeal to be provided by Appellant) – HMRC making application for the appeal to be struck out on the basis that Appellant had no reasonable prospects of success as no evidence had been provided – appeal still at early stage when no directions had been issued for either party to produce their evidence – application refused – HMRC directed to file and serve their Statement of Case without further delay

Judgment date: 1 March 2023

Decided by:

TRIBUNAL JUDGE BAILEY

Between

PHU HUNG LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the Respondents’ application to strike out this appeal on 24 February 2023 without a hearing having first read the Notice of Appeal (with enclosures) received on 24 September 2021 and the documents on the Tribunal file including, in particular, the Respondents’ application to strike out this appeal dated 20 December 2022.

DECISION

INTRODUCTION

1. This decision decides an application made by the Respondents on 20 December 2022 to strike out this appeal. The application is made under Tribunal Rule 8(3)(c) as the Respondents contend that this appeal has no reasonable prospects of success.

2. On 3 February 2023, the Appellant was invited to comment on the application, and both parties were asked if they were willing for this application to be decided on the papers. The Respondents agreed to a paper determination of the application. There was no reply from the Appellant.

THE DECISION UNDER APPEAL AND THE NOTICE OF APPEAL

3. I start with the decision under appeal and the Notice of Appeal filed by the Appellant. On 12 August 2021, the Respondents issued a review decision to the Appellant, upholding an earlier decision to change the Appellant's effective date of registration for VAT. The reviewing officer set out his understanding of the background facts, including the discussions that had taken place between the original officer and the Appellant's representative. The Appellant had registered for VAT in July 2019 with an effective date of 1 May 2019. The reviewing officer set out the Appellant's turnover figures, and noted that there was a steady increase in turnover until June 2019, and a more dramatic increase in turnover from June 2019 onwards. The reviewing office considered the points made by the Appellant's representative, but confirmed the earlier decision to change the effective date of registration to 1 July 2017.

4. The Appellant originally filed an appeal with the Tribunal on 3 September 2021 but this incomplete appeal was returned as it did not include a copy of the Respondents' decision. The Appellant filed a complete appeal with the Tribunal on 24 September 2021. (The Respondents have not objected to this appeal being filed eleven days late, and it is now too late to object.)

5. In the Notice of Appeal, the Appellant noted that the appeal was against the effective date of registration, and that no assessments had yet been raised. The Appellant noted that the Respondents had requested a VAT return for the extended period of 1 July 2017 to 30 April 2019 but the Appellant had not yet completed such a return. With the Notice of Appeal, the Appellant's representative included a two page letter sent to the Respondents, with two further pages of explanation of why the Appellant did not believe that the change to the date of registration was justified. The letter included a request for a copy of a National Minimum Wage report made by the Respondents in November 2018, and made observations about when various employees had started, a business "make over" in August 2017, and how the business operated. The two further pages set out the Appellant's observations on two visits made by the Respondents, and factors that affected the Appellant's level of turnover. The Appellant accepted that earlier record keeping was inadequate but challenged the Respondents' method of calculation. The Appellant suggested an alternative method using the Respondents' figures would give an effective date of registration of 1 August 2018.

6. The appeal was registered by the Tribunal. On 18 January 2022, the Respondents were directed to provide their Statement of Case no later than 21 March 2022.

THE RESPONDENTS' FIRST APPLICATION

7. On 15 March 2022, the Respondents applied for the appeal to be struck out on the basis that the Appellant had neither paid the VAT in dispute nor made an application for hardship to either the Respondents or the Tribunal.

8. On 28 September 2022, a Tribunal Caseworker emailed the parties to point out that the appeal was against a change to the effective date of registration. As there could be no appeal against prime assessments, it did not appear that hardship was engaged. The parties were directed to provide the Tribunal with clarity about what was under appeal.

THE RESPONDENTS' SECOND APPLICATION

9. On 12 October 2022, the Respondents emailed the Tribunal to confirm that hardship was no longer an issue. The Respondents confirmed that a prime assessment had been issued on 8 September 2021 and accepted there was no right of appeal against this assessment (so it could not form part of this appeal).

10. The Respondents went on to state that they did not consider that the grounds of appeal disclosed sufficient reasons for the Appellant to appeal against the effective date of registration. The Respondents asked for a direction that the Appellant file further and better grounds of appeal, and that they should not have to file a Statement of Case until a further 60 days had passed from the provision of those additional grounds.

11. On 21 October 2022, a Tribunal Caseworker emailed the parties to acknowledge the Respondents' application. The Tribunal Caseworker pointed out that there had been a detailed review decision, indicating the Respondents already understood the Appellant's arguments, and also that the Appellant had provided two further pages of grounds when filing the Notice of Appeal. The Respondents were directed to provide their Statement of Case no later than 20 December 2022.

THE RESPONDENTS' CURRENT APPLICATION

12. On 20 December 2022, the Respondents made their current application for this appeal to be struck out. The Respondents set out their contentions as to why they were right to change the effective date of registration and argued that the Appellant had kept insufficient records and had not provided any evidence to support their contentions. The Respondents argued that even if the Appellant's own figures were correct, the effective date of registration should be changed to February 2018.

DISCUSSION AND DECISION

13. Rule 8(3)(c) provides that the Tribunal may strike out the whole or a part of the proceedings if it considers that there is no reasonable prospect of the Appellant's case, or part of it, succeeding.

14. As the application has been brought by the Respondents, the onus is on them to demonstrate, on the balance of probabilities, that the Appellant's case or part of it has no reasonable prospect of success.

15. The Respondents have not referred to the test they consider should be applied by the Tribunal in considering this application. In *HMRC v Fairford Group plc and another* [2014] UKUT 329 (TCC) the Upper Tribunal set out the following:

[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.

16. The Respondents' main argument in support of their application to strike out this appeal is that the Appellant's turnover figures are not reliable because the Appellant has not provided evidence:

- to support their figures;
- to show that improvements made to the nail bar had an effect on sales;
- to show that changes to the price lists had an effect on turnover; or
- to show that social media increased their customer base.

17. The Respondents have also argued that in any event, even on the Appellant's own turnover figures, it would be liable to be registered for VAT from February 2018.

The contention that there is no evidence

18. I remind myself that, despite the time that has passed, this appeal is still at a very early stage. No directions have been issued requiring the parties to provide their list of documents or the names of their witnesses. Very little of the evidence that would be before the Tribunal at a substantive hearing has yet been filed or been required from the parties.

19. I must avoid conducting a mini-trial. At this early stage (when the Respondents have yet to file their Statement of Case so I must rely on their review decision as setting out their case) it appears that the dispute between the parties is primarily a factual dispute but there is also an argument about whether the Respondents' method of scaling back to estimate the Appellant's earlier turnover is appropriate in this case. The Appellant has argued that other factors should be taken into account and that a calculation that involves the number of hours worked by employees is a better proxy for these factors.

20. The Respondents' review decision suggests that until the Respondents' visit in December 2018, the Appellant did not retain daily booking sheets. The Appellant installed a till and a card reader in August 2019 and, prior to that, the Appellant's customers paid in cash. The Appellant's grounds of appeal accept that the Appellant's earlier record keeping was insufficient but do not say anything about the Appellant's record keeping after December 2018. It is unclear – because the proceedings have yet to reach that stage – whether the Appellant will provide documentary evidence and/or witnesses in support of its appeal.

21. At a substantive hearing, the Appellant will bear the onus of proof. Therefore, if the Appellant fails to produce any documents and also fails to call any witnesses to give oral evidence, then the Appellant would have a lower likelihood of success as it would be relying entirely on its argument about the appropriate method of calculating estimated turnover. But, at this early stage of proceedings, the Tribunal (and the Respondents) simply cannot know what evidence the Appellant will present. In the circumstances I am not persuaded that the Appellant's lack of evidence, at a stage prior to any evidence being required, demonstrates that the Appellant does not have a realistic prospect of being successful in this appeal. I am not persuaded that this is an appeal that is not fit for a full hearing.

The Respondents' suggestion that the Appellant's figures show an effective date of registration of 1 February 2018

22. I am bemused by this argument. The Respondents do not state in their application what they understand to be the registration threshold during the periods relevant to this appeal but I note that currently a person must register for VAT if their total taxable turnover for the preceding 12 months exceeds £85,000 (£83,000 between 1 April 2016 and 31 March 2017).

The Appellant's turnover figures from December 2016 to mid-March 2020 are provided in the Respondents review decision letter. Looking at those figures, I calculate the Appellant's turnover for the 12 months to February 2018 to be £74,266. My calculations show that, if the Appellant's turnover figures are correct, the Appellant did not reach an annual turnover of £85,000 or more until May 2019 (unsurprisingly, the month from which the Appellant asked to be registered for VAT). So, if my calculations are correct, and if the Appellant demonstrates to the Tribunal's satisfaction that its turnover figures are correct, then the Appellant will be wholly successful in this appeal.

23. However, even if it were not the case that the Appellant's figures for its turnover support its choice of 1 May 2019 as the effective date of registration, the decision that the Respondents are defending is a decision to change the Appellant's effective date of registration to 1 July 2017, some seven months earlier than 1 February 2018. So, even if the Respondents were correct to argue that the Appellant could only succeed to the extent of establishing that the effective date of registration was 1 February 2018, that alone would be sufficiently good reason for me not to exercise my discretion to strike out this appeal. As Judge Jonathan Richards stated in *The First de Sales Limited Partnership and others v HMRC* [2018] UKFTT 106 at paragraph 54:

It follows that there is no reasonable prospect of the appellants establishing that they are entitled to the entirety of the deduction they have claimed in relation to the restrictive undertakings. Nevertheless, if I thought that the appellants had a reasonable prospect of establishing that they were entitled to some deduction, I do not consider I should strike out the appeal since the act of striking out the appeal would deprive the appellants of the ability to argue for any deduction at all.

24. In the circumstances, the Respondents have not demonstrated on the balance of probabilities that the Appellant does not have a reasonable chance of success in this appeal.

CONCLUSION

25. The Respondents' application for this appeal to be struck out is dismissed.

26. The next stage is for the Respondents to file their Statement of Case. The Respondents have now been on notice for more than a year that a Statement of Case is required from them. Given the time that has passed, I do not consider it would be appropriate for the Appellant to be asked to wait a further 60 days to see the Respondents' case. I direct the Respondents to file their Statement of Case no later than 28 days from the date of release of this Decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

27. 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.

**JANE BAILEY
TRIBUNAL JUDGE**

Release date: 1st MARCH 2023