[2017] UKUT 181 (TCC)

Appeal number: UT/2016/0101

VAT – hardship application – s 84, Value Added Tax Act 1994 – whether the FTT wrongly treated as irrelevant (i) the availability of the appellant's extant borrowing facilities, or (ii) the ability to borrow on its non-business investments – whether the FTT failed to take account of other relevant factors

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

ELBROOK (CASH & CARRY) LIMITED **Respondent**

TRIBUNAL: MR JUSTICE MARCUS SMITH
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, The Rolls Building, Fetter Lane, London EC4 on 30 March 2017

Howard Watkinson and James Jackson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Geraint Jones QC, instructed by Rainer Hughes, for the Respondent

DECISION

1. This is the appeal of the Appellants, HMRC, from the decision of the First-tier Tribunal ("FTT") released on 21 March 2016 by which the FTT decided that the requirement on the Respondent, Elbrook (Cash & Carry) Limited ("Elbrook"), to pay or deposit the amount of assessed VAT in dispute, namely £771,430.20, would cause Elbrook to suffer hardship. In consequence, Elbrook's appeal against the VAT assessment was to be entertained without the payment or deposit of that amount.

Background

2. Elbrook is a cash and carry wholesaler which also deals in alcohol wholesaling and operates a function hall, restaurant and a film studio.

3. The VAT assessment in question arose as a result of a decision of HMRC, notified to Elbrook on 18 December 2014, to deny Elbrook credit for input tax of £771,430.20 which had been deducted by Elbrook in computing its VAT for the five quarterly periods 01/13 to 04/14. An assessment for that amount was issued by HMRC on 6 January 2015. Following a review, HMRC's decision and the assessment were upheld, and Elbrook filed a notice of appeal on 4 March 2015, in which it was stated that Elbrook had a pending hardship application before HMRC.

4. At around the same time, HMRC was taking steps to revoke the authorisation of Elbrook under the Warehouse-keepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR"). That authorisation was revoked with effect from 24 March 2015.

5. On 28 April 2015, Elbrook's accountants, Mehta & Tengra, sent to HMRC a letter addressed to "To whom it may concern", and referred to by the FTT as the TWIMC letter, in support of Elbrook's hardship application. That letter, as the FTT recorded at [13], stated that as a result of the cancellation of Elbrook's WOWGR authorisation:

> (1) payment of £750,000 had been made to a warehouse to enable the release of goods;
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> (2) payment had been made in advance to certain suppliers who had demanded funds up front before despatching the ordered goods; and
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> (3) certain professional fees had been paid to defend the cancellation of the WOWGR authorisation.

The letter noted that there had been a drop in turnover and margins, and attached evidence to demonstrate that the company's bank deposit had reduced from £5 million to £300,000 by 2 April 2015 and that the company had used up its loan facilities of £5 million. The letter stated that there was immense pressure on the company's cash flow.

6. Further information was sought by HMRC on 1 June 2015. On 6 July 2015 Mehta & Tengra again wrote to HMRC, providing some 190 pages of additional documentation, and confirmation that Elbrook had not approached its bank for further funds, as it had not wished to panic the bank. Mehta & Tengra did include details of approaches to American Express and other potential lenders. The documentation provided included: the statutory accounts for the year ended 31 July 2014; management accounts for nine months to 31 May 2015; a cash flow forecast to 30 November 2015; lists of investments and properties; and bank statements for the six-month period to 29 May 2015.

7. A further request for information was made by HMRC on 17 July 2015, which sought detailed information by reference to the documents that Elbrook had provided. That letter was sent direct to Elbrook, as HMRC had not received the relevant authority to correspond directly with Mehta & Tengra. Subsequent correspondence makes the point that neither Mehta & Tengra nor Elbrook's solicitors, Rainer Hughes, had received that letter, but in the event, and absent a reply having been received, HMRC wrote to Elbrook on 20 August 2015 to say that they were "not completely satisfied you would suffer hardship if required to pay or deposit the amount of tax under appeal."

8. Having been informed of HMRC's decision in this respect, on 11 September 2015 the FTT issued directions with a view to Elbrook's hardship application being determined at a hearing. The FTT records at [18] of its decision that there then followed "a great deal of procedural wrangling between the parties and the Tribunal". The FTT does not provide further details, confining itself to comments regarding certain "intemperate language" and the fact that an application by HMRC to strike out the hardship application had not been taken forward.

9. Further information is recorded by the FTT as having been provided by Elbrook. This comprised unaudited management accounts for the year to 31 July 2015 and the period 1 August – 31 July 2015, "2014 activity reports" for customers to which duty suspended goods had been supplied before the cancellation of the WOWGR authorisation, a facility letter from Barclay's Bank and a response (dated 12 January 2016) to HMRC's letter of 17 July 2015. A witness statement of Mr Amjad Khalid, a director of Elbrook, exhibited an invoice from Gallaher Ltd in an amount of £860,167 paid by direct debit on 3 February 2016 (although, as the FTT remarks at [19], it was not clear what amounts might be due monthly), a bank statement at 3 February 2016, and a short cash flow forecast on a weekly basis of liabilities payable and monies receivable.

The law

10. An appeal against an assessment to VAT such as the one at issue in Elbrook's appeal, which is an assessment made under s 73(2) of the Value Added Tax Act 1994 ("VATA"), may be appealed to the FTT pursuant to s 83(1)(p) VATA. Such an appeal can, however, only be entertained by the FTT if either the appellant has paid or deposited the tax assessed or if either HMRC or the FTT has been satisfied that such a requirement would cause the appellant "hardship".

11. The material provisions are set out in s 84 VATA, as follows:

> "(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)(b), (n), (p), (q), (ra), (rb) or (zb), it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.
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> …
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> (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—
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> (a) HMRC are satisfied (on the application of the appellant), or
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> (b) the tribunal decides (HMRC not being so satisfied and on the application of the appellant),
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> that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship."

Jurisdiction of the Upper Tribunal

12. This Tribunal has jurisdiction on an appeal from a decision of the FTT on a hardship application. That is so notwithstanding that s 84(3C) VATA provides in terms that the decision of the FTT is final. It was held by the Court of Appeal in *R (on the application of ToTel Ltd) v First-tier Tribunal (Tax Chamber) and another* [2013] STC 1557 ("*ToTel 1*") that the provision by which s 84(3C) was inserted into s 84, namely paragraph 221(5) of Schedule 1 to the transfer of Tribunal Functions and Revenue and Customs Order 2009 (SI 2009/56), was *ultra vires* s 124 of the Finance Act 2008, and that accordingly the statutory right of appeal to the Upper Tribunal in respect of a decision of the FTT on a hardship application had not been lawfully removed.

HMRC's grounds of appeal

13. With permission of the FTT in respect of Ground 1 and with the permission of this Tribunal in respect of what is now Ground 2, HMRC appeal to this Tribunal on the following two grounds.

Ground 1

14. First, HMRC submits that the FTT's decision that Elbrook's ability to borrow a sum to pay the VAT in dispute using either (i) its extant borrowing facilities or (ii) borrowing on its non-business investments, was irrelevant to the question of hardship was an error of law.

Ground 2

15. Secondly, it is submitted that the FTT failed to take into account relevant factors and in doing so fell into an error of law. Those factors were as follows:

(1) Elbrook was a cash and carry business which also had some interest in a film studio and a restaurant. Elbrook's business was not in property investing. Despite this, Elbrook had, on the balance sheet presented to the FTT before the hearing, fixed assets of more than £20 million. The FTT erred in failing to take into account that Elbrook could have paid the VAT in dispute if it realised even a small proportion of the value of its fixed assets.

(2) Elbrook failed to produce any evidence regarding the two French companies that its accounts showed it to own. The FTT simply ignored this in deciding whether Elbrook had discharged its burden of proof.

(3) Elbrook provided a cash flow forecast in support of its claim to hardship. HMRC analysed this and submitted that it was seriously inaccurate, a matter that was relevant to Elbrook's claim that it would suffer hardship if it paid the sum in dispute. The FTT simply ignored the issue.

(4) Elbrook provided only partial evidence about its financial position. HMRC relied on this in support of their submission that Elbrook had not discharged its burden of proof. Again, the FTT simply ignored the fact that Elbrook had not provided anything like a full picture of its financial circumstances.

(5) HMRC invited the FTT to conclude that Elbrook had wilfully delayed its hardship application and the provision of evidence. The FTT simply ignored the point. The impact of this was that the FTT could, and should, have looked at Elbrook's position as and when the VAT in dispute was due to be paid, and not many months later.

Discussion

16. The decision of the FTT can be interfered with by this Tribunal only if it involved the making of an error on a point of law: s 12(1) of the Tribunals, Courts and Enforcement Act 2007. In the context of a decision on a question whether the FTT is satisfied that the requirement to pay or deposit the VAT in dispute would cause the appellant to suffer hardship, that decision involves a value judgment or multi-factorial assessment.

17. An appeal against such a judgment, on a question of law, needs to be approached with appropriate caution. As Jacob LJ observed in *Proctor & Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990, at [7], it is the FTT which is the primary maker of a value judgment based on primary facts. Unless the FTT has made a legal error, for example by reaching a perverse finding or failing to make a relevant finding or misconstruing the statutory test, it is not for the appeal court or tribunal to interfere. Furthermore, as Lord Hoffmann said in *Biogen v Medeva* [1997] RPC 1, at p 45:

> "Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

18. Lord Hoffmann returned to the same theme in *Designers Guild v Russell Williams (Textiles) Ltd (trading as Washington D.C.)* [2000] 1 WLR 2416, a case concerning whether one company had infringed another's copyright by copying a fabric design. The judge at first instance had found that there had been such copying. The Court of Appeal conducted its own analysis and came to a different view. The House of Lords reversed the decision of the Court of Appeal, holding that it had adopted the wrong approach. Lord Hoffmann said, at p 2423:

> "… because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle …"

The legal principles

19. We turn first to the legal principles. It is clear that s 84 VATA is intended to strike a balance between, on the one hand, the desire to prevent abuse of the appeal mechanism by employing it to delay payment of the disputed tax, and on the other to provide relief from the stricture of an appellant having to pay or deposit the disputed sum as the price for entering the appeal process, where to do so would cause hardship. That may, as the tribunal dealing with the hardship application in *ToTel 1* observed, and which is recorded by Simon J at [70] of *ToTel 1* in the High Court, be apt to prevent a meritorious appeal being stifled, but we should say that there is nothing in s 84 which requires the merits of an appeal to be considered, and it would not be appropriate for the FTT on a hardship application to concern itself with the merits of the underlying appeal. What is material is the right of the taxpayer to appeal a relevant decision and the risk of that right being stifled by a requirement that would cause hardship, and not whether or not the appeal is meritorious.

20. In that connection it has been established that the relief provided by s 84(3B) VATA in cases of hardship should not be applied so as to operate as a fetter on the right of appeal (see *Tricell UK Ltd v Revenue and Customs Commissioners* [2003] UKVAT 18127, at [27], cited with approval by Simon J in *ToTel 1*, at [82]). Hardship applications must therefore be approached in that context.

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:

> "…
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> 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]).

23. The availability of resources by way of borrowing may therefore be considered, as where there are unused facilities, or the facilities are immediately available with minimal formality and without the obtaining of those facilities in itself giving rise to financial hardship. The principle was encapsulated by the chairman of the VAT and Duties Tribunal, Dr John Avery Jones, in *Buyco and Sellco*, at [8], in a passage relied upon by the FTT, as follows:

> "So far as borrowing is concerned I accept that a business may need to borrow in order to pay VAT in dispute if the business had existing unused borrowing facilities (or could obtain such facilities or an increase in them merely by asking the bank). Like Mr Bishopp in *Tricell* I do not consider that, if a business's normal bankers will not lend, it should be expected to pursue other sources of finance purely for the purpose of paying the tax in dispute. I consider that I should rely on the fact that a business that needs finance for the business will already have taken reasonable steps to obtain it, and if a business knows that a bank is unlikely to lend in the circumstances I can understand its being reluctant to make a definite request and risk receiving a refusal which might make borrowing more difficult in the future. I also bear in mind that investigating new sources of borrowing may require the incurring of significant expenses, such as valuations of land and legal fees, which might not ultimately achieve any results."

24. We agree that ordinarily the possibility of an appellant obtaining access to a new source of borrowing should not be regarded as a resource that is immediately or readily available for this purpose. That is not to exclude such borrowing from being taken into account in particular circumstances, for example where it is shown that arrangements for such finance are at such a stage where it has become readily available. But the mere fact that other sources of finance might be explored, or that an appellant might have equity in a property or other security to support possible borrowing, will not of itself render such borrowing capacity as a resource which is either immediately or readily available. To the extent that the decision of the VAT and Duties Tribunal in *Peter and Linda Kemp v Revenue and Customs Commissioners* (No 19479; 28 February 2006) suggests a different approach, we would respectfully disagree with it, and endorse the view taken by the FTT at [24].

25. The same principles can be applied to other sources of finance, as well as third party borrowings. Thus, as Dr Avery Jones found in *Buyco and Sellco,* at [8], a disposal outside the ordinary course of business of assets that were properly purchased for the business would involve an irrevocable step that could cause hardship, whether or not the assets are currently used in the business. On the other hand, as the FTT (Judge John Walters QC) observed in the unpublished decision in *DGM UK Limited v Revenue and Customs Commissioners* (TC/2011/04619), at [31], each case must be considered by reference to its own circumstances and there is no hard and fast rule, for example, that regard can never be had to the resources of connected (but legally independent) entities where, as in that case, 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. It is all a matter of the individual circumstances of the particular case.

26. Consistently with the need to consider immediately or readily available resources, the normal rule is that the tribunal should look at the position as at the date of the hearing. Furthermore, in the same way that the tribunal should consider the availability to the appellant of present resources and whether hardship would be caused by the immediate use of any such resources to pay the disputed tax, and should not speculate as to what might become available to the appellant in the future, the tribunal should ordinarily have regard to the position at the time the question of hardship falls for determination, and not any earlier time. As Nugee J succinctly put it in this Tribunal in *ToTel Ltd v Revenue and Customs Commissioners* [2015] STC 610 ("*ToTel 2*"), at [37], the question is "Would it cause the applicant hardship if he is required to pay or deposit the tax assessed?"; it is not "Would it have caused the applicant hardship if he had been required to pay or deposit the tax assessed when the appeal was brought?"

27. There are, however, circumstances where this normal rule may not be applied. Relying on *ToTel 2*, Mr Watkinson submitted that it was open to the tribunal to consider the question of hardship by reference to circumstances at an earlier date from that of the hearing. He argued that the tribunal may take into account whether the appellant is himself responsible for putting himself in a position where he cannot pay the tax due, and that would include by delaying the hearing so that at the time of the hearing he cannot pay the tax due without hardship.

28. We accept that those are relevant factors for the FTT to consider. But it is important, we consider, for the tribunal to be mindful of the statutory question, and the relevance of those factors in that context. The question is not as simple as enquiring whether there has been a delay, or even whether the delay has been caused by the appellant. The question is one of causation, and we can do no better than to refer to the decision of Nugee J in this respect in *ToTel 2*, at [45] – [47]:

> "[45] I consider that the principle … that the tribunal can take into account the fact that transactions have been undertaken with a view to avoiding payment of the disputed tax, can best be reconciled with the statutory language (with its apparent requirement to assess the question of hardship at the date of the hearing) as follows. The statute requires

> the tribunal to decide whether the requirement to pay or deposit the amount determined 'would cause' the appellant to suffer hardship. In the example I have given, it may well be that the appellant will be in financial difficulty if he now has to find the £100,000. But the real cause of that is not the requirement to pay or deposit the £100,000; the real cause is the appellant's own deliberate act in paying away the £200,000 which would otherwise have been available to him for that purpose.
>
> [46] This seems to me the most satisfactory way both to enable the tribunal to take into account the fact that the appellant is himself responsible for being unable to pay, and to respect the statutory language which requires the tribunal to assess whether the requirement to pay or deposit the tax would cause the appellant hardship rather than assessing whether it would have caused him hardship.
>
> [47] But if this is right, then similar considerations apply where the appellant has been responsible for delaying the hearing of the application. If for example, the appellant can easily afford the £100,000 when the appeal is brought, but is responsible for the hearing of the hardship application being delayed by two years, by which time he will be in difficulties if he has to find it, I do not see why the tribunal should not conclude in an appropriate case that the appellant is again himself the real cause of any hardship that may be caused. Had he not delayed the application, the requirement to pay or deposit the tax in issue would not have caused him hardship, so it is not so much the requirement that is the real cause of the hardship as his own delay."

29. Hardship should ordinarily be assessed on the basis of up-to-date information on all aspects of the business of the appellant. That was the view of Dr Avery Jones in *Buyco and Sellco*, at [15], which was endorsed by Simon J in *ToTel 1* at [79]. As Dr Avery Jones also said, and which was likewise endorsed, HMRC should apply for a direction for disclosure if they are not satisfied with what the appellant has provided. Furthermore, as Nugee J said in *ToTel 2* at [79], since HMRC is unlikely to have much accounting information about the appellant, in the ordinary case the appellant is the only one who can demonstrate hardship, and the absence of contemporaneous accounting information is in itself a justification for the tribunal to conclude, in an appropriate case, that it can place little if any weight on the appellant's oral assertion that it is unable to afford to pay.

30. The need for the appellant to provide relevant, and up-to-date, evidence is one aspect of the burden of proof which is on the appellant to establish that the payment or deposit of the disputed tax would cause financial hardship (*ToTel 2*, at [50]).

31. Finally, we should note that the test for financial hardship is an "all or nothing" one. The only question is whether payment or deposit of the whole of the disputed tax would cause financial hardship. It is of no relevance that payment of some lesser amount might be capable of being achieved without hardship (*Buyco and Sellco*, at [6]).

Ground 1

32. With those principles in mind, we turn to HMRC's grounds of appeal. The first ground takes as its starting point what the FTT said at [38], namely:

> "Bearing in mind the factors set out in *ToTel 1* and *Buyco* we consider that we should look simply at the appellant's ordinary trading transactions, not at what it might be able to sell from its fixed assets, or be able (realistically) to borrow from its normal resources or what it might at any given moment be capable of paying …"

33. Mr Watkinson submitted that, on the face of the FTT's decision, the FTT had accepted as a matter of law that whether the appellant had shown that it could not pay the VAT in dispute from its extant borrowing facilities was a relevant enquiry, but had then said that this enquiry was, in effect, irrelevant.

34. We do not accept Mr Watkinson's submission. Although the language used by the FTT was infelicitous, its meaning when viewed in the context in which it appears is clear. It is evident that, in saying what it did at [38], the FTT was drawing a distinction between the sales of assets in the normal course of trade and the sale of fixed assets, the former of which would be relevant and the latter of which would, following *Buyco and Sellco*, normally be regarded as giving rise to hardship, and that the FTT associated borrowing from normal sources with ordinary trading and the ability to pay from immediately available resources, and accordingly regarded such borrowing capacity as a relevant factor.

35. That this is the case emerges from consideration of what the FTT went on to say in the remainder of [38] and in [39]. The FTT clearly regarded the available resources of Elbrook from its trading operations as relevant to be considered. Equally it referred to Elbrook's "normal resources" as including its banking facilities "if these have not been exhausted". It explained that it had qualified the ability of Elbrook to borrow by the use of "realistically" advisedly, in order to take account of the difficulties that it found could have arisen if Elbrook had, in the circumstances of this case, approached its existing bankers. That explanation makes sense only if the FTT was saying that what could realistically be borrowed from an appellant's normal resources was a relevant factor.

36. Viewed in this way, which we consider is the right analysis of what the FTT said at [38] and [39], we do not accept Mr Watkinson's argument that there is any contradiction between those two paragraphs. We do not accept that the FTT discarded evidence relating to Elbrook's extant borrowing facilities, whether the revolving credit facility of £4 million or the additional overdraft facility of £1 million which had been granted with effect from 15 September 2015 and which was expressed to remain in place until 31 January 2016, in other words shortly prior to the hearing before the FTT. The FTT made a finding of fact at [38] that Elbrook's business needed a cash float and that its available resources from its trading operations fluctuated between less than a positive number and £2 million. Having regard also to the effect of the WOWGR cancellation on the business and consequent financial loss, the FTT concluded that the payment of the whole amount of the disputed VAT would cause hardship. It went on, at [39], to find as a fact that an

approach to its bankers could have caused those bankers to panic, and on that basis further borrowing from those bankers was not a realistic proposition. We do not consider that the FTT's conclusion in this respect is undermined by any failure to find that the existing banking facilities had been exhausted; it is evident that the FTT had in mind both the existing and available resources and the hardship that would be caused to Elbrook's financial position either in employing those resources to pay the VAT, or by reference to what it could realistically borrow.

37. As a second limb of Ground 1, Mr Watkinson submitted that the FTT had erred in law in effectively disregarding the ability of Elbrook to borrow against its "non-business" assets comprising a £5.9 million investment portfolio. Mr Watkinson sought to draw a distinction between a taxpayer that has assets that appear obviously connected to the running of its business, for example a taxpayer which owns its own trading premises, and a taxpayer who has extensive assets that have no obvious connection with the running of the business. He submitted that hardship should be construed as referring to harm to the business of the taxpayer, and that borrowing on the security of non-business assets and sales of such assets to raise funds for the payment of the disputed tax should not be regarded as giving rise to such hardship.

38. That submission is, in our judgment, untenable. Leaving aside the question whether the investment properties owned by Elbrook could in any sense be described as other than assets of its business as a whole, there is nothing in the wording or context of s 84(3B) VATA to suggest any such limitation. What s 84(3B) is directed towards is financial hardship to the appellant; such hardship might be to the business of the appellant, but it could equally be personal financial hardship. There are numerous obvious examples; an appellant who is able to pay only by selling personal investments at a loss, or whose sale would trigger a substantial tax bill that would not otherwise arise. To the extent such assets would be readily realisable, they would be relevant to consider, but so too would be any financial hardship that might arise in consequence of the realisation of those assets. Furthermore, there is no warrant in the statutory language, or in the context, for construing hardship as being confined to hardship in the context of a taxpayer's business. That would be a very different test, and one that does not arise out of the language of s 84 VATA. Hardship for this purpose simply means financial hardship, and is a concept that needs no further elaboration or limitation.

39. We do not consider that Mr Watkinson can derive any support for his proposition from *Buyco and Sellco*. Mr Watkinson sought to rely on what Dr Avery Jones had said in the final part of [8]:

> "In relation to disposals outside the ordinary course of business of assets that were properly purchased for the business, I consider that it would involve hardship for the business to take the irrevocable step of selling them in order to pay VAT in dispute, whether or not the assets are currently used in the business. The hardship would also include the expenses incurred in selling."

40. Although Dr Avery Jones' remarks were directed in terms at business assets, we do not consider that he intended to draw the distinction put forward by Mr Watkinson.

The distinction drawn by Dr Avery Jones was between disposals in the ordinary course of the business, such as the ordinary trading transactions of the business and the consequent cash flow, and sales of assets that, although purchased for the business, would not be disposed of in the ordinary course. Those assets would not normally be regarded as resources that were immediately or readily available to pay the disputed tax without hardship. Exactly the same principle would apply to sales of assets with no connection to the business.

41. The same principle applies to borrowings secured by such non-business assets. There may be circumstances in which the ability to make such borrowings may be regarded as constituting an immediately or readily available resource which may be realised without giving rise to financial hardship. Ordinarily, however, the process of seeking and completing such finance may be found to militate against such a conclusion. In the absence, therefore, of appropriate circumstances, a conclusion that the prospect of such borrowing would not constitute immediately or readily available resources capable of being realised without financial hardship will be one that is open to a tribunal, and not capable of being displaced as an error of law. In this case, by discounting by reference to *ToTel 1* and *Buyco and Sellco* the fixed assets, including the investment properties, which were accounted for as fixed assets in Elbrook's accounts, the FTT was, at [38], concluding that such assets, and their borrowing capacity (if any), were not immediately or readily available resources that could be realised without financial hardship. That was a conclusion that it was open to the FTT to reach.

42. We find therefore that Ground 1 does not persuade us that the FTT made any error of law.

Ground 2

43. Ground 2 is a more compendious ground, asserting as it does that the FTT failed to take account of a number of relevant factors in making its value judgment.

Fixed assets and investment property portfolio

44. The first such factor identified by HMRC is the fixed assets of Elbrook, including its investment property portfolio. We have largely addressed this matter when considering Ground 1. For the reasons we have given, we do not consider that the FTT was wrong to regard the fixed assets as not being immediately or readily realisable resources in the sense described in *ToTel 1*, at [82], nor that it could not properly have regarded the sale of such assets as giving rise to hardship as set out in *Buyco and Sellco*, at [8]. That the FTT was applying those principles to Elbrook's fixed assets is clear from the introductory words to [38] of its decision. The FTT did not disregard Elbrook's fixed assets, including its investment property portfolio; it had due regard to those assets and properly applied the applicable law to them.

45. In reaching that conclusion, we reject again the submission of Mr Watkinson that a distinction should, as a matter of principle, be drawn between business and non-business assets. He sought to argue, first, that the test of ready availability in such

cases ought to be flexible, and secondly that commercial properties are routinely sold in very short timescales. We disagree with both propositions. As to the first, there is no warrant for applying anything other than the ordinary meaning of "immediately or readily available resources". As we have said, that is a question that is one of value judgment for the tribunal, and it is one that should take account of all the circumstances. As to the second, we do not discount the possibility of there being evidence, in a given case, as to the ready realisability of a particular property, and that of course would be something relevant to the tribunal's determination, but in this case there was no such evidence, and no basis on which the FTT could conclude that any of the fixed assets should be regarded as readily available resources.

French companies

46. The second factor which is said to have been ignored is the absence of evidence concerning the two French companies that Elbrook's accounts showed it to own. It is submitted that the FTT ignored this in deciding whether Elbrook had discharged its burden of proof.

47. It is correct to say that the FTT made no specific mention of the French subsidiaries. Those companies, TMT Stockage and EBAF Holdings, were referred to in the Report of the Directors in the audited accounts of Elbrook for the year ended 31 July 2014 as having been respectively acquired in August and September 2014 in order to purchase a warehouse and its trading operations. But, as Mr Jones submitted, there was nothing to indicate that those companies should be regarded in any way other than fixed assets of Elbrook, and not therefore as immediately or readily available assets. The absence of any specific reference to those assets did not mean that the FTT disregarded them; they were encompassed in the description of fixed assets referred to by the FTT at [38].

48. This is not a case where, on the evidence, those French companies could be regarded as the source of readily-available finance, such as was the case in *DGM UK Limited*. In contrast to that case, there was here no evidence of a course of activity between Elbrook and its associated companies to suggest that the reasonable requirements of Elbrook, including the requirement to pay or deposit the disputed tax, would ordinarily be met by cash advances to Elbrook by one or more associated companies.

49. In our judgment, on the evidence before it, the FTT was entitled to regard the shares in the two French companies as nothing more than fixed assets, and to take the view that, along with other fixed assets, those assets were not immediately or readily realisable without causing hardship.

Cash flow forecast

50. The third issue raised under this ground is the absence of any finding of fact as to the accuracy or otherwise of Elbrook's cash flow forecast. That forecast, for the period from 1 June 2015 to 30 December 2015, had been provided as part of the materials sent by Mehta & Tengra to HMRC with their TWITMC letter of 28 April

2015. Mr Watkinson submitted that, as recorded by the FTT at [34], HMRC had argued that the forecast was seriously inaccurate and could not be relied upon. That submission had been based on a comparison of the cash flow forecast for the period from August to October 2015 with the unaudited management accounts for the same period, with the net inaccuracy being put by HMRC at £740,000.

51. We do not consider that this asserted deficiency in the FTT's reasoning can come close to an error of law. The FTT recorded the submission, but clearly did not regard it as material. It was entitled to come to that view. The FTT did not base its conclusion solely on the impugned cash flow forecast; it had regard to all the financial evidence before it, including a further forecast which was provided on the day of the hearing, and in respect of which we heard no argument as to its accuracy. The argument with respect to the impugned forecast was not directed at any particular error which affected the FTT's conclusion, in particular the FTT's finding, at [38], that Elbrook's available resources from its trading operations fluctuated between less than a positive number and £2 million. That was a finding which the FTT was entitled to make on the evidence, and any alleged discrepancy between the cash flow forecast and the unaudited management accounts for the period between August and October 2015 cannot form a basis for interfering with that finding or with the conclusion of the FTT which flowed from the evidence as a whole.

Partial evidence of Elbrook's financial position

52. The fourth factor which is said to have been disregarded by the FTT was the fact that, as was submitted by HMRC to the FTT, Elbrook had provided only partial evidence as to its financial position, and that this supported HMRC's submission that Elbrook had not discharged the burden of proof.

53. In support of this argument, Mr Watkinson referred to *ToTel 2*, at [79], where, as we recorded earlier, Nugee J made the point that the absence of contemporaneous accounting information can in itself be a justification for the tribunal to conclude, in an appropriate case, that it can place little if any weight on the appellant's oral assertion that it is unable to afford to pay. We respectfully agree. But that does not amount to an inviolable rule that in the absence of such information a hardship application is bound to fail. Mr Justice Nugee was doing no more than to confirm that in such circumstances it would be open to the tribunal to reach such a conclusion. Whether such a conclusion should be reached must, at the end of the day, turn on all the circumstances, including in particular what evidence has actually been adduced by the taxpayer.

54. When considering the question of hardship, the tribunal must of course consider whether there is adequate evidence to support such a finding. In this case, the FTT had a considerable body of evidence before it. Mr Watkinson submitted that it was insufficient for the following reasons. As at the date of the hearing, 3 February 2016, the last unaudited management accounts provided by Elbrook were three months old, and accordingly did not take account of the most recent Christmas trading period which, on Elbrook's own evidence, was its most substantial, the last audited financial statements were to the year ended 31 July 2014, bank statements had been provided

for the period from 28 February 2015 to 29 May 2015 and for 3 February 2016 itself, but there were no statements for the interim period of 30 May 2015 to 2 February 2016 showing, for example, how Elbrook had used (or not used) its £1 million overdraft facility that had been granted to it with effect from 16 September 2015. There was no contemporaneous evidence before the FTT as to the extent to which Elbrook had used its revolving credit facility of £4 million, the last such evidence being a letter from its accountant dated 28 April 2015 in which it was stated that all but £300,000 of the facility had been used up, and a further letter dated 12 January 2016 which stated that as at 31 October 2015 Elbrook had bank loans of £7.3 million, neither letter being supported by documentary evidence.

55. The question of the sufficiency of evidence is essentially one for the value judgment of the FTT, having regard to the particular circumstances of the case, and the evidence as a whole. Although, as Nugee J said in *ToTel 2*, at [79], it is possible for a tribunal in particular circumstances to place little weight on the witness evidence of an appellant in the absence of contemporaneous accounting information, that does not exclude the value of such witness evidence in all cases. Having regard to the evidence as a whole, in our judgment the FTT was entitled to take the view that it had sufficient evidence on which to base its conclusion, taking into account, as the FTT evidently did, the burden of proof which rested on Elbrook. That is not a view which we consider to be capable in this case of being interfered with as a matter of law.

Delay

56. The final factor said to have been disregarded by the FTT is delay. It had been submitted to the FTT that Elbrook had wilfully delayed its hardship application and the provision of evidence. That point was, it was argued, not dealt with by the FTT.

57. We have summarised the law regarding the significance of delay in determining a hardship application. We do not accept Mr Watkinson's submission that delay of itself mandates a different approach, and that in all cases of delay the tribunal should have regard to the appellant's position at an earlier date. The key factor in the significance of delay is whether it affects causation, in other words whether the delay, or something which has occurred as a consequence of the delay, is the proximate cause of the financial hardship, and not the requirement to pay or deposit the disputed tax. That was the reasoning of Nugee J in *ToTel 2*, at [47], with which we respectfully agree. That will necessarily involve enquiry as to the financial position of the appellant at the time of making the appeal to the tribunal. If the appellant was able to afford to pay the disputed tax at that time, and the tribunal concludes that in the intervening period it is the appellant who has caused the financial hardship in some way, the necessary causation condition in s 84(3B) VATA will not be satisfied.

58. In any event we do not accept that the FTT failed to address the question of the delay and the submission for HMRC that it had been Elbrook which had wilfully delayed the hardship application. The FTT was mindful of the extensive argument it had heard concerning the procedural history. That it found it of little import is evident by its description of it, at [18], as "procedural wrangling". That, in our judgment, was sufficient to dispose of any argument as to responsibility for the delay. There was

nothing to indicate that Elbrook had been the cause of its own financial hardship, and accordingly no reason to interfere with the FTT's conclusion that it would be the requirement to pay or deposit the disputed tax that would cause that hardship.

59. We find therefore that none of the elements of Ground 2, whether taken individually or together, persuades us that the FTT made any error of law.

Conclusion

60. Although the FTT's decision might in places have been more felicitously worded, and it might have provided more detailed reasoning in certain respects, taken as a whole it did, in our judgment, fairly resolve all the issues that were material for its determination. Particularly in the case of a hardship application which should not involve a lengthy investigation of assets and liabilities, there is no need for a lengthy judgment. It nonetheless remains necessary, as the leading authority in this respect, *English v Emery Reimbold & Strick Limited* [2002] 1 WLR 2409, per Lord Phillips MR at [19], makes clear, for the tribunal to identify and record those matters which were critical to its decision. We consider that the FTT did so in this case.

61. In summary, in our judgment, the FTT was entitled to reach the conclusion it did on the basis of the evidence before it. No error of law can be identified in its decision.

62. We dismiss this appeal.

MR JUSTICE MARCUS SMITH
UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 10 May 2017