[2016] UKFTT 456 (TC)

TC05209

Appeal number: TC/2013/01008

VALUE ADDED TAX – assessment – appeal – tax unpaid – statement in Notice of Appeal that appellants had applied to HMRC for agreement that appeal may proceed without payment or deposit of tax and that application granted – no such application made – subsequent refusal of application by HMRC – consideration by Tribunal – delay between application and date of hearing – whether assessment in amount determined on review or as reduced following ADR despite Appellants' withdrawal from ADR agreement – whether sufficient evidence to support application – no – application refused – consideration of Totel and appeal rights

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAVED and AZRA MUGHAL (PARTNERSHIP) trading as DALLAS CHICKEN AND RIBS **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN CLARK

Sitting in public at Fox Court, 30 Brooke Street, London EC1 7RS on 26 April 2016

The Appellants were not present and were not represented

Rita Pavely, Officer, Local Compliance, Appeals and Reviews, HM Revenue and Customs, for the Respondents

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DECISION ON HARDSHIP APPLICATION

1. In their Notice of Appeal dated 14 November 2012, resubmitted on 6 February 2013, the Appellants appealed against an assessment to VAT. That Notice, which had been completed by the Appellants' representative, stated that the Appellants had applied to the Respondents ("HMRC") for their agreement that the appeal could proceed without payment or deposit of the disputed tax, and that their application had been granted. As I explain below, an application was subsequently made, and refused by HMRC. The purpose of this hearing was to hear the Appellants' application.

2. On 17 April 2016 Mr Mughal sent an email to HM Courts & Tribunals Service ("HMCTS") in the following terms:

> "Please take note that we will no longer be attending the above tribunal that was due to take place on Tuesday 26th April 2016 as this matter has now been settled between all parties involved."

3. As a result, at the point when this hearing was due to begin, the Appellants were not present and no representative had arrived to appear on their behalf.

4. I had been provided with a copy of the information sheet which had been sent to the Appellants' address together with the letter giving notice of the hearing. This information sheet explained that the parties should assume that a hearing remained in the list unless the Tribunal informed them that it had been removed. It also stated that if an appeal was settled before a hearing, then the hearing would be taken out of the list when a formal agreement or evidence that the disputed decision or appeal had been withdrawn was provided.

5. I determined that it was in the interests of justice to proceed with the hearing.

The background as explained by Mrs Pavely

6. Mrs Pavely referred to the Notice of Appeal form and the position as set out above. Although the appeal was notified a little out of time, HMRC were not opposing it on this ground.

7. On 3 May 2013 HMRC had applied for a stay of the appeal while they considered the Appellants' application for hardship; on the evidence available to them at that point, they had not been satisfied that payment of the tax would lead to hardship.

8. On 17 June 2013, following correspondence sent by HMRC to the Appellants and to their representative, HMRC gave notice that they opposed the Appellants' application for leave to appeal without payment or deposit of the tax. They further contended that the Tribunal should not entertain the appeal; the appeal was against a notice of assessment for VAT, and the Appellants had not paid to or deposited with HMRC the amount determined by them to be payable. HMRC accordingly applied for

a direction that the appeal be struck out in accordance with s 84(3) of the VAT Act 1994 ("VATA 1994") on the grounds that the disputed amount remained unpaid.

9. On the same date, HMRC wrote to the Appellants to inform them that HMRC could not accept their hardship application. HMRC also indicated that if the Appellants still wanted their appeal to be heard without payment of the disputed tax, they could write to the Tribunal and ask that they consider the Appellants' hardship application; if the Appellants did not do so, they had to pay the disputed tax before their appeal could be heard by the Tribunal.

10. By Directions released on 23 September 2013, the Tribunal directed that the appeal (and another appeal made by the Appellants) should be stayed under Rule 22 of the Tribunal Rules pending the Tribunal's determination of the hardship application.

11. On 17 October 2013, the Appellants' representative sent an email to HMCTS stating that the case was currently being dealt with under an Alternative Dispute Resolution (ADR) procedure.

12. On 20 February 2014, an ADR officer of HMRC sent an email to Mrs Pavely confirming that the ADR case was now closed. HMRC had agreed to reduce the assessment to £21,048; another HMRC officer would shortly be issuing an amended assessment, and also issuing a penalty decision.

13. On 17 April 2014, the Appellants' representative sent a letter to HMRC, for the attention of the "Appeals Officer". This indicated that the Appellants wished their representative to appeal on their behalf against the assessment in the sum of £21,048 VAT. The letter set out a detailed history of the dispute, and attached proposals for an offer in settlement.

14. HMRC replied on 20 May 2014; the representative's letter had been referred to the Appeals and Review team. Their response had been that a decision could only be reviewed once, and the present case had already been subject to a statutory review.

15. In response to my question concerning the current amount of the assessment, Mrs Pavely explained that this could be taken back to a larger figure, but that according to HMRC's records, the debt at the present point was £21,048.

16. Mrs Pavely referred to the accounts provided so far to HMRC in support of the Appellants' hardship application. The accounts for the year ended 31 March 2012 were in the name of W Mughal trading as Dallas Chicken and Ribs. HMRC understood that W Mughal was a relative who had taken on the business. There was nothing in these accounts to show any connection with the partnership that was the Appellant in this appeal.

17. Another set of accounts for the period 9 January 2012 to 31 March 2012 was in the name of "Dallas Chicken and Ribs (Sutton)". Again, there was nothing to show any connection to the Appellant partnership.

18. There was a further set of accounts for Dallas Chicken and Ribs, 172 Streatham Hill for the period 1 May 2011 to 31 December 2011; again, there was nothing in these to identify the Appellant partnership as being connected with that business. Mr Javed Mughal had signed those accounts.

19. The other two sets of accounts supplied to HMRC were for Mr Javed Mughal as an individual; these were rental accounts for 172 and 172a Streatham Hill, and for two addresses in Thornton Heath.

20. The HMRC Hardship Officer's original decision had been made on the basis that there was nothing to connect any of these accounts either with Mrs Mughal or with the partnership.

21. HMRC had also been provided with copy bank statements, in the name of Mr Javed Mughal only, dated between 2007 and 2008. The last statement covered the period up to 21 July 2008 and showed a balance of over £150,000. These had been forward to HMRC's Hardship team, who had said that the statements did not cover the relevant period and did not cover both partners.

22. Mrs Pavely explained that the background information which she had described was the reason for HMRC's presence at the hearing.

23. I consider it necessary to explain at this point that, in addition to the bundle of documents which Mrs Pavely provided, I had been supplied with a very substantial bundle of copy correspondence from the Tribunal file, and that the background as set out here is a very limited extract from the lengthy and detailed history of this appeal

HMRC's submissions

24. For HMRC, Mrs Pavely submitted that the Appellants had not provided substantive evidence to support their claim to hardship. HMRC requested that their decision to refuse the Appellants' hardship application should be upheld by the Tribunal.

25. In response to my question as to the time at which the hardship conditions should be examined, Mrs Pavely referred to various paragraphs of the decision of the Upper Tribunal in *Totel Limited v Revenue and Customs Commissioners* [2014] UKUT 0485. I refer below to relevant paragraphs of that decision.

26. I also asked Mrs Pavely about the ADR procedure. She explained that the alternatives following such a procedure were either, if it was successful, for the parties to sign to acknowledge this, or if it was not successful, to sign to say that it had not been and that the parties were at liberty to continue the appeal. Here, the facilitator had been under the impression that agreement had been reached and that the Appellants would pay the reduced assessment.

27. In relation to Mr Mughal's email dated 17 April 2016, Mrs Pavely's view was that he must have been thinking about the direct tax appeal. It had been explained to the Appellants that it was not possible to reach agreement without agreeing the basis

on which the assessment had been calculated. As Mrs Pavely had explained in an email to HMCTS dated 3 February 2016, it had been impossible up to that point to recalculate the VAT assessment on the figures available at present. The reason for this was that VAT is a tax on sales, whereas direct taxes are levied on profits, which were calculated as taxable income less expenses and deductible allowances. For this and other reasons involving income from rental properties, HMRC did not have enough information to make any decision with regard to the VAT. An alternative proposal had been put by the Appellants' representative, but HMRC could not agree to this without further information being provided by the Appellants or their representative. On the basis of this proposal, the assessment would be reduced to a figure which HMRC considered to be completely unrealistic; in some cases, the margins would be lower than the ones declared prior to the VAT inspection.

Consideration and conclusions

28. The first comment I need to make is that, contrary to the assertion in Mr Mughal's email dated 17 April 2016, the matter has not been settled between the parties. This was obvious from the fact that HMRC were present at the hearing. Thus there is an outstanding dispute.

29. In order to resolve that dispute, there needs to be a hearing of the appeal. Although it had been thought that the dispute had been resolved by means of the ADR procedure, as indicated in the email to Mrs Pavely dated 20 February 2014, it was clear from the "Letter of Appeal" dated 17 April 2014 that the Appellants did not accept the terms which appeared to have been agreed.

30. That letter was a purported appeal; however, it could not constitute a formal appeal, because steps had already been taken for the Appellants to appeal to HMRC, leading to HMRC's review letter dated 26 October 2012. The Appellants' Notice of Appeal against HMRC's decision as upheld by that review letter had then been lodged with HMCTS in November 2012, subsequently being resubmitted on 6 February 2013.

31. Thus what is under consideration in this part of the Tribunal proceedings is a particular aspect of that original appeal to the Tribunal.

32. Where an appeal is made to the Tribunal against a VAT assessment, s 84(3) VATA 1994 states that it shall not be entertained unless the amount notified by the assessment has been paid or deposited with HMRC. However, this is subject to s 84(3B), which permits an appeal to be entertained without payment or deposit of the VAT either—

> (1) if HMRC are satisfied, on application by the appellant, that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship, or
>
> (2) where (1) is not the case, but the Tribunal decides that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship.

33. It is also important to note s 84(3C) VATA 1994:

> "Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007, the decision of the tribunal as to the issue of hardship is final."

5 34. As appears from *Totel* at [2], the latter sub-section was the subject of judicial review proceedings in *R (ToTel Ltd) v First-tier Tribunal (Tax Chamber)* [2012] EWCA Civ 1401, in which the Court of Appeal held that the introduction of s 84(3C) VATA 1994 was *ultra vires*. Thus, although on the face of that sub-section it would appear that a decision by this Tribunal as to the Appellants' hardship application 10 would finally determine whether they can continue with their appeal without payment or deposit of the VAT in question, the result of the judgments of the Court of Appeal is that if I were to decide that the Appellants' hardship application should be refused then (subject to obtaining permission to appeal) an appeal would lie to the Upper Tribunal, provided it met the conditions set out in s 11 of the Tribunals, Courts and 15 Enforcement Act 2007.

35. As far as I am aware, no steps have been taken to repeal s 84(3C) VATA 1994 following the decision of the Court of Appeal in that judicial review case.

36. As indicated above, the Appellants' representative indicated on the Notice of Appeal form that an application for the appeal to proceed without payment of tax had 20 been made to HMRC and that the application had been granted. This statement was incorrect, and completely misrepresented the position.

37. Clearly, no documentary evidence was provided to demonstrate that an application had been made and that it had been successful. I find it surprising that HMCTS did not ask the Appellants' representative to produce such evidence, but I 25 have no information available to me as to the normal procedure followed by HMCTS in such cases.

38. As a result of the history of this appeal, the resolution of the hardship issue has been left for an extended period. HMRC refused the Appellants' application in May 2013. This raises questions as to the approach to be taken to the Appellants' 30 application to this Tribunal.

39. Mrs Pavely referred me to *Totel* at [34]-[50], dealing with the question whether the issue of hardship fell to be examined by reference to the position at the time of the hardship application hearing, or at some earlier time. At [37] the Upper Tribunal (Nugee J) commented:

35

> "Miss Kamm accepted that the normal rule was that the tribunal should look at the position as at the date of the hearing. I agree: s. 84(3B) requires the tribunal to decide whether the requirement to pay or deposit the amount determined "would cause the applicant to suffer hardship". In other words the question the tribunal must ask itself is: 40 "Would it cause the applicant hardship if he is required to pay or deposit the tax assessed ?" As a matter of ordinary language this looks to the future; it is not the same as asking: "Would it have caused the

> applicant hardship if he had been required to pay or deposit the tax assessed when the appeal was brought ?" "

40. In the present case, it appears to me that the practical approach to take is to follow what Nugee J agreed to be the normal rule. If the substantive appeal is to be pursued to a hearing, the question is whether the Appellants currently have the resources to pay the VAT assessed, or should be relieved of the normal obligation to pay such tax as a precondition to being permitted to continue with their appeal.

41. The question of timing is relevant not only to the Appellants' financial position either at the present time or at the time when the appeal was notified to the Tribunal, but also to the level of liability to tax. In the Notice of Appeal, the Appellants' representative inserted at section 3 of the form, against "The amount of tax or penalty or surcharge (if applicable)", the words "To be adjusted and advised", rather than specifying the amount as should have been the case. Mrs Pavely informed me that the assessment had originally been in the sum of £127,951. However, this had been reduced following HMRC's review; the reduced figure was £99,719.

42. As already mentioned, following the ADR procedure the amount of the assessment was reduced to £21,048; this was the amount of tax standing in HMRC's books as owed by the Appellants.

43. The difficulty which this raises is as follows. The reduction was made following the ADR procedure; that procedure is a way of arriving at a settlement of the dispute between the relevant party or parties and HMRC without taking the matter through the Tribunal appeal procedure. Although the parties to the present proceedings appeared to have reached agreement, this proved not to have been the case. As a result, it is open to HMRC to ignore the result of the ADR procedure and revert to the assessment in the figure as reduced following HMRC's review. Thus the question is whether the Appellants' hardship application is to be treated as relating to an assessment in the sum of £21,048 (a figure which the Appellants continue to dispute), or the pre-ADR sum of £99,719.

44. Mrs Pavely indicated to me that HMRC could take the amount of the assessment back to £99,719, rather than the £21,048 currently shown in HMRC's records as the amount of tax outstanding in respect of the Appellants' VAT liability. Although Mrs Pavely referred to this possibility, she gave no indication of the likelihood or otherwise of HMRC seeking to revert to the higher figure.

45. Rather than seeking at this point to determine which of these levels of potential liability is appropriate for me to use as the basis for determining the result of the Appellants' hardship application, I consider that the practical course is for me to review the extent of the evidence which the Appellants have provided in response to the requests from HMRC's Hardship Officer for evidence of hardship and an explanation of how payment of the disputed tax would cause the Appellants hardship.

46. In her letter dated 24 May 2013, the Hardship Officer referred to the absence of a response from the Appellants to her letter dated 22 April 2013:

> "In the absence of a response I am required to write to you to confirm that I cannot accept your application. The next stage would be for me to write to the Tribunal to confirm that to date we have not received payment of the disputed amount and as you have not supplied the required information / evidence, the Commissioners [*ie HMRC*] cannot accept your hardship application.
>
> Before I do so, I would like to again ask you to provide me with the relevant information / evidence in support of your hardship application or to confirm that you now intend to pay the relevant amount, in order for your appeal to proceed. Please confirm your intentions by writing to me at the above address and in addition please send me the following information and / or documents by the 10th June 2013.
>
> Unfortunately, I must advise am [*sic*] not able to accept an application for hardship based on the annual accounts provide [*sic*] for 'Dallas Chicken & Ribs' for the year ending the 31st December 2011 or 2012, for several reasons. Firstly, I note that the accounts are proper to a period after the above VAY registration was deregistered and either only lists one of the partners or neither of the partners.
>
> Secondly, the accounts do not show the current financial position of either or [*sic*] the partners. Thirdly, in order to consider hardship I need satisfactory evidence that both partners would suffer hardship, if required to pay the disputed debt.
>
> Therefore, I must advise at this stage, on the evidence provided to date, you have provided insufficient evidence that either or both partners would suffer hardship.
>
> . . ."

Her letter continued by asking for personal, business and joint bank account statements for both partners for the three months to the date of her letter, and partnership and individual tax returns, together with a range of other items of information.

47. I have already referred, in setting out the background to this application, to the documentation which had been supplied. No further financial information relevant to the hardship application was provided in advance of the hearing.

48. None of the financial information previously supplied relates to the position as at the time of the hearing. Thus, whether the tax in dispute is £21,048 or £99,719, there is no evidence on the basis of which I can satisfy myself as to the financial position of the Appellants. It is clear that at no stage has any such information been provided in respect of Mrs Mughal. Such limited information as has been supplied relating to Mr Mughal is incomplete and far from contemporaneous.

49. In *Totel* at [50] the Upper Tribunal commented:

> "In practical terms, it is obviously unsatisfactory for hardship applications to be dragged out over months and years. What can be done about this must primarily be a matter for the FTT, but it may be that early listing of hardship applications, together with short time-

> limits for the serving of evidence and rigid adherence to them will go some way towards reducing the difficulties. It is the appellant who has the burden of establishing hardship and all the evidence will usually be in his possession so if he does not produce the requisite evidence when required to do so his application will fail."

50. I have already mentioned the difficulties in the present case resulting from the delay in dealing with the Appellants' hardship application. These are further examples of the unsatisfactory position to which the Upper Tribunal was referring. However, in the present context the section of the above passage which needs to be emphasised is that it is for the Appellants to establish hardship. I do not consider that they have "produced the requisite evidence when required to do so". As a result, my conclusion is that their application fails.

51. For the above reasons, I refuse the Appellants' application for permission to for their appeal to proceed without payment or deposit of the disputed tax.

52. As a result of my decision to refuse their application, the Appellants must pay or deposit the disputed tax if they wish to pursue their appeal. Whether the amount of the disputed tax is £21,048 or £99,719 is a matter for HMRC to decide.

Result of the application

53. The Appellants' application for permission to for their appeal to proceed without payment or deposit of the disputed tax is refused.

Right to apply for permission to appeal

54. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 28 JUNE 2016