[2017] UKFTT 92 (TC)

TC05610

Appeal number: TC/2015/06268

Value Added Tax – Import VAT – Onward Supply Relief – strike out application – failure to comply with Tribunal directions - Rule 8(3)(b) of the Tribunal Rules – Tribunal cannot deal with the proceedings fairly or justly - application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

XG CONCEPT LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at the Royal Courts of Justice on 11 January 2017

The Appellant not attending nor being represented

Simon Pritchard of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. HMRC apply to strike the appeal of XG Concept Ltd, the appellant, under Tribunal Rule 8(3)(b) on the grounds that it has failed to cooperate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly.

Proceeding in Absence

2. The appellant did not attend nor was it represented at the hearing. HMRC applied to proceed in the appellant's absence under Rule 33 of the Tribunal Rules.

3. The Tribunal was satisfied that the appellant had been notified of the hearing or that reasonable steps had been taken to notify the appellant of the hearing. Letters dated 13 October 2016 were sent by the Tribunal to the appellant and its solicitor notifying them of the hearing date of 11 January 2017. At the time of the notification the hearing was to be listed for the substantive appeal.

4. The Tribunal subsequently issued directions on 23 December 2016 stating that HMRC's application to strike out the appeal should be heard on 11 January 2017 and that the hearing of the substantive appeal should be postponed. On 10 January 2017 HMRC's counsel served his skeleton in support of the application upon the appellant's solicitor by email.

5. The Tribunal was also satisfied that it was in the interests of justice to proceed with the hearing in the appellant's absence. This is because it was very unlikely that a postponement would secure the appellant's attendance. On 10 January 2017, the day before the hearing, the appellant's solicitor emailed the solicitor for HMRC in the following terms:

> "I am unable to attend the hearing tomorrow as I do (sic) have my client's instructions as regards the strike out hearing. I have no received any response from my client since December 2016.
>
> Please not that, I do not intend to oppose your application to strike out the matter given the circumstance."

6. There was no communication with the Tribunal from the appellant nor from its solicitor in respect of the strike out hearing. It appears to have voluntarily absented itself from the hearing or disengaged from the proceedings.

7. Therefore the Tribunal was satisfied that the appellant had been notified of the hearing and it was in the interests of justice to proceed in the absence of the appellant.

Background

8. On 5 October 2015, the appellant appealed against the decision of HMRC dated 10 April 2015 to issue it a C18 Post Clearance Demand Note (C18) in the amount of

£360,239.67. HMRC had refused to review the decision by letter 23 July 2015 as the appellant's request had been made on 17 July 2015 which was out of time.

9. The C18 Post-Clearance Demand Note was issued on 10 April 2015 in the sum of £360,239.67 due to the appellant's failure to comply with the conditions of Onward Supply Relief (OSR). OSR provides relief from import VAT on goods imported from outside the EC, in this case Turkey, by a UK VAT registered trader in the course of a zero-rated onward supply to a VAT registered trader in another Member State, in this case Italy.

10. HMRC asserted that the appellant failed to declare the names, addresses and VAT registration numbers of customers in the EC Member State to whom the goods were to be consigned. These conditions have force of law by virtue of paragraph 2.3 of Notice 702/7 and are to be fulfilled by declarations in Box 44 of the import entry. The declared goods were imported under entries between 11 October 2012 and 26 November 2012.

11. On 27 January 2015 HMRC wrote to the appellant to establish that the conditions of OSR had been met requesting the following documentation:

- Copy import entry showing the name, address and VAT Registration number of the EC consignee;
- Copies of order from EC consignee;
- Copies of sales invoice to EC Consignee;
- Copy of shipping / airway bill for transport of goods to EC consignees; and
- Copy EC sales lists for the relevant periods showing satisfactory accounting of VAT.

12. On 3 March 2015 the appellant replied attaching the requested documentation but confirming that it had not completed an EC Sales List for the VAT period 11/12.

13. Further investigations with the Italian authorities revealed that there was no trace of 'Ital Services', the named consignee, at the address supplied by the appellant. They confirmed that the VAT number of the recipient supplied was incorrect and the number belonged to a 'Mrs Aamir Seemab' (sic) who had ceased trading in 2012. The Italian authorities visited the operating premises of the company supplied by the appellant but found no trace of it. Therefore, HMRC assert that no VAT was declared or paid in the destination Member State.

14. It is difficult to discern the appellant's precise grounds of appeal, however, the appellant makes the following propositions in its notice of appeal:

a. First, the appellant accepted that there was an administrative error on the part of the appellant company's Freight Agent and the relevant

declaration on the C88 as it *"did not contain all the correct information..."*

b. Second, the appellant asserts that *"It would be manifestly unjust for the UK to benefit from the VAT paid by the company, when VAT has been accounted for in another Member State by the consignee [in relation to the relevant goods]..... and the Commissioners would be unjustly enriched by the accounting for VAT a second time"*

c. Third, the appellant asserts that *"HMRC's actions are unreasonable and it is clear that if the respondent continues with the action to raise C18s the respondent would not have taken into account the evidence demonstrating legitimate transactions, save for an administrative error on the part of a third party freight forwarder, and the fact that the appellant would have been given relief"*.

15. The appellant has also contended that:

- EC sales Lists were completed the HMRC can see that VAT has been accounted for in another Member State;

- Evidence of dispatch to another Member State was produced at the time of the import in 2012;

- Valid sales invoices were raised at the time and submitted to HMRC bearing the consignee's VAT registration details; and

- The goods were not altered and were dispatched within the time limits.

16. The appeal was due to come to trial on 11 January 2017 as set out above.

17. However, the appellant failed to comply with the Tribunal's directions in five regards.

18. The first failure was the appellant's failure to produce a List of Documents in contravention of the Tribunal directions dated 23 June 2016 by 29 July 2016. On or about 29 July 2016, the appellant produced a document entitled *"Appellant's List of Documents"* in purported compliance with the June directions however that document expressly stated that is was *"not exhaustive"* and an *"additional list of documents will be served in due course."* The appellant has not produced any further or completed List of Documents.

19. By way of a letter dated 6 August 2016 a hearing was listed by the Tribunal for 21 September 2016. The Tribunal received a notification from the appellant to vacate the hearing in a letter dated 9 August 2016 as the appellant's counsel was unavailable and the appellant wished to adduce the evidence from three witness, including an 'Expert Witness'.

20. The second failure of the appellant was a failure to provide information about the appellant's witnesses in contravention of the directions of Judge Morgan in a letter dated 24 August 2016. The relevant direction was that by 7 September the parties

'shall provide to the tribunal and each other confirmation of the witnesses on whose evidence they wish to rely at the hearing, including the details of any expert witness and an explanation as to why that party considers the expert evidence is required in these proceedings.'

21. On 9 August 2016, the appellant had indicated, by email, an intention to call three witnesses. On 14 September 2016, one week following the deadline, the appellant informed HMRC that: *"The witnesses the Appellant intend to call are Mr Russell Williams, Mr Jason Weeks and Mr Ian Worth (Expert witness)."* The Appellant said that *"The expert witness will investigate and consider the circumstances and information that informed the demand issued by the Respondent and provide independent and expert opinion in relation to the demand."* By email dated 19 September 2016, HMRC sought further information on the role of the proposed expert. No such information was forthcoming, the appellant's representative said: *"I note [the Commissioners'] concern. I will take instructions and revert to you."*

22. The appellant's third failure was a failure to serve any witness statements by the deadline of 8 November 2016 or subsequnetly, in contravention of the Tribunal directions dated 13 October 2016. On the same date the appeal was listed for hearing on 11 January 2017. By the October directions, the parties were required to serve witness statements on 8 November 2016. The appellant failed to comply with this obligation. Indeed, the appellant still has not complied and has not provided any explanation for its non-compliance. HMRC filed their witness evidence on 8 November 2016 (a statement from Officer Dane). On 7 November 2016, the appellant's solicitor informed HMRC by email that 'I am still waiting to receive my client's instruction in relation to this matter following my review of this matter'.

23. The fourth failure was the appellant's failure to prepare hearing bundles by 22 November 2016 or at all as required by the October directions. The October directions required the appellant to produce a hearing bundle. The appellant did not do so and still has not done so. In order to assist the Tribunal at the hearing of this application, HMRC produced a small bundle of the relevant directions and *inter parties* correspondence for the purposes of the strike-out application.

24. On 19 December 2016 HMRC wrote to the appellant's solicitor asking whether his client was continuing with the appeal in light of the lack of compliance with the October directions. HMRC requested that an answer be forthcoming. The appellant's solicitor sent an email on the same day stating 'Many thanks for your email. I am sorry for the delay but my client is unwell. As I understand it, he is hospitalised at the moment. I will revert to you tomorrow before the close of business.' No further communication was received.

25. The appellant's non-compliance meant that the HMRC made an application to strike-out the appellant's appeal on 22 December 2016. HMRC's grounds were that the trial preparation was severely prejudiced and they could not proceed with the appeal without the appellant's completed List of Documents, witness statements or

hearing bundle. HMRC purported to make the strike out application under Rule 8(3)(a).

26. By directions dated 23 December 2016, Tribunal Judge Cannan postponed the substantive hearing and directed that the application to strike-out be heard instead on 11 January 2017.

27. The appellant's fifth failure is to comply with the requirement, in the directions that the appellant should *"set out in writing … on or before 6 January 2017 any facts and matters it relies on in opposing the [Commissioners'] application to strike out the appeal."* The appellant has not set out any opposition to the strike out either by the deadline or at all.

28. On 10 January 2017, the appellant's solicitor sent an email to HMRC in the terms set out above. Neither the solicitor nor the appellant attended the hearing to oppose the application nor explain any non-compliance with previous directions of the Tribunal.

The Law

29. Rule 8(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Rules') provides:

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

30. As is the case with the Rules generally, in the interpretation and exercise of rule 8 the Tribunal must seek to give effect to the overriding objective to deal with cases fairly and justly, according to Rule 2.

31. Dealing with cases fairly and justly includes (by virtue of Rule 2(2)):

"(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using the special expertise of the Tribunal effectively; and (e) avoiding delay, so far as compatible with proper consideration of the issues."

32. In addition, Rule 2(4) requires that the parties help the Tribunal to further the overriding objective and co-operate with the Tribunal generally.

33. HMRC relies on Rule 8(3)(b) in this application.

34. Rule 8(3)(b) has been considered by the FTT in various decisions. In *Nutro UK Ltd v HMRC* [2014] UKFTT 971 Judge Berner considered a strike-out application in circumstances where the appellant had a history of persistent defaults and where the appellant, in the strike-out proceedings, had misled the Tribunal. Judge Berner stated:

[10]. This Tribunal has previously considered the application of rule 8(3)(b) in *First Class Communications Ltd v Revenue and Customs Commissioners* [2013] UKFTT 090 (TC), a case concerning an application for HMRC to be barred from taking part in 30 the proceedings. In that case, Judge Mosedale, whilst being careful not to limit the cases in which rule 8(3)(b) could apply, described, at [52], the following two situations where the rule might be applicable:

> "Firstly, Rule 8(3)(b) could apply where the appellant has already been so prejudiced by HMRC's conduct in a manner which cannot be 35 remedied and that therefore the proceedings cannot be fair and just. In such a case HMRC should normally be barred from the proceedings. Secondly, I consider that Rule 8(3)(b) could apply where there has been a course of conduct by HMRC which, while it has not yet meant it is not possible to deal with the appeal fairly and justly, nevertheless is part of a pattern of conduct which, if it continues, will mean that the appeal cannot be dealt with fairly and justly. In such a case, I consider it might be appropriate to bar HMRC from proceedings."

…………………………..

[17] These judgments have resonance with the decision of Judge Mosedale in First Class Communications, to which I have referred. Thus, the issue whether there can be a fair hearing is an important one, but not decisive. Regard may be had to the likely future conduct of the proceedings. The Tribunal should, in short, take account of all the circumstances, having regard to the overriding objective, including the need to ensure that case management directions, aimed at achieving the objective of dealing with cases fairly and justly, are observed.

[18] I should say that I do not consider that, in the context of an application to strike out, much direct assistance can be derived from the line of cases dealing with relief 35 from sanctions, starting in the courts with *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and culminating more recently in *Denton v T H White Ltd* (and related appeals) [2014] EWCA Civ 906, and cases concerning extensions of time in the Upper Tribunal in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] STC 973 and *Leeds City Council v Revenue and 40 Customs Commissioners* [2014] UKUT 0350 (TCC).

………………………..

[52] Mr Watkinson rightly referred to the litany of persistent defaults on the part of Nutro which have characterised these proceedings. It is correct that I should have regard to the whole history, not only in considering the conduct of the proceedings to date, but also the likely conduct in the future. I also have to take account of the fact that the Tribunal has seen fit to deal with those instances by way of case management, including the making of unless orders, in a manner which has, until now, fallen short of a striking out of the appeal."

Submissions

35. HMRC submit that as matters stand, the appellant is in breach of various directions and the Tribunal should strike out the appeal because of those breaches. The application is made under FTT Rule 8(3)(b), namely *"the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly..."*

36. Furthermore, they submit that the appellant has the burden of proof in the substantive appeal and yet has failed to adduce any evidence. There are therefore grounds for the Tribunal to consider under Rule 8(3)(c) that *"there is no reasonable prospect of the [Appellant's] case ... succeeding."* In fact, the appellant has not provided any legal basis upon which its case might succeed.

37. HMRC submit there is no merit in the appellant's appeal grounds.

38. Onward Supply Relief is not available as the appellant did not meet the conditions as set above.

39. Furthermore, HMRC submit the appellant's appeal grounds are simply wrong in fact when asserting that VAT has been paid in another Member State. HMRC submit that VAT has not been accounted for in another EC Member state. The appellant purported to sell the relevant goods to a company named *"Ital Services"* based in Italy but the Italian authorities have confirmed that there was no trace of *"Ital Services"* at the address provided by the Appellant. Furthermore, the VAT number provided which was said to be *"Ital Services"* VAT number in fact belonged to a *"Mrs Aaamir Seemab"* who ceased trading in 2012. The Appellant has not provided any evidence to refute this.

40. HMRC submits that it follows from the fact that no VAT has been paid that a debt must have incurred under regulation 123 of the Value Added Tax Regulations 1995 (SI 1995/2518) because the relevant relief is only available if the relevant goods have been supplied in accordance with the requirements in section 30(8)(a)(i),(ii) and (b) of section 30(8) of the Value Added Tax Act 1994 – those requirements have not been met where no VAT has been paid.

Discussion and Decision

41. The Tribunal recognises that strike-out is a draconian remedy with severe consequences and therefore an appeal should not be struck out merely for good housekeeping purposes or out of a preoccupation with tidiness. Nor should an appeal be struck out for non-compliance with directions, other than unless orders, that will not affect the fairness or justice of the proceedings continuing.

42. Rule 8(3)(b) is directed to a party's failure to cooperate with the Tribunal and the Tribunal's ability to conduct proceedings fairly and justly. Therefore, the Tribunal may look backwards at the history of the party's actions and also forwards to the

future conduct of the proceedings in order to consider fairness and justice. It is not simply a question of looking at serious prejudice having been or likely to be caused to the opposing party. There may be a range of lesser sanctions available to remedy failures causing prejudice such as unless orders, costs orders, exclusion of evidence and postponements that may yet render proceedings fair and just.

43. The Tribunal adopts approach to Rule 8(3)(b) of Judge Berner in *Nutro UK Ltd* at [17]:

> Thus, the issue whether there can be a fair hearing is an important one, but not decisive. Regard may be had to the likely future conduct of the proceedings. The Tribunal should, in short, take account of all the circumstances, having regard to the overriding objective, including the need to ensure that case management directions, aimed at achieving the objective of dealing with cases fairly and justly, are observed.

44. The Tribunal agrees with Judge Berner that the line of authorities on applications for relief from sanctions in *Mitchell* and *Denton* are not of great assistance but it does consider that the judgment of the Court of Appeal in *BPP Holdings v HMRC* [2016] EWCA Civ 121; [2016] 1 WLR 1915 is of some assistance in approaching applications to strike out under Rule 8(3)(b). At [2] of the judgment in *BPP* the Senior President stated: 'The key question is the proper approach of tax in cases where there has been breach of an order'. His Lordship continued:

> 16. The key question underlying the two decisions can be characterised in the following way: whether the stricter approach to compliance with rules and directions made under the CPR as set out in Mitchell v News Group Newspapers Ltd [2014] 1 WLR 795 and Denton v TH White Ltd [2014] 1 WLR 3296 applies to cases in the tax tribunals. The two conflicting decisions of the UT on the point came to different conclusions. For the reasons I shall explain, I am of the firm view that the stricter approach is the right approach.
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> …………..
>
> 36. HMRC are content that the UT relies upon the CPR by analogy where it suits their purposes, for example, as to the discretionary power to strike out in rule 8.3(c) FtT Rules, in which circumstance the UT has recently held that the approach under CPR 3.4 is helpful (see *HMRC v Fairford Group* [2014] UKUT 329 at [41] and their reliance on *Abdulle v Commissioner of Police for the Metropolis* [2014] EWHC 4052 (QB) and the decision in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC). The irony in that circumstance is not lost on this court.
>
> 37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.

38. A more relaxed approach to compliance in tribunals would run the risk that noncompliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.

45. The Tribunal is alive to the fact that Rule 8(3)(a) already provides a strike out sanction for non-compliance with unless orders.

46. None of the directions breached in this case by the appellant were unless orders. Nevertheless in this case the appellant's five failures to comply with three different sets of directions over a period of five months might properly be described as litany of defaults. They have cumulatively and individually affected the fairness and justice of the proceedings to date and indicate that the approach of the appellant is likely to continue. The third and fifth of the appellant's breaches, in response to the October and December directions, to provide witness statements and grounds to oppose the strike out application, were serious and significant breaches in their own right.

47. This conduct is compounded by the appellant's failure to attend or oppose the strike out application at the hearing itself.

48. This catalogue of non-cooperation means that the Tribunal can reasonably extrapolate that the appellant's conduct of the proceedings would continue in the same vein in the future were the case to proceed to a final hearing. This would mean that the Tribunal would not be able to deal with the case fairly or justly. This is an appeal where the appellant's repeated failure to engage with the process means that a fair and just determination is not possible.

49. The Tribunal relies on the following further points.

50. Even at the time of the hearing, on full notice of the consequences of a strike out application, the appellant declined to engage. It has chosen not to respond to the strike-out application and it has failed to comply with the December directions by declining to set out its arguments for opposing HMRC's application. This further demonstrates that the appellant has no intention to change its approach of non-co-operation and cannot be reasonably expected to change that approach.

51. The appellant's conduct has meant that this appeal has not been able to proceed to a substantive hearing in a timely manner.

52. The appellant's conduct is in breach of the overriding objective.

53. HMRC submitted that a litany of failures has seriously prejudiced the Commissioners' trial preparation. I accept this submission.

54. HMRC's alternative ground for strike out under Rule 8(3)(c) is that the appeal has no realistic prospect of success. The appellant has not sought to produce in evidence support for it contention that its failure to meet the conditions for OSR were merely as a result of administrative error on the part of its Freight Forwarder nor evidence that VAT has in fact been paid in another member state. The burden of proof in any appeal would be on the appellant and HMRC have produced evidence to suggest that VAT has not been paid in Italy as the consignee's VAT.

55. This ground was raised by counsel in his submissions of 10 January 2017 but did not form a ground of HMRC's strike out application of 22 December 2016. In the circumstances, while this ground may carry some weight, the appellant has had not received proper notice of it forming a ground of the application. Given the decision upon Rule 8(3)(b), it is unnecessary to consider it further.

Conclusion

56. For the reasons given above, the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly. The appeal is struck out under Rule 8(3)(b).

57. 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.

TRIBUNAL JUDGE
JUDGE JONES

RELEASE DATE: 19 JANUARY 2017