TC07746

VAT – hardship application – insufficient evidence of hardship – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/03512

BETWEEN

QN HOTELS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 10 June 2020 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the Covid-19 pandemic. The documents to which I was referred are detailed in the decision and included a 35 page bundle submitted by the respondents together with their submissions as to why the appellant's application for hardship should not be granted; and a 38 page bundle submitted by the appellant together with submissions and further submissions as to why its application should be granted.

DECISION

INTRODUCTION

1. This is a VAT case. The appellant has been assessed to VAT of £9,113. It has appealed against this assessment. The general rule in section 84 VAT Act 1994 is that an appellant who wishes to bring an appeal against a VAT assessment must pay or deposit the amount of the assessment with HMRC. However, if it can persuade HMRC or this Tribunal that payment or deposit of that amount would cause it to suffer hardship, HMRC or this Tribunal can direct that the appeal may proceed without the appellant paying or depositing the tax. In this appeal the appellant has told HMRC that payment of the tax to HMRC would cause it hardship. HMRC are unconvinced and have not accepted the appellant's position. The appellant now appeals to the Tribunal.

THE LAW

2. In his decision in *NT ADA Limited v HMRC* [2019] UKFTT 0333, Judge Poole set out a comprehensive review of the relevant legislation and case law. The latter is not binding on me but I agree with that review and gratefully adopt it and set it out below.

> "31. The relevant statutory provisions are contained in section 84 Value Added Tax Act 1994 ("VATA"), which provides, in relevant part, as follows:
>
> "**84 Further provisions relating to appeals**
>
> (1) References in this section to an appeal are references to an appeal under section 83.
>
> (2) …
>
> (3) Subject to subsections (3B) and (3C), where the appeal is against a decision with respect to any of the matters mentioned in section 83(1)… (p)…, it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.
>
> (3A) Subject to subsections (3B) and (3C), where the appeal is against an assessment which is a recovery assessment for the purposes of this subsection, or against the amount of such an assessment, it shall not be entertained unless the amount notified by the assessment has been paid or deposited with HMRC.
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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."

32. The Tribunal is therefore required to decide whether "the requirement to pay or deposit" some £2.2 million "would cause the appellant to suffer hardship".

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

(1) The purpose of the provisions is to strike a balance between the abuse of the appeals mechanism by employing it to delay paying disputed tax and the stricture of having to pay or deposit the disputed sum as the price of entering the appeal process; the relief afforded by the "hardship" provisions should not be applied so as to operate as a fetter on the right of appeal ([19]).

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

(3) The test is an "all or nothing" one, in which it is not relevant that the appellant might be able to pay or deposit some amount less than the whole disputed sum ([31]).

(4) The test is to be applied to the position at the date of the hearing ([26]). This means that the Tribunal should not "speculate as to what might become available to the appellant in the future" ([22] & [26]). It should focus on "immediately or readily available resources" ([21]).

(5) The fact that the appellant may have the necessary cash or other readily available resources may not be determinative, if hardship would result from using it (or them) in paying the disputed sum ([22]).

(6) Available borrowing resources may be considered, but generally only from existing sources, e.g. unused facilities or new facilities immediately available with minimal formality ([23]).

(7) Potentially available borrowing from new sources, for example if the appellant owns property capable as acting as security for a new loan, will only exceptionally be considered as "immediately or readily available", for example where arrangements for borrowing are at an advanced stage ([24]).

(8) The potential sale, outside the ordinary course of business, of assets properly purchased for the purposes of the appellant's business, might cause hardship even if the assets are not currently being used in the business ([25]).

(9) There is no hard and fast rule that "regard can never be had to the resources of connected (but legally independent) entities where… there is common control and the evidence suggests a free flow of resources to meet the needs or requirements of any one entity at the expense of the other or others of them from time to time" ([25]).

(10) Although the test is to be applied by reference to the circumstances at the date of the hearing (see [33(4)] above), that does not mean that events leading up to that time are necessarily ignored. The Tribunal can take into account "whether

the appellant is himself responsible for putting himself in a position where he cannot pay…, and that would include by delaying the hearing so that at the time of the hearing he cannot pay… without hardship" ([27], endorsed at [28]). The basis for this is that the "real cause" of the appellant's inability to pay without hardship may be his own prior actions.

(11) The Tribunal should make its assessment on the basis of the most up-to-date available information. The burden lies on the appellant to establish hardship, so it is normally incumbent on the appellant to adduce the necessary evidence to satisfy the Tribunal ([29]). Absence of contemporaneous accounting evidence may justify the Tribunal in placing little, if any, weight on an oral assertion that the appellant is unable to afford to pay.

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

3. In *Elbrook*, the Court of Appeal had said this:

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

"…

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

iii) The hardship enquiry should be directed to the ability of an appellant to pay from resources which are immediately or readily available. It should not involve a lengthy investigation of assets and liabilities, and an ability to pay in the future, see *Seymour Limousines 7 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]."

BACKGROUND

4. The background to this application is set out below. I find these matters as facts. The basis for the background and this finding is largely a bundle of documents which has been provided by HMRC, containing, in the most part, correspondence between HMRC and the

appellant relating to the hardship application, and which included the appellant's notice of appeal.

(1) In their letter of 29 April 2019 to the appellant, HMRC indicated that they had raised VAT assessments on the appellant in the total amount of £9,113.

(2) The appellant appealed against the assessments on 14 May 2019. In its notice of appeal it indicated that it had not paid the tax in dispute, nor had it asked HMRC if it could appeal without paying the tax.

(3) By way of a letter dated 21 May 2019 to HMRC's solicitors office, the appellant explained that it had filed an appeal against the assessments and asked that the appeal should be heard without the need for the tax to be paid. In that letter it indicated that payment of the tax would cause financial hardship, and due to the ongoing uncertainties of Brexit the appellant had suffered a significant fall in revenue.

(4) In their letter dated 19 August 2019 to the appellant, HMRC approach the appellant's application for hardship. That letter set out the relevant legislation and then went on to ask for information and evidence to support the appellant's application. HMRC told the appellant that they had reviewed the Companies House website and its accounts for the year ended 31 December 2017. HMRC had some queries about these. Under current assets there appeared to be cash at the bank and in hand of £302,147 and asked how the money had been appropriated within the business. There were also debtors of approximately £10,000 and HMRC asked if those debtors had been approached for payment. HMRC noted that there was a share premium account entry of approximately £17,000 and sought an explanation of that entry and whether it was available to pay the tax.

(5) HMRC also asked for copies of a variety of documents including bank statements, facility letters, management accounts, cash flow forecasts, investments, and other assets and liabilities including the value of the then current trade debtors and creditors. HMRC also asked whether there were any banking covenants which would be breached if the appellant had to pay the VAT.

(6) HMRC asked that this information be provided by 18 September 2019. HMRC chased for this information on 3 September 2019 to which the appellant responded on 10 September 2019. In a letter of that date it explained that the reason it had made the hardship application was because it was awaiting a refund from HMRC of corporation tax amounting to £88,740.75. In that letter the appellant explained that an HMRC officer, Officer Daniel Smitten, was conducting a review of the appellant's direct tax affairs, which had started in July 2016, and at the date of that letter the appellant was still awaiting the conclusion of the review. The appellant indicated that in its view it would be unfair to expect to to pay the VAT without getting the benefit of the corporation tax refund. It included, with that letter, a six-page document setting out an action plan which Officer Smitten had asked the appellant to commit to.

(7) In a letter dated 17 September 2019, HMRC told the appellant that they had determined its application for hardship and were not satisfied that it would suffer hardship if required to pay or deposit the amount of tax in dispute. HMRC explained that in reaching this conclusion to taken into account the comments made by the appellant in its letter of 10 September 2019 concerning the corporation tax refund and Officer Smitten's review. However it went on to say that none of the information and

documentation which had been sought by HMRC in its letter of 19 August 2019 had been supplied by the appellant. In light of this absence of information and evidence available, HMRC had concluded that the appellant should not be granted hardship. That letter went on to explain that if the appellant disagreed with their decision, the appellant had a right to appeal to this Tribunal. HMRC notified the Tribunal that it was opposing hardship, and the Tribunal in turn notified that fact to the appellant.

(8) The appellant's hardship application to the Tribunal was due to be heard at a face-to-face hearing but the Covid-19 pandemic meant that no such hearing was possible. The parties agreed that the application could be heard on the papers without an oral hearing. In support of that submission the appellant submitted a four page document of which approximately one page related to the application for hardship. This submission took into account the implications for the appellant's finances of the Covid-19 pandemic.

(9) However such submissions were very general and referred to documents that were not before the Tribunal. Accordingly, I directed that the appellant should submit its bundle of documents to the Tribunal and should also provide additional information and details of the financial impact that Covid-19 was having on its business. It should also supply evidence of the financial hardship which Covid-19 was causing including evidence of the cash flow impact of the Coronavirus Job Retention Scheme to which the appellant had referred in its original submissions together with evidence of what borrowing sources were available to the appellant and what effort the appellant had made to secure additional borrowing to provide the sums necessary for paying the tax to HMRC.

THE APPELLANTS SUBMISSIONS

5. In response to that direction, Mr Qamar Ahmed made the following submission on behalf of the appellant (in his words):

> (1) The impact of Covid-19 on the appellant has been extremely significant. On 24 March 2020, the government required the appellant to close its business. The business was therefore closed through no fault of the appellant.
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> (2) The revenue of the appellant fell to zero overnight.
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> (3) The appellant was able to utilise the Coronavirus Job Retention Scheme by furloughing majority of its staff. The scheme covers 80% of the employee's wages capped at a maximum of £2,500. The wages of a majority of the employees was covered under this scheme. However, it was not legally possible to amend the contracts of the senior employees and the company had to top-up their wages. As a result, the company is currently paying £l7,450 as top up in salaries per month.
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> (4) In the normal course of its business the appellant has taken deposits and prepayments from its customers for room bookings, weddings and functions. As the hotel was closed the appellant was obliged to issue refunds of these deposits to customers. To date the appellant has had to refund deposits of £26,723.
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> (5) During the normal course of its business the appellant holds stocks of food and beverage of around £25,000 at any time. Whilst some of the beverages will be able to be used majority of the food and all the beer kegs will have to be discarded

as a result of this closure. The appellant estimates a stock loss of £17,000 due to the sudden closure of the business.

(6) Due to the fact that the hotel was ordered to be shut and to protect the asset the appellant had had to engage the services of a security company at a cost of £12.50 per hour which equates to £2,100 per week. This is a significant sum given that there is no revenue coming into the hotel.

(7) Despite the fact that the business is closed the business the appellant still is required to pay substantial fixed costs in the business. These relate to equipment leasing; maintenance contracts; legionellae testing; tv licensing; sky tv royalties; rentals. These amount to approximately £15,000 per month.

(8) As part of the support measure announced by the government hospitality businesses with a rateable value of between £15,000 and £51,000 were given a grant of £25,000. The appellant's hotel has a rateable value of £155,000 and therefore was not eligible for this grant.

(9) The Prime Minister has announced a provisional date of 4 July when hospitality businesses can be re-opened. However, it must be noted that the Welsh Government (the appellant's hotel is located in Newport, South Wales) at yet not announced a date for re-opening. Even if a date is announced this is subject to change.

(10) Once the business does re-open, there will continue to be social distancing. This will inevitably mean that there will be practically no conference business or events held at the hotel. It is unlikely that the hotel will be able to host any weddings this year.

(11) The government has also announced a 14-day quarantine period for travellers arriving from abroad. As a result of this it is highly unlikely that corporate travellers will be travelling to the UK. It is highly unlikely that the hospitality business will be business as usual for the hospitality sector.

(12) The full financial impact the coronavirus is very difficult to predict.

(13) Given the uncertainties and financial pressures surrounding, the government announced that HMRC will be sympathetic to businesses seeking Time to Pay and allowed deferment of a quarter's VAT to next year. It is therefore some what surprising that HMRC continue to oppose the hardship application in this case. One the one hand HMRC are stating that they are committed to support business to ease cash flow pressure by deferring tax that is actually due, whereas in this case, the tax is in under dispute, HMRC are opposing the hardship application and not consenting to the appeal to proceed.

(14) The financial difficulties have been compounded by the fact that the Appellant is due a sizeable refund for Corporation tax of £88,740.75.

(15) Further on 13 November 2019 Officer Smitten wrote to the appellant confirming that the CT enquiries had been completed that closure notices would be sent and the S458 relief claims actioned. To date this has not happened. It is my

understanding that HMRC have suspended work on the enquiries due to the pandemic.

(16) This too demonstrates the further financial hardship that will be caused by requiring the appellant to deposit the disputed tax whilst withholding the refunds due.

(17) The appellant had made a claim for business interruption and denial of access to its insurers. However, the claim was refused, It is common knowledge that insurers are not paying out on Covid-19 related claims.

(18) The government announced the Bounce Bank loan scheme for government backed loans of up to £50,000. The appellant banks with Coutts & Co and currently Coutts is not an accredited lender under this scheme. The appellant is unable to approach another bank as other lenders are only currently servicing the requirements of their existing customers.

(19) The appellant would respectfully submit that there is significant financial distress currently and to require the appellant to deposit the disputed tax amount would cause further financial hardship on the appellant. The appellant therefore requests the tribunal to allow the hardship application so that the appeal can be heard without the assessment amount being deposited or paid.

HMRC SUBMISSIONS

6. HMRC have maintained their position opposing hardship in their representations to the Tribunal following the aforesaid directions. They submitted that Covid-19 could not have impacted on the decision originally made by HMRC since that was issued in September 2019. Then, and to date, the appellant had not provided any information sought by the hardship officer and HMRC were not therefore able to reconsider the appellant's position in light of the Covid-19 position.

BURDEN OF PROOF

7. The burden of proving that the requirement to pay the tax would cause it to suffer hardship rests on the appellant. It must show that it would suffer this hardship if I were to decide that it should pay the tax. It must show this on the balance of probabilities, in other words it is more likely than not that it would suffer such hardship.

DISCUSSION

8. In order to persuade HMRC that it would suffer hardship, the appellant needed to provide evidence that this was the case. It singularly failed to do so. HMRC's position is that the appellant had not provided most of the information requested by the hardship officer who then decided that she was not satisfied that the appellant would suffer hardship if it had to pay the tax; and as at May 2020, the appellant had provided no further information which would allow HMRC to reconsider that decision.

9. I am entirely with HMRC in this. It was impossible for the hardship officer to allow the appellant's application in the absence of the information which she sought from the appellant in her letter of 19 August 2019. The only information it supplied concerned the investigation by Officer Smitten and the anticipated corporation tax refund of £88,740.75.

10. No indication was given as to what had happened to the cash of approximately £300,000 which was reflected in the accounts to the year end 31 December 2017, nor was any meaningful information or documentation provided concerning management accounts, cash flow forecasts, bank facilities etc.

11. The burden is on the appellant to persuade me that, in light of HMRC's decision, I should decide that it would suffer hardship if it had to pay the tax. I must look at the appellant's position at the date of the hearing. So what additional evidence has the appellant supplied which might allow me to do so?

12. Briefly stated it is as follows:

(1) The appellant is receiving no income.

(2) It is paying £17,450 per month by way of salaries which are not reimbursed under the furlough scheme.

(3) Its stock is likely to be discarded or sold at a loss totalling approximately £17,000.

(4) It is paying £2,100 per week for security services.

(5) It is paying fixed costs of approximately £15,000 per month.

(6) The appellant is not eligible for a government hospitality grant.

(7) The appellant banks with Coutts & Co.

(8) Coutts is not an accredited lender under the Bounce Back loan scheme for government backed loans.

(9) The appellant cannot approach another bank as other lenders are only currently servicing the requirements of their existing customers.

13. I accept that the appellant is in a difficult financial position as are many businesses in the hospitality and entertainment sectors. And the picture painted by the foregoing evidence illustrates the financial difficulties faced by this appellant. I find as facts the numerical information set out in the appellant's submissions.

14. But the test is whether the requirement for the appellant to pay the tax would cause it to suffer financial hardship. Or, as the appellant would no doubt say, further financial hardship. As the Court of Appeal said in *Elbrook*, the hardship enquiry should be directed to the ability of an appellant to pay from resources which are immediately or readily available. I am afraid to say that the appellant has not provided sufficient evidence that it would suffer financial hardship or greater financial hardship even under the current difficult trading conditions. It seems to me that it has readily available resources as evidenced by the extent of its current outgoings.

15. The appellant appears to have sufficient cash which is readily available to pay outgoings of approximately £40,000 per month. It has provided me with no evidence of the source of these payments nor the impact which those payments are having on its business (other than the obvious one which is that more money is going out is coming in). On the one hand, the appellant might be sitting on an enormous pile of cash which it is using to make these payments, and

thus the effect of the payments, whilst reducing that cash pile, is causing it no hardship whatsoever. And so a further payment of £9,113 would have a negligible impact on its financial position.

16. At the other extreme, the sole source of payment may be Coutts, and all that is happening is that the appellant is borrowing either on a fixed term basis or by way of an overdraft, and paying those amounts out to its creditors. And the continuation of these arrangements is limited since, for example, it is close to its overdraft limit, with the result that the payment of an additional £9,113 might have a considerable and detrimental financial impact.

17. I suspect that the truth of the matter lies somewhere in between these two extremes, but the appellant's difficulty is that it has not provided me with any evidence on which I can come to a conclusion that finding an additional £9,113 would cause it financial hardship. I had asked the appellant to provide me with evidence supporting its assertion that the Covid-19 pandemic was causing financial hardship to its business which should include evidence of the cash flow impact of the Coronavirus Job Retention scheme as well as evidence of what borrowing resources are available to the appellant and what efforts the appellant has made to secure additional borrowing to provide the sums necessary for deposit in this appeal.

18. The appellant's response is set out at paragraph [5] above. Whilst this does provide additional evidence over and above that provided to HMRC, it does not provide any of the primary evidence regarding cash flows or bank borrowings which are crucial for me to come to a decision in its favour regarding hardship.

19. I wholly accept that, as a legal principle, approaching lenders other than Coutts would not, generally, be required. But the appellant has provided no evidence of what approach it has made to Coutts and any request it has made for the provision of an additional £9,113 for the tax it must pay in order to bring its appeal. £9,113 in absolute terms is not a significant sum, nor is it in relative terms when more than £40,000 is being paid out by the appellant per month even when there is no revenue coming in.

20. So regrettably for the appellant it has not managed to demonstrate to my satisfaction that payment of tax of £9,113, even given the current difficult financial trading conditions, will cause it financial hardship. The principle is that I should be able to come to a conclusion about hardship on the readily available material. The appellant has been unable to supply me with sufficient relevant material to enable me to conclude that it would suffer hardship. It is clear from the legal principles set out above that the onus is squarely on it to do so.

21. The possibility of a refund of corporation tax of approximately £80,000 does not weigh in its favour even though there appears to be evidence that HMRC accept that it is a meritorious claim. Whilst the appellant might feel aggrieved that it should not be obliged to pay HMRC the tax to bring the VAT appeal when, in its view, it is owed a substantial sum by HMRC, that does not affect its hardship position. The appellant is managing to find £40,000 per month without this corporation tax repayment. The appellant has provided no evidence of the impact which the withholding of the refund is having on its ability to pay its current creditors.

22. The appellant's submission that HMRC is being sympathetic to taxpayers who owe VAT by entering into time to pay arrangements, does not affect the position either. It is up to HMRC (acting within government policy) to enter into arrangements with particular taxpayers. It does not affect the appellant's capacity to pay the tax in this appeal without suffering financial hardship.

DECISION

23. And so, for the foregoing reasons I refuse the appellant's application that its appeal should be entertained without paying or depositing the tax in issue with HMRC.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

24. 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.

NIGEL POPPLEWELL

TRIBUNAL JUDGE

RELEASE DATE: 17 JUNE 2020