[2019] UKUT 229 (TCC)

Appeal number: UT/2019/0003

PROCEDURE – application for security for costs CPR Rule 25 – whether reason to believe appellant will be unable to pay respondents' costs if ordered to do so – yes – whether just to make an order in the circumstances of the case – yes – application granted

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

GOLDSHINE TRADE LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in chambers at The Royal Courts of Justice, Strand, London WC2 on 10 July 2019

DECISION

1. The appellant, a company that traded in beer, wine and spirits, appeals to the Upper Tribunal ("UT"), with the permission of the First-tier Tribunal ("FTT") against the FTT's decision refusing to admit a late appeal against HMRC's review decision upholding two excise duty assessments in the sum of £2,690,241.

2. This interlocutory decision deals with HMRC's application for security for costs made shortly after HMRC filed its response to the appellant's notice of appeal with the UT. HMRC consider there is reason to believe the appellant company will be unable to pay HMRC's costs if it were ordered to do so by the Tribunal. They seek security in the amount of £19,379.40 or £13,654.40 (the different amounts will, HMRC say, vary depending on the scope of the hearing before the UT).

Procedural Background / Deciding application on the papers

3. While it was envisaged that the application would be determined at an oral hearing, HMRC now apply for their application to be decided on the papers. The procedural history which led to the change of form of hearing is described in more detail in the annex to this decision. Having reflected on that, I consider I am able to, and should, determine the application on the papers without a hearing in accordance with Rule 34 of the Upper Tribunal Rules and in seeking to give effect to the overriding objective in the Tribunal's Rules to deal with cases fairly and justly. I note in particular the applicant did not comply with the tribunal's directions relating to the application, which required the appellant to serve its response and evidence in advance of any oral hearing and that there has been no engagement by them with the tribunal since 8 May 2019. The applicant has not taken advantage of the clear opportunity it was presented with to participate in proceedings. Even if the application were determined at an oral hearing, in the absence of permission, given the directions that were made, there would be no additional argument or evidence before the tribunal which was not already before it now. To the extent the merits of the substantive appeal are relevant I am equipped with the applicant's grounds of appeal which were drafted at a time when it had the benefit of professional representation. I must, under Rule 34 take into account the parties' views but note the applicant has not expressed any view on the form of the hearing despite being put on notice that a hearing on the papers was proposed. Taking account of the need to deal with cases proportionately to the costs and resources of the parties and the need to avoid delay, I conclude it is fair and just in the circumstances to deal with application on the papers.

The law

4. As confirmed by Judge Bishopp, sitting in this tribunal, in *Blada Limited (in liquidation) v Revenue and Customs Commissioners* [2013] Case number FTC/64/2010, in relation to matters incidental to this tribunal's functions, the Upper Tribunal has, pursuant to s 25 of the Tribunals, Courts and Enforcement Act 2007, the

same powers as the High Court. The procedure is governed by the rules contained in Part 25 of the Civil Procedure Rules 1998.

5. Under CPR, rule 25.13, the tribunal may make an order for security for costs if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order and a relevant condition has been met. The relevant condition for the current application is in rule 25.13(2)(c), namely that the appellants are companies and "there is reason to believe that [they] will be unable to pay the [respondents'] costs if ordered to do so".

6. HMRC's application mentions the Court of Appeal's decision in *Premier Motor Auctions v PWC* [2017] EWCA Civ 1872 at [7] which in turn refers to *Jirehouse Capital v Beller* [2009] 1 WLR 751. In that decision the Court of Appeal noted the court's previous guidance against paraphrasing the condition above. The threshold did not require the court to be satisfied on the balance of probabilities that the claimant would be unable to pay the defendant's costs. The court only needed reason to believe that it would not be able to do so. Unless the relevant condition, which is a threshold test, is satisfied, the jurisdiction to make an order for security for costs does not arise (*Geophysical Service Centre Co v Dowell Schlumberger (Me) Inc* [2013] EWHC 147 (TCC), per Stuart Smith J at [12]).

7. If the relevant condition is satisfied, the decision whether to grant the order is then a question of judicial discretion. As to the exercise of that discretion, the relevant principles are those summarised by Peter Gibson LJ in the Court of Appeal in *Keary Developments Ltd v Tarmac Construction Ltd and another* [1995] 3 All ER 534, beginning at p 539. In (*GSM Export (UK) Ltd v HMRC* [2014] UKUT 0457 (TCC)), a decision of the Upper Tribunal, Judge Berner noted (at [18]) various points arising from that decision relevant to the application before him. With the exception of considerations of the lateness of the application, that summary is equally relevant in this case:

> (1) The balancing exercise must weigh the injustice to the party against whom an order is sought if that party is prevented from pursuing, in this case, its appeal against the injustice to the respondents if no security is ordered and, having been successful, the respondents find themselves unable to recover costs.
>
> (2) The possibility or probability that the appellants will be deterred from pursuing their appeals is not without more a sufficient reason for not ordering security.
>
> (3) Regard should be had to the appellants' prospects of success. But the tribunal should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.
>
> (4) Before a tribunal refuses to order security on the ground that it would unfairly stifle a valid claim, the tribunal must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases, likely to be exceptional, where this can properly be inferred without

> direct evidence. However, it is for the party against whom an order is sought to satisfy the tribunal that it would be prevented from continuing the litigation. The tribunal should consider not only whether the appellant can provide security out of its own resources, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. (Gibson LJ explained that as this was likely to be peculiarly within the knowledge of the company against the order was sought, it is for the company to satisfy the court that it would be prevented by an order for security from continuing the litigation).

Threshold question – reason to believe company cannot pay adverse costs?

8. HMRC's case on this question rests principally on 1) various findings made by the FTT following the oral hearing as to the level of activity of the company and its financial health and 2) a witness statement dated 5 February 2019 made by Tanzila Rashid, a Chartered Certified Accountant employed by HMRC as an advisory accountant who considered financial statements for the years ending 31 July 2015, 2016 and 2017, various VAT returns over that period, and reports of HMRC visits to the appellant.

9. As regards the FTT's decision, HMRC refer to various passages which dealt with the financial and trading status of the firm as part of the FTT's consideration of prejudice. The FTT hearing took place on 24 September 2018 and heard oral evidence from the appellant's director, Mr Popat, who was cross-examined. The FTT noted:

> (1) that the Tribunal's decision would not change the "precarious financial status of the appellant which has not been trading at a profit for the past two years" (at [130]).
>
> (2) that Mr Popat's evidence was to the effect that there was very limited business now ongoing, that he had no employees since September 2016 and that his accounts suggested the company was trading at a loss in years ending 31 July 2016 and 2017 (at [132]).
>
> (3) there was no evidence Mr Popat as sole director and shareholder currently drew any salary or income from the company (at [133]).
>
> (4) it did not appear that the company had engaged in much trading in the eighteen months since the injunction was granted in April 2017 (at [170]). (The injunction granted by the High Court on 12 April 2017 allowed the appellant to trade, HMRC having refused the appellant approval under the Alcohol Wholesalers' Registration Scheme on 21 March 2017).

10. Officer Rashid's statement exhibited the financial information and returns referred to. She examined copies of the unaudited financial statements for accounting periods ended 31 July 2015, 2016 and 2017 which had been sent to HMRC and which reflected the abbreviated accounts filed with Companies House. While in 2015 the company made a gross profit of £782,746 and an operating profit of £60,559, in 2016 the company made a loss after taxation of £107,138 and in 2017 it made a gross loss of £4,881 and an operating loss of £21,981. It appears that on 5 December 2015 the

company agreed to sell a number of vehicles and its stock to another supplier for £50,000. (While it is noted that in 2017 the statements reported a profit after tax due to a £60,308 taxation credit in the Profit and Loss account, Officer Rashid says she is unable to understand whether it was accounted for correctly but concedes it is possible the amount related to VAT on the sale of assets to the purchaser company – Goldshine Ltd's previous agents had sent in documentation to evidence input VAT in the same amount attaching credit notes to the purchaser for the VAT element of the sale of assets on 4 December 2015). Officer Rashid further noted the company had no wage or rent and rates costs in 2017. She went on to examine amounts declared on the Vat returns :- those from 31 July 2017 to 30 November show outputs of £4,477 and inputs of £37,417 which Officer Rashid suggests show the company was trading at a loss. Officer Rashid's statement points out that the Director appears to have provided some funding through a loan account. The amounts stood at £12,825 at 31 July 2015, £7766 at 31 July 2016 and £25,018 at 31 July 2017 and are included within the creditors section in the financial statements.

Discussion

11. As regards the FTT's findings, the context in which they arose should be recognised, namely at an interlocutory hearing where consideration of prejudice to the appellant if permission to appeal out of time were not granted and thereby the impact on the financial health of the company, was just one of the many issues considered. However, the FTT made its findings having heard live evidence from the company's director, Mr Popat, and the tenor of the FTT's findings was to a large extent echoed and elaborated upon by Officer Rashid's statement which included copies of the company's own accounting information and returns. The fact the financial statements show a rapid downturn in trade is consistent with the fact the company sold equipment, vehicle, and stock on 4 December 2015, and with Mr Popat's own evidence to the FTT that there was very limited business ongoing.

12. From this information I note the balance sheet as at 31 July 2017 showed net liabilities of £25,539. In terms of fixed assets, tangible assets are recorded as £1582. Under current assets nothing is recorded for stock or debtors, the only current asset is cash at bank and in hand which is recorded as £373. The liabilities on the other hand consist of creditors in the amount of £25,912. The profit and loss account records sales of £839 and purchases of £5720 giving a gross loss of £4881. There was no other income from profits of sale of fixed assets, investments or deposit account interest but there were various items of expenditure all below £1000 except for motor expenses of £1084 and legal and professional fees of £11,810.

13. HMRC refer to a credit agency search which suggests a likelihood of company failure of 10.8% but without further information on the underlying methodology used to draw that conclusion I am unable to place any reliance on that (Officer Rashid explicitly acknowledged that her statement did not address the reliability of the credit search).

14. The picture painted by the financial statements is one of a company which has been trading at a loss, which has miniscule assets, and which does not have the

wherewithal to generate profits going forward. Those factors make it all the more unlikely the company would be able to obtain borrowing from commercial lenders on the basis of the company's ongoing or future trading prospects. While there is some indication the director is funding the company through the loan account, without further information, there is nothing to suggest the extent of Mr Popat's future willingness and ability to further fund the company should an adverse costs order be made. The financial information in terms of the accounts before me is only current up until 31 July 2017 but there is nothing to suggest from what is known about the company's state at that date or, from Mr Popat's evidence to the FTT in September 2018 of limited ongoing business, that the company's financial health has materially improved.

Conclusion on threshold condition: Rule 25.13(2)(c)

15. The costs sought by HMRC range from £13,654.40 to £19,379.40 (depending they say on the scope of the hearing). Whether the costs at issue are HMRC's lower or higher amount, I am satisfied, in view of the evidence above, that there is reason to believe that the appellant company will be unable to pay the respondents' costs if ordered to do so. (In reaching this conclusion I do not need to address the relevance or otherwise of the fact some very significant wrongdoing penalty assessments imposed on the company by HMRC, which have not been appealed, and are not accounted for in the amount of creditors or in any of the financial information recorded above.)

16. The condition in rule 25.13(2)(c) is therefore met and the tribunal has the discretion to make the order.

Exercise of Discretion - relevant factors and circumstances

Prospects of success

17. The guidance from *Keary Developments (*see [8] above), suggests that the tribunal should not go into the merits in detail unless it can clearly be demonstrated that there is a high probability of success or failure. In effect I understand this to mean that unless the requisite high probability of success of failure is clearly demonstrated the factor of merits will not weigh significantly in the balancing exercise.

18. In this case the appeal is before the Upper Tribunal because the FTT gave permission. In *GSM* it was noted (at [18(c)]) that the fact the appellant had been given permission to appeal established that there were arguable grounds of appeal. In *Blada* (at [30]) the tribunal pointed out this was a low threshold. It would in my view be improper to unpick the FTT's decision on permission. That, coupled with the fact that the FTT found the grounds at least arguable effectively points away from a conclusion that the appeal stands a high probability of failure. The question remains however whether the appeal is one which clearly stands a high probability of success. To assess that I need to turn to the FTT's decision, the company's grounds of appeal before the Upper Tribunal, and HMRC's response.

19. The FTT's substantive decision refused the company permission to appeal out of time a review decision upholding two excise duty assessments totalling £2,690,241. The appeals were nearly six months late. Applying the guidance in *Martland v HMRC* [2018] UKUT 178 (TCC) the FTT's consideration included, amongst other factors, looking at whether the merits of the company's appeal were overwhelmingly in the company's favour. Key amongst the company's arguments was a claim that the assessments were time-barred under the one year time limit in s12(4)(b) Finance Act 1994. Specifically, the company maintained that relevant invoices, upon which the assessments were made, were available to HMRC on 26 June 2015 and therefore that HMRC had "evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment" more than one year before the dates the assessments were made (July and August 2016).

20. The FTT rejected the company's submission that a limitation argument amounted to a "knock down" point for two reasons. First, the FTT had insufficient evidence before it to make a finding of fact that the invoices in question were in fact received by HMRC on 26 June 2015. Second, on the FTT's understanding of the relevant law (following the Court of Appeal's Decision in *Lithuanian Beer v HMRC* [2018] EWCA Civ 1406), it could not determine the merits of the time limit argument without hearing evidence from the assessing officer on his or her subjective knowledge at the time they made the assessments compared with their subjective knowledge based upon receipt of the invoices.

21. In summary the company's grounds of appeal are that the FTT did not apply the *Martland* approach correctly as there was no proper consideration of merits. In essence this is because the FTT wrongly concluded that the company did not have a knock out argument on the one year time limit.

> (1) As to the evidence on when the invoices were received, the appellant highlights that HMRC notified VAT assessments which it is said were based on the invoices on 26 June 2015 and also the date was inferred from a later HMRC review letter. Furthermore, in circumstances where HMRC had not provided any information about when the invoices were received and in accordance with the duty of candour on HMRC, the FTT should have either drawn an adverse inference against HMRC or required them to produce the information.
>
> (2) The FTT erred in applying *Lithuanian Beer* incorrectly: it was sufficient for HMRC (the body as a whole) to have received the relevant invoices; the statutory test did not require that the actual assessing officer receive the evidence.

22. In response, HMRC point out it is difficult for the company to show, as it needs to, that the FTT decision was plainly wrong. The appellant's criticism of the FTT's decision not to make a finding on the receipt date of the invoices amounted to an *Edwards v Bairstow* challenge which went nowhere as no perversity was alleged. The FTT's task was to make a summary assessment of the merits and it was right to conclude it could do no more, in the absence of evidence from assessing officer, as it was her opinion on sufficiency which mattered. As to the significance of the earlier

VAT assessments, the question of what was sufficient evidence of fact to raise excise duty on supplies engaged a different "matrix of fact and law". Further, as the tribunal had to consider all the circumstances, not just merits, it was not inevitable that even if the time limit point was a knock-out point, that permission to appeal out of time would be granted.

23. Having considered the appellant's grounds, they do not appear to me ones which clearly demonstrate a high probability of success. I am mindful that this application is not the place to analyse the parties' cases on the substantive appeal before the UT in detail so deal with this matter briefly.

24. First there is the difficulty for the company that the FTT will be afforded some lee-way in the conclusions of its merits analysis – that much is inherent in the guidance given in *Martland* that a tribunal need not carry out a detailed evaluation of the case but should consider the parties' respective arguments in outline so that it can form a general impression of the strength or weakness of the appellant's case.

25. Regarding the FTT's decision not to make a finding on the receipt of the invoices, the question of the relevance and impact of any duty of candour, and what inferences should have been drawn, are matters which, by virtue of the FTT's grant of permission, are at least arguable. But, the question of how any duty of candour and any ensuing non-disclosure on the part of HMRC would interact with a tribunal's fact finding when carried out as part of the task of addressing the parties' arguments in outline (as opposed to fully) is not clear cut. The issue, which is contested by HMRC, would need to be articulated and developed in greater detail before its prospects of success could sensibly be assessed. It has not been clearly demonstrated this avenue of attack stands a high probability of success.

26. The arguments on the application of *Lithuanian Beer* appear superficially more promising. The issue before the Court of Appeal (as summarised by Sales LJ at [19]) was "what matters have to come to the knowledge of the commissioners in order to trigger the start date of the one year limitation period…?"). While at [20] the court held it was necessary to identify some "human agent" acting for the Commissioners, the facts of that case show that that "human agent" did not necessarily have to be the same officer as the officer who made the assessment. If examination specifically of the assessing officer's knowledge one year or more before the assessment was required the appeals in *Lithuanian Beer* would not have needed to engage with the question of whether the relevant evidence had been communicated to another officer in HMRC who was not the assessing officer.

27. But having said that, the subjective state of mind of an officer is relevant both in the case of the officer making the assessment and in the case of the "human agent" acting on behalf of the Commissioners whose knowledge of the relevant matters is in question (as explained at [28] of the Court of Appeal's decision, and quoted at [185] of the FTT's decison). Even if it were the case that the FTT erred in assuming the assessing officer's subjective knowledge needed to be assessed not only at the time of assessment but also in the period before the assessment, then this did not detract from the FTT's core reasoning as to why the appellant's appeal lacked obviously strong

prospects. This was that the exercise of fact-finding on subjective knowledge was not one the FTT could carry out as part of the application. That concern would apply even if it were accepted the invoices were communicated to HMRC as it would still need to be established what particular facts the assessing officer relied on.

28. Further even if the FTT applied the law as interpreted by *Lithuanian Beer* incorrectly this would not mean a ground of appeal founded on such error would stand a high probability of success. As HMRC point out, there was no factual finding on whether the invoices were received back in June 2015. The issue of whether the FTT was wrong not to make such a finding, although itself an arguable error of law, is not one that stands a high probability of success for the reasons discussed above.

29. The appellant's grounds neither disclose a high probability of success nor a high probability of failure. Accordingly when it comes to weighing the injustice to the appellant, should security be granted, of not being able to pursue an appeal, the prejudice to them amounts to the appellant not being able to pursue an appeal which, although arguable, does not stand a high probability of success.

Amount of security / Scope of substantive hearing

30. HMRC seek security in the amount of £19,379.40 or £13,654.40, the difference hinging on the eventual scope of the substantive hearing. They submit, in their written response, that there are two way of dealing with the appellant's ground that the FTT misapplied the law on time limits. HMRC invite the UT to take a "short route" which involves only determining whether the FTT's general approach to the merits of the appeal disclosed a material error of law rather than a "long route" requiring the UT to ultimately determine the relevant law on time limits.

31. I am not persuaded however that examination of a general approach to the merits, when those merits include consideration of contested legal arguments, can be demarcated so clearly from an analysis of the underlying law; the "short" and "long" routes may well be intertwined. The tribunal hearing the substantive appeal might well need submissions on the case law on time limits referred to in the FTT's decision in order to understand and assess the appropriate range of scrutiny that should be taken when a tribunal considers the outline of disputed legal issues. I also do not consider, having looked at the case-law on time limits (which is not especially lengthy) as referred to in the FTT's decision, that narrowing the scope of the appeal in the way sought, will make a great deal of practical difference to the length and complexity of the hearing. Whichever route is taken I anticipate the hearing would last no longer than a day. It will of course be open to the panel dealing with the substantive hearing to direct the focus of the parties' submissions at the hearing as it sees fit.

Probability of appeal being stifled

32. As regards the question of whether the company's appeal would be unfairly stifled, the law is clear the burden rests on the party against whom the order is sought, in this case the appellant company, to show it is probable their appeal would be

stifled. The amount HMRC seek by way of security is up to £19,379.40. As will be apparent from the procedural background to this case, the difficulty for the company is that did not comply with the directions made on 24 April 2019 to provide statements from any witnesses on which it proposed to rely on together with exhibits of relevant documentary evidence. There is therefore no direct evidence before me which would enable me to conclude that stifling of the appeal would be probable. Nor do I consider that is this an exceptional case where inferences might be drawn that stifling is probable without direct evidence.

33. The inconsistency at first sight in finding, on the one hand that there is reason to believe the company cannot pay costs if ordered, but then not accepting that it is probable the appeal would be stifled if security were ordered, was resolved by Gibson LJ in *Geary Developments* at pg403

> "…The considerations affecting those two questions seem to me to be rather different. For example, a backer might well be prepared to put up money to assist a company to pursue a case when the trial has not yet occurred, but the same backer would be extremely unlikely to put up money after the trial has been unsuccessfully concluded against the company."

34. I note the appellant has, despite the adverse financial situation it faced following the sale of its assets and downturn in its trading, secured professional representation both before the FTT and in settling its grounds of appeal before this tribunal. This would suggest that some form of external funding has at least in the past been found to progress the appellant's appeal.

35. I conclude the appellant has not discharged the burden on it to show it is probable the appeal would be stifled. It is notable the same conclusion was reached by the tribunal in *Blada* due to the lack of evidence on the issue put forward. Appellants who find themselves the subject of security for costs orders would be wise to engage with the proceedings and make sure that if they wish to argue that their appeal would be stifled that they have marshalled the appropriate evidence to back that claim up.

36. HMRC emphasise the tribunal should take into account that the appellant did not avail itself of the injunction it obtained which permitted it to continue its alcohol wholesale trade, and that it exacerbated the difficulties by failing to bring a timeous appeal. They refer to *Interoil Trading Ltd. v Watford Petroleum Ltd* [2003] LTL 16/7/2003 by way of support but its relevance is unclear. That decision, an ex tempore decision which contained a brief analysis turning on the particular facts of the case did not appear to me to lay down any particular point of principle. At best, the fact the appellant was at least able to trade provides some comfort against a concern that the appellant's financial situation was directly attributable to HMRC's treatment of it. But beyond that, in circumstances where I have no information as to the reasons for why trading was not undertaken, and where what the appellant seeks is an opportunity to appeal assessments against it for large sums of money, rather than another injunction, I do not regard the fact that the appellant did not trade when it was able to, as particularly relevant.

Balancing exercise and conclusion

37. As mentioned in the procedural background (set out in the annex) HMRC made their application for security for costs promptly after their formal response – delay is not therefore a factor which points against them as it did in *GSM*. I take into account that the appellant has not met the burden of showing that it is probable its appeal will be stifled. Also, to the extent there is a possibility it will be deterred from running an appeal, then it must be acknowledged that, although the appeal may be arguable, it is not one which stands a high probability of success. When I weigh this possibility against the real risk that, should no security be ordered, that the Respondents would not recover their costs, it is just, in my judgment, for an order for security for costs to be made and I direct accordingly.

38. As to the amount of security to be awarded, having reflected on the schedules annexed to HMRC's application which set out their estimates of costs, the matters in issue in the substantive appeal, and that the estimate would not necessarily reflect the costs actually recoverable under assessment, I consider that £15,000 is an appropriate amount. CPR Rule 25.12 calls on a court making an order for security for costs to determine not only the amount but also to direct "..i) the manner in which; and ii) the time within which the security must be given." As mentioned in *Blada* the tribunal does not have the facility to hold funds. HMRC's draft order requires the security to be met by paying the sum in to the Court Funds Office by a date which worked off the date of application back in February 2019 and has long since passed. Also as it is not immediately clear to me what recognition the Court Funds Office would give to an order of this tribunal, I direct in the first instance that the parties seek to agree on the means by which security is to be provided and the date by which it is to be provided. The agreed draft order, or if agreement is not possible, the parties' respective draft orders should be sent to the tribunal no later than 28 days from the release date of this decision. If payment to the Court Funds Office is contemplated, then further detail should be provided on the relevant legal provisions which permit the payment in, and in due course, as appropriate, the release of sums, pursuant to an order of this tribunal. All further proceedings in the appeal are stayed until the security in the amount of £15,000 is given (in the manner and by the time agreed or subsequently directed). It is envisaged that the eventual order settling the means and time by which security will be given will also confirm that unless the security is given as ordered then the appeal will be dismissed without further order.

Costs

39. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Swami Raghavan
Judge of the Upper Tribunal

Release date: 11 July 2019

Annex – procedural background

1. The FTT decision refusing permission to make a late appeal against two excise duty assessments released on 11 October 2018. The applicant's solicitors at the time, Alexander Whyatt, applied to the FTT for permission to appeal, setting out their detailed grounds in an 11 page document. The FTT gave permission to appeal in its written decision of 17 December 2018. HMRC's Respondents' notice filed on 28 January 2019 indicated an intention to apply for security for costs which they went on to do on 6 February 2019. They also sought a case management hearing to settle the scope of the hearing before the UT. The application for security for costs was accompanied by two witness statements with various exhibits. The same day the UT asked the parties to provide their availability for a hearing and to agree directions within 28 days which were to include provision for the applicant to serve evidence if it wished.

2. On 7 March 2019 the UT extended the deadline to 2 April 2019, with the agreement of HMRC, to allow the applicant's solicitors to obtain instructions. On 1 April 2019 Alexander Whyatt e-mailed the UT to say they were no longer instructed. The following day the applicant was requested to confirm within 14 days if it wished to proceed with the appeal, confirm any new representation, and was invited to seek time extensions to the directions if needed. No response was received and on 17 April 2019 HMRC sought an "unless order" with an automatic strike out if the applicant did not respond within 7 days. Mr Popat responded on 18 April 2019 asking for a two week extension in order to seek further advice which led to HMRC renewing their request for strike out but with a 14 day deadline.

3. On 24 April 2019 the UT (Judge Richards) having considered the parties' correspondence, issued directions requiring the applicant to confirm if it wished to pursue an appeal and warning the applicant could be struck out if it did not comply. In the event the appeal was pursued the directions made provision for preparation for the application hearing and in particular (point 5 of the directions) required the appellant to serve its response to the security application, any witness statements with relevant documentary evidence within 35 days. In a response annotating the directions and sent in around 4 hours after the relevant deadline on 8 May 2019, the applicant confirmed it wished to pursue the appeal, that it had no unavailability in the suggested hearing period and that it would follow through the remainder of the directions. On behalf of the applicant, Mr Popat set out that if advisers could not be found then the company would represent itself. The appeal was not struck out (Judge Richards considered this course would be disproportionate given the minimal delay in compliance and the parties were told on 9 May 2019 that the UT would write separately regarding the application hearing which it subsequently did on 3 June 2019).

4. In the meantime the applicant did not serve its response and any witness statements in accordance with the 35 day deadline and accordingly the UT informed the applicant on 3 June 2019 that if it did not comply with point 5 (service of response and witness statement) within 7 days then the tribunal was likely to assume the applicant did not object to the application for security for costs and in such a case might determine the application on the papers and vacate the oral hearing. There was no response within that deadline. In their e-mail of 10 June 2019 copied to the appellant, HMRC requested that the tribunal determine the application on the papers.