Neutral Citation: **[2022] UKUT 00307 (TCC)**

Case Number: UT/2021/000103

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: Video hearing on 21 June 2022

PROCEDURE – cancellation of VAT registration in 2017 for risk of abuse - cancellation not appealed – HMRC refusal of subsequent application in 2020 to register for VAT in relation to new supplies – appeal against refusal struck out by FTT as abuse of process – appeal allowed

Judgment given on 17 November 2022

Before

JUDGE THOMAS SCOTT
JUDGE JULIAN GHOSH KC

Between

GB FLEET HIRE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Kieron Beal KC, instructed by VC Law Ltd

For the Respondents: Howard Watkinson, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. In a decision dated 5 August 2020 ("the 2020 registration rejection"), the Respondents ("HMRC") refused to register the Appellant ("GBFH") for VAT. GBFH appealed to the FTT against that refusal. HMRC applied to the FTT to strike out the appeal. The FTT, in a decision released on 30 April 2021 ("the Decision"), granted HMRCs' application and struck out GBFH's appeal. This is the decision on GBFH's appeal against the Decision.

FACTS FOUND BY THE FTT

2. References below to paragraphs in the form [*] are, unless stated otherwise, to paragraphs in the Decision.

3. The material background facts, including those as found in the Decision at [4]-[17], are as follows:-

(1) In September 2017, HMRC notified GBFH of their decision to assess GBFH to VAT for the periods 01/16 to 03/17 on the grounds that supplies made by GBFH did not qualify for zero- rating as exports.

(2) By a decision letter dated 18 October 2017 (the "2017 notification"), HMRC notified GBFH of HMRC's decision to cancel GBFH's VAT registration with effect from 31 October 2017. HMRC's sole ground for de-registering GBFH in the 2017 notification was that GBFH was "using its VAT registration principally or solely for abusive purposes.": [6]. The 2017 notification specified that "… The following factors indicate that [GBFH] are principally or solely registered for VAT for abusive purposes: [GBFH] seems to be registered to facilitate fraud. DVLA check shows vehicles still registered in the UK. No credible evidence of export. Failure to apply for road tax refunds. No evidence of vehicles being insured when transporting. Refusal to provide bank statements. Checks found no credible evidence of customers in Far East. Payments were not made until car has been shipped.": [6].

(3) The 2017 notification set out GBFH's right to seek from HMRC a statutory review and to appeal against HMRC's decision to the FTT.

(4) GBFH did not exercise its right of appeal to the FTT against the decision to de-register GBFH in the 2017 notification.

(5) However, GBFH did appeal against the resultant VAT assessments. GBFH's grounds of appeal included the statement that "[GBFH] does not make a free-standing appeal against [HMRC's decision communicated by the 2017 notification], to de-register [GBFH] for VAT as of 31 August 2017. That is because if the conclusions [in the 2017 notification] were correct, [HMRC] was left with no alternative as a matter of law but to de-register [GBFH]… However since [the] conclusions [in the 2017 notification] are the subject of strenuous challenge, it follows that, if GBFH's appeal [against the assessment to VAT] is allowed…the de-registration decision [i.e. the decision communicated in the 2017 notification] must also fall away.": [8].

(6) GBFH's appeal against the assessment to VAT was partially struck out in a direction by Judge Poole dated 5 August 2019 and struck out altogether by Judge Brooks in 2020 in a decision reported at [2020] UKFTT 365 (TC). We note that the Upper Tribunal has allowed an appeal against Judge Brooks' decision and GBFH's appeal against the VAT assessments has been reinstated: see [2021] UKUT 0225 (TCC).

(7) Judge Poole, in his direction dated 5 August 2019 which partially struck out GBFH's appeal against the VAT assessments, correctly observed that GBFH was wrong

to say, in their grounds of appeal against the VAT assessments, that if GBFH successfully appealed against the VAT assessments, HMRC's decision to de-register GBFH in the 2017 notification would automatically "fall away". HMRC's decision to de-register GBFH in the 2017 notification was a separate matter from any assessment to VAT which stood alone as an appealable matter and since GBFH had specifically stated it did not wish to appeal against the de-registration decision in the 2017 notification, the 2017 notification of HMRC's decision to de-register GBFH remained good. This meant that certain grounds of appeal raised by GBFH against the assessments to VAT had no reasonable prospect of success and were thus struck out by Judge Poole.

(8) On 3 July 2020, GBFH applied to register for VAT on the basis that GBFH's supplies in May 2020 exceeded the VAT registration threshold (the "2020 registration application"): [12]. GBFH had made two supplies (the "2020 supplies") in May 2020: (1) the sale of a Ford Transit minibus on 6 May 2020 to the West Lancashire Freemasons Charity, which was donated by the charity to a scout group in Blackpool and (2) the sale of a Lamborghini on 21 May 2020 to Autobell, whose address on the invoice was in Japan, which was exported to Kuala Lumpur in Malaysia. Documentary evidence of the 2020 supplies was included in the bundle before the FTT and HMRC did not dispute that the 2020 supplies were actually made: [12].

(9) HMRC rejected the 2020 registration application in the 2020 registration rejection, stating as follows:

> We are unable to proceed with your VAT registration application as G B Fleet Hire Ltd has previously been registered for VAT under number 106 9706 10 which has been cancelled by HMRC on the basis that the VAT registration was being utilised solely or principally for abusive purposes. The letter issued to you by Stephen Mills dated 18 October 2017 refers (A copy of which can be forwarded on request). As that compulsory cancellation is currently under appeal the application to register G B Fleet Hire Ltd is refused. I refer you to your discussion with HMRC Visiting Officer.
>
> If your circumstances change and you start to make taxable supplies or the value of your taxable supplies exceeds the registration threshold, you should inform HMRC promptly[1].

(10) In fact, the 2020 registration rejection was wrong to say that the "compulsory cancellation" was "currently under appeal": [14]. We comment further on this inaccuracy below.

(11) No statutory review of the 2020 registration rejection took place and GBFH appealed to the FTT against it on 19 August 2020.

THE DECISION

4. The FTT's decision to strike out GBFH's appeal against the 2020 registration rejection was made on the basis of the following reasoning and conclusions:

(1) The FTT has a discretion to strike out an appellant's case if the FTT "considers there is no reasonable prospect of the appellant's case, or part of it, succeeding": The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, Rule 8(3)(c) ("Rule 8(3)(c)").

(2) Rule 8(3)(c) extends to striking out on grounds that the proceedings amount to an abuse of process.

[1] Importantly, the FTT omitted the opening words of this passage in their description of the letter at [10].

(3) Abuse of process includes the bringing of an appeal in circumstances where the matter should have been raised in earlier proceedings, if it was to be raised at all.

(4) The 2020 supplies took place. The FTT expressly held that GBFH had made out an arguable case in relation to entitlement to register for VAT on the basis of its economic activities: [64], [66].

(5) However, HMRC's entitlement to protect the revenue from abuse, which GBFH must have accepted had a sound basis and was based on objective evidence, "trumped" GBFH's entitlement to VAT registration: [66].

(6) The 2020 registration rejection referred back to the underlying reasons for the cancellation of GBFH's VAT registration communicated by the 2017 notification and it was clear on the face of the 2020 registration rejection that "the underlying reason why HMRC refused to register GBFH [in 2020] was because it its (sic) previous VAT registration had been cancelled as it was being utilised solely or principally for abusive purposes.":[44]. The FTT made the same point at [56], in holding that the reason why GBFH's VAT registration was cancelled in the 2017 notification "provides the reason" why the 2020 registration application was rejected.

(7) The FTT further observed that the appeal would be a full merits appeal and HMRC would be able to clarify the grounds on which HMRC made the 2020 registration rejection in a Statement of Case: [45]. HMRC were not, as at the time of the FTT hearing the strike out application, under any obligation to provide particulars of the abusive purpose for which GBFH used its VAT registration, as HMRC were still to file a Statement of Case. The FTT further held that the fact that the 2020 registration rejection was wrong in giving as a reason for rejecting the 2020 registration application the fact that there was an extant appeal against the 2017 notification was irrelevant because HMRC could clarify their reasons in a subsequent Statement of Case: [62].

(8) The FTT expressly found that by making a "*considered and deliberate decision*" not to appeal against the compulsory de-registration communicated by the 2017 notification, GBFH must have accepted that HMRC had an objective basis for cancelling its registration to prevent abuse of the VAT system: [48]. The FTT also seemingly attributed an implicit concession to Mr Beal, who also appeared for GBFH before the FTT, that HMRC's reasons advanced in the 2017 notification correctly justified the cancellation of GBFH's registration.

(9) The cancellation of VAT registration to prevent abuse is prospective in nature, to prevent future abusive claims for (amongst other things) credit for input tax. It followed from this that for GBFH to register again for VAT, GBFH would need to be able to demonstrate either that the risk of abuse identified in 2017 was no longer present or that it was never present: [50]-[51], [67].

(10) The mere fact that GBFH had engaged in economic activities amounting to the supply of two vehicles (i.e. the 2020 supplies) was not enough to justify GBFH's 2020 registration application for VAT "in circumstances where its registration was previously cancelled because of its abusive behaviours": [50].

(11) GBFH's appeal against the 2020 registration rejection on the basis that GBFH was a taxable person carrying on economic activities, that the 2020 registration rejection unlawfully impeded a lawful right to deduct input tax and that the 2020 registration rejection was also contrary to the registration provisions in the VAT legislation, could not succeed unless the risk of abuse was no longer present. GBFH would have to show

that by objective evidence, such as changing the individuals running the business, which it had not pleaded or shown.

(12) Any argument by GBFH that the risk of abuse was never present would simply be another way of saying that the decision communicated by the 2017 notification was wrong. Any such pleading would amount to an abuse of process and thus could not succeed. Similarly, any complaint by GBFH that HMRC had not sufficiently particularised the reasons for the cancellation communicated by the 2017 notification would be seeking to raise an issue which could and should have been raised in earlier proceedings, if it was to be raised at all.

(13) The prospective nature of the cancellation of GBFH's VAT registration also meant that, without GBFH demonstrating that the risk of GBFH engaging in abusive behaviours was no longer present, it was an abuse of process by GBFH to complain that any allegation of abusive behaviours by GBFH in prior VAT periods had no relevance for the VAT periods relating to the 2020 registration application.

(14) The strike out of GBFH's appeal against the 2020 registration rejection did not infringe any EU rights on the part of GBFH.

THE RELEVANT LAW

5. We refer below to various principles of EU law. The continued relevance of those principles in this appeal was common ground. Thus, we see no reason to lengthen our decision by analysing the relevant provisions of the European Union (Withdrawal) Act 2018.

Striking out

6. We are concerned with the application, in respect of GBFH's appeal against the 2020 registration rejection, of Rule 8(3)(c), which provides that "the Tribunal may strike out the whole or part of the proceedings if… the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

7. It is common ground that Rule 8(3)(c) extends to striking out on the grounds that the proceedings amount to an abuse of process: *Shiner and Sheinman v HMRC* [2018] EWCA Civ 31 at [19]. We discuss this principle in relation to the appeal below.

8. The principles as to whether an appeal should be struck out are summarised by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 Ch ("*Easyair*"), at [15] of that decision:

> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
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> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
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> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be

available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

Registration for VAT

9. Article 9 of Council Directive 2006/11/EC (the Principal VAT Directive or "PVD") provides that a "taxable person" is "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity".

10. Article 213 PVD provides that "Member States shall take the measures necessary to ensure that [every taxable person is] identified…".

11. Article 273 PVD provides that "Member States may impose…obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion…".

12. The Value Added Tax Act 1994 ("VATA 1994") Schedule 1 paragraph 1 provides that a person who makes taxable supplies in excess of £85,000 is "liable to be registered".

13. VATA 1994 Schedule 1(2) paragraph 13 provides that "…where [HMRC] are satisfied that a registered person has ceased to be registrable, they may cancel his registration with effect from the day on which he so ceased…".

14. In *Valsts ienemumu dienests v Ablessio SIA* (C-527/11) ("*Ablessio*") the CJEU recognised[2] that Member States may take measures that are "necessary to prevent the misuse of identification numbers [in the context of this appeal, VAT registration], in particular by undertakings whose activity, and consequently their status as taxable persons, is purely fictitious. However, these measures must not go beyond what is necessary for the correct

[2] At [30] of the decision.

collection of tax and the prevention of evasion, and they must not systematically undermine the right to deduct VAT, and hence the neutrality of that tax."

15. The CJEU expressly acknowledged the application of the principle of proportionality as well as the preservation of VAT neutrality as confining both the scope and application of measures taken to prevent the "misuse" of identification numbers/VAT registration.

GBFH'S SUBMISSIONS

16. Mr Beal KC, who appeared for GBFH, submitted as follows:

(1) As a person making taxable supplies GBFH was liable to pay output VAT on those supplies and was in principle entitled to receive its VAT registration from its Member State of establishment (here the United Kingdom): PVD Articles 9 and 213.

(2) The 2020 supplies were an economic activity, being a domestic supply of goods (the minibus) and an export of goods (the Lamborghini).

(3) The 2020 supplies exceeded the compulsory registration threshold of £85,000 specified in VATA 1994 Schedule 1, paragraph 1. In the alternative, GBFH intended to make taxable supplies exceeding the registration threshold in the forthcoming 12 months.

(4) Under EU law, a taxable person's entitlement to deduct input tax is strong one.

(5) Member States (and the United Kingdom) are entitled to enforce provisions, including the cancellation of a VAT registration or refusal of VAT registration, to ensure the correct collection of VAT and to prevent VAT evasion: PVD Article 273 and VATA 1994 Schedule 1, paragraph 13. However, that power must (1) comply with the principle of proportionality and (2) be based on sound evidence with objective reasons.

(6) A decision to deregister on grounds of risk of abuse could not persist for time immemorial, so there must come a point at which a right to be registered for VAT would be capable of being exercised.

(7) So far as the determination of a strike-out application is concerned, the relevant principles to be applied are those set out by Lewison J in *Easyair*. In particular, the power to exercise any strike-out of an appeal calls for real caution and should be exercised sparingly. Moreover:

(a) the burden of proof rests on the applicant for summary judgement;

(b) an application for summary judgement is not appropriate to resolve a complex issue of law and fact;

(c) there can be more difficulties in applying the "no real prospect of success" test than trying the case in its entirety.

(8) The FTT made the following errors of law in striking out GBFH's appeal on the basis that it had no real prospect of success:

(a) It did so without any consideration of the evidence which had been adduced, in particular evidence as to the 2020 supplies, or which would be adduced at a substantive hearing. Mr Beal also referred to four "concessions" made by HMRC, namely (1) the fact of the 2020 supplies, (2) HMRC's acknowledgement that GBFH had not traded for nearly 2 years prior to the 2020 registration rejection, (3) an implicit concession that factual circumstances may establish a sufficient change in the risk profile of a business to mean that the risk of abuse from a VAT registration can no longer be presumed and (4) HMRC's acknowledgement,

recorded by the FTT, that HMRC had granted input tax credits to GBFH nearly 2 years after the 2017 notification.

(b) The FTT's finding that the underlying reason for the refusal of the 2020 registration application was that the previous VAT registration had been cancelled was flawed. This explanation was insufficient to explain why any alleged risk which justified de-registration in 2017 remained present in 2020. The FTT also erred in law, or acted in a procedurally unfair way, in concluding that the reasons in the 2017 notification provided the reasons why the 2020 registration application had been rejected. The only reason given in the 2020 registration rejection was the erroneous observation that an appeal against the 2017 notification was extant and the 2020 rejection did not incorporate by reference the reasons given in the 2017 notification.

(c) The FTT erred in concluding that any procedural flaws in the 2020 registration rejection could be cured by HMRC serving its Statement of Case, since the FTT's striking out of GBFH's appeal meant that HMRC would never actually serve a Statement of Case.

(d) The FTT erred in holding that the previous cancellation of GBFH's VAT registration remained determinative unless and until GBFH demonstrated that circumstances had changed. This wrongly reversed the burden of proof in a strike-out application.

(e) The FTT behaved procedurally unfairly in finding that GBFH had made a "considered and deliberate" decision not to appeal against the previous deregistration decision (communicated by the 2017 notification). Although GBFH had indeed failed to appeal the decision communicated by the 2017 notification it was unfair to attribute to GBFH as a result of this any conscious acceptance that there was a sound and objective basis for cancelling its VAT registration.

(f) The FTT erred in finding that aspects of GBFH's appeal represented an abusive attempt to re-litigate matters already determined conclusively against GBFH. GBFH was not challenging the 2017 notification but rather the 2020 registration rejection, the latter being a separate public law decision to the former.

(g) The FTT was wrong to rely upon the fact that the 2017 notification was to some extent prospective.

(h) The FTT's position was also contrary to EU law: the right to deduct input tax was a fundamental right, proportionality underpinned the entire VAT system, and GBFH's right of effective protection before the court was denied by the FTT's decision.

HMRCS' SUBMISSIONS

17. Mr Watkinson, who appeared for HMRC, submitted as follows:

(1) *Ablessio* shows that Member States (and the United Kingdom) may legitimately take measures which are necessary to prevent the misuse of VAT registration, subject to the principle of proportionality (which requires that such measures do not systematically undermine the right to deduct VAT or offend against the neutrality of VAT).

(2) The *Ablessio* principle is prospective. It is about prevention not cure.

(3) A public law litigant who loses an opportunity to have his case heard through the default of his own advisers cannot complain that he has been the victim of a procedural impropriety or the denial of natural justice.

(4) The "no reasonable prospect of success" test in Rule 8(3)(c) extends to striking out all or part of an appeal for an abuse of process. A summary of the abuse of process principles was recently approved by the Court of Appeal in *Koza Limited v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1018 ("*Koza*") at paragraphs 30 to 42. Those principles include that if a point should have been taken on an earlier occasion then a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be an abuse of process.

(5) An appellate tribunal should give considerable weight to the views of the initial tribunal in an appeal against a decision on a strike-out application.

(6) Where there is a deregistration that is not appealed, followed by a later application for VAT registration that is refused based on the earlier deregistration, the two matters cannot simply be decoupled as if the original deregistration never happened. Otherwise, there is no incentive for the taxpayer to appeal the original decision; time limits in relation to the original decision would be circumvented and a taxpayer who lost an appeal against the original decision could make HMRC prove their case once again.

(7) The FTT was entitled to conclude that GBFH must have accepted that the *Ablessio* criteria were met because of GBFH's failure to appeal the 2017 notification, which meant that the unchallenged deregistration decision stood as binding. Concluding otherwise would have put GBFH in a better position than if GBFH had litigated the issue and lost. There was no suggestion by GBFH that the 2017 notification was wrong or that GBFH challenged HMRC's submission that GBFH made a considered decision not to appeal. GBFH's submission that "the failure to appeal that decision was the result of an error, rather than a conscious decision" was not GBFH's pleaded position and could not now found any complaint about procedural fairness.

(8) The FTT did not err in relation to the burden of proof. The burden of proof was on HMRC in relation to both the *Ablessio* criteria and showing that there was no reasonable prospect of success. The FTT was right that the evidential burden had shifted to GBFH because GBFH had not appealed the original deregistration decision and must have accepted that the *Ablessio* criteria were made out. Mr Watkinson developed this submission to say that because the original 2017 notification was binding the risk of abuse continued unless GBFH could show otherwise.

(9) To demand that HMRC must re-prove the original case would be to permit abuse. If GBFH's case were correct, even on an immediate subsequent voluntary application for re-registration, HMRC would have to prove that the registration was likely to be used for fraudulent or abusive purposes, even if there had been no taxable transactions made in the meantime.

(10) The position is analogous to the "presumption of continuity" under which once a discovery has been made as to undeclared income the situation is presumed to go on until there is some change, the onus being on the taxpayer to show that change: *Jonas v Bamford* [1973] STC 519.

(11) In relation to the facts, two clean taxable transactions could not begin to outweigh the risk that had been established by the original unchallenged deregistration decision, and the FTT was entitled so to conclude. Further, the fact that GBFH had not traded for nearly 2 years simply reinforced that there had been no change in GBFH's circumstances. GBFH had not advanced any material change of circumstances, and the payment of input tax credits did not mean that GBFH was not also abusing its VAT registration.

(12) The FTT did not take into account immaterial factors, fail to take account of material factors, err in principle or come to a conclusion which was impermissible or not open to it.

(13) The error in the 2020 registration rejection letter was irrelevant.

(14) The availability of a strike-out or summary judgement under protection against abuse of process does not offend any EU law-based right.

DISCUSSION

18. The only issue in this appeal is whether the FTT erred in law in agreeing to HMRC's application to strike out GBFH's appeal against the 2020 registration rejection as an abuse of process.

19. HMRC's case before the FTT was summarised by the FTT as follows:

> 18. Mr Watkinson submits that the present appeal to this Tribunal is an abuse of process and should therefore be struck out. He submits that this appeal amounts to an abuse of process because:
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> (1) GBFH are seeking to litigate the same issue that it deliberately failed to appeal in relation to in 2017,
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> (2) in circumstances where the indirect attempt to appeal the issue has already been struck out, and
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> (3) where there has been no identified material change of circumstance such as a change of director.
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> 19. Mr Watkinson submits that if the Tribunal fails to strike out this appeal, GBFH would have *carte blanche* to make repeated appeals against decisions resulting in it not having a VAT registration number, all of which are made on the basis of identical factual matrices, whether those are deregistration decisions, or refusals to register. This, he submits, would bring the administration of justice into disrepute.
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> …
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> 21. Mr Watkinson submits that the HMRC's decision to deregister GBFH was made in order to address the risk of future VAT abuses by GBFH - it was prospective as to risk. And GBFH made a deliberate decision at that time not to appeal HMRC's decision. Mr Watkinson submits that GBFH's grounds of appeal in this case seek to litigate matters that should have been raised in an appeal against HMRC's original decision to de-register it. This therefore amounts to an abuse of process, and the appeal should therefore be struck out.
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> 22. Mr Watkinson accepts that HMRC would be under an obligation to re-register GBFH if there were a change in circumstances, such that the risk of VAT abuse no longer existed. That might occur if, for example, there was a change in the composition of GBFH's board of directors. But submits Mr Watkinson, all GBFH have done is to seek to side-step HMRC's decision by undertaking two "clean" transactions. This (even if repeated *ad nauseam*) does not amount to a change in circumstances that would justify re-registration. Whilst it might be possible, says Mr Watkinson, for a leopard to change its spots, it takes more than just taking its toe out of a mucky pool, and dipping it tentatively into a clean pool for just a few moments.

20. The FTT largely accepted HMRC's case, expressing its conclusions as follows:

> 64. The background facts in this appeal are not in dispute. HMRC do not dispute that GBFH has made the two supplies that are the economic activities

> that GBFH say justify its registration. There is therefore no need for a substantive hearing insofar as it would enable the Tribunal to undertake an investigation of the facts, as these facts are not in doubt. I am able to accept the facts pleaded by GBFH, namely that the supply of the two vehicles are economic activities that potentially justify its entitlement to be registered.
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> 65. This application therefore gives rise only to short points of law on which I have all the evidence necessary of the proper determination of the question before the Tribunal. I do not consider that these points of law are of such difficulty that would justify a substantive hearing.
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> 66. Although Mr Beale makes out an arguable case in relation to GBFH's entitlement to register on the basis of its economic activities (grounds 1,2 and 8), I find that this appeal has no realistic prospect of success on these grounds. HMRC's entitlement to protect the revenue from abuse (which GBFH must have accepted was based on sound evidence and had objective reasons) "trumps" any entitlement of GBFH to be registered for VAT on the basis of its economic activities. GBFH would be entitled to be re-registered if it can show that the risk of future abuse (being the reason why its registration had been cancelled) had been addressed and mitigated, but no such ground has been pleaded in its notice of appeal.
>
> 67. Mr Beale in his submissions sought to distinguish between the prior accounting periods (in respect of which the GBFH had undertaken abusive behaviours), and the recent periods in which it had made the supplies on which its application for registration was based. In essence, his submission is that GBFH's application for registration is not an abuse of process, because the deregistration decision related to previous accounting periods, whereas the economic activities justifying registration occur in subsequent accounting periods. The decision not to appeal against the deregistration therefore does not, he says, impact the requirement for registration arising in the subsequent accounting periods. I am not persuaded by this argument. I agree with Mr Watkinson that deregistration is prospective in its nature - its purpose is to prevent abuse in the future. This is why I have found that in order to register for VAT, GBFH must be able to demonstrate that the risk of it engaging in abusive behaviours is no longer present.
>
> 68. I find that grounds 3,4 and 5 of GBFH's notice of appeal in essence seek to reopen the basis on which its registration was originally cancelled. I find that this amounts to an abuse of process.

21. The parties are in substantive agreement as to many of the principles applicable to the application which was before the FTT. In effect, at the heart of this appeal is the FTT's application of those principles to the facts.

22. The material applicable principles can be briefly summarised as follows:

(1) The FTT's power to strike out an appeal, or part of it, which has no reasonable prospect of success extends to striking out an appeal which would be an abuse of process because it seeks to re-litigate a matter which has already been determined or should have been raised previously.

(2) The relevant principles remain well summarised in *Easyair*.

(3) VAT registration may be cancelled or refused on the basis of risk of abuse: *Ablessio.*

(4) The burden of proof both as to the strike-out application and the risk of abuse rests with HMRC.

23. We begin from the position that this Tribunal should not lightly disturb the conclusions of the FTT in a situation such as this. However, we have concluded that although the FTT correctly directed itself as to the applicable principles, it made a number of material errors of law in applying those principles to the facts before it.

HMRC's reasons for the decision which GBFH sought to appeal

Two reasons, one wrong

24. Because there was no statutory review, the relevant matter against which GBFH sought to appeal was the decision contained in the 2020 registration rejection. The FTT considered, and the parties agreed, that in relation to that appeal the FTT would have a full appellate jurisdiction. We also agree, for the reasons set out in *Millennium Energy Trading Ltd v HMRC* [2018] UKFTT 633 (TC) at paragraph 99 of that decision.

25. So, the correct starting point for the FTT in considering whether an appeal against that rejection stood a reasonable prospect of success was to consider the reasons given by HMRC in that rejection for their decision to refuse to register. The rejection stated as follows, with emphasis added to the original:

> We are unable to proceed with your VAT registration application **as** G B Fleet Hire Ltd has previously been registered for VAT under number 106 9706 10 which has been cancelled by HMRC on the basis that the VAT registration was being utilised solely or principally for abusive purposes…**As** that compulsory cancellation is currently under appeal the application to register G B Fleet Hire Ltd is refused. I refer you to your discussion with HMRC Visiting Officer.

26. Unfortunately, in quoting only part of the rejection decision (at [13]) the FTT omitted the opening words, and in particular the first "as". However, we consider it clear as a matter of language that the use of the word "as" shows that two reasons were given by HMRC. The first was the cancellation of registration in 2017 on the basis that it was being used for abusive purposes. The second was that the 2017 cancellation was currently under appeal.

27. It is common ground, and was common ground before the FTT, that the second reason was simply wrong. So, one of the two stated reasons for the decision which GBFH sought to appeal was wrong. There was no indication in the terms of the rejection that one reason had been given any greater weight than the other by HMRC. The FTT noted that the statement was incorrect (at [14]) but accepted (at [62]) HMRC's argument at [24] that this was "irrelevant, as it would be open to HMRC to clarify the grounds on which they refused registration in their Statement of Case"[3]. The FTT also rejected Mr Beal's argument that the supposed appeal against the cancellation was the only reason given by HMRC because GBFH's original grounds of appeal against the VAT assessments did include a challenge to the cancellation in 2017, although those grounds had been struck out by the date of the 2020 registration refusal: [43].

28. We consider that in reaching its decision that it was irrelevant that one of HMRC's two stated reasons was wrong, the FTT erred in law in reaching a decision which could not rationally be reached, and which took into account irrelevant factors. The reference at [43] to GBFH's original grounds of appeal may have explained HMRC's error, but it did not mean that it was not an error, and it was therefore irrelevant in considering the prospects of GBFH being able to establish in its appeal that the 2020 rejection was susceptible to challenge on the basis that one of the two stated reasons was wrong. Additionally, the FTT took into account an irrelevant factor in relying on HMRC's ability to clarify its reasons in its Statement of Case. It was the 2020 registration refusal against which GBFH's appeal had been made, and, as GBFH

[3] We note that the summary of Mr Watkinson's position at [24] implicitly accepts that two reasons were advanced by HMRC in the rejection decision.

point out, granting HMRC their application to strike out GBFH's appeal meant that no HMRC Statement of Case would ever be served.

2017 reasons were 2020 reasons and those reasons accepted by GBFH

29. The FTT found that the 2020 registration rejection referred back to the underlying reasons for the cancellation of GBFH's VAT registration in 2017 and that "it was clear on the face of the [2020 registration rejection] that the underlying reason why HMRC refused to register GBFH was because it its (sic) previous VAT registration had been cancelled as it was being utilised solely or principally for abusive purposes."[4] The FTT made the same point at [56], in holding that the reason why GBFH's VAT registration was cancelled in the 2017 notification "provides the reasons" why the 2020 registration application was rejected. In reaching this conclusion, the FTT found that by failing to appeal the 2017 cancellation, GBFH had made a considered and deliberate decision to accept HMRC's assessment of the risk of abuse which lay behind the decision in 2017 to cancel the registration.

30. For the reasons we have set out above, we consider that the FTT was wrong simply to ignore, or relegate in importance, the second reason provided by HMRC, namely the supposed appeal against the 2017 decision. We also consider that the FTT erred in law in taking into account irrelevant factors, or reaching an irrational decision, in drawing the conclusion it did from GBFH's failure to appeal the 2017 cancellation.

31. The FTT's finding was based on GBFH's failure to appeal against the 2017 notification. However, there is all the difference in the world between a party to litigation accepting that a deregistration is binding to that party on a particular basis and accepting the reasons advanced by HMRC for the compulsory deregistration. GBFH expressly denied the correctness of the proposition as to abuse and the factual factors contained in the 2017 notification in its (now reinstated) appeal against the resultant VAT assessment, indicating that GBFH did not accept the proposition as to abuse and the factual factors contained in the 2017 notification. We consider it was irrational to conclude that a failure to appeal the 2017 notification, in the facts and circumstances of this case, gave rise to an inference of fact that GBFH accepted that GBFH was abusing its VAT registration. An attempt before a court or tribunal to contest the 2017 cancellation would, as GBFH accepted, have been an abuse of process, but that is not the same thing. The terms of GBFH's grounds of appeal against the VAT assessments show that GBFH thought (wrongly) that a successful appeal against a VAT assessment would result in the 2017 notification "falling away". GBFH may have had other reasons why it did not appeal the 2017 notification; the only positive factual evidence points to a failure to appeal based on a mistaken legal analysis.

32. We disagree with the FTT that Mr Beal's submission before the FTT that, in the event of a strike out of GBFH's appeal against the 2020 registration rejection, GBFH would have no opportunity to show a change of position from that adopted in the 2017 notification, amounted to an implicit concession that GBFH accepted the position as stated in the 2017 notification. Before us, Mr Beal made it quite clear in his skeleton argument that GBFH accepted that the determination comprised in the 2017 notification was binding and that GBFH could not, having failed to appeal against it, impugn it in respect of the VAT periods it covered but did not accept that the proposition as to abuse in the 2017 notification or the factual assertions were correct.

33. Finally, the FTT failed to take into account in reaching its conclusion on this issue that the 2020 registration rejection did not explain whether, let alone why, the 2017 risks were said by HMRC to persist in 2020, and to outweigh GBFH's right to register on the basis of the 2020 supplies.

[4] [44].

Abuse of process?

34. As we have described, the FTT rejected Mr Beal's argument that there was a distinction between the 2017 situation and that applying in 2020. Parts of its reasoning in reaching that conclusion were vitiated by the errors we have set out in relation to HMRC's reasons for refusing the 2020 application. In concluding that GBFH's appeal against that refusal must be struck out as an abuse of process, the FTT also relied on (a) what it found to be a failure by GBFH to meet its obligation to plead or prove a material change in circumstances since 2017 such that "the risk of future abuse had been addressed and mitigated", (b) the prospective nature of the *Ablessio* power, and (c) its conclusion that the risk of abuse "trumped" GBFH's apparent right to be registered by reference to the 2020 supplies.

35. With respect to the FTT, for the reasons below we consider that the consideration of these issues and the weight to be attached to them were matters properly to be argued and assessed in a substantive appeal. At the stage of HMRC's application before the FTT, the issue was whether that appeal stood a realistic as opposed to fanciful prospect of success, or whether, in the words of Lord Woolf in *Swain v Hillman* [2001] I All ER 91[5], the appeal was a case which was "not fit for trial at all".

36. We agree that the *Ablessio* power is prospective in nature. However, that power must be exercised in compliance with the principle of proportionality, taking into account the strength of the right and obligation to register for VAT. Proportionality in the domestic courts was expressly considered and endorsed by Henderson J (as he was then) in *Littlewoods Retail v HMRC* [2014] EWHC 868 (Ch) in the following terms (emphasis added):

> …res judicata (in the sense of issue estoppel) cannot the prevent application of the EU doctrine of abuse of rights in the field of VAT ***on a year by year basis***. In such circumstances, the principle of legal certainty is trumped by the principle of effectiveness[6].

37. In our opinion, proportionality requires an ongoing scrutiny of all of the relevant facts and circumstances. This effectively displaces the "presumption of continuity" discussed in *Jonas v Bamford* [1973] STC 519 (at 540a-c, per Walton J), which otherwise presumes that a state of affairs which persists in one year continues into future years. So, it did not necessarily follow from the mere fact that the power to refuse registration for risk of abuse is prospective in nature that the 2020 supplies fell to be ignored, or automatically trumped, by the 2017 circumstances.

38. We agree with Mr Watkinson that there may be circumstances where a party who has lost a case immediately makes the same case as before, with no change of circumstances, and this may well be an abuse of process, depending on the facts and circumstances. However, that was not the case here. In *Koza*, on which HMRC relied, in discussing the application of the abuse of process principles in interlocutory hearings Popplewell LJ stated as follows (emphasis added)[7]:

> The *Henderson* and *Hunter* principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, ***absent a***

[5] At paragraph 95.
[6] At paragraph 197.
[7] At paragraph 42.

> ***significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing***. This is not a departure from the principle in *Johnson v Gore Wood* that it is not sufficient to establish that a point *could* have been taken on an earlier occasion, but a recognition that where it *should* have been taken then, ***a significant change of circumstances or new facts*** will be required if raising it on a subsequent application is not to be abusive.

39. In this case, the 2020 supplies were "new facts", which, by definition, could not have been known to or discovered by GBFH at the time of the 2017 cancellation, or indeed until they were made. The 2020 supplies both entitled and obliged GBFH to register for VAT. Whether or not in all the facts and circumstances those supplies were in fact "trumped" by the continued presence of the factors which had led HMRC to cancel GBFH's registration in 2017 was in our opinion a matter best determined in a substantive appeal.

40. In deciding that GBFH's appeal had no reasonable prospect of success, the FTT relied on its conclusion that GBFH had not pleaded or proved material changes in circumstance sufficient to "address and mitigate" the abusive factors present in 2017. However, the burden of proof in relation to the risk of abuse in 2020 was on HMRC[8]. While the evidential burden may have shifted toward GBFH given the factors present in 2017, the legal burden remained with HMRC. It is relevant in this context that the appeal which GBFH sought to make was against a rejection decision which was silent as to HMRC's case regarding the 2020 position, save possibly by implication relying on the factors present at the time of the 2017 cancellation as a knockout reason (more correctly, one of two stated reasons) notwithstanding the 2020 supplies which HMRC accepted had been made. So, while GBFH may not have addressed in its pleadings the presence or absence of the various factors identified in 2017 by HMRC as giving rise to abuse, nor had HMRC in the decision which GBFH sought to appeal. As we have already pointed out, it was irrelevant at the strike-out stage that HMRC could have particularised its position in its Statement of Case had the appeal been allowed to proceed.

41. GBFH made the 2020 supplies. It was for HMRC to show (the burden being on HMRC) why those supplies did not entitle GBFH to registration in 2020 as a taxable person and also for HMRC to show (the burden again being on HMRC) why the appeal against the 2020 registration rejection was an abuse of process and should be struck out.

42. Our conclusions above mean that it is unnecessary for us to address Mr Beal's detailed arguments regarding EU rights (other than proportionality).

DISPOSITION

43. For the reasons given we allow the appeal.

44. Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") we set aside the FTT's decision as containing material errors of law. In accordance with section 12(2)(b) TCEA we remake the decision as follows.

45. Applying the criteria in *Easyair*:

(1) We do not consider that HMRC have discharged the burden on them of showing that GBFH has a merely "fanciful" prospect of success in appealing the 2020 rejection decision.

[8] *Universal Enterprise (EU) Ltd v HMRC* [2015] UKUT 311 (TCC) at [100] (on fraud) and *Lower Mill Estate Ltd v HMRC* [2010] UKUT 463 at [137], *HMRC v Citibank* [2017] EWCA Civ 1416 at [103] (on abuse of law/right).

(2) HMRC have not shown that that any such case advanced by GBFH is not more than merely arguable and does not carry some conviction.

(3) We have not engaged in a "mini-trial" of GBFH's substantive appeal. Rather we have considered whether HMRC have met the burden of proof in the two instances (to show abuse of law/right and to show that GBFH's appeal against the registration rejection would be an abuse of process).

(4) We have not taken at face value without analysis everything said by GBFH.

(5) We have taken into account that there may well be evidence led by HMRC that the 2020 supplies, although made by GBFH, would lead to some abuse of law/right but this evidence would be properly led at trial.

(6) Such a trial requires a much fuller investigation than that which can be conducted at a strike out application.

(7) Put another way, we disagree with the FTT's conclusion that the application by HMRC raised a short point of law which could be determined without any such further investigation.

46. We have concluded that in the facts and circumstances of this case GBFH's appeal cannot be said to have no reasonable prospect of success.

47. The strike-out application is refused and GBFH's underlying appeal against the 2020 registration rejection is re-instated. That appeal is remitted to the FTT to be heard in due course.

JUDGE THOMAS SCOTT
JUDGE JULIAN GHOSH KC

Release date: 17 November 2022