



TC06596

**Appeal number: TC/2015/04883
TC/2016/01006**

*VAT – electronic submissions – HMRC refusal to apply discretion to allow
paper returns – age and lack of computer competence - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Glen Lyn Generations Limited
Exmoor Coast Boat Cruises Limited**

Appellants

- and -

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

Respondents

TRIBUNAL: JUDGE Rachel Short

**Sitting in public at Exeter Magistrates' Court, Heavitree Road, Exeter on 25
April 2018**

the Appellant not appearing

**Mr Clarke, instructed by the General Counsel and Solicitor to HM Revenue and
Customs, for the Respondents**

DECISION

1. This is an appeal by both Appellants against HMRC's decision of 28 July 2015
5 that they were required to file their VAT returns on-line and did not qualify for an exemption from on-line filing under Regulation 25A VAT Regulations 1995.

2. The Appellants are represented by Mr Oxenham, a director of both of them.

Procedural issues

3. At the hearing HMRC told the Tribunal that Mr Oxenham had notified them
10 that he was not able to attend because he could not travel to Exeter due to ill-health (a back problem). HMRC provided the Tribunal with copies of a letter from Mr Oxenham of 18 April 2018 stating that he could not attend the Tribunal for medical reasons.

4. An application to postpone the hearing had already been made by Mr Oxenham
15 and refused on 16 April 2018 because Mr Oxenham had not produced sufficient medical evidence to satisfy the judge that he was unable to travel to Exeter.

5. Mr Oxenham did not provide any further medical evidence in his letter of 18
20 April 2018. The Tribunal contacted Mr Oxenham by telephone at the start of the hearing. Mr Oxenham confirmed that he could not attend the hearing but asked if he could participate by telephone. HMRC consented to attempt to allow Mr Oxenham to participate in the hearing by telephone. Due to technological problems this did not prove to be possible.

6. HMRC made submissions that the hearing should proceed in Mr Oxenham's absence because:

25 (1) He had not provided sufficient medical evidence to support his claim that he could not travel to Exeter.

(2) The hearing had already been postponed on two occasions (15 June 2017 and 19 October 2017) at the request of Mr Oxenham.

(3) Mr Oxenham was on notice that the hearing would go ahead on 25 April.

30 (4) There was no significant prejudice in hearing the case without Mr Oxenham; in particular the appeal did not concern a large financial liability. The consequences for the Appellants were that they would be obliged to make electronic VAT returns.

35 (5) It was in line with the overriding objective of the Tribunal that the appeal should be heard without any further delay.

7. I agreed to proceed with the hearing in Mr Oxenham's absence, not because I considered that the appeal did not have serious implications for Mr Oxenham, who obviously felt very strongly that the Appellants should not have to make on-line VAT filings, but because of the serious delay which has already been caused by previous

postponements, because of Mr Oxenham’s failure to submit evidence to support his position that he was unable to travel to Exeter for the hearing and finally, because Mr Oxenham, (in his letter of 18 April 2018) had provided a written skeleton argument based on Article 9 of the European Convention on Human Rights (“the ECHR”), to be considered if the hearing proceeded without him, which was available to the Tribunal.

The law

Regulation 25A VAT Regulations 1995 SI 1995 No. 2518:

“ (6) *A person –*

10 *(c) for whom the Commissioners are satisfied that it is not reasonably practicable to make a return using an electronic return system (including any electronic return system that that person is authorised to use) for reasons of disability, age, remoteness of location or any other reason,*

is not required to make a return by regulation 25 using an electronic return system”

15 **Authorities referred to**

8. *L H Bishop Electric Co Ltd v HMRC* [2013] UKFTT 522(TC)
9. *GB Housley Limited v HMRC* [2016] EWCA Civ 1299
10. *Tower MCashback v HMRC* [2011] UKSC 19
11. *Gardner v Blaxhill & Anor* [1960] 2 AER 457
- 20 12. *Customs and Excise Commissioners v Peachtree Enterprises Limited* [1994] STC 747.

Evidence seen

13. Respondents’ letter of 31 March 2015 rejecting the Appellants’ application for exemption from on-line filing and saying:

25 *“As your case for religious exemption was recently rejected by the First Tier Tribunal.....then the only criteria that can be considered is that it is not reasonably practicable to file electronically for reasons of age, disability or remoteness of location (i.e. resulting in poor internet coverage).*

30 *HMRC records indicate that returns have been submitted electronically on previous occasions (specifically for Glen Lyn Generations Limited) this would lend itself to nullifying the contention that it is not reasonable practicable to file on line.*

Furthermore your letter indicates that you operate both businesses (the one business in conjunction with your parents) and that you are responsible for the administration of both.

5 To date you have presented no evidence that you individually cannot file electronically for either disability or age related reasons.

Additionally you have cited the costs incurred from the use of an accountant and the remoteness of location.

10 The Commissioners consider that incurring the costs of a professional to advise upon or assist with the administration of the business, is part of the integral cost of being in business and cannot in itself be used as a reason for failing to comply with the tax regime requirements.

15 Finally, the Commissioners accept that a rural location can present difficulties with electronic communication, however I would reiterate the fact that as electronic returns have been received on previous occasions it is a reasonable assumption that any subsequent electronic submission will be successful”

14. Appellants’ letter of 23 April 2015 providing evidence of disability and age related reasons, stating in respect of Mr Oxenham that:

20 “I am 51 years old. It means that we did not use computers at school or university, I am able to use a telephone however. As can my father who is 93 years old. What is that allows you to consider age as a reason not to file on-line? please answer this question!”

15. and by reference to previous electronic filings:

25 “Lastly your assertion that because an electronic submission has been received on previous occasions, it would be a reasonable assumption that subsequent submissions will be successful does not in any way logically mean that it was reasonably practicable”.

16. Respondents’ decision letter of 28 July 2015, referring to their conclusions in their 31 March 2015 letter.

17. Appellants’ written statement of 11 March 2017 including:

30 “If age does not relate to an inability to physically use a computer then I could only think that this age related exemption has something to do with a person “from the old days” when things were done differently (i.e. paper)

35 18. Various other correspondence between Mr Oxenham on behalf of the Appellants and HMRC and the tribunal service from 6 February 2015 to 2 May 2017, including letter of 6 February 2015 from Mr Oxenham to HMRC saying:

“Lynmouth is one of the most remote places in England....it is a 50 mile round trip to South Molton to see the Accountants and I have little other business to do in the town.....In our current situation a visit to our accountant incurs about £400 of costs”

and letter of 23 November 2015 saying:

5 *“Of course, myself or anyone else operating a VAT business could instruct an agent by telephone to file online on our behalf. If, as HMRC suggest, this is sufficient evidence to force us to file online, then I ask what is the purpose of having an exemption on grounds of age, disability or remoteness of location. Who could possibly benefit from this exemption?”*

19. Mr Oxenham’s letter of 18 April 2018 to the Tribunal setting out his skeleton argument for the appeal.

The history of this appeal

10 20. Exmoor Coast Boat Cruises Limited appealed against a decision of HMRC of 15 May 2012 that it should not be granted an exemption from filing its VAT returns on-line by reason of its director, Mr Oxenham’s religious views. That appeal was dismissed by the First-tier Tribunal in a decision of 17 December 2014.

21. As part of that decision the Tribunal found as a fact that:

15 (1) Exmoor Coast Boat Cruises Limited filed its corporation tax returns on-line through an agent.

 (2) Glen Lyn Generations Limited had submitted its VAT returns on-line by an agent since 2010 and its corporation tax return is submitted on-line by an accountant.

20 22. Both Appellants subsequently appealed against HMRC’s decision of 28 July 2015 that they were required to file their VAT returns on-line. That appeal has been the subject of a strike out application by HMRC. A judge determined that application and released her decision on 2 December 2016. That decision identified three separate grounds of the Appellants’ appeals on which the strike out application had been based:

 (1) Religious and moral grounds, including the application of the European Convention on Human Rights

 (2) Disability grounds – relating to Mr Oxenham’s health issues

 (3) Age and other grounds.

30 23. The decision in the strike out application agreed that grounds (1) and (2) should be struck out. The only remaining ground which is the subject of this appeal is ground (3). This was set out by the judge in her decision on the strike out application as:

35 *“That Mr Oxenham is 52 did not learn to use a computer at school or university. He still does not actually know how to use a computer and has never used a computer although he accepts that he has seen other people use them and considers that he might learn to use one quite fast. However, he does not wish to learn how to use one. He does not choose to own a computer and does*

not own one. So even if he learnt how to use one, he could only actually use one by:

(a) purchasing one;

(b) using one belonging to friend

5 (c) Using one in a library which is a long drive away

(d) Employing an agent to file on-line on the companies' behalf"

Options (a) and (d) would involve in him expense; options (b) and (c) would potentially involve confidential financial information becoming known to other persons who would not owe the companies a duty of confidentiality"

10 24. The judge accepted that Mr Oxenham's arguments under this head had a "reasonable prospect of success" in any substantive appeal, particularly taking account of the decision in *L H Bishop*. This is that substantive appeal.

The jurisdiction issue

15 25. On behalf of HMRC Mr Clarke stated that HMRC considered that the Tribunal's jurisdiction in determining this appeal is supervisory only, i.e. the Tribunal can determine whether in deciding that the Appellants did not fall within the exemption from filing their VAT returns on-line, HMRC exercised their discretion reasonably, taking account of all relevant facts and not taking account of any irrelevant facts.

20 26. Mr Clarke referred to the wording of Regulation 25A and to the decision in *GB Housley Limited* in support of this approach:

25 "In relation to the decision in relation to the Proviso, the F-tT's function and jurisdiction are properly supervisory. In other words, the F-tT is to examine whether discretion has been properly exercised. If, as in the present case, it decides that it has not been, then it will identify why that is so; but it is not for the F-tT to substitute its own view for that of HMRC" [11]

30 27. Mr Clarke accepted that no point on this had been taken by HMRC in the strike out proceedings, (as made clear in paragraph 26 of that decision) but said that this did not indicate that HMRC had conceded the point and that the question of jurisdiction had been fully raised in HMRC's statement of case for the strike out application, so could not be said to be a new point. Finally, there was no prejudice to the Appellants in arguing the jurisdiction point at this stage in relation to the one ground which had not been struck out.

35 28. Mr Clarke also suggested that even if HMRC were wrong on this and the Tribunal had the jurisdiction to come to its own decision about whether the Appellants should be granted an exemption from electronic filing, the result would be the same.

29. I have considered whether HMRC should be allowed to take this position, having seemingly failed to argue this in the strike out application. I have taken

account of the approach taken by the higher courts to similar situations in which a party has introduced new arguments which appear to be outside the scope of the original appeal and particularly the approach taken in the *Tower MCashback* decision. This indicates the duty to weigh the need for the Tribunal to consider all the relevant legal arguments against any prejudice to a party in introducing a new argument at a late stage of the proceedings.

30. I have taken account of the fact that the Appellants are not present at the Tribunal for this hearing and therefore have been deprived of the opportunity to make oral submissions on this jurisdiction question. However, this point was raised in HMRC's statement of case and their later skeleton argument, which was served on the Appellants in May 2017, now nearly a year ago. It cannot be said that the Appellants were not aware of this argument or that they have not had the opportunity to respond to that issue.

31. I have also concluded that there is no obvious prejudice to the Appellants in taking a narrower view of the Tribunal's jurisdiction at this stage.

32. For these reasons I have decided that HMRC should be allowed to advance this argument at this stage, subject only to the Appellants being allowed the opportunity to make further written submission on this point within a specified time.

33. The Appellants did provide further written submissions on 5 June 2018 but did not make any specific submissions concerning the Tribunal's jurisdiction.

Supervisory or appellate jurisdiction

34. I have concluded that HMRC are correct that the Tribunal's jurisdiction in this matter is supervisory only on the basis of the relevant legislation which refers at Regulation 25A to the Commissioners "*being satisfied that it is not reasonably practicable to make a return using an electronic return system*".

35. That means that the only question which I can consider is whether HMRC came to an unreasonable decision in failing to take account of Mr Oxenham's age or other grounds in refusing to grant the Appellants the exemption which they sought.

36. If I conclude that HMRC did come to an unreasonable decision for this reason, I can direct that HMRC should consider the matter again, unless HMRC can demonstrate that their decision would have been the same even had this matter been taken into account.

The substantive issue

The Appellants' arguments

37. In his letter of 18 April 2018 on behalf of the Appellants Mr Oxenham referred to Article 9 of the ECHR and pointed out that his desire, on behalf of the Appellants,

not to file on-line VAT returns could not be said to contravene any of the restrictions at Article 9(2) and said that:

- (1) HMRC's requirement to file on-line discriminated against people wishing to manifest their beliefs alone.
- 5 (2) The Tribunal should direct HMRC to amend their "limited, arbitrary and discretionary exemptions" in line with Article 9.
- (3) He still considers himself to be a member of the Plymouth Brethren.
- (4) He is fighting for the right of people who do not wish to go on-line because using more electricity contributes to global warming.
- 10 (5) HMRC are refusing to set out parameters to meet the age exemption for filing on-line, for example by stipulating a specific age criteria.

HMRC's arguments

15 38. HMRC point out that of the points raised by Mr Oxenham in his letter of 18 April, only point (6) refers to the grounds of appeal which are live, not having been struck out; that whether, in failing to take account of Mr Oxenham's age and his ability to use a computer, HMRC exercised their discretion unfairly under Regulation 25A.

20 39. HMRC say that in considering and applying the grounds referred to in Regulation 25A to a particular taxpayer, the test of whether those grounds are satisfied in an objective one; the question is whether HMRC properly concluded that a reasonable taxpayer would have found the obligation to file on line "not reasonably practicable" as that term was used in the *Gardner v Blaxhill* decision:

25 "by inserting the word "reasonably" the parties not only intended to mean, but must be deemed to have meant, that the tenant can exercise his option provided he behaves during his tenancy in a way in which a reasonably minded tenant might well behave" p 462 at C

30 40. Mr Clarke suggested that in determining what was "reasonably practical" it had to be accepted that statutory obligations could entail some degree of inconvenience, effort and expense and that the question was whether in the Appellants' case HMRC had exercised their discretion to draw the line between what was not reasonably practicable and what was merely inconvenient in the right place.

Age

35 41. HMRC say that on their interpretation of Regulation 25A the reference to "age" should be read with the other criteria listed and that it is intended to apply to physical infirmities arising with age, rather than just a person's age.

42. Mr Oxenham's infirmity (his ill health) has already been rejected as a possible ground of appeal (under the "disability" head). The only "age" related factor which

has been raised by Mr Oxenham and which might be said not to have been properly taken account of by HMRC is his lack of formal computer training at school or university.

5 43. HMRC argue that in the manner in which this has been argued by Mr Oxenham, does not raise issues which are “age” related: Mr Oxenham has not suggested that his age prevents him from learning how to use a computer, but only that his age means that he was not taught how to use one as part of his education and is unwilling, rather than unable, to learn now. This argument should in fact be treated not as an “age” related ground, but as a factor falling under the “any other grounds” head of the test in
10 Regulation 25A.

44. It is not the case that HMRC have failed to take account of Mr Oxenham’s age as a relevant consideration in coming to their decision.

Other grounds

15 45. The only other question is whether there are “other grounds” which HMRC should have considered which they failed to consider in refusing to exercise their discretion in favour of the Appellants.

46. HMRC say that they considered the “other grounds” raised by Mr Oxenham; the fact that he does not own a computer and so would have to incur expense, inconvenience and risk confidentiality to make on-line VAT returns but concluded
20 that these do not fall within the objective criteria of what is “not reasonably practicable” in Regulation 25A.

47. In HMRC’s view Mr Oxenham has not demonstrated that his lack of computer training, unfamiliarity with computers and lack of ownership of a computer mean that obliging him to file on-line is so onerous that a reasonable taxpayer would not be able
25 to take steps to comply with his on-line filing obligations.

48. Mr Oxenham is obliged to take reasonable steps to comply with the law and there are reasonable steps which he could have taken to circumvent the fact that he does not own a computer, such as hiring an agent to do the on-line filing for the Appellants.

30 49. HMRC did look at all the relevant circumstances in coming to their decision and concluded that:

(1) The real reason for the Appellants not wanting to file on-line VAT returns was Mr Oxenham’s personal crusade on this issue.

35 (2) Mr Oxenham had not provided any reasonable explanation for why he could not train himself to use a computer or appoint an agent to file on-line VAT returns.

(3) Mr Oxenham’s reference to concerns with confidentiality of information was not a reasonable concern given the amount of confidential information that

had to be provided about the Appellants for other regulatory purposes (such as to Companies House).

5 (4) The fact that one of the Appellants (Glen Lyn) had filed its VAT returns on-line previously and the other, (Exmoor), had filed its PAYE and corporation tax returns on-line suggests that it was practicable for Mr Oxenham to make on-line filings.

Findings of Fact

10 50. On the basis of the evidence seen and heard the Tribunal finds as a fact that:

(1) Glen Lyn Generations Limited has filed on-line VAT returns through an agent since 2010.

15 (2) Exmoor Coast Boat Cruises Limited filed on-line PAYE and corporation tax returns prior to 2015.

(3) Mr Oxenham was 51 at the time of his application for the exemption on behalf of the Appellants and had not been taught to use a computer as part of his general education nor become familiar with computer use since.

20 Decision

25 51. I have already concluded that the Tribunal's jurisdiction in this appeal is limited to a supervisory jurisdiction. That means that in order to succeed the Appellants need to demonstrate that HMRC's decision of 28 July 2015 to refuse to allow them an exemption from on-line filing was a decision at which HMRC could not reasonably have arrived. That decision could be unreasonable because (i) it was a decision that no reasonable body of commissioners could have arrived at, or (ii) an irrelevant matter was taken account of or a relevant consideration was ignored or there has been an error of law.

30 52. In this case, by reference to the grounds as set out in the strike-out application, the Appellants must demonstrate that HMRC's failure to take account of Mr Oxenham's age or any other grounds in coming to their decision led to an unreasonable decision being made.

Age

35 53. I disagree with HMRC's approach to how the "age" criterion should be interpreted in Regulation 25A. There is nothing in the wording of that provision which suggests that "age" in this context is only intended to cover the physical and cognitive impairments which arise with age. On the contrary, the reference in that provision to "disability" as a separate criterion suggests that "age" may connote

something different than a physical impairment which might otherwise also fall under the “disability” head.

54. In my view the age of a person who is responsible for on-line filing can be a criterion in itself for the purposes of Regulation 25A because the age of a taxpayer may be relevant to their ability to use a computer and deal with on-line filing, as suggested in the *L H Bishop* case. I do not accept that it is necessarily the case that someone who has had no, or very little exposure to computers during their formative years can readily learn to use a computer. Computer aptitude cannot be taken for granted, even in the twenty first century.

55. That is not to say, as Mr Oxenham has suggested, that HMRC should state a specific age at which it is not reasonable to expect a taxpayer to be able to deal with on-line filing, but that the age of a taxpayer may be taken account of as indicative, on the particular facts of a given case, of a taxpayer’s computer competence.

56. In Mr Oxenham’s case, by failing to take account of Mr Oxenham’s age as potentially relevant to his likely computer competence, HMRC have failed to take account of a potentially relevant matter in refusing to apply the exemption from on-line filing to the Appellants.

Other grounds

57. HMRC viewed this as confined to the ground that Mr Oxenham does not own a computer, meaning that he would have to incur expense, inconvenience and risk confidentiality in order to file VAT returns on-line.

58. HMRC considered this ground in their letter of 31 March 2015 and concluded that this did not mean that it was not reasonably practicable to file on-line returns through an agent and relied on the fact that on-line returns had been filed previously for both the Appellants, including VAT returns for Glen Lyn.

59. I do not consider that in coming to this conclusion HMRC have come to a decision to which no reasonable commissioner could come. HMRC were aware at the time when they made their decision that one of the Appellants (Glen Lyn) had already filed on-line VAT returns, which strongly militated against accepting Mr Oxenham’s arguments relating to the impracticality of filing on-line as a result of cost, inconvenience and confidentiality concerns.

60. Mr Oxenham suggested, with some logical force, that if HMRC were able to say in any case that a taxpayer should rely on a third party to undertake electronic filing on their behalf, it was difficult to see how anyone could ever take advantage of the exemption provided by Regulation 25A.

61. This can be answered in two ways:

(1) The manner in which these appeals have been heard, having had various grounds of appeal struck out before getting to this Tribunal, has meant that the remaining grounds under appeal have had to be considered as discrete issues.

The grounds listed in Regulation 25A are not necessarily discrete and it would be perfectly possible for a taxpayer to be able to rely on a combination of one or more of the grounds to persuade HMRC that they should exercise their discretion and remove the electronic filing obligation.

5 (2) Second, Regulation 25A is an exemption from a general filing obligation and should therefore be expected to be applicable only in a very small percentage of cases, meaning that the hurdle to demonstrate that the exemption should be granted should be expected to be very high. As HMRC pointed out, mere inconvenience is not sufficient to bring a taxpayer within these
10 exemptions, a taxpayer needs to demonstrate to HMRC that the difficulties in filing on-line are so significant that no reasonable taxpayer would be able to deal with them.

Did HMRC come to an unreasonable decision?

15

62. Mr Clarke referred to a number of other circumstances which HMRC had taken account of in coming to their decision. That included some facts which came to light as a result of other litigation undertaken by Mr Oxenham on behalf of the Appellants, such as Mr Oxenham's statement in his EHCR application of May 2016 that he "*did not know how to use a computer well*". In deciding whether HMRC exercised their discretion reasonably, I am not taking account of facts which came to light as a result
20 of later litigation and of which HMRC were not aware at the time when they made their decision in July 2015. (see *Customs and Excise Commissioners v Peachtree Enterprises Limited*)

25 63. However, there are factors which HMRC refer to and which were known to them at the time when they made their decision which suggest that age, computer competence, or the fact that Mr Oxenham did not own a computer, were not the main reason for HMRC concluding that they should not exercise their discretion in favour of the Appellants; those reasons were Mr Oxenham's moral crusade against the
30 requirement to file on-line and his religious beliefs.

Conclusion

64. The question for this Tribunal is whether HMRC came to an unreasonable decision in refusing to accept the Appellants' application for an exemption from on-line filing, particularly in failing to take account of Mr Oxenham's age, his lack of
35 computer competence and his problems with accessing a computer to make on-line returns for the Appellants.

65. In my view HMRC acted reasonably in refusing the Appellants' application to for an exemption from on-line filing on these grounds.

66. It was reasonable for HMRC to treat the main reasons for Appellants' application as Mr Oxenham's personal crusade and his religious objections to filing
40 on-line and to be influenced by the fact that the Appellants had both already filed

some returns on-line, as set out in their letter of 31 March 2015. It was reasonable for HMRC to dismiss Mr Oxenham's lack of computer competence and his lack of easy access to a computer as insufficient grounds to grant the Appellants that exemption.

5 67. The fact that HMRC did not properly take account of Mr Oxenham's age as a separate criterion has not, in my view, led to HMRC making an unreasonable decision. Even had they considered Mr Oxenham's age as a separate criterion, the other factors which they, correctly, viewed to be of much greater significance, outweigh any considerations of Mr Oxenham's age.

10 68. I have considered this appeal on the basis that the Tribunal's jurisdiction is a supervisory one only. For completeness I add that were this found to be wrong, and the Tribunal's jurisdiction to be a full appellate jurisdiction, my decision would be the same; Mr Oxenham's age, lack of computer competence and problems with accessing a computer are not sufficient grounds to allow the Appellants to take advantage of the exemption from on-line filing in Regulation 25A.

15 69. For these reasons this appeal is dismissed and HMRC's decision of 28 July 2015 in respect of both Appellants is confirmed.

20 70. 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.

25

Rachel Short
TRIBUNAL JUDGE

RELEASE DATE: 16 July 2018

30