Neutral Citation: [2022] UKFTT 336 (TC)

Case Number: TC08593

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2015/06840

VAT – *penalty - retrospective deregistration – no - whether lack of HMRC review affects appeal – no – late appeal – long period of delay – reasonable excuse - no – appeal dismissed*

Heard on: 9 September 2020
Judgment date: 13 September 2022

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

JAGVINDER TAKHAR t/a GOLDEN FRY

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: no appearance by or for the Appellant

For the Respondents: Ben Williams, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Notice of Appeal, dated 18 November 2015, submitted by the appellant's then accountants, appealed a penalty of £8,590 and "£45,559 of VAT charged".

2. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. A face-to-face hearing was not held because of the difficulty of ensuring the safety of all participants. The documents to which I was referred comprised a Bundle consisting of 188 pages. I also had an Authorities Bundle extending to 70 pages. HMRC had lodged a Skeleton Argument.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Preliminary matters

4. The Grounds of Appeal are very vague and since the appellant was not present or represented, with Mr Williams' consent, I therefore considered all possible arguments, whether articulated or not.

Postponement

5. On 1 September 2022, new representatives for the appellant lodged with the Tribunal an application for postponement of the hearing listed for 9 September 2022. That was on the basis that the appellant had engaged a new representative and that "The appellant has also submitted an ADR application as it has not been explored in this case …".

6. HMRC vigorously opposed that application on the basis that:-

(a) There had been a long history of delay by the appellant and the current representative was "at least" the third representative of which HMRC was aware.

(b) The parties had been scheduled to conduct ADR on 22 November 2016 but the appellant cancelled on the day before.

(c) ADR did occur on 9 May 2017 but it was unsuccessful.

(d) The appeal was first listed for hearing on 24 October 2019 but, on the day of the hearing the appellant's representatives advised the Tribunal that they were newly appointed and knew nothing about it. They stated that they could not represent the appellant and the appellant had been admitted to hospital the night before, albeit no evidence of that was produced. The hearing was postponed.

(e) Judge Redston had issued Directions on 4 August 2021 and 20 September 2021 which set out the sequence of delays (which do not require to be repeated here) including delays caused by another change of representative in 2021.

(f) The appeal was listed for hearing on 13 January 2022 and was postponed at the request of the appellant.

(g) This hearing was listed on 15 July 2022.

7. On 6 September 2022, the Tribunal administration, at my behest, emailed the parties and, in particular, the appellant's new representatives at 15.16 stating *inter alia*:-

> "The issues before the Tribunal on Friday are straightforward and technical and could be argued by the representative. In all these circumstances the application is refused and the appeal will proceed".

8. No appearance was made by either the appellant or the representative. The Video Hearings Team attempted to contact both but without success.

9. Mr Williams argued that the Tribunal should proceed to determine the matter in the absence of the appellant or his representative and in that regard he relied on Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules").

10. I was satisfied that the appellant and his representative had been notified that the hearing would proceed and that it was in the interests of justice to proceed with the hearing. I had regard to Rule 2 of the Rules.

The decision notice

11. Another preliminary issue was appropriately raised by Mr Williams. The Notice of Appeal indirectly referenced a letter from HMRC to the then, and newly appointed, accountant dated 23 October 2015, wherein HMRC had indicated that the appellant should appeal to the Tribunal within 30 days. That was treated as the decision notice.

12. That letter referred to a letter from that accountant seeking retrospective cancellation of the appellant's registration for VAT, by way of a Form 7 VAT cancellation form, and an amendment to NIL of the appellant's VAT liability for 2009 to 2013, by way of a Form 652 Error Correction Notice.

13. In his Skeleton Argument, Mr Williams had said there were two ways of approaching the Error Correction Notice and the first was to consider whether HMRC made a decision not to give effect to the Error Correction Notice in which case there would be an appeal against that decision or if HMRC made no such decision, then there would be no discrete appeal in relation to the VAT liability.

14. On reflection he argued that there had been no decision.

15. It is clear from the terms of the letter of 23 October 2015 that there was no decision on the Error Correction Notice. The officer stated in that letter that:-

> "I am also unable to comment with any authority upon the assertion that his return for the period to July 2013 is incorrectly completed".

That most certainly is not a decision.

16. In terms of section 83 Value Added Tax Act 1994 ("VATA") only appealable decisions can come to the Tribunal. Therefore the Tribunal has no jurisdiction. Accoringly, in terms of Rule 8(2)(a) of the Rules, I must strike out any part of the appeal that purports to appeal against a failure to implement the Error Correction Notice.

The review issue

17. Lastly, Mr Williams conceded that the said letter of 23 October 2015 had not offered a review as is required in terms of section 83A VATA. He conceded that that was a regrettable failure but argued that it did not invalidate the appeal to the Tribunal. He is correct. He referred to the decision of Judges Berner and Falk in *HMRC v NT ADA Ltd* [2018] UKUT 59 (TCC) where they made it explicit that a failure to offer a review under section 83A VATA would not invalidate an appeal. It does not.

The issues in contention

18. There appeared to be three issues, namely:-

(a) Was the appellant liable to be registered for VAT with effect from 1 January 2009?

(b) Was the appellant liable to VAT in the sum of £45,579.38 for the period 1 January 2009 to 31 July 2013?

(c) Was the appellant liable to a penalty under section 67 VATA in the sum of £8,590 for belated notification of his liability to VAT registration? The penalty was levied on 29 July 2013 and the appeal lodged on 22 November 2015 so the issue was whether a late appeal of that penalty would be admitted by the Tribunal.

The facts

19. The appellant had operated a Fish and Chip shop since 2007. In 2012, HMRC noted that the business was not registered for VAT and on 2 November 2012, HMRC carried out an unannounced visit to the appellant's premises to discuss his tax affairs including VAT matters.

20. During the visit the till roll was collected so that HMRC could establish the level of takings being recorded by the business.

21. On 19 November 2012, HMRC met with the appellant at the business premises and explained that their examination of the till rolls had shown takings in excess of £800 for Thursday 1 and Friday 2 November 2012. They pointed out that if that result was indicative of the general level of daily trade then it would indicate that the appellant should have been registered for VAT.

22. The appellant argued that those figures were not indicative of his normal pattern of trade.

23. On 28 November 2012, HMRC asked the appellant to keep written details of each sale on self-invigilation sheets with which they provided him. He was also notified that he was required to ring all sales through the till and to maintain the till rolls for analysis.

24. He had told HMRC, at the meeting on 19 November 2012, that he had noted the daily takings on a scrap of paper and at the end of each week he disposed of those. His accountant, who had been present at that meeting, said that he had never been given any evidence of the actual sales of the business and therefore he had estimated the sales figures based on verbal information provided by the appellant.

25. On 17 January 2013, HMRC visited the appellant and found that he had stopped completing the self-invigilation sheets on 24 December 2012. He was told to begin completing the sheets again and continue until notified not to do so.

26. On 19 March 2013, HMRC wrote to the appellant referring to a meeting with him on 8 March 2013 which ended the period of self-invigilation.

27. In that letter HMRC confirmed that:-

(a) During the period of invigilation (28/11/12 to 08/03/13) HMRC had sent officers into the premises on ten separate occasions to purchase meals. That was done in order to check if all of the sales were being run into the till and if the appellant was writing down every order on the invigilation sheets.

(b) Having inspected the daily till rolls and the invigilation sheets, HMRC confirmed that three of the ten meals purchased by officers were not on the till rolls or the sheets.

(c) In addition, at least three orders, that were overheard being placed whilst the officers were on the premises, were also not included on the till rolls or invigilation sheets.

(d) On those three occasions, when the officers purchased unrecorded meals, the staff member who served the officers put the cash into a box next to the till and change was given from that box. The orders were not rung into the till and therefore were not recorded as sales.

(e) HMRC had come to the conclusion that the figures recorded in the self-invigilation sheets and till rolls were 70% of the total sales and on that basis the appellant should have been registered for VAT with effect from 1 January 2009.

28. On 17 May 2013, HMRC registered the appellant for VAT. His first accounting period return that was due was for the accounting period 07/13 covering the period from 1 January 2009 to 31 July 2013.

29. On 29 July 2013, HMRC notified the appellant of a Notice of Assessment for a penalty under section 76 and section 67 VATA in the sum of £8,590.

30. On 22 December 2014, the appellant submitted his 07/13 VAT return showing a net amount due to HMRC in the period of £45,579.38. That was accepted by HMRC.

31. On 12 August 2015, the appellant's agent sent an Error Correction Notice to HMRC stating that the VAT return for 07/13 should show a net liability of NIL. They also enclosed an application to cancel registration for VAT requesting that the registration be cancelled with effect from 1 January 2019 on the basis that the appellant had never exceeded the turnover threshold.

32. On 23 October 2015, HMRC wrote to that agent stating that "The request to deregister from an inappropriate date…" could not be accepted. As indicated above, it also intimated that the officer could not comment on the Error Completion form. That letter stated that the appellant should appeal to the Tribunal within 30 days.

33. On 18 November 2015, the appeal was made to the Tribunal.

Discussion

Was the appellant liable to be registered for VAT with effect from 1 January 2009?

34. The appellant was liable to be registered for VAT with effect from 1 January 2009. The appellant's then accountant accepted that that was the case; the decision to register the appellant for VAT was not appealed and the appellant duly lodged a VAT return.

35. The real question is whether the appellant's VAT registration can be cancelled retrospectively.

36. The law is absolutely clear. Paragraph 13(1) Schedule 1 VATA provides:-

> "(1) Subject to sub-paragraph (4) below, where a registered person satisfies the Commissioners that he is not liable to be registered under this Schedule, they shall, if he so requests, cancel his registration with effect from the day on which the request is made or from such later date as may be agreed between them and him."

37. HMRC accurately argue that they had no jurisdiction to cancel the appellant's registration retrospectively. Whilst I am not bound by it, I agree entirely with the decision of Judge McNall in *Inspired By Service Limited v HMRC* [2016] UKFTT 812 (TC) and adopt his analysis of the legislation.

38. Accordingly, that element of the appeal falls to be dismissed.

Can the appellant make a late appeal in regard to the penalty of £8,590?

39. The appeal was lodged more than two years out of time and can only be admitted if the Tribunal gives permission in terms of Rule 20(5) of the Rules. In fact, the appellant has not made a request for permission to make a late appeal nor provided any reasons for the delay as is required in terms of Rule 20(4).

40. In fairness, however, I am treating the appeal of the penalty as an application for the ability to make a late appeal. The only challenge to the penalty appears to be on the basis that the appellant should not have been registered for VAT. As I indicate above that is not correct.

41. In the context of a 30 day period within which to appeal a penalty, a delay of more than 26 months is both very serious and significant. The only conceivable reason for the delay, and it has not been advanced, is that the appellant changed accountants but that does not suffice as a reasonable excuse. That is not a tenable argument. If the appellant has issues with his previous accountants then his remedy is to raise those with them. I was not referred to the decision but I simply reference, in that context, *HMRC v Katib* [2019] UKUTT 189 (TCC).

42. In all those circumstances the penalty stands and therefore the appellant is liable to that penalty.

Decision

43. For all these reasons the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

44. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 13th SEPTEMBER 2022