



Neutral Citation: [2023] UKFTT 00406 (TC)

Case Number: TC08811

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

In public by remote video hearing

Appeal reference: TC/2022/01032

*VAT – hardship application – application granted*

**Heard on:** 27 April 2023

**Judgment date:** 03 May 2023

**Before**

**TRIBUNAL JUDGE NIGEL POPPLEWELL**

**Between**

**ABA MOTORS LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Yusuf Asghar director of the Appellant

For the Respondents: Ms Ini Udom of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. This case concerns VAT, and in particular whether the appellant should be permitted to prosecute its appeal without having to pay the VAT in question to HMRC under section 84 Value Added Tax Act 1994 (“VATA”). An appeal can be entertained if the respondents (or “HMRC”) are satisfied that the requirement to pay or deposit the amount of VAT would cause the appellant to suffer hardship. If HMRC are not so satisfied, then an appellant may apply to the tribunal, and if the tribunal is satisfied that the appellant would suffer hardship, the tribunal may allow the appeal to proceed.

2. In this case, that is exactly what has happened. The appellant (or “ABA”) claims that it is unable to pay or deposit the VAT of £110,310 with HMRC and had applied to HMRC for hardship. This was denied, and accordingly the appellant made an application to the tribunal. The question which I must decide, based on the evidence before me on the day of the hearing, is whether ABA would suffer hardship if it was required to deposit the VAT. For the reasons given below, I have decided that it would. I therefore allow the application.

### THE LAW

3. There is no dispute about the law which was extremely helpfully set out in Ms Udom’s skeleton argument and which I set out below.

#### *Statute*

4. Section 84 VATA:

“ 84 Further provisions relating to appeals

(1) References in this section to an appeal are references to an appeal under section 83.

(2) ...

(3) Subject to subsections (3B) and (3C), where the appeal is against a decision with respect to any of the matters mentioned in section 83(1) ... (p)..., it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.

(3A) Subject to subsections (3B) and (3C), where the appeal is against an assessment which is a recovery assessment for the purposes of this subsection, or against the amount of such an assessment, it shall not be entertained unless the amount notified by the assessment has been paid or deposited with HMRC.

(3B) In a case where the amount determined to be payable as VAT or the amount notified by the recovery assessment has not been paid or deposited an appeal shall be entertained if-

(a) HMRC are satisfied (on the application of the appellant), or

(b) The tribunal decides (HMRC not being so satisfied and on the application of the appellant), that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship”.

#### *Case law*

5. In the case of *NT ADA Limited v HMRC* [2019] UKFTT 0333 Judge Poole undertook a comprehensive review of the relevant legislation and caselaw. In particular he summarised

the pertinent legal principles confirmed in the case of *HMRC v Elbrook (Cash & Carry) Limited* [2017] UKUT 181 (TCC) at [16] to [31] (references are to paragraphs in the Upper Tribunal's decision):

- (1) The purpose of the provisions is to strike a balance between the abuse of the appeals mechanism by employing it to delay paying disputed tax and the stricture of having to pay or deposit the disputed sum as the price of entering the appeal process; the relief afforded by the "hardship" provisions should not be applied so as to operate as a fetter on the right of appeal ([19]).
- (2) The Tribunal should not concern itself with the merits of the underlying appeal ([20]).
- (3) The test is an "all or nothing" one, in which it is not relevant that the appellant might be able to pay or deposit some amount less than the whole disputed sum ([31]).
- (4) The test is to be applied to the position at the date of the hearing ([26]). This means that the Tribunal should not "speculate as to what might become available to the appellant in the future" ([22] & [26]). It should focus on "immediately or readily available resources" ([21]).
- (5) The fact that the appellant may have the necessary cash or other readily available resources may not be determinative, if hardship would result from using it (or them) in paying the disputed sum ([22]).
- (6) Available borrowing resources may be considered, but generally only from existing sources, e.g. unused facilities or new facilities immediately available with minimal formality ([23]).
- (7) Potentially available borrowing from new sources, for example if the appellant owns property capable as acting as security for a new loan, will only exceptionally be considered as "immediately or readily available", for example where arrangements for borrowing are at an advanced stage ([24]).
- (8) The potential sale, outside the ordinary course of business, of assets properly purchased for the purposes of the appellant's business, might cause hardship even if the assets are not currently being used in the business ([25]).
- (9) There is no hard and fast rule that "regard can never be had to the resources of connected (but legally independent) entities where... there is common control and the evidence suggests a free flow of resources to meet the needs or requirements of any one entity at the expense of the other or others of them from time to time" ([25]).
- (10) Although the test is to be applied by reference to the circumstances at the date of the hearing (see [33(4)] above), that does not mean that events leading up to that time are necessarily ignored. The Tribunal can take into account "whether the appellant is himself responsible for putting himself in a position where he cannot pay..., and that would include by delaying the hearing so that at the time of the hearing he cannot pay... without hardship" ([27] and [28]). The basis for this is that the "real cause" of the appellant's inability to pay without hardship may be his own prior actions.
- (11) The Tribunal should make its assessment on the basis of the most up-to-date available information. The burden lies on the appellant to establish hardship, so it is normally incumbent on the appellant to adduce the necessary evidence to satisfy the Tribunal ([29]). Absence of contemporaneous accounting evidence may justify the Tribunal in placing little, if any, weight on an oral assertion that the appellant is unable to afford to pay.
- (12) Within the above parameters, the decision of the Tribunal is a value judgment on the basis of the evidence before it ([16]).
- (13) Although I am not bound by Judge Poole's synopsis, I agree with it and gratefully adopt it for the purpose of this decision.

## **THE EVIDENCE AND FINDINGS OF FACT**

6. I was provided with a bundle of documents along with a bundle of authorities. Mr

Yusuf Asghar (“YA”) gave oral evidence on which he was cross examined by Ms Udom. From this evidence I make the following findings:

*Background*

- (1) ABA was incorporated on 27 March 2019. The declared nature of its business was the sale of used cars and light motor vehicles. It was registered for VAT on 1 April 2019.
- (2) ABA’s business model was that it would source motor vehicles at the behest of its customers, from UK dealers, and then arrange for those vehicles to be transferred to the customer. Those customers were based in southern Ireland
- (3) Exports of those vehicles are zero rated for VAT. ABA however pays VAT to the dealer from whom it buys the vehicles. On 29 July 2021 HMRC raised assessments on the basis that ABA was involved in missing trader fraud, and thus were not entitled to repayment of the VAT which is incurred on its purchases. The total amount of VAT assessed is £110,310.
- (4) By notice of appeal dated 7 February 2022, ABA appealed against the assessments and at the same time made an application for hardship.
- (5) On 25 May 2022, HMRC asked the appellant for further information to enable it to consider the hardship application. This included details of assets, bank statements, accounts, financial investments, and other financial information. No such information was provided.
- (6) On 23 June 2022, HMRC refused the hardship application.
- (7) Following directions by the tribunal to provide information, followed up by unless orders, ABA provided a bank statement for the period 28 November to 29 December 2020 on 10 August 2022. And subsequently a second bank statement for the period 20 May 2019 to 4 August 2022, on 28 September 2022.
- (8) When submitting these bank statements, ABA told HMRC that no transactions had been undertaken since HMRC had denied repayments and deregistered its business. Hardship should be granted because the appellant has no financial assets. And ABA owed money to YBA Ltd who had provided loans to ABA.
- (9) The bank statement for the period 28 November to 29 December 2020 shows an end balance of £307.57. The bank statement for the period ending on 4 August 2022 shows an end balance of £161.57.

*YA’s evidence*

- (10) ABA had been set up as a trading vehicle for his brother, Mr Aweis Asghar (“AA”). In 2019, AA was the sole shareholder and director of ABA. However, at the date of the hearing, the shares were owned by YA who was also the sole director. He paid nothing to buy his brother’s shares.
- (11) YBA was YA’s trading vehicle. He had set it up to trade in motor vehicles some time ago. He, too, bought from dealers and sold to customers. However, YBA sold to both UK and non-UK customers.
- (12) YA wanted to help his brother start up his own business, and thus suggested that ABA adopted the same business model. It bought motor vehicles from UK dealers having been commissioned to do so by customers. However, ABA’s customers were all based in southern Ireland. ABA then secured terms for the vehicle with the dealer. It was paid a deposit by the customer and in turn paid the deposit to the dealer. Once all the paperwork had been finalised, the customer paid the balance. ABA either took commission on the customer’s payment, or had secured a discount on the price it paid the dealer. These were small amounts of between £500 and £2,500. ABA then paid the appropriate amount to the dealer and the vehicle was transferred, physically, to the customer.
- (13) During the period in question, there were only 6 to 8 trades undertaken by ABA. These were in 2019. Trading ceased because HMRC refused to repay the VAT which ABA had paid to the dealer.

(14) In order to pay this VAT, it had borrowed from YBA. Since ABA has not been able to trade as it did not have the financial wherewithal to do so as a result of not being repaid its VAT, it has not been able to repay YBA. At the date of the hearing, YA estimated that ABA owed YBA approximately £80,000.

(15) ABA never prepared management accounts. It never prepared or filed accounts at Companies House. It owns no assets. During its short period of activity, it rented office premises on 30 day rolling leases. It no longer does so.

(16) YBA is a considerably more mature business than ABA. It had built up considerable capital and held stock. It also traded with UK customers. On two occasions, in order to help his brother, YBA commissioned ABA to sell vehicles on its behalf. It paid ABA a commission for this. The bank statements show that loans were made to ABA by YBA, and repaid, in part, by ABA to YBA. The loans were made pursuant to a loan agreement drawn up by an accountant.

(17) That accountant had provided information and documents to HMRC following HMRC officers' attendance at ABA's premises and discussion of the appellant's VAT position with AA.

(18) YBA has also appealed against assessments made by HMRC and has instructed lawyers and accountants in respect of its appeal.

(19) YBA holds no financial assets and has no money in the bank. It has no bank account. ABA has no bank account. The only way that YBA could recover the money that had been lent to ABA, was for YA to take over ABA.

(20) YBA is in no position to lend any further money to ABA.

## **DISCUSSION**

7. The burden of establishing hardship lies with ABA. It must show, on the balance of probabilities, that it would suffer hardship if it were required to pay £110,310 to HMRC.

8. In deciding whether this is the case, I can consider all of the evidence which has been presented to me, not just that which had been provided to HMRC.

9. Based on the evidence presented to it, HMRC had no alternative but to refuse hardship. I would have refused hardship on that evidence. It was an entirely appropriate and correct decision.

10. But HMRC did not have the benefit of the oral testimony provided by YA. Although he explained that, in his view, HMRC had all the information that had been provided to me by his evidence (by dint of the information given to HMRC officers who visited ABA's premises, followed up by further information and documents given by ABA's accountant) he was not able to tell me precisely what that information was.

11. However, that does not really matter. What matters is whether, on the evidence before me today, I consider that the appellant would suffer hardship.

12. This largely depends on whether I believe the testimony given by YA. It was pointed out to me, quite rightly, by Ms Udom that no further primary financial information has been provided to me than was provided to HMRC. All I have seen are the two bank statements. Whilst these might describe the financial position of ABA (and they are not up to date), they tell us nothing about the financial position of YBA. The only information we have about that company is the oral testimony of YA which Ms Udom submits that I should not accept in light of the lack of corroborating documentary evidence.

13. The reason why YBA's position is relevant is that it has clearly provided funding in the past, and thus if ABA could readily source additional funds from YBA to enable it to deposit the VAT with HMRC, that might be justification to deny hardship. The argument runs that ABA would suffer no hardship since it could procure funds from YBA.

14. However, I accept the reliability and accuracy of the evidence given by YA. I do so

because he gave his evidence clearly and in a manner designed to assist both myself and Ms Udom. He was not evasive. He addressed questions head-on and gave comprehensive, coherent, and, to my mind, wholly plausible answers. I have some experience with MTIC's I fully understand the difficulties faced by traders who need to borrow funds to enable them to pay their suppliers' VAT whilst awaiting repayment from HMRC. And the difficulty that those traders face when those repayments are denied. I therefore find it wholly unsurprising that once repayment was denied by HMRC, ABA faced a genuine cash flow difficulty. I also find it unsurprising that if HMRC's attention then turned to YBA, (and I have no reason to doubt YA's evidence that this was the case and that he is currently in dispute with HMRC, that dispute having escalated to bring tribunal proceedings) that YBA too, as a repayment trader in part, also faces cash flow difficulties if HMRC have withheld VAT repayments.

15. I therefore accept, and find as a fact, that ABA currently has no assets. It cannot generate any income. It cannot trade. If it were to trade, it would be trading insolvent by dint of the liability to make repayments on the loan from YBA. It does not have the resources to pay or deposit £110,310, with HMRC. It is not just a question of hardship. It simply cannot pay it. It has no source of funds to do so.

16. I also find as a fact that YBA too is in a difficult financial position and that it cannot be a source of funds for ABA notwithstanding that it has been such a source, in the past. YBA itself cannot source funds from a third party. So, the same position applies to YBA as applies to ABA. It isn't just a question that paying the VAT would cause hardship. YBA cannot get its hands on the funds to fund ABA even if it wanted or was obliged to.

#### **DECISION**

17. For the foregoing reasons it is my view that the requirement to pay or deposit £110,310 before the tribunal can entertain its appeal would cause ABA hardship. I therefore allow its application.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

18. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**NIGEL POPPLEWELL  
TRIBUNAL JUDGE**

**Release date: 03<sup>rd</sup> MAY 2023**