Neutral Citation: [2024] UKFTT 1100 (TC)

Case Number: TC09374

TAX CHAMBER

Taylor House, London

Appeal reference: TC/2024/01608
TC/2024/02229
TC/2024/02344
TC/2024/05369

PROCEDURE – Value Added Tax – appeal to First-tier Tribunal against decision and assessments - assessments withdrawn – application to strike out appeals – jurisdiction of Tribunal where assessments withdrawn – whether appeals should be struck out or allowed by Tribunal – whether underlying decision withdrawn – whether appeals against underlying decision should continue - whether further appeal not notified to HMRC should be expedited to be heard with other appeals

Heard on: 26 November 2024
Judgment date: 5 December 2024

Before

TRIBUNAL JUDGE GREG SINFIELD

Between

ALIGN TECHNOLOGY SWITZERLAND GMBH
ALIGN TECHNOLOGY BV

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Ben Elliott, counsel, instructed by Ernst & Young LLP

For the Respondents: Edward Hellier, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This case management decision concerns the following appeals:

   (1) appeals under references TC/2024/01608, TC/2024/02229 and TC/2024/02344 against decisions of the Respondents ('HMRC') that VAT was chargeable at the standard rate on supplies of Invisalign clear aligners ('Aligners') by the Appellants (together 'Align') and assessments for such VAT in the periods 12/19 to 05/23 (the 'VAT Liability Appeals'); and

   (2) an appeal under reference TC/2024/05369 against a decision of HMRC to refuse a claim by Align Technology Switzerland GmbH ('Align GmbH') by way of error correction notice for repayment of VAT that it had accounted for on supplies of Aligners from 19 October 2023 to the end of period 05/24 (the 'ECN Appeal').

2. As is explained further below, the VAT Liability Appeals are listed to be heard by the First-tier Tribunal (the 'FTT') over four days between 27 and 30 January 2025. There is no date for a hearing of the ECN Appeal and, indeed, although lodged with the FTT on 8 October 2024, it had not been notified to HMRC by the FTT by the time of the case management hearing on 26 November.

3. On 25 October, HMRC emailed the FTT to say that they had withdrawn the decisions and assessments in the VAT Liability Appeals and asking for the hearing to be vacated. The FTT wrote to Align on 28 October to say that, as HMRC had withdrawn the decisions and assessments which were the subject of the appeal, there was no longer any appealable matter and, accordingly, the FTT no longer had jurisdiction in the proceedings which must be struck out and the hearing would be cancelled.

4. On 1 November, Align asked the FTT to list an urgent case management hearing to determine:

   (1) whether the FTT retained jurisdiction;

   (2) whether the ECN Appeal should be joined with the VAT Liability Appeals; and

   (3) any consequential matters including whether the VAT Liability Appeals should be allowed or struck out.

5. A case management hearing was listed before me at short notice. At the hearing, Mr Ben Elliott appeared for Align and Mr Edward Hellier represented HMRC. I am grateful to both counsel for their assistance. At the end of the hearing, I said that I would need further time to read the correspondence between the parties more fully and reflect. Having done so, I have decided that:

   (1) the assessments which were the subject of the VAT Liability Appeals were withdrawn and that part of the proceedings must be struck out;

   (2) the underlying decision on which the assessments were based was not withdrawn and, accordingly, there is still an appealable matter in the VAT Liability Appeals and that part of the proceedings will continue and be determined at the hearing between 27 and 30 January 2025; and

   (3) the ECN Appeal should be stayed until 70 days after the release of the FTT's decision in the VAT Liability Appeals.

BACKGROUND FACTS

6. In the description of the background facts that follows, 'Align' also includes their advisers, Ernst & Young LLP, who acted on their behalf.

7. Align made and continue to make supplies of the Aligners within the UK. Until 1 January 2020, Align Technology BV ('Align BV') made the supplies; after that date the supplies have been made by Align GmbH. Align currently makes approximately £8m - £12m of sales of the Aligners in the UK each month. There has been no change to the nature of the Aligners supplied during the material period.

8. Before 1 September 2023, Align submitted their VAT returns on the basis that their supplies of Aligners were exempt from VAT. Align considered that the supplies were exempt on the basis of HMRC's published guidance, which stated that "orthodontic appliances" are exempt from VAT as "dental prostheses" within items 2 and 2A of Group 7 of Schedule 9 to the VAT Act 1994 ('VATA94').

9. In a letter to Align GmbH dated 9 June 2023, HMRC stated that their current view was that imports and supplies of the Aligners are subject to VAT at the standard rate because they are not "dental prostheses". HMRC stated that the Aligners could be exempt as orthodontic appliances when installed by an orthodontist as part of a course of orthodontic treatment but Align GmbH did not supply orthodontic services. The letter was not an assessment but invited Align GmbH to make any comment and/or provide further information in relation to HMRC's conclusions.

10. On 24 August 2023, in compliance with the Pre-action Protocol for Judicial Review, Align GmbH sent HMRC a letter (the 'First PAP Letter') saying that the company intended to issue a claim for judicial review challenging HMRC's decision in the letter of 9 June that the Aligners are not "dental prostheses".

11. HMRC responded to the First PAP Letter in a letter dated 1 September 2023 (the 'First PAP Response'). In the First PAP Response, HMRC said that their letter of 9 June did not contain any decisions but simply set out HMRC's analysis at the date of the letter and a judicial review claim would be premature.

12. On 21 September 2023, HMRC issued three letters assessing Align GmbH for VAT on supplies of Aligners in periods 08/22 to 05/23. The reason for the assessments in each case were stated to be as follows:

> "… as per my letter dated 09 June 2023, the supplies cannot be exempted unless supplied in the course of orthodontic treatment. As [Align GmbH] do not provide healthcare services the supplies made cannot be exempted under the provision of health care services and should be supplied at the standard rate."

13. Having received the assessments, Align GmbH began accounting for VAT on their supplies of the Aligners with effect from 1 September 2023.

14. On 20 October 2023, Align GmbH requested a statutory review of the assessments.

15. On 9 November 2023, Align GmbH sent a further letter to HMRC pursuant to the Pre-Action Protocol for Judicial Review ('the Second PAP Letter'). In that letter, Align GmbH said that it intended to issue a claim for judicial review challenging HMRC's decisions to raise the assessments on 21 September.

16. On 23 November 2023, HMRC's Solicitor's Office replied to the Second PAP Letter setting out HMRC's response to the proposed claim for judicial review.

17. On 18 December 2023, HMRC issued an assessment in respect of the periods 12/19 and 03/20 to Align BV on the basis that supplies of the Aligners were chargeable to VAT at the standard rate because:

> "Aligners are not prostheses; the supplies of aligners can only be exempted when provided in the course of health care services, ATBV do not provide health care services."

18. On 21 December 2023, Align GmbH issued a claim for judicial review challenging the assessments issued by HMRC on 21 September 2024.

19. On 29 January 2024, HMRC issued their review conclusion letter in response to Align GmbH's request of 20 October 2023 for a statutory review of the assessments issued on 21 September. The review officer described the matters in dispute as follows:

> "1) VAT liability
>
> [Align GmbH] considered that the VAT liability of the supplies of [the Aligners] were VAT exempt under the provisions of the VAT Act 1994, Schedule 9, Group 7, items 2 or 2A. [Align GmbH] rendered VAT returns for periods 08/22, 11/22, 02/23 and 05/23 for net VAT credit (reflecting the VAT exempt liability).
>
> Officer Sunny Lake informed [Align GmbH] on 9 June 2023 that the VAT liability of the aligners was standard rated, as the aligners did not meet the conditions for VAT exemption."
>
> 2) VAT credit denials / VAT assessments
>
> As a consequence of the VAT liability decision, Officer Lake notified a reduction in credit to nil, and made and notified VAT assessments by four separate letters all dated 21 September 2023 as follows [the letter then sets out the periods and amounts assessed]."

20. In summary, the review officer confirmed that supplies of the Aligners by Align GmbH were chargeable to VAT at the standard rate for the reasons given in HMRC's letter of 9 June 2023. The officer also confirmed that the VAT assessments were legally, technically and procedurally correct.

21. On 23 February 2024, HMRC assessed Align GmbH for VAT on supplies of the Aligners in periods 02/20 to 05/22 on the basis that:

> "As outlined in previous correspondence, 09 June 2023 and 21 September 2023, your supplies of aligners do not fulfil the criteria for exemption and are assessed for output VAT at 1/6 value of 'exempt' supplies made."

22. In an order dated 23 February 2024, the Administrative Court granted permission for Align GmbH to apply for judicial review, observing that the judicial review proceedings and the FTT proceedings concerned entirely separate issues:

> "Observations
>
> 1. The claim is arguable. I have not stayed the claim as it seems to me that the issue raised for this court is a distinct question of public law which should proceed to substantive hearing at a normal pace. In the event that proceedings in the FTT render these judicial review proceedings unnecessary, it is the parties' responsibility to notify this court and seek appropriate directions for the further management or disposal of this claim. The Claimant's application for permission to rely on its Reply need not be determined as I am granting permission."

23. On 27 February 2024, Align GmbH notified its appeal to the FTT stating:

> "The Appellant brings an appeal pursuant to sections 83(1)(b) and (p) Value Added Tax Act 1994 ('VATA 1994') against:
>
> a. A decision that its supplies of aligners are subject to VAT at the standard rate;
>
> b. VAT assessments for a total amount of £22,354,746.22 in respect of its supplies of aligners."

24. The grounds of appeal identified the decision appealed against as the decision contained in the review conclusion letter dated 29 January 2024 in which HMRC:

> "a. have upheld the four VAT assessments issued by [HMRC] under section 73(1)(p) VATA 1994 on 21 September 2023 … for a total amount of £22,354,746.22;
>
> b. have upheld a decision, set out in correspondence from 9 June 2023 to 12 October 2023, that the supply by [Align GmbH] of aligners is a standard-rated taxable supply of goods."

25. On 29 February 2024, HMRC issued their review conclusion letter in response to Align BV's request of 16 January 2024 for a statutory review of the assessment notified by letter dated 18 December 2023. The review officer confirmed that supplies of the Aligners are a standard rated taxable supply of goods and that the assessments were legally, technically and procedurally correct.

26. On 22 March 2024, Align GmbH notified a further appeal to the FTT in materially identical terms to its appeal of 27 February.

27. On 28 March 2024, Align BV notified an appeal to the FTT in terms and on grounds that were materially identical to the appeals made by Align GmbH.

28. On 10 May 2024, Align made an application (supported by witness evidence) for the VAT Liability Appeals to be joined and expedited due to the ongoing damage being caused to the business due to the lack of certainty as to the VAT treatment of supplies of the Aligners. The application enclosed draft case management directions for the hearing.

29. By email dated 16 May 2024, HMRC made submissions to the Administrative Court to the effect that the judicial review claim should be stayed pending the determination of the VAT Liability Appeals. By email dated 20 May 2024, Align objected to its claim for judicial review being stayed pending resolution of the VAT Liability Appeals by the FTT. The judicial review claim was not stayed but was listed to be heard on 9 and 10 October 2024.

30. On 20 May 2024, HMRC stated in an email to the FTT that they did not object to the Appellants' application for the VAT Liability Appeals to be joined and expedited. The parties subsequently agreed expedited case management directions for the VAT Liability Appeals which were endorsed by me and issued on 30 July 2024.

31. On 26 July 2024, HMRC filed their Statement of Case in the VAT Liability Appeals. Paragraph 1 of HMRC's Statement of Case was as follows:

> "1. This joint appeal is against the following decisions of [HMRC]:
>
> a. The decision to issue assessments against [Align GmbH]: four contained in a decision letter dated 21 September 2023 and upheld in a letter dated 29 January 2024 (the 'ATSG Review Decision') for a total of £22,354.746.22, and six contained in a decision letter dated 23 February 2024;
>
> b. The decision to issue two assessments against the Second Appellant ('ATBV') in the amount of £3,323,754 contained in a decision letter

dated 18 December 2023 and upheld on review in a letter dated 29 February 2024 (the 'ATBV Review Decision'); and

c. The decisions in the above decision letters and upheld in the ATSG and ATBV Review Decisions that the supply of aligners by the Appellants is a standard-rated taxable supply of goods."

32. On 7 August 2024, following receipt of the parties' available dates, the FTT listed the VAT Liability Appeals for hearing over four days between 27 and 30 January 2024.

33. On 27 August 2024, Align GmbH submitted an error correction notice to recover VAT that it had charged and accounted for on supplies of the Aligners in the periods 11/23, 02/24 and 05/24. HMRC rejected the claim in a letter dated 20 September 2024 for the following reasons:

> "We have decided to reject your error correction notification for the periods shown in the table below. This is because, in line with the determination issued 21 September 2023, HMRC do not consider the [Aligners] to be prosthesis [sic]. As the product is not supplied by Align in the course of orthodontic treatment; nor are the goods prosthesis [sic], the supplies are liable at the standard rate."

34. On 8 October 2024, Align GmbH notified the ECN Appeal to the FTT stating:

> "[Align] brings an appeal pursuant to sections 83(1)(t) Value Added Tax Act 1994 ('VATA 1994') against:
>
> a. [HMRC's] decision that [Align GmbH's] supplies of [Aligners] are not 'dental prostheses' and are therefore subject to VAT at the standard rate; and
>
> b. the decision letter issued by [HMRC] dated 20 September 2024 (the 'Disputed Decision') rejecting [Align GmbH's] error correction notice dated 27 August 2024 (the 'ECN') for repayment of output VAT paid in the total amount of £17,327,005.94 for the VAT periods from 1 September 2023 to 31 May 2024."

35. The grounds of appeal included an application for the ECN Appeal to be joined with the VAT Liability Appeals which was repeated in an email dated 11 October.

36. The claim for judicial review was listed to be heard on 9 and 10 October 2024. After Align had filed their skeleton argument, HMRC sought a number of extensions of time to file their skeleton argument and finally indicated that they were minded not to defend the proceedings.

37. Before the start of the hearing on 9 October 2024, HMRC and Align concluded a settlement agreement (the 'Settlement Agreement') under which HMRC agreed to withdraw the decisions that were the subject of the judicial review claim and to pay Align's costs in the judicial review proceedings. In Clause 1 of the Settlement Agreement, HMRC agreed to withdraw "the Decisions", namely the various assessments issued to Align (and a late payment penalty, not relevant to this decision). In Clause 18, the parties also agreed the following:

> "This agreement constitutes the entire agreement between the Parties in respect of the Judicial Review Claim and is entered into by the Parties without prejudice to their position in any other instance. In particular, this is without prejudice to any statutory appeals made to the [FTT] by [Align] in respect of the liability of the supplies to VAT under the Value Added Tax Act 1994, including extant appeals TC/2024/0608, TC/2024/02229 and TC/2024/02344 and any future appeals."

38. On 11 October, HMRC wrote to Align GmbH to notify them that their assessments had been withdrawn saying:

> "We've decided to withdraw our assessments for output VAT. This is because in light of the circumstances of the case HMRC consider there may be some merit in Aligns [sic] proposed position for the periods in question."

39. On 18 October, HMRC wrote to Align BV to notify them that their assessments had been withdrawn saying:

> "We've decided to withdraw our assessment. This is because in light of the circumstances of the case HMRC consider there may be some merit in Aligns [sic] proposed position for the periods in question and have elected to withdraw assessments [sic]. This means you do not have to pay us anything for this assessment."

40. In an email to Align BV dated 25 October, HMRC confirmed that repayments of VAT had been made to the company's bank account and also stated the following:

> "I would like to confirm that, for the avoidance of doubt, the decisions contained in the assessment notification letter dated 18 December 2023, have also been withdrawn in light of the circumstances of this particular case for the periods in question, however this is not a concession that the decisions were wrong in law."

41. HMRC also sent an email to Align GmbH on the same day which confirmed in the same terms that the decisions contained in the assessment notification letters dated 21 September 2023 and 23 February 2024 had also been withdrawn and that it was not a concession that the decisions were wrong in law.

42. On 25 October, which was the deadline for filing their witness evidence in the VAT Liability Appeals, HMRC emailed the FTT saying:

> "We are writing to inform the Tribunal that HMRC have withdrawn the following decisions and assessments which are the subject of the [VAT Liability Appeals], and hereby withdraw their case in respect of the [VAT Liability Appeals] pursuant to Rule 17 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009:
>
> - The decisions and VAT assessments issued to [Align GmbH] on 21 September 2023 and 23 February 2024.
> - The decision and VAT assessments issued to [Align BV] on 18 December 2023.
>
> In the circumstances, the hearing listed for 27 to 30 January 2025 can be vacated as the Tribunal will not be required to consider the [VAT Liability Appeals].
>
> In light of the above, we do not consider it appropriate to join the [ECN Appeal] to the [VAT Liability Appeals]. HMRC's view is that the [ECN Appeal] should proceed as a stand-alone appeal once it has been formally assigned and notified by the Tribunal. HMRC reserve the right to make further submissions in relation to the Appellants' application to join its [ECN Appeal] if necessary."

43. On 28 October, the FTT wrote to Align as follows:

> "HM Revenue and Customs have informed the Tribunal (copy letter enclosed) that they have withdrawn the decision/assessment which was the subject of your appeal. In the absence of an appealable decision, the Tribunal does not

have jurisdiction in these proceedings and they must be struck out under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on grounds of lack of jurisdiction. Any hearing date is cancelled.

If you wish to make any representations before the appeal is struck out, please write to the Tribunal as soon as possible. If we do not hear anything from you within 28 days from the date of this letter, the proceedings will be struck out and the file will be closed."

44. Later on the same day, Align wrote to HMRC as follows (emphasis in original):

"In light of the Tribunal's letter of today's date, please can you confirm as a matter of urgency that, following HMRC's confirmation of the withdrawal of the decision (that the aligners are standard rated) and the VAT assessments, HMRC now agree that [Align's] supplies of aligners are exempt from VAT. Please confirm this point by 5pm on 29 October 2024.

If HMRC maintain that the supplies of aligners are taxable, then evidently HMRC have not withdrawn the decisions; they have merely withdrawn the assessments. This would accord with the emails from Sunny Lake dated 25 October 2024 in which Ms Lake confirmed that the decisions contained in the assessment notification letters dated 21 September 2023, 18 December 2023 and 23 February 2024 have been withdrawn in light of the circumstances of this particular case, for the periods in question, "*however this is not a concession that the decisions were wrong in law*". On this basis, the question of whether HMRC's decisions that the aligners are taxable at the standard rate of VAT were wrong in law remains extant. This is contrary to what is stated in your email to the Tribunal of 25 October. HMRC's position therefore requires urgent clarification.

If HMRC maintain that the aligners are taxable then, contrary to what is stated in your email to the Tribunal, the decisions have not been withdrawn and the hearing listed for 27 to 30 January 2024 is required in order to determine the correct VAT liability of the supplies. Further, if this is the case, t[Align] would contend that HMRC have evidently misrepresented their position to the Tribunal since HMRC have not withdrawn their decisions and nor have they "*withdrawn their case in respect of the extant appeals*". At present, the position stated by HMRC's officers (stating that the decisions are correct) conflicts with the position stated by their solicitors (stating that HMRC have withdrawn their case and the decisions)."

45. On 30 October, HMRC responded to Align by email as follows (emphasis in original):

"I can confirm that HMRC **do not** agree that [Align's] supplies of aligners are exempt from VAT and maintain their position that the supplies are taxable at the standard rate.

For the avoidance of doubt, HMRC's decisions and assessments issued to [Align GmbH], on 21 September 2023 and 23 February 2024, and [Align BV], on 18 December 2023, have not been withdrawn on the basis that they were wrong in law. Rather, the decisions and assessments have been withdrawn as a consequence of the settlement that was reached between the parties on 9 October 2024 in respect of the judicial review proceedings.

We do not consider that the email to the Tribunal on 25 October 2024, and Officer Lake's emails, of the same date, to [Align] are contradictory. Both emails make it clear that the above-mentioned decisions, and assessments, which are the subject of the [VAT Liability Appeals], and relate to particular periods, have been withdrawn.

> Our proposition that [Align GmbH's ECN Appeal] should proceed as a stand-alone appeal is made on the basis that HMRC maintain their position that [Align's] supplies of aligners are standard rated. Whilst we consider this issue to be extant in [Align GmbH's ECN Appeal], we do not consider it to be extant in [Align's VAT Liability Appeals] as a consequence of the withdrawn decisions and assessments. On the issue of expedited proceedings, following the settlement of the judicial review proceedings and the consequential payment of approx. £75m made to [Align], we see no compelling reason for [Align GmbH's ECN Appeal] to be heard earlier than it usually would. For the avoidance of doubt, if [Align] were to apply to expedite its new appeal, HMRC would object to the application."

LEGISLATION

46. Section 83 VATA94 sets out the matters in relation to which a person can appeal to the FTT. It relevantly provides as follows:

> "83 Appeals.
>
> (1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—
>
> …
>
> (b) the VAT chargeable on the supply of any goods or services ... or, subject to section 84(9), on the importation of goods ... ;
>
> …
>
> (p) an assessment—
>
> (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or
>
> (ii) under subsections (7), (7A) or (7B) of that section;...
>
> …
>
> or the amount of such an assessment;
>
> …
>
> (t) a claim for the crediting or repayment of an amount under section 80 an assessment under subsection (4A) of that section or the amount of such an assessment …"

47. Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules') is as follows:

> "8(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal –
>
> (a) does not have jurisdiction in relation to the proceedings or part of them …"

48. In so far as material, rule 17 of the FTT Rules provides:

> "17(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case -
>
> (a) by sending or delivering to the Tribunal a written notice of withdrawal ..."

DISCUSSION

49. It was common ground that, in the VAT Liability Appeals, Align had appealed under both 83(1)(b) and under 83(1)(p) VATA94. The appeals under section 83(1)(b) related to HMRC's decision that supplies of the Aligners were not exempt but were chargeable to VAT at the standard rate. The appeals under section 83(1)(p) were against the VAT assessments issued by HMRC on 21 September 2023, 18 December 2023 and 23 February 2024.

50. It was also common ground that HMRC had withdrawn the assessments and thus there was no longer any appealable matter within section 83(1)(p). The case law on the consequences of the withdrawal by HMRC of an appealable decision was discussed in detail by Judge Jane Bailey in *Charles Kendall Freight Ltd v HMRC* [2024] UKFTT 492 (TC) ('*C K Freight*') at [27] - [39]. I gratefully adopt Judge Bailey's analysis of those cases and apply it below.

51. At [48] of *C K Freight*, Judge Bailey observed:

> "…generally, proceedings would be resolved more quickly and with less dispute between the parties if (whenever possible) HMRC were to withdraw from an appeal in accordance with Tribunal Rule 17, instead of only withdrawing the underlying decision. It is not surprising that an appellant who considers they have been successful in their appeal because HMRC has withdrawn the underlying decision, should be frustrated to find the consequence of that success is that HMRC expects them either to withdraw their appeal to the Tribunal or have their appeal struck out."

I entirely agree with that observation and note that, in this case, HMRC said in their email to the FTT on 25 October 2024 that they were withdrawing the decisions and VAT assessments and their case in respect of the VAT Liability Appeals pursuant to Rule 17 of the FTT Rules.

52. At [52] – [57] of *C K Freight*, Judge Bailey set out the consequences that must follow from the withdrawal of a decision (which includes an assessment). I agree with her analysis which, in my view, can be summarised as follows. If HMRC withdraw a decision or assessment before the taxpayer makes an appeal to the FTT, there is no right to appeal under section 83 VATA94 because there is no matter within the section to appeal against (see *Furtado v City of London Brewery Company* [1914] 1 KB 709 as discussed by the Upper Tribunal in *LS v HMRC and RS v HMRC* [2017] UKUT 257 (AAC) ('*LS and RS*') at [20]). Accordingly, the FTT never has jurisdiction in relation to the matter. Where HMRC withdraw a decision or assessment after an appeal has been made to the FTT, the FTT ceases to have jurisdiction from that point and must strike out the proceedings or the relevant part of the proceedings (see *LS and RS* at [25] and rule 8(2)(a) FTT Rules). However, that does not necessarily mean that the proceedings are at an end. There may be an application for costs in some cases. The FTT has jurisdiction to deal with an application for costs under rule 10 of the FTT Rules even where the substantive appeal has been struck out. Accordingly, where a decision is withdrawn, the appropriate direction will usually be to strike out that part of the proceedings, ie the substantive appeal, and invite the appellant to make any application in consequence, eg for costs, within a specified period of time. Only after all ancillary matters have been dealt with should the case be closed.

53. Applying the above approach to this case, the FTT ceased to have jurisdiction in relation to the VAT Liability Appeals insofar as they related to the VAT assessments issued by HMRC on 21 September 2023, 18 December 2023 and 23 February 2024 when HMRC gave notice to the FTT of the withdrawal of their case in relation to those assessments on 25 October 2024. As the FTT no longer has jurisdiction, it follows that I must strike out that the part of the proceedings relating to the VAT assessments issued on 21 September 2023, 18 December 2023 and 23 February 2024 and I so direct. For reasons that will become apparent, I consider that any consequential applications that Align may wish to make may be deferred.

54. The same result must, of course, follow in relation to Align's appeal under section 83(1)(b) against HMRC's decision that supplies of the Aligners were subject to VAT at the standard rate if that decision has been withdrawn. However, Align submitted that HMRC had not withdrawn the decision and their appeal under section 83(1)(b) remained to be determined. Align contended that the VAT Liability Appeals should not be struck out but should take place in January 2025 to decide the issue of whether the supplies of the Aligners are standard rated for VAT. HMRC contended that the decision in relation to the VAT treatment of the Aligners had been withdrawn and therefore the FTT no longer had jurisdiction to hear any aspect of the VAT Liability Appeals.

55. It seems to me that this is principally a question of fact and the relevant facts are:

(1) the decision that supplies of the Aligners are not exempt but standard rated for VAT is contained in in correspondence from 9 June 2023 to 12 October 2023 and, in particular, in HMRC's letter of 9 June 2023 which was confirmed in the letter dated 21 September 2023 which also notified some assessments;

(2) in Clause 1 of the Settlement Agreement of 9 October 2024, HMRC agreed to withdraw "the Decisions" which were defined as "the decisions in Recitals [A] to [D]" which merely listed the assessments issued and made no reference to the decision in the letter of 9 June 2023;

(3) Clause 18 of the Settlement Agreement stated that it was without prejudice to any statutory appeals made to the [FTT] by [Align] in respect of the liability of the supplies to VAT under the Value Added Tax Act 1994, including extant appeals TC/2024/0608, TC/2024/02229 and TC/2024/0234;

(4) in letters dated 11 and 18 October 2024, HMRC told Align that they had decided to withdraw their assessments without making any reference to the underlying decision or the letter of 9 June 2023;

(5) in emails to Align on 25 October, HMRC said that the decisions contained in the various assessment notification letters had also been withdrawn "for the periods in question" but stated that this was not a concession that the decisions were wrong in law;

(6) in their email to the FTT on 25 October, HMRC said that they were withdrawing the decisions and assessments issued to Align but made no reference to the letter of 9 June 2023 and did not say that the withdrawal of the decisions was not a concession that they were wrong in law; and

(7) in an email of 30 October in response to a query by Align, HMRC confirmed that they maintained their position that Align's supplies of the Aligners are taxable at the standard rate.

56. In my view, it is clear that HMRC did not agree to withdraw the decision contained in their letter of 9 June 2023 in the Settlement Agreement. That only referred to the assessments and made no reference to the view expressed in the letter of 9 June 2023 which was the decision underlying the assessments that were issued subsequently. Clause 18 of the Settlement Agreement expressly stated that it was without prejudice to the Align's appeals "in respect of the liability of the supplies to VAT" which can only be a reference to appeals under section 83(1)(b). It seems to me that Clause 18 shows that, at the time of entering into the Settlement Agreement, the parties envisaged that the VAT Liability Appeals would continue in relation to the decision that supplies of the Aligners were standard rated for VAT even though the assessments had been withdrawn.

57. In their emails of 25 October, HMRC said that the underlying decision was withdrawn for the periods that had been assessed although they did not concede that the decision was wrong in law. That does not appear to me to be a withdrawal of the decision. HMRC's position was and remains that Align's supplies of the Aligners are chargeable to VAT. That was confirmed in HMRC's email of 30 October. HMRC have never changed their view on the VAT liability of Align's supplies of the Aligners, first expressed in the letter of 9 June 2023. However, Mr Hellier tried to persuade me that the underlying decision had been withdrawn in relation to the periods assessed and there was, therefore, no matter of "the VAT chargeable on the supply of any goods" in the VAT Liability Appeals for the FTT to consider. I am unable to accept that submission. It clear from the Settlement Agreement and subsequent correspondence between the parties that HMRC maintained their view that VAT is properly chargeable on the supplies of the Aligners by Align. In the Settlement Agreement, HMRC only agreed not to act on their view, ie not to assess Align for VAT, in the circumstances of this case. It follows that, absent a change in their view of the law, the decision that VAT is properly chargeable on the supply still stands notwithstanding HMRC's decision not to enforce it for the periods assessed.

58. The fact that Align is not at risk of being required to account for VAT for the periods assessed does not make a challenge to HMRC's view by Align merely hypothetical. I respectfully agree with the views expressed by Judge Herrington in *HMRC v SDI (Brook EU) Ltd* [2017] UKUT 327 (TCC) ('*SDI*') at [47] (emphasis added):

> It is clear that appeals are not confined to cases where HMRC have decided the precise amount of VAT to be charged. Cases may proceed on questions of principle which are related to the chargeability of VAT, such as questions as to the nature of a particular class of supply and whether those supplies are standard rated, exempt or zero-rate. Section 83(1)(b) cannot therefore be construed narrowly; it must be construed broadly so as to encompass any issue between a taxpayer and HMRC, in respect of which HMRC has made a decision, which is material to the chargeability of the taxpayer to VAT."

59. It is, in my view, notable that Judge Herrington does not refer to the chargeability of VAT in specified VAT accounting periods. As in *SDI*, the VAT Liability Appeals concern questions of principle which are related to the chargeability of VAT on supplies of the Aligners by Align. HMRC are applying their view that VAT is chargeable on supplies of the Aligners by Align in the ECN Appeal and more generally to supplies by Align going forward. Accordingly, whether the decision that Align's supplies of the Aligners are not exempt but standard rated for VAT is correct is a matter that is material to the chargeability of Align to VAT.

60. For the reasons set out above, I find that HMRC have not withdrawn their decision that supplies of the Aligners by Align are chargeable to VAT at the standard rate and, therefore, the FTT has jurisdiction to hear VAT Liability Appeals on that issue.

61. It seems to me that there is no reason why the issue of whether VAT is chargeable on supplies of Aligners by Align should not be dealt with at the hearing which is already listed to take place between 27 and 30 January 2025. Mr Hellier submitted that such a hearing would not be determinative because there was another argument which HMRC proposed to raise in the ECN Appeal but which was not included in the pleadings in the VAT Liability Appeals. This additional argument was included in an email which HMRC sent to Align at 16:05 on 25 November 2024, ie the day before the case management hearing. It stated that HMRC intended to rely on "at least two elements in their defence" in the ECN Appeal. The first argument is that the Aligners are not 'dental prostheses' for the purposes of items 2 and 2A of Group 7 of Schedule 9 VATA94 and the second argument is that the supplies were not made by a person registered in the dentists' register or the dental care professionals register or by a

dental technician. In fact, both arguments are referenced in HMRC's Statement of Case dated 26 July 2024 in the VAT Liability Appeals. It describes the meaning of prostheses as the primary issue but also refers to the need for them to be supplied by relevant professionals. Specifically, in paragraphs 35 and 36 of the Statement of Case, HMRC contend:

> "35. Accordingly, the Respondents contend that the goods in the Exempt column of VATHLT2490 are only exempt when they are supplied for the dental benefit of the patient and when supplied by a dentist or dental technician.
>
> 36. The supply of Aligners by the Appellants is not a supply by a dentist or dental technician where the primary purpose of their services is the protection, maintenance or restoration of health of the patient or is for the dental benefit of the patient. Rather, it is a wholesale supply of goods to their customers, who are dentists and dental technicians."

62. It follows that HMRC are able to raise both elements of their defence in the VAT Liability Appeals if they wish to do so.

63. A further consideration in favour of proceeding with the hearing in January 2025 is that if it were to be cancelled, it would probably be a very long time before it could be re-listed.

64. Align also applied to have the ECN Appeal joined and heard with the VAT Liability Appeals. In the email of 25 November and at the hearing before me, HMRC made the point that they had not been notified of the ECN Appeal by the FTT and so the 60 day period for filing their statement of case in that appeal had not yet started to run. As far as I am aware, it has still not been notified at the time of writing this decision. I am also concerned that requiring the parties to try to catch up once the ECN Appeal has been notified to HMRC would be, at best, a distraction and, at worst, a cause of delay to the VAT Liability Appeals. Accordingly, I have decided to stay the ECN Appeal until after the FTT has issued its decision in the VAT Liability Appeals. As I have already discussed, this should not prevent HMRC from raising any point in the VAT Liability Appeals.

DISPOSITION

65. For reasons set out above, I direct that:

(1) the part of the VAT Liability Appeals relating to the VAT assessments issued on 21 September 2023, 18 December 2023 and 23 February 2024 is struck out;

(2) the part of the VAT Liability Appeals relating to HMRC's decision that supplies of Aligners by Align are chargeable to VAT at the standard rate is not struck out but will be determined at the hearing listed between 27 and 30 January 2025; and

(3) the ECN Appeal is stayed until 70 days after the release of the FTT's decision in the VAT Liability Appeals.

66. It is not necessary for me to make any further case management directions in relation to the VAT Liability Appeals as there are existing directions which were issued on 30 July 2024 which provide for the steps necessary to bring the appeals to a hearing. If, however, any party wishes to apply to amend those directions or for new directions, I direct that they must submit their application (agreed, if possible) within 14 days of the date of release of this decision. Any other applications consequential upon this decision can wait until after the final determination of the VAT Liability Appeals by the FTT.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

67. 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.

Release date: 05th DECEMBER 2024