TC03792

Appeal number: TC/2013/04142

PROCEDURE – application by HMRC to strike out proceedings – application by Appellant to adjourn – overriding objective and Article 6 of the Convention – adjournment application refused – Tribunal jurisdiction – HMRC's application granted – unreasonable behaviour – costs

FIRST-TIER TRIBUNAL
TAX CHAMBER

WESTMINSTER COLLEGE OF COMPUTING LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MR LESLIE HOWARD

Sitting in public at 45, Bedford Square, London on 19 June 2014

Dr Arasaratnam Arasilango, director of the Appellant, for the Appellant

Mr Philip Rowe, of HM Revenue and Customs Appeals and Reviews Unit, for the Respondents

DECISION

1. On 20 May 2013, HMRC sent two documents to the Westminster College of Computing ("the company"). One was a Statement of Liabilities and the other a letter informing the company that HMRC was about to file a winding up petition with the High Court on the grounds that the company was unable to pay its debts.

2. On 17 June 2013, the company filed a Notice of Appeal with the First-tier Tribunal ("the FTT"). That Notice requires the Appellant to enclose "a copy of the document I am appealing against." The company attached both documents.

3. On 20 December 2013, HMRC applied to strike out the company's appeal on the grounds that the FTT had no jurisdiction in relation to the matter appealed against. For the reasons given below, we allow HMRC's application.

4. The company's appeal under reference TC/2013/04142 is hereby **STRUCK OUT**.

The facts

Background

5. The company had previously claimed a VAT repayment of £400,681 on the basis that it was an "eligible body" within Note 1 to Group 6 of Schedule 9 of the Value Added Tax Act 1994.

6. On 11 September 2012, the FTT (Judge Sinfield and Mrs De Albuquerque) decided that the company was not an eligible body. Their decision is recorded as *Westminster College of Computing Ltd v R&C Commrs* [2012] UKFTT 579(TC) ("the First Decision").

7. The company asked the FTT for permission to appeal the First Decision; permission was refused. The company then applied to the Upper Tribunal for permission to appeal and this was refused on 14 January 2013.

8. Rule 22(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Upper Tribunal Rules") allows a further application for an oral hearing. Rule 22(5) says that the time limit for such an application is 14 days after refusal of permission on the papers. Mr Arasilango informed us that on 18 June 2014 he had made a late application for the Upper Tribunal's refusal of permission to appeal to be reconsidered at a hearing.

9. On 23 January 2013, the FTT received a Notice of Appeal dated 20 January 2013, recorded under reference TC/2013/00746. On 3 May 2013, HMRC applied to the Tribunal to have that appeal struck out. On 29 January 2014, the FTT (Judge Gammie and Ms Debell) decided to strike out the company's appeal on the grounds that the company was seeking to relitigate the issue decided in the First Decision. Their decision is recorded as *Westminster College of Computing Ltd v R&C Commrs*

[2014] UKFTT 132 (TC) ("the Second Decision"). The FTT also refused permission to appeal the Second Decision, see [22]-[27] of the judgment.

10. At some point before 30 January 2013, the company appealed to the European Court of Human Rights in relation to the First Decision.

The facts relating specifically to this decision

11. On 20 May 2013, HMRC issued the company with a Statement of Liabilities totalling £204,006.69. This sum was made up of sums falling under the following headings:

(1) VAT assessments

(2) VAT penalties

(3) Corporation tax penalties

(4) Interest

(5) PAYE underpayments

(6) Class 1 National Insurance Contributions ("NICs") underpayments

12. In a covering letter attached to the Statement of Liabilities, HMRC informed the company that a winding up petition would be presented to the High Court unless the company paid the £204,000.69 in seven days.

13. As stated at the beginning of this decision notice, on 17 June 2013 the company filed a Notice of Appeal with the FTT. The FTT issued a letter to the parties on 30 October 2013, acknowledging the Notice and saying:

> "HMRC have 60 days from today's date to provide you and the Tribunal with a Statement of Case. You will then have 42 days in which to provide a list of documents to the Tribunal and HMRC."

14. On 20 December 2013, HMRC applied to strike out the appeal. The FTT provided Mr Arasilango with a copy of the strike out application.

15. On 31 December 2013, Mr Arasilango wrote to the FTT, saying that HMRC had failed to comply with the direction to produce a Statement of Case. He also submitted that the FTT had no jurisdiction to strike out the appeal, for reasons set out later in this decision notice.

16. On 7 April 2014, the FTT listed HMRC's application for a hearing on 19 June 2014 and directed that the parties provide a skeleton argument to the FTT and each other "no later than seven days before the hearing."

17. Mr Arasilango delivered the company's skeleton argument to the FTT and HMRC on 12 June 2014. HMRC delivered their skeleton argument on 17 June 2014 at 5.00pm.

The company's application for an adjournment

18. Mr Arasilango applied for the hearing to be adjourned, on the grounds that HMRC had only delivered their skeleton argument at 5pm on 17 June 2014, which was only one working day before the hearing.

19. Mr Arasilango said that this had not allowed him time properly to consider HMRC's skeleton argument and so prevented him deciding whether to instruct Counsel. He submitted that if we continued with the hearing, this would be a breach of Article 6 of the European Convention of Human Rights which requires that there be a fair trial.

20. Mr Rowe responded by pointing out that the skeleton argument merely replicated the strike out application: it begins by saying "HMRC's case is basically as set out in their Notice of Application dated 20 December 2013" and it then reprises that Application.

21. We asked Mr Arasilango whether he agreed that the two documents were almost identical in content. He said "I accept they are the same but the procedure hasn't been followed."

22. We asked Mr Arasilango why he had been unable to consider the arguments, so as to decide whether or not to instruct Counsel, during the six month period since HMRC filed and served the strike out Application. Mr Arasilango said he was planning to do this "nearer the hearing; there was no point in disturbing them in advance. I had a date for the hearing but no arguments had been put forward."

23. We took time to consider the company's application. We considered the Tribunal Rules, and in particular Rule 2, the overriding objective, which is "to deal with cases fairly and justly." We also considered Mr Arasilango's submission that continuing with the hearing would be a breach of Article 6 of the European Convention of Human Rights.

24. We decided not to allow an adjournment, for the following reasons:

(1) Mr Arasilango's complaint was that HMRC had not followed the procedure. There was no substantive issue: the company had not been taken by surprise by any matter in the HMRC skeleton argument, which was, as Mr Arasilango accepted, essentially the same as HMRC's Application.

(2) In considering the overriding objective, we took into account in particular, the need to avoid delay, so far as compatible with proper consideration of the issues. An adjournment would clearly cause delay, and as no new arguments had been put forward by HMRC in their skeleton argument, there was nothing to prevent the parties making submissions on the issues already in the Application and the Notice of Appeal. There was also nothing to prevent us from considering those arguments and submissions.

(3) Rule 2 also requires us to ensure, so far as practicable, that the parties are able to participate fully in the proceedings. Mr Arasilango has had six months in which to instruct Counsel; it would not be in accordance with the overriding

objective for the Tribunal to delay the hearing so that he could have further time to consider whether or not he wished to issue instructions. Mr Arasilango did not submit that either party's submissions were of such complexity that the attendance of Counsel was required. He had attended the hearing to represent the company; he was familiar with the company's history; he had put forward the company's grounds of appeal and was able to explain them to the Tribunal. We found that continuing with the hearing was entirely consistent with "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings."

(4) Turning to Article 6, there was, as we explained to Mr Arasilango, doubt as to whether the company's tax dispute was protected by that Article. We referred to *Ferrazzini v Italy* (Application 44759/98) (2001) 3 ITLR 918, where the court decided that "proceedings regarding taxation do not determine 'civil rights and obligations' for the purposes of art 6 of the convention." However, we acknowledged that tax penalties fell within the protection of Article 6(2): *Jussila v Finland* (2006) 9 ITLR 662.

(5) However, even if the company's appeal did (in whole or in part) come within the protection of Article 6, failure to provide documents to a party in advance of the hearing does not automatically constitute a violation of that Article. For that to be the position, the person must be unaware of the content of a document material to the proceedings, which could therefore have affected the person's legal argument (see *Krčmář v Czech Republic* (2001) 31 EHRR 953). It is clear on the facts of this case that Mr Arasilango was aware of the contents of HMRC's skeleton argument, as the same material had been provided to him six months previously in the Application.

(6) Mr Arasilango's complaint was that HMRC had failed to comply with the directions and so "the procedure hasn't been followed." Article 6 does not give a person any rights arising out of a procedural failure, rather, it is necessary to consider the consequences of that failure for the party involved. Here, the late delivery of the skeleton argument had no consequences for the company. Mr Arasilango had been aware of HMRC's arguments for around six months and had he thought it necessary to instruct Counsel he could easily have done so.

25. As a result of the foregoing, we found that there would be no breach of Article 6 if we continued with the hearing without an adjournment, and that it was in the interests of justice for us to do so.

26. We moved on to consider the parties' submissions on HMRC's strike out application.

Submissions of HMRC

27. Mr Rowe submitted that the company has no right to appeal to the FTT against either the Statement of Liabilities or the letter advising of the winding up petition. Even if the FTT were to go on to consider the liabilities set out in that Statement, it also has no jurisdiction because none of those liabilities were appealable to the FTT.

28. He said that:

(1) The VAT liabilities arose because the company's supplies were not exempt, for the reasons set out in the First Decision. As the FTT has already said in the Second Decision, there is no further right of appeal to the FTT in relation to the liability issue. The quantum is calculated from the outputs shown on the company's VAT returns, so that too is not appealable.

(2) Although VAT penalties are appealable decisions, the company has neither appealed against those penalties within the time limit, nor applied to the FTT for permission to make a late appeal.

(3) The corporation tax liabilities arise from determinations made by HMRC under paragraph 36 of Schedule 18 to Finance Act 1998 ("FA 1998"). Determinations are made when at taxpayer has not submitted a corporation tax return. There is no right of appeal against a determination because a taxpayer can replace the determination by submitting the return. In any event, any appeal against a corporation tax liability has to be made to HMRC and (unlike VAT) cannot be made directly to the FTT: see para 48(2), Sch 18, FA 1998.

(4) There is no statutory right of appeal against interest charged by HMRC on late paid tax or penalties.

(5) The underpayment of PAYE and Class 1 NICs arises from the figures submitted by the company on its year end returns, and this too is not appealable.

29. In oral submissions Mr Rowe added that if the company wished to challenge HMRC's right to collect the amount shown as a debt on the Statement of Liabilities, the proper forum for such a challenge was the High Court. It was not a matter for the FTT.

Submissions of Mr Arasilango on behalf of the company

30. In the company's Notice of Appeal to the Tribunal, Mr Arasilango has set out the following items under the heading "grounds of appeal."

(1) The company's business records have been seized by the Metropolitan Police on 19 June 2009 unlawfully and many of these have not been returned.

(2) This has damaged the business and made Mr Arasilango very sick.

(3) There are ongoing proceedings against the Metropolitan Police.

(4) Some of the business records have been lost as the landlord locked the premises.

(5) The company's bank account was closed and the company is not trading.

(6) As a result of the unavailability of the records, the company could not submit the returns to HMRC.

(7) The company is in a loss position and does not have the money to pay HMRC.

(8) HMRC made a winding up petition for a sister company, unlawfully, using this company's VAT number, and that petition has been dismissed. That proceeding was an abuse of process or malicious prosecution. The company will be filing a claim against HMRC for abuse of process or malicious prosecution in the High Court within the stipulated time frame.

(9) The company did not make a profit and therefore does not owe any corporation tax.

(10) HMRC will owe money to the company when the High Court decides the case.

(11) As there is an ongoing VAT Tribunal the company does not have to pay the PAYE until the proceedings are completed.

31. In his email of 31 December 2013 to the FTT, which was copied to HMRC, Mr Arasilango said that:

(1) The FTT has no jurisdiction to strike out the appeal because HMRC owe the company a VAT refund of £400,681 and "proceedings regarding this matter was not completed yet."

(2) The Statement of Liabilities issued by HMRC "was a first step for abuse of process" and the company was preparing a case against HMRC in relation to their abuse of process.

32. In his oral submissions, Mr Arasilango reiterated that he still considered the company's supplies to be exempt, and HMRC therefore owed the company a refund of the VAT which had been charged on its outputs. He said he had retained the PAYE and NICs in order to balance the money owed to him by HMRC.

33. We asked about his submissions that there were still legal proceedings in train relating to the VAT status of the company's outputs, given the First and Second decisions. Mr Arasilango said that he was seeking permission for a late appeal to the Upper Tribunal against the First Decision and had also referred this issue to the European Court of Human Rights. He said that the heart of his company's case was that it didn't owe HMRC any money because the company's outputs are exempt from VAT.

Discussion and decision

34. First, we had to clarify the matter which the company was seeking to appeal. Rule 20(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") states that:

> "The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against"

35. The company's Notice of Appeal form attached the Statement of Liabilities and the covering letter setting out HMRC's intention to initiate a winding up petition. Under "the amount of tax or penalty or surcharge" Mr Arasilango had entered

"£204,006.69" – the amount on the Statement of Liabilities. Although the company's "grounds of appeal" as stated in the Notice of Appeal are multi-faceted, in terms they are a statement that the company does not owe the tax set out in the Statement of Liabilities. This was confirmed by Mr Arasilango at the hearing when he said that the heart of the company's case was that it didn't owe HMRC any money.

36. It is therefore clear that the company's appeal was against HMRC's decisions to *collect* the £204,006.69 and not against the underlying liabilities.

37. The FTT is a creature of statute. It only has the powers and jurisdiction given to us by Parliament. If there is no jurisdiction to hear an appeal, the FTT must strike out that appeal. This is clearly stated in Rule 8(2) of the Tribunal Rules.

38. Parliament has given the FTT jurisdiction to hear a range of appeals. However, we agree with Mr Rowe that the FTT has no jurisdiction to hear an appeal against a Notice of Liabilities. That Notice is simply a statement of what is owed to HMRC. There is no provision in any legislation giving the FTT power to hear an appeal against such a Notice. There is also no legislation giving us power to hear an appeal against a letter warning that HMRC will be petitioning to wind up the company. As Mr Rowe said, the place for the company to contest HMRC's right to collect this money, and/or the winding up petition, is the High Court.

39. As a result, we strike out the company's appeal.

40. Even had the appeal been against the liabilities listed on the Statement, we agree with Mr Rowe that the FTT would have no jurisdiction. In summary:

(1) The FTT has no jurisdiction in relation to the company's liability to pay VAT on its outputs. That issue has already been decided by the FTT in the First Decision; we echo the words of the Second Decision at [16] that "the legislation confers no further right of appeal and confers no further jurisdiction, power or discretion on this tribunal."

(2) The FTT has no jurisdiction in relation to the VAT penalties, because no application for permission to make a late appeal is before the FTT.

(3) Although we are doubtful whether Mr Rowe is right to say that a corporation tax determination cannot be appealed, we agree with him that the FTT has in any event no jurisdiction over the corporation tax shown on the Statement of Liabilities, as no appeal has been made to HMRC.

(4) The PAYE and NIC liabilities are those established by the company via its own filing of returns, and there is no right of appeal. We have no jurisdiction in relation to these liabilities.

(5) There is no right of appeal against interest charged on liabilities owed to HMRC and therefore the Tribunal has no jurisdiction.

Costs

41. Rule 10(1)(b) states that the FTT may make an order for costs "if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings."

42. In this context we note that:

(1) almost six months before this hearing, HMRC clearly set out the reasons why the FTT had no jurisdiction in these proceedings;

(2) this is the company's third appearance before the FTT. As Mr Arasilango said, the "heart of his case" was that he does not accept that the company's outputs are standard rated. This is another way of saying that the company does not accept the First Decision. The company's two requests for permission to appeal that decision to the Upper Tribunal have been refused. Mr Arasilango has now made a late application for an oral hearing. Whether that application is granted or not is a matter for the Upper Tribunal. But what is absolutely clear is that as far as the FTT is concerned, the issue is closed;

(3) the company's appeal under reference [2014] UKFTT 132 was an attempt to appeal an issue which had already been decided. In the Second Decision the FTT reprimanded the company, saying that "the Appellant's attempt to resurrect its appeal in this way is clearly an abuse of process."

43. HMRC have had to devote time and resources to the further appeal before this Tribunal: they have had to consider the company's Notice of Appeal, draft the strike out Application, provide a written skeleton argument, prepare for the hearing, and attend the hearing venue to put HMRC's case to the Tribunal.

44. In our judgment the company has behaved unreasonably in bringing the proceedings.

45. We invite HMRC to make an application for its costs pursuant to Rule 10. Any such application must be made within 28 days of the date of this decision and must be accompanied by a schedule setting out the costs in sufficient detail so as to allow this Tribunal to carry out a summary assessment. It must be copied to the company at the same time as it is sent to the Tribunal.

46. The company then has a further 28 days from the date of issue of that costs application to write to the FTT, with a copy to HMRC, setting out any reasons why the company should not have to meet the costs. We will then decide the costs issue on the papers.

Appeal rights

47. 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 Rules.

48. The application must be received by the FTT 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 REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 8 July 2014