



TC03472

Appeal number: TC/2012/07904

VAT – purported appeal against “decision” of HMRC that appellant required to make online VAT returns – liability to file online arising automatically under secondary legislation without requirement for HMRC to reach a “decision”- whether the European Convention on Human Rights relevant - no – appeal struck out for lack of jurisdiction

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

K W HADLEIGH LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Mr G Webb, Counsel for the Appellant

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

DECISION

1. HMRC applied on 22 October 2012 to have the appellant's appeal struck out. In December 2012 they applied to have their strike out application stayed behind the hearing of a similar application in another case which appeared to raise the same issue and the appellant and Tribunal consented to this. Following the release of the Tribunal's decision in *Le Bistingo* [2013] UKFT 524 (TC), the Tribunal wrote to the parties on 6 January 2014 asking them how they wanted to proceed.

2. Mr Webb's reply was that he wished to proceed with his appeal but that, as he had just had a stroke, he wanted the matter to be decided on the papers or telephone. I directed that the application would be dealt with on the papers and that the parties had until 7 March 2014 to make any additional representations.

3. HMRC made further representations but the appellant did not.

Background

4. The appellant filed a Notice of Appeal on 20 July 2012. It enclosed with it a letter from HMRC dated 8 June 2012 and appeared to be an appeal against a letter received by it from HMRC dated 8 June 2012. It is his case that it is not lawful for the company to be required to file online; and the *L H Bishop* case [2013] UKFTT 522 (TC) suggests he might be right in that, in so far as this appellant is concerned, its alter ego is Mr Webb and he is 75 years old.

5. The 8 June 2012 letter was a "VATC11" letter and appeared to be in a standard form. The letter states that HMRC wrote to the appellant in February 2012 informing it that it must file its VAT returns online as from 1 April 2012. I was not given a copy of the February letter. The June letter appeared to have been sent as a follow-up because the appellant had not taken the first step towards filing online which was to sign up for the VAT Online Services.

Out of time?

6. Mr Webb (for the appellant) wrote to HMRC in reply on 18 June and asked them to accept his letter as a formal appeal against the requirement to file online. He filed the notice of appeal just over a month later. I note that *if* I have jurisdiction to deal with the matter in respect of which the appellant lodged its appeal, it seems it was lodged out of time under s 83G(1)(a)(i) in that the appellant has 30 days from the date of the document notifying the decision to which the appeal relates in which to lodge an appeal. If that document was HMRC's letter of 8 June, the appeal was lodged more than 30 days later.

7. However, this strike out application was on the basis that I have no jurisdiction to deal with the subject matter of the appeal. If that is right, the point on the lateness of the notice of appeal is irrelevant; if it is not correct, then whether time should be extended is a matter that can be dealt with at the substantive hearing.

Jurisdiction?

8. HMRC applied to have the appeal struck out under Rule 8(2)(a) on the grounds that the Tribunal had no jurisdiction in respect of it. This was on the basis that HMRC had taken no decision in respect of the Appellant's liability to file its VAT returns online as this was contained in legislation. The Tribunal is a statutory body and only has jurisdiction in respect of decisions made by HMRC over which the Value Added Tax Act 1983 ("VATA") gives it jurisdiction.

The legislation

9. Section 25 of the Value Added Tax Act 1994 ("VATA") provides that a taxable person shall account for and pay VAT by reference to prescribed accounting periods and "in such time and manner as may be determined by or under regulations".

10. Regulation 25 of the Value Added Tax Regulations 1995 ("the Regulations"), as amended by the Value Added Tax (Amendment) (No. 4) Regulations 2009/2978 with effect from 1 December 2009, provides:

“(1) Every person who is registered shall, in respect of every period of a quarter....., not later than the last day of the month next following the end of the period to which it relates, make to the Controller a return in the manner prescribed in regulation 25A showing the amount of VAT payable by or to him”

11. Regulation 25A provides (with effect from 1 April 2012):

25A.—

...

(3) Subject to paragraph (6) below, a person who is registered for VAT must make a return required by regulation 25 using an electronic return system

...

(6) A person—

(a) who the Commissioners are satisfied is a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications, or

(b) to whom an insolvency procedure as described in any of paragraphs (a) to (f) of section 81(4B) of the Act⁵ is applied

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

...

(15) Subject to paragraph (15A) in relation to returns made for prescribed accounting periods which end on or after 31 March 2011, a

person who fails to comply with paragraph (3) above is liable to a penalty.

....

5 (16) But a person who has a reasonable excuse for so failing to comply is not liable to a penalty.

...”

12. Prior to 1 April 2012, and since 12 December 2009, Regulation 25A(5) had provided that a person was only a specified person in relation to electronic returns if his turnover equalled or exceeded £100,000 and then only if “that person has been notified as required by paragraph (7)”. Paragraph 25A(7) required HMRC to notify a person if they considered him to be a specified person.

13. Some persons, including the appellant’s director Mr Webb in his personal capacity, have lodged appeals against such decisions made by HMRC. HMRC has not asked the Tribunal to strike those appeals out on the grounds of lack of jurisdiction nor has the Tribunal done so of its own motion: on the contrary, the Tribunal has heard four of these “tranche 1” appeals as lead cases. In those cases, the Tribunal agreed that HMRC’s decision that they must file online was unlawful in so far as the first three appellants were concerned, on the grounds it was a breach of various human rights in indirectly discriminating against them on the grounds of age, disability and/or remote location. See *L H Bishop Electric Company Ltd and others* referred to above.

14. I find that the appellant was in tranche 2 rather than tranche 1. What little information I have been provided with in this case indicates that the appellant did not receive notification under Regulation 25A(7) as it was. Mr Webb’s letter of 18 June 2012 indicates that the appellant company’s turnover (as opposed to his turnover in his personal capacity) was too low to be in tranche 1, and HMRC’s letter of 8 June referred to the company being liable to file online from 1 April 2012, which was the date for tranche 2 taxpayers. HMRC consider the appellant is in tranche 2 and the appellant has certainly not provided anything which suggests otherwise. Therefore, I proceed on the basis that the appellant’s turnover was too low to put it within tranche 1 and that therefore the legislation set out above applies to it, and in particular that it was required to file online because that is what the legislation, amended with effect from 1 April 2012 provided, and not because of any decision taken by HMRC.

The FTT’s Jurisdiction

15. 12. The FTT’s jurisdiction is statutory. It has no jurisdiction to hear any dispute which does not fall within the statutory provisions that confer jurisdiction upon it.

16. 13. Section 83(1)(zc) VATA 94 provides as follows:

40 (1) Subject to sections 83G and 84, an appeal shall lie to the tribunals with respect to any of the following matters—

...

5 (zc) a decision of the Commissioners about the application of regulations under section 135 of the Finance Act 2002 (mandatory electronic filing of returns) in connection with VAT (including, in particular, a decision as to whether a requirement of the regulations applies and a decision to impose a penalty).

17. The appellant's complaint concerns the application of Regulation 25A to him. Regulation 25A is a regulation made under section 135 FA 2002. Section 83(1) is the only provision which confers jurisdiction on this Tribunal in VAT matters and s
10 83(1)(zc) is the only possible sub-section of s 83 which would confer jurisdiction on this Tribunal to hear the appellant's complaint.

18. And, as HMRC state, the scope of s 83(1)(zc) is circumscribed by the requirement that HMRC issue a decision. I agree with HMRC that s 83(1)(zc) is in particular to be read as limiting the Tribunal's jurisdictions to decisions of HMRC in
15 respect of online filing. This includes jurisdiction over a decision of HMRC whether a requirement of the regulations applies and a decision to impose a penalty.

19. No penalty has been imposed. It is HMRC's case that no decision at all has been made, or if it has, then it is irrelevant as the appellant's liability to file online arises by virtue of the legislation and not because of any decision HMRC made. The
20 letter of 8 June 2012 was not, says a *decision* that the appellant should file online: the appellant was already liable under the secondary legislation outlined above to file online whether or not the letter was sent.

20. I have to agree that HMRC has made no decision in this case against which an appeal could lie. The appellant has not in his various letters suggested that HMRC
25 did make a decision: his case is simply that he should not be required to file online.

21. As a matter of UK law therefore it appears that I must strike out this appeal for lack of jurisdiction: there has been no decision by HMRC. S 83(1)(zc) is not engaged.

Does the Convention on Human Rights apply to give a right of appeal?

30 22. The Human Rights Act s 3 requires this Tribunal to interpret UK law in so far as possible to be consistent with the rights contained in the Convention:

“So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights”.

35 23. The effect of s 83(1) VATA is that the appellant is unable to test in this Tribunal whether the obligation contained in Regulation 25A to file online is lawful. The reason s 83(1) has this effect is because it is limited to ‘a decision’ of HMRC and the obligation in Regulation 25A applies irrespective of any decision by HMRC.

24. Article 6 of the Convention nevertheless provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

5 25. The appellant wants this Tribunal to determine whether he does have an obligation to file online. HMRC’s view is that firstly, that Article 6 does not apply because the obligation to file tax returns is not a civil obligation; and secondly, even if the obligation to file tax returns was a civil obligation, nevertheless Article 6 could not confer jurisdiction on this Tribunal where otherwise it would have none.

10 26. Is filing a tax return a civil obligation? In *Ferrazzini v Italy [2001] STC 1314* the European Court of Human Rights (“ECHR”) held that tax disputes fell outside the scope of civil rights and obligations because tax was a public law matter. In a common law jurisdiction, this is a very difficult decision to understand but nevertheless I am bound to apply it: this is because s 2 Human Rights Act requires
15 me to take account of any relevant judgment of the ECHR.

27. The effect of *Ferrazzini* is that the Convention does not guarantee a fair trial in a tax dispute. Therefore, s 3 HRA cannot require a strained reading to be given to s 83(1)(zc) in order to give the appellant a right to a hearing of his challenge to the legality of Regulation 25A.

20 28. If it were not for the *Ferrazzini* case, my view might have been that s 3 HRA would require “decision” in S 83(1)(zc) to be given a strained reading and to include the letter written by HMRC to the appellant referred to in paragraph § 5 above. This is because, unless it was given such a meaning, it would leave the appellant without an effective means to challenge the legality of Regulation 25A. Yet Article 6 entitles
25 a person to a fair hearing. In practice, if this Tribunal does not have jurisdiction in this case, all the appellant could do would be to wait for HMRC to impose a penalty for non-compliance and then appeal it: this is obviously unsatisfactory as it requires the appellant to break the law in order to determine whether the law itself is lawful. Further, while the legality of legislation could be challenged in judicial review
30 proceedings, such actions are not of right and in a case like this, which does not involve significant sums of money and legal advice, is not in practice an option, and therefore not an effective remedy.

29. However, I am bound by the decision in *Ferrazzini* and have to conclude that s 3 HRA does not require s 83(1) to be interpreted in such a way to give this Tribunal
35 jurisdiction in order to give effect to rights under Article 6 of the Convention.

30. In addition to the European Convention on Human Rights there is the Charter of Fundamental Rights of the European Union, which applies because this is a VAT case and the European Communities Act 1972 gives supremacy to EU law. Article 47 of the Charter grants the right to a fair trial in all matters and it does not suffer from the
40 *Ferrazzini* limitation. However, s 3 HRA applies only to the Convention and not to the Charter. While the taxpayer has the *right* under the Charter to a fair hearing, that does not give this Tribunal the *power* to “interpret” legislation to grant itself the

jurisdiction to give the taxpayer a fair hearing where the legislation does not give it jurisdiction on an ordinary reading.

5 31. Therefore, while it seems it is unlawful for the UK government under the Charter (applicable in the UK because of the ECA) to impose obligations on a taxpayer without giving the taxpayer a right to challenge them, that does not permit this Tribunal to confer jurisdiction on itself in order to give taxpayers the right to challenge the obligation.

Conclusions

10 32. Mr Webb may find it very surprising that this Tribunal does not have jurisdiction to entertain the company's appeal and consider the validity of the law: this is particularly the case when in his personal capacity as a VAT registered trader his appeal has been accepted as valid. But, as I have said, that was because tranche 1 mandation required an HMRC decision. Tranche 2 does not.

15 33. The only decisions HMRC could reach in respect of a Tranche 2 mandation would be whether a taxpayer was entitled to the insolvency or religious exemption or to impose a penalty. The appellant has laid no claim to either of these exemptions and no penalty has been imposed. HMRC has simply taken no decision at all in respect of the appellant's liability to file online.

20 34. While technically a person in the appellant's position could seek to judicially review HMRC over the legality of the secondary legislation, in practice the expense and difficulty of such a course of action to a person of small resources means that this is an unreal remedy.

25 35. It seems to me that the only practical way that the appellant would have of obtaining a judicial ruling on its grievance over the requirement that it must file online is to appeal any penalty imposed if it fails to comply with the law. But that, as I have said, is equally unsatisfactory as it requires the appellant to break the law in order to challenge it.

30 36. So it is with a great deal of regret that I have to agree with HMRC that the requirement on the Appellant to file VAT returns online, to which the Appellant objects, is contained in legislation and applies directly, without the need for any decision on the part of HMRC. HMRC have not even purported to make a decision that the appellant must file online: their letter of 8 June 2012 were no more than reminder to the appellant of its liability under the legislation. As this Tribunal only has jurisdiction to entertain appeals against *decisions* made by HMRC, it has no
35 jurisdiction to consider the appellant's complaint in this case and must strike out the appeal.

37. Nevertheless, it follows from what I have said in my decision on tranche 1 mandation (see *L H Bishop Electric Company Ltd and others*) that the regulation complained of is not lawful in respect of elderly and/or disabled taxpayers. I expect

that HMRC will immediately bring to the attention of Mr Webb their concession for elderly and disabled person obliged by legislation to file online.

5 38. 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.

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**BARBARA MOSEDALE
TRIBUNAL JUDGE**

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RELEASE DATE: 7 April 2014

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