



TC06737

Appeal number: TC/2017/01012

PROCEDURE – Appeal withdrawn – Late application for reinstatement – Whether power to reinstate under rule 17 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 precluded by s 85(4) Value Added Tax Act 1994 – Yes – OWD Ltd (t/a Birmingham Cash & Carry) v HMRC [2018] UKFTT 497 (TC) applied

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LIBBY'S MARKET PLACE LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOHN BROOKS

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 25
September 2018**

Mr Udku Kettas, director of Libby's Market Place Limited, for the Appellant

Mr Victor Olamide, of HM Revenue and Customs, for the Respondents

DECISION

1. This is the application, dated 15 January 2018, of the appellant, Libby's Market Place Limited, for its appeal which was withdrawn on 25 October 2017 in the circumstances described below, to be reinstated.

Background

1. An appeal by Libby's Market Place Limited against the decision of HM Revenue and Customs ("HMRC"), dated 20 December 2016, to refuse backdate the effective date for the application of the flat-rate scheme ("FRS") came before Judge Redston on 5 October 2017. At that hearing Mr Utku Kettas, the director of Libby's Market Place Limited, produced a transcript of a call between him and "Mark" of HMRC which, although included on HMRC's list of documents on which it intended to rely provided to the Tribunal (which is how Mr Kettas obtained a copy of a CD with the conversation and transcript) had not been seen or heard by HMRC's presenting officer at the hearing.

2. Judge Redston therefore adjourned the hearing and made directions, which were issued on 9 October 2017, to enable HMRC to consider the transcript and confirm either that the appellant had been authorised by "Mark" of HMRC to backdate the FRS to 1 September 2015 or it had been given a legitimate expectation that it would be authorised to do so from that date.

3. By letter, dated 18 October 2017, HMRC notified Mr Kettas (in response to the directions) that although it did not agree that a decision had been made authorising the backdating of the FRS it accepted that it had given a "legitimate expectation to that effect" and that arrangements would be made to backdate the FRS.

4. On the basis of that letter, on 25 October 2017, the appellant withdrew its appeal. The withdrawal was acknowledged by the Tribunal which, by letter of 26 October 2017, informed the appellant that it had the right to apply in writing to reinstate its appeal with any such application to be made within 28 days.

5. By email to the Tribunal, dated 15 January 2018, the appellant confirmed that its application for FRS had been backdated but that it had not received an expected VAT repayment arising as a consequence of the backdating. This email was treated as an application for reinstatement of the appeal and, on 24 January 2018, representations were sought from HMRC. In its reply, of 6 February 2018, HMRC explained that it considered that "no further Tribunal involvement is necessary" as the request for backdating the FRS had been accepted and that all that remained was action to resolve the quantum of sums owed as a result which HMRC said it would endeavour to resolve "as soon as possible".

6. However, in the absence of agreement between the parties on 6 June 2018, on the quantum of any repayment, the Tribunal notified the parties that the reinstatement application be listed for hearing.

Law

7. Rule 17 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Procedure Rules”) provides:

17. Withdrawal

(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; or

(b) orally at a hearing.

(2) The Tribunal must notify each party in writing of its receipt of a withdrawal under this rule.

(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

(4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—

(a) the date that the Tribunal received the notice under paragraph (1)(a); or

(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b).”

8. In *HMRC v C M Utilities Ltd* [2017] UKUT 205 (TCC), the Upper Tribunal observed, at [20]:

“Two features of Rule 17 are readily apparent. The first is that it provides for the withdrawal (and reinstatement) of a party’s case, but it does not provide for the consequences of withdrawal. The second is that it is expressly subject to statutory provisions relating to both withdrawal and settlement. It is to those statutory consequences that we must look to determine the consequence of withdrawal.”

9. *C M Utilities* was a direct tax case concerning s 54 of the Taxes Management Act 1970 for which the VAT equivalent is s 85 of the Value Added Tax Act 1994 (VATA). This provides:

85. Settling appeals by agreement

(1) Subject to the provisions of this section, where a person gives notice of appeal under section 83 and, before the appeal is determined by a tribunal, HMRC and the appellant come to an agreement (whether in writing or otherwise) under the terms of which the decision under appeal is to be treated—

(a) as upheld without variation, or

(b) as varied in a particular manner, or

(c) as discharged or cancelled,

the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement.

(2) Subsection (1) above shall not apply where, within 30 days from the date when the agreement was come to, the appellant gives notice in writing to HMRC that he desires to repudiate or resile for the agreement.

...

(4) Where—

(a) a person who has given a notice of appeal notifies HMRC, whether orally or in writing, that he desires not to proceed with the appeal; and

(b) 30 days have elapsed since the giving of the notification without HMRC giving to the appellant notice in writing indicating that they are unwilling that the appeal should be treated as withdrawn,

the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and HMRC had come to an agreement, orally or in writing, as the case may be, that the decision under appeal should be upheld without variation.

(5) References in this section to an agreement being come to with an appellant and the giving of notice or notification to or by an appellant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the appellant in relation to the appeal.

10. Although the Tribunal may, under its case management powers in rule 5 of the Procedure Rules, extend or shorten time for complying with any rule in cannot do so if it “would conflict with a provision of another enactment setting down a time limit” such as s 85 VATA. Having considered these provisions in *OWD Ltd (t/a Birmingham Cash & Carry) v HMRC* (“*OWD*”), Judge Falk said, at [32], that

“Section 85 is quite clear in its terms. If an appellant, or someone on its behalf, notifies HMRC that it desires not to proceed with an appeal and there is no objection from HMRC under s 85(4)(b), then the parties are deemed to have agreed that the appeal is upheld, with the same consequences as if the Tribunal had determined it. This is the effect of s 85(4), read with s 85(1.) The only caveat to this is where the appellant notifies HMRC within 30 days of the original notification (being the date of the deemed agreement) that it no longer wishes to withdraw. In that case the effect of s 85(2) is that the deemed Tribunal determination created by the withdrawal does not take effect. There is no power in s 85 for this 30 day time limit to be extended, and in my view rules 5 and 17 of the Tribunal Rules cannot supply such a power.”

Discussion and Conclusion

11. Mr Olamide, for HMRC, who accepted that the appellant was entitled to a VAT repayment but was unable to agree the quantum of any such repayment with Mr Kettas, contended that the Tribunal did not have the jurisdiction to determine this issue. However, he did not (apparently from a lack of preparation) refer to any legislative provision or authority to support his position, a most unsatisfactory and unhelpful situation.

12. On the other hand, Mr Kettas pointed to the sum of £8,039.95 shown on the original Notice of Appeal as the amount of tax in dispute to say that the issue of a repayment was always in dispute. I agree and would add that in an appeal such as this where, if an appellant succeeds in its claim that the effective date for commencement of the FRS should be backdated there is also an inherent claim for repayment of overpaid output tax under s 80 VATA, an appealable matter within the jurisdiction of the Tribunal in accordance with s 83(1)(t) VATA.

13. However, there is no doubt that the appeal was withdrawn on 25 October 2017 and the reinstatement application was made, on 15 January 2018, more than 28 days after. The withdrawal of the appeal also falls within s 85(4)(a) VATA and HMRC have not given notice that they are unwilling that the appeal should be treated as withdrawn in accordance with s 85(4)(b) VATA. Therefore, as the appellant has not given notice, under s 85(2) VATA within 30 days, that it wishes to resile or repudiate from it, there is a deemed agreement between HMRC and the appellant under which the appeal is to be treated as varied in a particular manner, ie the backdating of the FRS, as though a tribunal had determined the appeal in accordance with the terms of the agreement.

14. Had it been made either within the 28 days stated by the Tribunal Rules or within the 30 days permitted by s 85 VATA I would have been minded to grant the application to reinstate the appeal. However, as Judge Falk observed in *OWD* there is no power in s 85 VATA for this 30 day time limit to be extended. I agree with her that rules 5 and 17 of the Procedure Rules cannot supply such a power.

15. Therefore, in the circumstances I have no alternative but to dismiss the application and refuse to reinstate the appeal.

16. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 28 SEPTEMBER 2018