



Neutral Citation: [2022] UKFTT 231 (TC)

Case Number: TC08552

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video

Appeal reference: TC/2020/03614

*LATE APPEAL – whether appeal made in time – whether failure to pay disputed VAT or make hardship application precludes appeal being made – meaning of ‘entertained’ in section 84(3) VAT Act 1994*

**Heard on:** 18 July 2022  
**Judgment date:** 27 July 2022

**Before**

**TRIBUNAL JUDGE GREG SINFIELD**

**Between**

**SNM PIPELINES LIMITED**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Bart Casella, counsel, instructed by Richardson Lissack, solicitors

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

## DECISION

### INTRODUCTION

1. On 20 August 2017, the First-tier Tribunal ('FTT') received a Notice of Appeal submitted by Carter Moore Solicitors ('Carter Moore') on behalf of the Appellant, SNM Pipelines Limited ('SNMP'). The appeal was against a review decision by the Respondents ('HMRC'), dated 20 July 2017, confirming the denial of input tax claimed by SNMP and assessments to recover the input tax so claimed. It was, therefore, an appeal under section 83(1)(c) and (p) of the Value Added Tax Act 1994 ('VATA94'). Section 83(1) is subject to sections 83G and 84 which, respectively, provide for a time limit for making an appeal and a requirement that any disputed tax must be paid or deposited before the appeal can be entertained.

2. In summary, HMRC claim that SNMP did not make a valid appeal in 2017 because it had not paid or deposited the disputed input tax with HMRC as required by section 84(3) and had not applied under section 84(3B) for the appeal to be entertained without payment of the VAT on the ground that it would cause SNMP to suffer hardship. SNMP sought to re-submit their Notice of Appeal in October 2020 but that was returned again as no tax had been paid and no hardship application had been made. SNMP re-submitted the notice of appeal in December 2020 and made a hardship application which was accepted by HMRC in February 2021. However, that did not mean that SNMP's appeal could proceed and, in July 2021, HMRC served a notice of objection to SNMP's late appeal.

3. The parties' submissions are summarised and discussed below. For reasons set out below, I have decided that, notwithstanding the fact that it did not make a hardship application until December 2020, SNMP made a valid appeal in 2017. Accordingly, SNMP's appeal is admitted.

### FACTUAL AND PROCEDURAL BACKGROUND

4. At the hearing of the application, there was no dispute about the facts leading up to the initial appeal and the subsequent steps in the proceedings. Accordingly, I take the facts below from the skeleton arguments of the parties and witness statements of Stephen Morgan for SNMP and Stephen Sharrock for HMRC.

5. On 19 May 2017, HMRC decided that SNMP was not entitled to repayments of input tax claimed in accounting periods 06/13, 09/13, 12/13, 03/14, 06/14, 09/14, 12/14, 06/15, 09/15 and 12/15 on the grounds that that SNMP knew or ought to have known that the input tax had been incurred in transactions which were connected with the fraudulent evasion of VAT. HMRC issued assessments for £312,377 to recover the disputed input tax. Following a statutory review under sections 83A-G VATA94, the decision and the assessments were confirmed in a review letter dated 20 July 2017.

6. The time limit for appealing to the First-tier Tribunal ('FTT') was 30 days beginning with the date of the review letter, ie 19 August 2017. In 2017, 19 August fell on a Saturday. Rule 12 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules') provides that where the time limit for doing anything specified by the Rules ends on a day other than a working day, the act is done in time if it is done on the next working day. Accordingly, the time limit for making an appeal in this case expired on Monday 21 August 2017.

7. Carter Moore submitted a notice of appeal dated 18 August 2017 to the Tribunal by post, copying it to HMRC by email and post. The FTT received the notice of appeal on 19 or 20 August. The notice of appeal was therefore lodged in time subject to it being an effective notification of the appeal in accordance with the FTT Rules.

8. On 25 August 2017, the FTT returned the notice of appeal to Carter Moore by post because the VAT in dispute had not been paid and SNMP had not made a hardship application. Carter Moore resubmitted the appeal on 31 August 2017 but the disputed tax has still not been paid and there was no hardship application. On the same day, the FTT returned the notice of appeal for the same reason as before to Carter Moore by email. Unfortunately, FTT used an incomplete email address and it was never received by Carter Moore.

9. Some three years passed before any further action by either SNMP or HMRC in relation to the VAT dispute. During that time, HMRC concluded an investigation into SNMP's operation of the Construction Industry Scheme by issuing penalties for careless inaccuracies which were later suspended.

10. In July and August 2020, HMRC Debt Management Unit sought to recover the disputed VAT. SNMP told HMRC that they believed that they had been successful in the VAT appeal because they had not heard anything from HMRC or the FTT since submitting their appeal for the second time on 31 August 2017. After further correspondence, it was established that the FTT had used an incorrect email address when it tried to return the notice of appeal to Carter Moore on 31 August 2017.

11. On 2 October 2020, SNMP's new solicitors wrote to HMRC to inform them that the FTT had failed to return the original notice of appeal to the previous solicitor and that SNMP intended to make an application for permission to appeal out of time.

12. The new solicitors submitted a notice of appeal with a late appeal application on 13 October 2020. Again, SNMP had not paid the outstanding tax or made a hardship application so the FTT returned the notice of appeal to the new solicitors on 20 November.

13. On 3 December 2020, SNMP made a hardship application to HMRC and resubmitted the notice of appeal to the FTT. The FTT acknowledged receipt of appeal on 5 January 2021.

14. HMRC wrote to SNMP on 12 February 2021 to confirm that the hardship application had been granted. In a letter to HMRC on 2 June, the FTT acknowledged that the hardship application had been accepted by HMRC and stated that HMRC had 60 days to lodge a notice of objection to the late appeal. On 28 July 2021, HMRC filed their notice of objection to SNMP's late appeal.

#### **SUBMISSIONS**

15. At the hearing, SNMP's primary submission was that its appeal had been made in time. Mr Casella, who appeared for SNMP, submitted that the appeal was still made or notified even if the disputed tax had not been paid and a hardship application had not been made. He contended that the effect of section 84 VATA94 is that, where no tax is paid or hardship application made, the appeal cannot be entertained by the FTT. Neither section 84 nor rule 20 of the FTT Rules invalidated the making or notification of the appeal in those circumstances.

16. In the alternative, SNMP submitted that the FTT should exercise its discretion to grant permission for SNMP to make a late appeal in the circumstances and applying the approach approved by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) ('*Martland*'). Mr Casella invited me to consider the period of delay in four stages, namely:

(1) the initial 30 day period following the review decision when SNMP sought to appeal and was unaware that the FTT had tried to return the notice of appeal on 31 August 2017;

(2) the period from 31 August 2017 to 24 September 2020 when nothing happened. Mr Casella frankly described this as the "free fall period";

(3) the period from 25 September 2020 to 13 October 2020 following the realisation that the notice of appeal had been rejected by the FTT in August 2017 when SNMP instructed new solicitors and counsel; and

(4) the period from 14 October 2020 to 3 December 2020 when the new solicitors filed the notice of appeal again without the disputed tax being paid or an application for hardship being made.

17. In summary, HMRC submitted that the word “entertained” in section 84 must mean deal with and any other interpretation would defeat both the plain language of the provisions and Parliament’s intention in enacting them. In relation to SNMP’s alternative submission, Mr Edwards, who appeared for HMRC, submitted that:

- (1) the delay of more than four years was serious and significant;
- (2) SNMP did not have any good reason for such a long delay; and
- (3) in all the circumstances, which include the prejudice to HMRC and the need to enforce compliance with the rules, the application should be refused.

#### DISCUSSION

18. Section 83G of the Value Added Tax Act 1994 (‘VATA94’) is headed “Bringing of appeals” and relevantly provides as follows:

“(1) An appeal under section 83 is to be made to the tribunal before —

(a) the end of the period of 30 days beginning with—

(i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or

(ii) ..., or

...

(6) An appeal may be made after the end of the period specified in subsection (1) ... if the tribunal gives permission to do so.”

19. Section 84 VATA94 relevantly provides:

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

...

(3B) In a case where the amount determined to be payable as VAT ... has not been paid or deposited an appeal shall be entertained if—

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

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

20. The meaning of the word “entertained” was considered by the Inner House of the Court of Session in *Customs and Excise v Hubbard Foundation Scotland* [1981] STC 593 (‘*Hubbard*’). In *Hubbard*, the taxpayer had not accounted for VAT for several years and HM Customs and Excise (‘HMCE’), now HMRC, issued assessments to obtain payment of the tax. The taxpayer appealed to the VAT Tribunal, a forerunner of the FTT, under section 40 Finance Act 1972 (‘FA72’), a predecessor to the VATA94. Section 40 FA72 stated that:

“(2) An appeal under this section shall not be entertained unless the appellant has made all the returns which he was required to make under section 30(2) of this Act and has paid the amounts shown in those returns as payable by him.

(3) Where the appeal is against a decision with respect to any of the matters mentioned in paragraph (b) or (c) of subsection (1) of this section [ie assessments for VAT] it shall not be entertained unless –

(a) the amount which the Commissioners have determined to be payable as tax has been paid or deposited with them; or

(b) on being satisfied that the appellant would otherwise suffer hardship the Commissioners agree or the value added tax tribunal decides that it should be entertained notwithstanding that that amount has not been so paid or deposited.”

21. The VAT Tribunal had its own rules of procedure, the Value Added Tax Tribunal Rules 1972 (‘VATT Rules’), which made provision for dealing with appeals where the disputed amount of VAT had not been paid or deposited. Rule 6(1) of the VATT Rules stated as follows:

“The Commissioners shall, within 30 days of the date of service of a notice of appeal or application under Rule 20, and within 14 days after the date of service of a notice of application for an extension of time to appeal or to apply under Rule 20, serve at the appropriate tribunal centre a copy of the disputed decision and

(a) in relation to an appeal, a document stating their grounds for the disputed decision and any further grounds they may wish to advance in support thereof,

(b) in relation to an application under Rule 20, a document stating whether or not they wish to oppose the application and their grounds for any such opposition ...”

22. Where HMCE contended that an appeal could not be entertained by a tribunal, rule 6(2) provided that they must serve a notice to that effect containing the grounds for such contention on the VAT Tribunal.

23. Rule 16 of the VATT Rules provided that the VAT Tribunal must “dismiss an appeal where the appeal cannot be entertained by a tribunal.” Rule 20 provided that an application could be made to the VAT Tribunal to entertain an appeal without payment or deposit with the Commissioners of any tax.

24. In *Hubbard*, the taxpayer’s hardship application was refused but the taxpayer argued in the VAT Tribunal that “entertained” in section 40(3) FA72 should be construed as meaning the hearing of the case on the merits. The VAT Tribunal agreed and HMCE appealed to the Court of Session.

25. Lord Cameron at page 600 held that:

“..., it would appear clear that when the issue of competency has been decided (when this is put in issue by applications whether under r 6(2) by the commissioners or under r 20 by the taxpayers) the tribunal has begun to ‘entertain’ the appeal. When the tribunal formally decides that it can do so and intimates that decision to the parties then the tribunal has admitted the appeal to its consideration. Where no such application is made and where therefore neither party objects to the appeal being entertained, the position is that the appellant has invited the tribunal to entertain an appeal which it is competent for the tribunal to entertain. Having received that notice of appeal and the implied invitation to entertain the appeal contained in it and on the

grounds therein set out, the tribunal not only intimates its acceptance of the invitation but at the same time gives notice under r 23, 'stating the date and time when and place where such appeal ... will be heard not less than 14 days before such date'. Thus, this is not only an acceptance of an invitation to entertain, but intimation of an active and essential step in the process of appeal. In this context and in these circumstances I am clearly of the opinion that entertainment of an appeal begins in the one case when the contested issue of competency is decided in the taxpayer's favour, and, where no question of competency arises, from the date of service of the requisite notice of hearing in conformity with r 23."

26. Lord Avonside concluded on page 603 in the last paragraph of his opinion:

"... I have no difficulty in holding that a tribunal begins to entertain an appeal as soon as it fixes a date of the hearing thereof and sends out the appropriate notice to the parties. In any case, accordingly, in which there is a live appeal before the tribunal and either no r 20 application has been made by the appellant, or such an application has been made and has been refused or withdrawn, the question whether the tribunal is entitled to entertain the appeal arises at once and should be disposed of as soon as it has been drawn to the tribunal's attention, by a r 6(2) notice or otherwise, that the tax has neither been paid nor deposited."

27. The third member of the Court, the Lord President (Emslie), agreed with Lords Cameron and Avonside.

28. It is important to note that it does not seem to have been argued in *Hubbard* that the taxpayer had not made an appeal. Indeed, such an argument would seem to go against the clear words of rule 16 of the VAT Rules which provided that the VAT Tribunal must "dismiss an appeal where the appeal cannot be entertained by a tribunal." It is stating the obvious to say that an appeal cannot be dismissed by the tribunal unless it had been validly made to the tribunal so that it has jurisdiction to dismiss it. It is particularly clear from the passage quoted from Lord Avonside's opinion that the Court of Session considered that, notwithstanding the fact that no hardship application had been made or one had been made and refused, the VAT Tribunal had jurisdiction to consider whether it was entitled to entertain the appeal and that continued at least until the appeal was dismissed in accordance with rule 16 of the VAT Rules.

29. *Hubbard* was considered by the VAT Tribunal in *Widnell Group v HMCE* (1997) VAT Decision 15170 ('*Widnell*'). In *Widnell*, the taxpayer served an out of time notice of appeal against default surcharges. The Tribunal gave leave to appeal out of time (apparently with no objection from HMCE). The Tribunal listed the appeal for hearing and issued a hearing notice to the parties. HMCE subsequently applied under rule 6 VATTR on the ground that VAT due on a return relating to a later period than those under appeal remained outstanding so that the Tribunal was not entitled to entertain the appeal. The VAT Tribunal Chairman (Theodore Wallace) actually decided that there was no obligation to pay or deposit amounts of surcharges as a condition of appealing against them. He held that the issue of whether the appeal could be entertained had to be decided before the tribunal began to entertain the appeal which it did by fixing a date for the hearing and sending out the hearing notice. He went onto hold, in [57], that HMCE must make any rule 6 application before the Tribunal has started to entertain the appeal which was not done in that case. The clear implication of the decision in *Widnell* is that there was a valid appeal the Tribunal

30. In *O'Brien v HMRC* [2008] STC 487 ('*O'Brien*'), the taxpayer appealed under section 83(b) and/or (p) VATA94. He refused to pay the disputed tax and made no application to be excused paying or depositing the tax on grounds of hardship. HMRC applied to the VAT and Duties Tribunal, as it was then called, for the appeal to be dismissed in accordance with Rule

16 of the VATT Rules. The Tribunal gave directions that the money be paid and deposited, failing which the appeal would be dismissed. Mr O'Brien appealed to the High Court where the issue was whether the requirement under section 84(3) that he pay or deposit the disputed tax was unfairly discriminatory. Mann J had no difficulty rejecting that submission but he did not say that there was no appeal. Mann J stated in [8]:

“The appeal before me is merely an appeal from the decision that his appeal will stand dismissed, and probably does stand dismissed, in the light of his failure to pay the disputed tax to HMRC.”

31. Having dismissed the appeal, Mann J later observed, in [13], that Mr O'Brien could still have his appeal if he paid or deposited the money “unless HMRC takes the point at this stage that it is too late for him to do so”. It is important to note the words “at this stage” as they show that Mann J was not saying that there had never been an appeal but that, as it had been dismissed by the VAT and Duties Tribunal, HMRC could argue that Mr O'Brien must make a new appeal which would then be out of time. Mann J was careful to say that he was not determining that point which could be addressed if and when it arose.

32. From the cases referred to above, it seems to me to be clear that the under both FA72 and VATA94 the fact that an appeal cannot be entertained does not mean that it has not been validly made. It does not seem to have been argued in the cases that a tribunal entertained an appeal when it received and acknowledged a notice of appeal. The cases, in particular *Hubbard*, suggest that the tribunal only begins to entertain an appeal when it lists it for hearing. It might be argued that this followed from the procedural rules that applied at the time, namely the VATT Rules. The statutory provisions in the VATA94 remain the same but the procedural rules have changed. Proceedings in the FTT are now subject to the FTT Rules. The question for me is whether the new rules produce a different answer to the question of whether SNMP made a valid appeal when it filed a notice of appeal without paying the disputed tax or applying for hardship.

33. Rule 2 of the FTT Rules provides in so far as material:

“(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

...

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it-

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.”

34. Rule 20 of the FTT Rules is headed “Starting appeal proceedings” and provides:

“(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.

(2) The notice of appeal must include—

- (a) the name and address of the appellant;
- (b) the name and address of the appellant’s representative (if any);
- (c) an address where documents for the appellant may be sent or delivered;
- (d) details of the decision appealed against;
- (e) the result the appellant is seeking; and
- (f) the grounds for making the appeal.

(3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain.

(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal-

- (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
- (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.

(5) When the Tribunal receives the notice of appeal it must give notice of the proceedings to the respondent.”

35. Rule 22 of the FTT Rules is headed “Hardship applications” and provides:

“(1) This rule applies where an enactment provides, in any terms, that an appeal may not proceed if the liability to pay the amount in dispute is outstanding unless HMRC or the Tribunal consent to the appeal proceeding.

(2) When starting proceedings, the appellant must include or provide the following in or with the notice of appeal—

- (a) a statement as to whether the appellant has paid the amount in dispute;
- (b) if the appellant has not paid the amount in dispute, a statement as to the status or outcome of any application to HMRC for consent to the appeal proceeding; and
- (c) if HMRC have refused such an application, an application to the Tribunal for consent to the appeal proceeding.

(3) An application under paragraph (2)(c) must include the reasons for the application and a list of any documents the appellant intends to produce or rely upon in support of that application.

(4) If the appellant requires the consent of HMRC or the Tribunal before the appeal may proceed, the Tribunal must stay the proceedings until any applications to HMRC or the Tribunal in that respect have been determined.”



36. It is clear that there is a tension between the provisions of section 84(3) VATA, read with rule 22(1) FTT Rules, and the wording of rule 22(2). Section 84(3) refers to an appeal being entertained and rule 22(1) uses the term “an appeal proceeding” whereas rule 22(2) refers to “starting proceedings”. Both counsel agreed that “entertaining” and “proceeding” must mean the same. It seems to me that section 84(3) VATA and rule 22(1) are entirely consistent with the authorities which I discuss above in making a distinction between making an appeal and entertaining or proceeding with an appeal. For reasons set out above, I consider that starting proceedings is not the same thing as entertaining or proceeding with an appeal.

37. HMRC contend that rule 22(2), like rule 20, specifies requirements that must be met when starting an appeal where section 84(3) is engaged and if any of those requirements are not met then the appeal proceedings cannot start. Mr Edwards submitted that the requirements must be satisfied before the FTT has jurisdiction to deal with an appeal. I do not accept HMRC’s submissions. There is nothing in the VATA94 to suggest that the FTT Rules can override its provisions. In my view, rule 22(2) is a procedural requirement which follows from rule 22(1) and it should not be read as a pre-condition to starting an appeal. I consider that in order to be read consistently with section 84(3) VATA and rule 22(1), “when starting proceedings” in rule 22(2) must be read as “in order for proceedings to be entertained” or “to enable the appeal to proceed”.

38. In practical terms, where an enactment provides that an appellant must have paid the amount in dispute or made a hardship application before an appeal can be entertained and the appellant files a notice of appeal without having done either of those things, the tribunal should accept the appeal as made but not proceed further until the appellant either pays or applies for hardship. As there is no equivalent to Rule 16 of the VATT Rules in the FTT Rules, HMRC cannot apply for the appeal to be dismissed if the appellant fails to pay the disputed tax or make a hardship application but HMRC can, after allowing a reasonable time for compliance, apply for a direction that the proceedings be struck out under rule 8(1) FTT Rules.

39. In summary, I have decided that SNMP’s appeal in 2017 was made in time and, notwithstanding the fact that the disputed tax was not paid and no application for hardship was made at that time, it was a valid notification of the appeal. As HMRC have subsequently accepted that SNMP would suffer hardship if it were required to pay the disputed tax, there is no longer any reason why the appeal should not now proceed towards a hearing.

40. In view of my decision, there is no need to consider whether to grant SNMP permission to make a late appeal in December 2020. Had it been necessary to do so, I would, applying the three stage test in *Martland* at [23] – [47], have had no hesitation in refusing permission. First, the delay in this case cannot be described as anything other than serious and significant and, to his credit, Mr Casella for SNMP did not contend otherwise. Secondly, there was no good reason for the delays from 31 August 2017 until 24 September 2020 when nothing happened or between 14 October 2020 and 3 December 2020 when new solicitors had been instructed but did not file any notice of appeal and no application for hardship was made. Finally, it seems to me that the prejudice to HMRC caused by the delay outweighs that caused to SNMP by its own inaction. In all the circumstances, I consider that it would not be consistent with the overriding objective to grant permission in a case such as this if I had not concluded that the appeal in 2017 was made in time and was a valid notification of the appeal.

#### **DECISION**

41. For the reasons set out above, SNMP’s appeal is admitted.

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

42. 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.

**JUDGE GREG SINFIELD  
CHAMBER PRESIDENT**

**Release date: 27 JULY 2022**