[2012] UKFTT 38 (TC)

TC01736

Appeal number TC/2011/05981

Strike out –jurisdiction - proportionality

FIRST-TIER TRIBUNAL

TAX

Westward Group Limited **Appellant**

- and -

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

TRIBUNAL: Rachel Short (TRIBUNAL JUDGE)
Henry Russell OBE (MEMBER)

Sitting in public at Vintry House, Wine Street Bristol on 6 October 2011

Having heard David Lewis, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents, and the Appellant not being present at the Hearing,

DECISION

1. The Tribunal concluded that this application should be DISMISSED.

2. In accordance with s 8(2) Tribunal Procedure (First-tier Tax Tribunal)(Tax Chamber) Rules 2009 (the "Tribunal Rules") the Appellant has been notified of this application and given the opportunity to make representations.

3. The Appellant's representative was contacted on the day of the hearing but the Appellant did not attend the hearing.

Facts

4. This case concerns an appeal against a VAT surcharge under s 59 Value Added Tax Act 1994 ("VATA") in an amount of £2,810.70 in respect of the March 2011 VAT period. The rate at which the surcharge has been applied is 15%.

5. The VAT payment was due on 7 May 2011 but was not received until 10 May 2011, three days late.

6. The Taxpayer, Westward Group Limited ("Westward") have appealed to this Tribunal against this surcharge on the basis that it is unfair and does not fit the crime. No other defence is being raised in this case.

7. HMRC have appeared before us to argue that the appeal should be struck out under s 8(2) of the Tribunal Rules on the basis that the Tribunal does not have jurisdiction to consider the appeal.

Arguments

8. HMRC's basis for requesting that the case be struck out is that:

(1) Westward is attempting to argue that the VAT penalty is disproportionate.

(2) That is an argument concerning HMRC's administration of the law.

(3) Any arguments concerning administration of the law should be made by way of judicial review.

(4) The Tribunal cannot consider judicial review cases.

(5) In this particular case, proportionality cannot be argued because of the restrictions in s 59(7) VATA which prevent this Tribunal from mitigating a surcharge penalty.

Decision

9. Taking each of these arguments in turn:

Is Westward's argument based on "disproportionality" and administrative law principles ?

10. Westward's appeal notice does not refer to the Human Rights Act 1998, the Convention for the Protection of Human Rights (the "Convention") or to the concept of proportionality, but does request that the VAT penalty should be adjusted downwards to reflect the small number of days for which Westward was in default.

11. Westward say in their Notice of Appeal "*I accept that we were late but did not feel that 2 days late warrants the maximum penalty of 15% and that the punishment does not fairly fit the crime"*

12. The Tribunal is accepting that for these purposes this can be treated as an argument based on "proportionality" as set out in the Human Rights Act and the Convention, although that principle has not been specifically cited by Westward. The Tribunal is accepting that this case does concern issues of administrative law, but it is worth pointing out that HMRC should not automatically assume that any reference to unfairness in a taxpayer's appeal should trigger considerations of proportionality and the Human Rights Act.

Can this Tribunal consider administrative law and judicial review cases ?

13. As to whether the Tribunal has jurisdiction in these cases, HMRC referred to a number of First Tier Tribunal decisions, including *Enersys Holdings Limited*, ([2010] SFTD 387) a decision which they said they did not accept.

14. In putting their case HMRC also referred to *Saint Gobain Building Distribution Limited* (TC 2011/099270), *Total Technology (Engineering) Limited* (TC 2010/01291) and *Crane Limited* (TC/2010/02801). While each of these decisions concern the proportionality or otherwise of penalties imposed by HMRC and do apply public law arguments, none deal in any detail with the prior question of whether the Tribunal has jurisdiction in the first place. In fact, since the *Enersys* decision numerous Tribunal decisions have considered these arguments on the assumption that the Tribunal does have jurisdiction to hear them.

15. Aside from referring to these decisions, HMRC did not produce any detailed arguments concerning the Tribunal's jurisdiction.

16. HMRC have requested a full decision in this matter. The correct starting place for this analysis is the High Court decision in *Oxfam* (2009 EWHC 3078) and the judgment of Mr Justice Sales, which was not referred to by HMRC in their arguments.

17. The *Oxfam* decision does not give a definitive view as to where the correct jurisdiction for cases such as this lies, but does give the clearest available guidance about the remit of this Tribunal's jurisdiction.

18. The *Oxfam* case also concerned VAT, but not the default surcharge provisions. Nevertheless many of the general points made by Sales J are relevant here. Two significant points were made about this Tribunal's jurisdiction as far as public law is concerned, the first of which was an entirely practical one. Sales J stressed the importance of the "*Tribunal having jurisdiction to hear such claims so that unattractive, costly and potentially time consuming proliferation of applications to*

different bodies can be avoided" and, perhaps more importantly that "*the Tribunal is in a position to consider all of the relevant points on the same issue at one hearing*".

19. From the perspective of cost efficient and timely provision of justice, the implication from Sales J is that there is every advantage in interpreting the jurisdiction of the Tribunal widely.

20. Secondly the Judge in *Oxfam* made clear that he was not intending to give carte blanche to the Tribunal to consider all and every issue of public law. The Tribunal can consider such issues only to the extent that it is clearly related to a matter over which the Tribunal does have jurisdiction, which will usually be a matter to which an appeal can be made to the Tribunal.

21. In the *Oxfam* case it was made very clear that what gave the Tribunal jurisdiction was the basis of Oxfam's appeal in the VAT legislation (in that case s 83(1) VATA) and the Tribunal could consider any public law issues which arose in respect of that appeal.

22. This point is put most succinctly at para 67 of the Oxfam judgment "*in my view it does not follow from this that the Tribunal will never have jurisdiction to consider issues of general private and public law where it is necessary for it to determine the outcome of an appeal against a decision of HMRC …..…*".

23. That is not to say that it impossible to envisage circumstances in which the Tribunal could be asked to look at a public law issues and decide that it was proper to strike the application out for lack of jurisdiction because one of the fundamental conditions of Oxfam was not met.

24. HMRC are arguing in this case that because the only appeal which is being made to the Tribunal is on the basis of public law and not, as has often been the case (as in *Enersys* for example) as part of an appeal on the basis of "reasonable excuse", that the Tribunal cannot consider the "proportionality" appeal as a stand alone issue.

25. I do not consider that the decision in *Oxfam* limits the Tribunal's jurisdiction to that extent. The first question to ask is whether in this case there is an appeal in respect of which the Tribunal has jurisdiction, to which the answer appears to be yes; s 83(1)(n) VATA sets out a right of appeal to the Tribunal in respect of penalties under s 59 (the default surcharge) and that is the basis of Westward's appeal.

26. It follows from *Oxfam* that as long as the public law issue is related to the tax matter which is being appealed, the Tribunal has jurisdiction. This appeal relates to the penalties levied by HMRC under s 59 VATA and so does on the face of it, fulfil that condition.

Can the Tribunal hear a "disproportionality" appeal under s 59 VATA ?

27. HMRC state however, that because the Tribunal cannot mitigate the amount of the default surcharge, but can only either enforce it or reduce it to nil under s 59(7)

VATA, the question of proportionality cannot be relevant and so the Tribunal does not have jurisdiction to consider this case.

28. Firstly, the mere fact that the Tribunal has no choice about the level of the surcharge to be levied, does not seem to me to mean that the penalty is not subject to appeal under s 83, given that it is always open to the Tribunal to reduce the level of the penalty to nil.

29. However, HMRC's contention is that even if it is accepted that in some circumstances the Tribunal might be able to consider public law issues, that cannot be the case when the appeal in question relates to the default surcharge because the VAT legislation specifically rules out the possibility of mitigating these penalties, so there is no right to appeal to the Tribunal on the basis of "proportionality". To put it another way, the appeal to the Tribunal concerns only whether there should be a penalty or not, rather than the amount of the penalty and it is the amount of the penalty which is relevant to a "proportionality" appeal.

30. Given the statements above concerning the application of the Tribunal's jurisdiction in *Oxfam*, I do not consider that it can be correct to limit the subject matter of the appeal in this way. The question of whether a penalty is to be applied and the amount of the penalty are inextricably linked and we consider that it would be counter to the principles set out in *Oxfam* to separate the issues in this way.

31. This was the approach taken in the *Enersys* case where it was accepted that the fact that the Tribunal could not mitigate the penalty did not mean that the Tribunal had no jurisdiction at all.

32. To suggest that cases concerning the VAT surcharge cannot be subject to proportionality based appeals because of the lack of the ability to mitigate the penalty under the VATA is a reversal of the logic which has been applied in previous decisions, where it is the very fact of the inability to mitigate which triggers EU law and the application of the Convention.

33. Previous cases have proceeded on the basis that the UK's VAT legislation, as EU based law, must be applied by reference to the concept of proportionality, see for example the statements in *Garage Molenheide BVBA v Belgium* [1998] STC 126; "*the principle of proportionality is applicable to national measures which …. are adopted by a member state in the exercise of its powers relating to VAT*". This EU based principle overrides any specific, national legislation.

34. Similar logic applies to the principle of proportionality derived from the UK Human Rights Act and the Convention, on the basis that VAT penalties are criminal in nature, Article 6 of the Convention applies and these general principles override any specific provisions of the UK's VAT legislation.

35. Arguing that a lack of a power to mitigate VAT penalties means that none of these principles can be applied by the Tribunal ignores the fact that these principles override the specific provisions of national law.

36. The real problem for the Tribunal, highlighted by HMRC in this case, is not whether it has jurisdiction to apply the proportionality principle, which we think it clearly does in this case, but how it goes on to apply those principles in the face of VAT legislation which offers only an all or nothing approach under s 59.

37. In previous decisions such as *Enersys* the Tribunal, having accepted that the proportionality principle applied, went on to reduce the amount of the default surcharge penalty to nil because that was the only course open to it on the basis of the UK VAT legislation, even if the effect of that was to change a penalty from being disproportionately heavy to being disproportionately light.

38. No Tribunal has yet concluded that accepting the proportionality principle means that it can only properly be applied by overriding the specific rules in s 59 VATA and applying a lower rather than a nil penalty to the taxpayer in question, even though that might be the logical conclusion of the application of the principle.

39. This Tribunal does not consider that these issues with the application of the proportionality principle mean that the Tribunal has no jurisdiction to consider the principle itself, though it might suggest that there are aspects of the UK's VAT legislation which make the principle difficult to apply.

40. For these reasons this Tribunal considers that it does have jurisdiction to consider an appeal on the basis of proportionality and HMRC's application to strike out this appeal is dismissed.

41. In the absence of the Taxpayer the Tribunal declined to consider the substantive matters under appeal but directs that this appeal should be re listed for a hearing subject to the standard directions for basic cases.

42. 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.

Rachel Short

TRIBUNAL JUDGE
RELEASE DATE: 11 January 2012