[2018] UKFTT 29 (TC)

TC06309

Appeal number: TC/2016/00671
TC/2016/05684

PROCEDURE – application for costs – jurisdiction of Tribunal in VAT security appeals

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE MORETON BELL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at Taylor House, Rosebery Avenue, London on 9 January 2018

Christopher Horne, Director of the Appellant, for the Appellant

Siobhan Brown, Officer of HM Revenue & Customs, for the Respondents

DECISION

1. This is a decision on case management issues. The appellant company (the "Company") has or had two appeals before the Tribunal[1] both relating to a notice that HMRC served requiring security for VAT in 2013. The Company withdrew one of those appeals during a Tribunal hearing in November 2016 and HMRC are seeking their costs in connection with that appeal. There is a dispute as to whether the Tribunal has jurisdiction to hear the Company's other appeal and, accordingly, the Tribunal fixed a case management hearing to decide that issue and, more generally, to make such directions as are appropriate in connection with the second appeal.

2. On 23 December 2017, Mr Horne[2] wrote to the Tribunal to request costs to be awarded against HMRC. That application was not accompanied by the schedule of costs required under Rule 10(3)(b) of the Tribunal Rules and so, unless the Tribunal waived the requirement of that rule, it was not a valid application for costs. However, Mr Horne withdrew the application for costs at the hearing itself. It follows that the issues for determination during the hearing were as follows:

> (1) whether I should award HMRC costs in connection with the Company's first appeal that was withdrawn;
>
> (2) what case management directions I should make in connection with the second appeal. HMRC urged that I should strike that appeal out. Mr Horne argued that I should make a direction requiring HMRC to set aside their notice to require VAT security.

Conclusion and directions made

3. For the reasons in this decision, I make the following directions:

> (1) In exercise of the Tribunal's powers under Rule 9(1)(a) of the Tribunal Rules, the appellant in both appeals under reference TC/2016/00671 (the "first appeal") and TC/2016/05684 (the "second appeal") is the Company (and not Mr Horne).
>
> (2) The Company must pay HMRC their costs associated with the first appeal summarily assessed at £3,631.32 within 28 days of release of this decision.

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[1] The appeals have previously been recorded by the Tribunal's administration as being made by "Christopher Horne T/A The Moreton Bell Limited", but it is hard to see how an individual could be said to "trade as" a limited company. More fundamentally, the appeal relates to a Notice of Requirement to provide security for VAT which was served on the Company. Therefore, it seems to me (and both parties agreed at the hearing) that the proper appellant is the Company and I accordingly direct that the name of the appellant should be changed in accordance with Rule 9(1)(a) of the Tribunal Rules.

[2] Given that, historically, this appeal has been treated as made by Mr Horne, understandably he has written in his own name to make applications, rather than in his capacity as director of the Company. I will, however, treat any communication between Mr Horne and the Tribunal as being made in his capacity of director of the Company unless I state otherwise.

(3) The second appeal is struck out. The Company is not entitled to apply for the appeal to be reinstated.

Background

The background to the first appeal and its withdrawal

4. The Company, and Mr Horne, who has at all times been a director and shareholder of the Company, have been involved in a succession of litigation relating to the business of the Bell Inn in Moreton-on-Mash since 2013 if not before. There was little, if any, agreement between HMRC, the Company and Mr Horne on even such fundamental questions as whether the Company or Mr Horne were even carrying on the business of the Bell Inn or what the outcome of various pieces of litigation has been.

5. On 17 May 2013, HMRC wrote to the Company warning that they considered four VAT returns (relating to 05/12, 08/12, 11/12 and 02/13) were outstanding and that they were considering requiring the Company to provide security for its VAT obligations under paragraph 4(2)(a) of Schedule 11 of the Value Added Tax Act 1994 ("VATA 1994").

6. On 20 June 2013, HMRC officers visited the Bell Inn and handed Mr Horne a notice pursuant to paragraph 4(2)(a) of Schedule 11 of VATA 1994, addressed to the Company, requiring the Company to provide security for VAT of £20,211 (or £16,261 if it agreed to submit monthly VAT returns).

7. Following this visit, on 20 June 2013, Mr Horne wrote a letter to HMRC that included the following paragraphs:

> Two of your staff called, without an appointment, today at the Bell Inn in Moreton in Marsh.
>
> As you know, I am still awaiting a refund from the first period VAT to 31 May 2012, and I admit that I have not submitted the subsequent returns.
>
> In the circumstances, please let me have the appropriate forms to appeal to the independent Tribunal; these were NOT included with your letter….

8. The question of who is entitled to carry on the trade at the Bell Inn has been the subject of much controversy and litigation. I was not provided with a clear statement of the issues in dispute. In his submissions, Mr Horne made a number of highly general references to this litigation (and summarised what he said various judges had said in connection with it). It appears that between 2009 and 2011, the business was carried on by a company called GBIH Limited. In 2011, GBIH Limited was put into liquidation. From the patchy account of matters that I was given, it appears that the freeholder of the Bell Inn, Enterprise Inns Limited, considered that the lease of the Bell Inn (and so the right to trade from its premises) remained vested in the liquidators of GBIH Limited. However, other parties (perhaps including Mr Horne, the Company or some distant cousins of Mr Horne who he referred to as the "Dempsters") considered

that at various times they had acquired the lease directly or indirectly from GBIH Limited and so were entitled to trade there).

9. In his submissions, Mr Horne submitted that there had been some court decisions that had established that the Company was not carrying on the trade at the Bell Inn. For example:

> (1) He submitted that on 3 March 2014, he was acquitted of charges that were brought at Cheltenham Magistrates court under food safety legislation in connection with the preparation of food at the Bell Inn on the grounds that neither he nor the Company was carrying on business at the Bell Inn. Ms Brown submitted that he was never acquitted on this ground and rather, Cotswold District Council chose not to offer any evidence once the Bell Inn had passed a subsequent hygiene inspection. In his correspondence with the Tribunal, Mr Horne sent what he described as "an agreed" record of the hearing at Cheltenham Magistrates Court (though it is not clear who prepared that record). That record tends to support Ms Brown's account of the hearing and suggests that the prosecution tendered no evidence (with the result that the charges were formally dismissed) but that the court did not make a positive finding that the Company was not carrying on business at the Bell Inn. I accept that Mr Horne was awarded his costs from central funds in connection with these proceedings
>
> (2) He submitted that the Companies Court ultimately concluded that the right to carry on the trade at the Bell Inn had, since 2011, been vested in the liquidators of GBIH Limited. He produced a witness statement from Patricia Wallington dated 18 July 2016. In that document, Ms Wallington stated that she attended the Companies Court on 24 April 2014 and during the hearing Mrs Registrar Derrett determined that the business at the Bell Inn which had been conducted by various persons since the 7 February 2012 was being carried on on behalf of the liquidator of GBIH Limited.

10. It seems to me possible that a finding that the Company was carrying on its business on behalf of the liquidator of GBIH Limited does not necessarily mean that the Company was not carrying on the business. For example, the Company may still have been carrying on the business but may have had an obligation to account to the liquidator for profits that it made. Alternatively, the Company may have been carrying on the business as undisclosed agent for the liquidator (in which case it seems possible that the Company, rather than the liquidator, would have the obligation to account for VAT on supplies made in the course of that business). However, I simply was not provided with enough information to decide who actually owned the lease of the Bell Inn, who was actually carrying on the business there, who was entitled to carry on business there and who had the obligation to account for VAT on supplies made at the Bell Inn. I will simply conclude that in 2013 and 2014 there was uncertainty on these matters.

11. The Company did not provide the security required by the Notice. On 14 March 2014, HMRC wrote to Mr Horne warning that continuing to trade without providing

security could render both him and the Company liable to prosecution under s72(11) of VATA 1994 and s171(4) of the Customs & Excise Management Act 1979.

12. On 7 October 2015, Mr Horne wrote to HMRC requesting that the decision to issue the Notice be reviewed by an independent officer. On 26 October 2015, HMRC responded, refusing to perform a review since the request for a review was out of time.

13. Meanwhile, HMRC were taking steps to prosecute Mr Horne and the Company under the statutory provisions referred to at [11]. A preliminary hearing in these criminal hearings was arranged in the St Albans Magistrates' Court for 8 March 2016. An HMRC officer, Debra Perrett, submitted some document in the criminal proceedings (perhaps a witness statement or pleadings) to the effect that the Company was carrying on the business at the Bell Inn. Mr Horne took exception to that document considering that, in the light of what he regarded as the findings referred to at [9], and his belief that Officer Perrett was aware of those findings, she had given perjured evidence.

14. On 3 February 2016, Mr Horne submitted a notice of appeal (the "First Notice of Appeal") to the Tribunal against the requirement to provide security. In the First Notice of Appeal, he acknowledged that he may need permission to appeal out of time but, in support of an application for permission to do so, stated that he had not seen the Notice until 1 February 2016. It is not straightforward to reconcile that assertion with the fact that he wrote the letter dated 20 June 2013 responding to the Notice (referred to at [7] above). At the hearing, Mr Horne did not refer to this reason for submitting the First Notice of Appeal so late. Rather, he said that he wanted to wait until the question of who was entitled to run the business at the Bell Inn had been resolved in litigation in the Companies Court.

15. On 8 March 2016, HMRC wrote to oppose the Company's application for permission to make a late appeal. They pointed out that the hearing at the magistrates' court had been postponed pending the Tribunal's decision on whether the Company was to be granted permission to appeal late and they requested that the Tribunal fix an early date for hearing of the appeal for this reason. The Tribunal proceedings then continued on the basis that there would be a single "rolled up" hearing to hear the Company's application for permission to bring a late appeal and, if that application was granted, the substantive appeal against the Notice.

16. Meanwhile, Mr Horne was pursuing his complaints to HMRC against what he regarded as Officer Perrett's perjured evidence in the criminal proceedings. On 15 April 2016, HMRC wrote to him to say that the complaint had been referred to the Independent Police Complaints Commission who would decide either to investigate the complaint itself or to send the matter back to HMRC to investigate.

17. On 20 April 2016, the Crown Prosecution Service (who were involved in prosecuting the criminal proceedings at St Albans Magistrates' Court) wrote a letter to Mr Horne that read as follows:

> I write further to HMRC's referral to the Independent Police Complaints Commission and confirm that in the circumstances it would not be appropriate for me to communicate with you further on these issues.
>
> Please be advised that I have communicated with the courts who have advised that the next hearing is for pleas to be entered and that it is not listed for Trial.
>
> I will review the position prior to the next hearing as to the next appropriate action.

18. On 22 April, Mr Horne wrote a letter to the Tribunal that read as follows:

> I have received a letter today from the Crown Prosecution Service confirming that all matters should be stayed pending the result of the Independent Police Complaints Commission's investigation into the perjured evidence of HMRC in this matter.
>
> Please confirm the tribunal proceedings will also be stayed.

19. On 28 April 2016, HMRC objected to Mr Horne's application for a stay (arguing that the Crown Prosecution Service had not requested a stay) and also objected to Mr Horne's parallel application for an extension of time to provide documents. They asked that the appeal be listed for hearing as soon as possible.

20. On 28 April 2016, Judge Poole issued case management directions. He refused the application for a stay and issued a revised timetable for complying with directions. Mr Horne was not satisfied with that decision. Between April and June 2016, he wrote a number of letters to the Tribunal and it was far from clear that those were all copied to HMRC. For example, on 28 April 2016, Mr Horne wrote a letter that included the following paragraph:

> The Director of Public Prosecutions has referred HMRC's evidence in this matter to the Independent Police Complaints Commission and has ordered that no action be taken during the Police investigation into the evidence. I believe a Direction by the Director of Public Prosecutions takes priority over a Direction by a Tribunal Judge and [I] will appeal the directions.

21. Mr Horne sought permission to appeal against the directions and the Tribunal refused permission to appeal on 11 July 2016.

22. On 11 July 2016, Mr Horne wrote to the Tribunal stating that a decision in the criminal proceedings was due shortly. Since that decision would involve the magistrates' court deciding whether the Company was carrying on the business at the Bell Inn, he asked for a direction that the Tribunal hearing should not take place until after the criminal proceedings were concluded. He indicated that, if the Tribunal made such a direction, the criminal proceedings would be set down for an urgent hearing on 9 August 2016.

23. On 21 July 2016, Judge Poole granted a short stay of proceedings until 23 August 2016.

24. On 3 August 2016, HMRC wrote to the Tribunal. In that letter, they explained that the position of the Crown Prosecution Service was that the criminal proceedings in the magistrates' court should be heard only after the Tribunal proceedings were concluded (because, if the Notice was set aside, there would be no prospect of obtaining a criminal conviction). They explained that the magistrates' court had already agreed twice to postpone the criminal proceedings pending resolution of Tribunal proceedings and expressed concern that Mr Horne was asking the Tribunal for directions which ran contrary to the approach the magistrates' court was taking.

25. Mr Horne submitted a response to HMRC's observations on 7 August 2016. In the light of HMRC's letter, on 16 August 2016, the Tribunal revoked its directions of 21 July 2016 staying proceedings. Mr Horne was dissatisfied with these directions and requested permission to appeal from the Tribunal (which was refused on 6 September). He renewed his application for permission to appeal to the Upper Tribunal (which refused permission on 17 October 2016).

26. On 12 August 2016, Mr Horne wrote to the Tribunal saying that the criminal charges against him had been dropped. In his evidence at the hearing before me, he said that he had received a letter from the Crown Prosecution Service to this effect which was full of spelling mistakes but that it was swiftly followed by a letter confirming that the charges remained on foot. On 17 August 2016, HMRC wrote to the Tribunal to say that, in their view, the criminal charges remained live.

27. On 10 October 2016, Mr Horne wrote to the Tribunal stating that the magistrates' court, the Crown Prosecution Service and HMRC would not oppose his application to make a late appeal. On 14 October 2016, HMRC wrote to the Tribunal contradicting that assertion, submitting that the Crown Prosecution Service had not entered into any such agreement with Mr Horne. In any event, HMRC submitted that whether Mr Horne should be allowed to make a late appeal was a matter for the Tribunal and HMRC's objection to Mr Horne's application stood.

28. The first appeal was eventually listed for hearing on 14 November 2016. On 7 November 2016, Mr Horne sent by a letter by post to the Tribunal. That letter set out some submissions that he wished to make as well as a copy of the further appeal that he had made on 18 October 2016 (which I deal with in the section below). In his letter, Mr Horne said that it was dishonest of HMRC to claim (in support of their decision to issue the Notice) that the Company carried on the business of the Bell Inn (as he asserted it had never done so and HMRC knew as much). He also argued that HMRC were dishonest in claiming that other companies associated with him had been dissolved leaving VAT debts. However, despite those claims, insofar as I understand his submissions, Mr Horne appeared to accept that the evidence that would demonstrate that HMRC's decision to issue the Notice was unreasonable all came into existence after the Notice was served. Therefore, he expressed the view that, following the decision of Dyson J in *Customs & Excise Commissioners v Peachtree Enterprises Limited* [1994] STC 747, he could not succeed with his appeal as submitted. However, he noted that Dyson J had referred, in the *Peachtree* decision, to HMRC's duty to consider new information and stated that he had asked HMRC to reconsider their decision but they had refused. In view of that refusal he explained that he had submitted

a new appeal to the Tribunal. Mr Horne concluded his letter by saying in a section headed "Conclusions":

> It follows from the above that this appeal must fail, unless a decision is made to adjourn the hearing until directions have been given for the second appeal. This appeal should, therefore, be got out of the way and therefore, despite the objection of the Revenue to this course of action, I shall seek withdrawal of this appeal… It is therefore my intention at the hearing on Monday 14 November to put my case as above, in order that it is on the record as having been heard, and then withdraw my appeal.

Viewed in context, it seems to me that this letter was not itself a withdrawal of the appeal. Rather, it indicated an intention to withdraw the appeal during the hearing on 14 November.

29. Mr Horne said that he sent a copy of this letter to HMRC, although he did not state that he had done so on the face of the letter. Ms Brown denied that the letter had been copied to HMRC and said that the letter was not received by HMRC prior to the hearing. I am satisfied that HMRC did not receive the letter as I accept Ms Brown's assurance that, had she received the letter, she would not have travelled to the hearing accompanied by all of HMRC's witnesses and would simply have travelled alone. However, I am not able to make a finding as to whether Mr Horne sent a copy to HMRC: a review of the Tribunal file indicates that there were occasional complaints from both parties that the other was not copying them in on correspondence. Those complaints were renewed at the hearing in front of me, but neither party produced evidence for their respective assertions.

30. Mr Horne evidently withdrew the first appeal during the hearing on 14 November and the Tribunal sent a notice recording this withdrawal to the parties on 22 November 2016.

The second appeal and its subject matter

31. Some time in September 2016 Mr Horne wrote to HMRC to request them to reconsider their decision to issue the Notice. He referred to the *Peachtree* decision and argued that HMRC had a duty to consider all material that has come to light since they issued the Notice in 2013. He wrote a letter on 26 September 2016 that set out a summary of what he regarded as relevant facts. HMRC evidently refused to reconsider and, on 17 October 2016, Mr Horne submitted a further appeal to the Tribunal. The Notice of Appeal did not make clear precisely what decision was under appeal or what remedy was sought from the Tribunal. In Section 8 of the Notice of Appeal, Mr Horne stated that the result that he was seeking was for the Notice to be set aside (which suggests that he was seeking to appeal against the Notice) and he made submissions that the Notice should be set aside at the hearing before me. However, Section 7 of the Grounds of Appeal focused on HMRC's refusal to reconsider the matter (and referred to the *Peachtree* decision) suggesting that he wanted the Tribunal to direct HMRC to review their decision to require security.

32. In contemporaneous correspondence, Mr Horne emphasised that this complaint was against HMRC's refusal to make a fresh decision. For example, in a letter dated 29 November 2016, Mr Horne wrote to the Tribunal:

> …for avoidance of all conceivable doubt [the second appeal] is against the refusal of the Commissioners to reconsider the issue of the Notice of Requirement as in the procedure laid down by Dyson J in [*Peachtree*], which both sides agree is relevant to this matter.

33. On 23 December 2016, the Tribunal informed the parties that it was listing a case management hearing to decide whether the second appeal related to an appealable decision (and so whether the Tribunal had jurisdiction to hear it).

The conclusion of the criminal proceedings

34. Some time prior to the hearing before me, Mr Horne was convicted at St Albans Magistrates' Court under s171(4) of the Customs & Excise Management Act in connection with the Company making supplies without providing the security required by the Notice.

35. Mr Horne submitted that his conviction had the paradoxical effect of demonstrating that HMRC had been wrong to require security in the first place. He reasoned as follows:

> (1) He could only have been convicted under s171(4) if the Company was carrying on the business at the Bell Inn.
>
> (2) If the Company was carrying on business at the Bell Inn, it was required to submit VAT returns. The Company had not filed some historic VAT returns but Mr Horne said that, following his conviction, it had now done so and those VAT returns demonstrated that it had no overall VAT obligation (taking into account its claims for input tax).
>
> (3) Therefore, HMRC were wrong to consider that the Notice was necessary "for the protection of the revenue" since the Company had no VAT liability that needed to be secured under paragraph 4(2) of Schedule 11 of VATA 1994.
>
> (4) It followed, therefore, in his submission that the Notice should be set aside.

36. I will deal with that submission in a later section. For the time being, I will note that it rested in part on Mr Horne's submission that the Company had submitted full VAT returns. Mr Horne showed both the Tribunal and Ms Brown copies of the paper returns he said had been submitted which prompted Ms Brown to deny that HMRC had received them and, in any event, to argue that any returns needed to be submitted online and not in paper form. For reasons I will come on to, I do not consider that it matters whether the Company has, or has not, now submitted outstanding VAT returns. However, for completeness, I record that I am not able to conclude that the Company has submitted all VAT returns that were outstanding.

HMRC's application for costs

37. On 19 December 2016, HMRC submitted their claim for costs in relation to the first appeal. That application was made within 28 days the Company's withdrawal of that appeal (and so was made in time) and was accompanied by a schedule of costs. HMRC are claiming a total of £11,149.55 covering the total costs they consider they incurred in connection with the first appeal.

Determination of HMRC's application for costs

The law applicable to HMRC's costs application

38. The Company's first appeal was at all relevant times allocated to the "standard" category. It follows that I only have power to award costs, pursuant to Rule 10(1)(b) of the Tribunal Rules, if:

> the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.

If a party has met the threshold requirement of acting unreasonably, then the Tribunal has a discretion, but not an obligation, to award costs which, like other discretions that the Tribunal is given, must be exercised judicially (*Shahjahan Tarafdar v HMRC* [2014] UKUT 0362).

39. Part of HMRC's criticism of Mr Horne's and the Company's conduct of its litigation relates to the circumstances in which the first appeal was withdrawn. In the *Tarafdar* decision referred to above, the Upper Tribunal determined that the following questions should be posed in if a litigant is said to have behaved unreasonably in connection with a withdrawal of its appeal:

> (1) What was the reason for the withdrawal of that party from the appeal?
>
> (2) Having regard to that reason, could the party have withdrawn at an earlier stage?
>
> (3) Was it unreasonable for that party not to have withdrawn at an earlier stage?

Discussion of HMRC's costs application

40. For the reasons set out below, I consider that Mr Horne and the Company have acted unreasonably in the conduct of certain aspects of the proceedings. I do not, however, consider it was unreasonable for the Company to bring the proceedings. Nor, on balance, do I consider that the Company acted unreasonably in connection with its withdrawal of the first appeal.

41. It was unreasonable for Mr Horne to engage in protracted correspondence with, and applications to, the Tribunal from 22 April 2016 seeking a stay of proceedings because of the referral of his complaint about Officer Perrett to the Independent Police Complaints Commission. Mr Horne said that he interpreted the letter from the Crown Prosecution Service dated 20 April 2016 as a request for a stay but I do not consider that he could reasonably have held that view. The letter from the Crown Prosecution Service stated only that the writer regarded it as inappropriate to engage in

correspondence with Mr Horne. It said nothing about what the Tribunal should, or should not, do as regards proceedings falling within the Tribunal's jurisdiction. Moreover, the letter from the Crown Prosecution Service expressly confirmed that the next hearing in the criminal proceedings would consider pleas. It was wrong, and unreasonable, of Mr Horne to portray the letter from the Crown Prosecution Service as suggesting that "all matters" should be stayed pending the outcome of the IPCC's investigation. Moreover, if Mr Horne had thought about matters in a reasonable way, he would have realised that the purpose of the Tribunal proceedings was to decide whether the Notice should stand and his assertion that Officer Perrett had given perjured evidence in criminal proceedings instituted after the Notice was served was of no obvious relevance to the Tribunal's task. Judge Poole explained this point in his directions of 28 April 2016, but Mr Horne still persisted with correspondence with the Tribunal (and an application for permission to appeal) against those directions. Mr Horne's letter of 28 April 2016 referring to an "order" by the Director of Public Prosecutions was, if anything, even more unreasonable and could not on any view by supported by the letter of 22 April 2016 that Mr Horne had received from the Crown Prosecution Service.

42. It was also unreasonable of Mr Horne, from 11 July 2016 onwards, to seek to secure a stay of the Tribunal proceedings pending resolution of the criminal proceedings. He would have known that the magistrates' court was following the opposite approach, of postponing the criminal proceedings until the Tribunal proceedings were concluded. I recognise that Mr Horne is not a lawyer but, as a matter of pure logic, he should have realised that the approach of the magistrates' court was by far the more sensible as, before deciding whether he or the Company should be convicted of trading without providing security, the magistrates' court would want to know that HMRC had made a proper demand for security in the first place. Moreover, he made his application to the Tribunal on 11 July 2016 without disclosing to the Tribunal that, as he must have known, the magistrates' court was taking the opposite course to the one he was asking the Tribunal to make.

43. Mr Horne has a tendency to quote others as expressing views favourable to his appeal. He has not always taken care to ensure that he is being accurate in doing so. For example, on 10 October 2016, he wrote to the Tribunal to state that HMRC had dropped their objection to his late appeal. He also suggested that HMRC had given an "undertaking" to the magistrates' court to allow the appeal to proceed late. HMRC are adamant that no such undertaking was given and I consider it more likely than not that there was no undertaking not least because HMRC have, throughout the Tribunal proceedings, shown that they objected to Mr Horne's late appeal (unsurprisingly given that it was indeed made very late). I am prepared to grant Mr Horne some latitude as he is not a lawyer and could not be expected to follow all the legal argument he heard in the magistrates' court. However, I consider that he has failed to take reasonable care to ensure that the views he attributed to others were correct by, for example, checking that the paraphrase he was proposing to send the Tribunal was accurate.

44. I will not make a finding that Mr Horne was lying when he wrote to the Tribunal on 12 August 2016 to say that criminal charges had been dropped. He says that he received a letter from the Crown Prosecution Service to this effect which was quickly

withdrawn. Although he has not produced a copy of that letter, I am prepared to accept his word. However, he did not write to the Tribunal to correct the record after being told that the criminal proceedings remained live.

45. The above set out specific instances of what I regard as Mr Horne's unreasonable conduct of this litigation. Those specific instances should not obscure the general point that, throughout this appeal, Mr Horne has sent an unreasonably large volume of correspondence to the Tribunal and HMRC which was, in general, disproportionate in the context of an appeal of this nature and the Tribunal's case management directions. I accept that the litigation surrounding the right to trade at the Bell Inn complicated matters so that this was not a straightforward appeal against a requirement to provide security. However, even taking that into account, Mr Horne has not conducted the litigation in a reasonable way. Reasonable conduct of the litigation would have put the Tribunal in a position to list an early "rolled-up" hearing of the application to make a late appeal and the substantive hearing if permission to make a late appeal was granted. An early hearing of the Tribunal appeal would also have been desirable from the perspective of the criminal proceedings. Mr Horne's sent an unreasonably large amount of correspondence in connection with the appeal and made unreasonable interlocutory applications that served to delay matters and increased HMRC's costs.

46. I do not, however, consider it was unreasonable of Mr Horne and the Company to bring the first appeal. I accept that Mr Horne genuinely thought that it was open to doubt whether the Company was carrying on the trade at the Bell Inn. Without knowing the precise details of the dispute involving Enterprise Inns, I cannot say that this belief was unreasonable. The appeal was brought extremely late and given the explanation he has put forward for the lateness, I doubt whether the application for permission to make a late appeal would have succeeded. However, it was reasonable for the appeal to be brought.

47. In answer to the specific questions set out in *Tarafdar*, I have concluded:

(1) The Company withdrew its appeal because it considered that, following the *Peachtree* decision, it could not succeed as its contention that HMRC's decision was unreasonable depended on evidence that came into existence after the date of the Notice.

(2) The Company could have withdrawn earlier.

(3) However, it was not unreasonable for the Company not to withdraw its appeal earlier. I think Mr Horne may have been somewhat hasty in concluding that the decision in *Peachtree* was fatal to the first appeal. I do not think that the decision in *Peachtree* would necessarily have precluded the Company from arguing that, as at 20 June 2013, when the Notice was served, it was not carrying on the trade at the Bell Inn even if some of the evidence that the Company relied on to substantiate that assertion (for example other court decisions to which Mr Horne referred) came into existence after 20 June 2013. It seems to me that the prohibition Dyson J set out in *Peachtree* was against relying on facts that came into existence after the notice requiring security was served (in *Peachtree* itself the relevant new

facts were the appellant's good VAT compliance subsequent to the issue of the notice). It would have been reasonably arguable that the Company was not seeking to rely on new facts: rather it was seeking to establish that the Company was not, at the date of the Notice, carrying on the business at the Bell Inn and that HMRC had wrongly, or unreasonably, come to the view that it was carrying on that business.[3]

I have therefore concluded that the Company's conduct in relation to the withdrawal was not unreasonable.

48. I do not accept Ms Brown's submission that HMRC incurred additional costs because of Mr Horne's unreasonable failure to copy his letter of 14 November to HMRC broadly because HMRC travelled to the hearing with all their witnesses and would not have done so if they had seen Mr Horne's letter. First, as I have said at [29], I am not able to find that Mr Horne failed to copy his letter to HMRC. However, in any event, the letter was not a withdrawal but indicated an intention to withdraw at the hearing. As noted above, I have concluded that it was reasonable for the Company to pursue the appeal at a hearing (and it was not unreasonable of the Company to fail to withdraw that appeal earlier). Moreover, the Tribunal had made case-management directions that required a single "rolled-up" hearing of both the application for permission to make a late appeal and the substantive appeal (if permission was granted). Therefore, unless and until HMRC received an actual withdrawal, they were bound to incur the costs of travelling with witnesses to the hearing.

49. Given that Mr Horne and the Company have acted unreasonably in conducting proceedings, and that unreasonable conduct has added to HMRC's costs, I see no reason not to exercise my discretion to award costs. However, given that it was reasonable of Mr Horne to bring the appeal in the first place, and given that it was no fault of Mr Horne that HMRC were forced to incur the whole cost of preparing for a substantive appeal before they knew whether the Company was to be given permission to appeal late, HMRC should not have all of the costs they have claimed. Rather, I will make an award of costs that recognises that, even if Mr Horne had conducted the proceedings reasonably, HMRC would still have incurred costs.

50. I have adopted the following approach to determine the amount of costs that the Company must pay:

(1) HMRC's schedule of "work done on documents" includes a total of £5039.10 for "non-routine" communications with the Company, the Tribunal and from HMRC's Solicitor's Office to HMRC. Given the comments that I have made as to the conduct of this litigation, I consider that a large proportion (which I will estimate at 70%) of "non-routine" work

[3] In making this observation, I am not saying, of course, that I consider the first appeal was likely to succeed. The first appeal faced considerable difficulties not least the fact that it was made very late indeed and the possibility that, even if the Company was carrying on its business on behalf of the liquidator of GBIH Limited, the Company still had an obligation to account for VAT on supplies made in the course of that business. However, it was not unreasonable for the Company not to withdraw its appeal until the hearing on 14 November 2016.

on documents was necessary because of Mr Horne's unreasonable correspondence with, and applications to, the Tribunal. I will therefore award HMRC costs of 70% of £5039.10 (i.e. £3,527.37).

(2) I will not make an award in relation to other costs that HMRC have incurred in connection with the appeal since, based on the description with which I have been provided, I consider that they are costs that HMRC would have incurred even if Mr Horne had conducted the appeal reasonably.

(3) HMRC claimed a total of £10,834.55 (excluding the fees of the costs draftsman). I am allowing 33% of that figure. I will therefore allow 33% of the costs of HMRC's costs draftsman (i.e. £103.95 being 33% of the total cost of £315).

(4) It follows that I summarily assess the costs that the Company must pay at £3,631.32.

(5) Since the award of costs is against the Company (not against Mr Horne), I do not need to consider Mr Horne's financial means before making this award (see Rule10(5)(b) of the Tribunal Rules).

Discussion of the second appeal

51. Ms Brown submitted that I should strike out the second appeal as it does not relate to an underlying "appealable decision" so the Tribunal does not have jurisdiction to consider it. Mr Horne submitted that the decision in *Peachtree* demonstrated that the Tribunal did have jurisdiction to consider HMRC's refusal to reconsider the requirement to provide security in the light of matters occurring since the date of the Notice.

52. As I have noted, it was not certain whether, in the second appeal, the Company is appealing against HMRC's refusal to reconsider their decision to require security or whether it is appealing against the Notice itself. I will therefore approach matters in the alternative.

53. To the extent that the second appeal relates to HMRC's refusal to reconsider the requirement for security, the statutory scheme Section 83B of VATA 1994 and s83E of VATA 1994 provide relevantly as follows:

> **83B Right to require review**
>
> (1) Any person (other than P) who has the right of appeal under section 83 against a decision may require HMRC to review that decision if that person has not appealed to the tribunal under section 83G.
>
> (2) A notification that such a person requires a review must be made within 30 days of that person becoming aware of the decision.
>
> **83E Review out of time**
>
> (1) This section applies if—
>
> …

(b) a person who requires a review under section 83B does not notify HMRC within the time allowed under that section or section 83D(3).

(2) HMRC must review the decision under section 83C if—

(a) after the time allowed, P, or the other person, notifies HMRC in writing requesting a review out of time,

(b) HMRC are satisfied that P, or the other person, had a reasonable excuse for not accepting the offer or requiring review within the time allowed, and

(c) HMRC are satisfied that P, or the other person, made the request without unreasonable delay after the excuse had ceased to apply.

(3) HMRC shall not review a decision if P, or another person, has appealed to the tribunal under section 83G in respect of the decision.]

54. Mr Horne's letter of 26 September 2016 referred to at [31] amounted to a request for a review of their decision to require security. That request for a review was late because it was made more than 30 days after the Company became aware of HMRC's decision.[4] In those circumstances, HMRC are obliged to perform a late review only in the circumstances set out in s83E(2) of VATA 1994. However, Mr Horne did not show me any statutory provision that confers a right of appeal to the Tribunal if HMRC refuse to perform a late review.[5] In any event, s83E of VATA 1994 makes it clear that HMRC are not obliged to perform a late review if the matter in question is the subject of an appeal to the Tribunal. Since, in September 2016 when he made his request for a review, Mr Horne had made an appeal to the Tribunal against the Notice, it is clear that HMRC were under no duty to perform a review.

55. Mr Horne submitted that he had a right of appeal to the Tribunal against HMRC's refusal to reconsider the issue of the Notice. He relied strongly on the following passage from the decision of Dyson J (as he then was) in *Peachtree*:

> I do not accept that the conclusion that I have reached offends common sense. If after a requirement has been made under para 5(2) fresh material comes to light or into existence which the taxpayer considers justifies a modification of the requirement, the taxpayer may ask the commissioners to reconsider the matter. The commissioners have a duty to reconsider in the light of the fresh material in those circumstances. The taxpayer can appeal the commissioners' decision following the reconsideration. In my view, this is the correct way of bringing the fresh material into play. A taxpayer may appeal several decisions taken at different times in the light of material available from time to time. It may sometimes be possible for all such appeals to be heard by the same value

[4] As noted above, I consider that the Company became aware of HMRC's decision on 20 June 2013. At the hearing, Mr Horne did not seek to argue to the contrary.

[5] In the context of HMRC's discretionary power to restore goods seized under s152(b) of the Customs and Excise Management Act 1979, s14A(4) of the Finance Act 1994 permits the Tribunal to direct HMRC to perform a late review of their decision. However, Mr Horne did not suggest that there was a general statutory power for the Tribunal to make such a direction in relation to a late review requested under s83E of VATA 1994 and my own researches have not disclosed any such specific power.

> added tax tribunal at the same time. That will, no doubt, often be a sensible course to adopt. This may seem somewhat cumbersome; it is certainly not nonsensical. Be that as it may, questions of administrative and practical convenience cannot determine the matter when principle clearly points the way.

56. I do not, however, accept Mr Horne's submission. In this passage, Dyson J refers to HMRC's duty under public law to consider fresh material. He also states that if, having considered fresh material, HMRC make a new decision, a taxpayer has a right to appeal against that new decision. However, the passage does not state that, if HMRC refuse to consider fresh material, there is necessarily a right of appeal to the Tribunal. The Tribunal is a creature of statute, and so there is only a right of appeal to the Tribunal where statute provides one. The decision in *Peachtree* cannot provide for a right of appeal to the Tribunal that is not set out in statute.

57. It follows, therefore, that insofar as the Company is asking Mr Horne to direct HMRC to reconsider their decision to issue the Notice, the Tribunal has no power to do so.

58. That leaves the question of whether the Tribunal can consider the second appeal as either a separate appeal against the Notice or as an amendment to the grounds of the first appeal.

59. I do not see how the second appeal can be treated as a separate appeal against the Notice. When the Company made the second appeal, its first appeal against the Notice was current. Section 83 of VATA 1994 provides for "an appeal" to lie to the Tribunal. It cannot be intended to permit a taxpayer to submit multiple appeals against the same decision. That would be contrary to common sense and the efficient administration of justice.

60. Nor would the Company's cause be advanced by treating the second appeal as merely requesting permission to amend the grounds of appeal of the first appeal. Even if that were its effect (and permission were granted), the Company withdrew the first appeal. There has been no application for reinstatement of the first appeal and the time limit for making such an application has long passed.

61. Therefore, the second appeal is either in respect of a matter on which the Tribunal has no jurisdiction or is a variation or extension to the first appeal which has been withdrawn and not reinstated. It is therefore right that the second appeal should be struck out as the Tribunal does not have jurisdiction to consider it. Since the appeal is not being struck out on the basis of the Company's failure to comply with directions, Rule 8(5) of the Tribunal Rules does not provide the Company with a right to request reinstatement of the appeal.

62. At the hearing, Mr Horne considered that it was obvious that, following his conviction at St Albans Magistrates Court and the Company's submission of VAT returns showing no overall VAT payable, the Notice necessarily has to be set aside. While my conclusion at [61] means that I strictly do not need to consider that submission, I will note that I do not accept it. As Dyson J held in *Peachtree*, the

Tribunal's jurisdiction in relation to appeals against notices to provide security is supervisory. We can only interfere with HMRC's decision to issue the Notice if we conclude that HMRC's decision was unreasonable. It is perfectly possible that HMRC made a reasonable decision to require security in 2013 (at which time they evidently thought that the Company was behind with the submission of its returns) even if, as events transpired, the Company did not have a material VAT liability. Indeed, the decision in *Peachtree* indicates that VAT returns submitted in 2018 are not relevant to the reasonableness or otherwise of HMRC's decision to require security in 2013. More fundamentally, in order for the Tribunal to set aside the Notice, there would need to be a "live" appeal before the Tribunal. For the reasons I have given above, there is no such live appeal.

63. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 25 JANUARY 2018