



[2021] UKFTT 253 (TC)

TC08199

PROCEDURE – strike out application under Rule 8(2)(a) Tribunal Procedure Rules for want of jurisdiction – application granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/04165

BETWEEN

DOLLAR FINANCIAL UK LTD

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: LESLIE BROWN**

The hearing took place on 23 and 24 June 2021. With the consent of the parties, the form of the hearing was video conference on the Tribunal video platform.

Hui Ling McCarthy, QC and Michael Ripley of Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

James Rivett, QC and Calypso Blaj of Counsel instructed by PricewaterhouseCoopers, LLP for the Appellant

DECISION

INTRODUCTION

1. The substantive appeal in this matter is HMRC's rejection on 6 March 2018 of the application headed "Request to amend VAT grouping effective date" made by the appellant ("DFUK") and dated 29 September 2016. Effectively, DFUK were asking HMRC to backdate the admission of its parent company, Dollar Financial Group Inc ("DFGI"), to its VAT Group ("the DFUK VAT Group") from 26 June 2013 to 1 July 2012. Hereinafter we refer to the period 1 July 2012 to 26 June 2013 as "the Relevant Period" and the letter of 6 March 2018 as "the Decision".

Preliminary issues

Jurisdiction and strike out

2. DFUK has been on notice that HMRC's stated primary contention was that the appeal should be struck out ever since they lodged their Statement of Case on 8 October 2018. That was made explicit at paragraph 2.

3. The first issue for us was to decide whether or not we required a formal application from HMRC to strike out the appeal, as DFUK argued. Certainly not. Jurisdiction is at the heart of what the Tribunal can or cannot do and if not raised by the parties must be raised *ex proprio motu*. We did. In any event, Ms McCarthy made it clear that she wished to pursue that point and sought a strike-out of the appeal in terms of Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules").

4. By agreement between the parties the DFUK witness, who was in the United States, was only available to give evidence on the afternoon of the first day of the hearing so we heard some submissions on strike out in the morning and returned to the matter on the second day of the hearing. The arguments advanced were complex and we therefore reserved our decision until such time as we had the opportunity to read the transcript and the authorities to which we had been referred.

5. This decision is simply on the matter of strike out.

Grounds of appeal

6. DFUK's Notice of Appeal stated explicitly that the appeal was brought pursuant to Sections 83(1)(b), (k) and (t) of Value Added Tax Act 1994 ("VATA"). However in their Skeleton Argument at paragraph 69 they stated that the disputed decision "... should in substance be regarded as a decision to refuse to register DFGI for UK VAT with effective date of 1 July 2012, from which an appeal lies to the Tribunal pursuant to s.83(1)(a) VATA 1994."

7. That had not previously been raised in correspondence, the Notice of Appeal or indeed anywhere else. In opening Ms McCarthy pointed to that change in stance as hitherto, including at a case management hearing on 20 January 2019, their argument has been entirely predicated on Section 43A VATA and therefore an appeal under Section 83(1)(k) as indicated in the Notice of Appeal.

8. On the first day, Ms McCarthy asked whether the appellant intended to amend their Grounds of Appeal but no such formal application was made. Nevertheless we heard extensive argument from both parties on the question of registration for VAT. We have had due regard to Rule 2 of the Rules and we do not intend to "dance on the head of a pin". On a pragmatic and proportionate basis, notwithstanding the lack of a formal application to amend, we find that it would be appropriate to treat the Grounds of Appeal as having been amended *de facto* and we thus address those arguments.

9. For the avoidance of doubt no arguments were advanced on Section 83(1)(b).

Background

10. At all material times DFGI was headquartered in Philadelphia in the USA and it was the parent company of a corporate group which provided financial services in various jurisdictions including the UK. Some members of the corporate group including DFUK, which was the representative member, were members of the DFUK VAT Group.

11. On 27 June 2013, PricewaterhouseCoopers LLP (“PwC”) acting on behalf of DFUK applied to HMRC for DFGI to be added to the DFUK VAT Group with immediate effect. The letter from PwC stated that the “VAT grouping eligibility criteria” were regarded as satisfied from 27 June 2013. On 12 August 2013, without an extensive investigation, HMRC issued a letter in standard form approving DFGI’s inclusion in the DFUK VAT Group with effect from 27 June 2013.

12. From that date onwards supplies of management services from DFGI to DFUK were disregarded for VAT purposes on the basis that these were *intra*-group supplies in terms of Section 43(1) VATA.

13. On 29 September 2016, DFUK wrote to HMRC requesting an amendment to the date on which DFGI was included in the DFUK VAT Group. They set out the background pointing out that a number of DFGI’s employees had been seconded to the UK during 2011 and 2012. The UK businesses had been charged a total of £12,469,598.50 during the Relevant Period. A reverse charge had been applied by the DFUK VAT Group.

14. DFUK argued that DFGI had created a UK fixed establishment for VAT purposes prior to the registration of its UK branch. Accordingly it had registered for VAT too late. The request for amendment of the group registration was predicated on paragraph 6(2) Schedule 1 VATA which states that where a trader becomes liable to be registered

“The Commissioners shall register any such person (whether or not he so notifies them) with effect from the beginning of the period by reference to which the liability arises” .

15. Reliance was placed on HMRC’s manual VATREG 25400 on the basis that this was a “... belated notification case and the trader is already registered”.

16. In the event that HMRC failed to amend the effective registration date that would “... produce an illogical result. It will also result in an unjust amount of irrecoverable VAT...”. It was argued that had DFGI been aware that they had a fixed establishment in the UK as at 1 July 2012 they would obviously have joined the DFUK VAT Group then. On that basis they requested a repayment of £2,220,614.23.

17. DFUK made it explicit that they were not seeking to register DFGI for VAT as a separate registration.

18. Correspondence ensued and then on 6 March 2018, HMRC issued the Decision refusing to treat DFGI as a member of the DFUK VAT Group during the Relevant Period on the following grounds:-

(a) DFGI did not have a fixed establishment in the UK during the Relevant Period and so was ineligible to join the DFUK VAT Group during that time; and

(b) Even if DFGI had been eligible to join the DFUK VAT Group during the Relevant Period, HMRC declined to exercise its discretion to allow backdating of the effective date of registration under Section 43B(4)(b) VATA on the basis that, in HMRC’s view, DFGI had not demonstrated the exceptional circumstances which HMRC considered to

be a condition precedent to the exercise of their discretion under Section 43B(5)(b) VATA.

19. On 3 April 2018, DFUK requested a statutory review and on 14 May 2018, a senior review officer notified DFUK of her conclusion that the Decision should be upheld on both grounds.

20. On 12 June 2018, DFUK appealed to the Tribunal.

21. The application for repayment was rejected in a decision dated 5 December 2018 and that is the subject matter of another appeal (“the Second Appeal”) which together with a third appeal was stayed on 24 January 2020 pending the outcome of this appeal.

The Legislation

22. Article 11 of the Principal VAT Directive (the “PVD”) provides:

“After consulting the advisory committee on value added tax..., each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.”

23. This option is implemented in the UK by Sections 43-44 VATA. Section 43 provides:

“(1) Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and—

(a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and

(b) any supply which is a supply to which paragraph (a) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; and

(c) any VAT paid or payable by a member of the group on the acquisition of goods from another member State or on the importation of goods from a place outside the member States shall be treated as paid or payable by the representative member and the goods shall be treated—

(i) in the case of goods acquired from another member State, for the purposes of section 73(7); and

(ii) in the case of goods imported from a place outside the member States, for those purposes and the purposes of section 38, as acquired or, as the case may be, imported by the representative member; and all members of the group shall be liable jointly and severally for any VAT due from the representative member.”

24. Insofar as material, at the relevant time, Section 43A provided that:

“Two or more bodies corporate are eligible to be treated as members of a group if each is established or has a fixed establishment in the United Kingdom...”.

25. At the relevant time, Section 43B provided:

“(1) This section applies where an application is made to the Commissioners for two or more bodies corporate, which are eligible by virtue of section 43A, to be treated as members of a group.

(2) This section also applies where two or more bodies corporate are treated as members of a group and an application is made to the Commissioners—

- (a) for another body corporate, which is eligible by virtue of section 43A to be treated as a member of the group, to be treated as a member of the group,
- (b) for a body corporate to cease to be treated as a member of the group,
- (c) for a member to be substituted as the group's representative member, or
- (d) for the bodies corporate no longer to be treated as members of a group.

(3) An application with respect to any bodies corporate—

- (a) must be made by one of them or by the person controlling them, and
- (b) in the case of an application for the bodies to be treated as a group, must appoint one of them as the representative member.

(4) Where this section applies in relation to an application it shall, subject to subsection (6) below, be taken to be granted with effect from—

- (a) the day on which the application is received by the Commissioners, or
- (b) such earlier or later time as the Commissioners may allow.

(5) The Commissioners may refuse an application, within the period of 90 days starting with the day on which it was received by them, if it appears to them—

- (a) in the case of an application such as is mentioned in subsection (1) above, that the bodies corporate are not eligible by virtue of section 43A to be treated as members of a group,
- (b) in the case of an application such as is mentioned in subsection (2)(a) above, that the body corporate is not eligible by virtue of section 43A to be treated as a member of the group, or
- (c) in any case, that refusal of the application is necessary for the protection of the revenue.

(6) If the Commissioners refuse an application it shall be taken never to have been granted.”

26. Section 84(4A) VATA reads,

“(4A) Where an appeal is brought against the refusal of an application such as is mentioned in section 43B(1) or (2) on the grounds stated in section 43B(5)(c) –

- (a) the tribunal shall not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for refusing the application,
- (b) the refusal shall have effect pending the determination of the appeal, and
- (c) if the appeal is allowed, the refusal shall be deemed not to have occurred.”

27. Insofar as relevant Section 83 VATA reads:-

83(1) Subject to Sections 83G and 84, an appeal shall lie to the Tribunal with respect to any of the following matters –

- (a) the registration or cancellation of registration of any person under this Act; ...

- (k) the refusal of an application such as is mentioned in section 43B(1) or (2); ...
- (t) a claim for the crediting or repayment of an amount under section 80 ...”.

Discussion

28. The Tribunal was created by statute and has only the powers expressly given to it by statute. Section 83 VATA makes it explicit which decisions are capable of appeal to the Tribunal. Those are the limits of our jurisdiction.

29. HMRC referred us to *Olympia Technology Limited v HMRC*¹ which at paragraphs 11 and 12 make it absolutely explicit that there has to be an appealable decision within one of the paragraphs of Section 83 VATA. Whilst we are not bound by that decision we entirely agree with it. It is trite law.

30. Whilst, in their Skeleton Argument, HMRC had set out three issues relating to jurisdiction and Mr Rivett addressed those three issues in his argument before us, we prefer to look first at the relevant provisions of Section 83 VATA. In doing that we encompass those three issues, which were:-

- (1) Was the letter of 29 September 2016 a valid application in terms of Section 43B?
- (2) What is the consequence if there is no valid application under Section 43B?, and
- (3) If there was a valid application what is the consequence of HMRC neither refusing nor agreeing the application within 90 days.

Section 83(1)(a)

31. The letter of 29 September 2016 (“the Application”) was headed “Request to amend VAT grouping effective date”. Whilst the Application did advance an argument that DFGI was required to register for VAT, DFUK sought to achieve that not by requesting a separate registration (which only DFGI could do) but by backdating DFGI’s membership of the DFUK VAT Group.

32. In his Skeleton Argument, Mr Rivett conceded that “Strictly, Dollar Financial recognises that it had an obligation to notify HMRC of its VAT registration liability before 31 July 2012 under Sch. 1 para 6(1) VATA 1994”.

33. He went on to argue that the belated notification does not alter the fact that in terms of paragraph 6(2) of Schedule 1 VATA, HMRC were obliged to register DFGI. Therefore they were obligated to correct the date on which DFGI became VAT registered to 1 July 2012 with the effect that DFGI is treated as a member of the DFUK VAT Group from that date.

34. Accordingly the decision under appeal “... should in substance be regarded as a decision to refuse to register DFGI for VAT and therefore there was a right of appeal pursuant to Section 83(1)(a) VATA”.

35. Mr Rivett’s argument is that in failing to backdate DFGI’s membership of the group that meant that that was a refusal to register DFGI for VAT. By contrast, Ms McCarthy made the very valid point that membership of any VAT group is voluntary and therefore it cannot be the case that VAT grouping automatically flows from registration.

36. Registration and grouping are two discrete matters in terms of VATA.

37. Firstly, the Application was not a valid notification of a liability to be registered for VAT. Paragraph 17 Schedule 1 VATA provides:-

¹ [2006] Lexis Citation 1022

“Any notification required under this Schedule shall be made in such form and manner and shall contain such particulars as may be specified in regulations or by the Commissioners or in accordance with regulations.”.

The Regulations prescribing the form of notification of a liability to be registered are to be found in Regulation 5 and Schedule 1 to the VAT Regulations 1995².

38. In summary the Regulations prescribe that notification of liability to be registered must be on the relevant form (VAT 1) and must make a declaration and give specified information. That form would have had to have been completed by DFGI and DFGI alone. DFUK could not do that.

39. Secondly, there is absolutely nothing in the Decision that purports to make any decision about registration of DFGI for VAT.

40. It is not disputed that if DFGI were required to be registered for VAT then HMRC would be required to register DFGI regardless of whether or not they notified HMRC but there is no time limit within which HMRC would have to do so. They have not done so since they do not currently accept that there was a liability to register for VAT, either in 2012 or indeed in 2013. They have issued a decision on 5 December 2018 retrospectively removing DFGI from the DFUK VAT Group in terms of Section 43C VATA.

41. HMRC has not issued any decision letter to DFGI in respect of either registration or grouping.

42. We agree with HMRC that even if there was a liability to be registered that does not imply an entitlement to be included in a VAT Group and that the only means for DFGI to join the DFUK VAT Group is by way of a valid Section 43B application.

Section 83(1)(k)

43. Mr Rivett argued that HMRC’s decision meant that they had accepted that there was a valid application. Whether or not that officer or the review officer thought that there was a valid application is irrelevant. The question for the Tribunal is whether there was a valid application and therefore whether there is an appealable decision.

44. Since Section 43B is derived from Article 11 of the PVD it is relevant to look at *Commission v Ireland*³ where the CJEU stated at paragraph 47 that the objectives of Article 11 were to simplify administration and to combat abuse.

45. That is reflected in domestic jurisprudence. In *C & E Commissioners v Thorn Materials Supply Ltd & Another*⁴ Lord Nolan, in discussing the predecessor provisions, stated that the purpose of the legislation was to simplify and facilitate the collection of tax.

46. In *C & E Commissioners v Barclay’s Bank plc*⁵ Lady Justice Arden, as she then was, again dealing with the predecessor provisions, said at paragraph 32 that Section 43 “... constitutes a comprehensive scheme for bringing into being, and bringing to end, single taxable person status. Accordingly the statutory machinery must be followed”.

47. Mr Rivett relied extensively on three cases, namely *University of Essex v Revenue & Customs Commissioners*⁶ (“Essex”), *Cophorn Holdings Ltd v HMRC (No. 1)*⁷ and *Cophorn*

² SI 1995/2518

³ Case C – 85/11

⁴ [1998 HL 725]

⁵ [2001] EWCA Civ 1513

⁶ 2010 UKFTT 162 (TC)

⁷ 2013 UKFTT 190 (TC)

*Holdings v HMRC (No. 2)*⁸ (“Copthorn 1” and “Copthorn 2” respectively). As Ms McCarthy pointed out, those cases can be distinguished on the facts because in both cases the taxpayer had made a valid Section 43B application.

48. *Essex* concerned the refusal of an application to degroup an existing member and that falls squarely within Section 43B(2)(b).

49. *Copthorn 1* and 2 involved two Section 43B applications and the relevant entity was not an existing VAT group member. One of the refusals was within 90 days and the other was just outside the 90 days but that did not appear to have been brought to the Tribunal’s attention.

50. Section 43B(1) is not of relevance in this matter since it deals only with the creation of a VAT group.

51. As far as Section 43B(2) is concerned, the wording is clear and it reads:-

“This section also applies where two or more bodies corporate are treated as members of a group and an application is made to the Commissioners –

(a) for another body corporate, which is eligible by virtue of section 43A to be treated as a member of the group.”.

52. We have highlighted the word “another”. We agree with HMRC’s argument that Section 43B(2) only relates to applications made in respect of a body corporate which is not already in the group. The remainder of that section references applications relating to companies which are currently members of the Group.

53. In summary, HMRC argue that the VAT legislation does not enable an existing member of a VAT group to backdate its original membership; that is outside the scope of section 43B(2). Ms McCarthy pointed to the predecessor provisions which used the word “further” as opposed to “another”. We agree that looking at both sets of provisions, there was no obvious intention to change the scope of those provisions in this regard. The meaning is clear that it is an application by a body corporate which is not a member of a group.

54. Mr Rivett argues that what has to be considered is not whether DGFI was a member of the group at the time the application was made, because of course it was, but rather whether it was a member in June 2012, which it was not. He also argues that there is nothing in Section 43B that stipulates that an existing member may not apply to backdate membership.

55. The reason that we have quoted Lady Justice Arden, as she then was, is because she makes it clear that Section 43B is a complete code and sets out specific rights for specifically identified applications. A taxpayer either falls into one of those categories or not. That explains why there is no prohibition on an existing member submitting an application to backdate membership.

56. Bluntly, Section 43B(2) makes no provision for an application to amend the date from which group membership takes effect. There are only four types of application.

57. If a taxpayer does not fall within the scope of Section 43B then an application can be made to HMRC to make a decision using their care and management responsibilities (ie their discretionary powers in terms of Section 5 of the Commissioners for Revenue and Customs Act 2005).

58. We are not persuaded by Mr Rivett’s argument that because DFGI were not members of the DFUK VAT group in 2012 that means that they should be treated as being “another body

⁸ 2015 UKFTT 405 (TC)

corporate”. The Application was made in 2016 and has to be considered at that date. They were already members.

59. HMRC argue that looking at the position in 2016 is wholly consistent with the purpose of the UK VAT grouping rules which is to simplify and facilitate the collection of tax and reduce the administrative burden imposed on groups of companies. It is also consistent with the voluntary nature of VAT groups.

60. We find that it cannot be the case that the Application is deemed to be made in 2012. If that interpretation were to be adopted it would be the opposite of the intended purpose of the legislation in that, far from simplifying the administration of VAT it would not only complicate matters but would open the door to manipulation of dates and therefore abuse.

61. In summary we find that no Section 43B(1) or (2) application was validly made and nor could it have been.

62. In case we are wrong on that we must consider Section 43B(4) which refers to an application in terms of those sub-sections and states that it shall be effective from the date that it is received or such earlier or later time as HMRC might allow. If HMRC does not respond within 90 days then it will be the date of the application. This statutory framework simply does not work in the context of an application for a current member to be treated as a member from an earlier date which reinforces our view that there was no valid Section 43B application.

63. We agree with the Tribunal in *Cophorn I* which made it clear at paragraphs 149-151 that an application in terms of Section 43B was for a “candidate member” to join the group and in the absence of a refusal within 90 days the default position was that the effective date of registration is the date of receipt of the application. That is also made clear at paragraphs 171 and 172.

64. That reinforces our view that an application can only be made in respect of a body corporate which is outside the group as at the date of that application.

65. In this case there is no doubt that HMRC did not respond within the 90 day period which expired on 29 December 2016. Where an application is not refused within 90 days it is deemed to have been granted with effect from the date on which it was received by HMRC. At that date DFGI was already a member of the DFUK VAT Group so the Application had no legal effect.

Conclusions

66. We answer the three questions posed by HMRC as follows:

(1) The Application was not a valid application in terms of Section 43B.

(2) In the absence of any valid application DFGI cannot be treated as a member of the DFUK VAT Group during the Relevant Period.

(3) Even if the Application were to have been valid, the effective date of registration is the date the Application was received by HMRC.

67. We agree with Ms McCarthy that, although the Decision purported to refuse the Application, effectively the Decision is a nullity.

68. Turning to Section 83(a), (k) and (t) of VATA we find that:

(1) Since there was no valid application under Section 43B and there was no other application for registration, we find that there was no appealable issue in respect of registration. DFGI remained registered for VAT until compulsorily deregistered. Section 83(a) is not engaged.

(2) As the Application was not valid, Section 83(k) is not engaged.

(3) HMRC made no decision on repayment in the Decision so Section 83(t) is not engaged.

69. Accordingly the Tribunal had no jurisdiction and the appeal must be struck out in terms of Rule 8(2)(a) of the Rules.

Right to apply for permission to appeal

70. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 08 JULY 2021