Neutral Citation: [2024] UKFTT 00115 (TC)

Case Number: TC09057

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2021/02244

PROCEDURE – strike out application – whether there is a right of appeal against a refusal of an overseas refund where supply properly zero rated – yes – if so does the appeal have a reasonable prospect of success – no – whether there is a right of appeal in respect of a Reemtsma claim – no – application allowed

Judgment date: 25 January 2024

Decided by:

TRIBUNAL JUDGE AMANDA BROWN KC

Between

METATRON D.O.O.

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined this application for strike out on 11 and 22 January 2024 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**FTT Rules**) with the consent of the parties and because the Tribunal considers that it is able to determine the application without a hearing. The Tribunal was provided with a hearing bundle of 1003 pages, the application and a skeleton argument served by HM Revenue & Customs (**HMRC**). Metatron d.o.o (**Appellant**) was provided with the opportunity to serve a skeleton argument but did not do so.

DECISION

INTRODUCTION

1. In this application by HMRC strike out two appeals bought by the Appellant.

2. The Appellant is a business established and registered for VAT in Slovenia. It is understood that the Appellant's business is that of computer facilities management and other management consultancy services. In the course of that business the Appellant purchased goods through the eBay platform from suppliers established in the UK. A list of the suppliers the supplies from who are the foundation of the claim for the period 1 January – 31 December 2019 is in included in an annex to this judgment.

3. On 26 August 2020 the Appellant made a claim in the sum of £1,138.32 for refund of UK VAT paid in the period 1 January 2019 to 31 December 2019 (**First Refund Claim**).

4. The majority of the invoices associated with the First Refund Claim show the Appellant as the customer to which the invoices were issued, some however show only "eBay customer". Some, but not all, invoices also bear a shipping address. In the main, those which show a shipping address show a Slovenian address. However, the invoice from Finity (Invoice number 42984 dated 8 September 2019) shows as the delivery address the eBay global shipping service in Fradley, Staffordshire. Some of those without a delivery address show the method of delivery as involving international shipping. The invoices from Datatek ltd, Spiratronics, Green IT Disposal Ltd, Bluecharge Direct Ltd, and Computers in Leeds provide no information regarding delivery/shipment.

5. It does not appear to be disputed and therefore I find as a fact that despite the incomplete information on the invoices they all relate to supplies of goods which were dispatched from the UK to Slovenia during 2019 when the UK was still a member state of the EU.

6. Th First Refund Claim was rejected by HMRC by letter dated 9 October 2020. The decision was upheld on review and was appealed to the Tribunal with an effective dated on 21 June 2021 (**First Appeal**).

7. A second claim was submitted on 15 January 2021 in the sum of £179.46 for a refund of UK VAT paid in the period 1 January 2020 to 31 December 2020 (**Second Refund Claim**)

8. The First and Second Refund Claims will be referred to as **Claims**..

9. I was not provided with the detail of the claim or the invoices to which it related. However, again as it does not appear to be disputed I find that the Second Refund Claim also related to goods which were dispatched from the UK to Slovenia but, in the case of these invoices, during 2020 whilst the UK was still a member of the EU.

10. The second Refund Claim was rejected by letter dated 27 April 2021. Following an unsuccessful review the Appellant submitted an appeal which was then consolidated with the First Appeal (**Appeal**).

11. The Claims were rejected on the basis that there is no right for an EU (but non-UK) established business to claim a refund of VAT paid in the UK (as provided for under EU Directive 2008/9 (**8th Directive**), section 39 Value Added Taxes Act 1994 (**VATA**) and Part XX Value Added Tax Regulations 1995 (**VAT Regs**)) where the supply on which VAT has been charged should properly have been zero rated as an intracommunity dispatch of goods.

12. In relation to the First Refund Claim HMRC advised the Appellant to approach each of the suppliers and request a refund of the sums shown on invoices as VAT. In response the Appellant indicated that it had already requested that the supplies be zero rated by the vendors but that their request had been refused.

13. On 24 March 2022 HMRC applied to strike out the Appeal on the basis that the Tribunal had no jurisdiction to hear them and/or they had not reasonable prospect of success.

14. Also on 24 March 2022, HMRC offered to treat the Appellant's First Refund Claim as a "Reemtsma" Claim i.e. a claim made directly to the UK tax authority to recover sums incorrectly paid to a UK supplier who had accounted to HMRC for the VAT on the supply on the basis that it was virtually impossible or excessively difficult to obtain recovery of such sums directly from the suppliers. The entitlement to bring such claims having been indicated in the case of *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze* C-35/05 (***Reemtsma***). HMRC's subsequent letter of 1 April 2022 set out the documents and information HMRC required in order to assess whether the Appellant's ability to recover the sums overpaid as VAT to its supplier met the *Reemtsma* requirements.

15. HMRC did not offer to consider a Reemtsma claim for the Second Refund Claim as, in their view, post Brexit there was no legal basis for such a claim. Although the supplies on which the overpayments had been made were received prior to Brexit HMRC stated that, as a Reemtsma claim requires the application of general principles of EU law, by 2021 a new claim was precluded by the European Union (Withdrawal) Act 2018 (**EUWA**).

16. Additional information was provided by the Appellant in respect of the First Refund Claim under cover of an email dated 12 May 2022.

17. On 24 June 2022 the strike out application was listed for a hearing. The hearing was adjourned to allow HMRC to consider the Reemtsma claim. When adjourning the application Judge Staker noted:

> "… if the Tribunal is subsequently called upon to determine whether the Tribunal has jurisdiction to decide an appeal against a *Reemtsma* claim, a pertinent question will be whether any other court or tribunal can be identified which can hear such claims or entertain challenges against HMRC decision in respect of such claims."

18. By letter dated 25 July 2022 HMRC notified the Appellant that the information provided did not satisfy the conditions required in order to justify repayment and the Reemtsma claim was thereby refused.

Legislative basis for strike out

19. So far as relevant in the determination of this application Rule 8 FTT Rules provides:

> (1) …
>
> (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal:
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them; and
>
> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part.
>
> (3) The Tribunal may strike out the whole or part of the proceedings if:
>
> …
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

20. Rule 5(3)(k)(i) provides that the Tribunal may make directions to transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and "because of a change of circumstances since the proceedings were started this Tribunal

considers that the other tribunal is a more appropriate forum for the determination of the case" (there is no definition of "tribunal/other tribunal" for these purposes).

Tribunal's jurisdiction

21. As confirmed in the binding judgment of the Court of Appeal in *David Beadle v HMRC* [2020] EWCA Civ 562 the Tribunal has no inherent or general jurisdiction to determine disputes between HMRC and taxpayer. The Tribunal's powers are limited to those provided under the various taxing statutes. In the case of VAT, VATA section 83 provides an extensive list of the disputes on which the Tribunal may adjudicate and section 84 sets out associated provisions on the extent of its jurisdiction in relation to particular categories of dispute i.

22. So far as material those provisions state:

> 83(1) …an appeal shall lie to the tribunal with respect to any of the following matters:
>
> …
>
> (c) the amount of any input tax which may be credited to a person
>
> …
>
> (ha) any decision of the Commissioners to refuse to make a repayment under a scheme under section 39
>
> …
>
> (t) a claim for the … repayment of an amount under section 80 …

VAT recovery for EU established businesses

23. In accordance with the UK's obligations the 8th Directive, and until 31 December 2020, a scheme for refund of VAT incurred in the UK by a business established in the EU (such as the Appellant) was provided for in section 39 VATA which, so far as material, stated:

> **Repayment of Vat to those in business overseas**
>
> (1) The Commissioners may, by means of a scheme embodied in regulations, provide for the repayment, to persons carrying on in another member state, of VAT which would be input tax of theirs if they were taxable persons in the United Kingdom.
>
> (2) ...
>
> (3) Repayment shall be made in such cases only, and subject to such conditions, as the scheme may prescribe (being conditions specified in the regulations or imposed by the Commissioners either generally or in particular cases); …

24. The relevant regulations authorised under section 39 VATA were contained in Part XX VAT Regs. In respect of supplies made to the Appellant in the period to 31 December 2020 (and thus to both the First and Second Refund Claims)and in so far as material, these regulations provided:

> "**173A Repayments of VAT**
>
> (1) The commissioners shall make a repayment of VAT described in regulation 173B … [certain requirements not relevant to this appeal then specified]
>
> **173B Repayments of VAT**

> (1) The VAT referred to in regulation 173A is VAT charged on … (b) supplies of goods … made to the claimant in the United Kingdon if that VAT would be input tax of the claimant if the claimant were a taxable person.
>
> (2) A claim for repayment may not be made in respect of VAT charged on … (b) a supply which the claimant has removed or intends to remove to another member State …"

25. Further, Notice 723A (a notice published pursuant to section 39 VATA) paragraph 4.5 stated that claims could not be made to reclaim "amounts of VAT that have been incorrectly invoiced, or where VAT has been charged on the dispatch of goods to … another member state".

Recovery of incorrectly paid VAT

26. VAT paid in error can be recovered from HMRC through section 80 VATA which, so far as relevant, provides:

> "(1) Where a person:
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period … and
>
> (b) in doing so, has bought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit that person with that amount.
>
> …
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose."

REEMTSMA

27. In general, and in accordance with principles of EU law, VAT charged by a supplier to a customer will be accounted for by the supplier to the relevant tax authority. Where VAT has been incorrectly declared the supplier will have the right (subject to time limits and certain administrative requirements) to recover any sum overpaid to the tax authorities in consequence of the error. Where such a claim is made the tax authorities will require the supplier to reimburse the customer such amount of the repayment as was borne by the customer and in respect of which the supplier would be unjustly enriched if the amount were repaid without a reimbursement requirement. Subject to the reimbursement obligations imposed in order to avoid unjust enrichment the right of the customer to be repaid amounts of VAT incorrectly charged will be a commercial issue between the customer and the supplier and there will be no basis on which the customer can seek to secure repayment of incorrectly charged VAT from the tax authorities.

28. However, in the case of *Reemtsma* the Court of Justice of the EU (**CJEU**) determined that there may be limited circumstances in which the tax authorities of a member state may be required to make a direct repayment to a customer which has borne an incorrect VAT charge rather than through the supplier. In such a situation the customer will be entitled to make the claim against the tax authority.

29. In *Reemtsma* the German customer of an Italian supplier had been incorrectly charged VAT on a supply of advertising and marketing services. The Italian company had accounted for the VAT to the Italian authorities. The German customer made a claim to the Italian tax authorities under the equivalent provisions to section 39 VATA for a refund of the VAT paid.

30. The CJEU determined that there was no right to claim a refund of VAT under the provisions equivalent to section 39 VATA. This was on the basis that such a right to claim is

the cross boarder right equivalent to a right to deduct input tax. As there is no right to deduct as input tax VAT which was incorrectly charged on a supply between two traders established in the same country (because such a charge whilst shown as VAT is not VAT incurred) there can, similarly, be no right as between traders in different member states. In essence the overseas customer cannot be in an better position than a taxable person established in the member state in question

31. In the alternative, the German company had also argued that as it had borne the VAT incorrectly charged and as it could be established that the VAT had in fact been accounted for and paid to the Italian authorities then, under general principles of EU law, there should be a right of reimbursement directly from the relevant tax authority rather than there being a requirement for the customer to claim from the supplier and the supplier then seek a refund from the tax authorities. The CJEU determined that there was nothing offensive about a two-stage process. However, in circumstances in which such a process rendered it virtually impossible or excessively difficult for the incorrectly charged VAT to be recovered by the customer (i.e. through the insolvency of the supplier) then, the relevant tax authority should provide a mechanism for recovery.

HMRC'S APPLICATION

32. By updated and combined application dated 4 November 2022 HMRC apply for both appeals to be struck out on three alternative grounds:

(1) Under Rule 8(2)(b) on the basis that there is no jurisdiction to consider the refusal of the refund claims originally made by the Appellant; and

(2) In respect of the First Refund claim, under Rule 8(2)(b) on the basis that there is no jurisdiction to consider the refusal to repay on *Reemtsma* grounds; or

(3) In respect of both appeals, under Rule 8(3) there is no reasonable prospect of the appeal succeeding.

33. HMRC contend that in accordance with the UK's then requirements to implement the provisions of the 8th Directive (and its predecessors) section 39 VATA, regulations 173A and 173B VTA Regs and the terms of Notice 742, as interpreted through the *Reemtsma* judgment, preclude a conclusion that the claim made by the Appellant was a claim made under section 39 VATA at all. Accordingly, the decision to refuse it cannot be a refusal of a claim made under section 39 and there can be no jurisdiction to appeal under section 83(1)(ha). They contend that there is no other provision of section 83 which would permit an appeal against the decision to refuse the claim on the basis. In particular, they (at least implicitly) contend that a refund of sums incorrectly charged on the supply of goods dispatched to an EU country is not input tax which may be recovered. They also explicitly contend that the Claims made by the Appellant cannot be claims under section 80 VATA because the Appellant did not account for the VAT to them. In the alternative, and by reference to the same statutory provisions and in reliance on *Reemtsma*, they contend that the appeals cannot succeed.

34. They further contend that there is no provision of section 83 which gives jurisdiction for an appeal in respect of a *Reemtsma* claim. They contend that prior to 31 December 2020 there was an alternative but EU compliant remedy through a county court claim against HMRC in circumstances in which it could be shown that a commercial claim against the supplier was virtually impossible or excessively difficult. They contend that there is no longer a requirement to provide such a remedy to protect EU law rights and, in consequence of the EUWA there is no basis for now brining a claim.

35. They refer to the binding authority of *HMRC v Earlsferry Thistle Golf Club* [2014] UKUT 250 (TCC) (***Earlsferry***) at paragraphs 13 – 23 in which the Upper Tribunal confirms

that the right to bring a commercial claim against the supplier in the ordinary course and a commercial claim against HMRC where a claim against the supplier is virtually impossible or excessively difficult (i.e. where the supplier is insolvent) was sufficient to satisfy the requirements arising under EU law. The Upper Tribunal confirmed that there was no right of appeal to the Tribunal and given the alternative remedy there was no need for there to be such a right of appeal.

THE BASIS OF THE APPELLANTS REFUND CLAIMS

36. The Appellant's First and Second Refund Claim were originally made on the basis that VAT had been incorrectly charged to them. The Appellant accepts that, as an EU registered business, the supply of goods shipped to them from the UK and for use in its business should have been zero rated for VAT purposes. They thereby accept that the VAT shown on the invoices and paid by them to the suppliers in question is not VAT which has been properly charged to them. However, they contend that as they were required to account for VAT on the acquisition of the goods into Slovenia and unless the sums paid to their suppliers are refunded they will suffer double taxation contrary to EU law. They contend that double taxation should be avoided and repayment of the incorrectly charged VAT puts them back into a VAT neutral position.

37. In the alternative, and following HMRC's invitation to do so, the Appellants claim in respect of the First Refund Claim that recovery of the incorrectly charged VAT direct from HMRC meets the conditions required for a *Reemtsma* refund i.e. it was virtually impossible or excessively difficult to obtain a commercial refund from their suppliers. They contend that the suppliers were requested to either zero-rate the supply in the first place or to refund the incorrectly charged VAT and in each case the suppliers have refused to do so.

DISCUSSION

38. It is right at the outset to acknowledge that having paid their suppliers amounts on invoices shown as VAT and having accounted for VAT on the acquisition of the same goods into Slovenia it appears that the Appellant has paid VAT twice on the same goods an outcome contrary to the foundation of the EU VAT system.

39. However, and unfortunately, that does mean that they are entitled to bring the claims they have made or pursue the appeals they have lodged.

Application to strike out refusal of the claims under section 39 VATA

40. On the first question as to whether the appeals should be struck out for want of jurisdiction on the basis that the claims do not fall within section 39 VATA such that there can be no right of appeal under section 83(1)(ha) it is my view it would be wrong to strike out the appeals.

41. HMRC have refused the claims on the basis that they do not meet the conditions prescribed under regulation 173B VAT Regs and by reference to the terms of Notice 723A (which are requirements consistent with the provisions of the 8th Directive). However, the claims were purportedly made under the refund scheme for businesses established in another member state as provided for in section 39 VATA. In my view the terms of section 83(1)(ha), which provide for an appeal in respect of "any decision to refuse to make a repayment under a scheme under section 39", includes a decision that, in some way, the claim is not compliant with the scheme for whatever reason. It is not appropriate when considering a question of jurisdiction to have to evaluate and consider whether the claim complies with the terms of the scheme, which is to determine the appeal itself by way of mini trial. If any justification were needed for that conclusion see *The First De Sales Ltd Partnership and others v HMRC* [2018] UKUT 396 (TCC)) (***First De Sales***) discussed below in the context of consideration of the prospects of success of an appeal.

42. I therefore refuse HMRC's application to strike out the appeals as I consider I do have jurisdiction under section 83(1)(ha) VATA.

43. However, I must then go on to consider whether the appeal should be struck out in exercise of my discretion under rule 8(3)(c) FTT Rules.

44. The test to be applied when determining whether the Appellant's case has a reasonable prospect of success is as set out by the Upper Tribunal in *First De Sales* by reference to court guidance on when it is appropriate for summary judgment to be granted. The approach directed is:

> (1) To determine whether the Appellant has a "realistic" as opposed to a "fanciful" prospect of succeeding in the appeal.
>
> (2) In order to have a realistic prospect of success the case must have some degree of conviction in that it is more than merely arguable.
>
> (3) In answering that question, no "mini trial" must be conducted.
>
> (4) It is not necessary to take at face value assertions, without analysing what is said, particularly if contradicted by contemporaneous documents.
>
> (5) Consideration should be taken not only of the evidence available at the time the application is made, but also what evidence could reasonably be expected to be available at the hearing.
>
> (6) The tribunal should not make a final decision "where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence".

45. In this case it is plain that regulation 173B VAT Regs excludes a valid claim under section 39 VATA where the claim relates to the supply of goods which are dispatched to an EU country. Further, it was confirmed in *Reemtsma*, on the first issue before it, that there is no right to a refund under a scheme such as that prescribed in section 39 VATA where VAT has been incorrectly charged such that the sum shown on the invoice is not VAT and to which there could be no domestic entitlement to input tax.

46. In addition, it is at least arguable that the terms of Notice 723A represent conditions imposed on the circumstances in which a refund claim can be made albeit that the terms of the Notice reflect the legal position as set out in paragraph 45. (For an analogous position in relation to conditions imposed under the excise duty drawback scheme see my own judgment in *Drinks and Food UK Ltd v HMRC* [2023] UKFTT 979 (TC)).

47. I have found as a fact that the VAT claimed by the Appellant in respect of both the First and Second Refund claims was charged on goods dispatched to the EU (prior to Brexit) and the supplies should properly have been zero rated. The VAT invoices were therefore raised by the suppliers showing output tax in error. Whether the additional sum shown as output tax is due from the Appeallant to the supplier would need to be determined by reference to the contractual terms agreed between them but it is at least feasible that the Appellants were overcharged contractually. However, such overcharging does not (as confirmed in *Reemtsma* make the sum VAT either for a claim to input tax or under section 39 VATA).

48. On the basis of the law as set out above, the Appellant has no reasonable or indeed any prospect of succeeding in showing that it had a valid claim to repayment under section 39 VATA. The claims made are precluded by the terms of the scheme and HMRC were therefore right to reject them.

49. I therefore exercise my discretion to strike out the Appellant's appeals in so far as they relate to a claim to be repaid under section 39 VATA under the provisions of rule 8(3)(c) FTT Rules. I do so in accordance with the overriding objective to deal with matters justly and fairly. There can be no purpose in a full hearing of the appeal in respect of which I do have jurisdiction when the case on section 39 VATA is entirely hopeless.

Application to strike out the *Reemtsma* claims

50. The question of the Tribunal's jurisdiction on Reemtsma claim has already been determined by the Upper Tribunal in *Earlsferry*. As argued by HMRC, at paragraph 22 of that judgment, the Upper Tribunal determined that the UK's EU law obligations to ensure neutrality where a commercial claim was virtually impossible or excessively difficult were met through a requirement that a claim could be bought for recovery in the county court.

51. Following Brexit the UK no longer has an obligation to ensure that EU rights are complied with. Section 1 EUWA repealed the European Communities Act 1972 (**ECA**). Sections 4 and 5 EUWA detail circumstances in which EU law rights are preserved post Brexit however, as there is no right to bring an appeal to the Tribunal in respect of a Reemtsma claim there can be no right to be preserved.

52. Whether a right to bring a claim in the county court remains is a complex issue. HMRC contend that no new action may be commenced reliant on general principles of EU law post 31 December 2020 by virtue of Schedule 1 paragraph 3 EUWA. There are many practitioners who disagree with them and would consider that as the principles of effectiveness and neutrality were acknowledged by the UK courts directly in connection with a Reemtsma claim prior to Brexit the Appellant would have an entitlement to bring a county court claim to enforce those protected rights. I make no comment on the substance of this issue as it is not a matter for me. It is a matter for the county court.

53. Mindful of Judge Staker's note in the directions issued following the adjourned hearing on 24 June 2022 (see paragraph 17 above). I have carefully considered the provisions of Rule 5(3)(k)(i) FTT Rules. Judge Staker appeared to interpret those provisions as having the potential for me to have a discretion to transfer the dispute in respect of the Reemtsma claim if an appropriate "court or tribunal" were identified. With respect to Judge Staker (who did not need to provide any analysis or justification for his thinking on that issue) I do not interpret the language adopted by Parliament in rules 5(2)(k)(i) and 8(2) FTT Rules as providing any discretion to transfer a matter to an alternative court and only an alternative tribunal i.e. an alternative chamber of the First-tier Tribunal or potentially to the Upper Tribunal. There is no reference to the alternative courts.

54. In consequence I conclude that I have no jurisdiction in respect of the Reemtsma claim and must therefore strike out the appeal in accordance with rule 8(2) FTT Rules.

DECISION

55. For the reasons given all grounds are struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 25th JANUARY 2024

ANNEX

Datatek ltd
Spiratroncis
Nooelec Inc
CCC Computers Ltd
Nebra Ltd t/a Pi Supply
Finity IT LTD
Green IT Disposal Ltd
Intelligent Brokerage Limited
Bluecharge Direct Ltd
System Supply Industries Limited
Computers In Leeds