



Neutral Citation: [2024] UKFTT 00140 (TC)

Case Number: TC09075

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2023/01143

*HARDSHIP – Whether the Appellant would suffer hardship if required to pay or deposit the amount of the assessment prior to a substantive hearing – capacity to pay and principle of proportionality – value judgment of whether resources were immediately or readily available to the Appellant – consideration of the most up to date financial information provided – principles in R (on the application of ToTel Ltd) v First-tier Tribunal; HMRC v Elbrook (Cash & Carry) Ltd considered and applied – Application dismissed*

**Heard on:** 14 December 2023

**Judgment date:** 13 February 2024

**Before**

**JUDGE NATSAI MANYARARA  
JULIAN SIMS**

**Between**

**SC BUSINESS GATEWAY LTD.**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS  
Respondents**

**Representation:**

For the Appellant: Mr John O’Donnell, Tax & Forensic Services Ltd.

For the Respondents: Ms Maddie Di Benedetto, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. This application concerns the issue of whether the Appellant should be permitted to pursue its appeal without having to pay the VAT in question to HMRC, under s 84(3B) of the Value Added Tax Act 1994 ('VATA'). The VAT arose as a result of an assessment ('the Assessment') raised by HMRC for the periods 02/21 to 01/22 (inclusive).

2. With the consent of the parties, the form of the hearing was V (video). The documents to which we were referred were included in the Documents Bundle consisting of 59 pages. This Decision solely relates to the issue of hardship and does not dispose of the issues in relation to the substantive decision by HMRC in respect of the Assessment.

### BACKGROUND FACTS

3. The Appellant registered for VAT in January 2020. The Director is Ms Ning Zhou Lemon Li. The Appellant's business activity is the purchase and sale of luxury merchandise for export to Asia. The substantive appeal concerns the Assessment, dated 5 December 2022, originally in the sum of £274,152, reduced on review to £273,857 (to take into account the reduction for the period 03/21). The Assessment was raised following HMRC's decision to disallow the Appellant credit for input tax claimed, and was raised pursuant to s 73(2) VATA.

### ISSUE(S)

4. The issue for consideration is whether the Appellant has discharged the burden of proof to show that it would suffer hardship if required to pay or deposit, the amount of VAT due under the Assessment in order to pursue its substantive appeal to the Tribunal. The standard of proof is the civil standard; that of a balance of probabilities.

### THE RELEVANT LAW

5. The relevant law is set out at s 84 VATA. Section 84 VATA provides that:

**“84 Further provisions relating to appeals.**

(1) References in this section to an appeal are references to an appeal under section 83.

(2) . . .

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

(3A) Subject to subsections (3B) and (3C), where the appeal is against an assessment which is a recovery assessment for the purposes of this subsection, or against the amount of such an assessment, it shall not be entertained unless the amount notified by the assessment has been paid or deposited with HMRC.

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

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

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

[Emphasis added]

### THE HEARING

6. We heard oral evidence from Ms Li, as well as brief submissions from both representatives. In summary, Ms Di Benedetto submitted that whilst HMRC have

acknowledged the bank statements submitted in support of the application to the Tribunal, HMRC have rejected the Appellant's application due to the lack of any documentation to support the application. Mr O'Donnell, on behalf of the Appellant, submitted that the Appellant had ceased trading and its bank accounts were frozen, thus explaining the absence of any further documentary evidence. I shall refer to the evidence and submissions so far as is material to our decision.

7. Following completion of the hearing, we reserved our decision and issued a Summary Decision. We now give our full Decision, with reasons.

#### DISCUSSION

8. This is the Appellant's application for hardship in respect of the Assessment, in the sum of £273,858, issued by HMRC following a decision to disallow input tax in claimed for the periods 02/21 to 01/22 (inclusive). When appealing against a decision of the nature in the underlying appeal, the hardship provisions provide that an appellant is required to either: (i) deposit the tax; or (ii) demonstrate hardship.

9. An appeal against a VAT assessment can proceed if HMRC are satisfied that the requirement to pay, or deposit, the amount of VAT would cause the Appellant hardship. If HMRC are not satisfied that there would be hardship, the Appellant may apply to the Tribunal; and if the Tribunal is satisfied that the Appellant would suffer hardship, the Tribunal may allow the appeal to proceed. The issue of whether the Appellant has resources which are immediately or readily available is a value judgment, taking into account all of the evidence and circumstances. This assessment must be made on the basis of the most up-to-date information available.

10. The burden of establishing hardship lies with the Appellant. In discharging this burden, it is incumbent on the Appellant to adduce the necessary evidence to satisfy the Tribunal on the issue of hardship. The absence of contemporaneous accounting evidence may justify the Tribunal placing little, if any, weight on an oral assertion that the Appellant is unable to afford to pay.

11. The issue of hardship has been the subject of much consideration and adjudication. Helpful guidance can be derived from the High Court decision in *R (on the application of ToTel Ltd) v HMRC* [2011] EWHC 652 (Admin); [2012] 2 WLR 435 (Simon J) ('*ToTel*'), and from the Upper Tribunal in the related appeal *ToTel Ltd v HMRC* [2014] UKUT 485.

12. The Administrative Court in *ToTel* held, at [82], that:

"82. The principles to be applied in hardship cases are clear and emerge from various passages in previous decisions of the First-tier Tribunal or its predecessors.

i) The subsection which provides relief in case of hardship should not operate as a fetter on the right of appeal, see *Tricell UK Ltd v. Commissioners for Revenue and Customs* [2003] UKVAT 18127 at [27].

ii) The test is one of capacity to pay without financial hardship, and must be applied in a way which complies with the principle of proportionality in order to comply with Community law, see *Seymour Limousines Ltd* (above) at [57].

iii) The hardship enquiry should be directed to the ability of an appellant to pay from resources which are immediately or readily available. It should not involve a lengthy investigation of assets and liabilities, and an ability to pay in the future, see *Seymour Limousines Ltd* (above) at [58]. This is a reflection of the broader principle that the issue of hardship ought to be capable of prompt resolution on readily available material."

13. Consideration may also be had as to whether the Appellant is responsible for putting itself in a position where it cannot pay as the “real cause” of the Appellant’s inability to pay may be as a result of an appellant’s own prior actions. The Upper Tribunal (Nugee J) in *ToTel* had earlier held, at [45] to [46], that:

“45. ... The statute requires the tribunal to decide whether the requirement to pay or deposit the amount determined “would cause” the appellant to suffer hardship. In the example I have given, it may well be that the appellant will be in financial difficulty if he now has to find the £100,000. But the real cause of that is not the requirement to pay or deposit the £100,000; the real cause is the appellant’s own deliberate act in paying away the £200,000 which would otherwise have been available to him for that purpose.

46. This seems to me the most satisfactory way both to enable the tribunal to take into account the fact that the appellant is himself responsible for being unable to pay, and to respect the statutory language which requires the tribunal to assess whether the requirement to pay or deposit the tax would cause the appellant hardship rather than assessing whether it would have caused him hardship.”

14. Mr Justice Nugee further held, at [55], that the correct test is whether the Appellant has capacity to pay without financial hardship:

“55. I entirely agree. Mr Burgess relied on *Seymour Limousines Ltd v HMRC* [2009] UKVAT V20966 (Judge Wallace) at [58] where he said:

“Under section 84(3) of the VAT Act 1994 an appeal shall be entertained without prior payment of tax if Customs or the Tribunal are “satisfied that the Appellant would otherwise suffer hardship”. The test which Customs applied in this case was not whether payment would involve hardship, which in the context is financial hardship, but whether the Appellant had the capacity to pay. The correct test is whether the Appellant had the capacity to pay without financial hardship, which is very different.”

15. And at [95], that it is not disproportionate for the appellant to be required to demonstrate hardship as the appellant is the only person likely to have the necessary financial information:

“95. It seems to me that he was right not to do so. As it was put by Mann J in *O’Brien v Revenue and Customs Commissioners* [2007] EWHC 3121 (Ch) at 15 [11]:

“Section 84(3) is a provision which ... I would, if necessary, find to be compliant with [the Human Rights Act 1998]. It does not unfairly and improperly exclude access to justice, because if there is no hardship in paying the tax up front it will be paid and access to justice can be had. If there is hardship in paying, then the money does not have to be paid so there is no impeding of access to justice.”

Simon J agreed and so do I. The principle that an appellant who can afford to do so without hardship should have to deposit the tax before appealing does not render it excessively difficult for such an appellant to vindicate his rights to deduct input tax, challenge the decision of the Commissioners to raise an assessment against him, or have such a challenge heard before an independent and impartial tribunal in accordance with art 47 CFR, because he can pursue the appeal by depositing a sum of money which, *ex hypothesi*, he can afford to pay without hardship. Nor did Mr Burgess suggest that it was disproportionate to require the appellant to demonstrate hardship. Again I consider he was correct not to do so: once it has been accepted that it is proportionate for there to be a scheme under which appellants are exempt from the requirement to deposit the tax only in cases of hardship, it seems self-evidently proportionate to require an appellant to demonstrate hardship as an appellant is the only person likely to have detailed information about his own finances.”

16. In *NTADA Ltd. v HMRC* [2019] UKFTT 0333 (‘NT’), Judge Poole reviewed the relevant legislation and case law, including the principles in *Elbrook*, which take their name from the case of *HMRC v Elbrook (Cash & Carry) Ltd.* [2017] UKUT 181 (TCC); [2017] BVC 514, at

[16] to [31] (Marcus Smith J & Judge Berner). The appellant in *Elbrook* successfully appealed to the Upper Tribunal against HMRC's decision that the appellant in that application should seek additional finance to pay the VAT due, rather than allow the case to be heard without payment on the grounds of hardship.

17. It is clear from *NT* that we are not concerned with the underlying merits of the appeal, and that the test is an "all or nothing" test to be applied to the position at the date of the hearing. The fact that an appellant may have the necessary cash, or other readily available resources, may not be determinative if hardship will result from using it. We can, however, have regard to available borrowing resources - from unused facilities or new facilities - which are available with minimal formality. A property with which to secure a new loan is only exceptionally to be considered as "immediately or readily available". Connected assets under the common control of the Appellant are also a relevant consideration. However, the potential sale of assets might cause hardship, even if such assets are not being used.

18. With those principles in mind, I turn to the circumstances of this application:

*Whether financial information has been provided by the Appellant to determine the issue of whether resources are immediately or readily available*

19. In support of the application, Ms Li has provided bank statements from Cash Plus Bank, for the period 1 May 2023 to 31 August 2023. The bank statements did not, however, include any transactions and were of marginal probative value to us in truly understanding the Appellant's financial position. We accept that the reason for an absence of any transactions is that the Appellant has ceased trading. The fact that the Appellant had ceased trading is not, however, determinative of the issue before us, in light of the oral evidence given by Ms Li.

20. Having considered the documentary evidence in its entirety, we find that the evidence relied on in this appeal is "thin on the ground". At the commencement of the appeal hearing, Mr O'Donnell submitted, that the letter from HMRC dated 5 June 2023 had not been received by the Appellant. That letter requested information, by 5 July 2023, in relation to the Appellant's financial position. It was explained that Ms Li had been in China from 26 June 2023 until 5 August 2023. On her return, Mr O'Donnell had informed her about HMRC's decision. Ms Li subsequently emailed the Tribunal, instead of HMRC. Prior to this, Mr O'Donnell had emailed HMRC with a view to seeing if a resolution can be reached. At that time, HMRC's position was that the matter was now in the hands of the Tribunal.

21. Whilst we accept that the letter dated 5 June 2023 (requesting further information) was not received, the Appellant has been represented in these proceedings. Mr O'Donnell confirmed that he has provided representation in hardship applications and we are satisfied that there would have been familiarity with the nature of evidence that would be required to support such an application. The filing of bank statements which contain no transactions, and the decision not to file other documents, is, generally, unhelpful. In any event, despite the letter dated 5 June 2023 not being received, the Appellant has nevertheless been able to file the Cash Plus bank statements. This suggests that the sort of evidence that would be required was known to the Appellant.

22. Whilst we can consider whether we accept the credibility of the evidence given in the absence of any documents, we find that Ms Li's evidence was replete with internal inconsistencies in some material respects. I shall return to consider the inconsistencies later.

23. Ms Li was the director of the Appellant from its incorporation. She dealt with day-to-day operations at the material time covered by the Assessment. Whilst the Appellant was not trading when it was initially incorporated, and whilst the Appellant managed properties for

family and friends (prior to registering for VAT), the Appellant began to trade in 2020 and registered for VAT at that time. VAT returns were submitted on a monthly basis. The Principal Place of Business ('PPOB') was stated to be 65 Bath Street, which was a warehouse. Prior to this, Ms Li was working from home at 66 Lincoln Avenue.

24. Ms Li stated that the Appellant's business model was buying merchandise from the United Kingdom, and the subsequent export of that merchandise to various Asian countries. The merchandise comprised of perfumes and luxury items. She explained that the Appellant's business revenue solely came from the buying and selling of goods. She added that the Appellant was funded by shareholders to purchase goods, or customers who gave money as a deposit. Ms Li's evidence was also that goods would be purchased for c. £1200 (£1000 plus VAT). She added that the goods were then sold at a loss as the cost of shipping had to be deducted, but that VAT was factored in to give rise to a profit. The Appellant was, therefore, relying on the recovery of VAT for income.

25. In terms of monthly sales, Ms Li's evidence was that the company was bringing in between £100,000 and £120,000 in sales. The position argued on the Appellant's behalf is that the decision by HMRC resulted in the Appellant ceasing trading, with the resultant need to make a hardship application for these proceedings.

26. During her oral evidence, Ms Li referred to the Appellant's bank accounts with the Royal Bank of Scotland ('RBS') and the Bank of China. She clarified that the accounts were the subject of freezing orders. In response to questions from the panel, Ms Li stated that the Bank of China account had a balance of around £50,000, whilst the RBS account had a balance of a few hundred pounds. She added that she therefore opened the Cash Plus account for the purposes of trading. No further light was, however, shed on the reasons why the accounts with RBS and Bank of China were frozen, save that it was said to have been in relation to anti-money laundering rules.

27. Furthermore, no bank statements to substantiate what the balance of the accounts were at the time that they were said to have been frozen were provided, nor indeed was any correspondence from the banks to state that the accounts have been frozen provided. Ms Li further stated that the Appellant had a bounce-back loan, but no further details of this loan were provided.

28. Whilst Ms Li also referred to the Appellant's company accounts, these, too, were not provided despite being available. Both Ms Li and Mr O'Donnell explained that the company accounts were not provided as they contained errors. Once again, no further light was shed on the nature of the errors and why the company accounts would not remotely assist with establishing the Appellant's financial position.

29. In respect of the warehouse that the Appellant used to store goods before they were shipped (65 Bath Street), Ms Li's evidence was that this was no longer rented as the Appellant had ceased trading. The lease agreement was not, however, provided.

30. Returning to the inconsistencies in the oral evidence, in relation to the issue of company accounts, Ms Li initially stated that she had tried to get accountants, but did not have the funds to do so. We find that this is, however, at odds with the alternative statement by her that the accountant had advised that the company accounts were incorrect. It was not, therefore, initially clear whether any accounts were available or, if accounts were available, whether an accountant had been engaged to prepare those accounts. When she asked whether the inability to find an accountant meant that no company accounts were filed, Ms Li stated that accounts were filed on an annual basis.

31. Ms Li further omitted to mention a Barclays bank account, until much later in her evidence. Her evidence was that the balance in this account was £15,000. We have already found that there was a failure to provide any correspondence from Barclays bank to substantiate the claim that the account was, indeed, frozen, or the balance that exists in the account.

32. Despite initially referring to the Appellant's creditors and debtors, Ms Li proceeded to say that she did not think that the Appellant had any creditors, in a significant departure from the earlier position stated.

33. Ms Li's evidence was also that there were no insurance policies. This is despite her evidence that the Appellant shipped goods with various shipping companies on behalf of customers who sometimes paid deposits for those goods under insurance policies.

34. We find that it would have been a relatively simple and straightforward manner to provide documents that are relevant to the consideration of the Appellant's true financial position. We conclude that it was, undoubtedly, not helpful to have simply decided not to provide various documents (such as correspondence from the bank(s) and company accounts), whilst also seeking, at the same time, to establish hardship as a matter of fact. We also conclude that providing bank statements that do not include any transactions does not sit well with Ms Li's evidence that the Cash Plus account was opened in order to continue trading when the RBS and Bank of China accounts (which had balances in them) were closed. We find that the Appellant was aware, since at least August 2023, that documents were required in order to support the application.

35. Despite referring to various other potentially relevant documents in her correspondence to the Tribunal, Ms Li has not provided any further documents. Ms Li's position was that she thought that HMRC would hold any relevant evidence and would be well aware of the financial position in respect of the Appellant. We find that position is unhelpful, in sufficient and aggravated by the internal inconsistencies identified above.

#### **CONCLUSION**

36. Having considered all of the documentary and oral evidence, cumulatively, we hold that the Appellant has failed to discharge the burden of proof in respect of the issue of hardship. Consequently, therefore, the application is dismissed.

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

37. 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.

**NATSAI MANYARARA  
TRIBUNAL JUDGE**

**Release date: 13<sup>th</sup> FEBRUARY 2024**