Neutral Citation: [2024] UKFTT 00748 (TC)

Case Number: TC09266

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2023/16121

Procedure – whether appeal made in respect of appealable matter – section 83 VAT Act 1994 – whether appeal should be struck out – whether appeal made in time

Judgment date: 13 August 2024

Decided by:

TRIBUNAL JUDGE GREG SINFIELD

Between

HAMPSHIRE HOSPITALS NHS FOUNDATION TRUST

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the issues on the papers under Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and with the consent of the parties

DECISION

INTRODUCTION

1. This appeal concerns the ability of the Appellant, Hampshire Hospitals NHS Foundation Trust ('the Trust'), to make a claim for a repayment from the Respondents ('HMRC') of VAT incurred by the Trust on supplies to it of locum doctors. This decision is not concerned with the substantive issue of the VAT liability of the supply of locums but with an application by HMRC for the appeal to be struck out. HMRC's application raises two issues:

   (1) Does the Trust have a right of appeal under section 83 of the VAT Act 1994 ('VATA')?

   (2) If the Trust has a right of appeal, did it appeal in time?

2. For reasons set out below, I have decided that the Trust's appeal does not relate to a matter within section 83 VATA and so the proceedings must be struck out because the First-tier Tribunal (Tax Chamber) ('the FTT') does not have jurisdiction in relation to the Trust's dispute with HMRC. If I had concluded that the FTT had jurisdiction, I would have decided that the Trust's appeal could not be admitted on the ground that it was made after the time limit for appealing had expired and there has been no application for permission to make a late appeal.

LEGISLATION

3. Before I set out the background and consider the parties' submissions, it is useful to set out the relevant parts of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules').

4. The right to appeal is specified in section 83(1)(b) VATA which provides that:

> "83 Appeals
>
> (1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters –
>
> …
>
> (b) The VAT chargeable on the supply of any goods or services …
>
> …
>
> (t) a claim for the crediting or repayment of an amount under section 80 …".

5. Section 83G(1) VATA provides:

> "83G - Bringing of appeals
>
> (1) An appeal under section 83 is to be made to the tribunal before –
>
> (a) The end of the period of 30 days beginning with –
>
> (i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or
>
> (ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision …".

6. Rule 8(2) of the FTT Tax Rules relevantly provides:

> "(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 …"

7. Rule 20 of the FTT Rules sets out the requirements for starting appeal proceedings in the FTT. It provides as follows:

> "(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.
>
> (2) The notice of appeal must include—
>
> (a) the name and address of the appellant;
>
> (b) the name and address of the appellant's representative (if any);
>
> (c) an address where documents for the appellant may be sent or delivered;
>
> (d) details of the decision appealed against;
>
> (e) the result the appellant is seeking; and
>
> (f) the grounds for making the appeal.
>
> (3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain.
>
> (4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal—
>
> (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
>
> (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.
>
> (5) When the Tribunal receives the notice of appeal it must give notice of the proceedings to the respondent."

8. The notice of appeal must include the information specified in rule 20(2) and enclose or attach a copy of any written decision being appealed against if the appellant has it or can reasonably obtain it. If the appellant does not provide all the information and documents required by rule 20, the notice of appeal will be incomplete and there will not have been a valid notification of an appeal to the FTT. The FTT administrative staff will (or should) reject incomplete notices of appeal and return them to the sender with a letter stating what information or documents are missing. The letter invites the appellant to re-lodge the notice of appeal with the required information or documents. It also states that, if the appellant re-submits the notice of appeal outside the original time limit for appealing, they must give the reasons for making a late appeal on the notice of appeal or the FTT will reject the appeal again.

BACKGROUND

9. On 27 March 2023, the Trust's representative, RSM UK Tax & Accounting Services Limited ('RSM'), wrote to HMRC to register a claim with HMRC in respect of the Trust's expenditure on supplies of locum doctors in the previous four years. RSM said that they understood that this claim would not be processed until a final decision is reached in an appeal brought by the Isle of Wight NHS Trust and others which was the subject of an interlocutory decision of the FTT released with neutral citation [2023] UKFTT 23 ('the *Isle*

of Wight case'). The letter included an appendix "summarising the VAT incurred on locum doctors in the immediate four-year period, in order to time-protect this VAT". The total amount shown in the Appendix was £937,288.56 and the final paragraph of the letter stated:

> "We would appreciate your acknowledgement of receipt of this claim, holding on file until a resolution is reached with the appellant in the above-mentioned case relation to this matter."

10. HMRC replied to RSM by letter dated 2 May 2023. In that letter, HMRC said:

> "Whilst you have submitted a claim for VAT paid by your client, it is not a valid claim under Section 80 of the VAT Act 1994. Only the person who accounted for VAT i.e. the supplier or their agent acting on the suppliers (sic) behalf, is entitled to make a Section 80 claim unless the supplier formally assigns that right. … Where the recipient of a supply believes it has been charged VAT incorrectly, that is a commercial matter between both parties.
>
> …
>
> HMRC's view is that the Isle of Wight decision does not support an entitlement for a customer to submit a claim. The decision found that the appellants, NHS bodies, had standing to bring an appeal to the Tribunal against a decision by HMRC on the VAT liability of the supplies. The FTT did not say that a customer was entitled to submit a claim to HMRC, and paragraph 75 of the decision said '*HMRC correctly state that the NHS Trusts cannot make section 80 claims …*'.
>
> Therefore, I must inform you that HMRC are unable to hold a claim on file for your client because you have not asserted a credible basis for making it under current UK law."

11. RSM responded to HMRC in a letter dated 14 July 2023. The letter set out RSM's understanding of the *Isle of Wight case* and said that the claim that the Trust was making was in line with that decision. The final two sentences of the letter were as follows:

> "In this way, we have proved our client has a relevant financial interest, and as such intend to submit details of this claim directly to the tribunal pending the outcome of this case.
>
> As we are on all fours with the category 3 appellants, and whether or not acknowledged by HMRC, we consider our claim has been received by HMRC on 27 March 2023and intend to make a submission directly to the tribunal to stand behind *Isle of Wight NHS Trust & others v HMRC* [2023] UKFTT 23."

12. On 27 July 2023, HMRC wrote again to RSM. The main paragraph of the letter was as follows:

> "HMRC's position in respect of your client's purported 'claim' remains as set out in my letter dated 2 May 2023. Our view is that the Isle of Wight decision does not support any entitlement for a customer in a transaction (an NHS body) to submit a 'claim' to HMRC. On the issue of standing, the decision found that the appellants had standing to bring an appeal to the Tribunal against a decision by HMRC on the VAT liability of supplies".

13. On or shortly after 18 September 2023, Mr Hugh Cronshey, Associate Director of Finance at the Trust, submitted a notice of appeal to the FTT using form T240 on behalf of the Trust.

14. In response to question 3 (Do you have someone to represent you?) in the notice of appeal, the Trust had ticked the box to say that it did not have a representative and it left question 4 (Your representative's details) blank.

15. The Trust stated that it did not have a review conclusion letter and wanted HMRC to repay £937,288.56. Question 16 on the notice of appeal asks whether the person is appealing in time and explains in a side note that the relevant time limit for appealing is 30 days from the date of the decision. The Trust ticked the box that said it was in time to appeal.

16. In the box for its grounds of appeal, the Trust wrote:

> "Claim of overpaid output tax in relation to VAT incurred on locum doctors.
>
> Further to the recent First-tier Tribunal (FTT) decision in Isle of Wight NHS Trust & others v HMRC [2023] UKFTT 23, we would like to register a claim to stand behind the outcome of a further case by the same appellants considering the merits as to whether item 5, Group 7 Schedule 9 VAT Act 1994 must exempt purchases of temporary locum doctors. We understand that this claim will not be processed until such point that a final decision is reached in relation to the issues outlined by the appellants in the above-mentioned proceedings.
>
> Usually, the mechanism for recovering overpaid output tax on a supply would be via the supplier. The supplier in turn would submit a claim to HMRC under section 80 of the VAT Act 1994. However, in this instance, HMRC's very clear policy on supplies of locum doctors contradicts the wording of the law in the UK, and thus our client's suppliers, understandably, will not refund any VAT until HMRC alter their policy.
>
> As was determined by the court in the Isle of Wight case, as the recipient of the services has no clear prospect of HMRC approving any s.80 claim made by the supplier, we hold sufficient financial interest to submit a claim directly.
>
> We therefore include an appendix within our original letter summarising the VAT incurred on locum doctors in the immediate four-year period, in order to time-protect this VAT in the event Isle of Wight NHS Trust & others are successful in litigating that supplies of temporary doctors should indeed have been VAT exempt by virtue of item 5, Group 7.
>
> It is our understanding the figures enclosed in the Appendix (£937,288.56) relate to VAT incurred, where no VAT was reclaimed under s41(3) or s25/26, for the hire of locum workers. We can undertake further verification should the principle be agreed to rebate the VAT costs directly. The locums also include temporary locums hired either for additional capacity or to stand-in for existing roles."

17. In response to the question about what outcome the appellant would like, the Trust stated:

> "HMRC's view is that the Isle of Wight decision does not support any entitlement for a customer in a transaction (an NHS body) to submit a 'claim' to HMRC. We understand the usual position would be for the supplier to make a section 80 claim but this route is impossible for our NHS client to pursue in respect of obtaining a refund (as per HMRC's clear policy). We intend to stand behind Isle of Wight NHS Trust & others v HMRC [2023] UKFTT 23."

18. In the document checklist in the notice of appeal, the Trust ticked the box to say that it enclosed the original notice letter or decision document and also stated that it enclosed their original submission to HMRC.

19. Puzzlingly, the Trust also ticked the box which stated that it authorised the representative named in question 4 but, as stated above, the notice of appeal said that the Trust did not have a representative and the answer to question 4 was a blank. The form was signed by Mr Cronshey. The question of representation and authorisation was subsequently resolved when Mr Cronshey submitted a Form T239 on or around 17 October 2023 authorising RSM to represent the Trust in the appeal.

20. On 30 October 2023, the FTT wrote to RSM but I have not been provided with a copy of that letter and there does not seem to be one on the FTT's file for this appeal. It seems from RSM's response (see next paragraph) that, in the letter, the FTT was questioning whether the Trust had made a valid appeal.

21. RSM responded in a letter dated 14 November 2023, sent by email on 15 November, as follows:

> "We write in response to your letter dated 30 October 2023 with the intent to lodge an appeal for the above-named client. This submission is intended to be a clarification of the original submission, rather than a new submission.
>
> Our client wishes to stand behind the case of *Isle of Wight NHS Trust & others v HMRC* [2023] UKFTT 23 [TC08682], pending its outcome, on the basis our client's circumstances are identical to those outlined in the case. As in the case of *Isle of Wight NHS Trust & others v HMRC* [2023] UKFTT 23 [TC08682], HMRC have not provided our client with a statutory decision and timeframe with which to comply. For completeness, we enclose our correspondence with HMRC [the letters dated 2 May 2023 and 27 July 2023], in which HMRC have refused to accept a section 80 claim from our client pending the outcome of the above-mentioned decision.
>
> We highlight this notice of appeal is also being lodged on the same procedural and tax basis as the appellants in the case of *Isle of Wight NHS Trust & others v HMRC* [2023] UKFTT 23 [TC08682]. In the decision of *Isle of Wight NHS Trust & others v HMRC* [2023] UKFTT 23 [TC08682], the FTT made it clear that NHS Trusts were and are the recipients and bore the VAT costs relating to locum doctor charges, thus have a financial interest. The judge agreed that someone other than a taxpayer who has been notified of a decision can bring an appeal if they have standing by virtue of section 83G(1)(a)(ii) VATA 1994; hence our application on behalf of the above-named client.
>
> Further, we have notified HMRC of our intention to lodge an appeal and have received no objections.
>
> If anything, further is required to lodge our client's appeal at this time, please let us know."

22. On 9 January 2024, the FTT acknowledged receipt of the Trust's appeal and directed that it be stayed until 60 days after the release of the FTT decision in the appeal of Isle of Wight NHS Trust with reference TC/2021/03151.

23. On 23 May 2024, HMRC applied to the FTT for a direction striking out the Trust's appeal under to Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules') on the ground that the FTT does not have jurisdiction in relation to the appeal. The FTT asked for the Trust's submissions on HMRC's application which were

provided by RSM in a letter dated 17 June 2024. HMRC submitted a response to the Trust's submissions on 11 July. Both parties were content for this application to be dealt with on the papers.

SUBMISSIONS

24. HMRC's primary submission is that there is no appealable decision within section 83 VATA in this case and thus the FTT does not have any jurisdiction and is required by Rule 8(2)(a) of the FTT Tax Rules to strike out the proceedings. HMRC say the letters from RSM and the Trust's notice of appeal show that the Trust is seeking to make a claim for repayment of £937,288.56 VAT paid by the Trust to third party suppliers for supplies of locum doctors made to it in VAT periods 03/19 to 11/22. There is no right of appeal against a refusal by HMRC to accept a claim by a recipient of a supply for a repayment of overpaid VAT because that refusal is not a matter within section 83 VAT Act 1994. This was confirmed by the Upper Tribunal in *HMRC v Earlsferry Thistle Golf Club* [2014] UKUT 250 at [21] and [22].

25. HMRC accept that the Trust could have appealed against HMRC's decision dated 3 August 2021 in the *Isle of Wight* case that supplies of locum doctors are not exempt from VAT. HMRC submit, however, that the Trust has not made any appeal against that decision.

26. HMRC's secondary submission is that, if there is an appealable decision, the Trust's appeal was made late. That remains the case whether the Trust is found to have appealed against HMRC's decision dated 3 August 2021 in the Isle of Wight case or against HMRC's letters to RSM of 2 May and 27 July 2023.

27. The Trust contends that HMRC are wrong to interpret the reference in their notice of appeal to a "claim for overpaid output tax in relation to VAT incurred on locum doctors" as meaning that the appeal related to a claim by the Trust under section 80 VATA for a repayment of overpaid VAT. The Trust submits that the appeal was made on the same basis as the appeals by the Category 3 appellants in the Isle of Wight case. The Trust says that its appeal is against HMRC's decision in that case which is a matter within section 83 VATA. Although that decision is not specifically mentioned in the notice of appeal, the Trust maintains that it was incorporated by referencing the *Isle of Wight* case. The Trust also submits that RSM's letter of 14 November 2023 clearly explained that the notice of appeal was submitted under section 83 VATA rather than section 80. The Trust asserts that it is not seeking to appeal against HMRC's letters to RSM of 2 May and 27 July 2023 because there was no need for the Trust to ask HMRC to make a decision when they had already made their position clear in their letter dated 3 August 2021 referred to in the *Isle of Wight* case.

28. The Trust made no submissions on why, as stated in the notice of appeal, the appeal was in time or, if not, why the Trust should be permitted to make a late appeal.

DISCUSSION

29. The FTT does not have jurisdiction to hear an appeal against a decision of HMRC not to accept a claim for overpaid VAT from a recipient of a supply because there is no right of appeal against such a decision in section 83 VATA. A recipient of a supply, such as the Trust in this case, cannot make a section 80 VATA claim for repayment of VAT. Only the supplier can make such a claim and only the supplier has a right of appeal under section 83(1)(t) if the claim is refused. That is clear from the Upper Tribunal's decision in the *Earlsferry Thistle Golf Club* case which is binding on me. In any event, the Trust says that it is not seeking to appeal against a refusal of a claim under section 80 VATA.

30. The Trust maintains that it is appealing against HMRC's decision in the *Isle of Wight* case. HMRC accept that the Trust can appeal against that decision but submit that it has not done so and is now out of time. I agree that the Trust could appeal against HMRC's decision

dated 3 August 2021, concerning the VAT liability of the supply of locum doctors, in the same way as the Category 3 appellants referred to in the FTT's decision in the *Isle of Wight* case. HMRC's decision in that case was a decision on the VAT chargeable on the supply of any goods or services which is an appealable matter within section 83(1)(b) VATA. The Trust maintains that is what it has done but I do not accept that.

31. In my view, the correspondence between RSM and HMRC and the wording of the notice of appeal can only be read as concerning a claim by the Trust under section 80 VATA for repayment of overpaid VAT.

32. The first line of the Trust's grounds in its notice of appeal is "Claim of overpaid output tax in relation to VAT incurred on locum doctors". The grounds also referred to an appendix which summarised "the VAT incurred on locum doctors in the immediate four-year period, in order to time-protect this VAT in the event Isle of Wight NHS Trust & others are successful" in their appeal. In the notice of appeal, the Trust stated that it wanted HMRC to repay £937,288.56. The Trust's response to the question in the notice of appeal asking what outcome the appellant would like is opaque. I infer from it and from the reference to "time-protect" in the grounds that the Trust wanted HMRC to accept its claim so that the limitation period for such claims ceased to run and for its claim not to be processed until the final outcome in the *Isle of Wight* case had been determined.

33. I do not accept the Trust's submission that RSM's letter to the FTT dated 14 November 2023 clearly explained that the notice of appeal was submitted under section 83 VATA rather than section 80. In fact, the letter specifically stated that "HMRC have refused to accept a section 80 claim from our client" and enclosed HMRC's letters dated 2 May 2023 and 27 July 2023 in which HMRC repeatedly refused to entertain a section 80 claim by the Trust. There is no mention of section 83 in the letter of 14 November.

34. The letter of 14 November did refer to section 83G(1)(a)(ii) as conferring standing to appeal on someone other than a taxpayer who has been notified of a decision. In fact, section 83G(1)(a)(ii) does not confer standing and Judge Scott did not say that it did in the *Isle of Wight case*. Section 83G(1)(a)(ii) sets the time limit for an appeal to be brought by a person who does not have a document notifying the decision to which the appeal relates. The section only applies where a person already has standing to bring an appeal. At [96] of the decision in the *Isle of Wight case*, Judge Scott said "… provided [a Category 3 appellant] could prove its financial interest, as with the other two categories of appellants, it would have standing."

35. At no point in the correspondence did the Trust ask HMRC for a ruling on whether VAT was chargeable on the supply of locum doctors and HMRC's letters dated 2 May and 27 July 2023 did not constitute or contain any decision on the VAT treatment of such a supply.

36. As the Trust has sought to appeal against the refusal by HMRC to accept its claim for a repayment of VAT and, as already discussed, that is not an appealable matter, it follows that the FTT does not have jurisdiction and the appeal must be struck out.

37. If I had not struck out the appeal for want of jurisdiction but had found that the Trust had appealed against HMRC's decision dated 3 August 2021 referred to in the FTT's decision in the *Isle of Wight case*, I would have refused to admit the appeal on grounds of lateness. The Trust does not have a copy of that decision. Section 83G(1)(a)(ii) provides that a person who does not have a document notifying the decision to which the appeal relates must bring an appeal within 30 days of the date that person becomes aware of the decision. The Trust was clearly aware of HMRC's decision dated 3 August 2021 when it first wrote to HMRC on 27 March 2023, because that letter refers to "the recent First-tier Tribunal (FTT) decision in Isle of Wight NHS Trust & others v HMRC [2023] UKFTT 23" and the decision

sets out the text of HMRC's letter of 3 August 2021 in full at [19]. Assuming in the Trust's favour that it first became aware of the *Isle of Wight case* and HMRC's decision on the day that RSM first wrote to HMRC, the time limit for appealing expired on 26 April 2023. The Trust first lodged its appeal on or shortly after 18 September 2023 which was 145 days after the time for appealing had expired.

38. Where an appeal is made after the period for appealing has expired, rule 20(4)(a) states that the notice of appeal must include a request for permission to make a late appeal and the reason why the appeal had not been notified in time. Rule 20(4)(b) provides that if the FTT does not give permission then it must not admit the appeal. In this case, the Trust ticked the box on its notice of appeal that said it was in time and did not make any application for permission to appeal late. Further, no such application has been made at any point. Accordingly, the FTT is required by rule 20(4) to refuse to admit the appeal.

39. In conclusion, the Trust's appeal must be struck out under rule 8(2)(a) of the FTT Rules because there is no right of appeal under section 83 VATA against HMRC's refusal to accept the Trust's claim for repayment of VAT paid by it and, therefore, the FTT has no jurisdiction in relation to the matter. If the Trust's appeal had concerned a matter within section 83, it cannot be admitted because the appeal was made out of time and the Trust has not made an application for permission to make a late appeal.

DISPOSITION

40. HMRC's application is granted and the Trust's appeal is struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

41. 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.

JUDGE GREG SINFIELD
CHAMBER PRESIDENT

Release date: 13th August 2024