Neutral Citation: [2025] UKFTT 20 (TC)

Case Number: TC09392

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/01173
TC/2023/16484

Procedure – Case management – Appellants applications to (i) amend grounds of appeal to include a new appeal; (ii) admit late appeal; (iii) to amend grounds of appeal to expressly refer to time limits and validity of assessments; and (iv) for appeal to be determined by reference to sample documents – Respondents' application to amend Statement of Case

Heard on: 19 December 2024
Judgment date: 8 January 2025

Before

TRIBUNAL JUDGE BROOKS

Between

TRENBE UK LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ben Elliot of counsel, instructed by PricewaterhouseCoopers LLP

For the Respondents: Howard Watkinson of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This case management hearing was listed in July 2024 to determine two applications made by the Appellant, Trenbe UK Limited ("Trenbe"). The first, made on 20 October 2023 was to amend its grounds of appeal to include appeals against assessments for VAT periods 12/20 – 08/22 and the second, made on 9 November 2023, was for its appeal (made on 9 November 2023, also against the VAT assessments for 12/20 – 08/22) to be admitted out of time.

2. Subsequent to those applications being listed, Trenbe has made two further applications:

   (1) On 2 December 2024, to expressly include wording relating to time limits and the validity of the assessments; and

   (2) On 3 December 2024, that the Input Tax Issue and Output Tax Issue (as defined below) be determined by reference to sample documents.

3. On 10 December 2024, the Respondents, HM Revenue and Customs ("HMRC") made an application to amend their statement of case ("SOC") to remove erroneous references to time limits as the assessments to which these applied have been withdrawn.

4. As this case management hearing was already listed, I directed that the December applications also be determined at this hearing.

5. With the consent of the parties, the hearing was held remotely by video over Microsoft Teams as it was more practical for the parties to attend remotely. The documents to which I was referred were an electronic hearing bundle of 366 pages, an authorities bundle of 703 pages and skeleton arguments of the Appellant and Respondents of 24 and 26 pages respectively

6. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Background

7. The following summary of the background facts, which is taken from the documents provided and submissions on behalf of the parties, is to put the Applications and my decision in context. Nothing below should be taken as a finding of fact for the purposes of the substantive appeal.

8. Trenbe, which makes monthly VAT returns, is a subsidiary of Trenbe Inc, a company registered in South Korea. The primary operation of Trenbe Inc is the sale of luxury fashion items to private individuals in South Korea and the majority of its sales are conducted via its online platform, known as 'Trenbe Garden'. During the material periods, Trenbe operated from its business premises in London. On receipt of an order, its role was to source the item and arrange for it to be shipped to South Korea.

9. Trenbe made its supplies to Trenbe Inc (not to Trenbe Inc's customers) and did not have any direct contact with the customers. It is Trenbe that is responsible for shipping/exporting the goods to South Korea.

10. During the course of an investigation by HMRC into Trenbe's VAT position, which commenced in 2021, two issues were identified:

    (1) The "Output Tax Issue" – whether the supplies made by Trenbe (to Trenbe Inc), met the conditions in VAT Notice 703. HMRC contend that they do not and Trenbe is therefore not entitled to zero-rate its supplies (which have been standard rated).

(2) The "Input Tax Issue" – whether, as it did not hold valid VAT invoices for all of the supplies on which input tax had been reclaimed, Trenbe was only entitled to claim the input tax if HMRC exercised its discretion to permit it to rely on alternative evidence.

11. A letter containing five schedules, addressing both the Output Tax Issue and the Input Tax Issue, headed "Notice of VAT assessments and overdeclarations", was issued to Trenbe by HMRC on 23 September 2022 (the "23 September Letter").

12. The 23 September Letter explained that Schedule 1 contained output tax assessments for the VAT periods 04/17 – 06/20; Schedule 2 contained input tax assessments, for the periods 10/19 – 11/20 restricting input tax to 21% of that claimed by Trenbe; Schedule 3, which also covered VAT periods 10/19 – 11/20 contained assessments fully restricting input tax claimed by Trenbe. The total of the assessed sums detailed in Schedules 1-3 was £5,419,998.

13. Schedules 4 and 5 to the 23 September Letter concerned the Input Tax Issue for the periods 12/20 – 07/22. Schedule 4 restricted the input tax to 21% of the amounts claimed and Schedule 5 restricted the input tax by 95%. The 23 September Letter stated, in relation to Schedules 4 and 5 that:

> "These represent the treatment of VAT on the periods held on file and I will notify you separately of how these VAT periods will be concluded."

14. Having described the contents of each Schedule, the 23 September Letter stated:

> "**Summary**
>
> As a result of these assessments and overdeclarations, the total VAT due is £5,419,998.00. Please pay this amount now. Details of how to pay are shown later in this letter."

15. Although HMRC sent the 23 September 2022 letter by post it was not received by Trenbe which had changed its address.

16. A further 20 letters were sent by HMRC to Trenbe on 26 September 2022 (the "26 September Letters"). These too were sent by post and not received by Trenbe. The 26 September Letters were headed "Change to the amount claimed on VAT return and notice of penalty assessments" (although did not impose penalties) and all related to the 20 VAT periods 12/20 – 7/22. Unlike the 23 September 2022 Letter, none of the 26 September Letters referred to an assessment although each contained notice of the rights of review and appeal.

17. On 11 October 2022 HMRC notified Trenbe of a change to the amount claimed on its VAT return for VAT period 08/22 (the "11 October Letter"). That letter, which did not refer to an assessment, again contained notice of the rights of review and appeal.

18. At the hearing it was accepted, for the first time, that the 26 September Letters and the 11 October Letter were not assessments as neither demanded payment from Trenbe (see *Aria Technology Ltd v HMRC* [2020] STC 782 at [43]). However, HMRC now say that, although not assessments, the 26 September Letters and the 11 October Letter were nevertheless decisions of HMRC to restrict the amount of input tax to be credited to Trenbe and therefore appealable under s 83(1)(c) of the Value Added Tax Act 1994 ("VATA").

19. On 21 December 2022 Trenbe notified HMRC that it had not received the "paper letters" and asked HMRC to send them by email. In response HMRC sent both the 23 September Letter and the 26 September Letters. On 10 January 2023, HMRC issued a penalty assessment in the amount of £1,161,466.34 under Schedule 24 to the Finance Act 2007 in respect of the periods 12/20 – 08/22.

20. On 17 February 2023, Trenbe's representative, PricewaterhouseCoopers LLP ("PwC"), appealed to the Tribunal enclosing the 23 September Letter. The Notice of Appeal stated that it appealed against:

> "[T]he decision of the Commissioners for His Majesty's Revenue and Customs (the "Respondents" or "HMRC") to raise an assessment in the amount of £5,419,998 for the VAT periods 04/18 to 11/20 (the "Relevant Period"), notified to the Appellant in a letter dated 23 September 2022 (the "Decision")."

21. There was no further reference in the Notice of Appeal to any other decision that it sought to appeal. In particular, the Notice of Appeal did not appeal against any decision in relation to individual VAT periods 12/20 – 08/22, either by reference to any asserted decision to restrict input tax claimed in those VAT periods, or by reference to any of the "assessments" notified by HMRC to Trenbe for those VAT periods. There was no objection to the appeal being late.

22. On 22 March 2023, HMRC issued their review conclusion in respect of the penalty assessment and upheld the penalty. On page 4 (of 9) the letter stated:

> "The decisions to deny you 79% of the input tax claimed covering VAT periods 12/20 to 08/22 have not been disputed".

23. A letter from HMRC to Trenbe, dated 20 April 2023, headed "Amendment to Assessment of VAT" stated:

> "Following an internal review of the above assessments made on 26/09/2022, 27/09/2022 and 11/10/2022 we now provide notice to amend the assessment made."

24. In response, in an email of 4 May 2023 to HMRC, PwC stated that it was understood that:

> "• The assessment currently raised by HMRC covers the VAT periods 04/18 to 11/20, and is in the amount of £5,419,998 (notified to the Appellant on 23 September 2022).
>
> • …, this assessment has been appealed to the Tribunal and HMRC have confirmed the grant of hardship to the amount of the assessment.
>
> • Your [HMRC's] letter refers to assessments made on 26/09/2022, 27/09/2022 and 11/10/2022, however we do not understand further assessments to have been made on these dates
>
> • can you please clarify? …."

25. HMRC replied on 15 May 2023, saying that most of what PwC on behalf of Trenbe had said "seems correct", but that it might be best if there was a telephone call to clarify matters. On 23 May 2023 HMRC sent PwC a spreadsheet clarifying the VAT account in relation to assessments and credits which showed that there were assessments for VAT periods 12/20 – 08/22. A further spreadsheet was sent by HMRC to PwC on 24 May 2023 with totals added which indicated that there were assessments for VAT periods 12/20 – 08/22, with a total liability exceeding £4.1 million.

26. On 15 June 2023, HMRC issued a letter headed "Amendment to Assessment of VAT" withdrawing the output tax assessments for the periods 04/18 – 08/18 on the basis that these were out of time.

27. On 26 June 2023, PwC applied to amend Trenbe's Notice of Appeal to include an appeal against the "Amended Assessment" issued on 20 April 2023 and the "Further Amended

Assessment" made by HMRC on 15 June 2023. The application enclosed an Amended Notice of Appeal that appended HMRC's correspondence dated 20 April 2023 and 15 June 2023.

28. On 29 June 2023, HMRC confirmed that there was no objection to Trenbe's application to amend its notice of appeal.

29. On 15 September 2023, HMRC filed their Consolidated Statement of Case in which:

(1) HMRC stated (at paragraph 1.8) that the decisions under appeal consisted of the assessment issued on 23 September 2022 (comprised in Schedules 1 and 3 of that letter) and also stated that HMRC had issued further assessments on 26 September 2022 and 11 October 2022 which had not been appealed;

(2) At paragraphs 6.1-6.8, HMRC addressed the validity of the assessments by reference to the principles on best judgment and time limits (under the heading "The law in relation to assessments, best judgment and time limits").

30. On 4 October 2023, PwC wrote to HMRC contesting their position that certain decisions were not the subject of the appeal. On 12 October 2023, HMRC's solicitor responded, stating that:

(1) the 23 September Letter had only included assessments for the period 04/18 -11/20 (not 12/20 – 08/22),

(2) HMRC's view was that the 26 September Letters contained assessments for the periods 12/20 – 07/22, and

(3) HMRC's position was that those periods had never been appealed.

31. On 20 October 2023, Trenbe applied to amend its grounds of appeal to expressly include any decisions relating to input tax for the periods 12/20 – 08/22 and enclosed a Further Amended Notice of Appeal.

32. On 1 November 2023, HMRC filed an objection to Trenbe's application to amend its grounds of appeal to challenge the assessments for the periods 12/20 – 08/22 stating (in summary):

(1) The 23 September Letter did not include assessments in relation to the periods 12/20– 08/22;

(2) "On 26.9.22 HMRC then notified the Appellant of changes to amounts claimed on its VAT returns for periods 12/20 – 07/22 inclusive, each of which contained notice of the rights of review and appeal";

(3) Trenbe's original notice of appeal and amended notice of appeal had not been in respect of the assessments for the periods 12/20 – 08/22; and

(4) Trenbe required permission to make a late appeal. HMRC's position was that the application should be refused.

33. On 9 November 2023, Trenbe protectively notified a separate appeal to the Tribunal in respect of the periods 12/20 – 08/22. This included an application for the appeal to be made out of time. The grounds of appeal are materially identical to those in the original notice of appeal in relation to recovery of input tax.

34. On 22 March 2024, HMRC objected to Trenbe's application to make a late appeal. On 22 April 2024, HMRC requested that the application be dealt with as a preliminary issue. On 3 May 2024, the Tribunal directed that Trenbe's application to amend its grounds of appeal and its application for permission to appeal out of time should be listed for a hearing.

35. A Notice of Hearing was issued on 15 July 2024 notifying the parties of a video hearing (with a one day time estimate) on 19 December 2024. As noted above, subsequent applications by Trenbe and HMRC were made in December 2024 which are also to be determined.

36. Turning to the applications:

Trenbe's Application of 20 October 2023

37. By this application Trenbe seeks to amend its grounds of appeal to include appeals against assessments for VAT periods 12/20 – 08/22.

38. It is common ground that, provided there is compliance with Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, including provision of the details prescribed in Rule 20(2), it is not necessary for an appellant to complete the Tribunal's online "T240 Notice of Appeal" form for there to be a valid Notice of Appeal (although doing so not only assists the Tribunal but also ensures compliance with Rule 20).

39. For HMRC, Mr Watkinson contends that it is not possible for an appeal to be made against a completely different decision of HMRC by way of an application to amend existing grounds of appeal that relate to another decision (see *Wetheralds Construction Ltd v HMRC* [2016] UKFTT 927 (TC) at [138]).

40. While this must be correct, I also agree with Mr Elliott who contends that as all the information complying with Rule 20 was provided in Trenbe's application, there is no reason why it should not be treated as being a valid Notice of Appeal, albeit late, to which the principles as set out in *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*") should be applied to determine whether it should be admitted or not.

41. In *Martland* the Upper Tribunal considered, at [44] – [47] of the decision, the legal principles to be applied by the First-tier Tribunal ("FTT") when exercising its judicial discretion as to whether to admit a late appeal. In summary, and insofar as material to the present application:

> (1) the FTT must remember that the starting point is that permission should not be granted unless it is satisfied on balance that it should be.
>
> (2) when considering that question, the FTT can usefully follow the three-stage process set out in *Denton*:
>
> > (i) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being 'neither serious nor significant'), it 'is unlikely to need to spend much time on the second and third stages';
> >
> > (ii) Establish the reason (or reasons) why the default occurred; and
> >
> > (iii) Evaluate 'all the circumstances of the case'. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> (3) the balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

(4) In carrying out the balancing exercise the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice.

(5) It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal (see *Hysaj, R (in the application of) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 ('*Hysaj*'))

(6) It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail.

(7) Where an appeal has some merit, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

Length of Delay

42. In adopting a three stage approach, there is a dispute between the parties as to the length of the delay in this case.

43. Mr Watkinson contends that, as they contained appealable decisions, any appeal should have been made within 30 days of the 26 September Letters and 11 October Letter. As this application was made on 23 October 2023 it is over a year late which, he contends, is a serious and significant delay (see *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC). Mr Elliott contends that as HMRC's letter of 20 April 2023 amended the "assessment", it was not final until then. It is that date, 20 April 2023, from which any delay must be calculated.

44. Assuming that is right, there is still a delay of just over six months which cannot be dismissed as 'neither serious nor significant' and, as such, it is necessary to consider the second and third *Martland* stages.

Reason for Default

45. The reason given for the default was, Mr Elliott contends, the confusion caused by the issue of "assessments" by HMRC which, until the hearing on 19 December 2024, maintained their validity. This confusion, he says, is clear from the correspondence between the parties, particularly that between HMRC and PwC referred to at paragraphs 24 and 25, above. In this correspondence PwC sought clarity on whether its understanding that no assessments were made by HMRC on 26 and 27 September 2023 and 11 October 2023. Despite what HMRC now contend, their response at the time was that PwC's understanding "seems correct".

46. Mr Watkinson contends that despite the references to "assessments" in the 26 September Letters and 11 October Letter it ought to have been clear to PwC at an earlier stage that there had not been an appeal covering the 12/20 – 08/22 VAT periods. He refers, by way of example to the Penalty Review Conclusion Letter of 22 March 2023 (see paragraph 22, above) which clearly stated that these periods had not been disputed. Accordingly, he contends that Trenbe has failed to advance a good reason for the default.

All the Circumstances of the Case

47. Having regard to all of the circumstances of the case, in particular a late appeal should not be admitted unless I am satisfied that, on balance, it should, and taking into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost with proper respect for the statutory time limits, I have come to the conclusion that, given the clear confusion that has arisen regarding the status of the 26 September Letters and 11

October Letter, with HMRC maintaining until the hearing that they contained "assessments" that, despite the delay, the appeal should be admitted out of time.

48. In addition to that confusion, the new appeal in respect of Trenbe's 12/20 – 08/22 VAT periods does not raise any new matters that are not already in issue between the parties in the current proceedings which are at an early stage (there has been no exchange of evidence and the current appeals have not been listed).

49. I also recognise the prejudice to Trenbe if it were not permitted to appeal against a VAT liability of over £4m which the FTT could possibly determine was not due (given the same arguments will be made in relation to other periods which are subject of the ongoing appeal). While, as the Upper Tribunal recognised in *HMRC v Katib* [2019] STC 2106 at [60], this would not of itself be sufficient grounds for permitting a late appeal but should be considered especially when contrasted with the lack of prejudice to HMRC which, other then the inclusion of additional VAT periods, will have to meet the same case as in the ongoing appeals.

50. As such, the application, which amounts to a new appeal is allowed and that appeal is admitted out of time.

Trenbe's Application of 9 November 2023

51. This application by Trenbe, that its appeal, made on 9 November 2023 be admitted notwithstanding it was made outside the 30 day statutory limit (see s 83G VATA 1994), was, as noted above (at paragraph 33), a protective appeal which was made in addition to its 20 October 2023 application concerning the periods 12/20 – 08/22.

52. In view of my conclusion above, in relation to the 20 October 2023 application, it is not necessary to determine this application.

Trenbe's Application of 2 December 2024

53. By this application, Trenbe seeks to amend its notice of appeal to expressly include wording relating to time limits and the validity of the assessments. In particular, Trenbe contends that HMRC were out of time to raise the Decision and Amended Assessment and wishes to rely on the new principle arising out of the decision in *Go City Ltd v HMRC* [2024] UKFTT 745 (TC).

54. Mr Elliott contends that both this application and HMRC's application to amend the SOC be allowed at such an early stage in proceedings. However, given it is now agreed that, although erroneously referred to as "assessments" to which time limits apply and that *Go City* is applicable to assessments, I agree with Mr Watkinson that the amendments sought do not have a real prospect of success (see *SPI North Ltd v Swiss Post International (UK) Ltd and another* [2019] EWHC 2004 (Ch)).

55. As such, this application is therefore dismissed.

Trenbe's Application of 3 December 2024

56. Under this application, Trenbe seeks a direction that the appeal (both in relation to the Input Tax Issue and the Output Tax Issue) be determined by reference to sample documents. In particular, Mr Elliott contends that as Trenbe had purchased and exported approximately 5,000 items per month on average over the periods concerned, the consideration of all of the evidence by the parties and the Tribunal would be impractical. He therefore contends that the parties should be directed to seek to agree an appropriate sampling methodology.

57. Although, given the quantity of transactions concerned, I have some sympathy with Mr Elliott in relation to sampling, I accept Mr Watkinson's argument in relation to the Output Tax Issue that, while he accepts that HMRC had made their decisions on the basis of samples, because of the inconsistent approach by Trenbe to the issue, in the application it refers to the

need for the facts to be assessed on a “transaction by transaction basis”, such an approach is not appropriate. Mr Watkinson also contends that unless HMRC is able to see all of the documents, as they are entitled (see *Horizon Contracts Ltd v HMRC* [2024] UKFTT 348 (TC) at [12] – [19]), it is not possible for a common approach to sampling to be agreed.

58. With regard to the Input Tax Issue, he contends that as the grounds of appeal are against HMRC’s decision, under Regulation 29 of the Value Added Tax Regulation 1995, not to exercise their discretion to accept alternative evidence sampling is not appropriate.

59. Given HMRC’s position, I consider it premature to make any direction regarding sampling. However, having come to such I conclusion I would hope that before any hearing, or indeed the provision of listing information to the Tribunal, the parties would be able to reach a common approach on this issue having regard to their obligation to assist the Tribunal to further the overriding objective (see Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

60. The application is therefore dismissed.

HMRC’s Application of 10 December 2024

61. HMRC apply to amend the SOC of case by deleting erroneous references to time limits as the assessments to which these applied have been withdrawn. Given that the decisions to which those references applied have been withdrawn, there is no reason for them to remain in the SOC.

62. As such HMRC’s application is allowed.

SUMMARY OF CONCLUSIONS:

63. In summary, in relation to each of the applications:

(1) Trenbe’s application dated 20 October 2023, to amend its grounds of appeal, which has been treated as an application to admit an new appeal out of time, is ALLOWED.

(2) In the light of the decision in (1) above, it is not necessary to determine Trenbe’s application dated 9 November 2023, that its appeal be admitted out of time.

(3) Trenbe’s application dated 2 December 2024, to further amend its grounds of appeal to expressly include wording relating to time limits and the validity of the assessments is DISMISSED

(4) Trenbe’s application dated 3 December 2024, for a direction that the parties attempt agree a sampling methodology to enable the appeal to be determined by reference to sample documents is DISMISSED.

(5) HMRC’s application dated 10 December 2024, to amend the statement of case is ALLOWED.

DIRECTION

64. The parties are directed, in the light of the above conclusions, to liaise and agree case management directions for the further progress of this matter and, by not later than 56 days, provide the proposed agreed directions (or their separate proposed case management directions in the absence of agreement) to the Tribunal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

65. 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.

Release date: 08th JANUARY 2025