[2018] UKFTT 0006 (TC)

TC06285

Appeal number: TC/2016/04621

PROCEDURE – application for witness summons and orders and for disclosure – refused – Tribunal of its own motion minded to strike out appeal on grounds of no reasonable prospect of success, subject to representations – representations made and appeal struck out.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID JAMES SMITH **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Taylor House London EC1 on 4 September 2017 with further written representations on 5 October 2017

The Appellant in person

Ms Akua Adusei, Litigator Solicitor's Office and Legal Services, for the Respondents

DECISION

1. This was an application by Mr David James Smith ("the appellant") for a summons requiring two officers of the respondents ("HMRC") to attend the hearing of his appeal and an order requiring HMRC to produce certain files and records and to make a "good character" statement as an alternative to certain records.

2. I declined to issue the summons and make the order, and after announcing my decision I informed the appellant that I was minded to strike out his appeal on the basis that it had no realistic prospect of success. I gave the appellant the opportunity to make representations in writing to say why I should not strike out the appeal, and he did so.

3. I have decided to strike out the appeal. This decision contains my reasons for my not issuing the summons or making the order and for striking out. They are essentially the same for both.

Facts

4. Here I set out some undisputed facts giving the background to the appellant's application.

5. The appellant registered for VAT from 1 April 2000. His profession was that of freelance journalist. He is also an author.

6. In 2011 he applied to join the Flat Rate Scheme ("FRS") for VAT and chose a rate of 11%.

7. On 16 November 2015 HMRC informed the appellant that they would check his VAT returns for the period 01/12 to 04/15 (that is the prescribed accounting periods of three months ending on 31 January 2012 and so on).

8. The appellant provided the records sought by letter of 21 November 2015.

9. On 30 November 2015 a "pre-assessment letter" was sent to the appellant asking him to check HMRC's calculations of additional VAT due. This arose because the appellant had applied the flat rate scheme percentage to his net turnover (ie before adding VAT to the amount of any invoice).

10. On 11 December 2015 the appellant wrote to HMRC to explain why he had used net turnover in his calculations.

11. On 6 January 2016 HMRC sent the appellant a notice of assessments for the periods 01/12 to 04/15 in the sum of £2,868.

12. On 6 February 2016 the appellant asked for a review of the decision to assess.

13. On 5 March 2016 the appellant sent a letter of complaint to HMRC.

14. On 4 August 2016 HMRC wrote to the appellant with the conclusion of their review which was to uphold the decision to assess.

15. On 5 August 2016 HMRC responded to the appellant's complaint: it was not upheld.

16. On 26 August 2016 the appellant appealed to the Tribunal

17. On 2 May 2017 the appellant sought the summons and order.

18. On 5 June 2017 HMRC sent the appellant a witness statement of one of the officers of HMRC for whom a summons was sought.

19. On 9 June 2017 HMRC (Ms Adusei) wrote to the appellant explaining why the witness summons and disclosures were not necessary.

20. On 12 June 2017 the appellant responded to Ms Adusei's letter.

Law

21. The FRS allows a person within it to apply a percentage lower than the standard rate to their turnover to find the amount of VAT due without having to claim input tax credit for all the individual items of VAT that he been incurred on purchases.

22. Section 26B(2)(c) Value Added Tax Act 1994 ("VATA") defines "relevant turnover", that to which the percentage is applied thus:

> "(1) The Commissioners may by regulations make provision under which, where a taxable person so elects, the amount of his liability to VAT in respect of his relevant supplies in any prescribed accounting period shall be the appropriate percentage of his relevant turnover for that period.
>
> A person whose liability to VAT is to any extent determined as mentioned above is referred to in this section as participating in the flat-rate scheme.
>
> (2) For the purposes of this section—
>
> (a) a person's "relevant supplies" are all supplies made by him except supplies made at such times or of such descriptions as may be specified in the regulations;
>
> (b) the "appropriate percentage" is the percentage so specified for the category of business carried on by the person in question;
>
> (c) a person's "relevant turnover" is the total of—
>
> (i) the value of those of his relevant supplies that are taxable supplies, *together with the VAT chargeable on them*, and
>
> (ii) the value of those of his relevant supplies that are exempt supplies.
>
> …" [my emphasis]

23. The relevant rules in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") in relation to witness summons etc (cited by the appellant in his application) are:

> "16.—(1) On the application of a party or on its own initiative, the Tribunal may—
>
> (a) by summons (or, in Scotland, citation) require any person to attend as a witness at a hearing at the time and place specified in the summons or citation;
>
> (b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.
>
> (2) A summons or citation under paragraph (1)(a) must—
>
> (a) give the person required to attend at least 14 days' notice of the hearing, or such shorter period as the Tribunal may direct; and
>
> (b) where the person is not a party, make provision for the person's necessary expenses of attendance to be paid, and state who is to pay them.
>
> (3) No person may be compelled to give any evidence or produce any document that the person could not be compelled to give or produce on a trial of an action in a court of law in the part of the United Kingdom where the proceedings are due to be determined.
>
> (4) A person who receives a summons, citation or order may apply to the Tribunal for it to be varied or set aside if they did not have an opportunity to object to it before it was made or issued.
>
> (5) A person making an application under paragraph (4) must do so as soon as reasonably practicable after receiving notice of the summons, citation or order.
>
> (6) A summons, citation or order under this rule must—
>
> (a) state that the person on whom the requirement is imposed may apply to the Tribunal to vary or set aside the summons, citation or order, if they did not have an opportunity to object to it before it was made or issued; and
>
> (b) state the consequences of failure to comply with the summons, citation or order."

24. The appellant also relies on Rule 5(3)(d) (case management):

> "5.—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

…

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

…"

25. Rule 8 of the Rules deals with striking out, so far as relevant, says:

"**Striking out a party's case**

8.—(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(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 of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant."

26. And all of these Rules must be considered in the light of the overriding objective of the Tribunal in Rule 2:

> "2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> …"

The application and HMRC's response

27. The appellant's grounds for his application are best seen in the context of his grounds of appeal. Those are:

(1) He was penalised for innocent non-compliance with the flat rate scheme which is poorly designed and misrepresented to customers.

(2) The errors and misrepresentations were HMRC's not his, and he should not be penalised for HMRC's own failings.

(3) He never received the explanatory documents which HMRC sent to him and HMRC had accepted that they had failed to update his address.

(4) He had the honest belief that he was complying with the FRS from the start in 2011-12.

(5) The errors and misrepresentations were compounded by a catalogue of further errors

(6) After the compliance check in 2015 HMRC sent calculations which miscalculated the underpayment at £4,000 which was corrected by Mr Christy,

an officer of HMRC. The appellant should not be required to pay this amount and it should be refunded.

(7) When he wanted to find someone to appeal to against the errors, he was passed from "pillar to post", was told by an officer that HMRC's letter to him was "gobbledygook" and that another officer had told him that they knew there were problems with the FRS.

(8) Two "signed for" letters he sent to HMRC were lost

(9) Nothing happened to his complaint letter for 5 months. When he phoned he was told he was next in the queue and then his complaint and appeal were both promptly rejected. The complaint letter resiled unfairly from the admission of errors made by Mr Christy.

28. In his application of 2 May 2017 the appellant sought to summon two witnesses, Mr Christy and the unnamed member of HMRC's staff who was the officer who participated in a phone conversation with the appellant on 11 December 2015, a record of which was included in HMRC's list of documents. He also asked for those witnesses to produce documents.

29. He also sought the following documents from HMRC under Rule 5(3)(d):

(1) All internal files and records of HMRC (including emails and notes of meetings and phone calls and any transcripts of calls apart from the one already disclosed) relating to the appellant's use of the FRS.

(2) All internal and external communications, files and records of HMRC (including emails and notes of meetings) relating to customers and internal concerns which arose over alleged flaws in the FRS, where they are dated after 1 May 2011.

(3) The full records of the appellant's VAT returns or alternatively a "good character" statement from HMRC stating that the appellant has at all times been consistent, timely and diligent in filing his VAT returns and had never been the subject of any investigation or inquiry outside the current matter.

30. HMRC's response of June 2017 to the appellant's application was:

(1) Mr Christy was already being called as a witness so the summons was unnecessary.

(2) The officer who spoke to the appellant did so after the enquiries had been made and errors identified in the appellant application of the FRS. The evidence of the officer is not necessary to determine the appeal against the assessment. If there are matters for complaint they should be raised in the usual channels as complaints about HMRC's conduct is not within the Tribunal's jurisdiction.

(3) As to the documents, item (1) (in §29) is not necessary to determine the appeal, and HMRC have provided a list of all the document on which they will rely, and it incudes all relevant documents.

(4) Item (2) cannot be provided as it would reveal personal data of other taxpayers contrary to the Data Protection Act 1998 ("DPA"), and the level of information sought is neither necessary nor reasonable to further the appeal.

(5) HMRC consider that the 3 years worth of returns for the periods under appeal demonstrate good character.

31. In further submissions of 12 June 2017 the appellant complained that HMRC had misunderstood the appellant's case because the matters about which he sought the summons (to prove the multiple failings by HMRC and the systemic errors in the operation of the FRS) were fundamental to his appeal which he said may be argued to amount to a complaint and an attempt to seek a remedy.

32. In relation to the documents the appellant cited *Tower Bridge GP Ltd v HMRC* [2017] UKFTT 54 (TC) ("*Tower Bridge*") on the disclosure of evidence, and in particular on paragraph 23 where Judge Jonathan Richards sets out the approach he adopted to the applications for disclosure under Rule 5(3)(d) in that case. The appellant asserted the relevance of the matters for which he sought disclosure.

33. He added that s 35 DPA did not prevent personal data being disclosed in legal proceedings.

Submissions

34. On 17 August 2017 the appellant produced his "outline of arguments" (ie skeleton. In this he said:

(1) he noted that HMRC intended calling Mr Christy at the hearing of his appeal. He submitted that Mr Christy's witness statement contained errors of fact and trivial inaccuracies which he listed in an Appendix.

(2) he sought disclosure of a transcript (if one exists) of the conversation he had with Mr Christy and of any contemporary or subsequent notes of internal correspondence written or received by Mr Christy in the appellant's case.

(3) in relation to the now named other witness, Nicola Tracey, whose attendance he sought, he now asked for disclosure of the full recording of his conversation with Ms Tracey.

(4) in relation to the document disclosure request he relied on the Rules for relevance and the associated issues of fairness, justice and proportionality in relation to the application of the FRS. He was prepared to accept that HMRC need only supply his VAT returns from 2012 to 2015 if they accept he is of good character as defined by him.

(5) as well as the law he refers to in his application and response to HMRC, he also relies on *R (oao Hely-Hutchison) v HMRC* [2015] EWHC 3261 (Admin) ("*Hely-Hutchison*"), noting that it had also recently been considered in the Court of Appeal ([2017] EWCA Civ 1075) but in his view the expression of principles which he took from the High Court decisions was unaffected by the reversal of the decision of Whipple J.

(6) the unfairness to the appellant, both in systemic failings and in the individual handling of his case, is of a magnitude that requires a concession in this instance. The application for directions must be fairly considered in that context.

35. HMRC's skeleton submits that:

(1) as Mr Christy is being called by HMRC a summons is not required.

(2) summoning Ms Tracey is not necessary to determine the appeal which is against the assessments raised by Mr Christy on the appellant. The conversation with Ms Tracey took place after the assessments were made. Further HMRC had included in the bundle a record of the conversation made by Ms Tracey, and they noted that given the lapse of time it was unlikely that Ms Tracey would be able to given any evidence beyond what she said in that conversation.

(3) as to the documents, all documents relevant to the appellant's use of the FRS dated after 1 October 2015 have been disclosed, and any other documents held do not add to or further the appeal. HMRC has requested a transcript of the 11 December 2015 recording and are waiting to see if it can be provided.

(4) as to the request relating to other customers HMRC say that the extremely broad information request is not necessary to determine the appeal, and the cost to and time expended by HMRC would be disproportionate to the matter under appeal.

(5) disclosure of personal data other than that of the data subject is not disclosable without the consent of the other data subjects (s 7(4) DPA).

(6) the appellant's own evidence can demonstrate what problems he experienced and why anything said about the FRS by HMRC is misleading.

(7) disclosure of such documents would go beyond what is permitted by s 18 Commissioners for Revenue and Customs Act 2005 ("CRCA")

36. In relation to *Tower Bridge*, HMRC say that it shows that consideration should be given where disclosure is in issue to the factors listed by Judge Richards, and doing this they submit that the application would be too costly to comply with, is disproportionate to the nature of the case which is about whether the assessments are correct, a matter which can be determined on the evidence already disclosed. In essence the making the orders sought would not be in accordance with the overriding objective.

37. As to the good character statement HMRC reiterate their point in §30(5).

Discussion – witness summons & document disclosure

38. I first make the point (which the appellant recognises in his further submissions of 9 June 2017) that the witness summons and orders to produce documents he wishes the Tribunal to make are to be made under Rule 16 and the request to HMRC for disclosure of documents is a request to the other party, not a witness, and falls under Rule 5(3)(d).

39. That distinction does not alter my approach to the application. I am quite content to follow Judge Richards' list of matters in *Tower Bridge* to be taken into account which though only expressly in relation to Rule 5(3)(d) are to my mind equally applicable to a Rule 16 application. I do however, in approaching the application, take into account that the witness summons and orders are directed to individual officers of HMRC but that the application for documents under Rule 5(3)(d) is directed to HMRC as an entity.

40. In my view the crucial issues to be taken from the matters in Judge Richards' list are relevance and proportionality, noting that the test for relevance does not set a high bar.

41. But relevant to what? That must be, as HMRC suggest, relevant to the issues raised by the appeal and which relate to the matters that the Tribunal can consider when deciding the appeal.

42. This raises a major problem for the appellant. His appeal is against assessments made by HMRC to recover VAT and interest from the appellant because it is HMRC's case that his VAT returns are incorrect. In such a case the Tribunal's job is to decide whether or not HMRC are correct, and if they are not whether the assessments should be cancelled or varied and if varied to what extent. In so doing the Tribunal will, and can only, have regard to the provisions of section 26B VATA and Part 7A of the VAT Regulations and Parts 4 and 5 of the Value Added Tax Act 1984, in particular section 83(1)(p)(i).

43. The appellant's grounds of appeal do not address this issue, and indeed there is no indication that the appellant thinks HMRC's figures as shown in the assessments are wrong. The thrust of his attack is against HMRC's conduct of his case and of the FRS more generally. Those matters are not ones on which this Tribunal can reach any decision because it has no jurisdiction to do so. As a creature of statute it has no inherent powers like the High Court and can only do that which the law as set out in Acts of Parliament and secondary legislation says it can.

44. With this in mind I turn to the particular applications.

45. As to the witness summons to Mr Christy, I accept that his evidence will be relevant to the appeal. But as HMRC have said that he will attend, the appellant would at any hearing of his appeal be able to cross-examine him.

46. As to his production of documents by him I accept HMRC's submission that that any documents that are relevant that he might be capable of bringing and that exist will be on HMRC's list of the documents on which they will rely. In particular I do not think that the matters referred to at §34(2) are at all relevant to the appeal as they relate to things that happened after the assessments were made.

47. For these reasons I decline to issue a witness summons and order for production to Mr Christy.

48. As to the witness summons and order for production to Ms Tracey, I consider that her evidence and documents are wholly irrelevant to the matters under appeal, for the same reasons as I give in relation to Mr Christy, and I decline to issue a witness summons and order for production to Ms Tracey.

49. I take the same view about the Rule 5(3)(d) direction, as all the documents requested are wholly irrelevant to the appeal. Whether some members of HMRC staff think that the FRS is flawed or difficult or not being operated correctly is wholly immaterial and in addition I consider that the request for information about other users of the FRS would be disproportionately costly for HMRC to provide.

50. In so deciding I remind myself that the bar is low when it comes to relevance. But the appellant has not got off the ground, let alone reached the bar or cleared it.

51. I do not accept however that the disclosure sought by the appellant would necessarily breach either the DPA or the CRCA without further argument from HMRC to show why any provision of those Acts would be breached by disclosure in legal proceedings.

52. As to the good character statement I would not direct HMRC to produce it if it does not exist, for that very reason – see *Tower Bridge* at [23(2)]. If it did exist it would be irrelevant to the appeal.

53. Accordingly I decline to make any direction as requested by the appellant.

Discussion - strike out

54. After hearing the appellant and HMRC, I informed the parties that I declined to issue the summons and orders or make the directions that the appellant sought. I then informed the appellant that it appeared from my reading of the papers I had that there was no reasonable prospect of his appeal succeeding. I told him that I was obliged to give him the opportunity to make representations to convince me that I should not strike out his appeal.

55. The appellant duly took that opportunity. I received six pages of written submissions and two appendices and the transcript of his phone conversation with Ms Tracey (which HMRC had obviously found and sent to him).

56. Paragraph 3 of his submission says this:

> "The Appeal is against HMRC's decision to reclaim unpaid tax. *With hindsight, it is not disputed that VAT was underpaid.* However, the issue at stake is that this underpayment was due to a genuine error on the part of the Appellant, which HMRC failed to address for four years." [My emphasis]

57. The appellant has in this statement accepted that he has no grounds of appeal that the Tribunal could consider to be relevant to his appeal. If he accepts that VAT was underpaid and if the appellant does not dispute the amount then he could only succeed in a challenge to the assessments if there is some procedural flaw in any of

them. From the documents I saw in the bundle for the hearing of the application I would say that the only possible flaw would be that the assessments were out of time. Since the assessments were all made within one year of information coming to HMRC's knowledge that would enable them to assess, there is no question of the assessments being out of time under s 73(6)(b) VATA, and since the earliest period assessed ends on 31 January 2012 and the assessment for that period was made on 6 January 2016, the overriding four year limit in s 77(1)(a) VATA is not breached. So the assessments were all made in time.

58. There is nothing in the statement that persuades me that there is a reasonable prospect of success: indeed the appeal is doomed to failure.

59. I therefore strike it out under Rule 8(3)(c) of the Rules.

Final observations

60. Mr Smith had shown the tenacity and investigative skills one would expect of a good journalist. I do not have sufficient material in my bundle to tell whether his complaints are well grounded, but if what he says is right then he would seem to have some legitimate ground for complaint about his treatment by HMRC. But such complaints are about maladministration. The avenue of redress for that is through HMRC's complaints procedures and from there to the Revenue Adjudicator or the Parliamentary Commissioner for Administration (Ombudsman).

61. But I am afraid that his researches, and possibly advice he has received, have led him to be under a major misapprehension about the role of this Tribunal. This is exemplified by his discovery of, and citing to me, of *Hely-Hutchison*. I have no doubt that the statements made in that case by Whipple J about the obligations on HMRC are correct, but *Hely-Hutchison* was not a case that started before this tribunal: it was a judicial review where the actions of HMRC in exercising their discretion or the question whether HMRC has acted fairly or reasonably can be considered. This Tribunal has no general judicial review jurisdiction, it can only consider matters such as reasonableness of decision making if a statute gives it that power. There is no such relevant power in the area of the tax dispute between the appellant and HMRC (and as I have noted there does not even seem to be a tax dispute as such).

62. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 3 JANUARY 2018