



TC02912

Appeal number: TC/2012/3904

VAT – purported appeal against “decision” of HMRC that appellant required to make online VAT returns – liability to file online arising automatically under secondary legislation without requirement for HMRC to reach a “decision”- whether the European Convention on Human Rights relevant - no – appeal struck out for lack of jurisdiction

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LE BISTINGO LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 19 December 2012 with written submissions from HMRC dated 6 September 2013. The appellant was invited to make written submissions but did not do so.

Mr S Gigliucci, Director of the Appellant, for the Appellant

Mr A McNab, Counsel, and Mr P Woolfe, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

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1. The appellant filed a Notice of Appeal on 21 February 2012. It purported to be an appeal against a letter received by it from HMRC dated 8 February 2012.

2. The 8 February 2012 letter was a “VATC1A” letter and appeared to be in a standard form. It was a long letter and I only reproduce parts of it. It was headed

10 **“Important change: from 1 April 2012, virtually all VAT customers will be required to file VAT returns online and pay VAT electronically – or they may face penalties**

.....

1. important information

15 • For VAT periods starting on or after 1 April 2012, virtually **all** VAT customers **must** file their VAT returns online and pay any VAT due electronically....

20 • There will be two, **very limited**, categories of customer who, by law, are not required to file online. These are (a) businesses subject to an insolvency procedure; and (b) businesses run exclusively by people who are practising members of a religious group whose beliefs are incompatible with the use of computers....

•

2. You must act NOW

25 (here followed instructions about how to register for online filing)

3. Help and support

Filing online is quite straightforward, and if you need help, there’s plenty available.....

4. What to do if you think you are not required to file online.

30 If you feel that you fall into one of the two very limited categories of customers who are not required to file online, you should write to HMRC [address given]. You should explain in your letter which exemption you think applies to you, and provide any information that you think is relevant.

35

.....”

3. HMRC applied on 10 July 2012 to have the appeal struck out under Rule 8(2)(a) on the grounds that the Tribunal had no jurisdiction in respect of it. This was on the basis that HMRC had taken no decision in respect of the Appellant’s liability to file
40 its VAT returns online as this was contained in legislation. The Tribunal is a statutory

body and only has jurisdiction in respect of decisions made by HMRC over which the Value Added Tax Act 1983 (“VATA”) gives it jurisdiction.

4. There have been a number of other cases in which such a strike out application was filed and this appeal was the first of them to be heard.

5 *The legislation*

5. Section 25 of the Value Added Tax Act 1994 (“VATA”) provides that a taxable person shall account for and pay VAT by reference to prescribed accounting periods and “in such time and manner as may be determined by or under regulations”.

6. Regulation 25 of the Value Added Tax Regulations 1995 (“the Regulations”), as amended by the Value Added Tax (Amendment) (No. 4) Regulations 2009/2978 with effect from 1 December 2009, provides:

“(1) Every person who is registered shall, in respect of every period of a quarter....., not later than the last day of the month next following the end of the period to which it relates, make to the Controller a return in the manner prescribed in regulation 25A showing the amount of VAT payable by or to him”

7. Regulation 25A provides (with effect from 1 April 2012):

20 25A.—

...

(3) Subject to paragraph (6) below, a person who is registered for VAT must make a return required by regulation 25 using an electronic return system

25 ...

(6) A person—

(a) who the Commissioners are satisfied is a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications, or

30 (b) to whom an insolvency procedure as described in any of paragraphs (a) to (f) of section 81(4B) of the Act⁵ is applied

is not required to make a return required by regulation 25 using an electronic return system.

...

35 (15) Subject to paragraph (15A) in relation to returns made for prescribed accounting periods which end on or after 31 March 2011, a person who fails to comply with paragraph (3) above is liable to a penalty.

....

(16) But a person who has a reasonable excuse for so failing to comply is not liable to a penalty.

...”

5 8. Prior to 1 April 2012, and since 12 December 2009, Regulation 25A(5) had provided that a person was only a specified person in relation to electronic returns if his turnover equalled or exceeded £100,000 and then only if “that person has been notified as required by paragraph (7)”. Paragraph 25A(7) required HMRC to notify a person if they considered him to be a specified person.

10 9. Some persons, including the appellant’s director Mr Gigliucci in his personal capacity, have lodged appeals against such decisions made by HMRC. HMRC has not asked the Tribunal to strike these appeals out on the grounds of lack of jurisdiction nor has the Tribunal done so of its own motion: on the contrary, the Tribunal is has heard four of these “tranche 1” appeals as lead cases. In those cases, the lawfulness of the decisions made by HMRC is challenged. The decision of the
15 Tribunal is issued simultaneously with this one: *L H Bishop Electric Company Ltd and others* .

20 10. However, the appellant did not receive such notification under Regulation 25A(7) as it was. I presume this was because HMRC did not consider it to be a specified person on the grounds its turnover was less then £100,000. HMRC’s case is that since the amendment of Regulation 25A with effect from 1 April 2012, there was no such notification requirement. HMRC’s case is that since that date the appellant’s liability to make an electronic return followed automatically under the new version of Regulation 25A and, unlike the earlier version of Regulation 25A, did not require a decision to be made by HMRC. This is, as HMRC describe it, a Tranche 2 case, and
25 one which HMRC say the Tribunal has no jurisdiction to hear.

The FTT’s Jurisdiction

12. The FTT’s jurisdiction is statutory. It has no jurisdiction to hear any dispute which does not fall within the statutory provisions that confer jurisdiction upon it.

30 13. Section 83(1)(zc) VATA 94 provides as follows:

(1) Subject to sections 83G and 84, an appeal shall lie to the tribunals with respect to any of the following matters—

...

35 (zc) a decision of the Commissioners about the application of regulations under section 135 of the Finance Act 2002 (mandatory electronic filing of returns) in connection with VAT (including, in particular, a decision as to whether a requirement of the regulations applies and a decision to impose a penalty).

40 11. The appellant’s complaint concerns the application of Regulation 25A to him. Regulation 25A is a regulation made under section 135 FA 2002. Not only does regulation 25A provide that an appeal in respect of it must fall within s 83(1)(zc) there

is no other applicable provision in s 83 which would confer jurisdiction on this Tribunal to hear the appellant's complaint.

12. And, as HMRC state, the scope of s 83(1)(zc) is circumscribed by the requirement that HMRC issue a decision. I agree with HMRC that s 83(1)(zc) is in particular to be read as limiting the Tribunal's jurisdictions to decisions of HMRC in respect of online filing. This includes jurisdiction over a decision of HMRC whether a requirement of the regulations applies and a decision to impose a penalty.

13. No penalty has been imposed. It is HMRC's case that no decision at all has been made: its letter of 8 February merely informed the appellant of the law and in particular the legal requirement to file online. The letter was not a *decision* that the appellant should file online: the appellant was already liable under the secondary legislation outlined above to file online whether or not the letter was sent.

14. I have to agree that HMRC has made no decision in this case against which an appeal could lie. The appellant did not suggest otherwise to me in his submissions: this is a technical area of law and that is not surprising. Mr Gigliucci's case is that the law ought not to require him to file online.

Does the Convention on Human Rights apply to give a right of appeal?

15. This case was heard after the first six days of the hearing in the "tranche 1" lead cases, behind which Mr Gigliucci's appeal in his personal capacity is stood. The hearing of the tranche 1 lead cases was not concluded until February 2013 and the decision is only just published. I delayed the issue of the decision in this case to ensure that my decision on submissions made by counsel in the tranche 1 case were consistent with the decision in this case: consistency is particularly important in that Mr Gigliucci has an interest in both sets of proceedings and in any event the delay was, as I understand, of no prejudice to the appellant in that HMRC do not seek penalties for non compliance in the so-called VAT online cases pending the decisions in the appeals.

16. Mr Gigliucci did not make submissions on the Convention on Human Rights in this case but such submissions were made in the tranche 1 case. As I considered them of potential relevance to this case, I gave both Mr Gigliucci and HMRC the opportunity to make such submissions on paper on them in *this* case. HMRC did so but not Mr Gigliucci. I now set out the conclusions I have reached on the relevance of the Convention to this case.

17. The Human Rights Act s 3 requires this Tribunal to interpret UK law in so far as possible to be consistent with the rights contained in the Convention:

"So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights".

18. The effect of s 83(1)(zc) VATA is that the appellant unable to test in this Tribunal whether the obligation contained in Regulation 25A to file online is lawful.

It is his case that it is not lawful. The reason s 83(1)(zc) has this effect is because it is limited to ‘a decision’ of HMRC and the obligation in Regulation 25A applies irrespective of any decision by HMRC.

19. Article 6 of the Convention nevertheless provides:

5 “In the determination of his civil rights and obligations or of any
criminal charge against him, everyone is entitled to a fair and public
hearing within a reasonable time by an independent and impartial
tribunal established by law.”

20. The appellant wants this Tribunal to determine whether he does have an
10 obligation to file online. HMRC’s view is that firstly, that Article 6 does not apply
because the obligation to file tax returns is not a civil obligation; and secondly, even if
the obligation to file tax returns was a civil obligation, nevertheless Article 6 could
not confer jurisdiction on this Tribunal where otherwise it would have none.

21. Is filing a tax return a civil obligation? In *Ferrazzini v Italy [2001] STC 1314*
15 the European Court of Human Rights (“ECHR”) held that tax disputes fell outside the
scope of civil rights and obligations because tax was a public law matter. In a
common law jurisdiction, this is a very difficult decision to understand but
nevertheless I am bound to apply it: this is because s 2 Human Rights Act requires
me to take account of any relevant judgment of the ECHR.

20 22. The effect of *Ferrazzini* is that the Convention does not guarantee a fair trial in
a tax dispute. Therefore, s 3 HRA cannot require a strained reading to be given to s
83(1)(zc) in order to give the appellant a right to a hearing of his challenge to the
legality of Regulation 25A.

23. If it were not for the *Ferrazzini* case, my view might have been that s 3 HRA
25 would require “decision” in S 83(1)(zc) to be given a strained reading and to include
the letter written by HMRC to the appellant referred to in paragraph § 2 above. This
is because, unless it was given such a meaning it would leave the appellant without an
effective means to challenge the legality of Regulation 25A. Yet Article 6 entitles a
30 person to a fair hearing. In practice, if this Tribunal does not have jurisdiction in this
case, all the appellant could do would be to wait for HMRC to impose a penalty for
non-compliance and then appeal it: this is obviously unsatisfactory as it requires the
appellant to break the law in order to determine whether the law itself is lawful.
Further, while the legality of legislation could be challenged in judicial review
proceedings, such actions are not of right and in a case like this, which does not
35 involve significant sums of money and legal advice, is not in practice an option, and
therefore not an effective remedy.

24. Unfortunately, I am bound by the decision in *Ferrazzini* and have to conclude
that s 3 HRA does not require s 83(1)(zc) to be interpreted in such a way to give this
Tribunal jurisdiction in order to give effect to rights under Article 6 of the
40 Convention.

25. In addition to the European Convention on Human Rights there is the Charter of Fundamental Rights of the European Union, which applies because this is a VAT case and the European Communities Act 1972 gives supremacy to EU law. Article 47 of the Charter grants the right to a fair trial in all matters and it does not suffer from the *Ferrazzini* limitation. However, s 3 HRA applies only to the Convention and not to the Charter. While the taxpayer has the *right* under the Charter to a fair hearing, that does not give this Tribunal the *power* to “interpret” legislation to grant itself the jurisdiction to give the taxpayer a fair hearing where the legislation does not give it jurisdiction on an ordinary reading.

26. Therefore, while it seems it is unlawful for the UK government under the Charter (applicable in the UK because of the ECA) to impose obligations on a taxpayer without giving the taxpayer a right to challenge them, that does not permit this Tribunal to confer jurisdiction on itself in order to give taxpayers the right to challenge the obligation.

15 *Conclusions*

27. Mr Gigliucci may find it very surprising that this Tribunal does not have jurisdiction to entertain his appeal and consider the validity of the law: this is particularly the case when in his personal capacity as a VAT registered trader his appeal has been accepted as valid. But, as I have said, that was because tranche 1 mandation required an HMRC decision. Tranche 2 does not.

28. The only decisions HMRC could reach in respect of a Tranche 2 mandation would be whether a taxpayer was entitled to the insolvency or religious exemption or to impose a penalty. The appellant has laid no claim to either of these exemptions and no penalty has been imposed. HMRC has simply taken no decision at all in respect of the appellant’s liability to file online.

29. While technically a person in the appellant’s position could seek to judicially review HMRC over the legality of the secondary legislation, in practice the expense and difficulty of such a course of action to a person of small resources means that this is an unreal remedy.

30. It seems to me that the only practical way that the appellant would have of obtaining a judicial ruling on its grievance over the requirement that it must file online is to appeal any penalty imposed if it fails to comply with the law. But that, as I have said, is equally unsatisfactory as it requires the appellant to break the law in order to challenge it.

31. So it is with a great deal of regret that I have to agree with HMRC that the requirement on the Appellant to file VAT returns online, to which the Appellant objects, is contained in legislation and applies directly, without the need for any decision on the part of HMRC. HMRC have not even purported to make a decision that the appellant must file online: their letter of 8 February 2012 were no more than notification to the appellant of its liability under the legislation. As this Tribunal only has jurisdiction to entertain appeals against *decisions* made by HMRC, it has no

jurisdiction to consider the appellant's complaint in this case and must strike out the appeal.

5 32. Nevertheless, it follows from what I have said in my decision on tranche 1 mandation (see *L H Bishop Electric Company Ltd and others*) that the regulation complained of is not lawful in respect of elderly and/or disabled taxpayers.

10 33. 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.

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**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 2 October 2013

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