TC 04952

Appeal no: TC/2015/04286

Strike out Application by HMRC – Application granted

FIRST-TIER TRIBUNAL

TAX CHAMBER

COLIN THOMPSON t/a CC TILES

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: JUDGE HOWARD M. NOWLAN

SHEILA CHEESMAN

Sitting in public at Fox Court, Brooke Street in London on 4 March 2016

The Appellant in person

Lynne Ratnett of HMRC on behalf of the Respondents

DECISION

Introduction

1. This was a rather sad and unfortunate case in which the Appellant had sought for a long period to remedy what he regarded as an unfairness in the VAT system that put his business model at a competitive disadvantage over the business model usually adopted by his competitors. We will summarise the basic problem first, and the various avenues explored by the Appellant to solve the problem. We will then address the rather different topic of the particular issue for us in this Appeal which is that the Respondents contended that we should strike out the Appellant's Appeal. Finally we will summarise as clearly as we can for the Appellant why it is that he should abandon the attempts of securing modifications to the VAT system and accept that the only expedient to solve the unfairness that he perceives is for him to change his business model. This third subject is not strictly relevant to our decision but, rather in the way that one HMRC officer wrote to the Appellant and tried to give him practical suggestions at one point, the suggestions in the final part of this decision simply represent an attempt, in a very general way, to give some clarification that seems to us to be important. If its only effect is to explain to the Appellant that he should cease trying to pursue the unattainable, the comments may be of assistance.

The basic problem

2. The basic problem faced by the Appellant has been very simple and indeed it is a problem that has put him at a competitive disadvantage.

3. The Appellant's business is to operate a shop that sells both wall and floor tiles, and his unique selling point is that instead of just selling tiles and expecting purchasers to locate a tradesman to fix the tiles, the Appellant offers the composite service of planning and discussing the design with the customer; selling the tiles and then affixing them to the wall or floor. He says that the cost of the fixing can often equal the cost of the tiles and with his composite service, he of course issues just one invoice to the customer for the entire supply.

4. The Appellant's problem is that when competitors just sell the tiles and customers find their own tradesman to affix the tiles, the person fixing the tiles will often have a turnover below the threshold at which VAT becomes chargeable (or conceivably may be trading on a cash basis and avoiding the VAT) so that the purchase from the competitors will suffer the cost of VAT only in respect of the sale consideration for the tiles, and not for the fixing as well. In the Appellant's case, where he sub-contracts the fixing himself, generally to one of three contractors, then regardless of whether they have to charge VAT on their invoice to the Appellant, or more likely do not have to charge VAT on that supply, in either case the Appellant must pay VAT on the invoice for the composite service. In order to eliminate the resultant competitive disadvantage over his competitors, he has simply absorbed the cost of the VAT in respect of the fitting service, and with the rate of VAT at 20% and the cost of fixing often matching the cost of the tiles, this expedient has naturally cut into any profit margin or possibly involved the Appellant in making losses. One of its consequences was that he was periodically late in paying his VAT, though this Appeal is not strictly a default surcharge appeal.

The Appellant's search for a solution

5. Beyond writing to his Member of Parliament, the more technical efforts that the Appellant made to eliminate the perceived (and indeed actual) unfairness have included a request that he be allowed to adopt a special method for calculating his VAT that would capture the consideration for the supply of the tiles but not for the cost of fixing them, and he has secondly sought to de-register. His attempt to de-register was refused because in order to de-register the trader has to provide certain information and be up-to-date with his VAT payments, and the Appellant failed to supply the required information in any event. Accordingly his request to de-register was rejected.

6. Both possible solutions sought were unsuccessful. We suggested to the Appellant that the proper scope for special methods was rather the situation in which the whole trade (for instance selling antiques or second-hand cars) would be undermined if the traders were inevitably having to buy cars from non-registered sellers and then having to pay VAT on their entire selling prices. With the present rate of VAT it would mean that traders would only be able to make profits when their sale price exceeded the purchase price by more than 20% such that they would be driven out of business. The Appellant is admittedly in somewhat the same situation in relation to the cost of fixing the tiles, but his situation is also identical to that in doubtless countless examples where registered traders have to pay VAT on the whole of the consideration for their supplies, notwithstanding that they may be receiving some services from non-registered small traders, and that were it possible to change the trading model and for the non-registered traders to make supplies directly to the end customers, again the charge to VAT would be reduced.

7, While the effort to secure the benefit of a special method was unsuccessful, the second expedient of seeking de-registration was unfortunately just misconceived. While it was blocked for the technical reason that the relevant forms had not been completed, it was obvious that the Appellant's turnover, even if he simply sold tiles and did not fix them, would be above the VAT threshold, and he did indeed accept that he would register again in relation to that activity. It was not entirely clear why he then supposed that if his trade remained the composite trade of selling and fixing tiles, the turnover geared to the fixing activity would drop out of account, and of course it would not have done. The effort to de-register was thus effectively a misconceived effort to generate the effect of a special method, in that it would have relied on the fixing service being left out of account in calculating the Appellant's turnover, following re-registration, and this was naturally an impossible outcome.

The present Appeal

8. So far as we were able to ascertain, the present Appeal was brought in order to deal with three issues. One was that HMRC were seeking to enforce a tax debt and threatening to bankrupt the Appellant. In relation to that, our understanding was that the tax debt itself was not alleged to be incorrect for any taxation reason, and in other words any reason on which we had jurisdiction to adjudicate. The second issue was the Appellant's complaint that HMRC had failed to de-register the business. This was said by HMRC to be an impossible claim because the Appellant had failed to fill in the required forms. It was also, and perhaps rather more significantly, untenable for the reasons that the Appellant's continuing sales turnover would in any event be above the VAT threshold, the Appellant did have tax debts owing to HMRC at the point of the requested de-registration, and finally the whole de-registration plan was misconceived if, as it seemed, the plan remained that the Appellant would still be providing the fixing service to his customers.

9. The third matter that was the potential subject of an appeal was geared to the fact that the Appellant had sought to appeal against two or more default surcharges, though the Applications to Appeal had been very severely out-of-time. Beyond being out of time, none of the papers before us advanced a case of reasonable excuse in relation to the default surcharges, and having regard to the reason for the late payment of VAT (i.e. effectively the self-induced though understandable strategy of seeking to absorb the cost of VAT in respect of the fixing service, with the resultant erosion of profits) there appeared to be no chance that any default surcharge appeal would stand any chance of success even if we were to allow the appeal to be brought when very severely out-of-time.

10. We do therefore allow the Respondents' Application that this Appeal be struck out. In relation to the first point, concerning the tax debt and the possibility that the Respondents may be threatening the Appellant with bankruptcy, there is no cause of action over which we have jurisdiction. There is in other words no contention that the tax said to be owing is not in fact due.

11. In relation to the failure to de-register, this application by the Appellant is plainly hopeless for the technical reason advanced by the Respondents, and for the various more substantive reasons that we mentioned in paragraph 8 above.

12. In relation to the default surcharge appeals, we refuse the Application to bring those appeals when the Applications to Appeal were very seriously out of time, and when in addition any default surcharge appeals appeared in any event to have no change of success.

Other practical considerations

13. In an effort to assist the Appellant, we and the two representatives from HMRC did seek to persuade the Appellant that the only solution to his problem was to change his business model and effectively trade as his competitors did, selling the tiles and suggesting to customers that they found their own tradesman to fix the tiles. The Appellant was dismayed by this suggestion because he considered that the unique selling point of his business was indeed that he did provide the full composite service. We hoped to persuade the Appellant that provided that his customers (i.e. purchasers) chose their own tradesman and critically contracted directly with the tradesman for the fixing of the tiles, there should be no objection to the Appellant offering the contact details of the three workers to whom he had been sub-contracting the fixing work, suggesting to customers that those three workers had proved very satisfactory in the past and should thus be satisfactory. He might even be able to mention their likely basis of charging.

14. We did make clear to the Appellant that it was not our role, nor indeed HMRC's role, to act as tax advisers and that if, as seemed likely, the Appellant wanted certainty that with a slightly revised method of operation, he would solve his VAT problem and also avoid other tax problems, he should seek to vet any new proposed basis of trading with a small accountant. Hopefully that accountant would not charge the Appellant the charge mentioned by a firm that had sought in the past to contract to solve the Appellant's present problems.

15. We nevertheless regard it as fairly obvious that provided the Appellant did not act as agent on behalf of the three workers to engage them to supply services to the tile purchasers, but rather the Appellant left it to the purchasers to contact one of the three workers (or indeed some other worker of their own choosing) and providing that the Appellant charged only for the sale of tiles, and the workers invoiced the customers directly for their fixing charges, he

might be able to operate in practice in not too different a manner than hitherto, and without VAT or other problems. On the reasoning that under the revised arrangement, he would never be paying the workers himself and would indeed have no contractual arrangement with them, his potential exposures in relation to PAYE, Constructors Industry Scheme deductions, National Insurance deductions and any IR35 exposures should the workers be operating through one-man companies would all be eliminated. But that should be addressed by someone qualified to advise the Appellant. It would of course also follow that contractually speaking the new arrangement would be different and would have two different and quite significant implications. The first is that the Appellant would not be liable to the customer for faulty work in fixing the tiles, provided that his recommendation of a particular worker had not constituted some form of representation or guarantee. Secondly there is the related point that he would not be able to represent to customers that they had the assurance of a "one shop" service in which the Appellant would effectively guarantee and be responsible for the standard of the tile fixing work.

The existing tax debt

16. We mention finally that there is a tax debt owing to HMRC, and we very much hope that the two representatives of HMRC who attended the hearing, and who saw that the Appellant was an honest, but frustrated, gentleman who did not want to be driven out of business, will be able to ensure that those in HMRC responsible for collecting tax debts will do so in this case in a sensible manner and in manageable instalments so that the Appellant is not driven into bankruptcy, leaving (as he periodically said) another empty shop in the High Street.

Right of Appeal

17. This document contains full findings of fact and the reasons for our decision in relation to each appeal. Any party dissatisfied with the decision relevant to it 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.

HOWARD M. NOWLAN

TRIBUNAL JUDGE

RELEASE DATE: 8 MARCH 2016