



TC05271

Appeal number: TC/2010/8717

VAT – online filing – whether appellant does not have a reasonable prospect of success based on agent’s (alleged) inability to file online – appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MICHAEL CLEMENTS
T/A THE GLASS CENTRE**

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Fox Court, London on 13 July 2016

The appellant did not appear and was not represented

Mr G Hobson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. HMRC notified the appellant in February 2010 that he was obliged under new
5 legislation to file his VAT return online. The appellant asked for a review of this
decision. The review decision upheld the notification and the appellant lodged an
appeal with this Tribunal.

2. That appeal was stayed for a number of years behind lead cases testing the new
legislation. My decision in the lead cases was issued in 2013: *L H Bishop and others*
10 [2013] UKFTT 522 (TC). I decided in that case that the legislation was unlawful to
the extent it failed to give exemptions to taxpayers who were computer illiterate due
to their age, or unable to use a computer due to disability or unable to connect reliably
to the internet due to their remote location.

3. That decision was not appealed and HMRC went on to amend the legislation to
15 provide exemptions from online filing for such persons. I set out this legislation in
§28 below.

4. Some of the many appeals stayed behind *L H Bishop* were, so far as I am aware,
settled, but some were not. This appeal was one of a group of appeals which were not
settled. That group of appeals all concerned taxpayers who were represented by the
20 same representative, Mr Bland. Their claim that the legislation was unlawful so far as
it applied to them rested on their representative's computer illiteracy and age (he was
in his late 60s at the time).

5. HMRC applied to have all those appeals (save this one) struck out on the
grounds they had no reasonable prospect of success: for this one they applied in
25 January 2015 for further and better particulars. Mr Bland opposed the strike out in the
other linked appeals and did not initially provide the requested particulars in this
appeal.

6. The matter went to hearing and my decision was released on 22 October 2015.
The other appeals were struck out; by the time of the hearing the appellant had
30 provided the further particulars (see §38-39 of *Additional Aids (Mobility) and others*
[2015] UKFTT 547 (TC). Having considered the further particulars, HMRC applied
on 27 January 2016 for this appeal to be struck out on the same grounds as the others,
in other words, that it had no reasonable prospect of success. That application was the
subject of the hearing on 13 July.

35 **Appellant not present or represented at the hearing**

7. The appellant was not present at the hearing nor did anyone arrive to represent
him. I considered in accordance with Rule 33 whether he had been properly notified
of the hearing. I was satisfied that reasonable steps to notify the appellant of the
hearing had been taken as notice of the hearing had been sent to both the appellant
40 and his authorised representative (Mr Bland) on 19 May 2016.

8. There had been an application for postponement of the hearing, which I had refused. I was also satisfied that not only was the appellant and Mr Bland sent the Tribunal's policy on postponement applications which states that the parties must assume that the hearing will take place on the date notified unless and until they are notified otherwise, but in addition the refusal of the application for postponement was notified to both the appellant and Mr Bland on 17 June 2016.

9. I also note that the venue for the hearing was changed and this was notified to both the appellant and Mr Bland in the letter of 17 June together with a map to the new location (Fox Court).

10. I then considered whether it was in the interests of justice to proceed with the hearing in the absence of the appellant or any representative acting for him.

11. I considered that it was. I had no good explanation for the non-appearance of the appellant or his representative although I am satisfied that they knew of the date, time and location of the hearing. In particular, while I had no explanation at all for the appellant's non-appearance, the application for adjournment had been made on the basis his representative would be on holiday and I presumed that Mr Bland was not present because he was on holiday. However, the postponement had been refused in sufficient time for the appellant to attend himself and/or appoint a new representative. And the application for postponement due to Mr Bland's holiday I had judged unmeritorious as Mr Bland had neither claimed, nor produced evidence to support such a claim, that the holiday had been booked before he was notified of the hearing date, and the fact that the application for postponement was made nearly 3 weeks after the notification of the hearing was consistent with it being booked after notification of the hearing date. Moreover, even if the holiday had been booked before notification, the Tribunal's policy on postponement clearly stated that applications should be made as soon as possible yet I had been given no explanation for the nearly three weeks between notification of the hearing and Mr Bland's application for postponement.

12. I considered there was no good reason for the appellant's non-attendance and it was in the interests of justice to proceed with the hearing as the matter had been outstanding for six years, and needed to be resolved. The appellant has appealed against a notice to file online; pending resolution of that appeal by concession HMRC has permitted him to continue to file by paper. The concession will end when the appeal is resolved either way. HMRC, and the general public, have an interest in the end of a concession that other taxpayers do not benefit from, and therefore had an interest in the case being resolved sooner rather than later.

13. Moreover, the matter was which could be resolved on the papers as it turned on the law rather than evidence, but I had called a hearing simply because the appellant had requested a hearing of the case. As the appellant had failed to attend without good reason, it was right to deal with the matter in his absence.

Reasonable prospect of success?

14. I need to consider whether the appellant's case has a reasonable prospect of success: I can only strike it out if HMRC satisfy me that it does not have a reasonable prospect of success.

- 5 15. The relevant legislation is set out in detail at §§15-23 of my decision in *L H Bishop*. In particular, the regulation at issue provided at the time of the disputed decision:

VAT Regulations 1995/2518

Regulation 25A

- 10 (1) Where a person makes a return required by regulation 25 using electronic communications, such a method of making a return shall be referred to in this Part as an 'electronic return system'.
- 15 (2) Where a person makes a return on the form numbered 4 in Schedule 1 to these Regulations ("Form 4") or, in the case of a final return, on the form numbered 5 in Schedule 1 to these Regulations ("Form 5"), such a method of making a return shall be referred to in this Part as a 'paper return system'.
- 20 (3) A specified person must make a specified return using an electronic return system.
- (4) In any case where an electronic return system is not used, a return must be made using a paper return system.
- (5) In this regulation a 'specified person' means a person who –
- 25 (a) is registered for VAT with an effective date of registration on or after 1 April 2010 whether or not such a person is registered in substitution for another person under regulation 6 (transfer of a going concern), or
- (b) is registered for VAT with an effective date of registration on or before 31 March 2010 and has as at 31 December 2009 or any date thereafter an annual VAT exclusive turnover of £100,000 or more whether or not that person's turnover falls below this level,
- 30 provided that, in each case, that person has been notified as required by paragraph (7) below.
- (6) However a person –
- 35 (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
- (b) to whom an insolvency procedure as described in any of paragraphs (a) to (f) of section 81(4B) of the Act is applied at the time when he would otherwise be notified under paragraph (7) below
- 40 is not a specified person for the purposes of this regulation.
- (7) Where the Commissioners consider that a person is a specified person, they shall notify that person of that fact in writing.

(8) Where an electronic return system is used, it must take a form approved by the Commissioners in a specific or general direction.

16. As I mentioned at §38 of *Additional Aids*, the appellant in this case was in the first tranche of taxpayers compelled to file online due to his turnover exceeding the minimum of £100,000 (as per VAT Regulation 25A(4)(b)). As I have said, having appealed the notice to file online, by concession HMRC permitted returns during the currency of the appeal to be filed by paper. So the appellant, so far as I am aware, has not been penalised for the last six years for paper VAT return filings even though it has not yet been determined whether he ought to have filed online. So no penalties are at issue in this appeal.

17. My understanding from Mr Bland's many letters and what he said to me in the hearing of *Additional Aids* is that he relies on the same grounds as the first three appellants in the case of *L H Bishop*. The claim is that it is a breach of law to compel his clients to file online when their choice is to instruct him as their agent, and he is computer illiterate due to his age and does not own and cannot (he says) afford a computer.

Human rights and EU proportionality

18. I do not rehearse what I have said in *L H Bishop* but proceed on the basis that it was rightly decided. HMRC did not in this hearing seek to persuade me that my decision was wrong (indeed they did not appeal it and to some extent changed the law to reflect it, see §28 below): nor does Mr Bland suggest it was wrongly decided, indeed he relies on it.

19. The appellant's case here was, as the appellants' cases in *L H Bishop* were, therefore reliant on the European Convention on Human Rights and the European Communities Act 1972 which gave him rights under the European Treaties. I decided, relying on those rights, that for reasons explained in *L H Bishop*, the appellants in that case were discriminated against because the requirement to file online put them to an extra expense not suffered by persons who were not old/disabled/too remote. I also decided that that discrimination was outside the UK's margin of appreciation on such matters and therefore unlawful because (a) the UK had given exemption to other classes of persons, such as those with religious objections and (b) the UK had itself recognised (by an unlawful telephone filing concession) that elderly/disabled/remote persons ought to have an exemption.

20. As I explained in *Additional Aids*, that reasoning is of no help to the appellants in these appeals. Firstly, there is no causation. In other words, Mr Clements has not suggested he would be put to extra expense if he was required to file online. On the contrary, it is clear that he pays Mr Bland to file his tax returns by paper. He could as easily instruct and pay a different agent to file his tax returns online.

21. Secondly, the appellant has not raised a prima facie case of discrimination against himself. Even assuming that Mr Clements is 'old' in the sense that he attended school before computer literacy was taught, nevertheless what evidence the Tribunal has is that Mr Clements is computer literate. His replies to the further

particulars requested indicates that he uses a computer and further, other evidence shows that his business not only has a website, the website has a 'contact' section which suggests it is possible to contact Mr Clements (or someone on his behalf) via email from that website. His replies to the further particulars were also that he was not disabled nor did he live too remotely for a reliable internet connection (his address is in Hounslow).

22. In any event, even if Mr Clements were computer illiterate, it is clear that it did not cause his failure to file online. He chose to instruct an agent who would not file online: so it is clear that whatever his reasons for using an agent, it was not because it was his only way of complying with the law to file online. He could have instructed an agent who would file online.

23. The complaint in reality, as recognised in *Additional Aids*, is that Mr Bland is discriminated against because the law requiring his clients to file online means that Mr Bland must learn how to file online, or pay someone else to file online on his behalf, or lose his clients (who, one assumes, would dislike incurring penalties each time Mr Bland fails to file online). I explained in *Additional Aids* why this complaint has no reasonable prospect of success. Firstly, the appellant lacks victim status so he cannot use his appeal to assert Mr Bland's human rights. Secondly, to the extent that the requirement to file online indirectly discriminates against agents who are too old to be computer literate or too disabled to file online, this is clearly within the UK's margin of appreciation because all agents are treated alike and, were the law to be otherwise, it would enable taxpayers to escape the obligation to file online by instructing agents who could not do so. For either reason, the appeal, relying on Mr Bland's human rights, is bound to fail.

24. So far as EU law is concerned, the position is the same for the same reasons. While the law may not have been proportional so far as taxpayers who were elderly, disabled or too remote were concerned, the same cannot be said of the law in so far as taxpayers who chose to instruct agents who are unable to file online were concerned.

25. I note that the Upper Tribunal were also of the view that the contrary is not arguable: permission to appeal to the Upper Tribunal was refused in the case of *Additional Aids*.

Conclusion

26. I am satisfied for these reasons that the appeal has no reasonable prospect of success and it should be struck out. It is hereby STRUCK OUT.

27. The effect is that, as I understand it, the concession from which this appellant has had the benefit of for the last 6 years will come to an end and in future his returns must be filed online and a failure to do so will incur penalties on the appellant. The appellant is no stranger to this as this Tribunal has already dismissed an appeal by this appellant against a failure to file online a PAYE return: *Broadway Glass Company & Glass Centre* [2014] UKFTT 72 (TC). Permission to appeal that decision was refused by the Upper Tribunal.

28. As I recognised in earlier decisions, the law has moved on and the appellant could now make an application for exemption under the new law: The new law provides:

Regulation 25A(6)(c):

5 ..A person...(c) for whom the Commissioners are satisfied that it is not reasonably practicable to make a return using an electronic system...for reasons of disability, age, remoteness of location or any other reason, is not required to make a return required by Regulation 25 using an electronic return system.

10 If such an application is made, it is for HMRC to decide, although, for the reasons given above, the appellant may well not qualify.

29. 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: 29 JULY 2016

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