



TC05520

Appeal number: TC/2016/01006 and TC/2015/04883

VAT – online filing – appeals struck out in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GLEN LYN GENERATIONS LIMITED

**First
Appellant**

-AND-

EXMOOR COAST BOAT CRUISES LIMITED

**Second
Appellant**

- and -

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

Respondents

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Fox Court, Brook Street, London on 24 November 2016

Mr M Oxenham, director of the Appellants, attending by telephone

**Mr M Voice, Counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

- 5 1. Both appellants appeal against a decision of HMRC dated 28 July 2015 that they were required to file their VAT returns online as they did not qualify for exemption from online filing.
2. The appeals were lodged late with the Tribunal but HMRC take no point on this: as there was clear intent to appeal, I admit both appeals.
- 10 3. HMRC applied to strike out the appeals on the grounds they had no reasonable prospect of success.

The law

The law on electronic filing

- 15 4. Regulation 25A(3) of the VAT Regulations 1995 requires VAT returns to be made using an electronic return system, apart from persons who are listed as exempt from the requirement:

(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....

...

- 20 (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

- 25 (b) to whom an insolvency procedure as described in any of paragraphs (a) to (f) of section 81(4B) of the Act 7 is applied, or

- 30 (c) for whom the Commissioners are satisfied that it is not reasonably practicable to make a return using an electronic return system (including any electronic return system that that person is authorised to use) 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.

- 35 5. The appellants' case was that they were not or should not be subject to the requirement to file online. HMRC's position was that the appellants' case on this had no reasonable prospect of success and it should be struck out. Rule 8(3)(c) provides that the Tribunal may strike out an appeal if it considers that it has 'no reasonable prospect of success'.

Test for no reasonable prospect of success

6. I agree with Mr Voice that this test is the same test as applies to summary judgment in the Courts and that is whether there is ‘a real prospect of success.’ In *Swain v Hillman* [2001] CP Rep 16 this was described as follows:

5 ‘The word “real” distinguishes fanciful prospects of success or, ... they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success...’

7. And in *Berezovsky v Abramovich* [2010] EWHC 647 (Comm) Colman J further defined the test:

10 ‘For the court to be satisfied that the claim has no real prospect of success it must entertain such a high degree of confidence that the claim will fail at trial as to amount to substantial certainty...’

15 8. Mr Voice accepted that it was for HMRC to satisfy me that the appeal (or a party of it) had only a fanciful prospect of prospect of success and unless they did so it could not be struck out (or partly struck out).

9. I consider the grounds of appeal in turn to decide whether any of them have no reasonable prospect of success.

Religious/moral grounds

20 10. Mr Oxenham accepts my decision in *Exmoor Coast Boat Cruises Ltd* [2014] UKFTT 1103 (TC) that the second appellant did not qualify for exemption from online filing under Regulation 25A(6) on the basis that he was not a practising member of a religious society or order. He does not seek to rely on that exemption for either appellant in this appeal.

25 11. He did not accept my decision in the case that the second appellant was unable to benefit from Article 9 of the European Convention on Human Rights. He had sought, and had been refused, leave to appeal from the Upper Tribunal. Since then he has applied directly to the European Court on Human Rights.

30 12. So as it was clear that the appeals were in part based on a claim that online filing breached the appellants’ human rights under Article 9 (freedom of religion), I proceeded to consider whether this case had a reasonable prospect of success.

Abuse of process

35 13. Mr Voice did not accept that the second appellant could re-open that question in this Tribunal. His point was that the principles of abuse of process should mean that litigants could not re-open decided questions of law or fact between the same parties, and even though that did not extent to different tax years, the principle would apply here where different tax years were not in issue.

14. My conclusion on this was that HMRC’s case was that the appellant’s had no reasonable prospect of success: they had not suggested the Tribunal had no

jurisdiction to hear the appeal. I would therefore consider whether the appellant's (implied) case that there was no abuse of process for the second appellant to re-open an already decided issue had a reasonable prospect of success, rather than actually deciding whether or not there was an abuse of process by so doing.

5 15. And my conclusion on that question was that the law was uncertain and therefore the appellant did have a reasonable prospect of success of persuading this Tribunal that abuse of process did not apply to the second appellant, and an even better prospect of success of persuading a Tribunal that it did not apply to the first appellant, as that company was not a party to the original appeal.

10 16. I would therefore not strike out this element of the appeal on that basis.

Could companies rely on the ECHR?

15 17. Mr Voice for HMRC accepted that the appellants had a real prospect of success in their case on Article 9 in so far as it was their claim that companies could benefit from Article 9. This is because the second appellant had succeeded on that part of its claim before me in the earlier appeal.

18. I would therefore not strike out this element of the appeal on that basis.

Is it the kind of belief A9 protects?

20 19. However, even accepting that companies might have human rights and that abuse of process might not apply, Mr Voice did not accept that the appellants had a real prospect of succeeding in their claim that Article 9 would protect the particular religious/moral beliefs in this case.

25 20. Mr Oxenham explained that his beliefs had not really changed since the 2014 decision. He did object to my summary of them there in §82 as 'he only used the internet in so far as he judged it economically necessary' as he said he only used the internet 'in extremis' in order to keep the companies alive.

30 21. Putting aside that (a) §82 did refer to the economic viability point and (b) §82 also referred to the fact found in that appeal that there were other circumstances in which the internet had been used and in particular by the first appellant, and proceeding instead on the assumption that Mr Oxenham only permitted either appellant to use the internet in order to maintain their economic viability, I considered that their case on this still had no real prospect of success.

35 22. As I said in §83 of my earlier decision, Article 9 only protects beliefs which reach a certain level of cogency, seriousness, cohesion and importance. Mr Oxenham's strong disinclination to use the internet is obviously not such a belief: he rates the economic survival of his companies above his personal beliefs. In any event, fundamentally, his belief is a belief that the law is wrong to require persons to file online even if they don't want to do so: but Article 9 is not there to protect beliefs

that the law is wrong else no one would be obliged to obey a law with which they disagreed.

Conclusion on religious/moral grounds:

23. I do not consider that the appellants' case on this has a reasonable prospect of success and I strike that part of the appeals out.

Disability grounds

24. The appellant's next ground of appeal rested on the new exemption from online registration which was enacted with effect for returns after 1 July 2014. It was not in force when the decision complained of in the earlier appeal by the second appellant was made and therefore irrelevant to that appeal: there is therefore no question of abuse of process in it being raised in these appeals. It is a new point.

25. The new exemption is contained in Reg 25A(6)(c) which is set out above. The appellants' case is that by reason of 'disability' it is 'not reasonably practicable' for the appellants to make online returns.

26. The exemption refers to whether HMRC are satisfied whether online filing is not reasonably practicable for the appellant but Mr Voice indicated that HMRC took no point on this and in particular did not suggest that the Tribunal was limited to a supervisory role. In other words, the Tribunal was entitled to decide whether online filing was not reasonably practicable for the appellants due to disability of their director; it was not restricted to deciding whether or not HMRC had reached a reasonable decision on this.

27. The appellant's case is that they have only one active director, Mr Oxenham, and Mr Oxenham has a long-standing problem with this back: sitting for any length of time can cause extreme pain. He doesn't make long journeys by car, he stands up to complete paperwork, and, as he reminded me, he stood all through the hearing two years ago.

28. I accept that the appellants have a real prospect of success in making out their evidential case that their director has a bad back, although Mr Oxenham's evidence was obviously not tested in this hearing.

29. However, as Mr Oxenham accepted, his bad back would not prevent him using a computer. It might well make it difficult for him to travel any distance to use a computer, but if he had a computer, he accepts he could use it by standing up, just as he does his paperwork.

30. For this reason, his case that he has a disability which means that it is (in his view) not reasonably practicable for the companies to file online has no real prospect of success: it is not Mr Oxenham's disability (if proved) that would prevent online filing.

Conclusion on disability ground of appeal

31. I strike out the appeals in so far as they are based on the claim that Mr Oxenham's bad back means that it is not reasonably practicable to file online.

Age grounds and 'other' grounds

5 32. I deal with the last two grounds together. As I understand it, Mr Oxenham's case
is that he is 52 years old and did not learn to use the computer at school or
university. He still does not actually know how to use a computer and has never used
a computer although he accepts he has seen other people use them and considers that
10 he might learn to use one quite fast. However, he does not wish to learn how to use
one. He does not choose to own a computer and does not own one. So even if he
learnt how to use one, he could only actually use one by:

- (a) Purchasing one;
- (b) Using one belonging to a friend;
- (c) Using one in a library which is a long drive away;
- 15 (d) Employing an agent to file online on the companies' behalf.

33. Options (a) and (d) would involve him in expense; options (b) and (c) would
potentially involve confidential financial information becoming known to other
persons who would not owe the companies a duty of confidentiality.

20 34. He points out that the companies are on annual returns and so this appeal concerns
only two VAT returns per year.

35. HMRC considered Mr Oxenham too young to rely on his age as a reason for not
filing online.

25 36. I did not fully understand HMRC's case on this. The reference to age in Reg
25A(6)(c) was not a reference to disability: it seemed possible it was intended to refer
to whether a person belonged to the 'computer generation'. Indeed, it was HMRC's
case that Reg 25A(6)(c) was introduced in response to my decision in *L H Bishop*. As
I pointed out in the hearing, 'age' in that case referred to persons who were too old to
have learnt computing skills at school: see §§386-394 from that decision appended to
30 this decision. As Mr Oxenham was too old to have learnt to use a computer at school,
it was not obvious to me that his age of 52 was irrelevant, particularly when combined
with the alleged facts that he did not own a computer and did not know how to use
one.

37. In these circumstances, I was not satisfied that Mr Oxenham's case on this had no
reasonable prospect of success and I refused to strike it out.

35 **Directions**

38. As a part of both appeals remain live, I issue the DIRECTIONS contained in the
first appendix to this decision to take both appeals to a joint hearing.

39. 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.

10

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 02 DECEMBER 2016

15

APPENDIX 1 - DIRECTIONS

5 **1. Statement of case:** Not later than 31 December 2016 HMRC shall serve on the appellants and file with the Tribunal a joint statement of case;

2. List of documents: Not later than 28 January 2017 each party shall:

- 10 a. send or deliver to the other party and the Tribunal a list of documents in its possession or control which that party intends to rely upon or produce in connection with the appeals (“documents list”); and
- b. send or deliver to the other party copies of any documents on that documents list which have not already been provided to the other party and confirm to the Tribunal that they have done so.

15 **3. Witness statements:** Not later than 28 January 2017 each party shall send or deliver to the other party statements from all witnesses on whose evidence they intend to rely at the hearing setting out what that evidence will be (“witness statements”) and shall notify the Tribunal that they have done so.

20 **4. Listing information:** Not later than 11 February 2017 both parties shall send or deliver to the Tribunal and each other a statement detailing:

- a. the expected number of persons attending the hearing for each party, to assist the Tribunal in identifying an appropriate venue;
- b. the names of all the witnesses who will give evidence on their behalf.;
- 25 c. the anticipated duration of the hearing; and
- d. dates to avoid for a hearing for the period of April-May 2017;
- e. whether the appellants request a telephone hearing.

30 Shortly after 11 February 2017 the Tribunal will fix the date of the hearing **even if the parties did not provide their dates to avoid**. A request for postponement on the grounds that the date of the hearing is inconvenient is unlikely to succeed if the party making it did not provide its dates to avoid.

35 **5. Bundles for hearing:** Not later than 25 February 2017 the respondents shall send or deliver to the appellant an indexed, paginated and bound bundle of documents (“documents bundle”) to include:

- a. the notices of appeal provided under Tribunal Procedure Rule 20;
- b. the statement of case provided under Tribunal Procedure Rule 25;
- c. all documents on the lists of documents provided; and
- 40 d. the witness statements provided as directed above.

The respondents shall ensure that the copy in the documents bundle of the witnesses’ statements shall, where there is a reference to an exhibit in the text, have added in its margin a cross-reference to the exhibit by its place in the documents bundle.

45 **6. Outline of case:** Not later than 14 days before the hearing both parties shall send or deliver to each other an outline of the case that they will put to the Tribunal (a skeleton argument) including the details of any legislation and case law authorities to which they intend to refer at the hearing.

At the same time both parties will file with the Tribunal an electronic copy of their skeleton argument together with electronic copies of the witness statements on which they rely.

5 **7. Authorities bundle:** Not later than 7 days before the hearing the respondents shall send or deliver to the appellant one copy of a bundle of authorities (comprising the authorities mentioned in both parties' skeleton arguments).

10 **8. Delivery of bundles to Tribunal:** The respondents shall bring three copies of the documents bundle and two copies of a bundle of authorities to the hearing centre on the morning of the hearing no later than 9:30 am unless the Tribunal notifies the respondents to deliver them at an earlier date. **Bundles delivered before the due date will be rejected.**

15 **9. Witness attendance at hearing:** At the hearing any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute).

10. Right to request new directions: Either party may apply at any time for these Directions to be amended, suspended or set aside, or for further directions.

20

APPENDIX 2 – EXTRACT FROM *L H Bishop*

Is an older person less likely to be able to use a computer?

5 386.HMRC seemed to see this question as relating to an older person's ability to learn to use a computer and they said there was absolutely no evidence an older person would find learning to use a computer any more difficult than a younger person.

10 387.In my view this overlooked the obvious. Irrespective of the relative abilities of older and young people to learn new skills, it is the case that persons under a particular age are very likely already to know how to use a computer because they will have been taught at school, while persons over a certain age cannot have been taught how to use one at school because home computers simply didn't exist when they were at school. Indeed, HMRCs own reports recognised this.

15 388.So, in order to make their VAT return online, an older person is more likely than a young person to need to be taught how to use a computer and to use the internet. As years pass, and the computer literate generation becomes old, this will cease to be the case. But it is not the case yet.

20 389.I was presented with surveys and reports by the joint appellants. They all seemed consistent in saying there was less computer and internet useage by older persons. The Office of National Statistics ("ONS") 2012 survey showed that showed that 82% adults below 65 years use a computer every day while only 29% of adults about 65 years did so. It showed that only 36% of households of persons over 65 years of age had internet access. The ONS 2010 survey showed that internet usage increases with education and with managerial/professional jobs and income. The most marked difference in users was however determined by age. The ONS report also showed (as one would expect) that lack of internet access was associated with lack of computer skills.

390.Mr Williamson's evidence refers to the ONS reports. Mr Macnab says the reports are of little weight as:

30 (a) They do not consider business people and therefore it is not possible to draw the conclusion that old persons in business are less likely to use internet than young persons in business;

(b) It looks at use of the internet rather than computer illiteracy. The fact a person does not use the internet does not mean they can't use the internet.

35 (c) Mr Sheldon is the oldest of the four appellants but is computer literate, and Mr Tay is not old (as he is only 61) yet he is computer illiterate and so (implies Mr Macnab) the conclusion of the report is suspect.

40 391.I do not dismiss the reports as of no weight. They state what is obvious which is that older people, who were born and grew up in a world without home computers and the internet, are less likely to use, and to know how to use, computers and the internet than younger people.

392. And so far as Mr Macnab's comments at (c) are concerned, the criticism is groundless. While it is clear from the ONS surveys that its findings are that age is the biggest determinative of whether someone is a computer user, it is not the only determinative. As the report recognised (§ 389 above), the nature of a person's employment has an impact too. Mr Sheldon learned to use a computer in a managerial role when he was employed in his 50s (approximately 20 years ago). Whereas, although Mr Tay and Mr Bishop are younger, they are not and have not been in managerial/professional work.

393. Mr Tay's age at 62 is also irrelevant: for the purpose of computer literacy he is too old to have learnt at school. The same is true of Mr Bishop, as although he is young enough to have had some college training on computers, what he learnt is now hopelessly out of date and his job has not caused him to renew and update his knowledge of computers.

394. Mr Macnab does criticise the appellants for saying exemption should be given to persons over 60 because the age 60 or 65 is arbitrary. And I agree as far as it goes. From the point of computer literacy it is not a person's absolute age that is significant but their year of birth and in particular whether they were born more than, say, twenty years before home computer use became widespread so that they were unlikely to have learnt about computers at school. As at 2013, that would apply to people aged over about 45. So all of the joint appellants in this sense are old.