TC02961

Appeal number: TC/2012/07011

VAT – hardship application – s 84(3)-(3C) VATA – amount determined to be payable as VAT – meaning of "hardship" – relevant factors – whether serious risk of exceeding appellant's overdraft limit – question of reasonableness – whether breach of EU law or human rights principles

FIRST-TIER TRIBUNAL
TAX CHAMBER

FAIRWAY LAKES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
MRS SHEILA CHEESMAN

Sitting in public at 45 Bedford Square, London WC1 on 13 September 2013

Laurence Gage, director, for the Appellant

Errol Robathan, VAT & Duties Litigation, HMRC Solicitor's Office, for the Respondents

DECISION

1. This was a hardship application by the Appellant, Fairway Lakes Limited ("Fairway"), under s 84(3B) of the Value Added Tax Act 1994 ("VATA").

2. The relevant parts of s 84 are as follows:

> "(3) Subject to subsections (3B) and (3C), where the appeal is against a decision with respect to any of the matters mentioned in section 83(1)*(b)*, *(n)*, *(p)*, *(q)*, *(ra)* or *(zb)*, it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.
>
> …
>
> (3B) In a case where the amount determined to be payable as VAT or the amount notified by the recovery assessment has not been paid or deposited an appeal shall be entertained if—
>
> *(a)* HMRC are satisfied (on the application of the appellant), or
>
> *(b)* the tribunal decides (HMRC not being so satisfied and on the application of the appellant),
>
> that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship."

3. The appeal of Fairway in question was made against a review decision of HMRC dated 6 July 2012, which upheld an earlier decision of 27 March 2012 to the effect that certain supplies made by Fairway were not, as accounted for by Fairway, zero-rated, but were standard rated. Assessments were raised for affected VAT periods to 06/11, with further assessments to be raised later depending on the provision of further information by Fairway.

4. The notice of appeal referred to an amount of tax in dispute of £156,079.79. An application was made on 10 July 2012 by Fairway to HMRC that this amount should not be required to be paid or deposited before the appeal could be entertained. The relevant amount of VAT has subsequently, following provision of further information by Fairway to HMRC, been recalculated to £14,415.21.

5. As Fairway's appeal is in respect of the VAT chargeable on a supply, it falls within s 83(1)(b) VATA, and cannot be entertained unless HMRC or the tribunal grants the hardship application.

6. We note that the appeal is in respect of the VAT assessments (which will include any applicable interest), and not in relation to penalties. It appears that a penalty assessment has been raised, but that was merely foreshadowed in HMRC's original decision letter of 27 March 2012, and we have not seen the penalty assessment. We mention this if only to draw Fairway's attention to the need to make an appeal against any penalty assessment (if necessary with an application to appeal out of time), but also to make the point that, contrary to what appears to have been

indicated in a letter from HMRC to Fairway's advisers of 9 May 2013, the amount of any penalty does not have to be paid before an appeal may be entertained.

7. We are concerned therefore only with the question whether we are satisfied that the requirement on the part of Fairway to pay or deposit the sum of £14,415.21, being the amount determined to be payable as VAT, would cause Fairway to suffer hardship. That is a fixed amount; the determination of the tribunal must be "all or nothing". There is no scope for the tribunal to determine that a lower amount could be paid without causing hardship. If payment of the full amount would cause hardship, the appeal will be entertained without any payment or deposit on the part of Fairway.

8. The factors to be taken into account are limited. The question is one of hardship which in this context, as has consistently been held by tribunals, means *financial* hardship. It follows that the merits of an appellant's case are not material. Nor are questions relating to other disputes with HMRC material to the question whether a particular appeal may be entertained.

9. The burden of showing hardship is on the appellant. Mr Gage, for Fairway, argued that the payment of the amount in question would cause financial hardship. He referred generally to the recession, and the financial difficulties experienced in that regard by Fairway as well as by its associated company, Sunningdale Investments Limited ("Sunningdale").

10. Part of Mr Gage's case rested on his submission that HMRC were wrongly withholding amounts due to Fairway in respect of input tax deductions that are not the subject of this appeal. Those amounted to £222,517.95. The argument was effectively that the failure by HMRC to pay over monies that were due to Fairway should offset any sums that would otherwise be required to be paid by Fairway in order to be able to proceed with this appeal.

11. The amount of input tax due to Fairway is, we understand, the subject of dispute. Appeals are to be made in this respect. There is therefore, at this stage, no amount that can be said to be due to Fairway. There is no question of any offset being available. In any event, as we described above, the only question before us is that of the financial hardship that would be caused to Fairway if it were required to make the payment of £14, 415.21. The disputed amount of £222,517.95 is relevant only to the extent that it is a sum that cannot be regarded as an available resource of Fairway in assessing its financial position.

12. We had little documentary evidence before us of the current financial position of Fairway. It was limited to copies of draft unaudited financial statements of Fairway for the year ended 31 March 2013, a bank statement (number 40) issued on 13 August 2013 showing an overdraft limit of £50,000 and an overdrawn balance at 12 August 2013 of £21,543.98. We also had some further more historic accounts for the years ended 31 March 2011 and 31 March 2012 and bank statements for dates between December 2012 and February 2013, numbered 17, 18, 19, 20 and 22.

13. The most recent statement (no 40 issued on 13 August 2013) indicated that Fairway's overdraft limit had been due for review on 1 September 2013. Mr Gage confirmed to us that, at the date of the hearing, this limit remained at £50,000.

14. From our review of the bank statements, we conclude that we are not satisfied that there is a serious risk of Fairway exceeding its overdraft limit if it pays to HMRC the amount of £14,415.21 to HMRC. Although Mr Gage told us that the debit balance at the date of the hearing was greater than the figure of £21,543.98 recorded for 12 August 2013, and was close to the overdraft limit, we had no documentary evidence in that respect. The historic accounts by contrast showed a debit balance exceeding £30,000 only on two occasions; on 12 and 13 February 2013. We do, however, note that the unaudited financial statements for the year to 31 March 2013 showed an overdraft figure at the balance sheet date of £56,505 for 2013 and £51,798 for 2012.

15. Mr Gage argued that payment of the VAT amount would inhibit the payment by Fairway of amounts due to its suppliers and payments of wages and salaries. As to the former, when questioned by the tribunal, Mr Gage's evidence showed that amounts due to a kitchen supplier (£17,000) and to a plumber and electrician (£12,000-13,000) would be largely offset by a receipt of £26,249 that would be due from the client on completion. As to the latter, although Mr Gage told us that the amount for wages and salaries, including those of directors, would be in the region of £100,000 per year (or about £8,000 a month), he accepted that the 2013 financial statements showed, in cost of sales, wages and salaries of £45,367 and, in administrative expenses office wages of £4,920 and directors' remuneration of £12,300, a total for the year of £62,587 (a little over £5,200 per month).

16. A review of Fairway's accounts did not alter the picture. Although in its unaudited financial statements to 31 March 2013 Fairway was reporting a loss for the year of £182,012, that was largely attributable to an exceptional item of £158,098 in respect of "rent, wayleave and drainage", and if an expense for the same item for 2013 of £25,773 were added back, the year on year comparison would have been that a loss of £24,756 in 2012 would have been replaced by a profit of £12,429.

17. We asked Mr Gage if he could explain the basis for these payments, which were made to Fairway's associated company, Sunningdale. We understand the explanation to be related to the adoption by Fairway of certain infrastructure, such as drainage, on land owned by Sunningdale. Mr Gage attempted to show us an email to provide further explanation, but was unable to do so because of a lack of an internet connection.

18. We are content for present purposes to accept that the payment for rent etc for the year 2013, and the exceptional expense to catch up for previous years, are valid expenses. In any event, we also accept that, as regards the exceptional item, no actual payment was made, the expense being recorded by way of a contra item in the accounts. That, accordingly, has no impact, one way or another, on Fairway's cash flow position.

19. We are concerned only with the financial position of Fairway, and its ability to pay the disputed VAT without suffering hardship. So, although Mr Gage told us that the company had recently received additional finance from Mr Gage's sister in the sum of £35,000 and that he himself had given a guarantee for the bank overdraft, those are not considerations that bear upon the question before us.

20. We conclude that the question is resolved by whether Fairway's overdraft position will be prejudiced by the making of the VAT payment. In our view, on the limited evidence we have seen, it will not. We are, accordingly, not satisfied that the requirement for Fairway to pay or deposit the amount of £14,415.21 determined to be payable as VAT would cause Fairway to suffer hardship.

21. There remains one further question to consider. Although not raised expressly by Mr Gage at the hearing, a letter from Fairway's advisers to HMRC dated 23 May 2013 argued that the withholding of the input tax claim to which we referred earlier meant that it was unreasonable for HMRC to demand that Fairway deposit the amount of VAT assessed. To the extent that is an argument that goes to principles of EU law of proportionality, equivalence and effectiveness, or to questions of human rights, it has been held by the High Court in *R (on the application of ToTel Ltd) v First-tier Tribunal (Tax Chamber) and another* [2011] STC 1485 that the provisions of s 84 do not make it impossible or excessively difficult to exercise EU law rights, and nor is the right of protection of property under article 1 of the First Protocol of the European Convention of Human rights infringed.

22. For these reasons, we refuse Fairway's application in respect of hardship.

23. We announced our decision to the parties at the end of the hearing on 13 September 2013. At the same time we informed Mr Gage that, in order to assist with Fairway's management of its cash flows, we would allow a period of six weeks to enable Fairway, if it is so advised, to make the payment required of £14,451.21. We accordingly direct as follows:

> (1) The tribunal having refused Fairway's application under s 84(3B) of the Value Added Tax Act 1994, this appeal shall be entertained only if, not later than 25 October 2013, Fairway shall have paid or deposited with HMRC the sum of £14,451.21.
>
> (2) If the said payment or deposit is not made by 25 October 2013, the appeal shall not be entertained and shall be dismissed.

Application for permission to appeal

24. Although s 84(3C) VATA provides that the decision of this tribunal as to the issue of hardship is final (and so, on the face of it, not susceptible to appeal), it has been held by the Court of Appeal, in *ToTel* [2013] STC 1557, that this provision is *ultra vires*, and that accordingly a right of appeal on a point of law does lie under s 11 of the Tribunals, Courts and Enforcement Act 2007.

25. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 14 October 2013