



[2020] UKFTT 00145 (TC)

TC07638

Appeal number: TC/2018/06603

Procedure - financial hardship application - VAT assessment - Appellant awaiting determination of a VAT refund claim and CIS repayment claim from HMRC - financial information requested by HMRC in support of the hardship application - information not provided - application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROK CONSTRUCTION & HIRE LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
SUSAN STOTT**

**Sitting in public at Lincoln County Court, High Street, Lincoln LN5 7PS on 4
December 2019**

**Mr Simon Holloway, Director of the Appellant Company and his agent Mr Chris
Hawes for the Appellant**

Mr Connor Fallon, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is a hardship application by Rok Construction & Hire Limited (“the appellant”) relating to its proposed appeal against a VAT assessment in the amount of £6,189 issued by HMRC for periods 12/15 and 03/16.
2. A taxpayer is required to pay a disputed amount of tax before the tribunal can progress the appeal. However, if the appellant considers that the requirement to pay the disputed tax will cause financial hardship, he can ask HMRC to consider an application for hardship.
3. A hardship application is an application by a proposed appellant for a direction pursuant to s 84(3B) of the Value Added Tax Act 1994 (“VATA 1994”) that the appeal be entertained without payment or deposit of the disputed tax on the grounds of hardship.
4. The appellant asserts that a VAT refund of £13,000 and a CIS repayment of £34,958 are due to the company and that it is unable to pay the VAT claimed of £6,189 until HMRC have issued the refund and repayment.
5. The appellant company’s application to HMRC has been refused under the provisions of s 84(3B) VATA 1994 on the basis that the appellant company has not provided sufficient supporting documentation and information for the purposes of determining the current financial position of the business.
6. The appellant now applies by way of appeal to the tribunal for a financial hardship order. The issues relating to the substantive appeal are not under consideration by the tribunal.

Relevant legislation

7. The relevant legislation pursuant to hardship is the VAT Act 1994 sections 84(3), 84(3A), 84(3B) and 84(3C) which state:

84(3) Subject to subsections (38) 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.

84(3A) Subject to subsections (38) and (3C), where an appeal is against an assessment which is a recovery assessment for the purposes of this subsection, or against the amount of such an assessment, it shall not be entertained unless the amount notified by the assessment has been paid or deposited with HMRC.

84(3B) In a case where an 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.

84(3C) notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007, the decision of the tribunal as to the issue of hardship is final.

Background

8. On 20 November 2018, following the appellant company's Notice of Appeal dated 23 October 2018 against the VAT assessment of £6,189, an application for financial hardship was received by HMRC's Hardship Team, on the grounds that the appellant would suffer financial hardship if required to pay the £6,189 VAT because a VAT refund of £13,000 and a CIS repayment of £34,958.61 had been withheld by HMRC.

9. On 28 January 2019 Officer Sally Smith, the HMRC officer dealing with the application, wrote to the appellant and requested documentary evidence and information to support the application. She copied in the appellant's authorised representative, Mr Chris Hawes and requested a full response by 27 February 2019.

10. Officer Smith raised the following enquiries:

- i. A full explanation as to why the company would suffer financial hardship if required to pay the VAT assessment of £6,189.
- ii. The company's accounts for the year ended 31 March 2018 showed a Debtors figure of £27,009. The appellant was asked to confirm how much of this debt had been repaid and how any repayments had been appropriated within the business.
- iii. The accounts also showed provisions for liabilities of £12,879. The appellant was asked to explain what the figure related to and how it has been appropriated.
- iv. Copies of the company's bank account statements for the previous three months, together with copies of bank statements covering the last three months for any other accounts held by the company.
- v. Copies of the facility letter relating to any overdraft facilities the company has with any bank or financial institution together with any third party loan or investment agreements.
- vi. A copy of the most recent management accounts analysed by month, together with the comparative budgets or forecasts with explanations of any major differences.

- vii. A full cash flow forecast of the business requirements over a period of at least the following six months to include all income streams, revenue costs and capital expenditure; the expected funding requirements throughout the year and also the maximum funding available.
- viii. Provide details of any investments held by the company to include stocks, shares and investments in other businesses.
- ix. An explanation of the steps or action taken since the date of the VAT assessment to try and raise the funds to settle the tax supported by the relevant evidence as appropriate.
- x. Details of any other assets or liabilities, including the value of current trade debtors and creditors.
- xi. Whether the company had any bank covenants which would be breached if required to pay the VAT, together with copies of the relevant documentation and confirmation of the action the bank would take if the covenants were breached.
- xii. Any further information the appellant wished to be taken into account

11. On 22 February 2019, Mr Hawes requested an extension until 8 March 2019 to provide the information requested. Mr Hawes said that the information requested in connection with the company's financial accounts had been prepared by a different accounting agent (Messrs Wright Vigar) and suggested she contacted them directly.

12. On 26 February 2019, Officer Smith agreed to the requested extension of 8 March 2019.

13. On 1 March 2019, Mr Hawes wrote to Officer Smith enclosing a letter dated 31 October 2018 from Officer Turner of HMRC, who was the VAT decision maker. Mr Hawes asked "why Officer Turner had issued a demand for VAT when she was fully aware that potential VAT repayments were still owing to the business".

14. On 8 March 2019, Officer Turner advised that she had advised Mr Hawes that his client's VAT returns would need to be verified for accuracy before any repayments could be released. Supporting records had been requested in order to substantiate the VAT returns but the appellant had not provided any information. Officer Turner advised that she could not authorise a repayment until she had sight of the records in order to substantiate the returns in question.

15. On 12 March 2019 Officer Smith advised Mr Hawes and the appellant that she did not have the appropriate authority from the company allowing her to communicate with Messrs Wright Vigar.

16. On 8 April 2019 Officer Smith notified HM Courts & Tribunals Service that the appellant and its authorised representative had failed to provide her with the supporting information and documentation required to make a decision on the hardship application.

Appellant's Case

17. The appellant's stated grounds of appeal in its Notice of Appeal to the Tribunal (so far as relevant) :

“It will cause severe financial hardship if the company is forced to pay the tax under dispute. The company does not have the money to pay the tax under dispute, and this is because the company is owed in excess of £13,000 in VAT refunds which should have been processed by the HMRC officer involved, before any assessment was issued against the company.

It is a fundamental grievance to us, that the HMRC officer involved, Officer Turner, chose to issue an assessment against us, for the sum of £6,600 in VAT, while there were VAT refunds which the officer chose to ignore.

It was only after we filed an appeal against the £6,600 assessment, that Officer Turner admitted in a letter, that there were VAT repayment returns which should be processed....”

18. At the hearing Mr Hawes said that he no longer acted for the appellant company and enquiries into its financial status should have been raised by HMRC with the current agents, Messrs Wright Vigar.

19. He said that HMRC had not addressed any of his concerns or explained how and why they had arrived at an assessment of £6,189.

20. He argued that the merits of the appeal, that is, the substantive issues, should be considered by the tribunal as part of the decision relating to the financial hardship application.

HMRC's Case

21. Mr Fallon for HMRC said that any financial hardship that may be suffered by the appellant company could not be assessed without the information that had been requested by Officer Smith. Nothing had been provided.

22. It was not for Officer Smith to contact the appellant's new accountants Messrs Wright Vigar for the information. HMRC held no authority from the appellant for her to do that.

Conclusion

23. The only issue for the tribunal to consider is whether to grant the appellant's application for a direction pursuant to s 84(3B) of VATA 1994 that the substantive appeal be entertained without payment or deposit of the disputed tax on the grounds of hardship.

24. The appellant has not provided the information requested by HMRC for the purposes of determining its current financial position.

25. There is clearly no obligation on the part of HMRC to approach a third party for that information without an appropriate authority from the appellant to do so.

26. There is a statutory obligation on a person required to make a return to pay the VAT to HMRC. Value Added Tax Regulations 1995, at Regulation 40, state that any person required to make a return “shall pay” to HMRC “such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return”.

27. It is specifically stated in s 71(1) VATA 1994 that any insufficiency of funds to pay any VAT is not reasonable excuse. Irrespective of the hardship application, the appellant had not produced any bank statements, copy accounts or other documentation to substantiate its assertion that it is or was suffering an insufficiency of funds due to unavoidable and unforeseen circumstances beyond its control.

28. It may transpire that a VAT refund is due to the appellant or that an assessment has been incorrectly made, but before those matters can be considered the appellant must either pay the tax due or prove financial hardship.

29. With regard to any CIS repayment similar considerations apply.

30. The tribunal cannot consider the issues relevant to the substantive appeal, but in any event it should be made clear that there is no provision which allows HMRC to offset CIS deductions against the company’s VAT liability “in year”. The Income Tax (Construction Industry Scheme) Regulations 2005 Regulation 56(5) stipulate that HMRC shall not repay any sum deducted under FA 2004 s 61 to a company sub-contractor until:

“The tax year in which the deduction was made, has ended and the qualifying sub-contractor has delivered the return required by regulation 73 of the PAYE Regulations (annual return of relevant payments liable to deductions of tax).”

31. Regulation 56(2) stipulates the order in which any CIS credits should be discharged and Regulation 56(3) states any sum deducted as is not required to discharge the sub-contractor’s liabilities specified in paragraph (2) shall be repaid to the qualifying sub-contractor.

32. Where the sub-contractor is a company, the legislation states at FA 2004 s 62(3) that deductions are first to be treated as paid on account of any “relevant liabilities” of the sub-contractor. “Relevant liabilities” in this context means the company’s obligations to pay over to HMRC any PAYE, NICs, and CIS deductions. Any excess deductions determined at the end of the tax year when the company has submitted its employer’s annual return on form P35 for non-Real Time Information (“RTI”) year, or Employer Payment Summary returns for RTI years, can be set against corporation tax liabilities or repaid.

33. For RTI years, the company will complete monthly Employer Payment Summary returns showing cumulative CIS deductions taken from its own income during the tax year. These amounts are off-set against the PAYE and other deductions it is due to pay

for the tax year. Any excess of CIS deductions taken from the company's own income is carried forward month by month until all of the CIS deductions for the tax year are used, or the end of the tax year is reached.

34. Repayment and off-set claims for limited company subcontractors can only be dealt with when the company has filed its final Employer Payment Summary and all associated Full Payment Submissions for the tax year. If HMRC cannot agree the company's whole claim, they will ask the company for their payment and deduction statements and supporting evidence of receipt. HMRC can still consider a part repayment/off-set for the deductions they can agree. Where there is a mis-match, HMRC will need to take up the discrepancy with the company.

35. It is not until the end of the tax year that excess CIS deductions which cannot be set-off and are still available may be refunded or set against other liabilities.

36. The appellant company's financial hardship application cannot be granted whilst information reasonably requested by HMRC in support of the VAT application is outstanding. The appeal is accordingly refused.

37. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 13 MARCH 2020