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UT (Tax & Chancery) Case Number: UT/2021/000053

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Royal Courts of Justice, London

Heard on: 20 October 2022
Judgment: 9 November 2022

VAT – Whether procedural irregularity in FTT hearing led to a witness not being called – no – appeal dismissed

Before

JUDGE JONATHAN RICHARDS
JUDGE ANDREW SCOTT

Between

MOHAMMAD AMEEN MIRZA

Appellant

and

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Taher Nawaz of T Nawaz & Co Ltd

For the Respondents: Sarah Black, Counsel, instructed by General Counsel and Solicitor for HM Revenue & Customs

DECISION

1. The appellant, Mr Mirza, appeals against a decision (the "Decision") of Judge Anne Scott (the "FTT Judge"), sitting in the First-tier Tribunal (Tax Chamber) (the "FTT") released on 9 November 2020 under reference TC/2019/05125. By the Decision the FTT dismissed Mr Mirza's appeal against a default surcharge of £3,701.55 imposed for what HMRC considered to be late payment of VAT due for the 02/19 VAT period.

The Decision of the FTT

2. References in the remainder of this decision to numbers in square brackets are to paragraphs of the Decision unless we specify otherwise.

3. Relevant aspects of the VAT default surcharge are not in dispute and the FTT correctly summarised the law at [23] and [24]. Very broadly, if a taxpayer does not submit a VAT return or make payment of VAT due by a particular date, s59 of the Value Added Tax Act 1994 provides for a surcharge to be imposed. However, s59(7)(b) provides for a defence: a taxpayer is not liable to the default surcharge if there was a "reasonable excuse" for the default.

The FTT's factual findings

4. There is no appeal against the FTT's central relevant findings of fact. In his comments on the draft embargoed decision that we sent to the parties, Mr Nawaz provided, on Mr Mirza's behalf, a selection of what he described as factual inaccuracies in the Decision and areas where he considered the FTT had overlooked relevant context. We mean no discourtesy to Mr Nawaz by not reflecting all those points in the summary below whose purpose is to summarise the facts as the FTT found them, given that there is no appeal against those findings. It is sufficient to note that Mr Nawaz formally submitted that the FTT's findings do not give a full picture and, in particular, that Mr Mirza's provision of information to HMRC was much better than the Decision suggests and HMRC's dealing with his VAT affairs much less satisfactory than the Decision suggests. We are grateful to Mr Nawaz for drawing to our attention a mistake made by the FTT as to the date of a letter sent by HMRC (see paragraph 8 below).

5. Mr Mirza was registered for VAT at material times and carried on business as a grocer ([2]). He submitted a VAT return for 02/19 showing VAT due of £24,677 ([11]). He did not make any cash payment of that sum by the VAT due date ([26]).

6. There were some other dealings between HMRC and Mr Mirza that were of significance. Although the FTT did not make detailed factual findings on these other dealings, it found that:

> (1) In a raid on Mr Mirza's premises on 22 October 2015, HMRC, accompanied by Police Scotland, had seized "documents and certainly £550,200" (the "Seized Cash") from Mr Mirza ([43]).
>
> (2) Mr Mirza had made a number of claims for repayment of input tax (the "Repayment Claims") which HMRC had not paid because, in HMRC's view, Mr Mirza had provided insufficient evidence to support the claims ([14]). The FTT did not give full details of the Repayment Claims, but it appears from [17] that those claims dated back to VAT period 02/12 and that Mr Mirza's position was that they resulted in HMRC owing him some £190,000 ([18]).

7. The FTT did not make express findings on Mr Mirza's wider VAT compliance. However, it seems clear from its summary of submissions made on Mr Mirza's behalf at [39] to [41] that there

was a sustained pattern of Mr Mirza not paying VAT liabilities shown on returns on the basis, it was submitted, of Mr Mirza's belief that the VAT due could be set off against the Repayment Claims.

8. On 8 November 2018 (although the FTT wrongly found that this was dated 8 November 2019), HMRC wrote a letter (the "Letter"). The Letter referred in general terms to the scale of Mr Mirza's outstanding tax debts and recorded HMRC's belief that these tax debts were "far in excess of" the Seized Cash. HMRC suggested that Mr Mirza should contact HMRC's Debt Management department which the FTT interpreted as a suggestion that Mr Mirza might seek to agree a "time to pay" ("TTP") arrangement.

9. Mr Mirza gave no evidence to the FTT, whether in the form of a witness statement or orally. The reasons for that are at the heart of this appeal and we will return to that issue later in this decision.

The FTT's reasoning

10. Mr Nawaz argued before the FTT that Mr Mirza was not in default, and so could not be made liable to a default surcharge, because he had in fact paid his VAT liability for 02/19 by setting it against either or both (i) his right to the return of the Seized Cash or (ii) the Repayment Claims. We do not need to set out the detail of the set-off arguments that Mr Nawaz put before the FTT because none of those arguments form the basis of the grounds on which Mr Mirza has permission to appeal to the Upper Tribunal. It is sufficient, therefore, to note that, at [33], the FTT found that there could be no set-off against the Repayment Claims and, at [46] and [47], the FTT concluded that there could be no set-off against an obligation to return the Seized Cash.

11. It follows from what we have said in paragraph 10, that there is no appeal against the FTT's conclusion that Mr Mirza was in default and so potentially liable to the default surcharge. That leaves the question of "reasonable excuse". Mr Nawaz was submitting (see [54]) that Mr Mirza had a "reasonable excuse" consisting of a belief that it was appropriate for him to pay his VAT liability for 02/19 by set-off. The FTT directed itself on the applicable law as follows:

> 52. HMRC, and indeed the appellant, also relied on *Perrin v HMRC* [reported at [2018] UKUT 156 (TC)] where the Upper Tribunal stated:
>
> > "70 … the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer….
> >
> > 71. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co and Coales*)….
> >
> > 75. It follows from the above that we consider the FTT was correct to say (at [88] of the 2014 Decision) that 'to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account'.".

12. At [53], the FTT dealt with the first part of the test it had derived from *Perrin*, namely whether the excuse was "genuine", stating as follows:

> 53. Firstly, no evidence was led as to the appellant's state of mind or indeed his attributes. All that is known about him is that he is a businessman who is in dispute with HMRC and is facing possible criminal prosecution in relation to VAT. He was professionally advised. Mr Nawaz stated that the accountants had had documents seized on three or four occasions and as can be seen from paragraph 8 above it was they who advanced the original arguments for non-payment of VAT. It was simply argued by Mr Nawaz that the appellant's actions in making no payments and relying on sums that he believed were due to him had been entirely reasonable.

13. At [54] to [58], the FTT moved on from a consideration of the "genuineness" of the excuse advanced to its "reasonableness". At [54] and [55], the FTT said:

> 54. Was it reasonable for the appellant to believe that he could offset current (2019) VAT liabilities against the repayments that he had claimed? The short answer to that is that *Tradecorp* [i.e. *R (UK Tradecorp Ltd) v C&E Commissioners* [2005] STC 138] is not new law and the appellant has been professionally advised throughout, albeit Mr Nawaz has only been retained latterly. Firstly, even if he thought that he could offset the liability the appellant's representative, and indeed he, should have known about TTP arrangements; the appellant has been in the Default Surcharge regime since 08/10 and no payment of VAT has been made since 02/12. The Letter flagged up the need to talk to HMRC. Nothing was done in relation to VAT and TPP. That does not amount to a reasonable excuse.
>
> 55. If his accountant had told him that he could offset it without seeking TTP then that advice was incorrect.

14. At [56] and [57], the FTT considered the possibility that Mr Mirza's accountant (not Mr Nawaz who was only instructed subsequently) might have incorrectly concluded that a set-off was permissible but, having considered the decision of the Upper Tribunal in *Katib v HMRC* [2019] UKUT 189 (TCC) concluded that this made no difference saying:

> 57. In summary, if the appellant's then advisor did not know about *Tradecorp* or did not advise him about that, that is not a reasonable excuse. He knew or should have known that the repayment claims had not been agreed with HMRC and are the subject of a long running dispute. There is no guarantee that the repayments will ever be agreed. TTP should have been sought and agreed in advance of the due date. It was not. The appellant's remedy is with his advisor. It does not amount to a reasonable excuse.

15. At [58], the FTT found that no reasonable person could have concluded that there was any possibility of setting off a VAT obligation due for 02/19 against a right to a repayment of the Seized Cash because it was clear that there was no such "right". It rejected Mr Nawaz's submissions that the Letter suggested that Mr Mirza could operate a set-off. Indeed the FTT went further. At [45] it appeared to accept the view set out in the Letter to the effect that Mr Mirza's outstanding tax liabilities far exceeded the amount of the Seized Cash with the result that it was not reasonable for Mr Mirza to believe that he could operate any set-off.

16. In summary, therefore, the FTT rejected Mr Nawaz's submission that Mr Mirza had a reasonable excuse for the following reasons:

> (1) Since Mr Mirza had not given evidence, it was not possible to make any findings as to whether the excuse put forward was "genuine" or as to Mr Mirza's relevant beliefs and attributes.
>
> (2) Mr Mirza was professionally advised. His then accountant (to repeat, not Mr Nawaz) should have realised that no set-off was possible against the Repayment Claims as a matter of law. The FTT evidently drew some conclusions from the Upper Tribunal's decision in

Katib which we will consider in more detail in our analysis of Ground 2 of Mr Mirza's appeal.

(3) Mr Mirza had not paid any VAT since 02/12 and had been within the default surcharge regime since 08/10. HMRC's continued imposition of default surcharges and their suggestion in the Letter that Mr Mirza should contact them would have led a reasonable taxpayer to conclude that no set-off was available, whatever his accountant had told him.

(4) No taxpayer could reasonably believe that there could be set-off against a right to repayment of the Seized Cash when it was obvious (i) that the Seized Cash might never be returned and (ii) Mr Mirza's outstanding tax liabilities vastly exceeded the amount of Seized Cash.

The grounds of appeal against the Decision

17. Mr Mirza sought permission to appeal on a number of grounds, including that the FTT erred in concluding that Mr Mirza was not entitled to pay his VAT liability for 02/19 by set-off against either the right to the return of the Seized Cash or the Repayment Claims. However, following an oral hearing the Upper Tribunal granted permission to appeal on the following two limited grounds:

(1) Ground 1 – that the FTT erred by proceeding with the hearing without hearing oral evidence from Mr Mirza.

(2) Ground 2 – that the FTT erred by assuming at [54] to [57] of the Decision that Mr Mirza could not have a reasonable excuse if his accountant had provided incorrect advice without considering the separate question of whether it would be reasonable for a taxpayer with Mr Mirza's attributes to rely on that advice even if incorrect.

Ground 1

Introduction

18. Ground 1 is an allegation of a procedural irregularity in the FTT proceedings. Given that Ground 1 invites an examination of why Mr Mirza did not give oral evidence before the FTT, the Upper Tribunal permitted both sides to put forward witness evidence relating to the FTT proceedings.

19. HMRC relied on evidence in the form of a witness statement dated 17 May 2022 from Mr Mark Boyle, the HMRC litigator who represented HMRC before the FTT. Mr Boyle attended the hearing before us and Mr Nawaz cross-examined him.

20. Mr Mirza submitted no witness statement by the applicable deadline of 15 July 2022. On 21 August 2022, he applied for permission to rely on a late witness statement. However, the witness statement that he put forward focused on the advice he said he had received from his then accountant to the effect that he was entitled to pay his VAT liabilities by way of set off and his reliance on that advice. That evidence was not relevant to either ground on which Mr Mirza had permission to appeal. It did not explain why he gave no evidence to the FTT but rather set out the evidence that Mr Mirza says he would have given if asked. Accordingly, in a decision notice released on 22 September 2022, the Upper Tribunal refused Mr Mirza permission to rely on this witness statement. In that decision notice, the Upper Tribunal stated that it remained willing to consider an application to rely on a late witness statement from or on behalf of Mr Mirza dealing with the FTT proceedings and why he came to give no evidence in them but Mr Mirza made no such application. It follows that we had no witness evidence from Mr Mirza or anyone on his behalf.

The FTT proceedings –findings of fact

21. We make the following findings of fact about the FTT proceedings so far as relevant to Ground 1.

22. Mr Mirza appealed to the FTT against the default surcharge for 02/19 on 4 August 2019. He appointed Mr Nawaz to act as his representative. Mr Nawaz is an accountant and not a lawyer. However, he appears frequently as an advocate before the FTT and the Upper Tribunal. Mr Mirza's notice of appeal focused on the assertion that he was entitled to pay his VAT liability for 02/19 by way of set-off. It did not raise a defence of reasonable excuse.

23. HMRC served their Statement of Case on 28 October 2019. Following receipt of HMRC's statement of case, the FTT's usual practice is to issue "standard directions" that include provisions dealing with witness statements. For cases of lower complexity, such standard directions might provide for witness evidence to be given orally at a hearing. In more complex cases, the FTT might require witness statements to be exchanged. Yet in this case, for reasons that remain unclear, the FTT issued no standard directions that dealt with witness evidence at all.

24. It is possible, though we make no finding, that the reason no standard directions were issued was because, on 5 September 2019, the Company applied for the appeal to be sisted pending the determination of criminal proceedings. That application was listed for oral hearing. The FTT Judge refused it in a decision notice released on 15 October 2019. It is possible that, having determined the disputed application for a sist, the FTT lost sight of the need for standard case management directions.

25. On 30 March 2020, the FTT wrote to Mr Nawaz. Unfortunately, we do not have the full text of the FTT's communication, but we can infer that it asked some questions because Mr Nawaz responded by email and started by saying that he was aware that the FTT needed an answer to various points that had been raised. Mr Nawaz copied that email to HMRC and said, in the fourth paragraph:

> There is no intention to provide any oral evidence unless the Respondents dispute the submission of returns, of which copies have been provided as far back as 3 January 2020, in which case the accountant may be needed to give evidence of the fact that returns have been submitted.

26. Later, we will deal with the significance or otherwise of this email. However, we pause to note that HMRC did not dispute that returns had been submitted, so on the email's own terms no evidence from "the accountant" would be offered. We also note that since the email refers only to possible evidence from "the accountant", read naturally it excludes the possibility of Mr Mirza himself giving evidence.

27. On 25 June 2020 the FTT wrote to both HMRC and Mr Mirza to say that it was considering hearing the appeal remotely by video link. It invited the parties to give the FTT information about the persons who would be attending the hearing and their access to IT equipment that would be needed if the hearing was remote. In response to a question about the "name and role of each person participating on the hearing on behalf of that party", Mr Nawaz responded:

> On behalf of the Appellant T Nawaz will represent as the sole participant.

28. In its letter of 25 June 2020, the FTT offered the parties a test of the FTT's video hearing equipment which both parties accepted. As part of the email exchanges fixing the test hearing, Mr Nawaz wrote to the FTT on 5 October saying:

> … I write to ask that the Appellant be given the opportunity to at least listen in to the hearing that takes place. …

> [Mr Mirza's contact details were then provided]
>
> I hope you can let him have the necessary details as soon as possible so that he can participate in the test run on 13 October and also the hearing on 20 October.

29. The test hearing took place on 13 October 2020 and was attended by the FTT Judge, Mr Boyle (HMRC's litigator with conduct of the case), some observers from HMRC's side, Mr Nawaz and Mr Mirza. There was a dispute about what was said during the test hearing. Mr Boyle's evidence was that, while the focus was on testing the video equipment, some other matters were discussed and that (i) Mr Boyle told the FTT Judge that he would propose to serve an amended schedule of defaults prior to the full hearing and (ii) the FTT Judge asked Mr Nawaz whether Mr Mirza would be giving evidence and Mr Nawaz responded that, while Mr Mirza would be attending, he would not give evidence.

30. Mr Nawaz challenged that evidence in cross-examination and suggested to Mr Boyle that the test hearing was concerned just with a test of the video equipment and nothing further. We were faced, therefore, with a straightforward disagreement on recollections from a hearing that took place almost exactly two years ago. We accept Mr Boyle's evidence set out in paragraph 29 above for the following reasons:

(1) The purpose of the hearing was to test video connections. It would make sense for the FTT Judge to ask whether Mr Mirza would be giving oral evidence because in that case, the stability and quality of his video connection would be of some importance.

(2) While, in challenging Mr Boyle's evidence, Mr Nawaz set out his own recollections of the test hearing, this tribunal has received no formal evidence from anyone on Mr Mirza's team as to what happened at the test hearing. In a similar vein, while Mr Boyle accepted that he had made no contemporaneous notes of the test hearing, no notes made by any member of Mr Mirza's team were put into evidence.

(3) It would have been consistent with the correspondence set out in paragraph 25 and 27 for Mr Nawaz to state that Mr Mirza would not be giving oral evidence. That confirmation was not inconsistent with Mr Mirza being added as an attendee "at least to listen in to the hearing".

(4) Neither Mr Mirza's notice of appeal, nor Mr Nawaz's skeleton argument raised the defence of "reasonable excuse" expressly (see paragraphs 22 and 31). A case to the effect that Mr Mirza had, as a matter of law, paid his VAT liability by way of set-off did not obviously depend on oral witness evidence from Mr Mirza. A confirmation that Mr Mirza would not be giving oral evidence was therefore consistent with the way his case was being advanced as at 13 October 2020.

31. Mr Nawaz served a skeleton argument in advance of the substantive hearing. That skeleton argument, like the notice of appeal, focused on the argument that Mr Mirza had validly paid his VAT liability for 02/19 by set off. There was no express argument that Mr Mirza had a "reasonable excuse". Paragraph 9 of the skeleton argument did assert that "there were reasonable grounds for the Appellant not to make any payment and that should obviate the need for a payment and as such there is no justification for the Default Surcharge". However, even that passage sets out an argument that no payment was needed. It does not go on to assert expressly that, even if a payment was needed, Mr Mirza had a reasonable excuse for not making it consisting of a reliance on professional advice.

32. The substantive hearing took place on 20 October 2020, by video as the FTT had indicated. Mr Nawaz and Mr Mirza attended that hearing on Mr Nawaz's side. Mr Boyle, and another HMRC litigator, attended on HMRC's side.

33. We were provided with a transcript of the hearing before the FTT. The hearing started at 10.05 am and finished at 11.08 am.

34. The FTT Judge made a number of interruptions when Mr Nawaz was making his submissions. Towards the beginning of the hearing, she provided her own summary of the law on HMRC's duties when considering a claim for a VAT repayment which drew, in part, on her experience as the judge at first instance in *DCM (Optical Holdings) Limited v HMRC* which went on appeal to the Inner House of the Court of Session reported at [2020] CSIH 60. (On 12 October 2022, shortly before the Upper Tribunal hearing, the Supreme Court released its judgment in the appeal from the judgment of the Inner House which left the Inner House's judgment undisturbed.) At another point, the FTT Judge asked Mr Nawaz questions about what happened when HMRC had seized the Seized Cash and the legal authority underpinning that seizure. That led to Mr Nawaz and the FTT Judge sharing their (differing) views on how such seizures were normally effected with that exchange not being obviously rooted in documentary evidence relating to the particular seizure.

35. During the hearing, it was Mr Boyle, representing HMRC, who first mentioned the concept of "reasonable excuse" saying that "we can look at the reasonable excuse behind this". In his submissions to the FTT, Mr Nawaz expressly advanced the argument that, even if Mr Mirza was not entitled in law to pay his VAT liability by set-off, there was nevertheless a reasonable excuse because it was reasonable for him to rely on advice that set-off was possible. That argument had not been trailed in Mr Mirza's notice of appeal or Mr Nawaz's skeleton argument, but no-one suggested that he was precluded from advancing it (indeed, as we have noted, Mr Boyle said that he was content for the question of reasonable excuse to be considered).

36. However, even though Mr Nawaz made submissions that Mr Mirza had a genuine and reasonable belief that he could pay his VAT liability by set off, he referred to little, if any, evidence to underpin those submissions. There was a letter from Mr Mirza's former accountants to HMRC dated 25 April 2019 which expressed the view that no default surcharge could be imposed for 02/19 given that HMRC held the Seized Cash and were obliged to settle the Repayment Claims. However, as we have noted, Mr Mirza did not give oral evidence and therefore did not himself say even that the idea of set-off was in his mind when he declined to pay his VAT liability. Since Mr Mirza did not give evidence, he was not cross-examined on what he made of HMRC's assertion that they were continuing to issue default surcharges when VAT liabilities went unpaid and whether or not that dented any belief he held in the validity of a set-off. In short, the case on reasonable excuse was advanced almost entirely in the form of assertions that Mr Nawaz made during the course of his oral submissions.

37. Mr Nawaz mentioned in his submissions that there were a "couple of cases quoted in the bundles" that would be of assistance. He placed particular reliance on the following exchange between him and the FTT Judge:

> MR NAWAZ: I'm grateful to you, ma'am. I think the point about reasonable excuse, there's a couple of cases quoted within the bundles, and they seem to refer to a reasonably held belief to – may in the end, and the you might have seen me repeat that a couple of times, but I think that a person of your experience I didn't need to –
>
> [Crosstalk]
>
> JUDGE SCOTT: I think Mr Boyle can speak to the fact I do lots of cases on reasonable excuse. There are a great many of them sitting daily. No, I know that law very well, but that is one of the reasons I want to go away and think about it. I will issue a decision in fairly short order. All right? If there is nothing else arising?

38. The two cases to which Mr Nawaz was referring were *Rowland v Revenue & Customs Commissioners* [2006] STC (SCD) 536 and *Clean Car Company Ltd v Customs and Excise Commissioners* (Decision Number 5695 of 1991). We understand why Mr Nawaz wished to refer to *Rowland* in particular because it dealt with a situation where a taxpayer had been found to have a "reasonable excuse" consisting of reliance on advice from a professional adviser, even though that advice was incorrect. We do not, however, accept that in the passage quoted above the FTT Judge prevented Mr Nawaz from referring to the cases. Mr Nawaz himself suggested that the FTT Judge would be familiar with the law so that reference to the authority might not be necessary. The FTT Judge simply accepted that suggestion and asked if there was anything else arising. Mr Nawaz had an opportunity to take the FTT Judge to his authorities had he wished to.

39. At no point did the FTT Judge suggest in terms that the FTT would benefit from hearing oral evidence from Mr Mirza. But she did conclude the hearing by addressing Mr Mirza directly to ask whether he was "happy that everything has been said". After a delay during which it was realised that Mr Mirza was on mute he said "Yes, ma'am, yes".

Discussion of Ground 1

40. On balance, for the reasons set out below, we have concluded that the fact that the FTT's decision was reached without hearing Mr Mirza's first-hand witness evidence involved no procedural irregularity.

41. We agree with Mr Nawaz that it is regrettable that the FTT issued no directions regulating the provision of witness evidence. If Mr Mirza had not been professionally represented, he would not have realised that witness evidence was even possible, still less how it should be given. That certainly had the potential to result in a procedural irregularity.

42. However, Mr Mirza was professionally represented, by Mr Nawaz. Mr Nawaz was certainly aware of the possibility that Mr Mirza might give oral evidence in support of his case. As noted in paragraph 25 above, by 30 March 2020, Mr Nawaz had considered whether Mr Mirza should give oral evidence and had concluded that he should not or need not. His response to the FTT Judge's question at the test hearing on 13 October 2020 demonstrated that he remained of that view.

43. Mr Nawaz submitted that the desirability of oral evidence from Mr Mirza would have emerged from a discussion of the "two cases in the bundles" (particularly *Rowland*). Therefore, he submitted that the FTT Judge's act of shutting down discussion of those cases was a procedural irregularity that prevented the witness evidence from being given. We do not accept that submission since, as we have explained, the FTT Judge did not shut down discussion of those cases.

44. Mr Nawaz rightly referred to the overriding objective in Rule 2 of the FTT's rules of procedure of dealing with cases fairly and justly. One aspect of that overriding objective involves "avoiding unnecessary formality and seeking flexibility in the proceedings". We quite accept that a different judge might have concluded that the overriding objective could have been furthered by saying expressly to Mr Nawaz that some evidence was needed to make good his submissions on reasonable excuse. However, there is no single right way to conduct a hearing such as this. We do not consider that it was incumbent on the FTT Judge to intervene in this way given that Mr Mirza was professionally represented and that just a week before at the test hearing, Mr Nawaz had demonstrated that he had considered the question of witness evidence and concluded that none need be given. There was HMRC's position to consider as well: having been told that Mr Mirza would not be giving evidence, they might have objected if it was suggested that this position should change at short notice. A different judge might have pressed Mr Nawaz on whether it truly was the best course of action for his client not to give evidence, but the FTT Judge was not obliged to do so.

45. Some additional support for the above conclusion comes from the fact that the FTT Judge did close the hearing by asking Mr Mirza if he was happy that everything had been said. We acknowledge that this question did not bring out the point that Mr Nawaz lacked evidence to make good on the submissions he had made. But it did at least offer Mr Nawaz a final chance to reconsider the position on witness evidence.

46. We should not, however, be taken to suggest that the FTT Judge's conduct of the hearing was beyond reproach. We do consider that Mr Nawaz should have been given more time to develop his submissions without interruption. We do not consider that it was helpful for the FTT to provide, unrequested, its own summary of the law which amounted, in effect, to a summary rejection of Mr Mirza's case on set-off. Nor do we consider that it was right for the FTT to engage in a debate with Mr Nawaz about how seizures of cash normally work since that approach itself risked blurring the line between evidence and submission. However, ultimately we have concluded that those defects in the procedure were not sufficient to amount to a procedural irregularity that prevented Mr Mirza from giving evidence. The true position, as we have explained, is that the decision that Mr Mirza would not give evidence was reached independently of, and separately from, the hearing before the FTT Judge.

47. We dismiss Mr Mirza's appeal on Ground 1.

Ground 2

48. The FTT found that Mr Mirza was not entitled in law to pay his VAT liability by set-off. Mr Mirza has no permission to challenge that conclusion. We therefore proceed on the assumption that the FTT's conclusion was correct. It follows that, by Ground 2, Mr Mirza asserts that the FTT applied a flawed approach in determining whether Mr Mirza had a reasonable excuse consisting of genuine reliance on incorrect advice.

49. There are some indications in the Decision that the FTT might have been following a flawed approach. At [57], after considering the Upper Tribunal's decision in *Katib*, the FTT concluded shortly that "… if the appellant's then advisor did not know about *Tradecorp* or did not advise him about that, that is not a reasonable excuse." There is perhaps a suggestion in that paragraph that *Katib* is authority for a broader proposition that all defaults of an adviser are to be attributed to the client so that reliance on incorrect advice is incapable of constituting a reasonable excuse. If that is the conclusion that the FTT was drawing at [57], it was incorrect. Reliance on incorrect advice is capable of being a reasonable excuse. Of course the taxpayer will need to show that the advice was indeed relied on as part of the process of establishing that the excuse relied upon was "genuine" in the sense set out in *Perrin*. The taxpayer will also need to establish, taking into account all relevant attributes of that taxpayer, that reliance on the incorrect advice was reasonable. The mere fact that advice is incorrect does not render all reliance on that advice necessarily unreasonable.

50. However, we do not need to reach a settled conclusion on what precisely the FTT meant at [57] of the Decision. As we have explained in our discussion of Ground 1, there was insufficient evidence (as distinct from submission) before the FTT to the effect even that advice on the availability of set-off had driven Mr Mirza's decision not to pay his VAT liability for 02/19. Still less was there any sufficient evidence for the FTT safely to conclude that even if Mr Mirza had relied on such advice it was reasonable for him to do so. At various points in his submissions before us, Mr Nawaz asserted that Mr Mirza was illiterate and not equipped to look critically at advice he received. But the FTT was referred to no evidence to make that submission good. Nor, since Mr Mirza gave no evidence, could he be questioned as to why he thought it was possible for him to apply set-off when HMRC seemed to issue him with a default surcharge on those occasions when he did. If a reasonable taxpayer in Mr Mirza's position would have realised that set-off could not properly be applied, despite

professional advice to the contrary, any defence based on reasonable excuse would fail. We respectfully consider that the following passage from the decision of the Upper Tribunal (Joanna Smith J and Judge Cannan) in *Archer v HMRC* [2022] UKUT 61 (TCC) is just as applicable to Mr Mirza's situation as it was to the taxpayer in that case:

> 167. Notwithstanding the relevant external facts to which Ms Brown drew our attention, there is no evidence as to why Mr Archer did not pay the tax. Without that evidence we cannot be satisfied as to Mr Archer's reason for non-payment. We cannot be satisfied that the reason for non-payment was that he was acting on the strength of 'robust' professional advice or that he reasonably believed there was no obligation to make payment. We cannot be satisfied that any reason Mr Archer may have had in fact caused the non-payment of tax. Accordingly, and having regard to the guidance in *Perrin* and *Sheiling*, we cannot go on to arrive at the conclusion that he has an objectively reasonable excuse. The available facts are insufficient to enable us to reach such a conclusion.

51. In saying this, we should not be taken as endorsing the entirety of the FTT's reasoning that we have summarised in paragraph 16. We are not sure precisely how the FTT reached its conclusion that Mr Mirza's outstanding liabilities "vastly exceeded" the Seized Cash, a proposition that Mr Mirza strenuously denied. However, the short point is that even if the FTT did make an error of law of the kind asserted as Ground 2, that could not affect the outcome since any correct application of the law would lead to the conclusion that the evidence before the FTT was insufficient to establish that Mr Mirza had a reasonable excuse.

52. We accordingly dismiss Mr Mirza's appeal on Ground 2.

Disposition

53. Mr Mirza's appeal is dismissed.

54. During the hearing before us, Mr Nawaz explained that Mr Mirza remains bemused at the fact that despite HMRC, on his view, owing him a large sum in the form of the Repayment Claims they are continuing to charge him default surcharges for non-payment of, what he considers to be, much smaller amounts of VAT owed to HMRC. We do not want either Mr Mirza or his family, who travelled a long way to attend the hearing before us, to be left wondering why the Upper Tribunal has not made any findings on an issue that is puzzling him.

55. The Upper Tribunal only has permission to deal with the specific grounds of appeal that are before us. Mr Mirza was refused permission to appeal on the grounds that he was permitted to pay his VAT liability by way of set-off because the Upper Tribunal was not satisfied that these grounds of appeal were sufficiently arguable to have a realistic prospect of success. It follows, therefore, that questions of whether HMRC should have paid Mr Mirza the Repayment Claims, and whether, when they did not, he was entitled to pay his VAT liability by way of set-off, were not before the Upper Tribunal. As a result, the Upper Tribunal simply had no power to consider these issues and Mr Nawaz likewise had no permission to put forward arguments on them and he, quite rightly, did not seek to do so.

JUDGE JONATHAN RICHARDS
JUDGE ANDREW SCOTT

RELEASE DATE: 09 November 2022