**[2021] UKUT 0225 (TCC)**

**Appeal number: UT/2020/000202 (V)**

***VAT - Procedure – First-tier Tribunal Rule 8(3(c) – strike out, no reasonable prospect of success***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**G B FLEET HIRE LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE PHYLLIS RAMSHAW**
**JUDGE ANDREW SCOTT**

**Sitting in public by way of a remote video hearing treated as taking place at The Royal Courts of Justice, Strand, London WC2 on 27th May 2021.**

**Mr Kieron Beal QC and Mr Christopher McNall, counsel, instructed by Silver Law LLP for the Appellant**

**Mr Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

**Introduction**

1. The appellant appeals to the Upper Tribunal (permission to appeal having been granted by the Upper Tribunal on 29 October 2020) against a decision of the First-tier Tribunal dated 16 September 2020 ([2020] UKFTT 365 (TC)). The First-tier Tribunal's decision was made following the hearing of two applications at a case management hearing held on 20 August 2020. The First-tier Tribunal dismissed the appellant's application for permission to further amend its grounds of appeal and allowed the respondents' application for the appeal to be struck out. The First-tier Tribunal struck out the appellant's entire appeal, exercising its discretion in accordance with Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the First-tier Tribunal Rules'). The appellant has not appealed against that part of the First-tier Tribunal's decision to refuse permission to amend its grounds of appeal. This appeal is solely against the First-tier Tribunal's decision to strike out the appellant's appeal.

2. The grounds of appeal, as set out in the grounds attached to the UT1 form, are:

> (1) The First-tier Tribunal erred in its construction of the letter of 5 August 2020;
>
> (2) The First-tier Tribunal acted in a procedurally unfair manner;
>
> (3) The First-tier Tribunal deprived the appellant of access to the court and/or effective protection of its EU law rights.

3. Permission to appeal was granted on the basis of those grounds.

4. An oral hearing of the appeal was held before the Upper Tribunal on 27 May 2021. Both parties submitted written skeleton arguments and made oral submissions.

**Background**

5. The underlying tax dispute concerns supplies made prior to the UK leaving the European Union. We do not need to consider what the position is in terms of the application of EU law. The central issue we are concerned with is the construction of assertions in a letter of the appellant's representative of 5 August 2020 ('the letter'). In submissions made in that regard it is necessary to consider the parties' reference to various concepts in EU and domestic law. At paragraph 38 of the appellant's skeleton argument the following submissions were made:

> 'That construction of the letter was either wrong; or the terms of the letter represent an obvious (and otherwise incomprehensible) error. The vehicles exported to the Far East and those removed to Ireland were properly subject to zero-rating, the conditions having been met for the supplies to be entitled to an exemption from VAT with recovery of input tax under Article 138 (for intra-EU removals), Article 146 (for exports) and Article 169 (input tax recovery) of the PVD. No output tax was accordingly due on those transactions, but input tax could be claimed. That was the point which the letter of 5 August 2020 was,

> properly construed, seeking to make. The letter was also drawing a distinction between exemption with refund for exports or removals of goods and zero-rating of supplies of goods for social policy reasons, as established by Schedule 8 VATA 1994.'

6. Throughout the proceedings we note that both parties referred variously to a 'claim' to zero-rating, entitlement to zero-rating, entitlement/claim to input tax. The concept of exempt transactions with a right to deduct appears to be more latterly referred to – e.g. in the appellant's proposed amended grounds of appeal. The underlying tax dispute is not the subject of this appeal. We do not need to consider the issues or the law but, as the central issue is the construction of the appellant's representative's assertions in its letter of 5 August 2020, we briefly refer to the legislative provisions from which those expressions and the subsequent submissions arise. We note that reference was made to supplies that are outside the scope with the right to deduct in the proposed amended grounds of appeal, however as Mr Beal asserts that the supplies were properly subject to zero-rating (section 30(6) and (8) Value Added Tax Act 1994 ('VATA') and zero-rating has been referred to throughout the proceedings by the parties, we refer to the domestic legislative provisions that are relevant to zero-rating.

7. The general principle (in both EU and UK law) is that the VAT charged on purchases and acquisitions that are used in the making of an exempt supply (on which VAT is not chargeable) is not deductible. There is a broad range of exempt transactions on which the associated input VAT is nevertheless deductible. The Principal VAT Directive (Council Directive 2006/112/EC) requires that certain supplies (which meet certain conditions) are exempt from VAT (including relevantly Articles 138 and 146 which provide exemption for goods dispatched from one Member State to a taxable person in another Member State and exemption on export of goods respectively). The PVD provides that the VAT paid on supplies made to the taxable person in respect of certain exempt supplies (including supplies made pursuant to Articles 138 and 146) is deductible (Article 169). Article 110 of the PVD provides a standstill provision that permits Member States to continue to grant certain exemptions with a right to deduct. Supplies made pursuant to Article 110 and supplies made pursuant to Articles 138 and 146 are generally referred to in EU parlance as exemptions with deductibility or with the right to deduct. The distinction arises only in respect of the fact that Article 110 is a derogation from the provisions of the PVD that would otherwise apply to those supplies. There is no distinction in the terminology used describing the supplies as exempt with a right to deduct. The UK has given effect to the relevant parts of Articles 138, 146, 169(b) and 110 through the mechanism of zero-rating supplies. Zero-rating and input tax are UK concepts. VAT paid on supplies received and used for business purposes is defined as input tax (section 24 VATA). In UK law, insofar as is relevant to this case, input tax is allowable as an entitlement to credit if attributable to taxable supplies (section 26). Input tax is allowable on zero-rated supplies (section 30) through the mechanism of treating the zero-rated supplies as taxable supplies with a nil rate of VAT. Section 30(8) and Regulation 134 (of the VAT Regulations 1995 (SI 1995/2518)) provides for certain removals of goods to be zero-rated, section 30(6) for exports and section 30(2) for supplies in Schedule 8 to be zero-rated. There is no distinction in the mechanism

between supplies in 30(2) (those in Schedule 8) and any other zero-rated supply in section 30. The above summary is of course a simplification and should be considered as such. Although the domestic legislative provisions do not refer to a claim or entitlement to recover input tax it is generally accepted and referred to as claiming, reclaiming or entitlement to recovery of input tax and VAT returns and guidance also refer to claiming input tax.

8. There is a lengthy history to the proceedings that were before the First-tier Tribunal. The appellant appealed to the First-tier Tribunal against decisions of the respondents dated September 2017 and November 2017. These decisions were made in relation to the appellant's sales of certain motor vehicles. The issue, in essence, appears to be whether those motor vehicles had been exported or removed from the UK entitling the appellant to zero-rate (i.e. to recover as input tax the VAT charged on supplies made to it without accounting for output tax on onward supplies it made) the supplies of the vehicles and the sufficiency of evidence to support the claim.[1]

9. During the course of proceedings before the First-tier Tribunal numerous applications had been made by both parties resulting in various directions being made – some of which are set out in the decision of the First-tier Tribunal.

10. The relevant procedural background to the case management hearing is set out in detail in the First-tier Tribunal's decision (paragraphs 7- 27). The First-tier Tribunal identified that three applications remained outstanding as at 20 August 2020. These included an application made by the appellant for the respondents to be required to amend parts of a witness statement of Officer Mills. It was accepted by the appellant that this application would fall away if it were successful in its application to re-amend its grounds of appeal and, as identified by the First-tier Tribunal, it would fall away if the appeal was struck out. The First-tier Tribunal therefore considered and decided the remaining two extant applications. As set out above this appeal is solely against the First-tier Tribunal's decision on the strike out application. The First-tier Tribunal's decision to refuse to permit the appellant to re-amend its grounds of appeal therefore stands.

**Ground 1 - The First-tier Tribunal erred in its construction of the letter of 5 August 2020**

The appellant's submissions

11. A considerable proportion of the appellant's arguments, as set out in the grounds of appeal, skeleton argument and in oral submissions, was devoted to setting out the details of the procedural history to the dispute between the parties and the specific evidence in the case. Mr Beal (who did not appear below) submitted that this was necessary because it demonstrated that it showed the strength of the appellant's underlying case, the considerable efforts that had been made to provide and explain the evidence in support of its claims to zero-rating, that it provided the background

[1] In summarising the issues as set out we have made no findings as to what the issues in dispute before the First-tier Tribunal are and have not accepted, as fact, any matter – the summary is simply for the purpose of providing background.

leading up to the context in which the letter was written and the context in which the First-tier Tribunal ought to have approached what amounted to a throwaway sentence in a letter. We were referred in great detail to various paragraphs in several witness statements, a spreadsheet of transactions, specific details contained in exchanges of correspondence, the law on exports/removals and zero-rating etc. Reliance on this lengthy and detailed analysis of the evidence, law and procedural history is misplaced. This is an error of law jurisdiction. It is necessary to focus on the error said to have been made by the First-tier Tribunal. Many of these arguments were not advanced before the First-tier Tribunal. It was not taken to all this detailed and lengthy evidence in the defence of the strike out application. It is not the task of the First-tier Tribunal, in a case such as this, to trawl through the evidence when it has before it experienced counsel and the appellant is legally represented. An appeal to the Upper Tribunal is not an opportunity to put forward arguments that could have been, but were not, put before the First-tier Tribunal, in other words to remedy shortfalls in the case that was advanced at the time. There was a simple question before the First-tier Tribunal – had the appellant abandoned its case that its supplies of motor vehicles were zero-rated or, as the First-tier Tribunal identified, was the position now that 'the Company "never claimed zero-rated export of cars"? A simple and unequivocal answer/rebuttal could very easily have been supplied. We find that no clear answer was made in response to what was a clear application for strike out on this basis. We have decided this appeal without reference to the above arguments.

12. Mr Beal submitted that the First-tier Tribunal failed to consider that the correspondence of 5 August 2020 was made in the context of the respondents' decision to withdraw its assessments in respect of the Category 3 transactions[2]. The First-tier Tribunal alighted on a single sentence, but has not referred at all to the remainder of the letter of 5 August 2020, which questions why the respondents had changed their mind and challenges the consequential impact on the credibility of the exercise of judgment by the sole assessing officer, Officer Mills.

13. Reference was made by Mr Beal to specific aspects of correspondence between the parties. It was submitted that it was and should have been apparent from this exchange that a confined cohort of transactions (defined in his skeleton argument as 'Category 3') was no longer in dispute because it was accepted that they were never goods which were exported from the UK. The letter cannot sensibly have been construed as the appellant suggesting that all of the relevant transactions were said to be Category 3 transactions. The respondents' application proceeded on an entirely erroneous assumption that the assertions made in relation to the Category 3 transactions applied equally to Category 1 and 2 transactions as well.

14. For the First-tier Tribunal to have construed the letter to justify the summary dismissal of the appeal the letter would need to be an express acceptance that none of

[2] The description of different types of transactions as falling into Categories 1-3 appears in the skeleton argument before the Upper Tribunal. We are not aware of the transactions being described in numbered categories previously. We understand Mr Beal to be describing vehicles that the appellant asserts were exported or removed from the UK as Category 1 and 2 transactions respectively and vehicles that never entered the UK as Category 3 transactions.

the remaining transactions met the conditions for zero-rating for export and/or removal. Such a statement would be incomprehensible in the context of this appeal where the grounds of appeal, the witness evidence and documents were directed towards establishing the sufficiency of the evidence to meet the conditions for zero-rating. Such a counter-intuitive construction of a legal representative's letter would have required the clearest terms to be used. The First-tier Tribunal adopted a construction of the letter which was clearly a nonsense - the respondents rightly described that construction as "incomprehensible". The respondents' construction (adopted in error by the First-tier Tribunal) requires the adoption of a confected meaning to the words used in the letter of 5 August 2020, wholly at odds with the tenor of appellant's case.

15. Mr Beal accepted that greater care should have been used in the context of claims for zero-rating. It was apparent from the appellant's skeleton argument, at paragraph 33, that the letter had been trying to capture the concept of exemption with refund which is allowed under EU law for exports or removals of goods, in contradistinction to the purely domestic, statutory, concept of 'zero-rating' conferred on the supply of goods for social policy reasons under Schedule 8 of the VATA 1994. Zero-rating is not formally claimed – input tax is claimed.

16. The proposed amended grounds of appeal expressly retained the challenge to the respondents' conclusions on the export evidence.

17. The appellant also sought permission to withdraw a concession - if it were found that the letter of 5 August represents a concession that the basis of its appeal was misplaced.

The respondents' submissions

18. For the respondents it is submitted that the Category 3 transactions related only to the VAT periods 11/15 – 01/16, 02/16 – 04/16, and 05/16 – 07/16. The same issues did not arise in relation to the remaining transactions (the Category 1 and 2 transactions in the appellant's skeleton argument for this appeal). There were no Category 3 transactions in VAT periods 09/16- 06/17 yet the letter stated for periods 09/16 to 03/17 inclusive, the appellant did not claim zero-rating on its exports and, in relation to VAT periods 09/16 – 12/16 inclusive, "Our client had not (and has never) claimed zero rating sales for those periods". The appellant's assertion that no claim for zero-rating was made in the context of considering Category 3 transactions was, therefore, demonstrably wrong.

19. The respondents, in a letter of 10 August 2020, challenged the apparent change in position in the clearest terms. The appellant was put on notice of the intention to apply for the appeal to be struck out on the basis 'since the Appellant now accepts, since it never claimed zero-rating but charged no VAT on the relevant invoices, that VAT must have been charged on all supplies, and was therefore due, as assessed, on all of its claimed export/dispatch transactions for all periods in dispute.'

20. The respondents applied to strike out the appeal on the stated basis that the appellant had now abandoned any claim that the transactions were zero-rated and had put forward no alternative basis for why VAT should not have been charged on all the supplies that remain in dispute arguing that the appeal now had no reasonable prospect of success.

21. The appellant now contends that there was some confusion and states that the construction of the expressions to the effect that the appellant accepted that the conditions for zero-rating its transactions had never been met, would be simply incomprehensible. If the respondents had misunderstood the appellant's position so badly one would have expected it to have said so. It did not respond to correct what it must have believed to have been a catastrophic misunderstanding that put it at risk of having its appeal struck out. Instead it filed an application to amend its grounds of appeal that were "intended to stand in complete substitution" for the extant Grounds. There was no response from the appellant denying that it had abandoned its original grounds of appeal cementing the respondents', and the First-tier Tribunal's, understanding that the appellant had so abandoned them.

22. Despite the letter of 10 August 2020, the strike out application, and the objection to the application to amend the grounds of appeal being based explicitly on the respondents' understanding that the appellant had abandoned its claim to be entitled to zero-rating the skeleton argument for the appellant did not deny that abandonment. In the circumstances the First-tier Tribunal was entitled to conclude that the letter meant what, on its face, it said: the appellant had never claimed zero-rated exports of cars. The First-tier Tribunal's reasoning is not confined to a single sentence as alleged; it encompasses the apparent abandonment of the grounds of appeal.

23. In the light of what was before it the First-tier Tribunal was fully entitled to strike the appeal out as having no reasonable prospect of success. There was no case left that was fit for trial at all and therefore this was a perfectly proper use of the procedure (see Lord Hope of Craighead in *Three Rivers DC v Bank of England* (No 3) [2003] 2 AC 1 at [94] - [95] citing Lord Woolf in *Swain v Hillman*).

**Discussion – Ground 1**

Relevant Legislative Provisions

24. The Tribunal struck out the appellant's case on the basis that there was no reasonable prospect of it succeeding under Rule 8(3) of the First-tier Tribunal Rules.

Authorities

25. We were referred to a number of authorities regarding the approach the First-tier Tribunal ought to adopt in considering the striking-out of a case on the basis of no reasonable prospect of success. The principles drawn from them are not generally contentious but for the reasons given below they are not entirely relevant on the facts as the First-tier Tribunal found them in this case. Both parties referred us to the decision of the Upper Tribunal in *HMRC v Fairford Group plc and Another* [2014]

UKUT 329 (TCC). This addressed the approach that should be taken when dealing with an application to strike out. It was held (paragraph 41) that:

> 'In our judgment an application to strike out in the FTT under r 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Pt 24). The tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable… The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike out procedure is to deal with cases that are not fit for a full hearing at all.'

26. Mr Watkinson submitted that the First-tier Tribunal was correct to strike out as the case was not fit for trial at all.

27. The First-tier Tribunal did not specifically refer to any authorities in relation to striking out a case. This does not necessarily mean that it did not apply the legislation appropriately to the facts of the case before it. Most of the authorities referred to concern how 'reasonable prospects of success' are to be measured and the extent to which the merits/strength of the case ought to be considered. Following a refusal to permit the appellant to amend its grounds of appeal to include a best judgement challenge, in this case an assertion by the appellant that it had never claimed zero-rating[3] and in the absence of any other basis for its claim this would result in the whole basis of the case previously advanced (i.e. an assertion by the appellant that its evidence was sufficient to support its claim to be entitled to zero-rate the supplies) necessarily falling away. As set out below we find that the First-tier Tribunal was incorrect to reach the conclusion it did but if it had been correct there would be no need to examine the strength or the merits of the case in such circumstances. There would be no need to consider the nuances as to whether the prospects of success are realistic as opposed to fanciful. On that basis the authorities are of little assistance.

<u>The conclusion reached by the First-tier Tribunal</u>

28. The First-tier Tribunal set out its reasons for striking out the appeal in 2 substantive paragraphs. We set them out in full:

> ***'Strike Out Application***
>
> 41. Given my conclusion to dismiss the application to re-amend the grounds of appeal to include a "best judgment" challenge the extant grounds of appeal are as stated in the Company's Amended and Supplemental Grounds of Appeal dated 10 June 2019 (see paragraph 9, above). I have already concluded (at paragraph 34, above) that these grounds do not include a best judgment challenge but are limited to the assertion by the Company that its evidence was sufficient to support its claim for zero-rating on the basis that the vehicles concerned had been exported. However, as Mr Watkinson

[3] Assuming the construction of what was said in the letter as found by the First-tier Tribunal was correct.

submits, in the light of the letter of 5 August 2020 (see paragraph 24, above) in which it is stated that the Company "never claimed zero-rated export of cars" it is clear that any appeal on these grounds cannot succeed.

42. Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that the Tribunal may strike out the whole or a part of the proceedings if it "considers there is no reasonable prospect of the appellant's case, or part of it, succeeding." Mr McNall contends that it would be disproportionate to strike out the Company's case. However, given its distinct lack of prospects it would appear that this is the only option open to me.'

29. These paragraphs must be read in light of the some of the conclusions reached and the analysis undertaken by the First-tier Tribunal on the application to re-amend the grounds of appeal and its recitation of the relevant procedural history.

30. The First-tier Tribunal set out some of the procedural history relating to the appeal and to various applications made. It is clear that the Tribunal was aware of the appellant's case as set out in the amended grounds of appeal filed on 10 June 2019 as subsequently considered and restricted by Judge Poole (see paragraphs 9-11 of the First-tier Tribunal's decision). At paragraphs 13 and 15 the First-tier Tribunal set out paragraph 9 of the respondents' statement of case and paragraph 29 of Keith Patterson's witness statement indicating that the First-tier Tribunal was aware that the, or one of the, principal issue/s in contention was evidence in relation to export of cars. We note that in paragraph 22 the First-tier Tribunal recorded the respondents' raising an issue in connection with the place of supply of vehicles that may never have been in the UK so that no assessment to UK VAT could stand. At paragraph 24 it set out some details from the letter of 5 August 2020 noting the comments made regarding never claiming zero-rating of cars. It recorded the subsequent applications – the respondents' strike out application and the appellant's application to re-amend its grounds of appeal.

31. When considering the delay in making its application to raise new grounds of appeal the Tribunal noted at paragraph 35 that:

'… this does not adequately explain why the Company seeks to re-amend its grounds of appeal now when it must, or at the very least should, have been aware of the nature of its case and whether it was raising a best judgement challenge, as opposed to whether there was sufficient evidence to support its zero-rating claim which it now seems to have abandoned, even before it commenced these proceedings.'

32. The First-tier Tribunal set out two passages from the letter of 5 August 2020 at paragraph 24 of its decision:

'24… "For periods 09/16 to 03/17 inclusive, GB Fleet did not claim Zero Rating on its exports. For those periods (monthly accounting) our client claimed Input Tax on its exports"

And further in the letter that:

"Our client has never claimed zero rated exports of cars."'

33. It then recorded a passage from the strike out application of 10 August 2020 namely:

> 'All of the Appellant's invoices in the transactions that remain in dispute showed VAT at a zero-rate. The Appellant has now abandoned any claim that the transactions were zero-rated but has put forward no alternative basis for why VAT should not have been charged on all the supplies that remain in dispute. The VAT on the transactions that remain in dispute is therefore due and the Appellant has no reasonable prospect of showing otherwise. The Appellant's appeal in relation to the transactions that remain in dispute must therefore be struck out [as no reasonable prospects of success under r 8(3)(c)].'

34. Pausing at this juncture, before we analyse the First-tier Tribunal's approach to the strike out application, we deal with both parties' reference, in their submissions to the Upper Tribunal, to the issue of whether the appellant had 'abandoned its grounds of appeal' referring to the amended grounds of appeal of 10 June 2019 (as restricted by Judge Poole). Mr Beal submitted that at the hearing Judge Brooks asked counsel what the position would be if the application to re-amend the grounds of appeal were not allowed and his answer was that the appeal would proceed on the basis of the amended grounds read in the light of Judge Poole's decision. We do not need to decide what was said at the hearing before the First-tier Tribunal because it is evident that the First-tier Tribunal did not make a finding that the grounds of appeal (of 10 June 2019) had been abandoned. It specifically referred to the grounds of appeal as extant when deciding the strike out application:

> '41…the extant grounds of appeal are as stated in the Company's Amended and Supplemental Grounds of Appeal dated 10 June 2019 (see paragraph 9, above).'

35. The issue identified was whether the appeal could succeed on the basis of the extant grounds '*that its evidence was sufficient to support its claim for zero-rating on the basis that the vehicles concerned had been exported … in the light of the letter of 5 August 2020 (see paragraph 24, above) in which it is stated that the Company "never claimed zero-rated export of cars*"'. The finding of the First-tier Tribunal that the appeal on those grounds could not succeed was premised on a finding that the appellant had abandoned its claim that there was sufficient evidence to support a zero-rating claim (paragraph 35).

36. The reasons provided in the decision were sparse. It is not easy to discern how far the First-tier Tribunal considered the immediately relevant documents when determining what was meant by 'assertions' in the letter of 5 August 2020; namely the appellant '*had never claimed zero rated export of cars'* and '*did not claim Zero Rating on its exports'*. There is no analysis by the First-tier Tribunal of the 'assertions' either in the immediate context of the sentences in which they were written, the letter as a whole or in the context of the application to re-amend the grounds of appeal.

37. The task of the First-tier Tribunal was to consider if there was a reasonable prospect of the appeal succeeding before exercising its discretion to strike out. The First-tier Tribunal concluded that the appellant had abandoned its case that there was

sufficient evidence to support its zero-rating claim. Mr Beal argued that the clearest terms and an express acceptance that the conditions for zero-rating were not met would be required and that such a statement would be incomprehensible where the grounds of appeal were directed towards establishing the sufficiency of the evidence to meet the conditions for zero-rating. He argued that given the effort that had been put into the underlying case it would be odd to abandon it. Although not argued in this way we consider Mr Beal's arguments are that a stark question must have arisen for the First-tier Tribunal as to why the appellant had abandoned its case that it had sufficient evidence to entitle it to zero-rate its supplies and why then would it would continue with the appeal in the face of such an abandonment. However, if the appellant had abandoned its claim to entitlement to zero-rate its supplies it may still succeed (as submitted by Mr Watkinson) on an appeal purely on the basis of a best judgement challenge to the lawfulness of the assessments despite not meeting the requirements for zero-rating. This would provide an answer if the First-tier Tribunal had addressed its mind to the question we have identified. This cannot be the answer to that question, however, as the First-tier Tribunal had refused permission to amend the grounds of appeal to include a best judgement challenge prior to considering the strike out application.

38. The respondents' letter of 10 August 2020 referred at several points to the appellant's case having been pleaded on the basis of a claim that sales/supplies were zero-rated with specific reference to the grounds of appeal and witness evidence. That letter referred to the appellant's letter of 5 August 2020 and the assertion that zero-rating had never been claimed and stated that *'these are astonishing and incomprehensible claims to make in light of the appellant's grounds of appeal and evidence. All of the appellant's invoices in the transactions that remain in dispute showed VAT at a zero-rate…the respondents will apply to strike out the appellant's case…since the appellant now accepts, since it never claimed zero-rating but charged no VAT on the relevant invoices, that VAT must have been charged on all supplies and was therefore due…'.* The strike out application set out the arguments in a similar manner. It was clear from this application that the respondents' view was that the appellant no longer claimed that its supplies of vehicles were zero-rated supplies.

39. Mr Beal submitted that the reference in the letter to never having claimed zero-rating was only made in respect of category 3 transactions. It does not appear that this was an explanation offered to the First-tier Tribunal. Mr Watkinson submitted that this cannot be the correct meaning as the specific periods referred to in connection with the assertion that the appellant had never claimed zero-rating are not periods in which only category 3 transactions were made. We accept Mr Watkinson's submission - the letter cannot be sensibly read as referring solely to the 'category 3' transactions.

40. The strike out application and the respondents' skeleton argument expressed in clear terms the view that it appeared from the statements in the 5 August 2020 letter that the appellant had abandoned its claim that the transactions were zero-rated. We can see no express rebuttal of that argument or a clear explanation of what the letter was referring to having been made to the Tribunal.

41. The skeleton argument in response to those arguments as set out in the strike out application submitted:

> ‘32. The Grounds of Appeal are the Grounds of Appeal. Cases are 'Stated' in Statements of Case, and not in letters. Striking out here is unfair, unjust, and savours of opportunism and oppression. Fighting this appeal, fairly and squarely on its merits, is far better than trying to secure some technical KO.
>
> 33. The application seems to flow from a confected misunderstanding by HMRC arising from use of the expression 'zero-rating' in a letter. In UK law, zero-rating covers two distinct concepts - 'true' zero rating and exempt supplies with a right to reclaim. Had HMRC responded properly to the Appellant's letter, and asked, its misapprehension would have been allayed.
>
> 34. Much more could be said about the application to strike out. But for present purposes suffice to be said that, if pursued, it should be dismissed. What is really needed is to get this appeal back on its feet and moving forwards.’

42. We find these paragraphs obscure and unhelpful. Whilst we agree that cases are not stated in letters, correspondence is relevant, and an explanation was required. Mr Beal argued that the skeleton argument explained that the letter of 5 August 2020 had been trying to capture the concept of exemption with refund in contradistinction to the purely domestic concept of zero-rating under Schedule 8 to VATA. The First-tier Tribunal has not engaged with that submission. However, the letter cannot, in our view, be read in this way. The letter of 5 August 2020 made no reference to any distinction between ‘true’ zero-rating and exempt supplies with a right to reclaim – this would be a very strained reading of what was being referred to in the letter and is not consistent with the terms used throughout the proceedings by the appellant which consistently asserted its supplies were zero-rated. We do not accept that there was a confected misunderstanding by the respondents arising from use of the expression 'zero-rating'. In UK law section 30 of VATA provides for zero-rating of supplies and it is under these provisions (as far as we understand it) that the appellant asserted its supplies fall. As set out above the concept of exemption with refund applies equally to Article 110 (the Schedule 8 zero-rating provisions) and domestic provisions/mechanism for zero-rating apply to all the supplies mentioned in section 30 (which includes Schedule 8). As this was the only submission made in the appellant’s skeleton argument regarding the assertions made in the letter, it was incumbent on the Tribunal to have engaged with the argument raised even if only to reject it. However, given our finding, even if this were an error of law, it would not be material.

43. Mr Beal argued that the assertions referred to the fact that zero-rating is not claimed, it is input tax that is claimed. It does not appear that this was an argument put to the First-tier Tribunal. It is not an obvious meaning to draw from the letter. In our view the assertions cannot be read as distinguishing between what it is that is ‘claimed’. One of the assertions regarding zero-rating, which was not set out by the First-tier Tribunal, reads: ‘*On 7 August 2017, Officer Mills wrote in relation to periods…. inclusive…that those periods showed zero-rating sales. That was wrong. Our client had not (and never has never) claimed zero-rating sales for those periods.*

*Our client had claimed (and had been paid) input tax credits for each of those months.'* The appellant is stating that the respondents were wrong to have said that the periods in issue showed zero-rating sales and, in that context, says it has never claimed zero-rating sales in those periods. This cannot be read as drawing a distinction in the manner suggested by Mr Beal.

44. We cannot escape from the conclusion that a simple clarification that the appellant had not abandoned its case that its supplies were zero-rated (in the sense both parties have used throughout the proceedings) despite what appeared to the contrary in the letter should have been made. Such a simple statement/explanation would probably have avoided the necessity for the current proceedings before this Tribunal.

45. However, although we consider that the First-tier Tribunal was aware of the correct legal test that must be applied when exercising its discretion to strike out, we find that the First-tier Tribunal erred in law. The test to be applied by the tribunal was whether there was any reasonable prospect of the appeal succeeding by reference to the relevant materials. For the reasons set out below we find that the decision reached was irrational. Once all of those materials are considered as a whole, it was simply not open to the First-tier Tribunal to decide that the appellant had abandoned its case that its supplies were zero-rated.

46. The assertions regarding zero-rating in the letter do not make sense. We consider that the author of the letter has failed to articulate in any readily comprehensible sense what is meant by the assertions and why it has made them. What is obvious in the letter is that the appellant's case continues to be that it is entitled to reclaim input tax in relation to its supplies. That case is strenuously put throughout the letter. The First-tier Tribunal recorded one of the sentences referring to claiming input tax on its exports. As the supplies (that are subject to the assessments) were of motor vehicles and as no output tax has been charged and accounted for, the appellant's case, as argued for in the letter, must be that its supplies are either zero-rated or some other provision that would permit input tax to be reclaimed in the absence of a corresponding output tax charge applies. On its face the letter appears to be contradictory. The Tribunal has not made any reference to the substance of the letter or the appellant's strenuous assertions in the letter regarding its entitlement to reclaim its input tax. The First-tier Tribunal has erred by failing to engage with and analyse the basis on which the appellant asserts or maintains its case that it is entitled to reclaim input tax. It also failed to grapple with, when deciding what the letter asserted, the apparently wholly contradictory position of claiming entitlement to input tax recovery whilst arguing the supplies were not zero-rated in circumstances where, in the absence of the zero-rating of the supplies, no entitlement to input tax would appear to arise. The only clear basis to strike out the case in these circumstances would be if the First-tier Tribunal found that the appellant, in abandoning its case that the supplies were zero-rated, had no other basis on which it was entitled to recover input tax. There is no reasoning in the First-tier Tribunal's decision that indicates the Tribunal thought about or considered if there was any other basis upon which the appellant could reclaim input tax in light of the strenuous and persistent claims throughout the letter that it was entitled to do so.

47. The letter was not the only relevant document. Our view is the that First-tier Tribunal also fell into error in considering that the proposed amended grounds of appeal were *'raising a best judgement challenge, **as opposed** to whether there was sufficient evidence to support its zero-rating claim which it now seems to have abandoned, even before it commenced these proceedings.'* (paragraph 35, emphasis added). Mr Watkinson submitted that the new grounds of appeal no longer claimed that the evidence in support of the zero-rating was enough, instead they sought to raise a challenge to best judgment abandoning the entirety of its grounds of appeal and replacing them, solely, with an attack on the "best judgment" aspect of the assessments. We do not accept Mr Watkinson's submission. The proposed amended grounds of appeal were not solely aimed at the assessments. They included:

> ***'Capricious or unexplained rejection of HMRC evidence***
>
> 3.14 Officer Mills has wrongly, and otherwise than to best judgment, failed to give any or any proper consideration to HMRC's own information and materials as to the exportation of the vehicles in question, including but not limited to the 'Goods Departed Message' (GDM, also known as a DTI-S8) generated by HMRC's **C**ustoms **H**andling **I**mport and **E**xport of **F**reight ('CHIEF') system, and/or has wrongly refused to treat the GDMs on CHIEF as conclusive evidence that a vehicle has been exported and/or has failed to set out in any way which can fairly be interrogated by the Appellant taxpayer (or the Tribunal) why Officer Mills individually and/or HMRC institutionally should consider the GDMs on CHIEF as inconclusive evidence;
>
> ***Capricious or unexplained rejection of the Appellant's evidence of export***
>
> 3.15 Officer Mills has wrongly, and otherwise than to best judgment, failed to give any or any proper consideration to the information and material provided by the taxpayer to HMRC as to the exportation of the vehicles in question and/or has failed to set out, in any way which can fairly be interrogated by the taxpayer (or the Tribunal) why he has rejected the evidence of export;
>
> 3.16 Further or in the alternative, and without prejudice to the foregoing, Officer Mills has wrongly, and otherwise than to best judgment, failed to consider and treat other evidence provided by the taxpayer as demonstrating that the vehicles had been exported;'

48. It is clear from the above paragraphs that the appellant maintained its claim that the vehicles had been exported and that it had sufficient evidence to support its claim. The proposed new grounds of appeal were not a best judgement challenge '**as opposed'** to whether it had sufficient evidence to support its zero-rating claim as set out by the First-tier Tribunal. The grounds raised a best judgement challenge that the evidence had not been properly considered. In so doing it is clear that the appellant

continued to rely on having sufficient evidence to prove vehicles had been exported. The only reason for proving vehicles had been exported is that the supplies would be zero-rated entitling the appellant to reclaim input tax without charging and accounting for output tax.

49. On a proper construction of the assertions in the letter in light of the evidence as a whole we find that the appellant had clearly not abandoned its claim that its supplies were zero-rated. We consider this to be the only possible conclusion that the tribunal could have reached on the materials before it when those materials are –as they must - be considered in context as a whole.

50. We accept Mr Beal's submission that in the context of this appeal the First-tier Tribunal's construction of the letter required the clearest terms to be used particularly where even the respondent had described that construction as 'incomprehensible'. The assertion in the letter to have never claimed zero-rating is simply (and as identified by the respondent) inexplicable. The Tribunal failed to properly engage with and consider if there were any reasonable prospects of an appeal succeeding on the basis of a continued and strenuously argued case that the appellant was entitled to input tax recovery. A more detailed analysis of the assertions in the letter and an adequate explanation was required in the face of such an 'astonishing *volte-face'* (to adopt the language used by the respondents).

51. We find the First-tier Tribunal materially erred in law for the following reasons. When construing assertions in the letter regarding zero-rating it failed to consider the letter as a whole, failed to consider relevant aspects of the proposed amended grounds of appeal and failed to take a highly relevant factor into account, namely the continuing claim to be entitled to recover input tax. We accept that the Upper Tribunal must be slow to interfere with elements of First-tier Tribunal's evaluation but in this case there is no discernible evidence that the First-tier Tribunal evaluated the above aspects of the evidence or if it did so has not provided an explanation in the written reasons for the decision. Our view is that the assertion in the letter as construed by the First-tier Tribunal is – as the respondents put it in their correspondence – simply incomprehensible. On closer analysis of the letter and the proposed grounds of appeal, the letter clearly cannot be construed as the appellant abandoning its case that its supplies were zero-rated. Such a conclusion, in our view, is inconsistent with the evidence and therefore the Tribunal's finding that the appellant could not succeed was irrational. No reasonable tribunal could, when considering the relevant material before it, have come to that conclusion. For the above reasons, we consider that the Tribunal's decision was vitiated by an error of law.

52. Given our findings on ground 1 we do not need to consider grounds 2 and 3.

**Conclusion**

53. For the reasons we have given we allow the appeal.

54. Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA'), we set aside the Tribunal's decision.

55. In accordance with section 12(2)(b) of the TCEA we re-make the decision as follows.

56. The application to strike out the appeal was made solely on the grounds that the appellant had abandoned any claim that its transactions were zero-rated. As we have found that the appellant had not abandoned its claim that its supplies were zero-rated, the strike out application is refused.

57. The consequence of our decision is that the underlying appeal is re-instated. It is remitted to the First-tier Tribunal to be heard in due course.

Signed on Original

**UPPER TRIBUNAL JUDGE RAMSHAW**
**UPPER TRIBUNAL JUDGE ANDREW SCOTT**

**RELEASE DATE: 14 September 2021**