TC04175

Appeal number: TC/2011/05540

Procedure – application for extension of time for applying for permission to appeal – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PRIME & CO (a firm comprising ANDREW STEVENSON & JANET STEVENSON) **Appellants**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE

Full findings of fact and reasons for a summary decision issued on 15 October 2014

DECISION

Introduction

1. This appeal concerns default surcharges totalling £6,761.69 imposed in respect of late payment of VAT for the periods 02/08 to 11/10 inclusive.

2. A full decision of the Tribunal was issued on 4 April 2013, dismissing the appeal.

3. The appellants now seek to appeal against that decision, but they are out of time for doing so. They therefore seek an extension of that time limit. In a summary decision issued on 15 October 2014, I refused to grant that extension. The appellants have requested full findings of fact and reasons for that summary decision.

The facts

4. From my perusal of the Tribunal's correspondence file, I find the following facts.

5. This appeal marks the latest stage in a dispute between the parties on the appellants' VAT compliance history which goes back some 20 years.

6. The appellants originally fell into default as a result of burglaries at their business premises in 1993. An account of the history of matters up to September 2000 was contained in a decision of the VAT and Duties Tribunal released on 5 April 2001 (VATD No. 17166). In that decision, the VAT and Duties Tribunal allowed the appellants' appeal against a large number of VAT default surcharges for periods up to 05/99.

7. Events after the April 2001 decision were summarised in the substantive decision on this appeal, issued in April 2013, as follows:

> "4. In the 2001 decision, it was made clear that a very significant part of the reason for the Appellants' defaults was the unhelpful, uncooperative and, at times, incompetent action of HMRC. There were difficulties in establishing the correct state of the Appellants' VAT account with HMRC due to the destruction of the Appellants' records and HMRC's inability or unwillingness to provide full and accurate information. The actions of the bailiffs of HMRC's Debt Management Unit were particularly highlighted, the Tribunal observing that "most if not all of the distraints were for greater amounts than have turned out to be due at the times when they were distrained for".
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> 5. The Appellants' VAT problems led to a number of other difficulties. Because they were unable to piece together their VAT account, they were unable to produce audited accounts for either the Law Society or their bankers. Their overdraft facilities were badly affected. They had to meet business expenses (including making payments to HMRC's bailiffs which were subsequently found to have been excessive) using

personal credit cards and premature encashment of personal investments. Long term personal financial planning for retirement was completely undermined.

6. Following the Tribunal decision in April 2001, it was agreed that the Appellants' VAT account should be revised again on the basis of that decision, in order to provide a firm agreed starting point going forward. In spite of extensive correspondence, it was not possible to reach agreement. We note however that by 2002 the parties were only some £2,000 apart and therefore we do not see why it should not have been possible to produce audited accounts with an appropriate reserve or contingency to cover the difference, which would have unlocked the bank problems.

7. In fact arguments over the draft VAT account carried on. The Appellants had been able to file their VAT returns and pay on time, by and large, from 2001 up to 2007. Mr Stevenson explained they had only managed this by expanding the business and using the corresponding increasing cash flow to keep up – just – with the current VAT liabilities.

8. Mr Stevenson said it was only when the recession started to bite in 2008 that this tactic failed. Levels of work dropped off and from period 02/08 the Appellants were unable to pay their VAT due to the cumulative effect of the previous 15 years' financial damage, ultimately attributable to HMRC's mistakes, incompetence and worse over the intervening period. He relies on the principle enunciated in *HMCE v Steptoe* [1992] STC 757 (Court of Appeal)."

8. This appeal (which, it will be recalled, concerns default surcharges totalling £6,761.69 imposed in respect of late payment of VAT for the periods 02/08 to 11/10 inclusive) was notified to the Tribunal in July 2011.

9. Following a hearing on 7 December 2012, the Tribunal issued a summary decision on 2 January 2013. The Appellants requested full findings and reasons, and these were supplied in a decision dated 4 April 2013.

10. The Tribunal's file on the appeal was destroyed in January 2014, in line with its usual document retention policies.

11. On 9 July 2014, the Tribunal received from the Appellants a letter dated 2 July 2014, in which they stated that "in light of new evidence not previously available to the Tribunal including an admission by the Respondent that evidence relied on before the Tribunal was wrong we wish to make a late application to appeal the decision and, of course, for leave to appeal out of time." Clarification was sought as to the appropriate way of doing so.

12. This correspondence was forwarded to HMRC for comment and they replied on 18 July 2014. Their reply was copied to the Appellant by the Tribunal on 5 August 2014, along with a letter from the Tribunal giving some broad indications of the

possible procedural steps open to the Appellant but stating that "it is not for the Tribunal to provide advice to the parties".

13. This letter crossed with a letter dated 5 August 2014 from the Appellants, in which they stated they wished that letter to be treated as an application for a "review" of the decision, and set out at some length the "circumstances" upon which they relied in seeking the review.

14. The letter sets out a number of detailed assertions about what evidence was and was not before the Tribunal, and effectively questions the reliability of the Tribunal's findings of fact on key points, largely in the light of new evidence which is said to have emerged subsequently.

The law

15. The time limit for delivering an application for permission to appeal is set out in Procedure Rule 39:

> "**39 – Application for permission to appeal**
>
> (1) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.
>
> (2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 56 days after the latest of the dates that the Tribunal sends to the person making the application –
>
> (za) the relevant decision notice;
>
> (a) where –
>
> (i) the decision disposes of all issues in the proceedings; or
>
> (ii) subject to paragraph (2A), the decision disposes of a preliminary issue dealt with following a direction under rule 5(3)(e),
>
> full reasons for the decision;
>
> …"

16. It is well established that the Tribunal has power to extend the time limits laid down in its own procedure rules – see Rule 5:

> "**5 – Case management powers**
>
> (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers contained in paragraphs (1) and (2), the Tribunal may by direction –
>
> > (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;
>
> …"

17. Whilst the Procedure Rules do not lay down any criteria to be applied when considering applications for extensions of time, it is clear that the overriding objective contained in Procedure Rule 2 ("to enable the Tribunal to deal with cases fairly and justly") must be taken into account.

18. There have been two recent decisions of the Upper Tribunal concerning the extension of time for compliance with time limits, *HMRC v McCarthy & Stone (Developments) Limited* [2014] UKUT 196 (TCC) and *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC). It would be fair to say that *McCarthy & Stone* points towards a strict approach to such applications, whereas *Leeds City Council* is more liberal.

19. I consider the *Leeds City Council* case the more appropriate one to follow.

20. This requires me (as mentioned in paragraph [19] of *Leeds City Council*) to follow "the practice which has applied hitherto, as it was described by Morgan J in *Data Select*" (*Data Select Limited v HMRC* [2012] UKUT 187 (TCC)).

21. The relevant passage from Morgan J's decision is as follows:

> "34….. Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.
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> 35. The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see Sayers v Clarke Walker [2002] 1 WLR 3095; Smith v Brough [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an

> extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc [2007] STC 1196.
>
> 36. I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in Advocate General for Scotland v General Commissioners for Aberdeen City [2006] STC 1218 at [23]-[24] which is in line with what I have said above.
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> 37. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision.
>
> 38. As I have indicated, the FTT in the present case adopted the approach of considering all the circumstances including the matters specifically mentioned in CPR 3.9. It was not said that there was any error of principle in that approach. In my judgment, the FTT adopted the correct approach."

Discussion and decision

22. Without entering into a detailed consideration of the merits of the Appellants' application (which the Tribunal originally treated as an application for set-aside, but which the Appellants subsequently explained they wished to have treated as an application for a review and then as an application for permission to appeal), I consider first the question of whether the application should be entertained by the Tribunal so long after the decision was issued.

23. The time limit for seeking permission to appeal against a decision is 56 days from the date of issue of the decision – see [15] above. In the present case, that time limit expired on 30 May 2013. The fact that an application of some kind was intended was first communicated to the Tribunal on 9 July 2014, over a year later. The actual application was received on 8 August 2014.

24. The general rule is that time limits are there to be obeyed, and whilst the Tribunal has power to grant extensions, it should only do so for good reason. The Appellants appear to be saying that time should be extended in this case because the new evidence upon which they wish to rely only came to light in May 2014, when it was found amongst old files.

25. In considering applications for extension of time, in considering the factors identified in *Data Select,* it is well established that the Tribunal may take account of the strength of the underlying application itself.

26. In the present case, the essence of the underlying application is that, in the light of new evidence which only came to light in May 2014 in the Appellants' records, the findings of fact made by the Tribunal in the original decision are susceptible to attack under the principles set out in *Edwards v Bairstow* [1956] AC 14.

27. There is a contradiction at the heart of the application. The appellants do not argue that the Tribunal made findings of fact which were perverse on the basis of the evidence before it; they effectively argue that the findings of fact are perverse when viewed in the light of the later new evidence.

28. It seems to me that on this basis alone, the application would be doomed to fail even if it were admitted out of time. If the basis for the application is that the later-discovered evidence is what makes the findings of fact in the decision perverse, it is implicitly accepting that, on the basis of the evidence actually submitted to the Tribunal, they were not perverse (indeed, if it had been thought that they were, an application for permission to appeal should have been submitted straight away). What the appellants are really saying is not that the Tribunal reached a wrong conclusion on the basis of the evidence before it, but that its conclusion can no longer be sustained in the face of the later-discovered evidence. The doctrine of *res judicata* provides a complete answer to this argument. The appellants' remedy, if they could show a procedural irregularity (in the form, for example, of wrongful concealment of the missing evidence by HMRC) would be to apply for the decision to be set aside; however in this case they have confirmed that this is not their application; and I can see no basis on which such an application could be sustained given that any shortcomings in the evidence before the Tribunal is attributable to the appellants' misfiling.

29. Turning to the five questions specifically identified by Morgan J in *Data Select*, the answer to the first is clear. The purpose of the time limit is to bring finality and enable the parties to close their files and apply their attention and resources to other matters.

30. The length of the delay before the application was made was well over a year. The appellants would no doubt say this is because it was only in May 2014 that they realised they had some further evidence to submit which would be relevant. Even if this is accepted, there was still a delay of over a month before any contact was made with the Tribunal, and of over two months before a proper application was received.

No explanation is offered for this delay. The implication might be that, seen against the background of the whole history, it is insignificant. If that is the appellants' position, I consider it unsustainable.

31. Both HMRC and the Tribunal have moved on to other matters since this matter was thought finally closed in April 2013. The Tribunal's files have been destroyed and therefore the evidence before it at the time of the hearing is no longer in existence. Memories have faded. The events involved in this appeal already stretch back over twenty years and have been examined at great length on two occasions by the Tribunal and its predecessor tribunal. Whilst not insignificant, the surcharges involved in the appeal were some £6,800 and both HMRC and the Tribunal have already expended a great deal of time and resource in what was believed to be a final resolution of them. An appeal is supposed to offer an appellant a one-off opportunity to put forward his best case with all necessary supporting evidence and if he fails to do so he cannot expect to come back for an indefinite further number of bites at the cherry.

32. In summary, for all the reasons summarised above I do not consider it would be appropriate for me to exercise my discretion to permit this application to be made out of time.

33. The application for an extension of time for making the intended application for permission to appeal is therefore REFUSED.

34. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 8 December 2014