[2016] UKFTT 051 (TC)

TC04850

Appeal number: TC/2015/03864

VAT – Application for extension of time for to appeal – Data Select Ltd v HMRC criteria applied – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

OCEANAIR EXPRESS LOGISTICS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice on 29 January 2016

Dario Garcia, Solicitor of Mishcon De Reya LLP, for the Appellant

Richard Evans, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Oceanair Express Logistics Limited (the "Company") is an import clearing agent which was authorised by HM Revenue and Customs ("HMRC") to operate under the Low Value Bulk Import arrangements of the Customs Procedure Code to import low value goods into the EU free of import VAT. HMRC, being unable to resolve issues in relation to goods imported through correspondence, on 18 June 2013 issued the Company with a C18 Post Clearance Demand Note in the sum of £1,219,255.78 on the basis that it had made ineligible claims under the Code.

2. The letter enclosing the C18 stated inter alia:

> If you do not agree with any decision issued to you there are two options available. Within 30 days of the date of this decision you can either:
>
> - Request a review of the decision by someone not involved in making the decision …or
> - Appeal direct to the Tribunal who are independent of HMRC.

3. On 11 July 2013 the Company responded. Its letter included the following passage:

> Please treat this letter as an appeal against the C18 Post Clearance Demand … and a request for reconsideration of the issue of the demand.
>
> …
>
> Please also treat this letter as a request that the Company be permitted not to pay the "1,129,255.78 shown on the demand on the grounds of hardship pending the outcome of this reconsideration and any subsequent appeal to the First-tier Tax Tribunal and any subsequent appeals to the higher Courts.

4. A letter in reply from HMRC, dated 20 August 2013, referred to the Company's letter of 11 July 2013:

> … appealing against the issue of post clearance demand note C18 and requesting that your company be permitted not to pay the"1,219,255.78 on the grounds of hardship, pending the outcome of the review, and any subsequent appeal to the Tribunal.

5. On 18 September 2013 the Company wrote again to HMRC raising "some additional concerns" and thanking HMRC for their letter "concerning our appeal".

6. Having undertaken a review, as requested by the Company in its letter of 11 July 2013, which upheld the decision to issue the C18 Post Clearance Demand Note, a letter, of 4 November 2013, setting out HMRC's position concluded:

> I hope you are satisfied with the outcome of this review. However, if having considered all the points made in this letter, you believe there are grounds for a different outcome, you can ask an independent tribunal to decide the matter. Appeal requests should be made on the appropriate forms, which you can obtain, along with an explanatory leaflet, from the Tribunal Service website www.tribunals.gov.uk or by telephone [number] …
>
> There are three options if the case progresses to an appeal. These are as follows;
>
> 1. Payment of the full amount in cash, cheque or deduction from a deferment provision;
>
> 2. The provision of security using Form C&E 250 Guarantee (available from this office).
>
> 3. In certain circumstances where a guarantee is not obtainable we can consider the issue of a Certificate of Hardship where a requirement to pay would cause serious economic or social difficulties for the appellant. Applications for hardship should be made to me at the above address.
>
> …
>
> The request for an appeal should be sent to the tribunal at the following address within 30 days of the date of this letter and be accompanied by a copy of this letter.
>
> [Tribunal's address]

7. During November 2013 the Company sought professional advice (from a different firm to the solicitors now instructed). On 20 November 2013 an email was sent to HMRC to which was attached a Certificate of Hardship dated 22 October 2013. An email in reply from HMRC, dated 20 February 2014, stated:

> I refer to your email below which was sent following my review decision of 4 November 2013.
>
> As you are aware any appeal to the Tribunal of a review decision must be made within 30 days from the date of that decision. From your email below it is not clear what your intention was, as of today's date we have not been notified of such by the Tribunal Service. Could you let me know whether you have submitted an appeal be return email please?

The reply on 20 February 2014 stated:

> Thank you for your email below and I can advise that an application was made to HMRC to deal with this matter under ADR and [name] of your Counter Avoidance team in Peterborough is currently dealing with the matter.

8. An application for ADR had been made to HMRC on 30 January 2014. On 27 March 2014 HMRC's Dispute Resolution Unit wrote to the Company's representatives to advise that ADR was not appropriate in respect of the legal issues arising but was suitable in relation to the calculation of the quantum of the liability.

Although the letter asked the Company if it wished to proceed on this basis it took no further action in relation to ADR.

9. On 24 February 2014 HMRC wrote to the Company "further to" the email of 20 February 2014. The letter explained:

> As you are aware at the time of the above-mentioned review you applied for, and were issued with, a Certificate of Hardship to cover the amount notified to you on the Post Clearance Demand Note C18[number]. A Certificate of Hardship can only be issued during the litigation process (please note that ADR is not part of the litigation process) and, therefore, as this has now ended, there are no legal provisions to secure the debt.
>
> In view of the above I have notified HMRC's Debt Management Unit that the amount of £1,219,255.79 is no longer covered by a Certificate of Hardship. Should you wish to discuss "Time to Pay" arrangements please contact Debt Management direct as below
>
> [Address of HMRC Debt Management Branch]

10. There was no further correspondence between the parties until 21 May 2015 when HMRC wrote to the Company demanding payment of the £1,219,255.78. The Company's representatives wrote to HMRC on 2 June 2015 stating that neither they nor the Company had received any correspondence from HMRC since March 2014. The letter continued:

> As far as I am concerned [HMRC] are awaiting the decision in an appeal by Citipost Ltd which is dealing with an identical matter. On this basis I assumed that [HMRC] had stayed all matters in respect of this alleged debt. I can see no reason otherwise for 15 months to have elapsed with no action on your part.

11. It would appear from a letter, of 16 June from the Company to HMRC that its representative had been in discussions with HMRC earlier that day. The letter advised that "an out of time" would be made to the Tribunal with an application that it be stayed behind the appeal of Citipost Limited. It also requested HMRC to re-issue the Certificate of Hardship granted in October 2013. HMRC replied by email on the same day explaining that the Certificate of Hardship could not be re-issued but that once the appeal was filed at the Tribunal stating that a hardship application had been made the Debt Management branch would suspend action until the conclusion of the appeal.

12. On 16 June 2015 the Company submitted its Notice of Appeal to the Tribunal. Included within that Notice was a hardship application and an application to extend time on the basis that the Company had not received the letter of 24 February 2014 from HMRC withdrawing the Hardship Certificate and was not aware that the Certificate had been withdrawn until 15 June 2015. Also, it was only as a result of the subsequent discussions with HMRC that the Company become aware that no formal appeal had been made as it was assumed that action had been stayed because of an identical case (Citipost Limited) being progressed through the Tribunal system.

13. A copy of the 24 February letter was sent to the Company's representatives on 17 June 2015 as an attachment to an email. In an email response later that day the representatives wrote:

> Thank you for the copy letter. It appears that it was just delivered through the normal system, in which case it would not have been signed for but it was never received by [the Company's] Mr Goldswain as I can assure that he would have contacted me and we have advised you that the Company was not undertaking ADR but was remaining within the main appeals system. Clearly if we had become aware of this letter we would also have become aware that HMRC required a formal appeal to be lodged while awaiting a decision in the Citipost case.

14. A Certificate of Hardship was issued on 11 August 2015.

15. Under s 85G of the Value Added Tax Act 1994, where HMRC are requested to undertake a review, an appeal is to be made within 30 days of the conclusion of that review. It is accepted that in this case that time began to run from HMRC's letter of 4 November 2013, notifying the Company of the conclusion of HMRC's review; that the Company should therefore have submitted its appeal by 4 December 2013; and that the Company did not make its appeal on time. However, the Tribunal may, by virtue of s 85G(6), give permission for an appeal to be made out of time.

16. The decision whether or not to grant an extension of time is essentially a balancing exercise and in coming to a conclusion it is necessary to have regard to the overriding objective of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 to deal with cases "fairly and justly". This includes "avoiding delay" (see rule 2(1)(e)).

17. It was accepted that in considering whether to grant the Company permission to make a late appeal I should adopt the approach of Morgan J in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) where he said, at [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."

18. It was not disputed that the purpose of the time limit was to provide certainty and to avoid delay. As Judge Bishopp put it in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC) at [24] the purpose of the time limit;

> "… is to require a party asserting a right to do so promptly, and to afford his opponent the assurance that, after the limit has expired, no claim will be made."

19. The delay in this case was from 4 December 2013 to 15 June 2015, a little over 18 months.

20. Turning to the explanation for the delay, Mr Dario Garcia, for the Company, contends that this was not the result of complacency, inadvertent or dilatory behaviour on the part of the Company which, as is clear from the correspondence, had believed that it had protected its position with regard to an appeal. In particular Mr Garcia referred its letter of 11 July 2013 which the Company had asked to be treated "as an appeal", HMRC's response had referred to the Company "appealing" against the C18 post Clearance Note and the Company had written to HMRC on 18 September 2013 "concerning our appeal".

21. However, he submits, following the decision not to pursue ADR, as it had not received the letter advising of the withdrawal of the Certificate of Hardship and the necessity of an appeal, the Company had assumed that, because it had not heard from HMRC, its appeal had been accepted and that all matters were on hold pending the determination by the Tribunal in the case of Citipost Limited in which similar issues arise (and which by coincidence was being heard in another courtroom at the Royal Courts of Justice at the same time as this application).

22. Mr Richard Evans, who appears for HMRC, contends that there was no basis for the Company's assumption that an appeal had been made or that the appeal had been stayed. He also referred to the correspondence between the parties particularly the letters from HMRC in which, as Mr Garcia accepts, the Company's appeal rights and time limits for appealing were clearly stated.

23. Mr Evans submits that it was not for HMRC to prompt the Company when it did not appeal and took me to the decision of the Administrative Court in *R (on the application of Khan v Secretary of State for the Home Department* [2014] EWHC 2494 (Admin) in which Green J at [75] quoted a passage in *Ahmed v SSHD* [2014] EWHC 300 (Admin) at [42] in which he (Green J) had said:

> "It is not for the SSHD to prompt Applicants; the responsibility for complying with the rules lies with Applicants themselves. I would actually go one step further. It seems to me that in principle it cannot be right that a person can acquire additional rights through inadvertence relative to a person who is diligent and who observes the rules. A rule which rewarded dilatoriness or forgetfulness would create a powerful if not overwhelming perverse incentive on Applicants to suffer selective amnesia or carelessness. The fact that the Claimant overstayed his permission by a very lengthy period of time, whether through inadvertence or otherwise, is not a factor which can either (at least normally in the absence of some fairly exceptional circumstances – which do not arise here) weigh in his favour or be neutral; it is a fact against the Applicant."

24. Although, as Mr Garcia emphasised, the Company did not have the benefit of professional advice until November 2013, Mr Evans contends that it should not be afforded undue indulgence for this reason citing *Tinkler v Elliot* [2012] EWCA Civ 1289 in support where Maurice Kay LJ had said, at [32]:

> "I accept that there may be facts and circumstances in relation to a litigant in person which may go to an assessment of promptness but, in my judgment, they will only operate close to the margins. An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the fact that a litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him for months does not entitle him to extra indulgence."

25. As for the consequences of the Company being given permission to appeal out of time Mr Garcia says that, as would have been the case if a timely appeal had been made, given its similar facts and issues this appeal would have inevitably been stayed behind the Citipost litigation. Moreover, he submits that as the relevant evidence consists of recorded data rather than disputed issues of fact HMRC would not be prejudiced by an extension of time.

26. Mr Evans does not agree. He says that HMRC are entitled to know that the dispute has been settled and would be prejudiced by a late appeal. He also referred to the grounds of appeal which raised issues of whether HMRC had "misguided" the Company by agreeing the "bulking of entries" under the Low Value Bulk Import arrangements and, contrary to Mr Garcia's submission, contends that more than just documentary evidence would be required to determine this appeal if the Company was granted extra time.

27. It is accepted that if the Company is not granted permission to make a late appeal it will be unable to pay the £1,219,255.78 and will cease trading with the consequent loss of jobs for its four full-time employees.

28. While I accept that all of HMRC's letters did indeed clearly explain the Company's rights and routes of appeal I agree with Mr Garcia that the contents of the correspondence could have led the Company to understand that an appeal had been made and was being considered by HMRC. The differences between an appeal in a direct case which has to be made to HMRC and an indirect case, such as this, which requires an appeal direct to the Tribunal, although not mentioned by Mr Garcia, could also have been a cause of confusion.

29. However, in the absence of any reference to the Citipost case or a stay in the correspondence I do not consider that the Company could have credibly assumed that its appeal was stayed following the decision not to pursue ADR. The email of 20 February 2014 made it clear that HMRC had not been notified by the Tribunal that an appeal had been made and, as is accepted by Mr Garcia, it was not for HMRC to prompt the Company into making an appeal.

30. In HMRC's "Notice of Objections to the Appellant's Application for an Extension of Time" it is argued that the "proper course" the Company should have taken was to "lodge an appeal in time then apply to either stay or stand over as necessary" while steps were taken to engage in ADR. This was interpreted by Mr Garcia as HMRC accepting that the appeal should be stayed behind Citipost. However, as there was no reference to that case in the Notice of Objections I am

unable to accept Mr Garcia's interpretation and cannot agree that it was "inevitable" that this appeal would be stayed behind Citipost. As Mr Evans contends it is possible that if the Company had submitted its appeal in time it may have come on for hearing before that of Citipost.

31. I also agree with Mr Evans that there are potentially further issues arising from grounds of appeal which may require oral evidence.

32. Therefore, on balance, having had regard to the consequences, I have reluctantly come to conclusion that I should not give the Company permission to appeal out of time and dismiss its application accordingly.

33. 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.

JOHN BROOKS

TRIBUNAL JUDGE
RELEASE DATE: 1 FEBRUARY 2016