TC07778

PROCEDURE – application to make a late appeal – length of delay serious and significant – whether reliance on adviser and delays by HMRC in responding are good reasons for the delay – no – application to make a late appeal refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/06050

BETWEEN

ANDRIY KONDRATENKO **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE FAIRPO

The hearing took place on 2 July 2020. With the consent of the parties, the form of the hearing was a telephone conference. A face to face hearing was not held because of the restrictions arising current restrictions on movement arising from the COVID-19 crisis. The documents to which I was referred were contained in a bundle of 133 pages together with a separate bundle of authorities.

Mr Owen of VAT Advisory Services Ltd, representative for the Appellant

Ms Donovan, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. This decision arises from an appeal by the appellant in respect of decisions made by HMRC to disallow certain amounts of input tax on the appellant's VAT returns for the VAT periods 09/15-12/16 and 06/17-09/17.

2. The decision itself concerns an application by the respondents (HMRC) that the Tribunal should not exercise its discretion under Rule 5(3)(a) the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the Tribunal Rules) to extend the time limit for the appeal to be made to the Tribunal. Under Rule 20(4) of the Tribunal Rules, an appeal cannot be made out of time unless permission is given.

Background

3. Following a visit by HMRC to the appellant on 18 October 2017, HMRC issued a pre-assessment letter to the appellant on 24 November 2017 stating that the costs of certain ferry bookings would be disallowed as these had been incurred for the benefit of a customer of the appellant, to maintain the business relationship, and so were costs of another party rather than the business.

4. Subsequently, HMRC wrote to the appellant to amend the amounts claimed on his VAT returns on the following dates:

(1) 09/17: 27 November 2017

(2) 09/15: 29 November 2017

(3) 12/15: 29 November 2017

(4) 03/16: 29 November 2017

(5) 06/16: 29 November 2017

(6) 09/16: 29 November 2017

(7) 12/16: 11 December 2017

(8) 06/17: 11 December 2017

5. On 2 April 2018, the appellant's tax adviser (who was not the representative at this hearing) wrote to HMRC asking for copies of correspondence issued since the VAT visit in October 2017 as no correspondence had been received. Copies of the pre-assessment letter and the letter amending the returns were sent to the accountant by email on 4 April 2018.

6. On 11 June 2018, the adviser wrote to ask for a breakdown of the amounts disallowed in each period as they were unable to ascertain how the adjusted amounts of VAT had been arrived at.

7. On 30 July 2018, the adviser wrote again to follow up the letter of 11 June 2018 as no response had been received. They wrote again on 24 August 2018 as they had still not had a reply, noting that they were "keen to test [the disallowance] through the normal appeals process" but could not "move forward" until they "understood exactly" what had been allowed and disallowed in the calculations.

8. On 5 September 2018, HMRC responded with a list setting out the amount of input tax disallowed for each period.

9. The adviser replied to this letter stating that they were "unable to agree to the rationale behind disallowing all the ferry journeys; it was agreed for earlier VAT periods that the input

VAT for one leg of the journey was allowable as a necessary business expense" and asked HMRC to "advise". The actual date of this letter is unknown; it is dated 5 September 2018 but is written in response to HMRC's letter of 5 September 2018, which is marked as having been received by the adviser on 7 September 2018, so that the date of 5 September 2018 may have been a typographical error.

10. No response was received to this letter and the appellant appealed to this tribunal on 28 August 2019.

11. The notice of appeal attached a copy of HMRC's letter of 5 September 2018, the adviser's letter of 24 August 2018 and their reply to HMRC's letter of 5 September 2018. In the notice of the appeal the appellant states that they had had a review of the original decision but that the review had not finished, and they had been waiting more than 45 days without a review conclusion letter. At box 15 of the notice of appeal form, the appellant had ticked the box marked "Yes, I am in time".

12. The grounds for appeal were that the supplies had been "properly incurred fully in the operation of his business and should be allowable".

13. On 18 November 2019, HMRC applied to object to the appeal being made late.

HMRC's submissions

14. HMRC submitted that, although not specified in the notice of the appeal, the decisions appealed against were issued between 27 November 2017 and 11 December 2017.

15. Each of the decisions contained information under the heading "What to do if you disagree" which set out the time limits for an appeal to HMRC or to this Tribunal. HMRC submitted that the appeal rights had therefore been conveyed to the appellant and that these appeal rights were clearly stated to be time limited, with any such appeal being required to be made within thirty days of the date of HMRC's letter.

16. HMRC noted that the appeal had been made on 28 August 2019, and so was made at least one year and seven months after the expiry of the time limits for such an appeal. HMRC also noted that the form for notifying the appeal also includes a clear reference to the time limits.

17. HMRC submitted that the approach in *Martland* ([2018] UKUT 178 (TCC), §44) should be followed, as follows:

> (1) Establish the length of the delay: in this case, HMRC submitted that a delay of at least one year and seven months could only be regarded as significant;
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> (2) Consider the reason for the delay: the appellant had not acknowledged in their notice of appeal that there had been any delay, and no good reason had been given for the delay, as HMRC had clearly set out the basis for disallowing the expenses in their letter of 24 November 2017.
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> > (a) If the accountants considered that more information was needed, s83(1)(c) VATA 1994 clearly establishes that an appeal can be brought against an amount of an input tax credited to a taxpayer so that it is not necessary for an appeal to have complete details as to how the amount has been arrived at.
> >
> > (b) There was still a delay of almost a year between the accountant's last letter in response to HMRC's letter of 5 September 2018 and the date that the appeal was made.

18. HMRC submitted that, in all the circumstances, permission should not be given to bring a late appeal as time limits exist for the purpose of bringing finality and certainty to proceedings

for both parties; the appeal was seriously and significantly late and no good reason had been given for the appeal.

Appellant's submissions

19. For the appellant, it was accepted that the appeal was made late, and that the appeal form had been incorrectly completed, but it was submitted that there were good reasons for the appeal being made late due to the significant delays by HMRC in providing information to enable the appeal to be made and, indeed, their complete failure to respond to the letter in reply to their letter of 5 September 2018. It was submitted that *Martland* had established that actions by HMRC such as delay and failure to provide information could be relevant factors in considering all of the circumstances of the case.

20. It was submitted that it was necessary to consider the history of the matter in context, particularly the fact that the appellant is not English and has needed to have documents interpreted for him by his advisers.

21. The appellant had understood that the matter was being dealt with by his tax adviser, as the letters amending his VAT returns each stated that a copy of the letter had been sent to his tax adviser. However, the adviser had not received any copies of these letters as shown by his email to HMRC on 2 April 2018. There was no record in the bundle to show that the decision letters had actually been sent to the adviser.

22. The adviser subsequently requested more detail from HMRC in order to be able to appeal, as they considered that it was not possible to appeal against an amount for which they did not understand the basis.

23. There were significant delays on the part of HMRC, as no response to requests for clarification was received until 5 September 2018 and that response simply reiterated the numbers set out in the original letters. No detail was provided as to the transactions and amounts which had actually been disallowed. Although clarification was again requested, this has never been received.

24. It was further submitted that this matter would not involve reopening a case which had "gone cold" and that, if the appeal was allowed to proceed, that the matter was likely to be suitable for alternative dispute resolution and so could be resolved without the need for a further hearing on the substantive appeal.

25. Accordingly, it was submitted that in the circumstances, permission should be given for the appeal to be made late.

Decision

26. This matter started on a slightly unusual basis, with the appeal being stated to be in time and a subsequent application by HMRC that the Tribunal not exercise its discretion to admit the appeal late. At the hearing, the appellant accepted that the appeal was being made late and so this decision treats this matter as an application by the appellant for permission to make a late appeal.

Approach to be taken

27. There is no statutory guidance as to when this tribunal may give permission for a taxpayer to make a late appeal, as made clear in the Upper Tribunal decision of *Martland* which states at §24 that:

> 'The statutory discretion conferred on the FTT in such cases is "at large", in that there is no indication in the statute as to how the FTT should go about exercising it or what factors it should or should not take into account.'

28. The Upper Tribunal in *Martland* noted at §43 that case law had indicated that:

> 'in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".'

29. The Upper Tribunal in *Martland* also endorsed at §44 the three-stage approach in *Denton v TH White Ltd* ([2014] EWCA Civ 906) as appropriate guidance for the First-tier Tribunal to follow:

> 'When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton:*
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
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> (2) The reason (or reasons) why the default occurred should be established.
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> (3) The FTT can then move onto its evaluation of 'all the circumstances of the case'. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.'

Length of the delay

30. It was agreed that the appeal was made late: the last correspondence from the adviser to HMRC appears to have been made in September 2018, almost a year before the appeal was notified to the Tribunal; the decisions appealed against were made more than one year and seven months before the appeal was made.

31. In *Romasave (Property Services) Limited* [2015] UKUT 254 (TCC) at §96, the Upper Tribunal noted that:

> 'Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days form the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.'

32. Following the point noted in *Romasave* that a delay of 3 months is serious and significant, the delays in this matter must also be regarded as serious and significant.

Reasons for the delay

33. For the appellant, it was submitted that the delays arose because the appellant understood that the matter was being dealt with by his tax adviser and did not realise that the adviser had not received copies of these. In addition, the appellant requires that documents be interpreted for him by his advisers. However, even if this could be considered to be a good reason for the delay, the adviser had received copies of the pre-assessment letter of 24 November 2017 and the letters amending the returns by email on 4 April 2018. Accordingly, this could not be

regarded as a reason for the delay to any great extent beyond that date and certainly does not provide a good reason for the length of time before the appeal was notified to this tribunal on 28 August 2019.

34. Part of the delay appears to have arisen from the adviser's belief that more information was needed in order to be able to appeal the decision, as they believed that they needed to understand the basis on which the assessments had been raised before they could submit the appeal.

35. I consider that this does not amount to a good reason for the delay: I consider that the pre-assessment letter states clearly why the assessments are being raised and, to the extent that there is any lack of further detail, that is a reason to make an appeal rather than to delay making an appeal. The appeal mechanisms exist in part to enable a taxpayer to have some redress where they reasonably consider that HMRC have not adequately explained why an assessment is being made. It is, I consider, clear on the face of the decisions which the adviser had received in April 2018 at the latest that the appropriate mechanism for dispute was to appeal to the tribunal.

36. It was also submitted that HMRC had contributed to the delays by failing to respond to correspondence. It is somewhat regrettable that HMRC did not respond to the adviser's letter of 5 September 2018 but I do not consider that this constitutes reasonable grounds for a delay in appealing until almost a year later, particularly when there was also no evidence provided to suggest that the adviser had sought to follow up that letter.

All the circumstances of the case

37. In carrying out this evaluation, I am mindful of "the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected" (*Martland* at §45).

38. Although the appellant submitted otherwise, I consider that if permission for the late appeal is granted, HMRC will be required to devote further time and resources to litigating a matter which ought properly to have been decided, but that is always a consequence of such decisions and there is nothing unusual in this case in respect of that. It was submitted that the matter could be resolved through alternative dispute resolution without troubling this tribunal further, but I do not consider that to be a relevant consideration.

39. If permission is refused, the appellant will be deprived of the opportunity to advance his arguments against a liability to tax and penalties, but that is also always a consequence of such decisions and there is nothing unusual in this case in respect of that.

40. With regard to the merits of the case, there was little evidence provided as to the strength of the case. The correspondence suggests that there may be some dispute as to whether the input tax on part of the particular expenditure had been allowed previously, but there was no suggestion that there was a very strong case and so I have given this little weight.

Decision

41. The starting point, as set out in *Martland* and noted above, is that permission should not be granted for the appeal to be admitted out of time unless the tribunal is satisfied on balance that it should be.

42. Having established that there was a serious and significant delay and that no good reason had been established for the delay, it is necessary to evaluate all of the circumstances of the case to decide whether to permit the appeal to proceed in spite of the serious and significant delay in notifying the appeal to the tribunal.

43. In all of the circumstances set out above, I do not consider that a good case has been made out for the time limit to be extended.

44. Permission for the appeal to be admitted in spite of its late notification to the Tribunal was therefore REFUSED. Since the Tribunal therefore has no jurisdiction to consider the appeal, I also direct that it be STRUCK OUT pursuant to Rule 8(2)(a) of the Tribunal's procedure rules.

Right to apply for permission to appeal

45. 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.

ANNE FAIRPO

TRIBUNAL JUDGE

RELEASE DATE: 16 JULY 2020