



TC02519

Appeal number: TC/2012/05823

VAT - Permission to appeal out of time. Merits of substantive appeal highly relevant.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TOUQUEER AHMED KHAN

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GERAINT JONES Q. C.
DAVID WILLIAMS ESQ CTA**

Sitting in public at 45 Bedford Square, London WC1 on 09 November 2012.

Mr. Miah and Mr Kasim for the Appellant

**Mrs McHugh, instructed by the General Counsel and Solicitor to HM Revenue and
Customs, for the Respondents**

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DECISION

1. The appellant, Mr Khan, voluntarily registered for Value Added Tax ("VAT") with effect from 26 January 2010. He indicated that he intended to trade as a sole proprietor retailing food, drink and/or tobacco.

2. For the quarters ended 31 March 2010 and 30 September 2010 the appellant reclaimed VAT in the sums of £8065.84p and £3232.03p respectively. The expenditure that led to that reclaim had been incurred by way of refurbishment costs for trading premises in Jamaica Road, London. On 17 May 2011 the respondent refused to make the repayments and in respect of each quarter reduced the input tax to nil. It did so on the basis that it did not accept that the appellant had intended to trade but, instead, intended to let the retail premises at Jamaica Road.

3. The appellant has contended that he did not receive either of the two letters dated 17 May 2011. In our judgement that is something of a side issue, because the real issue upon a substantive appeal would be whether or not the appellant is or is not entitled to the repayments. The only relevance of the issue of whether the appellant did or did not receive the letter is dated 17 May 2011 is that it is but one factor that goes to whether the Tribunal should grant the appellant permission to appeal out of time. There are competing arguments. The respondent has adduced no evidence to show that the letters were posted; it relies simply upon the fact that copy letters appear on its file. Equally, the appellant has put in no evidence to say that they were not received. He simply relies upon an allegation in the Notice of Appeal and the say-so of his representative, Mr Miah.

4. We have therefore decided that the proper way to proceed is to take a view as to the overall merit of the proposed appeal, if permission to appeal out of time was to be granted. For reasons which we will now proceed to give we take the view that any substantive appeal would have virtually no prospect of success.

5. It was part of the appellant's case that he had not let the retail premises to a Mr Choudhury but, rather, simply appointed him as the shop manager. We asked to be provided with a copy of the lease, licence or other written agreement that put that arrangement in place. Eventually we were provided with a copy of a document headed "Management Agreement" which puts it beyond doubt that Mr Choudhury was not a shop manager, in the sense of being employed by the appellant, but, rather, was to run the business on his own account.

6. The Management Agreement is dated 01 April 2010. It provides for "the Manager" to be appointed as the manager of the business but on specified terms. One term is that the manager will be self-employed and not an employee of the owner. Another term is that he will have no authority to act as an agent for the owner. Clause 2 provides that the "appointment" shall commence on 01 June 2010, it being terminable by either party giving the other 30 days notice in writing. Clause 3 of the agreement provides that the manager shall not have exclusive access to the whole of the premises at all times and will have "non-exclusive" rights to use the fixtures, fittings and chattels in the retail premises.

7. The payment (or rent), under the agreement is £600 per week with the first three months' payment being in advance.
8. It is difficult to imagine a more hybrid type of agreement designed to give the impression that it is not creating a lease or business tenancy but, instead, leaving the manager in the premises in some other ill-defined capacity. It is a sham insofar as the intention of the agreement is to portray Mr Choudhury as being anything other than the proprietor of the business; the person entitled to enjoy the profit derived therefrom; and the person solely responsible for running it. The weekly payment of £600 is in the nature of rent.
9. The significance of the Management Agreement is that it demonstrates that the appellant had let or otherwise parted with possession of the trading premises very shortly after refurbishing them. At one stage we thought that the appellant may not have "let" the premises until sometime in 2011, but that was based upon a typographical error in a document which, to that limited extent, was misleading. The Management Agreement shows the correct date, as confirmed by Mr Miah.
10. We were told that Mr Choudhury did not register for VAT notwithstanding that clause 13.1 of the Management Agreement expressly provided that he should do so (another incident of him being the owner and operator of the business).
11. Whilst it is not for us to decide that if the appeal proceeded it would be bound to fail, it is for us, at this stage, to take a view of the overall merits of the proposed appeal if the material available to us permits us to do so. In our judgement, the material that was made available to us at the outset of the hearing, as supplemented by the further material (the Management Agreement) provided to us during the hearing, leaves us in no doubt that the appellant's proposed appeal would have only the most modest prospects of success. That is a factor that we are entitled to take into account in deciding whether, as a matter of discretion, permission to appeal out of time should or should not be granted.
12. The appellant has sought to excuse the delay by reference to his alleged non receipt of the letters dated 17 May 2011. We find it difficult to accept that neither of those letters was received. They were both sent to what was agreed to be at all relevant times the appellant's home address, in Harrow, and there was no evidence that they had been returned undelivered. On the appellant's case he was owed something over £11,000 by HMRC but no enquiries were made to chase repayment of that sum until May 2012.
13. There is no evidence adduced to show that the letters dated 17 May 2011 were not received by the appellant. The evidence available to us persuades us that if this appeal proceeds to a substantive hearing, it would have but scant prospects of success.
14. A Contact Centre Enquiry form shows that on 21 May 2012 Mr Kasim on behalf of the Appellant made an enquiry and said that he was chasing up the repayments from March 2010 and September 2010. The note records that he was told "advised had been reduced to nil". That, we note, is the same date as appears on the Notice of

Appeal. Nonetheless, given our firm view concerning the overall merits of any substantive appeal, permission to appeal out of time is refused.

5 15. 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.

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Decision.

15 Permission to appeal out of time is refused.

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**GERAINT JONES Q. C.
TRIBUNAL JUDGE**

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RELEASE DATE: 5 February 2013

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