



TC03028

Appeal number: TC/2011/01093

Procedure – late indication of wish to appeal against a summary decision – taken as a late application for full findings of fact and reasons – no good reason given for lateness – approach to extensions of time for such matters – any application for permission to appeal premature, as no full findings of fact and reasons previously asked for or provided – factors to be taken into account in considering extensions of time limits under the Tribunal’s procedure rules – application for extension of time for requesting full findings of fact and reasons dismissed – summary decision therefore final

FIRST-TIER TRIBUNAL

TAX CHAMBER

A & E SERVICES (MIDLANDS) LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE KEVIN POOLE

ORDER

Having received on 4 July 2013 a late application dated 25 August 2013 indicating a wish to appeal against (which was therefore taken as a request for full findings of fact and reasons for) a summary decision issued on 15 July 2011, the Tribunal has **refused** the application. Full reasons for its refusal are set out below.

DECISION

Introduction

1. This decision relates to an application made out of time by the appellant for full
5 written findings and reasons for the summary decision of the Tribunal released on 15
July 2011.

2. That summary decision (“the Summary Decision”) related to an original appeal
against a default surcharge of £5,284.30 imposed in respect of the appellant’s late
payment of VAT for the VAT accounting period ended 31 October 2010.

10 The original substantive appeal and its disposal

3. With the passage of time, the Tribunal’s file has been destroyed in accordance
with standard document retention policies. The following picture can be
reconstructed from the information still available from various sources.

4. The essence of the substantive original appeal was as follows. The appellant
15 was expanding rapidly at the time and cash flow was tight. Of the appellant’s total
VAT liability for period 10/10 (due to be received by HMRC by 7 December 2010 by
electronic payment), £15,000 was received on 8 December 2010 by BACS (one day
late), £9,000 was received on 9 December 2010 by BACS (two days late), £6,000 was
received on 30 December 2010 by BACS (23 days late) and the balance of £6,470.85
20 was received on 14 January 2011 by BACS (38 days late).

5. At the hearing, the appellant’s representative Mr Hadley argued that the
payments received by HMRC on 8 and 9 December had been sent from the
appellant’s bank account on 6 and 7 December respectively and he had believed they
would be received by HMRC on the same day in each case. He was not aware that it
25 could take up to three days for money to be transmitted by BACS, and would have
used CHAPS to guarantee a same-day transfer if he had realised. He was content to
accept a surcharge on the amounts received at the end of December and mid-January,
but asked the Tribunal to accept that he had a reasonable excuse for the late payment
of the £24,000 paid in early December.

30 6. On the basis of the evidence put before the Tribunal, they dismissed the
appellant’s appeal, setting out in the Summary Decision that they did not accept there
was a reasonable excuse for the late payments.

7. The Summary Decision, which was sent to the parties on 15 July 2011,
contained the usual final paragraph, which included the following text:

35 “A party wishing to appeal against this decision must apply within 28
days of the date of release of this decision to the Tribunal for full
written findings and reasons.”

The appellant's applications

8. The appellant wrote to the Tribunal by letter dated 25 August 2013 (received at the former office of the Tribunal on 26 June 2013, and forwarded from that office to the Tribunal's present office where it was received on 4 July 2013), purportedly
5 chasing a response to an earlier letter dated 11 August 2011 (nearly two years earlier) in which a desire to appeal against the Summary Decision was expressed.

9. In addition, on 16 July 2013, the Tribunal received a notice of appeal in the Tribunal's standard form, signed by Mr Hadley on behalf of the appellant and dated 15 August 2013 (nearly a month after it was received). In that notice of appeal, the
10 letter dated 11 August 2011 was again referred to and it was also stated that:

“The reason we are appealing is because we factor our invoices and the percentage held back until paid by our customers is the amount for VAT. Due to new legislation we now only pay VAT on cash received and have been on time with our VAT payments.”

15 10. The time limit for receipt by the Tribunal of the application for full findings of fact and reasons for the original Summary Decision was 12 August 2011. The Tribunal has no record of having received the appellant's letter dated 11 August 2011 before the copy of it which was attached to the appellant's letter dated 25 August 2013. The application was therefore received nearly two years after (and was dated
20 more than two years after) the deadline. The Tribunal therefore responded by letter dated 9 September 2013 to the appellant, asking for an explanation why it had taken two years for the appellant to follow up on its earlier letter.

11. By letter dated 9 September 2013 (received at the Tribunal on 4 October 2013), signed by Mr Handley, the appellant stated that:

25 “We were unaware that you did not receive our original letter and we also believed through our conversations with HM Revenues that this surcharge had been resolved.

30 A recent meeting with a representative from HM Revenues confirmed that this had not indeed been the case and we had to again send correspondence to you directly.

The original person dealing with this for our company also sadly passed away some 18 months ago so all these factors have meant a delay in resolving this matter.

35 It has never been our intention to delay this and was in our interest to appeal against this surcharge which we believed we had.”

12. We note that Mr Hadley himself attended at the original hearing in July 2011 and appears to have done most of the speaking on behalf of the appellant. We do not accept that the unfortunate death of Mr Johnson (who attended the hearing with him) can affect our decision, though we note that Mr Johnson was supposedly the signatory
40 to the letter dated 11 August 2011.

13. The appellant's administration appears to have some marked shortcomings. The two letters and the notice of appeal received by the Tribunal from the appellant since June 2013 all carry dates which bear no resemblance to the dates on which they were respectively received. It is also inherently implausible that the appellant should have
5 lodged an appeal and then omitted to do anything to chase it up for nearly two years. I find as a fact that the original letter dated 11 August 2011 was never sent to the Tribunal before the copy of it was attached to the appellant's letter dated 25 August 2013.

The appeals process

10 14. Under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the TPRs"), the procedure for appealing a decision of the Tribunal is clearly set out.

15. An original decision can take one of three forms:

- (1) a simple decision, with no supporting findings of fact or reasons (this can only be done with the consent of both parties).
- 15 (2) a decision which includes only a summary of the findings of fact and reasons which support it. This is commonly called a "summary decision", and the vast majority of the Tribunal's decisions are issued in this form.
- (3) a decision which is accompanied by full written findings of fact and reasons which support it. This is commonly called a "full decision". In general,
20 only full decisions are published on the Tribunal's website.

16. A decision of the Tribunal can be appealed to the Upper Tribunal, but only with permission (which may be granted either by the Tribunal or by the Upper Tribunal). An appeal is only permitted on questions of law – the findings of fact made by the Tribunal are generally final.

25 17. The TPRs are drafted on the basis that a party cannot properly formulate an application for permission to appeal unless it has first received a full decision. Thus if a summary decision is issued, it will include a standard paragraph which notifies the parties that if they wish to appeal, they must first apply for a full decision. Once that has been issued, they may then apply for permission to appeal against it, stating the
30 grounds of appeal.

18. There is a time limit of 28 days after the issue of a summary decision for the Tribunal to receive a request for a full decision (see rule 35(5) TPRs). This is a comparatively short time limit, because all that is required from the party concerned is a simple application in no particular form and giving no reasons. The standard
35 wording included in every summary decision (including the one in this case) includes a specific reference to the 28 day time limit.

19. Once a full decision has been issued, a party has a further 56 days from the date on which it was sent to him to deliver an application for permission to appeal to the Tribunal (see rule 39(2) TPRs). Every full decision issued by the Tribunal includes a

standard paragraph which notifies the parties of this time limit. A longer period than 28 days is appropriate because the party must have time to consider the full decision, perhaps take advice on it, and formulate a statement of his grounds of appeal which must be included in any application for permission to appeal.

5 **Treatment of the appellant's letter**

Application for full findings of fact and reasons for the decision

20. As mentioned above, no particular format is required for an application for full findings of fact and reasons for a decision. The letter from the appellant dated 11 August 2011 would therefore have been considered sufficient from this point of view as it expressed a wish to appeal the decision and the Tribunal would therefore have considered it to be implicitly requesting the provision of full facts and reasons as a first step in the appeal process. The only problem with the letter was that it was not received by the Tribunal until a copy of it was sent as an attachment to a letter nearly two years later, and the explanation as to why it was not followed up for nearly two years is inherently implausible.

21. It follows that I find the request for full findings of fact and reasons for the Summary Decision was received nearly two years outside the requisite time limit as laid down by the TPRs.

22. The Tribunal does have a general power to extend time limits, including the 28 day time limit for making an application for full findings of fact and reasons for a decision.

23. I consider below the question of whether I should exercise this power, under the heading "Extension of time".

Application for permission to appeal against the Summary Decision

24. As will be apparent from the summary of the appeals process set out above, such an application is incorrect, or at best premature. No application for permission to appeal can be made until a full decision has been issued, and of course no full decision has been issued in this case.

25. As it stands, therefore, this application must be refused.

30 **Extension of time**

Introduction

26. As mentioned above, the Tribunal has power to extend the 28 day time limit for requesting full findings of fact and reasons for a decision given in summary form.

27. The effect of refusing such extension of time would be to decide the appeal finally against the appellant. The position is therefore very similar (in practice, identical) to the situation where an appellant wishes to start an appeal after expiry of

the statutory time limit for doing so. The case law which governs how judicial discretion is to be exercised in such cases should apply equally to these situations.

Extensions of time – applicable rules and case law

5 28. The Tribunal has power to allow extensions of time, and in an appropriate case it will do so. The relevant time limit is set out in rule 35(5) of the TPRs. The TPRs also contain a general power to extend that time limit (in rule 5(3)(a)). In considering whether or not to exercise that power, it is clear that the Tribunal must observe the “overriding objective” of the TPRs, which is set out in rule 2(1):

10 “The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.”

29. As is set out in rule 2(2)(a) of the TPRs, dealing with a case fairly and justly includes dealing with it:

15 “in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties”.

30. As has been made clear in numerous decisions of the Tribunal, time limits are there to be observed and will only be extended for good reason.

20 31. Recently, the Upper Tribunal has had occasion to examine the issue of judicial discretion to extend time limits in two cases. In *Data Select Limited v HMRC* [2012] UKUT 187 (TCC), the Upper Tribunal was considering whether to permit a late appeal against a VAT assessment. It said (at [37]):

25 “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.”

32. This approach was effectively endorsed in *O’Flaherty v HMRC* [2013] UKUT161 (TCC), where the Upper Tribunal said “it is clear that the FTT should consider all the relevant circumstances, and should conduct a balancing exercise in reaching its conclusion whether to grant permission for the late appeal or not.”

30 33. The reference to “CPR 3.9” is to rule 3.9 of the Civil Procedure Rules, as it stood before 1 April 2013. In its form at the relevant time, it read as follows:

35 “(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including–

- (a) the interests of the administration of justice;
- (b) whether the application for relief has been made promptly;
- (c) whether the failure to comply was intentional;
- (d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

5

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.”

10 34. It is clear also that extensions of time should not be routinely given, but a proper discretion should be exercised in each case. Also, it is clear that the arguable merits of the underlying case should be considered as part of the balancing exercise – see *O’Flaherty* at [59].

Application of the law to the present case

15 35. In this case, the Appellants’ application was not received until nearly two years after the expiry of a 28 day deadline. All that it was required to do within the deadline was deliver to the Tribunal a letter or email requesting full findings of fact and reasons. I find that it did not do so.

20 36. The cases make it clear that the burden lies on the appellant to show that it is appropriate to extend a time limit, and that such extensions should be the exception, and not the rule.

37. I do not consider there to be any satisfactory explanation of the reason why it has taken two years to make a simple application, and I find the explanation that has been proffered wholly implausible.

25 38. The matter had been thought to be resolved by the issue of the Summary Decision and both the Tribunal and HMRC had moved on to other matters, destroying relevant records.

39. In any event, I find the underlying strength of the appellant’s substantive appeal to be extremely weak.

30 40. The appeal involves a not insignificant amount, but it is not enormous. Even at the hearing, the appellant indicated that it was only seriously pursuing the appeal in respect of some £3,600 of the total surcharge. In all the circumstances and after considering the matters summarised above, I believe that enough public resource, both of the Tribunal and of HMRC, has already been devoted to the consideration of
35 the appeal. I see no good reason why I should, in all the circumstances, exercise my power to extend time.

Summary

41. The appellant's letter, insofar as it was taken to be an application for full findings of fact and reasons for the Summary Decision, was made nearly two years after expiry of the 28 day time limit.

5 42. I see no good reason to extend that time limit and therefore the application is invalid.

43. The appellant's letter, insofar as it amounted to an application for permission to appeal, is invalid as such an application cannot be made until full findings of fact and reasons have been provided.

10 44. The Summary Decision is therefore final. Full findings of fact and reasons for that decision do not need to be provided and no application for permission to appeal against it can validly be made.

15 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.

20

25

**KEVIN POOLE
TRIBUNAL JUDGE**

RELEASE DATE: 6 November 2013