



TC03098

Appeal number: TC/2013/01508

LATE APPEAL—application to appeal VAT default surcharges between 2 and 25 years out of time – no real explanation for lateness and grounds of appeal having no reasonable prospect of success – application refused and appeals struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HERNE BAY CATHOLIC SOCIAL CLUB

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE BARBARA MOSEDALE
JO NEILL**

Sitting in public at Bedford Square, London on 4 November 2013

The appellant did not appear and was not represented

Mrs E Carroll, HMRC officer, for the Respondents

DECISION

1. The appellant did not appear and was not represented. We were satisfied that a notice of hearing had been sent to the appellant's officer, Mr McCullough, as a copy was kept on the file and in any event Mr Mr McCullough had written to the Tribunal on 11 October from which letter it was clear he was aware of the hearing on 4 November. We were also satisfied that it was in the interests of justice for the appeal to proceed in the absence of the appellant as in that letter Mr McCullough had requested the tribunal to proceed in his absence and to treat his letter as written representations of the appellant's position.

2. We proceeded with the hearing and took note of the representations made in Mr McCullough's letter of 11 October 2013 as well as all the material in the bundle produced by HMRC.

3. The appellant had applied for leave to have its appeal heard out of time: HMRC applied to have it struck out on the basis it opposed this application.

Is the appeal late?

4. We find that the appellant lodged an appeal dated 30 January 2013 although it was not received by the Tribunal until 28 February 2013. The appellant's explanation for the dating discrepancy was that it was posted on time but returned to the sender as it had insufficient postage on it. Mr McCullough then sent it back to the Tribunal with the correct postage. We accept this explanation.

5. The decision appealed against was stated to be one dated 17 December 2012 and the amount of the surcharge at stake was stated to be £3,635-97. HMRC's letter of 17 December was in response to a letter from the appellant dated 22 November 2012 which requested a review of some 23 default surcharges issued by HMRC. The first default was for period 03/88 and the last for 09/10. We treat the application as relating to all 23 defaults although we note that the total was somewhat greater than the figure in the notice of appeal.

6. Putting aside the issue of any delays by the appellant before that letter of 17 December 2012, the lodging of the appeal was late. Taxpayers have 30 days from the date of a review letter in which to appeal. The 30 day period was stated in HMRC's letter of 17 December 2012. Even on Mr McCullough's case, the notice of appeal was not posted until 30 January 2013 which would have been two weeks' late. In fact, due to the appellant's mistake over postage, it was over 5 weeks' late.

7. But delays prior to 17 December 2012 are relevant too. HMRC's letter of 17 December 2012 explains in brief HMRC's view of the law relating to default surcharges and makes general statements such as the insufficiency of funds is not a reasonable excuse. It then stated:

“The surcharges for the above periods will therefore remain in force.

.....

If you still dispute this decision, you have 30 days from the date of this letter in which to lodge an appeal to.....

5 However in view of the time which has elapsed since the first 19 defaults were incurred, this would need to be on an out of time basis.”

8. HMRC’s letter followed on from lengthy correspondence between the appellant and HMRC over a number of years, not all of which was available to the Tribunal. We find the correspondence had initially mostly been concerned with the appellant’s direct and indirect tax arrears. Having paid off the tax arrears in around 2011, the
10 appellant’s letters then shifted focus to the surcharges and it was seeking to identify exactly what it owed in default surcharges and for what periods. It was also sought to be excused payment of the surcharges.

9. So far as all but the last 4 default surcharges were concerned HMRC cannot have made an offer of a review under s 83A Value Added Tax Act 1994 (“VATA”) as
15 the imposition of these charges pre-dated the legislation. In so far as a review of the last four default surcharges were concerned, this should have been offered but we had no evidence that it had been accepted in time.

10. Further, we find that an earlier letter by an HMRC officer dated 8 October 2010 which dealt with the appellant’s arrears included the sentence:

20 “...the balance of the debt relates to surcharges for late submission of previous VAT returns, and it is understood that you will be appealing to have these charges waived in due course...”

11. We also have a copy of an even earlier letter from HMRC dated 10 January 2008 which was a response to a letter dated 16/12/7 from the appellant in which he
25 explained the appellant’s poor compliance record was due to cash flow difficulties. HMRC’s letter gave Mr McCullough’s letter a rather generous interpretation as being a notice of appeal lodged against the surcharge levied for period 09/07. It refused the appeal and notified the appellant of its 21 days in which to appeal to the Tribunal. The appellant did not lodge an appeal until 2012.

30 12. The first 19 default surcharges: Taxpayers have 30 days from the date of the decision in which to appeal. So far as the 19 oldest default surcharges are concerned, HMRC does have power to extend the time limit to lodge an appeal with the Tribunal (reg 4(2) of the Value Added Tax Tribunal rules 1986 as preserved by paragraph 4(2) of Schedule 3 to the TTFRCAO 2009/56). But we find no evidence that HMRC ever
35 did so: HMRC’s letter of 8 October 2010 does not expressly or impliedly state that out of time appeals would be accepted, and the letter of 17 December 2012 expressly refers to the 19 appeals being out of time.

13. Therefore, by 17 December 2012 all 19 appeals were already late, varying in
40 lateness by between approximately 3½ years and over 24 years, and HMRC did not exercise their power to extend time.

14. The last 4 default surcharges: The taxpayer would have been, as we find it was, offered reviews of the decisions imposing the surcharges in these cases as they post-date the new legislation of April 2009. HMRC has power to undertake a review out of time: s 83E(2) VATA. By its letter of 17 December 2012 this is what HMRC appears to have done although no express reference is made to the provisions of s 83E and no reference was made to whether the taxpayer fulfilled the preconditions for having a late review. Nevertheless, the letter of 17 December clearly treated the appellant's letter of 22 November as a request for a review and proceeded to carry out a review. Unlike with respect to the first 17 defaults, HMRC's letter does not suggest that an application to the Tribunal would be on the basis that the permission to make a late appeal would be needed.

15. We therefore find that HMRC did extend time under s 83E(2) and that, had the appeal been lodged by 16 January 2013, it would have been in time in relation to the last four default surcharges.

15 *Should the Tribunal extend time?*

16. Mr McCullough's submissions of 11 October 2013 state that in his view HMRC's only defence to his appeal is that it is out of time, and implies that it does not consider this to be a good ground of defence. Nevertheless, there are very good public policy reasons why late appeals are not routinely accepted. Promptness in appealing matters is very important. Persons, including Government bodies such as HMRC, are entitled to rely on the legal effect of their actions if not litigated promptly.

17. There are a number of matters which we consider relevant to the question of whether this Tribunal should extend time to appeal, and these are:

- (a) Why was the appeal lodged late?
- (b) Had HMRC led the appellant to suppose an appeal could be lodged late?
- (c) Would the appeal have a reasonable prospect of success if allowed in?

18. Why was the appeal against the various surcharges lodged late? The appellant's various letters do not really explain this. Not surprisingly in view of the quarter of a century that has passed, it seems Mr McCullough was not an officer of the appellant at the time the earliest default surcharges were imposed and we have no explanation for why these defaults were not appealed in time.

19. So far as those defaults incurred more recently are concerned, the letters appear to show that the appellant was more concerned with arranging a payment plan with HMRC with a view to paying off its tax arrears than dealing with the surcharges. For instance, the letter referred to above dated 8 October 2010 indicated that appealing the surcharges was discussed by Mr McCullough with an HMRC officer but the appellant took no action until 2012.

20. It is also clear that the appellant in its 2012 letter was confused by the figures and trying to establish what surcharges were charged and for what period. Even HMRC cannot now explain exactly how the figure of money owing to HMRC correlates with the unpaid surcharges as records do not go back that far.

5 21. The only explanation for lateness really proffered by Mr McCullough is that the appellant is a small non-profit making social club attached to a church and “not particularly aware of laws governing appeals.” We take judicial notice of the fact that HMRC’s standard default surcharge letters do notify appellants of the right to appeal and the time limits and indeed in so far as the Tribunal had HMRC letters in front of it
10 (in particular the letters of 17 December 2012 and 10 January 2008), it was clear that HMRC had notified of the right to appeal to this tribunal and the appropriate time limit.

22. Had the appellant been led to suppose an appeal could be lodged late? We find that nowhere had HMRC suggested that the appellant could lodge an appeal as late as
15 it did. While the letter of 8 October 2010 does not state a time limit it neither expressly or impliedly stated that lateness would not be an issue in any appeal.

23. Indeed, from the letter it seems Mr McCullough had indicated that he would be appealing and we have no explanation of why he did not do so for another 2 years and more.

20 24. Does the appeal have a reasonable prospect of success? The appellant has put forward a number of grounds of appeal:

- (a) Shortage of funds;
- (b) Shortage of funds due to an unexpected loss of a major income source;
- 25 (c) Shortage of funds due to economic recession;
- (d) Since 2010, it has brought its tax affairs up to date and kept them up to date

25. We find the appellant accepts that it did pay its VAT late. Indeed, as mentioned, there are letters in which it accepts its compliance record was poor.
30 Therefore, we consider its appeal against the surcharges could only succeed (in whole or in part) if it could show a reasonable excuse for the defaults or some of them.

26. Shortage of funds: shortage of funds by itself cannot amount to a reasonable excuse for late payment of VAT as this is what the legislation provides at s 71(1)(a) VATA.

35 27. Unexpected loss of income: the appellant’s case is that a major part of its income came from renting out the church hall for functions but that its ability to rent it out ceased unexpectedly sometime in 2008 leading to a loss of about £30,000 in income per year. A schedule of the appellant’s VAT returns prepared by Mrs Carroll for 2004-2010 bears this out: for the last three years the returns show turnover
40 reduced by about £30,000 per annum.

28. While shortage of funds by itself cannot be a reasonable excuse, it is well established that the cause of the shortage of funds could be a reasonable excuse. A sudden loss of income leading to unexpected cash flow problems has been found to be a reasonable excuse in many tribunal cases for late payment of VAT for around 3 to 6 months.

29. However, we do not consider that the appellant would be likely to make out such a case here. The schedule of defaults, not to mention the appellant's own letters, make it clear that late payment of VAT was already entrenched by 2008. Putting aside earlier years, three out of four payments were late in 2006, and then again in 2007. While a Tribunal is likely to accept that the appellant's cash flow worsened significantly in 2008 it is unlikely the appellant can make out a case that this would have caused the VAT to be paid late, as a tribunal is likely to find it would have been paid late in any event.

30. Further we note that the appellant was not consistently late: if the loss of income was the cause of the default for 03/08 and 09/08, why was 06/08 paid on time? Again this only goes to show that its case that the loss of income *caused* the default is very weak.

31. The recession: the appellant's case on this is vague. Mr McCullough does not explain why the recession caused the inability to pay on time: while the appellant's receipts diminished, its liabilities to VAT would similarly have diminished. As we have stated, he would need to show the recession had caused a sudden and unexpected loss of revenue in order to be a good reason for non payment of VAT and the appellant has not begun to make out a case on this.

32. It has brought its tax affairs up to date: Mr McCullough seeks credit for his success in bringing the club's tax affairs up to date, which involved, over a number of years, abiding by a payment plan with HMRC to discharge its tax arrears, and at the same time keeping up to date with all current taxes. Mr McCullough's position is that HMRC should write off the surcharges as goodwill and in recognition of the fact that the club could have chosen to go insolvent rather than discharge its liabilities.

33. However, while it is to Mr McCullough's credit that the appellant has paid off its arrears and now keeps itself up to date, nevertheless this could not amount to a ground of appeal with any prospect of success. As a matter of law, a reasonable excuse could only be an excuse if it amounted to being the cause of the default. The appellant's current good payment record, however laudable, was not the *cause* of the earlier defaults.

34. Mr McCullough may not appreciate it but the Tribunal has no discretion. It can only apply the law. It has no power to excuse a taxpayer from surcharges other than in accordance with the law. The appellant's case on its current good payment record is therefore bound to fail.

Decision on whether to extend time to appeal

35. So far as the default of 09/07 is concerned, it is clear that the appellant was given notice of the limited period of appeal. It has not offered any reason why it did not appeal in the allotted time frame and we would not extend time to appeal. For any surcharge arising before that date the same applies: HMRC's letter of 10 January 2008 as well as the earlier letters (not before the Tribunal) notifying the defaults would have made it aware of the short time frame to appeal any surcharge. Yet we find the appellant made no attempt at that time to appeal the earlier surcharges. Indeed, these defaults were imposed in between 6 years and 25 years before the appeal was lodged: it would be very hard to justify such a delay and the appellant has not come even close to doing so.

36. In any event we do not consider that any of the grounds of appeal put forward could have a reasonable prospect of success, and for that reason too, we would not extend time to appeal.

37. So far as the 3 remaining defaults within the 19 for which HMRC did not extend time are concerned (ie 03/08, 09/08 and 03/09) are concerned, we have no real explanation of why they are late. We find that the time limit would have been notified to the appellant, and indeed it is clear from HMRC's letter of 8 October 2010 that the appellant was considering an appeal at that time but still did not lodge one for another 2½ years. In any event, for the reasons stated above we do not consider that the appeals would have a reasonable prospect of success and for this reason too we would not extend the time to appeal on any of these defaults.

38. That leaves the four most recent defaults where we have found that HMRC did extend time to lodge a review. Nevertheless, the appeals were all late by some 5 weeks, although, had the appellant not made the mistake on postage, they would have been only some 2 weeks late. Nevertheless, late is late. Even though the appeals for these four surcharges were therefore not lodged particularly late, this was one more late response by the appellant after many years of failing to appeal promptly its default surcharge notices, despite receiving from HMRC clear notice of the time limits. We would not be inclined to extend time in any event but we also do not consider that the appeal for these four periods would have a reasonable prospect of success for the reasons given above. We do not give permission to extend time.

39. The application for permission to appeal out of time is refused in respect of all 23 defaults and the underlying appeals are therefore struck out. The effect is that all 23 surcharges are upheld.

40. 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.

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

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RELEASE DATE: 28 November 2013