



TC03192

Appeal number: TC/2013/00658

PROCEDURE – Permission to extend time to appeal- VAT security dispute – factors from UT decision in Data Select [2012] UKUT 187 (TCC) applied – whether extra prejudice to HMRC where delay arose in VAT security appeals – no – taking account of appellant’s explanation, length of delay, purpose of time limits and respective prejudice to parties (which in the case of the appellant included being subject to criminal proceedings) interests of justice served by granting permission to appeal out of time

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HELIANTHUS (LONDON) LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE SWAMI RAGHAVAN
MRS SUSAN LOUSADA**

Sitting in public at 45 Bedford Square, London on 9 July 2013

Mr Adam Routlege, solicitor, for the Appellant

Ms Harry Jones, HMRC Officer, Appeals and Reviews, for the Respondents

DECISION

Introduction

1. The appellant applies for permission to extend the time in which to appeal a
5 decision to provide a security deposit in respect of VAT. Proceedings are pending
before the criminal courts against the appellant and its director.

2. The appellant says its delay in appealing was due to the confusion of its director
as to the appellant's ability to appeal the decision and that it was only upon receiving
the advice of professional tax consultants that it became aware it was possible to
10 appeal and advisable to do so. The balance of prejudice, given the serious
consequences of the criminal proceedings which are stayed, points to it being fair and
just that the appellant should have its chance to have its arguments dealt with at a
substantive hearing.

3. HMRC oppose the application. The delay of at best 11 months and at worst over
15 a year is significant. When considering a VAT security decision, time limits are
particularly critical and the delay has severely prejudiced HMRC.

Evidence

4. On behalf of the appellant we had a witness statement from Marina Mitreska,
the appellant's director and heard oral evidence from her which was cross-examined.
20 Ms Mitreska also answered questions from the Tribunal. We found Ms Mitreska was
an intelligent and a credible witness. At certain points her answers to cross-
examination unwittingly entered into the terrain of making submissions.

5. For the Respondents we heard oral evidence from Marian Chambers, the
HMRC officer who attended the appellant's premises to serve the notice of
25 requirement. Ms Chambers' evidence was also subjected to cross-examination. We
found Ms Chambers was a credible witness.

6. We also had a bundle of documents containing correspondence between the
parties in relation to the security requirement and the criminal investigation. At the
hearing, HMRC sought permission to advance a further bundle of documents
30 containing copies of their records of telephone conversations, between persons acting
on behalf of the appellant and HMRC. They explained these were not originally in the
bundle because they related to matters which only became relevant upon HMRC
having subsequently received a witness statement and submissions from the appellant.
On the basis that the appellant would be allowed extra time as appropriate in which to
35 consider the documents in the course of the hearing we decided the further documents
could be admitted.

Facts / Chronology

Background

5 7. The appellant is a hair and beauty company trading under the name Beauforts
Hair and Beauty. Ms Mitreska was the appellant's director. Ms Mitreska, while an
MBA graduate did not have any practical experience of running a business. She saw
herself as an entrepreneur and when an opportunity to run a business in the prestigious
10 Kings Road area of London came up, in circumstances where she could lease the
premises for 6 months rent free she decided to take it on. She invested £17,000 of her
own money in the business which was primarily focussed on hairdressing. It had 2
employees and 2 hairdressers who rented chairs. Ms Mitreska was persuaded to take
on the business by Mr Kamaz, a hairdresser who she had used and who she had
become friends with.

15 8. The nature of Mr Kamaz's role within the business is a matter of dispute
between the parties.

9. The business started trading in November 2009.

20 10. The director found an accountant, Mladen Jovasevic, who was based in an
office close to where she lived. No VAT returns were filed. Ms Mitreska said the
accountant had told her he did not have the information to submit anything and
advised her to close the business. She was unwilling to do this and her evidence was
that she had provided relevant information to the accountant. She then sought the
services of a different firm of accountants (see below at [21]).

The VAT security dispute

25 11. There were factual disputes as to whether and when documents were received
which we deal with in the course of this chronology. The appellant's argument is that
its director, Ms Mitreska was confused about whether to appeal. The relevance of that
is discussed later. In the light of that argument we also explain what was said in the
letters regarding appeal rights.

30 12. On 15 September 2011 the Notice of Requirement was issued. One copy was
addressed for the personal attention of the Director(s) of Helianthus (London)
Limited. The Notice required security to be paid in the amount of £34,334.02 or in the
alternative £24,220.02 if the appellant submitted monthly returns. The letter contained
a section headed dealing with what to do if the person disagreed with the notice with
35 three bullets and some further text as follows:

“If you do not agree with my decision; you can

– immediately send me any further information that you want me to
consider

40 – ask for my decision to be reviewed by an HM Revenue and Customs
officer not previously involved in the matter, or

– appeal to an independent tribunal

5 If you opt for a review you can still appeal to the tribunal after the review has finished. If you want a review you should write into this office within 30 days of the date of this letter giving the reasons why you do not agree with my decision. If you want to appeal to the tribunal you should send your appeal within 30 days of the date of this letter.”

13. The letter went on to give details about appeals and reviews on the HMRC website and also gave details of the Tribunal’s website.

10 14. It was delivered by Ms Chambers to an employee of the appellant to the business address of the appellant.

15 15. Ms Mitreska saw this the next day. This is confirmed by the fact that a letter referring to the security deposit was faxed to HMRC from Ms Mitreska on 16 September 2011.

15 16. It was queried by the appellant whether because the date of 15 September 2013 was written in by hand that meant the date was actually 15 September 2013. In any event whether the date was hand written or type written would not make it more likely or not to be inaccurate. We are satisfied from the evidence of Ms Chambers, and her record of service the letter was correctly dated 15 September 2013.

20 17. With the letter Ms Mitreska received Notice 700/52. Ms Chambers says this was enclosed. It was her job to serve these notices. The letter referred to Notice 700/52, and there was no evidence Ms Mitreska had followed up on the fact that an enclosure with the letter was not included. We consider it more likely to be the case that Ms Chambers would have enclosed the notice with the letter than it being the case that
25 Ms Mitreska would have a specific recollection of the document not being received.

18. The letter also included a form of authority for HMRC to disclose information to a third party the appellant wished to represent them.

19. A similar package (letter, and notice) was addressed for the attention of Mr Vedat Kamaz.

30 20. Ms Mitreska’s evidence is that she did not understand these options. That was the reason she called HMRC. She wanted to speak to them before doing anything further. She found her conversations with HMRC were “not pleasant” and she was simply told she had to pay in full.

35 21. On 16 September 2011 Ms Mitreska sent an undated letter to HMRC. In the letter Ms Mitreska stated she had recently given her accounts to her bookkeeper, Senel Mehmet at Diligent Accounts Limited, and Sultan Mohamed an accountant. She said it had become apparent a few months ago that her previous accountant had not done any work on the accounts and that having requested her paperwork back she had only received this several weeks ago. She said her bookkeeper was doing her best to

get the figures completed in order to file her VAT returns and asked for more time for this to be done. In relation to the security deposit Ms Mitreska stated:

5 “I understand that a security deposit is required however this will cause great financial difficulty to the business. I would appreciate it if on this occasion you would consider my case and allow the returns to be filed once the bookkeeper has completed the accounts to a position that the returns can be filed and paid. It is estimated that a further 6 weeks is needed to finalise the figures before they can be filed.”

22. On 26 September 2011 Ms Chambers of HMRC replied to Ms Mitreska’s fax in a letter addressed to the business address of the appellant. The letter explained HMRC required a security deposit because of the appellant’s poor compliance history and its association with a de-registered business, Exotic Solutions Ltd and its company director Mr Vedat Kamaz. The letter instructed Ms Mitreska to refer to an enclosed letter for details of options regarding the Notice of Requirement. Ms Chambers also asked for details of the book keeper’s business address. The letter finished with warnings as to the risk of prosecution if taxable supplies were made without having provided security.

23. The letter enclosed on the 26 September 2011 referred to above contained the following options. 1) Paying the security 2) If the appellant disagreed with the requirement or thought it too high, the appellant could write to Ms Chambers’ colleague asking that she re-examine her decision or recalculate the amount of security. It was suggested with this option that copies of documentation supporting the appellant’s case be included. In relation to option 3) it was stated:

25 “If you choose option 2 (as explained above) but after considering your case my colleague Mrs C. Christian is still of the opinion that security is required, you can request an Independent Review... you can ask for an Independent Review even if you have not previously requested option 2.”

24. The letter then stated that options 2 and/or 3 (as explained above) were chosen, but the result was that HMRC decide that security is required, then forms could be obtained online or by telephone to lodge an appeal to the First-tier Tribunal (option 4). Finally option 5 “cease to trade immediately” was also given, it was stated that:

35 “You have thirty days from the date on which the Notice of Requirement was served (i.e. until 15 October 2011) in which to exercise one of the above options (with the exception of option 5).”

25. Ms Mitreska’s evidence is that she did not receive the letters dated 26 September 2011. We were shown an e-mail from Elizabeth Williams of HMRC to Ms Chambers dated 29 September 2011 which refers to the appellant’s bookkeeper having received Ms Chambers’ letter of 26 September 2011. On the balance of probabilities we find that the letter was received by the appellant because at that point in time there is no evidence that HMRC had a correspondence address for the bookkeeper. We find the letter was received by the appellant and forwarded on to the bookkeeper (see [26]). If Ms Mitreska did not keep a copy it does not necessarily

strike us as untoward that Ms Mitreska would necessarily remember receiving the letters of 26 September 2011 and that she now says she did not receive the letter.

5 26. On 29 September 2011 a telephone conversation took place between the bookkeeper and Ms Chambers with regards to the Notice of Requirement to give Security.

27. On 4 October 2011 Ms Mitreska signed the third party authority form. She nominated Ms Senel Mehmet (the bookkeeper) as to represent her.

10 28. On 5 October 2011 Ms Chambers wrote to the book keeper c/o Ms Mitreska at the business address of the appellant. The letter referred to the telephone conversation on 29 September 2011 and informed the bookkeeper that the authorising officer Mrs C Christian had agreed to grant the appellant 6 weeks as from 16 September 2011 (the date of Ms Mitreska's fax) on the condition that the outstanding VAT returns for certain tax periods amounting to six months worth were rendered with full payment by 28 October 2011. The letter again contained warnings as to the risk of prosecution if the security was not provided and taxable supplies were made. Attention was drawn to para 3.8 of Public Notice 700/52 which was also enclosed. (Para 3.8 deals with the issue of whether the person involved in a business which continues to trade without providing the security may be prosecuted individually.) Ms Mitreska's evidence is that neither she nor her accountant received this letter. We find the letter was received by Ms Mitreska. We take into account that Ms Mitreska's recollection is given some time after the event and that Ms Mitreska is unlikely in our view to reliably recollect whether a specific piece of correspondence was received on a given date. We did not receive any evidence from the accountant as to how they dealt with incoming correspondence. As between the possibilities of the letter having been sent but not received and Ms Mitreska not recollecting the letter being received we think the latter is more likely.

25 29. On 26 October 2011 HMRC received Ms Mitreska's letter of authority which gave the address of the bookkeeper.

30 30. Subsequent to 11 January 2012 HMRC received VAT returns but no payment.

30 31. On 11 January 2012 Ms Chambers wrote to the bookkeeper at the bookkeeper's business address. The letter explained that based on the declared liabilities HMRC recalculated the security deposit amounts. The security for 6 months was recalculated at £25,424.08 and for four months at £22,674.08 (both these amounts included £17,174.08 VAT debt). In her witness statement Ms Mitreska says she did not receive this letter. This is consistent with the fact the letter was not addressed to her but to the bookkeeper at her business address. The letter offered the appellant 3 months time to pay to settle the VAT security deposit. It included a reminder that if security was not provided the appellant rendered itself liable for prosecution.

40 32. On 7 March 2012 Mrs Jane Clark of HMRC Criminal Investigation Securities wrote to the director and company secretary of the appellant at its business address. Ms Mitreska accepts she received this letter. The letter stated Mrs Clark would visit

on 21 March 2012 and warned that HMRC might wish to interview all individuals involved in running the business under caution and that the appellant might wish to consider having legal representation present. The letter was copied to Ms Senel Mehmet at her address and to Ms Mitreska at her home address.

5 33. The meeting on 21 March 2012 took place.

34. On 26 April 2012 Mrs Clark wrote to Ms Mitreska. A further meeting was arranged for 7 June 2012 regarding the non-payment of the security deposit. Again Ms Clark warned that an interview under caution was possible and that Ms Mitreska might wish to consider having legal representation present.

10 35. The meeting arranged for the 7 June 2012 did not take place. A meeting did take place between Mr Alan Goldring of HMRC and Ms Mitreska on 25 July 2012. Although HMRC suggest Ms Mitreska was made aware of her appeal rights at this meeting, no evidence was put forward to support this contention. Ms Mitreska's evidence was that there was no discussion of appeal rights and time limits at this
15 meeting. Our finding in view of the evidence before us is that appeal rights and time limits were not discussed.

36. Ms Mitreska received a summons on 28 January 2013 at which point she contacted her current advisers CMT Ltd.

37. The appeal was filed by the appellant's agents CTM Ltd on 30 January 2013.

20 *Legal framework for appeal and time limits*

38. Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") provides:

25 "(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.

....

30 (4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal –

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the notice of appeal."

35 39. The approach to exercising the Tribunal's discretion to grant permission is as described in the Upper Tribunal decision of *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC). There Morgan J set out the questions which courts and tribunals ask themselves when they are asked to extend a relevant time limit:

- (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?
- 5 (5) what will be the consequences for the parties of a refusal to extend time?

Discussion

40. We consider first whether the appellant has a good explanation for the delay in lodging its appeal.

41. In terms of the matters which Ms Mitreska was dealing with HMRC during the period following service of the Notice of Requirement there were four issues at play. 1) the obligation to pay security, 2) filing the VAT returns, 3) making payment of VAT debt, and 4) dealing with the criminal investigation. Ms Mitreska elided these together and it appears to us that by the time the focus of correspondence switched to filing overdue returns, settling a VAT debt, and dealing with a criminal investigation any awareness that Ms Mitreska might be expected to have had about the time limits for appealing the security decision had in her mind at least been overtaken by other matters.

42. There was no statutory obligation on HMRC to alert the appellant to the time limits for appealing the security requirement but in the context of considering whether someone has a good explanation for appealing out of time we think it is relevant to take account of their level of awareness of their appeal rights.

43. We can see that there was potential for confusion from the 26 September 2011 letter setting out the various options which we have found Ms Mitreska received. It was not clear that an appeal had to be lodged by 15 October 2011 because option 4 gave the impression that an appeal could be made in the event further information was provided, or a review requested and the result was still against the appellant. Given the timescales for response it could not reasonably be thought that this stage would be reached by 15 October 2011. Although we have found the appellant did receive the letter of 5 October 2011 there is no mention in there of the appeal deadline or in the paragraph of the Notice the appellant was specifically referred to. The 11 January 2012 letter from HMRC to the appellant which included the recalculated security deposit accounts did not say anything about appeal time limits.

44. We accept that Ms Mitreska was confused about how the time limits for appeal operated and in particular the fact they were not conditional on other matters that were in issue between the appellant and HMRC being resolved. This provides an explanation or the delay but we would not necessarily go as far as saying it provides an especially good explanation for the delay in appealing. One of the approaches Ms Mitreska said she took to trying to find out more information about how to challenge the security requirement was to ask around businesses on the same street. This struck us as a course of enquiry which was not particularly likely to yield results. We accept however she did try to make enquiries of HMRC on the telephone. It was not the case

that she was aware of the time limits and yet chose to do nothing. Nor was it the case that having received the notice of requirement, and not being aware of how the appeal time limits operated that she was content to lay low. She did make some efforts to understand what her options were.

5 45. The explanation for the delay is something which we weigh in the balance along with the other factors of looking at the effect on each party in respectively granting or not granting permission to appeal out of time. These further considerations include taking into account in our view the related issues of the length of delay, the purpose of time limits, and the appellant's prospects of success.

10 46. HMRC's primary submission is that adherence to time limits is particularly critical when considering a VAT security decision. A Notice of Requirement is issued to address a risk which has arisen to address a risk at a particular juncture and it will be removed if the revenue risk ceases. In the meantime if a person continues to make taxable supplies this may lead to criminal prosecution. Consequently they say a delay
15 over at least 11 months in this case (taking the recalculation of amount date in January 2012) severely prejudices HMRC in the conduct of its duties.

47. HMRC highlight that if the matter were to proceed to a substantive hearing the Tribunal's jurisdiction would be confined to looking at the reasonableness of HMRC's decision on the basis of the information available to HMRC at the time the
20 decision was made. They say that irrespective of whether it was relevant to link the affairs of Mr Kamaz (the director of a company which had defaulted on its VAT obligations) to the appellant, the appellant's own poor VAT compliance (failure to file returns over a significant period of time) would have led an HMRC officer to have reasonably arrived at the conclusion that the appellant represented a risk to the
25 revenue which needed to be protected.

48. The appellant argues it did not pose a revenue risk, that it was actively making efforts to pay back the money in as short a time as possible and that the absence of VAT returns was due to the actions of the appellant's previous accountants who failed to submit returns as instructed. It says Mr Kamaz was not an officer of the appellant at
30 the relevant time and any link to him is irrelevant to the decision to issue security requirement.

49. We have considered the purpose behind having a time limit of promoting finality and certainty. We accept there is some prejudice to HMRC in having to re-open matters, in having to retain and retrieve documents and evidence once it has
35 been assumed that the time limit for appealing the Notice of Requirement has passed. It is also the case that once VAT security appeals are made, the Tribunal seeks to progress them more speedily taking account of the immediacy of the consequences to an appellant who wishes to challenge the security requirement in terms of their ceasing to trade or their exposure to prosecution if they continue to trade. But, we are
40 not persuaded that there is a heightened level of prejudice to HMRC where an appellant is allowed to appeal out of time above and beyond that which exists in relation to any other out of time appeal. Knowing whether or not the appellant has appealed the security requirement does not affect the underlying risk of non-payment

which will either have been addressed by payment of the security or not. If the appellant ceases trading, the revenue risk is reduced correspondingly. If the appellant continues to trade without paying the amount, HMRC has a sanction in the form of criminal proceedings which remains in tact subject to any prejudice that arises in relation to evidential matters such as aging of evidence, retention of documents and officers moving on.

50. The appellant argues, the prejudice to it, in terms of Ms Mitreska's liability to criminal proceedings was clear and significant whereas any prejudice to HMRC was limited.

51. We accept that if the matter were to go to a substantive hearing the Tribunal's jurisdiction will be supervisory rather than appellate. The appellant failed to file returns over a significant period of time and on the face of it, against that backdrop we cannot say it is clear the appellant has a strong case. But, we also recognise that we do not have any evidence from the relevant officer as to the considerations taken into account by the officer imposing the security decision and are not in a position to make an assessment of what considerations were taken account of by the officer, whether these were relevant and whether any irrelevant considerations were taken into account.

52. While, on the basis of what is before us at this hearing today, and taking account of the Tribunal's more limited jurisdiction in VAT security matters, it does not appear to us that the appellant has a high probability of success we take into account the severity of outcome in terms of Ms Mitreska's exposure to criminal proceedings if the appellant is not allowed the chance to challenge the VAT security decision. The length of delay is not insignificant, but the combination of the fact the appellant does have some explanation for the delay and the prejudice in terms of the potential criminal liability faced by Ms Mitreska does we think outweigh the prejudice that arises to HMRC. We think it is in the interests of justice for the appellant to be allowed to have its appeal heard.

53. The appellant is granted permission to appeal out of time and directions in relation to the substantive hearing of the matter are issued separately to the parties.

54. 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.

**SWAMI RAGHAVAN
TRIBUNAL JUDGE**

RELEASE DATE: 6 January 2014