



TC03873

Appeal number: TC/2014/02123

*VAT – late appeal against penalty under schedule 24 Finance Act 2007 -
application to appeal out of time – should permission be given? - No –
application refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CENTRAL GARAGE (CHESHAM) LTD

Applicant

- and -

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

Respondents

**TRIBUNAL: JUDGE ALISON MCKENNA
MOHAMMED FAROOQ**

Sitting in public at Bedford Square on 16 July 2014

Mr Hardwick appeared for the Appellant

Mr Rowe of HMRC appeared for the Respondents

DECISION

1. This matter concerns an application for permission to appeal out of time against
5 the imposition of a penalty in respect of an inaccurate VAT return for the period
06/11. Mr Hardwick is a director of the Applicant company.

Factual Background

2. Mr Hardwick bought a garage business as a going concern in 2011. The sale
agreement referred to the sale price as being “inclusive of VAT” and the Applicant
10 made an input tax claim in the relevant period. Following an inspection visit, HMRC
took the view that the goodwill element of the sale price was not within the scope of
VAT so that the input tax element had been over-claimed.

3. HMRC imposed a penalty on the company on the basis that this was a
“prompted” disclosure, that the Applicant had been careless and that it was unable to
15 suspend the penalty of £4,749.99.

4. The penalty was issued on 26 April 2012. HMRC conducted a review at the
request of the Applicant and wrote to him on 11 June 2012, upholding the penalty
decision and advising him that if he wished to appeal he would need to contact the
Tribunal within 30 days. The letter included the Tribunal’s contact details.

20 5. The Notice of Appeal to the Tribunal was filed on 6 April 2014. The reason
given for the delay was that Mr Hardwick thought that his appeal was being dealt with
internally at HMRC but heard nothing from HMRC until March 2014.

The Law

6. Paragraph 1 of Schedule 24 to the Finance Act 2007 provides that a penalty is
25 payable if a VAT return contains an inaccuracy which leads to an understatement of
liability to tax or a false or inflated claim to repayment of tax and the inaccuracy was
careless or deliberate.

7. There is a right of appeal to the Tribunal under paragraph 15 of schedule 24.
Paragraph 16 provides that appeals against penalties are to be treated as an appeal
30 against an assessment to the tax concerned. Section 83G of the Value Added Tax Act
1994 gives the Tribunal discretion to allow a late appeal to proceed.

8. Mr Rowe for HMRC referred us to a number of decisions of differently-
constituted panels of the First-tier Tribunal. Such decisions turn on their own facts
and do not create legal precedent so we are not bound by them. He also referred us to
35 the Upper Tribunal’s decision in *HMRC v McCarthy and Stone (Developments) Ltd*
[2014] UKUT 196 (TCC), which considered the impact on Tribunal procedure of the
Court of Appeal’s decision in *Mitchell v News Group Newspapers Ltd* [2013] EWCA
Civ 1537 and its emphasis on the need for compliance with time limits to be enforced.

Submissions

9. Mr Hardwick told the Tribunal that the delay of nearly two years in filing his Notice of Appeal was due to a lack of organisation on his part. He said that after he received the review letter he had told HMRC that he wished to appeal and then did not hear anything until a debt collection agency contacted him. He accepted that he had made a mistake in not contacting the Tribunal as advised in HMRC's review letter.

10. With regard to the error in the return, Mr Hardwick said that he had relied on advice about the terms of the contract for the sale of the business but this had not been correct. He said he wanted to appeal against the basis for the penalty as he did not accept that the disclosure was prompted or that the error was careless. He said that HMRC had made an error on another matter but it was not penalised but he was penalised for his error. Finally he told the Tribunal that there had been too much going on and not enough hours in the day and that he was sorry but he had made a mistake. He did not accept HMRC's decision that it could not suspend the penalty.

11. Mr Rowe submitted that HMRC's letter was unequivocal as to the need to contact the Tribunal within 30 days if the recipient wished to appeal the penalty. He also submitted that the statement of account sent to the company on 1 August 2012 showed that the penalty was still payable and that HMRC had also contacted Mr Hardwick's mother, who handles the VAT returns for his businesses, to inform her that the penalty was still due in 2013. It was submitted that no good reason had been given for not making an application to the Tribunal after either of these prompts.

12. Finally, Mr Rowe submitted that there was no record of Mr Hardwick contacting HMRC after the review letter was sent. Mr Hardwick told the Tribunal that he had spoken to HMRC but that he did not have copies of any correspondence due to a flood at work.

Conclusion

13. The question of whether to allow these appeals to proceed out of time is a matter for the Tribunal's discretion. In exercising our discretion we are required to have regard to all the circumstances of the case but, following *McCarthy and Stone*, to give weight to the need for litigation to be conducted efficiently and to encourage compliance with time limits. We find that there was a long and largely unexplained delay in making the application to the Tribunal in this case. We find that Mr Hardwick was informed clearly by HMRC of the steps that he should take but that he did not take them until he was contacted by a debt management agency nearly two years later. We take the view that there would be considerable prejudice to HMRC if the issue of the imposition of the penalty were to be re-opened at this late stage. We also take the view that there is a public interest in the efficient conduct of litigation and we note that there would be considerable disruption to the Tribunal if applications were allowed to proceed out of time in the absence of good reasons being shown.

14. We recognise that a decision to refuse the application to proceed out of time effectively shuts the Applicant out from litigation, so we have also considered the

likelihood of the Applicant's appeal succeeding if it were allowed to be made out of time. We note that the Applicant makes no challenge to the fact that there was an error in his VAT return, but disagrees that it was carelessly made or that disclosure was prompted. He also challenges the decision not to suspend it. We note that it was
5 an inspection by HMRC which uncovered the error in the VAT return, so it seems likely that a Tribunal would regard the disclosure as prompted. The Applicant wishes to argue that it was not a careless inaccuracy as he says he took legal advice on the transaction. However, he also told us that the advice was on the phone and that he has no record of it so it seems it would be difficult to establish his case.

10 15. Taking all those factors into account, we find that the reasons given for the late appeal in this case are insufficiently compelling when weighed against the consequences to both HMRC and the Tribunal of the very serious delay in filing the appeals. For all these reasons we refused the application for permission to proceed out of time.

15 *Post-Script*

16. Since the date of the hearing and our decision, our attention has been drawn to two significant decisions concerning the making of late applications. These are, firstly, the decision of the Court of Appeal in *Denton, Decadent Vapours Limited and Utilise TDS Limited* [2014] EWCA Civ 906 and, secondly, the decision of the Upper
20 Tribunal in *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC), in which Judge Bishopp noted that Tribunals operate differently from the courts and preferred the approach previously taken in Tribunals to that of the Court of Appeal in *Mitchell and Denton*. He commented at [19] that:

25 In my judgment therefore the proper course in this tribunal, until changes to the rules are made, is to follow the practice which has applied hitherto, as it was described by Morgan J in *Data Select*.

16. This is a reference to the following passage in Morgan J's decision in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC):

30 "[34] ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (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? and (5)
35 what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

13. At the hearing of this application, *Leeds City Council* had not yet been decided and we decided to dismiss the application having regard to all the circumstances of
40 the case and applying the approach set out in *McCarthy and Stone*. However, we are satisfied that, even if we had applied the *Data Select* approach which has now been approved in *Leeds City Council*, we would have reached exactly the same decision on the facts of this case.

17. 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.

10

**ALISON MCKENNA
TRIBUNAL JUDGE**

RELEASE DATE: 04 August 2014

15