



TC04068

Appeal number: TC/2013/07811

VAT – Procedure – application for strike out of appeal submitted 13 years late – s 83G VATA 1994 - criteria to be adopted – proceedings struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR ASSAF ALI BUTT

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE PETER KEMPSTER
MR DUNCAN MCBRIDE**

Sitting in public at Bedford Square, London on 17 September 2014

Mr James Taylor (JKT Advice Ltd) for the Appellant

Mr Philip Rowe (HMRC Appeals Unit) for the Respondents

DECISION

1. By an application dated 28 November 2013 the Respondents (“HMRC”) applied for the appeal of the Appellant (“Mr Butt”) filed on 9 November 2013 to be struck out pursuant to Tribunal Procedure Rule 8 (“the Application”). The Application contained several grounds but, following correspondence between the parties, the matter before the Tribunal was, “any appeal would be out of time by 13 years and [Mr Butt’s notice of appeal] does not include any valid reasons for the lateness of the appeal.”

2. Mr Butt was unable to attend the hearing due to ill health but was professionally represented by Mr Taylor, and also in attendance was Mr Butt’s wife, Mrs Humira Assaf.

Approach

3. Mr Taylor for Mr Butt accepts that the appeal was made late. We consider that the appropriate approach to the Application is to determine whether the Tribunal would grant permission for a late appeal pursuant to s 83G(6) VAT Act 1994: “An appeal may be made after the end of the period specified ... if the tribunal gives permission to do so.”

4. In terms of the tests and general approach that we must adopt in dealing with applications to appeal out of time we have considered the recent decisions of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Denton v T H White Ltd* [2014] EWCA Civ 906, and those of the Upper Tribunal in *McCarthy & Stone (Developments) Limited* [2014] UKUT 196 (TCC), *Data Select Limited* [2012] UKUT 187 (TCC) and *Leeds City Council* [2014] UKUT 350 (TCC). Taking together all those decisions, we concur with the conclusion reached by this Tribunal in the recent case of *Aeron Mathers* [2014] UKFTT 893 (TC) (at [25]):

“... briefly, we consider the main points to be that:

- even if Tribunals are not required to follow the full requirements of the latest guidance given to the higher courts in terms of seeking to ensure much stricter adherence to time limits and other directions, in order to ensure the efficient and most cost-effective conduct of litigation, we must certainly pay some regard to that intended stricter adherence to such matters;
- as Tribunals, we are entitled to approach matters slightly more flexibly than the higher courts are now encouraged and directed to do;
- we must certainly not, however, allow litigation to be side-tracked by other parties in litigation seeking to rely on, and exploit, trivial procedural steps that their opponents may have failed to address; and

- 5
- in considering generally how to deal with late applications (for instance to bring an appeal, as in this case) we should still address the list of points summarised by Mr. Justice Morgan in *Data Select*. Those points are that we should address the 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 a refusal to extend time or the grant of such an extension?
- 10
- We also consider it appropriate in this case to pay some regard to whether we consider that the Applicant was likely to have been able to raise valid and compelling points, should an appeal proceed, particularly because it seemed that the tax and penalties being imposed would be a serious matter for the particular appellant; and
- 15
- It is also relevant to pay some regard to the whole conduct of the enquiries, and to the issue of whether there have been repeated delays, non-cooperation and failures to advance points, arguments and explanations at many earlier times.”
- 20

Facts

5. From the bundle of documents prepared for the hearing and the explanations provided to us, we make the following findings of fact.
6. Up to October 1999 Mr Butt ran a shop in Lewisham as a sole trader. The business was registered for VAT. The books were written up and VAT returns submitted by a local firm of accountants. In October 1999 the business was sold. In November 1999 Mr Butt moved to Pakistan. He put in place a mail redirection arrangement to redirect post to his father-in-law’s house.
7. In January 2000, in the absence of VAT returns, HMRC issued VAT assessments. Interest has accrued on those amounts since. The assessment under appeal was issued on 14 January 2000 and is for in excess of £22,000 (“the Assessment”).
8. In June 2000 Mr Butt submitted to HMRC a notice of change of address.
9. In March 2007 Mrs Butt wrote to HMRC’s “Debt Management National Missing Trader Unit” stating that Mr Butt left the UK in July 1996 and returned in 2000; stating that the shop was closed in September 1999; asking for “a tax calculation which is more reasonable”; and explaining that the family was suffering great financial hardship.
10. In June 2008 Mr Butt appointed a new firm of accountants and authorised them to deal with HMRC.

11. In November 2013 Mr Butt filed a notice of appeal against the Assessment.

Respondents' case

12. Mr Rowe for HMRC submitted as follows.

13. In late 1998 HMRC had visited Mr Butt's business in connection with an operation investigating possible excise duty evasion. Mr Butt's cousin had informed officers that Mr Butt was not present but the officers ascertained that Mr Butt lived above the premises and interviewed him. In the absence of adequate supporting documentation a quantity of beer, wine and spirits was seized. After further visits and following analysis of the business records, HMRC concluded that Mr Butt had been suppressing the true takings of the business. They calculated an estimate of the underdeclarations and notified their conclusions to Mr Butt by a letter dated 5 November 1999. In the absence of any response they issued the Assessment. No communications had been returned to HMRC as undeliverable.

14. The change of address filed in June 2000 indicated that Mr Butt was aware of HMRC's continuing interest in his VAT affairs. Yet he still took no action in relation to the Assessment. Mrs Butt's letter to HMRC debt management department in March 2007 indicated that she was aware of the tax demand at that time, at the latest. New accountants were appointed in mid-2008. Clearly, there were several opportunities to make an appeal but that was not done. There were several discrepancies in Mr Butt's account of events.

15. The deadline for appeal was 13 February 2000. The extreme length of delay would prejudice HMRC if a late appeal were admitted. Although the investigating officer was still with HMRC, their recollection of the case after 13 years might not be reliable. The Appellant had stated that he had no business records in his possession relating to the relevant time. Given that the burden of disproving the Assessment would be on Mr Butt, it was difficult to see that he could have any reasonable prospect of success in that regard. Even if Mr Butt sought to attack the basis of calculation of the Assessment as not representing "best judgement", the background to the issue of the Assessment showed that HMRC's approach had not been capricious or otherwise clearly unreasonable.

16. Mr Rowe's own check of HMRC's electronic files did reveal that there was only one piece of correspondence on record from the previous accountants in the relevant period. However, the new accountants had been appointed in June 2008 but no appeal was lodged until November 2013 – no explanation had been provided for even that delay.

17. It would not be fair and just to allow the appeal to proceed 13 years late with no reasonable explanation for the delays.

Appellant's case

18. Mr Taylor for Mr Butt submitted as follows.

19. Mr Butt was out of the country when the Assessment was issued. His family (to whom post was to be redirected) do not recollect receiving the Assessment. Thus Mr Butt was unaware of the existence of the Assessment at that time. The first that Mr Butt knew of the Assessment was in 2007 when debt enforcement letters were received. At that time Mr Butt sought the advice of a firm of accountants; they also acted for Mrs Butt in relation to her own business affairs. Mr Butt received repeated assurances from the accountants that matters were being dealt with but it appeared that they had failed in the quality of their service. Mr Butt, who was not a native English speaker, was reliant on his accountants in these matters. The accountants no longer held their papers from that time, although Mrs Butt had been given access to the firm's files. Mr Butt held no relevant papers. Mr Butt's belief now was that the accountants had done nothing. Steps were taken to challenge the debt collection actions that were being brought in the County Court (and solicitors were also instructed in that regard), but no one seemed to have asked the obvious question: what does this debt relate to and is it really a proper tax liability?

20. When HMRC themselves had referred to the possibility of a late appeal (in 2013) that had been acted on. Mr Taylor had been consulted at that point and, in getting to the bottom of the matter with the co-operation of HMRC, had concluded that the Assessment was misconceived and excessive. It would be in the interests of justice to allow the appeal to proceed out of time. If the appeal was blocked then there would be very serious consequences for Mr Butt – the family home would have to be sold to meet the tax demand.

21. A late appeal was feasible. Mr Butt would argue that the basis of the Assessment was not sensible, having been based on the result of a single cashing-up inspection which, while it had revealed discrepancies with the till records, had then been extrapolated to cover a period of six months.

Consideration and Conclusions

22. This is an extreme case of a taxpayer seeking to open an appeal against an assessment made over 13 years earlier. Even accepting Mr Butt's explanation that he was unaware of the Assessment until HMRC commenced debt collection procedures against him in 2007, there was still a further delay of six years before a notice of appeal was filed. Mr Butt should have been familiar with the VAT system, having been a registered trader for some years, and from at least 2008 a firm of Chartered Accountants had been dealing with the dispute. Solicitors were also instructed in relation to the debt collection proceedings. However, no action was taken to make a late appeal nor has any explanation been offered of that failure, other than an allegation of professional incompetence which is unsupported by any evidence of what advice was received. We are not satisfied that Mr Butt has given a convincing explanation of why an appeal could not have been lodged (albeit out of time) at some point in 2008.

23. We have considered the consequences for each party. If the appeal is rejected then we are told that the financial consequences would be very serious for Mr Butt; however, that seriousness does not appear to have prompted him or his advisers to

take any action in relation to the Assessment over a number of years. If the appeal is allowed in late then HMRC would be in the position of having to defend an appeal against matters they treated as final and settled over a decade ago.

5 24. Further, even if the appeal was allowed to proceed out of time we do not consider that Mr Butt would have any realistic prospect of mounting a successful attack on the Assessment. We do not accept Mr Taylor's contention that the basis of the Assessment was unsupportable. On the contrary, HMRC discovered a gross takings discrepancy and made a calculation from the data available to them (their calculation schedules running over several spreadsheet pages were in the hearing bundle) which we consider to be a reasonable methodology in all the circumstances. Even if a subsequent Tribunal could be persuaded to re-examine the basis of the calculations, the onus would be on Mr Butt to overturn the Assessment and it seems that no evidence of the business's trading is available to rebut the figures behind the Assessment.

15 25. For the above reasons we would not admit a late appeal, and for those same reasons we would grant the strike out application.

Decision

26. The Application is GRANTED and the proceedings are now STRUCK OUT.

20 27. 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.

30

**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 14 October 2014