



**TC04507**

**Appeal number: TC/2014/01001**

*VALUE ADDED TAX – application for leave to appeal out of time – application refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GRAHAM DOVEY T/A THE GOAT**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE AMANDA BROWN  
MS SANDI O'NEILL**

**Sitting in public at Fox Court, 20 Grays Inn Road, London WC1X 8HN, on 13  
May 2015**

**Mr Graham Dovey representing himself**

**Mrs Ann Sinclair, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. Mr Dovey seeks to appeal VAT assessments issued in respect of VAT periods  
5 01/03, 04/03, 01/04, 07/04, 04/05, and 07/05 originally issued by HM Revenue and  
Customs (HMRC) on 27 April 2006. The assessments were subsequently amended  
on a number of occasions, the final amendment being on 2 May 2008.

2. The Notice of Appeal against the assessments was submitted to the Tribunal on  
17 February 2014. No application was made, at that time, for the appeal to be  
10 accepted out of time. The Tribunal wrote to the Appellant on 19 February 2014  
inviting the Appellant to confirm whether it wished to make an application to appeal  
out of time. That application was made by letter dated 2 March 2014.

3. By Notice dated 8 December 2014 HMRC objected to the application.

4. The hearing on 13 May 2015 was to determine the application for an extension  
15 of time in which to lodge the appeal and, if appropriate, make case management  
directions.

### Facts

5. The Tribunal was provided with correspondence by HMRC. Mr Dovey was not  
20 required to give evidence on oath but presented his evidence to the Tribunal. On the  
basis of this evidence the Tribunal finds the following facts.

6. HMRC undertook a VAT control visit to the Appellant and by letter dated 15  
December 2005 identified a number of discrepancies. Correspondence ensued and in  
order to protect their position vis a vis time limits, assessments were issued by HMRC  
on 27 April 2006. Further correspondence followed. However, by letter dated 29  
25 January 2007 HMRC wrote to the Appellant, in absence of a response to additional  
queries from his representatives, and advised that "I now consider this matter closed  
and the VAT is still due on my officers' assessment".

7. This letter prompted a telephone call from the Appellant indicating that the  
representatives had not received the additional queries. A copy was provided to the  
30 Appellant on 28 February 2007 under cover of a letter stating: "If I do not receive a  
satisfactory reply by 22 March 2007, I will consider this matter closed and my officer  
assessments are payable".

8. Further correspondence took place resulting in a reduction in the assessment.  
35 By letter dated 15 May 2007 HMRC notified the Appellant that the balance of the  
assessments were considered due and that the Debt Management Unit would continue  
recovery action.

9. It appears, by reference to a letter from the Appellant's representatives dated 7 September 2007, that a demand notice was issued at some point prior to that letter. By their letter the Appellant's representatives sought clarification of a particular issue. HMRC clarified the issue by letter dated 20 September 2007 and again confirmed that  
5 "the balance of all these assessments is due and DMU will continue with their recovery action".

10. Correspondence continued in parallel to debt enforcement action. By letter dated 4 February 2008 the Appellant wrote to HMRC referencing a demand dated 21 January 2008 stating that "our accountant has appealed against this". This was  
10 followed by letter dated 12 February 2008 from the Appellant's representatives acknowledging as at that date no "formal appeal" had been made and asking that "an appeal be accepted against the amounts assessed". This letter was treated as a request for reconsideration by HMRC and was acknowledged by letter dated 22 February 2008. At that time it was noted by HMRC "If the request for reconsideration was not  
15 within the 30 day period following the original assessment or decision, and the assessment or decision is confirmed, and you wish to appeal to the VAT & Duties Tribunal, an application for an extension of time to serve an appeal must be included with the Notice of Appeal sent to the Tribunal Centre".

11. Further information was requested by HMRC by letter dated 28 February 2008.  
20 This was responded to by the Appellant's representatives on 3 April 2008 and led to a reduction of the assessment. By letter dated 24 April 2008 HMRC confirmed the balance of the assessment and notified "You have 30 days from the date of this letter to appeal to an independent VAT & Duties Tribunal."

12. On 25 June 2008 (and thus outside the 30 days provided for in the letter of 24 April 2008) the Appellant's representatives wrote to HMRC indicating that they had not been able to adequately communicate with the Appellant due to the Appellant's ill health and requesting an extension of time in which to appeal. It further stated "We have advised our client to carefully consider his position and advise us within the next seven to ten days whether he wishes to lodge an appeal with an independent Tribunal and if this is the case we will come back to you further". This letter was  
30 acknowledged on 3 July 2008 providing: "Should you decide to appeal the decision to the VAT & Duties Tribunal, your application should also request that you apply for an extension of time to make the appeal and provide the grounds for doing so. The Commissioners have the option to oppose the application".

13. There is then nothing in the papers presented to the Tribunal until 8 September 2009 when the Appellant wrote to HMRC claiming that his representatives had written to HMRC over a year previously. No copy of the 'appeal' correspondence was made available to the Tribunal. HMRC acknowledged the letter on 29 September 2009 noting that as no correspondence had been received following the letter of 3 July 2008 the case had been closed. It is not clear if any debt recovery action was taken in  
40 this period though it may be implicit that some action was taken shortly before the letter dated 8 September 2009. Mr Dovey could not remember what prompted his letter.

14. The Tribunal understands that on 31 October 2009 the Appellant applied to  
45 cancel his registration. The business activity of The Goat continued with Mr Dovey and his wife running the business but as from that date the business was operated through a limited company. The cancellation of registration request did not seek to

transfer the registration to the limited company which was registered under a new VAT registration.

15. It appears (and following a request for confirmation by the Tribunal) that cancellation of registration had the effect that the debt was crystallised at cancellation.  
5 Interest had continued to accrue on the unpaid assessment up until the time of cancellation but does not continue to accrue.

16. There is then a letter of 2 November 2009 from HMRC to the Appellant providing a Trib 1 form and the address to which it should be sent. The letter acknowledges a letter from the Appellant's representatives which apparently stated  
10 that the Appellant wished to appeal. There was no copy provided by either the Appellant or HMRC of the letter from the representatives. However, somewhat curiously, there is a copy letter dated 30 November 2009 from the representatives which acknowledges the letters of 25 June 2008 and 3 July 2008 and which challenges HMRC's interpretation of those letters (as set out in the letter of 29  
15 September 2009). The letter concludes: "We discussed the matter with our client and believed that he had communicated his desire to appeal the decision but clearly he did not send the appeal to the correct address. In order that he can ensure that the appeal is sent to the correct address could you please send this to Mr Dovey so that he can action the matter".

17. It is not clear to the Tribunal whether one of the letters (either the 2 November 2009 or 30 November 2009) is incorrectly dated as it would appear that the one dated 2 November 2009 is in response to that of 2 November 2009. However, Mr Dovey was clear that he did not believe he had ever received the one dated 2 November 2009 and had not received the Trib 1.

18. HMRC stated in the hearing that they continued to pursue the debt due from the Appellant. The only evidence that this was so was a single letter dated 23 March 2011 (some 19 months post previous correspondence). Mr Dovey could not recollect any debt action being taken in the period prior to receipt of the letter of 23 March 2011. In the Tribunal's view the letter appears to acknowledge that debt action had  
20 not been taken in the intervening time as it states "We appreciate that you may not have heard from us about this recently .... If you do nothing, we will start recovery action against you". On the basis of this letter the Tribunal finds that it was unlikely that there was any debt recovery action between November 2009 and March 2011.

19. It appears from the papers provided by the Appellant's representatives, but not the HMRC file, that on 30 June 2011 the Appellant's representatives stated: "We  
25 enclose copies of some of the correspondence from our files to support the above and claim that as no final appeal hearing was held that it is now unfair after some three years to reopen the case which the taxpayer thought was closed".

20. There is then again a period of time in respect of which there is no documentary evidence of communication between the parties. The Tribunal considers  
30 it unlikely that any action was undertaken by HMRC post 23 March 2011 to pursue the debt for the best part of two years. However, there was evidence that on 22 January 2013 the Appellant telephoned HMRC. It is again not clear what prompted this call but the Tribunal concludes that it was likely to have been a renewal of the  
35 debt action. Following the telephone conversation HMRC wrote to the Appellant copying previous correspondence and noting that as no appeal had been lodged with the Tribunal the debt remained due.

21. It would appear that there was a subsequent letter dated 20 August 2013 from HMRC. Again no copy was available but it is referred to in a letter from the Appellant's representatives dated 4 November 2013, acknowledging that they had been passed a copy of the letter in September 2013. By reference to the pattern of  
5 correspondence the Tribunal considers that the letter dated 20 August 2013 was probably some form of debt management action.

22. In a letter dated 4 November 2013 the representatives asserted that the last correspondence had been dated 30 June 2011. They raise the difficulty of substantiating some 6/7 years on that no VAT was assessable and request a further  
10 review of the assessment.

23. It does not appear that HMRC responded formally to this letter but on 14 November 2013 the Debt Management Unit sent a Statement of Liabilities "further to ... your recent correspondence querying the account".

24. The Notice of Appeal was then lodged on 17 February 2014.

15 25. On the evidence the Tribunal finds that at no point prior to 17 February 2014 did the Appellant or its representatives lodge an appeal. The Tribunal also finds that whilst there were periods of sporadic correspondence between the parties HMRC did not in a consistent way pursue the debt due on the assessment which, on the evidence of the Appellant, allowed him to consider for extended periods, that the matter was  
20 closed. However, certainly for the period from March 2011 through to submission of the appeal in February 2014 the Appellant did not act as a reasonably diligent taxpayer alive to what he described as a significant debt on his VAT account with HMRC.

**Relevant legislation**

25 26. The Value Added Taxes Act 1994 section 83 permits an appeal against HMRC's decision to assess for under paid output tax or over claimed input tax.

27. At the time the assessments were issued (and amended) the time limit for an appeal against a VAT assessment were set out in the VAT Tribunal Rules 1986. Rule 4 provided that the time limit in which to bring an appeal was 30 days from the  
30 disputed decision unless, within the prescribed 30 day period HMRC notified the taxpayer that such time limit had been extended to 21 days from the outcome of a review of the decision.

28. On 1 April 2009 the functions of the VAT Tribunal were transferred to the First-tier Tribunal (Tax Chamber). The Transfer of Tribunal Function and Revenue  
35 and Customs Appeals Order 2009 provide that where HMRC had notified a decision under section 83 prior to 1 April 2009 and no appeal had been commenced the provisions of rule 4(2) of the VAT Tribunal Rules 1986 shall apply but subject to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Rule 20(4) provides that if the notice of appeal is provided after the specified time the Tribunal  
40 may give permission for the appeal to be accepted out of time.

29. Consideration should also be given to the overriding objective prescribed in rule 2(1) requiring the Tribunal to deal with cases justly and fairly.

**Parties' submissions**

30. The Appellant contended that he disagreed with HMRC's assessment and does not consider that the sums assessed are due from him. He stated that if his representatives had considered that the money was owed he would have advised payment but they considered that the tax was not due. He recognised that there had  
5 been delay on his part but considered that it arose as a combination of his own ill health and that of his wife and confusion as to whether he had already done all that needed to be done. He considered that the delays on HMRC's part had led him to conclude that the matter had been resolved and he did not owe the tax.

31. HMRC argued that over the period from 2008 onwards there had been a series  
10 of opportunities to appeal which had been missed by the Appellant or his representatives. HMRC claimed that they had persistently made the Appellant aware of the need to appeal and that the debt continued to be due. HMRC contended that the time limit for appeal is a statutory one which had expired on 23 May 2008 and to extend time to appeal to 17 February 2014 was inappropriate in light of the criteria set  
15 out by the Upper Tribunal in *Data Select Ltd [2012] UKUT 187 (TC)*.

### **Matters to be considered when granting an extension of time to appeal**

32. The Tribunal was referred to the judgement of the Upper Tribunal in *Data Select Ltd* and that of the First-tier Tribunal in *Assif Ali Butt [2014] UKFTT 955*.

33. The Tribunal has considered the approach to be adopted in out of time appeals  
20 by reference to those judgements and agree that such an approach requires the Tribunal:

(1) to be cognisant of the strict application of time limits adopted by the higher courts in accordance with the provisions of the civil procedure rules; whilst the Tribunal may not be strictly bound by them it is right that the move of  
25 the higher courts to ensure adherence to time limits should be reflected in the Tribunal;

(2) but recognise that Tribunal litigation is designed to be more accessible and thus the Tribunal should not allow the disputes that come before it to become excessively burdened or side tracked by trivial procedural issues being  
30 taken by the parties against each other;

(3) and in applying a reasonable approach consistent with the overriding objective to have regard to the conduct of both parties and the prospects of success

(4) finally to address the questions set out by Morgan J in *Data Select*:

- 35
- (a) What is the purpose of the time limit?
  - (b) How long was the delay?
  - (c) Is there a good explanation for the delay?
  - (d) What will be the consequences for the parties of a refusal to extend time or the grant of such an extension?

### **40 Discussion**

34. The present case concerns an appeal which has been bought just short of 6 years out of time. In light of the stricter approach encouraged by the higher courts, it

represents a case which the Tribunal should approach with great caution, even given the greater flexibility and accessibility in the Tribunal system.

35. The Tribunal must act in a way which fairly and justly balances the assertion by the taxpayer that the assessed tax is not due against the wider interests of HMRC in achieving finality of assessments and the collection of tax.

36. Applying Morgan J's questions:

(1) The purpose of the time limit on appeal is clear: it is to ensure that both parties can fairly bring their case without significant delays which prejudice evidence and argument; it ensures certainty and finality of decisions.

(2) The delay was almost 6 years.

(3) The reasons for the delay appear to have been a mixture of illness, confusion and, with all due respect to the Appellant, an apparent desire to believe that the issue had gone away. The Tribunal is sympathetic to both (i) the periods of illness that the Appellant and his wife have faced; and (ii) to the fact that the prolonged periods during which HMRC do not appear to have pursued the debt had the consequence that the Appellant mistakenly believed that the matter was resolved.

However, the Tribunal is of the view that a reasonably diligent taxpayer would not, on each successive occasion when it became clear that the matter had not been resolved, have failed to take concrete and specific action to bring an appeal. HMRC made clear the need to bring an appeal and to make an application out of time as far back as 2008. However, the Tribunal is of the view that the critical period in respect of which the Appellant's failure to bring an appeal timeously is the period from March 2011 from when it was clear that the debt remained due and that only an appeal could resolve the underlying liability to tax.

The Tribunal is greatly concerned that HMRC having, on several occasions, made clear that the debt was due and that enforcement action would be taken, did not then, save sporadically, take such action. Their failure to do so contributed to the Appellant's continued failure to take action. Had interest continued to accrue on the debt the Tribunal may have been more concerned at the delays that were attributable to HMRC. However, as noted above interest stopped accruing on 31 October 2009, the Appellant has therefore suffered little prejudice in the delays.

(4) The consequences for the Appellant are clear: refusing the application has the effect that the debt will be due and payable without him having the opportunity to further challenge the assessment. However, the Tribunal has carefully considered the argument and evidence provided to HMRC in the period 2006 – 2008 (as available to it in the form of correspondence) and note that it has been actively considered and where appropriate the assessments were reduced. Some 7 – 10 years on from the periods to which the assessments relate the Tribunal considers it unlikely that new evidence will be available which would provide a basis on which to effectively challenge the assessments. It is to be noted that there is no statutory requirement to maintain records beyond 6 years and the Appellant was, in any event de registered 6 years ago. On the other hand to grant the extension would prejudice HMRC in the wider sense of

justifying assessments which are over 7 years old thereby re-opening matters which have been justifiably considered settled.

**Decision**

5 37. The Tribunal has carefully considered the obligation placed on it pursuant to the overriding objective and in light of the guidance provided by the Upper Tribunal. The Tribunal concludes that the balance of finality in the system must determine the outcome of this application. Such that the Appellant's application for time to be extended is refused.

10 38. 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)" 15 which accompanies and forms part of this decision notice.

**AMANDA BROWN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 2 July 2015**