



**TC04661**

**Appeal number: TC/2014/06031**

*TYPE OF TAX– default surcharges – application for leave to appeal out of time – application for leave to amend appeal - bankruptcy – application refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PETER ANTONY FARRINGTON**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE IAN HYDE  
SONIA GABLE**

**Sitting in public at Manchester on 20 July 2015**

**Ms Graham-Wells, counsel, instructed by Vincents Solicitors, for the Appellant**

**Miss Linklater, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

5 1. The appellant has for all relevant periods, subject to his bankruptcy as described below, operated a public house.

2. By a notice of appeal dated 5 November 2014 the appellant appealed against a VAT default surcharge for the period 04/05 (“the Original Appeal”). By an amendment filed and served on HMRC on 16 July 2015 the appellant sought to extend the Original Appeal to cover all relevant VAT surcharges in the VAT periods  
10 04/04 to 10/07 inclusive and extend the grounds of the appeal (“the New Appeal”). HMRC objects to the appellant serving the Original Appeal late and the appellant’s applications.

3. This Tribunal is not concerned with the merits of the appeal but whether the appellant should be allowed to appeal out of time and, if so, whether he should be  
15 allowed to amend his notice of appeal.

### Facts

4. Both parties were represented by counsel but neither the appellant nor any officers from HMRC attended. The factual background to this dispute is complex and there was no witness evidence. Nevertheless for the purposes of determining the issues  
20 currently before the Tribunal, the Tribunal found that the following events occurred.

5. During the period of broadly 2004 to 2007 the appellant operated a public house. Throughout this period from VAT period 04/04 to 10/07 inclusive HMRC issued VAT demands and VAT surcharge liability notices in respect of failure by the appellant to pay VAT due in respect of his business (“the Surcharges”). The amount  
25 currently outstanding on the Surcharges is £2,628.04. The appellant denies being served some or all of the relevant notices. The Surcharges can usefully be summarised as follows;

- 04/04 to 07/04- “the 2004 Surcharges”;
- 04/05 to 04/06 - “the 2005-06 Surcharges”; and
- 30 - 07/06 to 10/07 - “the 2006-07 Surcharges”

6. In August 2004 the public house was flooded and, according to the appellant, his books and records were destroyed.

7. In April 2006 the appellant’s mother- in-law died, having been ill from 2005. During this period the appellant claims that he and his wife were the primary carers.

35 8. About this time the appellant’s brother also fell ill and died in July 2005.

9. In August 2006 the appellant was served with a statutory demand for unpaid VAT and the 2004 and 2005-06 VAT Surcharges.

10. Following the statutory demand and a petition for bankruptcy by HMRC for non payment of the statutory demand, the appellant made payments of the unpaid VAT but not the Surcharges.
- 5 11. On 9 January 2007 the 2005-06 Surcharges were reduced to reflect the payments of VAT made. It is common ground that the appellant received the notification of these amendments. The appellant claims he asked HMRC to review the surcharges owing to his personal circumstances.
12. In June 2007, a further storm caused disruption to the appellant's business and its closure for some 10-12 weeks.
- 10 13. On 9 November 2007, the appellant was made bankrupt by HMRC for non payment of the outstanding VAT and surcharges.
14. In November 2007 the insurance loss adjusters made an offer to the appellant's trustee in bankruptcy of £4,234 to cover business interruption caused by the 2007 flood over and above £12,500 which had previously been paid.
- 15 15. In 2010 the appellant's (undated) skeleton argument in his application for discharge of the bankruptcy made reference to surcharges.
16. On 18 February 2011 the High Court rejected the appellant's application to annul his bankruptcy. The appellant was represented by solicitors for the later stages of this application.
- 20 17. On 23 December 2013 the appellant applied again to annul his bankruptcy, this time representing himself.
18. In July 2014 the appellant's bankruptcy order was annulled by District Judge Bland in the County Court.
- 25 19. On or after 30 September 2014, according to the appellant, the solicitors for the appellant first become aware of the 2006-7 Surcharges because they are mentioned in a witness statement in HMRC's application to set aside the bankruptcy annulment.
20. On 3 November 2014 District Judge Bland dismissed HMRC's application to set aside the annulment.
- 30 21. On 5 November 2014 the appellant appealed to this Tribunal in respect of the surcharge for the period 04/05 and on the short ground that the appellant was not indebted to HMRC.
22. On 26 November 2014 HMRC received the appellants' notice of appeal.
- 35 23. On 2 January 2015 the appellants solicitors provided information to HMRC following a request from HMRC dated 31 December 2014 on the flooding, bankruptcy and his mother-in-law's illness hoping that it would be of use to HMRC "in considering the issue of surcharges".

24. On 23 January 2015 HMRC objected to the appellant's application for permission to appeal out of time and deferred issue of its statement of case pending the outcome of the Appellant's application.

5 25. On 16 July 2015 the appellant filed and served an application to extend the appeal to cover all relevant VAT surcharges in the VAT periods 04/04 to 10/07 inclusive and extend the grounds of the appeal to include the grounds that the appellant did not receive the surcharge notices and that the appellant had a reasonable excuse for the late filing ("the New Appeal").

10 26. In order to determine this matter, and in particular the question of delay, it is relevant to establish when the appellant was aware of the Surcharges so that he could have appealed them. The difficulty is that this risks encroaching on the question as to whether he was served with the surcharge notices.

15 27. As regards the 2004 and 2005-06 Surcharges, the appellant denies or at least cannot recall whether he was served the 2004 and 2004-05 Surcharges. However, they were mentioned in the August 2006 statutory demand. Further, the appellant accepts he was notified when the surcharges were amended on 9 January 2007.

20 28. The appellant also denies he received the 2006-07 Surcharges but the skeleton argument for the appellant's application for discharge of the bankruptcy in 2010 referred to a liability to surcharges for £2,628.04, being the amount of the surcharges in issue in this application.

### **Relevant Legislation and Principles**

25 29. The Original Appeal in November 2014 was notified out of time. The New Appeal in July 2015 contained in substance two different applications: an application for leave to appeal out of time for those Surcharges which were not the subject of the November 2014 appeal and an application to amend the grounds of appeal for the November 2014 appeal. This Tribunal is therefore concerned with two issues;

(1) Whether to grant leave to appeal out of time in respect of the surcharges referred to in the Original Appeal and the New Appeals; and

30 (2) Whether to grant leave for the appellant to amend his grounds of appeal for those surcharges in the Original Appeal

35 30. The Tribunal has treated the question as to appealing out of time as the main issue to be determined but on the assumption that the appellant would be granted leave to amend his grounds. The reason for doing so was that both parties proceeded on the assumption that it was only if both applications succeeded that there would be a viable appeal. Further, the two issues are interlinked. HMRC's grounds for objecting to the appellant being granted leave to appeal out of time relate to the difficulties they would have in responding to the wider grounds and the appellant's position appeared to be that an appeal without the amended grounds would be pointless.

31. The relevant time limit for appealing the Surcharges is governed by the Value Added Tax Tribunal Rules 1986, preserved by the Transfer of Tribunal Function and Revenue and Customs Appeals Order 2009. Under rule 4(1) of the Value Added Tax Tribunal Rules 1986, a taxpayer has 30 days from the disputed decision to appeal.

5 32. The time limit to appeal the VAT Surcharges clearly expired a number of years ago. However, under Rule 20(4) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (“the Tribunal Rules”), the Tribunal has discretion to allow appeals out of time.

10 33. Guidance on the enforcement of time limits was provided by Judge Bishopp in the Upper Tribunal in *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 350, applying the principles set out by Morgan J in the Upper Tribunal in *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187.

15 34. Summarised briefly, these decisions require the Tribunal to adopt a flexible approach to time limits. Whilst the Civil Procedure Rules of the High Court are a guide, the Tribunal Rules have been couched in more flexible terms and the Tribunal should bear in mind, not only the overriding objective in Rule 2(1) to deal with cases fairly and justly but also the requirement under Rule 2(2)(b) to avoid unnecessary formality and to seek flexibility.

20 35. Bearing in mind these general principles, the principles set out in *Data Select* require the Tribunal to ask itself the following questions;

(1) What is the purpose of the time limit?

(2) How long was the delay?

(3) Is there any good explanation for the delay?

(4) What will be the consequences for the parties of an extension of time?

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

30 36. As regards amending the grounds of appeal, the Tribunal has, under Rule 5(1) of the Rules, a general power to regulate its own procedure and, under Rule 5(3)(c), a power to permit a party to amend a document. In exercising these powers, the overriding objective in Rule 2(1) to deal with cases fairly and justly applies in our view as does the specific requirement in Rule 2(2)(b) to avoid unnecessary formality and to seek flexibility. We also consider the above principles set out in *Leeds City Council* and *Data Select* to be entirely appropriate to considering whether the appellant should be given leave to amend the grounds of appeal.

### 35 **Parties’ submissions**

37. The appellant’s principal argument is that he could not appeal during his bankruptcy and appealed as soon as he knew that the bankruptcy annulment had been confirmed by DJ Bland’s rejection of HMRC’s application to set aside the annulment. The appellant believed that before then he could not take any action. The annulment

was confirmed on 3 November 2014 and the appellant appealed to this Tribunal on 5 November. Prior to that the appellant had no standing to appeal the matter.

38. The appellant also claims that he could not appeal the Surcharges because he had not received the surcharge notices. Further, he believed that he had in practice  
5 deferred the time to appeal by asking HMRC for an informal review prior to October 2007. To this end the appellant relies upon the skeleton arguments and documents from the bankruptcy proceedings.

39. Even if the additional surcharges were not included in the Original Appeal the appellant argues that it was obvious to HMRC from correspondence that the appellant  
10 was disputing the surcharges and that reasonable excuse was one of the grounds.

40. As to amending the Original Appeal by amending the grounds of appeal and adding new surcharges via the New Appeal, the appellant seeks to rely on two factors. First, the difficulty his current solicitors have had in obtaining papers from his former solicitors which meant that there was insufficient information available, the appellant  
15 being unwell and unable to give comprehensive instructions. Second, the Appellant's new solicitor delegated the drafting of the notice of appeal for the Original Appeal in his absence. In any event correspondence since November 2014 between the appellant and HMRC clearly indicate that the appellant was appealing in respect of more periods and on wider grounds.

41. HMRC's case on both the late appeals and the application to amend the grounds is that there has been too much delay in this matter and HMRC's position is therefore prejudiced. HMRC say that it would be prejudicial for the appellant to be able now to appeal on the additional grounds, that the appellant was not served with the surcharge notices and that he had reasonable excuse because of the 2004 flood, the death of his  
20 mother- in-law in 2006 and the severe weather in 2007. The surcharges are at least 7 years old and in some cases 11 years old. HMRC have not retained evidence to be able properly to address the appellant's arguments that the surcharge notices were not served on the appellant and that the appellant had a reasonable excuse. For example,  
25 HMRC do not now have any records to demonstrate that the surcharge notices were served. HMRC cannot be expected to retain records for 11 years against the chance a taxpayer may seek to appeal out of time.

42. HMRC point to periods of delay by the appellant when he could have appealed. There was a period of prior to the appellant's bankruptcy in when he could have appealed the Surcharges. The appellant had the power to apply to set aside the  
35 bankruptcy. Further, during the bankruptcy, whilst the appellant did not have the capacity to appeal, he could have asked the trustee in bankruptcy. The offer from the loss adjuster shows that there would have been funds to do so. Further, there was a period of over three months following the annulment of the bankruptcy in July 2014 when the appellant had the power to appeal to the Tribunal but did not do so until 5  
40 November.

43. As regards the periods of delay between the filing of the Original Appeal in November 2014 and the New Appeal in July 2015 – which go to both the issue of late

5 appeals and amending the grounds of appeal - HMRC say that it is unsatisfactory for a taxpayer, represented by solicitors at the time the Original Appeal was filed now to ask, based on an application made some 8 months later, for substantially more surcharges to be added and for the appeal to proceed on radically wider and different grounds.

### Decision

10 44. As described above, the principal issue is whether, applying the principles set out in *Leeds City Council* and *Data Select*, the appellant should be granted leave to appeal out of time. In addressing this issue the Tribunal has, for the reasons set out above, assumed that the appellant would be granted leave to appeal on the wider grounds.

45. The purpose of the time limit is to provide certainty in tax compliance and ensure disputes cannot be raised long after the relevant matters occurred.

46. The delay in this matter is considerable, the Surcharges being between 7 and 11 years old.

15 47. As described above we are prepared to treat the appellant as being aware of the 2004 and 2005-06 Surcharges from January 2007, conscious that he may well have been aware considerably earlier. On that basis the appellant has therefore delayed over 7 years in respect of the 04/05 surcharge and 8 years in seeking to appeal both the 2004 Surcharges and the remainder of the 2005-06 Surcharges as contained in the  
20 New Appeal.

48. As regards the 2006-07 Surcharges, for the reasons set out above, we are prepared to treat the appellant as being aware of these surcharges from the date of the appellant's (undated) skeleton argument in his application for discharge of the bankruptcy in 2010. Again we are conscious the appellant could have been aware  
25 much earlier. On that basis the appellant has therefore delayed some 5 years in respect of the 2006-07 Surcharges.

49. As to whether there is a good explanation for the delay, having considered carefully all the facts and issues raised in this application, we do not find the justifications for the appellant's delay convincing. We accept much of the appellant's  
30 points as to business disruption, personal difficulties and the undoubted stress and disruption caused by his bankruptcy over the years but this cannot explain the entire delay. In particular;

(1) As regards the 2004 and 2005-6 Surcharges, the appellant could have  
35 appealed in the 9 months from January 2007 to his bankruptcy in November 2007. However, we accept that the storm in June 2007 caused disruption to the appellant's business and hampered the appellant's ability to appeal in this period;

(2) During his bankruptcy the appellant could have asked the trustee in bankruptcy to appeal on his behalf;

(3) The appellant could have appealed after the annulment of his bankruptcy in July 2014 but waited until November 2014. We note that at this time the appellant had legal advice and was dealing with the repayment of unpaid VAT during this period;

5 (4) For those surcharges included in the New Appeal in July 2015, the delegation of drafting the Original Appeal within the appellant's solicitors to an individual not familiar with the matter can be no justification for defective drafting;

10 (5) Whilst the correspondence with HMRC in 2014 and 2015 covered matters that might be used as grounds in a reasonable excuse appeal, that is not the same as making an appeal. The correspondence available to the Tribunal did not show HMRC had been alerted to the appellant wishing to appeal additional surcharges;

15 (6) Whilst there is no evidence of any request for a review of the surcharge position, the appellant may have thought he had asked for a review and that therefore there was no reason for an appeal. However, this does not explain the very long delays in this matter;

50. Turning to the consequences of granting an extension of time or a refusal to extend, the point is relatively short. An extension of time would allow the appellant to  
20 appeal the surcharges, although in practice this would only be of any benefit if the appellant is allowed to amend his grounds of appeal. Again, assuming the appellant is permitted to amend his grounds, the Respondents would have to present evidence and argument on the appellant's grounds of not being served the notices and reasonable excuse. On service in particular the fact that HMRC has not retained records must  
25 prejudice them. If the application to extend is refused the appellant would be unable to defend his liability to the Surcharges, whatever the merits of his arguments.

51. In conclusion and mindful of the overriding objective and the guidance set out in *Leeds City Council* and *Data Select* it is our decision that the appellant should not be  
30 granted leave to appeal out of time, whether in respect of the Original Appeal in November 2014 or the New Appeal in July 2015. The delay in bringing these appeals has been considerable. The purpose of the time limit is to ensure that any dispute as to a tax matter should be brought without significant delay. The appellant in this matter has clearly had significant difficulties in his personal and business life. However, there were sufficient periods in the years of delay where he could and should have  
35 brought an appeal. HMRC cannot retain records indefinitely and they would be significantly prejudiced in defending the appeal by the delay.

52. For completeness, whilst the point is academic, we should record that we would also reject the appellant's application to amend the grounds of appeal.

53. This document contains full findings of fact and reasons for the decision. Any  
40 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.

5

**IAN HYDE**

**TRIBUNAL JUDGE**

**RELEASE DATE: 19 OCTOBER 2015**

10