



TC04831

Appeal number: TC/2015/02296

Excise Duty assessment and penalty - application for permission to appeal out of time – whether the Tribunal should accept that an earlier in time appeal had been made and that there had been five reasons for the delay in submitting a “second” Notice of Appeal – No - application refused

FIRST-TIER TRIBUNAL

TAX CHAMBER

MOHAMMAD IIYAS

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

Sitting in public at Phoenix House, Rushton Avenue Bradford on 9 November 2015

Mr Neil Allerton Solicitor for the Appellant who did not attend

Ms Rebecca Young officer of HMRC for the Respondents

DECISION

The Appeal

- 5 1. Mr Mohammad Ilyas (“the Appellant”) applies for permission to appeal out of time against the decision of the Commissioners (‘HMRC’) on review dated 25 April 2013 (the first decision) to uphold, on review, the issue of an assessment in the sum of £2,688 in respect of Excise duty issued on 1 November 2012, following a seizure of tobacco from the Appellant s premises and a decision on 9 May 2013 to issue an Excise Wrongdoing Penalty in the sum of £940.
- 10 2. HMRC object to the Appellant’s application.

Background to the late application

3. On 27 July 2012 Officers of HMRC visited the Appellant s premises at Bismillah Roti House, 4 Whitby Road, Bradford BD8 9JW.
- 15 4. A key to the basement underneath the shop was obtained when it was being handed from a joiner who was working on an awning at the time, to the person who appeared to be in charge of the Roti House.
- 20 5. In the basement storage area, Officers found, 2.5kg of Amber Leaf, Hand Rolling Tobacco (‘HRT’), 1.2kg of Golden Virginia HRT, 800 Trokadero cigarettes and 6000 Jin Ling cigarettes. In an outhouse behind the Roti House (also described as a toilet) they found 0.55kg of Amber leaf HRT. Golden Virginia HRT 0.2kg, 820 Trokadero cigarettes, 820 Jin Ling cigarettes, 700 Gold Leaf cigarettes, 140 Gold Classic cigarettes. All the goods were seized.
- 25 6. In total, the excise goods seized from the Roti House amounted to 9,280 cigarettes and 4.45kg HRT.
- 30 7. On the 1 November 2012 Ms Rachel Young of HMRC Newcastle, wrote to the Appellant at the 4 Whitby Street address. The letter advised of a liability for excise duty on the goods seized, calculated at £2,668, by virtue of Part 2 Regulations 6(1) (b) and 10(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, and informed the Appellant that he was the person liable to pay the duty. The letter also advised that he was liable to a 'wrong doing penalty'. He was issued with an EX601 Notice of Assessment for £2688 under Section 12(1A) of the Finance Act 1994 with a Schedule showing how the excise duty has been calculated.
- 35 8. On the 21 December 2012 the Appellant wrote to HMRC. He denied that the goods belonged to him and claimed that they were owned by the proprietor of the shop next door, Bismillah Mini-Mart. He pointed to the fact that the basement and out house, where the tobacco was found were shared by the occupants of three shop properties; Bismillah Roti House, the Bismillah Mini-Mart and the Cash In.

9. On the 4 January 2013 HMRC wrote to the Appellant asking for further information about the locations where the goods were found. He replied on the 22 January confirming that the areas were shared by him with the adjoining premises.

5 10. Ms Young confirmed with the officer who conducted the search that the goods were found in the basement directly underneath the Roti House. Also stored in that part of the basement, were food stuffs which would be used in the Roti House.

10 11. On the 28 January 2013, the Ms Young confirmed her decision. The goods seized were held on the Roti House premises which the Appellant owned and from which he operated his business. Excise duty on those goods had not been paid, relieved, remitted or deferred under a duty deferment arrangement on these goods. He was therefore liable to pay the duty on these goods. Ms Young advised the Appellant of the choices available if he wished to contest the decision.

15 12. On 11 February 2013, HMRC received a letter from the owner of the properties at 2-4 Whitby Road, confirming that the basement and outhouse were shared by the three shops.

13. HMRC wrote to the Appellant to inform of the receipt of this letter and advise that this did not have an effect on the decision to assess him for duty.

14. In a letter dated 26 February 2013, received on the 1 March 2013, the Appellant requested a review of the decision.

20 15. 13 March 2013, HMRC acknowledged the Appellant's request and confirmed that an independent review of the decision would be undertaken. The letter explained that if the Appellant was not happy with the outcome of the review he then had the right to appeal to the independent tribunal service.

25 16. On 25 April 2013, Mr Charles Dunn an HMRC officer not involved in the original decision undertook an independent review. His letter set out the background facts, relevant legislation and his conclusion.

Relevant legislation

30 Excise Goods (Holding, Movement and Duty Points) Regulations 2010, Part 2, Excise Duty Points and Payment of the Duty

Goods released for consumption in the United Kingdom-excise duty point

35 5 Subject to regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom.

6 (1) Excise goods are released for consumption in the United Kingdom at the time when the goods--

- a) leave a duty suspension arrangement;
- b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
- 5 c) are produced outside a duty suspension arrangement; or
- d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

10 (1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1) (b) (holding of excise goods outside a duty suspension arrangement) is the person holding the excise goods at that time.

(2) Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1).

15 Section 12(1A) of the Finance Act 1994 provides:

12(1A) (1) Subject to subsection (4) below, where it appears to the Commissioners —

- (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
- 20 (b) that the amount can be ascertained by the Commissioners, the Commissioners may assess the amount of duty due from that person notify that amount to that person or his representatives.

25 17. Mr. Dunn said that taking into account the officer's account of the discovery of the goods, including their location on the premises and the fact that no information or evidence had been provided to HMRC to support the Appellant's claim that the goods were owned by another party, her conclusion was that the decision should be upheld. Mr. Dunn's letter included the following appeal advice:

30 'If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. If you want to appeal to the tribunal, you must write to the tribunal within 30 days of the date of this letter. You can find out how to do this on the Tribunals Service website www.iustice.gov.uk/ or you can phone them on 0845 223 8080.

If you decide that you wish to appeal you should send a copy this letter and a copy of the original decision letter to the Tribunal Service along with your application.

35 Normally you must pay the disputed tax before any appeal can be heard by the tribunal. If paying the tax would cause you hardship you may ask for your appeal to be heard without payment of the tax [or you may be able to provide security for some or all of the tax instead]. If you think this applies to you, please tell me. I will need you to explain why payment would cause hardship and to provide evidence to support this.

40 If I do not hear from you and you do not appeal to the tribunal within 30 days of the date of this letter I will assume that you agree with my conclusion'

You can find further information about appeals and reviews on the HMRC website <http://www.hmrc.gov.uk/dealingwith/appeals.htm> or you can phone the number on this letter'

5 18. On 9 May 2013 HMRC wrote to the Appellant informing him that an Excise Duty
Wrongdoing Penalty of £940 was to be imposed under section 41 Finance Act 2008,
amounting to 35% of the potential lost revenue with an explanation as to how the
penalty had been calculated. The letter also explained that the Appellant had an
opportunity to provide information which may not have previously been taken into
10 account, and that if he did so, the quality of disclosure in terms of 'telling,' 'helping'
and 'giving' information regarding the circumstances surrounding the seized goods,
may reduce the penalty payable.

19. On 23 May 2013, the Appellant contacted HMRC requesting a further copy of Mr
Dunn's letter of 25 April 2013. HMRC duly provided a copy of the letter on the same
day.

15 20. Nothing further was heard from the Appellant, and on 28 May 2013 HMRC issued
the penalty of £940.

21. The £2688 excise duty and £940 penalty remained unpaid and on 25 and 26 July
2013, HMRC wrote to the Appellant warning of enforcement action in respect of the
unpaid duty and penalty. On 10 and 19 November 2014, because the Excise Duty and
20 Penalty remained unpaid, HMRC's Debt Management and Banking Department
wrote to the Appellant to say that payment was overdue and again warned of
enforcement action

22. In early December 2014, the Appellant contacted the Tribunal Service to request a
Notice of Appeal form.

25 23. The Appellant's Notice of Appeal was received by the Tribunal Service on 9
January 2015 but was returned to him on 13 January 2015 as he had not completed
section 6 explaining why his appeal had been submitted outside the time limit for
making an appeal and did not include a request for permission to appeal out of time.
The Tribunal Service also explained that a copy of the decision appealed against was
30 required.

24. The Appellant returned his Notice of Appeal on 21 January 2015 but without a
copy of the decision appealed against and on 27 January 2015 the Tribunal Service
again returned the Notice of Appeal, reminding the Appellant that a copy of the
decision appealed against was required.

35 25. On 13 March 2015, the Tribunal Service received the Appellant's resubmitted
Notice of Appeal together with a copy of the decision appealed against.

26. In the Notice of Appeal the Appellant stated that he had originally lodged a Notice
of Appeal on 10 June 2013 but did not receive any acknowledgement or reply, and
assumed matters had been resolved. He said that the forms were faxed to HMRC at
40 fax number 03000 540 872.

27. Under section 16(1F) Finance Act 1994, an appeal may be made after the end of the 30 day period if the appeal Tribunal gives permission to do so.

The evidence

5 28. The evidence before the Tribunal included a copy of the Notice of Appeal sent by the Appellant in January 2015 and also a copy of the Notice of Appeal which the Appellant says he submitted on 10 June 2013. Also included was copy correspondence between the Appellant and HMRC, copy Assessments, copy Penalty notice and copy documentation provided to the Appellant, relevant legislation and case law authority. The Appellant did not provide a witness statement and did not
10 attend the hearing to give evidence.

Conclusion

29. Under section 16(1B) Finance Act 1994, an appeal against an Excise Duty assessment or Wrongdoing Penalty is to be made within 30 days of "the date of the document notifying P of the decision to which the appeal relates". The Appellant's
15 Notice of Appeal should therefore been lodged with the Tribunal no later than 24 May 2013.

30. The undated Notice of Appeal was first submitted to Birmingham Tax Tribunal on 9 January 2015 (as evidenced by the date of receipt stamp on the Notice of Appeal). This was almost one and a half years after the penalty decision and over one and a
20 half years after the excise decision.

31. Rule 20(4) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009/273 provides:

25 20(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 permission, the Tribunal must not admit the appeal.

30 32. The Appellant states that that he 'sent the appeal forms by fax' on 10 June 2013, but had not received a reply or any kind of correspondence and assumed 'the matter was resolved'. It was not in my view reasonable for the Appellant to assume that a matter involving the notification of the requirement to pay a significant amount of tax and a substantial penalty would be resolved, without at the very least, in the first
35 instance, some form of acknowledgement.

33. The Tribunal guidance extant at the relevant time made no reference to a facility whereby an appeal could be lodged by fax, but did specify that receipt of an appeal would be acknowledged in writing. Page 7 of the Notice of Appeal form specifically

states that a Notice of Appeal must be sent by post or email. In any event the Appellant has provided no evidence of the fax transmission.

5 34. The copy Notice of Appeal dated 10th of June 2013 now produced by the Appellant refers to the latest date, by which the appeal ought to have been made or notified, as being 24 May 2013, that is 30 days from the date of Mr Dunn's review letter upholding the decision. In box 6 of the Notice, the Appellant explains that the Notice of Appeal is late because he had not received any paperwork giving him details as to how or by when he should appeal. However the Appellant makes reference to receiving Mr Dunn's letter upholding the decision, which notifies the Appellant that he had the right to ask an independent tribunal to decide the matter, and in which event he had to write to the tribunal within 30 days of the date of Mr Dunn's letter. He was informed that he could find further information about appeals and reviews on HMRC's website and was told that he could telephone HMRC's local compliance appeals and reviews Department in Glasgow on telephone number 030 10 15 0052 9749.

20 35. The Appellant requested a copy of Mr Dunn's letter of 25 April 2013 which was sent to him by HMRC on 23 May 2013. A copy was sent to his home address. There was no subsequent contact from the Appellant to suggest that he may not have received the copy letter. At that stage a Notice of Appeal to the tribunal would have still been in time.

25 36. The fax number which the Appellant says he used to send his Notice of Appeal of 10 of June 2013, that is 030 0054 0872, was in fact the fax number of HMRC's Debt Management and Banking division, which fax number he would not have had until late 2014 when HMRC began threatening enforcement action. There were no telephone calls or correspondence from the Appellant when he was being chased for payment of the duty and the penalty between May 2010 and the end of 2014, as one would have expected had the Appellant lodged a Notice of Appeal with the tribunal. If he was diligent enough to retain a copy of the Notice of Appeal which he says was submitted on 10 June 2013, it is difficult to understand why he did not chase it up 30 when he received no acknowledgement.

37. At the hearing Mr Allerton on behalf of the Appellant said that the 'first' Notice of Appeal was not only sent by fax but also by first class post. That had not been mentioned previously and in particular is not mentioned in the 'second' Notice of Appeal when explaining the reason for the delay.

35 38. The March 2015 Notice of Appeal was undated and initially defective in that it did not include a copy of the decision notice. Further, the Notice of Appeal does not appear to have been sent by the Appellant with any due expedition, given that he first requested a Notice of Appeal form from the Tribunal Service in mid-November 2014.

40 39. All the indications are that the Appellant did not in fact, submit a Notice of Appeal in June 2013 and that the Notice of Appeal which he eventually lodged with the Tribunal in proper form in March 2015, was prompted by HMRC's threats of enforcement action in late 2014.

40. Generally the purpose of adherence to time limits is finality and certainty, which is necessary for HMRC to efficiently operate the taxation system. Time limits are also necessary for the efficient organisation of the Tribunal appeals system. Generally, an extension of time is the exception rather than the rule.

5 41. I do not accept the Appellant's explanation for the delay, and in any event the merits of the appeal would appear questionable. The Appellant has not provided any information or evidence to support his claim that the seized goods were owned by another party.

10 42. Taking all these factors into account, this is not in my view, a case in which in the interests of justice I should exercise the Tribunal's discretion to permit the appeal to be made after the expiry of the normal time limit.

43. The application for permission to appeal out of time is therefore refused.

15 45. 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.

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MICHAEL S CONNELL

**TRIBUNAL JUDGE
RELEASE DATE: 20 JANUARY 2016**

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