[2016] UKFTT 0065 (TC)

TC04864

Appeal number: TC/2015/3748

PROCEDURE – application to make late appeals - s 16(1F) FA 1994 & s 83G(6) VATA 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

PARK INDUSTRIAL & AGRICULTURAL HOLDINGS LIMITED **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster
Mr Ian Perry

Sitting in public at Centre City Tower, Birmingham on 15 January 2016

Mr David Bedenham of counsel, instructed by Rogers & Norton, for the Appellant

Mr Brad Pomfret of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

Background

1. The Appellant ("the Company") is a warehouse and logistics business and in 2013 that included bonded warehouse operations. The bonded warehouse operations ceased subsequently. In September 2013 the Respondents ("HMRC") inspected the Company's premises and came to the view that certain duty-suspended goods had been removed from bond without adequate paperwork: (a) a number of solar panels; and (b) a quantity of metaldehyde. On 1 November 2013 HMRC raised a C18 post clearance demand note - effectively an assessment for customs duties (anti-dumping duty) and VAT - in the amount of £4,300.01 in relation to the metaldehyde ("the Metaldehyde C18"). On 20 December 2013 HMRC raised a C18 post clearance demand note in the amount of £39,589.12 in relation to the solar panels ("the Solar Panels C18").

2. On 12 February 2014 the Company requested a formal review of the decision to issue the Solar Panels C18. On 1 May 2014 HMRC asked for more information before concluding their review; this email was sent to an employee in the Company's accounts department who had a similar email address to the managing director. The review decision was issued on 12 May 2014 ("the Review Letter") and upheld the original decision. The Review Letter informed the Company of its right to appeal to the Tribunal and of the 30 day time limit for such an appeal.

3. On 17 June 2015 the Company filed a notice of appeal with the Tribunal:

(1) Enclosing the Review Letter as the disputed decision (Tribunal Procedure Rule 20(2)(d) refers);

(2) Stating the amount of tax in dispute as £39,589.12;

(3) Requesting permission to appeal out of time; and

(4) In the grounds of appeal referring to both the Solar Panels C18 and the Metaldehyde C18.

Hearing

4. The hearing was listed to consider the Company's application for permission to appeal out of time. At the hearing Mr Bedenham for the Company also sought permission to amend the grounds of appeal to include an appeal against the Metaldehyde C18.

5. We took oral evidence from the managing director of the Company, Mr Stephen Gibson. Mr Pomfret for HMRC objected to the late delivery of Mr Gibson's witness statement. We decided to hear Mr Gibson's evidence but bear in mind that there may be points which were previously unknown to HMRC; nothing arose during Mr Gibson's evidence that HMRC were not already aware of, or else were dealt with in cross-examination by Mr Pomfret.

Law

6. For customs duties the 30 day time limit for an appeal to the Tribunal is set by s 16 Finance Act 1994 and the Tribunal's discretionary power to extend that time limit (and so admit an appeal out-of-time) is given by s 16(1F). For VAT the 30 day time limit for an appeal to the Tribunal is set by s 83G VAT Act 1994 and the Tribunal's discretionary power to extend that time limit is given by s 83G(6).

Mr Gibson's Evidence

7. Mr Gibson adopted and confirmed a witness statement dated 13 January 2016.

8. The Company had been trading since 1978. Its current financial position was poor and HMRC had granted the Company's hardship application for the appeal to be heard without payment or deposit of the disputed taxes. Mr Gibson had already sold 90% of his shareholding in the Company and had put that cash into the Company for business purposes. Payment of the aggregate taxes assessed by the disputed C18s could not be afforded and would put the future of the Company at risk; insolvency would threaten the futures of the Company and also its 74 employees.

9. So far as Mr Gibson could understand, the dispute concerned the failure to produce some relevant paperwork. He considered that there was no suggestion that any taxes had failed to be accounted for. He had been advised that there was a number of legal arguments against the taxes being due from the Company, including a case currently being appealed to the Upper Tribunal (*HMRC v B&M Retail* FTC/29/2015).

10. Mr Gibson had assumed that both C18s were being appealed; he had not picked up the fact that the Review Letter only covered the Solar Panels C18. Throughout the Company had been disputing both C18s. He had misunderstood the difference between a review and an appeal. When he had asked for a formal review HMRC had telephoned him and requested an extension of time to conclude the review, which he had agreed. He had assumed that the Company would have an opportunity to present its case before conclusion of the review and he awaited a revised timetable, but instead HMRC issued the Review Letter. He had written on 16 May 2014 protesting that the Company still had not presented its case; HMRC did not seem to have received that letter but it was resent on 9 July 2014. HMRC replied on 17 July 2014 that they would agree a late appeal made within 30 days. This is where his misunderstanding arose because he had already put forward the Company's case to HMRC in his letter dated 16 May 2014 and assumed that was all that was required of him. He had not distinguished between HMRC and the Tribunal.

11. The Company appointed solicitors in the matter in November 2014. They had conduct of the matter after that point and he had assumed they were dealing with everything.

12. By the time of the dispute the Company was still an authorised warehouse operator but had ceased to offer bonded warehouse facilities. The staff responsible for that area of operations had left and the paperwork was in disarray; thus there were

problems in retrieving the necessary documents. Mr Gibson thought the problem on the metaldehyde was just that the product had been recorded by lots rather than by weight, leading to a mismatch on the paperwork. The Company had the necessary paperwork and could produce it, but first had to find it. He had handled matters to the best of his abilities throughout. Ultimately it was a matter of prioritisation of resources.

13. In response to questions in cross-examination by Mr Pomfret for HMRC:

(1) Emails in May 2014 from HMRC had been sent to "sgibson" but the exact email address used belonged to a member of the accounts department (Mr Gibson's former wife), rather than Mr Gibson. However, Mr Gibson accepted that the email address had been used on previous correspondence to HMRC from the Company, and that the incoming emails had been forwarded to him internally shortly after receipt.

(2) Mr Gibson accepted that he had not requested a new timetable from HMRC.

14. In response to questions from the Tribunal:

(1) After he had objected to the Review Letter he had assumed he would have an opportunity to produce the necessary documentation.

(2) No further documents had been provided to HMRC since September 2013, and the documents attached to the notice of appeal contained no new items.

(3) He could not comment on matters after appointment of solicitors in November 2014 as he had placed matters in their hands.

Appellant's case

15. For the Company, Mr Bedenham submitted as follows.

16. It was accepted that the appeal against the Decision Letter was late. When filing the notice of appeal the intention of the Company had been to challenge both disputed C18s. Paragraph 3 of the grounds of appeal referred to both the Solar Panels C18 and the Metaldehyde C18. The Company applied for permission to amend its grounds of appeal to include specifically the Metaldehyde C18.

17. The correct approach for the Tribunal was as set out by the Upper Tribunal in *Romasave (Property Services) Ltd v HMRC* [2016] STC 1 at [91]: "The obligation remains simply to take into account, in the context of the overriding objective of dealing with cases fairly and justly, all relevant circumstances, and to disregard factors that are irrelevant." That was in accordance with the test set out by the Upper Tribunal in *Data Select Ltd v HMRC* [2012] STC 2195 (at [37]). In applying the *Data Select* test an arguable case (but nothing stronger) was required: *Romasave* at [98].

18. If the appeals were not allowed to go ahead then it would have a devastating effect on a business that had been trading for 38 years. Mr Gibson had candidly

accepted his misunderstanding. When he had granted extra time to HMRC for production of the Review Letter, he had assumed that he would be given an opportunity to present the Company's case, and that the matter was proceeding by way of negotiations. The Company had engaged in correspondence with HMRC throughout, and had appointed solicitors when it was eventually realised that appeals needed to be lodged with the Tribunal. It was unfortunate that the notice of appeal was not filed until June 2015 but HMRC had been aware throughout that both C18s were in dispute, and there was no prejudice to HMRC who clearly had never considered that the dispute had gone away.

19. The Company maintained that it could produce the documents required by HMRC to satisfy themselves on the points in dispute. Of course, HMRC could then challenge those documents if they so wished – again, there was no prejudice to HMRC.

20. To deal with matters justly and fairly the Tribunal should exercise its discretion to allow the grounds of appeal to be amended and also to admit the appeal out of time.

Respondents' case

21. For HMRC, Mr Pomfret submitted as follows.

22. The correct approach for the Tribunal in these matters was set out by the Upper Tribunal in *Romasave*. That case supported the approach in *Data Select* ([89-90] of *Romasave*) of looking at all relevant circumstances and not slavishly following a checklist ([91]), adopting a three part test ([93-94]):

(1) The reason for the time limit was clear and it was not supportable that the lateness was not serious ([95-96]). In *Romasave* the delay was around three months; in the current case the appeal against the Review Letter concerning the Solar Panels C18 was twelve months late, and (even if it was encompassed within the appeal) that against the Metaldehyde C18 was even later (around 19 months).

(2) In terms of the reasons for the delay ([97] of *Romasave*), no good reason had been put forward by the Company. HMRC refuted any suggestion that they had misled the Company. HMRC had carefully and accurately explained to the Company its appeal rights, even if Mr Gibson did misunderstand.

(3) All the circumstances should be considered, including the respective prejudice to be suffered by each party. It was accepted that only an arguable case need be put forward. Despite opportunities presented, the Company had failed to produce the required documentation.

23. The Court of Appeal decision in *R oao Dinjan Hysaj v Home Office (and others)* [2014] EWCA Civ 1633 was also instructive.

(1) There the delay was nine months ([54]) which again was considerably shorter than in the current case.

(2) The appellant had decided where to prioritise his resources ([55]). That was also the decision of Mr Gibson and the Company.

(3) No urgent steps had been taken even after appointment of solicitors ([56]) – again as in the current case.

(4) The appellant was adjudged to be the author of his own misfortune ([57]) –as should be found in the current case.

(5) The court should not generally have regard to the merits of the appeal, save in cases where they are reasonably clear one way or the other ([58]).

24. HMRC had requested certain records. The Company maintained that it held and could produce those records but they had never been provided. The Company had been the commercial operator of a bonded warehouse and must have been aware of the importance of being able to answer questions from HMRC. Even after Mr Gibson had given his explanation, there was still no good reason provided as to why the Company had not answered HMRC's questions.

25. It was unfortunate that HMRC had addressed some emails to Mr Gibson's ex-wife but that was excusable given the very close similarity between the email addresses for Mr Gibson and Mrs Gibson, and that some emails to HMRC had been sent from Mrs Gibson on Mr Gibson's behalf. In any event, it was apparently not disputed that she was also an employee of the Company and had promptly referred the emails to Mr Gibson.

26. This was a clear case of unsubstantiated delay and the Tribunal should not exercise its discretion in favour of the Company.

Consideration and Conclusions

Application to amend grounds of appeal

27. This application was made at the hearing. We consider that the notice of appeal clearly relates only to the Review Letter – it is the disputed decision stated under Rule 20(2)(d); the disputed tax stated is the amount on the Solar Panels C18; the Metaldehyde C18 was not exhibited (Rule 20(2)(d) again); and there is only a passing reference in the grounds of appeal to the metaldehyde dispute. Accordingly, we feel that bringing the Metaldehyde C18 into these proceedings would be more than just an amendment of the grounds of appeal. Rather, it significantly extends the subject matter of the proceedings before the Tribunal, which we do not think is appropriate.

28. We consider the fairest approach for the Tribunal to adopt is to recast the Company's application as one applying for permission to lodge a (separate) late appeal against the Metaldehyde C18. Although we did not state this approach at the hearing, both parties did fully address the matter of lateness during their submissions and so neither party should be prejudiced by this approach.

29. Thus we are adjudicating applications for admission of two late appeals: the first against the Review Letter and the other against the Metaldehyde C18

Approach

30. We agree with the parties that the approach to be adopted is as set out by the Upper Tribunal in *Data Select* and *Romasave*.

Consideration

31. *Reason for time limit and length of delay* - Both this Tribunal and the Upper Tribunal have repeatedly emphasised the importance of statutory deadlines set by the taxing statutes. The 30 day deadline for appeal to the Tribunal was clearly stated in the Review Letter. Even accepting Mr Gibson's explanation of his initial confusion between reviews and appeals, HMRC's email dated 17 July 2014 should have left him in no doubt that the review process was exhausted and an appeal to the Tribunal was the important and necessary next step – and also indicated that HMRC would not object to the lateness if the appeal was filed within 30 days (ie by 16 August 2014). The Company seems to have done nothing substantial until November 2014 (perhaps because HMRC Debt Management had now become involved) when it did instruct solicitors. However, there is then a further, unexplained, delay of over six months until the notice of appeal was filed in June 2015.

32. *Reason for delay and other circumstances* - The Company says that if permission is refused, and so the disputed ADD and VAT are payable, then that will have a calamitous effect on the Company (and thus also on its employees). We cannot comment on the Company's financial position as we had no accounts or other documentary evidence on that point, although we note that HMRC did grant the Company's hardship application for the appeals to proceed without payment or deposit of the disputed taxes. However, if the possible consequences of this dispute are as serious as the Company maintains, we are surprised at the lack of action taken by the Company. The Company was aware of the magnitude of the amounts in dispute when the C18s were issued in November and December 2013 respectively. The Company was aware from the outset that what HMRC required from the Company was production of certain documentation reasonably required of a customs bonded warehouse operator. It is clear from the correspondence contained in the trial bundle that HMRC emphasised to Mr Gibson that the paperwork available at the inspection was not adequate, and also spelled out exactly what was required (letter of 31 October 2013, letter of 17 January 2014, the Review Letter (page 4), and email of 25 November 2015 all refer). We do not accept Mr Gibson's statement that the Company was somehow unaware that it had to produce the missing documentation, or that the Company was awaiting some revised timetable or deadline from HMRC. We conclude that the Company was fully aware that stipulated documentation needed to be produced immediately to HMRC to resolve the dispute. The Company maintains that the documents are available in its records, but the only reason given for the failure to produce them in the three years since the inspection is that the records are in disarray following the departure of the staff previously responsible, and it would be burdensome to find the documents. In our firm view, a taxpayer faced with assesments it considered incorrect and excessive, and who was confident that the required records were available, would promptly put in the work necessary to retrieve the papers and satisfy HMRC that the C18s should be withdrawn. Instead, the

Company has done nothing to address HMRC's legitimate requests of a customs bonded warehouse operator, and has given no convincing explanation for its failure to pursue a timely appeal to the Tribunal.

33. For those reasons we do not think it would be fair and just to allow the two appeals to proceed out of time.

Decision

34. The applications are REFUSED.

35. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 3 FEBRUARY 2016