[2016] UKFTT 0094 (TC)

TC04883

Appeal number: TC/2015/06197

EXCISE – refusal to restore knives – appeal against the refusal of a request to carry out a late statutory review – Section 14A of the Finance Act 1994 - 55 days late – alleged non-receipt of the decision – finding of fact that the decision had been received – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARK LITTLER **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE RICHARD CHAPMAN
MICHAEL ATKINSON

Sitting in public in Manchester on 30 November 2015

The Appellant did not attend and was not represented

Mrs Jennifer Newstead Taylor, Counsel, instructed by the Director of Border Revenue, for the Respondents

DECISION

Introduction

1. Mr Littler seeks an order for a late statutory review pursuant to section 14A of the Finance Act 1994. This relates to a decision dated 29 April 2015 not to restore two gravity knives ("the Knives"), which had been seized on 12 March 2015 at HWDC Postal Depot.

2. Mr Littler did not attend the hearing. He did not notify either the Tribunal or the Respondents ("the Border Force") of any difficulty or any intention either to attend or not to attend. Further, there was no application for an adjournment. Mrs Newstead Taylor applied to have the case struck out upon the basis that Mr Littler was not present to pursue it. We dismissed that application upon the basis that the overriding objective obliges us to deal with cases fairly and justly. This was for the following reasons. First, it would not be fair and just to strike out the appeal in circumstances in which an alternative available to us was to hear it in Mr Littler's absence pursuant to rule 33 of the Tribunal Procedure (First-tier Tribunal) Tax Chamber Rules 2009. Secondly, the appeal is a straightforward one. Whilst the value of the Knives is relatively modest, they have importance to Mr Littler. A more proportionate response to his non-attendance was therefore to proceed in his absence. Thirdly, Mr Littler has had the chance to participate fully in the proceedings. Insofar as his arguments could be taken from the documents before us, his arguments could be fully considered.

3. We therefore considered rule 33 and decided to proceed with the hearing in Mr Littler's absence. This was because we were satisfied from the Tribunal file that a letter was sent to Mr Littler's correct address on 20 October 2015 and so he had been notified of the hearing date. We were also satisfied that it was in the interests of justice to proceed with the hearing; we repeat the second and third points in paragraph 2 above and make the further points that an adjournment would merely delay the resolution of the appeal in circumstances in which no good reason (or any reason at all) for Mr Littler's non-attendance had been given.

4. In the course of the hearing it became clear that a letter from Mr Littler in April 2015 could be relevant but was not within the documents before us. We also needed to know whether or not the Knives had been destroyed and, if so, when. The Border Force agreed to (and subsequently did) provide this letter and further information about the Knives to allow us to reach our decision.

The Factual Background

5. The factual background can be summarised as follows. The Knives were posted to Mr Littler from the USA. They were seized by the Border Force at HWDC Postal Depot on 12 March 2015 upon the basis that they were gravity knives and so offensive weapons prohibited under section 1(2) of the Restriction of Offensive Weapons Act 1959.

6. On 20 April 2015, Mr Littler wrote to the Border Force seeking restoration of the Knives. He also made the point that they were second hand collectors folding Knives with blade lengths of under three inches and that they were lockable folding knives rather than gravity knives. He also said that they would only open under gravity through improper handling during transit or because they were loose.

7. By a decision dated 29 April 2015, the Border Force refused to restore the Knives ("the Decision"). The Decision stated that the Knives fitted the description of gravity knives, "as the blade can be released from the handle, into a locked position, by the application of centrifugal force." The Decision also stated that if Mr Littler disagreed with the Decision he could have it reviewed by a Review Officer by writing to the address provided within 45 days of the date of the Decision. The Decision was addressed and, the Border Force say, sent to Mr Littler at the same address which appears on his correspondence.

8. Mr Littler sent a letter dated 15 June 2015 to the Border Force requesting a response to his letter (although it refers to a letter dated 21 April 2015 the Border Force informed us that they have no record of receiving a letter dated 21 April 2015 and so we infer that Mr Littler was referring to his letter dated 20 April 2015).

9. By a letter dated 16 July 2015, the Border Force replied to Mr Littler's letter dated 15 June 2015 and said that letters had already been sent to him regarding the case. In particular, it said that Mr Littler had been sent a "no restoration decision" on 29 April 2015 and enclosed a further copy of the Decision.

10. Mr Littler wrote to the Border Force again on 2 August 2015 asking for a late review. In particular, he gave the following explanation for the request being late:

> "I apologise for the late response but I did not receive the letter from the Border Force that they say they sent on the 28th April 2015. In only received this letter around the 23 July."

11. The Border Force responded on 10 September 2015, refusing the request for a late statutory review.

12. Mr Littler issued a notice of appeal, which was received by the Tribunal on 6 October 2015. His grounds are as follows:

> "Border Force confiscated some items from me which I believe were folding knifes. I asked them to reconsider their decision which they did. I did not receive their response which was apparently sent 28 April 2015. I called and wrote to them about a month later asking for this response and it was forwarded. I then replied to this response to the review officer. The review officer did not accept my statutory review because I was out of the time limit. I believe this is unfair as I did not receive the letter from Border Force which they say they sent on 28th April which has led to me being late requesting a statutory review."

13. By a letter dated 12 October 2015, the Tribunal wrote to Mr Littler informing him that the matter was listed for an application for permission to make a late request

for a statutory review only. He was also informed that the matter had been assigned to the basic category and so if he wished to rely at the hearing upon any documents not previously sent then he should provide them to the Tribunal and the Border Force at least 14 days before the hearing.

14. The Border Force informed the Tribunal after the hearing that the Knives were destroyed on 11 June 2015.

The Border Force's Submissions

15. Mrs Newstead Taylor provided us with a skeleton argument and also made oral submissions. She began by setting out the statutory framework as follows.

16. Section 1(2) of the Restriction of Offensive Weapons Act 1959 prohibits the importation of certain offensive weapons, including gravity knives.

17. The relevant sections of the Customs and Excise Management Act 1979 ("CEMA 1979") provide as follows:

> "139(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by an officer …
>
> …
>
> 152 The Commissioner may as they see fit –
>
> …
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized …"

18. Section 14 of the Finance Act 1994 provides for reviews of, amongst other things, decisions as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored. Section 14(3) provides as follows:

> "(3) The Commissioners shall not be required under this section to review any decision unless the notice requiring the review is given before the end of the period of forty-five days beginning with the day on which written notification of the decision, or of the assessment containing the decision, was first given to the person requiring the review."

19. Section 14A of the Finance Act 1994 ("Section 14A") is of particular relevance and provides as follows:

> "14A Review out of time
>
> (1) This section applies if –
>
> (a) a person may, under section 14(2), require HMRC to review a decision, and

(b) the person gives notice requiring such a review after the end of the 45 day period mentioned in section 14(3).

(2) HMRC are required to carry out a review of the decision in either of the following cases.

(3) The first case is where HMRC are satisfied that –

(a) there was a reasonable excuse for not giving notice requiring a review before the end of that 45 day period, and

(b) the notice given after the end of that period was given without unreasonable delay after that excuse ceased.

(4) The second case is where –

(a) HMRC are not satisfied as mentioned in subsection (3), and

(b) the appeal tribunal, on application made by the person, orders HMRC to carry out a review."

20. Mrs Newstead Taylor submitted that the proper approach to extensions of time is set out in the judgment of Morgan J in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC) ("*Data Select*") at [34] to [38] (see also *Leeds City Council v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKUT 0350 (TCC) *per* Judge Bishopp at [19]):

"[34] Although the FTT gave permission to appeal to the Upper Tribunal in the belief there was a lack of case law on the approach to be adopted to an application for an extension of time pursuant to section 83G(6), there was no real difference of approach between the parties before me. That is not surprising. Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following 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 an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

[35] The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker* [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see *Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc* [2007] STC 1196.

[36] I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also

> applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [23]-[24] which is in line with what I have said above.
>
> [37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision.
>
> [38] As I have indicated, the FTT in the present case adopted the approach of considering all the circumstances including the matters specifically mentioned in CPR 3.9. It was not said that there was any error of principle in that approach. In my judgment, the FTT adopted the correct approach."

21. Upon being asked whether or not the correct test involved an analysis of whether or not there was a reasonable excuse, Mrs Newstead Taylor submitted that the Tribunal is applying a fresh discretion and so is not restricted to the question of reasonable excuse but it is still a factor within that discretion. She further submitted that the Tribunal's jurisdiction is an appellate jurisdiction rather than supervisory.

22. Mrs Newstead Taylor submitted that, applying this legal framework, the appeal should be dismissed for the following reasons:

(1) The purpose of the 45 day time limit is to ensure that a party asserting a right to a review does so promptly. The Border Force reasonably understood that the matter had been finalised.

(2) The request for review was 55 days late.

(3) There is no reasonable excuse for the delay. Although Mr Littler's position was that he had not received the Decision, she notes that it was correctly addressed, there were no other problems with Mr Littler's post and he has not provided any satisfactory evidence of non-receipt. Mrs Newstead Taylor said that Mr Littler's assertion should not be taken at face value.

(4) Allowing the appeal would enable Mr Littler to have his review but would require the Border Force to re-open the matter adding to costs and the use of resources.

(5) Dismissing the appeal would mean that Mr Littler is bound by the Decision but would avoid further delay, costs and the use of resources.

Discussion

Findings of fact

23. It is important to note that this is not a substantive appeal against a refusal to restore the Knives. As such, we do not need to make any findings of fact other than in respect of the circumstances of the late request for a review and do not seek to do so.

24. The central factual questions are whether or not the Border Force sent the Decision and whether or not Mr Littler received it.

25. There was no witness evidence from either party and so we have to make the best of the documentary evidence before us. In doing so, we bear in mind that the burden of proof is upon Mr Littler and that this is upon the balance of probabilities.

26. We find that it is more likely than not that the Border Force sent the Decision to Mr Littler on or about 29 April 2015. We have seen a copy of the letter so it is clear that it exists. There is nothing to suggest that it was not generated at the same time as the date on it. The Border Force's letter dated 16 July 2015 said that the Decision had been sent on 29 April 2015. Crucially, it is for Mr Littler to prove on the balance of probabilities that this was wrong. He has not presented any evidence to do so.

27. We find that it is more likely than not that Mr Littler received the Decision. The Decision was correctly addressed and there is no evidence of any problem with Mr Littler's post or any suggestion that other letters were not received. There is no suggestion that the Decision was returned to the Border Force or otherwise undelivered. This leads to the inference that it was delivered. We agree that Mr Littler's assertion that he did not receive the Decision is a bare assertion. This might not itself have been problematic for Mr Littler if he had given credible evidence to that effect. Crucially, however, it is not an assertion to which we can give sufficient weight for Mr Littler to discharge his burden of proof given that he did not attend at court to give evidence or to be cross-examined. We accept the point that could be made on Mr Littler's behalf that he cannot prove a negative in the way that the Border Force could be seen as requiring. However, the point is a subtler one. Mr Littler has not explained whether or not he was present at the address on the Decision at the time, whether or not he is saying that it was delivered but that it did not reach him or whether he is saying that it was not even delivered. Without oral evidence (or even a witness statement) from Mr Littler dealing with these points or adding weight to his assertion, we cannot assess his credibility and he has not discharged his burden of proof.

The correct legal test

28. We agree with Mrs Newstead Taylor that the statutory framework is as set out above. We also agree that our jurisdiction is a full appellate jurisdiction and not merely supervisory.

29. However, we do not agree that the correct legal test to be applied is as set out in *Data Select*. This is for the following reasons.

30. *Data Select* does not state that the test is inevitably to be applied *whenever* an extension of time is required. Instead, at [34], Morgan J notes that this is a, "general rule". *Data Select* itself related to an application to bring an appeal out of time and so is in a different context to the present case.

31. Section 14A is unhappily worded. It provides the Tribunal with the jurisdiction to order a late statutory review. However, it does not at first sight set out the circumstances in which such an order should be made.

32. If Section 14A is properly construed as a general discretion then we would have no doubt that the test in *Data Select* is appropriate. However, the distinguishing feature of the present case is that the Border Force must reach a decision refusing to permit the late request before the Tribunal's jurisdiction is engaged. The context for the decision is therefore whether or not the Border Force was right or wrong to refuse to permit a late request. It follows, therefore, that the proper construction of Section 14A is that the Tribunal must apply the same test as the Border Force.

33. This construction has logic on its side. The "reasonable excuse test" (by which we mean both Section 14A(3)(a) and Section 14A(3)(b)) is materially different to the *Data Select* test. In one sense, the reasonable excuse test is a higher hurdle for an appellant than the *Data Select* test as "reasonable excuse" is at least in principle different to there being a good explanation for the delay. However, in another sense, the reasonable excuse test is more generous to an appellant than the *Data Select* test as there is no need to consider the purpose of the time limit. Similarly, the consequences of the delay will not inevitably form part of the reasonable excuse test. Clearly, there is overlap between the tests. However, they are different and at least in principle could result in different outcomes. Given the appellate nature of the jurisdiction (as signified by the reference in Section 14A(4)(b) to "appeal tribunal"), it would be logically inconsistent for the Tribunal to apply a different test to the Border Force.

34. Our view is reinforced by the decision of Judge Kempster sitting in the First-tier Tribunal (and so having illustrative force rather than being binding upon us) in *Kolodziejski v Director of Border Revenue* [2016] UKFTT 035 (TC) (see also *Asumaning v Director of Border Revenue* [2016] UKFTT 0075 (TC), also a decision of Judge Kempster). He states as follows at [23] and [24] of *Kolodziejski*:

> "[23] However, I do not agree with Mr Millington that the test I should apply is that set out in *Data Select*. While that test is usually appropriate to applications for an extension of time to comply with a time limit, I construe s14A as adopting a different approach. Section 14A(3) sets the test for when UKBA *must* (s 14A(2): "*required* to carry out") carry out a late review: "[UKBA] are satisfied that (a) there was a reasonable excuse for not giving notice requiring a review before the end of that 45 day period, and (b) the notice given after the end of that period was given without unreasonable delay after that excuse

> ceased." Section 14A(4) then provides that if UKBA are not so satisfied then the Tribunal may order UKBA to carry out a review. I consider that requires the Tribunal to adopt the same test as that imposed on UKBA by s14A(2). That approach is different from the one usually applicable to late applications (where I agree the *Data Select* test is appropriate – see for example the Upper Tribunal in *Romasave (Property Services) Ltd v HMRC* [2016] STC 1 at [88-92]) but it follows, I think, from the specific (and rather unusual) wording in s14A(4). That may possibly be explained by the history of the provision. Before 2009 the Tribunal and its predecessor VAT & Duties Tribunal had no jurisdiction whatsoever where HMRC (as then had responsibility) refused a late review – see *Angliss* at [20-22]. As Mr Millington guided me at the hearing (for which I am grateful), that was changed with effect from April 2009 by the insertion of s14A by para 200 sch 1 of The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56). In conferring a new jurisdiction on the Tribunal s14A has, I think, applied the reasonable excuse test for the Tribunal as well as UKBA. For completeness, that contrasts with the general position where the test for exercise of discretion to permit late application is *not* one of reasonable excuse – see the Upper Tribunal in *O'Flaherty v HMRC* [2013] STC 1946 at [58-59].
>
> [24] Given the specific wording of s14(A)(4), I consider the test for me to adopt is that in s14A(3): was there was [sic] a reasonable excuse for not giving notice requiring a review before the end of the 45 day period, and, if so, was the notice given after the end of that period without unreasonable delay after that excuse ceased?"

Outcome

35. Applying the reasonable excuse test, it is our view that Mr Littler's application must fail. We can well see that non-receipt of a decision has the capacity to be a reasonable excuse, subject to the determination of further matters such as the reason a decision was not received and whether or not any conduct of an appellant has led to the non-receipt. For the reasons set out above, we have already found that, on the balance of probabilities, Mr Littler did receive the Decision. This deprives Mr Littler of the only factual basis which he puts forward as a reasonable excuse.

36. For completeness, in case we are wrong as to the applicable test, Mr Littler's appeal must also fail when applying the *Data Select* test. This is upon the following basis:

(1) The purpose of the 45 day time limit is to achieve finality. However, for the reasons set out in *Data Select*, this ought not to be overstated in relation to a Border Force decision as distinct from a judicial decision.

(2) The delay was 55 days. This is a substantial delay, as it is means the total time taken to make the request was more than twice the statutory time limit.

(3) For the same reasons that there is no reasonable excuse, there is no good explanation for the delay. This is an important feature in the present case.

(4) Although Mrs Newstead Taylor is right to say that additional costs and resources will be expended if permission is granted, those are not likely to be extensive.

(5) In the context of considering the consequences for Mr Littler, we note that the Knives have been destroyed. As such, the consequence of not ordering a late review is the same as doing so; even if a late review is undertaken, this cannot result in the restoration of the Knives.

(6) The destruction of the Knives is also an important matter when considering all the circumstances of the case. The practical reality is that the outcome of any review is inevitable in the sense that it cannot result in the restoration of the Knives.

Further matters

37. We do wish to make one final point in closing. The Knives were destroyed 43 days after the date of the Decision. This was of course before the expiry of the statutory time limit. We were not given any explanation for this and so make no findings in respect of it. We simply express concern that the Knives were destroyed at a time when Mr Littler was still entitled to request a review without the need for permission, notwithstanding that the items seized were not a living creature or, in the opinion of the Border Force, of a perishable nature (in which case such destruction or sale would have been within their powers under paragraphs 16 and 17 of Schedule 3 to CEMA 1979).

Disposition

38. It follows that we dismiss Mr Littler's appeal.

39. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 15 FEBRUARY 2016