TC05261

Appeal number: TC/2015/2062

PROCEDURE – application for admission of late appeal – Data Select and BPP criteria

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr NIRMAL SINGH SUNNER **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster

Sitting in public at Centre City Tower, Birmingham on 13 July 2016

Mr Jonathan Wright of counsel (instructed by Neil Davies and Partners, Solicitors) for the Appellant

Mr Richard Adkinson of counsel (instructed by the General Counsel and Solicitor to HM Revenue & Customs) for the Respondents

DECISION

1. This is an application by the Appellant ("Mr Sunner") for permission to bring an out of time appeal against an excise duty assessment and associated penalty. The excise assessment was issued on 14 May 2012 and thus the deadline for an appeal was 12 June 2012 (being 30 days later, per s 16(1B) Finance Act 1994). The penalty was issued on 26 February 2013 and thus the deadline for an appeal was 27 March 2013 (being 30 days later, per para 18 sch 41 FA 2008 and s 16(1B) FA 1994). The notice of appeal was filed on 3 March 2015. Thus the appeals against the disputed decisions were late by respectively two years and nine months, and one year and eleven months. The notice of appeal states that the total sum in dispute is approximately £77,000.

Hearing

2. Mr Wright confirmed that Mr Sunner would not be attending the hearing. Mr Wright did not have instructions as to whether his client was in the UK. Mr Wright apologised for the fact that the requested Punjabi/English interpreter that the Tribunal had provided was not now required.

Appellant's case

3. For Mr Sunner, Mr Wright submitted as follows.

4. Mr Sunner maintained that he first became aware of the disputed decisions in late 2014. Mr Sunner was not functionally literate in the English language; he relied on his son, Daljit. Daljit had been a former business partner with his father; Mr Sunner and Daljit had been joint owners of the trading premises and had jointly held the excise licence for the premises; the partnership was dissolved in 2008 when Mr Sunner retired from business; after his retirement Mr Sunner had continued to help out at the premises and that was why he was present at the time of the HMRC seizure visit on 3 October 2011. Mr Sunner had relied on Daljit in relation to the business but had been let down; Daljit had not removed Mr Sunner's name from the licence or notified the authorities that Mr Sunner was no longer involved. When Mr Sunner became aware of HMRC's claims against him (in late 2014) he relied on Daljit to instruct lawyers but had again been let down because Daljit apparently did nothing on this until February 2015. All the above was substantiated by a witness statement (containing a statement of truth) filed by Mr Sunner on 11 March 2015 in connection with the County Court debt proceedings against him by HMRC.

5. Once solicitors were instructed, the notice of appeal had been filed promptly. Lack of funds had caused Mr Sunner's solicitors to come off the record but then be reinstated; it would be unfair to infer any lack of co-operation by Mr Sunner. Mr Sunner had assumed matters were being properly handled by Daljit. Mr Sunner's reliance on Daljit was evidenced by the papers and was consistent throughout. It appears that it was Daljit who telephoned HMRC on 11 September 2013 to request income and expenditure forms for himself and his father. Mr Sunner's reply on 22 September 2013 (quoted below) could have been drafted in English by Daljit, for signature by his father. During the Tribunal proceedings Daljit had (in August 2015)

requested an extension of time on behalf of Mr Sunner. Due to his lack of facility in English Mr Sunner had relied on his son throughout and had been let down; it would be unfair to hold those failings against Mr Sunner.

6. In deciding whether to exercise its discretion in favour of Mr Summer the Tribunal should conduct a balancing exercise. It was accepted that compliance with rules was important, and also that HMRC were entitled to the certainty afforded by an unchallenged assessment. However, the following factors tipped the balance in favour of Mr Sunner's application:

(1) Mr Sunner's lack of functional literacy in English constituted an exceptional circumstance.

(2) Mr Sunner had relied on Daljit, who had let him down.

(3) The appeal was not without merit and Mr Sunner now had legal representation to pursue the Tribunal proceedings.

(4) Not being able to pursue the Tribunal proceedings would constitute serious prejudice to Mr Sunner. The amount in dispute was significant and Mr Sunner maintained that he was not liable.

(5) Mr Sunner had acted promptly once he finally became aware of the true situation.

(6) Any prejudice to HMRC from allowing the late appeal would be relatively limited. This was not a case where witness evidence may be affected by the passage of time, and any delayed collection of revenue if the appeal failed was compensated by statutory interest.

Respondents' case

7. For HMRC, Mr Adkinson submitted as follows.

8. Mr Sunner had chosen not to attend the hearing, despite being aware of it and having requested an interpreter to be available. It was not appropriate for the Tribunal to be asked to draw inferences that went beyond the documentary evidence that was available.

9. Mr Sunner had been a joint owner of the business, the premises and the licence. There is no evidence of the dissolution of the partnership – eg final accounts. He was present when HMRC seized the alcohol goods, so he was aware that there was a serious problem with the business.

10. Mr Sunner claims problems with the English language but the documents suggest otherwise. His witness statement is in English and signed by him, and contains no translation certificate or any other reference to it having been prepared in another language. Similarly, his County Court defence filed on 18 August 2014. The 22 September 2013 letter to HMRC is in English and signed by him.

11. That letter was highly significant. It amounted to an admission of liability.

"Dear Miss Dale,

Further to your letter of 11th September I am able to make the following offer of payment.

First of all I would like to reiterate that my only involvement in this matter is that I am named on the premises licence and have been advised that because of this I have an obligation on a several basis for the outstanding debt.

I am a 70 year old retired pensioner with a small income. I would like to offer a payment of £5000.00 payable immediately from my savings which I have available followed by £1000.00 monthly.

I hope you will find this offer acceptable."

12. It was clear that at the date of that letter Mr Sunner was not only aware of the claims against him, he also does not deny liability and makes (not expressed to be without prejudice) an offer of payment. Mr Sunner was still out of time to appeal in September 2013 but at least the delay would have been months rather than years. However, no late appeal is filed; in fact, nothing happens.

13. The next evidenced event after the September 2013 letter is the filing of the County Court defence in August 2014. By defending the debt action Mr Sunner must be aware that there is a claim against him but, again, he takes no steps to dispute the assessments until he instructs solicitors in February 2015.

14. The procedural history of the appeal proceedings was relevant in considering the conduct of Mr Sunner. A hardship application had been made but no evidence was produced for some months despite numerous chasers, necessitating the Tribunal listing a hearing. HMRC had agreed extensions of time and eventually accepted the hardship application. Mr Sunner's solicitors had come off the record twice but reinstated on both occasions – that could be because they were unable to obtain instructions from their client. The hearing of the late appeal application had been postponed previously, on the basis of a sick note from Mr Sunner declaring him "unfit for work". He had failed to attend at this postponed hearing.

15. It was relevant that the appeal had few merits. There was no factual dispute that Mr Sunner was the joint owner of the premises and a joint licence holder. There was the admission of several liability in the September 2013 letter.

16. The statutory time limit allows HMRC to allocate limited resources appropriately; limits so far as reasonably possible prejudice caused by delay in disposing of a matter; promotes the public interest in permitting efficient administration of the tax system; and provides certainty for taxpayers.

17. The length of delay is significant. There is no explanation why the appeal could not be brought within the time limit.

18. Mr Sunner was at the store when the seizure happened. He knew of the penalty and assessment in September 2013, said he had taken advice, admitted liability to pay and that he is the licence holder. That letter contradicts his witness statement dated 11 March 2015 in the County Court proceedings (paras 24 and 26 state that he did not know of the assessment until February 2014). His statement does not explain the delay between late 2014 and February 2015 to see lawyers - especially as he had filed a defence. He filed a defence dated 18 August 2014 but delayed almost seven months before lodging his appeal.

19. If time is extended then HMRC will have to re-open the assessment and penalty relating to a matter that started in 2012, and allocate resources to an appeal that lacks merit given that the September 2013 letter undermines Mr Sunner's appeal.

20. If time is not extended then Mr Sunner will be unable to pursue his appeal - however, he has had ample opportunity to do so. HMRC can treat the matter as concluded and can promote the collection of tax and penalties which is in the public interest.

21. Mr Sunner's conduct of the appeal proceedings does not show any attempt to conduct litigation efficiently or in line with the overriding objective.

22. Mr Sunner's delay had been inordinate and inexcusable and his application should be refused.

Consideration and Conclusions

Approach

23. The discretion to admit excise appeals out of time is conferred on the Tribunal by s 16 (1F) FA 1994.

24. The approach I am to take in deciding whether to exercise that discretion was set out by Morgan J in *Data Select Ltd v Revenue and Customs Commissioners* [2012] STC 2195:

> **"[34]** … 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 r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645, [2002]

3 All ER 490, [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 Value Added Tax and Duties Tribunal to the High Court: see *Revenue and Customs Comrs v Church of Scientology Religious Education College Inc* [2007] EWHC 1329 (Ch), [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 Comrs for Aberdeen City* [2005] CSOH 135 at [23]–[24], [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 s 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. None the less, 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."

25. Subsequent to *Data Select* CPR 3.9 was rewritten; the new CPR 3.9 states:

"**3.9 Relief from sanctions**

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence."

26. The new CPR 3.9 was commented upon by the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2014] 2 All ER 430, and *Denton v TH White Ltd* [2015] 1 All ER 880. In *Denton* Lord Dyson MR and Vos LJ stated:

> **"[24]** We consider that the guidance given at paras [40] and [41] of *Mitchell* remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied

> in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages r 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application, including [factors (a) and (b)]'. ...”

27. Whether and how the new CPR 3.9 should be applied by this Tribunal was the subject of conflicting decisions of the Upper Tribunal in *Revenue and Customs Comrs v McCarthy & Stone (Developments) Ltd* [2014] STC 973 and *Leeds City Council v Revenue and Customs Comrs* [2015] STC 168. That conflict was resolved by the Court of Appeal in *Revenue and Customs Commissioners v BPP Holdings Ltd and others* [2016] STC 841, where Ryder LJ stated:

> **“[16]** The key question underlying the two decisions [*McCarthy & Stone* and *Leeds CC*] can be characterised in the following way: whether the stricter approach to compliance with rules and directions made under the CPR as set out in [*Mitchell* and *Denton*] applies to cases in the tax tribunals. The two conflicting decisions of the UT on the point came to different conclusions. For the reasons I shall explain, I am of the firm view that the stricter approach is the right approach.”

28. Also in *BPP*, Ryder LJ (at [44]) endorsed Morgan J’s approach in *Data Select*.

29. Accordingly, in determining Mr Sunner’s application I shall consider the five questions directed by *Data Select* and also the three stages directed by *BPP*.

Discussion

30. I agree with Mr Adkinson that in the absence of attendance by Mr Sunner to provide explanations and answer questions, I must rely on the documentary evidence. Mr Wright has performed a sterling task in his submissions in the unexplained absence of his client but there is a limit to the inferences that I should draw from the documents.

31. In relation to Mr Sunner’s proficiency in English, I am prepared to accept that he has enlisted the help of others in producing documents that he has signed – for example, that Daljit drafted the September 2013 letter and the County Court defence, and that Mr Sunner’s solicitors drafted the witness statement. Of course, that does not mean that Mr Sunner can disassociate himself from the contents of those documents, which he has signed. Mr Wright, properly, does not suggest that Mr Sunner was misled as to the contents of those documents – although in relation to the September 2013 letter he does note that Daljit is not disinterested, having also been assessed by HMRC in relation to the alcohol seizure. My conclusion is that Mr Sunner understood the contents of those documents.

32. In relation to the allegation that Daljit let down his father in various respects, I have carefully reviewed the documentation in the bundle. So far as I can see, this allegation was previously made in relation to Daljit's handling of the business after Mr Sunner's purported retirement from the business (namely, Daljit did not inform the authorities and remove Mr Sunner from the excise licence). But it is a new suggestion that Daljit has mishandled Mr Sunner's delegation of the challenge to the disputed decisions. All that paragraphs 24 to 27 of the witness statement aver is that Mr Sunner asked Daljit to perform certain tasks for him (which is uncontroversial) – there is no complaint about how Daljit performed those tasks. Similarly, in section 6 of the notice of appeal to the Tribunal (reasons why appeal is notified late) it is stated that Daljit dealt with matters but there is no complaint that he has not done as asked. On the evidence available to me I am not prepared to infer that Mr Sunner has been let down in relation to the delegation of the challenge to the disputed decisions.

33. In relation to the September 2013 letter, I do not take this as a simple admission of liability. Although it is not marked "without prejudice", it puts forward a proposal of settlement (being payment by instalments) which was not accepted by HMRC. Rather, I draw two conclusions from this letter. First, Mr Sunner had received some advice concerning his legal position ("I … have been advised that … I have an obligation on a several basis for the outstanding debt") and that advice led him to make an offer of settlement. The letter prompting that advice (HMRC's decision letter dated 14 May 2012) clearly stated the 30 day deadline for an appeal to the Tribunal. Secondly, he was on notice in September 2013 that he faced significant revenue assessments, and was attempting to settle the position. For those reasons, I do not accept the contention that Mr Sunner only became aware of the assessments in late 2014. Further, I conclude that he was or should have been aware in September 2013, at the latest, of the deadline for an appeal to the Tribunal.

Consideration of specific factors

34. On the five questions directed by *Data Select*:

> (1) *Purpose of time limit* – Mr Wright accepts, and I agree, that the statutory time limit for notification of an appeal is important for the orderly administration of the tax system. Where a taxpayer disagrees with a decision of the tax authorities and intends to pursue the dispute to this Tribunal then it is important that the taxpayer puts the authorities on notice of that fact promptly, so that both sides can seek to resolve the dispute (either inside or outside the Tribunal) and prepare their respective cases while matters are fresh in their minds.
>
> (2) *Length of delay* – This is clearly serious, being two years and nine months in relation to the excise duty assessment, and one year and eleven months in relation to the associated penalty.
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> (3) *Explanation for the delay* – As stated above, I have concluded that Mr Sunner was or should have been aware in September 2013 of the deadline for an appeal to the Tribunal. Although Mr Sunner was still out of time to appeal in September 2013, the delay would have been much shorter. As

stated above, I do not accept that Mr Sunner has been let down in relation to the delegation of the challenge to the disputed decisions. No other reason has been given for the long delay.

(4) *Consequences of granting the application* – HMRC were fully entitled to believe almost three years ago that the liability was admitted and payment terms were being offered. They commenced debt collection proceedings on that basis. They have suffered delays in being given evidence in support of Mr Sunner's hardship application in these proceedings. Many of those delays occurred at times when Mr Sunner had professional representation; I do not criticise the advisers but it points to serious problems in obtaining proper instructions. I do accept that Mr Sunner has suffered some health problems in that time, but there is no evidence that if the appeal were allowed to proceed then there would be any more urgency in pursuing matters before the Tribunal than has been shown so far.

(5) *Consequences of refusing the application* – The amount in dispute is significant and I understand Mr Sunner would find it difficult to meet the demand – for example, HMRC have granted his application for the proceedings to commence without payment or deposit of the disputed duties on grounds of hardship. HMRC are already pursuing the debt in the County Court and thus a refusal to admit his appeal here is likely to crystallise the debt liability.

35. On the three stages directed by *BPP*:

(1) *Seriousness and significance* – As discussed above, the delay in filing the appeal was both serious and significant.

(2) *Why the default occurred* – As discussed above, I do not accept that Mr Sunner was let down by Daljit or his professional advisers in relation to the tax dispute. He has simply failed to comply with the deadline set out clearly in HMRC's decision letter of May 2012. That may be because by September 2013 he had decided to accept liability and thus not challenge the decisions – that is the implication of the September 2013 letter. If he subsequently decided to challenge the decisions, as indicated by his filing a defence in the County Court proceedings in August 2014, he still did not trouble to make a (late) appeal to this Tribunal. Nothing is done until his solicitors take the initiative in early 2015.

(3) *Evaluation of all the circumstances* – I must balance all the above considerations (without attaching special weight to any in particular). While I appreciate the seriousness for Mr Sunner of a refusal to admit his appeal late, I have no doubt that is the best decision in accordance with the overriding objective (to deal with cases fairly and justly). The delays are very long. HMRC clearly stated the deadline in the decision letter. Mr Sunner took advice on that decision and, apart from blaming his son, has given no real reason why no appeal was filed before March 2015.

Conclusions

36. For the above reasons I have decided not to exercise the discretion conferred by s 16(1F) FA 1994 and I shall refuse the application for admission of an out of time appeal.

Decision

37. The application is REFUSED.

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

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 20 JULY 2016