[2016] UKFTT 0543 (TC)

TC05292

Appeal number:TC/2015/07077

PROCEDURE – application for permission to make a late appeal – discretion – Data Select Ltd v HM Revenue & Customs applied – BPP Holdings v HM Revenue & Customs considered – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

HUSSAIN AJAM-HAIDE **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester 28 April 2016

Mr Hussain Ajam-Haide appeared in person

Ms Rebecca Young of HM Revenue & Customs Solicitor's Office appeared for the Respondents

DECISION

Background

1. The Appellant is Mr Hussain Ajam-Haide. He has lodged an appeal with the Tribunal against a decision dated 15 December 2014 assessing a penalty of £1,976 for the dishonest evasion of customs duty and excise duty ("the Penalty"). The notice of appeal was not received by the Tribunal until 9 December 2015.

2. The appeal is made pursuant to section 16(1B) Finance Act 1994 which provides for the appeal to be made to the Tribunal within 30 days of the date of the document notifying the decision. The appeal to the Tribunal should have been made by 15 January 2015 and was therefore out of time. Section 16(1F) provides that an appeal can be made after the end of the 30 day time limit if the Tribunal gives permission.

3. The issue before me is whether I should give permission to the Appellant to make a late appeal against the Penalty. The Respondents have objected to the Appellant's application for permission to make a late appeal and have in turn applied to strike out the appeal if permission is not granted.

Circumstances in which the Appeal came to be Made

4. We heard evidence from the Appellant as to the circumstances in which he came to make the appeal. We also had documentary evidence provided by the Respondents. In the light of that evidence we make the following findings of fact.

5. The Appellant was stopped at Manchester Airport on 8 April 2014 returning from Dubai. He failed to declare 25kg of shisha tobacco which was seized from him. His case on this appeal, if it proceeds, is that he was unaware that the product he was importing contained tobacco and was therefore liable to excise duty. He considers the Penalty was too high and he makes various criticisms of the procedure adopted at the time of seizure.

6. On 27 October 2014 Ms Samantha Easton of HMRC wrote to the Appellant stating that she was enquiring into what she had reason to believe was conduct involving the dishonest evasion of excise duty. The Appellant was invited to co-operate with the enquiry and to provide certain information as to the circumstances in which he imported the shisha tobacco. The letter enclosed various public notices and factsheets.

7. The letter was addressed to the Appellant at an address in Cheetham Hill, Manchester which he had given to the officers at the time of seizure. All subsequent correspondence to the Appellant was sent to the same address.

8. There was no reply to the letter and Ms Easton wrote to the Appellant again on 10 November 2014. She referred to her previous letter and asked for a response by 27 November 2014. She noted that a failure to reply would be taken as an indication of

non-cooperation for the purposes of any penalty. She also said "if you did not receive my previous letter, please let me know as soon as possible".

9. The Appellant sent a letter dated 24 November 2014 to Ms Easton. It was in the form of an email but in fact it appears to have been sent from and to the Appellant. It appears on its face to have been printed off and I infer that a hard copy was sent Ms Easton. In that letter the Appellant gave details of several trips abroad between April 2013 and August 2014. He stated that he had never previously exceeded his allowances for tobacco or alcohol on the trips identified and that he did not realise the "fruit molasses" he was importing from Dubai contained tobacco.

10. On 15 December 2014 Ms Easton wrote to the Appellant giving notice of assessment of the Penalty. She considered his actions had been dishonest. The total duty evaded was £3,295 which would have been the maximum penalty but it was mitigated by 40% to reflect disclosure and cooperation. The notice of assessment stated that payment was due within 30 days, by 15 January 2015. Information about appealing the Penalty was also provided.

11. I was told by Ms Young on instructions that letters seeking payment of the Penalty were sent by the Respondents' debt management department on 11 February 2015 and 7 March 2015. The Appellant did not dispute that was the case and I accept that such letters were sent.

12. Debt collectors acting on behalf of the Respondents called at the Cheetham Hill address on 18 November 2015. The Appellant's younger brother who was then aged 17 was present and he informed the Appellant of the visit shortly afterwards. He passed to the Appellant an enforcement letter which the debt collectors had left at the premises. The debt collectors had also provided contact details for Ms Easton.

13. The following day the Appellant emailed Ms Easton and by 23 November 2015 the Appellant had given authority to Ms Easton to communicate with him by email. On 24 November 2015 Ms Easton sent copies of her three letters to the Appellant including the Penalty notice of assessment.

14. On 3 December 2015 the Appellant sent a notice of appeal to the Tribunal. It was received by the Tribunal on 9 December 2015. The Appellant applied in the notice of appeal for permission to make a late appeal. The reasons given for doing so were as follows:

> "I …have possibly not seen letters containing the information about the appeal to the tribunal or the time scale allowed for the appeal because I have not been staying at home due to work commitments (the address recorded above) and therefore was unaware that the process had gone to debt management before I had chance to make an appeal to the tribunal."

15. The Appellant's case before me was that he had not received the Penalty notice of assessment. His evidence was that the Cheetham Hill address was his mother's address. He was not really staying there at the time of the correspondence although he had been staying there at the time of seizure which is why he gave that address. Since

then he had moved into a flat close by. He often worked and lived away from Cheetham Hill as he was a partner in a carpet cleaning business as well as working for his aunt. Further his mother travelled abroad a lot in connection with her work. He has a young family and is of limited means.

16. In outlining his case the Appellant specifically told me that he did not recall receiving any communication from HMRC between his letter dated 24 November 2014, and 18 November 2015 when the debt collectors called. He said that he was not sure when he had received the notice of Penalty but thought he had asked for it to be sent again. Later he said the first time he saw the Penalty notice dated 15 December 2014 was when it was emailed to him on 24 November 2015. Further, he told me that he had no arrangements in place for dealing with post because he received very few letters, mostly junk mail.

17. Almost as an afterthought at the end of the hearing, and following Ms Young's reference to the letters from the debt collectors, the Appellant told me that after the debt collectors had called he went to his mother's address and found all the correspondence from the debt collectors in a draw. He said that the letters had been placed there by his brother and he had been annoyed with his brother.

18. It is not clear to me why the Appellant had not previously volunteered that information. His initial evidence was simply that he did not recall receiving any communication from HMRC between his letter dated 24 November 2014 and 18 November 2015 when the debt collectors called. I would expect a reliable witness at that stage of the questioning to say that he did not recall receiving any communications but that he had later found correspondence from debt collectors in a draw.

19. I note the equivocal terms in which the Appellant stated in his notice of appeal that he had "possibly" not seen HMRC's letters.

20. In the circumstances I do not consider the Appellant to be a reliable witness.

21. It is also notable that the Appellant did not ask for a copy of the letter dated 27 October 2014 even though Ms Easton's reminder letter suggested he should do so if he had not received it. Based on the evidence I have heard it is likely that the Appellant received Ms Easton's first letter dated 27 October 2014. That was why he did not request a copy of it. The most likely explanation as to why he did not reply to the letter was because he hoped that the enquiry might not be pursued for some reason.

22. I cannot be satisfied that the Appellant did not receive the letters from the debt collector in February and March 2015 at or about the time they were sent. If he did receive them then his failure to respond could also be explained on the basis of a hope that for some reason the debt would not be pursued.

23. When the Appellant sent in the information requested by Ms Easton in his letter dated 24 November 2014 he must have been expecting to hear further from her in

connection with the enquiry. His failure to make an attempt to find out what was happening is consistent with a hope that he Penalty would not be pursued.

24. The burden in this application is on the Appellant to satisfy me as to the circumstances in which he received the notice of Penalty and as to his reasons for not appealing the Penalty in time. I have no reason to doubt the Appellant's description of his living arrangements. However I am not satisfied on the balance of probabilities that he did not receive the notice of Penalty dated 15 December 2014 and the debt collector's letters in February and March 2015 at the time they were sent.

Reasons

25. The approach to applications to extend time was considered by Morgan J sitting in the Upper Tribunal in *Data Select Ltd v HMRC [2012] UKUT 187 (TCC)* where he said as follows:

> "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.
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> 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 [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.
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> 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.
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> 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."

26. Rule 3.9 of the Civil Procedure Rules ("CPR") has since been amended and now reads as follows:

" (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."

27. Data Select is a decision of the Upper Tribunal and it is binding upon me. I must take into account all the circumstances including the overriding objective of dealing with cases fairly and justly and ask myself:

(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?

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

28. I also have regard to the decision of the Court of Appeal in *BPP Holdings Limited v Commissioners for HM Revenue & Customs [2016] EWCA Civ 121* which was concerned with the approach of this Tribunal to non-compliance with Tribunal Rules and directions. It referred to the application by analogy of CPR 3.9 in Data Select although it did not consider the Upper Tribunal's decision in detail.

(i) Purpose of the Time Limit

29. The purpose of the time limit of 30 days is clearly to promote finality. Morgan J in Data Select stressed 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. In the present case I am satisfied that HMRC were entitled to assume after 15 January 2015 that the penalty had become final.

(ii) The period of delay

30. The period of delay in the present case is from 15 January 2015 to 9 December 2015 when the appeal was received by the Tribunal. It is a period of more than 10 months which is a significant delay.

(iii) Explanation for the Delay

31. The burden is on the Appellant to satisfy me as to the explanation for the delay. For the reasons given above I am not satisfied that there was any good explanation. I am not satisfied that the Appellant did not receive the Penalty notice of assessment, or that he did not receive the debt collection letters. In the circumstances I am left with no reliable explanation for the delay.

(iv) Consequences for the Parties of Extending Time

32. If I give permission for the Appellant to make a late appeal then HMRC will lose the finality which from January 2015 onwards they were entitled to expect. Ms Young did not rely on any specific prejudice to HMRC beyond that. In particular she did not suggest that the evidence, documentary or oral, would have been affected by the period of delay. Having said that it is not in dispute that HMRC instigated debt recovery procedures to enforce the debt.

33. If permission is granted then the Appellant will have the opportunity to pursue his arguments. The issues would be determined on their merits.

(v) Consequences for the Parties of Refusing to Extend Time

34. I am not in a position to readily assess the merits of the Appellant's proposed appeal, but I shall assume that he has at least a reasonable prospect of success. Thus he would lose the opportunity to challenge the Penalty if time is not extended. The sum in dispute is significant for the Appellant who has a young family and is of limited means. Quite apart from the amount involved, he would lose the opportunity of challenging HMRC's case that he had dishonestly sought to evade duty.

(vi) Generally

35. I also have regard to the need to ensure compliance with time limits generally, and to the wasted costs and resources involved in applications such as the present.

36. I must balance all the circumstances and factors described above. Having done so I do not consider that the time for appealing should be extended.

Conclusion

37. For the reasons given above the application for permission to make a late appeal is refused. In the circumstances I must strike out the appeal.

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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 02 AUGUST 2016