[2016] UKFTT 0545 (TC)

TC05294

Appeal number: TC/2015/05341

VALUE ADDED TAX AND CUSTOMS DUTY – application for permission to appeal out of time - application denied

FIRST-TIER TRIBUNAL
TAX CHAMBER

77 DIAMONDS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

SHEILA CHEESMAN

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 12 July 2016.

Mrs Renee Mann and Mr Robert Warne appeared for the Appellant

Ms Laura Poots, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by the Appellant for permission to admit out of time its appeal against five decisions made by the Respondents demanding payment of customs duty and import VAT. Those decisions were issued in the form of a "Post Clearance Demand Note", known as a "C18", and accompanied in each case by a covering letter.

Background

2. The five C18s which were issued by the Respondents in this case related to goods which were brought to the UK for processing in the period from 7 July 2012 to 11 March 2014. Where goods are brought to the EU for processing with the intention that they will be re-exported, customs duty and VAT are suspended and arise only if the goods in question are not re-exported within six months of their importation, as evidenced by a return, known as a "C99", which is required to be filed within 30 days of the end of that six month period.

3. In this case, the Respondents issued five C18s because they considered that the Appellant had failed to file the C99s in relation to five imports. Relevant information in relation to the C18s is set out in the table below.

Decision Number	**Date of Original Import**	**Date of Issue of C18**	**HMRC Reference**	**Amount**
1	7 July 2012	27 March 2013	C18124670	£2845.84
2	17 February 2014	1 October 2014	C18170418	£99.82
3	31 January 2014	8 October 2014	C18169143	£704.26
4	24 March 2014	2 December 2014	C18173540	£4818.52
5	11 March 2014	29 December 2014	C18175137	£1032.12

4. Each C18 is a "relevant decision" for the purposes of customs duty and VAT by virtue of Section 13A Finance Act 1994 (the "FA 1994") and sub-section 16(1) Value Added Tax Act 1994. By sub-section 16(1B) FA 1994, an appeal in relation to each C18, as a "relevant decision", should have been submitted within the period of 30 days beginning with the date on which the Appellant received the relevant C18. It follows that the appeal deadline for each of the C18s mentioned in the above table is as follows:-

Decision Number	**Date of Notification**	**Appeal Deadline**
1	27 March 2013	25 April 2013
2	1 October 2014	30 October 2014
3	8 October 2014	6 November 2014
4	2 December 2014	31 December 2014

5	29 December 2014	27 January 2015

5. Each C18 was accompanied by a covering letter notifying the Appellant of the option to request a review or make an appeal and informed the Appellant of the time limit of 30 days for making the appeal.

6. In the event, the Appellant appealed against each C18 on a much later date than the appeal deadline for that C18 set out in the above table. The precise date that the appeal was made is subject to some uncertainty because, although the Respondents accept that they had definitely received the relevant notice of appeal by February 2016, the relevant notice of appeal has a date of 22 July 2015 and the Appellant alleges that it submitted the relevant notice on that date but that the relevant notice was lost by the Respondents. Even if the earlier date of 22 July 2015 is accepted as the date on which the relevant notice of appeal was given, that date is materially later than the appeal deadline in relation to each of the five C18s set out in the above table. The period of time by which the notice of appeal is late ranges from two years and three months (in the case of the earliest C18) to six months (in the case of the most recent C18). If the appeal in relation to the five C18s were to be treated as being made only in February 2016, then the relevant appeals would have been out of time by between thirteen months and two years and ten months.

7. Under rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"), where an enactment provides that an appeal may be made or notified after the period specified in the enactment with the permission of the Tribunal, the Tribunal must not admit the appeal unless it gives such permission.

The position of the parties

8. Mrs Mann and Mr Warne, on behalf of the Appellant, did not dispute any of the relevant law or the above facts. Mrs Mann explained that she joined the Appellant in October 2013 and had spent a considerable amount of time since then in dealing with a number of outstanding tax issues. Mrs Mann said that, in the course of dealing with this dispute, she had engaged in protracted correspondence with the Respondents in relation to the provision of evidence that the goods which are the subject of the C18s were re-exported. She added that she had had great difficulty in finding the appropriate person within the Respondents with which to conduct the dispute in relation to each C18. However, she was unable to produce any correspondence from the Respondents dated more than 30 days after the issue of any C18 and dealing with the question of whether or not the goods which were the subject of the C18 had been re-exported.

9. She also could not explain why she had failed to heed the advice on the time limit for appealing against a C18 that was set out in the covering letter that accompanied each C18.

10. In the course of the hearing, Mrs Mann informed us that she first realised that an appeal should have been made in relation to the C18s in March 2015 and yet did not

lodge the appeal for a further four months. Her explanation for this delay was that she was dealing with two audits from the Respondents over that period and had therefore been too busy to do so.

11. The Respondents claimed that, even if it was accepted that the notice of appeal was given by the Appellant in July 2015, that amounted to a substantial and serious delay. They added that, even the delay between March 2015 (when Mrs Mann said that she first became aware that an appeal ought to have been made) and July 2015 (when the notice of appeal is alleged by Mrs Mann to have been given) was a substantial and serious delay and that the fact that Mrs Mann was busy on other audits over the period between March 2015 and July 2015 did not amount to a reasonable excuse for that delay.

The law

12. In considering whether or not to allow the appeal in this case to proceed out of time, we are bound in the first instance to apply the overriding objective set out in Rule 2 of the Tribunal Rules. This requires the Tribunal to deal with cases fairly and justly.

13. We are also bound by the decision of Morgan J in the Upper Tribunal case of *Data Select Limited v Revenue & Customs Commissioners* [2012] UKUT 187 (TCC), who held, in similar circumstances to the ones which we are considering – namely an application for an extension of time to make an appeal pursuant to a statutory provision – that "the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r3.9, is the correct approach to adopt" (see paragraph 37 of his judgment).

14. We should add that, whilst we understand why the matters set out in CPR 3.9 should, by logical extension, be taken into account in considering the exercise of the Tribunal's discretion to extend the time for making an appeal for which provision has been made in an enactment, CPR 3.9 in its terms is concerned with applications for relief from sanctions imposed for a failure to comply with any rule, practice direction or court order. The sanction for which relief is sought in this case is imposed by an enactment – namely, sub-section 16(1B) FA 1994 – and not a rule, practice direction or court order. Nevertheless, we can understand why the same principles should be adopted in a case relating to sanctions imposed by a statutory provision as in relation to sanctions imposed by a rule, practice direction or court order.

15. In any event, we are obliged to take into account the matters listed in CPR 3.9 in deciding whether or not to grant an extension of time for the making of the appeal in this case.

16. CPR 3.9 requires that, 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."

17. The application of CPR 3.9 has been considered in a number of cases, including *Revenue & Customs Commissioners v McCarthy & Stone (Developments) Limited* [2014] STC 973, *Mitchell v News Group Newspapers Limited* [2014] 1 WLR 795 ("*Mitchell*"), *Denton v TH White Limited* [2014] 1 WLR 3296 ("*Denton*") and, most recently, the Court of Appeal decision in *BPP Holdings v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 121.

18. In giving the judgment of the court in *Mitchell*, the Master of the Rolls stated at paragraph 36 that the requirements set out in paragraphs (a) and (b) above "should now be regarded as of paramount importance and be given great weight. It is significant that they are the only considerations which have been singled out for specific mention in the rule". He went on to note that, whilst it was true that the reference to "all the circumstances of the case" meant that a broad approach should be adopted in such circumstances, "the other circumstances should be given less weight than the two considerations which are specifically mentioned".

19. In the *Denton* case, the Court of Appeal agreed with the principles set out in the *Mitchell* case and went on to say that an application for relief from sanctions should be addressed 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 r3.9(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 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)]"."

Discussion

20. Turning now to the facts which are relevant to this application and adopting the three-stage process suggested by the Court of Appeal in the *Denton* case, we would make the following observations.

The first stage – seriousness of breaches

21. The Respondents allege – and we agree – that the Appellant's delay in making this appeal has been significant and that the failure to comply with the relevant time limits should be regarded as serious. Even if we accept that the appeal in relation to the five C18s was made in July 2015 – and the Appellant has produced no concrete evidence to prove that this was the case – the appeal would have been out of time by between six months and two years and three months. If the appeal in relation to the five C18s were to be treated as being made only in February 2016, then the relevant appeals would have been out of time by between thirteen months and two years and ten months.

22. We consider that it is unnecessary to determine whether the Appellant's assertion that the notice of appeal was given in July 2015 is justified because, even if the notice of appeal was given at that time, the delay in making the appeal was still significant.

23. Moreover, Mrs Mann informed us that she first realised in March 2015 that an appeal should have been made and yet she did not lodge the appeal for a further four months. That too is a serious delay.

The second stage – reasons for default

24. As noted above, the Appellant has given two reasons for the delay in its making the appeal – namely, the fact that it was in regular touch with the Respondents throughout the period of delay in seeking to provide the Respondents with the necessary evidence of re-exportation and did not realise that an appeal was necessary and that Mrs Mann (as the responsible person at the Appellant) was busy on other matters over the period between March 2015 (when she first became aware of the fact that the Appellant should have appealed against the C18s) and July 2015 (when she alleges that the notice of appeal was lodged).

25. We consider neither of these reasons to be a reasonable excuse for the delay. In relation to the first reason, Mrs Mann did not deny that she had received the covering letters accompanying each C18 and notifying the Appellant of the time limit for making its appeal. We were shown a few examples of these letters at the appeal and they were short and clear. It should have been obvious to Mrs Mann that an appeal needed to be made within the 30 day time limit. In addition, although Mrs Mann alleged that, over the period in which the Appellant had failed to lodge the appeal, she was in regular correspondence with the Respondents in relation to the evidence of re-exportation, she was unable to produce a single letter from the Respondents engaging in that debate and dated more than 30 days after the C18 to which it related was issued.

26. In relation to the second reason, the fact that Mrs Mann was dealing with other enquiries from the Respondents over the period between March 2015 and July 2015 is not, in our view, sufficient excuse for the four month delay in making the appeal.

The third stage – all the circumstances

27. Whilst we have some sympathy with the Appellant's predicament, we do not think that there is any circumstance in this case which would justify our giving permission for the appeal to proceed out of time.

28. Whilst we have no doubt that Mrs Mann was acting in good faith in her dealings with the Respondents, we think that it is incumbent on a company which is conducting a business and engaging in litigation over the tax affairs of the business to display at least a rudimentary grasp of the relevant processes.

29. It follows that, when considering all the circumstances of the present case, we do not think that it would be appropriate to allow the appeal to be made out of time. We are bound to give particular weight to the need for litigation to be conducted efficiently and the need for compliance with the rules of the Tribunal. Unfortunately, the Appellant has not followed the simple instructions which were set out in the covering letter accompanying each C18 and it has no reasonable explanation for that failure.

30. We therefore refuse the Appellant's application for permission to appeal out of time against each of the C18s.

31. 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 Rules. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 03 AUGUST 2016