TC05444

Appeal number: TC/2015/00161

Import VAT – Customs Duty – Excise Duty – Inward Processing Suspension Regime – Post Clearance Demand Note – Bill of Discharge - permission to appeal out of time – Data Select criteria - application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ABDALLAH EL-LAMAA — **Applicant /Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at the Royal Courts of Justice on 12 September 2016

Ms Leda Haddad for the Appellant

George Hobson, counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Abdallah El-Lamaa, the appellant, applies to the tribunal to grant permission to admit a late appeal. The appeal is against the decision of HMRC to charge the amount of £5,630.34 under a C18 Post Clearance Demand Note ('the demand note') enclosed with a letter dated 1 June 2012. The appellant's appeal was filed in an appeal notice dated 2 January 2015.

2. The application was opposed by HMRC.

Facts

3. The tribunal received two bundles of documents, one from each party, mainly consisting of correspondence between the parties. The bundles also included two witness statements dated 23 February and 24 August 2016 from HMRC officer Gareth Garland who gave oral evidence and was cross examined at the hearing.

4. The Tribunal finds the following facts.

5. Inward Processing ('IP') suspension provides for the suspension of customs duties, import VAT and excise duty on goods that are imported from outside the European Union ('EU') to be processed and exported outside the EU. Export must take place before the end of the throughput period and this is normally within 6 months of the import date. IP suspended goods are not properly discharged until they have been correctly re-exported and a bill of discharge has been received within the allocated time (thirty days after the end of the throughput period). If a bill of discharge is not received within the allocated time, the customs duties, import VAT and compensatory interest will become due and payable.

6. The appellant was involved in importing certain metal goods from China to the UK and re-exporting them to Lebanon on behalf of family. He was not doing so for profit but in order to assist a relative based in Lebanon. He used a shipping company, Luna Shipping Limited ('Luna' or 'shipping company'), and agent, Seaport Freight Services Ltd ('agent' or 'Seaport'), to manage this process. He onwardly shipped 11 or 12 containers in this manner between 2009 and 2012.

7. On 7 February 2012 HMRC wrote to the appellant to indicate it had received a late inward processing bill of discharge (a C99 return) for inward processing relief in respect of an import dated 10 June 2011. A demand note (a C18) had been issued by HMRC because the return was not received within 6 months and 30 days from the date of import of the goods (by 10 January 2012). However on this occasion the letter stated that the C18 was cancelled and HMRC accepted a late return and therefore there was no debt due. The letter cited the obvious negligence clause within the governing Article 859 of Commission Regulation 2454/93 and warned that any returns received late in the future would not result in cancellation of the debt. The letter also stated that it was the appellant's responsibility to make sure that all returns reached HMRC in time.

8. On 14 April 2012 HMRC wrote to the appellant regarding an importation of 14 October 2011. The letter stated that records showed that the throughput period for the above import had expired and that the appellant was required to provide a bill of discharge (a C99) within 30 days of the end of the period having not already done so.

9. On 1 June 2012 HMRC issued the appellant a C18 demand note for £5,630.34 in respect of unpaid VAT and duties on the import dated 14 October 2011 enclosed with a final decision letter of that date. The demand note requested payment by 10 June 2012.

10. The letter set out the appellant's right to challenge the decision either by requesting a review by HMRC and/or appealing directly to the tribunal. The deadline for the request for a review or an appeal was explained to be 30 days from the date of the decision letter (1 July 2012). No request for a review or appeal was received from the appellant within that time.

11. The appellant's agent, Ivan Mayes of Seaport Freight Services Ltd, emailed HMRC on 12 June 2012 confirming that the goods were exported on 26 October 2011, a C99 was completed and sent on 28 October 2011 but he could only assume HMRC never received a copy. The email attached a scanned copy of the C99 dated and signed by him for 28 October 2011.

12. On 20 June 2012 HMRC wrote to the appellant stating that he had previously been warned about the obvious negligence clause under the relevant Article and that future late returns would not result in cancellation of the debt. Therefore the debt under the demand note would remain.

13. The letter gave three options for the appellant to challenge the decision within 30 days of the letter, by: 1) sending new information or arguments to HMRC; 2) requesting a review from a separate HMRC officer; or 3) appealing directly to the tribunal. Again, this deadline expired on 20 July 2012 without there having been a request for a review or an appeal to the tribunal.

14. In the mean time the appellant forwarded the demand note to his agent, Seaport Freight Services Ltd.

15. On 29 June 2012 the appellant's agent, Ivan Mayes of Seaport Freight Services Ltd, wrote a letter to 'C18 Team' of HMRC. He explained that the C99 in respect of the import of 14 October 2011 was completed soon after the export of the container. In his naivety he considered an original signature was required on the document so posted the paperwork to the National Imports Relief Unit (NIRU) team of HMRC so that he would not be able to prove that the document had been sent. He asked that the C18 demand note sent to the appellant be cancelled as the paperwork was sent in good faith and he hoped HMRC would not penalise the appellant because of this mis-calculation.

16. The letter did conclude '*I do hope you can help resolve this matter*' but did not include a request for a review or ask for an appeal to the tribunal.

17. No further correspondence was received from or on behalf of the appellant and there was no further contact between HMRC and him or his agents until November 2013.

18. On 15 November 2013 HMRC officer Gareth Garfield made telephone contact directly with the appellant regarding collection of the debt under the demand note in a distraint appointment. On HMRC's computer system it is recorded that the appellant was seen by the officer but this is incorrect. During the telephone call the appellant explained that the charge had been levied incorrectly as the goods had never been imported into the country and he would see his agent on 18 November 2013 to collect documents and resolve the matter. The appellant was warned of potential distraint action and he stated he had no car.

19. On 18 November 2013 Officer Garfield again telephoned the appellant. Again the notes on the computer system incorrectly record the appellant as having been seen by the officer. It is recorded that the appellant's English was poor. The notes also stated that if after a review any additional information was required the reviewer should contact the shipping agent as the appellant's English was poor and he held no information. The appellant was warned by the officer that county court proceedings action would be deferred for one month. The appellant had stated he was in a poor condition and had no assets.

20. The officer rang the appellant's shipping company, John Woodgate of Luna Shipping Ltd, who explained the relevant documentation had been forwarded to HMRC showing the goods never entered the country and the assessment was correct. Mr Woodgate informed the officer that all information had already been forwarded to HMRC to negate the debt.

21. On 19 November 2013 Mr Woodgate emailed the appellant's daughter to say he had spoken to Officer Garland and given him his details and would cooperate in any way he could. The email states that Officer Garland was satisfied there is no collection to be given and would be advising his counterparts to contact Mr Woodgate or his agents in Fexistowe. The email stated that appellant's daughter may get the odd call and if she did to refer them to him but hopefully the matter should be sorted out now.

22. It is clear from his oral evidence that while Officer Garland did tell the appellant that HMRC would further investigate the position and consider the debt enforcement options there was no guarantee given that the debt would not be enforced. There was no assurance given by Officer Garland or any other officer of HMRC that the matter had been resolved or concluded.

23. The debt was then left for a further year with no review of its enforcement by HMRC. The unresolved debt enforcement was followed up by letter on 18 November 2014 from HMRC reminding the appellant of the outstanding demand note and the options explained in the decision letter of 1 June 2012. The letter stated that exceptions to the 30-day period might be entertained where a reasonable excuse existed for not submitting the request for a review within the permitted time and the

request for a review was made without unreasonable delay once the excuse ceased. The letter also stated that the tribunal service might entertain an out of time appeal application.

24. On 16 December 2014 the appellant wrote to HMRC asking it to read and consider the letter as a late appeal. The appellant's daughter submitted that she wrote this letter on his behalf. The letter stated that the demand note for payment was issued because HMRC stated they did not receive the C99 from their agents at the correct time due. The appellant stated that the C99 form signed and dated on 28 October 2011 by Ivan Mayes of Seaport Freight Services Ltd was definitely signed and dated within the 30-day period. The appellant stated he received a letter from HMRC dated June 2012 which he forwarded onto the shipping company which he directly dealt with. They were in contact with the agents and advised that contact would be made with HMRC to send the document they were missing.

25. The appellant's letter also stated when the letter from HMRC dated 20 June 2012 was received the appellant was advised by the shipping company that the documents were re-sent and that the matter he reported had already been addressed. Therefore the appellant thought that the letters had crossed in the post. This was stated to be why no further action or communication had been made from June 2012 until December 2014 when the appellant received the letter of HMRC dated 18 November 2014.

26. The appellant's letter of 16 December 2014 was treated by HMRC as a request for formal departmental review.

27. HMRC replied in a letter dated 19 December 2014. The letter refused the request for a review on the basis of the exceptional delay involved, the request being received over two years outside the 30-day review period. HMRC was not satisfied there was a reasonable excuse to conduct an out of time review for the purposes of section 15E(2) of the Finance Act 1994.

28. On 2 January 2015 the appellant appealed to the tribunal by filing a notice of appeal. The grounds of appeal accompanying the appeal notice were in a letter containing similar points to those set out in the appellant's letter of 16 December 2014. In addition the appellant stated that it had become extremely difficult to try and gather information from all the parties involved two/three years on especially when staff had left and he did not deal with imports or exports anymore.

The Law

29. Under section 16(1B) of the Finance Act 1994 any appeal against a relevant decision must be made within 30 days of the document notifying the decision. Under section 16(1F) of the Act it may be made after that period if the Tribunal gives permission.

30. The tribunal has the power to give permission to admit an appeal under Rule 20(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

('Tribunal Rules') and extend time for the notice of appeal under Rule 5(3)(a) of the Tribunal Rules.

31. The tribunal must also apply the overriding objective under Rule 2(1) of the Tribunal Rules to deal with cases fairly and justly. This is supplemented by Rule 2(2) which provides:

(2) Dealing with a case fairly and justly includes— (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; and (e) avoiding delay, so far as compatible with proper consideration of the issues.

32. The tribunal notes the useful summary provided by the First-Tier Tribunal (Tax Chamber) at paragraph 4 of its decision in *Assaf Ali Butt v The Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 95 (TC) on applications to appeal out of time:

'In terms of the tests and general approach that we must adopt in dealing with applications to appeal out of time we have considered the recent decisions of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2103] EWCA Civ 1537 and *Denton v T H White Ltd* [2014] EWCA Civ 906, and those of the Upper Tribunal in *McCarthy & Stone (Developments) Limited* [2014] UKUT 196 (TCC), *Data Select Limited* [2012] UKUT 187 (TCC) and *Leeds City Council* [2014] UKUT 350 (TCC). Taking together all those decisions, we concur with the conclusion reached by this Tribunal in the recent case of *Aeron Mathers* [2014] UKFTT 893 (TC) (at [25]):

> "… briefly, we consider the main points to be that:
>
> - even if Tribunals are not required to follow the full requirements of the latest guidance given to the higher courts in terms of seeking to ensure much stricter adherence to time limits and other directions, in order to ensure the efficient and most cost-effective conduct of litigation, we must certainly pay some regard to that intended stricter adherence to such matters;
> - as Tribunals, we are entitled to approach matters slightly more flexibly than the higher courts are now encouraged and directed to do;
> - we must certainly not, however, allow litigation to be side-tracked by other parties in litigation seeking to rely on, and exploit, trivial procedural steps that their opponents may have failed to address; and
> - in considering generally how to deal with late applications (for instance to bring an appeal, as in this case) we should still address the list of points summarised by Mr. Justice Morgan in *Data Select*. Those points are that we should address the 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 a refusal to extend time or the grant of such an extension?

- We also consider it appropriate in this case to pay some regard to whether we consider that the Applicant was likely to have been able to raise valid and compelling points, should an appeal proceed, particularly because it seemed that the tax and penalties being imposed would be a serious matter for the particular appellant; and

- It is also relevant to pay some regard to the whole conduct of the enquiries, and to the issue of whether there have been repeated delays, non-cooperation and failures to advance points, arguments and explanations at many earlier times."'

33. Subsequent to this decision the Court of Appeal handed down judgment in *BPP Holdings v HMRC* [2016] EWCA Civ 121; 2016 1 WLR 1915 in which the Senior President of Tribunals stated at paragraph 15-16 and 37-38 of his judgment:

15.There are two conflicting decisions of the UT about the principles that are to be applied when non-compliance with rules and directions falls to be considered by a tax tribunal. The first in time is the decision of Judge Sinfield in *McCarthy & Stone (Developments) Ltd v HMRC* [2014] UKUT 197 (TCC), [2014] STC 973 and the second is the decision of Judge Bishopp in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC) where he declined to follow Judge Sinfield's approach. The *Leeds* decision was promulgated after Judge Mosedale's determination in this case and accordingly she could not have known of it. Judge Bishopp followed his earlier reasoning in *Leeds* in coming to the conclusion that the FtT in this case had erred in law.

16.The key question underlying the two decisions 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 v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3926 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.

……..

37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.

38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.

34. Although he did not expressly analyse *Data Select Limited v HMRC*, at [44] of the judgment in *BPP Holdings* the Senior President said: "Morgan J applied CPR 3.9 by analogy…in just the manner I have suggested is appropriate".

35. Mr Justice Morgan referred to Rule 3.9 of the Civil Procedure Rules ("CPR") at [37] of his judgment in *Data Select*. Rule 3.9 has since been amended and now reads:

> "(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."

36. In *R (oao Dinjan Hysaj) v SSHD* [2014] EWCA Civ 1633 ("*Hysaj*"), Moore-Bick LJ, giving the judgment of the Court of Appeal, gave guidance on whether the merits of a substantive appeal should be considered in applications for extension of time. His Lordship stated at [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases."

37. In *Raymond Harvey v HMRC* [2016] UKFTT 597 (TC) the First-Tier Tribunal in considering an application for permission to appeal out of time adopted the approach of using the structure and the criteria set down by Mr Justice Morgan in *Data Select* at paragraph 34 of that decision:

> 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.

Submissions of the parties

Appellant

38. The appellant was very ably represented by his daughter who made six points in support of the application.

39. The first point was that as all communications were dealt with by the agents on the appellant's behalf there was no reason why he would behaved any other way than the way he did. The appellant is a chauffeur with no knowledge of imports and exports thus he used a shipping company and agent to manage the transactions. The same companies were used for all transactions. The appellant had no direct communication with the relief unit or HMRC generally concerning all the containers onwardly shipped. The appellant never had any audit trail. He did not know what a C99 document was nor what the circumstances surrounding it were.

40. The second point was that the demand note of 1 June 2012 was the first time HMRC did not receive a C99 document within the period of time that the appellant was importing and exporting. When the appellant received the demand note he forwarded it to his shipping agent to find out what was going on. At that point the appellant did not understand that the responsibility was on him to deal with the letter. It was submitted that Mr Mayes' email of 12 June 2012 to HMRC confirmed that the container left the UK and that a C99 was completed and sent but for some reason HMRC did not receive it. While the letter of 20 June 2012 gave him three options and he did not appeal within 30 days, the appellant did act within that time. He contacted the shipping company and forwarded the letter to them. Hence Seaport Freight Services Ltd wrote to HMRC's C18 team explaining why C99 was late on 29 June 2012. All the agent's previous documents were sent by post. The issue was therefore addressed at the time by the agent and there was a challenge made to HMRC's letters of 1 and 20 June 2012.

41. The third point was that following Seaport's letter of 29 June 2012, the appellant was assured over the phone by Seaport that the issue had been addressed and thus the appellant was so assured. Emails between Seaport and Luna in November and December 2014 evidence their belief, which the appellant shared, that the matter had been resolved in June 2012. While at no stage did the appellant receive anything in writing to say that the matter had been resolved either from HMRC, he had received nothing to say the representations had been rejected. Nothing further happened for 17 months until November 2013 when Officer Garland contacted the appellant.

42. The fourth point was that because of the appellant's trusted relationship with the shipping company, they having completed eleven other transactions, he had no reason to believe that the matter was not resolved. Given this trusted relationship and appellant having no uncertainty that the issue was not resolved, he finally took

personal ownership of the dispute with HMRC when it arose again on receipt of the letter of 18 November 2014. It was submitted that the appellant would have acted earlier if he had considered there was any risk that it had not been resolved.

43. The fifth point was that the appellant's substantive appeal turns on only one document not being received in time. It was submitted that the appellant was being held responsible for one document where his shipper sent it to HMRC but HMRC deny receiving it. It was submitted that evidence exists that the sums charged are not due and that the containers left within the right time and the note was sent to HMRC.

44. The sixth point was, while HMRC said that it has taken the appellant 31 months to appeal the decision of 1 June 2012 it had not acted expeditiously either. At the time the appellant needed to appeal in June 2012 or at least address the issue, action was taken and a letter was sent from Seaport within a month. There was no further communication from HMRC for 17 months thereafter until November 2013 when Mr Garland contacted the appellant. Thereafter the appellant was assured once again by the shipping company that there was nothing to worry about and so he did nothing further. There was then a further 12 months before HMRC wrote to the appellant in November 2014. Thereafter the appellant took over the dispute and acted expeditiously thereafter resulting in the request for a review on 16 December 2014 and appeal on 2 January 2015.

HMRC

45. Counsel for HMRC submitted that there was a public interest in the finality of their decisions. It was submitted that the length of the delay was extraordinary in being 31 months between the demand note of 1 June 2012, which explained the option of appealing to the tribunal within 30 days, and the appeal being filed on 2 January 2015.

46. It was submitted that there was no good explanation for the delay. The appellant was never informed that the matter had been resolved or concluded. The appellant was sent a warning letter by HMRC on 7 February 2012 that future late returns would not result in cancellation and that it was the appellant's responsibility to ensure returns reach HMRC in time. The appellant was sent a letter on 14 April 2012 requiring a bill of discharge to be sent within 30 days in respect of the import of 14 October 2011.

47. On 1 June 2012 the appellant was sent the C18 Post Clearance Demand Note which explained his options of appealing to the tribunal or requesting a review within 30 days. As a result of Seaport Freight Services' email on 12 June 2012, HMRC wrote on 20 June 2012 informing the appellant that a belated bill of discharge had been received. This letter again explained the options for the appellant in terms of a review to the tribunal or request for a review within 30 days. At no point thereafter was the appellant told that the matter had been concluded and Officer Garland never gave this assurance. If there was any doubt it would have been prudent to seek an assurance from HMRC. The appellant was made aware of his responsibilities both in sending bills of discharge, paying duties and making appeals and the timescales in

which each was required and could not reasonably rely on others to discharge these duties.

48. It was submitted that where the appellant engaged an agent to act on his behalf it was still his responsibility to discharge the duties or ensure they were discharged on his behalf. This must apply with respect to requesting reviews or making appeals. The lack of knowledge of procedural rules cannot afford the appellant an opportunity to pursue the present appeal out of time. It was submitted that the fact that a litigant in person 'does not really understand' or 'does not appreciate' the procedural courses open to him for months does not entitle him to extra indulgence – see *Tinkler v Elliott* [2012] EWCA Civ 1289.

49. It was submitted that there was a consequence for HMRC in extending time in that it would have to divert resources to defending an appeal against a decision which it was entitled to conclude was final.

Discussion and Decision

50. This decision is not the forum in which to analyse the potential effect of the stricter approach to compliance with rules and directions mandated by *BPP Holdings* when balancing or giving weight to the competing factors in *Data Select*. However, the Tribunal adopts the approach of considering the *Data Select* questions in the context of the stricter approach in *BPP Holdings.*

Purpose of the time limit

51. The purpose of the time limit in which to bring an appeal is in pursuit of a clear public interest in the finality of the decisions of HMRC. Time limits enshrine the need to bring the conduct or prospect of litigation to a speedy conclusion. As time limits, whether imposed by statute, tribunal rule or tribunal directions serve the public interest, compliance is normally to be expected.

52. In *John O'Gaunt v HMRC* TC/2014/04510, the Tribunal explained the purpose of such time limits at paragraph 21 of its decision: '*It is designed to provide certainty and it is not in the interest of justice to permit appeals after long periods of delay. There is a public interest in the finality of decisions of the commissioners.*' In *North Berwick Golf Club* [2015] UKFTT 0082 (TC) at [33] the Tribunal stated '*time bar provisions are created for a reason and that is that they provide finality and certainty and that is not a matter that should be lightly disregarded*'.

53. Rule 2(2)(e) of the Tribunal Rules, part of the overriding objective, requires the tribunal to avoid delay so far as compatible with proper consideration of the issues.

Length of the delay

54. The length of the delay in this case before a notice of appeal was filed and accepted by the tribunal on 2 January 2015 was extraordinary. It amounted to two years and six months from the deadline of 1 July 2012.

55. The tribunal notes that the Upper Tribunal in *Romasave (Property Services) Limited v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC) at [96] stated that '*a delay of more than three months cannot be described as anything but serious and significant.*' The tribunal also notes that the Upper Tribunal in *O'Flaherty v Revenue and Customs Commissioners [2013]* UKUT 0161 (TCC) stated that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely.

Is there a good explanation for the delay?

56. The tribunal considers there to be an insufficiently good explanation for the delay.

57. Following the decision of 1 June 2012 and expiration of the appeal period on 1 July 2012, the appellant was never informed by HMRC that the matter had been concluded or resolved whether orally or in writing.

58. Prior to the decision under appeal the appellant had received a warning letter from HMRC on 7 February 2012 that future late returns would not result in cancellation and that it was the appellant's responsibility to ensure returns reached the HMRC in time. This warned him to ensure that he complied with deadlines and that this was his personal responsibility. The appellant was also sent a letter on 14 April 2012 requiring a bill of discharge to be sent within 30 days. This was not done and it is not clear whether it was forwarded to his agent or shipping company. The explanation that was latterly given on 12 June 2012 could have been given within 30 days of 14 April 2012. The C99 dated 28 October 2011 which was sent on 12 June 2012 could have been re-sent to HMRC within the earlier time period. It would have been clear at this stage, had the appellant or agent turned their mind to it, that the document had not been received by HMRC in October 2011.

59. The appellant was informed personally twice of his appeal options to the tribunal and the timescale involved. On 1 June 2012 the appellant was sent the C18 Post Clearance Demand Note which explained his options of appealing to the tribunal or requesting a review within 30 days. As a result of Seaport Freight Services' email on 12 June 2012, HMRC wrote on 20 June 2012 informing the appellant that a belated bill of discharge had been received. This letter again explained the options for the appellant in terms of a review to the tribunal or request for a review within 30 days.

60. The appellant was made aware of his options and it was his responsibility to pursue them if he chose. The only actions on his behalf within the required 30-day time period, the agent's email of 12 June 2012 and the agent's letter of 29 June 2012, were not appeals to the Tribunal nor indeed requests for a review from HMRC.

61. It is fair of course to say that these communications, the resending of the C99 and the agent's explanation for the non-receipt of the C99, did constitute some action on behalf of the appellant during the required time period. However it was not suggested that the appellant believed either to be a request for a review or a request for an appeal. Even if there had been such a belief on the appellant's behalf, a

reasonable taxpayer would have been prompted to contact HMRC shortly thereafter in the absence of any further reply from HMRC upholding or rejecting the review or appeal.

62. At no point was the appellant told by HMRC that the matter had been concluded and Officer Garland never gave this assurance. If there was any doubt it would have been prudent by at least the autumn of 2012 to seek assurance from HMRC as to the position in respect of his review or appeal. The appellant was made aware of his responsibilities both in paying duties and making appeals and the timescales involved and could not reasonably rely on others to discharge these obligations.

63. It could not be reasonable for the appellant to rely upon his agent or shipping company for him. It was his responsibility to pursue avenues of review or appeal. Indeed he never received any written assurance from either the agent or the shipping company that the matter had definitely been concluded even if their correspondence may have led him to believe this to be the case. In any event, it would not be that of be reasonable to rely upon the word of an agent in the absence of confirmation from HMRC.

64. The lack of knowledge of procedural rules could not of itself afford the appellant an opportunity to pursue the present appeal out of time. It would be his responsibility to inform himself of the routes of challenge available and procedure to be followed.

65. It is fair to the appellant to note that there were substantial delays on HMRC's part between July 2012 and November 2013 and November 2013 and November 2014 in seeking to enforce the demand note. To some extent this lack of action by HMRC within sensible timescales may have led the appellant into a false sense of reassurance. Therefore the tribunal has some degree of personal sympathy for the appellant who had, although not reasonably, come to rely both on these delays on the part of HMRC in enforcement and upon his agent and shipping company in their dealings with HMRC.

66. Indeed, accepting that the appellant's English is not the best, the contact by telephone by HMRC twice within a period of three days in November 2013 would have put a reasonable taxpayer on notice that the matter were not concluded nor resolved. It would be sensible to ensure that matters were challenged immediately and in writing and that previous assurances that matters were resolved could not be relied upon. The mention by HMRC of court proceedings and available assets for enforcement would be likely to concentrate the mind of a taxpayer that there was a pressing need to take responsibility for the conclusion of any dispute.

67. Therefore, even accepting some mitigation on behalf of the appellant, none of the above can reasonably obviate the appellant's personal responsibility to bring his appeal within a reasonable time period.

Consequences of an extension

68. The consequences of granting an extension of time for the appeal to be brought would be that HMRC would have to divert resources to defending an appeal against a decision which it was entitled to conclude was final. However this factor does not hang heavily in the balance. The resources involved in defending the appeal would not be substantial and HMRC would not be greatly prejudiced, as it appears to have access to all the records and documents involved. It would be in the position to fully defend the appeal.

69. The consequence of granting an extension for the appellant would be the appeal proceedings and having the substantive merits considered.

Consequence of no extension

70. The consequences of not granting an extension of time would be that HMRC would not have to expend any further time or financial resources in defending the appeal. If the appeal does not proceed then the demand note stands and it is entitled to payment thereupon.

71. The consequence of not granting an extension for the appellant would be the appeal proceedings would not proceed and the substantive merits would not be considered. HMRC would be entitled to continue enforcement action upon the demand note and the appellant would be expected to pay the sum of money involved.

Conclusion

72. In considering all the competing factors in the balance the tribunal has concluded that the length of delay and the insufficiently good explanation provided by the appellant must weigh against him. Therefore the tribunal has decided that it is not in the interests of justice and overriding objective to extend time for filing the notice of appeal. The tribunal dismisses the application for permission for the appeal to be admitted out of time.

73. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 24 OCTOBER 2016