[2017] UKFTT 0847 (TC)

TC05572

Appeal number: TC/2016/03768

Procedure – application by taxpayer for permission to make a late appeal – application opposed and application by HMRC to strike out – Tribunal's discretion to extend time – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAHMED JAVID BALA **Appellant**

- and -

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

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC
MR LESLIE BROWN

Sitting in public at Alexandra House, Manchester on 17 November 2016

The Appellant in person represented by his wife

Rupert Davies (Counsel), instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. On 12 July 2016 the Tribunal received an appeal by Mr Mahmed Javid Bala ("the Appellant") against a decision by the Respondents ("HMRC") dated 11 June 2014 assessing a penalty of £1,913 for the dishonest evasion of customs duty and excise duty ("the Penalty"). The appeal notice was dated 1 July 2016.

2. The appeal is made pursuant to section 16(1B) Finance Act 1994. This 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 therefore have been made by 11 July 2014. 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 us is therefore whether we 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 granted.

4. We had documentary evidence provided by the Respondents setting out the course of events leading to the appeal. Mr Bala does not speak English or does not speak it well enough to represent himself. He was therefore assisted by his wife and Mrs Bala explained on her husband's behalf the reasons for the delay in appealing. In the light of that evidence we make the following findings of fact.

The Facts

5. The Appellant was stopped at Manchester Airport on 22 March 2013 on his return from Mumbai. His luggage was searched and 16kgs of undeclared shisha tobacco was seized. His case on this appeal, if it proceeds, is that this was the first time he had been stopped at the airport and the first time he had imported this product. He was unaware that the product he was importing contained tobacco and was therefore liable to excise duty. He points out that as far as he was aware it was molasses fruit flavour. The boxes did not mention anything about it containing tobacco, had none of the usual health warnings associated with tobacco and only had the names of different fruits. He had explained this to the customs officer at the time. His grounds of appeal elaborate on this by explaining that neither he nor his wife smoke and that he only bought the product because the seller had assured him that it was just fruit molasses.

6. On 4 February 2014 HMRC wrote to the Appellant notifying him that it was enquiring into the circumstances of this seizure to ascertain whether there had been any dishonest conduct. The letter, in a standard form, invited his co-operation in the enquiry. It offered a meeting and set out the information HMRC required should the Appellant prefer to deal with the matter in correspondence. The letter enclosed

various public information notices designed to assist the Appellant in understanding his rights and dealing with the matter. It asked for a reply within 30 days.

7. The letter was duly received by the Appellant because on 12 February 2014 his wife called HMRC on his behalf to explain that he did not understand English and that she was unaware of the seizure. The officer to whom she spoke gave her an explanation of the letter and its enclosures. She indicated that she would speak to her husband and reply as soon as possible.

8. On 12 March 2014 HMRC wrote again recording that they had received no reply to their letter of 4 February 2014. They asked for a reply by 26 March 2014, failing which they would assume that the Appellant had decided not to assist with their enquiry.

9. We conclude that that letter was also received by the Appellant because on 26 March 2014 his wife called HMRC again to explain that her husband had lost the letter of 4 February 2014 and asked for a further copy. She confirmed that her husband intended to cooperate with the enquiry. HMRC indicated that they would extend their deadline by a few days and reissued the Appellant with their letter of 4 February 2014.

10. On 2 April 2014 the officer concerned telephoned the Appellant's wife to enquire whether the Appellant had received the reissued copy of the original letter. She said that he had not but that she would call on 9 April 2014 if it had not been received by then. Having heard nothing further, on 6 May 2014 the officer concerned again telephoned the Appellant's wife to enquire whether the Appellant had received the reissued copy of the original letter. She confirmed that he had. She also said that she would call by 8 May 2014 to confirm his response and co-operation.

11. There is no record of any further call being made and accordingly, on 11 June 2014, HMRC notified the Appellant that they were charging the Penalty. The letter was correctly addressed and the Appellant did not suggest that he had never received it. We find that it was duly received in the ordinary course of post, as the previous correspondence had been.

12. The next documentary record is a letter from the Appellant dated 14 January 2015 to HMC's Debt Management Unit. This letter sets out the circumstances of the seizure from the Appellant's perspective (see paragraph 0 above). The Appellant's wife told us that she had made other calls to HMRC (in addition to those mentioned in paragraphs 7 and 9 above) and the Appellant's letter refers to a telephone conversation regarding the seizure on 12 January 2015. The Appellant's letter and whatever other telephone calls were made to HMRC appear to have been stimulated by HMRC's actions in seeking to recover the Penalty.

13. As the matter was by then being dealt with by the Debt Management Unit it may be that the records of any calls (including that on 12 January 2015) are held by that Unit. We saw none and the Appellant was unable to produce his own record of such calls or when they were made. His wife explained that he had written a letter to

HMRC before that of 14 January 2015 but had been told that it had not been received. He was unable to produce a copy of the earlier letter. She also said that they had been given the address to which to write in a previous telephone call. It may be that the first letter, if it did exist, never reached HMRC possibly because it was wrongly directed and the Appellant was only given the correct address on 12 January 2015.

14. In any event on 9 February 2015 the HMRC officer in local compliance who had conducted the original enquiry, had dealt with previous telephone calls and had issued the penalty notice responded to the Appellant's letter of 14 January 2015. He summarised the facts leading to the issue of the Penalty and indicated that after such a long passage of time he could see no reason to reduce the Penalty in the light of the information with which he had now been provided. He suggested that the Appellant re-read the leaflets he had been sent and either apply for a review of his decision or appeal to this Tribunal.

15. The Appellant did neither immediately. However, on 21 June 2016 the Appellant or his wife evidently telephoned the HMRC officer concerned. The officer wrote to the Appellant on 21 June referring to a telephone conversation of that day during which the officer outlined the basics of applying to the Tribunal for a late appeal and providing contact details for the Tribunals' Service helpline. His letter also enclosed a copy of the 'Warning' letter issued at the time of the seizure and the letter of 4 February 2014.

16. It was only at that stage that the Appellant lodged his notice of appeal with the Tribunal.

Extension of time

17. The burden in this application is on the Appellant to satisfy us as to his reasons for not appealing the Penalty in time. His wife explained the Appellant thought the matter was closed following the original seizure and that nothing more would follow. He had not appreciated the need to take any further action until HMRC started taking action to collect the Penalty.

18. The Appellant's notice of appeal suggests that he had been "trying to sort it out with HMRC". We saw no evidence of any sustained action on the Appellant's part to support that statement. The notice of appeal also suggested that the delay had occurred because there was a misunderstanding on both sides. It also referred to the "*very laid back and irresponsible response from HMRC.*" We saw no evidence, however, to suggest any misunderstanding on HMRC's part and the officer's handling of the case appears to have been both timely, efficient and helpful rather than "laid back and irresponsible". We find that none of these implicit criticisms of HMRC is justified.

19. The considerations that we should have in mind in deciding whether to extend the time for appealing were summarised by Judge Cannan in *Hussain Ajam-Haide v HMRC* [2016] UKFTT 543 (TC). We must take into account all the circumstances

including the overriding objective of dealing with cases fairly and justly and ask ourselves:

(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?

20. Taking each of these in turn:

(1) The purpose of the time limit of 30 days is to promote finality. In this case HMRC were entitled to assume that after 11 July 2014 the Penalty had become final. Even if on 9 February 2015 the officer concerned was prepared to contemplate the possibility that the Appellant might then be permitted to appeal out of time, HMRC were plainly entitled to assume that the Appellant had accepted that the matter had become final within a reasonable time of 9 February 2015, say, by the end of March 2015.

(2) The period of delay in this case is from 11 July 2014 to 12 July 2016 when the appeal notice was received by the Tribunal. Even allowing the possibility that in February 2015 HMRC would not have objected to the Appellant's application for an extension, a further 18 months passed before the Appellant did anything to lodge his appeal and apply for an extension of time to appeal.

(3) The burden is on the Appellant to satisfy us as to the explanation for the delay. No satisfactory explanation for the delay was offered. We can accept that the Appellant may have been wholly unfamiliar with the issues to which the seizure gave rise and with the procedures that then had to be followed. That may be true for the great majority of taxpayers. HMRC, however, clearly explained the issues and the procedure to his wife who was communicating with HMRC on his behalf. They also explained to her what was being asked of him. There was no suggestion that she had failed to explain matters to him. His actions (or rather his failure to take any significant action until several months after the event and then the further significant delay before notifying his appeal) have to be set against all that he was told at the time.

(4) If we give the Appellant permission to make a late appeal, then HMRC will lose the finality that they were entitled to expect. Mr Davies for HMRC fairly acknowledged that HMRC could not claim any particular prejudice beyond the loss of finality if we were to allow an extension.

(5) The consequence of not allowing an extension of the time for appeal is that the Appellant will lose.

21. Time limits are set for a purpose, to ensure that appeals are conducted fairly and efficiently and in a timely fashion. At the very least the failure to respect them requires an explanation. In the present case both the initial delay in responding and

then the further delay in notifying any appeal are essentially unexplained. While we recognise that our refusal to extend time means that the Appellant loses, he forfeited his automatic right of appeal once he had failed to adhere to the time limit. His failure was not minor or insignificant but substantial and required satisfactory explanation, of which there was none.

22. We therefore refuse to extend the time limit for the Appellant to appeal and his appeal must therefore be struck out as out of time.

23. 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.

MALCOLM GAMMIE CBE QC
TRIBUNAL JUDGE

RELEASE DATE: 21 DECEMBER 2016