TC05671

Appeal number: TC/2016/03610

VAT – application for leave to appeal out of time – whether reasonable excuse – no – application for extension of time refused – application for strike-out - granted.

FIRST-TIER TRIBUNAL
TAX CHAMBER

GULLANE GOLF CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: NOEL BARRETT

Sitting in public at George House, 126 George Street, Edinburgh on Wednesday 9 January 2017

Mr Philip Simpson, QC, instructed by Scott Moncrieff, for the Appellant

Susan Elwood, Officer of HMRC, for the Respondents

DECISION

1. The hearing was in respect of an application dated 1 July 2016 for an extension of time to appeal against the respondents' ("HMRC") decision not to allow a claim for overpaid VAT. HMRC's decision was made on 24 June 2009.

2. In accordance with Section 83G Value Added Tax Act 1994 ("VATA") the appellant should have notified the request within 30 days of the decision, namely, 24 July 2009.

The background to this appeal

3. On 27 March 2009, (the first page of the letter was dated that day and the second the day previously) the appellant submitted a voluntary disclosure for over-declared output tax for VAT periods covering 1 January 1990 to December 1996 and from 2005 to 2008 in the sums of £436,876.69 and £342,725.96 respectively. That voluntary disclosure also included a claim for compound interest. Since the deadline for submission was 31 March 2009, it was sent by "guaranteed post". It was stamped as received by HMRC on 30 March 2009.

4. On 28 April 2009, the claim for compound interest was rejected by HMRC on the basis that that was excluded under Sections 78 and 80 VATA and Regulation 29 of the VAT Regulations 1995.

5. On 5 May 2009, the Fleming Claim team of HMRC acknowledged receipt of the voluntary disclosure claims ("the claim"). On 24 June 2009, HMRC notified the appellant that the claim, totalling £779,602.65, had been rejected and intimated the right to statutory review and appeal rights.

6. It is not disputed that neither the appellant nor HMRC have any record of any further correspondence between 24 June 2009 and 22 February 2014.

7. Between 22 February 2014 and 14 May 2014, the appellant submitted further claims for the years 2009 to 2010. The claim for 2009 was rejected as it was made out of time. The 2010 return was returned for this to be resubmitted in the correct format. A resubmission of the 2010 claim was made by the appellant on 14 May 2014.

8. HMRC had rejected numerous other similar claims from other golf clubs which had not been appealed. The clubs that appealed the rejection decisions to the Tribunal were sisted behind the lead case of *Bridport & West Dorset Golf Club* ("Dorset"). The European Court of Justice handed down its decision in that case on 19 December 2013.

9. On 20 May 2014, HMRC wrote to the appellant to acknowledge receipt of the voluntary disclosure for 2010 and stated that no claims were being processed or

rejected as the decision reached by the European Court of Justice was being considered.

10. On 25 June 2014, HMRC published Revenue & Customs Brief 25 (2014) ("Brief 25") which provided an update on policy following the decision in *Dorset*.

11. On 28 January 2015, a further voluntary disclosure was submitted by the appellant for the 2011 year.

12. On 9 February 2015, HMRC published VAT information sheet 01/15 setting out HMRC's view on claims such as those of the appellant.

13. On 24 April 2015, the representative for the appellant wrote to HMRC and requested copies of any communication HMRC held as the appellant had been unable to locate correspondence relating to the claims from 1990 onward. On 22 May 2015, HMRC forwarded copies of correspondence between 27 March 2009 to 28 January 2015 being that which is identified above together with a complete ledger breakdown of VAT transactions.

14. On 18 December 2015, the appellant's representative wrote to HMRC requesting a review of the decision of 24 June 2009 and, if that was rejected, permission to appeal to the Tribunal. HMRC rejected both requests on 26 May 2016.

15. The representative had argued that the Club had believed that the previous Club Secretary had requested a review timeously but no correspondence had been found and he was not returning emails and other attempted communication.

16. In support of that contention about a review request, it was argued that on 17 July 2009, the then Secretary of the appellant had prepared his usual monthly report for the Committee of the appellant. In relation to VAT, that report stated:-

> "VAT
>
> Have now received an initial response turning down our claim and in accordance with procedure have requested that the matter is reviewed."

17. HMRC hold no evidence of a request for a review and the appellant has no other contemporaneous documentation on this topic.

18. As noted above, the appeal was lodged with the Tribunal on 1 July 2016 and HMRC lodged their opposition thereto on 17 August 2016 and sought a strike out of the appeal. On 28 September 2016, the appellant opposed the strike out application.

Appellant's submissions

17. It is acknowledged that the appeal is approximately 6 years late.

18. At the outset of the hearing Mr Simpson indicated that in addition to the arguments in the Skeleton Argument he argued that the appellant had served a Notice in terms of Section 98 VATA, being the application for review, and that it had been

sent by post in a letter addressed to HMRC by the then Club Secretary. He then relied on Section 7 Interpretation Act 1978 to the effect that service would have been deemed to be effective "… at the time at which the letter would be delivered in the ordinary course of post". There was no evidence to suggest that mail had not been delivered to HMRC.

19. If that were the case, then in terms of Section 83 VATA,

(a) HMRC were obliged to review the decision,

(b) in terms of Section 83F(6) HMRC must give the taxpayer notice of the conclusions of the review and their reasoning within a period of 45 days,

(c) in terms of Section 83F(8) if notice of the conclusions is not given then the review is to be treated as having concluded that the decision is upheld, and

(d) in that event there is a mandatory requirement that HMRC notify the taxpayer of that conclusion and in this case that had simply not happened. Accordingly the 30 days for appeal had not started to run.

20. In the event that that argument was not successful then Mr Simpson relied on the arguments in the Skeleton Argument that

(a) The appellant believed that it had adhered to the time limit and that together with all other cases following *Dorset* its claim was simply on hold pending the outcome of that case.

(b) Once it became aware that no review was in hand it acted with reasonable alacrity.

(c) There would be no prejudice to the respondents since any repayment due would have been made in or about October 2016 and that the delay by comparison is minimal. By contrast the appellant would lose the opportunity to claim a significant sum of money.

(d) It was recognised that permission to lodge a late appeal would disturb the finality that appeared to have been reached but in any event finality would only recently have been reached if an appeal had been timeously lodged.

(e) There are no implications for other cases and there is no policy in the Value Added Tax Acts that gainsays the grant of permission.

(f) No evidence had been lost in consequence of the fact that the application for review was not received in time.

HMRC's submissions

21. HMRC are adamant that no application for review was received and indeed are clear that there was no contact with HMRC for many years and even when the later claims were lodged there was no reference to the claim.

22. HMRC take the very straightforward view that the appeal was made to the Tribunal some 2535 days after the date of decision and therefore was extremely out of

time. There would be prejudice to HMRC, probable loss of evidence and if granted it would open the door to the many other similar claims.

23. The onus of proof lies with the appellant and if that is not discharged then the appeal falls to be struck out under the provisions of Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 as the Tribunal would not have jurisdiction in the proceedings.

24. HMRC relied on the *Advocate General for Scotland v General Commissioners for Aberdeen City*[1] *("Aberdeen"), Romasave (Property Services) Ltd v Commissioners of HMRC*[2] *("Romasave"), Data Select v Revenue & Customs Commissioners ("Data Select")*[3], and *Revenue & Customs Commissioners v BPP Holdings Ltd & Others ("BPP")*[4].

The evidence

25. The appellant only led evidence from Mr Steven Anthony who had been the Secretary of the appellant at the time that the claim was made. In summary his evidence was to the effect that he had requested a review and having heard nothing from HMRC believed that the claim had been sisted behind the *Dorset* appeal.

26. Mr Anthony's evidence was very short but we had some difficulty with it. He argued that he had prepared and submitted the claim (and the later claims) because he was familiar with that aspect of VAT law. Whilst that may have been the case, it became apparent, as Mr Simpson conceded, that he was less conversant with the detailed rules of procedure. That is evidenced by the facts that, for example, at least one claim was out of time and another was in the wrong format.

27. Our starting point was the whole question of what happened when the rejection letter was received from HMRC. In his witness statement Mr Anthony stated that "due to the private nature and complexity of this matter, all letters etc were word processed by myself, sent by post and occasionally faxed, printed and filed in the VAT claim files together with HMRC's letters and responses". There is then a bland assertion that in early 2014, when he was still the Secretary, some documents were sent to offsite storage and many documents and files were destroyed. There is a lack of clarity as to precisely what was destroyed and why. Nevertheless he did say that the records from which he prepared the claim (and in the event of a successful outcome to this application which would be required for verification of the claim) could still could be sourced. No detail was furnished.

28. On the other hand, none of the correspondence from HMRC or indeed his correspondence to HMRC, other than the original claim, could be found. We explored that with him. We asked how the application for review had been handled. He said that he had written a simple letter enclosing the decision letter and sent it to

[1] 2005 CSOH 135

[2] 2015 UKUT 0254 (~TYCC)

[3] 2012 STC 2195

[4] (2016) EWCA Civ 121

HMRC. He had used a computer. If he is correct that he had done so before he reported to the Committee, as indicated in paragraph 15 above, then that was shortly after the claim. We asked why that letter had not been filed in the same electronic folder as the original claim or indeed elsewhere on the computer. He could not explain that. We asked where it might have been filed. All he could say was that it was a simple letter. We asked if he had a 'brought forward' system in order to enable him to check whether a response would be received timeously. He said not. We found that quite remarkable for a claim which was valued in excess of three quarters of a million pounds. The original claim had been sent by "guaranteed post" and yet this "simple", but critical letter was apparently sent by ordinary mail.

29. We went on to ask why he had asked for a review since he had apparently enclosed no additional information in support of such a review. He described the application for review as being an appeal.

30. He relied on the argument that since he knew that numerous appeals were stood behind *Dorset* then it was reasonable to assume that this claim would have been stood behind it. That ignores the basic point that a request for review is not an appeal to the Tribunal.

31. Mr Anthony also explained that he had asked for a review rather than lodging an appeal with the Tribunal because he was hopeful that there would be an outcome of the *Dorset* case in early course. It is within our knowledge, and was widely canvassed in the Trade press at that time, that there was not likely to be any imminent resolution of the *Dorset* case and indeed there was not.

32. The report which had been lodged by Mr Anthony and which is referred to in paragraph 16 above was his monthly report to the General Committee of the Golf Club. It does not state that a letter had been sent. It does not quantify the amount. It simply says that it is a VAT claim. It makes no reference to any possible appeal or timescales.

33. The most extraordinary aspect of Mr Anthony's evidence was in regard to Brief 25. The relevant section of that reads as follows:-

"**Existing claims**

Where a submitted claim has already been rejected by HMRC and the claimant has not appealed, that claim cannot now be resubmitted. Any claims submitted now will be a new claim subject to the four year time limit.

Rejected claims that were appealed to the First-tier Tribunal, however, are still open …".

34. Mr Anthony conceded that he was, and had been, conversant with the terms of Brief 25. He had seen no need to put in a new claim (whether or not subject to the four year time limit) notwithstanding the fact that the submitted claim had already been rejected by HMRC. He stated that he took the view that the claim had been appealed. If that was in fact what he believed, he was wrong. He had to concede that

he had only ever asked for a review and that no appeal had been made to the First-tier Tribunal.

35. Bluntly, at best, Mr Anthony seems to have seen no distinction between HMRC and the Tribunal.

36. Further, Mr Anthony's account does not sit well with the argument advanced in the letter of 18 December 2012 that Mr Anthony had provided advice to other clubs "… to request a review and then appeal to the Tribunal so that their appeal could be stood behind the lead case". On the balance of probabilities, we do not accept that any letter requesting a review was sent to HMRC.

Discussion on the law

37. The Tribunal has a wide discretion.

38. The general approach to such discretionary decisions is set out by Lord Drummond Young in *Aberdeen* and in particular at paragraphs 22-24. Those read as follows:-

> "[22] Section 49 [of the Taxes Management Act] is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.
>
> [23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a

significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late.

[24] Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one and another, for example, in a case where there is a reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies."

39. HMRC referred us to *Data Select*, which is of course an English Authority and we are in Scotland, but it explicitly endorses *Aberdeen* at paragraph 36 indicating that both Authorities are broadly in line. That can be seen from the questions that Data Select indicates should be considered namely:

(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?

40. We were not referred to the case but we agree with the decision of Judge Berner at paragraph 36 in *O'Flaherty v HMRC*[5] and that reads:-

"I was referred to … where Sir Stephen Oliver refused permission to appeal out of time. In the course of his decision, Sir Stephen made the point that permission to appeal out of time will only be granted exceptionally. It is in my view important that this comment should not be thought to provide a qualitative test for the circumstances the FTT is required to take into account. It should properly be understood as saying nothing more than that permission should not routinely be given; what is needed is the proper judicial exercise of a discretion, taking account all relevant factors and circumstances."

41. He goes on to record at paragraph 37 that: -

"Time limits are prescribed by law, and as such should as a rule be respected".

We agree entirely.

42. Paragraph 38 reads:-

"These references to permission being granted exceptionally should not be elevated into a requirement that exceptional circumstances are needed before permission to appeal out of time may be granted. That is not what was said in *Ogedegbe* nor in *Aston Markland*, and it is not the case. The matter is entirely in the discretion of the FTT, which must take account of all relevant circumstances. There is no requirement that the circumstances must be exceptional."

[5] 2013 UKUT 01619 (TCC)

That is the approach which we adopt.

43. We have considered, and weighed in the balance, all of the relevant circumstances including, but not restricted to, the circumstances identified in *Aberdeen* and *Data Select*. In so doing, we have concurrently applied the three stage process set out by the Court of Appeal in *Denton & Others v T H Whyte & Another; Decadent Vapours Ltd v Bevan & Others* and *Utilise TDS Ltd v Davies & Others ("Denton")*[6]. The first of those is to identify the seriousness and significance of the failure to lodge an appeal in relation to which the relief sought. The second is to consider why the default occurred and the third is to evaluate all the circumstances of the case so as to deal justly with the application of the factors.

44. HMRC also relied upon and referred us to *Romasave*.

45. We are bound by and entirely agree with Judges Berner and Falk at paragraph 96 of *Romasave* which reads:-

> "… The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the Tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

46. Lastly, at all times we have had in mind Rule 2 of the Rules which reads:-

> "**2.—Overriding objective and parties' obligations to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (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.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
> (a) exercises any power under these Rules; or
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally."

[6] 2014 EWCA Civ 906

Is there a reasonable excuse for not observing the time limit?

47. We can see no basis for the appellant to have considered that a valid appeal had been lodged with the Tribunal and sisted behind *Dorset*. It is only appeals that can be sisted behind extant cases. HMRC do not "sit" on claims endlessly and certainly not without prior notice that they intend to do so. It is surprising that, even if the appellant had had cause to take that view, when the subsequent claims were lodged there was no reference to the claim. In our view it was not reasonable to assume that since nothing had been heard from HMRC, and in the absence of an appeal, that the claim was simply "pending".

Did matters proceed with reasonable diligence once the excuse had ceased to operate?

48. Since we find that there was no excuse at any stage then the answer must be no. Even if there had been an excuse at an earlier stage, there certainly was no excuse from the moment that the appellant discovered that no application for review had ever been received by HMRC. The appellant did not proceed to instantly lodge an appeal with the Tribunal but rather wrote to HMRC asking for a review. Only one request for a review can ever be actioned. In any event the letter to HMRC was sent almost seven months after HMRC made it explicit that no request for a review had been received. The fact that Mr Anthony had allegedly been unco-operative should not have prevented an earlier response. The eventual appeal to the Tribunal was not even lodged within 30 days of HMRC's refusal to admit a late appeal (albeit by only a few days).

Is there prejudice to one or other party if the appeal proceeds or is refused?

49. Clearly there is significant prejudice to the appellant if it does not proceed. There is a substantial sum of money at stake. On the other hand there is prejudice to HMRC. They had cause to believe that this matter had long since been closed. The claims have never been verified and to do so now would involve time and money and use of resource.

50. Mr Simpson argued that it was open to the Tribunal to find that as far as the substantive appeal is concerned there was a strong likelihood that, in principal, the appellants would be successful and that the argument lay only as to the quantum. By contrast HMRC argued that it was not even clear whether all of the claim was in date let alone the accuracy of the underlying figures for quantum. HMRC had the further concern that given the disappearance of the correspondence in this matter the relevant records might well not be available.

51. In considering whether to grant the application we have not given detailed consideration to the merits of the substantial appeal. As More-Dick LJ said in the

Court of Appeal decision in *R (Dinjan Hysaj) v Secretary of State for the Home Department*[7] 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 …".

52. However, we accept that the appellant would have had a reasonable expectation of at least partial success.

Conclusion

53. Every application for admission of a late appeal depends on its own facts and circumstances. The purpose of any time limit is to avoid delay and to provide certainty and as a general principle, time limits provided by statute should be observed unless there is a good explanation for the delay. At every stage in the consideration of this matter and when weighing the relevant factors in the balance, we have had in mind Rule 2 of the Rules. It is imperative that any decision should be fair and just. Fairness is very much a two-way street. We have weighed every fact and authority that has been brought to our attention in the balance and some that have not.

54. On the balance of probability, we find that the appellant has not discharged the onus of proof in establishing good reasons for extending the time limit in the circumstances of this case. We therefore decline to exercise our discretion and the application to notify a late appeal is refused.

55. Accordingly the appeal is not admitted and HMRC's application for strike out is granted.

56. 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.

JUDGE ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 15 FEBRUARY 2017

[7] 2014 EWCA Civ 1633