TC01497

Appeal number: TC/2011/4996

TIME LIMIT FOR APPEAL TO TRIBUNAL – Application over 3 years after assessment and penalty – No reasonable prospect of success – No satisfactory reason for delay – Extension of time to appeal refused

FIRST-TIER TRIBUNAL

TAX

SCAN CORPORATION LTD **Applicant**

- and -

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

TRIBUNAL: JUDGE THEODORE WALLACE

Sitting in public in London on 3 October 2011

Farhad Davarzani, director, for the Appellant

Jonathan Holl for the Respondents

DECISION

1. This was an application for an extension of time to appeal against assessments totalling £62,366 with interest for periods 11/05 to 05/08 notified on 23 July 2008 and misdeclaration penalties totalling £4,030. The assessment drew attention to the rights of appeal.

2. The assessments arose out of the disallowance of input tax on sums incurred in converting premises in Harrow for use as a restaurant, the premises having been bought by the Applicant with planning consent for restaurant use in the ground floor and basement. The upstairs is let by the Applicant as residential flats. The restaurant is let to a wholly owned subsidiary company, Freddy's Ltd, of which Mr Davarzani is also the director.

3. Mr Davarzani told me that Freddy's Ltd had previously operated a hotel known as Kew Gardens Hotel Ltd which had been sold and had unused losses for corporation tax. He said that Freddy's Ltd has been operating the restaurant in Harrow for several years; a letter dated 27 September 2008 referred to the development being completed in the very near future.

4. The disallowed input tax was in respect of construction services supplied to the Applicant.

5. Although in correspondence it was stated that there was a de facto VAT group, Mr Davarzani accepted that there has been no group registration.

6. Furthermore, although there was an election to waive exemption in respect of the premises at Kew Gardens Hotel, there has been no election in respect of the Harrow restaurant premises.

7. The basis on which the assessments were raised were set out in a letter by Michael Mallia dated 29 September 2008 stating that there is no such thing as a de facto VAT group registration and that there was no record of an application. The letter stated that the intended supplies were exempt, as domestic rental income was exempt as was commercial rental income unless there was an election to waive exemption which the Applicant had not done. The letter stated that there was a right of appeal within 30 days of the assessment date.

8. On 28 October 2008 Mr Davarzani wrote to Mr Mallia appealing against the decision.

9. On 21 November 2008 Mr S K Rishi wrote a considered letter which opened by stating that the Applicant had asked for the decision to be reviewed. He upheld the decision and stated that the Applicant had a right of appeal to an independent Value Added Tax Tribunal and referred to the VAT Guide and to the Tribunals Service explanatory leaflet.

10. The Applicant's accountant asked again on 8 December 2008 for a local consideration stating that it would write further. This it did on 22 May 2009 when it stated that it was always the intention to make taxable supplies to Freddy's Ltd and enclosed invoices dated 30 March 2009 showing £54,000 VAT for improvement costs in respect of restaurant trading as Freddy's restaurant and bar and £1,500 VAT for hire of equipment.

11. Mr Mallia replied on 9 June 2009 that the assessment stood, the Applicant had not made any supply to the restaurant and no rent had been charged. The charge for recovery of expenses of refurbishment did not make that a supply because invoicing for disbursements was not treated as a supply for VAT. The Applicant's accountant wrote contesting this. On 4 August 2009 Mr Mallia wrote reiterating that the input tax on refurbishment was the Applicant's expense because it had not elected to waive exemption; he referred to Mr Rishi's letter of 20 November 2008 and said that the trader had a right of appeal "of which he has not elected to take advantage."

12. On 22 October 2009 the Debt Management Office wrote a letter headed "Warning of Winding up action" asking the Applicant to contact the office within 7 days. It does not appear that this was followed up.

13. On 25 January 2010 Customs acknowledged receipt of a draft lease and the latest set of accounts. The letter again referred to the right of appeal.

14. A further review by Mrs Fiona Hill dated 8 March 2010 followed. The review stated that there had only been one supply of accommodation, recharges of costs of fittings and fixtures being part of the rental agreement. The letter stated that the Applicant could appeal within 30 days of that letter.

15. On 2 June 2010 the accountant replied to the review letter of 8 March 2010 maintaining that there was "a separate and distinct supply in respect of refurbishments, fixtures and fittings to include supply of project management services which cannot be deemed to follow the main supply of accommodation." The Applicant was a contractor to Freddy's Ltd on a commercial basis and did not accept that it could not recover the input tax on the purchases to make those supplies.

16. Mrs Hill replied on 14 June 2010 stating that the Applicant could appeal to an independent tribunal.

17. Mr Davarzani wrote on 4 October 2010 asking for a fully considered response to the letter of 2 June 2010. He wrote that the Applicant was responding monthly to the debt management office to avert bailiffs and that the company would have to pursue the matter at the tribunal if it could not be resolved.

18. Mrs Hill wrote on 11 October 2010, "Your only option now is to appeal to an independent tribunal."

19. Mr Holl told me that there was no further correspondence on the electronic folder until the Notice of Appeal on 5 July 2011.

20. Mr Davarzani said that in June 2011 bailiffs tried to seize his car; this was the first visit by bailiffs, although demand notices had been sent monthly.

21. The Notice of Appeal said,

> "All expenditure incurred by Freddy's Ltd … Would have been VAT if it was tendered to any third party company."

The Applicant would charge Freddy's Ltd which would claim input tax. The rent would be exempt. The Applicant could not afford professional representation.

22. Mr Holl said that the Applicant had been notified on numerous occasions of the decisions and the right of appeal. There was no reasonable prospect of an appeal succeeding; he submitted that the VAT was irrecoverable since there was no option to tax.

Conclusions

23. The Applicant is seeking an extension of over three years from July 2008 to appeal. Although the review letter of 8 March 2010 (paragraph 14 above) stated that the Applicant could appeal within 30 days of that letter, Customs had no power to give such extension which is purely for the Tribunal.

24. The powers of the Tribunal to extend time to appeal are contained in Rules 5(3)(a) and 20(4) of the Tribunal procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. In exercising its powers the Tribunal must seek to give effect to the overriding objective in Rule 2.

25. This is a case where the Applicant has refused to take no for an answer. While one cannot but respect such tenacity, the fact is that there is a statutory time limit which the Applicant has effectively ignored.

26. The facts are complicated not lease because the Applicant has changed its ground. Initially it was contended that there was a de facto VAT group. If Freddy's Ltd had been part of a VAT group including the Applicant, there might have been an arguable case. However there was not a VAT group.

27. Then the Applicant sought to separate the refurbishment supplies from the accommodation supply. It is of course obvious that if Freddy's Ltd had been an independent company which owned the premises, the Applicant could have made a supply of construction services. However the Applicant itself owned the premises and the construction work became part of the premises.

28. If the Applicant had a good prospect of success, given the complexity of the case it might have been appropriate to extend time even given the delay.

29. However I accept Mr Holl's submission that there is no reasonable prospect of an appeal succeeding.

30. No satisfactory reason has been advanced for the delay in appealing. Even if the review letter of March 2010 was taken as the starting point, the delay was over two years. The Applicant was told explicitly in October 2010 that the only option was to appeal but did not do so until after the visit by the bailiffs in June 2011.

31. There was no suggestion by Mr Davarzani that he was misled in any way by Customs as to the need to appeal to the Tribunal if he disputed the assessment. He said that Customs had waited until June 2011 to take enforcement action, however that is no reason to justify the Applicant's inaction. In my judgment Customs showed remarkable forbearance in this instance.

32. The application to extend time to appeal against the assessments is dismissed and the Notice of Appeal is not admitted.

33. This document contains full findings of fact and reasons for the decision. The Applicant has a right to apply for permission to appeal to the Upper Tribunal pursuant to Rule 39 of the Rules. The right of appeal is limited to a point of law arising on this decision. The application must be received by this Tribunal not later than 56 days after the decision is sent, and must identify the alleged error or errors of law in the decision. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of the decision notice.

THEODORE WALLACE
TRIBUNAL JUDGE

RELEASE DATE: 10 October 2011