TC02260

Appeal number: TC/2012/05489

PROCEDURE – Application for permission to appeal out of time – Whether Appellant satisfied the Tribunal he had good reasons for failure to comply with the time limit – No – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LONDON CELLULAR ACCESSORIES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public at 45 Bedford Square, London WC1 on 23 August 2012

Ms Sunyana Sharma, counsel, instructed by Bark & Co, Solicitors, for the Appellant

Mr Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to an application out of time by the Appellant, London Cellular Accessories Ltd ("London Cellular") to appeal to the Tribunal against the decision of the Respondents ("HMRC") to deny the Appellant recovery by London Cellular of input tax of £587,682.63. HMRC oppose the application.

2. The proposed appeal arises out of investigations made by HMRC into missing trader intra-community ("MTIC") fraud. The decision relates to input tax claimed on the purchase of mobile phones in the period from 1 May 2006 to 31 July 2006.

The facts

3. The facts as to the sequence of events since the decision to deny input tax was notified by HMRC to the Appellant by letter dated 14 January 2010 are largely undisputed. The main area of dispute concerns the reasons why London Cellular delayed in submitting its notice of appeal against the decision to deny input tax until some seven months after the last date on which it needed to be submitted to be within the statutory time limit. In that regard, the Tribunal had a witness statement from Mr Amit Kotecha ("Mr Kotecha"), the sole director of London Cellular, together with various exhibits consisting of correspondence with HMRC concerning the disputed decision and during the period before it was made, material relating to various health and other personal issues concerning Mr Kotecha and his family, and material relating to the winding up petition that was served on London Cellular during September 2011. The Tribunal also had the notice of appeal of London Cellular dated 10 May 2012. Mr Kotecha was cross-examined on his witness statement.

4. From the material submitted and Mr Kotecha's evidence I make the following findings of fact.

5. The issue of HMRC's decision to deny input tax on 14 January 2010 ("the January 2010 decision") was preceded by correspondence between Mr Kotecha on behalf of London Cellular and HMRC during 2009 in which Mr Kotecha complained about the length of time that HMRC were taking to make a decision as to whether to deny the claim for recovery of input tax. During this period Mr Kotecha also sought the assistance of his Member of Parliament in order to speed matters along. Mr Kotecha explained that the delay in the lengthy investigation process impacted upon London Cellular's cashflow.

6. Mr Kotecha accepted in cross-examination that this correspondence revealed that he was aware that London Cellular had a right of appeal against any decision to deny input tax (at that time to the VAT and Duties Tribunal) and that his letter of 17 March 2009 to Ms Warner at HMRC indicated that he was tempted to engineer an early decision on the matter denying the claim so that the right of appeal could be exercised. Mr Kotecha also indicated in his evidence that he was aware at this time that the time limit for submitting an appeal was within 30 days of the relevant decision. Mr Kotecha also indicated, and I accept his evidence on this point, that at this stage he had not investigated for himself the procedure to notify any appeal but that when in due course he did so it appeared to him to be much simpler than he thought it would be, through the submission of a straightforward form.

7. Although the letters written to HMRC during 2009 were written by Mr Kotecha alone, perhaps, according to his evidence, with the assistance of advice, Mr Kotecha believed that Bark & Co, Solicitors, were engaged towards the end of 2009, and in particular were instructed in relation to a possible review of the January 2010 decision. As a result of those instructions, a letter was written by Bark & Co on 11 February 2010 seeking a review of the decision which, as Mr Kotceha accepted, provided responses to all the allegations of HMRC on the basis of which the decision to deny input tax had been made. Mr Kotecha also accepted that the underlying material on which Bark & Co's submissions in their letter requesting the review had been provided by him, as had the material necessary to enable Bark & Co to respond to requests for further information from HMRC, which resulted in further letters from Bark & Co on 26 March 2010, 23 April 2010 and 11 May 2010.

8. HMRC wrote to Bark & Co on 11 June 2010 stating that having considered all the extra material provided by Bark & Co in the letters referred to in paragraph 7 above, they remained satisfied that the transactions set out in the letter of 14 January 2010 form part of an overall scheme to defraud the Revenue. The letter also stated that HMRC remain satisfied that there are features of those transactions, and conduct on the part of London Cellular, which demonstrate that they knew, or ought to have known that this was the case. Accordingly, the decision on the review was that the right to deduct the input tax claimed in respect of these transactions remains denied. The letter concluded by informing Bark & Co of London Cellular's right to have this review decision itself reviewed by an HMRC officer not previously involved in the matter, or appeal to an independent tribunal, and that if an independent review was required it should be requested within 30 days of the date of this letter.

9. Although this letter was sent to Bark & Co on 11 June 2010 and received by them shortly thereafter, it did not reach the lawyer responsible for the conduct of the matter until sometime in November 2010. In the meantime the lawyer responsible for the matter had written to HMRC on 12 November 2010, in ignorance of the receipt by his firm of the 11 June 2010 letter, chasing a response to their letter of 11 May 2010 and enquiring what stage the review had reached.

10. On 12 November 2010 HMRC replied to this letter confirming that a final response to Bark & Co's letter of 11 May 2010 had been issued on 11 June 2010 and a further copy of that letter was enclosed.

11. It is therefore clear that until HMRC's letter of 12 November 2010 was received, Mr Kotecha had no knowledge of the completion of HMRC's review. It is also clear that Bark & Co did not chase HMRC for a progress report on the review until 11 November 2010 and neither did Mr Kotecha ask Bark & Co for such a report. From this, bearing in mind Mr Kotecha's previous anxiousness in 2009 for HMRC's investigation to proceed to a speedy conclusion so that London Cellular's appeal rights could be exercised, I conclude that at this stage London Cellular were not minded to proceed with an appeal. I will deal later with Mr Kotecha's evidence on the reasons for this.

12. It would appear that shortly after HMRC's letter of 12 November 2010, Mr Kotecha instructed Bark & Co to seek an independent review of the decision set out in the letter of 11 June 2010. Mr Kotecha's evidence, which I accept, is that on 24 November 2010 Bark & Co sent a draft letter by email requesting this review to Mr Kotecha. Mr Kotecha accepted that he did not respond to this draft, but believed, in error as he accepted, that he had instructed them to seek the independent review.

13. In his witness statement Mr Kotecha stated that he did not realise the error regarding the independent review request until August 2011, when London Cellular, in a letter addressed to Mr Kotecha personally dated 26 July 2011, received notification from HMRC that an amount of £16,770.32 in respect of VAT remained unpaid and that failure to settle the amount due would result in winding up proceedings being commenced. Mr Kotecha was aware that debt recovery proceedings would be suspended whilst a review was being undertaken so it prompted him to ask Bark & Co as to the progress of the review.

14. Upon being told by Bark & Co that they had not been instructed to seek a further review, Mr Kotecha then instructed them to ask for such a review which Bark & Co did in a letter to HMRC dated 2 September 2011.

15. The application for a review was clearly out of time, as the original decision was made on 11 June 2010, but the relevant legislation (referred to in paragraph 35 below) allows HMRC to review a decision after the time allowed if they are satisfied that the person seeking the review had a reasonable excuse for seeking the review out of time and that the request was made without reasonable delay after the excuse had ceased to apply.

16. HMRC, in its letter dated 14 September 2011, refused to review the decision out of time stating that the circumstances disclosed did not amount to a reasonable excuse. In particular, the letter stated:

> "I have looked closely at the circumstances leading to the late application for a review. It is apparent that subsequent to your drafting of the independent review request letter of 24 November 2010, London Cellular Accessories Ltd was put on notice, by letter of 21 December 2010, that debt recovery action was being pursued by HMRC.

> Neeta Kotecha of London Cellular Accessories Ltd then spoke with HMRC by telephone on 7 January 2011 and it was stated that an independent review was being pursued. HMRC advised Neeta Kotecha that notification of such was required, if possible within 2 weeks.
>
> Subsequent to the telephone call of 7 January 2011 a request for independent review was not made by London Cellular Accessories Ltd and on 26 July 2011 a 2nd letter for payment of unpaid VAT was therefore issued by HMRC.
>
> In response to the HMRC letter dated 26 July 2011 Bark & Co Solicitors have written to HMRC on 9 August 2011 and telephoned on 12 August 2011. These communications resulted in HMRC advising Bark & Co Solicitors on 12 August 2011, by telephone and in writing, that there were no pending VAT reviews or appeals for London Cellular Accessories Ltd. HMRC also agreed during the telephone call and confirmed within the letter that debt recovery action would therefore be put on hold until 24 August 2011.
>
> It is noted that Bark & Co Solicitors letter of 2 September 2011 requesting a late review was made after the date that HMRC agreed to put on hold the debt recovery action."

17. Mr Kotecha did not refer to these circumstances at all in his witness statement. He did, however, in cross-examination and in response to questions from the Tribunal, accept that the conversation with Neeta Kotecha referred to above did take place and that although he cannot be sure, he would like to think that he would have spoken to Mrs Kotecha about the need for a review. Mrs Kotecha is Mr Kotecha's wife and the company secretary of London Cellular. Mr Kotecha also did not refer in his witness statement to the letter of 21 December 2010 regarding the debt recovery action, but only to the subsequent renewed recovery request letter dated 26 July 2012.

18. Mr Kotecha did not challenge the fact that the letter dated 21 December 2010 was sent to London Cellular. He would have realised, as he accepted in respect of his reaction to the 26 July 2011 letter, that the fact of the recovery action being pursued would mean that a review was not outstanding, and I therefore find that subsequent to receiving this letter and the conversation between HMRC and his wife, Mr Kotecha would have been aware in January 2011 that no review was being pursued. Although I accept that Mr Kotecha had had a period of separation from his wife which ended at the end of December 2010, Mrs Kotecha was clearly engaged with the business in January 2011 and I find on the balance of probabilities that Mr and Mrs Kotecha spoke about the conversation Mrs Kotecha had had with HMRC shortly after it took place. The Tribunal was given no explanation as to why the question of the review was not pursued at that time. I can only conclude that a decision was taken to deal with other personal and business priorities at the time and I accept Mr Kotecha's evidence that although Mr and Mrs Kotecha had recently come together again, there were still issues between them to be resolved so that dealing with the review and a possible appeal was not a priority. It is therefore more likely than

not that the subsequent renewal of the threat of recovery action in July 2011 prompted Mr Kotecha to instruct Bark & Co to request the independent review but he was mistaken in his assertion that he was not aware of the fact that the review had not been requested until then.

19. On 15 September 2011 Mr Kotecha discovered a winding up petition against London Cellular attached to its business premises in respect of the unpaid VAT debt which was the subject of the letter dated 26 July 2011 referred to in paragraph 13 above.

20. On 19 September 2011 Mr Kotecha received HMRC's letter of 14 September 2011 refusing to carry out the independent review. The letter reminded London Cellular that the refusal to carry out a late review did not affect its right to apply to the Tribunal to accept a late notice of appeal, although, as is discussed in paragraph 36 below, because of the way the time limits operate when an out of time review is requested, notification of an appeal would have been in time until 14 October 2011.

21. Mr Kotecha's evidence was that he intended to discuss making an appeal with Bark & Co and his wife as they had to consider the merits of an action and make a decision as to whether London Cellular could afford the legal costs of an appeal in conjunction with continuing to conduct its business. He explained that the business is a very capital intensive cashflow driven business therefore they had to decide if there was sufficient cashflow to dedicate to legal costs. Mr Kotecha also stated in his witness statement that they had to consider whether London Cellular was able to dedicate personal resources to an appeal because it was a relatively small, family run business and the actual business takes considerable time before having to dedicate further resources to litigation.

22. Mr Kotecha also referred in his witness statement, and in his oral evidence, to a number of other factors which taken together resulted in a final decision to submit a notice of appeal not being taken until May 2012.

23. First and foremost, amongst these factors was the issue of the winding up petition. Mr Kotecha's evidence was that from September 2011 London Cellular had to dedicate its limited financial and personnel resources to dealing with the winding up petition. Eventually, the matter was settled in December 2011 and the winding up petition was withdrawn, with various ancillary matters arising out of the matter being finally concluded in January 2012.

24. Mr Kotecha's evidence was that he then started discussions with Bark & Co regarding the funding of an appeal as it was struggling with finances an could not afford to instruct solicitors to begin an appeal. These funding issues were resolved in May 2012 and the notice of appeal was filed on 10 May 2012.

25. The other factors which Mr Kotecha maintained contributed to the delay were a mixture of personal and other business issues. With regard to his personal issues, these largely impacted the period prior to September 2011 but Mr Kotecha contended that they were still having an impact on his ability to focus on the question of the appeal after that time.

26. The first factor was Mr Kotecha's marital problems. Mr Kotecha's evidence, which I accept, was that he separated from his wife for a year between December 2009 and 2010. His wife, who had previously been involved in the business, ceased to be so during the separation and this caused stress on the Appellant with an impact on the smooth running of the business as he was unable to work at times.

27. The second factor was a series of family illnesses. The first involved Mr Kotecha's uncle, who was close to Mr Kotecha, and died after a period of illness between May and September 2010 during which Mr Kotecha spent a lot of time with his uncle. The second involved his father who fell ill in April 2011 and was admitted to hospital. The third involved Mr Kotecha himself who suffered from haemorrhoids between June and August 2011, severe pain from which inhibited his ability to be involved in London Cellular's affairs at this time. He was still suffering from the effects of this illness during September 2011. Finally, in June and July 2011 Mr Kotecha's father-in-law was in hospital undergoing a heart operation resulting in his wife, who had returned to work in the business after she got back together with Mr Kotecha in December 2010, being less available at a time when Mr Kotecha was under pressure with the annual accounts of London Cellular needing to be prepared.

28. Mr Kotecha also stated that although he and his wife were now together again, there were still issues between them and in September 2011 they were contemplating a divorce.

29. With regard to business related factors, Mr Kotecha stated that in December 2011 there was a large trade London Cellular undertook with Nokia that ran into difficulties which took up a large amount of his time and he was away in March and April for a period of three weeks.

30. Finally, Mr Kotecha maintained that the failure to submit the notice of appeal was also partly due to an administrative error. When pressed in cross examination to identify this in relation to the filing of the notice of appeal after September 2011, as opposed to the earlier errors in relation to the review, Mr Kotecha was unable to be more specific. I find that Mr Kotecha was conflating the two processes in his recall of the events in question and that administrative error was only a factor in relation to the failure to submit a timely request for an independent review, following the issue of HMRC's decision letter in June 2010.

31. The picture that emerges from Mr Kotecha's evidence is of a dedicated and intelligent businessman who was also mindful of his family responsibilities and who struggled to meet all the demands placed upon his time, particularly during periods where he was experiencing marital difficulties and health problems. It is clear that during 2009, and the early part of 2010 when Mr Kotecha was corresponding with HMRC and his Member of Parliament regarding his grievance with the length of the investigation process, and when working with Bark & Co on the initial request for a review of the January 2010 decision that Mr Kotecha was fully focussed on the dispute and the opportunity to challenge the decision through a review and then subsequently an appeal.

32. The fact that Mr Kotecha did not press Bark & Co over the apparent delay in the making of the review decision after the correspondence ceased with HMRC in May 2010 and likewise failed to check on progress of the request for an independent review after November 2010, when he believed it had been submitted, suggests that the matter had now become less of a priority amongst the other matters that Mr Kotecha had to deal with at that time. He clearly remained aware of his rights to pursue the matter, and that would have become more to the fore following his conversation with his wife after HMRC's telephone call with her on 7 January 2011, which he accepts took place.

33. When it comes to the period after 14 September 2011, which is when time started running for the filing of a notice of appeal, I accept that the factors prevalent in 2010 and the first nine months of 2011 were still present to a degree and meant that Mr Kotecha was not giving the question of the appeal priority over other matters. Nevertheless, he was quite clear in the evidence in his witness statement and orally that he was concerned about the winding up petition, to which he gave priority, and the financial and human resources of London Cellular and whether they were sufficient to pursue lengthy litigation alongside business as normal. There was therefore a conscious decision not to pursue the question of filing a notice of appeal at that time until these matters were resolved. This is consistent with the terms of the notice of appeal itself which puts funding difficulties as the sole reason for the delay in submitting the notice of appeal .

The Law

34. London Cellular's right of appeal against the decision to deny repayment of input tax derives from section 83 of the Value Added Tax Act 1983 ("VATA"). Section 83A of VATA allowed London Cellular to request a review of the January 2010 decision prior to deciding whether or not to appeal to the Tribunal and this right was exercised in Bark & Co's letter of 14 February 2010 following which HMRC were bound to undertake the review under section 83C of VATA provided the request to HMRC to undertake the review was made within 30 days from the date of the document containing the notification of the offer of the review (see section 83C(1)(b) of VATA). It is HMRC's practice to offer a further independent review if the taxpayer is not content with the initial review, which is conducted by a local officer, and this was offered in HMRC's letter of 11 June 2010 on conclusion of the initial review, which gave rise to a further right to accept this offer under section 83C of VATA. The request for this review was made outside the 30 day period prescribed by section 83C of VATA, being made ultimately on 2 September 2011.

35. By virtue of section 83E(2) of VATA, HMRC must undertake a review under section 83C of VATA if a review out of time is requested (which it was in this case) and:

> (1) HMRC are satisfied that the person requesting the review had a reasonable excuse for not accepting the offer or requiring review within the time allowed; and
>
> (2) HMRC are satisfied that the person requesting the review, made the request without unreasonable delay after the excuse had ceased to apply.

36. In this case HMRC refused the request for a review out of time as it was not satisfied as provided for in section 83E(2) of VATA. However, by virtue of section 83G(4) of VATA, where HMRC are requested to undertake a review out of time under section 83E, and decide not to undertake a review, the time limit for notifying an appeal to the Tribunal is 30 days beginning with the date on which HMRC decide not to undertake a review (see section 83G(4)(b)(ii) of VATA). Consequently, HMRC's decision in this regard being made on 14 September 2011 the time for submitting a notice of appeal did not expire until 14 October 2011.

37. Therefore, London Cellular's appeal was notified seven months late, being submitted on 10 May 2012, notwithstanding that the original decision to deny input tax was made on 14 January 2010. This is a consequence of the way the review process operates which effectively extends the time for submitting a notice of appeal until all the options available under the review process have been exhausted.

38. Consequently, in considering whether to grant an extension of time to submit the notice of appeal I am only concerned with considering the reasons for delay which existed on or after 14 October 2011, although as I have indicated above, the conduct of Mr Kotecha and London Cellular in the period prior to that time and during the review process is of assistance in determining what reasons existed after that time and is also relevant in considering all the circumstances of the case when carrying out the balancing exercise referred to in paragraph 40 below.

39. It is well established that time limits having been prescribed by Parliament, it is for the appellant to show a good reason why the Tribunal should exercise its discretion to allow an appeal to be made outside those time limits. The exercise of such discretion should be exceptional as it extends the jurisdiction of the Tribunal beyond what it would otherwise have.

40. The recent Upper Tribunal case of *Data Select Ltd v HMRC* [2012] UK 187 (TCC) confirms that the approach of considering the overriding objective of the Tribunal as set out in rule 2 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 to deal with cases fairly and justly together with all the circumstances of the case, including the matters listed in the Civil Procedure Rules ("CPR"), rule 3.9(1) is the correct one (see paragraph 37 of the decision.) This involves a balancing exercise having regard to the respective interests of the parties. So far as material to this case the factors set out in CPR 3.9(1) are:

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant reaction protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

…

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.

41. As referred to by Judge Berner in paragraph 18 of his decision in *Lighthouse Technologies Ltd v HMRC* [2010] UKFTT 374 (TC) the factors I must consider include consideration of the reasons, if any, for the delay in making the appeal, but also all material factors including whether the Appellant has a prima facie case, whether there would be any material prejudice to HMRC if the appeal were permitted to be made out of time, and whether there would be demonstrable injustice to London Cellular were I not to allow the appeal to proceed.

Discussion

42. I turn now to consider the factors I have identified in paragraphs 40 and 41 above in the light of the submissions of the parties.

43. In MTIC cases the burden of proof is on HMRC to prove, on the balance of probabilities, a number of factors. I am not in a position to assess the merits of London Cellular's appeal, but in the light of the subject-matter of the appeal it is clear that there is prima facie an appealable matter.

44. With respect to the factors set out in CPR 3.9(1) I can deal with these as follows.

The interests of the administration of justice

45. Ms Sharma submits that this factor points in favour of London Cellular because the amount of input tax denied, £587,682.63 is a substantial figure for a small family runs business such as London Cellular and it is in the interests of justice, for both sides, that the correct amount of tax is paid. Mr Watkinson submits that the interests of administration of justice are served by the need for legal certainty created by the statutory time limits laid down by Parliament and

those time limits should only be extended if there is a compelling reason to do so. In my view the amount at stake in the appeal is not a material consideration; the prospect of London Cellular's claim being lost if time is not extended is balanced by the risk that HMRC may have to pay back a large sum of money if the appeal is admitted. This approach was endorsed by Judge Berner in *Lighthouse* where he stated at paragraph 24 of the decision:

> "The same rules as to appeals and the time at which they must be made apply irrespective of the amount at issue, and the same considerations must be applied to whether to give permission for a late appeal in every case."

Whether the application for relief has been made promptly

46. Ms Sharma accepted that the application for relief was not made promptly but submitted that it was made as soon as practicable. She did not elaborate on that, but I take it as a reference to the other factors that led to the delay of seven months from the date of the second review decision to the date the notice of appeal was submitted so I will deal with the point under paragraphs 49 to 51 below.

Whether the failure to comply was intentional

47. Ms Sharma submitted that the failure was not intentional, but it could be characterised as reckless. Recklessness connotes the taking of a risk in the knowledge of the circumstances that gave rise to that risk. Mr Kotecha was aware of his right to appeal and that there was a time limit attached to it. On the basis of Ms Sharma's submission, Mr Kotecha, in knowledge of the existence of a time limit, chose to ignore the risk of the appeal not being admitted because it was made out of time.

48. In my view Mr Kotecha's state of mind went further than this. In the period after September 2011 I have accepted that there were a number of circumstances; the winding up petition, funding difficulties, other business priorities and difficult personal issues that led Mr Kotecha to delay the submission of the notice of appeal, but that Mr Kotecha took a conscious decision not to submit the notice of appeal until these issues were resolved. I therefore find that the failure not to submit the notice of appeal within 30 days of 14 September 2011 was intentional.

Whether there is a good explanation for the failure

49. I have accepted that there were a number of factors that impacted upon Mr Kotecha's decision not to submit the notice of appeal before May 2012. I appreciate that Mr Kotecha was struggling with the demands of his business,

and in particular the need to prioritise the winding up petition at a time when there were other personal difficulties in his life. Nevertheless, the winding up issue was settled by the beginning of January 2012 and none of the other circumstances in my view are so compelling that they provide a good explanation for the continuing delay. It was simply a case that in circumstances where there were competing priorities Mr Kotecha chose not to prioritise the question of attending to the notice of appeal. This in my view cannot amount to a compelling reason. With regard to the funding issue, which was the sole reason given for the delay in the notice of appeal, I agree with Judge Berner, who stated, in paragraph 20 of the *Lighthouse* decision:

> "Insufficiency of financial resources to fund legal representation cannot in my view be a valid reason for failing to appeal on time."

50. As has been accepted by Mr Kotecha, the form on which to give notice of appeal was not difficult to complete and he would have been perfectly capable of completing it himself and submitting it as a protective measure whilst he considered whether London Cellular would have the necessary resources in due course to pursue the litigation. In my view this is the course of action that a prudent businessman would have taken when faced with the uncertainties that were before Mr Kotecha at that time. I therefore reject Ms Sharma's submission that it was not practicable to complete and submit the notice of appeal before May 2012.

51. Ms Sharma submitted that I should distinguish Lighthouse on the grounds that the delay in that case was much longer, namely two years rather than the seven months in this case, and that lack of funding was the sole reason put forward in that case, whilst here there are a number of other factors. In my view the difference in the time periods makes no difference to whether it is right to consider lack of funding as a good reason. The period of delay is a factor in its own right to be considered alongside the other factors and in the balancing exercise. I have in paragraph 49 above given consideration to the other factors present in this case as well as the funding factor.

The extent to which the party in default has complied with other rules etc.

52. Ms Sharma accepted that there had also been a failure to comply with time limits in relation to the review process. I attach little weight to that as those matters preceded the making of the second review decision which gave rise to the right of appeal.

Whether the failure to comply was caused by the party or his legal representative

53. It is common ground that the failure was caused by London Cellular rather than its legal representatives.

The effect which the failure to comply had on each party

54. I accept that the effect of the failure to comply has the potential to cause London Cellular a considerable deal of financial certainty and hardship if the appeal is not admitted. The failure would have led HMRC to believe that the case was closed and that it could file its papers away and devote its resources to other cases. These are competing factors which I must consider in the balancing exercise set out in paragraph 56 below.

The effect which the granting of relief would have on each party

55. I accept that the granting of relief would potentially benefit London Cellular considerably as if it was successful in its appeal, the significant claim for repayment of input tax would be of great value to its ongoing business. The effect on HMRC will be that they would have to devote resources to a case which they had believed to be closed. Again, these are matters to weigh in the balance.

Conclusion

56. Applying the overriding objective in the light of the factors set out above, in the balancing exercise that must be carried out I must balance the question as to whether there would be any material prejudice to HMRC if the appeal were permitted to be made out of time and whether there would be demonstrable injustice to London Cellular if I were not to allow the appeal to proceed. Ms Sharma submits that prejudice to HMRC is limited as the length of delay is under seven months, whilst conversely HMRC took three and half years to complete its investigation into London Cellular's July 2006 VAT returns. In my view that is a false analogy; the fact that HMRC may or may not have been tardy in its investigation (on which I make no finding) should not in itself mean that London Cellular should be given an extended period of time to submit its notice of appeal. Limited time needed to be spent by London Cellular to decide whether it had grounds for appeal; the basis of HMRC's decision was clearly set out in its letter of 14 January 2010 and the basis on which London Cellular took issue with them was clearly set out in Bark & Co's letter of 11 February 2010 in response. These matters could easily be transposed into grounds of appeal without the need for a lengthy extension of time.

57. In my view there would be material prejudice to HMRC if the appeal was admitted. I accept Mr Watkinson's submissions that granting London Cellular permission to appeal so far out of time, and in my view a period of seven months is a significant delay, would deny HMRC the certainty that HMRC are entitled in relation to appeal time limits laid down by Parliament unless there are exceptional circumstances and compelling reasons. I accept that the unexpected re-opening of closed investigation is disruptive to HMRC's planning for allocation of human and financial resources to the investigation into, and defence of, what have proved to be complex and resource intensive appeals in respect of which there are a considerable number pending before this

Tribunal. It would therefore not in my view be in the interests of justice that the appeal be made late unless there are reasons why the appeal should be admitted that are so compelling that to fail to do so would cause demonstrable injustice to London Cellular.

58. I have found, at paragraphs 49 and 50 above that there is not a good explanation for the failure to submit the notice of appeal in time. In the absence of such an explanation, the prejudice to London Cellular in not admitting the appeal is outweighed by the prejudice to HMRC which I have referred to in paragraph 57 above.

59. I have sympathy for the position that London Cellular now finds itself in. However, in spite of the potential adverse effect that the inability to conduct the appeal will have on London Cellular's financial position I do not consider that in the circumstances there is demonstrable injustice to London Cellular and therefore it would not in my view be in the interests of justice for me to grant permission to admit the appeal out of time. London Cellular's application for such permission is therefore refused.

60. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 13 September 2012