TC04087

Appeal number: TC/2013/05221

PROCEDURE – application to set aside decision of VAT and Duties Tribunal on ground that Applicant was not given notice of and did not attend hearing – Rules of the VAT and Duties Tribunal, rules 19(1) and 26(3) – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

BUJAR MUSTAFA t/a ORSI DELI FOODS **Applicant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR JOHN COLES

Sitting in public in London on 16 October 2014

Mr G Alahi, accountant, of Vision Consulting, for the Applicant

Mr P Rowe, Presenting Officer, for the Respondents

DECISION

1. This is an application by Mr Mustafa (the "Applicant") to set aside the decision of the VAT and Duties Tribunal dated 30 January 2009 in *Agron Haxhija and Bujar Mustapha (t/a Orsi Deli Foods v Revenue & Customs* [2009] UKVAT V20946 (the "2009 determination").

2. At the hearing of this application on 16 October 2014, the Tribunal dismissed the application. The Tribunal now gives its full written reasons for that decision.

3. Very limited material was placed before the Tribunal in support of the application. What material there is indicates the following.

4. In April 2002, an officer of HMRC visited the premises of Orsi Deli Foods and inspected its records. The HMRC officer concluded that the business had been suppressing sales, and that the sales suppression rate was 58.95%. The HMRC officer also concluded that there were some additional errors in VAT returns. Consequently, in April 2003 HMRC issued an assessment to VAT of £53,086 for periods 08/99 to 11/01 (the "2003 assessment"). HMRC also issued a civil evasion penalty under s 60(1) of the VAT Act 1994 of £34,810 (the "civil penalty").

5. The Applicant and his business partner appealed against the assessments and penalty to the then VAT and Duties Tribunal. The proceedings before that Tribunal lasted over 4 years. The substantive hearing was eventually held in January 2009, and the Tribunal gave its determination on 30 January 2009, dismissing the appeal. The Applicant did not attend and was not represented at the substantive hearing before the Tribunal.

6. In a letter to the Applicant dated 3 November 2010, HMRC warned that it may take bankruptcy action in respect of unpaid VAT, penalties and surcharges, including the 2003 assessment and civil penalty.

7. At some point the matter was taken up by the Applicant's present representatives who, in a letter to HMRC dated 21 November 2011, thanked an HMRC official "for going through the trouble of finding the information from the HMRC archives for the above client", and made further representations that the 2003 assessment was wrong and that the civil penalty was unjust. From this letter, it would appear that the Applicant's representatives were unaware at this time that the 2009 determination had been given. It appears that the HMRC official in question responded to this letter on 30 January 2012 (see HMRC letter dated 4 March 2014), and from what the Tribunal was told at the hearing, it appears that that particular HMRC official at that time was also unaware that the 2009 determination had been given.

8. By an amended notice of appeal dated 24 September 2012, the Applicant commenced the present proceedings before the First-tier Tribunal (Tax Chamber), purporting to appeal against the 2003 assessment. From the notice of appeal, it

appears that the Applicant and his representatives were unaware that the 2009 determination had been given. The notice of appeal states that "This is an old matter dating back to 2003 which appears to have been lost in the system". The notice of appeal also states that "The Appellant appealed these assessments at the time and went to an appeals tribunal with his landlord and (then) accountant. HMRC were unprepared and asked for an adjournment. The Appellant heard nothing further until a year ago when bailiffs called at the premises."

9. On 21 October 2013, HMRC made an application for the appeal to be struck out on the basis that the subject matter of the appeal had already been determined in the 2009 determination.

10. A letter from HM Courts and Tribunals Service ("HMCTS") to the Applicant dated 12 November 2013 noted that the Applicant had the option of applying to set aside the 2009 determination. That letter stated amongst other matters as follows:

> If you choose to make such an application, the Tribunal will consider it on its merits and you will need to provide a full explanation (backed up with whatever documentary evidence is available) as to why you did not attend the original hearing in January 2009 and why it has taken you until late 2013 to take any steps to have the January 2009 decision reconsidered. … The Judge asks me to emphasise that a very strong and convincing case will be needed before he will allow such an old appeal to be re-opened.

11. In a letter to HMCTS dated 18 November 2013, the Applicant's representative made an application to set aside the 2009 determination. That letter stated amongst other matters as follows:

> Mr Mustafa appealed against the original assessment and went to the Tribunal. However, HMRC were not prepared at the time and asked for an adjournment. Mr Mustafa tells us that he never received notification of the subsequent hearing and therefore was obviously unable to attend. Unfortunately judgement was passed in his absence without him having the opportunity to put across his case.
>
> Mr Mustafa's first language is not English and communication has at times been difficult.

12. A letter from HMRC dated 4 March 2014 opposed the application to set aside the 2009 determination. It argued as follows. Reopening such an old appeal would seriously prejudice HMRC as original document bundles, witness statements and evidence are no longer available. Documents on the HMRC electronic folder indicate that the Applicant failed to attend interlocutory hearings in 2005 and 2008 as well as the substantive hearing in 2009, and requested that a preliminary hearing in 2007 be postponed.

13. A letter from the Applicant's representatives dated 4 April 2014 replied to the 4 March 2014 HMRC letter.

14. A letter from HMRC dated 11 June 2014 replied to the Applicant's 4 April 2014 letter.

15. The 16 October 2014 hearing before the Tribunal was listed to deal with the issues of whether this Tribunal has jurisdiction to set aside a decision of the VAT and Duties Tribunal, and if so, whether the 2009 determination should be set aside and whether the present appeal proceedings should then proceed without payment or deposit of the disputed tax.

16. At that hearing, the Applicant's case was presented by Mr Alahi, assisted by Mr Gukhool. The Applicant attended and gave oral evidence.

17. The Applicant's evidence was that early in the proceedings before the VAT and Duties Tribunal, perhaps in 2004, he was represented by an accountant at one hearing, but that subsequently he was not represented and did not receive notices or correspondence relating to the Tribunal appeal.

18. Mr Alahi made submissions on behalf of the Applicant, which were essentially the same as the submissions in the documents referred to above. It was said that the Applicant's business had closed because it was not successful, that the Applicant faced bankruptcy if the appeal was not allowed, and that he was unaware of the 2009 hearing before the Tribunal and had therefore been denied an opportunity to present his case. It was also argued that his case had *prima facie* merit, and that it would be possible to reconstitute the case file and relevant documents in the appeal.

19. For HMRC, Mr Rowe accepted that the Tribunal has jurisdiction to set aside a determination of the former VAT and Duties Tribunal. In exercising that power, the Tribunal is to apply the rules of that former Tribunal. Rule 26(3) of those Rules provides that:

> Subject to paragraph (4) below, the tribunal may set aside any decision or direction given in the absence of a party on such terms as it thinks just, on the application of that party or of any other person interested served at the appropriate tribunal centre within 14 days after the date when the decision or direction of the tribunal was released.

20. Rule 19(1) of those Rules provides that:

> A tribunal may of its own motion or on the application of any party to an appeal or application extend the time within which a party to the appeal or application or any other person is required or authorised by these rules or any decision or direction of a tribunal to do anything in relation to the appeal or application (including the time for service for a notice of appeal or notice of application) upon such terms as it may think fit.

21. Mr Rowe said that the HMRC file relating to the proceedings before the VAT and Duties Tribunal no longer existed. He produced a thin bundle of documents printed out from the HMRC electronic folder relating to those proceedings. The Applicant's representative did not object to the introduction of these documents, and the Applicant and his representatives were given time to look at them. These notes

indicate that the proceedings before the VAT and Duties Tribunal were on foot at least as early as October 2004. As indicated above, the Tribunal did not give its determination in the case until January 2009. Those proceedings thus lasted over 4 years. The notes indicate that in the course of those proceedings there was an application by the appellants to postpone a January 2007 hearing, and that for a period in 2008 a Mr Stambalis (or Skamballis) was purporting to act for the appellants. The notes also indicate that in 2008, HMRC applied to dismiss the appeal for want of prosecution, but that the Tribunal refused the application.

22. The Appellant when asked said that he did not know anything about a Mr Stambalis.

23. Mr Rowe made submissions opposing the application to set aside the 2009 determination, which were essentially the same as the submissions in the documents referred to above. He submitted that the Applicant's substantive case did not have *prima facie* merit as the material presented does not show a challenge to HMRC's best of judgment assessment that could succeed under the test in *Pegasus Birds Ltd. v Customs and Excise* [2004] EWCA Civ 1015.

24. Having considered all of the material before it and the arguments of the parties, the Tribunal found as follows.

25. The Applicant is seeking an exercise by the Tribunal of the power under rule 19(1) of the VAT and Duties Tribunal Rules, to extend the two week deadline in rule 26(3) from 14 days to over 4 years. As the Applicant was warned in the HMCTS letter of 12 November 2013, such an application would require "a full explanation [of the relevant circumstances] (backed up with whatever documentary evidence is available)" amounting to "a very strong and convincing case". The Tribunal notes that the proceedings before the VAT and Duties Tribunal took over 4 years. Understandably, the Tribunal would only after very cautious consideration set aside the determination that concluded such protracted proceedings, some 10 years after those earlier proceedings began and over 5 years after they concluded.

26. The Tribunal accepts that it is difficult for an applicant to prove a negative (that is to say, to produce positive evidence that he did not receive notice of the 2009 hearing or the 2009 determination). Furthermore, the Tribunal accepts that an applicant may not be in a position to apply to set aside a determination until long after the event if the applicant only reasonably becomes aware of the determination long after it has been given.

27. However, the Tribunal does not consider that it has been given anything like a full explanation of the circumstances in this case. The Tribunal considers it unlikely that the notice of the 2009 hearing as well as the subsequent notice of the 2009 determination would both be lost in the mail. The more likely explanation is that at the relevant time in 2009 notices were being sent by the Tribunal to an address where they were not coming to the attention of the Applicant. However, the Tribunal would have sent notices and correspondence to the address that the Tribunal had on record as

the address for service for the Applicant. On the papers before the Tribunal, it is not possible to know to what address notices and correspondence were being sent.

28. The impression given by the Applicant's oral evidence is that he was simply not paying attention to the ongoing appeal before the Tribunal and not engaging with it. If so, that would hardly be a justification for setting aside the 2009 determination. If that is not the case, the Applicant simply has not explained what steps he took to ensure that he was aware of what was happening in the Tribunal proceedings. It is noted that there were two appellants in the proceedings before the VAT and Duties Tribunal. It might be that the Applicant was relying on the other appellant to deal with the Tribunal appeal. However, he has not said this. In any event, even if that were the case, that of itself would also not be a justification for setting aside the 2009 determination. It is simply impossible for the Tribunal to reach any conclusion on the very limited material and evidence before it that it was in any way reasonable for the Applicant not to have been aware of the Tribunal hearing in 2009, and not to have been aware of the 2009 determination shortly after it was given such that he could have made a set aside application within the normal time limit.

29. HMRC say that they no longer have their file relating to this case. Despite what the Applicant submits, the Tribunal is not persuaded on the material before it that the appeal could now be reheard fairly, or without prejudice to HMRC.

30. The Tribunal is also not persuaded on the basis of the limited material that has been presented to it that the Applicant's substantive appeal has *prima facie* strong merits, or that evidence has come to light since that hearing which had it been available to the original tribunal might have led it to reach a different conclusion.

31. Having regard to the circumstances as a whole, the Tribunal considered that it would be inappropriate to set aside the 2009 determination.

32. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 20 October 2014