[2017] UKFTT 155 (TC)

TC05648

Appeal number: TC/2015/07227

VAT – INPUT TAX PENALTY APPEAL - APPLICATION FOR PERMISSION TO APPEAL OUT OF TIME – APPLICATION REFUSED

FIRST-TIER TRIBUNAL
TAX CHAMBER

JTC ENVIRONMENTAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE IAN HYDE

Sitting in public at Birmingham on 8 November 2016

Christopher Snell, counsel, for the Appellant

Joshua Carey, counsel, for the Respondents

DECISION

1. On 18 December 2015 the appellant, a company involved in the buying and selling of high value cars, notified to the Tribunal an appeal in respect of a decision by HMRC dated 22 May 2015 denying it VAT input tax recovery of £549,970 ("the Denial Decision") and the issue by HMRC on 11 September 2015 HMRC of a penalty notice pursuant to schedule 24 Finance Act 2007 in the sum of £82,495.50 ("the Penalty Decision"). This appeal was not in time and HMRC objects to the appeal being late in respect of the Denial Decision but not the Penalty Decision. The appellant seeks permission to notify the appeal in respect of both decisions out of time.

2. The evidence produced to me consisted of the correspondence in this matter together with the witness statement of John Speight, a solicitor in Cartwright King, ("Cartwright King"), solicitors acting for the appellant. This statement had been prepared in the course of making an application for disclosure against HMRC which was not the subject of this application but, according to Mr Snell, provided relevant evidence for the Tribunal. Mr Speight was not at the Tribunal hearing and so unavailable to give evidence in person or be cross-examined. I do not cast any aspertions on Mr Speight but this was unsatisfactory. I have in particular disregarded Mr Speight's witness statement insofar as it amounted to hearsay evidence or speculation. There was no other witness evidence.

3. The hearing proceeded on the assumption that the appellant would be granted permission to appeal out of time in respect of the Penalty Decision.

The facts

4. On 22 May 2015 HMRC issued the Denial Decision on the basis that it believed the appellant had claimed an incorrect amount of input tax for the period 1 January 2005 to 31 May 2005 being £549,970 in respect of purchases of assets from an associated company and so an assessment under section 73 Value Added Tax Act 1994 ("VATA") for the VAT due in consequence. In the letter the reasons given by HMRC for blocking input tax recovery was lack of evidence. The Denial Decision included a notification to the appellant of their right to appeal within 30 days of the date of the letter.

5. On 24 June 2015 HMRC's criminal investigations team executed search warrants at the premises occupied by the appellant and an associated company, M&M Cambridge LLP ("M&M") and the premises occupied personally by Mr Crickmore, a director of both the appellant and M&M, and accountant Mr Wong. In the course of the raid the appellant had all physical documents, laptops and computers removed from the premises.

6. On 4 August 2015 HMRC notified the appellant that it intended to charge a penalty in the sum of £82,495.50.

7. On 27 August 2015 the appellant's solicitors wrote to HMRC in the context of HMRC's letter of 4 August, saying that the appellant was "attempting to pull together all of the documentation relevant to these matters so that we might consider the company's position fully…" .

8. On 8 September 2015 HMRC wrote to the appellants solicitors and, noting that the date of the VAT Decision was 22 May 2015, said that

> "if you[sic] client now wishes to dispute the penalty they will need to explain why there has been a considerable delay"

9. On 10 September 2015 the appellant's solicitors wrote to HMRC noting that he had attended the appellant's premises and there were no documents because all relevant paperwork had all been taken away. HMRC claim that they did not receive this letter until a further copy was sent on 29 October 2015.

10. On 11 September 2015 HMRC issued the Penalty Decision pursuant to schedule 24 Finance Act 2007 in the sum of £82,495.50. The Penalty Decision included a notification to the appellant of their right to appeal within 30 days.

11. On 29 October 2015 Cartwright King wrote to HMRC explaining that, as the records had been seized;

> "...the company (notwithstanding requests for copies of documents) simply has no documents to which it has access to assist in disputing the penalty….
>
> In the circumstances the purpose of this letter is to draw these facts to your attention and ask you to consider whether you might reconsider/suspend this penalty pending the acquisition of relevant documents from the company. You did ask within your letter for an explanation as to why there had been a considerable delay in order that you could consider representations. The reason why there has been such a considerable delay is because the company, by reason of [the raid], cannot get access to its records in order to make representations"

12. On 17 November 2015 HMRC wrote to Cartwright King reminding the appellant of the need to put in writing the reason for making a late appeal.

13. On 18 December 2015 the appellant appealed both the VAT Decision and the Penalty Decision to the Tribunal.

14. On 29 March 2016 HMRC objected to the appellant appealing the VAT Decision out of time. HMRC did not object to the appellant appealing the Penalty Decision.

Legislation

15. Section 83G Value Added Tax Act 1994 ("VATA") provides;

(1) an appeal under section 83 is to be made to the tribunal before-

(a) the end of the period of 30 days beginning with-

(i) in the case where P is the appellant, the date of the document notifying the decision to which the appeal relates,…

16. Section 83G(6) VATA provides that the Tribunal has discretion to grant permission to proceed with an appeal where the 30 day period has expired.

17. Rule 20(4) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Rules") provides;

"(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal-

(a) the notice of appeal must include a request for such permission and the reason why the notice was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal"

Applicable principles for appeals out of time

18. Guidance on the enforcement of time limits is provided by Judge Bishopp in the Upper Tribunal in *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 350, applying the principles set out by Morgan J in the Upper Tribunal in *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187.

19. These decisions require the Tribunal to adopt a flexible approach to time limits. Whilst the Civil Procedure Rules of the High Court ("CPR") are a guide, the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Tribunal Rules") have been couched in more flexible terms and the Tribunal should bear in mind, not only the overriding objective in Rule 2(1) to deal with cases fairly and justly but also the requirement under Rule 2(2)(b) to avoid unnecessary formality and to seek flexibility.

20. Bearing in mind these general principles, the principles set out in *Data Select* require the Tribunal to ask itself the following questions;

(1) What is the purpose of the time limit?

(2) How long was the delay?

(3) Is there any 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?

21. In *BPP Holdings v The Commissioners [2016]EWCA Civ 121 ("BPP")* the Court of Appeal reinforced the need to comply with the principles in CPR 3.9 being

the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders;

> "37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
>
> 38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non- compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party."

22. The Court of Appeal expressly did not consider the principles in *Data Select* but the Senior President of Tribunal said at paragraph 44:

> "Morgan J applied CPR 3.9 by analogy...in just the manner I have suggested is appropriate".

23. In summary the Tribunal must apply the principles in *Data Select*, conscious of the recent guidance from the Court of Appeal in *BPP* highlighting the need for parties to comply with the principles in CPR 3.9 being the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders

The parties' submissions

24. Both parties agreed that the principles set out by Morgan J applied with the additional guidance given by the Court of Appeal in *BPP*.

25. Mr Snell's arguments on behalf of the appellant split into two periods, prior to and after the raid on 24 June 2015. For the period prior to the raid, the appellant's first argument is that it is unclear when the decision was actually received. The 22 May 2015 letter would have been sent by second class post after being sent through a centralised processing office. It was therefore not unusual for post to be received in

excess of a week after the date of the letter. The appellant expected the 22 May letter to be in this category. Second, during that period Mr Wong was preparing further information to HMRC with a view to a reconsideration in the belief that such a review would extend the time to appeal.

26. Mr Snell argued, based on evidence in Mr Speight's witness statement which in turn was based on a conversation between Mr Speight and Mr Crickmore, the director of the appellant, that had Mr Crickmore received the Denial Decision he would have passed it to Mr Wong, his accountant. If Mr Wong had the Denial Decision and did nothing with it then the appellant should not be prejudiced by the failure of his accountant.

27. As regards the period after the raid, the appellant argument is that it did not have access to the relevant papers in order to appeal and so could not do so. It was making efforts to obtain the business records from HMRC but it was proving difficult. This period should therefore be ignored.

28. The appellant argued that there would be no prejudice to HMRC for the appeal to be allowed out of time. There was no identified prejudice and, as the appeal of the Penalty Decision was proceeding in any event, there would be a cross over to any Denial Decision appeal. For the appellant, whilst Mr Snell could not say that paying in excess of £500,000 would have a devastating effect on the appellant, even a large company would suffer. Certainly the prejudice to the appellant would outweigh the prejudice to HMRC.

29. Mr Carey for HMRC argued that, based on the principles in *BPP,* an extension of time ought to be exceptional rather than the rule. The delay was several days short of 6 months, which, according to Mr Carey was not inconsiderable.

30. Mr Carey argued that the time limit for appealing in section 83G(1)(a) was very clear, that is to say it should run from 30 days "beginning…with the date of the document notifying the decision to which the appeal relates". Accordingly it ran from 22 May, the date of the Denial Decision, to 22 June, being the next working day after the 30 days expired on 21 June (Rule 12(2) of the Tribunal Rules). On that basis HMRC's seizure of the documents took place two days after the 30 day time limit for appealing had expired.

31. In any event, according to HMRC, there is no explanation as to why the appellant did not appeal. The fact that the appellant was looking at a reconsideration showed that they knew there had been an appealable decision. In August 2015 when the penalty was raised, the appellant should have realised a penalty did not materialise out of thin air, for example the explanation of the basis of the penalty made reference to input tax disallowed. HMRC reminded the appellant's soliciotrs in their letter of 8 September. In HMRC's letter of 10 September 2015 reference is made to the letter of 22 May. In Cartwright King's letter of 29 October to HMRC there is an express acknowledgement of the delay in appealing.

32. As to lack of records, HMRC argued that the Tribunal notice of appeal was intended to be easy to complete and, even without records the appellant should have been able to complete it. Indeed, the appeal submitted in December 2015 was completed without the documents the appellant was requesting so there was no reason why it could not have been done earlier.

33. For HMRC the consequence of allowing the appellant to appeal late would be a redirection of resources 6 months after it had been assumed they could be used elsewhere. It was recognised that, as the Penalty Decision will still be appealed the facts of this matter would in any event be the subject of an appeal. However, HMRC argued the Penalty Decision was a more limited appeal not requiring such an extensive findings of fact around the substantive matters. There would therefore be cross over but it would be extremely limited.

34. HMRC recognised that a refusal to allow the appeal would have the consequence that the appellant would not be able to challenge the Denial Decision. However, this was a problem of the appellant's own making.

Decision

35. The issues are to be considered in the framework suggested by Morgan J in *Data Select*.

What is the purpose of the time limit?

36. The purpose of the time limit is to provide certainty in tax compliance and ensure disputes cannot be raised long after the relevant matters occurred.

How long was the delay?

37. The appellant was required to appeal 30 days after 22 May 2015.

38. As to the time to appeal, I agree with HMRC that section 83G(1)(a) is explicit in the calculation of the time to appeal, being from "the date of the document notifying the decision". There is no room for ambiguity or reading in an allowance for delay in posting the decision.

39. Further, I accept Mr Carey's calculation that the appeal should have been filed by 22 June. However, the appellant only appealed on 18 December 2015. The appellant's delay was therefore just under 6 months.

40. This is a very long period of time. The delay here must therefore be seen as very serious and significant.

Is there any good explanation for the delay?

41. I do not accept that the appellant has a good explanation for a near 6 month delay. The preparation of a request for reconsideration does not obviate the need to comply with the 30 day time limit for appeal.

42. As to access to the relevant documents, the appellant and his accountant, Mr Wong, were aware that the Denial Decision had been made. However, notwithstanding that Cartwright King were actively engaged on behalf of the appellants, at no point during the 6 month period did the appellant seek to make a appeal with the information available or seek permission.

43. The appellant tentatively argued, principally through Mr Speight's witness statement, that the appellant may not have received the letter of 22 May 2015 at all. Further, to the extent Mr Wong had the Denial Decision but did not do anything with it the appellant should not be prejudiced by the failure of his accountant. I cannot accept these arguments on the basis that the appellant has not discharged the burden of proof that is on it to establish the facts required.. Neither Mr Crickmore nor Mr Wong gave evidence in the Tribunal and the only evidence available is what Mr Speight in his statement says Mr Crickmore and Mr Wong told him. Whilst again, I stress that I do no cast any aspertions on Mr Speight, the factual basis for this argument, is therefore untested hearsay and speculation. The Tribunal is required in Rule 2 of the Tribunal Rules to deal with cases fairly and justly to avoid unnecessary formality and to seek flexibility but there are limits. If the appellant wanted to assert that it never received the Denial Decision that has been addressed to a company director at the correct address it must produce evidence to that effect.

What will be the consequences for the parties of an extension of time?

44. If the appellant is granted an extension of time he will be allowed to continue his appeal in respect of the Denial Decision. For HMRC the consequence will be a redirection of resources 6 months after it had been assumed they could be used elsewhere albeit this would be lessened to some degree by the fact that the penalty Decision would be appealed in any event.

What will be the consequences for the parties of a refusal to extend time?

45. The appellant would be denied the ability to challenge the Denial Decision, which involves a significant amount of VAT, albeit it would not make the appellant insolvent.

Generally

46. The Court of Appeal in *BPP* took compliance as its starting point, requiring there to be a good reason for non compliance. Here there has been nearly 6 months delay which is serious and significant. The burden of proof must be on the appellant to show a good reason for the delay and it has not done so.

47. I therefore do not find a good reason for delay and weighing the factors as set out by Morgan J in *Data Select* in the round, conscious in particular of the prejudice that would be suffered by the appellant, it is my decision that the appellant should not be granted leave to appeal the Denial Decision out of time.

48. For completeness, as HMRC do not object, I direct that the appellant be allowed to appeal the Penalty Decision.

49. 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.

IAN HYDE

TRIBUNAL JUDGE
RELEASE DATE: 3 FEBRUARY 2017