[2017] UKFTT 668 (TC)

TC06095

Appeal number: TC/2017/02531

VAT – denial of input tax credit – application for permission to make a late appeal against notice of assessment issued in November 2012 – BPP Holdings considered – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

ABDUL WAHEED **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK
IAN MENZIES-CONACHER

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 28 July 2017

Mr A. Duncan Williams of A.D. Williams & Co Limited (accountants) for the Appellant

Ms Sharon Spence, Officer of HMRC, for the Respondents

DECISION

1. This is an application for permission to make a late appeal to the Tribunal in relation to a notice of assessment dated 29 November 2012. The appellant's VAT return for the 09/10 period had declared output tax of £8,704.94 and claimed credit for input tax in the amount of £9,520.01, resulting in a repayment claim of £815.07. The assessment was in the amount of £8,704.94, reflecting a denial of the entire VAT credit. The assessment was made on the basis that the appellant had failed to provide business records that had been requested to verify the repayment claim. The appeal to the Tribunal was made on 23 March 2017, and therefore over four years late.

2. We announced our decision to refuse permission at the hearing and subsequently provided a summary of our findings of fact and reasons for the decision. This full decision is produced following a request made by the appellant under Rule 35(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") for full written findings and reasons.

Preliminary points

3. There are two preliminary points that were addressed at the hearing. The first is that HMRC made an application on 21 July 2017 to advance a further ground of objection to the late appeal, on the basis that the appellant was seeking to make a claim under s80 Value Added Tax Act 1994 ("VATA") that was out of time. Ms Spence accepted at the hearing that this was not the case and withdrew the application. The appellant's claim to input tax recovery was made in the original VAT return and s80 is not relevant.

4. The second, more significant, point relates to whether the assessment appealed against was made within the relevant time limit. The assessment was made under s73 VATA. In order for the assessment to be valid the time limits set out in s73(6) must be complied with. In particular, in addition to the normal time limits in s77 (generally, four years after the end of the relevant VAT period), s73(6) does not permit an assessment be made after the later of (a) two years after the end of the period or (b) "one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge". In this case the assessment was made more than two years after the end of the VAT period in question and it was not at all clear to us that the alternative time limit in paragraph (b) was satisfied. Based on the correspondence we saw nothing appears to have occurred in the year prior to the assessment being made which could be regarded as evidence of facts coming to HMRC's attention.

5. We did not consider that we had jurisdiction to address this point as part of an application to make a late appeal (particularly bearing in mind that, even if we admitted the late appeal, we could not deal with it at the hearing since the appellant had neither paid the tax nor made a hardship application: s84(3) and (3B) VATA). However, Ms Spence did assure us that HMRC would consider the point carefully before taking further action in respect of the assessment.

Evidence

6. The appellant provided oral evidence and was cross examined. Although not put forward as a witness, the appellant's representative Mr Williams also addressed a number of factual issues in his submissions. We have taken account of these in our findings of fact, effectively treating Mr Williams as providing oral evidence on factual issues addressed by him.

7. Documentary evidence principally comprised correspondence between the HMRC, the appellant and the appellant's representative.

Findings of fact

8. At the relevant time the appellant carried on three different VAT registered businesses, of which two were in corporate form. This appeal relates to the appellant's registration as a sole trader, under the business name "Dallas Chicken & Ribs". One of the incorporated businesses had a similar name and the other one appears to have been a separate property business.

9. The Dallas Chicken & Ribs business was originally a fast food business operated by the appellant, but the appellant moved to a model under which the management of at least some of the individual outlets was undertaken by others under management agreements (in the case of the sole trader business) or franchise agreements (in the case of the incorporated business). Under the management agreement model the appellant owned or leased the shop and equipment, and the manager ran the shop and paid management fees. The appellant's sole trader business was deregistered from VAT with effect from 1 October 2010.

HMRC's involvement and correspondence

10. Mr Rhodes, the relevant HMRC officer, visited the appellant on 3 November 2010 to discuss the activities of all three businesses. The visit followed an attempted meeting in June 2010 and one arranged for August 2010 which the appellant cancelled. HMRC's submission was that the visit related to periods up to 03/10, although we did not see evidence to confirm that. Mr Rhodes followed up the meeting with a letter dated 10 November 2010 requesting certain documentary records, including copies of all rental agreements and management contracts. The letter indicates that these records had been requested previously on two separate occasions, in May 2010 and again on 19 October 2010. The appellant responded by a letter dated 12 November 2010 which Mr Williams confirmed at the hearing was prepared by his firm. The letter enclosed copies of 11 different rental agreements and four management agreements for the appellant's sole trader business.

11. Mr Rhodes wrote again on 7 December 2010 in respect of the appellant's repayment claim for the 09/10 period. This letter explained that Mr Rhodes had been asked to verify the return for that period before the repayment was authorised and requested a copy of the VAT summary, records of all sales made and expenses incurred, and copy bank statements. The letter states that depending on his examination of those records Mr Rhodes might also require copies of sales and

purchase invoices. Mr Rhodes also thanked the appellant for the information he had sent in response to Mr Rhodes' letter dated 10 November, noting that the information was received on 30 November (as mentioned above, the covering letter was dated 12 November). Mr Rhodes wrote again on 24 January 2011 enclosing another copy of the 7 December letter and reiterating that the repayment could not be authorised until the VAT return had been verified. He wrote a further letter on 8 February 2011 asking some questions about the management agreements supplied in response to his letter dated 10 November. Both the letters dated 24 January and 8 February were sent by recorded delivery.

12. Having received no response to any of his letters dated 7 December, 24 January or 8 February Mr Rhodes sent a further letter on 19 April 2011, also by recorded delivery, in the form of a formal notice under paragraph 1 of Schedule 36 to the Finance Act 2008. This notice required the appellant to produce broadly the same information that had already been requested in the earlier letters, although there is an additional specific reference to copies of sales and purchase invoices in respect of the 09/10 period. No response was received.

13. Mr Rhodes wrote a further letter to the appellant on 1 June 2011. This was a standard letter enclosing an updated version of HMRC's factsheet about compliance checks.

14. No further steps appear to have been taken by HMRC until the notice of assessment was issued by Mr Rhodes on 29 November 2012. That notice made it clear that, if the appellant disagreed with the decision, he needed to write to HMRC within 30 days or alternatively appeal to the Tribunal within that period.

15. Mr Rhodes was not available to attend the hearing due to a pre-booked holiday but Ms Spence provided a note he had prepared in response to a letter sent by the appellant to the Tribunal dated 11 July 2017 enclosing documentation on which the appellant intended to rely. The note from Mr Rhodes confirms his recollection that he did not receive any of the requested documents or information, despite an apparent suggestion by the appellant in the 11 July letter that Mr Rhodes had acted as if he had received part of it (a suggestion which we do not accept is justified by the correspondence). Mr Rhodes' note also confirms that the 1 June letter was sent out because of the specific instruction to send it to all taxpayers under enquiry, and that correspondence was sent to the appellant rather than to Mr Williams because HMRC did not hold authorisation (under form 64-8) to deal with Mr Williams' firm as agent. In addition, the note comments that Mr Rhodes could not have seen the business records for 09/10 when he visited on 3 November 2010 because the appellant had yet to file the return. Whilst it is unfortunate that Mr Rhodes was not available, the contents of the note, apart from the comment about business records for 09/10, are in our view wholly consistent with the documentary evidence and we accept them. As regards the business records for 09/10, the fact that the return had not been filed would not necessarily mean that no business records were available for that period, although clearly Mr Rhodes would not have been in a position to check them against the return.

16. We noted at the hearing that the postcode used for the appellant's address varies somewhat between different letters from HMRC, and in particular between the notice of assessment and the Schedule 36 notice. However, the address and postcode used for the notice of assessment correspond precisely to information provided by telephone by the taxpayer's bookkeeper in a call to HMRC on 4 October 2011 which queried why returns were not being issued, and to other correspondence which the appellant had clearly received and was included in the documents provided by the appellant's representative at the hearing, including the original request for a meeting which was made on 7 May 2010 in relation to one of the appellant's other businesses, and the letter dated 1 June 2011 enclosing the factsheet about compliance checks. The documents supplied at the hearing by the appellant's representative also included a copy of the Schedule 36 notice dated 19 April 2011, which was clearly received by the appellant despite the difference in address.

The appellant's version of events

17. The appellant's notice of appeal to the Tribunal justified the late appeal on the basis that neither the appellant nor his agent had received the notice of assessment dated 29 November 2012 until 21 March 2017, and that he was not aware that his input tax claim had been rejected. He only found out once he was contacted by the Debt Management team. His online access to his VAT records was blocked and he was unable to check the position online. The grounds of appeal indicate that it took a long time for Mr Williams to work out that the amount claimed by the Debt Management team corresponded to the output tax for 09/10, and refer to the previous visit by HMRC, stating that Mr Rhodes had seen the records for 06/10 which had the same sources of input tax as 09/10. The grounds of appeal also refer to the appellant having complied with a request for records to be sent to authorise the repayment.

18. The appellant provided further detail in the letter dated 11 July to the Tribunal, which we infer was drafted by Mr Williams. This letter does not deny receipt of any of the correspondence apart from the notice of assessment, and copies of the Schedule 36 notice dated 19 April 2011 and the letter dated 1 June 2011 were supplied with the appellant's letter. The letter claims that the appellant responded fully to the Schedule 36 notice and suggests that, if he had not, it was strange for Mr Rhodes simply to update the appellant with information on compliance checks and not raise the matter. The letter queries why the assessment was not sent to the appellant's accountant. It also states that the appellant had been VAT registered from July 1988 and had submitted and paid all VAT on the due date, on average £7,500 per quarter up to mid-2005. Of around 40 VAT returns submitted between 2000 and 2010 only 11 were repayment claims, all towards the later stages of his business and averaging £1250 per return. Mr Rhodes had checked a reasonable number of the returns and the VAT accounting system and had not reported any problem.

19. The appellant's letter of 11 July enclosed an earlier letter from Mr Williams to the Debt Management team at HMRC. This claimed that the appellant had sent the documents requested by Mr Rhodes on two occasions, that the input tax for 09/10 was not dissimilar to that for 06/10 which Mr Rhodes would have checked on his visit, and that Mr Rhodes would have obtained an extensive understanding of the business from

the documents sent in response to the earlier request on 19 October 2010 (see [10] above). The appellant should have been informed about the liability imposed on him and the denial of his input tax claim.

20. Certain additional documents were also supplied by the appellant at the hearing. One of these was a copy of HMRC's letter dated 7 December 2010 (the original information request in respect of the 09/10 period) with some handwritten annotations, which Mr Williams said had been added by his assistant. The annotations refer to attachments which appear to comprise the requested information, apart from bank statements. Another document supplied was a letter sent in October 2016 from Mr Williams to the Debt Management team which indicated that the appellant had complied with the original notice to provide information and that the information had been sent again once it had become clear to the appellant that HMRC was claiming £8,704.94. There was also a letter from Mr Williams in July 2014 to the same team. It is clear from this letter that at least by that point Mr Williams was aware of HMRC's claim and that it related to VAT due for 09/10. The letter stated that the claim was incorrect and his client was due a repayment.

21. At the hearing Mr Williams repeated a number of the points raised in the correspondence described above. He also indicated that he was unsure whether the 7 December 2010 letter had been received, but that the information requested in that letter was information that Mr Rhodes had had an opportunity to look at when he visited on 3 November 2010. He did confirm that both the letters dated 19 April 2011 (the Schedule 36 notice) and 1 June 2011 were received. As an accountant he appreciated the significance of the 19 April letter and believed that a response had been made, although there was no documentary evidence of this. He had arranged for a staff member to put together the response for the appellant. However, unlike the letter dated 12 November 2010 which he had prepared (and a copy of which was included in the bundle) Mr Williams could not recall producing a covering letter to respond to the 19 April information request. The assistant had given the information to the appellant to send to HMRC and the consequences of failing to send it had been explained. The assistant might have prepared a covering letter but Mr Williams did not have it with him.

22. The appellant gave evidence indicating that, once the bundle had been prepared in response to the 19 April information request, he had sent it by recorded delivery. He usually kept evidence of items sent by recorded delivery until receipt was verified, but he thought that HMRC had received the information. Any letter of the kind sent on 19 April would be passed to his accountant and he would always follow the accountant's advice. That was what he had done here. The appellant also indicated that he had responded to the original information request made on 7 December 2010, and that when he responded to the 19 April notice he was sending information for the second time, together with more detailed information including bank statements.

23. The appellant's response to the question of why he did not follow the matter up given the VAT refund he was expecting was that he had just been careless and his failure to do so was due to oversight. He suggested that his health had not been good.

24. On cross examination, and in response to further questions from the Tribunal, it became apparent to us that the appellant had no specific recollection of receiving particular items of correspondence or of responding to them. His comments were more generic, about the way in which he dealt with correspondence. Indeed, on being shown a copy of the notice of assessment he suggested that he may have received it but was not sure. This evidence was clearly inconsistent with the appellant's case.

Conclusions on the appellant's version of events

25. We did not find the appellant's evidence, or Mr Williams' submissions as to what had occurred (to the extent that constituted evidence as to disputed matters of fact), to be credible. The evidence was also not particularly coherent. We find it more likely than not that the appellant did not send Mr Rhodes any of the requested information in response to the 7 December 2010 or 19 April 2011 letters, and that he did receive the subsequent notice of assessment.

26. We consider it highly unlikely that the responses that the appellant claims he made to the 7 December and 19 April letters were sent to HMRC but that HMRC failed to receive them. It is conceivable that one of the responses might have gone astray, but it is highly unlikely that both would have done. It is also very surprising that no covering letter, as well as no evidence of recorded delivery, is available in respect of the response that the appellant claims was made to the 19 April letter, in sharp contrast to the copy letter dated 12 November 2010 (referred to at [10] above). Whilst we acknowledge that it is possible that Mr Williams' assistant, who acted as bookkeeper, could have helped the appellant put together material to respond to HMRC we do not accept that the necessary action was taken to send any response. We also question the likelihood that an individual whose evidence was that he would pass any correspondence of this nature to his accountant, would be prepared to handle responses to letters of this kind himself, or that he would be prepared to write the covering letter that might be expected to be required. It was quite clear from the appellant's evidence that he does not handle paperwork well and relies heavily on his accountant, so we would have expected to see a file copy of a response to the requests for information either from, or drafted by, the accountant.

27. In our view it is not relevant that Mr Rhodes had access to information when he visited in November 2011 and that he subsequently received further documentation. Mr Rose was entitled to conduct a check of the 09/10 return as well as ask further questions about that documentation. The appellant's failure to respond might be explained by a view that he had already provided sufficient information to HMRC, but that does not provide a justification for the failure to respond to Mr Rhodes' requests.

The legislation and relevant principles

28. The assessment was made under s73 VATA. Although not stated on its face, the assessment must have been made under s73(1) which provides:

> "(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

29. By virtue of s83(1)(p) VATA an appeal can be made to the Tribunal against an assessment under s73(1) in respect of a period for which the appellant has made a return. This is clearly satisfied in respect of the period in question, 09/10. The relevant time limit for an appeal to the Tribunal in this case, in the absence of any request for a review, is set out in s83G(1) VATA, namely that the appeal "is to be made … before … the end of the period of 30 days beginning with … the date of the document notifying the decision to which the appeal relates". In this case the date of the assessment was 29 November 2012 and so any appeal should have been made before 29 December 2012. However, this is subject to s83G(6), which provides that an appeal may be made after the end of the period specified in subsection (1) if the Tribunal gives permission to do so.

30. Guidance has been provided in a number of cases as to the approach the Tribunal should take in determining questions of this kind. Most recently, important guidance has been provided by the Supreme Court in *BPP Holdings Limited and others v HMRC* [2017] UKSC 55. It is clear from the Supreme Court decision that we must take all relevant factors into account, but that close regard should also be paid to the approach now taken by the courts, under which importance must be attached to observing rules. The approach taken in the CPR (the Civil Procedure Rules) should generally be followed. Lord Neuberger referred in particular to the guidance given by Judge Sinfield in *McCarthy & Stone (Developments) Ltd v HMRC* [2014] UKUT 196 (TCC), [2015] STC 973 as being appropriate. Addressing the question of whether to permit an extension of time under the Upper Tribunal rules, Judge Sinfield referred to the Court of Appeal decision in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 as providing useful guidance. *Mitchell* made it clear that, whilst all the circumstances should be taken into account, particular weight should be given to the references in the CPR to the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions and orders. The Court of Appeal considered the issue again in *Denton v TH White* [2014] EWCA Civ 906 and provided some clarifications which were considered by the Upper Tribunal in *Romasave (Property Services) Ltd v HMRC* [2016] STC 1, which also considered the useful guidance provided by Morgan J in *Data Select Ltd v HMRC* [2012] STC 2195.

31. The guidance in *Data Select* suggests that the Tribunal should ask itself the following questions: what is the purpose of the time limit, how long was the delay, was there a good explanation for it, and what are the consequences for the parties of an extension or a refusal. The guidance in *Denton*, discussed and applied in *Romasave*, refers to a three-stage process, the first being to identify and assess the seriousness and significance of the failure, the second to consider why it occurred and the third to evaluate all the circumstances of the case, including those emphasised by the CPR rules.

Reasons for our decision

32. In our view this application cannot succeed.

33. The questions suggested by *Data Select* can be answered as follows. The purpose of the time limit is to ensure finality of litigation and legal certainty. The delay was very significant, and in our view there was no good explanation for it. Clearly, failure to admit the appeal will mean that the appellant's input tax claim will be denied and he will be required to pay the VAT that has been assessed, but account needs to be taken of HMRC's position. HMRC submitted that some of HMRC's records have been destroyed so that HMRC would be prejudiced if the hearing proceeded. Mr Rhodes' note for the hearing stated that the documents that were no longer available were the notes he would have made in HMRC's electronic folder relating to the query he raised over the 09/10 return, and his report of the visit made on 3 November 2010. We accept this.

34. Applying the approach in *Denton*, the delay was undoubtedly serious and significant (see in particular *Romasave* at [96], which considered a delay of more than three months as serious and significant, also in the context of the discretion to allow a late appeal). On the facts we have found there appears to have been no good reason for it to have occurred. As to other relevant circumstances, we have taken into account the prejudice to each party. The prejudice to the appellant in refusing permission is clear, but as noted in *Romasave* at [98] and [99] prejudice to the finality of litigation is itself a material factor, as is prejudice to the proper operation of the appeals process. In this case we also accept that HMRC's position could be prejudiced by a lack of available information.

Disposition

35. Accordingly, we refuse the appellant's application for permission to make a late appeal.

36. 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 Rules. 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 6 September 2017