[2017] UKFTT 786 (TC)

TC06193

Appeal number: TC/2017/03783

Stamp Duty Land Tax – avoidance scheme – late appeal – application for permission to notify a late appeal to the Tribunal - permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

RUI MANUEL VERA CRUZ DE JESUS **Appellants**
SANDRA CHRISTIE SILVA CAVALHEIRO

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**

Sitting in Chambers on 25 October 2017

Maxim Solicitors for the Appellant

Peter Kane, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is a decision on an application from the Appellants for permission to notify a late appeal to the Tribunal. The parties were informed that in the absence of any objection, the application might be determined without a hearing on the basis of the written representations of the parties. The Appellants confirmed they had no objection to this course of action, and HMRC did not indicate any objection to it.

The facts

2. The underlying appeal concerns the attempted use by the Appellants in September 2011 of a Stamp Duty Land Tax ("SDLT") saving scheme. The Appellants were purchasing a property in Essex for £265,000, and an unlimited company was interposed to contract for the purchase at that price. The Appellants allege that immediately following exchange of contracts, a deed of assignment was entered into between that unlimited company and themselves, under which the benefit of the contract was assigned to the Appellants, "subject to the liability under it" for a price of £66,250. The Appellants appear to be arguing that as the intermediate company only paid 85% of the purchase price to the vendor, the contract was not substantially performed; and as the £66,250 payable by the Appellants to the company was below the SDLT threshold, the end result was that no SDLT was payable.

3. The Appellants submitted an SDLT return showing their acquisition of the property from the intermediate company for £66,250, with no SDLT payable.

4. In due course, HMRC considered the SDLT return. On 15 June 2015 they wrote to the Appellants notifying an assessment of £7,950 of SDLT, calculated at 3% of the £265,000 consideration they had established from the papers submitted to HM Land Registry.

5. An appeal against this assessment appears to have been notified to HMRC. Various documents appear to have been supplied to them in support of that appeal. In a letter dated 1 October 2015, HMRC wrote to the Appellants summarising the information that had been supplied to them and setting out their analysis of that material. The Appellants were offered the opportunity of a formal review, which they appear to have taken up. On 20 January 2016, HMRC wrote to the Appellants, confirming their view that the Appellants were liable to SDLT of £7,950 in accordance with 15 June 2015 assessment. They also stated the Appellants were arguably liable for further SDLT based on the amount supposedly paid to the intermediate company for the assignment of the contract, but they did not propose to pursue that argument.

6. At the end of the 20 January 2016 letter, HMRC said this:

> "If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. If you want to notify the appeal to the

> tribunal, you must write to the tribunal within 30 days of the date of this letter. You can find out how to do this on the GOV.UK website…
>
> *If you do not notify the appeal to the tribunal within 30 days of the date of this letter, the appeal will be determined in accordance with my conclusion, by virtue of Paragraph 36 F Schedule 10 Finance Act 2003.*"

7. By letter dated 24 March 2016, in the absence of any appeal to the Tribunal, HMRC notified the Appellants that the appeal was now regarded as settled by agreement under Schedule 10 Finance Act 2003. This letter (erroneously) advised that the Appellants had a further 30 days within which they could notify their appeal to the Tribunal.

8. Maxim Solicitors wrote to HMRC on 22 April 2016, notifying them that they were now instructed on behalf of the Appellants. They requested that their letter be accepted as formal notice of appeal. They did not give any reasons for why the appeal was made late, nor did they send such a letter to the Tribunal. Whilst highlighting that they did not act in the purchase of the property, they failed to mention that their consultant solicitor Feisal Sheikh, whilst managing partner at Daybells Solicitors, had acted on the purchase.

9. On 4 May 2016 HMRC wrote to the Appellants advising them that they held no authorities for Maxim to represent them and guiding them as to how they could appeal the decision. The letter again highlighted the need to notify the appeal to the Tribunal.

10. After receiving such authorities on 9 May 2016, HMRC wrote to Maxim Solicitors on 13 May 2016, enclosing a further copy of their earlier letter dated 4 May 2016, explaining that an appeal to the Tribunal was necessary.

11. On 29 July 2016 Mr Sheikh informed HMRC of the Appellants' wish to appeal the assessment and to place the matter on hold as they were awaiting the conveyancing file from the SRA. No mention was made of any appeal to the Tribunal.

12. On 23 August 2016 HMRC once again referred Maxim Solicitors to the earlier letter of 4 May 2016.

13. On 7 March 2017, Maxim Solicitors wrote to the Tribunal. They did not submit a Notice of Appeal form, but asked that their letter be accepted as "formal Notice of Appeal against the Discovery Assessment dated 15 June 2015 issued by HMRC (and upheld by an Independent Review Officer on 20 January 2016) in respect of the SDLT paid by them on their purchase of the Property."

14. That same letter included the following reasons why the appeal should be admitted late:

> "1. This Firm did not act on the purchase of the Property. The purchase was dealt with by Daybells Solicitors which was sold to Nationwide Solicitors in January 2014 and then subsequently intervened by the

> SRA in October 2014. The file took a considerable length of time to be located by the SRA and even once it was it was clear that this was not the full file. Correspondence and documents seem to be missing. It has taken us time to consider the file and documents before being able to advise the Appellants upon the merits of making an Appeal to the Tribunal.
>
> 2. Having received the initial Discovery Assessment, the Appellants chose to make a complaint against their former Firm of Solicitors (Daybells) to the Legal Ombudsman. This took time to deal with and hence the delay in filing this Notice of Appeal."

15. On 10 May 2017, in response to enforcement action being taken against the Appellants, Maxim Solicitors emailed the Tribunal chasing up the appeal. Because the Tribunal's Notice of Appeal form had not been used and the 7 March 2017 letter did not include various material required under the Tribunal's procedure rules, it appears matters had ground to a halt at the Tribunal while attempts were made to establish whether the 7 March 2017 letter was adequate to notify a valid appeal. It was only on 18 May 2017 that the Tribunal responded by email, informing Maxim Solicitors that their letter was inadequate, and requiring delivery of a copy of any written record of the decision being appealed against.

16. On 1 June 2017, Maxim Solicitors emailed the Tribunal attaching copies of the original assessment dated 15 June 2015, HMRC's letter dated 1 October 2015, and HMRC's independent review letter dated 20 January 2016.

17. The Tribunal then accepted the appeal and, on 24 June 2017, notified it to HMRC, who responded by email dated 21 July 2017, objecting to the late appeal being admitted.

18. In response to HMRC's objection, Maxim Solicitors effectively repeated the reasons given in their 7 March 2017 letter, with a little further detail. It was said that after the Appellants had made their complaint to the Legal Ombudsman, they had contacted Mr Sheikh (now at Maxim Solicitors, formerly at Daybell), "who acted initially in their purchase of the Property, who as a gesture of good faith agreed to help them" in their appeal. Mr Sheikh had requested the original purchase file from the SRA in June 2016 but the file was only eventually received "around October/November 2016". It was argued that the file was "necessary before making an Appeal so that exact facts and mechanics of the SDLT scheme utilised at the time of Purchase could be ascertained. The file has to be reviewed by Mr Sheikh, and instructions taken from the Appellants. In addition, Mr Sheikh had to make enquiries with the Stamp Mitigation Company. Again this exercise took time to deal with."

19. It was also stated that they had "tried lodging an online appeal on 2 December 2016. No acknowledgement was ever received". The Tribunal has no record of any such attempt, nor was it referred to in Maxim Solicitors' letter dated 7 March 2017, even though that letter gave specific reasons why the appeal was being lodged late.

The law

20. The relevant statutory provisions are in paragraphs 36A, 36C, 36F and 36G of Schedule 10 Finance Act 2003, which provide (in relevant part) as follows:

> "**Appeal: HMRC review or determination by tribunal**
>
> **36A –**
>
> (1) This paragraph applies if notice of appeal has been given to HMRC.
>
> (2) In such a case –
>
> (a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see paragraph 36B),
>
> (b) HMRC may notify the appellant of an offer to review the matter in question (see paragraph 36C), or
>
> (c) the appellant may notify the appeal to the tribunal (see paragraph 36D).
>
> (3) See paragraphs 36G and 36H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.
>
> (4) This paragraph does not prevent the matter in question from being dealt with in accordance with paragraph 37(1) (settling of appeals by agreement).
>
> …
>
> **HMRC offer review**
>
> **36C –**
>
> (1) Sub-paragraphs (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.
>
> (2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC's view of the matter in question.
>
> (3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with paragraph 36E.
>
> (4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under paragraph 37(1) for the settlement of that matter.

(5) The appellant may not give notice under paragraph 37(2) (desire to withdraw from agreement) in a case where sub-paragraph (4) applies.

(6) Sub-paragraph (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under paragraph 36H.

(7) HMRC may not notify the appellant of an offer to review the matter in question (and, accordingly, HMRC shall not be required to conduct a review) if –

(a) HMRC have already given a notification under this paragraph in relation to the matter in question,

(b) the appellant has given a notification under paragraph 36B in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal under paragraph 36D.

(8) In this paragraph "acceptance period" means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question.

…

Effect of conclusions of review

36F -

(1) This paragraph applies if HMRC give notice of the conclusions of a review (see paragraph 36E).

(2) The conclusions are to be treated as if they were an agreement in writing under paragraph 37(1) for the settlement of the matter in question.

(3) The appellant may not give notice under paragraph 37(2) (desire to withdraw from agreement) in a case where sub-paragraph (2) applies.

(4) Sub-paragraph (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under paragraph 36G.

Notifying appeal to tribunal after review concluded

36G -

(1) This paragraph applies if—

(a) HMRC have given notice of the conclusions of a review in accordance with paragraph 36E, or

(b) the period specified in paragraph 36E(6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

(3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this paragraph "post-review period" means—

(a) in a case falling with sub-paragraph (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with paragraph 36E(6), or

(b) in a case falling within sub-paragraph (1)(b), the period that—

(i) begins with the day following the last day of the period specified in paragraph 36E(6), and

(ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with paragraph 36E(9)."

21. The Tribunal therefore has a discretion, under paragraph 36G(3), to give permission for late notification of the appeal, and there are no statutory provisions which state how that discretion is to be exercised.

22. Paragraph 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides as follows:

"(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 of appeal was not provided in time; and

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

23. The judgment of Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 included a useful analysis of the way in which the judicial discretion to permit the making of late tax

appeals ought to be exercised (that case was concerned with section 49 Taxes Management Act 1970, a provision which is closely mirrored by paragraph 36G(3)):

> "[22] Section 49 is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.
>
> [23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s 49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s 33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late.

> [24] Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed, in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one another, for example in a case where there is a reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies."

24. Morgan J in *Data Select Limited v Commissioners for Revenue & Customs* [2012] STC 2195, considering a late VAT appeal (where the relevant provisions are very similar) said this at [34] to [37]:

> "Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions.
>
> …
>
> Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in Advocate General for Scotland v General Comrs for Aberdeen City [2005] CSOH 135 at [23]–[24], [2006] STC 1218 at [23]–[24] which is in line with what I have said above.
>
> [37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. None the less, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

25. In *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2016] STC 1, the Upper Tribunal was considering a VAT appeal (where the terms of the relevant legislation are very similar) which was a little more than three months late. In refusing permission for the appeal to proceed, they said this at [96]:

> "The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant. We note, although judgment was given only after we had heard this appeal, that in *Secretary of State for the Home Dept v SS (Congo)* [2015] EWCA Civ 387, [2015] All ER (D) 210 (Apr) (at [105]) the Court of Appeal has similarly described exceeding a time limit of 28 days for applying to that court for permission to appeal by 24 days as significant, and a delay of more than three months as serious. Although each case must be considered in its own context, we can find nothing in this case which would alter our finding in this respect. As the court in *SS (Congo)* observed, one universal factor in this respect is the desirability of finality in litigation, a factor that is present in this case: see *Data Select* ([2012] STC 2195 at [37]), above. We are also mindful of the comments of Sir Stephen Oliver, sitting in the First-tier Tribunal, in *Ogedegbe v Revenue and Customs Comrs* [2009] UKFTT 364 (TC), [2010] SWTI 798 (discussed in *Markland v Revenue and Customs Comrs* [2011] UKFTT 559 (TC) and by this tribunal in *O'Flaherty v Revenue and Customs Comrs* [2013] UKUT 161 (TCC), [2013] STC 1946) that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely."

Discussion and decision

26. In the present case, HMRC issued their formal review in their letter dated 20 January 2016. Under paragraph 36F(2) of Schedule 10, therefore, HMRC's conclusions as set out in that letter are "to be treated as if they were an agreement in writing under paragraph 37(1) for the settlement of the matter in question" unless the Appellants notified their appeal to the Tribunal under paragraph 36F(4).

27. Such appeal had to be notified within 30 days of 20 January 2016.

28. The appeal was finally validly notified to the Tribunal on 1 June 2017, following an earlier abortive attempt to notify it on 7 March 2017 by post.

29. Whilst HMRC had confused matters somewhat by including in their letter dated 24 March 2016 a reference to a further 30 day period for appealing to the Tribunal, this does not appear to have prompted the Appellants into any material action, rather their new representatives attempted to appeal once again to HMRC (rather than to the Tribunal). Even following further guidance in HMRC's letter dated 4 May 2016 (re-sent on 13 May and 23 August 2016), the Appellants or their

representatives continued to ignore the legal requirements which had been pointed out to them and seek to excuse this by saying they were attempting to get hold of the original conveyancing file, though I note they say they only requested the file in June 2016. They did not need the conveyancing file in order to notify the appeal to the Tribunal, they already had in their possession all the necessary material, in particular HMRC's review letter setting out the statutory appeal rights.

30. I find the reasons for the lateness to be wholly inadequate. Essentially, in spite of being informed quite clearly a number of times that they needed to appeal within 30 days, the Appellants or their advisers allowed matters to drift on until well over a year had passed before even attempting (invalidly) to notify their appeal to the Tribunal.

31. In a "normal" appeal, such conduct would display an unacceptably lax approach to the statutory time limits. In an appeal such as this, I cannot see how a delay of this nature and magnitude can possibly be "excused" by permitting the late appeal to proceed. Where taxpayers embark on a course of action which involves careful reliance on detailed technical provisions to avoid tax, they cannot reasonably expect an indulgent attitude to be shown to them when they fail so spectacularly to observe basic time limits in seeking to exercise their rights of appeal when HMRC challenge the effectiveness of the scheme.

32. By reference to the various factors mentioned in *Aberdeen City* and the other cases cited above, I see nothing in the history of this case to displace the starting assumption that "the normal case is covered by the time limit". I see no reasonable excuse for the delay in notifying the appeal. There was nothing materially confusing or misleading about the communications which HMRC sent to the Appellants, and the Appellants have failed to act with any expedition even once it should have been clear to them that an appeal to the Tribunal was both necessary and late.

33. Permission to notify this appeal to the Tribunal after the relevant statutory time limit is therefore REFUSED. As such, the Tribunal has no jurisdiction to consider the appeal itself, which is therefore STRUCK OUT.

34. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 30 October 2017