



TC07895

FIRST-TIER TRIBUNAL

Appeal number: TC/2019/05782/V

TAX CHAMBER

BETWEEN

LINCOLN YURTS LTD

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE PETER HINCHLIFFE

CHRISTOPHER JENKINS

The hearing took place on 29th September 2020. The Appellant was represented by Sara Bell, who works with the Appellant. The Respondents were represented by John Nicholson, a litigator for the Respondent.

With the consent of the parties, the form of the hearing was agreed to be by video. The hearing took place with Ms Bell, Mr Nicholson and the Tribunal members present. The hearing used the Tax Tribunal's Video System.

A face to face hearing was not held because of the difficulties in assembling the parties in a single hearing room in the light of the impact of the COVID-19 virus. The parties confirmed in advance of the hearing and repeated at the hearing that they were content to proceed on this basis. The Tribunal found that a hearing by video was suitable for this case and avoided delay whilst being compatible with the proper considerations of the issues.

The documents to which we were referred were included in a bundle of 149 pages containing the submissions and evidence from the parties and relevant legislation and legal authorities. These bundles were available to the parties and the Tribunal in electronic form and the parties confirmed that they had received such bundles. Additional papers were provided with the consent of the Tribunal during the course of the hearing.

The Tribunal directed that the hearing should be in private on the basis that it was not in the public interest during the COVID-19 pandemic to hold a face to face hearing open to the public and that it was in the public interest for the hearing to go ahead remotely, which by necessity meant it must be in private.

DECISION on PRELIMINARY ISSUE

INTRODUCTION

1. The Appellant (“Lincoln Yurts”) submitted an appeal dated 28 August 2019 against a VAT assessment dated 27 November 2018 in an amount of £9996.00 and a penalty assessment dated 22 January 2019 in an amount of £1999.20. The Appellant denies that it had exceeded the threshold for registering for VAT. It does not believe that it should be liable for either the VAT assessment or the penalty assessment.

2. In the Notice of Appeal the Appellant stated that it was appealing in order to have the case reopened as it had submitted the appeal on time and had then been told that some of the attachments were illegible. It had re-sent these attachments and had heard nothing since then.

3. The Respondents responded to the appeal by requesting the Tribunal to refuse the Appellant permission to make a late appeal. The Respondents stated:

“ No reasons have been given by the Appellant for appealing out of time.

The Respondent submits that Appellant’s appeal against the decision and against the NPPS, if relevant, is significantly and seriously out of time.

The Respondent seeks that Appellant’s application to make a late appeal is refused on the ground of it being out of time. “

4. The Appellant is regarded as having made an application under Rule 20 (4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Tribunal Rules”) for the admission of this appeal outside of the time limits set out in the Tribunal Rules for such an appeal.

5. On 17 December 2019, a clerk to the Tribunal notified the parties as follows:“

“As HMRC has objected to your appeal being submitted out of time, we will arrange a hearing of the application for permission to make a late appeal, your application for permission to make late appeal will proceed straight to a hearing. If permission is granted, we will consider further case management of the substantive appeal. If permission is refused, we will close our file”

PRELIMINARY ISSUE

6. Judge Sukul issued directions to the parties in advance of the hearing. With their agreement it was decided to proceed by means of a video hearing to resolve the issue of whether the permission should be given for the appeal to proceed even it had been submitted outside of the required timescales.

7. At the hearing Ms Bell stated on behalf of Lincoln Yurts that they had not understood that the hearing would only consider the preliminary issue and not the whole of the appeal against the decision that Lincoln Yurts was required to register for VAT and should pay VAT and a penalty for not having registered on time. However, she confirmed that she was adequately prepared to make submissions in relation to the application for permission to make a late appeal and content to do so.

THE TRIBUNAL RULES AND LEGISLATION

8. The Tribunal Rules provide as follows:

“Overriding objective and parties’ obligation to co-operate with the Tribunal.

2. (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes-

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must-

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

Case Management Powers

9. (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedures.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside another direction.

(3) In particular and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction:

(a) extend or shorten the time for complying with any rule, practice direction or direction unless such extension or shortening would conflict with a provision of another enactment setting down a time limit.

20 Starting Appeal Proceedings

(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.”

8. The power to permit a late appeal has been conferred on this Tribunal (the “FTT”) by statute. Section 49 of the Taxes Management Act 1970 (“TMA”) and the Tribunal Rules confers this power. The Tribunal takes account of the decision of the Upper Tribunal in *William Martland v The Commissioners for HM Revenue and Customs* [2018] UKUT 0178 (TCC), which considers the issues that are relevant in deciding whether to give permission for an appeal to proceed when it has been submitted late. In this case the Upper Tribunal said:

“44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT’s deliberations artificially by reference to those factors. The FTT’s role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant’s case; this goes to the question of prejudice – it is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal.”

9. The Upper Tribunal in *Romasave (Property Services) Limited* [2015] UKUT 254 20 (TCC) stated:

“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.”

THE HEARING

10. At the hearing it was common ground that HMRC had notified Lincoln Yurts on 27 November 2018 that it should have registered for VAT between 1 May 2016 and 31 October 2017 and that it had issued a penalty on 22 January 2019 in respect of Lincoln Yurts failure to register for VAT.

11. At the outset of the hearing it became apparent that Ms Bell was working from an earlier version of the bundle, which had been prepared for a hearing that had been adjourned. Ms Bell located the later bundle on her computer. Ms Bell was asked if she would like time to read the additional 30 pages and then resume the video hearing. She was content to do so. The hearing then adjourned for 25 minutes whilst Ms Bell reviewed the additional pages in the bundle.

12. When the hearing resumed HMRC took the Tribunal through the timetable relating to the decisions that were the subject of the appeal and the submission of the appeal by Lincoln Yurts.

13. HMRC referred to the Upper Tribunal decision in *Martland v HMRC*, which sets out guidance on how the Tribunal’s discretion to permit an appeal being submitted out of time should be exercised. They asked that the serious and significant delay between the decision

on 27 November 2018 and the penalty assessment on 22 January 2019 and the submission of the appeal on 28 August 2019 should be taken into account in deciding whether to grant an extension of time for the submission of this appeal. HMRC argued that Lincoln Yurts had submitted their appeal 280 days late and that this was a serious and significant delay.

14. HMRC stated that Lincoln Yurts had not submitted a request for a review of the decisions within the required 30 day period. HMRC confirmed that Lincoln Yurts had paid the sums that are the subject of the appeal. They also stated that the Tribunal's overriding objective to deal with cases fairly and justly should lead to the dismissal of this late appeal. Otherwise they would suffer prejudice in dedicating resources to obtaining relevant documents and evidence in relation to a matter that they were entitled to regard as having been settled.

15. Ms Bell stated on behalf of Lincoln Yurts that they had paid the £9996 liability on 27 December 2018 as they believed that they had to pay this amount prior to appealing against the liability. Lincoln Yurts had submitted their appeal to HMRC for the first time on 6th January 2019. This was within the 30 day time limit. They had then received a response for HMRC on 15 January 2019 thanking them for their submission, but stating that it was illegible and asking that it be resubmitted. The submission was then re-sent to the email address given on the following day, 16 January 2019. Ms Bell read from the correspondence that Lincoln Yurts had received.

16. Mr Nicholson intervened to say that HMRC had no record of such correspondence and having heard Ms Bell set out the response that Lincoln Yurts had received, he queried whether the response was from HMCTS (H.M. Courts and Tribunal Service) rather than HMRC. Ms Bell reviewed the correspondence that she had and it became clear that this was the case and that Ms Bell had some e-mails from HM Court and Tribunal Service related to the submission of an appeal in January 2019 that were not included in the bundle.

17. With the consent of the Tribunal and the agreement of Mr Nicholson, Ms Bell forwarded three e-mail trails, which were then circulated to Mr Nicholson and the members of the Tribunal. After allowing time for the additional documents to be reviewed the hearing continued.

18. Ms Bell confirmed that she now recognised the distinction between HMRC and HMCTS. She indicated that Lincoln Yurts had thought it had appealed to HMRC in January 2019, but had submitted the appeal on-line to HMCTS.

19. The e-mails circulated by Ms Bell set out the following:

- On 15 January 2019, HMCTS sent an e-mail to Lincoln Yurts thanking them for their "submission to the Tribunal" and stating that unfortunately the documents that had been submitted via the HMCTS online submission system were distorted and illegible . Lincoln Yurts were asked to provide better quality images so that the appeal could proceed. The email contained a reference number for the appeal submitted by Lincoln Yurts; TC/2019/00165.
- On 16 January Daren Bell of Lincoln Yurts replied to this email with a brief email stating:

"hi as requested here is the new documents in a better format
Appellant : Lincoln Yurts Ltd
Our ref : TC/2019/00165 – Lincoln Yurts"
- An automatic response sent by HMCTS to Lincoln Yurts on 12 February headed "Auto reply" thanking them for an e-mail. The e-mail to which this relates was not attached.

20. Ms Bell said that they had not heard back in response to the e-mail of 16 January 2019. However, as the e-mail of 15th January, which said that some documents were illegible, was received quite soon after the original submission, they had assumed that the lack of a response meant that there was no concern and the appeal was proceeding. Ms Bell was able to clarify in response to questions that the notice of appeal had been completed online in the format that appears in the bundle and only the supporting documents that had been submitted through the system referred to in the e-mail of 15 January had to be re-sent.

21. The supporting document were re-sent on 16 January. Ms Bell said that she had waited until August to ask how the appeal was proceeding as she thought she was dealing with HMRC, where delays of some months in correspondence was not unusual.

22. Ms Bell was unable to clarify what e-mail had triggered the auto reply of 12 February.

23. Mr Nicolson considered the new e-mails and indicated that they appeared to show that an appeal had been submitted to HMCTS on or before 15 January 2019 as HMCTS had provided an appeal reference number when responding on 15 January 2019. He was puzzled by the auto response of 12 February. He said that HMRC would probably not have objected to an appeal that was received on 15 January 2019. Mr Nicholson went on to argue that that it was remarkable that Lincoln Yurts had waited six months before checking up on the progress of the appeal. Only then were they asked to resubmit the appeal. He asked the Tribunal to take account of the fact that the appeal has no merit when considering whether to give permission for the late appeal to proceed.

FINDINGS OF FACT AND LAW

24. The Tribunal reached the following conclusions on the evidence and submissions presented by the parties:

(1) Lincoln Yurts had submitted an online appeal to HMCTS on or before 15th January 2019.

(2) Lincoln Yurts had then responded to a request from HMCTS to re-submit supporting papers for this appeal.

(3) HMCTS had failed to notify HMRC of the appeal that had been submitted and to which they had given a reference number.

(4) The appeal that was submitted on 28 August 2019 was therefore correct in referring to an original appeal that had been submitted by Lincoln Yurts.

(5) Form the evidence available to the tribunal it appeared that HMCTS had failed to take forward the appeal submitted on or before 15 January and had not notified this appeal to HMRC.

(6) This appeal was given a different appeal reference number to that submitted in January 2019.

25. In the light of these findings and having weighed all of the circumstances relating to this application, the Tribunal concluded that in accordance with the overriding objective of this Tribunal it is fair and just that the time for the submission of the appeal generated on 28th August 2019 should be extended.

26. Any prejudice to HMRC in dealing with the appeal at this stage would be secondary to that suffered by Lincoln Yurts if their appeal could not proceed because of an error in the administration of this Tribunal.

CONCLUSION

27. In all of the circumstances of this case the Tribunal concludes that the application for permission to extend the time for submission of the appeal is granted.

28. A hearing of the substantive issues in this appeal should now be listed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

PETER HINCHLIFFE

TRIBUNAL JUDGE

RELEASE DATE: 19 OCTOBER 2020