[2020] UKFTT 0452 (TC)

TC07928

PROCEDURE – application for permission to make a late appeal against assessments to excise duty and penalties – Appellant an innocent agent in the same position as Mr Perfect in the case of that name – approach in Martland *followed – factors considered and weighed –particular weight given to failure to meet statutory time limit – that factor nevertheless outweighed by factors in Appellant's favour, notably merits of case and financial consequences – application allowed*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00030

BETWEEN

VASILE CERCHEZ **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

On 13 August 2020 the Tribunal determined the Appellant's Application for permission to make a late appeal ("the Application"). Both parties consented to the Application being determined without a hearing, and the Tribunal considered that it was in the interests of justice to do so.

Rainer Hughes, Solicitors, instructed by the Appellant, for the Appellant

The Solicitor's Office of HM Revenue & Customs, for the Respondents

DECISION

Summary

1. Mr Cerchez is a lorry driver. On 30 June 2016 and 16 July 2016 he entered the UK with a tractor unit and a trailer he had collected from Calais. The trailers were carrying alcohol. Both the trailers and the alcohol were seized by the Border Force.

2. HM Revenue & Customs ("HMRC") subsequently issued Mr Cerchez with excise duty assessments of £27,894 and £27,876 on the basis that he was the "holder" of the goods in question, together with two wrongdoing penalties of £10,739 and £11,708. Taken together, these total £78,217.

3. On 14 December 2018, Rainer Hughes filed a Notice of Appeal on Mr Cerchez's behalf against HMRC's decisions. It was common ground that this Notice had been filed around seven months late, and that Mr Cerchez required the Tribunal's permission to bring his appeal to the Tribunal.

4. In deciding whether to give permission I carried out a balancing exercise:

(1) I gave particular weight to Mr Cerchez's failure to meet the statutory time limit, in accordance with the relevant case law, including *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*") and *Katib v HMRC* [2019] UKUT 189 (TCC) ("*Katib*");

(2) I took into account the case of Mr Perfect as set out in *HMRC v Perfect* [2017] UKUT (0467) ("*Perfect UT*") and *HMRC v Perfect* [2019] EWCA (Civ) 465. ("*Perfect CoA*") where:

(a) the UT and the CoA found that Mr Perfect was not liable to the penalty charged on him because he was an "innocent agent"; and

(b) the UT found that EU law did not impose "strict liability" and thus an innocent agent cannot be liable to excise duty as a "holder" under EU law. The CoA said that "given the fundamental importance of proportionality in EU law, it is certainly arguable that, had there been any intention to impose strict liability in the 2008 Directive, it would have been expressly stated". However, they found that this issue was not "*acte claire*" and remitted it to the European Court of Justice ("CJEU").

(3) Like Mr Perfect, Mr Cerchez was a lorry driver acting under the instructions of his employer, with no financial interest in the load he was bringing into the UK. HMRC did not challenge Rainer Hughes's submission that Mr Cerchez was also an "innocent agent".

(4) It follows that the merits of Mr Cerchez's appeal against the penalties are extremely high, and that Mr Cerchez also has a very strong case in relation to the excise duty assessments

(5) The financial consequences for Mr Cerchez if he was not given permission to appeal were far more significant than the financial consequences to HMRC if they had to prepare for, and attend, the hearing of the appeal.

5. Having balanced the factors, I decided that those in Mr Cerchez's favour weighed more heavily than the factors on the other side of the scales, and I gave permission for him to make his appeal late.

6. I issued a summary decision on 25 August 2020. On 16 September 2020, HMRC applied for a full decision, saying that they were "considering their position with regards to the out of time point". This is that full decision.

Evidence

7. The Tribunal was provided with the following documents:

(1) Forms BOR162 "Warning about seized goods" ("the BORs") dated 30 June 2016 and 16 July 2016.

(2) The assessments and penalties Mr Cerchez is seeking to appeal, issued on14 August 2017.

(3) A document entitled "cerere de recuperare și", which I understand relates to HMRC's enforcement of the liabilities via the Romanian tax authorities, dated 5 January 2018.

(4) A witness statement dated 19 March 2018 sent to HMRC by Mr Cerchez.

(5) A letter dated 16 April 2018 from Officer Yasin of HMRC.

(6) Mr Cerchez's Notice of Appeal, attaching Grounds of Appeal drafted by Rayner Hughes, filed on 14 December 2018 and including the Application.

(7) HMRC's Notice of Objection to the Application, dated 20 March 2019.

(8) A garnishee order dated 3 June 2019 from the Romanian tax authorities to Mr Cerchez's bank in Romania, and a letter from that bank to Mr Cerchez attaching that order. together with related documents, including a "plan" to recover the liability by deductions on a monthly basis, ending on 4 June 2035.

(9) HMRC's confirmation dated 11 November 2019 that Mr Cerchez met the "hardship" requirements and so was not required to pay the disputed excise duty amount in advance of any proceedings.

(10) HMRC's email to the Tribunal dated 8 January 2020 confirming that they were maintaining their objection to the Application.

(11) Mr Cerchez's further witness statement dated 8 April 2020.

(12) The documents relating to:

(a) the hearing listed to determine the Application on 15 April 2020;

(b) the cancellation of that hearing because of the pandemic;

(c) the parties' agreement that the Application should be dealt with on the papers.

(13) HMRC's confirmation on 29 May 2020 that they had no further representations other than those in their Notice of Objection.

8. The findings of fact set out below are from the evidence contained within the above documents. None are in dispute.

Findings of fact

9. Mr Cerchez is a lorry driver. Until February 2016, he worked for an Italian company. Around the beginning of 2016 he met a Mr Cocardel in Calais, and was offered a job for higher pay working as a driver for Mr Cocardel's Bulgarian company. He was paid regularly

in cash on a weekly basis, and worked for that company without incident for five months, until the events described below.

10. On 30 June 2016 and 16 July 2016 Mr Cerchez entered the UK with a tractor unit and trailer which he had collected from Calais. The Tribunal was not told if the load was made up entirely of alcohol, or if it contained some alcohol, but it is not disputed that there was alcohol in the load.

11. In carrying out that task he was acting in his capacity as an employee of Mr Cocardel's company and was following Mr Cocardel's instructions as to when and where to collect the trailers. He was handed CMRs when he picked up the trailers, and he added the registration number of the tractor unit to those documents. His witness evidence was that he had "no idea about the load, for me being a load like any other load". This evidence has not been challenged and I accept it.

12. The trailers and the alcohol were seized by the Border Force. The BORs for each of those seizures gives Mr Cerchez's name, and an address in Romania. The BOR for 30 June 2016 states that Mr Cerchez "refused to sign", and that for 16 July 2016 has a squiggle in the signature box which does not correspond to Mr Cerchez's signature on his witness statements. I find as a fact that Mr Cerchez did not sign either of the BORs.

13. After the seizures Mr Cerchez met with Mr Cocardel in Calais and was told there had been a problem with the paperwork and that Mr Cocardel would recover the trailers from the Border Force. Mr Cerchez decided to stop working for Mr Cocardel, and did so.

14. On 14 August 2017, Officer Lilley of HMRC issued the following documents:

(1) in relation to the first seizure:

(a) an excise duty assessment of £27,894. The covering letter said this had been raised under Finance Act 1994 ("FA 1994"), s 12(1A) and the text of the assessment that it had been raised under the Customs & Excise Management Act 1979 ("CEMA"), s 116; and

(b) a wrongdoing penalty of £10,739. The text stated that it was issued under Finance Act 2008 ("FA 2008 "), Sch 41, but without reference to any particular provision of that Schedule;

(2) in relation to the second seizure:

(a) an excise duty assessment of £27,876, with the same statutory references; and

(b) a wrongdoing penalty of £11,708, with the same reference to FA 2008, Sch 41.

15. The assessments and the penalties were sent to Mr Cerchez at the address on the BORs. However, Mr Cerchez was no longer at that address, and the assessments and penalties were not forwarded to him. HMRC began recovery proceedings via the Romanian tax authorities. HMRC also sent follow-up correspondence, chasing collection, to an address in the UK where Mr Cerchez used to live, and which was occupied by Romanians who knew Mr Cerchez. Mr Cerchez visited his previous residence and was given the correspondence.

16. On 19 March 2018 Mr Cerchez wrote to HMRC, telling them he had not received the assessments or the penalties, and providing information about the transportation of the goods

and his role and responsibilities. He provided an address in Maidstone for HMRC to use for correspondence, and his email address.

17. On 16 April 2018 Officer Yasin of HMRC sent a letter to the address in Maidstone, which said that:

(1) Mr Cerchez had "failed to provide evidence of any due diligence checks [he had] carried out" on Mr Cocardel's company;

(2) he should have carried out "robust and stringent checks to prove" Mr Cocardel's company was "legitimate";

(3) he had not provided the full name and address of that company;

(4) "based on the information available to HM Revenue & Customs" Mr Cerchez was "the person holding the goods at the time of the seizure and HMRC has been unable to identify anyone else who was involved and had a legitimate interest in the goods";

(5) "a penalty was appropriate because [Mr Cerchez] had been found to have handled excise goods on which duty had not been paid after the duty point had arisen"; and

(6) Officer Yasin was therefore "in agreement with Officer Lilley's decision to assess [Mr Cerchez] for the excise duty and issue the wrongdoing penalty".

18. Under the heading "what to do if you do not agree", Officer Yasin said Mr Cerchez could:

(1) provide further information to him within 30 days;

(2) ask for a review by another officer; or

(3) ask an independent tribunal to "review" (sic) the decision.

19. That text was followed by paragraphs about the HMRC review option and the tribunal option; both stated there was a 30 day time limit.

20. Mr Cerchez's evidence is that he did not receive Officer Yasin's letter. That is not challenged by HMRC and I find it to be a fact. In the absence of a response from Mr Cerchez, HMRC took further steps to recover the money via the Romanian tax authorities.

21. The Tribunal was not informed of the date when Mr Cerchez instructed Rainer Hughes, but on 13 December 2020 that firm informed HMRC they had been instructed, sending the letter by recorded delivery. I infer from that evidence that Rainer Hughes were instructed on or shortly before that date. On 14 December 2018, Rainer Hughes filed the Notice of Appeal at the Tribunal, together with the Application.

22. On 20 March 2019, HMRC objected to the Application. The hearing to determine the Application was initially delayed while the "hardship" issue was considered; when that was resolved in Mr Cerchez's favour, the hearing was cancelled because of the pandemic.

23. On 3 June 2019, the Romanian authorities issued a garnishee order, and on 11 July 2019 Mr Cerchez's bank account communicated with him about that order, including sending him a "plan" to recover the liability by monthly deductions, ending on 4 June 2035.

24. The parties subsequently agreed that the Application could be decided on the papers and the Tribunal found that it was in the interests of justice to do so.

The date by which an appeal was required to be made

The statutory provisions

25. Both parties started from the point that Mr Cerchez was required to appeal within 30 days, but neither referred to the statutory provisions. My understanding of the position is as set out below.

26. FA 1994, s 16 is headed "Appeals to a tribunal" and subsection (1B) provides that appeals against a relevant decision (with certain exceptions which are not relevant to Mr Cerchez's case) may be made to an appeal tribunal within the period of 30 days "beginning with the date of the document notifying [the appellant] of the decision to which the appeal relates." The term "relevant decision" is defined by FA 1994, s 13 to include decisions that a person is liable to excise duty.

27. FA 2008, Sch 41, para 18 provides that an appeal against a penalty charged under that Schedule "shall be treated in the same way as an appeal against an assessment to the tax concerned" and para 24(3) provides that the term "tax" includes "duty".

From what date does the 30 days run?

28. I have found as fact on the basis of Mr Cerchez's evidence that he did not received the assessments or penalties issued on 14 August 2017, either directly or as the result of them being forwarded to him.

29. The Notice of Objection to Mr Cerchez's Application says:

> "the decisions were made on 14 August 2017 however subsequent discussions between the parties places the letter of 16 April 2018 as the relevant decision for the purposes of the appeal time frame."

30. I have therefore approached the Application on the basis that the 30 days runs from the date of Officer Yanev's letter

Whether the assessments/penalties were served

31. HMRC's acceptance that the time limit runs from the date of Officer Yanev's letter carries the necessary implication that they also accept he did not receive the actual assessments or penalties which had been issued.

32. This raised a possible issue as to whether Mr Cerchez had been served with the assessments/penalties at all, but Rainer Hughes did not raise that issue. If Mr Cerchez had not been properly served, this might be a further point in favour of the merits of his appeal. However, as neither party had raised this point, and because I was able to decide the Application on the basis of the evidence and submissions which had been made, I did not ask the parties for further submissions, and I did not take the possible non-service of the assessments/penalties into account when deciding whether to allow the Application.

33. For completeness, I note that the position in Mr Cherchez's case is different from that in *Websons 8 v HMRC* [2020] UKUT 154 (TCC) ("*Websons*"), a decision of Judges Herrington and Scott. In *Websons*, HMRC took the position that the review decision dated 21 December 2011 had been served, but the appellant did not agree. The parties were therefore in dispute about whether the decision had been served and about the length of the

delay. In contrast, both parties here agreed that the 30 days ran from Officer Yanev's letter, see the extract from HMRC's Notice of Objection set out above.

How late was the Notice of Appeal?

34. Officer Yanev's letter was dated 16 April 2018, so the 30 days expired on 16 May 2018. The Notice of Appeal was filed on 13 December 2018, a delay of some seven months.

The Tribunal's jurisdiction

35. The source of the Tribunal's jurisdiction is statutory: FA 1994, s 16(1B) sets the 30 day time limit, and FA 1994, s 16(1F) provides that "an appeal may be made after the end of the period specified in subsection..(1B)…if the appeal tribunal gives permission to do so".

36. In *Martland* at [18] and [19] the UT said this about the jurisdiction of the Tribunal to allow an appeal to be made after the statutory time limit:

> "[18]…In deciding whether or not to permit a late appeal, the FTT is exercising a discretion specifically and directly conferred on it by statute to permit an appeal to come into existence at all. It is not exercising some case management discretion in the conduct of an extant appeal. As the Upper Tribunal said in *Romasave Property Services Limited v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC) at [96]:
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> > "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."
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> [19] For this reason, it is not appropriate to regard the exercise of the discretion as involving a direct application of Rule 2 of the FTT Rules (Rule 2 being concerned with "dealing with a case fairly and justly" in relation to the various procedural matters identified in it – i.e. once proceedings have been properly commenced before the FTT). Nor, it will be noted, does Rule 20 apply to such matters (merely requiring that a late notice of appeal must contain a request for permission pursuant to the relevant enactment, and stating that the appeal must not be admitted unless permission is granted). That said, as will become apparent below, the principle embodied in the overriding objective is a broad one, and one which applies just as much to the exercise of a judicial discretion of the type involved in this appeal as it does to the exercise of such a discretion in relation to more routine procedural matters.

37. In relation to the overriding objective at Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules ("the Tribunal Rules"), the UT said at [55], referring back to the paragraph cited above:

> "whilst that rule is not in our view directly applicable to the exercise carried out by the FTT, there is no doubt that the principles of fairness and justice underpinning that rule also underpin the general exercise of discretion with which the FTT was concerned (see [19] above)."

38. The UT also said at [24]:

> "The statutory discretion conferred on the FTT in such cases is 'at large', in that there is no indication in the statute as to how the FTT should go about exercising it or what factors it should or should not take into account."

39. The UT went on to consider the case law, noting that "the key cases" were *Denton v White* [2014] EWCA Civ 906 ("*Denton*"), and *BPP Holdings v HMRC* [2017] UKSC 55 ("*BPP*"). They observed that the Supreme Court in *BPP* had "implicitly endorsed the approach set out in *Denton*" and then 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.
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> (2) The reason (or reasons) why the default occurred should be established.
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> (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.
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> [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…The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.
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> [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 – there 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…It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

40. The principles set out in *Martland* have been reaffirmed in a number of subsequent UT judgments, including *Bell v HMRC* [2018] UKUT 0254 (TCC) ("*Bell*"), a decision of Judge

Berner; *Peters v HMRC* [2019] UKUT 0058 (TCC), a decision of Judges Richards and Scott, and *Katib*, a decision of Mann J and Judge Richards.

41. The case of *Bell* concerned an Application to make a late appeal against a decision of the FTT. Judge Berner said at [26]:

> "Whereas in *Martland*, which concerned the Application of a statutory provision outside of the Tribunal's Rules, we took the view that there was no direct Application of the overriding objective in Rule 2, in this case there is a clear and direct Application to the exercise of the Tribunal's power to extend time in Rule 5(3)(a). However, that is a distinction without a difference. As we went on to say in *Martland*, the principle of fairness and justice is applicable as a general matter to any exercise of a judicial discretion."

42. In *Katib* at [17] the UT said (their emphasis) that that the FTT in Mr Katib's case:

> "did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion."

43. The UT continued at [60]:

> "Turning to other factors relevant to that third stage, the FTT concluded that the financial consequences of Mr Katib not being able to appeal were very serious because his means were limited such that he would lose his home. That, the FTT concluded, was too unjust to be allowed to stand. We have considered this factor anxiously for ourselves. However, again, when properly analysed, we do not think that this factor is as weighty as the FTT said it was. The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them."

The length of the delay

44. The first of the three stages in *Martland* is the length of the delay. As already noted, both parties accepted that the delay should be measured from 30 days after the issuance of Officer Yasin's letter of 16 April 2018, so the 30 days expired on 16 May 2018. The Notice of Appeal was filed on 13 December 2018, a delay of some seven months. In *Romasave*, the UT said at [96] that:

> "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."

45. Mr Cerchez's delay was much longer than the three month period considered in *Romasave,* so is clearly serious and significant.

The reasons for the delay

46. The reason for the delay is that Mr Cerchez did not receive Officer Yasin's letter, which included the 30 day time limit. However, HMRC sent it to the Maidstone address he had provided and in their submission Mr Cerchez could have contacted the persons residing at that address to see if he had any post; that it was not reasonable for him to think that

HMRC would take no further action to pursue the debt, and if he heard nothing, he could have contacted HMRC to find out the position.

All the circumstances

47. I have considered in particular the circumstances set out below.

The need for statutory time limits to be respected

48. The statutory time limit has been exceeded by seven months, which is serious and significant. I agree with HMRC that as Mr Cerchez had provided the address in Maidstone for correspondence, he should have checked to see if he had any post, and having done so, would have been alerted to the 30 day time limit.

The extent of the prejudice to the parties

49. The UT said in *Martland* at [33]:

> "…if permission is granted, HMRC will be required to litigate on a matter which they had previously considered closed; and if permission is refused, the taxpayer will lose the right to contest a decision, which will clearly cause him some prejudice. The real enquiry is into the extent of the prejudice in either case."

50. The factors on which the parties relied under this heading were the merits of the case and the financial consequences. In *Martland* the UT discussed factors which had been considered in earlier cases, but the only one which might have any bearing on this appeal was whether evidence would have become stale. As the Tribunal's discretion is "at large" I also considered whether there were additional factors which should be taken into account, but did not identify any.

The merits of the case

51. Rainer Hughes relied in particular on *Perfect UT*, a decision of Mrs Justice Whipple and Judge Greenbank. Mr Perfect was a lorry driver who had been issued with excise duty assessments and penalties on the basis that he was the "holder" of the goods. The UT found that Mr Perfect was not liable to the excise duty because he was an "innocent agent", and this also provided him with a reasonable excuse for the penalty. At [53]-[58] they found that:

> "the concept of the innocent agent extends to anyone who lacks actual or constructive knowledge of the *criminal enterprise* in relation to the goods (i.e. the attempt to evade tax on the goods), regardless of whether that person knows that the goods he or she is carrying are of a kind which is subject to excise duty in the first place."

52. HMRC appealed to the Court of Appeal ("CoA"). The case was heard by Nujee J, Patten LJJ and Baker LJJ, and Nujee J handed down their single judgment. In relation to the assessments, the CoA recognised that that the Criminal Division of that Court had taken a similar approach to the UT, and found that an "innocent agent" cannot be liable as a "holder" under EU law. However, the CoA also considered that "the public interest in ensuring that excise duty is paid may require that anyone holding the goods is strictly liable for the duty", although they added at [70] that:

> "Given the fundamental importance of proportionality in EU law, it is certainly arguable that, had there been any intention to impose strict liability in the 2008 Directive, it would have been expressly stated."

53. The CoA decided that the position was not "*acte claire*" and referred the strict liability issue to the CJEU. However, in relation to the penalty, the CoA confirmed that Mr Perfect had a reasonable excuse, holding at [73] that:

> "The facts as found by the FtT included:
>
> (1) that Mr Perfect had no interest of his own in the goods, was not part of any conspiracy, and had simply followed instructions;
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> (2) that the only information that he had was to be found in the documentation he collected when he picked up the goods;
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> (3) the documentation appeared to be consistent with the movement of goods subject to a valid duty-suspended arrangement; and
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> (4) Mr Perfect had no means of checking whether the ARC on the documentation had been used or not.
>
> In our judgment, those facts as found by the FtT entitled the Upper Tribunal to conclude that Mr Perfect was an innocent agent. In the light of those findings, the Upper Tribunal was plainly entitled to conclude that his action in bringing into this country goods on which duty had not been paid was plainly not 'deliberate' within the meaning of para 20 of Sch 41 to the 2008 Act and, furthermore, was plainly capable of giving rise to a reasonable excuse under that paragraph."

54. Rainer Hughes' submissions, made before *Perfect CoA*, were that the case of *Perfect UT* was "determinative" in relation to the success of Mr Cerchez's appeal. HMRC's Objection did not engage with those submissions. HMRC also had the opportunity to make further submissions before the Application was decided on the papers, but elected not to do so, see §XX.

The financial consequences

55. If the Application were to be allowed, HMRC would have to resource and attend the hearing. However, if the Application is refused, Mr Cerchez will be liable to pay £78,217.

56. Since (a) he is a lorry driver by profession, and (b) paying that sum to HMRC before the hearing would have caused him "hardship", I make the reasonable inference that £78,217 is a very significant amount of money for him, so that being unable to appeal would cause him significant prejudice. This inference is also supported the repayment plan set out by Mr Cerchez's Romanian bank, which can reasonably be assumed to know his regular income. Under the bank's plan it will take sixteen years for Mr Cerchez to pay the assessments, with deductions ending on 4 June 2035.

Whether evidence would have become stale

57. Neither party suggested that Mr Cherchez would be unable to remember what had happened at the time of the seizures, or that there was any other evidential difficulty if the Application was granted.

Weighing the factors

58. I have considered and weighed each of the factors identified above.

The need for statutory time limits to be respected

59. I gave particular weight to Mr Cerchez's failure to meet the statutory time limit, in accordance with the relevant case law, including *Martland* and *Katib.* Although Mr Cerchez

was acting as a litigant in person for almost all of the period, that does not reduce the weight to be given to this factor, see *Denton* at [40] and *Hysaj* at [44].

60. It is true that Mr Cerchez did not receive the letter from Officer Yasin, so had not been informed of the time limit, but this was because Mr Cerchez did not make contact with the person whose address he had given to HMRC. Responsibility for the non-receipt therefore lay at his door, and so this too does not reduce the weight to be given to his serious and significant failure to comply.

61. However, although particular weight must be given to the need for statutory time limits to be respected, it is not a trump card. Were that the position, there would be no need for a balancing exercise. In *Denton*, Lord Dyson MR and Vos LJ, giving the leading judgment, began their description of the "third stage" at [31] by correcting certain earlier misunderstandings as to how the new approach to compliance must be applied:

> "The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in the *Mitchell* case: see para 37. Rule 3.9(1) requires that, in every case, the court will consider 'all the circumstances of the case, so as to enable it to deal justly with the application'."

62. The Tribunal is required to exercise its discretion by reference to the same broad principles of fairness and justice as are referred to in Rule 2 of the Tribunal Rules, see *Martland* at [55] and *Bell* at [26], both cited above, but in doing so to give particular weight to the need for time limits to be respected.

The merits of the case

63. In relation to the merits, HMRC have not differentiated Mr Cerchez's position from that of Mr Perfect: in other words, they have not sought to argue that Mr Cerchez was not an innocent agent. I have therefore accepted Rayner Hughes' submission that Mr Cerchez is essentially in the same position as Mr Perfect. They were both lorry drivers acting under the instructions of their employer, with no financial interest in the loads they were bringing to the UK.

64. It is clear from *Martland* at [46] that in exercising its discretion, the Tribunal "can have regard to any obvious strength or weakness of the applicant's case" because "this goes to the question of prejudice", but that this should not involve "a detailed evaluation of the case" and rarely involve the "taking into account evidence which is in dispute".

65. In Mr Cerchez's case, there is no need for a detailed evaluation and there is no disputed evidence. It is clearly in the interests of justice for the Tribunal to form a "general impression of its strength or weakness" of his appeal and to weigh [it] in the balance". In carrying out that exercise, I find as follows:

(1) In relation to the penalties, I agree with Rainer Hughes that the merits are "overwhelmingly" in Mr Cerchez's favour given the judgments in *Perfect UT* and *Perfect CoA*.

(2) In relation to the assessments, the question of strict liability is yet to be determined by the CJEU. However, I find that Mr Cerchez is "putting forward a very strong case", given:

(a) the decision in *Perfect UT*;

(b) the discussion of this issue by the CoA and their comments on the principle of proportionality; and

(c) the earlier CoA Criminal Division judgments there referenced.

The financial consequences

66. I compared the financial consequences for the parties. I agree with the UT's comments in *Katib* at [60] that it is a "common feature" of tax appeals that an appellant will suffer more hardship than HMRC if his case cannot be heard. In the same case, the UT criticised the FTT for putting too much weight on the adverse financial consequences for Mr Katib, namely that if he was not able to appeal he would lose his home, and this was "was too unjust to be allowed to stand".

67. It is clear that the mere fact that Mr Cerchez will suffer *more* hardship than a governmental body such as HMRC is not, on its own, sufficient to allow the Application. However, in *Katib* the UT did not say that *no* weight should be given to the balance of financial prejudice. It is clearly a factor to be weighed in the scales and equally clearly is in favour of allowing the Application.

Other factors

68. The absence of any evidential difficulty is a minor factor in favour of granting permission for the appeal to go ahead.

Conclusion

69. Having considered and weighed the factors, and despite having given special weight to the need to comply with statutory time limits, I find that the prejudice which would be suffered by Mr Cerchez if he were unable to pursue this appeal weighs more heavily than the factors on the other side of the scales.

70. This is because his chance of success in relation to the penalties is extremely high; because he also has a very strong case in relation to the assessments; and because of the greater financial prejudice he would suffer relative to HMRC if the Application were refused. There is no evidential difficulty with allowing the appeal to proceed. I find that it is fair and just to exercise my discretion in favour of allowing the Application.

Decision and appeal rights

71. For the reasons above, the Application succeeds.

72. 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.

ANNE REDSTON
TRIBUNAL JUDGE
Release date: 06 November 2020