



Neutral Citation: [2023] UKFTT 43 (TC)

Case Number: TC08698

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/07085

Late appeal – VAT – Martland applied

Heard on: 3 August 2022

Judgment date: 16 January 2023

Before

TRIBUNAL JUDGE BOWLER

Between

**SINGH & KAINTH T/AWESTERN NEWS
and**

Appellant

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr P. Smallwood of Davies & Smallwood

For the Respondents: Ms M Sedari, Litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The Appellant has applied for its appeal of an assessment to VAT to be admitted late. On 10 February 2017 the Respondents (“HMRC”) issued an assessment for £58,310 of VAT for the periods 04/13 to 01/16 to the Appellant (“the Assessment”). On 22 September 2021 the Appellant notified its appeal to the Tribunal.

2. A summary decision was initially sent to the Appellant who have subsequently asked for this full decision.

FORM OF THE HEARING

3. With the consent of the parties, the form of the hearing was video using the Tribunal video hearing system. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

THE BASIS OF THE APPLICATION

4. In Mr Smallwood’s skeleton argument he says:

(1) The partnership had ceased operating much earlier than the periods of assessment as the individuals’ tax returns made clear;

(2) During a visit of HMRC in May 2019 Mr Singh was led to believe that the Assessment was being reconsidered by HMRC;

(3) Evidence in an HMRC visit note disclosed for the hearing shows that HMRC recognised that the Assessment was excessive;

(4) It is not submitted that the length of delay was anything other than serious and significant but the Appellant has a strong case;

(5) In a letter dated 15 April 2020 HMRC said they may accept a late request for review.

Findings of fact

5. Mr Singh and Ms Kainth (who are husband and wife) were conducting the business known as Western News together, although Mr Singh carried out more of the day to day activities.

6. The Appellant ceased to trade during October 2016. On 1 March 2017 Western News was de-registered for VAT.

7. On 22 July 2016 HMRC wrote to Western News saying that a VAT enquiry would be commenced. On 7 September 2016 a further letter was sent to Mr Singh to notify a proposed visit on 27 September 2016. Further correspondence between HMRC and the Appellant’s agent shows that the meeting was rearranged for 21 October 2016 and then 24 October 2016.

8. On 27 October 2016 HMRC contacted the Appellant’s agent asking for information and documentation regarding the VAT compliance of the business.

9. No reply was received by HMRC and a pre-assessment letter, explaining the best judgement assessment which would be issued, was sent to the agent on 28 December 2016 asking for comments no later than 28 January 2017. In that letter it was noted that an HMRC officer had called the agent on 19 December 2016 and asked for the agent to call back to discuss the case but no call had been received.

10. No reply was received and therefore on 10 February 2017, an officer of HMRC issued the Assessment. The Assessment described the 30-day process for asking for an appeal or statutory review. On 21 February 2017, a copy of the Assessment was issued to another address after the Appellant informed HMRC of a change to the principal place of business. On 27 February 2017, a computer-generated Notice of VAT Assessment (V655) was also issued to the new address.

11. As part of the correspondence between HMRC and the Appellants, HMRC had included factsheets and had asked for confirmation that the Appellant understood them. When no response was received on 20 April 2017, the Respondents sent a letter to the Appellant asking for a confirmation of understanding by 20 May 2017.

12. The Appellant's then agent called HMRC to request a review on the basis that it was considered that the assessments were too high. On 23 November 2017, the Respondents issued an email to the agent, to ask for clarification of what type of review was wanted. The letter highlighted four options, including an appeal to tribunal. A copy was also sent to the Appellant via post. No response was received.

13. On 1 May 2019 HMRC visited the Appellant's agent (as Mr Singh was not in the UK) to discuss periods other than those covered by the Assessment. HMRC's visit notes show that the visit was to verify claims for repayments made for periods 07/16, 10/16, 04/17 and 10/17.

14. The notes of that visit also explain that:

(1) The previous HMRC officer had been suspicious of the level of sales declared as inputs regularly exceeded outputs and in the absence of evidence to justify that result a best judgement assessment was raised by applying a mark-up to the expenses declared in the VAT returns. The officer making the visit to the agent wanted to understand to what the costs of the business related given that it was no longer trading;

(2) No till receipts or bank statements were available for the periods being investigated;

(3) The HMRC Officer told the agent that the amounts claimed in 04/17 and 07/17 would be offset against the debt owed to HMRC but no funds would be released as the money due from the Assessment was outstanding and the agent accepted that was the case;

(4) The HMRC officer left saying he would consider the earlier two periods and concerns about lack of evidence of sales. The earlier two periods were 07/16 and 10/16 and both were after the periods covered by the Assessment;

(5) The agent queried the Assessment.

15. After the visit the HMRC officer concluded that no further action needed to be taken in relation to the 07/16 and 10/16 figures calculated by the agent, based on a 20% mark-up to purchases. The officer noted that the Assessment may be too high because the mark-up applied by the other officer had seemingly been applied to total purchases and not just those for resale.

16. Mr Singh wrote to HMRC on 25 August 2019. In that letter Mr Singh said that he disagreed with the Assessment and the basis of its calculations; and was appealing to HMRC to review his case. It had been sent by Mr Singh to the debt management department. He was not aware that that was the wrong department and that the letter would not be forwarded within HMRC.

17. On 10 October 2019 Mr Singh wrote to HMRC noting he had not had a response to his 25 August 2019 letter and asking HMRC to open or review his case as soon as possible.

18. On 16 March 2020 Mr Singh wrote to HMRC to complain about a lack of response to his letter of 25 August 2019.

19. On 15 April 2020 HMRC replied saying that the letter of 25 August 2019 had not been received and noting that in the letter accompanying the Assessment it was explained how to challenge or appeal the Assessment. It was said that an application for a review may be accepted late or the Tribunal may consider a late appeal but reasons must be given for the delay.

20. On 15 July 2020 HMRC wrote to Mr Singh setting out the background to the Assessment and the subsequent correspondence. It was noted again that the assessment letter explained the appeal process. It was said that unless all the documentation and information requested in the letter dated 27 October 2016 was provided HMRC were unwilling to offer a review; and it was noted again that an application for a late appeal could be made directly to the Tribunal.

21. On 29 January 2021, HMRC received a letter, dated 10 October 2019, from Mr Singh seeking a response to his letter of 25 August 2019.

22. The Appellant applied to the Tribunal on 22 September 2021 (“the Application”) for permission to commence a late appeal against the Assessment first notified on 10 February 2017.

The Law

23. The right to appeal against the Assessment is set out in ss83 and 83G Value Added Taxes Act 1994 which also provides for applications for late appeals to be decided by the Tribunal.

24. Section 83G provides (a far as relevant):

“(1) An appeal under section 83 is to be made to the tribunal before –

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

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

(6) An appeal may be made after the end of the period specified in subsection (1) ... If the tribunal gives permission to do so.”

25. The reference to “P” is to the person to whom, or to which, the decision of HMRC has been notified.

26. The Upper Tribunal case of *William Martland v HMRC* [2018] UKUT 0178 (TCC) has considered what the approach of this tribunal should be to the exercise of such a statutory discretion.

27. The Upper Tribunal said that in exercising judicial discretions generally, particular importance is to be given to the need for ‘litigation to be conducted efficiently and at proportionate cost’, and ‘to enforce compliance with rules, practice directions and orders’, although this should not detract from the general injunction to ‘consider all the circumstances of the case’.

28. The Upper Tribunal provided the following guidance for the consideration of late appeals by the first tier tribunal (“FTT”):

“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. [...] 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 – 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 [...]

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT’s consideration of the reasonableness of the applicant’s explanation of the delay[...] Nor should the fact that the applicant is self-represented [...] HMRC’s appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.””

29. In the case of *Romasave (Property Services) Ltd v Commissioners of HM revenue & Customs* [2015] UKUT the Upper Tribunal said (at para 96) that:

“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.”

DISCUSSION

30. The Assessment was issued on 10 February 2017. Even if I treat the letter of 25 August 2019 as an appeal the Appellants were nearly 2 ½ years late in taking that step. This is a very significant and substantial delay. To put this in context, as already noted, the Upper Tribunal have described a delay of three months as being serious and significant.

31. The evidence to show the reasons for the delay is from Mr Singh and his wife Mrs Kainth. It is said that:

- (1) there was a genuine belief that there was ongoing dialogue between the Appellant and HMRC;
- (2) the Appellant’s agent had assured Mr Singh and Mrs Kainth that an appeal had been lodged;
- (3) Mr Singh and Mrs Kainth had been struggling to manage commitments as Mr Singh had to travel back and forth to India as a result of his father suffering a brain haemorrhage.

32. Furthermore, Mr Singh and Mrs Kainth say that the assessments will lead to their bankruptcy.

33. It became clear in the hearing that the core reason for the delay in submitting the appeal was Mr Singh's stated reliance upon the agent. He said that he simply passed HMRC's letters (which made clear that no appeal had been made) to the agent to deal with and Ms Kainth told me that her husband Mr Singh had been assured that everything was in hand with HMRC. However, the courts and this tribunal are circumspect about reaching conclusions regarding a professional agent's or adviser's competence without clear evidence such as evidence of action being taken against the professional, or complaint to the relevant professional body, or evidence from the professional themselves. I find the somewhat vague assertions about the adviser insufficient to conclude that the Appellant believed that an appeal had been lodged.

34. Furthermore it was ultimately the responsibility of the Mr Singh and Mrs Kainth, who together were trading as Western News, to ensure that the action had been taken. Mrs Kainth told me that she was pursuing her own career as a lawyer and had left the running of the business and all matters related to it to her husband. However, there was no reason why Mr Singh, was unable to read HMRC's letters. He confirmed that he had no problem with reading them.

35. In this case the assertion that it was understood that the agent had dealt with everything is inconsistent with Mr Singh writing to HMRC in August 2019. When I asked Mr Singh to clarify this he said that the agent had told him that he thought it might help. I conclude that in fact Mr Singh was fully aware of the correspondence and the fact that no review had been sought or appeal made.

36. Given the clear letters sent to the business (as well as the agent) seeking clarification of whether a review of the Assessment or an appeal was being made, I do not accept the assertion that the Appellant believed that there was some ongoing dialogue with HMRC which overrode the correspondence.

37. Mrs Kainth told me that she had had problems speaking to anyone at HMRC when she had telephoned about the Assessment. However, she said that these calls had only started in 2019/2020. By that time there was already a very serious and significant delay.

38. Mr Singh described travelling to and from India to visit family and, in particular, his father, although evidence of the length of those visits was not provided. His father had a brain haemorrhage in early 2016 which had left him paralysed. While this was clearly an additional strain for Mr Singh and his wife, he told me that he was speaking to the agent regularly when he was in the UK and the evidence does not show that he was away and out of touch for considerable periods of time. I therefore find little reason for Mr Singh not to have checked that the appeal was made and/or to discuss HMRC's correspondence seeking a response. Indeed, he confirmed receipt of correspondence and confirmed passing this to the agent.

39. I therefore conclude that there has been no real reason shown for the very considerable delay in making the appeal in this case.

40. The assessments have been made on a best judgement basis. There is limited information on which I can assess the merits of the appeal. However, I take into account that a visit note in 2019 notes that the Assessment may be excessive. If the appeal is not permitted to proceed the Appellants will be prejudiced by the fact that they will not be able to challenge a decision involving a substantial sum in circumstances where there is some evidence provided by HMRC itself calling into question the amount of the Assessment. However, given that the comment made by the officer in a visit note about the Assessment was speculative and without the benefit of records and evidence relating to the relevant periods I assume no more than that the

Appellant would have an arguable case. Furthermore, during the hearing HMRC agreed to review the Assessment in line with its duties of good administration to taxpayers.

41. That arguable case must be set against the prejudice to the finality of litigation, which the appeal time limits seek to address, and the absence of any good reason for failing to make the appeal for the very significant period of nearly 2 ½ years.

42. When I weigh those factors I conclude that the application to make the late appeal does not meet the *Martland* requirements to be approved.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. 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.

**JUDGE TRACEY BOWLER
TRIBUNAL JUDGE**

Release date: 16th JANAURY 2023