Neutral Citation: [2023] UKFTT 616 (TC)

Case Number: TC08857

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2022/11280

VAT - application for permission to make a late appeal – application rejected – permission denied

Heard on: 26 June 2023
Judgment date: 5 July 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MRS ANN CHRISTIAN

Between

DANIEL KENWRIGHT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant did not attend and was not represented

For the Respondents: Mrs Fariha Hanif litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This decision relates to an application by the appellant, set out in his notice of appeal dated 1 June 2022, for permission to bring a late appeal to the tribunal. The strict time limit within which an appeal should have been brought was 19 March 2021. This is on the basis that the appealable decision comprising a personal liability notice dated 19 November 2020, benefits from the three-month additional "covid concession" which was introduced following the pandemic. This extended the statutory 30-day period by a further three months. Notwithstanding this extended appeal period, notice of appeal to the tribunal was given some 14 months late.
2. The hearing on 26 June was to decide whether the appellant should be allowed to submit his appeal late. It was not to decide the substantive appeal itself which relates to a personal liability notice for £56,986.16. The appellant did not attend the hearing nor was he represented. The hearing was disrupted because the tax chamber video platform suffered a high-level malfunction and so the platform had to be switched to CVP. The tribunal attempted to contact the appellant by email to inform him of this change but notwithstanding this, the appellant did not attend. We were satisfied that the appellant had been notified of the date of the appeal by way of email (there was no bounce back or any other evidence of nonreceipt) on 4 April 2023. The appellant has a history of non-engagement with HMRC. Indeed, one of the bases of the assessments is that the appellant has failed to provide satisfactory evidence of input tax claims. Furthermore, this matter has now been before the tribunal for over a year, and it is high time the matter was resolved one way or the other in order to make best use of court resources.
3. Rule 33 of the First-tier Tribunal (Tax Chamber) Rules allows us to proceed in the absence of the appellant if we are satisfied that he has been notified of the hearing (or that reasonable steps have been taken to notify him) and that we consider that it is in the interests of justice to proceed with the hearing.
4. We are satisfied that both criteria have been met and proceeded with the application in the appellant's absence.

THE LAW

Legislation

5. HMRC may charge a penalty in respect of a careless or deliberate inaccuracy contained in the following documents where there is an understatement of a liability to tax in a VAT return. (Para 1, Sch 24, FA 2007).
6. A person may appeal against the decision to impose a penalty (para 15, Sch 24, FA 2007). Such an appeal will be treated in the same way as an appeal against an assessment to the tax concerned. (Para 16, Sch 24 FA 2007).
7. Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such proportion of the penalty as HMRC may specify by written notice to the officer (para 19 (1) Sch 24 FA 2007).
8. An appeal to the Tribunal may be brought by a person with respect to an assessment to VAT under s 83 Value Added Tax Act 1994 ("**VATA 1994**") (s 83(1)(p) VATA 1994).
9. HMRC must offer a review of the assessment where an appeal can be made to the Tribunal (s 83A VATA 1994). Such an offer must be made at the same time as the assessment.
10. An offer of a review by HMRC may not be accepted if an appeal under s 83G VATA 1994 has already been made (s 83C (2) VATA 1994).

11. Where no HMRC review of the decision is required following notification of the decision (s 83A (1) VATA 1994) an appeal is to be made before the end of 30 days.

Case law

12. In considering whether to admit a late appeal to the FTT, the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) ("***Martland***") considered that the approach to applications for relief from sanctions under CPR rule 3.9 should apply to applications for permission to appeal to the FTT outside the relevant statutory limit. The Upper Tribunal went on to say:

> "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.
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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…".

FACTS

13. We were provided with a bundle of documents. HMRC had provided a notice of objection to the appellant's late appeal application. In that they identified a number of contacts between HMRC, Bar Signature Ltd (the company of which the appellant was a director ("**the company**"), and the company's agent. Unfortunately, some of the documents which we needed to corroborate those contacts were not in the bundle. We have therefore come to the following conclusions of fact based on the primary material before us rather than on HMRC's synopsis.

(1) In March 2018 HMRC asked the company's agent to provide them with information to allow HMRC to validate the company's VAT return for the period 12/17.

(2) In the spring of 2019, HMRC attempted to arrange a meeting with the company at the company's premises. In March 2019 the visit to the company premises which had previously been arranged, was postponed.

(3) In May 2019 HMRC asked the company's agent for the company's business records going back four years.

(4) HMRC attempted to arrange a further visit in November 2019, but to no avail. On 13 January 2020, the company's agent told HMRC that they no longer represented the company which, we were told by HMRC, went into liquidation on 22 January 2020.

(5) On 15 January 2020, HMRC wrote to the appellant sending a copy of a letter they had sent to the company on 11 December 2019 which set out the schedule of records and information which they had requested from the company's agent. HMRC received no reply to that letter.

(6) On 2 October 2020, HMRC issued assessments to the company for VAT totalling £101,761. These assessments were issued on the basis that the company had failed to provide satisfactory evidence to support various claims for credit for input tax, and that it had failed to declare output tax on sales as evidenced by additional banked income for the years ending 2017 and 2018.

(7) On 14 October 2020 HMRC issued a penalty explanation letter to the company explaining that it intended to charge a penalty to the company for submitting inaccurate returns and the basis on which that penalty had been calculated. That penalty amounts to £56,986.16. HMRC considered that the inaccuracies were due to the deliberate behaviour of the company. Their view was that the appellant had failed to engage with HMRC for the vast majority of the enquiry and had failed to respond to the numerous attempts to arrange a meeting to discuss the irregularities in the business records. The appellant had also failed to produce purchase invoices to evidence claimed input tax despite numerous requests to do so. Although he had provided sales invoices and details of sales income to his agent, he had not provided the full amount of that income which HMRC deemed to be a deliberate act to suppress sales. The penalty percentage was calculated at 56% of the assessed VAT.

(8) On 19 November 2020 HMRC issued a personal liability notice to the appellant explaining that he was personally liable to pay the foregoing deliberate inaccuracy penalty and that he should do so by 19 December 2020.

(9) On 1 June 2022, the appellant, through the company's agent, submitted a notice of appeal against that personal liability notice.

(10) The notice of appeal provided the following reasons for the late appeal: The appellant had personal health problems at the time the penalties were issued and indeed throughout the national lockdowns when there was uncertainty and worry; he was severely impacted by

Covid19, as was his business and he was not in a position to appeal and his advisers at the time did not have authority to do so.

(11) The notice of appeal gave the following grounds for appeal: The VAT and penalties are estimated and excessive; the company had submitted all VAT returns and paid all VAT to HMRC; no deliberate action was taken by the appellant or the company to avoid paying VAT.

DISCUSSION

Burden of proof

14. The appellant bears the burden of proving to us that, on the balance of probabilities, the facts are such that we should exercise our discretion in his favour and allow him to bring his appeal out of time.

Submissions

15. The appellant's submissions as to why we should exercise that discretion in his favour are set out in his notice of appeal and we have listed them above at [13(10)].

16. Mrs Hanif submitted:

(1) The appeal decision in the personal liability notice was notified to the appellant on 19 November 2020. He therefore had 30 days to bring an appeal. This was clear from the notice itself. The covid concession allowed him a further three months. However, the appeal was not made until 1 June 2022 which is 14 months after the expiration of the 30 day time period plus those additional three months. The delay in bringing the appeal therefore is serious and significant.

(2) No good reasons have been supplied by the appellant for the delay. No evidence has been supplied by the appellant for the alleged health problems nor why he was not in a position to appeal earlier.

(3) At the final evaluation stage, we should take into account the fact that the appellant has failed to comply with the statutory time limit for which he has provided no compelling reasons or evidence, and that HMRC and other taxpayers will be prejudiced if the appellant was allowed to bring his appeal late. Time limits should be respected and they have not been in this case. To the extent that the merits of the appellant's case are relevant, his case is weak.

Martland discussion

Length of delay

17. The first of the *Martland* tests is to determine the length of the delay in bringing the appeal and whether that delay is serious or significant. The delay here is approximately 14 months which, in our view, is both serious and significant. This is both in absolute terms and, given that the appeal window is 30 days, in relative terms.

Reasons for the delay

18. The notice of appeal provided a number of reasons as to why the appeal was made late. These are set out at 13 [(10)] above. Clearly personal health issues, the impact of Covid 19, and the inability of an agent to make an appeal, can, potentially, comprise justifiable reasons for bringing a late appeal. However, in the case of this appellant, we attach little weight to these bald assertions. He has chosen not to attend the hearing, and thus has made himself unavailable to be cross examined on his assertions. They are therefore untested. He has provided absolutely no independent corroboration, by way of documents or other evidence, of these assertions. He has not explained why his agents were not in a position to bring an appeal in time. He has not explained why his agents were in a position to bring an appeal in June 2022 when they had not been able to in December 2020 (or, given the additional three months, in March 2021). We therefore give little weight to the ostensible reasons given by the appellant for the late appeal.

Evaluation of all the circumstances

19. We now turn to the third stage of the *Martland* test, namely a final evaluation of all the circumstances balancing the merits of the reasons, with the prejudice which would be caused to either party in granting or rejecting the application. We remind ourselves that when undertaking this exercise, we must be conscious that time limits should be respected, litigation should be conducted efficiently, and that we can consider any obvious strengths and weaknesses of the parties' respective positions as regards the underlying appeal.

20. In our view the balance of prejudice weighs heavily in rejecting the appellant's application. The delay is serious and significant. We have given little weight to the ostensible reasons for that delay. It is clear that the appellant has not engaged with the appeal process. He has disrespected the 30 day time limit (as extended by the covid concession). There are no obvious strengths to his case. It seems he has provided little evidence to HMRC to justify his claims for input tax credit, and there is prima facie evidence that he has suppressed his income. Clearly the appellant will be prejudiced if he cannot bring an appeal given that the amount for which he might be personally liable is significant. But that is simply a consequence of failing to bring his appeal in time and is something that is faced by all taxpayers in his position. It goes with the territory. It does not outweigh the factors which militate against him.

DECISION

21. We therefore reject the appellant's application for permission to bring a late appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

22. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 05th JULY 2023