TC01962

Appeal numbers: TC/2009/9794, 10081-3, and 2 others

Procedure – application for permission to appeal out of time – alleged negligence of former adviser – jurisdiction – approach to exercise of Tribunal's discretion – all circumstances taken into account, including whether appellants have an arguable case and the merits of that case, and the reasons for the failure to appeal in time – application allowed in part, on terms

FIRST-TIER TRIBUNAL
TAX

ELNAGY INTERNATIONAL LIMITED
ELNAGY UK LIMITED
ELNAGY JR LIMITED
ELNAGY TRADING LIMITED
BELGRAVIA TRADING LIMITED
PUREGOLD ENTERPRISES LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 30 January 2012 and following written closing submissions of the parties

Stephen Ferguson, instructed by Neumans LLP, for the Appellants

Kieron Beal and Simon Pritchard, instructed by the General Counsel and Solicitor for HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by the Appellants for permission to appeal out of time against certain Post Clearance Demand Notices ("PCDNs") in respect of customs duty on imported garlic issued by HMRC. The appeals, which are under s 16 FA 1994, if they are permitted to proceed, are, firstly, against a review decision of Officer Hazel Watts made on 14 July 2006 (subsequently confirmed on further reviews in August and September 2006). A further request for a review of subsequent PCDNs issued in October 2006 was not responded to within 45 days of the request, leading to a deemed confirmation of the decision by virtue of s 15(2)(b) of the Finance Act 1994; consequently, if permitted, these appeals are secondly against that deemed review decision.

2. The appeals were not made until 25 February 2009, substantially out of time. At the material time, the time for appealing under s 16(1) FA 1994 was, by virtue of rule 4 of the Value Added Tax Tribunals Rules 1986, 30 days from the date of the decision or 75 days from the date of a deemed confirmation of a decision under s 15(2) of the 1994 Act .

3. The legal and factual background is not straightforward. The hearing of the application occupied a full day, during which I heard evidence from Mr Nabil Mohammed Elnagy, who is a director and part owner of each of the Appellant companies. The hearing was adjourned for written closing submissions which I have received from the parties, and which I have considered, along with the documents and authorities provided, in reaching my decision.

The Tribunal's jurisdiction

4. Although these appeals were made to the former VAT and Duties Tribunal, and prior to the coming into force, on 1 April 2009, of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56), I do not accept the submission on behalf of HMRC that the application for an extension of time must be dealt with under the VAT Tribunals Rules 1986. The application constitutes "current proceedings" which, under the 2009 Order, continue before the First-tier Tribunal, but they do so on the terms of the currently applicable procedural rules, namely the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The only exception to that would be if the Tribunal were to make a direction, under para 7(3), Sch 3 of the 2009 Order, that the 1986 Rules were to apply in this respect. There has been no application for such a direction, and were one to be made I would not consider it appropriate to make that direction.

5. Although originally rule 20 of the 2009 Rules applied rule 5(3) (extensions of time) to applications for permission to appeal out of time, that position was inconsistent with the various statutory provisions under which the Tribunal has the power to permit a late appeal. Those provisions include, from 1 April 2009, s 16(1F) FA 1994. The position was rectified with effect from 29 November 2010; rule 20 now simply provides that if an enactment provides that an appeal may be notified

after the specified period with the permission of the Tribunal, then unless the Tribunal gives such permission it must not admit the notice of appeal.

The Tribunal's discretion

6. The Tribunal has a discretion to permit an appeal to be admitted even though it would otherwise be outside the statutory time limits. It is clear that the Tribunal's discretion is at large. The authorities consistently make the point, as I did myself in *Lighthouse Technologies Ltd v Revenue and Customs Commissioners* [2010] UKFTT 374 (TC) (at [18]), that the Tribunal must consider all material factors, including the reasons for the delay, whether the Appellants have a prima facie case, whether there would be prejudice to HMRC if the appeal were permitted to be made out of time, and whether there would be demonstrable injustice to the Appellants were I not to allow the appeals to proceed.

7. It seems to me that this expression of the Tribunal's discretion is all that is required, and that no further judicial gloss is needed. Mr Beal referred me to a decision of the VAT Tribunal in *Teji v Revenue and Customs Commissioners* [2006] UKVAT V19426, where, following an earlier tribunal decision in *Wans Chinese Takeaway v Customs and Excise Commisssioners* (1997) VAT decision 14829, a two-stage approach was adopted: stage 1 requiring the tribunal first to be satisfied that the party seeking an extension of time has shown good reason for the tribunal to exercise its discretion; if the tribunal is not satisfied at the end of stage 1 the tribunal must refuse the application; and stage 2, dependent on the tribunal being satisfied at stage 1, being consideration of all the circumstances.

8. I do not consider the two-stage approach to be consistent with a discretion at large or with the interests of justice. Such a discretion involves a balancing exercise which can, in my view, be undertaken only by taking into account, in the round, all relevant considerations. The two-stage approach potentially involves decisive weight being afforded to one factor – the reasons for delay – before consideration is given to others. Consideration of the reasons for delay is not an absolute test; there is no clear benchmark which defines on the one hand good and on the other insufficient reasons. That question can be properly considered only in the context of the circumstances as a whole. The question is not simply whether an appellant has a good reason for the delay, but whether, taking account of all the circumstances, including the merits of the appellants case, there is a good enough reason that the tribunal should exercise its discretion in favour of the appellant in the interest of justice.

9. That said, it is also clear that it is for the Appellants to show a good reason why the Tribunal should exercise its discretion in favour of allowing the appeals to proceed. The exercise of such a discretion is a very material one, as it gives to the Tribunal a jurisdiction that it otherwise would not have. Time limits are prescribed by law, and as such should as a rule be respected. As the Tribunal (Judge Poole and Mr Marjoram) noted in *Aston Markland v Revenue and Customs Commissioners* [2011] UKFTT 559 (TC), referring to comments of Sir Stephen Oliver in *GSM Worldwide Ltd v Revenue and Customs Commissioners* (TC/2010/07222) and *Ogedegbe v*

Revenue and Customs Commissioners (LON/2009/0200), it should be the exception rather than the rule that extensions of time are granted.

The Appellants' substantive case

10. The PCDNs concern the importation of 21 consignments of garlic by the Appellants from Egypt in the period from October 2002 to September 2004. The garlic was correctly declared to be fresh garlic, and it was said to have an Egyptian origin and thereby to benefit from a preferential rate of customs duty. EUR1 certificates were produced in support of the origin claimed.

Validity of the EUR1s

11. The European Commission's Anti-Fraud office ("OLAF") enquired as to the validity of the EUR1 certificates in June 2005, on suspicion that the fresh garlic had in fact come from China. A report by the Egyptian authorities issued in September 2005 confirmed that:

(1) None of the shipments of garlic made to the Appellants was inspected by the General Organisation for Export and Import Control ("GOEIC") in Egypt;

(2) GOEIC had not issued the EUR1 certificates presented by the Appellants with their importations; and

(3) At least some of the consignments of garlic had not even entered Egypt for customs purposes, but had been re-exported from China via the free trade zone at Port Said in Egypt, purportedly in accordance with EU transit procedures.

12. The consignor of the relevant goods was Elnagy International, an Egyptian company owned or controlled by the brother of Mr Nabil Elnagy. HMRC contend that the invalid EUR1 certificates enabled garlic of Chinese origin to be imported into the UK and a preferential rate of duty wrongly to be claimed by the Appellants.

13. The Appellants now claim that the EUR1s were indeed valid. In support of that submission they refer to a translation of a letter dated 15 August 2008 (and sealed on 18 August 2008) from the Undersecretary of the Ministry, Head of Exports Affairs Central Department, to the manager of El Nagy and El Hayawan International Companies for Export and Import, which reads as follows:

> "With reference to your letter dated 18 July 2008 in connection with furnishing you with the decision of the committee on the extent of liability of the exporters for export violations in connection with what was referred to the Exports and Imports Supervisory Authority with regards to the violation of El Nagy Import and Export Company and El Hayawan International Import and Export Company exporting garlic consignments to the United Kingdom accompanied by false certificates of origin that were not issued by the Authority;
>
> I have the honor to state that by putting the matter forward before the said committee in its session held on 6 Apr 2008 it concluded that there was no evidence establishing that the exporter (the two

> companies) fabricated the said certificates of origin. And whereas these certificates are incoming from abroad, the committee deemed that it has not been proven that the exporter had fabricated these certificates and decided to keep the subject matter on file."

14. The Appellants' case is that this is confirmation that the EUR1s were indeed valid, and that the appeals should therefore succeed. HMRC, on the other hand argue that it is apparent from this document that:

(1) The certificates of origin had been found to be invalid. They were "false". That is not the language used by a person indicating that the certificates are valid;

(2) The certificates had come into Egypt from abroad. This too confirms that they had not been produced by GOEIC;

(3) The Committee had not found it proven that the Egyptian supplier, the company owned or controlled by Mr Elnagy's brother, had itself fabricated the certificates. This implies that the certificates were false or fabricated; and

(4) Mr Elnagy accepted that this was the only evidence from the Egyptian authorities that had been adduced to support the assertion that the relevant certificates were valid.

15. In my view the letter does not support the Appellants' case. It is, as HMRC submit, evidence only that the relevant committee found that there was no evidence that the exporter had fabricated the certificates. It cannot in my view arguably be relied upon to show that the EIR1s were indeed valid. For the reasons given by Mr Beal and Mr Pritchard, the whole tenor of the document points in the opposite direction.

16. At a late stage in these proceedings, indeed on the morning of the hearing on 30 January 2012, a further witness statement of Mr Elnagy was served on HMRC. In that statement Mr Elnagy refers to a previous statement in which he gives evidence of a meeting in July 2008 between himself and a Mr Ali Suliman. It was Mr Suliman, apparently, who wrote the original report on Egyptian garlic exports sent to OLAF in July 2006. Mr Elnagy says that he was at that time shown a copy of a letter written by the Ministry of Trade and Industry, but that it has been impossible to obtain a copy. However, he says that Mr Suliman verbally confirmed to him that a letter was sent to the authorities in Brussels making clear that the garlic in the challenged loads was of Egyptian origin and that the EU1s were valid.

17. Mr Elnagy's evidence is also that, to his knowledge, Mr Suliman was one of the four members of the committee that met in April 2008 to consider the fabrication of the certificates of origin. That being so, it is in my view difficult to reconcile the letter reporting the conclusions of the committee with a finding that the EUR1 certificates were indeed valid. As I have found, the tenor of the committee's findings does not support that conclusion. Nor is there any evidence of any ruling of the Egyptian authorities that the EUR1s are valid having been communicated to OLAF, despite HMRC themselves having contacted OLAF in this respect in 2010.

18. In further support of the Appellants' arguments in this respect, Mr Elnagy produced a statement – headed Statement of Defense – made by Mr Shebi Hammam as attorney for both El – Nagi (sic) International Company for Trade and El- Hayawan International Company for Trade. That statement claims that the certificates of origin are valid, referring to the committee conclusions I have set out earlier, and asserts that the two companies firstly claim no responsibility, and secondly that the export processes were valid, legal and without any infringements.

19. This statement is in my view of no evidential value in any appeal by the Appellants. It makes assertions on behalf of Mr Hammam's clients, but is not corroborated or supported in any way. It can add nothing to the factual position concerning the validity or otherwise of the EUR1s in this case.

20. Nor do I consider that letters from Elnagy International Import – Export concerning its own role in the process can of themselves assist the appellants. The same applies to a memo, written in very general terms, from the Customs Clearance – Transportation Forwarders.

21. It is not of course appropriate for me to make findings in relation to the substantive appeal. The examination of the merits of the Appellants' case is for the purpose of seeking to examine the arguable strength of that case to weigh in the balance alongside the other factors. From what I have seen concerning the issues around the authenticity of the EUR1s, I do not consider the case of the Appellants to be a strong one. It is possible of course that further evidence might become available, including witness evidence from Mr Suliman. But on the evidence available to me I conclude that the Appellants do not have a reasonable prospect of succeeding on the ground that the EUR1s were valid.

Good faith

22. Mr Ferguson submitted that the Appellants also had at least an arguable case that they acted in good faith, such that relief should be available under Article 220.2(b) of the Community Customs Code, or, in the alternative, under Article 239. Article 220.2(b) provides relief where an importer has acted in good faith and his belief that the goods qualified for a reduced duty arose out of an error on the part of customs authorities. Article 220.2(b) provides in particular that:

> "... where the preferential status of the goods is established on the basis of a system of administrative cooperation involving the authorities of a third country, the issue of a certificate by those authorities, should it prove to be incorrect, shall constitute an error that could not reasonably have been detected."

23. This does not seem to me to be capable of availing the Appellants on the facts as presented to me. As Mr Beal and Mr Pritchard argued, the Appellants have not identified any error on the part of the competent Egyptian authorities. The letter of 15 August 2008 points in the opposite direction, referring as it does to the fact that the certificates of origin had emanated from outside Egypt.

24. As Mr Ferguson submitted, a good faith argument may also be raised under Article 239. That article provides for import duties to be remitted or repaid if the importer can demonstrate both the existence of a special situation, and the absence of deception and obvious negligence on its part. Mr Ferguson argued that the fact that the Egyptian authorities issued documentation on which reliance was placed was capable of constituting an exceptional situation.

25. There are two difficulties with an argument based on Article 239. The first is that, except in duly justified exceptional cases in which the customs authorities may permit the period to be extended, an application under Article 239 must be made within 12 months from the date on which the amount of the duties was communicated to the debtor. No such claim was made in this case. The second is that Mr Ferguson's argument is based on the special situation being the fact that the Egyptian authorities issued documentation (whether or not the garlic was ultimately of Egyptian origin) and reliance was placed on this. This again depends on the Tribunal being satisfied that the certificates were actually issued by the Egyptian authorities, as to which, as I have found, the evidence points to the contrary. Furthermore, as Mr Beal and Mr Pritchard point out, if the documents are indeed false or invalid, Article 904(c) of Commission regulation (EEC) No 2454/93 would preclude the remittance or repayment of duty.

26. On the basis of the evidence available to me, I conclude that the Appellants do not have an arguable case on the basis of good faith.

Second batch of PCDNs time barred

27. Mr Ferguson raised a separate and discrete argument in relation to the demands issued by HMRC in October 2006. He submits that the PCDNs were issued out of time, the time limit being three years from the date the customs debt arose (see article 221(3) of the Code). The following table illustrates the position:

Company	**PCDN**	**Amount claimed**	**Importation dates**
Elnagy Trading Ltd	C1802/2585/06 issued on 26.10.06	£169,484.73	March to May 2003
Belgravia Trading Ltd	C1802/2584/06 issued 10.06	£39,355.87	December 2002
Puregold Enterprises Ltd	C1802/2587/06 issued 26.10.06	£38,396.86	October 2002
Elnagy UK Ltd	C1802/2588/06 issued 26.10.06	£43,652.27	July 2003

28. On the face of it therefore the appeals against HMRC's decisions in respect of these PCDNs should succeed. HMRC, however, rely upon the terms of Article 221(4) to justify the issue of the PCDNs more than three years after the customs debt arose. They say that the delay was caused by the need to investigate the validity of the EUR1 certificates presented by the Appellants on import. HMRC say that the Appellants made untrue declarations by declaring the garlic in question to be of Egyptian origin and by asserting that the EUR1 certificates had been validly issued. The circumstances behind those declarations are such that could give rise to criminal proceedings under the domestic law of the UK. Alternatively, say HMRC, the Appellants recklessly made untrue declarations and the requirements of Article 221(4) are met.

29. It would not be appropriate for me, on an application of this nature, to comment on the respective positions of the parties on the applicability or otherwise of Article 221(4). There are technical legal arguments on the test to be applied in this respect. What I can say, however, is that I am satisfied that in this respect the Appellant has an arguable case.

Reasons for delay

30. In the context of my findings on the arguability or otherwise of the Appellant's case, I now turn to consider the reasons why these appeals were made significantly later than the prescribed time limit.

31. Much of the argument centred on the alleged negligence of the Appellants' original adviser, Mr Nathoo (who has since died). The actions of an adviser are a relevant factor, but they are not decisive. The mere fact that an adviser may have been guilty of negligent advice will not mean that a late appeal will necessarily be permitted. All the circumstances, including the engagement of an appellant in the process, and an appellant's own appreciation of the position, must be taken into account.

32. Mr Nathoo was originally instructed in June 2006. Following his receipt of detailed instructions, he wrote to HMRC on 20 June 2006 applying for a formal departmental review. That letter asserts that the goods were imported in good faith, but accepts that a mistake had been made as to the origin of the goods and the genuineness of the EUR1s. On 14 July 2006, the review was completed by Officer Watts. Reference was made to Article 220 of the Community Customs Code and Public Notice 826 that sets out guidance on how to check the veracity of the EUR1 certificates. It is noted that there has been no official error but invites the Appellants to provide evidence of the steps taken to verify the EUR1 certificates.

33. HMRC's letter to Nathoo & Company dated 14 July 2006 referred to the right os the Appellants to appeal to the tribunal, and advised that the appeal should be sent to the tribunal within 30 days of the date of the letter. Mr Nathoo received HMRC's letter on 17 July 2006, and on the same day sent a copy of it to Mr and Mrs Elnagy by fax, along with a covering letter which drew attention to the 30-day time limit and advised Mr and Mrs Elnagy that if they wished to appeal they must contact Mr

Nathoo immediately and not wait until nearer the deadline to appeal. The letter also notes that, as HMRC's letter itself stated, there was an opportunity for a second review if evidence of good faith as set out in the review decision. Mr Elnagy could not recall having received this fax, although the fax number stated on Mr Nathoo's letter was that of Mr and Mrs Elnagy.

34. Mr Nathoo replied to HMRC on 11 August 2006. He enclosed a letter from Elnagy International Ltd dated 2 August 2006 referring to the fact that, over a 20-year period, it had always been accepted in good faith that the exporter had provided the proper documentation for export from Egypt and importation into the UK. Referring to the comment made on review that the garlic was imported into the EU outside the traditional harvesting period for Egypt (March to June), Mr Nathoo makes the point that garlic may be stored in cold storage for up to one year after harvesting, and that garlic grown in Egypt is of the Chinese variety. In light of the letter from Elnagy International Ltd, I find that Mr Elnagy, or someone on his behalf, must have received Mr Nathoo's letter of 17 July 2006 (and consequently a copy of the review decision); the letter of 2 August 2006 was a response to the invitation to provide evidence of good faith.

35. Officer Watts wrote to Mr Nathoo on 10 August 2006 stating that the letter from Elnagy International Ltd could not be accepted as meeting the good faith requirements in Public Note (sic) 826 – Tariff preferences: Imports at point 2.2, which the letter sets out. Mr Nathoo then made a further attempt, by letter of 24 August 2006, to provide evidence of good faith with letters from Elnagy International Ltd and Elnagy International, Egypt. On 29 September 2006, HMRC replied saying that this documentation was not accepted as evidence that the Appellants acted in good faith.

36. Mr Nathoo ceased to practice on his own account, and became a consultant to the firm of Gavins, solicitors. In that capacity he wrote to HMRC on 27 November 2006, following receipt of a demand for payment, offering to pay the amount claimed by monthly instalments of £4,000, and informing HMRC that the Appellants had commenced proceedings against the Egyptian suppliers who "issued a faulty EUR1 certificate".

37. Shortly thereafter, by fax sent on 6 December 2006, in relation to the October 2006 PCDNs, Mr Nathoo wrote to HMRC to seek a formal departmental review. This letter is in substance the same as the first request for a departmental review sent on 20 June 2006. HMRC replied on 6 December 2006 to the effect that an independent review would be undertaken, and that the outcome of the review should be expected to be notified in writing by 20 January 2006. However, no such review was carried out.

38. In respect of the first batch of PCDNs, Mr Nathoo continued to make offers of payments by instalments. In his letter of 6 December 2006 he made an offer, for each of the Appellant companies of £5,000 per month. On 14 December 2006, that offer having been rejected by HMRC, a more substantial offer, with escalating payments over 5 years, was made. This was later, on 5 December 2007, followed by a letter from Mr Nathoo to HMRC stating, first, that Gavins had been instructed by the

Appellants that they understood from the Egyptian exporting company that the matter had been resolved, and, secondly, offering monthly instalment payments of £4,000, with six instalments in advance "[a]s a gesture of goodwill". And on 15 January 2008, a further offer was made, including an offer from the directors to pay out of their own resources. This was repeated in a letter dated 31 March 2008.

39. Following a further letter from Mr Nathoo dated 20 August 2008, providing financial information on the Appellant companies, HMRC wrote to him on 10 September 2008. In that letter HMRC recognised that if the Egyptian Department of Trade were to withdraw the case against the Appellant companies (it is not clear to what this refers) and provide written evidence that the certificates of origin were legitimate then HMRC would have to seriously consider that evidence. At the same time the most recent settlement proposals put forward on behalf of the Appellant companies were rejected.

40. About the end of 2008 the Appellants instructed MTC Law in place of Gavins. A letter from HMRC to MTC Law dated 27 January 2009, replying to a letter from MTC Law of 20 January 2009, sets out the position regarding the reviews on the first batch of PCDNs, and confirms that the Appellants have the option of lodging an out-of-time appeal to the then VAT and Duties Tribunal. Appeals dated 25 February 2009 were lodged.

Mr Elnagy's evidence

41. Mr Elnagy is an experienced businessman and importer of garlic. He was familiar with the customs' requirements, including the requirement to establish a preferential origin for goods imported by the Appellant companies. He was aware of the requirement to obtain valid EUR1 certificates in support of importations. In the past he had headed the office within the Egyptian Export Department that was responsible for the issue of EUR1 certificates.

42. In this case, however, on the evidence I find that at the relevant time none of the Appellants took steps to check the validity of the certificates. The procedures set out in Public Notice 826 were not followed. The exporter was a company controlled by Mr Elnagy's brother, and Mr Elnagy relied solely on his brother to ensure that the EUR1s were genuine, and did not seek written confirmation from the exporter at the time of the importations.

43. In cross-examination by Mr Beal, Mr Elnagy fairly confirmed that he knew he had the right to appeal, and that he knew the time limit was 30 days. Nevertheless, his lawyer, under instruction, took the course of seeking to persuade HMRC that the Appellants had acted in good faith, whilst in the meantime instigating proceedings against the Egyptian company. The tenor of the correspondence, of which Mr Elnagy must have been aware, is not to dispute the invalidity of the EUR1s, but to seek alternative relief. Even when the review process in relation to the first batch of PCDNs was exhausted, no attempt was made to lodge an appeal; the preferred course was to seek an instalment payment plan.

44. Mr Elnagy's evidence was that he had been recommended to Mr Nathoo. Mr Nathoo was almost completely blind and his written work was done for him by his wife, who was not herself legally-trained. He had not appreciated at the time that MR Nathoo was not competent. Mr Elnagy says that Mr Nathoo never explained the law to him, nor took any statement. He was never advised what was meant by "good faith". The advice to give up and pay by instalments was because, as Mr Elnagy explained what he had been told by Mr Nathoo, "you are the little guy and the big guy would always win."

45. Mr Elnagy said that at all times he knew that the EUR1 certificates were valid; he said that he was experienced enough not to need to make any checks. In those circumstances it is surprising that Mr Elnagy was content to accept the advice of his solicitor, and not insist on making an appeal, which he knew was a course open to him. In my view, on the evidence I have heard, Mr Elnagy was well aware that no appeal had been made. Instead a conscious decision was taken to pursue a good faith argument, accepting that the EUR1s were invalid, and to pursue an action against the Egyptian company. Experienced as he was, I do not accept that Mr Elnagy would have meekly accepted the advice of Mr Nathoo to pay the debt by instalments had he not also formed the view that commercially this, and not an appeal, was the most expedient course.

46. The position regarding the October 2006 PCDNs is different. There no review was carried out, with the consequence that the decisions were deemed to be confirmed on the expiry of the 45-day review period, and the right of appeal arose on 20 January 2006. I am satisfied in this respect that Mr Elnagy was not advised by Mr Nathoo of the issue whether the PCDNs had been issued in time, and he was not aware that the review process had been brought to an end by the failure of HMRC to carry out a review with the resultant deemed decision against which an appeal would have to be made. This conclusion is supported by the letter of 4 December 2008 from Mr Nathoo to HMRC which draws a distinction between the first batch of PCDNs, to which the settlement offers applied, and the October 2006 demands. In relation to the latter the letter states that the amounts are under appeal. This demonstrates that Mr Nathoo was (wrongly) under the impression that an appeal had effectively been made, and it is therefore unsurprising that Mr Elnagy shared that misapprehension.

Conclusions

47. In determining these applications I consider that I should have regard only to the circumstances arising in the period from the due date for an appeal and the date when the appeals were actually lodged. Although each party made submissions regarding alleged delays and lack of expedition on the part of the Appellants' advisers since the appeals were filed, I do not consider circumstances arising after the making of the appeals to be material to an application to permit the appeals themselves to be made out of time. Any such conduct might found an application for proceedings, including on an application for permission to appeal, to be struck out, but no such application was made in this case. I therefore pay no regard to the conduct of the proceedings after the appeals were made.

48. It is convenient, I think, for separate consideration to be given to the circumstances of the first batch of PCDNs, where a review decision was made which founded the right of appeal, and the second batch, issued in October 2006, where there was no review, and the decision was deemed to have been confirmed, with the consequent right of appeal. There is, however, some overlap, as I shall explain.

First batch of PCDNs

49. In relation to this batch I have found:

(1) Firstly, that on the evidence produced to me the Appellant does not have an arguable case. Although there is the possibility that further evidence might become available in this respect, including witness evidence of Mr Suliman, were he to be presented as a witness, on the basis of the evidence presented to me I do not consider the Appellants' arguments on the validity of the EUR1s to have a reasonable prospect of success.

(2) Mr Elnagy was aware of the right of appeal and the time limits applicable to that right. Although he gave evidence to the effect that he himself was convinced that the EUR1s were valid, he nevertheless accepted the advice of Mr Nathoo not to appeal. Instead, efforts were concentrated on seeking a review on good faith grounds, on taking proceedings against the Egyptian company and on offering settlement to HMRC on an instalment basis. This was a conscious decision of Mr Elnagy, and accordingly of the Appellant companies.

50. In my view this demonstrates that the Appellant companies took a commercial decision not to appeal. They did so in circumstances where, whatever Mr Elnagy might have thought, there was evidence that the EUR1s were indeed invalid. The Appellants now seek to reverse that conscious decision on the basis of what they claim is compelling new evidence as to the authenticity of the certificates. But as I have concluded, the available evidence points in the opposite direction.

51. Mr Beal and Mr Pritchard argue that HMRC would suffer prejudice if these appeals were permitted to proceed. HMRC were obliged, under EU law, to enter the customs debt on the UK's accounts. The UK has therefore accounted for those sums to the EU. The Appellants have not paid the assessed amounts due. They have had the benefit of those sums since 2006. Referring to my decision in *Lighthouse Technologies Ltd*, they submit that one of the functions of the time limits for appeals is to bring certainty to HMRC's financial position, for the benefit of HMRC and taxpayers alike. They point also to the difficulties in obtaining reliable witness testimony so long after the events in question (running from 2002 to 2008). They point to the need for the Appellants to call witnesses from Egypt to substantiate their present assertions. The reliability of the recollections of the witnesses is therefore called into question. Furthermore, as Mr Elnagy's evidence itself identified, there is in the current political circumstances great difficulty in obtaining reliable materials and documents from Egypt, and in obtaining reliable evidence from those who culturally will be unwilling to admit any errors.

52. Against this, Mr Ferguson points to the obvious prejudice to the Appellant companies in not being able to proceed with their appeals. The companies are, I am given to understand, likely to cease trading and be placed in liquidation. Those are serious consequences, of course, but they are the consequences that would have been clear to the companies when they decided to adopt the approach advocated by Mr Nathoo, and not make an appeal in due time. That prejudice is not therefore a decisive factor.

53. I accept the submissions made by Mr Beal and Mr Pritchard on prejudice. Although Mr Ferguson argued that any prejudice as to witness recall or reliability was a risk for the Appellants rather than for HMRC, I do not agree. The interests of justice require that reliable evidence be capable of being given, and this affects both the party who calls the witness and the other party who will cross-examine that witness, as well as the Tribunal itself. Where the credibility of witnesses is at issue, as I am sure it would be in this case, arriving at the true position will not be assisted by the fading memory of the witnesses.

54. As regards the first batch of appeals, taking the merits of the case and all the circumstances into account, I conclude that permission should not be granted for the appeals out of time. Here is no compelling reason why it would be in the interests of justice to give such permission.

Second batch of PCDNs

55. The position of the second batch of PCDNs gives rise to different findings:

(1) Firstly, I find that there is a clear arguable case on the basis of the argument that the PCDNs were themselves issued out of time. Whilst HMRC have put forward a counter argument, as I have described, that does not provide an immediate answer.

(2) Secondly, in contrast to the position of the first batch of PCDNs, there was no conscious decision on the part of the Appellant companies not to appeal. They were unaware that a right of appeal had arisen as a consequence of the deemed decision on the failure of a review, and as late as December 2008 they were misled by their own adviser into believing that an appeal was in fact on foot.

56. In these circumstances, having regard to the non-culpability of the Appellants, and the merits of the argument that the PCDNs were issued out of time, I have concluded that the appeals in respect of the second batch of PCDNs (those issued in October 2006) should be permitted to proceed on the terms that I set out below.

57. I am mindful of the fact that granting permission for such late appeals should be the exception rather than the rule. I have also considered the question of prejudice to HMRC. Although the general points about legal certainty continue to apply, the issues surrounding the reliability of witness evidence are relevant only to the question of the validity of the EUR1s and not the essentially legal argument on the time limits for the issue of the PCDNs. So if the appeal were confined to the ground that the

PCDNs are time-barred, the prejudice element of the balancing equation would have less weight.

58. It is the combination of the merits of the appeal on the ground that the second batch of PCDNs are time barred, and the circumstances of the delay in appealing the deemed review decision in that respect, that lead me to conclude that the appeals in respect of the second batch of PCDNs should be permitted to proceed. Both elements of that combination are material to the conclusion. The answer would have been different if the appeal had rested on the validity of the EUR1s; the merits of that case would have carried far less weight in the balancing exercise.

59. I have considered whether the scope of the Tribunal's discretion enables me to give permission to appeal on limited grounds only. I have concluded that it does. An appeal has no existence separate from the grounds on which that appeal is made. The discretion that the Tribunal has in this respect requires consideration of the prima facie merits of the case; a judgment must be made on the grounds put forward for the appeal. Where an appeal raises a number of different grounds, only some of which the Tribunal considers to be of sufficient merit in all the circumstances to justify permitting an out-of-time appeal to proceed, it would not be in the interests of justice to permit an appeal on other grounds which, by themselves, would not have persuaded the Tribunal to grant permission.

60. My conclusion, therefore, taking all these circumstances into account is that the interests of justice will be best served by permitting the relevant Appellants (that is to say, Elnagy Trading Ltd, Belgravia Trading Ltd, Puregold Enterprises Ltd and Elnagy UK Ltd) to appeal the deemed confirmation of HMRC's decision, but only on the ground, which has conveniently been encapsulated in the amended ground served by MTC Law on behalf of the Appellants on 1 December 2009, that the PCDNs issued in October 2006 were time barred. For the avoidance of doubt I refuse permission to appeal out of time on the ground that the EUR1s were valid.

Directions

61. Consequent upon my decision, I have made separate directions for the case management of the admitted appeals, which are released with this decision.

Costs

62. Any application for costs should be made in accordance with rule 10 of the 2009 Rules not later than 28 days after the date of release of this decision

Application for permission to appeal

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.

ROGER BERNER

TRIBUNAL JUDGE

RELEASE DATE: 2 April 2012