TC02089

Appeal number: TC/2011/6122

PROCEDURE - Late application for permission to appeal to the Upper Tribunal – Appellant's explanation for delay of over 3 years in submitting application considered – Whether exceptional reasons for admitting the application – No – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARTIN DAVID TALBOT **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public at 45 Bedford Square, London WC1 on 8 June 2012

The Appellant in person

Mr Michael Jones, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This decision relates to an application made out of time by the appellant, Mr Martin Talbot ("Mr Talbot") to appeal to the Upper Tribunal against the decision of the former VAT and Duties Tribunal released on 1 May 2008. The Respondents ("HMRC") oppose the application.

2. The underlying dispute relates to a VAT assessment made by HMRC on 20 November 2006 in respect of income earned for work which Mr Talbot did for Atlas Cars. From March 2004 onwards Mr Talbot drove a car providing cab driving services for Atlas Cars' customers. During this period he was VAT registered, a registration that related to a business that Mr Talbot had carried on as a sole proprietor, but although this business had ceased to trade Mr Talbot did not cancel the registration. HMRC said that the income Mr Talbot derived from Atlas Cars was in respect of taxable supplies rendered by Mr Talbot and that since he was a registered person VAT is due. Mr Talbot argued first, that any supply was made not by him alone but by a partnership between him and his wife which was not a registered entity and that since its supplies fell below the registration threshold no VAT was due; and second (and in the alternative) that the nature of his engagement with Atlas Cars was that of employment and as a result any supply he made was not VATable.

3. The VAT and Duties Tribunal concluded that Mr Talbot was not providing his driving services in partnership with his wife but as an individual, and during the engagement with Atlas Cars he was acting in an independent capacity and therefore liable to account for VAT. The Tribunal recognised that this was an unfortunate result for Mr Talbot in that had his VAT registration been cancelled before he started driving he would have had no VAT liability: he would not have been registrable because his supplies fell below the threshold.

Events since the decision was released on 1 May 2008

4. The facts of what occurred since May 2008 were not disputed. Mr Talbot explained in his notice of appeal why he initially decided not to appeal against the VAT and Duties Tribunal's decision after it was released in May 2008. He stated that because any such appeal, if leave were given, would be heard in the High Court it was not a sensible option due to the possibilities of his having to bear the costs if the appeal was unsuccessful. There was further correspondence between Mr Talbot and HMRC between June and September 2008 which was before me. From this correspondence I find that HMRC issued a revised assessment following the VAT and Duties Tribunal's decision in the sum of £3,826.05 on 9 June 2008. Having received a final demand for payment of this amount, Mr Talbot wrote to Mrs M Currie, of HMRC's Ipswich Office, on 1 September 2008 taking issue with the assessment in the light of other evidence that Mr Talbot said was not before the Tribunal. This correspondence continued during September 2008 in which Mr Talbot also took issue with the Tribunal's findings on the partnership issue. This correspondence ended with a letter dated 25 September 2008 from Mr M W Chapman, Mrs Currie's manager, in which

Mr Talbot was reminded of his right of appeal if he was dissatisfied with the Tribunal's decision and that if he had any information that might lead to a different basis of assessment for periods after those covered by the Tribunal's decision he should make it available. The letter concluded with an invitation to contact Mr Chapman if Mr Talbot wished to discuss the matter further, and to arrange a meeting if Mr Talbot felt it would be of benefit.

5. There was no further contact between Mr Talbot and HMRC until Mr Talbot received a letter dated 2 February 2011 from HMRC's Debt Management Office in Colchester, a copy of which was also produced to me, which referred to the amount outstanding from the assessment made in June 2008 and required immediate payment of the amount due failing which recovery action would be instituted.

6. Following receipt of this letter and further conversations between Mr Talbot and Mr Chapman, Mr Talbot states that he then decided to appeal against the Tribunal's decision which he did so in his notice of appeal dated 3 August 2011. Mr Talbot explained that he had taken no action to do so before then because he believed that HMRC had decided not to pursue the matter further. In addition, by early 2011 the tribunal system had changed so that any appeal would no longer be heard by the High Court, so that his concerns about instituting proceedings in the High Court no longer existed. Mr Talbot conceded that he could have considered appealing after the correspondence with HMRC ended in September 2008 but said that even if he had he would not have done so because at that stage the appeal processes had not yet been reformed.

The Law

7. As the VAT and Duties Tribunal was abolished with effect from 1 April 2009 and its functions transferred to the First-tier Tribunal (see the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56)) (the "Order") it is necessary to consider what effect that transfer has on Mr Talbot's right of appeal. The relevant provisions of paragraph 11 of schedule 3 to the Order state:

> "(1) This paragraph applies to a decision of an existing tribunal if, immediately before the commencement date –
>
> (a) an appeal lies to a court from that decision;
> (b) an application may be or has been made to an existing tribunal seeking a review of that decision, or
> (c) the existing tribunal wishes to correct an irregularity.
>
> (2) Except as provided for in sub-paragraph (3), on and after the commencement date such rights of appeal shall lie from the decision as would lie from a decision of the First-tier Tribunal made on or after that date."

8. The VAT and Duties Tribunal was by virtue of the above provision an "existing tribunal" for the purposes of paragraph 11(1) and the commencement date referred to in paragraph 11(2) of that provision was 1 April 2009.

9. It is therefore clear that Mr Talbot's application should be treated as an application to appeal to the Upper Tribunal from a decision of the First-tier Tribunal and consequently the relevant provisions of The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Rules") will apply to the application.

10. Under Rule 39(1) of the Rules an application to appeal must be made no later than 56 days after the latest of three dates, the applicable date in this case being the first, namely the date on which the tribunal sends to the applicant the full written reasons for the decision. It is therefore clear that Mr Talbot's application, having been made on 3 August 2011, is over 3 years late.

11. Rule 5(3)(a) of the Rules gives the First-tier Tribunal a general power to extend the time for compliance with any "rule practice direction or direction", and this extends to the provisions of Rule 39. Rule 39(4)(a) provides that a late application must contain a request for an extension of time and the reasons why it was late (which Mr Talbot's application does). By virtue of Rule 39(4)(b) I must not admit the application unless I extend the time for the application under the power contained in Rule 5(3)(a) of the Rules.

12. The applicable rules and case law relating to the exercise of the Tribunal's power to extend time have recently been considered in the case of *Fraser (representative Partner for Starlight Therapy Equipment Partnership) v HMRC* [2012] UKFTT 189 (TC). Judge Poole set out the relevant factors for consideration in paragraphs 48 to 57 of the decision.

13. The starting point when considering whether to exercise the power is, as stated in paragraph 48 of *Fraser*, that the "overriding objective" as set out in Rule 2(1) of the Rules must be observed. This provides:

> "The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly."

14. The overriding objective requires the Tribunal to carry out a balancing exercise as regards the competing interests of the parties in order to reach a decision which meets its requirements.

15. As stated in paragraph 50 of *Fraser*, time limits are to be observed and will only be extended for good reason. Judge Poole referred in this respect to *Ogedegbe v HMRC* [2007] UKFT 364 (TC) where the Tribunal said:

> "While this Tribunal has got power to extend the time for making an appeal, this will only be granted exceptionally. Moreover, there must be at least an arguable case for making the appeal. In the present circumstances I cannot see that the Appellant has even an arguable case."

16. The underlying principle here is that the time limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if an appellant is to institute an appeal beyond the period chosen by Parliament: see paragraph 52 of *Fraser* where Judge Poole quoted with approval Lord Drummond Young's statement to that effect in *IRC for judicial review of a decision of the General Commissioners of Income Tax (Hugh Love)* [2006] STC 1218.

17. Lord Drummond Young went on to examine the factors which he considered to be relevant when considering whether a case was exceptional. They were summarised by Judge Poole in paragraph 54 of *Fraser* and I adopt them as an appropriate framework against which to test the circumstances of Mr Talbot's application. The list of factors is not comprehensive and it is also necessary to consider any additional factors that may be relevant in any particular case. The overriding principle remains that the time limit will only be extended if good reason is shown that it should be and the burden is on the applicant to show that such is the case. The factors were summarised by Judge Poole as follows:

> "(1) Is there a reasonable excuse for not observing the time limit? So for example, reasonable lack of knowledge of grounds for an appeal might be relevant, as might the fact that HMRC had contributed to the delay.
>
> (2) If there was a reasonable excuse for the delay, did the appellant act reasonably promptly after that excuse ceased? For example, if the appellant only belatedly became aware of grounds for an appeal in spite of acting with due diligence, did he act swiftly to bring his appeal?
>
> (3) Prejudice to the respective parties by either allowing or refusing permission for the appeal to proceed late. In this context, it is important to note that by definition an appellant will often suffer severe prejudice if he cannot bring his appeal out of time; for example he may suffer severe financial hardship, suffer distress on his property or be made bankrupt. I do not consider that prejudice of this type can be regarded as a decisive factor, otherwise there would be a permanent open door for late appeals in any large and serious case.
>
> (4) The public interest. Here, he identified three elements. First, there is a general public interest in the finality of litigation, and this may militate particularly strongly against extending time when the delay has been a very lengthy one. Second, there is the possible effect on other litigation concluded in the past if similar litigation is allowed to be re-opened. Third, there should be a general policy of respect for time limits laid down by (or, by extension, under the authority of) Parliament.
>
> (5) Does the delay affect the quality of evidence available? Loss of documents and fading of witnesses' memories can lead to a serious deterioration in the quality of justice that is possible."

Mr Talbot's submissions

18. I take from Mr Talbot's notice of appeal and the oral submissions he made at the hearing of the application the reasons why he says I should exercise my discretion in his favour are as follows:

> (1) It was not feasible for him to have made his appeal in 2008 because of the risk of him being exposed to HMRC's costs if he were to take the matter to the High Court, which would not be an issue now following the reform of the tribunal system;
>
> (2) He reasonably believed, having had no communication from HMRC when their correspondence ceased in September 2008 until February 2011, that HMRC had withdrawn the assessment and it was unjust that they were now pursuing him again for the amount outstanding in the assessment, and
>
> (3) The VAT and Duties Tribunal made an error of law in contending that he was not in partnership with his wife when providing services to Atlas Cars and should have concluded that the services concerned were provided by that Partnership rather than by him personally.

HMRC's submissions

19. Mr Jones for HMRC submitted that no exceptional reason existed in this case that would justify granting an extension of time. The application was very late indeed and Mr Talbot was fully aware of his right to apply for permission to appeal in May 2008 and took a conscious decision not to exercise it on cost grounds. Mr Talbot had a further opportunity to consider whether to apply for permission when the correspondence ended in September 2008 and, as he stated during the hearing of this application, he decided not to do so, again on costs grounds. The correspondence ended with HMRC inviting Mr Talbot to contact them again if he wished to discuss the matter further so therefore the onus was on Mr Talbot to pursue the matter to a conclusion and it could not be said that the ending of the correspondence could reasonably lead him to conclude that the assessment would be withdrawn.

20. Mr Jones also submitted that when the correspondence resumed in February 2011 Mr Talbot delayed further before submitting his application in August 2011.

21. Mr Jones argued that the balance of prejudice was with HMRC, if the application was admitted they would have to deal with matters that were apparently closed some four years ago.

22. Finally, there was no substantive merit in the appeal which was based on challenging the factual findings of the VAT and Duties Tribunal and introducing fresh evidence.

Discussion

23. As indicated in paragraph 17 above, the factors identified by Lord Drummond Young in *Love* provide a useful framework against which to test Mr Talbot's reasons for the delay in submitting his application. I can consider each of the factors as follows:

(1) Reasonable excuse for not observing the time limit

Mr Talbot's primary reason was because it was not a sensible option for him to appeal prior to the reform of the tribunal system due to the costs risk. I do not find that to be a reasonable excuse. At the time of the original decision, the reform of the tribunal system was still some months away and in any event, there is no evidence that the implementation of the reforms was in Mr Talbot's mind when he took the deliberate (as I find) decision not to appeal on costs grounds. In any event, the rules of the Upper Tribunal under the new structure specifically make provision for costs to be awarded (see Rule 10 of The Tribunal Procedure (Upper Tribunal) Rules 2008). Mr Talbot had clearly made a settled decision not to appeal in 2008 and in my view it is more likely that the primary motivation that led him to consider making this application was the decision of HMRC to recommence recovery proceedings in respect of the assessment in February 2011.

I have also considered whether the fact that HMRC failed to pursue the recovery of the amount due under the assessment from September 2008 to February 2011 would give Mr Talbot a reasonable excuse for delaying his application until HMRC indicated the revival of the recovery proceedings. In my view this is not the case; the last letter from HMRC, on 25 September 2008, gave Mr Talbot no comfort that the matter would no longer be pursued and the letter made it clear that the ball was in his court if he wished to pursue the matter further. It would have been open to Mr Talbot at any time thereafter to check what the position was, and in my view for him to have reasonably believed that the matter was not being pursued would have required him to contact HMRC so as to ascertain whether that was the case rather than assuming that it was on the basis of having heard nothing. I might have been able to give less weight to this factor had Mr Talbot reasonably believed that the recovery of the sums due under the assessment was not being pursued, because in those circumstances it could be said that HMRC had contributed to the delay but I do not find that to be the case.

(2) Did the appellant act reasonably promptly after the reasonable excuse ceased?

I have not found that Mr Talbot's excuse was reasonable. But even if it was, I accept Mr Jones's submission that Mr Talbot did not act sufficiently promptly, first, after the decision was released in May 2008 and secondly, when he decided to pursue his application after the correspondence in February 2011. As I have found above, Mr Talbot had made a settled decision not to appeal in May 2008, and did not reconsider doing so after the correspondence ceased in September 2008. I also find that there was an unreasonable delay between learning of the decision to revive the recovery proceedings and the making of the application in August 2011.

(3) Prejudice to the respective parties by either allowing or refusing permission for the appeal to proceed late

I accept Mr Jones' submission that such a long delay between the original decision and the making of the application means that the prejudice will be greater for the respondent to the appeal. HMRC will have long ago disposed of their papers and I find there are no exceptional circumstances relating to Mr Talbot that outweigh this. I appreciate that he may be of limited means and he may find it difficult to find the resources to meet the assessment, but as was indicated in *Love*, prejudice of this type cannot be regarded as a decisive factor.

(4) The public interest

There is a clear public interest in the finality of litigation and the longer the delay the more this factor weighs in the balance. In this case the delay is a very long one, and unless there are exceptional circumstances, granting an application after a very long delay will lead to defeat the purpose of the time limit laid down by Parliament.

(5) Does the delay affect the quality of evidence available?

This factor is not relevant in this case as an appeal to the Upper Tribunal only lies if there is an arguable error of law and the admission of new evidence before the Upper Tribunal that might have been considered before the First-tier Tribunal (or in this case the VAT and Duties Tribunal) would be the exception rather than the rule.

24. The case of *Ogedegbe* referred to in paragraph 15 above indicates that the merits of the appeal is a relevant factor. I have therefore considered whether there is any substantive merit in Mr Talbot's submission that the VAT and Duties Tribunal erred in law when considering the partnership issue. In my view the Tribunal considered the issue fully and carefully by reference to the provisions of the

Partnership Act 1890. The key issue was whether Mr and Mrs Talbot were carrying on a business in common with a view to profit. The Tribunal's finding of fact that there was no sharing of profits between Mr and Mrs Talbot and no participation by Mrs Talbot in the business in their view outweighed the other findings that her car was used in the business, that she financed part of the insurance premium and may have financed any deficit. On the basis of these findings, I see no error of law on the part of the Tribunal in concluding that the business was not carried on in common with a view to profit.

Conclusion

25. Having considered all the relevant factors I conclude that no exceptional reason exists such that I should grant Mr Talbot's application. The application of the overriding objective leads to the conclusion that it is fair and just to refuse the application which I so do.

26. In common with the VAT and Duties Tribunal I have sympathy with Mr Talbot's predicament. As he admitted himself, his mistake was to retain his VAT registration when he no longer needed it. I can also understand why he feels aggrieved at the decision to pursue recovery proceedings after such a long gap, although I have not found this to constitute a reasonable excuse for Mr Talbot's late application. It was explained to me that the reason for the delay was that recovery cases are prioritised in favour of those which are for a large amount, which means there can be a long delay before smaller cases are pursued. This can lead to resentment when cases are pursued after a long gap and it is preferable that delays are minimised but unfortunately for Mr Talbot these are not matters that fall within the jurisdiction of this Tribunal.

27. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 19 June 2012