TC03246

Appeal number: TC/2013/03514

PROCEDURE – application to make appeal out of time - HMRC deciding not to undertake review on grounds of no reasonable excuse for out of time application for review - whether in those circumstances Appellant has 30 days in which to appeal - yes - ss 15E and 16(1D) Finance Act 1994 - whether, if appeal is out of time, tribunal should give permission for appeal to be made - yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

SCANWELL FREIGHT SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE EDWARD SADLER
JOHN WOODMAN CA

Sitting in public at Bedford Square on 17 December 2013

Mr S Chokshi FCCA, of S Chockshi & Co, chartered certified accountants, for the Appellant

Miss K Mastin, of the VAT and Duties Litigation Team, for the Respondents

DECISION

Introduction

1. This is an application by Scanwell Freight Services Limited ("the Appellant") for the tribunal to give its permission for the Appellant to make its appeal to the tribunal out of time. The Commissioners for Her Majesty's Revenue and Customs ("HMRC") oppose that application. The discretion to allow a late notice of appeal is conferred on us by statute, and, as we refer to below, there is guidance from case law as to the approach we should adopt in exercising that discretion. The question also arises in the circumstances of this case as to whether the relevant review and appeal provisions have effect so that the Appellant's appeal was in fact made in time.

2. Although the decision against which the Appellant wishes to appeal was dated 6 December 2010, and the Appellant's notice of appeal to this tribunal is dated 15 May 2013, we have nevertheless concluded, for the reasons we give below, either that the appeal was made in time, having regard to the relevant review and appeal provisions, or, if that is not the case, that we should give permission for the Appellant to make its appeal out of time, so that its substantive appeal against HMRC's decision may proceed.

The background circumstances

3. It is necessary to set out in some detail the circumstances which led to the decision of HMRC which the Appellant wishes to dispute, and the further circumstances which resulted in the considerable period between the date of that decision and the date of the Appellant's notice of appeal. We should make it clear that certain of the matters we refer to below may be matters of fact in dispute between the parties should the Appellant's substantive appeal proceed. We record them for present purposes as the contentions of the Appellant, and not as findings of fact (that, of course, will be the task of the tribunal which eventually hears any substantive appeal).

4. The Appellant carries on business as a freight forwarder, and in the course of that business deals with the import of goods as agent for the trader who has purchased the goods and is importing them into the United Kingdom for subsequent sale. The Appellant does not own the goods in question - it simply deals with the necessary processes of importing the goods on behalf of its importer customer, and those processes include dealing with the administrative requirements of HMRC in relation to any customs or excise duties, and also VAT, payable on import of the goods.

5. In 2007 a Mr Hussein Abdi Boss ("Mr Boss") appears to have appointed the Appellant to act on his behalf on the import of goods he proposed to make in the course of his trade. Mr Boss (or, perhaps, someone purporting to be Mr Boss) signed a letter of authority dated 18 December 2007 appointing the Appellant as his representative for clearing with HMRC goods he intended to import, and confirming that the goods imported belonged to him beneficially and that he would be liable for properly describing the goods and for payment of any customs duties and VAT in respect of the goods on their import.

6. In early 2008 Mr Boss appears to have imported from Kenya on six occasions consignments of boxes of the vegetable product miraa. The Appellant dealt with the necessary customs import declarations in relation to those imports on behalf of Mr Boss. According to the Appellant, VAT of £8,266.86 was due on import of the goods, and this was paid to HMRC by Mr Boss.

7. Subsequently HMRC (by its officer Mr Manjit Somal) conducted checks on the importation of these goods. As a result of those checks Mr Somal reached the conclusion that (1) the goods had been imported under an incorrect commodity code; (2) the volume of goods as declared in the customs import entries understated the likely volume of goods imported; and (3) the value of the goods as declared for customs purposes (which matched the overseas supplier invoices) was significantly less than the actual amount paid to the overseas supplier.

8. On 6 December 2010 Mr Somal wrote to the Appellant setting out these matters in detail. He concluded that (as per the calculations set out in his letter) underpayments of import VAT totalling £22,866.58 had occurred. His letter was accompanied by a Post Clearance Demand Note (referred to as a C18 Demand Note) addressed to Mr Boss as consignee of the goods and the Appellant as declarant/representative in respect of the goods, and requiring payment of VAT in the sum of £22,866.58.

9. The Appellant's notice of appeal is in relation to the decision of HMRC to issue that C18 Demand Note. In summary, the Appellant's grounds of appeal are that Mr Boss, rather than the Appellant, is liable to pay any additional VAT due as a consequence of any understatement of the volume or value of the goods in question, since the Appellant was acting solely as import agent for Mr Boss pursuant to a valid letter of authorisation. The Appellant points out that it could not have known that the value of the goods as declared was significantly below the amount actually paid to the overseas supplier, since it was not responsible for payment to the supplier, and it had completed the customs declaration forms by reference to the only information in its possession, namely the consignment documents provided by the supplier. The substantive issue, therefore, is the nature of the representation (whether direct or indirect) under which the Appellant acted when dealing with HMRC, and the liability to pay VAT on import arising from the particular representation in place and under which the goods were imported.

10. Mr Somal's letter of 6 December 2010 invited the Appellant to send to him any further information which the Appellant wished Mr Somal to consider. The letter also stated that if the Appellant did not agree with Mr Somal's decision, the Appellant could ask for a review by HMRC of the decision, or appeal to the tribunal. It stated that a request for a review should be made within 30 days of the date of the letter, and that if instead the Appellant wished to appeal to the tribunal, it should send the tribunal its appeal within 30 days of the date of the letter. It also made it clear that there would be a right to appeal to the tribunal after completion of any review, if the Appellant initially opted for a review.

11. The Appellant was then advised by Messrs Tahas, a firm of accountants and tax advisors. On 23 December 2010 Tahas wrote to Mr Somal pointing out that the Appellant was no more than the agent of Mr Boss, and that he alone was liable to pay any additional VAT on the import of the goods. There was no mention in that letter of a request for Mr Somal's decision to be reviewed or of an appeal to the tribunal.

12. On 7 January 2011 Mr Somal replied to this letter. He set out at length (but with no comment or application to the Appellant's circumstances) extracts from the European Union directive provisions relating to dealings by representatives with customs authorities and consequent liabilities for customs debts. Mr Somal also said that in May 2010 he had requested the Appellant to provide him with a copy of a letter of authority from Mr Boss appointing the Appellant as his representative in relation to the imports in question, and no such letter had been provided. He concluded his letter with a further request for such a letter of authority, and, in addition, for any further information which the Appellant wished him to consider. No mention was made of any request for a review of his decision, or of an appeal to the tribunal.

13. It is not clear if anything happened in the meanwhile, but on 18 July 2011 Tahas emailed to Mr Somal a copy of the 2007 letter of authority signed by Mr Boss appointing the Appellant as his representative for dealing with customs matters. Mr Somal replied by email the next day asking whether the Appellant had any other documentation bearing Mr Boss's signature.

14. On 22 September 2011 Mr Somal wrote to Tahas saying that he had in his possession copies of other documents signed by Mr Boss and also a copy of his driving licence, and the signatures of Mr Boss on those documents did not match the signature on the letter of authority. In those circumstances, the Appellant remained jointly liable for the underpayments of import VAT. He invited a response within 30 days, including any further evidence or arguments that might change his decision.

15. Further correspondence ensued between the parties in November 2011. In the course of that correspondence Mr Somal mentioned for the first time that in December 2010 he had met with Mr Boss, and that Mr Boss had denied that he had appointed the Appellant as his representative for dealing with customs matters on the import of the goods.

16. There is then a hiatus for the period of one year. Although in November 2011 Mr Somal had said that proceedings would begin for the debt for the outstanding VAT to be recovered, it appears that no such action was taken. On 28 November 2012 Tahas wrote to Mr Somal suggesting a meeting between HMRC, Mr Boss and the Appellant, in an attempt to resolve the matter, and stating that if matters could not be resolved the Appellant would appeal to the tribunal. Mr Somal replied to that letter on 10 December 2012 summarising his view of the issues, and explaining why in his letter of 6 December 2010 he regarded the Appellant as "fully liable" for the underpayment of VAT, and why now he regarded the Appellant as "jointly liable" for that VAT. He concluded in the letter, "I have arranged a meeting with your client to discuss the above situation."

17. At some point between then and 12 February 2013 the Appellant paid £4,000 on account of the liability to VAT of £22,866.58. The Appellant claims that it paid that amount under pressure from Mr Somal, and that it does not consider that it was liable for any of the VAT assessed in the Post Clearance Demand Note.

18. On 12 February 2013 Messrs S Chokshi & Co, Chartered Certified Accountants, wrote to Mr Somal, explaining that they were now acting for the Appellant in place of Tahas. That letter was expressed to be an attempt to bring matters to a satisfactory conclusion, and it summarised the history of the dispute and the Appellant's case. The letter stated: "Please treat this letter as an appeal against your Post Clearance Demand Note reference C18063443 for £22,866.58 ... We suggest you have a local review and if failing that we shall go to an independent VAT Tribunal."

19. Mr Somal replied to that letter on 7 March 2013. He set out the history of the matter and cited certain provisions of European Union law relating to representatives in customs matters. He referred to his letter of 6 December 2010 and to the reference in that letter to the 30 day period in which the Appellant could apply for a review or appeal to the tribunal. He said that since no review request or appeal was made within that period, any appeal made now would be out of time.

20. However, on 16 April 2013 Mr Somal wrote to Chokshi & Co to say that the case had been passed to the Customs & International Reviews Appeals Team.

21. On 18 April 2013 Miss Julia Warn, an officer of the Customs Reviews & Appeals Team, wrote to Chokshi & Co. She explained that she had received the papers in the matter from Mr Somal with regard to the review request made. She said that she would not be undertaking a review since the decision was issued to the Appellant on 15 February 2010 [this appears to be a mistake - the decision letter is 6 December 2010], and the review request was made considerably more than 30 days after that date. She referred to the review provisions in the Finance Act 1994, including the provision which permits a review outside the 30 day period where there is a reasonable excuse for the delay in making the review request, but concluded that in this case there was no reasonable excuse for the delay.

22. Miss Warn concluded her letter as follows: "However under the 1994 Finance Act you still have the option of appealing direct to the tribunal who are independent of HMRC. <u>You must do this within 30 days of the date of this letter</u>." (emphasis in the original).

23. The Appellant sent its notice of appeal to the tribunal office on 15 May 2013 (that is, within the 30 day period referred to in Miss Warn's letter).

The review and appeals legislation

24. Miss Mastin, who represented HMRC at the hearing before us, told us that the relevant legislation dealing with reviews and appeals in a case such as the Appellant's is found in the Finance Act 1994. (We should say that this is not immediately apparent from a reading of section 13A Finance Act 1994, which defines "relevant

decision" principally in relation to customs and excise duties, and where there is no express reference to VAT. But we note that Miss Warn also refers to the Finance Act 1994 provisions, and since VAT on import is collected through the customs mechanism we will assume that these are the relevant statutory provisions - in content they largely correspond with other statutory provisions dealing with the review and appeals process and the statutory discretion conferred on the tribunal to allow out of time appeals - see, for example, sections 83 to 83G of the Value Added Tax Act 1994.)

25. Section 15A Finance Act 1994 provides that if HMRC notify a person of a relevant decision which they make, they must at the same time offer that person a review of the decision. Section 15C Finance Act 1994 provides that HMRC must review a decision if, where they have offered a review under section 15A, the person concerned has requested a review within 30 days beginning with the date of the document offering the review. Section 15E Finance Act 1994 requires HMRC to review a decision out of time (that is, if the person offered the review does not request the review within the 30 day period) if the person has a reasonable excuse for not accepting the offer of the review or requiring the review within that 30 day period, and HMRC are satisfied that the person made the review request without unreasonable delay after the excuse had ceased to apply.

26. Section 16 Finance Act 1994 deals with appeals to the tribunal. In the Appellant's case sections 16(1B) and 16(1D) Finance Act 1994 are relevant.

27. Section 16(1B) Finance Act 1994 provides that an appeal against a relevant decision may be made within the period of 30 days beginning with the date of the document containing the relevant decision.

28. It is necessary to set out section 16(1D) Finance Act 1994 in full:

> *(1D) In a case where HMRC are requested to undertake a review in accordance with section 15E -*
>
> *(a) an appeal may not be made -*
>
> *(i) unless HMRC have decided whether or not to undertake a review, and*
>
> *(ii) if HMRC decide to undertake a review, until the conclusion date; and*
>
> *(b) any appeal is to be made within the period of 30 days beginning with -*
>
> *(i) the conclusion date (if HMRC decide to undertake a review), or*
>
> *(ii) the date on which HMRC decide not to undertake a review.*

For these purposes the "conclusion date" means the date of the document notifying the conclusion of the review (Section 16(1G) Finance Act 1994).

29. Section 16(1F) Finance Act 1994 provides that an appeal may be made after the end of a period (including the periods specified in, respectively, sections 16(1B) and 16(1D)) if the appeal tribunal gives permission to do so.

The submissions of the parties

30. The Appellant's case, as put to us by Mr Chokshi, is that since the decision letter of 6 December 2010 and the issue on that date of the Post Clearance Demand Note there has been a pattern of correspondence (sometimes intermittent) between the parties, with requests for further information from Mr Somal, and the provision of further information (in particular the letter of authority) from the Appellant, such that, in the Appellant's view, matters never reached, or appeared to have reached, the point where it seemed appropriate to request a review or appeal to the tribunal until February 2013. In the course of that correspondence (for example in his letter of 22 September 2011) Mr Somal asked if the Appellant had any further evidence or arguments which might cause him to change his decision. All of this suggested that the matter had not reached the point of finality where it should be reviewed or appealed. Further, throughout this period Mr Soml did not at any time until 7 March 2013 indicate that the review request or appeal period had expired in January 2011.

31. Mr Chokshi also pointed to the letter from Miss Warn of 18 April 2013: that letter clearly states that the Appellant may appeal to the tribunal if it does so within 30 days of the date of that letter, and that is what the Appellant has done.

32. In all these circumstances, the Appellant argues, it should be allowed to proceed with its appeal.

33. For HMRC Miss Mastin helpfully referred us to two recent decisions of the Upper Tribunal which provide guidance as to the approach which this tribunal should adopt in considering the exercise of its discretion to allow an appeal to be made out of time: *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) and *O'Flaherty v HMRC* [2013] UKUT 0161 (TCC).

34. In considering the factors referred to in those cases which we should take into account, she pointed out that the Appellant's delay in requesting a review of the decision was very substantial, at least over two years. Even if one took into account the fact that there had been continuing correspondence, on occasion the Appellant's advisers had taken lengthy periods to deal with matters (for example providing a copy of the letter of authority purportedly from Mr Boss), and no reasonable excuse was offered for such substantial delays. The Appellant was advised by professional advisers, and they should have been alert to the relevant time periods.

35. Miss Mastin said that if the appeal went ahead there would be prejudice to HMRC in that they would have to bear the costs of defending the appeal. She accepted, however, that if the appeal proceeded, HMRC would not be prejudiced in terms of the defence it would put to the tribunal - this was not a case where key witnesses or other material evidence had ceased to be available to HMRC because of the lapse of time.

36. As to the merits of the Appellant's substantive appeal, she said that HMRC would argue that even if the authority given to the Appellant by Mr Boss was valid, the Appellant could still be jointly liable for the underpayment of VAT, and on that basis HMRC considers that it has grounds for applying for the appeal to be struck out. She also pointed out that the VAT in dispute had not been paid and no hardship application had been made.

37. Finally (and in the Appellant's favour) Miss Mastin referred to what she described as the ambiguous terms of section 16(1D) Finance Act 1994 - it could be construed as giving a further 30 day period in which to lodge an appeal once a decision has been made that a review must be refused because the review request is out of time and there is no reasonable excuse for the delayed request.

Discussion and conclusions

38. The first question we have to consider is whether the Appellant's appeal notice is indeed out of time, or whether, by the terms of section 16(1D) Finance Act 1994, the 30 days during which the Appellant was entitled to appeal to the tribunal began on the date of Miss Warn's letter of 18 April 2013. If this is so, then since the notice of appeal is dated 15 May 2013, it is in time. This is the point to which Miss Mastin referred in her submissions. Miss Warn in her letter informs the Appellant that it has 30 days to appeal to the tribunal, as we mention above.

39. Stripping back the correspondence to its essentials, we have the decision letter and Post Clearance Demand Note of 6 December 2010; subsequent correspondence in which from time to time Tahas, on the Appellant's behalf, refer to the possibility of requesting a review or appealing to the tribunal without actually making such a request or appeal; Chokshi & Co's letter of 12 February 2013 requesting a review of the decision of 6 December 2010; and Miss Warn's letter of 18 April 2013 stating that no "out of time" review can be carried out since there is no reasonable excuse for the review request being out of time.

40. In terms of the provisions of Finance Act 1994, the decision in the letter of 6 December 2010 is the relevant decision, and pursuant to section 15A Finance Act 1994 in that letter HMRC offered the Appellant a review of that decision, which the Appellant could accept by requesting a review within the following 30 days (section 15C Finance Act 1994). Alternatively, by virtue of section 16(1B) Finance Act 1994 the Appellant could, within the following 30 days, appeal to the tribunal. The Appellant neither requested a review nor appealed to the tribunal within that 30 day period. If matters rested there the Appellant's notice of appeal of 15 May 2013 would be outside the 30 day period specified in section 16(1B) Finance Act 1994, and we would have to consider whether to exercise our discretion to allow an out of time appeal as we are entitled to do pursuant to section 16(1F) Finance Act 1994.

41. But matters did not rest there. On 12 February 2013 the Appellant requested a review of the 6 December 2010 decision, and since that request was (very considerably) after the 30 day period had expired during which the Appellant could require as of right a review, section 15E Finance Act 1994 comes into play. Under

that provision HMRC have to decide whether to review the original decision, which they must do if there is a reasonable excuse for the delay in the review request. As is to be expected, if they are satisfied that there is such a reasonable excuse, and therefore carry out a review, and the original decision is upheld on review, an appeal to the tribunal may be made within 30 days after the date of the document notifying the taxpayer that the review is concluded: section 16(1D)(b)(i) Finance Act 1994.

42. However, in the Appellant's case Miss Warn was not satisfied that the Appellant had a reasonable excuse for delaying making a review request. In that circumstance section 16(1D)(b)(ii) Finance Act 1994 appears to permit the taxpayer to appeal to the tribunal within 30 days after the date on which HMRC decide not to undertake a review. That was the position as Miss Warn explained it to the Appellant, and the Appellant proceeded to make its appeal within 30 days after the date of her letter. It is clear that the appeal referred to in section 16(1D) is an appeal against the original decision, not an appeal against HMRC's decision not to carry out a review.

43. The effect of sections 15E and 16(1D) Finance Act 1994, where an out of time review request is made and is not carried out, appears to be somewhat anomalous. It allows the taxpayer to disregard the normal 30 day period for requesting a review of a decision or for appealing against that decision, and then, without any time restraint, and without any excuse for the delay, trigger afresh the 30 day period for making an appeal by making an out of time review request. It is anomalous when contrasted with the position of the taxpayer who, more than 30 days after the decision, does not request an out of time review, but instead appeals to the tribunal. In that situation the taxpayer has to rely on the tribunal exercising its discretion to allow an out of time appeal.

44. Whether or not anomalous, sections 15E and 16(1D) Finance Act 1994 appear to have that result. These points were not argued before us in any detail (they were no part of the Appellant's case, and Miss Mastin referred only in passing, and by way of possible explanation for the terms of Miss Warn's letter, to what she described as the ambiguity in section 16(1D)), and so we reach our conclusion in a somewhat tentative manner. Nevertheless, it is our conclusion that section 16(1D) Finance Act 1994 entitles the Appellant to appeal to the tribunal against the decision of 6 December 2010 within the period of 30 days beginning with 18 April 2013, that being the date on which HMRC decided not to undertake a review of the decision following the out of time review request made by the Appellant. Since the Appellant lodged its notice of appeal within that 30 day period, that notice of appeal is valid and the Appellant's appeal may proceed in the normal way.

45. If we are wrong in our conclusion as to the effect of section 16(1D) Finance Act 1994 in the Appellant's circumstances, we need to consider the matter which was principally argued before us, namely whether we should exercise the discretion conferred on us by section 16(1F) Finance Act 1994 to allow the Appellant to appeal to the tribunal out of time.

46. As mentioned, we have guidance from the Upper Tribunal as to the approach we should adopt in exercising that discretion, as set out in the *O'Flaherty* and *Data*

Select Limited cases. We are, as in the conduct of any proceedings in this tribunal, to have regard to the overriding objective of dealing with the case fairly and justly. We must consider all material factors (and exclude consideration of anything which is not material), and those factors include the purpose of the time limit; the length of the delay in making the appeal; the reasons for the delay; the merits of the taxpayer's substantive appeal; and the prejudice and other consequences for the respective parties in, on the one hand, allowing the out of time appeal, and, on the other hand, refusing to allow the Appellant to make its appeal. Those factors are then to be weighed up in reaching a considered conclusion viewing matters as a whole. The *O'Flaherty* case in particular makes it clear that the focus of the tribunal should not be exclusively, or even predominantly, on determining whether or not the taxpayer had a reasonable excuse for his delay in making his appeal.

47. The purpose of the time limit seems clear: it is to give a point of finality and therefore certainty to both parties that an appeal will be pursued (so that the matter will be determined in due course by the tribunal) or that it will not be pursued (so that the matter can no longer be in issue). The question of finality, it seems to us, is highly significant in the present case.

48. The Appellant's principal submission is that it was never clear that HMRC had reached a concluded decision, at least until early 2013, at which point the Appellant asked for a review. The dialogue between HMRC and the Appellant continued, with HMRC prepared to consider new information or documents, and changing its views in response.

49. We see the force of the Appellant's case. The decision letter of 6 December 2010 invites the Appellant to provide any further information relevant to the matter in dispute. The Appellant responded, and on 7 January 2011 HMRC ask the Appellant for a copy of a key document, the letter of authority purportedly signed by Mr Boss, together with any further relevant information (we should mention that HMRC had asked for the letter of authority on a previous occasion). When that letter of authority is eventually provided, HMRC ask for any other documents the Appellant may have with Mr Boss's signature. This is followed by further correspondence in the course of which HMRC disclose further material matters (that they hold other documents with Mr Boss's signature and that the signature on those documents do not match that on the letter of authority; that HMRC have met Mr Boss who claims not to have appointed the Appellant as his representative) and also change the basis on which they claim the Appellant is liable for the underpayment of VAT (in the decision letter asserting that the Appellant is fully (meaning solely) liable, and subsequently asserting that the Appellant is jointly liable with Mr Boss). At each point HMRC invite the Appellant to provide any further information, and on 10 December 2012 Mr Somal states that he is arranging a meeting with the Appellant "to discuss the ... situation" as he has summarised it in that letter. Throughout this period it appears that the debt management team of HMRC is instructed not to seek to recover the VAT assessed in the Post Clearance Demand Note.

50. Whilst we can see that throughout this period Mr Somal is making every effort to explore fully the Appellant's case, which is to his credit, we can also see that it

induces the Appellant (and its professional advisers) to regard matters as still open and evolving. It is fair to conclude that Mr Somal regarded matters in the same way. After the decision letter itself, he did not seek to assert the 30 day limitation period for review request or appeal until his letter of 7 March 2013.

51. It is also the case that the matters of evidence which were disclosed during this period, and the evolving views of HMRC as to the nature of the liability of the Appellant, were issues relevant both to the decision HMRC were required to make and to the appeal which the Appellant might wish to make (and, indeed to its decision whether or not to appeal).

52. We take note that the delay from decision letter to lodging the notice of appeal is unusually long, but it seems to us that in this case the more relevant question is not how long that period is, but what happened during that period, and as we have set out, throughout that period both parties acted as though HMRC had not reached a final decision. We recognise that the Appellant (or its advisers) were at times tardy, perhaps unduly so, but even when there were lengthy periods between correspondence, both parties seemed content to let matters rest, and then recommenced their dialogue.

53. Once the matter of finality or certainty is seen in its context in this case, we need to consider the question of the prejudice to the parties in allowing an appeal. It is difficult to see that HMRC is prejudiced by allowing the appeal to proceed. As we have concluded, HMRC are not prejudiced on the grounds that they might fairly have regarded the issue as finally closed. Further, in answer to our question Miss Mastin specifically confirmed that she could identify no prejudice in terms of HMRC being in a worse position, by virtue of the delay, in making its case in response to the Appellant's appeal. On the other hand, assuming the Appellant has some hope of success in its appeal, it clearly is prejudiced if now it is barred from proceeding with its appeal. Nor, viewing matters from the opposite perspective, will it have gained any unfair advantage by reason of proceeding with its appeal now, rather than in early 2011 - facts and issues are clearer or better identified, but that is to the advantage of both parties.

54. This brings us to the merits of the Appellant's case - whether it is likely to have some hope of success in its appeal. In part - perhaps in large part - this will turn on matters of fact relating to the validity and nature of the representation of the importer which the Appellant asserts. The liability of the Appellant to the underpayment of VAT will follow from that. The parties have not yet engaged in exchanging views as to the application of the relevant legislation to the circumstances of the case, beyond Mr Somal setting out, without comment or application, a number of provisions from various European Union directives.

55. At the hearing before us Miss Mastin offered the view that even if the Appellant's representation of Mr Boss is valid, the Appellant would be jointly liable for the VAT in question, and that HMRC could apply to have the Appellant's appeal struck out (presumably on the ground that there is no reasonable prospect of its case succeeding). She did not elaborate on why that was so. We observe that there is

nothing in the correspondence from Mr Somal which indicates that the validity or nature of the Appellant's representation of Mr Boss is an irrelevance to the question of the liability of the Appellant - on the contrary, he sees that issue as central.

56. On the question of merits, we conclude from the correspondence and the very limited argument before us that there are material matters of fact which the Appellant should have the opportunity to prove, and if proved, could perhaps be determinative of the Appellant's liability. If it should transpire that HMRC have grounds for a strike out application, then the proper course is for them to make out their case to that effect once the appeal is underway.

57. Taking all these factors into account we consider that they clearly weigh in favour of allowing the Appellant to proceed with its appeal.

58. We therefore give the Appellant permission to make its appeal out of time.

59. Miss Mastin pointed out that the disputed VAT has not been paid nor has the Appellant made a hardship application. In the normal way the Appellant is required to deal with this matter before its appeal can proceed further.

Right to apply for permission to appeal

60. 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.

EDWARD SADLER
TRIBUNAL JUDGE

RELEASE DATE: 21 January 2014