[2016] UKFTT 378 (TC)

# TC05132

**Appeal number: TC/2016/00245**

***PROCEDURE – Whether appeal late – Yes – Application to admit late appeal – BPP v HMRC considered – Data Select Ltd v HMRC criteria applied – Application dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**BRAMLEY FERRY SUPPLIES LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN BROOKS**

**Sitting in public at the Royal Courts of Justice, London, on 9 May 2016**

**Christopher Snell, counsel, instructed by Rainer Hughes, for the Appellant**

**George Hobson, HM Revenue and Customs Solicitor's Office, for the Respondents**

## DECISION

1. Under s 16(1C) of the Finance Act 1994 an appeal against a decision by HM Revenue and Customs ("HMRC") to revoke an Owner of Duty Suspended Goods registration issued under the Warehouse and Owners of Warehoused Goods Regulations 1999 ("WOWGR") that has been upheld following a review must be made "within a period of 30 days" from the date of the document notifying the conclusion of the review. However, s 16(1F) provides that an appeal may be brought after the end of the 30 day period with the permission of the Tribunal.

2. Bramley Ferry Supplies Limited ("Bramley") was notified by HMRC, in a letter dated 28 January 2015, that a decision had been made to revoke its WOWGR registration. This decision was upheld following a review and Bramley was notified of the outcome of that review in a letter from HMRC dated 7 April 2015. In a witness statement dated 5 May 2016, Mr Sanjay Panesar the senior partner of Rainer Hughes, the solicitors acting for Bramley, says:

> "The Appellant [Bramley] appealed against this review decision on 1 May 2015 (Appeal reference TC/2016/00245), this appeal was emailed to the Tribunal on the same date. An automated response to this email, from the Tribunal, cannot be located on our system. We were, however, under the impression that the email had been received by the Tribunal. I refer to a copy of this Appeal and our email at pages 1 to 30 of Exhibit SP1.
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> My firm acts for the Appellant in connection with numerous matters. It only became apparent on or around 24 December 2015, upon reviewing the file, that we had not in fact received any response from the Tribunal in connection with this appeal. Subsequently my firm wrote to the Tribunal by email on 24 December chasing a response. I refer to a copy of this email at page 31 of exhibit SP1"

3. The Tribunal acknowledged receipt of the email and Notice of Appeal dated 1 May 2015 in a letter of 22 January 2016. The letter noted that the Notice of Appeal "includes an application for permission to make a late appeal". On 2 February 2016 HMRC wrote to the Tribunal objecting to this application. Following further correspondence the Tribunal wrote to the parties on 26 February 2016 stating:

> The lack of an automated response from the Tribunal indicates that either the appeal dated 01/05/2015 was not sent or was not received but the Appellant's representative was under the mistaken impression that it had been.

4. The primary argument advanced by Mr Christopher Snell, who appears for Bramley, is that the appeal was made on 1 May 2015 and, as it was made in time, it is not necessary for permission to be given for a late appeal. However, if he does not succeed on that ground he contends that permission should be granted to enable Bramley to make a late appeal.

5. Mr George Hobson, who appears for HMRC, contends that on the evidence the appeal was late and, having regard to the authorities in particular the recent decision of the Court of Appeal in *BPP Holdings v HMRC* [2016] EWCA Civ 121, permission to make a late appeal should not be granted.

*Was appeal on time?*

6. Mr Snell, in support of his contention that the appeal was made on time, relies on the fact that the Notice of Appeal is signed by Bramley's legal representative and is dated 1 May 2015; that the grounds of appeal settled by Leading Counsel are dated 27 April 2014; and that the email of 1 May 2015 bears the same solicitors reference as is found on the first page of the Notice of Appeal.

7. Mr Hobson contends that the evidence relied upon does not assist Bramley. He points out that Mr Panesar, who made the witness statement, was not the person who had sent the email on the 1 May 2015; the absence of an automated response to the email which meant that the appeal "was not sent or was not received"; and the absence of any indication that there had been attachments to the email of 1 May 2015 as would have been expected in the case of saved versions of "sent" emails.

8. Having considered the evidence, given the date shown on the Notice of Appeal is 1 May 2015 and that the grounds of appeal were settled on 27 April 2015 I find that the Notice of Appeal was completed on 1 May 2015.

9. However, there is no evidence from the person who sent the email or any other source (such as attachments shown on the "sent" email or a copy of the automated response from the Tribunal) to corroborate what is essentially an assertion by Mr Panesar that the email was sent on 1 May 2015. Of course it is possible that Mr Panesar would have been able to explain why, for example, the "sent" email did not appear to indicate that it had had attachments, if he had attended the hearing, given oral evidence and be available for cross-examination, as HMRC had requested following the service of his witness statement on 5 May 2016. However, he chose not to do so and, in the circumstances, I am unable to find that the email was sent to the Tribunal before 24 December 2015.

10. Therefore, as an appeal was not made within 30 days from 7 April 2015, the date of the notification of the conclusion of the review of HMRC's decision to revoke Bramley's WOWGR registration, it is necessary to consider whether permission should be granted to make a late appeal.

*Permission to bring late appeal*

11. The decision whether or not to give permission to bring a late appeal is essentially a balancing exercise and in coming to a conclusion it is necessary to have regard to the overriding objective of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 to deal with cases "fairly and justly". This includes "avoiding delay" (see rule 2(1)(e)).

12. It was accepted that in considering whether to grant Bramley permission to make a late appeal I should adopt the approach of Morgan J in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) where he said, at [34]:

> "Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

13. In adopting such an approach I should also have regard to the observation of the Senior President of Tribunals in *BPP Holdings v HMRC* [2016] EWCA Civ 121 that:

> "37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
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> 38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party."

14. Turning to the questions posed by Morgan J in *Data Select*; as Judge Bishopp said in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC) at [24] the purpose of the time limit:

> "… is to require a party asserting a right to do so promptly, and to afford his opponent the assurance that, after the limit has expired, no claim will be made."

ie to provide certainty and avoid delay in litigation.

15. As for the length of the delay, in this case the appeal should have been made by 7 May 2015 but was received by the Tribunal almost eight months later on 24 December 2015.

16. The explanation for the delay was, according to the witness statement of Mr Panesar an "administrative error" which "only became apparent on or around 24 December, upon reviewing the file". However, such an explanation, which raises more questions than it does answers (eg why did it take until 24 December 2015 to review a file when it was understood that a Notice of Appeal had been submitted in May 2015) cannot in my judgment, without any further clarification, be regarded as a "good explanation" especially when, unlike *BPP* which considered the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, the time limit in this case was imposed not by any rule, practice direction or court order but by an Act of Parliament.

17. Turning to the consequences for the parties if an extension of time was either granted or refused, Mr Hobson submits that if an extension was granted HMRC would be prejudiced in that it would have to divert resources to defending an appeal which it was entitled to consider did not exist.

18. Mr Panesar in his witness statement concedes that there is "*some* prejudice" caused to HMRC if a late appeal is allowed but says that Bramley:

> "… would suffer irremediable harm should it not be able to appeal the decision at this stage. A very *real* consequence of this would be the winding up of the company."

Although, in the absence of Mr Panesar, Mr Snell was unable expand on the explanation for the delay he was able to do so in respect of the "real" consequences for Bramley it were not able to make its appeal.

19. He referred to the decisions of the Administrative Court in *HT & Co (Drinks) Ltd v HMRC* [2015] EWHC 659 (Admin) and the Court of Appeal in *CC&C v HMRC* [2014] EWCA Civ 1655 which held that a challenge to the revocation of a WOWGR registration should be made before the Tribunal rather than by way of judicial review unless, as Cobb J observed at [59] of *HT & Co (Drinks) Ltd*, it can be demonstrated that HMRC's decision was of an "elevated and "exceptional" category which could be described as fundamentally unlawful". This, Mr Snell submits, would effectively preclude Bramley from being able to challenge HMRC's decision in this case.

20. Mr Snell also contends that if, as in this case, the delay appears to be that of a legal representative rather than the appellant itself, damages for a "loss of chance" would not be an adequate remedy and submits, relying on *Rowland v HMRC* [2006] STC (SCD) 536, that Bramley should not in effect be held responsible for the failings of its advisers. Although the Tribunal was persuaded by such an argument in *One Source (London) Ltd v HMRC* [2015] 0500 (TC), finding that the appellant should not be prejudiced by a failure of Rainer Hughes (the same solicitors relied upon by Bramley) to submit an appeal on time it concluded, at [65]:

> "Generally, as already stated, an extension of time is the exception rather than the rule. However, having considered the explanation for the delays, having taken into account all the matters set out above, with particular reference to the overriding objective and the potential merits of the appeal, this is a case in which in the interests of justice we should exercise the Tribunal's discretion to permit the appeal to be made after the expiry of the normal time limit."

21. However, unlike the Tribunal in *One Source* where there was a delay of two months I am not satisfied that there is a good explanation for the delay of almost eight months in the present case. I also reject Mr Snell contention that the potential merits of the appeal of the appeal should be taken into account. As More-Bick LJ, giving the judgment of the Court of Appeal said, at [46] in *R (on the application of Dinjan Hysaj v Secretary of State for the Home Department* [2014] EWCA Civ 1633:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases."

22. Therefore, having carefully considered all the circumstances of the case, given the approach taken in *BPP* with regard to litigation being conducted efficiently, the fact that the appeal in the present case is almost eight months out of time, and the wholly inadequate explanation for the delay, notwithstanding the effect on Bramley, permission to extend the time limit for an appeal to be made is refused.

23. Accordingly the appeal is dismissed.

*Right to apply for permission to appeal*

24. 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.

**JOHN BROOKS**
**TRIBUNAL JUDGE**

**RELEASE DATE: 11 MAY 2016**