



TC06037

Appeal number: TC/2016/03390

EXCISE DUTY – Respondent refusing to restore vehicle – Appellant’s appeal against Respondent’s review decision lodged with the tribunal late – Appellant’s application for permission to appeal out of time – whether application should be granted in circumstances – yes

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BACABO AUTO EN TRUCH VERHUUR

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondent

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the Appellant’s application for an extension of time to file its appeal on 6 July 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 20 June 2016 (with enclosures), the Respondent’s Statement of Case (with enclosures) received by the Tribunal on 22 August 2016, documents provided by the Appellant to the Tribunal and received on 6 October 2016, the Respondent’s application dated 6 October 2016 and email dated 30 November 2016, the Appellant’s application for time to submit more material dated 23 January 2017, an application from a Mr Brom dated 26 February 2017 and emails from the Respondent dated 24 April, 5 and 16 May, and 23 June 2017.

DECISION

Introduction

1. The application before this Tribunal is the Appellant's application for an extension of time in which to make its appeal to this Tribunal. That appeal is the Appellant's challenge to the Respondent's decision to refuse to restore a vehicle which had been seized and which was condemned as forfeit. The Appellant's application for an extension of time is opposed by the Respondent.

2. During the course of preparing for the paper hearing before the Tribunal the Appellant sought, and was granted, two extensions of time to produce additional documents. However, no further material has been forthcoming. Therefore this application is determined on the basis of the documents set out above.

Appellant's submissions in respect of its application for an extension of time

3. The Appellant's appeal was made by an email to the Tribunal, sent on 20 June 2016. This email attached five pages of Respondent's seven page letter dated 10 June 2016, an email from the Appellant to the Respondent dated 30 May 2016 and a letter to the Tribunal from Mr Dons of the Appellant dated 20 June 2016. In that letter Mr Dons explained the Appellant's delay in appealing to the Tribunal as follows:

Although I am a bit too late but because I was still correspondence with the Borderforce I wasn't aware of the delay within 30 days!

Last Friday the officer of Borderforce told me that your tribunal wouldn't mind too much if I explain.

The Respondent's submissions opposing the Appellant's application

4. In opposing the Appellant's application for an extension of time, the Respondent submits that the Appellant should have been fully aware of the time limit given that it was clearly stated (and indeed underlined) in the Respondent's decision letter of 12 May 2016. That time limit was reiterated in the Respondent's letter of 10 June 2016. Notwithstanding the deadline being set out so clearly, the Appellant had continued to email the Respondent rather than proceeding to file its appeal to this Tribunal.

Findings of fact

5. On the basis of the documents before me, I find the following facts:

a) On 17 December 2014, a Mr Berende was intercepted at Harwich by the Respondent's officers. Mr Berende had been driving a vehicle which was pulling a trailer, both of which had been hired from the Appellant, a Dutch vehicle rental company.

officer concluded that the Appellant's checks were insufficient to prevent vehicles being used for smuggling, that there was no evidence that Mr Berende had paid anything under the rental agreement or that the Appellant had sought redress against Mr Berende, and that the Appellant had not demonstrated that there were exceptional circumstances or that it would suffer exceptional hardship if the vehicle was not restored. The review decision letter concluded:

Conclusion

I am of the opinion that the application of the policy in this case treats you no more harshly or leniently than anyone else in similar circumstances and I have not found sufficient and compelling reasons to deviate from policy.

I have decided to uphold the original decision in that:

The unit (vehicle) should not be restored.

If you have *fresh* information that you would like me to consider then please write to me: however, please note that I will not enter into further correspondence about evidence that has *already* been provided.

Appealing Against My Decision

If you wish to contest my decision you may now, within 30 days of the date of this letter, lodge an appeal with a Tribunal that is independent of Border Force. An appeal should be made on the appropriate forms, available with an explanatory leaflet from the Tribunals Service and should include a copy of this letter.

- j) The contact details for the Tribunal were provided at the foot of the page.
- k) On 30 May 2016, Mr Dons on behalf of the Appellant emailed the Respondent. That email began:

In reply to your letter d.d 12 May 2016 I'd like to explain one and another in which I hope I can convince you of our good intentions.

- l) In his email Mr Dons reiterated the steps taken by the Appellant when a person came to hire a vehicle, and set out the difficulties which the company faced in identifying a person who might subsequently smuggle using the vehicle. Mr Dons concluded:

So I would ask you politely to reconsider again the restoration of the truck.

I propose for example that we or the borderforce remove the adaption so it can never be used again. We even have a potential buyer for the truck because we won't rent trucks anymore to avoid this situation again. We've already sold our trailer!

5 I'd also like to inform you that the local police, Mister Fred van Opstal, has told us that Europol UK wants to give our truck back!?

They only need a confirmation that we want it back!

So that means that they're two units of the UK police/borderforce working on the same case?

10 One unit to give and the other unit to take...

Strange but it is as it is!

m) On 10 June 2016, the Respondent wrote to the Appellant as follows:

15 As I have already explained in my letter dated 12 May 2016, I am satisfied that there is no evidence of exceptional hardship and my original decision, not to restore the unit to you was fair, reasonable and proportionate.

You were previously notified that should you wish to contest my decision then you had the opportunity to lodge an appeal with the Tribunal, within 30 days, of the date, of my original decision.

20 n) On Friday 17 June 2016, Mr Don telephoned the Respondent to try to discuss the removal of the adaption. I find that the Tribunal process and deadlines were discussed.

o) On Monday 20 June 2016, the Appellant emailed his appeal to the Tribunal.

25 **Discussion and decision**

6. In an application for an extension of time to submit an appeal to the Tribunal, the onus of proof lies with the Appellant. The standard of proof is the balance of probabilities.

30 7. Rule 20 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 provides that the Tribunal must not admit an appeal made out of time unless it gives permission for that appeal to be admitted out of time. Rule 5 allows the Tribunal to extend the time allowed for complying with any rule unless that extension of time would conflict with another enactment. There is no such conflict here.

8. The principles relevant to deciding whether to decide to extend the time allowed to appeal to the Tribunal are set out in *Data Select Ltd v Revenue and Customs Commissioners* [2012] STC 2195. At paragraph 34 Morgan J held:

5 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
10 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.

9. In undertaking the balancing exercise set out in *Data Select*, the Tribunal must 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
15 includes “avoiding delay”.

Purpose of the time limit

10. Applying the principles set out in *Data Select* here, I look first the purpose of the 30 day time limit for submitting an appeal. It is clear that this is to encourage a person to appeal without delay, if he intends to do so. Such a time limit also enables
20 both parties to achieve finality, and in cases such as the present it allows the Respondent to dispose of the vehicle if there is no appeal within a reasonable time. As was said by the Tribunal in a similar context in *Galvin v HMRC* [2012] UKFTT 280 (TC):

25 Time limits exist to provide finality to legal proceedings to both sides, and allow HMRC to move on to other cases, something that is in the general public interest.

The extent of the delay

11. The Respondent’s review decision letter was issued on 12 May 2016. An appeal against that decision should have been filed with the Tribunal on or before 13
30 June 2016 (the first working day after the deadline expired). The Appellant’s appeal was filed on 20 June 2016, seven days after the deadline.

Is there a good reason for the delay?

12. The reason provided by the Appellant for its delay is essentially that it was not aware that time was running during the period when it could have appealed in time.

35 13. Although the deadline is set out clearly in the Respondent’s letter of 12 May, and it is the only part of that letter which is underlined, it seems to me that there was scope for the Appellant to have become confused by the distinction between submitting fresh evidence to the Respondent, and making an appeal to the Tribunal. Although the Respondent did not consider the Appellant’s offer to remove the

5 adaption to be fresh evidence, it seems that Mr Dons did consider this to be a fresh proposal which might persuade the Respondent to change its mind. On that basis it is possible that, although Mr Dons was aware he had 30 days to appeal, he was not aware – because he thought fresh material had been submitted – that the 30 days had already begun to run. That seems consistent with Mr Dons’s explanation in the letter which accompanied the Appellant’s email of appeal.

The consequences for the parties as a result of my decision

10 14. I consider the consequences to each party of granting, or not granting, the application for an extension of time. If the Appellant is not granted more time then it will lose the opportunity to argue that the Respondent’s decision of 12 May 2016 was not one which could reasonably have been arrived at.

15 15. If the Appellant is granted an extension of time in which to appeal then the Respondent, and the general body of taxpayers, will be put to the time and expense of responding to the Appellant’s appeal. That expense is unlikely to be greatly diminished by the fact that the burden of proof on a substantive appeal lies very firmly with the Appellant.

Balancing the relevant factors and the over-riding objective

20 16. As I noted above, the over-riding objective of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 is to deal with cases fairly and justly. In balancing the competing considerations, I bear in mind that, as Sir Stephen Oliver stated in *Ogedegbe v HMRC* [2009] UKFTT 364, extensions of time should be given as the exception and not as the rule.

25 17. In this case I have considered carefully the Appellant’s explanation for its delay of one week. Mr Dons’s explanation, that he did not realise that the time limit was running while he was still in correspondence with the Respondent, is consistent with his behaviour in emailing the Respondent on 30 May 2016. Although the deadline for appealing was clearly stated by the Respondent’s officer in the letter of 12 May 2016, I accept that the Appellant was confused by the Respondent’s offer to consider fresh evidence. I accept that the Appellant did not appreciate that its proposal to remove
30 the adaption did not constitute fresh evidence, and so the time for appealing had begun to run.

35 18. The purpose of the time limit is to give the parties finality but, as Mr Dons continued to email the Respondent, the Respondent could not reasonably have thought that the Appellant accepted that the matter was concluded. If I refuse to extend time then I am satisfied that the Appellant will suffer some prejudice by losing the opportunity to appeal. Equally the Respondent will suffer prejudice if it has to bear the costs of responding to the Appellant’s appeal.

40 19. Although extensions of time should be granted as the exception rather than the rule, in this case I have concluded that the balance of factors is in favour of the Appellant. Therefore I grant the Appellant an extension of time to submit its appeal to this Tribunal.

Conclusion

20. The Appellant's application for an extension of time is granted, and this appeal is admitted out of time. Fresh directions will be issued to progress this matter to substantive hearing.

5 The Appellant's request for full findings of fact and reasons

21. A summary decision allowing the Appellant's application was released to the parties on 11 July 2017. Subsequently, two typographical errors were corrected under Rule 37 of Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and a corrected version of the summary decision was re-issued to the parties.

10 22. Although the Appellant was successful in its application which was the subject
of the summary decision, on 23 July 2017 Mr Dons emailed the Tribunal on behalf of
the Appellant to request full findings of fact and reasons be provided. Although it is
more usual for an unsuccessful party to make such a request, Rule 35(4) of the
15 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that any
party to the proceedings may make an application within 28 days for full findings of
fact and reasons for the decision.

23. 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
20 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.

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**JANE BAILEY
TRIBUNAL JUDGE**

RELEASE DATE: 01 AUGUST 2017