[2017] UKFTT 823 (TC)

TC06218

Appeal number: TC/2017/02259

VAT – default surcharge –procedure - late appeal – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Single Source Binding Machines Limited **Appellant**

- and -

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

TRIBUNAL: JUDGE ABIGAIL MCGREGOR
CATHERINE FARQUHARSON

Sitting in public at Ashford Hearing Centre, Ashford, Kent on 3 October 2017

Andrew Osborne, Director, for the Appellant

Fatouma Yusuf, HM Revenue and Customs presenting officer, for the Respondents

DECISION

Introduction

1. This decision deals with an application by the Appellant, Single Source Binding Machines Limited ('SSBML') to bring an appeal against a VAT default surcharge amount outside the relevant time limit.

Background

2. The substantive issue in the appeal brought by SSBML related to a VAT default surcharge of £555.68 for the period 08/15.

3. SSBML had brought an earlier appeal (referred to in this decision as the 'first appeal') against two earlier default surcharges for £517.94 and £808.52 for the periods 08/14 and 11/14 respectively. The first appeal had been heard on 16 October 2015, with the decision, dismissing SSBML's appeal, released on 27 October 2015.

4. The Notice of Appeal in the current appeal was submitted to the Tribunal on 16 February 2017. The notice was rejected by the Tribunal on 24 February due to missing information. It was then resubmitted on 10 March 2017.

Parties arguments

5. Mr Osborne submitted the following arguments, some of which conflicted with each other:

(1) The 3rd default surcharge (i.e. the one under appeal in this case) had been or should have been included in the first appeal;

(2) SSBML did not know there was a 3rd default surcharge until Mr Osborne had a call with HMRC at an uncertain date, but probably in late 2016; and

(3) HMRC had not chased for the amount and had let things slide until it was passed over to a debt collection agency in January 2017.

6. HMRC submitted that:

(1) The appellant is required, by rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (the 'TPR'), to bring its appeal within the time limits specified in section 83G of the Value Added Tax Act 1994, which requires the appeal to be brought within 30 days of the document notifying the appellant of the appealable decision;

(2) The appellant therefore had 30 days from the issue of the default surcharge notice, which HMRC submit was issued on 16 October 2015, giving a deadline of 15 November 2015;

(3) SSBML did not submit the appeal until 16 February 2017, which is 458 days late;

7. In relation to whether a late appeal should be allowed, HMRC submitted that we should approach the issue by considering the five questions set out in *Data Select Ltd V HMRC* [2012] STC 2195. Its submissions on those five questions were that:

(1) The purpose of the time limit is to enable a timely examination of the fact and progression of the legal process;

(2) The length of delay was 458 days, which was a serious and significant delay, relying on *Romasave Property Services v HMRC* [2015] UKUT 0254 (TCC), where a delay in excess of 3 months was considered serious and significant in the context of a 30 day deadline;

(3) There is no good explanation for the delay because the suggestion that SSBML thought that the 3rd default surcharge was dealt with by the first appeal is inadequate because:

(a) Mr Osborne was present at the hearing of the first appeal, which very clearly only dealt with the first two default surcharges;

(b) The decision in the first appeal was issued on 27 October 2015, which states clearly which surcharges it deals with; and

(c) There is still a delay of over a year after the issue of that decision;

(4) The consequence of allowing the late appeal for the appellant is a possible financial benefit if the subsequent appeal is upheld; but comes with the prejudice to HMRC of re-opening matters after a lengthy interval where HMRC was entitled to assume that matters had been finally settled;

(5) The consequence of not allowing the late appeal is a financial burden on SSBML, who will suffer the surcharge liability, and final closure for HMRC.

Facts

8. The essential disputed fact to be determined in this application is the question of when the surcharge liability notice under appeal was received by SSBML.

9. HMRC submit that it was issued on 16 October 2015, relying on their internal systems stating that it was so issued. HMRC submit that the letters are automatically generated by the computer system and that no copy of what was issued is kept.

10. Mr Osborne stated that he did not recall receiving the notice dated 16 October 2015 and was not aware of it until a phone call with HMRC at a date that he could not recall, but thought it was probably in late 2016.

11. This statement is obviously inconsistent with Mr Osborne's other submission that he thought that the 3rd surcharge had been dealt with by the first appeal.

12. Although Mr Osborne appeared to be a capable and articulate businessman, we found his evidence to the Tribunal to be, at best, disingenuous. He was clearly frustrated at the system, which he perceives to be unfair on small businesses. However, he also had clearly engaged effectively with the system in dealing with the two earlier defaults, requesting reviews and bringing the first appeal.

13. Ms Yusuf for HMRC does not escape criticism for her submissions either, as she was not in command of the evidence contained in the bundle and had not produced all of the relevant correspondence relating to the default surcharge, particularly when it came to addressing what HMRC had done to pursue the default surcharge after its issue.

14. We do not need to find definitively whether SSBML had received the 3rd default surcharge liability notice shortly after 16 October 2015, however, due to the presence in the bundle of documents of a letter from Mr Osborne, received by HMRC on 3 October 2016, which clearly refers to SSBML having received surcharges amounting to the combined sum of £1882 (being the sum of the three surcharges) and to 'several letters back and forth' prior to that date. Therefore we find, as a matter of fact, that SSBML, and Mr Osborne, had been aware of the 3rd surcharge from, at the latest, shortly before 3 October 2016, and in all probability for some time before that.

15. It is quite clear from the decision in the first appeal that it did not deal with the 3rd surcharge, and indeed clear from the dates in question, that it could not have done, because the date of the hearing was the same day as the earliest date on which the 3rd surcharge was issued by HMRC. The secondary question is whether Mr Osborne genuinely believed that the first appeal had dealt with it. During the tribunal hearing it was put to Mr Osborne that the first appeal clearly dealt with the sum of surcharges amounting to £1324, rather than the total sum of £1882 and therefore could not have incorporated the 3rd surcharge. Mr Osborne conceded that he did now remember that it was the lower sum dealt with in the first appeal. We therefore find that Mr Osborne had not genuinely believed that the third surcharge had been dealt with in the first appeal.

Discussion

16. HMRC invited this Tribunal to consider the question of whether to allow the late appeal by considering the five questions in *Data Select*. However, since *Data Select,* there has been an increased emphasis on compliance with rules, as the Supreme Court emphasised in *HMRC v BPP Holdings Limited* [2017] STC 1655.

17. The Upper Tribunal has given the following guidance in *Clear PLC v HMRC* [2016] UKUT 347 (TCC) (a decision later than *Data Select* and in line with the Supreme Court's approach in *BPP Holdings):*

> 'the correct approach to the application for extension of time…would be to consider the overriding objective and all the circumstances of the case and in that context to apply by analogy the new provisions of CPR 3.9, as interpreted in Mitchell [*Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537] and Denton [*Denton v TH White Ltd* [2014] EWCA Civ 906]. This would require the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, as set out in the new CPR 3.9, to be given particular weight when considering all the circumstances of the case. This indicates that a tribunal should take a stricter approach than might have been the case before the new rule was implemented, but it is still

> the case that a consideration of all the circumstances must be made before deciding the application.'

18. The Court of Appeal in *Denton* provided guidance on how the courts should approach applications under CPR 3.9 for relief from sanctions. Such guidance is relevant in an application for a late appeal but we bear in mind that, following the approach in ***BPP,*** the relevance of the guidance given is constrained to how we should apply the overriding objective in the TPR. The guidance in *Denton* suggests a three stage review:

> (1) firstly to identify and assess the seriousness and significance of the failure to comply with the time limit;
>
> (2) secondly to consider the reason for the failure to comply; and
>
> (3) finally to consider all the circumstances of the case, bearing in mind the overriding objective of the TPR.

19. We find that the delay in this case was serious and significant, being, even based on the latest possible date for SSBML becoming aware of the appealable decision shortly before 3 October 2016, over 4 months, and in all likelihood well over a year. The decision in ***Romasave,*** referred to by HMRC, considered over 3 months to be serious and significant and we would agree.

20. As we have set out in our findings of fact above, we do not find that Mr Osborne's reasons for failing to comply with the time limit, being a lack of awareness of the surcharge or that the surcharge had already been dealt with in the first appeal, were credible. The only other submission made was that HMRC had failed to pursue the surcharge. Again this does not match up with the correspondence between SSBML and HMRC provided to the Tribunal, but in any event would not justify the delay in bringing an appeal.

21. The overriding objective of the Tribunal, as set out in Rule 2 of the TPR, is to deal with cases fairly and justly, which includes, among other matters, ensuring that the parties are able to participate fully in proceedings and avoiding delay, so far as compatible with proper consideration of the issues.

22. It is clear that refusing the late appeal would prejudice SSBML in the sense that it could pursue its appeal and the surcharge amount would become due, but this same prejudice would apply in every late appeal and therefore cannot, of itself, be a reason to allow a late appeal.

23. We agree with HMRC's submission that the prejudice to HMRC is in the reopening of a case that it, justifiably, thought to have been settled (albeit that it was still working to pursue payment of the debt). While this could also be argued to be present in all applications for late appeal, we do not accept that it is so black and white – the period of time and the surrounding circumstances of each case would affect the prejudice to HMRC. The length of time in this case and the fact that other correspondence relating to collecting the debt had been exchanged would have encouraged HMRC to come to the conclusion that SSBML was not intending to appeal the decision.

24. Taking all the circumstances of the case into account and bearing in mind the matters described above, including the need for compliance with procedural rules and the efficient conduct of appeals as well as the overriding objective of the TPR, we have concluded that the length of the delay, the absence of any good reason for it and the presence of some prejudice to HMRC mean that SSBML's application to make a late appeal to the FTT should be refused.

Decision

25. For the reasons set out above, we find that SSBML should not be granted permission to make a late appeal and, accordingly, its appeal should not be admitted.

26. 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.

ABIGAIL MCGREGOR

TRIBUNAL JUDGE
RELEASE DATE: 27 NOVEMBER 2017