[2018] UKFTT 589 (TC)

TC06753

Appeal number: TC/2018/01675

VAT – application for permission to notify late appeal to Tribunal – Martland v HMRC applied – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALLEN PANTER **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**

Sitting in public in Centre City Tower, Birmingham on 4 October 2018

Jeremy Dable, instructed by Forbes & Loxley Limited accountants for the Appellant

Giselle McGowan , instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to an application by the appellant for permission to notify a late appeal to the Tribunal in respect of a personal liability notice issued to him by HMRC, whereby they imposed personal liability on him for a penalty of £78,237.07 notified to a company of which he had been sole director and shareholder at the relevant time.

The facts

2. At all material times up to 1 November 2016, the appellant was the sole director and shareholder of a company called Front Row Recruitment (UK) Limited ("FRR"), which carried on a business of supplying workers within the UK.

3. Following concerns about FRR's business structure arising from a meeting in July 2014, HMRC requested information and documents from FRR to enable them to consider the position further. In the absence of a response, they issued a formal notice dated 26 September 2014 to FRR pursuant to schedule 36 Finance Act 2008 requiring the delivery of certain documents and information. Following a chasing letter dated 28 November 2014 and the imposition of a £300 penalty, the information was provided.

4. Following a meeting on 4 August 2015, further correspondence and the provision of further documentation, HMRC issued a letter dated 5 August 2016 which notified FRR of their decision to refuse entitlement to deduct input tax totalling £138,748.34 which had been claimed by FRR in respect of its VAT accounting periods 07/14 to 01/15 in relation to invoices rendered to it by CS Staffing Management Corporation Limited, purportedly on behalf of FR Staffing Limited, over the period from 11 July 2014 to 31 January 2015. This was followed by a letter dated 12 September 2016 notifying FRR of assessments totalling £138,748.34. In the meantime, FRR had written to HMRC on 17 August 2016 to request a review of HMRC's decision. By letter dated 8 December 2016, HMRC confirmed the original decision. The main basis of HMRC's decision was that the relevant transactions were connected with fraudulent evasion of VAT and FRR knew or ought to have known of that fact.

5. In the meantime, the appellant had sold all his shares in FRR on 1 November 2016 to a company called Rigil Kent Acquisitions Limited for £100 and had resigned as a director. The disclosure letter on the sale included the statement: "There is an ongoing tax liability to HMRC".

6. Included in the bundle of documents before me was a copy of a letter dated 14 January 2017 which was said to have been sent by the appellant to the relevant review officer at HMRC, though they have no record of receiving it. The main body of this letter read as follows:

> "Thank you for your letter dated 8 December 2016. You will note from your letter that my request for a review has taken four months.
>
> I understand that HMRC are very busy and probably understaffed but four months seems an excessive period of time to conduct such a review.

> I am surprised by your review to uphold the decision of Mr Moore. I wish for you to review the file again based on the facts of the matter as I believe that you are mistaken in your findings. Mr Moore's investigation should be considered floored *[sic]* as he has failed to provide evidence despite his claims.
>
> I would be grateful if you could look at your review decision and contact me further to discuss the matter if anything is unclear."

7. As Ms McGowan pointed out, it would appear somewhat odd for the appellant to reply to a letter addressed to a company which he had sold over two months previously, and with which he no longer had any involvement. The appellant did not attend the hearing and therefore it was not possible to put any questions to him about this or indeed any other aspect of the application. I am prepared however to accept that this letter was sent, even though HMRC did not receive it.

8. On 21 February 2017, HMRC wrote to FRR. They informed it of the penalty they intended to charge in respect of what they considered to have been a deliberate inaccuracy whose disclosure was prompted. Their proposed penalty was £78,237.07, and they asked for any relevant information to reconsider this by 23 March 2017. In the absence of any response, a notice of penalty assessment in that amount was issued by HMRC to FRR on 23 March 2017. A copy of this notice was sent to the appellant at his home address.

9. On 31 March 2017, HMRC issued a personal liability notice to the appellant at his home address. This notice recorded HMRC's decision that the appellant was personally liable to pay the penalties which had been imposed on FRR as the penalties had been charged because of his actions. It required the appellant to pay £78,237.07 by 29 April 2017. Under the heading "What to do if you disagree", it included the following text:

> "If you disagree with my decision, you can send me any new information relating to the matter and I will look at it again.
>
> Also, you can:
>
> - ask for an HMRC officer not previously involved in the matter to carry out a review of my decision
> - appeal to an independent tribunal to decide the matter.
>
> If you want a review, you should write to me by 30 April 2017, telling me why you think my decision is wrong and send me any new information that you want me to consider.
>
> If you ask for a review and you are not satisfied with the outcome of that review, you can still appeal to the tribunal.
>
> If you do not want a review, you can appeal to the tribunal, but you must make sure they receive your appeal by 30 April 2017.

> If you choose to appeal to HM Courts and Tribunal Service you'll need to attach a copy of this letter with your appeal.
>
> You can find out more information about appeals and reviews in factsheet HMRC1 'HM Revenue & Customs decisions – what to do if you disagree'. To get a copy of this factsheet, go to www.gov.uk and search 'HMRC 1' or phone our orderline on 0300 200 3610."

10. The appellant did not request a review of the above personal liability notice, nor did he notify an appeal in respect of it to the Tribunal until 2 March 2018. I am satisfied that he received it, as reference to it was made by him in a conversation with HMRC on 7 August 2017 in relation to other matters.

11. The appellant has given no explanation of the delay between his receipt of the personal liability notice shortly after 31 March 2017 and his appeal to the tribunal on 2 March 2018. In his notice of appeal, he indicated that he was "not sure" whether his appeal was in time. The reason he gave for any lateness was as follows:

> "Despite the review of the investigating officer's decision to disallow the entitlement to reclaim input tax, further correspondence was sent to HMRC requesting further information and evidence to support their allegations. Responses were not received. Whilst the Taxpayer understands that he alone cannot close a case, HMRC have a duty to respond to requests for information where they are asked. On this basis, we believe the matter to still be 'in time' although HMRC believe they closed the matter."

12. As Mr Dable confirmed at the hearing, this was a reference to the appellant's letter dated 14 January 2017. The appellant's explanation for the delay accordingly appears to be that he was awaiting a response from HMRC to his request for a further review of their decision to disallow the input tax of FRR. Mr Anthony Evans of Forbes Loxley Limited said that he understood the appellant had consulted another firm of accountants to assist him in relation to the personal liability notice but they did not appear to have done anything. He himself had been acting for the appellant in trying to agree "time to pay" arrangements with HMRC in relation to other tax liabilities and had only become aware of this penalty when HMRC had raised it with him in early February 2018 as a reason why such arrangements could not be agreed. There was some reference by Mr Dable to unspecified "financial and personal difficulties" of the appellant, but there was no actual evidence before me of any such matters.

13. On 21 February 2018, FRR was placed into liquidation by order of the Companies Court, upon the petition of HMRC.

14. The main thrust of all correspondence from the appellant's representative to HMRC since January 2018 has been to dispute the validity of HMRC's original decision to deny input tax to FRR. In addition, it has sought to persuade HMRC that the appellant should not have any responsibility for the penalty because of his sale of FRR on 1 November 2016.

The law

15. It is common ground that the relevant legislation in this case is contained in section 83G Value Added Tax Act 1994, which sets out the basic 30 day time limit for making appeals to the Tribunal against decisions of HMRC.

16. The argument in this case revolves around section 83G(6), which provides that an appeal may be made after the end of that 30 day period "if the tribunal gives permission to do so".

17. The recent Upper Tribunal case of *William Martland v HMRC* [2018] UKUT 0178 (TCC) draws together the various authorities that have considered the application of this and similar provisions. After a review of the cases, it gave the following guidance:

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton:
>
> > (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
> >
> > (2) The reason (or reasons) why the default occurred should be established.
> >
> > (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.
>
> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the

opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:

> "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."

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

Discussion and decision

18. Adopting the three stage process set out by the Upper Tribunal, I consider first the length of the delay.

19. As set out above, the personal liability notice served on the appellant was dated 31 March 2017. The time limit for notifying an appeal to the Tribunal therefore expired on 30 April 2017. The appeal was actually notified to the tribunal on 2 March 2018, just over 10 months late. On any view, I consider this delay to be "serious and significant".

20. Turning to the second stage of the process, I need to consider the reasons for the delay.

21. Those reasons are unclear. The appellant did not attend the hearing to provide any clarification. If the stated reason in the notice of appeal is accepted at face value, the appellant's argument appears to be that in the absence of a direct response to his letter dated 14 January 2017 it was acceptable for him to do nothing further, even after receiving the personal liability notice dated 31 March 2017.

22. Mr Dable sought to make great play of the seriousness of the allegations which had been made by HMRC and the extreme prejudice which the appellant would suffer if he were not provided with all of the evidence upon which HMRC had relied in making such allegations, so that he could refute them. He seemed to be submitting that it was acceptable for the appellant to delay exercising his rights of appeal to the Tribunal until this evidence had been provided; if that is the case, then I disagree. The personal liability notice contained a very clear statement of the appellant's rights of appeal and of the applicable time limits.

23. It follows that I consider the reasons put forward for the delay to be extremely weak.

24. Turning to the third stage of the process, I must carry out the balancing exercise of evaluating all the circumstances of the case. As I have already found, the length of the delay was significant and the reasons for it extremely weak. Clearly the appellant will suffer significant prejudice if permission is not granted, as he will lose any chance of appealing against the imposition of a very large penalty. He may well become bankrupt as a result. Mr Dable's complaint is that this may well happen in spite of the appellant not being given any opportunity to refute the very serious allegations that were made by HMRC in their original decision. He says that there is still no evidence to show that there was a VAT fraud at all, still less to show that the appellant knew or should have known about it.

25. The difficulty with this line of argument is that FRR, while still under the appellant's control, had every opportunity to appeal against HMRC's decision. A very clear statement of its appeal rights had also been included in HMRC's review letter addressed to it on 8 December 2016. HMRC had given a perfectly adequate summary of the reasons for their decision and there is no obligation on them to provide a taxpayer

with copies of all the evidence they have considered in reaching that decision before time starts to run for the appellant to appeal it.

26. It is to be expected that the loss of the right to appeal a large tax or penalty liability may cause serious prejudice to a taxpayer. That is a prejudice which the appellant in this case has brought upon himself by his delay, possibly compounded by his erroneous belief that his sale of FRR would absolve him of all responsibility.

27. Mr Dable sought to persuade me that the merits of the appellant's underlying appeal were overwhelmingly in his favour. His basis for saying so was that HMRC had not provided any evidence of the underlying fraudulent loss of VAT or of any reason why the appellant either knew or should have known of that fraudulent loss. I consider this to be a misconceived argument. HMRC had given an outline of the reasons for their decision and FRR had the clear opportunity of challenging HMRC's position through an appeal to the Tribunal. If it had done so, then HMRC would have been required to produce all the relevant evidence for examination by the appellant and the Tribunal. The appellant, as FRR's sole director, had chosen not to take that course. This case clearly therefore in my view is one in which it is not possible at this stage to reach any clear view, on the evidence and arguments before the Tribunal, as to the likely strength of any appeal.

28. On the question of prejudice, as Ms McGowan submitted, if permission is granted for this appeal to proceed, then HMRC will be required to reopen a matter which it had justifiably regarded as closed in April 2017.

29. To summarise, therefore, I find there to have been a delay of over 10 months in notifying the appeal to the Tribunal, a delay which on any view is "serious and significant". The explanation for the delay, such as it is, is extremely weak. The appellant will undoubtedly suffer significant prejudice if his appeal is not permitted to proceed, but after considering the length of the delay and weighing in the balance the reasons given for it and the prejudice which would potentially be suffered by both parties (depending on my decision), I am satisfied that this is a case in which the Tribunal's discretion to admit a late appeal should not be exercised.

30. The appellant's application is therefore REFUSED. Accordingly the Tribunal has no jurisdiction to entertain these proceedings which are therefore STRUCK OUT.

31. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 09 OCTOBER 2018