[2019] UKFTT 152 (TC)

TC07018

Appeal number: TC/2018/04815

VAT – Agricultural Flat Rate Scheme – registration cancelled – decision accepted – European Court decision - appeal over six years later – no reason why did not appeal within time – no reasonable excuse – late appeal disallowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HAMPTON GEORGE HEWITT **Applicant**

- and -

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN

Sitting in public at Lands Tribunal, 2nd Floor, Royal Courts of Justice, Chichester Street, Belfast, BT1 3JF on Monday 4 February 2019 at 10:30 AM

Having heard Mr Robert Maas with Mr Warren McCleary of McCleary & Company Ltd, Chartered Accountants for the Appellant and Mrs Paula O'Reilly, Presenting Officer for the Respondents

1. The Tribunal decided that the application for permission to bring a late appeal should be dismissed.

Background

2. The Applicant applied for certification under the Agricultural Flat Rate Scheme (AFRS) on 18 June 2004 and was granted certification effective from 1 July 2004. The AFRS is an alternative to VAT registration for farmers under which a taxpayer does not account for VAT or submit returns and as such cannot reclaim input tax. Instead the taxpayer charges and retains a flat rate addition of 4% when it sells goods or goods and services from designated activities to VAT registered customers.

3. Following correspondence between HMRC and the Applicant in 2012 HMRC wrote to him on 26 October 2012 to advise him that they were cancelling his Flat-Rate Scheme for Farmers with effect from 31 October 2012. HMRC's letter included paragraphs informing him of his right to appeal the decision by asking for a review or by appealing direct to a tribunal. The letter included the following:

> "If you wish to appeal, you must do so within 30 days of the date on this letter (or the review conclusion letter, if relevant)."

4. The Applicant replied by letter dated 2 November 2012 stating

> "I hereby confirm that I will comply with your decision to take me off the scheme. I am however disappointed with your decision as I have endeavoured to comply."

5. By letter dated 15 October 2012 HMRC wrote to Shields & Sons Partnership (Shields) advising them that their certificate was being revoked. It would appear Shields requested a review as, according to the Advocate General, HMRC's decision was confirmed on 21 December 2012. Shields then appealed to the First Tier Tribunal which dismissed the appeal on 8 October 2014. Shields then appealed to the Upper Tribunal which referred the matter to the European Court of Justice (ECJ) which issued a decision on 12 October 2017. As a result of the ECJ's decision the Upper Tribunal allowed Shields' appeal on 21 December 2017.

6. On 7 March 2018 McCleary & Company Ltd, Chartered Accountants and Registered Auditors (McCleary), wrote to HMRC claiming that HMRC were wrong to remove the Applicant from the AFRS scheme and based on the outcome of the Shields decision they asked HMRC to reinstate the Applicant in the AFRS scheme and to pay him a refund of £65,687.87 in accordance with an attached schedule of calculations.

7. HMRC replied by letter dated 20 March 2018 refusing to reinstate the Applicant in the following terms:

> "Thank you for your letter received in this office on 12 February 2018 asking for [the Applicant] to have his Agricultural Flat Scheme certificate reinstated.
>
> This request is based on the decision made by the European Court of Justice in the case of Shields & Sons Partnership v Revenue & Customs Commissioners.
>
> Unfortunately I cannot reinstate the Agricultural Flat Rate certificate on the basis of the Shields case.

> I have reviewed the application that was submitted in the name of [the Applicanr]. Assuming the application, if approved, would be from a current date, on the information provided the application would be refused. This is because the gain would be more that £3,000 in the year of trading following your application.

8. The letter then offered the Applicant a review or an appeal to an independent tribunal.

9. McCleary replied to HMRC by letter dated 4 April 2018 stating that HMRC's decision not to reinstate was without foundation and the decision in Shields meant that the Applicant could not be excluded from AFRS.

10. HMRC then issued a detailed response dated 14 June 2018 dealing with the request to reinstate the Applicant to the AFRS with effect from 31 October 2012 and to refund a total of £65,687.87. The letter stated that the offer of a review contained in the letter dated 20 March 2018 only applied to the decision to refuse the application to join AFRS from a current date and in HMRC's view McCleary's letter dated 4 April 2018 made it clear that there was no desire to consider a current date application. The letter then dealt in considerable detail with time limits in connection with HMRC's decision letter dated 26 October 2012 and in particular the three paragraphs therein which set out the Applicant's rights of a statutory review or appeal within 30 days. Only if the Applicant had a reasonable excuse for failing to ask for a review or appeal to a tribunal within 30 days could HMRC consider a review request received over five years out of time. In HMRC's view no reasonable excuse had been put forward and there appeared to be no reason for the statutory time limits to be extended by over five years.

11. McCleary on behalf of the Applicant lodged a Notice of appeal to this Tribunal dated 3 July 2018.

Arguments on behalf of the Applicant

12. Mr Maas after briefly explaining the background to AFRS and in particular that the Applicant had been excluded from the scheme under Reg 206(1)(i) of the VAT Regulations which entitles HMRC to cancel a certification "if they consider it necessary to do so for the protection of the revenue". Mr Maas informed the Tribunal that of 38 cancellations in 2012 by HMRC 33 had related to Northern Irish farmers, one of which was Shields & Sons Partnership who had appealed the decision as detailed in paragraph 5 above.

13. In Mr Maas's view the Applicant really only had two possible challenges to the October 2012 decision – first that no reasonable body of Commissioners could have reached the decision and secondly that HMRC had acted in bad faith. In his view both of these are virtually impossible for a taxpayer to establish particularly bearing in mind that the burden of proof is on the taxpayer.

14. Mr Maas referred to the European Court decision of *C. Deville v Administration des impôts* (C-240-87 where the Court ruled:

> "A national legislature may not, subsequent to a judgment of the Court from which it follows that certain legislation is incompatible with the Treaty, adopt a

> procedural rule which specifically reduces the possibilities of bringing proceedings for recovery of taxes which were wrongly levied under that legislation. It is for the national court to determine whether the procedural rule at issue reduced the possibilities of bringing proceedings for recovery which would otherwise have been available."

15. Mr Maas then referred the Tribunal to the European Court decision in *Metallgesellschaft Ltd and others* (joined cases C-397/98 and C-410/98 which held that a provision in UK corporation tax law was unlawful. Basically non-resident parent companies and their subsidiaries resident in the United Kingdom were unable to make a group income election which UK resident parent companies were able to do and accordingly suffered a cashflow disadvantage. At paragraph 34(5) the Court was asked:

> "Is a Member State entitled to plead in answer to such a claim for restitution, tax credit or damages, that the plaintiffs are not entitled to recover, or that the plaintiff's claim should be reduced, on the grounds that, despite the terms of the national statute which prevented them from doing so, as a matter of national law they ought to have made a group income election, or claimed a tax credit and have appealed to the Commissioners and, if necessary, the courts, against the decision of the Inspector of Taxes refusing the election or claim, relying upon the primacy and direct effect of the provisions of Community law."

16. The European Court answered this question that it is contrary to Community law to refuse or reduce a claim

> "on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have exempted the subsidiary from making payments in advance and that they therefore did not make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where upon any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime."

17. He also referred to the House of Lords decision in *Fleming (trading as Bodycraft) v Revenue & Customs Commissioners* [2008] UKHL 2 where, according to the headnote

> "It was established that the principle of legitimate expectations was infringed by the retrospective introduction of a time limit for the making of claims retrospectively but that that would not be in breach of EU law so long as transitional arrangements were included which allowed an adequate period for the lodging of claims which persons had been entitled to submit under the original legislation; sufficient notice of those transitional arrangements had to be given to ensure that the exercise of those accrued rights was not rendered virtually impossible or excessively difficult which would be a breach of the principle of effectiveness."

18. Mr Maas then referred to the Upper Tribunal decision in *William Martland v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 178 where Judge Roger Berner outlined a three stage process as set out in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906:

19. "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 is 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."

20. Mr Maas then addressed each of the three tests in turn and reminded the Tribunal of the overriding objective contained in paragraph 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

21. Mr Maas stated that he could not pretend that the delay of around five and a half years was not a long delay. He maintained that following the European Court decision in *Shields* HMRC had acted unlawfully in removing the Applicant from the AFRS scheme. Until the *Shields* decision the Applicant could not have been aware that the United Kingdom legislation does not properly transpose the Principal VAT Directive. In his view where United Kingdom legislation is ruled by the European Court to be defective HMRC normally issues a press release or business brief explaining what taxpayers should do in the light of the decision. It was not unreasonable for the Applicant to wait for a reasonable period for HMRC to provide such guidance. In the absence of any such guidance McCleary wrote to HMRC on 7 March 2018 or possibly in February) asking for the certificate to be reinstated.

22. Mr Maas then informed the Tribunal that another Northern Irish farmer through his Member of Parliament had received a letter from HMRC dated 3 May 2018 saying:

"We are urgently looking at what changes to make to the AFRS taking the Upper Tribunal's decision of 21 December 2017 in the case of Shields & Sons into account. We are doing this while making sure that the original purpose of the AFRS is not undermined."

23. In the opinion of Mr Maas the Applicant would be severely prejudiced if he was not allowed to appeal as he is virtually bound to succeed in his appeal. It was hard to see how HMRC would be prejudiced as in May 2018 they were urgently considering what changes needed to be made to the AFRS following the decision in *Shields.*

Arguments on behalf of HMRC

24. HMRC maintain that the time to appeal the decision to this Tribunal expired on 25 November 2012. Section 83G(1) of the Value Added Tax Act 1994 states that an appeal must be made before the end of the period of 30 days beginning with -

> "(i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or
>
> (ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision, or"

25. The section continues:

> "(6) An appeal may be made after the end of the period specified in subsection (1) … if the tribunal gives permission to do so.

26. Mrs O'Reilly on behalf of HMRC referred the Tribunal to the *Martland* decision and suggested that the balancing exercise required by paragraph 44(3) should take into account the particular importance of (a) the need for litigation to be concluded efficiently and at proportionate cost, and (b) the need for statutory time limits to be respected.

27. She then referred to the Upper Tribunal decision in *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 where at paragraph 96 Judge Berner stated that

> "permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely."

28. Applying the Upper Tribunal's guidance, Mrs O'Reilly maintained that the Applicant's delay in seeking to exercise his appeal rights is very serious and significant. She highlighted the facts that even after the *Shields* decision was released by the European Court on 12 October 2017 there was a delay of over eight months and after the release of the Upper Tribunal's decision on 21 December 2017 there was a delay of over six months before the Notice of appeal was lodged with this Tribunal.

29. Mrs O'Reilly reminded the Tribunal that the Applicant took a deliberate decision when he wrote to HMRC on 2 November 2012 to say that he would comply with the decision to remove his certificate.

30. Mrs O'Reilly referred the Tribunal to the decision of the Court of Appeal in *Leeds City Council v HMRC* [2015] EWCA Civ 1293 where at paragraph 43 Lewison LJ stated:

> "…there is no rule of EU law requiring the running of a limitation period to be deferred until the existence of a right to recover the payment has been judicially established. It is not uncommon for a claim to repayment to have become time-barred in national law while proceedings are still in progress to determine whether the member state was in breach of EU law…Thus the fact the HMRC advanced a view of the law which is now conceded to be wrong does not preclude reliance on the limitation period. If a taxpayer is dissatisfied with

HMRC's view of the law, the proper course is to appeal to the appropriate tribunal."

31. Mrs O'Reilly then referred to several European Court decisions which held that the delivery of a decision after the expiry of a limitation period did not allow it to be concluded that an appellant could not assert its rights before the expiry of that period.

32. In addressing the phrase "all the circumstances of the case" referred to in the third limb of *Denton* Mrs O'Reilly referred to paragraph 37 of *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 where Mr Justice Morgan said:

> "…the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

33. In *John Wilkins (Motor Engineers) Ltd v Revenue and Customs* [2009] UKUT 175 Judge Colin Bishopp in the Upper Tribunal said:

> "[45] The 30-day time limit is long established and well known, and is there for good reason. Contrary to the appellants' arguments, there is prejudice to the government (or other taxpayers) in having to meet large, unexpected claims since they are disruptive of the government's planning of its income and expenditure. The time limit, short though it may be, is justified for that reason, and in the interests of legal certainty, should not be lightly extended.
>
> [46] In this context, it is worth repeating what Henderson J said in *Chalke* (see [2009] STC 2027 at [164]):
>
> > "[164] It is apposite in this connection to have in mind the "very illuminating general discussion" (as Lord Walker termed it in *Fleming* ([2008] STC 324 at [58], [2008] 1 WLR 195 at [58])) by Advocate General Jacobs in *Fantask A/S e.a. v Industriministeriet (Erhvervministeriet*) (CaseC-188/95) [1997 ECR 1-6783, [1998] All ER (EC)1 ("Fantask") where he emphasised (at para 71 of his opinion) "the need for States and public bodies to plan their income and expenditure and to ensure that their budgets are not disrupted by huge unforeseen liabilities", and (para 72)" the need, recognised by all legal systems, for a degree of legal certainty for the State, particularly where infringements are comparatively minor or inadvertent."

34. Mrs O'Reilly also referred the Tribunal to Scottish decision in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2005] CSOH 135 where at paragraph 23Lord Drummond Young stated:

> "The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. This may be a reason for refusing leave to appeal where there has been a very long delay."

35. In Mrs O'Reilly's opinion if the Applicant's argument that time limits should not apply where subsequent developments in case-law are helpful to him is successful

then HMRC could argue for decisions to be reopened where subsequent judicial decisions are favourable to HMRC. This would seriously prejudice the administration of justice and legal certainty.

36. Addressing the point of whether there would be any prejudice to the parties if the appeal was allowed to proceed, Mrs O'Reilly stated that HMRC does not accept that the appeal would succeed as there may be other legal issues to be considered such as the application of the normal VAT arrangements and there may be issues as to the quantum claimed. HMRC notes that the Applicant does not seek to apply for current admission to AFRS. As he has been registered for VAT since his AFRS certificate was cancelled he has recovered his input tax under the normal rules.

37. Finally Mrs O'Reilly referred the Tribunal to the recent Upper Tribunal decision in *Bell v Revenue and Customs Commissioners* [2018] UKUT 254 where Judge Roger Berner says:

> "34. … I accept that if Mr Bell is unable to pursue his application he will not have an opportunity to obtain permission to appeal and potentially challenge the decision of the FTT. I can understand his frustration at what he perceives to have been an injustice or series of injustices. But on the other hand, the courts and tribunals have consistently emphasised the public interest in the finality of litigation, and the purpose of a time limit being to bring finality (see for example, *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 and *Data Select Limited v Revenue and Customs Commissioners* [2012] STC 2195). To resurrect proceedings which have become final as a consequence of a conscious choice on the part of a party not to pursue an application, and where the delay is a serious and significant one, as in this case, is clearly prejudicial to the other party."

Decision

38. This Tribunal is able to distinguish the various court decisions referred to by Mr Maas. In *Deville* the court was dealing with legislation which was introduced by France after the ECJ had issued a decision requiring France to comply with an earlier judgment. This is not the case in the present appeal as the United Kingdom government has not introduced any legislation following the ECJ decision in *Shields* not has HMRC issued any guidance on the subject.

39. The *Metellgesellschaft* case decided that it was contrary to Community law for a national court to refuse a claim on the sole ground that the company did not apply to the tax authority in order to benefit from the taxation regime. There is no mention of time limits which are the subject of this appeal.

40. Finally the *Fleming* decision concerned the introduction of retrospective legislation. In the current appeal there has been no retrospective legislation.

41. No argument has been put forward on behalf of the Applicant why he could not have requested a review or appealed the decision to this Tribunal in 2012 within the time limits clearly set out in HMRC's letter dated 26 October 2012. Instead the Applicant accepted HMRC's decision to remove him from the scheme and despite being advised of his appeal rights chose not to do so.

42. Mr Maas has argued that the Applicant could not have been aware of his rights under European Union law until the ECJ decision in *Shields* in October 2017. However the same argument applies to the Shields partnership but they asked for a review and appealed the decision within the time limits. If the Shields partnership could ask for a review and appeal the decision within the time limits there is no reason why the Applicant could not have done so.

43. Adopting the three-pronged approach suggested in Denton this Tribunal finds that the delay in applying for permission to appeal – well over five years – is serious and significant. Secondly no reason has been put forward for the delay other than the fact that the ECJ decided in favour of the Shields partnership. The Applicant chose not to appeal in 2012. In all the circumstances of this application this Tribunal prefers the arguments put forward by Mrs O'Reilly on behalf of HMRC. In particular this TYribunal agrees with the final sentence of Judge Berner's decision in *Bell* quoted at paragraph 37 above.

44. The application for permission to appeal out of time is dismissed.

45. 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.

ALASTAIR J RANKIN
TRIBUNAL JUDGE

RELEASE DATE: 28 FEBRUARY 2019