[2019] UKFTT 189 (TC)

TC07039

Appeal number: TC/2018/00919

PROCEDURE - late application for permission to appeal - whether an extension of time should be granted - Martland and Denton considered - eight year delay - Application not admitted

FIRST-TIER TRIBUNAL
TAX CHAMBER

AKEEL BAJWA **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER LESLIE BROWN

Sitting in public at Tribunal Tax Service, City Exchange, Albion Street, Leeds on 20 August 2018

The appellant in person

Mr Barry Sellars, Officer of HMRC, for the Respondents

DECISION

The Application

1. This is a late application by Akeel Bajwa ("the appellant") for permission to appeal a decision by the Respondents ("HMRC") to issue a VAT assessment of £13,783.95 and a VAT mis-declaration penalty of £1,962.

2. The appellant has already paid a significant part of the assessment. He has not paid the penalty. His appeal relates to the penalty and the balance of the assessment outstanding at the date of his appeal, being in total £6,472.07 and consisting of £3,090 representing the balance of the assessment together with interest and the penalty charge amounting to £3,382.07.

3. HMRC oppose the application on the grounds that the assessment was issued on 18 August 2009 and the penalty assessment was issued on 7 September 2009, but the appellant did not lodge an appeal with the First-tier Tribunal until 31 January 2018. Section 83G VATA 1994 states that an appeal must be brought within 30 days of notification of the relevant decision. The appellant is therefore out of time.

Background facts

4. The appellant first applied to be registered for VAT on 22 August 2005. His trading name was 'Platinum Cars'.

5. By a letter dated 17 April 2009, HMRC confirmed a scheduled visit to the appellant's business premises, to take place on 12 May 2009. The visit was arranged to check the accuracy of the appellant's VAT returns and to offer any help that the appellant needed.

6. Following the review of the appellant's records, by a letter dated 19 May 2009, HMRC noted that purchase invoices relating to three cars bought from British Car Auctions were addressed to a different company, NASS Cars UK Limited, whereas the input tax appeared to have been claimed by the appellant t/a Platinum Cars. The letter requested confirmation that input tax was not also claimed under NASS Cars UK Limited's VAT registration number. HMRC did not receive a reply to this letter.

7. On 18 August 2009, a notice of VAT assessment in the sum of £13,783.95 was issued to the appellant relating to disallowed input tax claimed by the appellant on the purchase of the three cars. The letter advised the appellant that he had 30 days to ask for a review of the decision or, alternatively, appeal directly to an independent Tribunal.

8. By a letter dated 7 September 2009, HMRC issued a notice of assessment of mis-declaration penalty to the appellant in the sum of £1,962. The letter advised the appellant that he had 30 days to ask for a review of the decision or, alternatively, appeal directly to an independent Tribunal.

9. The appellant discharged a large part of the VAT assessment between 2009 and 2013. Part of HMRC's records have unfortunately been destroyed due to their data retention policy.

10. Correspondence was exchanged between HMRC and the appellant's agent in May 2013, with the latter suggesting that the input tax was actually owed by NASS Cars, not the appellant. No review was requested at this time and no appeal was lodged with the Tribunal.

11. In 2017 the appellant received a demand for payment from HMRC's Debt Management department in respect of the total balance then outstanding, amounting to £6,472.07.

12. On 11 September 2017 a payment plan was agreed of 29 monthly payments of £215.73 from 2 October 2017 and a final payment of £215.90 on 2 March 2020.

13. By a letter dated 17 November 2017, the appellant requested a review of HMRC's decisions to issue the assessment and penalties.

14. The appellant said that a book keeper was initially paid to handle the issue, but had left many matters "unattended". He also explained that he had been diagnosed with cancer in 2014 "and had since faced struggles with life and health".

15. By a letter dated 25th January 2018, HMRC advised that the appellant was now too late to request a review of HMRC's decisions and that if he wished to pursue an appeal he needed to appeal directly to the First-tier Tribunal.

16. On 17 February 2018, the appellant lodged an appeal with the First-tier Tribunal in which he said:

> "I am sending this letter regarding the interest amount and penalty charges that have been incurred on this account.
>
> I have placed a payment plan in place and hope to maintain the repayment agreement. However, I would like to plead to you and ask if you may take consideration in removing the penalties that have been added to the account.
>
> A book keeper was paid to handle this issue and yet from the correspondence received he has left many matters unattended. I was hoping that HMRC would have settled this account as I ask that why has HMRC left it so late in recovering the amount owed.
>
> The (balance of) Vat owed is £3,090.00 together with the interest and penalty charges of £3,382.07 equals to £6,472.07.
>
> During June 2014 I was diagnosed with cancer and since then I have been facing the struggles with life and health. Presently I don't have the financial means to clear this debt, of monies that have accumulated due to the irresponsible behaviour of the book keeper at the time.
>
> I would kindly like to make a request that you consider my mitigating circumstances and the interest and penalties to be cancelled because it is causing me personal and financial hardship.

I have an agreement in place with HMRC Ref No. 105064013. This is evidence of proving to HMRC that I have presented myself in good faith and taking positive steps in dealing with this matter.

Furthermore, I promise to keep up to date with my future debts."

The Relevant Legislation

17. The Relevant Legislation and regulations are contained in:

The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

Overriding objective and parties' obligation to co-operate with the Tribunal.

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
(2) Dealing with a case fairly and justly includes-
(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.
(3) The Tribunal must seek to give effect to the overriding objective when it-
(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.
(4) Parties must-
(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally.

Case management powers

5.(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction-
(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;

Under Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the appellant is required to bring their appeal within the time limits provided for under s 83G of the Value Added Tax Act 1994.

Starting appeal proceedings -

20 (1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.

(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal -
(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.

Civil Procedure Rules

[The CPRs are not binding on the Tribunal but reference to the rules and how they have been amended is necessary to understand the changes in the approach to applications for relief from sanction]

The rules before the Jackson reforms came into force on 1 April 2013 set out the circumstances that the court must take into consideration on any such application, as follows:

Rule 3.9 of the CPRs in its original form reads as below:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including -
> (a) the interests of the administration of justice;
> (b) whether the application for relief has been made promptly;
> (c) whether the failure to comply was intentional;
> (d) whether there is a good explanation for the failure;
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre- action protocol;
> (f) whether the failure to comply was caused by the party or his legal representative;
> (g) whether the trial date or the likely trial date can still be met if relief is granted;
> (h) the effect which the failure to comply had on each party; and
> (i) the effect which the granting of relief would have on each party."

With effect from 1 April 2013 Rule 3.9 and factors (a) to (i) were removed by the Civil Procedure (Amendment) Rules 2013 with a material change to its substance:

CPR 3.9

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
> (b) to enforce compliance with rules, practice directions and orders."

Case Law Authorities

18. A number of recent decisions have since clarified the approach to be applied in applications for relief from sanction under CPR r. 3.9. The Court of Appeal heard three conjoined appeals: *Denton v TH White Ltd, Decadent Vapours Ltd v Bevan* and *Utilise TDS Ltd v Davies* [2014] EWCA Civ 906. The first was an appeal against the grant of relief. The second and third were appeals against its refusal.

19. The Court of Appeal was unanimous in allowing all three appeals and took the opportunity to clarify the approach that had been advanced in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 A three-stage approach is now required to applications for relief (at [24]):

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"."

20. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1):

> "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered".

21. The first stage is a departure from the test of 'triviality' referred to in *Mitchell,* which the Court concluded had caused difficulties in its application. The Court accepted that in many circumstances the most useful measure would be to determine whether the breach imperilled future hearing dates or otherwise disrupted the conduct of litigation generally. If the Court concludes that the breach was neither serious nor significant, relief will usually be granted and it is unnecessary to devote time on stages 2 and 3. At stage 1, only the breach that resulted in the sanction should be considered. Other breaches by the defaulting party fall to be considered at stage 3.

22. The Court of Appeal was divided on the issue of how much importance should be placed on (a) and (b) of Rule 3.9. The majority view was that these two factors are of particular importance and should be given particular weight.

23. The other factors that are relevant in stage 3 will vary from case to case. The promptness of the application is a relevant circumstance to be weighed in the balance. Other breaches by the defaulting party may be considered at this stage.

24. The majority of the Court of Appeal expressed concern that some judges were adopting an unreasonable approach to CPR r. 3.9. In particular, they were approaching applications for relief on the basis that, if the breach was not trivial and there was no good reason for it, the application must fail. This had led to decisions which were manifestly unjust and disproportionate.

25. The court also noted that litigation cannot be conducted efficiently and at proportionate cost without cooperation between the parties and their lawyers. This applies to litigants in person as much as to represented parties. CPR r. 1.3 specifically requires the parties to assist the Court in furthering the overriding objective.

26. With this in mind, the Court expressed the view that parties should not act opportunistically or unreasonably in opposing applications for relief. The Court will now expect parties to agree applications for relief where (a) the breach is neither serious nor significant, (b) there is a good reason for the breach, or (c) it is otherwise obvious that relief should be granted. The Court will also expect parties to agree reasonable extensions of time of up to 28 days under the new CPR 3.8(4), which states:

> "… unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date."

27. The Court of Appeal was critical of the 'satellite litigation' and uncooperative attitude that the *Mitchell* decision had fostered. In its view, a contested application for relief should be very much an exceptional case. This is because (a) compliance should be the norm, and (b) parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even when a breach has occurred.

28. The Supreme Court in *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1WLR 2945 implicitly endorsed the approach set out in *Denton*. The case concerned an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FtT.

29. In *Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (TCC) the Upper Tribunal also endorsed the approach in *Denton* applying the three stage approach [at 43 to 45]

> "43. ……Whether considering an application which is made directly under rule 3.9 (or under the FtT Rules, which the Supreme Court in BPP clearly considered analogous) or an application to notify an appeal to the FtT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions - especially where the sanction in question is the striking out of an appeal (or, as in BPP, the barring of a party from further participation in it). The clear message emerging from the cases - particularised in Denton and similar cases and implicitly endorsed in BPP - is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case"……..
>
> 44. 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. When considering 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."

30. 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.

Appellant's case

31. At the hearing of this application the appellant said that NASS Cars UK Limited was a dormant Company and had lost all its papers and records.

32. He accepted that the application to bring a late appeal was significantly out of time, but said that he had been ill and was struggling financially. He blamed his accountant for the errors in 2009.

HMRC's case

33. Mr Sellars on behalf of HMRC addressed the three stage process referred to above.

34. The appellant is required, under Rule 20 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Rules"), to bring an appeal within the time limits prescribed under s 83G of the Value Added Tax Act 1994 ("the Act").

35. Section 83G of the Act provides that an appeal must be made within 30 days of the Respondents' decision, or, in cases where a review has been undertaken, within 30 days of the notice of the conclusion of the review. Therefore, the appellant has failed to comply with a statutory time limit.

36. Under rule 5(3)(a) of the Rules, and s 83G(6) of the Act, a Tribunal may extend the time within which a person is required to comply with the time limit to bring an appeal.

Seriousness and significance of delay

37. The purpose of the time limit in s 83G is to provide finality and certainty to both the appellant and the Respondents.

38. In addressing the seriousness and significance of the lateness, the case of *Romasave (Property Services) Ltd* (paragraph 96) found that "a delay of more than three months cannot be described as anything but serious and significant". In this case, the appellant was notified of the assessment on 18 August 2009 and the mis-declaration penalty on 7 September 2009, but did not lodge an appeal with the Tribunal until 17 February 2018, a delay of over eight years. HMRC contend that this is a significant and serious delay.

39. The appellant has not provided an explanation for the delay in appealing. It appears from the correspondence that the appellant paid a bookkeeper to handle the dispute, but the bookkeeper left the matter unattended. There was a brief exchange of correspondence with the appellant's agent in 2013, but there has not been any indication of an intention to appeal, which led the Respondents to believe that the matter had been concluded. In *Data Select* Justice Morgan emphasised, at paragraph 37 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" for appeals against determinations made by HMRC. The Respondents believe this appeal concerns such lengthy intervals; the appellant has appealed over eight years later than directed by the legislation.

Reason for the default

40. The appellant says that he encountered health difficulties in June 2014. While HMRC sympathise with the appellant, the decision being appealed was made five years earlier in 2009 and therefore HMRC contend that his health issues do not offer an explanation for the significant delay in appealing.

The circumstance of the case

41. A particular consideration is the consequences for both parties if an extension of time is granted/refused. The obvious consequence for the appellant is that he would lose the opportunity to bring the appeal and the penalty would stand.

42. However, as a result of the inordinate delay between the original decisions and this application, HMRC no longer possess, due to their data-retention policy, much of the documentation in respect of the decisions being appealed by the appellant. Accordingly, if an extension is granted, HMRC would be jeopardised in defending the appeal due to the lack of documentation.

43. The lack of documentation would also hinder the Tribunal's ability to establish the facts pertinent to the appellant's appeal. For example, HMRC no longer possess the visiting officer's notebook, a key piece of evidence which would explain what happened during the officer's visit and provide essential background information to the raising of the assessment.

44. HMRC will be prejudiced if this appeal were to be allowed to proceed in circumstances where there has been lack of contact from the appellant and no convincing explanation for the delays. and lack of contact from the appellant. Time and costs would be incurred in litigating an appeal, which in HMRC's submission has little chance of succeeding.

Decision

45. There has clearly been a serious and significant delay in bringing this application. The appellant's application to the Tribunal for permission to appeal relates to decisions made in 2009, but the application was not received until February 2018.

46. The appellant had been in the process of discharging the assessment, apparently without dispute, up until September 2017, after which he entered a payment plan to pay off the balance then standing at £6,472.07.

47. No explanation has been offered for the delay, other than the appellant being ill and in financial difficulties from 2014, some five years after the decisions.

48. The merits of the proposed appeal are very questionable. So far as we are able to conveniently and proportionately ascertain the merits from the information we have, it is very unlikely that the appellant has an arguable case.

49. HMRC would be prejudiced, and the interests of good administration would be compromised, if the Tribunal were to allow the application.

50. Taking all the circumstances of the case into account, we are not satisfied that there is any reason to allow the application. The application is therefore not admitted.

51. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 14 MARCH 2019