[2019] UKFTT 0739 (TC)

TC07497

PROCEDURE – application for permission to notify appeal out of time – section 83G of the Value Added Tax Act 1994 –* Martland *applied – principle of legal certainty – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06630

BETWEEN

DONALD MACKENZIE LTD **Applicant**

-and-

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

TRIBUNAL: JUDGE HEIDI POON
SONIA GABLE

Sitting in public at Employment Tribunal, Highland Rail House, Academy Street, Inverness on 18 October 2019

Nick Davies of Independent Tax and Forensic Services LLP, instructed by Mr George MacKenzie, Director, for the Applicant

Gordon Hume, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is a case-management decision in relation to Mr George MacKenzie's application on behalf of Donald MacKenzie Ltd ('the Company') for permission to make a late appeal.

2. The respondents ('HMRC') opposed the application. By notice dated 21 November 2018, the respondents applied to the Tribunal for the Company's application to make a late appeal to be determined as a preliminary matter.

3. The appealable decision in question is HMRC's review conclusion by letter dated 5 February 2018. The appeal against the decision was notified to the Tribunal by notice dated 24 October 2018, and included an application for permission to make a late appeal.

4. The substantive matter of the appeal to which this application relates concerns the notice of VAT assessment in the sum of £3,368 issued on 22 December 2017 by HMRC. The assessment was raised pursuant to s 73 of the Value Added Tax Act 1994 ('VATA') and was in relation to the return period 10/14.

RELEVANT LEGISLATION

5. The VAT assessment was raised under s 73 VATA, of which subsection (6) provides for the time limit for such an assessment to be raised:

> '(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following –
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge.'

6. Paragraph 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Tribunal Rules') provides as follows:

> '(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.'

7. The enactment in this case is the VATA, of which the relevant sections are as follows.

(1) Section 83 provides for certain matters within the VATA to carry a right of appeal.

(2) Subsection 83(1)(p) provides for an assessment under section 73 in respect of a period for which a VAT return has been made to be an appealable matter.

(3) Section 83A provides that HMRC *must* offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision,

and that the offer of the review must be made by notice to P at the same time as the decision is notified to P.

(4) Section 83C provides that HMRC must review a decision if they have offered a review under s 83A, and P has notified acceptance of the offer within 30 days from the date of the notice of the review offer.

(5) Subsection 83C(2) provides that P may not notify acceptance of the offer if P has already appealed to the tribunal under section 83G.

(6) Section 83D provides for extensions of time for HMRC to carry out the review.

(7) Section 83G provides for the time limits for an appeal under s 83 to be made to the tribunal. The relevant provisions in the present case are under subsection 83G(3) and (6):

> '(3) In a case where HMRC are required to undertake a review under section 83C–
>
> (a) an appeal may not be made until the conclusion date, and
>
> (b) any appeal is to be made within the period of 30 days beginning with the conclusion date.
>
> […]
>
> (6) An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so.'

THE FACTS

Background

8. The appellant company was founded by Mr George MacKenzie's father, Donald MacKenzie, and is in the business of selling motor vehicles to end-users. The company trades in both new and used vehicles, and servicing parts.

9. Mr MacKenzie is the sole shareholder, the managing director and the company secretary of the Company. He is a chartered accountant with the Institute of Chartered Accountants in Scotland ('ICAS'), and had been in general practice for several years before moving into industry some 30 years ago.

10. Under Mr MacKenzie's directorship, the Company has a good record in tax compliance. In terms of VAT assurance visits, Mr MacKenzie said that the visits used to be biannual, due to the high value of the business, but it became every four years, due to the good compliance history of the company.

11. The supply of vehicles, whether new or used, is standard-rated. Where certain adaptations are made to a vehicle as stipulated by a customer at the point of sale and before taking delivery, the adaptations are included in the overall sale price. In instances where adaptations are made to a vehicle to enable a person with disability to use the vehicle, the supply of the vehicle in question is made at the zero-rate on the basis that the supply is eligible for VAT relief.

The substantive matter in dispute

12. The matter in dispute concerns the VAT treatment of an Isuzu pick-up truck, which the appellant supplied at the zero-rate on the basis that the vehicle had been adapted by the addition of a hard canopy roof to accommodate the wheelchair used by the purchaser's disabled wife. The supply was made in the return period 10/14.

13. A VAT assurance visit was carried out between 28 and 30 November 2017 by HMRC Officer Murray at the appellant's premises. By email dated 1 December 2007, Officer Murray informed the appellant that the addition of a hard canopy roof to the Isuzu truck did not qualify for VAT relief, and that VAT would be assessed at 1/6 of £20,211.60, being the sale price of the vehicle as noted in the appellant's accounts in relation to the supply.

14. On 22 December 2017, Officer Murray issued a notice of VAT assessment in the sum of £3,368 pursuant to s 73 of the Value Added Tax Act 1994 ('VATA'). The accompanying letter referred to Schedule 8, Group 12 of VATA, and set out the conditions that are required to be met before a motor vehicle supplied to a disabled user can be zero-rated.

> 'Type of user who may be eligible for VAT relief - Disabled wheelchair user or an individual purchasing a vehicle on behalf of a disabled wheelchair user.
>
> Relief available – Zero-rate VAT on the supply of a "qualifying motor vehicle" that has been
>
> - designed to enable the disabled wheelchair user to travel in it, or
> - substantially and permanently adapted to enable the disabled wheelchair user to travel in it and the adaptation is necessary to enable that person to travel in the vehicle.'

15. In the letter, Officer Murray drew the distinction between a wheelchair that is: (a) motorised or of a 'fixed frame', and (b) foldable, and observed as follows:

> (1) to enable a motorised or fixed frame wheelchair to be transferred into a vehicle, the design of (or adaptations to) a vehicle would involve a ramp and a winch or a hoist, and for the wheelchair to be held safely and securely in place throughout the journey;
>
> (2) whereas if a wheelchair can be folded and stowed in the boot of a car or in a storage area in the back of a motorhome, then the vehicle has not been 'substantially and permanently adapted to carry [the wheelchair]'.

16. The letter of 22 December 2017 went on to state that since the adaptations must be 'permanent' and 'substantial' and 'designed to meet the specific needs of that person's disability', 'HMRC would expect to see significant change to the vehicle with the adaptations being bolted or welded to the body or chassis of the vehicle'. Officer Murray concluded that the addition of a canopy roof to the pick-up truck did not meet the criteria to allow the supply to be zero-rated.

17. In an email dated 21 December 2017, which crossed with the issue of the VAT assessment, Mr MacKenzie disagreed with Officer Murray's conclusion in the following terms:

> 'This is not a standard roof for this type of vehicle. Please do not issue the assessment until I send picture of various types of tops. …
>
> Without the canopy the vehicle is not fit for use for the disabled person.
>
> I am afraid that if you assess us we will have to appeal. I think it is unreasonable for us to be VAT inspectors and we allowed the VAT to be recovered based on what a reasonable person would assume.'

The request for review

18. The letter of 22 December 2017 advised Mr MacKenzie what to do if he disagreed with the assessment as follows.

> '… you need to write to us within 30 days of the date of this notice, telling us why you think our decision was wrong and we will look at it again. If you prefer, we will arrange for a review by an HMRC officer not previously involved in the matter. You will then have the right to appeal to an independent tribunal. Alternatively you can appeal direct to the tribunal within 30 days of this notice.'

19. On 3 January 2018, Mr MacKenzie wrote to Officer Murray in the following terms:

> 'We appeal against the VAT assessment for £3368.00 raised on our business as a result of HM Revenue's view that the adaption added before the new Isuzu was delivered does not qualify for VAT relief. …
>
> The Isuzu … [was] as a "pick up" (i.e. open rear end). … there was not a storage space suitable to initially store the disabled party's wheelchair but also keep it secure, clean and dry. …To make this vehicle suitable for the disable person a canopy was purchased and fitted.'

20. A sequence of email exchanges between Officer Murray and Mr MacKenzie followed:

(1) On 9 January 2018, Officer Murray wrote to alert Mr MacKenzie of the 30-day time limit if he wished to have an independent review. She also confirmed that on this occasion, HMRC would not issue a penalty.

(2) On 10 January 2018, Mr MacKenzie replied to state that:

> 'I did receive the assessment but I had replied as an appeal on the 3rd January by recorded delivery letter to the address on the letter received …'

(3) On 10 January 2018, Officer Murray wrote:

> 'I need you to confirm whether you wish an appeal or a review. For an appeal you must submit something to the tribunal and for a review someone independent within HMRC will look at the decision.'

(4) On 12 January 2018, Officer Murray wrote to chase for a reply:

> 'Sorry to chase you up re this – just there is a time limit for passing cases to the review team. Can you confirm whether it is a review or an appeal (tribunal) you wish?'

(5) On 15 January 2018, Mr MacKenzie replied by posing a 'question' as follows:

> 'Is it possible to have a review initially and if we are not successful have an appeal [no punctuation]'

(6) On 15 January 2018, Officer Murray replied by return as follows:

> 'I'll get the template worked on today and it should be with the review team by the end of the week.'

(7) From Officer Murray's reply, Mr MacKenzie's 'question' was taken as a request for review.

The review conclusion

21. By letter dated 5 February 2018, HMRC issued their review conclusion decision. The review took account of the evidence, including the photographs of the adapted vehicle submitted by Mr MacKenzie, the applicable legislation in relation to Schedule 8, Group 12, and having special regard to the following in HMRC guidance on eligible criteria:

> '… that by reason of its design, or being substantially and permanently adapted, includes features whose design is such that their **sole purpose** is to allow a

> wheelchair used by a handicapped person to be carried in or on the motor vehicle.' (emphasis original)

22. The review concluded that the s 73 assessment was raised within the time limit provided under subsection 73(6)(b), and confirmed the quantum of the assessment in the sum of £3,368 as satisfying the best judgment criteria.

23. On page 5 of the review conclusion letter, and under the heading of 'What happens next?', the process of notifying an appeal to the tribunal is set out in detail.

> 'If you do not agree with my decision, you can appeal to an independent tribunal to decide the matter. …
>
> … you must notify your appeal to the tribunal (enclosing a copy of this letter) within 30 days of the date of this letter. You can find out how to do this on the HM Courts and Tribunal Service website [url] or you can phone them on [phone number].
>
> […]
>
> If I do not hear from you and you do not appeal to the tribunal within 30 days of the date of this letter I will assume that you agree with my conclusion.'

24. The letter continues by covering three further material aspects:

(1) The option of Alternative Dispute Resolution process to resolve the dispute with details provided and references to factsheet FS21;

(2) Interest is calculated daily on the tax assessed, and to avoid interest accruing, Mr MacKenzie may 'want to pay the tax now' even if he is to proceed with an appeal;

(3) Further information on HMRC's website with the url link provided, and an invitation to phone the number on the review conclusion letter 'if you require further clarification in relation to this review decision, your appeal rights, or ADR'.

Mr MacKenzie's witness evidence

25. Mr George MacKenzie gave evidence as the sole shareholder, managing director and company secretary of the Company. We find Mr MacKenzie to be a credible witness, in that he was not being knowingly untruthful in his evidence. However, we do not find Mr MacKenzie a reliable witness, and we have reservations about the reasons given at different stages as to why there was not an in-time appeal. We set out our reservations in the discussion.

26. Mr MacKenzie lodged a witness statement. He was present at the hearing and was cross-examined. The salient aspects of his statement and oral evidence are summarised as follows.

(1) Although he has not worked in practice for over 30 years and is not up to date with all the rules governing the administration of taxes, he has always considered that he is 'competent to produce the company's VAT Returns'; that he aims 'to run a very tight ship and all returns and payments are made on time'.

(2) He would only take advice from the Company's accountants, MacKenzie Kerr Ltd if there were a particular technical point that he was unsure of.

(3) In relation to the VAT assessment, he stated: 'On 3 January 2018, I appealed against the assessment and provided grounds of the appeal.'

(4) In relation to the penalties, he stated that no penalties were imposed, 'as in the inspector's view, we had made a genuine mistake despite taking reasonable care'.

(5) His understanding of the email exchanges on 15 January 2018, when he asked: '*Is it possible to have a review initially and if we are not successful have an appeal*' and the reply thereto was that:

> 'the review decision would *automatically* be under appeal if it did not go in our favour as I thought that I had clearly indicated this and had taken [Officer] Murray's response to be that she had also understood this.' (emphasis added)

(6) When the review conclusion was issued on 5 February 2018, Mr MacKenzie said that his understanding was that:

> 'I had already appealed this decision by virtue of my email of 15 January 2018 and a telephone conversation with Ms Murray at around the same time during which I had reiterated that I wished to appeal should the review conclusion go against us.'

(7) In late May 2018 when HMRC's Debt Management pursued for payment of £3,368, Mr MacKenzie 'was surprised by this as [he] considered that the matter was under appeal'.

27. According to Mr MacKenzie, it was the actions from Debt Management that made him seek assistance from his accountants MacKenzie Kerr, who in turn referred the matter to Professional Fee Protection, with whom the Company holds fee insurance.

28. In August 2018, Professional Fee Protection referred the Company to Independent Tax and Forensic Services LLP ('ITFS'). By email dated 19 September 2018, Mr Davies of ITFS wrote on the Company's behalf to Officer Murray as follows.

> 'Our client has advised us that he is unsure whether appeal was subsequently made to Tribunal but thinks not as demands are now being received in connection with the matter. Should this be the case, we are writing to request that you agree to reopen the appeal to enable the matter to proceed to Tribunal.'

THE APPELLANT'S APPLICATION

29. On 24 October 2018, Mr Davies lodged a notice of appeal on behalf of the Company. The reasons given for the late appeal, as stated on the Notice, are as follows.

> 'Following the receipt of the Review Conclusion letter the Appellants did not consider that they had grounds for appeal. However they have subsequently taken further professional advice and now understand that they have valid grounds for an appeal. Once they came to this understanding they instructed us to make a late appeal.
>
> We submit that the initial lack of knowledge of valid grounds for an appeal constituted a reasonable excuse and once that reasonable excuse ended they acted without unreasonable delay to submit an appeal.'

30. In his evidence, Mr MacKenzie reiterated that he believed there had been a misunderstanding between HMRC and himself over whether the review conclusion had been appealed; that it was his 'genuine belief' that his email of 15 January 2018, together with his telephone conversation with Officer Murray, 'would be sufficient for the matter to be considered [as] under appeal'.

31. Mr Davies made the following submissions that the Tribunal should give permission to admit the late appeal in accordance with subsection 83G(6) of VATA for the following reasons:

(1) The appellant believed that an appeal had already been submitted, and that no further action was required of them.

(2) By submitting an appeal on the contingent basis that a review would be upheld in HMRC's favour, the Appellant believed that they were acting reasonably and prudently to ensure that the appeal would be submitted on time.

(3) This request significantly demonstrates the appellant's intention to appeal was present prior to the expiry of the 30-day period at section 83G (3).

(4) The failure to present an appeal to HMRC was a simple misunderstanding of procedure by an unrepresented taxpayer.

(5) The appellant's misunderstanding was not clarified by Officer Murray, who in her response to the appellant's request for an appeal following the outcome of an unsuccessful review, did not inform them that this was the incorrect procedure by simply stating: '*I'll get the template worked on today and it should be with the review team by the end of the week.*'

(6) Had Officer Murray informed the appellant that they needed to make a separate appeal following the outcome of the review, we are confident that one would have been made within the 30-day time limit under section 83G(3) of VATA.

(7) We are therefore of the strong opinion that the appellant holds a wholly reasonable excuse for their failure to submit an appeal on time, and that HMRC's lack of clarification when it was needed has borne this requirement to approach the Tribunal to accept a late appeal.

32. Mr Davies then made his submissions by addressing the questions raised by Morgan J in *Data Select v HMRC* [2012] UKUT 187 (TCC) as follows:

(1) The purpose of the time limit is to enable the taxpayer to consider whether to appeal against an assessment and to provide finality in the matter if they elect not to appeal.

(2) The delay of 231 days is explained by the fact that for the majority of that time the appellant had made the reasonable assumption that it had made an appeal.

(3) As to prejudice, the respondents will say that they lack finality, while the appellant will be denied the opportunity to make representations. HMRC will have finality in the matter when the appellant can make representations in support of its appeal.

33. In terms of prejudice to the applicant, Mr Davies made his submissions with reference to *Hannah Armstrong v HMRC* [2018] UKFTT 0404 (TC) ('*Armstrong*'), which was produced as the authority 'to assist [the] Tribunal in its deliberations' since the case 'demonstrates how prejudice should be viewed when making a decision'. Mr Davies cited *Armstrong* at [22], where Judge Richard Thomas stated at sub-paragraphs (3) and (4):

> '(3) The prejudice to HMRC should I give permission is non-existent as they have fully argued their case against the appeals.
>
> (4) The prejudice to the appellant is severe as she would have to pay what by any standards are harsh penalties.'

34. Applying *Armstrong* to the present case, Mr Davies submitted that:

(1) The appellant would be 'severely prejudiced' if the appeal was not allowed to be made.

(2) There remain 'robust appeal grounds' against the original assessment of VAT, and Independent Tax believe that the appellant's case would have 'a strong chance of success' at Tribunal or through ADR if a late appeal were to be allowed.

(3) That there will be zero prejudice to HMRC as they have 'fully argued their case against the appeals' as contained in the letter of 22 December 2017, and in the review conclusion of 5 February 2018.

HMRC'S APPLICATION

35. The respondents' grounds for seeking directions for the appellant's application to make a late appeal to be determined as a preliminary matter are the following:

(1) The Notice of Appeal was submitted on 24 October 2018. The reason provided for the late appeal was that he appellant did not consider they had grounds for appeal and did not immediately seek professional advice.

(2) HMRC submit that the review conclusion letter indicated that the appeal must be lodged within 30 days from the date of the letter.

(3) HMRC do not consider that the appellant has provided a reasonable excuse for the failure to submit the Notice of Appeal by 7 March 2018.

36. Having heard Mr MacKenzie's evidence, Mr Hume submitted that the appellant had the service of an accountant at the relevant times. If Mr MacKenzie was 'sufficiently confident' that he had set the appeal in motion, he did nothing to pursue his appeal until Debt Management action. Mr Hume also submitted that the prospect of the appellant's appeal succeeding is low.

DISCUSSION

37. The Upper Tribunal decision of *Martland v HMRC* [2018] UKUT 0178 (TCC) summarises the principles as developed in the well-known and wider stream of authority on relief from sanctions and extensions of time in connection with the procedural rules of the courts and tribunals. These principles are summarised at [43] of *Martland*:

> '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".'

38. The three-stage approach in *Denton v TH White Ltd* [2014] EWCA Civ 906 is endorsed at [44] of *Martland* as guidance for FTT to follow:

> '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.'

Stage one: the length of delay

39. The appeal is brought under s 83 VATA, and where a review offer has been accepted, an appeal may not be made to the tribunal until the review conclusion date. The time limit for bringing an appeal under s 83G is 30 days after the date of the review conclusion.

40. The relevant facts in relation to the length of delay are therefore the following:

(1) On 5 February 2018, HMRC issued a review conclusion letter in relation to the substantive matter under appeal. This is the appealable decision.

(2) The right of appeal against the review conclusion was to be exercised within 30 days from the date of the letter. The time limit to notify an appeal to the Tribunal was therefore 7 March 2018.

(3) The date on the Notice of Appeal was 24 October 2018; the length of delay reckoned from 7 March 2018 was 231 days, which was almost eight months late.

41. In assessing the length of delay, the Upper Tribunal in *Romasave (Property Services) Limited* [2015] UKUT 0254 (TCC) gives guidance at [96] as follows:

> 'The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.'

42. Given the length of delay was 231 days, we find the delay to be 'serious and significant'. It is necessary for us to consider whether there were good reasons for the delay.

Stage two: the reasons for the delay

43. In his evidence, Mr MacKenzie focused on relating to the Tribunal the belief he said he had formed during the course of the email exchanges with Officer Murray in January 2018, and in particular, that he believed there was a 'contingent appeal' lodged by virtue of the substance of his email to Officer Murray sent on 15 January 2018, which reads as follows.

> 'Is it possible to have a review initially and if we are not successful have an appeal [no punctuation]'

44. This email was in response to the question posed by Officer Murray on 12 January 2018. The question was: 'Can you confirm whether it is a review or an appeal (tribunal) you wish?' Instead of answering this question from Officer Murray, Mr MacKenzie would seem to be posing a return question as suggested by the syntax of his email reply of 15 January 2018.

45. Mr MacKenzie's witness statement was dated 2 July 2019, some18 months after the alleged email that gave rise to his erroneous belief that a contingent appeal was put in place by his reply to Officer Murray's question in the form of a return question in January 2018. For the following reasons, we are unable to exercise our discretion to admit the late appeal on the ground of this erroneous belief that there was a contingent appeal in place.

(1) On 19 September 2018, when Mr Davies wrote to Officer Murray, it would appear to be the first piece of correspondence with HMRC since the issue of the review conclusion letter on 5 February 2018. In the email, Mr Davies related that Mr Makenzie was 'unsure whether appeal was subsequently made to [the] Tribunal' (§28).

(2) On 24 October 2018, on the Notice of Appeal the reason given for the appeal being late was that the appellant 'did not consider that they had grounds for appeal' following the receipt of the review conclusion (§29).

(3) These earlier versions of why the appeal was late made no reference to this erroneous belief that had been held since January 2019.

(4) These versions in late 2018 of why the appeal was late are plainly at variance with the explanation given in 2019 in the witness evidence as regards the contingent appeal. These versions of explanations give rise to the following inconsistencies.

(a) First, if Mr MacKenzie had held the belief of a contingent appeal being in place since January 2018, he would not be 'unsure' as to whether an appeal was notified to the Tribunal; he would have told Mr Davies that he believed he had lodged a contingent appeal by dint of his January 2018 email.

(b) Secondly, the reason given on the Notice of Appeal indicated that no appeal was made within 30 days of the review conclusion letter because Mr MacKenzie (on behalf of the appellant) did not consider that there were grounds for appeal.

(5) The Notice of Appeal went on to say that it was upon seeking further professional advice that the appellant now 'came to this understanding' that it had 'valid grounds for an appeal'.

46. The reasons given for the appeal being late as stated on the Notice of Appeal lodged in October 2018 appear to us to accord more closely with the course of events and the personal attributes of Mr MacKenzie, which we observe to be:

(1) From Mr MacKenzie's evidence, the Tribunal is given to understand that the appellant has a good record in compliance generally, and not just in its tax affairs.

(2) From the course of correspondence between the parties, Mr MacKenzie would appear to be diligent and prompt in dealing with his business correspondence.

(3) The proactive and efficient manner with which Mr MacKenzie dealt with the enquiry correspondence is commensurate with the management style of the appellant.

(4) Being a chartered accountant, Mr MacKenzie is a professional who has had the training and the business experience to understand the importance of time limits.

(5) The review conclusion letter stated clearly the actions required if the appellant intended to appeal the decision. On a proper reading of the detailed information contained in the review conclusion letter on notifying an appeal, any erroneous belief of a contingent appeal being in place would have been dispelled.

47. In view of the different versions of explanations for the appeal being late, the version put forward at the later date in the witness evidence casts some doubt on Mr MacKenzie's recollection of what his belief was at the time. In any event, even if Mr MacKenzie had held the belief as he has claimed that his January 2018 email in the form of a question could have amounted to lodging a contingent appeal, that belief, in itself, did not give rise to sufficient reason for the Tribunal to exercise its case management discretion in the appellant's favour.

48. On the Notice of Appeal, the reason given to support the application for a late appeal is that the appellant did not appeal at the time because it thought it had no valid grounds, and on

being advised to the contrary at a later stage, the appellant tried to make a late appeal. The Tribunal is of the view that this version of explanation, while it seems to accord more closely to the reality, cannot give rise to a good reason for admitting a late appeal, since it is plainly contrary to the principles of legal certainty and finality in litigation.

49. The appellant seems to be fully aware of the inadequacy of the ground of application as stated in the Notice of Appeal; hence the witness evidence focused on Mr MacKenzie's belief that he had lodged a contingent appeal from an email written in the distant past. The Tribunal concurs in full with the appellant's assessment that the stated ground of application does not support the appellant's application for the late appeal, and there is no need to say any more.

Stage three: all the circumstances of the case

50. If the application is refused, the prejudice to the appellant is to be denied the opportunity to advance an appeal, which Mr MacKenzie has been given to understand from ITFS had a good prospect of success. The Tribunal is conscious of the financial implications for the appellant if its application is refused. The appellant would have to make good the input VAT which it did not charge the customer on the Isuzu vehicle.

51. Referring to the decision in *Young*, Mr Davies submitted that the prejudice to HMRC is 'non-existent', since their case against the appeal has been fully argued. *Young* is a decision of first instance and is not binding on this Tribunal. Furthermore, we distinguish the substantive matter in the present appeal from that in *Young*, which concerned late filing penalties imposed under Schedule 55 to the Finance At 2009. We conclude that the reasoning in *Young* on the matter of extension of time has no relevance to our considerations.

52. The interlocutory nature of the matter in front of us means that the merits of the appeal can only be considered as part of all the circumstances of the case, as More-Bick LJ, giving the judgment of the Court of Appeal in *R (Hysaj) v Secretary of State for the Home Office* [2014] EWCA Civ 1633, stated at [46]:

> '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.'

53. In balancing the various factors, the relevance of merits of the appeal is to be limited *only* 'to those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak'. We are unable to assess the merits of the appeal without much investigation in this case. Consequently, the prospect of the success of the appeal cannot be a factor that we take into account in considering all the circumstances of the case.

54. In terms of procedure, the principle of legal certainty demands that parties to potential litigation know their position at any one point in time. It is paramount for the court system, for justice, and for proper closure to a disputed matter, that time limits for bringing an appeal are strictly adhered to by a party wishing to seek justice at the court.

55. The Tribunal's overriding objective is to deal with cases fairly and justly, not only the appellants', but also the respondents'. One aspect of fairness concerns the proportionate use of

resources of the respondents as a party to litigation. The prejudice to HMRC would be to deploy resources to deal with a case that is quite properly considered as final and conclusive in law.

56. For similar reasons, the Tribunal's consideration of justice should also encompass a public interest dimension as respects access to justice. Master McCloud's dictum of what the overriding objective means after the *Jackson* reforms is at [59] in *Mitchell v News Group Newspapers Ltd* [2013] EWHC 2355 (QB) ('*Mitchell*'), and cited with approval by the Court of Appeal on appeal of the case in [2013] EWCA Civ 1537 at [17]:

> 'Judicial time is thinly spread, and the emphasis must, if I understand the *Jackson* reforms correctly, be upon allocating a fair share of time to all as far as possible and requiring strict compliance with rules and orders even if that means that justice can be done in the majority of cases but not all. Per the Master of the Rolls in the 18th Lecture ...
>
> > "*The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgment that the achievement of justice means something different now*."'

57. On the principle of legal certainty alone, we refuse the application to extend time for the appellant to make its appeal. This is irrespective of the prospect of success for the appeal.

58. We have considered the relevant factors in front of us, and can find no compelling circumstances to depart from the tougher and more robust approach to rule-compliance that the courts are to adopt after the *Jackson* reforms.

DISPOSITION

59. For the reasons stated, the application for permission to make a late appeal is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

60. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 6 DECEMBER 2019