



TC 0065 (TC)

TC08050

VAT - Notice of Requirement to provide security – permission to appeal out of time.

FIRST-TIER TRIBUNAL

Appeal number: TC/2019/02540

TAX CHAMBER

BETWEEN

EUNOIA INITIATIVES

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE SARAH ALLATT

The hearing took place on 1 February 2021. The form of the hearing was video attended by all parties. A face to face hearing was not held as a hearing in a court room was not felt necessary or desirable bearing in mind the current 'work from home where possible' instructions. The documents to which I was referred are a bundle of documents of 368 pages, and an additional 164 pages comprising Skeleton Argument, witness statement and appendices for the Appellant.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Me Jesmin Rahman for the Appellant

Mr Milan Chudasama, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal out of time against a Notice of Requirement to Provide Security (NOR) in relation to VAT issued by HMRC on 21 November 2017 to the business address, and 22 November 2017 to the director's home address.

BACKGROUND

2. The appeal is made 16 months and 1 day late. The Appellant agrees this is a serious delay.

3. HMRC object to the appeal on the grounds that the delay is very serious, the notice was properly served, and they submit that the director is trying to overturn a criminal conviction relating to trading without providing security.

4. The timeline background to the appeal is as follows:

5. Eunoia Initiatives Ltd (Eunoia) was incorporated in July 2013 and had a good VAT compliance record up until a large supplier failed to pay in 2016. As a result of this Eunoia had problems making VAT payments and this culminated in a notice of requirement (NOR) posted by HMRC on 21 November 2017 to the company address (33 Queen Street) and to the home address of the director (51 Chancellor Grove)

6. The director explained that she did not receive either letter. HMRC produced evidence of both letters being posted by recorded delivery and showing as delivered.

7. HMRC systems show a phone call on the 4th of December 2017 between Ms McLaughlin, the director, and HMRC in which the HMRC officer asked the director whether the NOR had been understood and she said yes it has been given to her solicitor.

8. In her statement and under cross-examination the director explained that she did not recall this phone call all although she accepted that the balance of evidence pointed to the fact that it happened.

9. HMRC posted a letter to the directors home address on the 22 of December 2020. This letter, being a reminder letter, does not come with a fact sheet.

10. This was also sent to 33 Queen Street. 33 Queen Street was a letterbox address that the appellant had paid for until the end of December 2017.

11. On 3 November 2017 the mailbox company wrote to say that they would close within 5 weeks of that date. The appellant therefore expected to receive post at that address for some of December and for all of November but that did not happen and they did not receive post after the 3rd of November.

12. In November 2017 director of the appellant was in conversation with HMRC in their debt management office requesting to pay VAT in instalments. She had appointed accountants and solicitors to the company.

13. Ms McLaughlin was informed she could not make a time to pay arrangement until corporation tax returns were filed. She and the advisers to the company concentrated on getting this done.

14. In March 2018 Ms McLaughlin was interviewed at her home by Ms Clark of HMRC. The interview was recorded and a transcript provided to the Tribunal. Ms McLaughlin was asked about the NOR. She agrees that she is aware of the notice, but she is not sure whether she has received the NOR or just the reminder. She says she has appointed solicitors to communicate with HMRC.

EVIDENCE FROM MS MCLAUGHLIN

15. The Tribunal heard evidence from Ms McLaughlin. This was in the form of a written witness statement with 17 Appendices, and oral evidence during which she was cross examined.

16. I found Ms McLaughlin to be a clear and consistent witness. Where she did not recall something she said so, and when she was asked about any part of her evidence she was consistent throughout.

17. The evidence can be divided into two parts – evidence surrounding the time close to the serving of the NOR (November to December 2017) and evidence about matters since then.

Evidence on matters November to December 2017.

18. The relevant evidence on this timeframe is:

19. Letters sent to 33 Queen Street were not received after 3rd November 2017, although this was not discovered until sometime in December 2017.

20. Ms McLaughlin attempted to change the company address with HMRC in December, but could not do it online because to obtain a Government Gateway password it needed to be sent in the post, and she knew she would therefore not receive it.

21. She wrote a letter to change the company address in December 2017.

22. Ms McLaughlin lives in a block of flats with mailboxes in a communal area. Although the NOR was posted recorded delivery she has no recollection of receiving it.

23. She remembers receiving the reminder letter in December 2017.

24. She was never aware of the Appeals Process.

Evidence on matters since December 2017.

25. Eunoia Initiatives made regular payments of VAT owing from March 2018 onwards.

26. HMRC prosecuted Ms McLaughlin for continuing to trade without providing security. The case was due to be heard in December 2018, but when Ms McLaughlin turned up to court there was an administrative error which meant the judge adjourned the case.

27. It was rescheduled to January 2019 but adjourned again to prepare Ms McLaughlin's defence due to the fact that she had agreed a repayment plan with HMRC and had submitted VAT returns on time.

28. In March 2019 Ms McLaughlin again attended court, this time unrepresented, and no prosecutor turned up, and an adjournment was granted.

29. In April 2019 Ms McLaughlin again attended court, and again the case was adjourned because the judge wanted to hear from an officer of HMRC.

30. The case was scheduled for May 2019. Ms McLaughlin heard just before the date of the hearing that her father was very ill in Jamaica. She booked a flight but unfortunately he died before she arrived. Whilst making funeral arrangements her aunt in Jamaica also died. Ms McLaughlin was unwell and did not return to the UK until January 2020.

31. Ms McLaughlin continued to be unaware of the Appeals Process until she met Ms Rahman in April 2019 after a recommendation from her accountant.

32. The criminal case was finally heard in her absence in September 2019 and he was convicted.

33. The consequences for Ms McLaughlin are severe as with a criminal conviction she loses her ability both to drive an HGV or to manage anyone that does, and so she loses her livelihood.

34. Ms McLaughlin has an ongoing legal case with her customer in order to attempt to recover the money owing.

EVIDENCE FROM HMRC

35. HMRC evidence on the delivery of the NOR was very clear. It had been sent by registered post on the 22 November 2017 and HMRC produced the Royal Mail tracked delivery form showing a delivery tracking number for the delivery of the NOR to the office at 33 Queen Street and to the director at her home address. HMRC has attempted to locate the signatures for the deliveries of each of these items but due to the time elapsed had not been able to do so.

36. HMRC also produced notes of a telephone conversation on the 4 December 2017 between Mrs McLaughlin and Matthew Peake of HMRC. The notes say ‘she confirmed has received NOR and has passed to solicitor to look at I explained issued to protect future revenue as current VAT outstanding explained has 30 days from date of NOR to take action pay NOR option to go onto monthly returns explained appeals process, writing to decision maker, formal review, tribunal. Risk of prosecution if makes taxable supplies without taking action she said she has a new agent 64/8 is for old agent she has faxed through new 64/8 but not showing on the record. I gave her fax number so she could send through email consent form also issued I advised last three returns are outstanding she said that due to business being owed £150000 from main customer has now engaged legal team to recover this money I said need to put this in appeal.’

37. On the 6 December 2017 HMRC received a fax with the 64/8 and a copy of a letter sent to the corporation tax team explaining the reason for the debt.

38. With regards to the address records HMRC produced several screenshots all taken on 25 May 2019 each showing the 33 Queen Street address. I find this surprising because a transcript of the conversation in March 2018 between Ms McLaughlin and HMRC shows extremely clearly that during that call HMRC told Ms McLaughlin that they would change the records to the new company address and would remove the Queen Street address. Furthermore a telephone conversation on the 5 April 2018 gives the impression that this has been done because that conversation transcript shows Ms McLaughlin giving the new address and HMRC agreeing that that is the address they have on a file. Whatever the reason HMRC files still show 33 Queen Street as an address Ms McLaughlin has clearly done all she could to change that from December 2017 onwards.

39. I also find it surprising that HMRC, knowing that those transcripts were in the bundle, presented the evidence of the screen shots.

FINDINGS OF FACT

40. I find that the NOR was received by Ms McLaughlin at her home address. The record of delivery from Royal mail, added to the phone call she made to HMRC on 4 December 2017, indicate that something triggered the phone call, and the only plausible explanation for this is the NOR.

41. I accept that Ms McLaughlin did not fully understand the NOR but immediately passed it to her solicitors to deal with.

THE LAW

42. The law surrounding late appeals has recently been considered by the Upper Tribunal in *Martland* [2018] UKUT 178 (TCC). Previously the leading case had been *Data Select* [2012] UKUT 187 (TCC).

43. *Data Select* had set out five considerations for the FTT to consider

- (1) What is the purpose of the time limit?
- (2) How long was the delay?
- (3) Is there a good explanation for the delay?
- (4) What will be the consequences for the parties of an extension of time?
- (5) What will be the consequences for the parties of a refusal to extend time?

44. *Martland* has modified this approach very slightly, saying this:

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, .

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.

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.

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. Nor should the fact that the applicant is self-represented – Moore-Bick LJ said ‘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

45. All parties are agreed that the appeal was made late. Therefore the only point at issue is whether there is a reasonable excuse for the delay in making the appeal. The burden of proof is on the Appellant.

46. HMRC contend that the delay is serious, and that their evidence shows that the Appellant received the NOR and the appeal rights, and made no attempt to appeal until many months later.

47. The Appellant contends that the NOR was not received, and that consequently she was not aware of her appeal rights until April 2019, and that taking the circumstances in the round this is a reasonable excuse for the delay.

48. As set out under Findings of Fact, I find that the NOR was received. However, that in itself does not mean that there is no reasonable excuse for the delay.

49. All parties agree that the delay is serious.

50. The reason for the delay is that the director of the Appellant was not aware (despite the NOR setting it out) that there was a right of Appeal. She passed the NOR straight on to her solicitors and the next correspondence she received did not mention appeal rights.

51. From the evidence in the bundle it is apparent that HMRC emailed the solicitors in January to ask whether an Appeal had been made, and received a reply in February that led to notes on the file 'reply from solicitors. No appeal to tribunal.'. I was not given copies of the letter to or from the solicitors, nor was I referred to these notes in the hearing.

52. I bear in mind that the Upper Tribunal judgement in *Katib* [HMRC v Muhammed Hafeez Katib [2019] UK UT 0189] makes it clear that failure of an agent is unlikely to amount to a 'good reason' for missing the deadline. I also bear in mind that the judgement makes clear that this can be considered at the third stage of the *Martland* analysis.

53. I have read all three transcripts provided that contained interactions between Ms McLaughlin and HMRC. In each conversation Ms McLaughlin is shown to be engaging well with HMRC, to have also engaged professional advisers to help her and the company, and to show a willingness to sort the VAT affairs out as soon as possible.

54. None of the transcripts show an awareness of the fact that an appeal to the Tribunal is possible.

55. Now I turn to my consideration of all the facts of the case. In considering the case for HMRC the starting point is that the late appeal should not be allowed. In addition I have found that the NOR was received at the home address of the director. There is a clear need to ensure that time limits are to be respected and litigation to be conducted proportionately and efficiently.

56. In considering the case for the Appellant, I bear in mind the significant detriment to the Appellant and the director if this case is not to be allowed to go ahead. I bear in mind that while this time limit was missed by a considerable extent, Ms McLaughlin was engaging with HMRC throughout the whole time, and making it clear she wished to pay the VAT owing, and when she could, agreeing an instalment plan and making payments.

57. I also bear in mind the overall nature of the evidence given by Ms McLaughlin. She was consistent (and the evidence shows her to have been consistent throughout) in not remembering ever seeing the NOR, and in being unaware of the right to Appeal. Throughout the process she has engaged advisers and she and they have engaged with HMRC.

58. I was not fully addressed by either side on the merits of the underlying case. HMRC see the late appeal as attempt to (at first) delay the criminal prosecution and (after the prosecution) an attempt to overturn the criminal prosecution. I do not see this case (appealed in April 2019) as an attempt to delay the prosecution because Ms McLaughlin had by that time attended court three times over the prosecution, each time to have the case adjourned, with at least two of these times the cause of the adjournment being HMRC or the court administrative process.

59. From reading the bundle I consider the underlying case to be not without merit.

DECISION

60. In this case I consider the considerable prejudice to the Appellant and the director, and the fact that they consistently engaged with HMRC, mean that the overall circumstances of the case merit the full facts case being heard, notwithstanding the considerable delay in the making of the appeal.

61. The appeal is therefore ALLOWED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

**SARAH ALLATT
TRIBUNAL JUDGE**

RELEASE DATE: 09 MARCH 2021