TC08260

EXCISE DUTIES – refusal to restore vehicle – no request for review within permitted time limit – section 14A FA 1994 –application for an order that the respondent carries out a review – application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/02253

BETWEEN

SC DUVENBECK LOGISTIK SRL

Appellant

-and-

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Hearing conducted in public remotely by video on 6 July 2021 with written submissions received from the parties on 3 August 2021

Karen Robinson instructed by Womble Bond Dickinson LLP for the Appellant

Rupert Davies instructed by the Home Office for the Respondent

DECISION

INTRODUCTION

1. The appellant applies for an order requiring the respondent to conduct a statutory review of the decision not to restore a Mercedes Benz tractor unit (the "**Vehicle")** seized on 23 January 2020.

2. On 23 January 2020 in the UK control zone at Coquelles, France, the Vehicle was intercepted by Border Force Officers. The Vehicle (the tractor unit) contained about 5,820 non-duty paid cigarettes, and was pulling a trailer containing a legitimate load consisting of palletised milk. The Vehicle, trailer, cigarettes and milk were seized under sections 139 and 144 of the Customs and Excise Management Act 1979 ("**CEMA**"), and the trailer and milk were restored and released very soon afterwards.

3. The appellant requested restoration of the Vehicle and by letter dated 2 March 2020 the respondent refused restoration. The letter explained that any request for a review of the decision must be received within 45 days of the date of the letter.

4. By email dated 14 May 2020 the appellant requested a review of the decision.

5. By letter dated 19 May 2020 the respondent requested evidence as to reasonable excuse for the request being made out-of-time.

6. By letter dated 10 June 2020 the respondent refused to review the decision out of time.

THE LAW

Statute

7. The decision not to restore is an "ancillary matter" as defined in section 16(8) of the Finance Act 1994 ("**FA 94**") and of a description specified in Schedule 5 paragraph 2(1)(r) of FA 94.

8. Section 14 of the FA 94 applies to this decision pursuant to section 14(1)(d) of that Act.

9. Under section 14(2) the appellant may by notice in writing to the Commissioners require them to review that decision.

10. Section 14(3) provides:

> "The Commissioners shall not be required under this section to review any decision unless the notice requiring the review is given before the end of the period of forty-five days beginning with the day on which written notification of the decision, or of the assessment containing the decision, was first given to the person requiring the review."

11. Section 14A ("**section 14A**") was inserted into the FA 94 by The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 S.I. 2009/56 Sch. 1 para. 199(4). It provides:

> "14A Review out of time
>
> (1) This section applies if—

(a) a person may, under section 14(2), require HMRC to review a decision, and

(b) the person gives notice requiring such a review after the end of the 45 day period mentioned in section 14(3).

(2) HMRC are required to carry out a review of the decision in either of the following cases.

(3) The first case is where HMRC are satisfied that—

(a) there was a reasonable excuse for not giving notice requiring a review before the end of that 45 day period, and

(b) the notice given after the end of that period was given without unreasonable delay after that excuse ceased.

(4) The second case is where—

(a) HMRC are not satisfied as mentioned in subsection (3), and

(b) the appeal tribunal, on application made by the person, orders HMRC to carry out a review.

(5) A person may require HMRC to review a decision falling within section 14(1)(b) only if HMRC are also required to review the decision within section 14(1)(a) to which it is linked.

(6) Section 14(5) applies to notices given under this section as it applies to notices given under section 14."

Case law

12. In *Hedley's Humpers Ltd v HMRC* [2013] UKFTT 684 (TC), the First-tier Tribunal stated that:

"16. In considering the criteria which the Tribunal should apply in exercising its powers under s 14A(4)(b), its starting point should be that its powers were restricted and there was no general discretion to the Tribunal to review the 2011 Decision. The Tribunal should have regard to the principles which are generally applied to applications for an extension of time limits, including the Civil Procedure Rules, which would include taking account of the unreasonable delay on the part of Hedley."

13. In *Kolodziejski v Director of Border Revenue* [2016] UKFTT 35 (TC), the First-tier Tribunal (Judge Kempster) held, following some detailed consideration, that the test to be applied was that of "reasonable excuse", as set out in s.14A(3), and not that set out in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) which was, then, the authority for the test to be applied in applications for extensions of time to comply with a time limit. The Tribunal held:

"22. I agree with Mr Millington that the Tribunal's jurisdiction under s 14A (4) is a full appellate one – ie not confined to a supervisory jurisdiction over UKBA's conduct in making their decision to refuse to carry out a late review.

23. However, I do not agree with Mr Millington that the test I should apply is that set out in *Data Select*. While that test is usually appropriate to applications for an extension of time to comply with a time limit, I construe s 14A as adopting a different approach. Section 14A(3) sets the test for when UKBA *must* (s 14A(2) : " *required* to carry out") carry out a late review: "[UKBA] are satisfied that (a) there was a reasonable excuse for not giving notice requiring a review before the end of that 45 day period, and (b) the notice given after the end of that period was given without unreasonable delay after that excuse ceased." Section 14A (4) then provides that if UKBA are not so satisfied then the Tribunal may order UKBA to carry out a review. I consider that requires the Tribunal to adopt the same test as that imposed on UKBA by s 14A(2) . That approach is different from the one usually applicable to late applications (where I agree the *Data Select* test is appropriate – see for example the Upper Tribunal in *Romasave (Property Services) Ltd* v HMRC [2016] STC 1 at [88–92]) but it follows, I think, from the specific (and rather unusual) wording in s 14A(4) . That may possibly be explained by the history of the provision. Before 2009 the Tribunal and its predecessor VAT & Duties Tribunal had no jurisdiction whatsoever where HMRC (as then had responsibility) refused a late review – see *Angliss* at [20–22]. As Mr Millington guided me at the hearing (for which I am grateful), that was changed with effect from April 2009 by the insertion of s 14A by para 200 sch 1 of The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56). In conferring a new jurisdiction on the Tribunal s 14A has, I think, applied the reasonable excuse test for the Tribunal as well as UKBA. For completeness, that contrasts with the general position where the test for exercise of discretion to permit late applications is not one of reasonable excuse – see the Upper Tribunal in *O'Flaherty v HMRC* [2013] STC 1946 at [58–59].

24. Given the specific wording of s 14A(4) , I consider the test for me to adopt is that in s 14A(3) : was there was a reasonable excuse for not giving notice requiring a review before the end of the 45 day period, and, if so, was the notice given after the end of that period without unreasonable delay after that excuse ceased?"

14. In *Perrin v. The Commissioners for_HMRC* [2018] UKUT 0128 (TCC) the Upper Tribunal gave the following guidance as to the approach to a 'reasonable excuse' defence:

"81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

15. In *the Clean Car Co Ltd v C&E Commissions* [1991] VATTR 234, Judge Medd QC said:

"The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

16. Although the Clean Car case was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in other tax and duty cases.

17. In the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 Judge Berner said:

"The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

18. In *Martland v HMRC* [2018] UKUT 178 (TCC), ("**Martland**") the Upper Tribunal considered the appellant's appeal against the FTT's decision to refuse his application to bring a late appeal against an assessment of excise duty and a penalty. The Tribunal said:

44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice - there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal."

19. In *HMRC v Katib* [2019] UKUT 0189 (TCC), the Upper Tribunal said this:

"50. We see no need to issue general guidance to the FTT that a formal waiver of privilege is necessary in all cases. Provided that an FTT follows the guidance set out in *Martland* referred to above and acknowledges that, in most cases, failings by a litigant's adviser are, for the purposes of an application for permission to appeal late, to be regarded as failings of the litigant (as discussed in more detail in the next section), it will be able to determine future applications of this nature. …

56. We consider that the correct approach in this case is to start with the general rule that the failure of Mr Bridger to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland* . However, when considering the third stage of the evaluation required by *Martland* , we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration."

20. In *HMRC v BMW Shipping Agents* [2021] UKUT 0091, the Upper Tribunal said this:

"51. Thus, the point being made by the Court of Appeal was that since particular weight has to be given to compliance with rules, practice directions and orders, it will not usually be good enough for a litigant to say, on an application for relief from sanctions, that a genuine attempt was made to comply, or that the litigant honestly thought the rules were complied with. Moreover, at paragraph 31 of *Denton*, the Court of Appeal confirmed that there are situations in which "serious and significant" breaches of direction for which there is no good reason can still in appropriate cases benefit from relief from sanctions at the third stage of examination. Therefore, we do not consider that any principle emerging from *Mitchell* precludes the Company from obtaining relief from sanctions simply because a serious and significant breach of directions arose because of failures on Mr Gibbon's part.

52. We will approach the third *Martland* stage by performing, as *Martland* requires, a balancing exercise. In that balancing exercise, the need for litigation to be conducted efficiently and at proportionate cost and for directions to be complied with must be given particular weight. However, it remains a balancing exercise which invites, among other

considerations, a consideration of the nature of the reasons for the breach of direction and the results that would follow if the appeal is, or is not, reinstated."

EVIDENCE AND FINDINGS OF FACT

21. I was provided with a bundle of documents. Oral evidence was given for the appellant by Mr Attila Albu.

22. From the documentary evidence I find the following:

Background

(1) The appellant is SC Duvenbeck Logistik SRL ("**Duvenbeck**"). Duvenbeck is a Romanian subsidiary company within the Duvenbeck Group, a German-owned logistics organisation. The Duvenbeck group has its headquarters in Bocholt and has 35 sites in 8 European countries. It is a full-service logistics provider for the automotive, beverages and plastics industries, as well as for the agricultural vehicle industry.

(2) On 23 January 2020, the Vehicle was seized at Coquelle, France, by representatives of the UK Border Force ("**UKBF**"), whilst it was en route to the UK. At the time of seizure, the tractor unit was being used to transport 33 pallets of milk on a trailer (trailer registration number BV58 DUO) to a dairy in Stockport, UK. The consignment was collected from a location in Germany on 23 January 2020 and was due to be delivered to an address in Stockport, UK, the following day, 24 January 2020.

(3) At the time of seizure, the Vehicle was the subject of a lease agreement which commenced on 1 December 2017. The term of the lease agreement was 54 months, and so it is due to conclude on 31 May 2022. The appellant remains liable for payments under the terms of the lease agreement. Under the terms of the lease agreement, Duvenbeck is the legal bailee of the Vehicle. The Vehicle has a current value in the region of €42,000.

(4) The Vehicle was seized by UKBF because the driver had been found to be in possession of about 5,820 cigarettes, which had not been the subject of an excise duty payment. The driver of the vehicle at the time of seizure was Ioan Diculescu, then a Duvenbeck employee. Mr Diculescu's employment with Duvenbeck was terminated on 27 January 2020.

(5) Shortly after the seizure, UKBF agreed to restore the trailer and its contents (the consignment of milk) to Duvenbeck, in order that the consignment could be delivered to the UK customer using an alternative tractor unit. No cigarettes (or other dutiable goods) were found in the trailer unit.

(6) On 27 January 2020, Duvenbeck made a written request for restoration of the Vehicle.

(7) By letter dated 2 March 2020, the UKBF determined not to restore the Vehicle, in essence because the same driver had previously been stopped and found in possession of a quantity of cigarettes.

(8) Duvenbeck had a right to a statutory review of the UKBF's decision not to restore the Vehicle. The letter dated 2 March 2020 included the following:

> "A request for a statutory review must be received by Border Force (not just posted or sent) within 45 days and your request must therefore be received by 16/04/20".

(9) On 14 May 2020, the appellant (by its then legal representative, IMD Solicitors) requested a review and an extension of time until 29 May 2020 to allow an "opportunity to present the reason for making a request for a statutory review and all the evidence".

(10) By letter dated 19 May 2020, the UKBA invited the appellant to send any additional evidence in relation to the issue of reasonable excuse for the request for review not being received within the 45 day time limit.

(11) By letter dated 22 May 2020, IMD Solicitors made representations on behalf of Duvenbeck to the UKBF for a review out of time of the restoration decision made on 2 March 2020. In relation to the delayed request for review of the decision, the letter from IMD said as follows:

> "Following your Decision dated 2nd March 2020 our client contacted IMD Solicitors LLP ('**IMD**') immediately with the view to instruct us in dealing with the Request for the review of your Decision.
>
> Further to discussions as between IMD and our client it was agreed that IMD would act for our client in respect of the Request.
>
> Due to and during these unprecedented times, it was extremely unfortunate that administrative errors were made resulting in delays and such agreement was not reached earlier, thus resulting in this Request being made outside the period of 45 days as envisaged by the legislation.
>
> This delay was due to no fault of our client and we note that our client has already provided you with some information as to the delay. Indeed, we cannot fathom such errors to have occurred if the current worldwide crisis had not taken place, as the said crisis caused disruption to channels of communication and required a period of adjustment.
>
> The reality is that this matter has simply slipped through the net and was not addressed in time due to this. It would therefore be entirely unjust to refuse to consider the Request for being out time and we would contend that the First Tier
>
> Tax Tribunal would overturn any such decision on appeal, as it has discretion to do
>
> Further, notwithstanding the date of your Decision, it is unfathomable for you to have been able to auction off the Vehicle during the crisis. As such, not prejudice is caused to the Border Force by the delay."

(12) On 10 June 2020, the UKBF replied to the 22 May letter in the following terms:

> "It appears to me that you are using the current crisis as a façade to explain either your client's or your firm's failing to request a review within the statutory time limit. The current Covid-19 restrictions have not affected emails and only short delays in the mail. I note that your emailed letter of Friday 22nd May 2020 was also posted on that day. That letter is recorded as received by BF on Tuesday 26th May 2020 – the next working day following the Bank Holiday. Your email requesting a review on behalf of your client was received **28 days after the 45day time limit.** With the evidence you have submitted, I am not satisfied that that your client has a reasonable excuse for being **late** in requesting a review". [original emphasis]

(13) The UKBF declined to conduct a review of the 2 March 2020 decision. The same letter advised Duvenbeck that it had 30 days in which to appeal the decision to the First-tier Tribunal. The appeal was lodged in time, on 9 July 2020.

(14) The request for a review out of time was made by email dated 14 May 2020 (a fuller explanation as to the circumstances of the request was contained in the letter dated 22 May 2020). It is agreed between the parties, as confirmed at the hearing, that the request for a review was 28 days out of time.

The oral evidence

23. Mr Attila Albu gave evidence for the appellant. He provided a witness statement on which he was cross examined and re-examined. I found Mr Abu to be a credible and truthful witness.

24. In his witness statement Mr Albu said as follows:

(1) Mr Abu was employed by Duvenbeck as process improvement manager and fleet coordinator and has worked for Duvenbeckfor 10 years.

(2) On 3 March 2020, Mr Albu emailed IMD Solicitors ("**IMD**") attaching the 2 March letter from the UKBF requesting that IMD assist him in relation to UKBF's decision. IMD had previously provided legal services to Duvenbeck.

(3) On 5 March 2020, Mr Albu again contacted IMD to ask whether the case had been accepted.

(4) On 5 March 2020, IMD replied to the email and indicated that the request for assistance had been sent to the head of department who can confirm the cost and the documents you need to prepare the application for vehicle restoration. The trainee solicitor who provided the response indicated that she would be in contact as soon as possible, probably the next day.

(5) On 12 March 2020, Mr Albu again emailed IMD in order to ask how long it would be for permission to be granted in order for the solicitors to take the case.

(6) Mr Albu was busy, as always, in March with carrying out annual professional driver evaluations for more than 350 people. He needed to ensure that his contribution towards this process was completed before his annual holiday and his workload was made more challenging because of the Covid pandemic.

(7) On two occasions between 20 and 23 March 2020, Mr Albu contacted IMD by telephone in order to progress the matter. He spoke with a colleague of the trainee solicitor who had provided the reply on 5 March, who advised that his messages would be passed onto the trainee solicitor. Mr Albu's calls were not returned.

(8) Between 25 March and 7 April 2020 Mr Albu was on annual leave; he is the only person in the organisation with experience in managing issues and incidents involving European regulators and law enforcement agencies. There was no one else at Duvenbeck who was able to assist in his absence.

(9) On 7 April 2020, the day before he was due to return to work, he was told that he was being furloughed until the end of May 2020. Notwithstanding this he carried on working from home.

(10) On 23 April 2020, Mr Albu by email asked IMD how long it would take for approval to be given for the firm to take on the case. On the same day IMD indicated that it would be prepared to offer its legal services in connection with the application for review of the restoration decision.

(11) On 6 May 2020, IMD enquired as to whether Duvenbeck wished to proceed with an application and attached a contract for engagement, and instructions for payment. Mr Albu returned the signed engagement letter on 12 May 2020.

(12) On 14 May 2020, IMD thanked Duvenbeck for its instruction, and began the formal process of taking instructions from the client. On the same date, IMD wrote to the UKBF and explained that the current public health crisis had resulted in a delay in making the application. Mr Albu was not copied into this letter and was unaware of the representations made in it that the failure to request a review was due to delays and difficulties by Duvenbeck. These representations were incorrect. It was correct that the delay was due to no fault of Duvenbeck as set out in IMD's letter of 22 May 2020.

(13) On 18 May 2020, IMD asked by email whether further work needed to be done by it in respect of the application.

(14) Between 18 and 19 May 2020, there was email communication between IMD and Mr Albu in which Mr Albu provided instructions to IMD.

(15) On 19 May 2020, the UKBF answered the communication of 14 May and invited IMD (on behalf of the appellant) to provide evidence of any reasonable excuse for the late request for a statutory review.

(16) On. 21 May 2020, IMD provided Mr Albu with an authorisation to act form for signature. That was returned by Mr Albu immediately so as to enable the letter of representations to be sent the following day.

25. In cross examination and re-examination, Mr Albu added:

(1) Two or three years before this issue with UKBF cropped up, he had worked with IMD in relation to English legal issues. These included issues regarding refugees. IMD was instructed because there was an individual there who spoke Romanian and with whom he could communicate. IMD were not on a retainer but helped the appellant out with UK legal problems. The appellant had never had problems with them before and had always won the cases that IMD had helped with. On no other occasion had time limits been missed.

(2) When he went on annual leave there was no one at the appellant organisation h to whom he could transfer responsibility for dealing with the restoration. The same was true when he went on furlough.

(3) When he had sent his emails to IMD and heard nothing back, he had assumed that there were no issues and that everything was in order and that when he came back from holiday, IMD would have resolved the issue.

(4) IMD had never told him that they would not take on his case. There had never been problems with them before. He did not know why they took so long in this instance.

(5) He thought that IMD would deal with everything and that if an extension of time was required, they would deal with that. Had he known that time limits were so strict there would be no reason for continuing with the correspondence after the expiration of that time limit.

(6) A fair summary was that he asked IMD to take on the case, they said that they had not made a decision whether they would take it on, and that he assumed that they would meet the deadlines without him needing to do anything further.

(7) Had he been told in unequivocal terms that IMD were not prepared to take the case on, he would have instructed someone else. He put his trust in IMD and did not think to do anything else. He had full confidence in IMD that they knew what they were doing.

(8) His Romanian contact at IMD had not told him that authorisation for taking on these instructions needed to go to someone of greater seniority within IMD.

SUBMISSIONS

26. The appellant submits that: the appropriate test to be applied in this case is that of reasonable excuse and not relief from sanctions; the tribunal has a full appellate jurisdiction; the appellant has a reasonable excuse as evidenced by the evidence by Mr Albu; he made repeated attempts to seek legal assistance from IMD; the failure to meet the time limit was due to the failure of IMD to action the appellant's requests for assistance in a timely fashion; the Covid pandemic had an impact on the appellant's ability to progress the request for a review; it was entirely reasonable for Mr Albu to seek the assistance of IMD; Mr Albu's holiday coincided with the lockdown imposed in Romania on 25 March 2020; notwithstanding the fact that he had been placed on furlough, Mr Albu took steps to progress the issue with IMD; if the test is not reasonable excuse but relief from sanctions, then the delay is not serious or significant and there were good reasons for it; the issue with IMD is that they failed to respond in timely fashion to Mr Albu's request for assistance; this is different from the situation in *Katib*; in the final evaluation, there has been no lengthy delay and UKBF has not been prejudiced; if permission to conduct a further review is not given, the appellant will be considerably prejudiced.

27. UKBF submits that: if the correct test is relief from sanctions, then the delay of 28 days is both serious and significant; there is no good reason for the delay; no specific Covid related reasons for the delay were identified by Mr Albu; the substantial part of the delay was caused by Mr Albu attempting to instruct IMD and in delegating all responsibility to IMD to meet deadlines without obtaining any confirmation that his instructions had been accepted; the appellant could and should have sought alternative representation much sooner in light of the failings of IMD to provide confirmation at an early time that they would act; there is a public interest in the finality in litigation; if I grant the application, all the appellant will have is a chance to have their restoration decision reconsidered, it will not result in the actual restoration of the Vehicle; if the appropriate test is reasonable excuse, then the appellant does not have one.

DISCUSSION

28. As far as jurisdiction is concerned, then I have full appellate jurisdiction. I have no doubt about that. As to the correct test which I should apply the position is more complicated. The legislation in section 14A deals specifically with the circumstances of this application. The appellant has asked for a review but after the 45 day time period set out in section 14(3) FA 94. In these circumstances HMRC are required to carry out a review if they are satisfied that there was a reasonable excuse for failing to meet the 45 day deadline and that notice was given after the end of that period without unreasonable delay after that excuse ceased. But if HMRC are not satisfied that there was a reasonable excuse, then the tribunal may order HMRC to carry out a review. There is nothing in the legislation which obliges the tribunal to adopt the same criterion as HMRC, namely, to consider whether the appellant had a reasonable excuse for failing to meet the deadline. As I say, my jurisdiction is appellate, and I do not believe that my role is to consider whether UKBF's decision that the appellant did not have a reasonable excuse, is a reasonable one. I look at the situation afresh. And, as I say, I cannot see that the legislation obliges me to consider only reasonable excuse when it comes to ordering HMRC to carry out a review out of time. I say this with some hesitation given that this is wholly contrary to the decision of Judge Kempster, a highly experienced and well-respected Judge, in *Kolodziejski*. The relevant extract from that decision is set out above, and the Judge recognises that the specific and unusual wording in section 14A is the reason that the tribunal should consider reasonable excuse rather than the usual tests for relief from sanctions. But I have to say that I cannot see that the wording in section 14A differs materially from the wording in section 49 Taxes Management Act 1970 which deals with providing late notice of appeal to HMRC. If a taxpayer, under these provisions, fails to meet time limits, HMRC may agree to notice being given after that time, but if they do not so agree, the tribunal can give permission. HMRC are obliged to agree to late notice being given if they are satisfied that the taxpayer has a reasonable excuse. But if they do not think that the taxpayer has a reasonable excuse, then on an application to the tribunal, the correct test is the relief from sanctions test. The tribunal does not decide whether a taxpayer should have permission to appeal out of time on the basis that it has a reasonable excuse. It adopts the *Martland* test. As I say, I cannot see there being a material difference between these provisions, and the provisions of section 14A, and for this reason I shall approach my analysis on the basis that the relief from sanctions provisions are relevant. However, if I am wrong on that, I also consider the facts tested against the reasonable excuse test.

29. The length of the delay is 28 days. That has been agreed. I do not think that is serious or significant either in absolute or relative terms. The delay needs to be seen against the background of the Covid pandemic. Whilst UKBF have no specific policy regarding extensions of time requests, HMRC have, since the early days of the pandemic, been prepared to accept, or agree to, late filings (for example late notification of an appeal to the tribunal) provided a Covid related reason is given. This suggests to me that the context of the length of delay needs to be considered, and tested against the background of the Covid pandemic, and I do not believe in this context a delay of 28 days is either serious or significant.

30. I now move onto the second stage of the *Martland* evaluation, recognising that in so doing, I am directed by *Martland* in view of my judgment that the delay is neither serious nor significant, that I might need to spend little time on this and the third stage. I do not think that this is a *Katib* case, by which I mean that the failure to meet the time limit for review was not a result of an agent having been appointed and he then failed to meet the deadline. The issue here is that Mr Albu did not nail down the engagement with IMD with sufficient certainty within the relevant time frame. Had he done so, and established, early on in the dialogue with

IMD, that they needed to carry out certain procedures at their end before they could come to a decision as to whether they would act, and that those procedures would take so long that review could not be requested within the 45 day time period, I have no doubt that, as he testified, he would have sought the advice of another firm who would be able to meet that deadline. So if blame can be attributed to Mr Albu, it is failure to chase up IMD, on a regular basis, and to clarify precisely what IMD needed to do before it agreed (or otherwise) to act and when it was likely that a decision would be made.

31. This is a point made by UKBF. But Mr Albu has given cogent reasons as to why he did not do this. He had instructed IMD in the past via the Romanian speaking lady there; IMD had always looked after their interests on those occasions; there was no intimation when he first instructed that lady at IMD that accepting the instructions to request a review were going to take a considerable time nor that they needed to be escalated within IMD for that decision to be made; on receipt of UKBF's letter of 2 March 2020 denying restoration, he acted promptly by sending that letter on to IMD on 3 March 2020; having received no response he then followed up on 5 March 2020 when he was told that IMD would contact him as soon as possible and probably the next day; having failed to hear anything, he followed up again on 12 March 2020 notwithstanding that this was a busy period of time for him; he followed up again on 20 and 23 March 2020. I accept that it might have been prudent for him to have followed up more quickly, but given that his experience with IMD had always been a good one, I accept his evidence that he thought that in the absence of anything specific in which IMD said they were not prepared to act, IMD were looking after his interests even though he had not signed an engagement letter or agreed a fee estimate. Whilst this might seem naïve, at that time there was still nearly a month to go before the request for review had to be made before 16 April 2020. So time was on his side. The trouble was that he then went on leave and was subsequently furloughed in circumstances where there was no one at the appellant's organisation who was able to deal with this matter in his absence. So I suspect that even had a letter from IMD arrived in his absence on holiday, it would not have been dealt with by the appellant (perfectly understandably) and strictly speaking (on the basis that the furlough rules in Romania the same as those in the UK) could not have been dealt with by Mr Albu during his furlough which came into effect as soon as he returned from holiday. To my mind the foregoing are good reasons as to why the deadline of 16 April 2020 was not met.

32. I now turn to the third stage of the *Martland* evaluation, namely to conduct a balancing exercise taking 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. But I also acknowledge the sentiments expressed in the *BMW* case that notwithstanding the foregoing, the third stage of the process is a balancing exercise which invites, among other considerations, a consideration of the nature of the reasons the failure to meet the time limit and the results which would follow if I do not grant this application.

33. I have already decided that the delay is not serious or significant, and that there are good reasons for failing to meet the 16 April 2020 deadline. The application for review was in fact made on 14 May 2020, so UKBF have known for some time of this application for review. There is no evidence that following 16 April 2020, they packed away their papers and have had to drag them out again, at some cost, to deal with the late application. I accept, however, that had the request for review been made in time, then the cost in time and financial terms of opposing this application would not have been required. To that extent UKBF have been prejudiced by the late application, but that has already happened. Any decision by me that UKBF should now be ordered to conduct a review will not ameliorate that prejudice. All it will do is require a review which, had a timely application been made, UKBF would have been

required to carry out in any event. On the other hand, if I reject the appellant's application, they will be prejudiced, considerably, since they will lose any opportunity of recovering the Vehicle. This could result in considerable financial loss. Little evidence was provided to me as to the likely outcome of any such review and whether the appellant has a strong or weak case.

34. However, it is my judgment that when undertaking this final evaluation stage, and the balancing exercise, in the light of the fact that the delay is neither serious nor significant, and there are good reasons for it, the balance of prejudice weighs very heavily in favour of granting the appellant's application.

35. If the test is not the relief from sanctions test but instead is whether the appellant has a reasonable excuse for the late application, then my decision is that they do have that reasonable excuse, for the reasons set out at paragraph [31] above. It is clear to me that the appellant, through the agency of Mr Albu, is a responsible trader conscious of and intending to comply with its obligations regarding tax. In the position in which Mr Albu was placed, what he did was a reasonable thing to do.

DECISION

36. In accordance with the provisions of section 14(4)(b) FA 94 I order UKBF to carry out a statutory review of their decision not to restore the Vehicle.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE
Release date: 6 SEPTEMBER 2021