Neutral Citation: [2022] UKFTT 473 (TC)

Case Number: TC08670

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2021/01487

Excise duty – restoration – application for extension of time to request review – Martland applied – application dismissed

Judgment date: 13 December 2022

Decided by:

TRIBUNAL JUDGE MCGREGOR

Between

VEHO LIMITED

Appellant

and

THE DIRECTOR OF BORDER REVENUE

Respondents

The Tribunal determined the appeal on 12 December 2022 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Appellant's request to the Tribunal dated 19 April 2021, the documents submitted to the Tribunal in support of the application, and the Respondent's written submissions submitted to the Tribunal on 23 October 2022

DECISION

INTRODUCTION

1. This decision relates to an application from Veho Limited for the Tribunal to order the Border Force to carry out a late review of their decision regarding restoration of goods seized.

FACTS

2. We find the following facts from the papers provided to us:

(1) Veho Limited (Veho) arranged for the import of a selection of alcoholic goods from Italy, using a third party carrier, Arcese, to deliver the goods.

(2) The UK Border Force conducted a review of the import and seized the following goods on 23 October 2020:

(a) 81 boxes of 6 bottles of wine;

(b) 3 bottles of Limoncello;

(c) 4 bottles of other assorted Italian liqueurs; and

(d) 1 bottle of brandy.

(3) The UK Border Force made an initial decision not to restore the goods – I do not have a copy of this decision and therefore cannot categorically conclude that the letter was dated 11 January 2021, as stated in the Respondent's submissions.

(4) Veho then made a request for a review of that decision. The Respondent's submission is that this request was made on 17 March 2021 and included the following statement:

> "Our apologies for not responding earlier, but the email must have been overlooked as my staff and were on part furlough. Further to speaking to one of your team this morning, she pointed out that the date to lodge an appeal had passed so I hope you will accept this belated request."

Again, this email is not included in the papers I have been sent and therefore I cannot confirm the date of this email or its contents.

(5) The Border Force sent a letter dated 13 April 2021 (which is included in the papers) refusing to grant the review on the grounds that the application was 20 days late and no reasonable excuse was provided.

(6) On 19 April 2021, Veho wrote to the Tax Tribunal requesting that this Tribunal order the Border Force to conduct a review of the decision not to restore. This email included the following statement:

> "I admit that we have been negligent in responding to the emails in the given time – see the letter from the Border Force attached, but will diligently check for any correspondence on a daily basis so that my response will be immediate."

(7) The Tribunal acknowledged the application on 4 May 2021 and requested that the Border Force, within one month of the letter, among other administrative details, either:

(a) Accept the application for late review; or

(b) Provide their grounds for opposing the application.

(8) On 1 July 2021, Veho provided some additional documents to the Tribunal, including receipts for some of the alcohol and copies of email correspondence between Veho and Arcese at the time of the seizure.

(9) On 5 July 2021, Veho provided one further document regarding the origin of the wine.

(10) On 12 Jul 2021, a solicitor from the Respondents emailed the Tribunal stating that the Border Force did not believe that they had the power to agree to carry out a late review because the Appellant had failed to provide them with a reasonable excuse. The email also included the following statement:

> "Please accept our apologies for our late response to the Tribunal's require for submissions on the Appellant's application for a late review under s 14A of the Finance Act 1994 in this case. The Tribunal's email below was completely overlooked, for which we sincerely apologise."

(11) On 2 August 2021, the Tribunal emailed Veho, giving 28 days to notify the Tribunal whether it wished to ask the Tribunal to consider making an order to Border Force to conduct a review.

(12) On 16 August 2021, Veho sent an email to the Border Force requesting that they reconsider their decision.

(13) On 22 September 2021, Veho sent an email to the Tribunal explaining that they had misunderstood the 2 August 2021 letter from the Tribunal as meaning that they should request a reconsideration from the Border Force but that they were now requesting that the Tribunal consider their application.

(14) On 1 December 2021, the Tribunal issued directions to both parties to enable the application to proceed towards a video hearing, including requiring the Respondent to provide a statement of reasons within 42 days.

(15) On 11 January 2022, the Border Force applied for a 14-day extension of time to submit its statement of reasons by 26 January instead of 11 January.

(16) On 31 January 2022, the Border Force applied for a further 7-day extension from 26th January to 2 February 2022. The email noted that this application was retrospective and that the Border Force solicitor had received the draft Statement of Reasons from Counsel on 20 January but "overlooked the email".

(17) On 1 February 2022, the Border Force submitted a Statement of Reasons.

(18) On 11 October 2022, a member of Tribunal staff identified that the Statement of Reasons provided had been for the wrong case.

(19) On 12 October 2022, the Respondents provided the correct Statement of Reasons to the Tribunal staff member. The Statement was provided to the Appellant on 23 October 2022.

(20) On 7 November 2022, the Tribunal gave the Appellant a deadline of 30 November 2022 for:

(a) Any response to the Statement of reasons and any additional documents;

(b) A decision as to whether the appellant was happy for the decision to be made on the papers or preferred a video hearing.

(21) On 23 November Veho replied confirming that no addition information or documents were available and that they were happy for a paper determination to be made.

PARTIES ARGUMENTS

3. The Border Force submits that:

(1) The request for a review was made 20 days late;

(2) The Appellant did not have a reasonable excuse for the delay since no details of which staff were on Furlough and why that impacted on Veho's ability to respond to the decision were provided;

(3) The Appellant had admitted negligence in dealing with correspondence.

(4) There are conflicting legal bases for the Tribunal to consider the application and the Respondent adopts a neutral stance between the two.

(5) If the Tribunal adopts the approach set out in *Hedley's Humpers Ltd v Director of Border Revenue [2013] UKFTT 684 (TC)* then we should consider the question from the point of view of the usual principles as set out in *Martland v HMRC [2018] UKUT 178 (TCC)* for considering a late appeal application.

(6) If the Tribunal adopts the approach in *Kolodziejski v HMRC [2016] UKFTT 35 (TC)*, then we should consider the question from the point of view only of reasonable excuse.

(7) if we adopt the *Kolodziejski* approach, they stand by their original conclusion that there has been no reasonable excuse for the delay shown;

(8) if I apply the *Martland* approach, they:

(a) adopt a neutral stance as to whether the delay is serious or significant, stating that it I find it is not they the application should be granted;

(b) submit that there was no good reason given for the delay, on the same grounds as the reasonable excuse;

(c) adopts a neutral stance in relation to the balancing exercise for all the circumstances of the case, noting the following relevant considerations:

(i) the interests of justice does not automatically result in the grant of extensions of time to appeal;

(ii) if the application is not granted, the Appellant will lose the seized items (the Statement of Reasons refers to a vehicle, but the notice included in the paperwork only refers to the seized alcohol);

(iii) if the application is granted, Veho will gain the change to have the restoration decision considered, but that does not mean that the original decision will be changed and therefore remains several steps away from regaining the seized items;

(iv) there is public interest in the finality of litigation and prejudice will be caused to the Respondent if it is required to reopen a matter believed concluded.

4. Veho do not provide a great deal by way of submissions in support of this application. They simply requested that the Tribunal consider their application, acknowledging that the lateness of their original request for a review was caused by them having overlooked the correspondence and committing to being more diligent with regards to the correspondence with the Tribunal.

DISCUSSION

5. I start by addressing the two possible tests which I must apply. Since the decisions that have been made on this are all also first-tier tribunal decisions, none are binding on me and, given that they conflict, I must decide which formulation I prefer based on my understanding of the law.

6. I prefer the reasoning set out by Judge Popplewell in *SC Duvenbeck Logistik SRL v The Director of Border Revenue [2021] UKFTT 0319 (TC),* where he adopted the "extension of time" approach, rejecting the *Kolodziejski* approach, noting at [28]:

> … 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….

7. Having reached that conclusion, we must follow the guidance of the Upper Tribunal in *Martland v HMRC* [2018] UKUT 0178, which requires use to we must follow the approach in *Denton v White* [2014] EWCA Civ 90 ("*Denton*") in deciding whether to allow the application requiring the Border Force to conduct a late review.

8. This is to:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason(s) why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to 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, and in doing so 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".

9. The starting point for assessing the seriousness of the delay is rather a difficult one in this case. As noted above, I do not have evidence of the original decision or the original request

for a review and therefore do not have any evidence of the lateness of the request. What I do have is a summary of those pieces of correspondence from the Border Force Statement of Reasons and an acknowledgement from Veho that there had been a delay and negligence on their part. I also note that Veho have not sought to challenge the dates set out in the Statement of Reasons.

10. If the dates of those pieces of correspondence are correct (11 January to 17 March 2021 being 65 days), then the delay is 20 days.

11. Given that Veho have made an explicit statement that their application for a review was late, it is not open to me to decide that the application was not late, but equally I do not have unequivocal evidence that it was 20 days late.

12. In *SC Duvenbeck Logistik*, Judge Popplewell decided that a delay of 28 days during the COVID pandemic was neither significant or serious.

13. In light of the lack of evidence of the actual lateness and the short period of time, I find that the delay was not serious or significant.

14. The Border Force in their submissions state that if I find the delay not to be serious or significant then the application should be granted. This is, I assume, based on the statements in *Martland* that in those circumstances I would need to spend little time on this and the third stage.

15. For completeness, I briefly consider the second and third stages.

16. The reason for the delay does not appear to be in dispute – the email with the decision on it was overlooked, i.e. it was a mistake.

17. At the third stage, I must take into account and balance all the circumstances of the case.

18. The circumstances include whether the reason given is a good one. Pure mistake without evidence of why the mistake was made cannot amount to a good reason.

19. Prejudice to the Border Force is a relevant consideration since an instruction to review the case now would require them to "re-open" the case. However, I conclude that this prejudice is limited given the shortness of the delay and the fact that this application has been a live question between 19 April 2021 and 12 December 2022 and the solicitor at the Border Force dealing with the matter has been actively engaged with the case throughout that time.

20. Compliance with time limits is of paramount importance in conducting litigation efficiently and effectively, but I would note that the period between 19 April 2021 and 12 December 2022 include two periods of delay caused by errors on the part of the Respondents:

(1) A delay of 31 days (from 4 June to 5 July 2021) caused by the solicitor at the Border force overlooking the email from the Tribunal; and

(2) A late application for a second extension of time which was also caused by the solicitor from the Border Force overlooking email correspondence.

21. I acknowledge the point that the Border Force make that granting the application for a review is only one step in a process that may or may not result in restoration of the seized items, but that would be true of any application under section 14A of Finance Act 1994 to this Tribunal and therefore I do not give it any weight.

22. Balancing all these factors into account, I grant the application to require the Border Force to review their decision out of time.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

23. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

Release date: 13th DECEMBER 2022