



TC06370

Appeal number: **TC/2017/06308**

VAT – application for permission to make late appeal - refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HOMECHOICE FLOORING (SKEGNESS) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at Lincoln on 27 February 2018

Mr Winfield for the Appellant

Mr Nicholson, presenting officer for the Respondents

DECISION on PRELIMINARY ISSUE

Introduction

- 5 1. This is an application dated 9 August 2017 for permission to make a late appeal in respect of an assessment in respect of VAT dated 7 April 2015.

Appellant's submissions

- 10 2. The appellant acknowledged that the appeal is being made out of time. The appellant's director, Mr Singh, had believed that his former accountants had been dealing with an appeal against the assessment but it had become clear that those accountants had not been dealing with the matter and no appeal had ever been lodged.

- 15 3. Although Mr Singh had been aware that HMRC had been enquiring into the VAT matters, the former accountants had not informed him of critical correspondence, including a letter from HMRC dated 16 February 2015 which advises that HMRC had not had any response to requests for further information and were preparing to issue an assessment. Mr Singh explained that he had never been asked by his accountants to provide any further information, nor had they provided him with a copy of this letter.

- 20 4. Mr Singh accepted that the appellant had received the penalty assessment and that he had signed the accompanying form agreeing to penalty suspension conditions. He had believed that this was part of the appeal process; he had spoken to his former accountants and had thought that this meant everything was being dealt with.

- 25 5. Mr Singh also submitted that trading has been difficult throughout this period and that his priority has been surviving and keeping the business going. His changes of accountant have also not assisted as there has been no ongoing dialogue and the thread of the matter had been lost; there has also been some difficulty obtaining records and information from his previous accountants. The appellant explained that he believed that, when he changed accountants, the appeal would transfer over as well. He didn't chase up matters as he thought that it was all being dealt with.

- 30 6. The appellant requested that the appeal be granted as his former accountants' failure to deal with the appeal meant that he had had no opportunity to do so earlier.

HMRC's submissions

- 35 7. For HMRC it was submitted that the time limit for making an appeal, 30 days after the issue of the assessment, meant that the appeal should have been submitted by 7 July 2015. The appeal was submitted on 9 August 2017, and was therefore 825 days late.

8. HMRC submitted that, in considering whether to exercise this Tribunal's discretion in an application for permission to make a late appeal, the five questions set out in the Upper Tribunal's decision in *Data Select* [2012] UKUT 187 are relevant:

5 9. Firstly, what is the purpose of the time limit? HMRC submitted that time limits are set down in order to provide finality to both parties. The time limit allows HMRC to close a case and move on to deal with other matters, and it allows the Treasury to set budgets.

10 10. Secondly, how long was the delay? In this case, the delay was 825 days. HMRC noted that Judge Berner, in the case of *Romasave* [2015] UKUT 254, had noted that time limits should generally be respected and that, "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". HMRC submitted that, as the delay in this case was substantially more than three months, it must be taken to be a serious and significant
15 delay.

20 11. Thirdly, is there a good explanation for the delay? HMRC submitted that the appellant's belief that an appeal had been lodged is not supported by any documentation. No appeal had been recorded by HMRC. Further, HMRC submitted that the appellant has changed advisers twice since the assessment was issued (on 20 July 2016 and 23 May 2017) and that the appellant could reasonably have been expected to make enquiries as to the status of the appeal when the advisers changed, and to chase up the matter with the tribunal.

25 12. In addition, HMRC submitted that the appellant had clearly received correspondence relating to the penalty and that this should have prompted the appellant to check the status of the appeal. HMRC also noted that the appellant's adviser's letter of 5 June 2017, referring to the assessment, asks to appeal the assessment without reference to any previous appeal. HMRC submitted that, if the appellant had believed that the matter was under appeal, this letter should have been referring to that earlier appeal and not requesting a new appeal.

30 13. Finally, HMRC responded to that adviser's letter on 13 June 2017, advising that an application would need to be made to the tribunal for permission to make a late appeal. That application was not made until almost two months later, on 9 August 2017, with no explanation for this further delay.

35 14. Fourthly, what will be the consequences for the parties of an extension of time? HMRC submitted that the consequence for HMRC will be that they will have to incur costs in reopening the case and dealing with the matter at tribunal. The consequences for the appellant are that he will have his appeal heard.

40 15. Lastly, what will be the consequences for the parties of a refusal to extend time? HMRC submitted that the consequences for HMRC are that they will not have to incur any further costs in this matter and the case will be closed. The consequences for the appellant are that they will not have their appeal heard.

16. HMRC submitted that, given the length of the delay and the lack of adequate explanation for that delay, the application should be dismissed.

Discussion

5 17. The purpose of this Tribunal is to give effect to the overriding objective of dealing with cases fairly and justly. In applications for permission to make a late appeal, the Tribunal must consider all of the circumstances of the case in a balancing exercise. The factors set out in *Data Select* are clearly of assistance, and were approved in *Romasave*. However, none of the factors is to be given any special weight, as also made in clear in these cases.

10 18. Judge Berner in *Romasave* also referred to guidance from the Court of Appeal in *Denton v TH White Ltd (and related appeals)* [2014] EWCA Civ 906 at [24]:

15 "... we propose to restate the approach that should be applied in a little more detail. A Judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice, direction or Court Order" If the breach is neither serious nor significant, the Court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case so as to enable [the Court] to deal justly with the application....".

20 19. *BPP Holdings* ([2016] EWCA Civ 121) further held that strict approach to compliance with rules should apply in the First Tier Tribunal and Upper Tribunal:

25 "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the Tax Tribunal rules that is inconsistent with the general legal policy described in ... *Denton*".

30 20. Although that case (and *Denton*) were concerned with breaches of court and Tribunal rules rather than time limits for an appeal from a decision of HMRC, it is clear from Mr Justice Morgan's comments in *Data Select* that similar principles apply when conducting the balancing exercise in relation to an appeal against a decision made by HMRC. The Tribunal must therefore, in considering the overriding objective
35 of dealing with cases fairly and justly, take into account the requirement for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

Balancing exercise

Purpose of the time limits

21. HMRC's submissions, which were not challenged by the appellant, are confirmed in case law. In particular, the fact that permission to appeal out of time
5 should only be given sparingly was emphasised in *Romasave* which held [at §96] that:

"Permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely."

22. It is clear that, in the case of late appeals, there is a real purpose in having a time
10 limit and this is therefore a factor against allowing the application.

Length of the delay

23. Following *Romasave*, the delay in this case (being 825 days) is both serious and significant. I note also that, even when informed by HMRC that an application to make a late appeal needed to be made, there was a further delay in excess of 30 days
15 in making the appeal. Although not determinative, this should be seen as background in the balancing exercise overall.

Explanation for the delay

24. The principal explanation given for the delay was the belief that the appellant's advisers had put in an appeal and were dealing with the matter. In signing the penalty suspension conditions, Mr Singh had believed that this was part of the appeal process.
20 He had believed that the appeal had been transferred to the appellant's new advisers on the two occasions following the assessment when the appellant changed advisers. It was also explained that trading was difficult and so pursuing updates on the appeal had not been a priority.

25. Looking at the penalty assessment, dated 25 June 2015, it clearly refers to a penalty being charged for an inaccuracy in respect of VAT and, under the category of "Behaviour" sets out that sales were not accounted for and that no reason has been given for these sales and an assessment had been raised, stating "My letter of 16 February 2015 refers". The assessment then goes on to set out a penalty, and then
30 proposes suspending the penalty on various conditions.

26. Mr Singh agreed that he had received and signed this on behalf of the appellant, although he states that he had been advised by his accountant that all was in order. However, Mr Singh had also stated that he had never been asked for further information and that he had not received a copy of the letter of 16 February 2015. I
35 consider that this penalty assessment should have prompted him to question his adviser as to that letter, and to question HMRC's request for further information.

27. Looking at the overall position, there is a clear impression that the appellant had left all matters in the hands of his accountants and did not question progress or make any enquiries as to how matters were going. Although difficulties in trading were

given as a reason for this lack of attention to the progress of the appeal, I consider that a prudent taxpayer would have made further enquiries as to the contents of the penalty assessment and would have raised questions as to progress at a minimum when changing to new accountants in July 2016 if not earlier.

- 5 28. Although there are clearly reasons for the delay, I do not consider that these constitute a “good explanation” for the delay in the sense intended by *Data Select*. I consider this weighs against the appellant in the balancing exercise.

Consequences of granting or refusing permission to make a late appeal

- 10 29. For HMRC, it was argued that costs would be involved in reopening the case and dealing with the matter. It was not however suggested that there would be any prejudice to HMRC in the sense that, as a result of the delay, there would be any difficulty in obtaining information or otherwise dealing with any points which might be raised as part of the appeal.

- 15 30. The appellant did not make any specific submissions as to the consequences for him of granting or refusing an appeal, although it is self-evident that if permission is refused, the appellant will have to pay the VAT assessed (£4,990) together with interest and will not have the opportunity to argue that his liability should be lower than this, or indeed that he has no further VAT liability over and above that reported on his VAT returns.

- 20 31. There have been different decisions in the First-Tier Tax Tribunal as to whether the merits of an appeal should be taken into account as part of the balancing exercise but it would clearly not be sensible for an application for leave to appeal out of time to become a mini-hearing of the substantive appeal. The merits of this case were not discussed and it is not apparent in this case that the prospects of any appeal
25 succeeding are very strong or very weak and I have therefore not taken into account the merits of any appeal.

Decision

32. I have considered the factors which need to be balanced in coming to a decision in accordance with the overriding objective of dealing with cases fairly and justly.

- 30 33. There is a clear purpose to the time limit for making appeals against HMRC's decisions. It is not in the interests of fairness and justice (in its widest sense and not just looking at the position of one particular taxpayer) to allow appeals to be made outside the statutory time limit unless there is some good reason for doing so.

- 35 34. The delay in this case was substantially over two years, rather than days or weeks. It was a serious and significant delay.

35. I agree with HMRC there was no good reason for the delay. The appellant made no attempt to check the progress of the appeal purported to have been made by the former accountants at any time, despite correspondence from HMRC which should

have made it clear that there were matters in the case of which the appellant was unaware, and despite two changes of accountant. I do not accept that trading difficulties amount to a sufficient reason for the failure to investigate progress over the course of more than two years.

5 36. Whilst I have sympathy for the appellant's position, my conclusion therefore is that, having weighed up all of the factors, the interests of fairness and justice would not be served by allowing the appellant to notify its appeals out of time. The application is therefore refused.

10 37. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.
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**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 5 MARCH 2018