TC06495

Appeal number: TC/2017/05663

VALUE ADDED TAX – notice of appeal not received by the Tribunal – whether deemed to be received by virtue of Section 7 of the Interpretation Act 1978 and, if so, the timing of the receipt – permission to appeal late – permission granted – consideration of which persons have rights of audience and the right to conduct litigation in the First-tier Tribunal

FIRST-TIER TRIBUNAL
TAX CHAMBER

PORTER & CO **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE
MS JANE SHILLAKER

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 30 April 2018

Mr P Long for the Appellant

Mr O Sanusi and Ms F Yusuf, officers of HM Revenue and Customs, for the Respondents

DECISION

1. This decision relates to an appeal made by the Appellant against the decision made by the Respondents in its review letter of 4 March 2014 to uphold the issue of VAT default surcharge notices and related surcharge liability extension notices in respect of the Appellant's VAT periods 05/13 and 11/13. Under Section 83G of the Value Added Tax Act 1994 (the "VATA"), if the Appellant wished to appeal against the conclusions set out in that letter, it was required to make that appeal within 30 days of the date of the letter. The Appellant was entitled to make an appeal against the conclusions set out in the letter after that date only with our permission.

2. The hearing to which this decision relates was concerned solely with the preliminary issues of:

> (a) whether, as it alleges to be the case, the Appellant made its appeal within the 30 day time limit for doing so – ie within 30 days of the date of the letter of 4 March 2014; and
>
> (b) if the Appellant is unable to establish that it made its appeal within that timeframe, whether we should give permission to the Appellant to make a late appeal.

3. If we find for the Appellant in respect of either of the above questions, then the Appellant's appeal in relation to the substantive issues can proceed and be determined at a subsequent hearing.

Preliminary issue

4. Before addressing the questions set out in paragraph 2 above, we should note that, at the start of the hearing, Mr Long made an application to the effect that the representatives of the Respondents who had attended the hearing – Mr Sanusi and Ms Yusuf – should be barred from participating in the proceedings before us on the basis that, unlike Mr Long himself, neither of them was an "authorised person" (as defined in Section 18 of the Legal Services Act 2007 (the "LSA 2007") or an "exempt person" (as defined in Section 19 of the LSA 2007). Mr Long submitted that the First-tier Tribunal was a "court", as defined in Section 207 of the LSA 2007, that each of the right of audience and the conduct of litigation before a court was a "reserved legal activity", as defined in Section 12(1) of, and Schedule 2 to, the LSA 2007 and that therefore, by virtue of Section 13 of the LSA 2007, such activities could be carried on only by "authorised persons" or "exempt persons".

5. Mr Long alleged that not only did this mean that a party to proceedings before the First-tier Tribunal that was not an individual (such as the Respondents or a body corporate) could not be represented by a person who was neither an "authorised person" nor an "exempt person" (in each case, as defined above) but also that no party to proceedings before the First-tier Tribunal could appoint a person who was neither an "authorised person" nor an "exempt person" (in each case, as defined above) as its formal representative under Rule 11 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). As that rule expressly permits a

party to proceedings before the First-tier Tribunal to appoint a representative "whether a legal representative or not" to represent that party, Mr Long submitted that Rule 11 of the Tribunal Rules was ultra vires to that extent.

6. We did not accede to Mr Long's application for the following reasons:

(a) the First-tier Tribunal is indeed a "court", as defined in Section 207 of the LSA 2007, for the purposes of the LSA 2007 because it was a "listed tribunal" in paragraph 25(1) of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007 (the "TCEA 2007") before that schedule was abolished by The Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013 (2013/2042) – see Section 207(1) of the LSA 2007;

(b) the First-tier Tribunal was created by Section 3 of the TCEA 2007. That section came into effect on 3 November 2008 pursuant to Section 148(5) of the TCEA 2007 and The Tribunals, Courts and Enforcement Act 2007 (Commencement No. 6 and Transitional Provisions) Order 2008 (2008/2696);

(c) procedure in the First-tier Tribunal is governed by Section 22 of, and Schedule 5 to, the TCEA. Those provisions came into effect on 19 September 2007 pursuant to Section 148(5) of the TCEA 2007 and The Tribunals, Courts and Enforcement Act 2007 (Commencement No. 1) Order 2007 (2007/2709);

(d) it is quite clear from those provisions that practice and procedure before the First-tier Tribunal is to be governed by the Tribunal Rules (to be made by the Tribunal Procedure Committee) and that the power to make the Tribunal Rules should be exercised with a view to securing that (inter alia) justice is done, the tribunal is accessible and fair, proceedings are handled quickly and efficiently and the rules are simple and simply expressed. In particular, paragraph 9 of Schedule 5 expressly provides that the Tribunal Rules may make provision conferring additional rights of audience before the First-tier Tribunal;

(e) Section 13 of, and Schedule 2 to, the LSA 2007 came into effect on 1 January 2010 pursuant to Section 211(2) of the LSA 2007 and The Legal Services Act 2007 (Commencement No. 6, Transitory, Transitional and Savings Provisions) Order 2009 (2009/3250);

(f) the day on which Section 13 of the LSA 2007 came into effect is referred to in various provisions of Schedule 2 to the LSA 2007, including paragraphs 2 and 3 of that schedule, as the "appointed day";

(g) immediately prior to 1 January 2010, when Section 13 of the LSA 2007 took effect, there were operative provisions in the Courts and Legal Services Act 1990 (the "CLSA") (see Sections 27 and 28 of the CLSA) that imposed similar restrictions to those set out in Section 13 of the LSA 2007. (Note that the definition of a "court" in Section 119(1) of the CLSA included the First-tier Tribunal because, from the date when the

First-tier Tribunal came into existence, it was a "listed tribunal" for, or for any of the purposes set out in, Schedule 7 to the TCEA 2007 and the definition of "court" in the CLSA was amended to that effect with effect from 1 November 2007 – see Section 48(1) of, and paragraph 15 of Schedule 8 to, the TCEA 2007 and The Tribunals, Courts and Enforcement Act 2007 (Commencement No. 1) Order 2007 (2007/2709)). However, each of those provisions contained an exclusion from the relevant restriction in circumstances where the relevant person had an entitlement to carry on the activity in question granted by or under any enactment or granted by the court in question – see Sections 27(2)(b) and (c) and Sections 28(2)(b) and (c) of the CLSA – and, as noted above, the TCEA 2007 and the Tribunal Rules did just that by containing no restriction to that effect;

(h) the above means that, immediately before 1 January 2010, when the limitation in Section 13 of the LSA 2007 took effect, no restriction was placed on the persons entitled to appear before or address the First-tier Tribunal, to call or examine witnesses in proceedings before the First-tier Tribunal or to conduct, in relation to proceedings before the First-tier Tribunal, any of the activities described in paragraph 3(1) of Schedule 2 to the LSA 2007;

(i) paragraph 2 of Schedule 2 to the LSA 2007 provides that the defined term "right of audience" "does not include a right to appear before or address a court, or to call or examine witnesses, in relation to any particular court or in relation to particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to exercise that right";

(j) similarly, paragraph 3 of Schedule 2 to the LSA 2007 provides that the defined term "conduct of litigation" "does not include any activity within paragraphs (a) to (c) of sub-paragraph [3](1), in relation to any particular court or in relation to any particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity"; and

(k) since, as at 1 January 2010, there was nothing to preclude a person who was neither an "authorised person" nor an "exempt person" from appearing before or addressing the First-tier Tribunal, calling or examining witnesses in proceedings before the First-tier Tribunal or conducting, in relation to proceedings before the First-tier Tribunal, any of the activities described in paragraph 3(1) of Schedule 2 to the LSA 2007, it follows that the restriction in Section 13 of the LSA 2007 does not apply to those activities to the extent that they relate to proceedings before the First-tier Tribunal.

7. For the above reasons, we dismissed Mr Long's application and allowed Mr Sanusi and Ms Yusuf to participate in the proceedings.

The notice of appeal

8. We then turned to consider the substantive issues in the proceedings before us – namely, the two questions set out in paragraph 2 above.

9. In dealing with the first of the questions mentioned in paragraph 2 above, we were presented with a notice of appeal to the Tribunal dated 2 April 2014. That notice contained an error in that, although section 1 of the notice correctly stated the name and address of the Appellant, in compliance with Rule 20 of the Tribunal Rules, it was signed in section 11 of the notice by a Mr Fuggle, the Appellant's accountant, who was in private practice on his own account. Mr Fuggle also ticked the box in that section stating that he was the Appellant. However, notwithstanding that error, we were satisfied that the relevant notice complied with the requirements of Rule 20 of the Tribunal Rules in that it contained the information required by Rule 20(2) and was accompanied by a copy of the Respondents' review letter of 4 March 2014, as required by Rule 20(3). We were therefore content to proceed on the basis that the relevant notice of appeal was valid.

10. Turning then to consider when the notice was received, the notice was dated 2 April 2014 and Mr Long alleged that it was sent to the Tribunal on that date. Unfortunately, the Tribunal has no record of receiving the notice on or around that date or indeed receiving a subsequent copy of the notice that Mr Long alleged that the Appellant sent to the Tribunal on 1 October 2014. It was not until 31 July 2017, when the Tribunal received a further letter from the Appellant, enclosing a copy of the notice, that the Tribunal recorded its receipt of the notice.

11. In support of the proposition that the Tribunal should be treated as having received the notice on or around 2 April 2014, Mr Long pointed us to Section 7 of the Interpretation Act 1978, which provides as follows:

"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

12. Section 98 of the VATA provides as follows:

"Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative."

13. It follows from the above that the VATA authorises a notice of appeal that may be given under Section 83G of that Act to be served by post and therefore that:

> (a) unless the contrary intention appears, service of the notice is deemed to have been effected by properly addressing, pre-paying and posting a letter containing the notice; and

(b) unless the contrary is proved, service of the notice is deemed to have been effected at the time when the letter containing the notice would be delivered in the ordinary course of post.

14. As no contrary intention appears in the VATA, as long as we are satisfied that the notice of appeal dated 2 April 2014 was in fact properly addressed, pre-paid and posted on that date ,we are bound to conclude that it was received by the Tribunal. To that end, we heard evidence from Mr Fuggle, who stated that he had prepared the notice of appeal and despatched it on 2 April 2014 by first class post to the address for the Tribunal set out in the Respondents' letter of 4 March 2014. He had not thought it necessary to send the notice by registered or recorded post but had retained a copy of the notice. Mr Fuggle also stated that he had despatched the further copy of the notice on 1 October 2014, under cover of his letter of the same date, and we noted that the address on that letter was the same address as that set out in the Respondents' letter of 4 March 2014.

15. In the light of Mr Fuggle's evidence, we have reached the conclusion that, on the balance of probabilities, the notice of appeal was sent by first class post to the correct address for the Tribunal on 2 April 2014 and therefore that it must be deemed by Section 7 of the Interpretation Act 1978 to have been received by the Tribunal.

16. As for the time at which it is deemed to have been received, unless the contrary is proved, that time is the time when it would have been delivered in the ordinary course of post. For a first class letter, the ordinary course of post is 2 working days after despatch – see the Practice Direction issued on 8 March 1985 by the Queen's Bench Division. So, in this case, as there has been no contrary evidence suggesting later receipt in respect of the posting on 2 April 2014, the notice of appeal must be deemed to have been received by the Tribunal on 4 April 2014, 2 working days after it was deemed to have been sent.

17. Section 83G of the VATA requires the notice of appeal to be made "within the period of 30 days beginning with the conclusion date" and the "conclusion date" is defined as "the date of the document notifying the conclusions of the review" (see Sections 83G(3)(b) and 83G(7) of the VATA). As outlined in paragraph [23] of the judgement of Chadwick LJ in the Court of Appeal decision in *Zoan v Rouamba* [2000] 1 WLR 1509, [2000] 2 All ER 620, where legislation sets out a period of time to run from a particular date, the date itself is not part of that period. So the first day of the 30 day period in this case was 5 March 2014, the day following the date of the Respondents' letter notifying the Appellant of its review conclusions.

18. This means that the 30 day period within which the notice of appeal was required by Section 83G(3)(b) of the VATA to be made ended on 3 April 2014. It follows that the notice of appeal in this case, which was deemed to be received by the Tribunal on 4 April 2014 as outlined above, was made one day outside the relevant time limit. We therefore answer the first question in paragraph 2 above by holding that the notice of appeal was not made within the time limit set out in Section 83G of the VATA.

19. That means that we need to consider whether we should give permission for the notice of appeal to be given late. To that end, we have considered the authorities dealing with the question of when permission to extend the time limit for allowing an appeal to be made should be given and, in particular, the two cases cited to us by the Respondents at the hearing – the Upper Tribunal decision in *Romasave (Property Services) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0254 (TCC) at paragraph [96] and the comments made by Judge Morgan in *Data Select Limited v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKUT 187 (TCC) at paragraph [37].

20. We have also noted that Rule 20(4) of the Tribunal Rules states as follows:

"If the notice of appeal is provided after the end of any period specified in an enactment referred to in [Rule 20(1)] but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal -

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

21. In this case, the relevant notice of appeal did not include a request for permission for an extension of time or contain any reasons for the delay in submitting the notice of appeal. However, we are entitled under Rule 7(2) of the Tribunal Rules to waive those requirements and to give permission. In considering whether to do so, we are cognizant of the fact that the date on which the notice of appeal is deemed to have been received by the Tribunal is only 1 day after the end of the specified period. Weighing up the potential prejudice to the Respondents of giving permission for the late notice against the potential prejudice to the Appellant of our refusing to give that permission, and taking account of the fact that the delay was so brief, we are inclined to give permission for the late notice in this case.

22. That determination is sufficient to dispose of the matter which is at issue in these proceedings. The parties can now proceed to a hearing in relation to the substantive issues involved the appeal.

23. However, for completeness, we would just record that, had we not concluded that the original notice of appeal of 2 April 2014 was received by the Tribunal on 4 April 2014, and instead concluded that the notice of appeal was not given until 31 July 2017, when the Tribunal actually received (and acknowledged) the notice, we would not have been inclined to give permission for late notice of the appeal to be given. This is because, if we had concluded that the notice of appeal was not received by the Tribunal until 31 July 2017, more than three years would have expired between the date of the Respondents' letter notifying the Appellant of the conclusions of their review and the date when the Tribunal received the Appellant's notice of appeal. This is a substantial period of time and, in light of the case law cited above, we consider that it would be too long to justify the granting of permission to make a late appeal.

24. In particular, in view of the fact that section 14 of the notice of appeal expressly informs the relevant appellant to expect to hear from the Tribunal with information on how the appeal will proceed, we do not think that, when the Appellant heard nothing in response to its initial notice of appeal of 2 April 2014 and subsequent letter of 1 October 2014, it was justified in its assumption that its appeal had succeeded. Having said that, we were surprised to hear that no communications had been received by the Appellant from the Respondents in relation to the matter over that three year period. However, Mr Long said that that had been the case and Mr Sanusi and Ms Yusuf produced no evidence to the contrary.

25. 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 Rules. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 10 MAY 2018