



Neutral Citation: [2023] UKFTT 00748 (TC)

Case Number: TC08928

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Bradford

Appeal reference: TC/2022/12087

VAT – error correction notice – appeal out of time – rejection letter not received – delay over three years – wider ongoing relevant litigation – whether permission should be granted - no

Heard on: 18 April 2023

Judgment date: 07 September 2023

Before

TRIBUNAL JUDGE ANNE FAIRPO

Between

BULL BRAND LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Allen, counsel

For the Respondents: Mr Mackley, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

Introduction

1. The appellant applied for permission to appeal out of time in respect of HMRC's rejection of an error correction notice (ECN) submitted on 29 October 2018.

Background and evidence

2. This appeal relates indirectly to appeals by other businesses as to the correct rate of VAT for e-cigarettes (whether this should be 5% rather than 20%). The appellant is a wholesale supplier of these products (and tobacco products) and, in August 2018, was contacted by a major customer who advised that they were intending to enter into a dispute with HMRC as to the correct VAT rate. This decision was delayed whilst establishing the current status of that wider litigation, as the appellant had made reference to an appeal which took some time to locate.

3. The customer had informed the appellant in order to ensure that the appellant had the opportunity to file an ECN to protect its position in the event that the customer was successful in its dispute with HMRC and sought to recover overpaid VAT from the appellant. The customer also provided a draft letter for the appellant to use in submitting such a claim, and some general background as to the process. This general background did not include any information about the need to appeal to HMRC.

4. The appellant submitted the ECN in October 2018, having taken some time to collect the necessary information. The appellant also advised the suppliers from which it purchased these products that they should similarly file an ECN as the appellant would seek to recover any overpaid VAT in the same way.

5. The amount claimed in the ECN was approximately £273,000. Mr O'Donovan, director for the appellant, confirmed that this was a very substantial amount for the company and was considerably in excess of net annual profits.

6. HMRC sent a letter rejecting the ECN on 10 December 2018. The appellant's evidence is that they did not receive this letter and heard nothing from HMRC regarding the claim. Mr O'Donovan could not recall any problems with the post in December 2018, having checked within the business.

7. The appellant did not expect to hear anything as they had assumed that their claim was stood behind that of their customer with others claiming in the same way. They believed they had done all that was necessary and were waiting to see how the lead appeals turned out. As the ECN was claiming a repayment, rather than disputing the need to make a payment, they did not consider that there would be any need for HMRC to follow up on the matter.

8. Mr O'Donovan stated that, if they had received the letter, they would have taken action to appeal as advised in the letter. They had taken their accountants' advice when filing the ECN and the accountant did not say anything to them about the claim afterwards, or follow up. The information from the customer had also not said anything about the need to appeal.

9. On 27 May 2022 HMRC wrote to the appellant to advise that they were approaching the four year limit for any further claims of a similar nature and inviting them to make a protective claim. The letter also indicated that any ECN would be rejected but that any appeal could be submitted in respect of that rejection. The letter also referred to the rejection of the previous ECN. The appellant's evidence was that this was the first time they had been aware that the ECN had been rejected.

10. The appellant sought advice from another accountant, who requested a copy of the rejection letter of December 2018 from HMRC. This was provided in July 2022. Mr O'Donovan confirmed that this was the first time he had seen the letter.

Discussion

11. The parties agreed that the three stage process set out by the Upper Tribunal in *Martland* [2018] UKUT 0178 (TCC) was the appropriate approach to be taken.

12. I note that the starting point, set out in *Martland* at [29], is that

“...the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission.”

13. The Upper Tribunal at [44] also notes that “the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be”.

The length of the delay

14. The appellant did not dispute that the appeal was made more than three years out of time and that the delay should be regarded as serious and significant.

The reasons for the delay

15. The appellant did not receive HMRC letter of 10 December 2018, rejecting the ECN claim. The appellant assumed that their claim was stayed behind others, as they were aware that their customer (amongst others) was in dispute with HMRC over the correct VAT treatment of the products. They were therefore not expecting to receive a response until that wider dispute was resolved. As the appellant had not previously been involved with any dispute with HMRC they were unaware that they should have received a response from HMRC and were unaware that there would be a need to appeal to the Tribunal before receiving the HMRC letter in May 2022.

All the circumstances

16. The appellants contended that the following circumstances should be taken into account, accepting that deadlines should be respected and that there is a clear need for finality in litigation:

- (1) they would have made an appeal in time if they had received the December 2018 letter from HMRC;
- (2) such an appeal would have been stood over behind the lead case in the wider litigation as to the correct VAT rate, which has not yet been heard;
- (3) the appellant acted promptly once they received the May 2022 letter from HMRC;
- (4) if the appellant is allowed to appeal out of time, and the wider dispute is resolved in favour of the taxpayers, the appellant will not receive a windfall as any amounts received would have to be paid on to customers;
- (5) on the contrary, if the appellant is not allowed to appeal out of time they will have to make any such payments on to customers from their own funds. This would have a substantial impact on the business as it is considerably more than the annual profits of the business;
- (6) HMRC would not be prejudiced as the litigation regarding the appropriate VAT rate is ongoing and the appeal, if allowed, would be stayed in the same way that it would have been if made on time. No further resources would need to be expended by HMRC.

The issue is an argument of law rather than fact, so that there is no question of evidence to be affected by the passage of time;

(7) in May 2022 HMRC invited the appellant to submit a further claim and so clearly did not consider the matter to be closed.

17. HMRC contended that:

(1) the appellant had failed to exercise appropriate due diligence with regard to their claim, as they had failed to follow up any progress on that claim for over three years. Even believing that their claim was stayed, they submitted that a reasonably prudent taxpayer would have expected to receive some response and would have checked with HMRC when no response was received;

(2) the appellant should have checked what the process was to ensure that their claim was stayed behind others, rather than simply assuming that it would so be stayed. If they had made such checks, they would have realised that they needed an appealable decision in order to appeal to the Tribunal and have the matter stayed;

(3) HMRC should be entitled to consider the matter closed, having not had any contact from the appellant with regard to this claim in over three years;

(4) if the appellant is allowed to appeal out of time, HMRC will be required to divert resources to consider the appeal, to the prejudice of other taxpayers. The deadlines are set by Parliament to provide finality in litigation, to ensure that litigation is conducted efficiently and at proportionate cost;

(5) although HMRC acknowledged that the appellant might suffer financial consequences if the appeal is not allowed to proceed out of time, the Upper Tribunal in *Katib* [2019] UKUT 0189 had made it clear that this was a common feature in appeals and should not be given significant weight. HMRC further submitted that a reasonable taxpayer, having made a claim for such an amount and being aware of the importance of being able to receive such a payment, would have followed up when they did not receive a response to the claim.

18. HMRC's notice of objection also made a number of other points which I have disregarded as they were clearly included in error, perhaps as a result of copying text from another matter, as they referred to the appellant's claim having been settled in 2011 and to the latest date for claim being 2015. However, this is not a matter of appealing a protective assessment by HMRC. Further, the ECN was not made until 2018 and the claim was rejected, not settled. The claim was also not rejected for being out of time but, instead, because HMRC did not accept the legal position taken in making the claim. There was also reference to records having been destroyed as the periods of claim dated back seventeen years. Given that the earliest period of the claim was in 2014, it is possible that HMRC might have destroyed some records for the earlier periods but, given the inconsistency, I have not given this any particular weight for or against granting permission in reaching the decision below.

Decision

19. The delay is clearly significant and serious. The reason for the failure is not disputed, as HMRC did not challenge the appellant's evidence that they did not receive the letter of December 2018 but, equally, the appellant did not contend that the letter was not sent. On balance, I consider it likely that the correspondence was lost in the post.

20. In evaluating all of the circumstances, I note in particular the following:

(1) the starting point, as set out in *Martland*, is that permission should not be granted unless I am satisfied on balance that it should be: and

(2) there is a principle that litigation should be finalised as expeditiously as is reasonably possible, as also noted in *Martland*. HMRC are entitled to expect that an appellant will appeal within the statutory time limits and so, if no appeal is made, that the matter has become final.

21. As noted above, there was no particular dispute as to the reason for the failure and Mr O'Donovan's evidence that the December 2018 rejection letter was not received was not challenged. It is not particularly surprising that the appeal was therefore not brought within the 30 day time limit.

22. However, I do not consider that the failure to receive that letter amounts to a good reason for the significant delay in appealing. I consider that a reasonable taxpayer would have made enquiries of HMRC or an adviser when it had not received *any* response to the claim and so would have realised sooner that the claim had been rejected and should be appealed. They would not have assumed it reasonable to hear nothing from HMRC with regard to the claim for over three years. This is particularly the case given the significant value of the claim in relation to the general finances of the business.

23. The appellant's lack of awareness of the process and Tribunal appeals does not assist. I consider that a reasonable taxpayer would, particularly given the claim value, have made enquiries as to the process and the next steps which they could expect to take place. I note that the customer correspondence which alerted the appellant to the need to make a claim does not make reference to the need to appeal; however, that letter does not purport to provide any information as to the process after the claim is made. It is, in my view, intended to alert the appellant to the need to make a protective claim but does not provide a step by step guide as to how the claim should be expected to progress.

24. I note the potential prejudice to the appellant of the financial consequences if the wider litigation is resolved in favour of the taxpayer. However, there are often financial consequences of a failure to appeal in time and I do not consider that these in this case outweigh the significant delay and the lack of a good reason for the failure throughout the period of delay.

25. I note also that the prejudice to HMRC, if I were to grant permission, would arguably be relatively limited given the ongoing litigation and the likelihood that the appeal would be stayed without any substantial action being required. Nevertheless, time limits are set for a reason and the fact that there is wider litigation involved behind which an appeal could be stayed is not, in my view, sufficient to displace the need to respect such time limits in circumstances where there is no good reason for a significant delay. The invitation to the appellant to submit a further claim is not reason to consider that the previous claim should not be regarded as closed as any such further claim would be for later VAT periods.

26. In evaluating the circumstances, I have not put any significant weight on the merits of the appeal (either for or against) as this is an area of ongoing wider litigation which indicates that the grounds of appeal may not be without merit but, equally, cannot be said to be unusually strong.

Conclusion

27. Taking all of the circumstances together, in the light of the very substantial delay and given that I do not consider that the appellant has established that there was a good reason for the delay, I do not consider that the potential financial consequences for the appellant and the limited prejudice to HMRC resources is sufficient to displace the starting point that time limits should be respected and that permission to appeal out of time should not be granted.

28. The application is therefore refused.

Right to apply for permission to appeal

29. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 07th SEPTEMBER 2023