TC01404

Appeal number: TC/2011/04113

Application for permission to appeal out of time – penalty for taking in and using rebated heavy oil – factors to be taken into account when considering "late appeal" applications – no longer governed by Procedure Rules due to November 2010 change of law – CPRs not relevant – no general "exceptional reasons" requirement – factors taken into account summarised – permission refused

FIRST-TIER TRIBUNAL

TAX

ASTON MARKLAND **Applicant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (EXCISE DUTY) **Respondents**

TRIBUNAL: **KEVIN POOLE (TRIBUNAL JUDGE)**
GORDON MARJORAM FCA

Sitting in public in Birmingham on 11 August 2011

The Applicant appeared in person

James Puzey, instructed by HMRC Solicitor's Office for the Respondents

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DECISION

Introduction

1. This application is for permission to appeal out of time against a decision of HMRC to impose two civil penalties of £250 each in connection with the taking in and using of rebated fuel in a road vehicle.

2. It brings into question the factors to be considered and general approach to be taken in all cases where the Tribunal has an apparently unfettered discretion to permit late appeals to be brought.

The Facts

3. On 15 October 2010 the Applicant was driving his Volkswagen pickup vehicle when he was stopped by HMRC officers to check the fuel in his tank. It was found to contain kerosene. The Applicant was unable to explain this to the satisfaction of the HMRC officers.

4. On 28 October 2010 HMRC sent to the Applicant a notification of the two penalties being imposed on him. They were £250 each for taking in and using rebated heavy oil in a road vehicle. In that letter they informed him that if he did not accept the decision to impose the penalties, he could either ask for it to be independently reviewed within HMRC or he could appeal to an independent tribunal, in either case within 30 days of 28 October 2010.

5. On 1 November 2010, the Applicant wrote to HMRC. In that letter, he said "I am appealing against your fine where you say I have used rebated heavy oil."

6. HMRC took this to be a request for an independent review of the decision within HMRC. On 8 November 2010, they acknowledged receipt of the Applicant's letter and told him they were subject to a 45 day time limit to complete their review. They identified the name and business address of the officer who would be carrying out the review.

7. On 26 November 2010, the review officer wrote to the Applicant, maintaining the original decision to impose the penalties. At the end of that letter, the following appeared:

> "**Appealing Against My Decision**
>
> If you wish to contest my decision you may now, within 30 days of the date of this letter, lodge an appeal with a Tribunal that is independent of HM Revenue & Customs. An appeal should be made on the appropriate forms, available with an explanatory leaflet from the Tribunals Service and should include a copy of this letter. The address of the Tribunals Service is:
>
> The Tribunals Service,
> Tax, 2nd Floor,

Administrative Support Centre,
54 Hagley Road,
Birmingham,
B16 8PE

Telephone number: 0845 223 8080

e-mail address taxappeals@tribunals.gsi.gov.uk

Website: http://www.tribunals.gov.uk/tax/Common/ContactUs.htm

Restoration and/or payment of a restoration fee or penalty do not affect your right to appeal subsequently against my decision."

8. Up to this point, there was no disagreement on the sequence of events. HMRC's version (which we accept) was that the next thing they heard was the receipt at their Maidstone office on 19 May 2011 of an unsigned letter, apparently from the Applicant, dated 6 December 2010 which was endorsed in manuscript at the top "copy of letter already sent". That letter read:

"Your reference RR/114/10/SPCK

Dear Sir/Madam

I have received your letter and noted the contents very carefully.

I am still appealing against the decision because I cannot understand how a qualified MOT officer inspected my vehicle and did everything possible to it on the day but still gave me the key back to proceed on my way if there was rebated fuel in the vehicle.

In your letter you say that I filled the vehicle out of the drum, No I did not fill the vehicle out of the drum the drum was on the back of my vehicle. The Revenue Officer took the drum away still full.

So I would be grateful if you would look at this matter again.

Yours faithfully

A Markland"

9. On 19 May 2011, HMRC wrote back to the Applicant, disagreeing with his account of the facts but also pointing out that the Applicant was out of time for appealing against HMRC's decision and that if he wished to apply to the Tribunals Service for his appeal to be considered out of time, he should do so straight away. They repeated the contact details for this Tribunal.

10. The Applicant then applied to the Tribunal for his appeal to be considered late, his application being received on 1 June 2011.

11. When asked at the hearing why he had delayed so long in replying to HMRC's review letter dated 26 November 2011, the Applicant said: "Anyone can only respond to a letter if they receive it." He denied having received the letter dated 26 November 2010. However, he also asserted that he had sent the letter dated 6 December 2010 on that date. He claimed that he had rung up HMRC to chase up the outcome of the review and the gentleman he had spoken to had told him of the outcome, which was why he wrote the letter. He said he was able to include the reference of the HMRC review letter because it had been given to him over the telephone. He was not able to explain why his own letter dated 6 December 2010 started with the words "I have received your letter and noted the contents very carefully" if he had not, as he now claimed, received that letter.

12. He had no other explanation (apart from his assertion that he had not received the 26 November 2010 letter) for his delay in bringing his appeal.

13. HMRC had no record of any other conversations with the Applicant following the submission of his original appeal on 1 November 2010.

14. We find that the Appellant clearly did receive HMRC's letter dated 26 November 2010 and replied to it by a letter dated 6 December 2010 which he did not in fact send to HMRC until May 2011.

15. Whilst we were not primarily concerned with the merits of the Applicant's substantive grounds of appeal, we note that he does not appear to dispute to any significant extent the main facts of the case. His main argument appears to be that a senior officer would not have given back his keys and allowed him to drive away if the fuel in his tank had truly been contaminated with rebated fuel. He admitted to the officers who stopped him that he had bought cheap fuel from an unidentified private source and that he had put that fuel in his tank. We considered that the grounds of appeal put forward did not disclose an obvious possible "reasonable excuse" that would clearly deserve full consideration at an appeal hearing.

The law relating to imposition of the penalties and subsequent review

16. Section 12 of the Hydrocarbon Oil Duties Act 1979 ("HODA 1979") provided at all material times as follows:

> "(2) No heavy oil on whose delivery for home use rebate has been allowed (whether under section 11 above or section 13ZA or 13AA(1) below) shall—
>
> (a) be used as fuel for a road vehicle; or
>
> (b) be taken into a road vehicle as fuel,
>
> unless an amount equal to the amount for the time being allowable in respect of rebate on like oil has been paid to the Commissioners in accordance with regulations made under section 24(1) below for the purposes of this section."

17. Section 13(1) of the HODA 1979 provided at all material times as follows:

> (1) Where any person—
>
> (a) uses heavy oil in contravention of section 12(2) above; or
>
> (b) is liable for heavy oil being taken into a road vehicle in contravention of that subsection,
>
> his use of the oil or his becoming so liable (or, where his conduct includes both, each of them) shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties)".

18. Section 9(2) Finance Act 1994 provided at all material times as follows:

> "(2) Any person to whose conduct this section applies shall be liable—
>
> (a) in the case of conduct in relation to which provision is made by subsection (4) below, or by or under any other enactment, for the penalty attracted to be calculated by reference to an amount of, or an amount payable on account of, any duty of excise, to a penalty of whichever is the greater of 5 per cent of that amount and £250; and
>
> (b) in any other case, to a penalty of £250."

19. Section 13(1) Finance Act 1994 provided at all material times as follows:

> "(1) Where any person is liable to a penalty under this Chapter, the Commissioners may assess the amount due by way of penalty and notify that person, or his representative, accordingly."

20. Section 15A(1) Finance Act 1994 provided at all material times as follows:

> "(1) If HMRC notify a person (P) of a relevant decision by HMRC, HMRC must at the same time, by notice to P, offer P a review of the decision."

21. Section 13A(2)(h) Finance Act 1994 provided at all material times as follows:

> "(2) A reference to a relevant decision is a reference to any of the following decisions—
>
> ....
>
> (h) so much of any decision by HMRC that a person is liable to any penalty under any of the provisions of this Chapter, or as to the amount of his liability, as is contained in any assessment under section 13 above; "

22. Section 15C(1) Finance Act 1994 at all material times provided as follows:

"(1) HMRC must review a decision if—

(a) they have offered a review of the decision under section 15A, and

(b) P notifies HMRC of acceptance of the offer within 30 days beginning with the date of the document containing the notification of the offer of the review."

23. Section 16 Finance Act 1994, so far as relevant, provided at all material times as follows:

"....

(1C) In a case where HMRC are required to undertake a review under section 15C—

(a) an appeal may not be made until the conclusion date, and

(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

.....

(1F) An appeal may be made after the end of the period specified in subsection ..... (1C)(b) ..... if the appeal tribunal gives permission to do so.

(1G) In this section "conclusion date" means the date of the document notifying the conclusion of the review.

....."

24. "The appeal tribunal" for these purposes is the First-tier Tribunal – i.e. this Tribunal – see section 7 Finance Act 1994.

Lawfulness of the procedure followed to date

25. The conduct for which the penalties in this appeal were imposed was not "conduct in relation to which provision is made by [Finance Act 1994, section 9] subsection (4)". We are here concerned with fixed penalties of £250 as referred to in section 9(2)(b) Finance Act 1994.

26. HMRC's decision to impose penalties under section 9(2)(b) Finance Act 1994 in respect of the Applicant's conduct in breach of section 12 HODA 1979 is a "relevant decision" by virtue of section 13A(2)(h) Finance Act 1994.

27. As such, HMRC were required by section 15A(1) Finance Act 1994 to offer a review of their original decision at the time they sent it to the Applicant.

28. HMRC's letter dated 15 October 2010 contained the necessary offer of a review.

29. I agree with HMRC's view that the Applicant's letter dated 1 November 2010 amounted to an acceptance of that offer, when he said "I am appealing against your fine", even though he did not send the letter to the address that was specified in HMRC's earlier letter, and referred to an appeal rather than a review.

30. As a result of the Applicant's acceptance of HMRC's offer of a review, HMRC became obliged under section 15C(1) Finance Act 1994 to carry out a review of their original decision issued on 15 October 2010.

31. HMRC having carried out the review and provided their review letter within the statutory timetable laid down in section 15F Finance Act 1994, the statutory right of appeal is governed by section 16 Finance Act 1994.

32. The time limit for applying to the Tribunal was therefore 30 days beginning with 26 November 2010, i.e. 26 December 2010. The application was actually received by the Tribunal on 1 June 2011, more than five months late.

33. The review letter dated 26 November 2010 from HMRC wrongly stated that the review had been carried out under sections 14 and 15 of (and schedule 5 to) the Finance Act 1994, but I am satisfied that the review that was in fact carried out complied with section 15F of that Act. I therefore consider that nothing turns on the incorrect statutory references contained in HMRC's letter dated 26 November 2010 and, in particular, they do not invalidate the review itself.

34. The question that then arises is whether we should exercise our discretion to give permission for the appeal to proceed, even though it was clearly made out of time.

Discussion of the law relating to the exercise of the Tribunal's discretion

Preliminary points

35. There is no guidance contained in the legislation as to the criteria that the Tribunal should apply when considering whether to give permission for a late appeal. Mr Puzey referred us to the decision of Sir Stephen Oliver QC in *GSM Worldwide Limited v HMRC* [TC/2010/07222, hearing 22 December 2010], in which he said (in the context of a similar provision contained in section 83G(3) Value Added Tax Act 1994):

> "To allow the application I would have to be satisfied that there were exceptional reasons that, consistent with the obligation to deal fairly and justly with those parties, required me to extend what would otherwise be the statutory 30 days for appealing. I am unable to think of any good reason that accounts for GSM's delay in lodging the appeal notice. For those reasons I dismiss the application."

36. When a discretion of this nature is conferred on a tribunal "at large", there is no authoritative guidance as to the way in which a Tribunal should go about exercising it. Mr Puzey sought to persuade us that there were no "exceptional reasons" in the present case, and that we should therefore follow *GSM Worldwide* and reject the application.

37. In addition to the *GSM Worldwide* case put before us by Mr Puzey, we have also considered the case of *Ogedegbe v HMRC* Tax Tribunal reference LON/2009/0200, in which Sir Stephen Oliver QC said:

> "While this Tribunal has got power to extend the time for making an appeal, this will only be granted exceptionally."

38. We note that in that case, the Tribunal also considered the Appellant's case to have very little prospect of succeeding.

39. We also considered the case of *Pledger v HMRC* [2010] UKFTT 342 (TC), in which the Appellant had "deliberately embarked upon a course of delay and obstruction" and the Tribunal declined to exercise its discretion to permit a late appeal after a review of the applicable law.

Relevance of the Tribunal's Procedure Rules

40. The Tribunal has a general obligation to give effect to the overriding objective, expressed in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Procedure Rules"), to deal with cases fairly and justly when it "exercises any power under these Rules" or "interprets any rule or practice direction" (rules 2(3)(a) and (b)). This general obligation must be borne in mind when the Tribunal exercises its case management power under rule 5 of the Procedure Rules (rule 2(3)(a)).

41. Rule 5(3) of the Procedure Rules provides:

> "(3).... the Tribunal may by direction-
>
> (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;
>
> ...."

42. As drafted, we take the view that rule 5 has no application in relation to the question of whether permission for a late appeal should be granted – it is headed "Case management powers", rule 5(1) confers a power on the Tribunal to "regulate its own procedure", and rule 5(2) authorises the Tribunal to "give a direction in relation to the conduct or disposal of proceedings". Rule 5 as a whole therefore appears on its face to be concerned only with how a case is dealt with once an appeal has actually been validly started, rather than whether a late appeal should be allowed to start at all.

43. Under the original version of rule 20 of the Procedure Rules (headed "Starting appeal proceedings"), it was made clear that rule 5(3) of the Procedure Rules (and, with it, the obligations in Rule 2) did however apply to govern the exercise of the Tribunal's discretion in "late appeal" cases. For the detail, see the analysis in paragraphs [46] to [48] of *Pledger*.

44. Since the release of the decision in *Pledger* however, rule 20 of the Procedure Rules has been amended by SI 2010/2653 (with effect from 29 November 2010). It now states:

> "(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.
>
> ....
>
> (4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (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 notice of appeal."

45. The revisions to the wording of rule 20 clearly indicate an intention on the part of the draftsman to "decouple" the exercise of judicial discretion in such cases from the provisions of rule 5(3) (and with it, rule 2) of the Procedure Rules. Instead of referring specifically to rule 5(3) of the Procedure Rules as being relevant in such cases (as the original version of rule 20 did), the new version of rule 20 does not mention rule 5(3) at all. This means that rule 5(3) can now be safely confined to more routine case management matters, as always appeared to be its intention if rule 20 were not considered.

46. To summarise, therefore:

> (1) the position up to 28 November 2010 was that the apparent statutory discretion under section 16 Finance Act 1994 to permit notice of appeal to be given out of time (which was amended to its current "wide ranging" form by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, which was made on 18 January 2009 and came into force on 1 April 2009) was in legal terms overlaid by the "extension of time" provisions of the Procedure Rules (which were made on 5 February 2009 and also came into force on 1 April 2009) and therefore had to be applied in accordance with the overriding objective set out in rule 2 of the Procedure Rules; but

(2) With effect from 29 November 2010, there is no such overlay. The statutory provisions allowing the Tribunal to give permission for late appeals must now be interpreted without regard to rule 5(3) (and therefore rule 2) of the Procedure Rules.

Relevance of the Civil Procedure Rules 1998

47. We also considered the case of *Leilunga v HMRC* [2010] UKFTT 229 (TC), in which a previous Tribunal referred to the overriding objective mentioned above, but also took into account the provisions of rule 3.9(1) of the Civil Procedure Rules 1998 ("the CPR's"). We decline to follow that approach. In *Pledger* it was made clear that the Tribunal was only required to consider rules 5(3) and 2 of its own Procedure Rules; Parliament has seen fit to change the Procedure Rules in response to the *Pledger* decision so that this is no longer the case, but it has not taken the opportunity (which would have been quite straightforward) to direct the Tribunal to the CPR's instead. It must therefore be inferred that Parliament intends the Tribunal to exercise its discretion "at large", with no fetter on its discretion beyond the general requirement to act judicially in identifying and considering the factors which are believed to be relevant in each individual case.

The exercise of the Tribunal's discretion to give permission for late notice of appeal – approach adopted by the Tribunal

48. We note that in this particular case, whilst the Applicant's right of appeal arose on 26 November 2010 (shortly before the change to the Procedure Rules referred to above took effect), the time limit for making his appeal expired on 26 December 2010 and the Applicant actually submitted his appeal on 1 June 2011 (both after the change took effect). We therefore consider that we should apply the "new rules" in our consideration of his application. We would however observe that our conclusion would not have differed if we had instead applied the "old rules".

49. In the light of the above, we have adopted the approach that our discretion in permitting the present appeal to proceed "out of time" is to be exercised judicially after due consideration of the factors which we consider relevant, but without specific regard to any of the factors listed in rule 2(2) of the Procedure Rules or the CPR's. In this context, we consider it helpful (but not determinative) to look at the factors which other tribunals have considered relevant.

50. We take the comments of Sir Stephen Oliver QC in *GSM Worldwide* and *Ogedebge* to be emphasising the general importance of observing time limits laid down by statute. We do not however accept that permission to appeal out of time should only be given "exceptionally" or where there are "exceptional reasons" to extend time – if Parliament had intended that to be the case, it would have been easy enough to say so in framing (or in subsequently amending) the legislation.

51. Rather, we interpret the comments in those two cases as meaning that it should be the exception rather than the rule that extensions of time are granted (i.e. the starting position should be that no extension will be granted unless the Tribunal sees good reason to do so); and in deciding whether or not to grant an extension, the

Tribunal may (as it did in *Ogedebge*) take into account its initial assessment of the strength of the Applicant's substantive appeal and (as it did in *Pledger*) the reasons for the delay and the conduct of the parties generally. We would add that the length of the delay is also an obvious factor to be taken into account – all other things being equal, a Tribunal is likely to view a very short delay more sympathetically than a delay of months or years.

52. We do not consider that a consideration of the prejudice caused to the respective parties by granting or refusing permission will generally be a useful exercise – of necessity, an applicant will always be prejudiced by losing his right of appeal (and, unless the delay is a long one, HMRC will be little prejudiced by the granting of permission) but we do not consider that this factor on its own provides support for routinely overriding the statutory time limits which Parliament has laid down.

Decision

53. We are conscious that if we refuse permission to appeal out of time, then we will effectively be denying the Applicant the opportunity to appeal. However, this will be true in every application for permission to appeal out of time, and we share the general sentiment expressed in *Ogedebge* and *GSM Worldwide* that permission to appeal out of time should be the exception rather than the rule.

54. We have formed a general impression of the strength of the Applicant's grounds of appeal, and we find that they are weak in any event.

55. We also find that the Applicant was not being truthful when he tried to convince us that he had not received HMRC's letter dated 26 November 2010.

56. The Applicant gave no other reason for the delay of nearly five months after the statutory time limit for bringing his appeal.

57. We therefore see nothing in the circumstances of the case (including the behaviour of the Applicant, the strength of his case or the length of (or reasons for) the delay in submitting his appeal) which persuades us that it is appropriate to make an exception to the general rule by granting permission. We therefore decline to exercise our discretion to permit the appeal to proceed despite being notified out of time. The application is accordingly dismissed.

58. 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.

KEVIN POOLE
TRIBUNAL JUDGE
RELEASE DATE: 22 AUGUST 2011