TC01480

Appeal number TC/2010/05212
TC/2010/05589

APPLICATION FOR LEAVE TO APPEAL OUT OF TIME - whether reasonable excuse - seven months delay –appellant aware of demands but not of liability- facts unclear – permission granted.

FIRST-TIER TRIBUNAL

TAX

MATTHEW RICHARD GRIFFITHS **Appellant**

- and -

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

TRIBUNAL: DAVID S PORTER (TRIBUNAL JUDGE)

Sitting in public at Alexandra House, Manchester on 16 and 17 August 2011

Nigel Gibbon for the Appellant

Jonathan Cannan, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant (Mr Griffiths) applies to the Tribunal for leave to appeal out of time the two post-clearance C18 demands dated 17 September 2009 in the sums of £144,365 and £15,178 respectively. The appeal should have been lodged by 30 October 2009, but was not in fact raised until 27 May 2010 some seven months later. Mr Griffiths says that he understood the liability related to American Pick Up Company Limited (the Company), which was in liquidation and that he had been told that the demands were not personal to him. He also said that he had not received any correspondence subsequent to the liquidation of the Company. The Respondents (HMRC) say that Mr Griffiths was well aware of the demands as he had received them at the offices previously belonging to the Company, and in any event occupied by his other company European Left Hand Drive Limited (European). He only chose to appeal the matter when the bailiffs attended.

2. Mr Jonathan Cannan (Mr Cannan), of counsel, appeared for HMRC and called Mrs Michelle Brierley and Ms Tracy Mary Clowry, who gave evidence under oath. He also provided the Tribunal with agreed bundles. Mr Nigel Gibbon (Mr Gibbon) appeared for Mr Griffiths and called Alan Henderson and Mr Griffiths' both of whom gave evidence under oath.

3. I have been referred to the following cases:

- TC 00656 [2010] UKFTT 374 (TC) *Lighthouse Technologies Limited v HNRC.*
- TC 00624 [2010] UKFTT 342 (TC) *David C Pledger v HMRC.*
- TC 00592 [2010] UKFTT 305 (TC) *B Fairall Limited (in liquidation) v HMRC.*
- TC 00476 [2010] UKFTT 172 (TC) *Alasdair Macdonald v HMRC.*
- 19859 *The Medical House PC v HMRC*
- A2/2001/2845 [2002] EWCA Civ 645: *Michael Patrick Sayers v Clarke Walker (a firm)*
- TC 00714 *Former North Wilshire District Council*

The facts

4. The only facts with which I am concerned are those giving rise to this appeal and the actions taken by Mr Griffiths during the seven months since he should have lodged an appeal. The Company went into a creditors' voluntary liquidation on 15 October 2008, arising from a meeting with Mr Griffiths and the liquidators on 23 September when Mark Beesley of Beesley & Company was appointed liquidator. Ms Clowry was the Licensed Insolvency Practitioner at Beesley & Company dealing with

the Company's liquidation. At the date of the liquidation the Company had a VAT liability of £22,833 and arrears of custom charges of £144,365 and £15,179.56. Ms Clowry arranged for all mail relating to the Company to be re-directed to her office from 11 November 2008. A post-clearance demand for £147,168.48 was issued by HMRC on 27 April 2009 to Beesley & Company, the letter was sent to Mr Griffiths. As a result Mr Griffiths went to see Mr Henderson in May 2009.

5. Mr Henderson of Omnis Customs Consultancy, gave evidence under oath. He stated that Mr Griffiths had come to see him in May 2009 because he had received a C18 post-clearance demand in the sum of £147,168.48. The post-clearance demand referred to some 51 vehicles. The list reveals the dates that the vehicles were received by the Company, the last being at the end of August 2008, but HMRC were unable to advise when the goods left the premises giving rise to the post-clearance demands. Although the form had been sent to 3-5 Clark Way Mr Henderson understood that the claim was personal to Mr Griffiths and he wrote to HMRC asking for a review. On 8 June 2009 Mrs Jan Pond telephoned Omnis to speak to him but, as he was engaged, she spoke to Mr Gibbon, his colleague. Mrs Pond advised Mr Gibbon of Omnis that, as the demand was against the company, Mr Griffiths had no appropriate authority to request a review. Mr Gibbon wrote to Mrs Pond on 22 June 2009 in the following terms:

> "I refer to our telephone conversation of 8 June 2009 in relation to our above named client, Matthew Griffiths. In that conversation you informed me that the above mentioned C18 Demand had been issued to the limited company (American Pick Up trucks Limited) and not to Mr Griffiths personally. You also noted that the limited company was in liquidation and that our firm is not instructed by the liquidator….. However, we are quite happy to accept your assurance that the Demand has been issued to the limited Company, particularly because we could not understand how it would have been legally possible to issue it to Mr Griffiths personally. On that basis we formerly withdraw our request for you to review the issue of the C18 demand."

Mrs Pond acknowledged receipt of the letter by email on 6 July 2009. A far as we know the matter has been taken no further by her. No evidence has been provided as to why she considered Mr Griffiths was not personally liable and whether her view remains unchanged.

6. Mr Henderson was consulted again by Mr Griffiths about the C18 demands in September 2009. A letter from HMRC dated 17 September 2009 referred to the issue of the previous C18 demand and it was clear that the current demands were connected to the earlier ones although the figures were different. Mr Cannan confirmed to the Tribunal that the demands were connected.. Mr Henderson completed an authority form 64-8, which Mr Griffiths had signed in blank and Mr Henderson inserted 3-5 Clark Way as the address for correspondence with Mr Griffiths. He wrote to Mrs Hulse on 17 December 2009. He received a detailed reply from her on 13 January 2010, a copy of which he sent to Mr Griffiths. He was unaware that Mr Griffiths had vacated the premises at 3-5 Clark Way. There had been a delay of some 4 months from Mr Griffiths visit and Mr Henderson's letter to HMRC on 17 December 2009.

Mr Henderson explained that he and Mr Gibbon had ceased to be partners in Omnis and that Mr Gibbon had set up Northgate during this period and he thought that might have been the reason for the delay. He had never seen the schedule relating to the demands until the hearing. He said that he had not tried to contact Mr Griffiths again and he accepted it would have been prudent for him to have done so. Mr Griffiths told us that he had not received a copy of Mr Henderson's letter of 17 December addressed to HMRC.

7. Mr Griffiths confirmed that the receipt of the letter from HMRC in September 2009 had triggered his second visit to Mr Henderson. Mr Griffiths told us that he always thought that he had no personal liability in light of the conversation which Mr Gibbon had had with Mrs Pond in June 2009. He had not pursued the matter after his visit to Mr Henderson in September 2009 on the basis that 'no news was good news'. He expressed surprise that HMRC had not written to him at his home as they had his personal address. He would have expected them to do so if they had been unable to obtain a reply to letters addressed to 3-5 Clark Way. He only thought about the matter again in May 2010 when HMRC's debt management unit tried to enforce the debt. He had spoken to Mrs Hulse at that time, who confirmed that the C18 demands were the same as the original ones that he had received in May 2009 and confirmed that he was personally liable. He had instructed Mr Gibbon to appeal. He indicted that he had not appreciated that Mr Gibbon had appealed on the basis that he had not received the September C18 demands. That was not correct and Mr Gibbon must have misunderstood his instructions. On 22 June 2010 Mrs Hulse issued a civil fraud penalty addressed to Mr Griffiths at his home on the grounds that the unauthorised removals of the vehicles from the warehouse, which '*may*' have occurred, were attributable to Mr Griffith's dishonesty. The penalty was appealed by Mr Gibbon on 30 June 2009 on the grounds that:

> 'There was no evidence that the Company, of which Mr Griffiths was a director, dishonestly evaded customs duty and there is no evidence that the conduct of the Company was attributable to the dishonesty of Mr Griffiths'.

8. It is not entirely clear why the second C18s were issued. There is, in the bundle, a copy of the letter addressed to the Company at Beesley & Company dated 17 September 2009, referred to above, from Ms S Bellingham at HMRC in the following terms:

> "I am now in a position to be able to issue 2 C18 demand notes which were going to be sent by Mr Kirk. The explanation for the debts is below.
>
> A previous C18 demand was issued but, due to departmental processes, had to be withdrawn.
>
> …. We are issuing 2 C18 demand notes. The reason for the 2 demands is that on 18 December 2008 Michelle Brierley and Graham Kirk identified a number of imported vehicles which were still in stock. The customs warehouse approval, however, had been withdrawn previously due to the insolvency of American Pick Up Trucks. These goods have been unlawfully removed as per

2913/92 Article 203 Schedule (1). The remainder of the imported vehicles which were not in stock and for which you have not provided proof of payment of the charges are the subject of the PN300 action. … We have issued the C18s to Mr Griffiths, who we have identified as being jointly and severally liable".

Mr Cannan confirmed at the hearing that the second C18s arose from the first set of C18s and were the same.

9. On 23 December 2009, a demand notice from HMRC addressed to Mr Griffiths was received by Ms Clowry. She returned the notice to HMRC marking the envelope 'do not redirect'. It would appear that this letter never reached Mr Griffiths. Mr Griffiths has denied that he received any further information after his visit to Mr Henderson in September 2009. Evidence has been given by Ms Clowry and Mrs Brierley that they had had extensive correspondence with Mr Griffiths from September 2008 to June 2010 in relation to European, which also operated from 3-5 Clark Way. Mr Griffiths said that that correspondence related to European, as all correspondence in relation to the Company went to Beesley & Company. Mr Griffiths said that he had left 3-5 Clark Way in January 2010 for a new unit in Stockport and that the workshop at 3-5 Clark Way was being used by two of his former employees, He has suggested that he would not have seen any correspondence in relation to the Company as he and his former employees would only have been concerned with correspondence with regard to European. Ms Clowry stated in her witness statement that Mr Griffiths eventually attended at the premises at 3-5 Clerk Way on 11 June 2010 to secure items that belonged to him when the bailiffs attended to forfeit the lease.

10. HMRC have produced evidence of Mr Griffiths' disqualification as a Director of a limited company on 8 April 2011. Mr Griffiths did not appear at the hearing in the Manchester County Court as he had given an undertaking that he would not act as a director for a period of 10 years. Mr Bird, on behalf of the Secretary of State, indicated at the hearing that Mr Griffiths had misappropriated some £280,000 and that 77 vehicles were unaccounted for. Mr Bird considered that Mr Griffiths had shown himself to be wholly dishonest. I have been supplied with no further evidence in this regard and, as Mr Griffiths did not attend the Court, he has had no opportunity to dispute the facts.

The Law

11. The appeal is pursuant to the provision of section 16 (1B) Finance Act 1994 which requires an appeal to be made within 30 days beginning with the date of the document notifying an appellant of the decision. Section 16 (1F) of the Act provides for appeals to be made after that period where the Tribunal gives permission to do so.

Rule 20 (4) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the Rules) provides:

"20 (4) If the appellant provides the notice of appeal to the Tribunal later than the time required by paragraph (1) (the time limit imposed by any enactment) or by an extension of time allowed under Rule 5 (3) (a) (power to extend time) –

(a) the notice of appeal must include a request for an extension of time and the reasons why the notice of appeal was not provided in time; and

(b) unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Tribunal must not admit the notice to appeal.

In considering the appeal the Tribunal must also take account of Rule 2 (1);

"2(1). The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly

It has been suggested that this Tribunal is bound by CPR and rule 3.9 in particular. This Tribunal is not bound by those rules, but it is clearly sensible to have a regard to those provisions when considering an application for an appeal to be brought out of time

The Cases

12. I have been referred to several cases and would observe that they all depend on their own facts. I refer specifically to *Ogedegbe v HMRC* LON/2009/0200 (not referred to by the parties) in which Sir Stephen Oliver said:

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

Time limits are imposed for good reasons and cannot be overridden without equally good reasons by the Tribunal.

Tribunal Judge Kevin Poole has given a useful comment on the position under the new Rules in the case of TC 00624 [2010] UKFTT 342 (TC) *David C Pledger v HMRC* in which he states:

" The Tribunal does have a general obligation to give effect to the overriding objective expressed in Rule 2 of the Rules to deal with cases fairly and justly when it "exercises any power under these Rules" or "interprets any rule or practice direction" (Rule 2(3) (a) and (b)). These general obligations must be borne in mind when exercising the case management powers under Rule 5:

Rule 5(3) …the Tribunal may by direction:

"(3) 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;…"

I propose to adopt Judge Poole's approach that the Tribunal's discretion in permitting the present appeal to proceed "out of time" is to be applied in line with its obligations under Rule 2 dealing with the case "fairly and justly".

Submissions

13. Mr Cannan submitted that Article 203 imposes the liability to duty on Mr Griffiths as he was responsible for the removal of the vehicles. Article 203 states:

> "A custom debt on importation shall be incurred through:
>
> - The unlawful removal from customs supervision of goods liable to import duties
>
> The debtors shall be:
>
> - The person who removed the goods from customs supervision
> - Any person who participated in such removal and who were aware or should reasonably be aware that the goods were being removed from customs supervision

Various letters were addressed to Mr Griffiths at 3-5 Clark Way. Mr Griffiths also operated through European from the same address to which other letters had been addressed. Mr Gibbon had originally alleged that Mr Griffiths had not received the letters of 7 August 2009 and 17 September 2009 and he was unaware that the C18s had been issued to him personally. European had vacated 3-5 Clark Way before those letters had been sent. Mr Gibbon and Mr Griffiths have accepted that that was untrue and had been caused by confusion between them. Mr Griffiths contends that by December 2009 he was no longer involved with business activities at 3-5 Clark Way and that was why Mr Henderson had not been able to contact him. Mr Cannan submits that this is demonstrably untrue. The evidence clearly establishes that Mr Griffiths, through his company European, was in occupation of 3-5 Clark Way until June 2010.

14. The factors which a Tribunal must take into account on an application to extend the time of service of a Notice of Appeal have been considered in a number of Tribunal cases. Mr Cannan submits that the provisions of rule 3.9 of the CPR should be taken into account. Namely:

> (a) The interests of the administration of justice;
> (b) Whether the application for relief has been made promptly .
> (c) Whether the failure to comply was intentional.
> (d) Whether there is a good explanation for the failure.
> (f) Whether the failure was caused by the party or his legal representatives
> (h) The effect which the failure to comply had on each party; and
> (j) The effect which the granting of relief would have on each party

Mr Cannan submitted that it is only where the case for granting relief is evenly balanced that the Tribunal should have any regard to the merits. (See A2/2001/2845 [2002] EWCA Civ 645: *Michael Patrick Sayers v Clarke Walker (a firm).*

15. Mr Cannan submits that the relevant circumstances to be considered are as follows:

a. It is not in the interest of the administration of justice to permit appeals after long periods of delay, where the grounds of the application are demonstrably untrue. The decision appealed against was made in September 2009 and relates to vehicles entering the customs warehouse as far back as May 2006. the delay in serving the Notice of Appeal amounts to some 8 months

b. Mr Griffiths must have made a conscious decision not to appeal during this period. He first contacted Omnis on or about 22 September 2009. It was not until December 2009 that Omnis made contact with HMRC. Even then, there was a period from 13 January 2010 to the end of May 2010 when no action was taken by Mr Griffiths in relation to the demands. Throughout the period from 22 September 2009 to 15 June 2010 Mr Griffiths had instructed experienced consultants.

c. The only explanation for the failure to appeal within the time limit is not simply bad, it is untrue. In the circumstances, the basis upon which Mr Griffiths makes this application amounts to an abuse of process.

d. There is a public interest in the finality of VAT and customs duty liabilities. There will be prejudice to HMRC if that public interest is diluted allowing appeals such as this out of time.

e. The present application is not evenly balanced and the merits of the underlying appeal are not therefore relevant. In any event it is impossible to say whether Mr Griffiths would make out any case on a hearing of the appeal.

There is no 'reasonable excuse' for Mr Griffiths failing to appeal within the time limit. The provision to extend time for appeal is exceptional in nature and Mr Griffiths has not established any case for the exception to be made. Mr Cannan therefore submitted the application should be refused.

16. Mr Gibbon in his submission rehearsed the history of the matter, which I do not intend to repeat. He reiterated that Mrs Pond had confirmed that the first C18s did not relate to Mr Griffiths and as a result he had no standing to ask for a review. The second C18s issued in September 2009 were addressed to Mr Griffiths in person. The letter referred to the previous demands and indicated that they had not been processed as HMRC had wished to be fair to Mr Griffiths. This suggests that the earlier letters *had* been addressed to Mr Griffiths personally, which conflicted markedly with the confirmation from Mrs Pond that he could ignore them. Mr Griffiths had thought that the second demands were addressed to the company and because of the breakdown in communications between himself and Mr Henderson, Mr Griffiths had not received the correspondence from HMRC. It was not until 27 May 2010 that Mr Griffiths

realised that the C18s had been issued against him personally and the appeal was made timeously thereafter by 15 June 2010.

17. The Tribunal is not bound by the tests in the CPR 3.9. (See TC 00714 *Former North Wilshire District Council)*. The Tribunal should exercise its discretion applying the overriding objectives contained in Rule 2 (2) of the Rules to deal with cases fairly and justly. Given the background and history to this matter, it is not wholly unreasonable for Mr Griffiths to consider that the September C18 demands had not been issued to him personally and that there was a need for him to appeal. There is no prejudice whatsoever to HMRC if the extension of time is allowed. The issue is whether or not there were unauthorised withdrawals from the warehouse and, if so, who was responsible for those removals. HMRC are unsure when the unauthorised removals occurred. The appeal in relation to the penalty provision is in time and that issue will be fought on the same facts as the present appeal. If the Tribunal found that there was, in fact, no liability on Mr Griffiths for the customs duty and VAT he could still be liable for the amounts due under the C18 demands currently issued. The loss and injury which Mr Griffiths would suffer if the extension of time is refused totals £159,543 far outweighs any prejudice to HMRC and the application for the extension should be granted.

The decision

18. I have considered the law and the evidence and I grant permission for Mr Griffiths to appeal out of time. Mr Griffiths received the first demand and dealt with it in time. He saw Mr Henderson and as a result of Mr Gibbon's intervention received confirmation that the demands were not served on him personally. He was told, as a result, that he had no authority to ask for a review. Mr Cannan makes no reference to this in his submissions. Some 4 months later he received a letter addressed to him purporting again to create person liability. He went to see Mr Henderson, who appears to have been confused as to the rationale for the new demands. Mr Henderson could not understand why the figures had changed and he eventually wrote to HMRC in December asking for an explanation. The delay appears to have arisien from the change in the partnership and all that that would involve. Mr Henderson received a reply from HMRC a copy of which he understood he had sent on to Mr Griffiths. Mr Griffiths said that he did not receive that corresponxence. Furthermore, both of them agreed that it would have been prudent to have pursued the matter. Mr Cannan has produced substantial evidence that Mr Griffiths was attending at 3-5 Clark Way and that he must have been receiving all the correspondence that was sent to that address. On the balance of probabilities that would seem to be a prudent observation. I am not however convinced that Mr Griffiths would necessarily have received the reply sent to Mr Henderson by HMRC. On the two previous occasions, when the C18's were brought to his attention, he immediately went to see Mr Henderson. Had he received HMRC's letter from Mr Henderson it is likely that he would have followed his previous response to the similar occasions and visited Mr Henderson immediately. It would appear that Mr Griffiths quite reasonably understood that the C18s were not served on him personally. He had been told that fact by Mr Gibbon and in the bundle there is confirmation to that effect from Mrs Pond. As a result, he had not been able to ask for a review. If he had been able to do so then matters would have turned out quite

differently. I have had no satisfactory answer as to why the first demand was withdrawn. I have, however, been told that the second demands were a continuation of the first demands, which I have been told were not personal to Mr Griffiths. In the light of Mrs Pond's letter and the way in which Mr Henderson has dealt with the matter I suggest that Mr Griffiths cannot be blamed for his inactivity. It may still be the case that there is no personal liability, as indicated by Mrs Pond. She must have considered the matter before coming to that conclusion. There have undoubtedly been delays, but I do not think that Mr Griffiths has acted unreasonably given his understanding of the facts..

19. I have concerns with regard to the anomalies and contradictions in the case. I have been told that the Company went into liquidation in October 2008 and as a result it lost its licence. The letter of 17 September 2009 indicated that in December 2008 Michelle Brierley and Graham Kirk 'identified a number of imported vehicles which were still in stock'. HMRC have been unable to say when all the vehicles were removed from stock. The vehicles must have been removed as the licence was withdrawn, namely on the liquidation, and in those circumstances Mr Griffiths could not be personally liable as he no longer had any interest in the Company, which was controlled by the liquidator. He could only have removed vehicles if he had the written authority of the liquidator to do so. He would also have needed to know whether the liquidator had taken account of the liability to the customs duty. Without evidence as to why HMRC have altered the liability now making it personal to Mr Griffiths and evidence as to the time that the vehicles were removed, I consider it would be neither just nor equitable to refuse Mr Griffiths' application.

20. Mr Cannan has produced details of the action against Mr Griffiths leading to his disqualification as a director. This occurred in 2011, it cannot necessarily mean that Mr Griffiths acted dishonestly in October 2008 or before that date without evidence to substantiate his dishonesty.

21. As a result of the above observations I have decided that although the application for relief has not been handled promptly, I consider that Mr Griffiths reasonably believed that the liability was not personal to him. His case has not been helped by the delay of his representatives, but I consider that that occurred as a result of the changes in Mr Henderson's business. I do not consider that HMRC have been prejudiced. The liability is joint and several and its remedy lies against both parties. If the relief is not granted there is a real danger that Mr Griffiths will be required to pay the demands in circumstances in which he may have no liability. I therefore permit Mr Griffiths to appeal the case out of time. I reserve any liability as to costs to be decided in the principal appeal.

22. 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.

TRIBUNAL JUDGE
RELEASE DATE: 29/09/2011