[2015] UKFTT 0504 (TC)

TC04662

Appeal number: TC/2015/2428

VAT – procedure - application for strike out of appeals submitted late – s 83G VATA 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr ALAN BATSON **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster

Sitting in public at Centre City Tower, Birmingham on 13 October 2015

Mr Nick Warne (Cottons Accountants LLP) for the Appellant

Mrs Ann Sinclair (HMRC Appeals Unit) for the Respondents

DECISION

1. On 20 March 2015 the representatives of the Appellant ("Mr Batson") filed a notice of appeal appealing "against an Inland Revenue assessment which is a mixture of VAT and Income Tax" and stating that the disputed tax was not required to be paid or deposited. At the hearing Mr Warne for Mr Batson confirmed that the assessments in dispute are three VAT assessments ("the Disputed Assessments"):

(1) Assessment issued 26 February 2007 in the amount of £6,101 VAT plus interest.

(2) Assessment issued 23 May 2007 in the amount of £1,794 VAT plus interest.

(3) Amended assessment issued 10 June 2008 (replacing an earlier assessment issued on 31 August 2007) in the revised amount of £10,634 VAT plus interest.

2. By a notice dated 18 June 2015 ("the Strike Out Application") the Respondents ("HMRC") applied for the proceedings to be struck out on the alternative grounds that (a) the appeals are over eight years out of time, and (b) the disputed VAT has not been paid or deposited and no hardship application (s 84(3B) VATA 1994 refers) has been made. I was not addressed by the parties on the second ground but, although I refer to it briefly subsequently, I am able to determine the Strike Out Application by reference solely to the first ground (lateness).

3. The appeals being late, Mr Batson requires the permission of the Tribunal to proceed: s 83G(6) VATA 1994 states, "An appeal may be made after the end of the period specified … if the tribunal gives permission to do so." I consider that the appropriate approach to the first head of the Strike Out Application is to determine whether the Tribunal would grant permission for a late appeal pursuant to s 83G(6). I consider that the correct approach to that matter is to follow the Upper Tribunal decision in *Leeds City Council v HMRC* [2015] STC 168 (at [19]) and apply the practice described by Morgan J in *Data Select Ltd v HMRC* [2012] STC 2195 (at [37]): "the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA."

Background

4. At the relevant time Mr Batson carried on business as a sole trader as a flooring supplier. In Summer 2006 HMRC conducted a VAT visit and, after extensive correspondence with Mr Batson's then advisers, formed the view that adjustments were necessary to the VAT returns in respect of various items including: undeclared sales revealed by bank receipts; underdeclared turnover by reference to a gross profit margin calculation derived from business accounts for a later period; refusal of input tax deduction for certain expenses, and certain items unsupported by VAT invoices; refusal of input tax deduction for a vehicle purchase (Chrysler Voyager); and restriction of input tax deduction by reference to partial exemption due to a residential

letting business also being carried on by Mr Batson. Those adjustments were reflected in the Disputed Assessments. Mr Batson disputes much of these adjustments. For determination of the Strike Out Application I do not need to go into further detail of the adjustments except to note that:

(1) Mr Warne states that some of the adjustments (for example, the allegation of undeclared sales) were addressed in relation to income tax assessments issued by HMRC, where, he states, HMRC accepted that the allegation was incorrect.

(2) Mr Batson's objection concerning the adjustment in relation to the Chrysler Voyager purchase appears to be that he asked HMRC before buying it whether he could recover the VAT and was told that he could.

5. The Disputed Assessments predated the establishment of this Tribunal and thus the appropriate appeal route at the relevant time would have been an appeal to the predecessor VAT & Duties Tribunal; there was a time limit of 30 days after the date of the disputed decision: rule 4 VAT Tribunal Rules 1986 (SI 1986/590). This Tribunal now has jurisdiction pursuant to sch 3 of The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56).

6. From the correspondence in the trial bundle I draw the following partial chronology of relevant matters. Mr Warne stated that he had not seen some of this correspondence until the day of the hearing, but I understand there is no dispute that the correspondence took place as described.

(1) Each of the three Disputed Assessments notified Mr Batson of his right to appeal to the VAT Tribunal.

(2) The appeal rights were also stated in the HMRC letters which explained the adjustments being made (eg HMRC letters dated 6 March 2007, 13 July 2007 and 14 November 2007).

(3) On 11 February 2008 HMRC wrote to Mr Batson's then advisers summarising the adjustments, as requested by the advisers.

(4) On 13 March 2008 HMRC wrote to Mr Batson's then advisers stating, "I have no record of this having been appealed to Tribunal. Can you please send me a copy of the Trib 1 appeal form" and reminding them of their appeal rights.

(5) Mr Batson had made a formal complaint about the HMRC case officer. The complaints team in an email dated 18 March 2008 explained to Mr Batson's then advisers the difference between an internal reconsideration and a formal appeal, and explained that a formal appeal to the VAT Tribunal would be required.

(6) On 14 April 2008 HMRC wrote to Mr Batson's then advisers stating "If you are to appeal against the assessments you need to set out what aspects you cannot agree and the grounds for appeal."

(7) The advisers' reply dated 18 April 2008 stated "We enclose a copy of our clients appeal to the Tribunal". However, Mrs Sinclair stated that there was no

enclosure on HMRC's file and the VAT Tribunal had not notified any appeal to HMRC.

(8) HMRC replied on 21 April 2008 again requesting clarification of any grounds of appeal and stating that collection of the tax would not be withheld longer than 14 days. Debt collection procedures were then initiated.

(9) On 15 April 2011 HMRC wrote to Mr Batson stating,

> "The time limit for appealing an assessment is 30 days, and that appeal should contain some evidence that shows why the tax payer disputes the amount. No such proof has been received and this amount … plus interest … remain due."

(10) Mr Batson changed advisers (to Cottons) and on 18 May 2011 Cottons wrote to HMRC stating,

> "Please accept this letter as our formal appeal against any assessments that may have been made on our client following the VAT compliance visit many moons ago."

(11) On 4 July 2011 Cottons wrote to HMRC stating,

> "I am aware that the client has appealed against the assessments but it appears that is as far as the matter has progressed. For the purpose of absolute clarity I would like you to accept this letter as a further appeal against any assessments that are outstanding in my client's name."

(12) On 13 July 2011 HMRC wrote to Cottons giving another summary of the assessments and stating,

> "In May 2007, your client asked for the £4137.74 included in the first assessment to be reconsidered; this related to input tax claimed on a Chrysler Voyager [reg no]. The decision was upheld by the Appeals officer on 14 November 2007, following which your client was advised of his right of appeal.
>
> There appears to have been no appeal submitted, nor a request for reconsideration of any of the other assessments subsequent to Tubney Associates' letter of 6 November 2009. If your client wishes to dispute the other assessments he will need to provide evidence in support.
>
> HMRC cannot accept your letter as a "further appeal" against any of the assessments. If your client wishes to submit a formal appeal, he would need to apply to the Tribunal to do so out of time. Further information can be found at [website address of HMCTS]."

(13) On 29 November 2012 HMRC's debt management unit wrote to Mr Batson stating,

> "Please note that if you wish to appeal this assessment at this time you will be required to apply to the tribunal. Further information can be found at [website address of HMCTS]. I am able to give you fourteen days to make any application or to contact me to discuss how you intend to clear this debt. After this time I shall have no option but to continue with our enforcement action."

(14) On 27 February 2015 Cottons wrote to HMRC stating, "We are therefore applying to the tribunal to have incorrect assessments overturned as they have no foundation in law and just advise you for your records." The notice of appeal was filed with the Tribunal on 20 March 2015.

Respondents' case

7. For HMRC Mrs Sinclair submitted as follows.

8. The appeals were extremely late, being over eight years out of time. Mr Batson and his professional advisers had had many opportunities to make formal appeals; HMRC had specifically pointed out the appeal procedure on several occasions; all those opportunities had been ignored, which suggested a deliberate decision not to engage in the tribunal appeal process. An appeal to the VAT Tribunal would have been routinely notified to HMRC by the VAT Tribunal, and there had been no such notification.

9. The Disputed Assessments had been calculated following an enquiry which involved detailed correspondence with both Mr Batson and his then advisers. The Disputed Assessments had been upheld (apart from adjustment for one item) on internal review; and they had been explained fully to Mr Batson, his previous advisers and his current advisers. Repeated opportunities had been given for Mr Batson to provide evidence contradicting the Disputed Assessments but this had not been done. A formal complaint against the case officer had been dismissed.

10. HMRC accepted that some correspondence had been sent to an incorrect address; Mr Batson had received an official apology and monetary compensation for the mistake. So far as Mrs Sinclair could research, the use of the incorrect address had lasted only a couple of months and did not affect the matters now before the Tribunal.

11. Mrs Sinclair had no formal instructions on Mr Batson's income tax position but from the correspondence it appeared that there was still an ongoing dispute relating to one tax year.

Appellant's case

12. For Mr Batson, Mr Warne submitted as follows.

13. Mr Warne's firm had been instructed in May 2010, mainly in relation to Mr Batson's income tax position. In February 2012 the income tax dispute was settled with HMRC withdrawing most of the challenged income tax assessments; an income tax statement showing nil payable had been issued in April 2012. There was considerable overlap between the income tax assessments and the Disputed Assessments for VAT – for example, there were allegations that certain bank deposits were unrecorded sales but HMRC had eventually accepted that was not justified. Mr Warne was under the impression that this would also resolve the VAT disputes but that was contradicted when the debt management unit again pursued payment of the

Disputed Assessments. HMRC should now just accept that there were errors in the Disputed Assessments and sort matters out.

14. Mr Batson had been let down by his previous advisers, however it appeared that they did appeal the Disputed Assessments to the Tribunal on 18 April 2008.

15. The conduct of HMRC had been incompetent. There had been a two year period when they had written to a completely different taxpayer and had paid only £30 compensation to Mr Batson for that breach of confidentiality. They had apparently lost many of the business records they had been given by Mr Batson, but then denied any problem.

16. Mr Batson faced bankruptcy proceedings in relation to a tax debt that was simply not due.

Consideration and Conclusions

17. As already stated (at [3] above) I shall determine the Strike Out Application by deciding whether I will grant permission for a late appeal pursuant to s 83G(6), using the test set out by Morgan J in *Data Select.*

18. Given the extreme lateness of the appeals, the main matter for me to consider is the reason why they were made so late. I accept that there would be serious financial consequences for Mr Batson if I refuse permission; I also accept that HMRC were entitled to believe that this dispute had disappeared long ago when there was no appeal made to the Tribunal against the Disputed Assessments – hence their continued pursuit of the tax debt. Although I heard nothing directly from Mr Batson's previous advisers, I have read the correspondence between that firm and HMRC and, without making any formal finding on the point, I am prepared to accept for current purposes that matters had drifted somewhat prior to the change of advisers in May 2010. I agree with Mrs Sinclair that HMRC went out of their way to explain and remind both Mr Batson and his advisers that formal appeals to the VAT Tribunal were required, if Mr Batson wished to pursue that route.

19. I believe there are three events that I need to consider in relation to the long delay in filing the appeals:

(1) First, the statement in the letter dated 18 April 2008 from Mr Batson's then advisers to HMRC: "We enclose a copy of our clients appeal to the Tribunal". Nothing has been provided by Mr Batson in relation to this correspondence (I understand there was a breakdown in his relationship with his previous advisers). Mrs Sinclair stated that there was no enclosure on HMRC's file and the VAT Tribunal had not notified any appeal to HMRC. HMRC's reply to that letter (dated 21 April 2008) makes no reference to any appeal to the VAT Tribunal but does state, "Can you please respond within the next 14 days since I am unable to withhold collection of the outstanding duties for longer than this". That indicates that HMRC were not apprised of any VAT Tribunal appeal, because in the event of such an appeal collection of the appealed tax

would normally be suspended pending determination of the appeal. In fairness to Mr Batson I have also taken the liberty of checking (after the hearing) the Tribunal's file registry system (this Tribunal having inherited from the VAT Tribunal any open appeals at 1 April 2009) but the only proceedings in the name of Batson are the 2015 appeals that are the subject of the current Strike Out Application. For those reasons I find, on the balance of probabilities, that no formal appeal was lodged with the VAT Tribunal by Mr Batson's then advisers in April 2008.

(2) Secondly, the exchange of correspondence in May and July 2011 between Mr Batson's new advisers and HMRC. The relevant passages are quoted at [6(10) to (12)] above. The effect of this was that Cottons were purporting to make appeals, which would of course by that point be out of time, but I consider HMRC's reply was crystal clear that late appeals were not accepted and "If your client wishes to submit a formal appeal, he would need to apply to the Tribunal to do so out of time. Further information can be found at [website address of HMCTS]." I asked Mr Warne why that was not done until March 2015 (ie almost four years later). His explanation was that his firm was negotiating certain income tax assessments with HMRC which related to concerns of HMRC about Mr Batson's tax affairs that raised points similar to the VAT queries that resulted in the Disputed Assessments; when the income tax dispute was (mainly) settled in February 2012 he had assumed that also resolved the VAT dispute, and thus the Disputed Assessments. I do not consider that is an adequate explanation. Mr Batson and his advisers could not have been in any doubt after HMRC's 13 July 2011 letter that the only course open to them to challenge the Disputed Assessments was to file a late appeal with the Tribunal. Even if there were collateral disputes about income tax matters, that did not affect the need to make the late appeal, which by that point (around three years after the issue of the last of the Disputed Assessments) would have been a matter of urgency.

(3) Thirdly, the statement by HMRC (the debt management unit) on 29 November 2012 to Mr Batson (see [6(13)] above): "… if you wish to appeal this assessment at this time you will be required to apply to the tribunal. ... I am able to give you fourteen days to make any application ... After this time I shall have no option but to continue with our enforcement action." The interpretation of that letter that is most favourable to Mr Batson is that HMRC were indicating that a late appeal to the Tribunal before 14 December 2012 would not be opposed on grounds of lateness. Even on that rather charitable reading, the notice of appeal (filed 20 March 2015) was over two years after the extended deadline. Mr Batson's explanation is that he left everything to his advisers. Again, I do not consider that is an adequate explanation.

20. Given the extreme lateness of the appeals and my conclusion that there is no adequate explanation for that lateness, I determine that it would not be fair and just to allow the appeals to be filed late. Accordingly, for that reason I shall grant the Strike Out Application.

21. I do not need to determine the second ground of the Strike Out Application - that the disputed VAT has not been paid or deposited and no hardship application (s 84(3B) VATA 1994 refers) has been made. I was not addressed by the parties on this point. The notice of appeal filed by Cottons states (section 5) that the disputed tax has not been paid or deposited but that such payment or deposit is "not required". There is no explanation for that assertion. From my understanding of the basis for the Disputed Assessments it would appear to be wrong.

Decision

22. The Strike Out Application is GRANTED and the appeals are now STRUCK OUT.

23. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 16 OCTOBER 2015