[2018] UKFTT 98 (TC)

TC06356

Appeal number: TC/2017/01372

VAT - application for permission to appeal out of time - application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NEWCASTLE UNDER LYME COLLEGE **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

Sitting in public at Birmingham on 21 September 2017

Mr Steven Hodgetts, VAT consultant, of RSM UK Tax and Accounting Limited, for the Appellant

Mr Joseph Millington, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an application by the Appellant for permission to bring a late appeal against a decision of HMRC to deny its claim that certain construction supplies made to it during 2009 and 2010 should be treated as zero rated.

2. The challenged HMRC decision is dated 23 September 2014. The Appellant's notice of appeal is dated and was filed with the Tribunal on 6 February 2017. Thus, the appeal is well over 2 years out of time, and the construction supplies to which the appeal relates were provided some 8 or 9 years ago.

3. The supplies related to the construction of a building on the Appellant college's campus. The Appellant's claim is that a portion of the construction supplies should be zero rated on the basis that a portion of the building was "intended for use solely for … a relevant charitable purpose" (namely use by a charity "otherwise than in the course or furtherance of a business"), within the meaning of item 2(a) and note 6(a) of Group 5 in Schedule 8 to the Value Added Tax Act 1994 ("VATA"). However, the Appellant has not been consistent as to what percentage of the construction supplies it claims should be zero rated, or as to the methodology by which that percentage falls to be determined.

4. The Appellant contends amongst other matters as follows. Some of the Appellant's students (referred to for convenience as "part-funded students") pay a fee which is subsidised by grant income. A critical question in this appeal is whether the education of such students is a business activity or a non-business activity for purposes of the provisions of VATA referred to above. In *Revenue and Customs v Wakefield College* [2016] UKUT 19 (TCC), the Upper Tribunal decided that the education of such students is a business activity (thereby reversing the contrary decision below of the First-tier Tribunal: [2013] UKFTT 731 (TC)). That decision of the Upper Tribunal is now the subject of a pending appeal to the Court of Appeal.

5. The Appellant says that the judgment of the Court of Appeal in the *Wakefield College* litigation will be critical to the outcome of its appeal. The Appellant concedes that if the education of part-funded students is a business activity, then its appeal must fail. However, the Appellant contends that if this is a non-business activity, it will have an arguable case. The Appellant maintains that it should be given permission to bring a late appeal to pursue that arguable case, although the Appellant proposes that if permission to bring a late appeal is granted, the appeal should be stayed behind the Court of Appeal's judgment in *Wakefield College*.

6. The position of HMRC is that permission to bring a late appeal should be refused.

Background

7. The building was constructed on the Appellant's campus in 2009 and 2010 by BAM Construct UK Limited ("BAM"). The construction supplies by BAM to the Appellant were standard rated, save that HMRC agreed that 14.4% could be zero rated to reflect the transfer of non-business activities previously carried out in a former college building.

8. In subsequent correspondence between the Appellant's then agent and HMRC, the Appellant took the position that additional parts of the building were also eligible for zero-rating, and requested HMRC retrospectively to issue a zero rated VAT certificate for the construction of those other parts. In the course of that correspondence, in letters dated 2 May 2013 and 26 July 2013, HMRC amongst other matters took the position that the teaching of part-funded students was a business activity.

9. In a letter to HMRC dated 22 August 2013, BAM stated that they wished to submit a protective claim of VAT in respect of the construction services, stating that it was estimated that 85% of the building's construction would qualify for zero rating with the remaining 15% subject to VAT at the standard rate.

10. A letter from HMRC to BAM dated 10 October 2013 refused the claim, stating that insufficient information had been provided to meet the requirements of regulation 37 of the VAT Regulations 1995.

11. In December 2013, the Appellant appealed to the Tribunal against the 10 October 2013 decision (appeal no TC/2013/09584). All references to Tribunal proceedings in paragraphs 12 to 51 below relate to this earlier appeal no TC/2013/09584.

12. The Appellant's notice of appeal in that earlier appeal indicated that the Appellant was seeking repayment of VAT in the sum of £1,375,113.06 and that its methodology for measuring non-business use was a turnover basis.

13. In a letter to HMRC dated 21 January 2014, the Appellant's agent stated that the Appellant was appealing to the Tribunal against the 10 October 2013 HMRC decision. The letter indicated that the Appellant was relying on the decision of the First-tier Tribunal in *Wakefield College*.

14. Following further correspondence between the Appellant's representatives and HMRC, in an e-mail dated 13 March 2014, HMRC informed the Appellant's representatives that HMRC considered that the 10 October 2013 decision needed amendment or reissuing, and stated that "This may change the whole basis for the current appeal, although we are not in a position to predict in what way (e.g. withdrawal and new appeal, or amending the grounds of this one)". The e-mail proposed a joint application for a stay of the Tribunal proceedings for 3 months.

15. On 17 March 2014, the Appellant and HMRC jointly applied to the Tribunal for those proceedings to be stood over for 3 months, on the basis that HMRC wished to reconsider their 10 October 2013 decision. The application noted that the new decision to be given by HMRC following that reconsideration might "alter the basis for the appeal, or mean that it falls away".

16. In a letter to BAM dated 18 March 2014, HMRC advised that the 10 October 2013 HMRC decision was being withdrawn, that the 22 August 2013 claim by BAM was now accepted to be a valid claim under s 80 VATA, and that a decision would be given on whether the construction services were to be zero rated under Item 2(a) of Group 5 of Schedule 8 to VATA. However, the letter went on to state that HMRC had a number of questions concerning the methodology and background.

17. In a letter dated 25 June 2014, the Tribunal noted that the stay of proceedings had now expired, and requested an update of the parties' intentions.

18. In a letter dated 2 July 2014, HMRC advised the Tribunal that the decision under appeal had now been withdrawn, and that HMRC would now be proceeding to issue a substantive decision on BAM's claim. The letter added:

> We wish to ensure that we protect our position in relation to any substantive decision and that the withdrawal of the disputed decision does not prejudice that. On that basis, we would invite the Tribunal to keep its file open and stay the current matter for a period of 3 months to allow a substantive decision to be made (and allow the Appellant to amend its ground of appeal if necessary).

19. On 29 July 2014, the Tribunal stayed the appeal until 3 October 2014.

20. Following further correspondence, on 23 September 2014 HMRC issued a substantive decision on BAM's claim, refusing the claim. The decision stated that the onus was on BAM or the Appellant to establish that an element qualified as a relevant charitable purpose, where this was claimed to be the case, and that this had not been established.

21. This new decision was sent by HMRC to the Appellant's agent under cover of an e-mail in which HMRC stated "you will be aware there is in fact an appeal already lodged with the Tribunal by the college under TC/2013/09584, and on the assumption that the underlying issue will ultimately be stood behind other litigation, HMRC have no objection to the parties using the existing appeal process for this claim rather than initiating a new appeal; perhaps you can inform me of your next steps".

22. In a letter dated 15 October 2014, the Tribunal noted that the stay of proceedings had now expired, and requested an update of the parties' intentions.

23. In a letter to BAM dated 29 October 2014, HMRC agreed on the Appellant's request to extend until 24 November 2014 the time limit within which the Appellant could request a review or make an appeal against the 23 September 2014 decision.

24. On 31 October 2014, the Tribunal stayed appeal until 31 December 2014.

25. In a letter dated 5 January 2015, the Tribunal noted that the stay of proceedings had now expired, and requested an update of the parties' intentions.

26. By an e-mail dated 22 January 2015, HMRC responded to the Tribunal that they were trying to ascertain from the Appellant whether the Appellant intended to maintain the appeal against the new decision, and for that purpose requested a further short extension of the stay.

27. In a letter to the Appellant's agent dated 10 February 2015, HMRC requested certain further information.

28. On 2 April 2015, HMRC applied to the Tribunal for a further extension of the stay until 1 May 2015, stating that the parties were still in discussions. It was stated that the discussions "may result in a decision to the satisfaction of the Appellant, or if not, will define the issues between the parties before proceeding to litigation". It is not clear from the papers, but it appears that the requested stay must have granted by the Tribunal, given the terms of the letter referred to in paragraph 31 below.

29. In a letter to the Appellant's agent dated 21 May 2015, HMRC requested a response to their 10 February 2015 letter.

30. In a letter to HMRC dated 2 July 2015, the Appellant's agent provided certain further information to HMRC. This letter indicated that the Appellant was now contending that 26.59% of the construction services should be zero rated, but stated that it may not be possible to conclude the matter until the outcome of the litigation in respect of *Brockenhurst College* [apparently a reference to [2014] UKUT 46 (TCC), which was at the time subject to a pending appeal to the Court of Appeal].

31. In a letter dated 8 July 2015, the Tribunal noted that the stay of proceedings had now expired, and requested an update of the parties' intentions.

32. In an e-mail dated 17 July 2015, the Appellant's agent stated that they were in correspondence with HMRC which may affect the appeal argument, and requested that the appeal be stood over for a further 3 months.

33. In a letter to the Appellant's agent dated 20 July 2015, HMRC responded to their 2 July 2015 letter, and raised additional points for response by the Appellant. That letter went on to state that the Appellant faced a "procedural hurdle" in that the first HMRC decision that was the subject of the appeal had now been withdrawn, and "There has been no appeal against the second decision to date". The letter then said that "HMRC would not oppose any application by your client on lateness grounds, but believes you need to resolve this issue with the VAT Tribunal".

34. In a letter dated 7 August 2015, HMRC stated that they had no objection to the appeal being stood over for 3 months.

35. On 14 August 2015, the Tribunal granted the requested stay.

36. In a letter dated 7 December 2015, the Tribunal noted that the stay of proceedings had now expired, and requested an update of the parties' intentions.

37. In a letter dated 9 December 2015, HMRC responded that it was a matter for the Appellant to decide how it wanted to proceed.

38. On 15 January 2016, the Tribunal chased the Appellant's agent for a response.

39. In an e-mail to HMRC dated 22 January 2016, the Appellant's agent stated:

> This is a case that we are still trying to conclude on the facts, until this is done, HMRC cannot issue a decision. Concluding this information is not straightforward and is taking longer than anticipated. We have previously extended the deadline and would request a similar action, we propose an extended deadline of 6 months.

40. In an e-mail dated 4 February 2016, the Appellant's agent requested that the matter be stood over to 31 March 2016. On 5 February 2016, HMRC stated that they consented to this application. On 25 February 2016, the Tribunal granted the requested stay.

41. On 13 April 2016, the Tribunal noted that the stay of proceedings had now expired, and requested an update of the parties' intentions.

42. On 28 April 2016, HMRC stated that they had had no contact with the Appellant or its representatives and could not provide an update. On 29 April 2016, the Appellant's representatives responded with a request that the appeal be stood over for a further 60 days "in order to finalise the case position". On 11 May 2016, the Tribunal granted the requested stay.

43. On 4 July 2016, the Tribunal noted that the stay of proceedings had now expired, and requested an update of the parties' intentions.

44. HMRC responded on 7 July 2016, stating that they had had no contact with the Appellant or its representatives for some time, but that HMRC had no intention of withdrawing from defending the appeal.

45. In a letter to the parties dated 31 August 2016, the Tribunal directed both parties within 5 days to clarify the status of the appeal, expressing concern at the delays in the case. The letter stated amongst other matters as follows. If the previous HMRC decision had been withdrawn, then there was no longer any appeal before the Tribunal, and the Tribunal could close its file. If a new decision had been issued, then the Appellant could submit a new appeal against the new decision in the usual way.

46. In a letter to the Tribunal dated 5 September 2016, the Appellant's agent responded that the 10 October 2013 HMRC decision had been withdrawn, and that a new HMRC decision had been issued in September 2014 rejecting the claim to zero rating. The letter stated:

> HMRC has stated they would not oppose any application for a late appeal. In the circumstances an application for a late appeal is made against HMRC's subsequent rejection on the basis the issue is essentially the same, ie whether part of a building can be zero rated as it was intended for use by the client solely for a relevant charitable purpose. There is no prejudice to the Respondents in allowing the appeal to proceed.

47. In a letter to the Tribunal dated 6 September 2016, HMRC confirmed that the 10 October 2013 decision was withdrawn on 18 March 2014, and was replaced by a subsequent decision dated 23 September 2014, and that no appeal against that decision had yet been received.

48. In a letter dated 28 September 2016, the Tribunal informed the parties as follows. As the 10 October 2013 decision had been withdrawn, there was no longer any current appeal before the Tribunal. Should the Appellant wish to appeal against the 23 September 2014 HMRC decision, it would need to submit a new notice of appeal, containing if necessary an application to make a late appeal. Until such time as such an appeal was made, the Tribunal would take no action in the matter.

49. In an e-mail to HMRC dated 14 October 2016 (in response to an e-mail from HMRC dated 26 September 2016), the Appellant's agent stated that the case was still ongoing. The e-mail stated:

> The calculation of the Business/Non Business apportionment has previously been submitted to HMRC but observations have been raised as to the nature of certain income particularly grants etc. In the circumstances we are attempting to pull together the source documents for grant funding. This has regrettably taken more time than anticipated.

50. In a letter dated 21 November 2016, the Tribunal requested representations on the progress of the appeal. On 19 December 2016, HMRC responded that it was their understanding that there was no current appeal to progress. In a letter dated 24 January 2017, the Tribunal informed the parties that unless either party sent a notice of objection with reasons within 14 days, the Tribunal would close the file for the appeal.

51. There is no suggestion that either of the parties raised any objection in response to that letter, and in the circumstances, it will have followed that the Tribunal's file in appeal no TC/2013/09584 will have been closed in February 2017.

52. On 6 February 2017, the Appellant filed the notice of appeal in the present appeal (TC/2017/01372), seeking to appeal against the 23 September 2014 HMRC decision, and seeking permission for a late appeal. This notice of appeal now indicated that the Appellant was seeking to recover VAT in the sum of "£500K", on the basis that approximately 40% of the construction of the new building qualified for zero rating.

53. On 28 April 2017, HMRC filed an objection to the application for permission for a late appeal. This application was accordingly heard in Birmingham on 21 September 2017. At the conclusion of that hearing, the Tribunal issued directions, which relevantly stated that:

> 1. By 27 October 2017, the Appellant shall send to the Tribunal and HMRC a detailed statement of the case that the Appellant proposes to advance in this appeal if permission to bring a late appeal were to be granted, and all evidence in support of that appeal. The statement of case shall state clearly:
>
> a. the specific facts contended for by the Appellant that, if proved, would be sufficient to establish the grounds of appeal;
>
> b. the propositions of law that the Appellant intends to advance that, if accepted by the Tribunal, would be sufficient to establish the grounds of appeal;
>
> c. which of these propositions of law will be affected by the outcome of the proceedings before the Court of Appeal in the *Wakefield College* case.
>
> 2. Within 35 days of receipt of the Appellant's materials under Direction 1, HMRC may send to the Tribunal and the Appellant any further submissions on whether or not the Appellant should be permitted to bring a late appeal.

54. Pursuant to that direction, the Appellant submitted a document entitled "Appellant's statement of case" on 26 October 2017, and HMRC filed a document entitled "Respondent's further submissions" on 30 November 2017. A subsequent e-mail was sent to the Tribunal by the Appellant on 29 December 2017, and a further e-mail was then sent to the Tribunal by HMRC on 13 February 2018.

Relevant legislation

55. The time limit for appealing to the Tribunal against a decision of HMRC concerning VAT is set out in s 83G(1) VATA. Section 83G(6) of that Act provides that an appeal can be brought after the expiry of that time limit if the Tribunal gives permission to do so.

Relevant case law on late appeals

56. The Tribunal was referred to *Data Select v Revenue & Customs* [2012] UKUT 187 (TCC); *Peter Arnett Leisure (a firm) v Revenue & Customs* [2014] UKFTT 209 (TC); *BPP Holdings v Revenue And Customs* [2016] EWCA Civ 121; *BPP Holdings Ltd & Ors v Revenue and Customs* [2017] UKSC 55, [2017] 1 WLR 2945; and *O'Flaherty v HMRC* [2013] UKUT 161 (TCC).

57. The Tribunal has considered these cases, and does not unnecessarily set out their contents.

The Appellant's arguments

58. Section 6 of the Appellant's notice of appeal, setting out the reasons why the appeal is made late, states that "HMRC has indicated that they will not object to a late appeal".

59. In oral argument, the Appellant's representative stated amongst other matters as follows.

60. There is litigation pending in this area in a number of cases, including in *Wakefield College* and *Brockenhurst College*. The correspondence between the Appellant and HMRC exists against a backdrop of present difficulty in knowing how to measure business activity. No particular methodology is prescribed by law; it is a matter of agreement with HMRC. That is the reason why the Appellant has had difficulty providing evidence to HMRC. HMRC were aware that the present appeal could not be decided until *Wakefield College* has been decided, and the Appellant was requesting extensions for that reason. The Appellant did not believe that it could get sufficient information to satisfy HMRC until *Wakefield College* was decided by the Court of Appeal, but lodged an appeal in the meantime to protect its position. This case should have been stayed behind *Wakefield College*, like other cases.

61. At this stage, the Appellant needs to consider whether there is a methodology for determining the extent of non-business use that would enable the Appellant to succeed in the appeal. Even if the Appellant could not succeed on the basis of a methodology based on turnover, it might succeed on the basis of a methodology based on headcount and/or floor area. The latter kind of methodology had not yet been put to HMRC.

62. It would be unfair not to allow the Appellant to appeal in circumstances where the Appellant thought that it already had a valid appeal on foot, and had been advised by HMRC that they would not object to a late appeal. It was accepted that there had been some procedural failing on behalf of the Appellant.

63. The Appellant had not yet located all relevant documents. Mr Hodgetts said that the relevant documents were not actively being looked for at present, and he could not say when they were last actively looked for, other than to say that no one had been looking for them in the last 12 months.

64. In the "Appellant's statement of case" filed after the hearing, the Appellant sets out a methodology under which £310,128 VAT was wrongly charged on the building. The methodology used to reach this conclusion is based on the floor area of the building, the Appellant's argument being that 19.17% of the floor area of the building is used solely for non-business use, if the education of part-funded students is treated as a non-business activity.

65. A further e-mail from the Appellant's representative dated 29 December 2017 acknowledged that the Appellant's case would fail if the appellant in the *Wakefield College* litigation lost its appeal before the Court of Appeal, and proposed that the

appeal in the present case be stood over until 30 days after the Court of Appeal releases its judgment in that case.

The HMRC arguments

66. The arguments set out in the HMRC notice opposing the late appeal, the HMRC skeleton argument for the hearing and in oral submissions are in essence as follows.

67. The last substantive piece of correspondence received from the Appellant's representatives detailing the merits of the Appellant's claim was dated 2 July 2015. HMRC responded to this on 20 July 2015 summarising the outstanding issues between the parties. HMRC have since received nothing further of substance from the Appellant. Even the notice of appeal in the present proceedings provides no further details of the Appellant's claim, and indeed, even after HMRC filed its notice of opposition to the late appeal, no further information was provided by the Appellant. This is unreasonable, especially since the Appellant has been professionally represented throughout. The Appellant has had ample opportunity to make an appeal or to progress the matter via correspondence with HMRC.

68. HMRC acknowledge that between 2014 and August 2016, both parties appeared to be working on the assumption that a new appeal was not necessary as the substantive issues could be dealt with in appeal no TC/2013/09584. However, it was made clear to the Appellant in the 20 July 2015 HMRC letter that the first appeal had been brought to an end by the withdrawal of the first HMRC decision, and that a new appeal would have to be brought against the second decision. Despite this, the Appellant did not bring this appeal until more than 2 years after the second decision was issued. The statement in the 20 July 2015 HMRC letter that HMRC would not object to a late appeal implied that an appeal would have to be brought within a reasonable timeframe. Apart from HMRC's alleged consent, the Appellant has given no justification for the delay.

69. Furthermore, after the 24 January 2017 letter from the Tribunal, the Appellant had ample time either to object to the closure of the Tribunal's file in the earlier appeal, or to lodge a new appeal.

70. The effect of the delay is that some of the original HMRC officers dealing with the claim are now no longer involved, and the current team are unfamiliar with the previous correspondence and issues in dispute, which renders it more difficult for HMRC to deal with the appeal than would have been the case if the appeal had been brought in a more timely fashion.

71. The HMRC post-hearing submissions state amongst other matters as follows.

72. The Appellant has made no formal application to stay the present appeal behind *Wakefield College*. Should the Court of Appeal in *Wakefield College* classify supplies to part-funded students as a business activity, the Appellant's case will fail. The alternative result in *Wakefield College* will not necessarily result in the Appellant's case succeeding, as without further clarification HMRC do not accept the

figures put forwards by the Appellant, and do not accept the categorisation of "other grants" as non-business income. The Appellant has also failed to explain fully its claim in relation to "franchised higher education income". The Appellant and HMRC have never reached agreement as to a reasonable methodology for the calculation of the claim. The Appellant has failed to address issues raised by HMRC, despite assurances that it would do so. There would be other issues that would need to be resolved before HMRC consented to stand this appeal behind *Wakefield College*. A further e-mail from HMRC's representative dated 13 February 2018 submitted that the Tribunal should not await the outcome of *Wakefield College* before deciding whether to grant permission for a late appeal.

The Tribunal's findings

73. No authority has been cited to the Tribunal in relation to the correct procedure to be followed where HMRC withdraws a decision and substitutes a new decision at a time when there is a pending Tribunal appeal against the earlier decision. Is it the case that the pending Tribunal appeal necessarily comes to an end upon the withdrawal of the earlier decision, such that it is for the appellant, if the appellant so chooses, to bring a new Tribunal appeal against the new decision? Or is it the case that the Appellant may apply to amend the grounds of appeal in the already pending Tribunal appeal so as to challenge the new decision without the need to commence new Tribunal proceedings?

74. However, there is no need to decide that issue in the present case. It is a moot question because the Appellant in the present case did not seek to amend its grounds of appeal in the earlier appeal to challenge the new decision. Instead, the Appellant *did* commence a new Tribunal appeal to challenge the new decision, and did not object to the Tribunal closing its file in the earlier appeal. There is now before the Tribunal a new appeal against a new decision of HMRC that has been brought over 2 years after the date of the new decision that is challenged. Permission to bring a late appeal is therefore needed.

75. However, in deciding whether to grant permission to bring a late appeal, the Tribunal can take into account, in determining the reasons why the appeal has been brought late, that the Appellant quite reasonably thought that it was open to it to challenge the new decision of HMRC in the earlier appeal proceedings, without having to commence a new Tribunal appeal. This belief of the Appellant, whether right or wrong as a matter of law, was understandable in the particular circumstances of this case for a number of reasons.

(1) First, there is no reason why it should have been obvious to the Appellant that this was inherently impossible. For instance, in judicial review proceedings, where a challenged decision is withdrawn and substituted with a new decision after proceedings have commenced, it can be possible to amend the grounds of judicial review in the already pending proceedings to challenge the new decision, rather than bringing an entirely new judicial review claim for that purpose (see for instance *Caroopen v*

Secretary of State for the Home Department [2016] EWCA Civ 1307; [2017] 1 WLR 2339 at [49]).

(2) Second, in the present case HMRC itself on various occasions expressed the view (either explicitly or by necessary implication) that it would be possible for the Appellant to amend its grounds of appeal in the earlier proceedings in order to challenge the new HMRC decision: see paragraphs 14, 15, 18, 21, 23, 26 and 28 above. On 20 July 2015, HMRC noted that there was a procedural issue arising from the fact that the earlier decision had been withdrawn and that there had as yet been no appeal against the new decision (see paragraph 33 above). However, that letter was ambiguous as to whether an appeal against the new decision could be made through an amendment to the grounds of appeal in the existing appeal. HMRC did not subsequently take the position that the earlier proceedings had come to an end, but rather, HMRC continued to treat the original proceedings as still ongoing and continued to agree to stays of those earlier proceedings being granted (see paragraphs 34 and 40 above). On 7 July 2016, HMRC stated that it intended to continue to defend the then pending appeal (paragraph 44 above), necessarily implying that HMRC did not consider the earlier appeal to have yet come to an end.

(3) Third, correspondence from the Tribunal registry would reasonably have appeared to the Appellant to have confirmed the above. On 2 July 2014, HMRC advised the Tribunal that the earlier decision had been withdrawn, and as early as 22 January 2015 HMRC advised the Tribunal that an amended decision had been issued. Despite this information, the Tribunal continued to issue stays of proceedings in the earlier appeal, suggesting that the earlier appeal had not yet come to an end with the withdrawal of the earlier decision.

(4) It was not until 31 August 2016 that the Tribunal expressed the view to the Appellant that if it wanted to appeal against the new decision, "the appellant can submit an appeal against that in the usual way". The Appellant's representative responded to this very quickly with a letter dated 5 September 2016, stating that "a late appeal is made" against the new decision. The Tribunal is satisfied that in the circumstances referred to in (2) and (3) above, the Appellant's representatives considered at the time (rightly or wrongly) that they had done what the 31 August 2016 letter from the Tribunal was requiring them to do.

(5) It was only in the 28 September 2016 Tribunal letter that it was made clear to the Appellant that if it wanted to appeal against the new decision, the Appellant would have to submit a new notice of appeal setting out its grounds of appeal.

(6) Subsequently, on 24 January 2017, the Tribunal informed the parties that it would close its file in the earlier appeal if neither party objected within 14 days. It was within that 14 day period that the Appellant then filed the notice of appeal in this second appeal proceeding.

76. On the basis of the above, the Tribunal considers that the Appellant has understandable reasons for its failure to issue a new appeal, at least until 31 August 2016, or possibly until 28 September 2016.

77. The Tribunal also considers that the Appellant has understandable reasons for its failure to apply to amend its grounds of appeal in the earlier appeal to challenge the new decision, at least until July 2016, when the last of the stays granted by the Tribunal expired. It is understandable that an Appellant would not take a formal step in proceedings of applying to amend grounds of appeal when the proceedings were subject to a stay.

78. It might perhaps be said that the Appellant should have understood the Tribunal's 31 August 2016 letter as requiring more than a letter stating that "a late appeal is made", and that the Appellant at that stage should have realised that a new notice of appeal, or at least a formal application to amend the grounds of appeal in the earlier proceedings, was now required. It can certainly be said that from 28 September 2016 the Appellant should have realised that a new notice of appeal was required.

79. For these reasons, although the appeal is out of time by more than 2 years, it is only the last 4 or 5 months that are not explained by the circumstances in paragraph 75(2) and (3) above.

80. HMRC contend that the Appellant made no serious efforts to progress the appeal or the dispute with HMRC after the 20 July 2015 HMRC letter. Indeed, at the hearing, Mr Hodgetts admitted that the Appellant had not been looking for documents relevant to the case since September 2016.

81. The Appellant's explanation for this is that litigation was pending in other cases that would affect the outcome of the Appellant's appeal. In their 21 January 2014 letter, the Appellant's agent referred to the *Wakefield College* litigation. At that time, the First-tier Tribunal had only recently given its decision in that case (6 December 2013), which was favourable to the Appellant's case. However, some time thereafter the Appellant presumably became aware that the First-tier Tribunal's decision was being appealed to the Upper Tribunal. On 20 January 2016, the Upper Tribunal gave its decision in that case which was unfavourable to the Appellant in the present case. Some time thereafter, the Appellant became aware that the Upper Tribunal's decision was going on appeal to the Court of Appeal. Additionally, the Appellant's 2 July 2015 letter refers to the *Brockenhurst College* litigation which was then pending. The HMRC covering e-mail that transmitted the second 23 September 2014 decision to the Appellant referred to the "assumption that the underlying issue will ultimately be stood behind other litigation". The 20 July 2015 HMRC letter stated that staying the appeal behind other litigation was "one possible outcome" although HMRC wanted certain additional points resolved before agreeing to this. As explained at the hearing, the Appellant's position was that the appeal had been brought to protect its position, but that the Appellant could not formulate its definitive claim until the pending litigation in other cases had been concluded.

82. The Tribunal does not suggest that the Appellant is beyond criticism for the delays in this matter, especially in the last 4-5 months before the new appeal was filed. Mr Hodgetts indeed acknowledges that there had been some procedural failing on behalf of the Appellant. However, in circumstances where it was apparent to HMRC throughout that the Appellant intended to appeal against the 23 September 2014 decision, and in circumstances where there had already been long stays in the earlier appeal by agreement between the parties, and where the Appellant understandably might not want to spend significant amounts of fees in developing a case which might subsequently be rendered unviable by the awaited outcome in other litigation, the Tribunal cannot conclude that the Appellant was acting in bad faith or was deliberately dilatory or adopting a shoddy attitude to the proceedings. If HMRC considered that the matter should have been progressed more quickly, it could have applied to the Tribunal in the earlier appeal for directions setting a timetable for further procedural steps, or could have applied for the earlier appeal to be struck out for want of prosecution. Instead, on the contrary, HMRC consented to a series of stays in the earlier appeal.

83. At this stage of deciding whether or not to allow a late appeal, the Tribunal is not concerned with the merits of the proposed appeal. However, the Tribunal can take into account whether the Appellant has a prima facie arguable case, or whether the proposed appeal appears to be hopeless. It was for this reason that the Tribunal issued its direction at the end of the hearing (paragraph 53 above). The "Appellant's statement of case" filed in response to that direction is relatively brief and supported by only some 12 pages of evidence, but HMRC have not suggested that it fails to comply with the Tribunal's direction. Both parties are agreed that the Appellant's case will be unarguable if the Court of Appeal upholds the Upper Tribunal's decision in *Wakefield College*. HMRC say that the Appellant will not necessarily succeed even if the Court of Appeal reverses the Upper Tribunal's decision in *Wakefield College*, but do not suggest that the Appellant's case will be hopeless regardless of the outcome in *Wakefield College*.

84. The Tribunal takes into account the amount at stake in this appeal (see paragraph 64 above), which is not inconsiderable.

85. The Tribunal takes into account that the Appellant has not presented a consistent case, either in relation to how much of the VAT should be returned to the Appellant, or as to the methodology by which the Appellant arrives at the relevant figure.

86. HMRC claim that they are prejudiced by the delay since the officers previously working on the case are no longer involved. However, HMRC agreed to a series of stays until July 2016, and at least contemplated that this case might be stayed behind other litigation. HMRC do not establish that they would have avoided this claimed prejudice if the Appellant had filed its new appeal in, say, July 2016 when the last stay expired, rather than in February 2017.

87. The Tribunal proceeds on the basis that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely. The correct starting point is compliance with the time limits prescribed by law. The Tribunal does not apply any more relaxed attitude than would be applied by a court under the Civil Procedure Rules. The Tribunal takes into account the very long passage of time since the decision appealed against was made, and takes into account that the Appellant was professionally represented throughout. However, having considered why the delay occurred, and having evaluated all the circumstances of the case, the Tribunal considers that it is appropriate in order to deal justly with the case to grant the Appellant permission to bring this appeal late.

Conclusion

88. This application for permission to bring a late appeal is granted.

89. Directions for the further progress of this appeal are issued with this decision.

90. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 21 FEBRUARY 2018