[2018] UKFTT 402 (TC)

TC06604

Appeal number: TC/2017/7714

VAT – *Late appeal – Whether notice of review conclusions validly given – Yes - Whether fair and just to grant permission - No*

FIRST-TIER TRIBUNAL
TAX CHAMBER

KINGSGATE GOLF CLUB LIMITED **Appellant**

-and-

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

TRIBUNAL: **Judge Peter Kempster**
Mr Terence Bayliss

Sitting in public at Centre City Tower, Birmingham on 4 July 2018

Mr Tony Trotman and Mr Tony Pocock (QDOS Vantage) for the Appellant

Mr Anharul Qureshi (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant applies for permission to bring out of time an appeal against a decision by the Respondents ("**HMRC**") to refuse to refund certain VAT in dispute.

Law

2. Section 83G VAT Act 1994 stipulates a deadline for an appeal to the Tribunal against a disputed decision of 30 days after the date of notification of the decision, or where the decision is subject to a formal review, 30 days after the notification of the conclusions of the review. Section 83G(6) authorises the Tribunal to grant permission to admit a late appeal. The relevant provisions are examined in more depth later in this decision notice.

Facts

3. We make the following findings of fact from the bundle of documents submitted.

4. On 25 & 30 March 2009 the Appellant's accountants ("Levicks") filed voluntary disclosures seeking repayment of VAT relating to the period 1 April 1973 to 31 March 2008 ("**the Claims**").

5. On 7 August 2009 HMRC wrote to the Appellant rejecting the Claims, for stated reasons ("**the Decision Letter**"). HMRC explained they did not hold authority to deal with Levicks, and enclosed a Form 64-8 for completion. The letter notified the Appellant of its right to request a formal review within 30 days, or appeal to the Tribunal within 30 days.

6. On 3 September 2009 Levicks wrote to HMRC to "appeal" against the Decision Letter. HMRC took that as an acceptance of the offer of a formal review, pursuant to ss 83A & 83C VATA 1994.

7. On 10 September 2009 the Appellant filed a Form 64-8 authorising Levicks.

8. On 2 October 2009 HMRC wrote to Levicks with their conclusion on the review ("**the Review Letter**"), upholding the Decision Letter. The Review Letter concluded,

> "If you do not agree with the decision you can ask an independent tribunal to decide the matter If you want to appeal to the tribunal, you must write to the tribunal within 30 days of the date of this letter. You can find out how to do this on the Tribunals Service website … or you can phone them on 0845 223 8080."

9. On 30 October 2009 Levicks wrote to HMRC stating "We further appeal against your findings and conclusions …" and "We therefore request that this matter is again reviewed …".

10. On 3 November 2009 HMRC replied to Levicks stating,

> "I refer to your letter dated 30 October 2009. I have already concluded my review and the legal provisions to [*sic* do] not allow a second review within the statutory review process. If you disagree with my conclusion you should appeal to the Tribunal as advised in my letter of 2 October 2009. I would suggest that you not delay lodging an appeal as the statutory time limits have already been exceeded."

11. Levicks have stated that they did not receive HMRC's 3 November 2009 letter.

12. On 4 August 2011 Levicks wrote to HMRC chasing a reply to their 3 September 2009 letter, and referring to the litigation in the *Bridport & West Dorset Golf Club* case.

13. HMRC replied on 10 August 2011 stating,

> "I refer to your letter of 4th August 2011 suggesting that you have not received a reply to your letter of 3rd September 2009 "appealing" our decision to deny repayment of your client's green fee claim. Your request actually amounted to a request for a review of the officer's decision to be carried out.
>
> Please find enclosed copies of the correspondence that followed you letter. You will note that I include a copy of you're [*sic*] letter of 30th October 2009 seeking to challenge the decision reached by the reviewer. His letters give you very clear guidance on your right to progress your clients claim to the VAT Tribunal. Even at this late stage, you may still approach the tribunal with a request to lodge a late appeal."

14. Levicks have stated that they also did not receive HMRC's 10 August 2011 letter.

15. In May and September 2014 Levicks submitted further claims.

16. In March 2016 Levicks wrote to HMRC asking why no repayment had been made to the Appellant. They chased for a reply in June 2016.

17. HMRC replied to Levicks on 13 September 2016 (with copy to the Appellant) apologising for the delay in replying and confirming that certain of the claims (called claim 3 and claim 4) were open but required revision and further calculations, for stated reasons. The letter also stated:

> "**Claim 1 in the sum of tax £176,365 for the period 1/1/90 to 3019/96. Claim 2 in the sum of tax £75,073 for the period 1/4/04 to 31103/08.**
>
> Claims 1 and 2 were both submitted with a letter dated 30 March 2009.
>
> Claims 1 and 2 were both rejected in the Commissioners letter of the 7 August 2009. That decision to reject the claims was upheld on review. The Commissioners letters of 2 October 2009 and 3 November 2009 refer. Furthermore, the 3 November 2009 letter states "If you disagree

with my conclusion you should appeal to the Tribunal as advised in my letter of 2 October 2009. I would suggest that you not delay lodging an appeal as the statutory time limits have already been exceeded."

Moreover, the Commissioners further advised in their letter of 10 August 2011 that "even at this late stage, you may still approach the Tribunal with a request to lodge a late appeal". I have enclosed a copy of that letter for your ease of reference.

As stated in the VAT Information Sheet 01/15 at para 1.4:

- "Where a submitted claim has already been rejected by HMRC and the claimant has not appealed, that claim cannot now be resubmitted. Any claims submitted now will be a new claim subject to the 4 year time limit.

- Rejected claims that were appealed to the First Tier Tribunal, however, are still open."

From the available information Claim 1 and 2 were both rejected and that decision was upheld on review. HMRC does not hold any record of an appeal. On the face of it as no appeal was submitted to the First Tier Tribunal both Claim 1 and 2 are not open or valid claims and cannot be considered. In the event the claims for the periods in question were resubmitted they would both be subject to the 4 year time limit.

I would be grateful if you could confirm if the club or their advisers did submit an appeal to the First Tier Tribunal or not. If an appeal was submitted please provide the Tribunal reference number to allow me to consider the claims. In the event an appeal was not submitted to the Tribunal please provide the full reasons if the Club wants to pursue the Claim 1 and 2."

18. On 10 October 2016 Levicks wrote to HMRC,

"In respect of Claims 1 and 2, these were submitted in March 2009. As you can see we were not in receipt of your letter responding to this and we did not receive your letter of 10 August 2011. We therefore believed as the case was still going through the court process, this claim was still valid and the appeal was still in place.

As such, the Club still wishes to pursue Claims 1 and 2, and we believe that the Claim was still live."

19. On 26 October 2016 HMRC wrote to the Appellant, with copy to Levicks, at length giving an accurate and helpful summary of the preceding correspondence, and including,

"**Claim 1 in the sum of tax £176,365 for the period 1/1/90 to 3019/96. Claim 2 in the sum of tax £75,073 for the period 1/4/04 to 31103/08.**

In my letter of the 13 September 2016 I requested confirmation or otherwise if the Club (or their adviser) had submitted an appeal to the First Tier Tribunal in respect to the Commissioners decision of 7 August 2009 to reject claim 1 and claim 2.

In the letter of 10 October 2016 Levicks have stated- "As you can see we were not in receipt of your letters responding to this and we did not receive your letter of 10 August 2011. We therefore believed that as the case was still going through the court process, that this claim was still valid and the appeal was still in place".

I therefore assume that Levicks are now confirming that no appeal was submitted to the First Tier Tribunal in respect to the Commissioner's decision to reject Claim 1 and Claim 2."

20. On 6 February 2017 HMRC wrote to the Appellant, with copy to Levicks, stating,

"I refer to your adviser Levicks letter of the 9 December 2016 a copy of which was received by e-mail on the 30 January 2017.

In that letter Levicks have asked for Claim 1 (now stated to be in the sum of tax £44 895) and Claim 2 (in the sum of tax £75,069.38) both originally submitted in a letter dated 30 March 2009 to be "re-reviewed". For the avoidance of any doubt I have not made any "new" decision in my letter of the 26 October 2016 in respect to Claim 1 and Claim 2.

I advised in my letter of the 26 October 2016 "The claim of 30 March 2009 which covered the period 1973 to 31 March 2008 was rejected in a letter dated 7 August 2009. The rejection was then upheld at review on 2 October 2009 and on both of these occasions, the rights of appeal were notified. The letter of 30 October 2009 from Levicks to HMRC documents that the decision of 2 October 2009 to uphold the rejection of the claim on review was received by the Club. Further analysis was provided with the Commissioners letter of 3 November 2009 and the rights of appeal again restated."

I understand that Levicks position is the HMRC letters of 3 November 2009 and 10 August 2011 were not received by Levicks or the Club. A timely appeal was therefore not made.

Notwithstanding this, it is clear from Levicks letter of 30 October 2009 that the letter of the 2 October 2009 upholding on review the decision of the 7 August 2009 was indeed received.

The HMRC letter of the 2 October 2009 clearly stated that if the review decision was not agreed with an appeal to the VAT and Duties Tribunal could be made. Thus a timely appeal could have been made on receipt of the 2 October 2009 letter.

> In order to establish whether a claim is open one has to look at it from the opposite perspective and consider when a claim is said to be closed or completed.
>
> For this HMRC rely on the decision in *University of Liverpool* (VAT Tribunal decision 16769) [2001] BVC 2088. The Tribunal ruled that a completed or closed claim was one which, "(d) has been rejected in full by the Commissioners and the time limit for appealing against that rejection prescribed by rule 4(1) of the VAT Tribunals Rules 1986, as amended, has expired;"
>
> It is considered that the claim submitted on 30 March 2009 is closed by virtue of (d) above as the Club did not lodge an appeal against the decision to refuse the claim dated 2 October 2009.
>
> Furthermore, Levicks assert that acknowledgment of a "further claim" in the HMRC letter of 27 May 2014 must imply there is a previous claim outstanding. In my view the phrase "I acknowledge receipt of your further claim" is merely confirming that a previous claim was submitted but is silent on whether that previous claim is or is not closed
>
> *My Conclusion*
>
> In my view there is no further evidence provided to be "re-reviewed" in respect to the 2 October 2009 decision. I have advised in my letter of the 26 October 2016 the reasons that the 2009 claim was closed and could not be considered live. I can see no reason to disturb this view.
>
> *What Happens Next*
>
> I appreciate that this is not the reply you were hoping for and can only advise that if you do not agree with my conclusion you can submit a late appeal application against the decision of the 2 October 2009 to the independent tribunal. You can find out more about tribunals on the Tribunals Service website … or you can phone them on 0300 123 1024"

21. Later in 2017 the Appellant appointed new agents (QDOS Vantage) and on 10 October 2017 a notice of appeal was filed with the Tribunal.

Appellant's case

22. Mr Trotman submitted as follows for the Appellant.

23. The Review Letter should have been sent to the Appellant but was instead sent only to the agent, Levicks. That was contrary to the requirements of s 83F VATA, and also HMRC's advice to its own officers (in ARTG4820): "Where an agent is acting the reviewing officer should write to the customer and send a copy of the letter to the agent." Thus the Review Letter was not properly notified to the Appellant. Although copies of the Review Letter had been sent to the Appellant by HMRC subsequently, those later letters did not notify the Appellant of a new 30 day deadline

for an appeal to the Tribunal. Accordingly, the Appellant was still in time to bring an appeal.

24. Alternatively, if the appeal was submitted late then the Tribunal should exercise its discretion to admit the appeal out of time. Levicks have stated that they did not receive either of HMRC's letters dated 3 November 2009 and 10 August 2011. It was accepted that copies were provided later by HMRC but Levicks had been under the impression that the claims were still open pending the outcome of lead case litigation (*Bridport & West Dorset Golf Club* and other cases); that was why Levicks had continued to correspond with HMRC about the claims. Indeed, some of the later claims had now been repaid. It had been misleading of HMRC to refer in correspondence to "further claims" as that implied that the original claims were still open, which HMRC now deny.

25. The Appellant had relied on its professional advisers. It was understood that Levicks had been consulting an external VAT adviser. Levicks were clearly unfamiliar with the procedure of Tribunal appeals.

26. The amount of the claim on the disputed items was substantial, being around £108,000. The only further action required from HMRC would be to check the calculation of the amount.

27. In *North Berwick Golf Club* [2015] UKFTT 0082 (TC) the Tribunal had admitted a late appeal relating to a claim pursuant to the *Bridport* litigation.

Respondents' case

28. Mr Qureshi submitted as follows for the Respondents.

29. The Decision Letter had been sent to the Appellant. The Review Letter had been sent to the Appellant's appointed agent. Copies of all relevant correspondence had been provided subsequently when requested.

30. The letters which were claimed not to have been received were not recorded by HMRC as having been returned as undelivered. Again, copies of all relevant correspondence had been provided subsequently when requested. Neither the Appellant nor Levicks approached HMRC concerning the perceived lack of any reply from HMRC.

31. The relevant correspondence had been clear as to the procedure and deadline for making an appeal to the Tribunal, and also subsequently that a late appeal was required.

32. The appeal was filed almost eight years late. The reason for the lengthy delay was not the actions of HMRC, nor a breakdown in communication, but instead the inaction of the agent. As was clear from the correspondence, HMRC had considered the matter closed over seven years ago, and there was no good reason why it should be reopened now given the failure by the Appellant and its agent to take the proper steps.

33. In *Romasave (Property Services) Ltd* [2015] BVC 518 (at [96]) the Tribunal commented that a delay of three months (on a 30 day deadline) "cannot be described as anything but serious and significant".

34. Several other golf clubs have had late appeals rejected by the Tribunal: for example *Teignmouth Golf Club* (TC/2014/1410) and *Nairn Golf Club* (TC/2014/4513).

Consideration and Conclusions

Was the Review Letter validly notified?

35. The first contention for the Appellant is that the Review Letter was not properly notified to the Appellant, because it was sent to the Appellant's agent (Levicks) and not to the Appellant itself.

36. The provisions relating to reviews and appeals are given by ss 83 to 83G VATA, and can be summarised for current purposes as follows.

(1) Section 83A requires HMRC to offer a review to the taxpayer (called "P" in the legislation) – it is agreed that this was satisfied by the wording in the Decision Letter, which was sent to the Appellant.

(2) Section 83C requires HMRC to conduct a review if P accepts the offer of a review within 30 days – the Appellant appears to believe the offer was accepted by Levicks's letter dated 3 September 2009. However, there are two potential problems here; first, Levicks were not then authorised as agents of the Appellant (that was made clear to the Appellant in the Decision Letter, and an authority in a Form 64-8 was not filed until after the 3 September letter); and secondly, Levicks sought to "appeal" the Decision Letter rather than request a review under s 83C.

(3) Section 83F(6) requires HMRC to give P notice of the conclusions of the review (and the reasoning) within 45 days of the review request. HMRC contend that was satisfied because the Review Letter was sent to Levicks, who were by this time properly authorised as agent of the Appellant. The Appellant contends that notification to an agent is not sufficient – the legislation requires it to be given to P.

37. Our view is that if the Appellant wishes to argue for a strict interpretation of the relevant provisions (so that references to P do not include references to an agent of P) then it must accept that approach for all the relevant provisions, and not cherry-pick only some. So if the Appellant contends that notice to an agent is insufficient for s 83F(6) then it must also accept that a request by an agent for a review under s 83C is invalid (because, on this interpretation, the request must be made by P itself). On that strict interpretation there was – contrary to HMRC's understanding at the time – never a review requested and the deadline for an appeal to the Tribunal was 30 days after the Decision Letter (s 83G). The Appellant also faces the problem referred to above,

that the agent in any event did not request a review, only protested an appeal (but took no steps to file one with the Tribunal, as advised in the Decision Letter).

38. We also consider that the Appellant's argument is not in accordance with the recent Upper Tribunal decision in *William Tinkler* [2018] UKUT 0073 (TCC). There the taxpayer contended that a formal return enquiry had not been validly opened by HMRC because the enquiry notice (s 9A TMA 1970 refers) had been given to his agent (BDO, authorised by a Form 64-8) rather than the taxpayer himself. The Upper Tribunal held (at [43-44]) that the Form 64-8 conferred both apparent and actual authority on BDO to receive notices on behalf of the taxpayer, and (at [47]) that sending a notice to BDO was valid notification to the taxpayer. We consider the same rationale applies to notices under s 83F(6) VATA as it does to notices under s 9A TMA 1970.

39. The Appellant points out that HMRC's manuals (in ARTG4820) state: "Where an agent is acting the reviewing officer should write to the customer and send a copy of the letter to the agent." However, there is no distinction from *Tinkler* on this point; in that case it was noted (at [10]) that the relevant page on HMRC's website at the time stated "while a formal notice of enquiry must be given to the client [ie taxpayer], correspondence can be addressed to the agent."

40. For the above reasons we conclude that HMRC were justified in treating Levicks's letter dated 3 September 2009 as a request for a formal review, and that the Review Letter was properly notified under s 83F(6) VATA.

Should a late appeal be admitted?

41. Section 83G(6) grants a discretion to the Tribunal to permit a late appeal. In the recent case of *Martland* [2018] UKUT 0178 (TCC) the Upper Tribunal gave the following guidance:

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in [*Denton and others v TH White Limited and others* [2014] EWCA Civ 906, [2014] 1WLR 3926]:
>
> > (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
> >
> > (2) The reason (or reasons) why the default occurred should be established.

> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. …
>
> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. …
>
> 47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in [*R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472 at [43]]. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

42. The Review Letter explained the procedure and deadline for an appeal to the Tribunal. The 30 day deadline after the Review Letter expired on 2 November 2009. The Review Letter was received by Levicks, and they replied on 30 October purporting to make a "further appeal" and requesting that HMRC "again review" the Decision Letter. That was clearly incorrect; a professional tax adviser should have appreciated that the legislation makes no provision for a second review, and that (as spelled out in the Review Letter) the route for an appeal was to the Tribunal (not HMRC).

43. Levicks have stated that they did not receive HMRC's letter dated 3 November 2009 nor that dated 10 August 2011. We did not have any evidence from the partners of Levicks, nor from any directors or other officers of the Appellant. What is clear is that both Levicks and the Appellant did receive HMRC's letter dated 13 September 2016; that letter again contains a clear statement that the disputed claim is out of time and making both Levicks and the Appellant aware that their only recourse is to apply to the Tribunal for permission to lodge a late appeal. Even at this late stage the penny does not appear to drop; Levicks do not apply to the Tribunal but instead state to HMRC that they believe claims 1 and 2 are still live – which appears to be merely wishful thinking. In our view, no one reading the 13 September 2016 letter could have been in any doubt that something had gone seriously wrong (and not merely because of the missing letters) and that urgent remedial action was required. Even on

the interpretation of events most favourable to the Appellant, an application should have been made to the Tribunal by October 2016 at the very latest.

44. In fact matters get even worse in that even when HMRC go beyond what could be reasonably expected of them and write lengthy explanations of the situation in their letters dated 26 October 2016 and 6 February 2017, there is still no action by either the Appellant or Levicks. Nothing happens until 10 October 2017 when new advisers file an application with the Tribunal. We note that the new advisers when appointed had no difficulty in recognising immediately what was required – file an application for permission to admit a late appeal against the Review Letter.

45. The length of the delay was almost eight years (November 2009 to October 2017). Even on the "most favourable to the Appellant" interpretation of events, there is no convincing explanation for the delay from October 2016 to October 2017 – around one year. On any interpretation the delay was serious and significant.

46. The reasons for the default are, we find, that neither the Appellant nor its agent followed the advice clearly stated by HMRC in the 13 September 2016 letter (and in earlier and subsequent correspondence which was also not followed). No convincing explanation has been provided for that failure.

47. We appreciate that the amount in dispute is significant (around £108,000) but that is only one factor that we are required to consider in the balancing exercise. We note that the Appellant considers it has a strong case in support of the disputed claims, and that similar claims for later periods have been met by HMRC (after adjustment), but the basis on which HMRC have been meeting claims was, apparently, under Customs Brief 10/2016 and VAT Information Sheet 01/15, and we have insufficient information about whether the disputed claims would meet the constraints of that practice.

48. There is a very clear prejudice to HMRC in requiring them to address now claims that were considered closed (for reasons clearly explained at the time) over eight years ago. That prejudice stems in no way from HMRC's own behaviour, which has been clear and consistent throughout.

49. Having carefully considered all the above factors and weighed them in a balancing exercise, we conclude that it would not be fair and just to grant permission for the appeal to be admitted out of time.

Decision

50. The application for the appeal to be admitted late is REFUSED.

51. 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.

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Peter Kempster
TRIBUNAL JUDGE

RELEASE DATE: 18 July 2018