



TC06728

Appeal number: TC/2018/1906 and TC/2018/2371

APPLICATION TO LODGE LATE APPEALS – application refused on facts

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TALKMORE VELA

Appellant

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

**Sitting in public at Taylor House, Rosebery Avenue, London on 6 September
2018**

The appellant in person

Mrs Williams, HMRC officer, for the Respondents

DECISION

- 5 1. Mr Vela is a self-employed person trading on Ebay. He sells adult and children's footwear and has done so for many years. He seeks permission from the Tribunal to lodge appeals against the assessments set out in the below table:

Tax year	Amount in £	Tax/penalty	Date of assessment
n/a	300	Penalty for non compliance with information notice	4/9/15
n/a	300	Ditto	12/10/15
2010/2011	4,967.80	Income tax	12/2/16
2011/2012	6,032.75	Income tax	12/2/16
2012/2013	7,264.55	Income tax	12/2/16
2012/2014	8,695.05	Income tax	12/2/16
2010/2011	3,104.87	Failure to notify liability to income tax	16/2/16
2011/2012	3,770.46	Ditto	16/2/16
2012/2013	4,540.34	Ditto	16/2/16
2012/2014	5,434.40	Ditto	16/2/16
1/4/11-31/8/16	122,222.00	VAT	11/11/16
1/4/11-2/6/16	68,750	Failure to notify liability to VAT	7/12/16
TOTAL	235,382.22		

- 10 2. Appeals against all the above matters except the VAT assessment and VAT penalty must be first lodged with HMRC: I had no evidence that he had ever made an application in writing to HMRC for permission to make a late appeal; nevertheless, HMRC treated him as having done so following an email exchange on 22 and 23 November 2017. The application was turned down by HMRC on 23 November 2017.

- 15 3. Mr Vela's application to be allowed to lodge appeals with HMRC was lodged with the Tribunal on 14 March 2018. As it became apparent he also wished to appeal the VAT assessments, he was advised by the Tribunal, and did lodge a separate application to make a late appeal against the VAT assessments on 8 April 2018.

Finding of facts

- 20 4. It is not for this Tribunal, considering whether to extend time in which Mr Vela can lodge an appeal, to make findings of fact on matters that would fall to the Tribunal to make findings if I give leave for Mr Vela to bring his appeals.

5. However, I do have to make findings of fact on matters which relate to whether I should extend time to lodge an appeal and in particular I have to decide why the appeal was lodged late. There was no dispute over the fact it was lodged late.

How late were the appeals?

6. The information notice penalties were imposed in the Autumn of 2015. The income tax assessments and penalties were imposed in early 2016. Mr Vela was retrospectively registered for VAT and the VAT assessments and penalties were imposed in late 2016.

7. Yet there was no contact with HMRC from Mr Vela until 19 June 2017 when his agent gave HMRC notice of acting. That letter did not lodge any appeal against the assessments. Nevertheless, it did ask for a schedule of them. HMRC's reply of 4 July 2017 stated that if there was no response within 30 days, the writer would notify HMRC's debt management section to pursue collection of them. His agent asked for a time extension by letter dated 2 August 2018. On 1 September HMRC notified the agent that debt collection action would be recommenced on 5 September. Both of these letters advised of the right to apply to the Tribunal for permission to make a late appeal.

8. Nothing more was heard from Mr Vela until 22 November and then his contact with HMRC was in response to receipt of a bankruptcy notice. And while, as I have said, there is no evidence Mr Vela did attempt to lodge a written appeal to HMRC at that time, he was treated as having done so as on 23 November 2017 he was refused permission to bring a late appeal.

9. In conclusion, as was accepted, the appeals were made very late. An appeal against the income tax assessments and penalties should have been lodged with HMRC within 30 days of the dates of the assessments. They should therefore have been lodged by mid-March 2016 but were not lodged until November 2017 (about 20 months late). The appeals against the information notice penalties were even later (over two years late). That VAT assessments did not need to be lodged with HMRC; they were not lodged with the Tribunal until April 2018, about sixteen months late.

10. There is no appeal against the retrospective VAT registration: Mr Vela accepts he traded above the VAT registration threshold for the period for which he has been registered. While it is his case that for many years he only traded in children's shoes which were zero rated, this would not give him an exemption from registration

Why were the appeals lodged late?

11. Mr Vela's explanation for the late lodging of the appeals was that he was unaware of the assessments until he became aware of the bankruptcy proceedings against him in about mid-2017. That answer raises two questions:

- (a) Why didn't he know about the assessments before mid-2017; and
- (b) Having found out about them on or shortly after mid-2017, why did he not apply to appeal them out of time until late November 2017 (in the case of the income tax assessments) and April 2018 (in the case of the VAT assessments)?

Why was Mr Vela unaware of the assessments?

12. Mrs Williams did not challenge Mr Vela's statement that he did not know about the assessments until mid-2017 and I accept it. His evidence overall was consistent; albeit consistent with the image he put forward of himself as someone who was naïve and somewhat casual in his attitude to compliance. Moreover, it was Mr Vela who had originally initiated contact with HMRC by completing a disclosure report in September 2012 and that was not the action of someone who planned to ignore contact from HMRC.

13. The reason he did not know about the assessments was as follows. He had lived for some time with his brother and sister-in-law at their home at an address which I shall describe as 'the Endeavour address'. In 2009, he moved out into a bedsit of his own. One of his new landlord's conditions for letting him the room was that he should not use the address for business related correspondence.

14. Mrs Williams doubted the reliability of this evidence: she did not think a landlord would impose such a condition. Nevertheless, I accepted this evidence: Mr Vela explained his landlord had had a bad experience with a previous occupant who had got into debt, leading bailiffs to call at the landlord's home. His landlord didn't want a repeat of the experience. Mr Vela had wanted the bedsit and was prepared to accept the condition. As it was his landlord's home too, his landlord would know if he broke the condition, and so he did not use his bedsit address for business purposes. I will refer to his bedsit address as 'the Grantham address'.

15. So Mr Vela continued to use the Endeavour address as his correspondence address. His bank sent his bank statements there. He gave it to HMRC as his address in his disclosure report he completed for HMRC in September 2012. He still gives it to HMRC as his address.

16. His sister-in-law was content for him to continue to use the Endeavour address as his address once he moved out in 2009. She remained happy for him to do so even after her relationship with his brother broke up. When she moved out of the Endeavour address herself, the new occupant was a relation of hers, and he was also - and continues to be - content for Mr Vela to use the Endeavour address for correspondence.

17. Mr Vela stated that he tried to call at the Endeavour address for his post once a week but admits that when busy, he would call less often. Indeed, he accepted that for a significant period he did not call at the Endeavour address for his post at all and has never retrieved the post that related to the period of the assessments. He could not be precise on dates. The period he did not collect his post lasted from the time he opted to cease receiving his bank statements by post until he learned of the bankruptcy proceedings. This period commenced before HMRC sent him a letter opening an enquiry and so commenced before June 2015 and therefore lasted for at least two years.

18. In short, therefore, the reason he never received the assessments was that he had given HMRC as his address an address from which he (knowingly) later ceased to receive his mail.

19. Mr Vela did not consider he was really at fault over this. As he explained, he didn't get much post other than bank statements. Once he opted to receive them online, he didn't expect to receive much post at all. In particular, he said he had made his disclosure to HMRC in 2012. He had received an acknowledgment from HMRC saying that they would be in touch. But he heard nothing further for a long time and ceased to expect that he would.

20. Mrs Williams thought Mr Vela was very wrong to give HMRC an address which was not his own; I accept that Mr Vela was struggling in difficult circumstances. While I can see Mrs Williams' point of view that giving an address which was not one's own might assist a person evade their tax liability, I accept that that was not Mr Vela's intent and at the start of his dispute with HMRC was his own voluntary disclosure to HMRC.

21. However, I do think it unreasonable for a taxpayer, even without any intention to evade tax, to give HMRC an address which was not his own without explaining to them that he had done so. And having done so, he can scarcely criticise HMRC for believing that he resided there.

22. Even though I accept he did not give HMRC an address which was not his address because he intended to evade his liabilities, I find the reason he failed to receive the assessments was due to his own failure to collect his post from the Endeavour address.

23. I don't agree that his behaviour was reasonable. By failing to collect his post he ought to have realised he had left HMRC with no means to contact him. Moreover, he ought to have realised he needed to register for VAT because he was trading and he had a duty to ensure he paid any tax that was due. While it was his belief (unchallenged by Mrs Williams) that only companies paid VAT, that was not a reasonable belief and he ought to have taken steps to acquaint himself with the law and not simply make assumptions. He accepts now that he traded over the VAT registration threshold: if he had checked this at the time, he would have known that he was liable to registration.

24. It was also his belief (unchallenged by Mrs Williams) that he was below the annual allowance threshold for direct tax; this was the basis of his 2012 disclosure. And while I accept this was a genuine belief, I consider it was an unreasonable belief because he kept no records, so he could not know for certain he was below the threshold.

25. In my view, he was unreasonable to assume there was need to contact HMRC and no need for HMRC to contact him: he should have ensured HMRC had a current address for himself. (This was not his only failure, of course: he also ought to have registered for VAT and kept business records).

26. Mr Vela's case is that some of the blame must be laid with HMRC. He says:

(a) HMRC waited too long to contact him after his disclosure;

(b) They should have tried to contact him by another method when he failed to reply to post sent to him at the Endeavour address. He had provided a telephone number and email address in his disclosure report.

27. I agree that HMRC were being less than effective at their statutory role when it took them nearly 3 years to contact a taxpayer who had completed a disclosure form. Whether Mr Vela would have received the assessments and been able to appeal them in a timely fashion if HMRC had acted more swiftly, I do not know: Mr Vela was totally vague as to the date on which he ceased to collect post from the Endeavour address.

28. But I do not consider HMRC's failures relevant because it was Mr Vela's duty to declare his liability to tax: he continued to trade and the ongoing failure was his.

29. And while it does not appear HMRC did attempt to contact him by another means, it was reasonable for them to use an address which Mr Vela had given as his contact address.

30. In conclusion, Mr Vela, and Mr Vela alone, must bear the blame for his failure to receive the assessments which were sent to him. I do not consider he has a good explanation for why he was unaware of the assessments.

20 *Once he was aware of the assessments, did he act promptly?*

31. It is also relevant to consider whether he acted promptly once he did know of the assessments. He clearly knew of the need to appeal: this was stated in HMRC's letters to his agent, copied to him in July and September 2017.

32. His case is that he instructed accountants to act for him and considered that they were taking care of any necessary appeal. But the email exchange on 22-23 November shows that Mr Vela had decided by late November no longer to instruct an agent and that he knew no appeal had been lodged on his behalf with the Tribunal Service. The HMRC officer emailed him the Tribunal's contact details.

33. So far as the income tax assessments and penalties are concerned, once HMRC have refused to accept a late appeal there is no time limit on lodging an application with the Tribunal. Nevertheless, whether the appellant did so promptly is a factor in the Tribunal's consideration of whether to give permission to appeal and I find there was no explanation for why he delayed from end-November 2017 until mid-March to lodge his appeal.

34. There is no requirement to lodge an appeal with HMRC against the VAT assessments and penalties; there is similarly no explanation of why he did not lodge an appeal with the VAT tribunal from when he must have known that his agent had not lodged an appeal (late November) until early April 2018.

35. I find he did not act particularly promptly in lodging proceedings with the tribunal once he knew that he needed to do so if he wished to challenge the assessments.

Should I admit these appeals?

5 36. The law requires that I consider all relevant circumstances in order to decide whether to admit the appeals out of time. See *Martland* [2018] UKUT 178 (TCC) at §32 and 43-47. All relevant circumstances include the importance of time limits, how late the appeals were lodged, whether there is a good explanation for the delay, and the consequences to the parties of allowing or not allowing the application.

10 *How late were the appeals lodged?*

37. I find the appeals were lodged very late. See §9 above. This is a serious and significant delay.

Was there a good reason for the delay?

15 38. I reached my findings of fact on this at §§12-30 above. I consider Mr Vela the author of his own misfortune as it was his choice to notify HMRC of an address which was not an address he occupied, and then his choice not to visit that address for a long period such that he remained unaware of the assessments for a long time.

20 39. I also find that once he did find out about the assessments, he delayed for several months before lodging any application to appeal out of time with HMRC and with the Tribunal and I did not consider that an adequate explanation was given for this, although this was a more minor delay.

Consequences to Mr Vela of not granting an extension

25 40. Mr Vela's case, which Mrs Williams accepted, was that he would become bankrupt if he was unable to successfully challenge these assessments. The assessments and interest total about a quarter of a million pounds: he cannot pay.

30 41. It was his case that if he became bankrupt, he would be unable to continue to trade. He said neither Ebay nor Paypal, both vital to his business, would permit him to trade while bankrupt. Mrs Williams did not challenge this. In any event, this evidence was credible and I accept it. Moreover, it is an offence (s 360 Insolvency Act 1986) for a bankrupt to obtain credit of more than £500, and being paid in advance counts as credit. His business model involves receiving multiple payments in advance, so in his case trading while bankrupt might well be unlawful.

35 42. So I accept that bankruptcy for him will mean an end to the business that he has been running for 10 years, and make it difficult for him to earn an income. This is a really serious outcome for him.

43. However, I have to take into account that bankruptcy might be the outcome even if he is given leave to appeal the assessments out of time. Having the right to challenge the assessments will only avoid bankruptcy if he is very substantially successful in his appeal. This is because his evidence (which I accept) is that he has
5 no assets and the assessments total nearly a quarter of million pounds. What chance of success does he have?

44. The VAT assessment: while he accepts he traded over the VAT registration threshold, his case is that for all or a significant part of the period for which he was assessed he only traded in children's shoes and all his sales were zero rated. He said,
10 had he kept records, they would show that HMRC would owe him tax rather than vice versa (as they would need to reimburse him his VAT on his petrol and other expenses).

45. The difficulty for him, as he admits, is that he kept no records. He told me he still kept no records although when I asked for details he said (since instructing advisers last year) he now (normally) kept a print out of each month's trading on Ebay and can access his bank statements going back for years; he also now keeps some receipts. However, it was also his case that he now trades in adult as well as children's shoes so it appears it will be difficult for him to evidence his claim that
15 during the assessed period his sales were all VAT-free.

46. I deal below with HMRC's case that in any event he has no right to appeal the VAT assessments. Suffice it to say that it appears there may be a second reason why his appeal against the VAT assessments would very likely fail.
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47. The income tax assessments: as I have said, his case is that his profits were low in comparison to his turnover, so that although he was over the VAT registration threshold, he was below the annual exemption for tax.
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48. Again, the difficulty with his position is that he kept no records. The law is that it is for the taxpayer not only to show that the assessment is wrong, but to show the right amount of the assessment¹. His position is not hopeless but it is very weak: he has some records of recent trading which he could use to attempt to establish his trading in the assessed years. However, since he did not bring the records to the
30 tribunal nor (it appears) have they ever been analysed, it appears his belief that he was not and is not liable to tax is not founded on any rational basis. I am certainly unable to conclude that his records, such as they are, would support his appeal.

¹ This is well-known in tax law and there are many statements to that effect, some of the better known being *Tynnewydd Labour Working Men's Club and Institute Ltd* [1979] STC 570 at 581b, *Lord Lowry in Biflex v Carribbean Ltd* [1990] UKPC 35 at page 10; *Lord Lowry in Biflex v Carribbean Ltd* [1990] UKPC 35 at page 10; *T Haythornwaite & Sons Ltd v Kelly* CA 1927, 11 TC 657.

49. Conclusion: On the information available to me in this hearing, I consider his appeal against the VAT and tax assessments has no reasonable prospect of success. What records he has are incomplete and relate to a later period; on his own admission they show sales of adult as well as children's shoes so cannot support his case that at
5 the relevant time he had no VAT liability; moreover, they have never been analysed nor has Mr Vela kept any accounts so his belief he has no income tax liability does not appear to be founded on a rational basis.

50. So far as the appeal against the penalties are concerned, I can see no reasonable prospect of success for his appeal against the information notice penalties. He did not
10 comply because he did not know about the information notice: a Tribunal is unlikely to find that to be a reasonable excuse for the reasons given at §§12-30.

51. The tax and VAT penalties were charged at a high rate to reflect HMRC's belief that his conduct was deliberate. I think, on the evidence he gave me, he has a good prospect of challenging that view. However, even if a Tribunal were to agree with
15 him that his conduct was not deliberate, I regard him as having little prospect of successfully challenging the view that he was careless. His own evidence is in effect an admission of carelessness for the reasons given at §§12-30.

52. In summary, I consider bankruptcy a likely outcome for him either way. If he is given leave to pursue the appeals, I consider he has a reasonable prospect of
20 challenging the quantum of the penalties, and successfully having them reduced from a 'deliberate' to a merely 'careless' level, but I do not consider him to have a real prospect of complete success in his appeal any of the penalties; I consider he has no reasonable prospect of success against the information notice penalties, and I consider he has no reasonable prospect of success in his proposed appeal against the tax and
25 VAT assessments, which form the largest part of the appeal.

53. From what he said, a reduction in the penalty assessments will not avoid bankruptcy. The tax and/or VAT assessments alone are enough to ensure bankruptcy as he cannot, on what he said to me, pay them. He has no assets.

54. Therefore, I am not satisfied that the consequences for Mr Vela of allowing his
30 application to lodge late appeals has any real prospect of being any different for him to the consequences to him if I refuse.

Consequences to HMRC of granting an extension

55. If the extension is granted, HMRC will be forced to defend assessments raised
35 some years ago, and long after they would have been entitled to assume they were final. The costs they have already incurred in the bankruptcy proceedings will be wasted. They will incur costs in defending the assessments. Those costs will be wasted if the outcome (bankruptcy of Mr Vela) of the litigation is much the same whether or not the extension of time is granted, and for reasons I have given I have considered that is likely to be the case.

Overall conclusion

56. Although I appreciate how very serious the consequences to Mr Vela will be of being unable to successfully challenge the assessments, I do not grant Mr Vela an extension of time to bring any of the appeals he wishes to bring. The delay was very long and without a good excuse. Apart from in respect of a challenge to the ‘deliberate’ aspect the penalties, I do not consider the appeals have a reasonable prospect of success, and bankruptcy is the likely outcome whether or not I accept the appeals out of time.

The VAT assessments – application to strike out appeal.

57. HMRC asked for the appeals against the VAT assessments to be struck out on the basis that there is no right of appeal where a VAT registered person has been assessed for periods for which they have not filed VAT returns (s 83(1)(p) Value Added Tax Act 1983). Mr Vela accepted that he had been correctly retrospectively VAT registered by HMRC; he accepted that he has never made VAT returns. It’s his position that without records he could not complete accurate returns.

58. Unfortunately, although HMRC’s application to strike out Mr Vela’s appeal against the VAT assessment was made in good time, the letter calling the hearing referred only to the application to make late appeals. Technically, Mr Vela was not on notice that he needed to respond to this application at the hearing, and for that reason I said he should have time to respond after the hearing if I concluded that the appeals would be admitted out of time.

59. As I have concluded that the appeals will not be admitted out of time, Mr Vela’s response on this is not relevant and is not required. An appeal which has not been admitted cannot be struck out.

60. 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.

Barbara Mosedale
TRIBUNAL JUDGE

RELEASE DATE: 25 September 2018