TC06739

Appeal number: TC/2018/01399

PROCEDURE – appeal against a refusal of an application for approval under the Alcohol Wholesaler Registration Scheme – original notice of appeal rejected as incomplete – whether the Appellant can establish that the notice of appeal was valid and therefore wrongly rejected - no – second notice of appeal submitted late – whether permission should be given for a late appeal - no

FIRST-TIER TRIBUNAL
TAX CHAMBER

FAMEFACE IMPORT LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 19 September 2018

Mr J Ukachukwu, director of the Appellant, for the Appellant

Mr J Carey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to an appeal by the Appellant against a review decision by the Respondents on 22 June 2017 to refuse the Appellant's application for approval under the alcohol wholesaler registration scheme (the "AWRS regime").

2. It is not concerned with the substantive issues involved in the appeal itself. Instead, it is concerned with the preliminary issue of whether or not the appeal should be allowed to proceed at all.

The facts

3. The following are the relevant facts in this regard:

(a) On 22 June 2017, the Respondents wrote to the Appellant to inform it that, upon review, the original decision of the Respondents on 20 April 2017 to refuse the Appellant's application for approval under the AWRS regime was being upheld;

(b) On 19 July 2017, which was within the 30 day time limit set out in Section 16(1C) Finance Act 1994 (the "FA 1994") within which the Appellant was entitled to notify the Tribunal of an appeal against the review decision, the Appellant notified the Tribunal that it was making such an appeal;

(c) The Appellant received a confirmation from the Tribunal that its notice of appeal had been received successfully and had been allocated case reference TC/2017/05717;

(d) The Tribunal alleges that, at some point between 19 July 2017 and October 2017, it wrote to the Appellant to inform the Appellant that the notice of appeal had been submitted with incomplete paperwork and that it was therefore returning the notice of appeal with a request to provide all documents. Unfortunately, that communication has not been made available to me (because it has been destroyed by the Tribunal and Mr Ukachukwu alleges that the Appellant did not receive it);

(e) On 20 September 2017, Mr Peter Clifford, an Officer of the Respondents, telephoned Mr Ukachukwu to enquire as to whether, notwithstanding the Appellant's failed application for approval under the AWRS regime, the Appellant was making wholesale sales of alcohol. During the course of that conversation, Mr Ukachukwu made it clear to Mr Clifford that he was appealing against the review decision and gave Mr Clifford the reference number for the Appellant's appeal to which reference is made in paragraph 3(c) above;

(f) Mr Clifford passed on this information to Ms Lauren Roberts, the Officer of the Respondents who had made the original decision of 20

April 2017 to refuse the Appellant's application for approval under the AWRS regime;

(g) On 11 October 2017, the Respondents' Solicitors' Office wrote to Mr Clifford to inform him that the Appellant's original notice of appeal had been rejected by the Tribunal because it was late and did not set out the reasons for being late and that the Tribunal had accordingly returned the papers to the Appellant so that a new notice of appeal, properly completed, could be given;

(h) It is at this point that matters become somewhat confused;

(i) In the Appellant's written notice of appeal to the Tribunal dated 21 February 2018, the Appellant alleged that Mr Ukachukwu first became aware on 16 November 2017 that the Appellant's original notice of appeal was out of time and had been returned to the Appellant. However, at the hearing, Mr Ukachukwu said that he first became aware that the Appellant's original notice of appeal was out of time and had been returned to the Appellant when Mr Clifford called on 11 October 2017 to tell him that. (The latter explanation seems the more plausible given that it ties in with the date of the email from the Respondents' Solicitors' Office to Mr Clifford referred to in paragraph 3(g) above);

(j) In the Appellant's written notice of appeal to the Tribunal dated 21 February 2018, the Appellant also alleged that Mr Ukachukwu had written to the Tribunal on 23 November 2017 to explain to the Tribunal the Appellant's position in relation to the initial notice of appeal dated 19 July 2017. However, at the hearing, Mr Ukachukwu said that his original email to the Tribunal to explain to the Tribunal the Appellant's position in relation to the initial notice of appeal dated 19 July 2017 was sent on 13 October 2017, two days after he learned from Mr Clifford that the Appellant's original notice of appeal had been returned by the Tribunal;

(k) In the Appellant's written notice of appeal to the Tribunal dated 21 February 2018, the Appellant said that Mr Ukachukwu had made one subsequent chasing telephone call to the Tribunal following his email of 23 November 2017 before making the call to the Tribunal on 5 February 2018 in the course of which the Tribunal informed him that the Appellant needed to provide a further notice of appeal. However, at the hearing, Mr Ukachukwu said that he had sent a number of emails and made a number of telephone calls to the Tribunal after 13 October 2017 to chase up on his initial email before the call of 5 February 2018 in the course of which he was instructed that the Appellant needed to submit a further notice of appeal;

(l) The Appellant has never produced to the Respondents or to this Tribunal either the initial email to the Tribunal of 13 October 2017 (or 23 November 2017, as the case may be) which the Appellant alleged, in the notice of appeal of 21 February 2018 and at the hearing, was sent by Mr Ukachukwu to the Tribunal - or, for that matter, any correspondence between the Appellant and the Tribunal between 11 October 2017 and 21

February 2018 - notwithstanding a direction by the Tribunal of 19 March 2018 requiring the Appellant to provide all correspondence on which it was seeking to rely in connection with the late notice of appeal;

(m) In a letter to the Tribunal of 9 April 2018, Mr Joseph Timmis of the Respondents' Solicitors' Office said that Mr Ukachukwu had telephoned him on 3 April 2018 and explained that he did not have copies of any written correspondence with the Tribunal over the relevant period because all of his communications with the Tribunal had been on the telephone. This is contrary both to the statement made by the Appellant in the notice of appeal of 21 February 2018 and to the statement made by Mr Ukachukwu at the hearing. As regards the latter, Mr Ukachukwu said at the hearing that he did have a copy of his email to the Tribunal of 13 October 2017 on his computer at the office but had not thought it necessary to bring a copy of the email to the hearing;

(n) Mr Ukachukwu has also not produced any correspondence between himself and Mr Clifford or Ms Roberts over the period between 19 July 2017 and 11 October 2017 but alleged at the hearing that, because of his various conversations with Mr Clifford and Ms Roberts over that period, the Respondents were well aware of the Appellant's intention to appeal against the review decision before the notice of appeal of 21 February 2018 was submitted; and

(o) Finally, there is some confusion as to the manner in which the Appellant's original notice of appeal of 19 July 2017 was deficient. In its letter of 3 May 2018 to Mr Timmis, the Tribunal said that its records showed that the appeal had been "submitted with incomplete paperwork". The email of 11 October 2017 between the Respondents' Solicitors' Office and Mr Clifford suggests that the defect in question may simply have been that the Tribunal considered that the notice of appeal was late and did not contain any reasons for being late. Since the notice of appeal was not late – it was submitted within 30 days of the review decision of 22 June 2017 – if that was the sole basis for the Tribunal's rejection of the original notice of appeal, then that would have involved an error on the part of the Tribunal. Unfortunately, as the original notice of appeal and the letter which the Tribunal alleges that it sent to the Appellant concerning the defective notice of appeal have been destroyed, it is impossible now to be certain as to whether the original notice of appeal was in fact defective and, if so, the nature of the defect.

4. It can be seen from the above that there is considerable uncertainty over why the original notice of appeal was rejected and exactly what steps were taken by the Appellant to remedy the position once it discovered that the original notice of appeal had been rejected. However, one thing that is clear is that Mr Ukachukwu, on behalf of the Appellant, discovered that the original notice of appeal had been rejected in either October 2017 or November 2017 and did not file a second notice of appeal on behalf of the Appellant until 21 February 2018. That is a delay of some 3 to 4 months.

5. Mr Ukachukwu alleges that this delay is attributable to the failure by the Tribunal to respond to his numerous entreaties for information as to how to progress the Appellant's appeal. However, leaving aside for the moment the question of whether or not reliance on the Tribunal for advice on how to file a valid notice of appeal is an acceptable reason for a delay, Mr Ukachukwu has not produced any evidence to support his allegation. There is a conspicuous lack of written evidence establishing that any communications took place between Mr Ukachukwu and the Tribunal over the period between 11 October 2017 and 21 February 2018. In addition, as is set out in paragraph 3 above, there are numerous contradictions between the facts as stated by the Appellant in its notice of appeal dated 21 February 2018, the report provided by Mr Timmis of his conversation with Mr Ukachukwu of 3 April 2018 and the evidence provided by Mr Ukachukwu at the hearing.

Preliminary issue

6. Given the facts described above, I need first to consider whether the Appellant has satisfied me that, on the balance of probabilities, the notice of appeal dated 19 July 2017 was valid and therefore wrongly rejected by the Tribunal because, in that case, the appeal can simply proceed on the basis of that original notice.

7. There is very little evidence to consider in that regard, given that the Tribunal has destroyed its version of the notice (and the letter which it allegedly sent to the Appellant rejecting the notice) and the Appellant has provided a copy of only the first page of the notice.

8. The Respondents suggested at the hearing that the deficiency in the original notice was that it attached the original letter of 20 April 2017 rejecting the Appellant's application for approval under the AWRS regime, instead of attaching the review conclusion letter of 22 June 2017, to which the appeal actually relates. The Respondents base this submission on the fact that, on the sole page of the original notice of appeal which has been provided by the Appellant, the document attached to the notice is described as the "AWRS Main Decision".

9. I do not find this argument to be particularly compelling in and of itself because those words are merely labelling the attachment and it is quite possible that the Appellant might have chosen to label the review decision of 22 June 2017 in this way. However, when that label is taken together with the reaction of the Tribunal in rejecting the notice for being incomplete and the reference in the internal email within the Respondents of 11 October 2017 to the notice's being out of time, the explanation proffered by the Respondents does gain greater credibility.

10. In any event, I do not consider that the Appellant has discharged the burden of satisfying me that the original notice of appeal was validly submitted and that the Tribunal acted in error when it rejected the notice. The Appellant has provided only the first page of the relevant notice and not the complete notice with the relevant attachments. In addition, from the page which has been provided to me, there is a credible interpretation of the attachments which suggests that the Tribunal was right to reject the notice as incomplete. There is also the fact that, as is apparent from the

facts described above, Mr Ukachukwu has not been consistent in his explanation of the events relating to this appeal and the general level of disorganisation in the Appellant's affairs tends to support the proposition that the original notice of appeal was deficient and therefore that the Tribunal was justified in rejecting the original notice.

11. For these reasons, I consider that the appeal cannot proceed on the basis of the original notice of appeal of 19 July 2017.

Permission for a late appeal

12. That then leads on to the question of whether I should exercise my discretion to allow the appeal to proceed on the basis of the notice of appeal dated 21 February 2018 notwithstanding the period of time which elapsed between the date of the review conclusion letter - 22 June 2017 – and the date of that notice of appeal.

The law

13. Under Section 16(1F) FA 1994, an appeal may be made to the Tribunal against a review decision outside the 30 day time limit laid down in Section 16(1C) FA 1994 "if the appeal tribunal gives permission to do so". Under Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"), the Tribunal must not admit the appeal unless it gives such permission.

14. In exercising my discretion as to whether or not to give permission for a late appeal, I am bound by the decision of the Upper Tribunal in *William Martland v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 178 (TCC) ("*Martland*"). The principles which I derive from that decision are as follows:

> (a) Although there is no guidance in the FA 1994 or the Tribunal Rules as to how the Tribunal should go about exercising its discretion as to whether or not to permit a late appeal, there is a helpful analysis of the issue by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 ("*Aberdeen*"). Although *Aberdeen* related to Section 49 Taxes Management Act 1970, that section has many similarities to Section 16(1F) FA 1994, the provision which is at issue in the present case;
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> (b) Lord Drummond Young in *Aberdeen* held that, in approaching this question, one should assume that the time limit should be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case and particular reasons must be shown if an appellant is to institute an appeal after that period has expired;
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> (c) According to Lord Drummond Young, certain considerations are typically relevant to the question of whether or not a late appeal should be allowed. These include whether there is a reasonable excuse for not observing the time limit – for example because the prospective appellant could not reasonably have been aware that it had grounds for an appeal or

because the delay has been caused by the action of the Respondents – whether the prospective appellant acted with reasonable expedition once the excuse ceased to operate, whether there would be prejudice to one or other of the parties if a late appeal were to be allowed to proceed or if a late appeal were to be refused, whether there are considerations affecting the public interest if a late appeal were to be allowed to proceed or if a late appeal were to be refused and whether the delay has affected the quality of the evidence that is available for the appeal;

(d) Lord Drummond Young pointed out that, in many cases, the answers to the questions set out above will conflict with one another and it will be for the Tribunal to weigh the conflicting considerations in reaching its decision;

(e) The same issue was addressed by Morgan J in *Data Select Limited v The Commissioners for Revenue and Customs* [2012] STC 2195 ("*Data Select*"). *Data Select* related to a late VAT appeal, the legislation in relation to which again had many similarities to Section 16(1F) FA 1994;

(f) Morgan J held that, in such cases, the Tribunal needs to determine the purpose of the relevant time limit, the length of the delay, the explanation for the delay and the consequences for the parties of allowing an extension of the time limit or refusing to extend the time limit. He went on to say that the Tribunal should take into account the overriding objective set out in Rule 2 of the Tribunal Rules and all the circumstances of the case, including the matters set out in rule 3.9 of the Civil Procedure Rules ("CPR") (in the form which it then took), in reaching its decision;

(g) The Upper Tribunal in *Martland* pointed out that, although Morgan J in *Data Select* said that his decision was "in line" with the decision in *Aberdeen*, the two lists read quite differently and therefore needed to be synthesized. Having done that, the following points emerged;

(h) First, permission to appeal out of time should be the exception and not the rule and should not be granted routinely. The presumption should be that the statutory time limit applies unless the prospective appellant can satisfy the Tribunal that permission for a late appeal should be given but there is no requirement that the circumstances must be exceptional before permission to make a late appeal can be given;

(i) Secondly, the Tribunal needs to consider whether there is a good explanation for the delay;

(j) Thirdly, rather than asking itself whether one or other of the parties will be prejudiced by a decision to allow a late appeal or a decision to refuse a late appeal – because there will inevitably be prejudice to one of the parties if a late appeal is allowed or refused - a more accurate way of formulating that particular enquiry is that the Tribunal needs to weigh up the extent of the prejudice to the relevant party if the late appeal is allowed or refused;

(k) Fourthly, the public interest involved in having finality in legal proceedings and the implications for cases that are thought to have been concluded of allowing an appeal to proceed means that the length of the delay is a material factor;

(l) The Upper Tribunal in *Martland* pointed out that, following the decisions in *Aberdeen* and *Data Select*, rule 3.9 of the CPR has been amended. In addition, the rule has been the subject of a decision by the Court of Appeal in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906, [2014] 1 WLR 3926 ("*Denton*") and a decision by the Supreme Court in *BPP Holdings Limited v Revenue and Customs Commissioners* [2017] UKSC 55, [2017] 1 WLR 2945 ("*BPP*") in relation to relief from sanctions. In *Martland*, the Upper Tribunal held that the changes to rule 3.9 of the CPR and the evolving approach to applications for relief from sanctions as set out in *Denton* and *BPP* should apply equally to applications to be permitted to make a late appeal because the consequences are often no different in practical terms;

(m) It went on to say that this meant that, in considering applications for permission to appeal out of time, the Tribunal should follow the three stage process set out in *Denton* of, first, establishing whether the delay is serious, secondly, establishing the reason or reasons why the delay occurred and, finally, evaluating all the circumstances of the case, which will involve balancing the merits of the reasons for the delay and the prejudice to the parties of granting or refusing permission;

(n) The balancing exercise at the third stage should take into account the need for litigation to be conducted efficiently and at a proportionate cost and the need for time limits to be respected. By carrying out this balancing exercise, the Tribunal will effectively be taking into account, to the extent that they are relevant in any particular case, the factors described in *Aberdeen* and *Data Select*;

(o) The Upper Tribunal in *Martland* held that, in reaching its decision, the Tribunal can have regard to any obvious strength or weakness in the prospective appellant's case – because there is a much greater prejudice to a prospective appellant in losing the opportunity to put forward a really strong case than there is in losing an opportunity to put forward a weak case – but, in accordance with the injunction of Moore-Bick LJ in *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472 ("*Hysaj*"), the Tribunal should not embark on a detailed investigation of the merits of the prospective appellant's case; and

(p) Finally, also in accordance with the decision of Moore-Bick LJ in *Hysaj*, none of a shortage of funds, an inability to instruct a professional adviser or the fact that the prospective appellant is self-represented should generally carry any weight in considering the reasonableness of the delay.

Discussion

15. Turning then to apply the principles set out above in the present case, it can be seen that the delay in filing the notice of appeal has been considerable – the 30 day period expired on 21 July 2017 and the notice of appeal was not filed until 21 February 2018, some 7 months later. The Appellant has alleged that, for a material part of this period, it was unaware of any invalidity in the original notice of appeal and therefore of the need to file a further notice. Even accepting that to be the case, the Appellant was notably dilatory in filing the later notice of appeal once it ascertained that the original notice of appeal was defective.

16. Mr Ukachukwu said at the hearing that he had discovered on 11 October 2017 that the original notice of appeal had been rejected and yet he did not get around to filing the new notice of appeal until 21 February 2018. That is a considerable delay, particularly as the Appellant was at that stage on notice that the notice of appeal was going to be late. In those circumstances, one might have expected there to be an element of urgency in the Appellant's approach. In *Romasave (Property Services) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 254 (TCC), the Upper Tribunal held, at paragraph [96], that, in the context of a thirty day period for making an appeal, a three month delay could not be described as anything other than serious and significant. In this case, the delay between 11 October 2017 and 21 February 2018 was four months, and that was against the background of the fact that, by definition, the Appellant knew that the new notice of appeal was already late.

17. Even if one takes at face value Mr Ukachukwu's assertion that he was continually chasing the Tribunal over the period between 13 October 2017 – when he claims that he wrote to the Tribunal about the invalid initial notice of appeal – and 5 February 2018 – when he was told that a new notice of appeal was required to be filed - and the Appellant has produced no evidence to that effect - there was still a sixteen day delay between 5 February 2018 and the date on which the new notice of appeal was filed. That is quite considerable, when one considers that some seven months had passed since the deadline for notifying the Tribunal of an appeal.

18. Mr Ukachukwu has cited as the reason for the Appellant's delay in filing the new notice of appeal the fact that he was repeatedly chasing the Tribunal for advice on what to do about his appeal and that the Tribunal did not provide that advice until 5 February 2018. In the absence of any evidence to support Mr Ukachukwu's claim that he was repeatedly chasing the Tribunal to this effect, it is hard to give much weight to his assertion. But, even if I were minded to do so, it is clear from the authorities which are binding on me that reliance on the Tribunal for advice on how to lodge a valid notice of appeal is not a good reason for any delay in filing the relevant notice of appeal. In *Hysaj*, Moore-Bick LJ pointed out, at paragraph [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" and, in *Martland*, the Upper Tribunal pointed out, at paragraph [47], that "it is not a complicated process to notify an appeal to the [tribunal], even for a litigant in person". In short, as Mr Carey submitted on

behalf of the Respondents at the hearing, it is not for the Tribunal to provide advice to taxpayers on how to lodge a valid notice of appeal.

19. So, in my view, the delay in this case has been serious and significant and without good reason. But, in accordance with the principles set out in *Martland*, I need to evaluate all the circumstances of the case and not just those two issues. One factor to consider in this regard is the detriment which the Respondents will suffer if I allow the late appeal to be made as compared to the detriment which the Appellant will suffer if I refuse to allow its late appeal.

20. It is clear that the Respondents will suffer a considerable detriment if I allow the appeal to proceed despite the late notice because they will then have to litigate an appeal which they might reasonably have considered to have been withdrawn. Mr Ukachukwu submitted at the hearing that there is nothing in this point because the Respondents, through their Officers Mr Clifford and Ms Roberts, were very well aware of the Appellant's intention to appeal against the conclusions set out in the review letter. That was certainly true as at 11 October 2017 because it was Mr Clifford who informed Mr Ukachukwu that the original notice of appeal had been rejected and it is clear from Mr Clifford's file note of 20 September 2017 that he had informed Ms Roberts of Mr Ukachukwu's belief that a valid notice of appeal had been given on 19 July 2017. However, as the days, and then months, passed after 11 October 2017 without either Mr Clifford or Ms Roberts hearing anything further in relation to the appeal, they would have been forgiven for thinking that the Appellant had decided to withdraw its appeal. It is not as if there were regular communications between the Appellant and those Officers over the period between 11 October 2017 and 21 February 2018 when the new notice of appeal was given. I therefore consider that there would be a considerable detriment to the Respondents if, at this stage, I were to allow the late notice of appeal to be given.

21. It is equally clear that there will be detriment to the Appellant if I do not allow the appeal to proceed because the Appellant will then be deprived of the means to challenge this refusal of its application for approval under the AWRS regime and will be unable to trade duty-paid alcohol. On the other hand, if this was of such significance to the Appellant, it ought to have been more diligent in pursuing its appeal than it clearly has been. In my judgment, the detriment to the Appellant if I refuse to exercise my discretion to allow the appeal to proceed does not outweigh the fact that there has been a serious and significant delay in the filing of the new notice of appeal for no good reason and that there would be a detriment to the Respondents in allowing the appeal to proceed.

22. For the reasons set out above, I have decided not to exercise my discretion to allow the appeal to proceed.

23. I have reached the above conclusion without conducting any in-depth review of the merits of the Appellant's case in this appeal, in accordance with the direction of Moore-Bick LJ in *Hysaj*. However, I should add that, in my view, the factors outlined above which have persuaded me not to permit a late appeal in this case are so

compelling that, even if the Appellant's case were to be a strong one, it would not change the outcome.

24. Having said that, I would observe that the manner in which the Appellant has conducted the appeal to date – such as its failure to meet deadlines or to preserve records of communications which it claims to have had with the Tribunal or the Respondents - and the factual discrepancies in the submissions made by the Appellant over the course of the appeal are somewhat consistent with the thrust of the objections which are set out in the review conclusion letter of 22 June 2017 and therefore tend to suggest that at least certain of those objections may have some validity and that the Appellant's grounds of appeal may not be particularly strong.

25. 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 Rules. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 28 SEPTEMBER 2018