



TC 08314

Keywords: application for appeal out of time, application granted.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/01578/V

BETWEEN

ZOBORTRANS EU S.R.O.*

Appellant

-and-

THE DIRECTOR OF BORDER FORCE

Respondents

TRIBUNAL: JUDGE HEATHER GETHING

The hearing took place on 26 April 2021. With the consent of the parties, the form of the hearing was V (video). All the parties attended remotely using the Tribunal video platform. A face-to-face hearing was not held because of covid restrictions. The documents to which I was referred are a trail bundle of 94 pages, the Respondents skeleton argument.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Jansky a Slovakian lawyer, for the Appellant

Mr Rupert Davies litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

INTRODUCTION

1. Zorbortrans EU SRO (“Zorbortrans”) seeks permission to appeal out of time in respect of a decision made by the Review Officer of Border Force not to restore a commercial vehicle (comprising a tractor and trailer) that had been seized by Border Force at Dover. The driver was employed by Zobortrans at the time. The driver had without the knowledge or permission of Zobortrans used the vehicle to carry tobacco into the UK in respect of which duty had not been paid.
2. In weighing the factors in *Denton v T H White Limited* [2014] EWCA Civ 906 (“*Denton*”), the length of the delay, whether the delay was serious, the reasons for the delay, and all the circumstances of the case, including the consequences of granting and refusing permission, I find the balance lies in granting permission to appeal out of time.

THE FACTS

3. I heard evidence from Mr Ing Roman Seidl, a director of Zobortrans, who was assisted by an interpreter, Mr Bladislab Musin. Regrettably, Officer Brenton was not present to assist the Tribunal. I find the following facts:

- (1) Zobortrans has operated a haulage business from Slovakia for over ten years. Zobortrans has since 2019 had in place an education programme aimed at drivers informing them (among other things) of the dire consequences of using the company’s vehicles for smuggling, namely instant dismissal, and liability to pay any fines and fees for restoring the vehicle.
- (2) Zobortrans had never had an issue with drivers smuggling until 2018 but since then have had two other cases, apart for the case before me today.
- (3) The vehicle that Zorbortrans wished Border Force to restore was seized on 5 December 2018. It was stopped and, following a search, Border Force found 96 kilos of hand rolling tobacco on board in the driver’s cabin and in the rear of the vehicle. The vehicle had not been adapted in any way to conceal goods. Zobortrans does not own the vehicle but leases it from a French comoany.
- (4) The driver admitted that he had been paid 800 Euros by a criminal gang to take the tobacco from Czechia to Slovakia. Zobortrans knew nothing of the arrangement. An offer to restore the vehicle for a fee was made immediately by Border Force to the driver but the driver had insufficient funds to pay.
- (5) By email on 23 January 2019, Zobortrans requested a review of the decision of the Border Force Officer to restore only on payment of £22,000 fee.
- (6) The review decision was sent by email to an incorrect address on 5 March 2019.
- (7) Zobortrans chased Border Force for a reply on 11 June 2019. The review officer’s decision dated 5 March 2019 was sent again on 24 June 2019 to the correct email address.
- (8) Zobortrans made contact with Officer Brenton on a number of occasions. The relevant documents were not in the bundle.
 - (a) An email of 27 June 2019 from Zobortrans enclosing many documents, asking for a review of the decision and inviting the officer to reopen the case.

(b) A request on 10 July 2019 to get access to the tractor to recover a device which needed to be returned to the lessors.

(c) An email dated 22 November 2019 at 10.35 indicating that Zobortrans were still waiting for a reply to the 27 June letter and notifying Border Force that Zobortrans was aware, from the GPS signal, in the tractor that the vehicle had been moved.

(d) Further contact was made on 22 November 2019.

(9) Given the lack of familiarity with the appeal process in the UK and the language barrier, I consider Zobortrans was effectively seeking an appeal by their email of 27 June 2019 and was still waiting for a reply to that email on 22 November 2019 and beyond.

(10) Zobortrans had had two other vehicles seized in the past, but on each occasion the amount of the fee had been relatively small and Mr Siedl had managed to pay. The drivers had been sacked immediately on each occasion. Zobortrans had redoubled the education of the drivers with weekly addresses to the drivers informing them of the serious implications and consequences of smuggling. The fee payable to Border Force, as a result of the seizure in December 2018, is an enormous amount by comparison to other fees, at £22,000.

(11) In relation to the seizure in December 2018, a Slovakian criminal gang had made contact with the driver. When the vehicle left the depot, it was carrying only legitimate goods. The driver had stopped en route and picked up the contraband. He had not diverted from the route otherwise the GPS would have alerted Zobortrans of the detour. Zobortrans was a victim. The driver had been employed for between 3 and 4 years. He was dismissed immediately upon his return.

(12) Mr Seidl had been in touch with the authorities in Bratislava to see what else can be done to protect legitimate businesses such as his. He has received no further guidance. He cannot stop work. He has a family to feed. He does not smoke.

(13) Mr Seidl had made contact with Border Force in June, July and November 2019 but as he had no reply, he had tried to solve the problem through negotiation with the lessor by paying the rental payments in instalments which had been rejected. He had asked for time to pay the fee in instalments but that had been rejected.

(14) Zobortrans filed a document headed “*notice of appeal*” dated 7 February 2020 and this appears to have been sent by email to the Tribunal of 6 April 2020. The delay in filing was due to covid restrictions in place.

THE LEGISLATION AND CASE LAW

4. Section 16 Finance Act 1994 provides that an appeal may be made against a decision within 30 days of the date of the document notifying the decision. An appeal in relation to VAT is required to be made to the Tribunal. There is no statutory requirement for the notice of appeal to be in any particular form. Section 16(1F) permits an appeal to be made late if the Tribunal gives permission.

5. Following *BPP Holdings v HMRC* [2017] UKSC 55 (“**BPP**”) at [26], the Tax Tribunal should follow the guidance in CPR Rule 3.9 in deciding whether to exercise the discretion conferred on the Tribunal under s16 Finance Act 2016.

6. This was followed by the Upper Tribunal in *Data Select v HMRC* [2012] UKUT 187 (TCC) (“**Data Select**”) which indicated that the Tribunal should identify:

The purpose of the time limit imposed by statute.

The length of the delay and determine whether the delay was serious and significant.

Whether there are good reasons for the delay.

The consequences for the parties of granting permission to appeal out of time.

The consequences for the parties of refusing permission to appeal, out of time.

7. The guidance was finessed in the UT in *William Martland v HMRC* [2018] UKUT 0178 (TCC) (“**Martland**”) which reduced the stages of the decision making to three:

Establish the length of the delay.

Establish the reasons for the delay.

Evaluate all the circumstances of the case which will involve a balancing exercise that will assess the merits of the reasons given for the delay against the prejudice which would be caused to both parties by granting or refusing the permission.

THE LENGTH OF THE DELAY- DISCUSSION

8. Border Force’s submissions are based on the assumption that the document headed notice of appeal was the document which began the appeal. Border Force say that assuming the decision letter was sent on 24 June 2019 and the notice of appeal was dated 7 February 2020 and the date of the email notifying the appeal was 6 April 2020, the length of the delay is between 6 and 7 months which is both serious and significant in the context of an appeal out of time where the time to do so is limited to 30 days, as indicated in the UT decision in *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 (TCC) where the delay under consideration was 3 months.

9. Zobortrans says the delay should be regarded as no more than two or three months. Zobortrans had been waiting for Mr Brenton to reply to their email of 27 June 2019. The decision of the review officer was not received until 24 June 2019. The last email from Zobortrans was 22 November 2019. Zobortrans is entitled to expect a reply from Border Force to its requests and correspondence. The “*notice of appeal*” is dated 7 February 2020 and the covid restrictions prevented filing earlier than 6 April 2020.

10. I note that Mr Seidl is a Slovakian national who speaks no English. He has run a small haulage firm for over ten years and has engaged with Border Force throughout with the assistance of an interpreter. Regrettably, the bundle did not incorporate the full correspondence. Zobortrans’ Slovakian adviser read out the missing items. The Review Officer was regrettably not present at the hearing to give his view and advise the Tribunal whether he received the correspondence and, if so, how he had responded. The email to Border Force from Zobortrans dated 27 June 2019 clearly indicated that Zobortrans did not accept the outcome of the review and in my view commenced the appeal. The review officer ought to have directed Mr Seidl to notify his dissatisfaction to the Tribunal to preserve Zobortrans rights and indicate the consequences of failure to do so. I note in passing that the review officer did not do so. Zobortrans were still waiting for a reply to that email on 22 November 2019 when they chased for a reply. A further delay is also to be expected after 22 November 2019. Given the normal 30-day interval expected in correspondence with government departments such as HMRC, the actual delay on the part of Zobortrans is short. If a reply had been made by Border force within the usual 30 days, a reply might have been expected by 22 December 2019. Zobortrans would

have had 30 days to appeal which would take the date to 22 January 2020. The document headed notice of appeal is dated 7 February 2020 – that would, on Zorbotrans timetable, be a delay of two weeks which is insignificant. If the email of 6 April 2020 is the date of the appeal, the delay would be 10 weeks and that would be serious. On the whole I consider that the appeal was commenced on 27 June 2019, i.e. 3 days after the decision letter albeit that it was notified to the Tribunal late owing to the failure of Border Force to respond to the email of 27 June 2019.

THE REASONS FOR THE DELAY - DISCUSSION

11. Border Force say there is no good reason for the delay. The notice of appeal states the delay was due to late receipt of the correspondence and covid issues, which is difficult to understand.

12. Zobortrans says that they had been in contact with Mr Brenton on numerous occasions and were waiting for him to reply to their request for him to review his decision which was sent to Border Force on 27 June 2019. They sent reminders in July and November but received no reply. They did not realise they had to appeal to the Tribunal but did so as soon as they realised that it was a necessity. In the interim, they were trying to raise the necessary finance to pay the fee and the payments under the lease of the vehicle and still run the business with a vehicle short. This included seeking agreement to pay the fee in instalments and the lease rental in instalments. Zobortrans have still not received a reply from Mr Brenton. The document headed appeal is dated 7 February 2020 but covid restrictions prevented their being able to file that document until 6 April 2020.

13. I accept that the reason for the delay was the belief that Zobortrans was waiting for HMRC to respond to their email of 27 June 2019. They were seeking a review while at the same time trying to resolve the issue by negotiating terms for payment of lease rentals with the lessor of the vehicle and agreeing payment terms with Border Force. Zobortrans were engaging with Border Force throughout. I also accept that the reason for the delay between the signing the document headed notice of appeal (7 February 2020) to the date of notifying the Tribunal (6 April 2020) was due to covid restrictions.

ALL OTHER FACTS AND CIRCUMSTANCES - THE BALANCE

14. HMRC say that the balance is in favour of refusing the permission, in view of:

- (1) The lack of a proper explanation by Zobortrans for the substantial delay
- (2) The public interest in providing finality to litigation, as prejudice will be caused to HMRC and the general public, if permission is granted.
- (3) The lack of prejudice to Zobortrans, the loss of the vehicle or liability to pay the fee should not be in the balance. They are the natural consequences of a vehicle being used for smuggling.
- (4) Zobortrans has not argued that the interests of justice should be taken into account.

15. Zobortrans say that the balance in this case lies in granting permission to appeal out of time:

- (1) Zobortrans had not been responsible for the smuggling which had caused the seizure. The driver had admitted he had smuggled the tobacco without the knowledge or consent of Zobortrans. The fees payable on restoring the vehicle must be paid by the haulage company. Neither the trailer nor the tractor had been modified for smuggling. The prejudice to

Zobortrans of not being able to appeal is significant. Effectively the public interest in such a case lies in Zobortrans being given a right to appeal.

(2) Throughout the period from the date of the review officer's decision being communicated to them on 24 June 2019 to the date of the hearing, Zobortrans had been trying to solve the problem caused by the rogue employee, seeking to persuade the leasing company to accept payments in instalments, seeking an ability to pay the fine by instalments and seeking a further review of the review officer's decision. Border Force has failed to respond to the communications of 27 June, 10 July and 22 November. Had Mr Brenton responded to any of the emails or calls, Zobortrans would have filed the notice of appeal with the Tribunal earlier.

16. In my view, the following considerations should be taken into account:

(1) The adherence to time limits is important and vital to ensuring efficient conduct of litigation. The usual time limit for appealing a decision of Border Force is 30 days.

(2) Parliament has however specifically enabled an appeal to be made outside 30 days but only if the Tribunal permits, under s16(1F) Finance Act 1994. Rule 20(4) of the Tribunal Rules allows the Tribunal to give permission to appeal outside of 30 days. It is not difficult to understand the purpose of Parliament behind the introduction of these provisions, given that 30 days is such a very short period in which to make a claim compared with the very substantial limitation periods to commence an action in civil litigation. Rigid adherence to the 30-day limitation to bring a claim/make an appeal could result in the public interest not being served. In exercising the discretion conferred on the Tribunal, I am required not to give permission unless the public interest so requires.

(3) Border Force prepared the Trial bundle in this case and it was provided late. In the event, it did not contain the entirety of the correspondence between the parties and Border Force failed to bring the Review Officer as a witness to the hearing who could have explained the issues and why no reply was ever sent to the email of 27 June 2019 and subsequent communications in July and November. In the absence of an alternative explanation, I accept Zobortrans' word that the emails and documents were sent and calls were made. Having regard to the lack of familiarity with UK Tribunal procedures and the language and customs, I consider that Zobortrans was indicating its lack of acceptance of the Review Officer's decision by its email of 27 June 2019. Had Zobortrans received a reply to that email indicating that the conversation between the Border Force Review Officer and Zobortrans cannot continue and an appeal had to be made and notified to the Tribunal to preserve Zobortrans rights, there likely would have been no delay.

(4) Prejudice to each party from granting or not granting permission must be taken into account. I consider both parties would be adversely affected, Border Force will have to deal with an old but not very cold case, but in Zobortrans case, as an innocent party and victim of a criminal gang's activities and given their continued involvement with Border Force and the lessor of the vehicle in trying to find a solution to a difficult problem, the greater prejudice lies with Zobortrans, if permission to appeal out of time is not granted.

DECISION

16. Taking all of the above into consideration, the balance of the public interest lies, in this case, in allowing the appeal out of time, because Zobortrans had done all it thought it had to do, to resolve the issue. Had Zobortrans received a reply to their email of 27 June 2019 within 30 days, this application may not have been needed. It is in the public interest in this case that I exercise the discretion given to the Tribunal to give permission to appeal out of time.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

17. 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 Tribunal hereby directs that the 56 days within which a party may send or deliver an application for permission to appeal against this. 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.

**Heather Gething
TRIBUNAL JUDGE**

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