[2022] UKFTT 90 (TC)

TC 08421/V

Income tax assessment – permission to appeal out of time

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/03371

BETWEEN

RODERICK THORNER AS TRUSTEE OF R B THORNER 1997 SETTLEMENT **Appellant**

-and-

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

TRIBUNAL: JUDGE SARAH ALLATT
MEMBER CELINE CORRIGAN

The hearing took place over on 22 November 2021. The form of the hearing was video attended by all parties. A face to face hearing was not held as a hearing in a court room was not felt necessary or desirable bearing in mind the ongoing pandemic. We had skeleton arguments from both parties, a documents bundle and an authorities bunds

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 Michael Clarke for the Appellant

Mr D Corps, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal out of time against the decision to issue a Notice of VAT Assessment under section 73 of the Value Added Tax Act 1994 totalling £92,036.00.

2. The assessment relates to VAT the Respondents considered to have been due from the Appellant on the deemed supply of assets at deregistration, based on information provided by the Appellant.

3. The Notice of Assessment was issued on 6th February 2019. The Appellant's Notice of Appeal was received by the Tribunal on 18th September 2020.

BACKGROUND

4. On 6th November 2002, the Appellant applied to register for VAT and to opt to tax land at Old Mills, Paulton, both from 1st November 2002.

5. The application gave the address of the Principal Place of Business ("PPOB") as Old Mills House, Old Mills, Paulton, Bristol, BS39 7SU. The Option to Tax Notification stated that two industrial units, numbers 41 and 42, would be constructed on the land.

6. On 1st August 2017, the Appellant wrote to the Respondents applying for its VAT registration to be cancelled. The application confirmed the PPOB was unchanged. The application included a valuation of assets on which output tax would be due on cancellation of the registration, which showed that the value of the two units was £546,000.

7. On 30th May 2018, the Respondents spoke to Mr Thorner concerning the land subject to the option to tax. Following that call, the Respondents wrote to the Appellant at the address given for correspondence. Factsheet CC/FS1b General information about checks by Campaigns and Projects was included. The call, and the letter, advised the Appellant that the Respondents had opened a compliance check into the VAT due on deregistration.

8. Over the period to 31st August 2018, further phone conversations took place and the Respondents left messages requesting information from Mr Thorner. On 17th August 2018 Mr Thorner told the Respondents that information had been sent on 20th July 2018; however this was not received by the Respondents. On 20th, 30th and 31st August 2018, the Respondents left messages asking Mr Thorner to contact them. No calls were returned.

9. On 29th November 2018 the Respondents wrote to the Appellant at its PPOB. The letter advised that as input tax had been recovered on the construction costs of Units 41 and 42, output tax was due on deregistration. The letter outlined the assessment the Respondents intended to make and invited comments by 20th December 2018. No reply to this letter was received by HMRC.

10. On 30th January 2019, the Respondents wrote to the Appellant at the PPOB. The letter informed the Appellant that a Notice of Assessment would follow in the sum of £92,036. It explained how to appeal against that notice and the 30 day time limit within which to do so. On 6th February 2019, the Respondents issued a Notice of VAT Assessment to the Appellant at its PPOB. On 16th August 2019 the Respondents issued proceedings in the County Court against the Appellant to recover, amongst other sums, the VAT assessment notified on 6th February 2019. The claim form was served to the Appellant at the PPOB address.

11. On 28th August 2019, the Appellant's Representative acknowledged service of the County Court claim. On 27th September 2019 the Appellant lodged a Defence against the Respondents' Claim. That Defence cited the provisions of section 83G Value Added Tax Act 1994, including time limits within which to bring an appeal, and the potential to apply to the Tribunal for permission to make a late appeal

12. On 2nd April 2020, HMRC replied to that Defence. That reply stated that no review had been requested nor appeal made to the Tribunal within the 30 day time limit, and no reason had been given for the failure to do so.

13. On 18th September 2020, the Appellant served a Notice of Appeal to the Tribunal. That Notice of Appeal confirmed the Appellant's address to be that used by the HMRC was the original address that had been used throughout.

SUBMISSIONS ON BEHALF OF THE APPELLANT

14. We had a witness statement from the Appellant but he did not appear in person. The witness statement stated that his understanding was that no output tax was due on deregistration.

15. The Appellant states that he did not receive the letter warning of the assessment, nor the assessment, and was not aware of this matter until the County Court Claim.

16. The Appellant has reviewed the list of calls made by HMRC to his office and states 'I do not recall all of these calls being made, and certainly do not recall any meaningful calls in which I was informed of the Respondents' assessment of the value of the property or the tax they were claiming. Had I been informed I would have immediately taken advice.'

17. The witness statement also states 'It was not until 11 August 2020 that my solicitors received a copy of the assessment, which was provided as an exhibit to the Respondents' Reply to Defence'.

18. The witness statement also states that 'the Respondents' assessment of the value of the Property is wrong.....On 1 August 2017 the Property will have been worth around £350,000 in my view [due to another property also being owned at the time and included in the estimated value]'.

19. A detailed valuation report by a third party was carried out on 7 December 2018 and valued the two units at £387,000.

20. Mr Clarke made the following arguments on behalf of the Appellant:

21. Firstly, in a new ground of appeal, Mr Clarke contends that there is not a valid assessment. He states that there is no evidence of posting of the assessment, no evidence of internal procedures that show that it would have been posted and that we have witness evidence that the assessment was not received.

22. Mr Clarke states that anything else that may serve as a notice of assessment was received outside the statutory time limit of two years of the end of the prescribed accounting period.

23. Secondly, on the late appeal, Mr Clarke submitted that although the delay was serious, and there is no good reason for the delay, when considering all the circumstances, including the strength of the case, the appeal should be allowed.

24. He submitted that the evidence of a vastly different valuation from the one on the deregistration form means that the underlying case is strong.

25. He submitted that although there was not a good reason for the delay, there was an understandable reason – Mr Thorner was relying on advisers who should have emphasised to Mr Thorner that a late appeal should and could be made.

26. Mr Clarke submitted that the prejudice to HMRC in allowing the case would simply be needing to deal with a case that they thought was closed.

27. On the other hand, he submitted that the consequences to Mr Thorner of not allowing the case would be an overly onerous sanction, since the valuations showed that there was likely to be a significant overstatement of the VAT due, and since any claim against his advisers would be very difficult to prosecute, not due to the specifics but due to the fact that claims against professional advisers rarely succeed.

HMRC SUBMISSIONS

28. HMRC submit that the assessment was validly made and on time.

29. They submit that the assessment was sent to the Principal Place of Business (PPOB), which has been the PPOB since the business was registered for VAT, and has remained the PPOB throughout the period of time that the business was in operation and is the address that was given in the Notice of Appeal as the taxpayer details.

30. HMRC submit that the taxpayer has not provided any evidence of postal problems to the address during the period when the notice was sent (or any other time).

31. HMRC submit that Mr Thorner knew, from phone calls made to and from him in July and August 2018, that HMRC wanted information from him and had not received it.

32. HMRC submit that the evidence shows that Mr Thorner ceased to engage with HMRC in August 2018.

33. HMRC invited the Tribunal to bear in mind that Mr Thorner was not giving oral evidence, and hence not being cross examined, and therefore his written statement should be considered in the light of this lack of cross examination.

34. HMRC point to discrepancies in the witness statement when Mr Thorner says 'it was not until 11 August 2020 that my solicitors received a copy of the assessment'. HMRC show that an email was sent on 11 October 2019 that detailed attachments (although the attachments were not provided to this Tribunal) including the assessment.

35. HMRC also submit that the Particulars of Claim in relation to the County Court matter show that Mr Thorner knew that any appeal to the Tribunal would be late even at that point, and in fact the appeal was not made until a year later.

36. HMRC also submit that there were 'warning signs' in relation to Mr Thorner's reliance on his advisers that Mr Thorner should have picked up on, such as the acknowledgement that any appeal would be late, and these should be borne in mind when considering all the circumstances in the case.

37. HMRC submit that when it comes to the Martland third stage, it is in the public interest to have finality. They submit that to prepare for the full hearing it would not be 'picking up where they left off' but preparing anew including fresh grounds of appeal.

38. HMRC submit that the starting point is that time limits should be respected, and that this appeal is over 18 months late when the time limit is 30 days. HMRC should be entitled to consider the matter closed after the many calls to the Appellant in August 2018, warning and pre assessment letters in September 18, and letters in January 2019 and February 2019. HMRC state that no non-delivery notification had been received.

39. HMRC also submit that the case on valuation is not as strong as made out by the Appellant, as the option to tax is being made in relation to land, not buildings, and so further arguments would be developed in relation to this point.

40. Furthermore, the valuation came from the Appellant's own figures, and is therefore contemporary, whereas the third party valuation is not.

THE LAW

41. Section 31A TMA requires a taxpayer to appeal a notice to HMRC within 30 days.

42. The law surrounding late appeals has recently been considered by the Upper Tribunal in *Martland* [2018] UKUT 178 (TCC). Previously the leading case had been *Data Select* [2012] UKUT 187 (TCC).

43. *Data Select* had set out five considerations for the FTT to consider

(1) What is the purpose of the time limit?

(2) How long was the delay?

(3) Is there a good explanation for the delay?

(4) What will be the consequences for the parties of an extension of time?

(5) What will be the consequences for the parties of a refusal to extend time?

44. *Martland* has modified this approach very slightly, saying this:

> 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*:
>
> 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, .
>
> 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.
>
> 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.
>
> 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. Nor should the fact that the applicant is self-represented – Moore-Bick LJ said '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.

DISCUSSION

45. There are two questions for the Tribunal to answer. Was there a valid assessment and if there was, was there a reasonable excuse for the late appeal?

46. On the first point we decide that there was a valid assessment. On a balance of probabilities we find that the assessment was delivered. The Appellant's argument is that HMRC cannot show that the assessment was posted. However when placed into context with the lack of engagement of the Appellant with HMRC from August 2018, and the fact that the Appellant also apparently did not receive letters from HMRC in November and January, but can produce no evidence of postal problems and is not prepared to be cross examined on this point, we consider it is more likely that the letter was posted and received but no action was taken until the County Court Claim made ignoring the situation untenable.

47. We find that there was an error in the witness statement regarding when the assessment was received by Mr Thorner's solicitors. We find the position taken by the Appellant's representative, that the existence of an email with attachments listed but not included within the bundle does not mean that the attachments were received, even though there exist multiple emails after this the first of which appears to be about one of the attachments, barely credible.

48. We then turn to the question of reasonable excuse.

49. It is a very clear that the starting point is that late appeals should not be allowed.

50. It is acknowledged that the delay is serious and there is no 'good' reason for the delay.

51. It is clear that those two matters by themselves do not preclude allowing the appeal, and that the third stage is to consider all the circumstances in the round.

52. The main points in the Appellant's favour are the valuation report which may indicate that the Appellant has a case in relation to quantum, and the fact that some of the blame for the length of the delay may be down to the Appellant's advisers and not himself.

53. The points against the Appellant are the lack of engagement with HMRC, the fact that the error, if it is an error, on the valuation is very clearly his error and appears twice on the deregistration form, once in a free text format and once in a box, and that the delay is considerable even after the very last possible date (2nd April 2020) that the Appellant knew that an appeal needed to be made within a 30 day time limit

DECISION

54. The starting point in all late appeal cases is that the late appeal should not be allowed as time limits should be respected. We consider the delay considerable and the reasons for the delay not 'good', and we do not consider that a consideration of all the facts in the round produces any other good reason why the appeal should be allowed.

55. The appeal is therefore DISMISSED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

SARAH ALLATT
TRIBUNAL JUDGE

Release date: 09 MARCH 2022