



Neutral Citation: [2023] UKFTT 295 (TC)

Case Number: TC08766

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video

Appeal reference: TC/2022/11029

LATE APPEAL - Martland considered - length of delay serious and significant – no good reason for delay – prejudice to parties considered – whether appropriate to admit late appeal in all the circumstances – application refused – appeal not admitted

Heard on: 28 February 2023
Judgment date: 9 March 2023

Before

TRIBUNAL JUDGE GREG SINFIELD

Between

RIZWAN BUTT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ian Spencer of Ian Spencer & Associates

For the Respondents: Joanna Vicary of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. On 23 March 2022, the First-tier Tribunal ('FTT') received two identical notices of appeal submitted by Mr Ian Spencer of Ian Spencer & Associates on behalf of the Appellant, Mr Rizwan Butt. The appeals were against three penalty notices issued to Mr Butt by the Respondents ('HMRC'). The penalty notices were as follows:

(1) a company officer liability decision notice dated 31 March 2021 under section 69D VAT Act 1994 ('VATA94') making Mr Butt personally liable for a penalty of £61,019 imposed on Trade Lynx (London) Limited under section 69C on the basis that the actions of the company were attributable to Mr Butt as a director and he knew or should have known that the relevant transactions were connected to fraud;

(2) a company officer liability decision notice dated 25 November 2021 making Mr Butt personally liable for a penalty of £15,219.22 imposed on Quantum London Limited under section 69C VATA94 on the basis that the actions of the company were attributable to him as a director and he knew or should have known that the relevant transactions were connected to fraud; and

(3) a company officer liability decision notice dated 9 March 2022 making Mr Butt personally liable for a penalty of £18,832.99 imposed on Quantum London Limited under section 69C VATA94 on the basis that, as a director of the company, he caused the actions which led to the penalty in that he was responsible for the transactions connected with fraud, due diligence of suppliers and customers and taking decisions about who Quantum London Limited purchased from and supplied.

2. Under section 83G of the Value Added Tax Act 1994 ('VATA94'), the time limit for bringing appeals was (and is) 30 days from the date of the disputed decision. The appeals in relation to the penalty decisions dated 31 March 2021 and 25 November 2021 were late. The appeal against the decision dated 31 March 2021 should have been brought by 30 April but the notice of appeal was dated 23 March 2022 and was therefore 327 days late. The appeal against the decision dated 25 November 2021 should have been brought by 25 December and thus the notice of appeal dated 23 March 2022 was 88 days late.

3. In his covering letter with the notices of appeal, Mr Spencer acknowledged that the appeals were submitted outside the statutory time limits. In his letter, Mr Spencer stated:

"You will note that the decisions to raise penalties against Mr. Butt relate to his position as director of two companies, Trade Lynx (London) limited and Quantum London Limited, and in two instances were raise outside the period of 30 days in which to submit an appeal. The reason for the delay with two of the penalty assessments is that we have been attempting to gain explanations and evidence from HMRC which would support their position and allow s (sic) to consider Mr. Butts position in knowledge of all available facts, these requests met with rejection. All penalties are raised on the same basis, and we consider that as we are within time to appeal against the latest penalty we should also be allowed to appeal against the earlier penalties."

4. In the box for reasons why the appeal was made late, both Notices of Appeal stated:

"This appeal covers a number of decisions made by HMRC against Mr Butt in a personal capacity which relate to VAT assessments raised by HMRC to disallow input tax claimed by two companies of which he was a director - Trade Lynx (London) Ltd and Quantum London Ltd.

HMRC say that the suppliers for which both companies sought input tax recovery have not made payment to HMRC of those sums as a result of a deliberate action/intent to defraud HMRC. HMRC say that Mr Butt either knew, or should have known, that the suppliers would default on payments due to HMRC with deliberate intent.

HMRC have consistently refused to provide any explanation or evidence that the suppliers have defaulted, did so deliberately, that Mr Butt knew this would occur, or should have known this would occur.

We wish to appeal against all of the penalties levied against Mr Butt on this basis by HMRC, but have been hampered by HMRC's refusal to provide explanations or evidence on which to set out our arguments why HMRC's position is incorrect."

5. In the box for grounds of appeal, the Notices of Appeal both stated:

"HMRC have raised penalties against Rizwan Butt under section 69C (VAT Act 1994) noting that input tax recovery made by Trade Lynx (London) Ltd and Quantum London Ltd (companies of which Mr Butt was a director) was disallowed as the companies and/or Mr Butt knew, or should have known, that the suppliers of the goods acquired by both companies would default in payment of that VAT to HMRC, as a result of a deliberate intent to defraud HMRC.

HMRC have provided no detailed explanation or evidence of the following

- the alleged defaults of the suppliers
- the alleged deliberate actions of suppliers
- the knowledge of such actions intent by either company (Trade Lynx (London) Ltd, Quantum London Ltd) or Mr Butt.
- That either company or Mr Butt should have known that such actions would occur and would do so with the deliberate intention of those companies to default in respect of the VAT charged.

In the absence of any detailed explanation or evidence Mr Butt is unclear why HMRC consider he is responsible for this and should be penalised in this way."

6. The appeals were given reference numbers TC/2022/11029 and TC/2022/11030 and notified to HMRC. Appeal TC/2022/11029 related to the company officer liability decision notice dated 31 March 2021 making Mr Butt personally liable for the penalty of £61,019 under section 69C VATA94 imposed on Trade Lynx (London) Limited. Appeal TC/2022/11030 related to the company officer liability decision notices dated 25 November 2021 and 9 March 2022 making Mr Butt personally liable for the penalties, amounting to £34,052.21 under section 69C VATA94 imposed on Quantum London Limited.

7. On 13 July 2022, the FTT issued directions consolidating the two appeals by Mr Butt under reference TC/2022/11029 and requiring HMRC to serve a combined statement of case within 60 days.

8. On 29 July 2022, HMRC served a notice of objection in relation to Mr Butt's application to make an appeal against the decision dated 31 March 2021 out of time.

9. HMRC did not object to Mr Butt making a late appeal against the decision dated 25 November 2021 because he had appealed against the decision dated 9 March 2022 in time and the facts and evidence in relation to both were the same. HMRC took the view that there would be no extra work in dealing with the two appeals relating to the Quantum London

Limited penalties and therefore they were not prejudiced by having to deal with the out of time appeal. Accordingly, I give Mr Butt permission to make a late appeal against the company officer liability decision notice dated 25 November 2021.

10. For reasons set out below, I have decided that Mr Butt's appeal against the company officer liability decision notice dated 31 March 2021 making him personally liable for the penalty of £61,019 imposed on Trade Lynx (London) Limited cannot be admitted.

BACKGROUND FACTS

11. I was not provided with any witness evidence and the background facts below are based on the selection of documents in the hearing bundle provided by HMRC. Mr Spencer did not challenge the facts set out in HMRC's notice of objection or other documents in the bundle. In his oral submissions, Mr Spencer referred to the existence of further correspondence with HMRC which was not in the bundle and, as it was not in evidence, I could not take it into consideration.

12. Mr Butt was a director of Trade Lynx (London) Limited. The company traded in soft drinks with traders in the EU but, following Brexit, business became more difficult and, at some point before 22 June 2020, the company entered into a members' voluntary liquidation.

13. On 22 June 2020, HMRC issued a '*Kittel* denial' decision in relation to Trade Lynx (London) Limited. The effect of the decision was to deny the company the right to recover input tax on the ground that the company had entered into transactions which it knew or ought to have known were connected with fraud. The denial letter was sent to the liquidator although Mr Butt was made aware of it.

14. On 2 September 2020, having undertaken an independent review of the *Kittel* denial at the liquidator's request, HMRC upheld their decision but reduced the amounts denied. There was no appeal to the FTT by the liquidator.

15. On 14 September 2020, HMRC imposed a penalty under section 69C VATA on Trade Lynx (London) Limited. At around the same time, HMRC notified Mr Butt of his potential personal liability to a penalty under section 69D VATA.

16. On 20 January 2021, HMRC issued a company officer liability decision notice under section 69D VATA94 making Mr Butt personally liable for the penalty notified to Trade Lynx (London) Limited.

17. HMRC amended the personal liability notice on 31 March 2021. The revised company officer liability decision notice under section 69D was issued to Mr Butt. It stated that he was personally liable to pay the penalties charged to Trade Lynx (London) Limited under section 69C VATA94 on 14 September 2020. The penalties amounted to £61,019. At the end of the notice, it stated that if Mr Butt disagreed with the decision, he could ask for another HMRC officer not involved in the decision to review the decision ('an independent review') or appeal to the FTT to decide the matter.

18. On 28 April 2021, Mr Spencer contacted HMRC to ask for further information about the status of Trade Lynx (London) Limited's suppliers. HMRC replied on the same day providing only limited information on the ground that they were not permitted to provide more given their duty of confidentiality under section 18 of the Commissioners for Revenue and Customs Act 2005.

19. Mr Spencer next contacted HMRC on 9 September 2021. He raised further queries regarding the *Kittel* denial and penalty.

20. HMRC replied on 22 September 2021. They referred to their decision letters and also stated that Mr Butt was now out of time to appeal the decision under section 69D VATA

although he could seek to appeal if he made an application for permission to be allowed to appeal out of time.

21. On 28 September 2021, Mr Spencer responded to HMRC indicating that he was awaiting instructions from Mr Butt.

22. On 30 November 2021, Mr Spencer wrote to HMRC to ask for an independent review. HMRC replied on the same day indicating that Mr Butt was out of time to request a review but he could apply to make an out of time appeal.

23. Nothing further was heard from Mr Spencer or Mr Butt until 23 March 2022 when Mr Spencer lodged a notice of appeal against the company officer liability decision notice dated 31 March 2021 with the FTT.

24. For completeness I mention that, from 27 October 2021, Mr Spencer was also dealing and corresponding with HMRC in relation to the penalties imposed on Quantum London Limited for which Mr Butt was made liable by the decision notices dated 25 November 2021 and 9 March 2022. There was no suggestion, however, that the later penalties and notices prevented Mr Spencer or Mr Butt from notifying an appeal against the company officer liability decision notice relating to Trade Lynx (London) Limited.

LEGISLATION

25. Section 83G of the Value Added Tax Act 1994 ('VATA94') is headed "Bringing of appeals" and relevantly provides as follows:

"(1) An appeal under section 83 is to be made to the tribunal before —

(a) the end of the period of 30 days beginning with—

(i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or

(ii) ..., or

...

(6) An appeal may be made after the end of the period specified in subsection (1) ... if the tribunal gives permission to do so.

..."

26. Rule 20(4) of the FTT Rules provides:

"(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal-

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

SUBMISSIONS

27. In summary, HMRC submitted that:

(1) the delay of 327 days was serious and significant;

(2) Mr Butt did not have any good reason for such a long delay; and

(3) in all the circumstances, which included the prejudice to HMRC and the need to enforce compliance with the rules, the application should be refused.

28. In summary, Mr Spencer submitted that Mr Butt could not appeal until HMRC had provided explanations and evidence in relation to their allegation that Mr Butt knew or should have known that the relevant transactions were connected to fraud. He said that, in the absence of such evidence and reasons, they struggled to provide any coherent grounds of appeal. He also submitted that, as all the penalties in relation to Trade Lynx (London) Limited were raised on the same basis as the penalties for Quantum London Limited which would go ahead, there would be no prejudice to HMRC and Mr Butt should also be allowed to appeal against the Trade Lynx (London) Limited penalties.

29. Towards the end of the hearing, which was by video, Mr Butt lost connection. At the end of the hearing, I told Mr Spencer that if Mr Butt wished to make any representations, he could submit them by email to the FTT. The day after the hearing, Mr Spencer forwarded an email sent to him by Mr Butt. In the email, Mr Butt set out his understanding of HMRC's position and stated that he agreed with the submissions made by Mr Spencer that he was unable to provide coherent grounds of appeal until he understood HMRC's case against him in detail. Mr Butt also provided some new facts that relied on as explaining why he did not submit the appeal against the Trade Lynx (London) Limited penalties within the time limit. In summary, those reasons were:

- (1) the breakdown of his marriage and its consequences at the time of the penalty assessment and in the following months;
- (2) issues with his mental and physical health at that time; and
- (3) he had solely responsibility for looking after his ill and elderly mother.

30. The fact that the additional reasons were only introduced after the hearing had concluded meant that HMRC did not have any opportunity to challenge the new evidence. It would clearly be neither fair nor just to accept Mr Butt's evidence without giving Ms Vicary an opportunity to cross-examine him about it. For that reason, I refuse to admit this evidence and I take no account of the additional reasons put forward by Mr Butt.

31. In any event, even if I had allowed the new evidence to be introduced, I would not have accepted it for the following reasons. If those matters were genuinely the cause of or a contributing factor to the appeal being made late then they should have been put forward, with supporting evidence, as reasons why the late appeal should be allowed. However, there was no mention of the factual matters now relied on by Mr Butt in any correspondence with HMRC or in the reasons for the appeal being late that were submitted by Mr Spencer with the notice of appeal. Even more tellingly, at no point in his oral submissions, did Mr Spencer suggest that Mr Butt wished to give evidence about or rely on any additional reasons in support of his application to be allowed to make a late appeal. In his email, Mr Butt has not explained why he introduced these reasons for the first time on the day after the hearing. Taking account of all the circumstances, I have concluded that that Mr Butt's additional reasons for not making the appeal in time are not credible and I would not have given them any weight.

DISCUSSION

32. The only issue is whether Mr Butt should be permitted to make an appeal against the Trade Lynx (London) Limited penalties in March 2022 almost eleven months after the time limit for making an appeal had expired.

33. The Upper Tribunal has given guidance on the correct test to be applied when considering an application for permission to make a late appeal in *Martland v HMRC* [2018] UKUT 178 (TCC) at [23] – [47], the essence of which is summarised at [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 v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 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.”

34. Applying that three-stage approach, I first consider the seriousness and significance of the failure to comply with the original time limit. The relevant time limit is 30 days from the date of the disputed decision. The purpose of the time limit is to promote the efficient disposal of proceedings and provide some finality to litigation before the FTT. In this case, the appeal was 327 days late which was over ten times the 30 day time limit. In my view, such a delay cannot be described as anything other than serious and significant.

35. The second stage is to consider the reason for the failure to comply with the time limit. In this case, the only reason given for the delay is that HMRC did not answer the questions put by Mr Spencer or provide any further information. Ms Vicary, for HMRC, submitted that this was not a good reason for the delay and I agree. The explanation is unsatisfactory for a couple of reasons.

36. First, although the FTT encourages parties to try to resolve disputes by discussion or other means as an alternative to bringing an appeal, such attempts at dispute resolution are not a reason to ignore time limits. In this case, the parties were not in negotiations. Mr Spencer said that he needed more information from HMRC in order to formulate the grounds of appeal. I do not accept that as a valid reason for not appealing, especially in a case such as this. The allegation was clearly put that Mr Butt knew that certain transactions entered into by Trade Lynx (London) Limited were connected with fraud and that he either knew or should have known they were so connected. In such an appeal, the burden is on HMRC and they must produce evidence to discharge it or they are bound to fail. Mr Butt could have appealed by simply maintaining that he did not know that there was any connection with fraud. The proper approach in a case such as this would be to appeal within the time limit and then, if necessary, for one party (or perhaps both) to apply for further and better particulars. If HMRC wished him to provide more detailed grounds of appeal then Mr Butt would be entitled to say that he will do so but only when he has seen HMRC’s case. In any event, this reason for the delay in appealing is seriously undermined by the fact that Mr Butt did appeal on 23 March 2022 notwithstanding the fact that HMRC had never provided him with the additional information that he sought. That shows that Mr Butt there was no good reason for the delay and could have appealed much earlier.

37. Secondly and most seriously, the reason for delay given by Mr Spencer does not explain the slow pace of correspondence and the final delay between the last communication from HMRC concerning Trade Lynx (London) Limited and the appeal being lodged.

Following the issue of the personal liability notice on 31 March 2021, Mr Spencer first wrote to HMRC on 28 April when the 30 day time limit for appealing to the FTT had almost expired. HMRC replied immediately on the same day but Mr Spencer did not contact HMRC again until 9 September 2021 when the time limit for appealing had already long since expired. HMRC replied on 22 September and informed Mr Spencer that Mr Butt was out of time to appeal and would have to seek permission to make a late appeal. Mr Spencer wrote again to HMRC on 28 September to say he was awaiting instructions from Mr Butt. It was not until over two months later that Mr Spencer wrote again when, on 30 November, he asked HMRC for an independent review. HMRC responded immediately on the same day and refused to carry out a review on the ground that the time limit for requesting a review had passed. Following HMRC's rejection of the request for a review, the only possible option left for Mr Butt was to apply to the FTT for permission to make a late appeal. However, no notice of appeal was lodged or application made until 23 March 2022. If Mr Butt needed more information before he could appeal and as time was not just running but had actually run out then I would have expected Mr Butt and/or Mr Spencer to have responded to HMRC with more urgency. There was no explanation for the long gaps between communications and, in particular, the almost four month delay between HMRC's refusal to carry out a review and the lodging of the notice of appeal.

38. The third stage is to consider all the circumstances of the case, balancing 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. In considering the prejudice to the parties, I 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.

39. In relation to prejudice, Mr Spencer contended that, as Mr Butt will be able to proceed in relation to the two penalties relating to Quantum London Limited and the issues are the same in all the appeals, HMRC would not be prejudiced if the Trade Lynx (London) Limited appeal were to be admitted. Ms Vicary resisted that submission on the ground that the evidence (ie case officers, the defaulting traders and facts) in the two cases is completely different. It follows that, if the FTT were to admit the Trade Lynx (London) Limited penalty appeal, HMRC would have to do twice as much which would be a significant additional burden.

40. I accept that HMRC and the public interest would be prejudiced if I were to grant permission for Mr Butt to make a late appeal in relation to the Trade Lynx (London) Limited penalty. As Ms Vicary submitted, if the Trade Lynx (London) Limited appeal were to go ahead, HMRC would have to defend two appeals rather than one. The two appeals concern two different companies and completely separate traders and transactions. There would also be an impact on the resources of the FTT as the length of time required for the hearing would be significantly extended, if not doubled.

41. There is no doubt that Mr Butt will be prejudiced if I refuse to grant him permission to notify this appeal late because he will be unable to challenge the substantial penalty of £61,019. In relation to that point, which must undoubtedly be taken into account, Ms Vicary relied on the Upper Tribunal's comments in *HMRC v Katib* [2019] STC 2106 ('*Katib*'). In that case, Mr Katib faced the prospect of losing his home if he was refused permission to make a late appeal. The Upper Tribunal stated at [60]:

"The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it

sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them.”

42. In my view, Mr Butt has not shown that the prejudice to him that will follow if his appeal is not allowed to proceed outweighs the serious delays for which there was no good reason, the prejudice that would be caused to HMRC and the public interest in appeals being conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

43. In all the circumstances, I consider that this is not a case where it is appropriate to give permission to make a late appeal.

CONCLUSION

44. As discussed above, Mr Butt’s appeal reference TC/2021/11030 against the company officer liability decision notice dated 25 November 2021 is admitted and will proceed to a hearing together with his appeal under the same reference against the company officer liability decision notice dated 9 March 2022. I have decided, however, that Mr Butt’s appeal reference TC/2021/11029 against the company officer liability decision notice dated 31 March 2021 making him personally liable for the penalty of £61,019 imposed on Trade Lynx (London) Limited cannot be admitted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

**JUDGE GREG SINFIELD
CHAMBER PRESIDENT**

Release date: 09th MARCH 2023