[2012] UKUT 187 (TCC)
Appeal number FTC/19/2011

VALUE ADDED TAX —application to First-tier Tribunal for extension of time to appeal under section 83G(1) and (6) of Value Added Tax Act 1994 – legal test to be applied to application for extension of time – First-tier Tribunal applied correct legal test - decision not perverse – no error of law - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DATA SELECT LIMITED

Appellant

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL:
MR JUSTICE MORGAN

Sitting in public at Rolls Building, 7 Rolls Building, Fetter Lane, London, EC4A 1NL on 19th April 2012

Mr Simon Farrell QC (instructed by JTK Associates) for the Appellants

Mr Michael Holland QC and Mr Howard Watkinson (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Respondents

DECISION

TRIBUNAL JUDGE: Mr JUSTICE MORGAN

RELEASE DATE: May 2012

Introduction

1. This is an appeal to the Upper Tribunal (Tax and Chancery Chamber) by Data Select Limited ("the Appellant") against the decision of the First-tier Tribunal ("the FTT"), released on 5th August 2010.

2. The appeal is brought under section 11 of the Tribunals, Courts and Enforcement Act 2007. Such an appeal can only be brought on a point of law arising from the decision of the FTT. The appeal is brought with the permission of the FTT. That permission was given by a decision in writing dated 14th October 2010 and released to the parties on 1st February 2011.

3. On this appeal to the Upper Tribunal, Mr Farrell QC appeared on behalf of the Appellant and Mr Holland QC and Mr Watkinson appeared on behalf of the Respondents.

The issue

4. The issue on this appeal is whether the FTT erred in law in refusing to grant to the Appellant an extension of time, pursuant to section 83G(6) of the Value Added Tax Act 1994 (VATA), so as to allow the Appellant to bring an appeal on or about 9th April 2010, against a decision made by HM Revenue and Customs ("HMRC"), contained in a decision notice dated 28th April 2009.

The essential facts

5. On 2nd May 2006, the Appellant submitted a VAT return for the VAT period 04/06 (covering the period February to April 2006). The Appellant declared input tax of approximately £9.8 million.

6. By letter dated 3rd March 2008, HMRC notified the Appellant of its decision to deny the Appellant its right to deduct input tax in relation to certain transactions the subject of that VAT return. Those transactions comprised 30 out of the 31 transactions which were the subject of that return. The other transaction ("Deal 16") was not dealt with in the letter of 3rd March 2008.

7. The Appellant duly appealed to the VAT & Duties Tribunal against the decision contained in the letter of 3rd March 2008. That appeal was pending at the time of the decision by the FTT on 5th August 2010.

8. On 28th April 2009, HMRC prepared a letter dated 28th April 2009 and headed "Notification of Decision to Deny Input Tax". I will leave until later any question as to whether that letter was sent to the Appellant. The letter was in essentially the

same terms as the earlier letter of 3rd March save that it related to Deal 16 and to none of the other transactions the subject of the VAT return (which had already been dealt with in the letter of 3rd March 2008). The amount of input tax in relation to Deal 16 was £166,250.

9. There was an issue before the FTT as to whether the letter of 28th April 2009 was received by the Appellant at around that time.

10. On 25th February 2010, HMRC wrote to the Appellant's tax adviser in relation to the appeal against the decision notified by the letter of 3rd March 2008. In the course of the letter of 25th February 2010, HMRC referred to the letter of 28th April 2009 and stated that the decision notified by that letter had not been the subject of an appeal.

11. On 1st March 2010, the Appellant's tax adviser emailed HMRC stating that he had been told by the Appellant that it had not received the letter of 28th April 2009 and asking for a copy.

12. A copy of the letter of 28th April 2009 was sent by HMRC to the Appellant on 3rd March 2010. The letter of 3rd March 2010 was received by the Appellant on or about 8th March 2010.

13. On 8th March 2010, HMRC wrote to the Appellant's tax adviser stating if the Appellant were to appeal the decision notified by the letter of 28th April 2009, the Appellant would have to apply for an extension of time to appeal and HMRC would expect such an application to be accompanied by a full explanation of the reasons for the appeal being brought out of time, whereupon HMRC would consider the matter further.

14. On 25th March 2010, the Appellant sent to the FTT a Notice of Appeal, in relation to the decision notified by the letter of 28th April 2009. That Notice of Appeal was defective in that the Appellant had not completed the sections identifying the grounds of the appeal or the result sought. As a result, on 6th April 2010, the FTT returned the Notice of Appeal to the Appellant. On 9th April 2010, the Appellant sent to the FTT a revised Notice of Appeal. The revised Notice of Appeal was issued by the FTT shortly thereafter.

15. The revised Notice of Appeal referred to the letter of 28th April 2009 in a number of places. The Notice of Appeal stated that HMRC had offered a review of the decision on 28th April 2009; that was a reference to the letter of that date. The Notice of Appeal sought an extension of time to appeal. It stated that the latest time by which an appeal ought to have been made was 27th Mary 2009. That presupposed that there had been a valid notification of the relevant decision on 28th April 2009. The appeal was said to be late because the Appellant had not received notification of the decision. The grounds of appeal referred to the "decision letter of 28 April 2009".

16. On 12th May 2010, HMRC served a detailed Notice of Objection to the application for an extension of time to appeal. This document stated that the letter of 28th April 2009 had been sent to the Appellant. It was pointed out that the

Appellant's contention that it did not receive the letter was not substantiated by sworn witness evidence. The document also took a number of other points.

17. On or before 14th July 2010, the Appellant's application for an extension of time to appeal was listed for hearing by the FTT on 16th July 2010 at 3.30 pm. On 14th July 2010, HMRC wrote to the Appellant's tax adviser asking if the Appellant intended to rely on any witness evidence or documents at that hearing. On 15th July 2010, the Appellant's tax adviser stated that he hoped to produce a very brief statement from a Mr Vincent to state that Mr Vincent was satisfied that the Appellant did not receive the letter of 28th April 2009. There was then an exchange of emails on the basis that Mr Vincent was expected to be available to give oral evidence at the hearing on 16th July 2010. On the day of the hearing at 10.36 am, the Appellant's tax adviser emailed HMRC with a copy of a statement by Mr Vincent and stating that Mr Vincent was not available to attend the hearing by reason of a pre-arranged holiday.

18. Mr Vincent's statement briefly referred to the systems within the Appellant for dealing with incoming post. He referred to certain enquiries he had made as to whether a member of staff had seen the letter of 28th April 2009 and he reported that no such member of staff had seen it. He stated that it was inconceivable that the Appellant would have received the letter of 28th April 2009 but yet taken no action.

19. The Appellant and HMRC were represented by counsel at the hearing on 16th July 2010. The Appellant did not apply for an adjournment of the hearing in view of the short notice which it had received of the hearing nor in view of the fact that Mr Vincent could not attend. Counsel for the Appellant accepted that the Appellant had the burden of showing that the letter of 28th April 2009 had not been received. Counsel also accepted that because Mr Vincent was not present to give his evidence and be cross-examined, the weight to be given to his written statement was a matter for the FTT. The FTT released its decision on 5th August 2010.

The decision of the FTT

20. In its decision, the FTT referred to the statutory provisions, the submissions of the parties in some detail and then proceeded to make its findings. It directed itself that it should have regard to the factors in Civil Procedure Rules, rule 3.9(1) and the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

21. The FTT considered whether the letter of 28th April 2009 was received by the Appellant at around that time. It referred to what it regarded as a fact, namely, that the letter had been sent to the Appellant. It thought that the Appellant could reasonably have been expected to have gone to greater lengths, than it had done in Mr Vincent's statement, to establish that the letter had not been received. It regarded the detail of the evidence given by Mr Vincent as "limited" and as not sufficient to exclude as a likely explanation the possibility that the letter had gone missing in the Appellant's internal administration. It therefore concluded that it could not determine that the letter had not been received around the time it was sent.

22. Having so decided, the FTT directed itself that it was still open to it to grant an extension of time to appeal. It stated that there would have to be "sufficiently persuasive reasons" to support the grant of an extension of time. It stated that it would consider whether the Appellant acted with due diligence when it did receive a copy of the letter in March 2010. It held that the 30 day period for appeal referred to in section 83G(1) of VATA ran from 28th April 2009 and the appropriate extension of time would not necessarily be as long as 30 days from the Appellant receiving a copy of the letter in March 2010. The FTT considered that the Appellant had not acted promptly when it became aware of the existence of the letter of 28th April 2009 and received a copy of it in March 2010. Whilst that finding did not exclude the possibility of an extension of time, it was a relevant factor.

23. The FTT then considered and declined to accept a number of arguments which had been put forward by HMRC. It was prepared to consider the undesirability of opening up a dispute about the relevant decision after a considerable period of time, on the ground that HMRC would then not have certainty that an amount of tax was not in dispute and on the further ground that there might be increasing difficulty in investigating the factual basis of the dispute.

24. The FTT took into account the pending appeal in relation to the decision notified by the letter of 3rd March 2008 but considered that point to be of limited relevance. Whilst the intended appeal overlapped with the pending appeal, the FTT considered that the intended appeal also raised discrete matters.

25. The FTT then expressed its conclusion. It referred again to CPR 3.9 and the overriding objective. It was not satisfied that the Appellant did not receive the letter of 28th April 2009 at around that time. It was not satisfied that the Appellant had advanced persuasive reasons as to why time to appeal should be extended. It was not satisfied that the Appellant had acted with due diligence in and after March 2010. Having considered all the circumstances of the case, it refused to extend the time to appeal.

Permission to appeal

26. The FTT granted the Appellant permission to appeal to the Upper Tribunal.

27. The FTT gave as its reason for the grant of permission that there was little case law on the approach to be adopted by the FTT when deciding whether to grant an extension of time under section 83G(6) of VATA.

28. In the event, on the hearing of this appeal, neither party submitted that there was any lack of clarity as regards the test to be applied on an application for an extension of time under section 83G(6).

The Grounds of Appeal

29. The Notice of Appeal to the Upper Tribunal raises a large number of suggested grounds of appeal. On reading these grounds, I was struck by the fact that most if

not all of them did not raise anything which one could regard as an error of law. Some of the suggested grounds referred to matters such as the weight of various factors, which plainly did not raise questions of law.

30. The grounds of appeal were not drafted by counsel who appeared before me. At the hearing before me, counsel appearing for the Appellant drafted two additional grounds of appeal. The first was that the finding of fact made by the FTT, that the letter of 28th April 2009 was delivered to the Appellant at around that time, was a perverse finding given the statement from Mr Vincent and the absence of any other direct evidence. The second additional ground was that the refusal to extend time was perverse. HMRC did not oppose an application to amend the Notice of Appeal to the Upper Tribunal to include these further grounds of appeal and I granted permission to amend accordingly.

The statutory provisions

31. By section 83(1)(c) of VATA, the appellant was entitled to appeal to the FTT against the decision expressed in the letter of 28th April 2009. By Section 83G(1) of VATA, an appeal under section 83, where "P" is the appellant, is to be made to the FTT before the end of the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates. There is a reference to "P" in section 83A. By section 83A(1), HMRC must offer a person ("P") a review of a decision that has been notified to P, if an appeal lies under section 83 in respect of that decision. By section 83A(2), the offer of the review must be made by notice give to P at the same time as the decision is notified to P. Section 83D provides for extensions of time in relation to a review by HMRC. Where someone other than P is the appellant under section 83G(1), the time for appeal by such person is the end of the period of 30 days beginning with the date that person becomes aware of the decision or, if later, the end of the relevant period within the meaning of section 83D.

32. By section 98 of VATA, any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of VATA may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative.

33. Section 98 of VATA is supplemented by the general provisions contained in section 7 of the Interpretation Act 1978. Section 7 of the 1978 Act introduces two relevant rules. The first is that where an Act authorises or requires a document to be served by post, then unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document. It was not submitted that the relevant provisions of VATA disclose an intention contrary to the operation of this general rule. The second relevant rule is that service of a document posted in the way described above is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary fact is proved.

Discussion

34. Although the FTT gave permission to appeal to the Upper Tribunal in the belief that there was a lack of case law on the approach to be adopted to an application for an extension of time pursuant to section 83G(6), there was no real difference of approach between the parties before me. That is not surprising. Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (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? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

35. The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see Sayers v Clarke Walker [2002] 1 WLR 3095; Smith v Brough [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc [2007] STC 1196.

36. I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in Advocate General for Scotland v General Commissioners for Aberdeen City [2006] STC 1218 at [23]-[24] which is in line with what I have said above.

37. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision.

38. As I have indicated, the FTT in the present case adopted the approach of considering all the circumstances including the matters specifically mentioned in CPR 3.9. It was not said that there was any error of principle in that approach. In my judgment, the FTT adopted the correct approach.

39. The application to the FTT expressly accepted that the latest time by which an appeal to the FTT ought to have been made was 27th May 2009 and that the intended appeal was out of time. That was obviously on the basis the 30 day period referred to in section 83G(1) of VATA began on 28th April 2009. Section 83G(1) refers to "the date of the document notifying the decision" to which the appeal relates. The application to the FTT also stated that the Appellant did not receive notification of the decision. Thus, it was clear that the Appellant was accepting that the time for appeal was measured from 28th April 2009 even in a case where it said that it had not received the notification.

40. In the course of the appeal to the Upper Tribunal, counsel for the Appellant submitted that it had been necessary for HMRC to call evidence before the FTT that HMRC had sent the letter of 28th April 2009 in the post to the Appellant and that in the absence of such evidence the FTT was not entitled to find that the letter of 28th April 2009 had been sent. HMRC responded by relying upon the Appellant's acceptance in its application to the FTT that time started to run on 28th April 2009; it was submitted that such acceptance inevitably involved the acceptance that the letter of 28th April 2009 had been sent to the Appellant even if the Appellant had not received it.

41. The submissions as to what the Appellant had accepted in its application to the FTT led to a consideration of the time limit in section 83G(1). HMRC contended that the reference to the date of the document notifying the decision was a reference to the date on the face of the document which was sent as notification of the decision. It was accepted that the document had to be sent to the addressee. It was not enough for HMRC to prepare a decision, to date it and then file it away without sending it to the addressee. Once the document, bearing a date, was sent to the addressee, the date of the document was the relevant date for the purposes of section 83G(1) whether the document was received by the addressee promptly, or after a long delay or not at all. HMRC submitted that any hardship for an addressee caused by the time for appeal starting to run before he was even aware of the decision which had been made would be dealt with by the tribunal exercising its powers under section 83G(6) to extend the time for appealing.

42. These submissions from HMRC led the Appellant to submit that time did not run under section 83G(1) until the addressee of the document had received the document. Until that date, it was not a document "notifying the decision" to the addressee. However, that submission was incompatible with the application which the Appellant made to the FTT. That application was for an extension of time on the basis that time expired on 27th May 2009. If the Appellant's submission as to the meaning of section 83G(1) were correct, and if the Appellant were also right that it had not received the letter of 28th April 2009 until a copy of that letter was sent to it in March 2010, then it ought to be submitting that the time for appealing ran from the receipt of the letter in March 2010.

43. It is not strictly necessary for me to determine the relevant date for the beginning of the 30 day period in section 83G(1). I say that for two reasons. First, this point was only raised in connection with the question, raised for the first time on this appeal to the Upper Tribunal, as to whether the letter of 28th April 2009 was sent to the Appellant. However, whether it is HMRC or the Appellant who is right as to

the relevant date for the purposes of section 83G(1), neither side contended that time can start to run if the relevant document is never sent to the addressee. Accordingly, the Appellant's acceptance in its application to the FTT that time started to run on 28th April 2009 inevitably involved an acceptance by the Appellant that the letter of 28th April 2009 was sent to the Appellant. Accordingly, it was not necessary for HMRC to prove that fact before the FTT. There was no submission made to the FTT that it needed evidence before it could hold that the letter of 28th April 2009 had been sent to the addressee. The FTT was entitled to proceed on the basis that the letter of 28th April 2009 was sent to the Appellant and was then entitled to consider the other possibilities which were that the letter was lost in the post or that the letter was misplaced internally by the Appellant.

44. Secondly, although the Appellant contended that time did not start to run until it received notification of the determination, it had applied to the FTT on a different basis, namely, that time started to run on 28th April 2009 and expired on 27th May 2009 and that the Appellant needed to persuade the FTT to grant an extension of time from 27th May 2009 to 9th April 2010 or thereabouts. The Appellant did not seek to appeal the decision of the FTT on the ground that as a matter of law time only started to run from a date in early March 2010.

45. As it is unnecessary for me to determine the relevant date for the beginning of the 30 day period in section 83G(1), I consider it would be better if I did not do so in this case. The argument on the point was relatively brief. I was not taken to other statutory provisions which might be relevant such as section 83A of VATA. I was not shown any authority that might be helpful whether directly relating to section 83G or to similar provisions in other statutes.

46. The Appellant next contended that the finding of the FTT that the Appellant had not established on the balance of probabilities that it had not received the letter of 28th April 2009 was perverse. The Appellant relied upon the witness statement of Mr Vincent and the fact that there was no other evidence on the point. It was submitted that there was only one possible finding of fact on that evidence and that was that the letter of 28th April 2009 had not been received by the Appellant.

47. Mr Vincent's statement tried to give the impression that the matter had been thoroughly investigated within the Appellant and the complete lack of any trace of the letter of 28th April 2009 was strong evidence that the letter had not been received by the Appellant. However, if Mr Vincent had been available to be cross-examined, there were many questions which might properly have been put to him in relation to the brief and general way in which he described matters. Mr Vincent said that he made enquiries as to whether anyone had seen the letter. If he had been available to be cross-examined, he could have been asked about the nature of the enquiries and to whom they were directed. Were the enquiries answered or was there a failure to respond? What exactly was said in any response? Mr Vincent also said that he asked staff to review their files. Which staff did he ask? Did they review their files? Did they say what they had found? Mr Vincent could also properly have been asked to explain in detail the systems in place within the Appellant as to the receipt of post.

48. The Appellant was not at fault as a result of Mr Vincent not being available to give evidence at the hearing before the FTT. But the Appellant did not ask for an adjournment of the hearing. Counsel for the Appellant who appeared before the FTT accepted that the weight to be given to Mr Vincent's statement was a matter for the FTT. The FTT thought that the statement contained "limited details" as to the position. In my judgment, it was right to think that and it was entitled to hold that the Appellant had not satisfied it on the balance of probabilities that the letter had not been received by the Appellant. In Smith v Brough [2005] EWCA Civ 261 at [54], Brooke LJ stressed the need for proof of any facts intended to be relied upon in support of an application for an extension of time. In the present case, prior to the hearing before the FTT, HMRC had stressed that it expected the Appellant to call a witness to prove its case in this respect.

49. In my judgment, the FTT's finding in relation to Mr Vincent's evidence was not perverse.

50. The Appellant next submitted that a decision to refuse an extension of time to appeal was perverse. It was said that there could only have been one possible decision and that was that an extension of time should be granted. In view of the fact that the FTT was not satisfied that the Appellant had not received the letter of 28th April 2009 around the time it was sent, the position was that the Appellant needed a lengthy extension of time and it had not put forward a good explanation for its delay in seeking to appeal. The FTT did not refuse an extension just because there was no good explanation for the delay. It considered all the circumstances. It specifically considered the overriding objective and the matters listed in CPR r 3.9. The other grounds of appeal contend that the FTT gave too much weight to some factors and not enough weight to other factors. But the weight to be given to relevant factors is a matter for the FTT. The amount of the weight given to a factor in this case does not involve a matter of law. Another tribunal might have taken a different view as to the ultimate decision in this case. However, in my judgment, the decision made by this tribunal, having made a possible finding as to the receipt by the Appellant of the letter of 28th April 2009, was a decision which was eminently open to it and cannot be characterised as perverse.

51. I do not think that I need to deal with any other matters. Counsel for the Appellant argued forcefully and persuasively that this was a case in which an extension of time ought to be granted. However, that matter has now been decided by the FTT which applied the correct legal approach and made a decision which was open to it. My task is to review that decision and not to make my own independent decision on whether or not this is a case in which an extension of time should be granted.

The result

52. The appeal will be dismissed.

MR JUSTICE MORGAN

Release Date: 01 June 2012