TC01382

Appeal numbers TC/2010/03415
LON/2008/0762

VAT – HMRC decision to deny input tax claim —Application for permission to appeal after the end of the specified time limit for an appeal – Value Added Tax Act 1994, s.83G(1) and (6) – Permission refused

FIRST-TIER TRIBUNAL

TAX

DATA SELECT LIMITED **Appellant**

- and -

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

TRIBUNAL: DR CHRISTOPHER STAKER (Tribunal Judge)

Sitting in public in London on 16 July 2010

Mr Timothy Brown for the Appellant

Mr Michael Holland QC for the Respondents

DECISION

Introduction

1. By a notice of appeal dated 9 April 2010, the Appellant seeks to appeal against a decision of the Respondents ("HMRC") dated 28 April 2009 (the "Decision") to deny the Appellant's right to deduct input tax of £166,250 claimed in respect of a particular transaction in VAT period 04/06 for the purchase of mobile phones. The Decision was based on HMRC being satisfied that that transaction was connected with the fraudulent evasion of VAT and that the Appellant knew or ought to have known of such a connection.

2. The Appellant's notice of appeal included a request that the time for making the appeal be extended. A hearing on this request for an extension of time in which to appeal was held on 16 July 2010. The present decision is a decision on that request only.

The relevant legislation

3. The Appellant seeks to appeal to the Tribunal against the Decision pursuant to s.83 of the Value Added Tax Act 1994 ("VATA"). Section 83G VATA 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, …
>
> (6) An appeal may be made after the end of the period specified in subsection (1) … if the tribunal gives permission to do so.

The submissions of the parties

4. The Appellant's notice of appeal, under the heading "Reasons why the appeal is made late", states: "The Appellant did not receive notification of the decision. A copy of the decision letter was requested and supplied as soon as the Appellant became aware of it while corresponding with the Commissioners on other matters".

5. At the hearing, Mr Brown submitted on behalf of the Appellant amongst other matters as follows.

6. The decision whether to grant an extension of time to appeal is within the discretion of the Tribunal, which should be exercised having regard to whether there has been prejudice to the other party and with regard to the overriding objective.

7. The relevant chronology is as follows. On 26 May 2006, HMRC began an extended verification of the Appellant's 04/06 VAT return. By a letter dated 3 March 2008, HMRC denied input tax of some £3.7 million in respect of deals 1 to 15 and 17 on that return. The Appellant appealed in time against that decision, and that appeal is presently pending before the Tribunal as case number LON/2008/0762 (the "2008 appeal"). In the Decision dated 28 April 2009, HMRC subsequently denied input tax of £166,250 in respect of deal 16 in that same return. The Appellant now seeks to appeal against the Decision in the present proceedings.

8. The Appellant's position is that it did not receive the 28 April 2009 letter, which is why it did not appeal against the Decision at the time. By a letter dated 31 December 2009, the Appellant wrote to HMRC in connection with the 2008 appeal, raising various matters. HMRC responded to that letter by a letter dated 25 February 2010, which contained a reference to the fact that HMRC had denied input tax in relation to deal 16 in a letter from HMRC dated 28 April 2009. This was the first time that the Appellant was aware of this. The Appellant then asked for a copy of the Decision dated 28 April 2009. This was provided under cover of a letter from HMRC dated 3 March 2010. This communication was in fact received by the Appellant on 8 March 2010.

9. Even assuming 3 March 2010 to be the date on which the Appellant received the copy of the Decision, the 30 day deadline for appealing would then be 2 April 2010, which was Good Friday. The notice of appeal was in fact sent by e-mail to the Tribunal on 25 March 2010, which was within this deadline. However, the Tribunal wrote back in a communication dated 6 April 2010 saying that the notice of appeal was not acceptable as it was incomplete, due to the fact that the pages containing certain sections of the notice of appeal had not been included in the e-mail. That communication from the Tribunal was received on 7 April 2010. The Appellant's advisors then sent a complete notice of appeal to the Tribunal by e-mail at 6pm on 9 April 2010.

10. As to the Appellant's contention that it did not receive the Decision earlier, it is difficult for the Appellant to prove a negative. The Appellant had already appealed against the HMRC decision to deny input tax in relation to deals 1 to 15 and 17 in the VAT period in question, and there is no reason why the Appellant would not have also appealed against the denial of input tax in relation to deal 16 if the Appellant had been aware of the Decision in relation to deal 16. Indeed, deal 16 was traced back to a contra-trader, which would arguably have been easier for the Appellant to defend.

11. Reliance was placed on a witness statement of Mr Stephen Vincent, director of the Appellant. Mr Brown acknowledged that the weight to be placed on this witness statement was a matter for the Tribunal, given that Mr Vincent did not attend the hearing. Mr Brown submitted that no advice had been sought from the Appellant's advisors in relation to the Decision until February 2010, which was consistent with the Appellant's position.

12. Mr Brown further submitted that if there was a valid reason for the Appellant not appealing in 2009, it would be extremely harsh not to allow the appeal to go forward

solely on the basis of delay in bringing an appeal after the Appellant's receipt of the Decision in March 2010. The notice of appeal was at most filed a few days after the elapse of 30 days from the time of receipt of the Decision. HMRC were not prejudiced by any such delay and have suffered no detriment as it is input tax that is being claimed. There is an extant appeal in relation to other deals in the VAT period in question, and the Decision was not taken by HMRC until April 2009, which was itself some 3 years after the VAT period in question.

13. Arguments on behalf of HMRC were contained in a written notice of objection to the application for extension of time, dated 12 May 2010, and in the oral submissions of Mr Holland QC.

14. The written notice of objection stated amongst other matters as follows. The Decision was sent to the correctly named Appellant at the correct address and was therefore correctly notified. HMRC has had a great deal of correspondence with the Appellant in relation to the 2008 appeal and there are no other known instances of postal correspondence from HMRC not reaching the Appellant. The Appellant was always aware that it had carried out deal 16. Prior to February 2010 the Appellant had neither raised with HMRC any issue as to repayment of the £166,250 claimed input tax that remained outstanding from the denial letter of 3 March 2008 nor raised any query with respect to deal 16 that neither appeared in the statement of case, the deal sheets or the evidence served by HMRC in relation to the 2008 appeal. The Appellant's officers are experienced businesspeople who had ample information that there was a further sum of input tax relating to the VAT period in question that had not been denied in the 3 March 2008 decision, and failed to raise the matter. This should count against the Appellant in the exercise of the Tribunal's discretion even if the Tribunal is satisfied that the Appellant did not in fact receive the 28 April 2009 letter. In any event, the Appellant did not act with due expedition after receipt of the 3 March 2010 letter. The Appellant was requested by HMRC by fax on 8 March 2010 to accompany any appeal notice with a full explanation of the reasons for the appeal being sought to be lodged out of time, yet a notice of appeal was not sent until 12 March 2010 (and effectively 13 March 2010 as it was sent at 17:53) which was 11 days after the expiry of a 30 day period. It was submitted that this should count against the Appellant, relying on *John Wilkins (Motor Engineers) Ltd v HMRC* [2009] UKUT 175 (TCC). It was further submitted that it would be disruptive of the Government's planning of its income and expenditure if it were required to meet large and unexpected claims, and that HMRC should not be placed at the whim of an appellant in their allocation of resources in defending complex and resource intensive appeals commenced so long after expiry of the 30 day limit.

15. In oral submissions, Mr Holland QC added amongst other matters as follows. If the application were granted, the result would be a genuine expansion of the scope of the existing 2008 appeal, requiring an additional 6 HMRC officers to give evidence. In the present case, unusually, it is HMRC and not the Appellant that is out of funds in relation to the £166,250 input tax in question and it is therefore HMRC that has an interest in the speedy resolution of the matter. If the application is granted, and the proposed appeal joined to the 2008 appeal, this would raise issues as to the applicable costs regime as the 2008 appeal is under the old costs regime while the proposed

appeal would be under the new regime. The reason for having time limits on appeals is so that HMRC can have certainty as to its resources and because it becomes harder to investigate matters as time goes by. Reliance was placed on a witness statement of an HMRC official dated 26 February 2009, paragraph 84(1) of which indicates that representatives of the Appellant have previously denied having received correspondence from HMRC. The VAT return for the period in question was incomplete when submitted. The Appellant must have been aware throughout that the £166,250 in question had not been repaid to them by HMRC yet never queried this. In exercising its discretion, the Tribunal is entitled to have regard to the fact that time limits exist for a purpose and to the effect that granting the application would have in practice on the other party.

16. In reply, Mr Brown submitted that the HMRC official whose witness statement is relied on also did not attend the hearing, that the fact that the Appellant never previously queried the non-repayment of the £166,250 input tax was at best neutral and perhaps in fact in favour of the Appellant's case, and that the fact that the input tax remained outstanding would not have appeared in the Appellant's records as the Appellant had offset the amount.

The Tribunal's findings

17. The parties in their arguments referred to no case law dealing specifically with the exercise of the Tribunal's discretion under s.83G(6) VATA. The Tribunal notes that in *NVM Private Equity Limited v HMRC* [2010] UKFTT 106 (TC), the Tribunal considered that in the exercise of this discretion, it should have regard to the factors referred to in CPR Rule 3.9(1), namely:

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.

18. The Tribunal has also had regard to the overriding objective in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

19. A significant issue in this matter has been whether the Appellant had notice of the Decision around the time that it was issued in April 2009, or whether the Appellant only had notice that the Decision had been made on receipt of the HMRC 25 February 2010 letter, and only had a copy of the Decision itself on receipt of the HMRC 3 March 2010 communication.

20. The Tribunal sees some force in the Appellant's arguments that it is difficult for the Appellant to prove a negative, and that the Appellant is unlikely not to have appealed against the Decision in 2009 if it had knowingly received it at that time. However, the Tribunal is satisfied on the evidence that the Decision would have been sent by HMRC to the Appellant in April 2009. While not wholly impossible that the Decision never left HMRC in April 2009 despite being recorded in their systems as having been sent, that is highly improbable. The remaining possibilities are then that the Decision when sent in April 2009 was lost in the post, or was lost internally within the Appellant's administration after receipt without coming to the attention of the relevant officer of the Appellant.

21. The former of these last two possibilities would be a rare occurrence, although certainly not unknown. The degree of likelihood of the latter would depend on factors individual to the Appellant, and in particular, on the reliability of its internal administration. Some evidence of the Appellant's internal procedure for handling incoming mail was provided in paragraph 4 of the witness statement of Stephen Vincent. Mr Brown acknowledged that as Mr Vincent did not attend the hearing where he could have been cross-examined, the weight to be placed on this statement is a matter for the Tribunal.

22. It is noted that paragraph 8 of the HMRC notice of objection states that "The Appellant's contention that it did not receive the letter from the Commissioners is, as yet, unsubstantiated by sworn evidence". It was therefore clear that HMRC were putting in issue the lack of sufficient evidence of non-receipt of the Decision in 2009. The statement of Mr Vincent was perhaps adduced in response to this. However, given the amount in issue in this appeal, a sum of £166,250, and given that this is such a central issue, the Tribunal considers that the Appellant could reasonably have been expected to go to greater lengths to seek to establish by evidence the unlikelihood of the Decision having been received in 2009, beyond simply producing a witness statement of one director who was unavailable to attend the hearing.

23. The Tribunal is prepared to give some weight to the statement of Mr Vincent. However, in view of the limited details given in paragraph 4 of that statement, and in view of Mr Vincent's failure to attend the hearing, the Tribunal cannot regard it as sufficient to exclude as a likely explanation that the Decision when sent in April 2009 went missing in the internal administration of the Appellant. On the basis of the evidence before it considered as a whole, the Tribunal is unable to conclude that the Appellant never received the Decision when it was sent in April 2009.

24. Even if the Decision was received by the Appellant when sent in April 2009, and was lost in the Appellant's internal administration, this would not necessarily wholly exclude the possibility of the grant of an extension of time in which to appeal. However, for an extension of time to be granted in such circumstances, it would be necessary for the Appellant to sufficiently persuasive reasons as to why it would nonetheless be appropriate to grant an extension of time.

25. Even if it were the case that the Appellant did not receive the Decision when sent in April 2009, the Tribunal would also need to consider whether it is satisfied that the Appellant acted with diligence when it did receive a copy of the Decision in March 2010. The Appellant appears to assume that in this event, the deadline for appealing was 30 days from the date of receipt of the copy of the Decision (which is said to be 8 March 2010), or at least, 30 days from the date of the letter transmitting the copy of the Decision (which was 3 March 2010). The Tribunal considers that this is not the case. Under s.83G(1)(a)(i) VATA the time limit for appealing is 30 days from "*the date of the document* notifying the decision to which the appeal relates", not 30 days from *date of receipt by the appellant of* the document notifying the decision. That means that in this case, where the Appellant is seeking to appeal against the Decision dated 28 April 2009, the time limit is 30 days from 28 April 2009, regardless of when the Decision was received by the Appellant. In cases where the decision appealed against is not received by the appellant until after the expiry of this deadline, or even until shortly before expiry of the deadline, this may be a circumstance justifying an extension of the deadline under s.83G(6). However, an extension of the deadline will not necessarily be for 30 days after the date of receipt of the decision in question. Any extension would be for whatever period is reasonably appropriate in all of the circumstances.

26. Given the amount in dispute in the proposed appeal, and given the length of time that had elapsed since the date of the Decision, the Appellant should have acted promptly with all due diligence upon receiving notice of the Decision. The evidence is that the copy of the Decision was received by the Appellant on 8 March 2010 and that the notice of appeal was first sent by e-mail to the Tribunal on 25 March 2010. Having considered the contents of the Appellant's notice of appeal, the Tribunal is not persuaded that the Appellant required 17 days in order to file a notice of appeal with an application for an extension of time, and notes that even then the notice of appeal that was filed was in unacceptable form as it did not contain all pages. A notice of appeal in acceptable form was not filed until 12 April 2010. The Tribunal is not satisfied that the Appellant acted with the diligence that would reasonably be expected after receiving the copy of the Decision. This also does not necessarily wholly exclude the grant of an extension of time to appeal, but is a factor to be taken into account.

27. The Tribunal does not accept all of the arguments of HMRC. The Tribunal does not consider that the Appellant was under any obligation to raise with HMRC the matter of the input tax in relation to deal 16 before it had notice of the Decision, or that its failure to do so should count against the Appellant. The fact that granting the request would expand the scope of the existing 2008 appeal is not considered relevant, as this would have been the case if the notice of appeal had been filed within time.

The fact that granting the request would give rise to issues as to costs in the appeal is also not considered particularly relevant as such issues would be capable of some appropriate resolution.

28. The Tribunal does however give weight to the consideration that the Government's planning of its income and expenditure is affected when decisions are challenged long after the time limit for an appeal has expired, and that HMRC's management of its own resources is similarly affected, and that investigation of appeals becomes more difficult for HMRC as time passes. The longer the period of time that has elapsed since the expiry of the time limit for an appeal, the more persuasive the circumstances will need to be to justify an extension of time. The amount in dispute in the appeal is considered neutral. On the one hand, given that it is a very significant amount, care should be taken before concluding that the Appellant has lost the opportunity to challenge the Decision. On the other hand, given that it is a very significant amount, care should be taken before concluding that after such a passage of time, the Decision still not a settled matter.

29. The Tribunal takes into account that the VAT return for the period in question is already the subject of another pending appeal. This is considered to be of some but limited relevance. It is true that this means that the VAT return for that period remains unsettled in any event. However, the fact that some aspects of that VAT return remain unsettled as they are subject to the 2008 appeal is not of itself a reason for allowing other aspects of the same return to be challenged long after the deadline for an appeal. While the proposed appeal may to a degree overlap with the existing appeal, it nonetheless raises discrete matters.

30. The Tribunal has considered these matters in the light of the considerations in paragraphs 17 and 18 above, to the extent that they are relevant on the basis of the evidence and arguments that have been presented by the parties. The Tribunal is not satisfied on a balance of probabilities that the Appellant did not receive the Decision when it was sent in April 2009. The Tribunal is not satisfied that the Appellant has advanced persuasive reasons why nonetheless an extension of time to appeal should now be allowed. The Tribunal is not satisfied that the Appellant has acted with due diligence. On a consideration of all of the circumstances of the case as a whole, the Tribunal is not persuaded that the application for an extension of time to appeal should be granted. The application is accordingly refused.

31. 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.

Christopher Staker

TRIBUNAL JUDGE
RELEASE DATE: 5 August 2010

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