TC01399

Appeal number: TC2009/12184

Direction – application to extend time for service of notice of appeal – made against background of appellant having failed to make returns on time, to have notified Commissioners of change of address, to have failed to pursue input tax repayment claims, and to have failed to serve notice of appeal within time assuming its own claim as to what constituted decision under appeal was correct – application dismissed

FIRST-TIER TRIBUNAL

TAX

PEN ASSOCIATES EUROPE LTD **Appellant**

- and -

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

TRIBUNAL: David Demack (TRIBUNAL JUDGE)

Sitting in public in Manchester on 4 July 2011

Mr Nigel Gibbon, solicitor, for the Appellant

Mr Richard Mansell of the Solicitor's office of HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by Pen Associates Europe Ltd ("Pen") for an extension of time in which to serve its notice of appeal. The notice was given on 14 July 2009. The application originally came before me on 28 July 2010 but had to be abandoned at that time as it was discovered that, with the consent of its directors, Pen had been dissolved. Before the fact of dissolution emerged, the Commissioners had consented to the application. I decided that, provided the company was restored to the register of companies, it might renew the application for an extension of time. Pen, having been restored to the register, now pursues the application.

2. Before me, Pen was represented by Mr Nigel Gibbon, solicitor, and the Commissioners by Mr Richard Mansell of the solicitor's office of the Commissioners of Revenue and Customs. I was provided with an agreed bundle of copy documents, and took formal oral evidence from Mr Roger Simon Grimshaw, a director of Pen. Additional oral evidence, of a rather informal nature since it was not controversial, was provided by Mr Nicholas Lawrence Platt, another director of Pen, and Mr David Miller, of the Vatpeople tax consultancy.

3. From the evidence provided, the following history of the company which led to the late service of the notice of appeal emerged. The company was formed in 2002 to provide automated teller machines ("ATMs"), commonly referred to as cash machines, to the convenience store retail market. Each ATM had to be connected to a network known as Link. Originally, only banks and building societies could be members of Link, but some years ago its rules were changed to permit membership by independent ATM providers. Pen did not have "the critical mass" itself to be a Link member, and consequently obtained access to the network via a sponsorship arrangement with Cardpoint Services Ltd ("Cardpoint"). By 2004 Pen had an "estate" of approximately 450 ATMs.

4. In March or April 2004 Cardpoint informed Pen that the contract between the companies was in breach of Link rules. Pen immediately contacted and opened negotiations with Link, hopefully to arrange to put the contract on to a compliant footing.

5. However, before the negotiations were completed on, 1 June 2004, Cardpoint disconnected Pen's entire "estate" from the Link network, and disabled the encryptions on all its ATMs, rendering them unusable without reprogramming.

6. As Pen was in turn in breach of the contracts with its members, it had to make alternative arrangements immediately to provide them with ATM services. To do so, it sold the "estate" to a Link member, TRM, and worked with that company to

transfer its own contracts with customers to TRM, and ensure its ATMs were restored to operation as quickly as possible.

7. Pen's contract with TRM included a covenant precluding it from operating in the ATM field, and Pen effectively ceased trading on the 1 June 2004. In the following three years Pen was faced with and met various compensation claims from its customers. The consideration for the sale to TRM was approximately £2 million, all of which was absorbed in compensation payments. Thirty staff of Pen were made redundant.

8. Gary Medlock, Pen's financial director, left the company at the end of July 2004, having dealt with the winding down of its operations. And it was at that time that Pen vacated its offices in Congleton, Cheshire, and its registered office was transferred to its accountants' offices in Stoke-on-Trent. The Commissioners were not informed of the change of address; their records continued to show the company's address as at Congleton.

9. Pen commenced proceedings against Cardpoint to recover the losses it claimed to have suffered from the latter's action in severing access to the Link network, but its claim ultimately was unsuccessful.

10. Mr Grimshaw subsequently commenced work for TRM, and its other directors obtained other employment.

11. When the time came for preparation of Pen's 2005 accounts, in the autumn of 2006, the company's accountants, DPC, enquired how it had dealt with the VAT on its purchases since ceasing to trade in June 2004. They were informed that VAT matters had been ignored, and no VAT returns had been made.

12. David Seabridge, a director of Pen until 2006, offered to complete and submit six outstanding VAT returns, including those for periods 09/04, 12/04 and 03/05. Mr Seabridge duly completed those returns and, despite apparently having no status to do so, signed them. In the process of completing the returns, Mr Seabridge 'tippexed' out the Congleton address of the company printed on their face and substituted, in manuscript, his own home address as that of Pen. The returns were submitted to the Commissioners on 27 September 2006 with a covering letter from DPC. The letter explained that Pen did not have a book-keeper "from July 2004 and so the books and records have only recently been bought (sic) updated to 31 December 2005." It made no mention of Pen's change of address.

The 09/04 return originally showed a repayment of £11,218.83 due to Pen, that for 12/04 a repayment of £4,133.35, and that for 03/05 a repayment of £9,977.50.

13. The Commissioners sought to verify the returns, and in the process wrote to Pen at Congleton on no less than 10 occasions. Not surprisingly, since the Congleton premises had long been vacated, they received no response. I was not told of what arrangements, if any, the company made for the redirection of mail. Consequently, on 4 December 2006 the Commissioners again wrote to Pen, once more at Congleton, informing it that its repayment claim for 09/04 had been reduced to nil. By letter of 6 November 2006 they similarly informed it that the repayment sought for period 12/04 had been reduced to nil, but that it had an output tax liability of £5,978.97, which they assessed. And by letter of 4 January 2007 the Commissioners informed Pen that its repayment for period 03/05 had also been reduced to nil. There matters rested for the next two years.

14. However, on 30 January 2009 Mr Grimshaw wrote to the Commissioners explaining that Pen had left the address to which their correspondence had been addressed. He claimed that they had been informed that Pen had moved from the Congleton address in the letter DPC sent with the outstanding returns. That was untrue. Mr Grimshaw also observed that since the returns on which the Commissioners' actions had been based had been accompanied by the accountant's letter, for whom the Commissioners held an 'authority to act' letter, it was not unreasonable to have expected someone within the Commissioners to have thought to address correspondence to the accountants, or at least to have copied it to them.

15. Mr Alex Baines dealt with Mr Grimshaw's letter writing to him on 9 February 2009 saying,

> *"Unfortunately, due to the three year time limits introduced in the VAT Act 1994, section 77(1), the periods referred to in your letter are now outside the capping period and as such I am unable to revisit them.*
>
> *The three year limit runs from the end of the accounting periods in question, which I believe in this case to be 09/04 and 12/04. As such the three year cap would have expired at the end of September 2007 for 09/04 and December 2007 for 12/04."*

16. By letter of 20 November 2009, the Commissioners agreed to refund Pen's input tax for period 03/05 which the company had reduced by letter from DPC of 12 March 2009 to £157.

17. Having dealt with those facts, which I necessarily had to find for present purposes, I then turn to the issue before me. It is common ground that the notice of appeal was not served within the 30 day time limit provided. Accordingly, I must decide whether to exercise the discretion given to me by rule 2(1) of The Tribunal

Procedure (First tier Tribunal)(Tax Chamber) Rules 2009 ("the Rules") to extend their time within which Pen was authorised to serve its notice of appeal. Mr Mansell submitted that it was not in the interests of justice to permit appeals after long periods of delay: there was a public interest in the finality of litigation. The inordinate delay in Pen making its appeal must weigh heavily against the tribunal granting late permission to appeal. In support of that claim, Mr Mansell relied on [30] of the decision of Judge John Walters QC in *Former North Wiltshire District Council v Commissioners of Revenue and Customs* [2010] UKFTT 449 (TC) and [31] of my own decision in *The Medical House plc v Commissioners of Revenue and Customs* (2006) Decision No. 19859. Those paragraphs read as follows:

North Wiltshire Council

> "**[30]** Mr Singh [counsel for the Commissioners] emphasised that the 30-day time limit for lodging an appeal is laid down by statute – section 83G(1) VAT Act 1994 ("VATA") – noting that section 83G(6) gives the Tribunal power to give permission for an appeal to be brought out of time. He referred us to rule 2(1) of the Rules – the overriding objective to enable the Tribunal to deal with cases fairly and justly – and rule (2(2)(e)), 'avoiding delay, so far as compatible with proper consideration of the issues.' He also referred us to rule 5(3) of the Rules, which allows the Tribunal to extend the time for complying with any rule, practice direction or directions. This, he submitted did not cover this case on its own, because the time limit was laid down by statute. However rule 20(1),(4)(b) of the Rules did cover the case, allowing the Tribunal to extend time for a notice of appeal under rule 5(3)(a). He emphasised that while these provisions did not in terms set out the basis on which the Tribunal should exercise its discretion to extend time, the context both of the Rules, and of the analogous provisions of the CPR, showed that it should do so 'so as to ensure a fair and just procedural result."

Medical House

> "**[31]** I agree with Mr Cannan's [counsel for the Commissioners'] submission that it is not in the interests of justice to permit appeals after long periods of delay. So far as I am aware, Medical House has never offered an explanation for the long delay in making its input tax claim, and whilst that delay is but one matter I must consider, it necessarily meant HMRC having to recover earlier records and to consider the matter against an historical background. Viewed against that background, I do not find it surprising that HMRC took some time properly to deal with the matter, and it is not a matter for which I believe they can be criticised. Medical Houses appeal was not served until 15 December 2005, some 14 months after the decision under appeal was made. In my judgment, that period of delay was unjustifiable, and must represent an intentional failure to comply with the Tribunal Rules. Even if, acting on its own behalf, Medical House was unfamiliar with the Tribunal Rules and not aware of the time limits they imposed for the service of new appeals and HMRC failed initially to give notice of its right to appeal, the letter of 17 September 2004 referred to the right to appeal. Had that been acted upon either within the time

limit therein referred to or possibly shortly afterwards, Medical House's position would have been protected, and since appeals to these tribunals attract no fees, it would have been at little or no cost to the company."

18. At this juncture I might observe that there was a dispute between the parties as to the extent of the delay in Pen serving its notice of appeal. The Commissioners maintained that the decisions under appeal were those made in 2006 reducing its input tax claims to nil. In contrast, Pen maintained that they were those made on 9 February 2009 and confirmed on review on 21 May 2009, denying its input tax claims on the basis that they were capped.

19. Mr Mansell submitted that I should take account of those matters set out at r.3.9 of the Civil Procedure Rules which were relevant in the present case. First, he contended that it was not in the interests of justice to permit appeals after a period of delay exceeding 4 years; the period of delay in the present case weighed heavily against the granting of an extension of time to appeal. He maintained that Pen did not direct its mind with sufficient regard to its VAT responsibilities, for instance by failing properly to inform the Commissioners of its change of address. The company knew that it had made input tax claims in 2006, yet did not pursue them for almost two years due, it was said, to its focusing on the litigation with Cardpoint. Further, the company's directors allowed its affairs to be wound up and the company itself to be dissolved without finalising its VAT affairs: an event which no reasonable businessman would have allowed to occur.

20. Secondly, Mr Mansell contended that Pen's failure to comply with its VAT obligations was intentional: its VAT matters were a "bit of a black hole". By its directors it made a conscious decision not to appeal the Commissioners' decision to reduce the company's input tax claims to nil; and that followed its failure to make the returns in question until over two years after they became due.

21. Then there was the absence of a good explanation of Pen's failure to prosecute its appeal. Mr Mansell maintained that that was exemplified by Pen's own advisers not being appraised of the company's dissolution. The explanation offered for the failure, that all the directors' attention was focused on the court proceedings with Cardpoint, was inadequate.

22. Mr Mansell disclosed that, subject to verification, the Commissioners accepted that Pen was entitled to the input tax it claimed, but maintained that, in the present case, it should not be a significant factor. Indeed, he added, were the tribunal to grant Pen's application, the Commissioners themselves would be prejudiced in terms of the public interest in good administration and certainty: the express time limit provided by Parliament would effectively be sidestepped were appeals to be allowed to proceed after such gross delay by Pen. In all the circumstances, Mr Mansell invited me to dismiss Pen's application.

23. Mr Gibbon opened his submissions by claiming that Pen's appeal was against the Commissioners' decision on review of 21 May 2009 to deny its repayment claims on capping grounds, so that its notice of appeal of 14 July 2009 was but little out of time.

24. In so far as the Commissioners' claim that Pen intentionally delayed its input tax claim was concerned, Mr Gibbon maintained that there was no such intention; the unique circumstances faced by Pen were entirely responsible for its behaviour. Its litigation with Cardpoint was "all consuming" - a fact that was well illustrated by Mr Grimshaw having to balance a new job with coping with the court proceedings and paying compensation to Pen's customers.

25. It was not until 2006 when messrs Grimshaw and Platt were discussing the potential closure of Pen with the company's accountants that the question of the company's outstanding VAT returns was raised, and they were made fairly soon afterwards. The delay in making the returns was not one which, in Mr Gibbon's submission, the Commissioners could criticise.

26. Mr Gibbon described the events which occurred as "almost a comedy of errors": If the Commissioners had taken certain steps, such as "doing the obvious" to try to contact the company, the tribunal would not have had to be troubled with the application; and if Pen had dealt with matters as it ought to have done, such as properly advising the Commissioners of its change of address, again the tribunal would not have had to be troubled. If I were to weigh, on the one hand, my assessment of Pen's culpability in delaying service of its notice of appeal, and the prejudice to the Commissioners in terms of the public interest in good administration and legal certainty and, on the other, the loss and injury that would be suffered by Pen were an extension of time to be refused, I should do so in favour of the company. Mr Gibbon submitted that if the Commissioners had made further attempts to contact Pen, the certainty was that the company would have received the input tax repayments it sought.

27. A further factor relied upon by Mr Gibbon – which he described as "not overriding but still a factor" - was the loss to Pen were its application to be refused.

28. Finally, Mr Gibbon noted that the Commissioners had made repayment of Pen's input tax repayment claim for period 03/05 which, he maintained, suggested that, if the company's application were to be granted they would suffer little prejudice.

Conclusion

29. In the *Wiltshire District Council* case, counsel for the Commissioners submitted that the tribunal should not consider itself obliged to consider the criteria set out in CPR 3.9(1). The tribunal in that case accepted that that was so, as do I. The *Wiltshire* tribunal accepted the submission because rule 2(1), which deals with the overriding objective, simply empowers the tribunal to extend time where necessary to deal with cases fairly and justly.

30. Nevertheless, I recognise that in exercising my discretion under rule 2(1), since CPR 3.9(1) provides a series of useful tests, it cannot be ignored. In my judgment the present case essentially requires my considering a number of criteria contained in CPR 3.9(1). One points to my granting the application; others suggest that I should dismiss it. The criterion which favours Pen is CPR 3.9(1)(i), the effect on the parties in the event of my granting relief. The Commissioners accept that, were I to grant the application, subject to verification, Pen would be entitled to the input tax claimed so that its appeal would succeed. In the particular circumstances of this case, I regard that as a minor matter, and not one sufficient alone to warrant my granting the present application.

31. It will be recalled that Mr Mansell submitted that I should reject the application on the basis that there was a public interest in the finality of litigation, and that it was not in the interests of justice to permit appeals after long periods of delay. I entirely accept the correctness of that submission, but in dealing with it find it necessary to take account of others of the matters set out in CPR 3.9(1), particularly whether the delay in making the application was intentional (CPR3.9(1)(c) and whether the failure was caused by the party or his legal representative (CPR3.9(1)(f), or in this case its accountants.

32. As I have explained, Pen's returns outstanding from 2004 and 2005 were submitted to the Commissioners by its accountants on 27 September 2006. Some of them were over 2 years late; others slightly less. The letter accompanying them from DPC made no mention of Pen's change of address, and ignored the fact of Mr Seabridge's manuscript amendment to the address printed on the returns. Any competent adviser submitting the returns would have given proper notice of the change of address. But even if the change was overlooked at that stage, the accountant's own follow up system should have resulted in the matter of those claims being revisited at regular intervals of say, one month, over the next two years and, had that been done, surely, someone within the firm would have noticed that the Commissioners had not been informed of Pen's change of address. But in the event matters rested there for over two years. In Mr Grimshaw's letter of 30 January 2009 he castigated the Commissioners for their failure to deal with Pen's claims. Only then did they become aware of the change of address, and even Mr Grimshaw failed to tell them that the company's registered office – the only office for the company – had changed to that of its accountants. In the circumstances, I consider that, if the Commissioners are worthy of censure, it is of the most minor nature and pales into insignificance when compared with that of Pen's accountants and, for that matter, its directors. They appear to have done nothing to pursue the input tax claims between September 2006 and January 2009. Had they done so they would have become aware that the Commissioners were labouring under the misapprehension that the company was still operating from Congleton but, more importantly, they would have discovered that its input tax repayment claims had been rejected on the basis that no evidence to support them had been produced. But even when the Commissioners later informed the accountants that Pen's claims would be refused on capping grounds, assuming that to be the decision it intended to appeal, they failed to serve its notice of appeal within the statutory 30 day period provided for the purpose. I regard that as

an intentional failure by Pen and its advisers timeously to serve its notice of appeal; they must have made a conscious decision not to pursue the claims and, in the process, effectively ignored the Commissioners' decision to reduce the claims to nil.

33. I accept that established case law shows that member States are required in principle to repay taxes collected in breach of European Community law, but since they are permitted to place procedural limitations on the recovery of such taxes (see *Marks and Spencer's Plc v Customs and Excise Commissioners* [2002] STC 1036), that entitlement to repayment avails Pen nothing.

34. In my judgment, it is not in the interests of justice to permit appeals after long periods of delay. Pen has offered no explanation for its failure to pursue its tax repayment claims and, in the absence of any explanation whatsoever, coupled with the other failures to comply with statutory time limits, I have concluded that its application to extend time for service of its notice of appeal should be dismissed. I accept the case presented by Mr Mansell in its entirety. I also record that in making my decision, I have taken full account of Mr Gibbon's submissions, but found them insufficient to persuade me to grant the application.

35. 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.

TRIBUNAL JUDGE
RELEASE DATE: 17 August 2011