TC02675

Appeal number: TC/2012/03651

VAT – application for permission to make late appeal – permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROMASAVE PROPERTY SERVICES LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
SUSAN HEWETT OBE

Sitting in public in 45 Bedford Square, London on 22 April 2013

The Appellant did not appear and was not represented

Lynne Ratnett, Presenting Officer of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This is a decision on an application for permission to appeal out of time, pursuant to section 83G(1) and (6) Value Added Tax Act 1994 ("VATA 94").

2. There had been an earlier abortive hearing of the application for such permission, combined with a hardship application pursuant to section 84 VATA 94. That hearing (on 31 January 2013) had been adjourned by the Tribunal because the Appellant's counsel had not been prepared to deal with the extension of time application.

3. Since the 31 January 2013 hearing, HMRC had considered evidence supplied by the Appellant on the question of hardship and had confirmed that hardship was no longer an issue. This hearing was therefore concerned solely with whether the Appellant's application for permission to appeal out of time should be granted.

4. The counsel previously instructed on behalf of the Appellant did not appear, nor did its accountants. Telephone calls were made but it was indicated that neither were planning to attend. We therefore proceeded in the absence of the Appellant but based on the documents previously submitted on its behalf, as well as hearing Mrs Ratnett on behalf of HMRC.

The facts

5. We were provided with a bundle of documents which had been produced for the earlier hearing by the Appellant, together with a small bundle of documents produced by HMRC which overlapped to a degree. We heard no oral evidence, though we had a copy of a witness statement dated 29 January 2013 of Avtar Singh Mann, a director of the Appellant, which had been produced predominantly for the purposes of its hardship application. From this evidence, we find the following facts.

6. The Appellant was at all material times involved in property development and/or letting.

7. In September 2008 HMRC carried out a visit to the Appellant. Following that visit, they disallowed £9,103.12 of input tax, reducing the Appellant's VAT repayment claim for period 06/08 from £22,256 to £13,152.88. They also asked for further information to support the remaining input tax claimed by the Appellant for the periods from 03/07 to 03/08

8. As the 06/08 repayment had already been made, HMRC sought to recover the £9,103.12 by assessment. Although this assessment (dated 24 October 2008) appears on a later list of disputed decisions drawn up by the Appellant, HMRC informed us that it had been settled in early 2009 and it is not, so far as they are concerned, outstanding nor was it disputed at the time.

9. In a letter dated 24 October 2008 addressed to the Appellant at "Griffins Wood House, Epping, Essex, CM16 5HT" (its correct business address, except for missing the line "Copped Hall Estate", which should appear before "Epping"), as well as issuing the £9,103.12 assessment for 06/08, HMRC warned that they would issue an assessment disallowing all the input tax claimed by the Appellant for the periods 03/07 to 03/08 if the Appellant did not respond to their earlier questions within 14 days. The Appellant claims not to have received this letter until much later, but there was no proper evidence on this point for us to test. In the absence of any convincing evidence to the contrary we find that the letter dated 24 October 2008 was sent to, and received by, the Appellant in October 2008.

10. On 21 November 2008, HMRC issued an assessment for a misdeclaration penalty of £1,365 in respect of the over-reclaim of £9,103.12 in period 06/08. This was notified to the Appellant by a letter dated 21 November 2008 correctly addressed to it at its place of business Griffins Wood House, Copped Hall Estate, Epping, Essex, CM16 5HT.

11. On 3 December 2008, HMRC wrote to the Appellant at its place of business (but mis-spelling the address as "Ganrids Wood House" instead of "Griffins Wood House") informing it of their decision to deny it a repayment of £2,890.70 claimed in its VAT return for period 09/08, due to the Appellant's "not responding" to HMRC's letter dated 24 October 2008. The Appellant claims not to have received this letter until much later, when it was exhibited to HMRC's winding up petition in July 2011. In the absence of any convincing evidence to the contrary we find that the letter dated 3 December 2008 was sent to, and received by, the Appellant at about that time.

12. The Appellant submitted a return for period 12/08 at the end of January 2009. It included output VAT of £5,666.66 and input VAT of £6,973.49. It thus claimed a net repayment of £1,306.83. The VAT return was issued by HMRC to the Appellant at "Ganrids Wood House, Copped Hall Estate, Epping, Essex, CM16 5HT" but it was received by the Appellant and returned, duly filled out, with a manuscript correction to the name "Ganrids" It appears HMRC wrote a letter dated 6 March 2009 to the Appellant, a copy of which was not before us, but which was followed up by a letter dated 13 March 2009. The later letter, which referred to the earlier letter dated 6 March 2009, advised the Appellant of HMRC's decision to disallow the input tax claimed "due to the non-submission of evidence" with the result that the Appellant became liable for VAT of £5,666.66 for the period. This letter was sent to the mis-spelt "Ganrids Wood House" address. The Appellant claims not to have seen the letter dated 13 March 2009 until 6 February 2012. In the absence of any convincing evidence to the contrary we find that the letter dated 13 March 2009 was sent to, and received by, the Appellant at about that time.

13. Presumably in the continued absence of requested information from the Appellant (we were not supplied with copies of the complete correspondence), HMRC decided that they should issue a further assessment covering the periods 03/06 to 06/08. This composite assessment, broken down between periods, was sent to the Appellant at the mis-spelt "Ganrids Wood House" address on or about 21 April 2009. This was around the same time as the Appellant submitted its VAT return for period

03/09 (which had also been sent to it at the same mis-spelt address by HMRC). This assessment totalled £99,464 plus interest of £9,861.34 (total £109,325.34). In the absence of any convincing evidence to the contrary, we find that this assessment was duly received shortly after 21 April 2009. See also [19] below.

14. Included in this assessment was an assessment for the remaining £13,152 of the repayment claim previously made by the Appellant for period 06/08.

15. It appears there were further decisions over the next few months – a notice of assessment of a misdeclaration penalty of £12,941 in respect of periods 03/06 to 03/08 (which was issued on 18 May 2009, according to the Appellant), an assessment of a misdeclaration penalty of £3,388 by way of revision to the earlier similar penalty (also apparently issued on 18 May 2009) and a decision issued on 21 August 2009 denying input VAT of £3,690.36, resulting in output tax liability of £1,021.74 in respect of period 03/09 (issued, according to the Appellant, on 21 August 2009). As to the receipt of these documents, see [19] below.

16. The next correspondence brought to our attention was a letter dated 22 September 2009 from HMRC to the Appellant's solicitors Anami Law (who shared the Appellant's address in Epping). In that letter (which was expressed to have been written "further to our telephone conversation yesterday afternoon"), HMRC included a breakdown of "the current balance of £133,422.44" (though no copy of that breakdown was included with our copy of that letter in the bundle). The letter stated that "if your client addresses the property liability and partial exemption issues raised in the correspondence, I shall arrange for the assessments to be reviewed…"

17. In a letter to HMRC dated 15 October 2009, Anami Law referred to "the letters dated the 11th September, 2008 through to the 21st August, 2009" as having been "incorrectly sent to Griffins Wood House" (they did not mention the "Ganrids" mis-spelling). They went on to point out that the registered office of the Appellant was at King & King Accountants, Roxburghe House, 273-287 Regent Street, London W1B 2HA. They then said:

> "We now seek your immediate withdrawal of all assessments raised against Romasave (Property Services) Limited, and Avtar Singh Mann.
>
> If we do not receive your confirmation that the assessments are withdrawn, we will proceed with an Application to the VAT and Duties Tribunal."

18. A new HMRC officer now took up the case, and on 9 November 2009 she wrote to King & King at the above address, giving the Appellant's name at the head of her letter. She sent them a copy of the letter dated 15 October 2009 from Anami Law and, effectively in response to their request to contact King & King, she said:

> "I am enclosing the relevant assessment documents and details of the information we require. The assessments will not be withdrawn until we have viewed the documents and are satisfied with the input tax claims being made."

19. From the Anami Law letter dated 15 October 2009, we infer that the correspondence from 11 September 2008 through to 21 August 2009 had been duly received by the Appellant. If only some of that correspondence had been received, we would have expected the gaps to have become apparent and been questioned by King & King when they compared the correspondence in question with the full pack of relevant assessment documents sent to them by HMRC on 9 November 2009. They raised no such queries.

20. There followed some chasing from HMRC and some desultory correspondence, but no satisfactory outcome so far as HMRC were concerned.

21. HMRC considered that the Appellant's 09/09 VAT return should also be amended to remove all input VAT in the absence of any progress on obtaining the necessary information, and issued a decision to that effect on 16 March 2010. This decision was addressed to King & King at their Regent Street address, marked to relate to the Appellant. It concerned £1,387.50 of input tax, thus removing a repayment claim of £287.93 and turning it into an output VAT liability of £1,099.57. We find this letter was duly received at that time at the Appellant's registered office.

22. Finally, in a letter dated 28 April 2010 addressed to the Appellant at King & King's address in London, HMRC's Debt Management Unit sent a seven day demand letter in respect of a total VAT debt of £136,319.05 detailed in an attached statement. The HMRC officer dealing with the compliance aspects still attempted to resolve matters by agreement but little useful further information was obtained and eventually that correspondence petered out in October 2010.

23. The next substantial action was HMRC's issue of a warning of a winding up petition in July 2011. In reply, Rainer Hughes (who appear to have taken over as Solicitors in succession to Anami Law, though with an individual solicitor of the same name acting) wrote to HMRC on 19 July 2011. Their letter included the following text:

> "We confirm that our client has never received any assessment or correspondence from you to advise them about this debt in the sum of £141,786.45, and request for the same to be provided to us so that we can advise them further."

24. Perhaps unsurprisingly (see [17] above), HMRC ignored this request and pressed ahead with the issue of a winding up petition on 27 July 2011.

25. Subsequent to the issue of the petition, there were apparently further decisions of HMRC which the Appellant now seeks to bring within this appeal. These were decisions which appear to have continued with HMRC's earlier approach of simply denying all input VAT until matters had been sorted out to their satisfaction. The only information we have about these decisions is that provided by the Appellant, which refers to decisions denying repayments of £1,050 in respect of 06/10, £50,041.44 in respect of 12/10 and £2,661.95 in respect of 03/11 (all issued on 17 October 2011) and a further decision denying a repayment of an unstated amount in respect of 06/11 (issued on 8 November 2011). We note that these decisions were all

issued while the winding up proceedings against the Appellant were being actively pursued.

26. In summary, therefore:

(1) we find that one decision which the Appellant seeks to bring within this appeal was settled and paid in early 2009 (see [7] and [8] above);

(2) we find that the initial misdeclaration penalty of £1,365 in respect of period 06/08 was notified to the Appellant by a letter dated 21 November 2008 correctly addressed to it at its place of business Griffins Wood House, Copped Hall Estate, Epping, Essex, CM16 5HT (see [10]);

(3) we find that HMRC's decision dated 3 December 2008 to deny the repayment of £2,890.70 claimed in the Appellant's VAT return for period 09/08 was duly received by the Appellant shortly after that date (see [11]);

(4) we find that HMRC's decision issued on 13 March 2009 to deny the input tax of £6,973.49 in the Appellant's return for 12/08 was duly sent and received at about that time (see [12]);

(5) we find that HMRC's assessment dated 15 April 2009 in respect of a total of £99,464 of VAT plus interest of £9,861.34 for the periods from 03/06 to 06/08 was duly sent and received in April 2009 (see [13]);

(6) we find that HMRC's assessment of a misdeclaration penalty of £12,941 in respect of periods 03/06 to 03/08 was notified to the Appellant on 18 May 2009 and received by it shortly after that time (see [15]);

(7) we find that HMRC's assessment of a further misdeclaration penalty of £3,338 in respect of period 06/08 was notified to the Appellant on 18 May 2009 and received by it shortly after that time (see [15]);

(8) we find that HMRC's decision denying input VAT of £3,690.36, resulting in output tax liability of £1,021.74 in respect of period 03/09 was notified to the Appellant on 21 August 2009 and received by it shortly after that time (see [15]);

(9) we find that HMRC's decision denying £1,387.50 of input tax for period 09/09, thus removing a repayment claim of £287.93 and turning it into an output VAT liability of £1,099.57, was notified to the Appellant on 16 March 2010 and received by it shortly after that time (see [21]);

(10)we find that HMRC's decisions denying repayments of £1,050 in respect of 06/10, £50,041.44 in respect of 12/10 and £2,661.95 in respect of 03/11 (all issued on 17 October 2011) and a further decision denying a repayment of an unstated amount in respect of 06/11 (issued on 8 November 2011) were all notified to and received by the Appellant shortly after the respective dates of issue (see [25] above).

27. The Notice of Appeal was sent to the Tribunal on 22 February 2012 by King & King on behalf of the Appellant. In it, it was stated to relate to £109,325.34 of "tax or penalty or surcharge". This figure ties up precisely with the figure for tax and

interest set out on the Notice of Assessment in respect of periods 03/06 to 06/08 which was sent to the Appellant on 21 April 2009 (see [13] and [26(5)] above).

28. It is presumably therefore only in respect of this assessment that the Appellant originally intended to appeal.

29. In a letter to the Tribunal dated 16 August 2012, however, the Appellant's solicitors Rainer Hughes sent "supplemental grounds" which included reference in some detail to the remainder of the assessments and decisions identified above. We take the Appellant thereby to be applying to add those matters to the current appeal.

The law

30. The relevant time limits for the Appellant to bring its appeals against the various assessments and decisions was within 30 days of the dates of the respective documents notifying those decisions to it – see section 83G(1) VATA 94.

31. Pursuant to section 83G(6) VATA 94, however, the Tribunal has the power to give permission for the appeals to be made late.

32. The principles that should govern the Tribunal's exercise of this discretion were considered at some length by the Upper Tribunal in *Data Select v HMRC* [2012] UKUT 187 (TCC). It was said that:

> "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 of 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.
>
> ….
>
> In my judgment, the approach of considering the overriding objective [in Civil Procedure Rule 1.1] 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."

33. Rule 1.1 of the Civil Procedure Rules lays down the "overriding objective of enabling the court to deal with cases justly and at proportionate cost". Until 1 April 2013 (i.e. at the time the Upper Tribunal was considering it for the purposes of *Data Select*), Rule 3.9 provided, so far as relevant, as follows:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including–
>
> (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."

34. Since 1 April 2013, Rule 3.9 has been radically shortened, so that it now provides as follows:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

35. For the purposes of the present application, we consider the guidance of the Upper Tribunal in *Data Select* should be read as referring to the original version of rule 3.9 and should not now be modified to refer to the new version.

Discussion and conclusion

36. Bearing in mind the history outlined above, including the fact that the Appellant's solicitors were indicating, as early as 15 October 2009, that they would be proceeding to notify the Appellant's appeal to the Tribunal if HMRC did not withdraw all the assessments up to that time, we do not consider it would be appropriate for us to grant permission for the late notification of the appeal in respect of such matters, some two years and four months later. This covers the matters listed at [26(1)] to [26(8)] above, even though we would observe that only item [26(5)] of those items appears to have been included in the original Notice of Appeal dated 22 February 2013. Permission to make a late appeal in respect of those matters is therefore refused.

37. There were also a number of later decisions against which the Appellant has indicated it wishes to appeal.

38. We are mindful that these later decisions do not appear to have been included in the Notice of Appeal dated 22 February 2012 though the Appellant, by the Rainer Hughes letter dated 16 August 2012, appears to wish to have them included in the appeal.

39. In respect of the decision dated 16 March 2010 (see [26(9)]) we see no basis, bearing in mind our finding at [21] above, for taking any different view and therefore we would not, if that decision had been included in the Notice of Appeal, have granted permission for a late appeal in relation to it. Permission to make a late appeal in respect of that matter is therefore refused.

40. In respect of the decisions issued on 17 October and 8 November 2011, however (see [25]), we consider that the circumstances are such that the interests of justice would militate in favour of permission for a late appeal to be granted. The period of delay is much shorter and occurred while the winding up proceedings were actually on foot.

41. We note however that strictly speaking the Appellant did not include those decisions ("the 2011 Decisions") in its original Notice of Appeal and therefore we doubt whether the Tribunal currently has jurisdiction to grant permission for a late appeal to be admitted in respect of them. In order to remedy this situation, we therefore direct as follows:

> (1) Provided the Appellant lodges a new Notice of Appeal in satisfactory form in respect of the 2011 Decisions with the Tribunal so that it is received no later than 28 days after the date of release of this decision, we hereby grant permission for the appeal in respect of the 2011 Decisions to be notified out of time.
>
> (2) If submitting such a Notice of Appeal to the Tribunal, the Appellant should include with it a note that it is submitted pursuant to this decision (referring to the case number).
>
> (3) If no Notice of Appeal is lodged within the time limit stated above, or if a Notice of Appeal is lodged which the Tribunal considers not to be in satisfactory form, then permission to make a late appeal is hereby refused.
>
> (4) For the avoidance of doubt, any such Notice of Appeal will only be "in satisfactory form" if it includes and has attached to it all the material required by the Tribunal's procedure rules. The only exception to this is that in giving the reasons why the appeal is being notified late, the Appellant need only refer to this decision as giving permission for such late notification.

Summary

42. We refuse permission to make a late appeal in respect of the matters referred to at [26(1)] to [26(9)] above.

43. We are prepared in principle to give permission for a late appeal to be made in respect of the 2011 Decisions, subject to compliance with the directions set out at [41].

44. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 26 April 2013