TC03300

Appeal number: TC/2013/03074

PROCEDURE – application to make appeal out of time - decision of Home Office not to restore seized lorry tractor unit upheld on review - appellant had 30 days in which to appeal under s 16(1) Finance Act 1994 - notice of appeal made out of time - appellant claimed delays occasioned by postal delay, difficulties of translating correspondence and an invitation to provide further evidence - whether tribunal should give permission for appeal to be made - yes - application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAREK SZCZEPANSKI **Appellant**

- and -

THE HOME OFFICE **Respondent**

TRIBUNAL: JUDGE EDWARD SADLER
IAN ABRAMS

Sitting in public at Bedford Square on 7 January 2014

The Appellant appeared in person with Mr P Zelako as his interpreter

Mr Culver of the Home Office Condemnation Legal Team, for the Respondents

DECISION

Introduction

1. This is an application by Mr Marek Szczepanski ("the Appellant") for the tribunal to give its permission for the Appellant to make his appeal to the tribunal out of time. The Home Office, the respondent party in these proceedings, opposes that application.

2. The Appellant's appeal is made under the provisions of the Finance Act 1994, following the decision of the Border Force (whose functions are now carried out by the Home Office) not to restore to the Appellant a lorry tractor unit seized by them in August 2012. Section 16(1) Finance Act 1994 provides that an appeal may be made to the tribunal in relation to such a decision within the period of 30 days beginning with the date of the document notifying the decision in question. Section 16(1F) Finance Act 1994 confers on the tribunal the discretion to allow a late notice of appeal, and, as we refer to below, there is guidance from case law as to the approach we should adopt in exercising that discretion.

3. The decision against which the Appellant wishes to appeal is dated 11 February 2013, and the Appellant's notice of appeal to this tribunal (which includes a request for permission to appeal out of time) is dated 19 April 2013, that is, some 67 days after the date of the decision letter. The Appellant argues that his delay in making his appeal was a consequence of postal delays as correspondence was conducted between the United Kingdom and his home in Poland, and also by the need for him to obtain translations of the lengthy decision letter and other correspondence. He argues that the decision letter asked him for further information, which he provided, and he was not aware that the 30 day period was running during that process. He also points to confusion arising from a mistake in the decision letter.

4. For the reasons we give below it is our decision to give permission for the Appellant to make his appeal out of time.

Background circumstances

5. It is necessary to set out in some detail the circumstances which led to the decision of Border Force which the Appellant wishes to dispute, and the further circumstances which resulted in the Appellant's notice of appeal being out of time. We should make it clear that certain of the matters we refer to below may be matters of fact in dispute between the parties should the Appellant's appeal proceed. We record them for present purposes as the contentions of the Appellant, and not as findings of fact (that, of course, will be the task of the tribunal which eventually hears any substantive appeal).

6. The Appellant is of Polish nationality and lives in Lodzkie in Poland. He speaks little or no English. He carries on a haulage business and owns two lorry tractor and trailer units to operate in that business. The Appellant drives one of the

lorries and he employees a man, also a Polish national, to drive the other. From time to time they transport goods to the United Kingdom.

7. On 2 August 2012 at Dover port one of the Appellant's lorries (driven by the employee) was intercepted by an officer of Border Force. On inspection it was discovered that the fuel tank on the tractor unit of the lorry had been tampered with, and in it was concealed 40,000 cigarettes. Border Force calculated that the excise duty on the cigarettes amounted to £10,660. The officer was satisfied that the cigarettes were held for a commercial purpose and that they were, in brief, unlawfully imported.

8. Thereupon, Border Force followed their standard procedure: they seized both the cigarettes and the tractor unit - the latter as being liable to forfeiture because it was adapted or altered for the purpose of concealing goods and because it was used for the carriage of goods liable to forfeiture. The driver of the lorry was advised that the owner of the lorry had the right, within one month, to challenge the legality of the seizure in a magistrates' court.

9. The Appellant did not take steps to challenge the legality of the seizure. Instead, on 3 September 2012 he wrote by email to Border Force asking for the tractor unit to be restored to him. Border Force replied, requesting extensive information about the Appellant's employment of the driver, the Appellant's procedures to prevent smuggling of goods by his driver, and the arrangements made for collection of the transported goods from the consignor and their delivery to the consignee.

10. The Appellant supplied such information as he had, but much of the documentation was in Polish.

11. On 14 December 2012 an officer of Border Force wrote to the Appellant refusing to restore the tractor unit.

12. On 2 January 2013 the Appellant emailed Border Force, who took the terms of the email to be a request for a review of the decision of 14 December 2012. In that email the Appellant provided further information about the circumstances in which the employee driver had access to the tractor unit (he parked it at his home, rather than at the Appellant's premises).

13. On 11 February 2013 Border Force wrote to the Appellant (the letter was sent by post to his address in Poland) to inform him that the officer's decision of 14 December 2012 had been reviewed, and that the result of that review was to uphold the original decision to the effect that the tractor unit would not be restored. The letter was not received by the Appellant until 25 February 2013. The Appellant obtained a translation of it into Polish from a local lawyer, and this took some days. Because of an error in the letter (referred to below) the lawyer was not clear whether the vehicle was to be restored.

14. The review decision letter of 11 February 2013 is some seven and a half pages long. It sets out in detail the circumstances of the seizure of the lorry in August 2012; the basis in law of the seizure; the history of the correspondence between the

Appellant and Border Force since that seizure; Border Force's policy for the restoration of commercial vehicles which have been seized; a summary of the legislation relating to restoration; the application of Border Force's policy to the circumstances of the seizure of the Appellant's lorry tractor unit; and the reasons why it remains the decision not to restore the vehicle.

15. The review decision letter explains that an appeal to this tribunal may be made against the decision not to restore the vehicle, and that such an appeal must be made within 30 days of the date of the letter. Full contact details of the tribunal are given.

16. On the first page of the review decision letter there is the following sentence:

> "I have now completed my review and conclude that: **the vehicle should not be restored**." [Bold as in the original]

17. In the conclusion section of the review decision letter there is the following sentence:

> "For the reasons set out above I conclude that the vehicle should be restored."

This, of course, is a mistake. As we mention, it was corrected on 20 March 2013.

18. The conclusion section of the review decision letter also has the following sentence:

> "If you have *fresh* information that you would like me to consider then please write to me: however, I will not enter into further correspondence about evidence that has *already* been provided."

19. On 8 March 2013 the Appellant (from an address in London NW10, which he asked Border Force to use for the purpose of contacting him) wrote by post and fax to Border Force referring to the review decision letter and asking for permission and co-operation to put forward further evidence: the Appellant referred to the Tachograph in the tractor unit, and asked for it to be checked to determine the movements of the vehicle prior to its journey to Dover. As the Appellant saw it, the Tachograph record would demonstrate that the driver of the lorry had lied about the movements of the tractor unit and trailer, and would vindicate the Appellant's account of what had happened. In his letter the Appellant also asked whether it was a mistake that in the conclusion section of the review decision letter it stated that the vehicle should be restored.

20. On 20 March 2013 Border Force replied to the Appellant's letter. They did so by post to the Appellant's address in Poland (and not to the London address). They corrected the error in the conclusion section of the review decision letter and pointed out that in the context of the letter as a whole, and in particular the clear statement on the first page of the letter, it was obvious that the statement in the conclusion section of the letter was a typographical error. They refused to allow the vehicle to be inspected.

21. The letter of 20 March 2013 concluded with the following paragraph (matters of emphasis as in the original):

> "**Appealing Against My Decision**
>
> If you had wished to contest my decision you had 30 days from the date of that letter, to lodge an appeal with a Tribunal that is independent of BF. An appeal should have be [*sic*] made on the appropriate forms, available with an explanatory leaflet from the Tribunals Service and should have include [*sic*] a copy of that letter."

22. At about this time the Appellant instructed Claims Pro Limited to act for him in this matter. The point was not entirely clear at the hearing, but it appears that this organisation has a Polish-speaking lawyer on its staff. He did not attend the hearing as the Appellant could not afford to pay his costs.

23. The Appellant's notice of appeal is dated 19 April 2013, although it appears to have been sent to the tribunal by email on 26 April 2013. The notice of appeal includes a request for permission to appeal out of time, giving reasons for the late making of the appeal (those reasons are set out below), and extensive grounds of appeal. The essence of the grounds of appeal is that the employee driver's account to the officer who seized the tractor unit (which implicates the Appellant in the smuggling) is untrue and can be proved to be so by an examination of the Tachograph.

24. The Appellant's business is severely damaged by his inability to use the tractor unit. Further, the vehicle is security for financing which the Appellant undertook to purchase the vehicle, and the financing institution is threatening to seek possession of the Appellant's home to recover the financing if the vehicle is no longer available as security.

The parties' submissions

25. The Appellant made his case through his friend Mr Zelako who acted as his interpreter.

26. The Appellant's case is that he did not delay unduly making his appeal - the period of 30 days was simply not long enough for him to understand what was happening and to take the steps necessary to make his appeal. He points to the fact that it took 14 days for the review decision letter to reach him, because it was posted (he had been in email contact with Border Force, but they did not send the letter to him by email), so that half of the 30 day period had expired before he was even aware of it.

27. He then points to the complexity of the review decision letter, with its extensive reference to matters of English law and Border Force policy. He first had to obtain a translation, and then attempt to understand the letter in order to decide whether to appeal and then to frame the ground of appeal. It is reasonable that he should have adequate time to consider and then deal with these matters.

28. The Appellant then points to the error in the review decision letter, which gives two clear but opposite conclusions. Border Force might say that the context shows that there was a typographical mistake, but the Appellant's Polish lawyer was unclear on the point, and for a non-English speaker this added to the complexity of the matter, until it was corrected in the letter of 20 March 2013 (again, sent by post, and to Poland rather than to the London address given for correspondence).

29. More significantly, the Appellant had understood from the review decision letter that the matter was still open if the Appellant could offer fresh evidence, and he assumed from the invitation to send fresh evidence that the 30 day appeal period would not run whilst that fresh evidence was being considered. The Appellant wanted the Tachograph to be examined to prove the movements of the tractor unit and to vindicate his case that the driver had lied - this would be fresh evidence which the Appellant considered would be very material.

30. Once the Appellant had eventually received the letter of 20 March 2013, which not only corrected the review decision letter, but also made it clear that Border Force would consider no further points, the Appellant took the steps necessary to prepare and submit his notice of appeal to the tribunal.

31. The repossession by the Appellant of his tractor unit is a matter vital to his livelihood and, indeed, to the retention of his home. He has to make every effort to have it restored. He has throughout tried to respond fully and promptly to Border Force correspondence, but the complexity of the law and the language difficulties inevitably mean that he requires more time than would otherwise be the case. He has not acted irresponsibly, and he should in all the circumstances be allowed to proceed with his appeal against the decision not to restore the vehicle.

32. Mr Culver, for the Home Office, argued that timetables and deadlines in the litigation process are there for a purpose: they provide certainty for the parties and ensure that litigation is pursued in a fair and timely manner, which is in the interests of the parties and also necessary for the administration of justice by the courts. Only in the most exceptional cases should a court exercise its discretion to waive them. He referred us to decisions of the European Court of Human Rights in the cases of *Welter v Sweden* (1985) and *J & P M Dockery (a firm) v Secretary of State for the Environment* (2002).

33. In the circumstances of the Appellant, although the review decision letter may have been received late, there was still time for him to make his appeal within the statutory time period. The Appellant had conducted previous correspondence in adequate English, indicating that he had access to persons who spoke good English, and it was not therefore established that the need to translate letters was a significant factor in the time it took the Appellant to respond and take action.

34. Further, the Appellant cannot claim that he was confused by the procedures and the time when the 30 day period began to run - his earlier correspondence with Border Force indicated that he was aware of the action he needed to take at each stage of the process. Moreover, even when it was made clear to the Appellant in the letter of 20

March 2013 that the 30 day period had expired, the Appellant did not rush to lodge his notice of appeal at the earliest opportunity, but waited until mid-April.

35. As for the fresh evidence which the Appellant offered, if it was as important as the Appellant now contends, why was the point not raised until his letter of 8 March 2013, more than six months after the seizure of the vehicle? In any event, even if it were fresh evidence, producing that evidence does not excuse the lateness of the appeal notice.

36. In all the circumstances the reasons offered by the Appellant for making his appeal out of time are inadequate and in no way justify his appeal being made more than 30 days after the statutory limit. The tribunal should therefore not exercise its discretion to allow the Appellant's appeal to be made out of time. Alternatively the tribunal should strike out the Appellant's proceedings under Rule 8(3)(b) of the Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 on the grounds that the Appellant cannot deal with the proceedings fairly and justly because of the tardiness of the Appellant in making his appeal.

Discussion and conclusion

37. The issue we have to decide is whether we should exercise the discretion conferred on us by section 16(1F) Finance Act 1994 to allow the Appellant to appeal to the tribunal out of time.

38. The Upper Tribunal has provided recent guidance as to the approach we should adopt in exercising that discretion, as set out in the cases of *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) and *O'Flaherty v HMRC* [2013] UKUT 0161 (TCC). That guidance is not in conflict with the authorities to which Mr Culver referred us. We are, as in the conduct of any proceedings in this tribunal, to have regard to the overriding objective of dealing with the case fairly and justly. We must consider all material factors (and exclude consideration of anything which is not material), and those factors include the purpose of the time limit; the length of the delay in making the appeal; the reasons for the delay; the merits of the appellant's substantive appeal; and the prejudice and other consequences for the respective parties in, on the one hand, allowing the out of time appeal, and, on the other hand, refusing to allow the Appellant to make his appeal. Those factors are then to be weighed up in reaching a considered conclusion viewing matters as a whole. The *O'Flaherty* case in particular makes it clear that the focus of the tribunal should not be exclusively, or even predominantly, on determining whether or not the taxpayer had a reasonable excuse for his delay in making his appeal.

39. The purpose of the time limit for making an appeal as provided in section 16(1) Finance Act 1994 seems clear: it is to give a point of finality and therefore certainty to both parties that an appeal will be pursued (so that the matter will be determined in due course by the tribunal) or that it will not be pursued (so that the matter can no longer be in issue). What is equally clear is that this purpose may yield to other factors, since we have a discretion to set that time limit aside.

40. We consider that the Appellant has made a strong case for us to exercise that discretion.

41. First it is clear that the actions of Border Force had the effect of curtailing the 30 day period: they chose to send the review decision letter by post to the Appellant when they could, concurrently, have emailed it to the Appellant. They were in email contact with him at that time. The result was that the effective appeal period for the Appellant was reduced to 16 days.

42. Secondly, Border Force could reasonably have anticipated that the Appellant would require time to translate and then understand the review decision letter. It is a long letter dealing with a complex matter and citing legislation which is specialist and technical in its nature. We do not criticise the letter - it endeavours to render as clearly and comprehensively as possible matters which are highly complex in law, as any judge who has adjudicated on seizure and restoration matters will readily attest. It cannot therefore come as a surprise to Border Force that it should take some further days - even if he acted with the utmost expedition - for the Appellant to gain sufficient understanding of the review decision letter to enable him, first, to decide whether or not to appeal, and secondly to frame the grounds of his appeal.

43. If matters rested there, Border Force must, had they applied their minds to it, have concluded that the Appellant was likely by force of circumstances to make his appeal out of time, and they cannot therefore reasonably claim that they have been unfairly treated if it is indeed made out of time and the tribunal then proceeds to give permission for the late appeal to be made.

44. For the Appellant, matters were confused by two further features of the review decision letter, both of which contributed to his delay in making his appeal.

45. The first is the clear statement in the conclusion section of the letter that the vehicle should be restored. Understandably the Appellant felt the need to have the matter settled beyond doubt. He told us that the lawyer in Poland who translated the letter could not advise him for certain of the consequence of the letter given the express contradiction within the letter. Border Force brushed this to one side as a typographical error which was apparent in context, but that response is too dismissive of the Appellant's particular disadvantages in dealing with these matters. The point was corrected in the letter of 20 March 2013, but although the Appellant had taken the trouble of giving Border Force an address in London to expedite matters, they used his address in Poland, with consequential delays.

46. The second is the invitation for further evidence for the review officer to consider. It is not an unreasonable assumption, and one which the Appellant apparently made, that if further evidence is provided, the decision remains open and not final. What is not made clear in the review decision letter is that even if further evidence is provided for consideration by the review officer, the 30 day appeal period nevertheless applies. The Appellant believed he was providing further evidence (or, more precisely, a means whereby Border Force could discover that further evidence). When it became clear to the Appellant that this would not be considered (that is, when

he received the letter of 20 March 2013 in Poland), he began in earnest the preparation of his appeal. We might add that there was something equivocal about the review officer's view about the 30 day appeal period - he felt the need to make some reference to it at the end of his letter of 20 March 2013, half referring to it in the past conditional tense and half in the future tense, no doubt as a result of a somewhat mangled "copy and paste" exercise. What it is not is a clear statement that the 30 day appeal period has expired.

47. Mr Culver submits that even if allowance is made for these factors, there was further and unjustifiable delay on the Appellant's part in making his appeal. We do not agree. Taking all these factors together, and the need for the Appellant to frame his grounds of appeal by careful reference to the terms of the review decision letter, we do not consider that the Appellant was tardy or careless of the need to press on with the appeal proceedings.

48. We must also take into account the merits of the Appellant's appeal. In restoration proceedings the tribunal has, by virtue of the provisions in section 16(4) Finance Act 1994, a restricted, supervisory, jurisdiction only. In summary, it can direct the reviewing officer to review his decision once again if the review procedure is flawed in any way (for example, a relevant matter of evidence has been disregarded in reaching the review decision, or a stated policy has not been properly applied). The tribunal cannot substitute its own decision even if it might have reached a different decision on the facts. In practice, a person seeking to appeal successfully against an officer's decision not to restore a vehicle in which goods have been smuggled faces a challenging task.

49. The Appellant bases his appeal on the records which the Tachograph is likely to reveal, together with challenges to the assertions made by the review officer in reaching his decision as to the use and monitoring of fuel consumption. These are relevant matters to an appeal against the decision of Border Force which deserve to be examined in substantive tribunal proceedings.

50. Finally, we consider the prejudice which each party might respectively suffer should we allow or, alternatively, refuse the Appellant's application.

51. If we allow the application so that the appeal can proceed, it is difficult to see that the Home Office suffers any prejudice beyond the obvious point that it has to defend an appeal which otherwise could not be made. Mr Culver could identify no particular detriment, in preparing and then making its case, which the Home Office would suffer by allowing the appeal to be made on 19 (or 26) April 2013 rather than on 13 March 2013.

52. In contrast, the Appellant may be severely disadvantaged if he cannot make his appeal, since he thereby loses the opportunity to attempt to save his livelihood and even his home.

53. Taking all these factors together: that Border Force should have anticipated that the Appellant would, in all the circumstances, struggle to make his appeal within the

30 day period; that the Appellant had reasonable grounds for his delay in making his appeal out of time; that his appeal has some merit in that the grounds of appeal are material to a challenge to Border Force's decision; and that the Appellant is at risk of significant hardship if his appeal cannot proceed, we conclude that we should exercise our discretion to allow the Appellant to make his appeal out of time.

54. We therefore allow the Appellant's application for his appeal to be made out of time, and his appeal may therefore proceed.

Right to apply for permission to appeal against this decision

55. 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.

EDWARD SADLER
TRIBUNAL JUDGE

RELEASE DATE: 5 February 2014