



TC03336

Appeal number: TC/2013/00258

PROCEDURE – application to strike out appeal against a refusal to restore a vehicle – appeal out of time – test in Data Select applied – application granted and proceedings struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AUTODOPRAVA MARIA ZORKOVA

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE PETER KEMPSTER
MR TERRENCE BAYLISS**

Sitting in public at Priory Courts, Birmingham on 28 November 2013

Mrs Maria Zorkova (Director) for the Appellant

Mr David Griffiths, instructed by the Director of Border Revenue, for the Respondents

DECISION

1. On 31 January 2013 the Tribunal received the Appellant's appeal against a decision by the Respondents to refuse to restore a seized vehicle (tractor and trailer unit) belonging to the Appellant. On 8 April 2013 the Respondents applied for the proceedings to be struck out on the grounds that the appeal was late and should not be entertained by the Tribunal.

Facts

2. On 17 July 2012 the Respondents seized at Dover Docks a truck (registration number NR611DX) and trailer belonging to the Appellant. Officers had searched the vehicle and discovered 142 kg hand-rolling tobacco concealed on board. The driver, a Mr Piterka, denied knowledge of the contraband tobacco. The Respondents issued a letter offering restoration of the vehicle upon payment of the duty evaded, in the amount of £27,964 ("the Decision").
3. On 23 July 2012 the Appellant requested a formal internal review of the Decision (ss 14 & 15 Finance Act 1994 refer). The Respondents agreed to allow the legitimate load to be transferred to another trailer to facilitate onward delivery to the customer.
4. There was some further correspondence between the parties and on 28 August 2012 the Respondents issued a formal review letter ("the Review") which upheld the original decision, for reasons stated in the Review. The Review concluded with a statement that there was a 30 day deadline for an appeal to the independent tribunal; contact details for the Tribunal; and a statement that restoration and/or payment of a restoration fee did not affect the appeal rights.
5. As stated above, the appeal was notified to the Tribunal on 31 January 2013.

Law

6. The Application is out of time, being outside the time limit given by s 16 FA 1994, and thus we must decide whether permission should be granted for the appeal to be made late (s 16(1F) refers).
7. The approach to be adopted by this Tribunal has been confirmed by the Upper Tribunal in the cases of *Data Select* [2012] STC 2195 and *O'Flaherty* [2013] STC 1946. In *Data Select* the Upper Tribunal stated (at [34]):

"Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the

consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.”

5 **Respondents’ Case**

8. For the Respondents Mr Griffiths submitted as follows.

9. The Review clearly stated the deadline for making an appeal and the appeal should have been made by 27 September 2012. The appeal was made 18 weeks late.

10. The Appellant appeared to have understood the documentation provided to it by the Respondents and there had been various correspondence leading up to the Review.

11. There was insufficient evidence relating to the alleged inefficiency of the solicitor alleged to have been appointed to deal with matters. The Respondents had no record of being contacted by any legal representative; all correspondence had been direct with the Appellant.

12. Even if the smuggling was the wrongdoing of the driver, with no complicity of the Appellant, that was irrelevant in examining the extraordinary delay by the Appellant in launching its appeal.

Appellant’s Case

13. For the Appellant Mrs Zorkova (speaking through an interpreter) submitted as follows.

14. The Appellant was a large operation with more than 30 vehicles and had been delivering to the UK from Slovakia for 20 years without any problems. On this isolated occasion the company had been let down by a dishonest driver, Mr Piterka. Since the incident the Appellant had taken steps to prevent any further smuggling. The Appellant appreciated the importance of deadlines and had not intended to appeal late.

15. Mrs Zorkova had communicated with the Respondents when the seizure occurred. Her priority was to deal with onward delivery of the load, which was a valuable consignment of furniture for IKEA. She had left the other correspondence with Mr Piterka who had instructed a solicitor in Dover and said he would deal with the restoration dispute. Mrs Zorkova had sufficient understanding of English to understand the various emails that were sent by the Respondents but not the legal documents such as the Review.

16. Soon after the seizure of the vehicle it became clear that Mr Piterka had been responsible for the tobacco, and he confessed he had been smuggling because of his financial problems. Mr Piterka had made one other trip after the seizure (when he had not been travelling alone), and he had also helped with loading trucks.

17. Mrs Zorkova had been in holiday in Italy when the Review arrived. Her colleagues had given the Review to Mr Piterka for him to sort out as he had said he was dealing with a solicitor about the dispute.

5 18. In early September 2012 Mr Piterka had contacted the interpreter who was now appearing at the hearing (Ms Zuzana Demcakova) and at his request she had given him the name of a solicitor in Dover.

10 19. On 26 September 2012 Mr Piterka emailed the Review to Ms Demcakova. She saw the paragraph concerning the appeal rights, researched the matter on the internet, and informed the Appellant of the position in early November 2012. Mrs Zorkova and Ms Demcakova then needed to find out whether a late appeal could still be made and if so how.

15 20. In October 2012 Mrs Zorkova had visited Mr Piterka at his flat to ask about progress on the dispute. Mr Piterka told her he was now working for an Italian company. Mr Piterka had assured the Appellant that he had instructed a solicitor who would advise the company and help to get the lorry back. Mrs Zorkova did not trust the driver but she had trusted the solicitor and relied on the solicitor. Otherwise she would have come to the UK personally and sorted matters out.

Consideration and Conclusions

20 21. We must determine whether it would be fair and just to allow the appeal to proceed out of time (as permitted by s 16(1F) FA 1994), taking into account all the factors described by the Upper Tribunal in *Data Select* (see [7] above), or instead to strike out the proceedings as requested by the Respondents. Having carefully considered all the points put to us by both parties, we have balanced those in favour of the Appellant with those against it.

25 22. In favour of the Appellant we consider are:

(1) The amount in dispute is almost £28,000; it is not a trivial dispute.

30 (2) If the appeal were to continue then the Appellant would have an arguable case. The Review clearly states that the Respondents' usual policy on a first occasion, where the driver but not the operator is responsible, is to restore the vehicle free of charge unless the operator did not take reasonable steps to prevent drivers smuggling. The Review contends that such steps were not taken. The Appellant may dispute that conclusion. We express no view on the strengths of such an argument (especially given the limited jurisdiction of the Tribunal in restoration appeals) but it does present an arguable case.

35 (3) The Appellant has been attempting to deal with unfamiliar matters in a foreign language, involving technical issues.

(4) The Appellant was under the impression that an English solicitor had been instructed to deal with the dispute on its behalf.

23. Against the Appellant we consider are:

(1) The delay was long – some 18 weeks beyond a statutory deadline of 30 days.

(2) The Appellant relied on Mr Piterka who had confessed to smuggling and had been dismissed by the Appellant.

5 (3) Even discounting the delay up to early November 2012 when Ms Demcakova made the Appellant aware of the true position in relation to the Review, there was then still a further eight weeks delay until the appeal was filed with the Tribunal.

10 (4) The Appellant is a sophisticated business with a history of international trade, yet it did not take professional advice itself but instead relied on the verbal assurances of Mr Piterka concerning what actions were being taken. That continued even after Mr Piterka had been dismissed for dishonesty.

24. Having balanced all those points we consider those counting against the Appellant outweigh those in its favour. In particular:

15 (1) We do not consider it reasonable that after the Appellant had been alerted in early November by Ms Demcakova (whose explanations we fully accept) that action was urgently required, there should then be a further two months without any activity until an appeal was filed.

20 (2) We do not consider it reasonable that after the Appellant had concluded that Mr Piterka had betrayed the trust placed in him by his employer by smuggling a large quantity of tobacco, the Appellant should then rely on what Mr Piterka had said concerning the alleged involvement of a solicitor without at least checking that story with the person concerned, or taking independent professional advice.

25 25. For those reasons we conclude that on balance it would not be fair and just to permit a late appeal to be brought before this Tribunal. Accordingly, we refuse permission for a late appeal and grant the Respondents' application for the proceedings to be struck out.

Decision

30 26. The application is GRANTED, so that the proceedings are STRUCK OUT.

35 27. 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.

PETER KEMPSTER

TRIBUNAL JUDGE

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RELEASE DATE: 14 February 2014