TC03829

Appeal number: TC/2013/09579

VAT – Procedure – Application by appellant for extension of time to make appeal over three years out of time – No adequate explanation for delay – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SUNA MEAH t/a
RAJ DHARBAR TAKEAWAY **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at 45 Bedford Square, London WC1 on 2 June 2014

Mr M A H Miah, of Miah and Company (GB) Limited Accountants and Tax Consultants, for the Appellant

Mrs R Pavely, of HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by Mr Meah, who trades as Raj Dharbar Takeaway, for an extension of time in which to make his appeal against VAT assessments and penalties arising out of his failure to register for VAT. It is not disputed that this application was made over three years after the expiry of the 30 day statutory time limit contained in s 83G of the Value Added Tax Act 1994 ("VATA").

2. Following a hearing of the application, on 2 June 2014, a Decision Notice containing a summary of the Tribunal's findings of facts and reasons for dismissing the application was released to the parties on 5 June 2014. By a letter dated 2 July 2014 from his accountant, Mr M A Miah of Miah and Company (GB) Limited Accountants and Tax Consultants, Mr Meah applied for permission to appeal to the Tax and Chancery Chamber of the Upper Tribunal against the Tribunal's decision.

3. However, Rule 35(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Procedure Rules") provides that before an application for permission to appeal can be made it is necessary to request full written findings of fact and reasons for the decision of the Tribunal. Therefore, the application for permission to appeal has been treated as a request for full written findings of facts and reasons and this decision has been provided to enable Mr Meah to decide whether to apply for permission to appeal and to assist him in formulating any such appeal.

4. Insofar as it applies to the present case s 83G VATA provides:

> (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, or
>
> …
>
> (6) An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so.

5. Section 83 VATA provides for an appeal to the Tribunal against certain assessments to VAT or against the amount of such assessments and penalties. It is not in dispute that the assessments and penalties in this case fall within that provision. However, as it is accepted that Mr Meah's appeal was not made within the 30 day time limit contained in s 83G VATA the issue before the Tribunal is whether permission should be granted to enable the appeal to be made notwithstanding the delay.

6. Mr Justice Morgan, at [34] of his decision in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC), said:

> "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."

7. He also found that the following matters set out in Part 3.9 of the Civil Procedure Rules ("CPR") did provide a useful checklist when considering such an application:

> On an application for relief from any sanction imposed for failure to comply with any rule, practice direction or court order the court will consider all the circumstances including—
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> (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; an
>
> (i) the effect which the granting of relief would have on each party.

Although the CPR does not apply to proceedings before the Tribunal, which are governed by the Procedure Rules, both the CPR and Procedure Rules have a similar overriding objective which is to deal with cases "justly". This includes ensuring they are dealt with "expeditiously and fairly"(CPR) and "fairly and justly" (Procedure Rules).

8. In the present case where there was a delay of over three years I was particularly concerned with Mr Justice Morgan's third question – is there a good explanation for the delay? The answer, which I consider to be inadequate as Mr Meah is responsible for his own business, was that because he worked as a cook six days a week at another business he was not aware of the assessments and penalties as he had not seen the letters and assessment sent to him by HMRC.

9. Having regard to the other questions of Mr Justice Morgan and also Part 3.9 CPR, it is clear that the purpose of the legislative time limit is to provide certainty in the interests of justice. Not, as Judge Sinfield observed at [56(1)] in *McCarthy and Stone*, "in the interests of justice generally or even in relation to the parties but the

interests of the administration of justice. It is clearly in the interests of the administration of justice that there should be time limits as this contributes to the finality of litigation." The consequences for the parties if the extension of time is granted would be to allow Mr Meah to pursue his appeal and he will be prejudiced if this is refused. However, given the length of the delay there would also be prejudice to HMRC if the appeal were allowed to proceed out of time.

10. The decision whether or not to grant an extension of time is essentially a balancing exercise and in coming to a conclusion it is necessary to have regard to the overriding objective of the Tribunal Rules to deal with cases "fairly and justly". However, since the comments of Mr Justice Morgan in *Data Select* Part 3.9 of the CPR has been replaced with a new version which states:

> 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.

11. The new Part 3.9 was considered by the Court of Appeal in the case of *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and its application to the Tribunal Rules by the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC) in which Judge Sinfield said, at [42]

> "In my view, the new CPR 3.9 and comments by the Court of Appeal in *Mitchell* and *Durrant* clearly shows the courts [and tribunals] must be tougher and more robust than they have been hitherto when dealing with applications for relief from sanctions for failing to comply with any rule direction or order."

12. More recently (on 4 July 2014), in *Denton & Ors v TH White Ltd & Ors* [2014] EWCA Civ 906, the Court of Appeal which considered, at [4], that the judgment in *Mitchell* had been misunderstood and misapplied by some courts clarified and amplified the approach to be taken in such cases identifying, at [24], the following three stage approach before continuing to provide further guidance in relation to each stage:

> "The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]."'"

13. In the present case there has been a significant breach not of any rule, practice directions or court order but an Act of Parliament which requires appeals to be made within 30 days. It is therefore necessary to consider the second stage – why the default occurred. This is similar to Mr Justice Morgan's third question – is there a good explanation for the delay? Given the inadequate answer, that Mr Meah was not aware of the assessments and penalties as he also worked elsewhere, consideration of the third stage is also necessary. This requires consideration of all the circumstances of the case and it is clear from *Denton*, at [31], that if there is a non-trivial (now serious or significant) breach and there is no good reason for the breach, the application for relief from sanctions will not automatically fail.

14. However, having carefully considered all the circumstances of the case , given the approach taken in regard to litigation being conducted efficiently, the fact that the appeal in the present case is over three years out of time and the inadequate explanation for the delay I dismiss the application to extend the time limit for an appeal to be made.

15. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 22 July 2014