



**TC05985**

**Appeal number: TC/2017/01686**

*VAT – application for leave to appeal out of time – whether reasonable excuse – no – application for extension of time refused – application for strike-out granted*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**KENDAL GOLF CLUB**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE SCOTT  
MEMBER: NOEL BARRETT**

**Sitting in public at Carlisle Magistrates Court on Wednesday 28 June 2017**

**Mr Guy Howell and Mr Ian Clancy for the Appellant**

**Mr Andrew Cameron, Officer of HMRC, for the Respondents**

## DECISION

### Introduction

1. The hearing was in respect of an application included in the Notice of Appeal  
5 dated 6 February 2017 for an extension of time to appeal against the respondents  
("HMRC") decision not to allow a claim for overpaid VAT.
2. There had been two decisions, namely, a decision dated 16 December 2016 for the  
period 03/09 to 03/10 and a decision dated 26 August 2009 for the periods  
1990/2008. The appellant conceded that there was no appeal in relation to the period  
10 03/09 to 03/10.
3. In accordance with Section 83G Value Added Tax Act 1994 ("VATA") the  
appellant should have notified the appeal within 30 days of the decision, namely, by  
24 September 2009. Accordingly, the delay in lodging this appeal is 2,703 days.

### The background to this appeal

- 15 4. On 18 February 2009 the appellant submitted claims for overpaid output tax on  
non-members green fees for the periods 1 April 1973 to 31 December 1989,  
31 December 1990 to 31 December 1996 and 31 December 2005 to  
31 December 2008.
5. On 26 March 2009, the appellant submitted another claim for overpaid output tax  
20 for the VAT periods 1997 to 2004.
6. On 14 May 2009, HMRC issued a decision to the appellant rejecting the claims  
for the years 1973-1989, 1990-1996, 1997-2005 and 2006-2008. That decision  
intimated the 30 day time limit for both the statutory right of review of the decision  
and the right to appeal to an independent tribunal.
- 25 7. On 21 July 2009 the appellant requested a review of HMRC's decision.
8. On 26 August 2009, HMRC upheld the decision. The final paragraph of the  
decision read:-  

"If you disagree with the decision you have the right of appeal to the Tribunal Service Tax  
whose address is Tribunals Service Tax ... If you wish to appeal to the Tribunal an appeal must  
30 be lodged within 30 days of the date of this letter. You can find out how to do this on the  
Tribunals Service website ...".
9. No appeal was lodged with the Tribunal Service.
10. On 6 May 2014, the appellant wrote to HMRC referring to the previous claims for  
repayment of VAT referring to the decision dated 14 May 2009 and enclosing a  
35 further claim for the period 1 January 2009 to 31 December 2013.
11. On 17 September 2014, the appellant wrote to HMRC enclosing a copy of the  
decision dated 14 May 2009, the review request and the reconsideration decision and

asking that the claims “remain open in light of the recent Court decision”. It requested that the appeal application be stayed behind the lead case of *Bridport and West Dorset Golf Club* (“Bridport”). HMRC did not respond and a reminder was sent on 11 November 2014 to which there was no response.

5 12. On 4 November 2015, the appellant wrote to HMRC referring to Revenue & Customs Brief 19, providing further information but not linking that information to any particular claim.

13. On 7 July 2016, the appellant wrote to HMRC referring to Revenue & Customs Brief 10 and the updated VAT Information Sheet 01/15 enclosing a time line and revised claim for refund of overpaid VAT for periods 1 January 1990 to 4 December 1996 and 1 January 2006 to 31 December 2008. That letter referred to the previous claim made in 2009.

14. On 16 December 2016, HMRC issued a decision notice settling the claim for the period 06/10 to 12/13. The claims for the period 03/09 to 03/10 were rejected on the basis that they were made outwith the time limit for submitting a claim. It was pointed out that the claims for 1990 to 2008 had been rejected in 2009 and had not been appealed.

15. On 17 February 2017, the Notice of Appeal, relating only to the decision of 26 August 2009, was received by the Tribunal.

#### 20 **Appellant’s submissions**

16. It was argued that HMRC’s decision letter dated 14 May 2009 was misleading because it indicated that the appellant “could request a departmental review OR the right the (sic) appeal to an independent VAT tribunal”.

17. Further the decision on review dated 26 August 2009 stated that if the appellant disagreed with the decision there was the right to appeal to the Tribunal Service Tax. The appellant argues that this advice should have stated that the claim would not remain “live” unless it was appealed to the Tribunal. It was their understanding at that time and since, that by requesting a review they had followed the procedure of appealing the decision and it would therefore remain open awaiting the outcome of any future court decision.

18. In summary the appellant argues that the advice given about the appeal procedure was not clear.

#### **HMRC’s submissions**

19. Rule 20 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) specifies that an appellant must bring an appeal within the time limits provided for under the relevant legislation which, in this case, is Section 83G VATA. Section 83G VATA provides that an appeal must be made within 30 days of the decision, or, in cases where a review has been undertaken, within 30 days of the notice of the conclusion of the review.

20. The appellant’s appeal was made to the Tribunal on 6 February 2017 being more than seven years later.

21. HMRC argue that the information contained in both the decision and the review letters was clear and that no good explanation has been offered for the delay in appealing.

22. HMRC take the very straightforward view that the extent of the delay in this appeal is so significant that, if the appeal was admitted, it will be contrary to the purpose of the time limit in Section 83G VATA and therefore contrary to the aims of the legislation. The onus of proof lies with the appellant and if that is not discharged then the appeal falls to be struck out under the provisions of Rule 8(2)(a) of the Rules as the Tribunal would not have jurisdiction in the proceedings.

23. HMRC relied on *Data Select v Revenue & Customs Commissioners*<sup>1</sup> (“Data Select”), *Romasave (Property Services) Ltd v HMRC*<sup>2</sup> (“Romasave”), and *BPP Holdings v Revenue & Customs*<sup>3</sup>.

## 15 Discussion on the Law

24. Under Rule 20(4) of the Tribunal Rules, the Tribunal has discretion as to whether to admit a late appeal, and the relevant considerations to be addressed when considering whether to admit a late appeal have been set out by the Upper Tribunal in the following terms in *Data Select* at paragraph 34 which reads:-

20 “Applications for extensions of time limits of various kinds are common place 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?

25 (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.

25. Justice Morgan also emphasised at paragraph 37 of *Data Select* the desirability of “... not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finely fixed and settled”.

26. We were not referred to the case but we agree with the decision of Judge Berner at paragraph 36 in *O’Flaherty v HMRC*<sup>4</sup> and that reads:-

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<sup>1</sup> 2012 UKUT 187 (TCC)

<sup>2</sup> 2015 UKUT 0254 (TCC)

<sup>3</sup> 2016 EWCA Civ 121

5 “I was referred to ... where Sir Stephen Oliver refused permission to appeal out of time. In the course of his decision, Sir Stephen made the point that permission to appeal out of time will only be granted exceptionally. It is in my view important that this comment should not be thought to provide a qualitative test for the circumstances the FTT is required to take into account. It should properly be understood as saying nothing more than that permission should not routinely be given; what is needed is the proper judicial exercise of a discretion, taking account all relevant factors and circumstances.”

27. He goes on to record at paragraph 37 that:-

10 “Time limits are prescribed by law, and as such should as a rule be respected”.

We agree entirely.

28. Paragraph 38 reads:-

15 “These references to permission being granted exceptionally should not be elevated into a requirement that exceptional circumstances are needed before permission to appeal out of time may be granted. That is not what was said in *Ogedegbe* nor in *Aston Markland*, and it is not the case. The matter is entirely in the discretion of the FTT, which must take account of all relevant circumstances. There is no requirement that the circumstances must be exceptional.”

20 That is the approach which we adopt.

29. We have considered, and weighed in the balance, all of the relevant circumstances including, but not restricted to, the circumstances identified in *Data Select*. In so doing, we have concurrently applied the three stage process set out by the Court of Appeal in *Denton & Others v T H Whyte & Another; Decadent Vapours Ltd v Bevan & Others* and *Utilise TDS Ltd v Davies & Others* (“*Denton*”)<sup>5</sup>. The first stage is to identify the seriousness and significance of the failure to lodge an appeal in relation to which the relief is sought. The second is to consider why the default occurred and the third is to evaluate all the circumstances of the case so as to deal justly with the application of the factors.

30. We are bound by and entirely agree with Judges Berner and Falk at paragraph 96 of *Romasave* which reads:-

35 “... The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the Tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.”

31. Lastly, at all times we have had in mind Rule 2 of the Rules which reads:-

40 “2.—**Overriding objective and parties’ obligations to co-operate with the Tribunal**

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<sup>4</sup> 2013 UKUT 01619 (TCC)

<sup>5</sup> 2014 EWCA Civ 906

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

- 5 (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;  
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;  
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;  
10 (d) using any special expertise of the Tribunal effectively; and  
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

- 15 (a) exercises any power under these Rules; or  
(b) interprets any rule or practice direction.

(4) Parties must—

- (a) help the Tribunal to further the overriding objective; and  
(b) co-operate with the Tribunal generally.”

## 20 *What is the purpose of the time limit*

32. We were not referred to the case but we agree entirely with Judge Redston in *Norman Archer v HMRC*<sup>6</sup> at paragraph 85 where she states in relation to a 30 day time limit that “Its purpose is to give finality, so that HMRC – the other party in the possible litigation – will know within that time limit whether or not they need to prepare for an appeal against their  
25 decision. The time limit is a ‘rule’ to ensure litigation ‘is conducted efficiently and at proportionate cost’”.

### *How long was the delay?*

33. The delay in this case is very, very significant. Even if HMRC had responded to the appellant in September 2014, and the appellant had then appealed to the Tribunal,  
30 the delay would still have been approximately five years. That is extraordinarily long.

### *Is there a good explanation for the delay?*

34. The explanation offered simply does not stand up to scrutiny. The decision dated 14 May 2009, did not, as argued by the appellant, give the appellant a choice of a review or a right of appeal. The penultimate paragraphs reads

35 “If you disagree with the above decisions you may request a Departmental review by this office where the evidence to support your request will be examined. You also have the right of appeal to an independent VAT tribunal. Further information regarding the procedures and time limit for making an appeal is obtainable from the HMRC NAS (Tel 0845 010 9000). You have a period of 30 days from the date of this notification to appeal, if you wish, to an independent  
40 Value Added Tax Tribunal against this decision”.

The appellant did request a review and as can be seen in paragraph 8 above, the right to appeal was set out in unequivocal terms in that decision. HMRC made the

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<sup>6</sup> 2014 UKFTT 423 (TC)

appellant's rights of appeal absolutely explicit and in plain English. Furthermore there was advice available online or by telephone. None was sought.

35. Lastly, there was no contact with HMRC about this matter for more than five years which is decidedly odd if the appellant genuinely believed that the claims were live. *Bridport* was progressing during that period and had been successful in the decision issued by the First-tier Tribunal on 1 June 2011. It would have been logical to have attempted to ask questions about the appellant's claims at that stage and again to have questioned HMRC's stance after the Upper Tribunal decision in 2012. The European Court's decision at the end of 2013 was widely publicised but contact was only made with HMRC in September 2014 after Mr Howell, for the appellant, read about *Bridport* in golf management magazines.

*What will be the consequences for the parties of an extension of time?*

36. Clearly if an extension of time is granted, the appellant would be placed in a position whereby they might be able to recover what they say is a substantial sum of money for the club. On the other hand there would be significant prejudice to HMRC. They had cause to believe that this matter had long since been closed. The claims had never been verified and to do so now would involve time, money and use of resource.

*What will be the consequences for the parties of a refusal to extend time?*

37. Clearly the appellant would be significantly prejudiced because they would be unable to progress the claims and/or litigate thereon. As far as HMRC are concerned their position would remain unchanged if an extension of time were not to be granted. The appeal would be struck out under the provisions of Rule 8(2)(a) since the Tribunal would not have jurisdiction.

## **Conclusion**

38. Every application for admission of a late appeal depends on its own facts and circumstances. The purpose of any time limit is to avoid delay and to provide certainty and, as a general principle, time limits provided by statute should be observed unless there is a good explanation for the delay. At every stage in the consideration of this matter and when weighing the relevant factors in the balance, we have in mind Rule 2 of the Rules. It is imperative that any decision should be fair and just. Fairness is very much a two-way street.

39. In this case, there has been a very substantial delay with no action taken in the interim. The terms of the two decision letters were very clear. Basically, the appellant decided not to go to the Tribunal following the decision dated 14 May 2009 and asked for a review. Incidentally, that request for a review was also out of time since it was dated 21 July 2009 which was rather more than 30 days later! Having received the review decision and been told that that decision could be appealed within 30 days nothing happened.

40. We find that the appellant had no grounds for believing that the claims were live. There was no reference in any correspondence at that time to any outstanding litigation and, of course, *Bridport* was only heard in the Tribunal in 2011. The explanation in the grounds of appeal to the effect that the appellant, having asked for a review and that having been rejected, understood that the claims "...would therefore remain open awaiting the outcome of any future court decisions" is frankly incredible, not least in the context of the clear statement of appeal rights.

41. It is a very serious delay and the appellant has failed to offer a credible explanation of the delay beyond an alleged total lack of understanding of the plain English in the decision letter.

42. As set out above, we have weighed every relevant circumstance in the balance. On the balance of probability, we find that the appellant has not discharged the onus of proof in establishing good reason for extending the time limit in the circumstances of this case.

**15 Decision**

43. We therefore decline to exercise our discretion and the application to notify a late appeal is refused.

44. Accordingly the appeal is not admitted and HMRC's application for strike out is granted.

20 45. 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  
25 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

30 **ANNE SCOTT**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 30 JUNE 2017**