[2017] UKFTT 733 (TC)

TC06147

Appeal number: TC/2017/02316

PROCEDURE – application to make late appeal against penalties imposed under Schedule 36 Finance Act 2008

FIRST-TIER TRIBUNAL
TAX CHAMBER

DARREN BILLINGTON **Appellant**

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL
MRS JANET WILKINS

Sitting in public at Taylor House, London on 5 September 2017

Mr M Drammeh of M&D Accountancy Services for the Appellant

Mr B Haley, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant ("Mr Billington") applied to the First-tier Tribunal on 13 March 2017 to appeal against the decisions of the Respondents ("HMRC") to impose penalties for failure to comply with an information notice issued by HMRC on 2 February 2015 under Schedule 36 Finance Act 2008 ("Schedule 36"). The appeal is late and includes the application to make the appeal out of time that is the subject of this decision.

Background

2. We have found the following facts relating to the background to this appeal.

3. Mr Billington has been the subject of an income tax enquiry for some years. On 9 October 2014 HMRC wrote to Mr Billington's tax agent, Mr Drammeh of M&D Accountancy Services, to confirm the date of a visit to check his client's VAT records. Mr Drammeh responded on 17 October 2014 that the records required were with HMRC's income tax enquiry team and that the visit should be after the income tax enquiry was "out of the way" so that they could access the records. On 2 December 2014 HMRC responded to Mr Drammeh, with a copy to Mr Billington, that HMRC could not postpone the VAT enquiry and that the officer had liaised with the officer dealing with the income tax enquiry in order to obtain copies of the records that she held. The letter concluded with a list of further information required by 5 January 2015. As the information requested had not been provided by 2 February 2015 HMRC issued a Schedule 36 notice to provide information by 2 March 2015.

4. The information required by the Schedule 36 notice is listed in seven categories and can be summarised as follows:

(1) List of clients and sales
(2) Bank statements from 2010-2014
(3) VAT summary sheets for workings for 01/11 onwards
(4) Daybooks, petty cash books, ledgers (if any)
(5) Sales invoices, delivery sheets, diary records (if any), contracts and correspondence for VAT period 01/11 onwards
(6) Purchase invoices for input tax claimed from 01/11 onwards
(7) Accounts for 2011-2014.

5. On 26 March 2015 HMRC wrote to Mr Billington to advise that a £300 penalty had been imposed as he had failed to provide the information required by the Schedule 36 notice. It stated that "to avoid any further penalties, you should let me have what is shown on the enclosed copy of the notice by 24 April 2015. If you do not, we may charge further penalties of up to £60 a day from the date of this penalty notice."

6. On 15 May 2015 HMRC wrote to Mr Billington, with a copy to Mr Drammeh, stating that a further penalty of £15 per day from 27 March to 14 May 2015, amounting to £735, had been imposed as the information had not been received. The

letter went on to explain that in the absence of any records HMRC would be raising VAT assessments based on the information on hand on the output tax and that it would disallow all input tax if invoices were not provided.

7. Both the penalty letters of 26 March 2015 and 15 May 2015 stated that Mr Billington had a period of 30 days from their issue to appeal to HMRC. On 26 July 2015 Mr Drammeh notified HMRC of a change of business address, but there was no correspondence from Mr Billington or Mr Drammeh about these Schedule 36 penalties until 19 January 2017 when Mr Drammeh wrote to HMRC to request that the penalties be suspended pending an appeal. Mr Drammeh's letter stated that his client had confirmed that he had no prior notice in connection with the penalty, that Mr Drammeh was not aware of any such liability and that their only dispute with HMRC was the VAT assessments that they were appealing. HMRC responded on 1 February 2017 with copies of the correspondence about the Schedule 36 penalties and noted that no valid appeals had been made against the VAT assessments.

8. On 13 March 2017 Mr Drammeh submitted an appeal to the Tribunal. The appeal states that the amount subject to the appeal is £1035 and that it concerns a decision of HMRC by letter dated 26 March 2016. As there is no letter dated 26 March 2016 in the bundle we have found that it refers to HMRC's letter imposing the penalty dated 26 March 2015.

9. Following the issue of the penalties under Schedule 36 on 26 March and 15 May 2015 HMRC raised VAT assessments. The first assessment was made on 4 September 2015 and was based on the information that they had received from the income tax enquiry team and the second was raised on 10 December 2015 to disallow input tax in the absence of records for the expenses claims. Mr Drammeh wrote to HMRC on 18 December 2015 to challenge the basis of these assessments and to notify HMRC that he was considering taking the matter to the Tribunal, HMRC responded by letter dated 25 January 2016 setting out the requests for information that had been made but not complied with, the issue of the Schedule 36 penalties which are the subject of this appeal and the issue of the assessments in the absence of the information requested. Mr Drammeh replied to this letter on 9 February 2016.

10. We have not been provided with a full bundle of the correspondence concerning the VAT assessments as the appeal relates to the Schedule 36 penalties, but it is clear from the correspondence that we have seen that the VAT assessments are based on the bank statements available to HMRC from the income tax enquiry. Mr Drammeh stated at the hearing that he disputes the accuracy of the assessments as HMRC does not have all of the information required. But he also confirmed that he prepares Mr Billington's VAT returns using only his bank statements as these show the payments made by Mr Billington's clients and his input claims.

11. Mr Billington has been asking Barclays Bank for copies of the bank statements required for the VAT enquiry for some time and these arrived in August 2016. Mr Drammeh had not given copies of these statements to HMRC for the purpose of the VAT enquiry by the date of the hearing. He says that he is concerned about HMRC

losing them and the cost of copying. Mr Drammeh is using the bank statements to complete a spreadsheet for HMRC.

Legislation

12. The relevant provisions of Schedule 36 Finance Act 2008 provide as follows:

12.1 Paragraph 1 provides that HMRC may by notice in writing require a taxpayer to provide information or documents if reasonably required for the purpose of checking the taxpayer's tax position.

12.2 Paragraph 39 provides that a person who fails to comply with an information notice issued under Schedule 36 is liable to a penalty of £300.

12.3 Paragraph 40 provides if a person's failure to comply with a notice continues after a penalty has been imposed under paragraph 39 he is liable to a penalty not exceeding £60 per day on which the failure continues.

12.4 Paragraph 47A provides that a person may appeal to the First-tier Tribunal against a decision that a penalty is payable. The procedure for appeal is that notice in writing must be given to HMRC before the end of the period of 30 days beginning with the date on which HMRC notified the person that it had assessed the penalty.

12.5 Paragraph 48(5) provides that the provisions of Part 5 of Taxes Management Act 1970 ("TMA") relating to appeals have effect in relation to appeals against penalties imposed under Schedule 36 as they have effect in relation to an appeal against an assessment to income tax. This includes the provision in section 49 TMA that an appeal may be made after the period stated in the enactment if the notice of appeal includes a request for permission from the Tribunal.

13. In relation to the VAT assessments, section 83G Value Added Tax Act 1994 ("VATA") provides that an appeal against a decision must be made to the Tribunal before the end of the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates. An appeal may be made after the end of the period if the Tribunal gives permission to do so.

14. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules') provides:

"(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 –

(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;
(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 –

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

15. Rule 20 of the FTT Rules provides:

"(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal. …

(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal –

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

Submissions

16. Mr Billington's tax agent, Mr Drammeh, has completed the notice of appeal to the Tribunal by reference to HMRC's decision to impose penalties of £1035 under reference CFSS-940174. We note however that the grounds of appeal state that the VAT officers have "no fact to pursue their case against my client. All based on fictions and imagination. They are holding false records from a wrong source. They have been harassing my client and his family since 2008. Proper investigation and coordination is required by the Tribunal."

17. On 7 April 2017 HMRC notified the Tribunal that HMRC oppose Mr Billington's application for an extension of time to lodge a late appeal. The grounds included the fact that the form of appeal did not specify why the appeal had been made late and that the information relates more to a complaint against HMRC. There has been no application for hardship and therefore the appeal cannot proceed unless the tax in dispute is paid or deposited. If the appeal is against the Schedule 36 penalties hardship is not engaged and payment of the tax is not applicable. HMRC submit that the matter should be struck out under Rule 8(3)(c) FTT Rules if the Tribunal gives permission for the late appeal to be made.

18. On 19 April 2017 Mr Drammeh wrote to HMRC's Solicitors Office and Legal Services, following receipt of HMRC's notification that they opposed Mr Billington's

application, and stated that "our appeal covers this penalty "£1035" and all other penalties and charges levied on account of tax since their checks were originally initiated."

Discussion

19. The hearing was listed as an application to allow a late appeal. We considered first which of HMRC decisions was the subject of the late appeal. In this respect we found that the fact that the notice of appeal stated under the heading "Details of the decision(s) you are appealing" that the amount of the penalty was £1,035 and referred to the letter imposing the Schedule 36 penalty (albeit referring to 26/03/16 instead of 26/03/15), that the appeal related only to the Schedule 36 penalties. This is supported by the facts that no hardship application was made to allow an appeal to proceed against the VAT assessments in the absence of payment or deposit arrangements, and that the assessment decisions were not enclosed with the appeal. We have therefore considered this application to allow a late appeal only in relation to the Schedule 36 decision to impose the penalties totalling £1,035 entered in the Notice of Appeal. Our decision does not relate to any application that may be made in relation to the VAT assessments and penalties included in the Tribunal's bundle by way of background information.

20. Mr Haley referred us to the guidance given by Justice Morgan in *Data Select Ltd v Revenue and Customs Commissioners* [2012]UKUT 187 (TCC) 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 for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequence 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."

21. We also note the guidance with regard to compliance and delay given by the Senior President of Tribunals in the Court of Appeal, that was approved by the Supreme Court in *BPP Holdings Limited v HMRC* [2017] UKSC 55, that the "correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal… Flexibility of process does not mean a shoddy attitude to delay or compliance by any party."

22. In considering the application we also applied the terms of the overriding objective in rule 2 of the FTT Rules, including the need for proportionality and to avoid costs and delays. We noted that the purpose of the time limit is to provide finality for HMRC in relation to administration of penalties. The delay in this case was very considerable and serious as it was some 718 days and 668 after the two Schedule 36 penalty notices were issued on 26 March and 15 May 2015.

23. We then looked at the wider circumstances of the case in the light of the overriding objective. In this respect, it is clear that Mr Billington and Mr Drammeh feel aggrieved about the circumstances of HMRC's checks on Mr Billington's income

tax and VAT affairs, but it is also clear that Mr Billington and Mr Drammeh have failed to provide HMRC with the information required for these checks. Mr Drammeh blamed the delay in providing the information in the Schedule 36 notice on the fact that Mr Billington's bank statements had been submitted to HMRC for the income tax enquiry, but he did not provide us with a reason for the failure to respond to the other requests in the information notice, whether by providing the documents or explaining that they did not exist. Further, Mr Drammeh stated that he had not sent copies of the Barclays bank statements to HMRC by the date of the hearing notwithstanding that (1) they had been received in August 2016 and (2) he alleges that they form the sole basis upon which the VAT returns and assessments should be made.

24. Similarly, Mr Drammeh did not provide a reason for the serious delay in making the appeal. In this respect we found that his letter to HMRC of 9 January 2017 that suggested that neither he nor his client were aware of the £1,035 liability was misleading given that the notices had not only been sent to Mr Billington and Mr Drammeh in 2015, but had also been explained in HMRC's letter to Mr Drammeh of 25 January 2016 to which he responded on 9 February 2016.

25. In these circumstances we find that there is no good reason for the delay in making the appeal. The consequences of refusing permission are that Mr Billington cannot challenge the Schedule 36 penalties, but he has failed to provide any reasonable argument against the penalties for the serious and ongoing failure to provide information required by the Schedule 36 notice. The consequences for HMRC of allowing the late appeal would be the considerable time and costs in managing an appeal. In all the circumstances of this case we consider that it is fair and just to refuse permission to admit the late appeal against the Schedule 36 penalties.

Decision

26. Permission to make the late appeal is refused.

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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 3 October 2017