TC06203

Appeal numbers: TC/2017/03660 (1)

Stamp Duty Land Tax – avoidance scheme – late appeal – application for permission to notify a late appeal to the Tribunal - permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID HORSLEY and LUCY HORSLEY **First Appellants**

EUROPA REAL ESTATE UNLIMITED **Second Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**

Sitting in Chambers on 2 November 2017

ME Office Limited for the Appellant

Peter Kane, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is a decision on an application from the First Appellants for permission to notify a late appeal to the Tribunal. The parties were informed that in the absence of any objection, the application might be determined without a hearing on the basis of the written representations of the parties. The Appellants confirmed they had no objection to this course of action, and HMRC did not indicate any objection to it.

2. This decision also deals with the position of the Second Appellant, an unlimited company which was dissolved in 2012.

The facts

3. The underlying appeal concerns the use by the Appellants in July 2010 of a Stamp Duty Land Tax ("SDLT") saving scheme which was provided to them by Premier Strategies Limited (which has since gone into administration and then been dissolved). The First Appellants were purchasing a property in St Albans for £935,000, and the Second Appellant was interposed to contract for the purchase at that price. It appears that the scheme sought to take advantage of s 45 Finance Act 2003. The Second Appellant bought the property, using funds subscribed by way of share capital in it; it then reduced its share capital and transferred the property to the First Appellants in satisfaction of their entitlement arising as a result of such reduction of capital. It appears to be argued that the First Appellant is entitled to what is commonly called "subsale relief" under s 45 and the transfer of the property to the First Appellants, being made for no consideration, attracts no charge to SDLT.

4. The Second Appellant submitted an SDLT return on a date which was not given to the Tribunal, showing its acquisition of the property from the original vendors. The return claimed sub-sale relief and accordingly reflected a nil SDLT liability.

5. In due course, HMRC considered the SDLT return. On 9 March 2012 they wrote to the Second Appellant notifying an assessment of £37,400 of SDLT to it, calculated at 4% of the £935,000 purchase consideration they had established from the papers submitted to HM Land Registry. On the same day, they wrote to the First Appellants, notifying them of a Determination (in the absence of any return) of the same amount due from them. The assessment and determination stated that if the recipients wished to appeal, they should do so to HMRC within 30 days.

6. On 3 April 2012, the Second Appellant was struck off the register of companies and dissolved. All subsequent correspondence purporting to be from it or sent on its behalf therefore was unauthorised.

7. HMRC stated in their representations dated 29 June 2017 that "timeous appeals were received" in respect of the assessment and determination, which I take to be accepting that the Appellants notified their respective appeals in time to HMRC.

8. It appears that HMRC were seeking to persuade the Appellants to take advantage of a "settlement opportunity", but their approaches were rebuffed by the First Appellants at least; in a later dated 30 April 2014 which purported to be sent by both First Appellants (though signed only by Mr Horsley), the following was said:

> "With reference to your offer we do not wish to take up either option offered. In order to progress the matter to conclusion, we are engaging litigation firm Reynolds Porter Chamberlain to act on our behalf.
>
> It is our understanding that Reynolds Porter Chamberlain will respond formally to your letter of 17th April 2014 and any other correspondence related to this issue."

9. HMRC state (and I accept) that they did not receive any contact or correspondence from Reynolds Porter Chamberlain confirming this.

10. In the absence of any further contact from the Appellants or advisers on their behalf, HMRC wrote to the First Appellants on 14 May 2014 and again on 25 February 2015. In the later letter, they indicated that if the First Appellants chose not to settle matters by paying the disputed SDLT within 30 days, HMRC would issue a formal closure notice or decision letter.

11. On 27 March 2015, in the continued absence of any response, HMRC wrote to the Appellants, setting out formal decisions that they were respectively liable to the £37,400 of disputed SDLT. The decisions addressed to the First Appellants made it clear that if the First Appellants were not liable for the SDLT, then HMRC considered that the Second Appellant was; and the decision addressed to the Second Appellant made it clear that if the Second Appellant was not liable for the SDLT then HMRC considered that the First Appellants were.

12. These letters all included reference to the rights of the respective recipients either to request a formal review of HMRC's decision or to appeal it to the Tribunal. Specific mention was made of the 30 day time limit applicable to either course of action.

13. In the absence of any response, on 9 June 2015 HMRC wrote to the First Appellants warning that collection of the outstanding SDLT from them had now been passed to HMRC's Debt Management Unit. It appears there had been previous letters to them dated 6 May 2015 from HMRC, but no copies were produced to me though from subsequent correspondence, it appears these letters recorded HMRC's view that in the absence of any response to their letters dated 27 March 2015, the matter was now treated as settled by agreement on the basis of those letters.

14. On 1 December 2015, inTAX LLP wrote to HMRC on behalf of the First Appellants. After recounting their understanding of the history, they pointed out that the Second Appellant had been dissolved in 2012 and they also indicated their intention to make an "out of time" appeal to the Tribunal on behalf of the First Appellants. They said that "Following Premier Strategies' demise Mr & Mrs Horsley instructed Reynolds Porter Chamberlain to safeguard their interests in this matter and

assumed that the appropriate responses to your department's letters were being properly attended to. However, they have only relatively recently discovered that this was not the case and that no *[sic]* the crucial letters of March this year went unheeded."

15. HMRC wrote back on 22 December 2015, setting out their view of the history. This letter includes further detail which was not set out in HMRC's representations to the Tribunal dated 29 June 2017, though none of that further detail is determinative for the purposes of this decision. This letter did however state that HMRC were not prepared to "reinstate" the lapsed appeals, and that the Debt Management Unit would be requested to re-commence collection if no response was received by 25 January 2016 (erroneously stated as 2015 in the letter).

16. On 21 January 2016, inTAX LLP wrote again to HMRC, stating they had been instructed by Mr Horsley to apply to the Tribunal for permission to make a late appeal; they went on to say that:

> "This matter is therefore being notified to the Tribunal under Finance Act 2003 Schedule 10 paragraph 36H(4) with a request that the appellants be given a further opportunity to respond to HMRC's letter of 27 March having regard to FA 2003 Schedule 10 paragraph 36A..
>
> The reason the application under FA 2003 Schedule 10 paragraph 36A is late is because Mr & Mrs Horsley were left without any effective professional representation after the demise of Premier Strategies Limited and the apparent failure of Reynolds Porter Chamberlain to act in accordance with instructions that were provided to that firm.
>
> I will send you a copy of the application to the FTT as soon as it has been submitted."

17. By letter dated 3 February 2016, HMRC confirmed that collection was being suspended pending the receipt of the expected application.

18. HMRC heard nothing further until 13 April 2017, when they received an email from ME Office Limited stating that they had now been instructed by the Appellants and would be lodging a late appeal.

19. The notice of appeal was received by the Tribunal on 2 May 2017.

20. In explaining the reasons for the late appeal, the following was stated:

> "This appeal is notified late as the company with whom Mr & Mrs Horsley carried out the SDLT mitigation arrangements is no longer in existence. Premier Strategies Ltd, the company that implemented the tax planning, went into administration.
>
> Mr & Mrs Horsley had via an agent engaged the services of Reynolds Porter Chamberlain to safeguard their interests in this matter to

represent them. They assumed that appropriate responses to HMRC's letters were being dealt with in a timely fashion.

It is not until HMRC Debt Management Unit became involved that they became aware that no responses or appeal had been made to HMRC."

21. In the First Appellants' response dated 20 September 2017 to HMRC's representations dated 29 June 2017, they essentially enlarged on this argument. They referred to a "trail of advisers" who had been introduced to them by their original tax adviser,

> "who have either failed to act on our behalf appropriately, ignored our requests for replies, advised us not to respond to HMRC or have been very slow in representing us. We have sought appropriate representation at every step, and have responded to our advisors following receipt of all HMRC correspondence. We have always been assured by Mr Peake and others that our case would be presented and replies forthcoming.
>
> As soon as we felt we were not being fairly or appropriately represented we would feel obliged to change advisors, based on their ability to bring a group of individuals together who had used the Premier Strategies planning opportunity. This was done to keep our ongoing fees manageable and to give us a fair chance of defending the planning against the might of HMRC. We sought to engage professional firms and at all times would request they respond to HMRC correspondence as appropriate, including follow up chasers. At no point did we ignore HMRC correspondence or sit on our hands doing nothing. This is represented in the numerous emails between us, Mr Peake and advisors, which HMRC would not be aware of."

22. Their response went on to refer to "lengthy email correspondence" which could be made available to the Tribunal if required. It went on:

> "As you will appreciate delay is inevitable when trying to find the best group representation. It is simply unfair for us to defend our position against the might of HMRC on our own. HMRC have brought so much resource to bear to pressure us to settle, it is only reasonable for us to seek to be represented by a group action…"

The law

23. The relevant statutory provisions are in paragraphs 36A, 36C, 36D and 36H of Schedule 10 Finance Act 2003, which provide (in relevant part) as follows:

> "**Appeal: HMRC review or determination by tribunal**
>
> **36A –**
>
> (1) This paragraph applies if notice of appeal has been given to HMRC.
>
> (2) In such a case –

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see paragraph 36B),

(b) HMRC may notify the appellant of an offer to review the matter in question (see paragraph 36C), or

(c) the appellant may notify the appeal to the tribunal (see paragraph 36D).

(3) See paragraphs 36G and 36H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.

(4) This paragraph does not prevent the matter in question from being dealt with in accordance with paragraph 37(1) (settling of appeals by agreement).

…

HMRC offer review

36C –

(1) Sub-paragraphs (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.

(2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC's view of the matter in question.

(3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with paragraph 36E.

(4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under paragraph 37(1) for the settlement of that matter.

(5) The appellant may not give notice under paragraph 37(2) (desire to withdraw from agreement) in a case where sub-paragraph (4) applies.

(6) Sub-paragraph (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under paragraph 36H.

(7) HMRC may not notify the appellant of an offer to review the matter in question (and, accordingly, HMRC shall not be required to conduct a review) if –

(a) HMRC have already given a notification under this paragraph in relation to the matter in question,

(b) the appellant has given a notification under paragraph 36B in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal under paragraph 36D.

(8) In this paragraph "acceptance period" means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question.

Notifying appeal to the tribunal

36D –

(1) This paragraph applies in a case where paragraph 36A applies.

(2) The appellant may notify the appeal to the tribunal.

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

(4) Sub-paragraphs (2) and (3) do not apply in a case where—

(a) HMRC have given a notification of their view of the matter in question under paragraph 36B, or

(b) HMRC have given a notification under paragraph 36C in relation to the matter in question.

(5) In a case falling within sub-paragraph (4)(a) or (b), the appellant may notify the appeal to the tribunal, but only if permitted to do so by paragraph 36G or 36H.

…

Notifying appeal to tribunal after review offered but not accepted

36H -

(1) This paragraph applies if—

(a) HMRC have offered to review the matter in question (see paragraph 36C), and

(b) the appellant has not accepted the offer.

(2) The appellant may notify the appeal to the tribunal within the acceptance period.

(3) But if the acceptance period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

> (4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.
>
> (5) In this paragraph "acceptance period" has the same meaning as in paragraph 36C."

24. The Tribunal therefore has a discretion, under paragraph 36H(3), to give permission for late notification of these appeals, and there are no statutory provisions which state how that discretion is to be exercised.

25. Paragraph 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides as follows:

> "(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."

26. The judgment of Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 included a useful analysis of the way in which the judicial discretion to permit the making of late tax appeals ought to be exercised (that case was concerned with section 49 Taxes Management Act 1970, a provision which is closely mirrored by paragraph 36H(3)):

> "[22] Section 49 is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.
>
> [23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s 49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of

the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s 33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late.

[24] Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed, in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one another, for example in a case where there is a reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies."

27. Morgan J in *Data Select Limited v Commissioners for Revenue & Customs* [2012] STC 2195, considering a late VAT appeal (where the relevant provisions are very similar) said this at [34] to [37]:

"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.
>
> …
>
> Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in Advocate General for Scotland v General Comrs for Aberdeen City [2005] CSOH 135 at [23]–[24], [2006] STC 1218 at [23]–[24] which is in line with what I have said above.
>
> [37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. None the less, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

28. In *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2016] STC 1, the Upper Tribunal was considering a VAT appeal (where the terms of the relevant legislation are very similar) which was a little more than three months late. In refusing permission for the appeal to proceed, they said this at [96]:

> "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. We note, although judgment was given only after we had heard this appeal, that in *Secretary of State for the Home Dept v SS (Congo)* [2015] EWCA Civ 387, [2015] All ER (D) 210 (Apr) (at [105]) the Court of Appeal has similarly described exceeding a time limit of 28 days for applying to that court for permission to appeal by 24 days as significant, and a delay of more than three months as serious. Although each case must be considered in its own context, we can find nothing in this case which would alter our finding in this respect. As the court in *SS (Congo)* observed, one universal factor in this respect is the desirability of finality in litigation, a factor that is present in this case: see *Data Select* ([2012] STC 2195 at [37]), above. We are also mindful of the comments of Sir Stephen Oliver, sitting in the First-tier Tribunal, in *Ogedegbe v Revenue and Customs Comrs*

> [2009] UKFTT 364 (TC), [2010] SWTI 798 (discussed in *Markland v Revenue and Customs Comrs* [2011] UKFTT 559 (TC) and by this tribunal in *O'Flaherty v Revenue and Customs Comrs* [2013] UKUT 161 (TCC), [2013] STC 1946) that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely."

Discussion and decision

29. In the present case, HMRC issued their view of the matter and their offer of a review in their letters dated 27 March 2015. As the Appellants did not accept the offer of a review, under paragraph 36C(4) of Schedule 10, therefore, HMRC's view of the matter as set out in those letters is "to be treated as if it were contained in an agreement in writing under paragraph 37(1) for the settlement of that matter" unless the Appellants notified their appeal to the Tribunal under paragraph 36H(4).

30. Such appeal had to be notified within 30 days of 27 March 2015.

31. The appeal of the First Appellants was finally notified to the Tribunal on 2 May 2017, well over two years after the statutory deadline. (As to the appeal of the Second Appellant, see below.)

32. I find the reasons for the lateness to be wholly inadequate. Essentially, the First Appellants are saying that HMRC (and the Tribunal) should be required to wait as long as it takes for the Appellants to arrange representation on a group basis which they consider economic and adequate, and HMRC (and the Tribunal) should endure whatever delays are imposed by the Appellants' inability or unwillingness promptly to engage competent professional advice if they are unable to conduct the appeal themselves.

33. I cannot see how a delay of this type of over two years can possibly be "excused" by permitting the late appeal to proceed. Where taxpayers embark on a course of action which involves highly artificial transactions and careful reliance on detailed technical provisions to avoid large amounts of tax, they cannot reasonably expect an indulgent attitude to be shown to prolonged difficulties experienced by them in arranging satisfactory representation when HMRC challenge the effectiveness of the arrangements.

34. By reference to the various factors mentioned in *Aberdeen City* and the other cases cited above, I see nothing in the history of this case to displace the starting assumption that "the normal case is covered by the time limit". I see no reasonable excuse for the delay in notifying the appeal. There was nothing confusing or misleading about the communications which HMRC sent to the Appellants, and the First Appellants have failed to act with any expedition in spite of clear warnings about the deadlines to be observed.

35. Permission to notify the appeal of the First Appellants to the Tribunal after the relevant statutory time limit is therefore **REFUSED**. As such, the Tribunal has no jurisdiction to consider the appeal itself, which is therefore **STRUCK OUT**.

36. So far as the Second Appellant is concerned, I note that it was dissolved on 3 April 2012 (on the application of Mr Horsley) and therefore did not exist as a legal entity at the time the appeal which is purportedly being made on its behalf was notified to the Tribunal, nor does it so exist now. As such, it is clear there can have been no valid authority for the notification of the appeal to the Tribunal, and an appeal in which one purported party simply does not exist cannot be properly constituted. There does not appear to be any intention to make application to restore the Second Appellant to the Register of Companies; even if it were so restored, it could only appeal against HMRC's original decision with permission (its appeal being even later than that of the First Appellants) and I can see no basis upon which such permission would be granted. Nonetheless, the Tribunal cannot strike out the Second Appellant's appeal for want of jurisdiction without giving an opportunity for representations to be made first (see Rule 8(4) of the Tribunal's procedure rules); as this would unnecessarily protract matters, I consider it appropriate instead to make an order that the appeal of the Second Appellant shall **AUTOMATICALLY AND WITHOUT FURTHER ORDER** be **STRUCK OUT UNLESS** the Second Appellant is restored to the Register of Companies by order of the Court, and a copy of such order is supplied to the Tribunal no later than **THREE MONTHS** after the date of release of this decision.

37. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 7 November 2017