[2018] UKFTT 596 (TC)

TC06758

Appeal number: TC/2017/02117

VAT – application for permission to bring a late appeal – balancing factors – permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHIRLEY GOLF CLUB LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at Birmingham on 31 August 2017

Mr Gold, auditor for the Appellant

Mr Ridley, presenting officer for the Respondents

DECISION

Introduction

1. This is an application for permission to bring a late appeal against HMRC's decision of 10 July 2009 to disallow a claim for overpayment of VAT on visitor's green fees.

Appellant's case

2. The appellants' contention is that an appeal was made to HMRC within 30 days of the HMRC decision letter, by way of a letter dated 17 July 2009. That letter was written by the appellants' former general manager, who left the club later and has since deceased.

3. Although HMRC state that they have not received that letter, the appellants submitted that their "post out" record clearly lists the letter as being sent on 17 July 2009. The appellants also noted that their copy of HMRC's letter of 10 July 2009 was annotated with a stamp showing that it was received on 17 July 2009 and also a handwritten note stating that it related to the protective claim which had been made.

4. The appellants' contended that they had continued to pursue the appeal throughout the subsequent period, as they had submitted up to date claims and correspondence throughout the period, including calculations to take into account partial exemption.

5. The appellants submitted that it was not until September 2016 that HMRC stated that the appeal was out of time. They had had no expectation of receiving correspondence as the claim was subject to the outcome of a test case.

HMRC's case

6. HMRC contended that the appellants did not submit an appeal in respect of the decision in their letter of 10 July 2009 within the 30 day time limit provided by section 83G Value Added Tax Act 1994. The appellants' request for a review, dated 17 July 2009, was not received by HMRC.

7. HMRC agree that a claim was made by the appellants on 20 October 2014, amended on 13 November 2014. HMRC contend that this was a new claim, as defined by *University of Liverpool* (MAN/96/728) 2000, as the original 2009 claim was closed when the appellants did not appeal the 10 July 2009 decision which rejected that claim in full.

8. The decision in relation to the 2014 claim was made on 19 September 2016 and rejected the earlier periods of the claim, including those which had been the subject of the decision on 10 July 2009, on the basis that the claim was brought out of time as a result of the four year capping rule.

Discussion

9. The appellants' letter of 17 July 2009 was produced to the tribunal. The contents are not an appeal against HMRC's decision of 10 July 2009: the letter requests a review of that decision. The substantive portion of the letter reads as follows:

> We are in receipt of your letter of 10th and note the contents.
>
> Please be advised that we would like a review of this decision to be carried out by HMRC. Enclosed is a copy of this letter and our original letter making a protective claim against a future test case on liability of non-members fees in respect of non-profit making organisations.

10. This letter clearly requests a review of HMRC's decision to refuse the "protective claim". Accordingly, I find that the appellant did not make an appeal to HMRC in July 2009.

11. As stated in HMRC's letter of 10 July 2009, where a decision is requested by an appellant, if the review is not completed within a specified period, the original decision is deemed to have been upheld and the appellant then has 30 days in which to appeal that original decision to the tribunal. No appeal to this tribunal was made until 2 March 2017.

12. The decision whether or not to give permission to bring a late appeal is then principally a balancing exercise considering the questions set out in the decision of Morgan J in the Upper Tribunal case of *Data Select Limited v Revenue & Customs Commissioners* [2012] UKUT 187 (TCC). (at paragraph 33):

(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?

(5) What will be the consequences for the parties of a refusal to extend time?

13. The *Data Select* decision also held that in an application for an extension of time to make an appeal pursuant to a statutory provision "the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r3.9, is the correct approach to adopt" (paragraph 37 of the decision).

14. CPR r3.9 requires that "the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need for litigation to be conducted efficiently and at proportionate cost; and to enforce compliance with rules, practice directions and orders."

15. The application of CPR 3.9 has been considered in a number of cases, most recently in the Court of Appeal decision in *BPP Holdings v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 121.

16. In the *BPP Holdings* case, the court held (at paragraph 37 and 38) that they could:

> … detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and …, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness … 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. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system …

17. With the comments in *BPP Holdings* in mind, turning to the questions set out in *Data Select*:

Purpose of the time limit

18. There was no particular disagreement that the purpose of time limits is as set out in cases such as *John O'Gaunt* where the judge noted that (para 21):

> there is no dispute that the time limits laid down by parliament are there in the public interest to promote legal certainty and security, and that the default position is that they are to be respected unless there is good reason to the contrary

19. Similar points are, of course, made in *Data Select* and *BPP Holdings.* Accordingly, extension of time limits should be exceptional, rather than the rule.

Length of the delay

20. The decision was issued on 10 July 2009; the deadline for the appellant to either appeal the decision or request a review was therefore 9 August 2009. Taking into account the request for a review in the appellants' letter of 17 July 2009, as no response was received the appellant should have submitted an appeal to the tribunal 30 days after the 45 day review limit expired: that is, 30 September 2009.

21. The appeal was submitted to this tribunal on 2 March 2017, more than seven years late regardless of which deadline is considered. This is clearly a significant and serious delay.

Explanation for the delay

22. The appellant does not in fact consider that there was any delay, because the appellant believes that they appealed the decision in 2009 and that their appeal was ongoing because HMRC had not advised them otherwise until September 2016. I consider that the explanation for the delay is, therefore, that belief.

23. The contents of the appellant's letter to HMRC in July 2009 are clear: they did not appeal the decision, they requested a review of that decision. The author of that letter is, sadly, deceased and so it is not possible to say at this point in time what the author believed he was requesting in that letter.

24. Nevertheless, I consider that HMRC's letter of 10 July 2009 clearly sets out the options open to the appellant: to request a review from HMRC or to appeal the decision to an independent tribunal. I do not consider that it is reasonable to believe that the request for a review was intended to be an appeal against the decision – it is clear in HMRC's letter that any appeal would need to be to the tribunal and not to HMRC and so I do not consider that the appellants' belief that they had appealed the decision, by corresponding with HMRC alone, is reasonable.

25. Further, the appellants failed to follow up their correspondence to HMRC: the subsequent substantive correspondence is not until 20 October 2014 and that is a letter from the appellant which makes no reference either to an appeal or to a review request and, instead, refers only to "our original claim made in 2009 which you rejected on 10 July 2010". The appellants state that they had not expected to hear from HMRC because there was a lead case ongoing, but did not explain why, if they believed that they had made an appeal in 2009, they did not refer to it in this letter. Nor do they explain how they considered that a letter to HMRC requesting a review could amount to an appeal to an independent tribunal.

26. I therefore do not consider that the appellants' mistaken belief amounts to a good explanation for the delay in bringing this appeal.

Consequences of an extension of time

27. Clearly, an extension of time would potentially benefit the appellants, allowing them to bring their appeal.

28. No particular evidence was provided as to the strength of the appellants' case although it appears that the relevant lead case could support their position.

29. I do not consider that the fact that there may be similar cases which might provide support for the appellant should be regarded as meaning that HMRC cannot be entitled to regard the matter as closed, nor should that fact mean that time limits can be breached.

Consequences of a refusal to extend time

30. No specific submissions were made in respect of the applicant's position if the late application is refused, but it will presumably have a financial impact for them as they will not be able to recover the overpayments made.

Decision

31. Considering the various questions in *Data Select*, and balancing all the circumstances of the case, I conclude that the statutory deadline for making an appeal should not be extended in this case. Although there will be clearly be financial consequences for the appellant, these need to be balanced against the substantial delay for which there is no good explanation and the clear purpose of the time limits.

32. This appeal is therefore struck out on the basis that it is made out of time under Rule 20 of the Tribunal Rules.

33. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 10 October 2018