



TC06875

Appeal number: TC/2017/01484

VALUE ADDED TAX – permission to make a late appeal – whether a delay of 11 months in making the appeal in circumstances where the Appellant’s brother had died within that period was justified – no – permission refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID FIORINI

Appellant

- and -

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

**TRIBUNAL: JUDGE TONY BEARE
 MR NICHOLAS DEE**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on
12 December 2018**

Mr Saf Farooq for the Appellant

Mr Victor Olamide, Officer of HM Revenue and Customs, for the Respondents

DECISION

Background

5 1. This decision relates to an application by the Appellant for permission to make a late appeal against a review conclusion letter of 18 February 2016 confirming a decision by the Respondents to issue to the Appellant a VAT assessment in the amount of £645 on 25 July 2015 and a VAT assessment in the amount of £6,690 on 23 October 2015.

10 2. The Respondents have objected to the application on the ground that the appeal was not made by the Appellant until 9 February 2017, almost 11 months after the expiry of the 30 day period within which, absent the permission of the First-tier Tribunal, the Appellant was entitled to make the appeal. The Respondents say that, in the circumstances, we should not give our permission for the appeal to be made.

15 The law

3. Section 83G of the Value Added Tax Act 1994 (the “VATA”) sets out the rules governing an appeal against a review decision in relation to VAT assessments and it is clear from that section that, as the appeal in this case was not made by the date falling 30 days after the review letter was issued – ie by 19 March 2016 – the appeal cannot
20 proceed unless permission to that effect is given by the First-tier Tribunal (see Section 83G(6) VATA).

4. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Tribunal Rules”) provides that, if a notice of appeal is given after any time limit which is set out in the relevant enactment but the enactment makes provision for
25 late notice of an appeal to be given with the permission of the First-tier Tribunal, then the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided on time and, unless the First-tier Tribunal gives that permission, the First-tier Tribunal must not admit the appeal.

5. In this case, the Appellant has made an application for permission to make a late
30 appeal and has set out those reasons in his notice of appeal. The reasons are set out below in the section in which we describe the arguments of the parties. Accordingly, we need to consider whether to give permission for the late appeal and, if we decline to give our permission, then we must not admit the appeal.

6. There is one point which we should mention at this point for completeness and
35 that is that, in addition to registering their objection to our giving permission for the late appeal to be admitted, the Respondents have applied for the appeal to be struck out under Rule 8(2)(a) of the Tribunal Rules on the basis that, because the appeal has been made late, the First-tier Tribunal does not have jurisdiction in relation to the proceedings. We are not sure that it is necessary for the Respondents to have made
40 such an application in addition to notifying us of their objection to the late appeal. This is because, if we give permission for the appeal to proceed notwithstanding the

late notice, then the application to strike out the appeal will necessarily fail – as, by giving our permission, we will have given ourselves jurisdiction to consider the appeal – and, if we don’t give permission for the appeal to proceed because of the late notice, then the appeal will necessarily fail because we are precluded from admitting it by Rule 20 of the Tribunal Rules.

7. Be that as it may, the sole issue for us to determine in this decision is whether or not we are prepared to exercise our discretion to permit the late appeal to proceed.

The relevant case law

8. There is no dispute between the parties as to the relevant principles that we should apply in determining whether or not to give permission for the late appeal in this case.

9. These principles have been established by a number of decisions of the higher courts, one of which is the recent Upper Tribunal decision in *Martland v The Commissioners for Her Majesty’s Revenue and Customs* [2018] UKUT 178 (TCC) (“*Martland*”).

10. In their decision in that case, the Upper Tribunal referred to several earlier decisions – most notably, the judgment of Lord Drummond in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 and the judgment of Morgan J in *Data Select Limited v The Commissioners for Her Majesty’s Revenue and Customs* [2012] STC 2195 – and concluded that those cases required the following questions to be addressed in each such case:

(a) what is the purpose of the time limit?

(b) how long was the delay?

(c) is there a good explanation for the delay?

(d) what will be the consequences for the parties of an extension of time? and

(e) what will be the consequences for the parties of a refusal to extend time?

11. The Upper Tribunal in *Martland* made it clear that, in answering these questions, one needs to consider the overriding objective of the Tribunal Rules, as set out in Rule 2 of those rules - to the effect that the First-tier Tribunal should deal with cases fairly and justly - and the matters listed in Rule 3.9 of the Crown Procedure Rules (the “CPR”) – that is to say, all of the relevant circumstances, including the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules.

12. The Upper Tribunal in *Martland* added that the reference to Rule 3.9 of the CPR shows that the case law in relation to an application for permission to make a late appeal is really just part of the wider stream of case law on relief from sanctions and extensions of time in connection with the procedural rules of the courts and tribunals.

In *Martland*, it was noted that the key cases in that stream of authority so far as an application for permission to make a late appeal is concerned are the Court of Appeal decision in *Denton v TH White Limited* [2014] EWCA Civ 906, [2014] 1 WLR 3926 (“*Denton*”) and the Supreme Court decision in *BPP Holdings Limited v The Commissioners for Her Majesty’s Revenue and Customs* [2017] UKSC 55, [2017] 1 WLR 2945 (“*BPP*”).

13. In *Denton*, the Court of Appeal was considering the application of the CPR to cases in which relief from sanctions for failures to comply with various rules of court was being sought. It said that, in any such case, the judge should address the application for relief from sanctions in three stages as follows:

- (a) identify and assess the seriousness and significance of the failure which has engaged Rule 3.9 of the CPR;
- (b) consider why the default occurred; and
- (c) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application and, for this purpose, giving particular weight to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules.

14. The Supreme Court in *BPP* implicitly endorsed the approach in *Denton*.

15. The Upper Tribunal in *Martland* concluded that, when the First-tier Tribunal is considering an application for permission to appeal out of time, it needs to remember that permission should not be granted unless the First-tier Tribunal is satisfied on balance that it should be. The Upper Tribunal went on to say that, in considering that question, the First-tier Tribunal “can usefully follow the three-stage process set out in *Denton*”, which is to say:

- (a) establish the length of the delay because, if it was very short, then the First-tier Tribunal “is unlikely to need to spend much time on the second and third stages” (see *Denton* at paragraph [28]), although the Upper Tribunal in *Martland* made it plain that this should not be taken to mean that permission may be granted in cases of very short delays without moving to a consideration of those latter two stages;
- (b) establish the reason for the delay; and
- (c) evaluate all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the extent of the detriment to the applicant in not giving permission and the extent of the detriment to the party other than the applicant of giving permission.

16. The Upper Tribunal in *Martland* reiterated that the evaluation at the stage mentioned in paragraph 15(c) above “should take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost, and for the statutory time limits to be respected”.

17. The Upper Tribunal in *Martland* made two final points in relation to the exercise by the First-tier Tribunal of its discretion in deciding whether or not to permit a late appeal.

18. First, the Upper Tribunal held that the First-tier Tribunal can have regard to any obvious strength or weakness in the applicant's case because that is highly relevant in weighing up the potential prejudice to the parties of the relevant decision. In other words, where the First-tier Tribunal refuses an application for permission to appeal, there is much greater prejudice to an applicant with a strong case than there is to an applicant with a weak case. The Upper Tribunal cautioned against such a process's descending into a detailed analysis of the underlying merits of the appeal but it did say that, if an applicant's case was hopeless, then it would not be in the interests of justice for permission to be granted because that would lead the time of the First-tier Tribunal to be wasted. However, in most circumstances, an appeal will have some merit and so, without conducting a detailed evaluation of the merits, the First-tier Tribunal should at least form a general impression of the merits of the appeal and allow the parties an opportunity to address that question in outline.

19. Secondly, the Upper Tribunal said that the shortage of funds and the consequent inability of the applicant to appoint a professional adviser should not, of itself, carry any weight in considering the reasonableness of the applicant's explanation of the delay. Nor should the fact that the applicant is self-represented. This is because the appealable decisions of the Respondents generally include a clear statement of the relevant appeal rights and it is not a complicated process to notify an appeal to the First-tier Tribunal, even for a litigant in person.

20. Finally in this context, mention should be made of the statement in paragraph [96] of the Upper Tribunal decision in *Romasave (Property Services) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0254 (TCC) ("*Romasave*") to the effect that a delay of more than three months "cannot be described as anything but serious and significant".

The arguments of the parties

21. The Appellant has given the following reasons for the lateness of his appeal. His brother lost a long battle with cancer on 4 November 2016 and, in addition to dealing with his own grief, he had to care for his 88 year old mother who has also subsequently died (although not until February 2018).

22. The Respondents have not sought to challenge the veracity of the explanation given by the Appellant for the relevant delay. However, they do not consider the reasons given by the Appellant to be adequate to justify an extension of time of this magnitude for making an appeal. The Respondents have expressed their sympathy for the plight of the Appellant but note that:

(a) the 30 day time limit for making the appeal was clearly set out in the review conclusion letter of 18 February 2016;

(b) the circumstances of the Appellant do not justify a delay of such significance in making the appeal to the First-tier Tribunal;

(c) the Appellant has continued to submit his VAT returns and to carry on his trade during the period in question; and

5 (d) the Appellant did not at any stage ask for an extension to the period for making an appeal.

23. The Respondents rely on the principles set out in the Upper Tribunal decision in *Martland* to support their position in this case.

24. They note that Judge Beare had to consider a similar application by the
10 Appellant in the context of direct tax in his decision in *David Fiorini v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 610 (TC) – where he gave permission in advance for the Appellant to make an appeal against the assessments in question - but say that the circumstances in this case are distinguishable from those in the earlier case in that the taxes in issue are different and
15 the period of delay is different. They note also the statement in paragraph [96] of the Upper Tribunal decision in *Romasave (Property Services) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0254 (TCC) to the effect that a delay of more than three months “cannot be described as anything but serious and significant”.

20 25. Mr Farooq, on behalf of the Appellant, said at the hearing that the reason for the late appeal in this case was identical to the reason for the late appeal in the direct tax case in that, in both cases, the Appellant had too much on his plate throughout the relevant period to focus on his obligations in relation to the making of any tax appeals. As evidence of this, both the appeal which was being considered in the
25 earlier direct tax case and the appeal in this case had been made on the same date (9 February 2017) when the Appellant was finally able to focus on his obligations in relation to the making of any tax appeals following the death of his brother some three months earlier.

Discussion

30 26. Applying the principles set out above, the first stage in the process of determining whether or not to give permission for a late appeal is to establish the length of the delay. In this case, the delay has been very substantial. Indeed, the delay – which is nearly 11 months after the final day on which the Appellant was entitled to make his appeal against the review conclusion letter – is considerably longer than the
35 delay of more than three months which the Upper Tribunal in *Romasave* said “cannot be described as anything but serious and significant”.

27. Turning then to the second stage in the process – the reasons for the delay - the Appellant relies on the fact that his brother died within the period of the delay (and was seriously ill before he died) and that he had to care for his mother.

40 28. The final stage in the process is to evaluate all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the

extent of the detriment to the Appellant which would be caused by our not giving permission and the extent of the detriment to the Respondents which would be caused by our giving permission. In conducting that process, we are required:

- 5 (a) to take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost and for the statutory time limits to be respected;
- (b) without descending into a detailed examination of the Appellant's case, to have regard to any obvious strength or weakness in that case because that is highly relevant in weighing up the potential prejudice to the parties of the our decision; and
- 10 (c) if the Appellant did not have had any legal or other professional advice in the period prior to his filing the appeal, not to make any material allowance for that fact because it is not a complicated process to notify an appeal to the First-tier Tribunal.

15 29. The critical question for us in deciding whether or not to give our permission for a late appeal to be made in this case is whether the Appellant is right in submitting that, if the delay in making his appeal in the direct tax case set out above was justified, then so too must be the delay in this case because the reasons were the same.

20 30. We do not agree with that logic. In the direct tax case, as recorded in the relevant decision, the relevant assessments were made on 11 October 2016, less than a month before the death of the Appellant's brother, and the notice of appeal which was submitted to the First-tier Tribunal was submitted on 9 February 2017, approximately 3 months late. In contrast, in this case, the review conclusion letter was issued on 18 February 2016, some 9 months before the Appellant's brother died, and the appeal was submitted to the First-tier Tribunal on 9 February 2017, approximately 11 months late.

30 31. We believe that those differences are of great significance in the context of the principles set out in *Martland* and the statement in Romasave to the effect that statutory time limits should be respected and that a delay of more than 3 months is serious and significant. We consider that, given that all that would have been required of the Appellant was to inform the Respondents of his circumstances and ask for an extension of time, and given that the Appellant's brother did not die until 4 November 2016, which was some 8 months after the expiry of the period within which the Appellant would have been able to make the appeal in this case without obtaining our permission, this is not an appropriate case in which to give permission. As noted by the Upper Tribunal in *Martland*, even a person without the benefit of professional advice should be able to deal with the process of making an appeal and, in this case, there is evidence in the terms of the review conclusion letter that the Appellant did have the benefit of professional advice in relation to his VAT obligations.

40 32. In saying this, we are cognisant of the need to consider the detriment to the Respondents if we were to give permission for the late appeal in this case. The Respondents were perfectly entitled to believe that, once the time limit for making an appeal against the review conclusion letter had expired, the Appellant was not going

to appeal against the relevant assessments. The purpose of the time limit for making an appeal is to provide finality for the Respondents in the exercise of their powers.

33. In this case, if we refuse permission to the Appellant to pursue the appeal, there is a clear and obvious detriment to the Appellant in that he will be unable to challenge the assessments in question. However, in view of the length of the period of delay and the timing of that period relative to the loss of the Appellant's brother, we believe that that detriment does not outweigh the potential detriment to the Respondents if we were to give permission for the late appeal.

34. As directed by the Upper Tribunal in *Martland*, we have not spent much time in considering the merits of the parties' respective cases. But, based on the statements made by the Respondents in the review conclusion letter, the ground of appeal in the notice of appeal and the statements made by Mr Farooq at the hearing, we do not believe that there is any obvious overwhelming strength or weakness in the Appellant's case which would outweigh the considerations set out above.

15 Conclusion

35. Our conclusion in this case is that, after taking into account all the factors which we are required to consider in our evaluation, this is not an appropriate case in which permission to make a late appeal should be given. The length of the delay in making the appeal and the detriment which the Respondents would suffer if we were to give permission and thereby enable the Appellant to dispute assessments which the Respondents fairly considered to be beyond dispute mean that this is not an appropriate case in which to give permission for a late appeal.

36. We therefore do not give our permission for the Appellant to make the late appeal and the appeal is therefore dismissed.

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 Rules. 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.

**TONY BEARE
TRIBUNAL JUDGE**

RELEASE DATE: 17 DECEMBER 2018