[2019] UKFTT 0668 (TC)

TC07443

Appeal number: TC/2018/04403

VALUE ADDED TAX – appeal – procedure – application to appeal to the Tribunal out of time – Martland applied – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL SHORE **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MR DEREK ROBERTSON

Sitting in public at Stoke on Trent Combined Court on 31 October 2019

Mr John Routledge, of Shackleton Limited, for the Appellant

Ms Margaret Nkonde, presenting officer, for the Respondents

DECISION

Introduction

1. The matter before us is the Appellant's application to appeal to the Tribunal out of time against assessments to VAT for the periods 07/11, 10/11, 01/12, 04/12 and 07/12.

Background to this application

2. On 9 July 2018, Mr Routledge filed a Notice of Appeal with the Tribunal on behalf of the Appellant. That basis of that appeal was said to be as follows:

> The Appellant is appealing for claims of input tax and unallocated payments made to HMRC, totalling £35134.93 to be offset against the liability as claimed.
>
> There have been no notices issued to the tax payer disallowing claims for input tax for the periods 07/11 onwards.
>
> The tax payer has voluntarily invited the Respondent to conduct a compliance check of the records, which are still held despite being outside the period needed for retention. To date the Respondent has not commented on this invitation and instead continued pursuit of the disputed sum.

3. The Tribunal's Notice of Appeal form requires certain information to be provided. When asked whether the appeal was made in time, the Appellant's response was "I am not sure". When asked to supply reasons for being late, the Appellant responded:

> This claim relates to VAT periods 07/11 onwards. The Respondent confused issues by introducing evidence in an appeal for period 04/11 for these periods. The decision on the 04/11 return was only given on the 20th March 2018.

4. No copy of any decision under appeal was provided with the Notice of Appeal. Instead, the Appellant provided a HMRC Warning of Bankruptcy letter, dated 28 June 2019. The total unpaid amount described in that letter was £108,589.87. As Rule 20(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Procedure Rules") requires a copy of the decision appealed against to be provided, on 15 September 2018, the Tribunal asked the Appellant to provide a copy of any written record of any decision which was under appeal.

5. On 7 November 2018, Mr Routledge provided the Tribunal with six letters, all dated 5 November 2018, from HMRC to the Appellant. Each of these letters was stated to be Notice of a VAT assessment, and these notifications covered the six VAT periods 04/11, 07/11, 10/11, 01/12, 04/12 and 07/12. The assessment for the VAT period 04/11

was in the sum of £14,605.52. The assessments for the VAT periods 07/11 to 07/12 inclusive totalled £91,010.76. Following the Tribunal's receipt of those six letters, the Tribunal notified the appeal to HMRC.

6. On 7 December 2018, HMRC objected to the appeal proceeding on the basis that the assessments for all six periods had been raised on 3 July 2018 and so the appeal had been made significantly out of time. HMRC also noted that an appeal against the assessment for 04/11 had been determined in a Tribunal decision released on 20 March 2018.

The relevant Tribunal rules

7. Where the Tribunal receives an appeal outside the deadline for appealing against the decision which is challenged, then Rule 20(4) of the Tribunal Procedure Rules applies:

> (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.

The relevant test to apply

8. The Tribunal has the power to extend the time for a taxpayer to make an appeal but must decide, in each case, whether it would be appropriate to do so given the particular circumstances of that case. When a party is late in undertaking any action, the onus of proof is upon that party to explain the reasons for their delay and to make the case for being given relief from their failure to comply with the relevant time limit.

9. The Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) considered what the First-tier Tribunal should consider when deciding whether an extension of time should be granted. The Upper Tribunal stated:

> 44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> > (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

10. In order to apply this *Martland* guidance, we set out a brief factual background which will enable us to consider the extent of the delay and whether there are reasons for all or part of that delay. We will then be able to weigh all the circumstances.

Evidence before us

11. The Appellant did not appear to give oral evidence. There was limited documentary evidence, and there was some dispute between the parties as to the factual background. We set out first our findings on the matters which do not appear to be in dispute, and then deal with the issues relevant to this application which are in dispute.

Facts not in dispute

12. On the basis of the limited documents before us, and the submissions of the parties, we find as follows:

The Appellant's submission of VAT returns

a. In February 2011, the Appellant registered for VAT. The Appellant submitted a return for 04/11 showing a repayment due of £3,025.60. The Appellant subsequently submitted VAT returns for the periods 07/11, 10/11, 01/12, 04/12 and 07/12. The Appellant ceased to trade thereafter and no further VAT returns were required or submitted.

b. Following the submission of the Appellant's first VAT return, HMRC began making enquiries into the Appellant's VAT returns. As a result of those enquiries, HMRC came to believe that the Appellant's VAT returns were incorrect. For all six periods, HMRC believed that the VAT due on sales had been underdeclared by the Appellant. For the period 04/11 only, HMRC also believed that the input tax claimed was overdeclared.

HMRC assessment for period 04/11

c. It is common ground that on 3 July 2013, HMRC raised a VAT assessment revising the Appellant's return for the period 04/11. Notice of that assessment was posted to an address which Mr Routledge accepted was the Appellant's correct postal address. Mr Routledge accepts this assessment came to the Appellant's attention but was unable to tell us whether the Appellant had received the posted copy of the assessment as he (Mr Routledge) stated that, as agent, he had also received notification of the assessment for this period.

The 2013 appeal to the Tribunal

d. On 27 August 2013, the Tribunal received an appeal from the Appellant (the "2013 appeal"). For unknown reasons that appeal proceeded very slowly. There was an initial hearing of the 2013 appeal on 18 July 2016 but this was adjourned on the day because it was said that the Appellant was in hospital.

e. On 19 July 2016, the Tribunal released Directions confirming that the only period under appeal in the 2013 appeal was the VAT period 04/11.

f. A further hearing of the 2013 appeal was listed for three days commencing on 3 July 2017. Neither Mr Routledge nor the Appellant attended this hearing. Again, the Appellant was said to be in hospital. The Appellant subsequently made written submissions. A final decision was released on 20 March 2018, in which the Tribunal confirmed the assessment of additional output tax on the Appellant and the disallowance of the three disputed items of input tax.

g. On an unknown date, the Appellant applied to the Tribunal for this decision to be set aside. On 29 June 2018, the Tribunal refused to set aside this decision.

HMRC's pursual of the debt owed by the Appellant

h. On an unknown date, which Mr Routledge asserted was in the tax year 2016/17, the Appellant wrote to HMRC. This letter was sent from the address to which HMRC had posted the assessments issued to the Appellant.

i. In this undated letter the Appellant referred to an unallocated amount of £35,134.93, which he thought might be Construction Industry Scheme deductions, and asked that this amount and any interest be allocated "to my alleged VAT liability". The Appellant's VAT liability at that time was the £91,010.76 due under the assessments for the periods 07/11 to 07/12, plus accrued interest.

j. On 25 May 2018, HMRC's Debt Management team sent a Statement of Liabilities to the Appellant.

k. On 28 June 2018, HMRC wrote to the Appellant warning him that they were about to commence bankruptcy proceedings if they did not receive payment of the amounts due.

Mr Routledge's 2 July 2018 letter

l. On 2 July 2018, Mr Routledge wrote to HMRC seeking "to negotiate settlement of a large VAT bill raised against [the Appellant]". Mr Routledge stated that the Appellant had traded only between 1 March 2011 and 30 June 2012, that HMRC's Debt Management team had been pursuing the Appellant, and that he believed that HMRC's figures for each of the six VAT periods for which the Appellant had been trading were incorrect. Mr Routledge stated that, despite it being outside the statutory retention period, the Appellant was in possession of "all the

original documents, consisting of original invoices, purchase orders, payment certificates and bank statements". Mr Routledge also asked that the unallocated amount of £35,134.93 be allocated to the VAT debt.

m. In relation to each of the six VAT periods, Mr Routledge stated his belief that "there have been no notices issued disallowing all of the input tax and we ask that the records be adjusted to the above." That assertion took no notice of the Tribunal's conclusions in the 2013 appeal. No reference was made to the fact that the assessment for the period 04/11 was final because it had been confirmed by the Tribunal, or to the fact that the assessments for 07/11 to 07/12 were final because there had been no appeal against them.

n. For each of the periods 07/11, 10/11, 01/12 and 07/12, the amount of input tax proposed by Mr Routledge was exactly the same as the input tax claimed in the Appellant's VAT returns. For 04/12, Mr Routledge proposed a figure £411.34 greater than the input tax claimed in the return.

The Appellant's attempt to appeal the Set Aside decision

o. On 2 July 2018, the Appellant also sought permission to appeal the Tribunal's Set Aside decision. Permission was refused on 23 July 2018.

The 2018 appeal to the Tribunal

p. On 9 July 2018, the Appellant filed his notice of appeal. (The grounds of appeal are set out above.) When asked to further explain the basis of this appeal, Mr Routledge told the Tribunal that there were "additional amounts" of input tax which the Appellant wished to claim, and these amounts were those described in his letter of 2 July 2018. Mr Routledge argued that his letter of 2 July 2018 was the relevant input tax claim as he confirmed that no earlier claim had been made to HMRC in respect of these "additional amounts".

Facts in dispute

13. We now deal with the main issues in dispute between the parties.

14. HMRC assert that on 3 July 2013, they raised assessments for the periods 04/11 to 07/12 inclusive (i.e. all six assessments were raised on the same day). They assert that copies of all of these assessments were posted to the Appellant at the correct postal address. Copies of the assessments for 04/11, 07/11 and 07/12, dated 3 July 2013, were produced and appear in the bundle. HMRC contend that, at this late date, no original copies of the assessments for the 10/11, 01/12 and 04/12 can be located but reissued copies (dated 5 November 2018, the date of re-issue) are available.

15. Mr Routledge contends that no assessments for the periods 07/11 to 07/12 were raised until 5 November 2018. Mr Routledge argued this on the basis that, when he asked HMRC to provide copies of the assessments which had been raised for these periods, the documents which they printed and supplied to him bore the date 5 November 2018. These are the letters provided to the Tribunal on 7 November 2018.

16. In order to ascertain whether there is delay in appealing and, if so, the length of that delay, we must decide when the disputed assessments were issued. Although not explicitly raised as a point by Mr Routledge, we consider it expedient also to consider whether the assessments were served upon the Appellant. We also comment on how those five assessments revised the figures in the Appellant's returns. On these issues we find as follows:

<u>The date of issue of HMRC's assessments for period 07/11 to 07/12</u>

q. We reject Mr Routledge's assertion that the disputed assessments were raised on 5 November 2018, and that the Appellant's appeal of 9 July 2018 is an appeal against those assessments. Clearly an appeal can only be against a prior decision, it cannot precede it by four months.

r. Mr Routledge accepted that, by 19 July 2016, the Appellant was aware that the amounts of VAT which HMRC claimed were due for the periods 07/11 to 07/12 exceeded the amounts of VAT due from him on the basis of his VAT returns. That disparity can only have arisen as a result of a decision taken by HMRC to revise the amounts in the Appellant's VAT returns for these five periods, and those revisions can only have occurred as the result of assessments having been raised. We conclude that the assessments must have been raised prior to 19 July 2016.

s. Mr Routledge had submitted (in a statement provided to the Tribunal on 18 December 2018) that if the disputed assessments had been raised on 3 July 2013 then they would have formed part of the 2013 appeal. We do not accept that this is correct. It is only if the Appellant had appealed to the Tribunal against the disputed assessments (by referring to them in his Notice of Appeal and by providing a copy of each relevant decision) that they would have formed part of the 2013 appeal. The Notice of Appeal filed by the Appellant in 2013 obviously referred only to the 04/11 assessment.

t. As HMRC's investigations into the Appellant had concluded by July 2013, there is no obvious reason why HMRC would issue an assessment for 04/11 but delay issuing assessments for the five later periods. The Appellant accepts that the assessment for 04/11 was raised on 3 July 2013. HMRC have provided copies, dated 3 July 2013, of assessments for 04/11, 07/11 and 07/12.

u. On the balance of probabilities, we find that the VAT assessments for the periods 07/11 to 07/12 were raised on 3 July 2018.

<u>Were the disputed assessments served on the Appellant</u>

v. All six of the assessments raised upon the Appellant bore the correct postal address for the Appellant. We are satisfied that they were posted to the Appellant as HMRC maintain. Section 7 of the Interpretation Act provides as follows:

> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any

other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

w. The onus of proving that service has not been effected is on the Appellant. Mr Routledge argued that postal delivery might be an issue because the Appellant lived at 21A and post could be delivered to 21. However, there was no evidence of other post going astray or of post being returned to HMRC. We do not consider the Appellant has demonstrated, on the balance of probabilities, that the contrary has been proved. We conclude that all six assessments were served upon the Appellant in the ordinary course of post.

x. Mr Routledge said that, as agent, he received notification of the first assessment but not of any of the others. That seems very odd and there is no obvious explanation for why that might be. However, Mr Routledge accepts that by 19 July 2016, both he and the Appellant were aware that HMRC was seeking considerably more in VAT for the periods 07/11 to 07/12 than was due under the returns for those periods. Therefore, even if we are wrong in forming the view that the assessments were served upon the Appellant in July 2013, by July 2016 it had come to the Appellant's attention that something had occurred to cause HMRC to believe they were entitled to claim far more VAT from him than was due under his returns. We conclude that, by 19 July 2016 at the very latest, the Appellant was aware that there had been assessments raised for the periods 07/11 to 07/12.

The effect of the assessments for 07/11 to 07/12

y. On the basis of the copy assessments in the bundle, we are satisfied that each of the five assessments for the periods 07/11 to 07/12 increased the amount of output tax due from the Appellant but made no revision to the amount of input tax claimed by the Appellant in his VAT returns.

Discussion and decision

17. Having set out that factual background, we follow the three stage process described in *Martland*.

The period of delay

18. Mr Routledge argued that the period of delay should run from 29 June 2018, the date on which the Tribunal refused to set aside the decision in the 2013 appeal. Mr Routledge argued that it followed there was no delay as the appeal had been filed on 9 July 2018.

19. We reject this submission. Section 83G of the Value Added Tax Act 1994 provides that an appeal to the Tribunal is to be made before the end of the period of 30

days beginning with the date of the document notifying the decision to which the appeal relates.

20. We have found that the assessments were raised on 3 July 2018. Therefore, the last date for an in-time appeal was 2 August 2013. The Tribunal received an incomplete appeal from the Appellant on 9 July 2018. The omissions in that appeal were rectified by the supply of copy assessments on 7 November 2018.

21. Therefore, the period of delay runs from 3 August 2013 to 7 November 2018 (when the Tribunal was in possession of a complete appeal). That is a period of 1922 days, or five years, three months and four days. In the context of delay in excessive of three months being considered to be "serious and significant", delay of this length is extremely lengthy.

The explanation for the delay

22. Although Mr Routledge did not provide us with any explanation of the Appellant's delay between 3 August 2013 and 19 July 2016, we note Mr Routledge's submissions about the potential for there to be issues with the delivery of post to the Appellant's address and his own lack of notification. We will take the Appellant's explanation for this period to be the Appellant's alleged ignorance of the assessments.

23. On 19 July 2016, the Tribunal issued Directions in the 2013 appeal making it clear that the only matter before it was the Appellant's appeal against the 04/11 assessment. When we asked Mr Routledge why the Appellant had not appealed as soon as possible after 19 July 2016, or even asked HMRC to explain why they considered so much VAT was due, Mr Routledge drew attention to the undated letter from the Appellant which was said to have been sent to HMRC in the tax year 2016/17. Mr Routledge told us that the Appellant did not appeal against the assessments after 19 July 2016 because he was willing to have a credit of £35,134.93 set against VAT he did not consider was due in order to have the VAT matter "go away". We do not find this explanation credible. Quite apart from the inherent improbability of the Appellant giving up more than £35,000 rather than appeal, the amount due under the five assessments was £91,010.76, plus accrued interest, so the credit of £35,134.93 was nowhere near enough for the Appellant to pay the tax in dispute. Mr Routledge's explanation for why there was no action from 19 July 2016 is also at odds with the Appellant continuing to pursue the 2013 appeal which concerned the far smaller sum of £14,605.52.

24. We asked Mr Routledge what had caused the Appellant to change his mind and file an appeal in July 2018 if, in July 2016, he had decided not to appeal. Mr Routledge initially told us that the Appellant could not file an appeal until the 2013 appeal proceedings were concluded. Mr Routledge could not explain why the Appellant might have thought this, particularly when Mr Routledge's clear view was that the two appeals were made on different grounds. Later in the hearing, Mr Routledge told us that in June 2018 it became apparent that HMRC considered the Appellant owed over £100,000. Mr Routledge told us that the Appellant had appealed in July 2018 because, although he was prepared to pay £35,000 that was not due, he could not afford to pay £100,000.

We note that in excess of £90,000 was due in July 2016. Against that background it is difficult to believe that the further £14,500 (from the 2013 appeal) and the accrued interest would make a significant difference to the Appellant's view of whether it was worth his while making an appeal.

25. Although we gave Mr Routledge repeated opportunities to tell us about any other issues which would explain the Appellant's delay in appealing, no other explanation was forthcoming.

26. We have concluded that there is no credible explanation for any part of the Appellant's delay. Even if we were to accept that the Appellant was unaware of the assessments until July 2016 (which, for the avoidance of doubt, we do not), the Appellant has accepted that from 19 July 2016, he was aware that HMRC was seeking more than £90,000 from him. The Appellant apparently kept documents from 2011 and 2012 so that he could prove assessments were incorrect. Yet it was not until 2 July 2019 that the Appellant contacted HMRC to try to discuss matters, and not until 9 July 2019 that the Appellant attempted to appeal against the assessments.

27. We agree with HMRC that the only credible explanation for a Notice of Appeal being filed on 9 July 2018 was that the Appellant had received HMRC's 28 June 2018 threat to commence bankruptcy proceedings, and he saw an appeal to the Tribunal as a way to stave to stave off that threat.

Evaluating all the circumstances

28. An important part of this evaluation is to consider the prejudice to each party if we do, or do not, allow this application.

29. We look first at the prejudice to HMRC if the application is allowed. We bear in mind the difficulties which HMRC may face in finding relevant documents from 2011 and 2012. Mr Routledge argued there was no evidence that HMRC had lost relevant material but the absence of copy assessments for three of the five disputed periods disproves this contention. Given the passage of time we consider it probable that other material has been destroyed or will not be located; and HMRC will certainly expend resources in conducting a search. If a substantive appeal proceeds, HMRC will expend further time and public resources on a matter they considered settled. There is also prejudice to the general body of taxpayers who expect the rules that they follow and respect to be upheld.

30. Looking at the contrary position, if we do not allow the Appellant's application, then he will be prejudiced by losing the opportunity to argue his substantive case. The value of that opportunity depends on the strength of that case. Mr Routledge submitted that we should not take the decision in the 2013 appeal (where the Appellant was unsuccessful) as indicative of the strength of the Appellant's case in the 2018 appeal because the two appeals were made on a different basis. Mr Routledge told us that the substance of the 2018 appeal was that there were additional input tax claims to be considered for each of the five periods in dispute. In support of his submission that the Appellant had a strong case, Mr Routledge told us that, even though it was outside the

statutory document retention period, the Appellant had retained all the paperwork necessary to support his input tax claims for the five VAT periods in dispute.

31. In assessing the relative strength of the Appellant's substantive case, we are not required to conduct a mini-trial. We have considered the following:

- the allocation of the credit of £35,134.93 is not an issue over which the Tribunal has jurisdiction, and so it does not form part of the 2018 appeal;
- the assessments for the periods 07/11 to 07/12 did not revise the amounts of input tax claimed by the Appellant in his returns for those periods;
- for periods 07/11, 10/11, 01/12 and 07/12, there is no difference between the amounts of input tax claimed in the Appellant's VAT returns and the amounts claimed in Mr Routledge's 2 July 2018 letter;
- for period 04/12, an additional amount of £411.34 was claimed in Mr Routledge's 2 July 2018 letter, compared to the Appellant's VAT return;
- if the letter of 2 July 2018 is the Appellant's claim for additional input tax due for period 04/12, then this claim is made more than four years after the date by which the return for 04/12 was required to be made, and so is outside the time permitted by the Value Added Tax Regulations 1995; and
- HMRC have yet to consider the Appellant's claim for additional input tax for 04/12, so there is no decision regarding that claim which can have been appealed or form part of the 2018 appeal.

32. We conclude that the Appellant's substantive appeal is so overwhelmingly weak that it has no reasonable prospects of success.

33. Mr Routledge submitted that if we refused the Appellant's application then the consequence would be that the Appellant would be made bankrupt, whereas bankruptcy could be avoided if the Appellant was successful in his substantive appeal. Given HMRC are seeking to recover more than £100,000 from the Appellant, we do not accept that avoiding bankruptcy is likely if the Appellant's additional input tax claim is for only £411.34 more than already agreed by HMRC.

Conclusion

34. Our starting point in this application is that permission should not be granted unless we are satisfied on balance that it should be. The onus is upon the Appellant to persuade us that permission should be granted. In undertaking this evaluation, we bear in mind that in making any decision under the Tribunal Procedure Rules, we should have regard to the over-riding objective to deal with cases fairly and justly.

35. We accept that the Appellant is currently in a perilous financial position. However, we conclude that his 2018 appeal is so overwhelmingly weak that there is very little prospect of the Appellant's financial position improving if the appeal was allowed to proceed. If we allowed the appeal to proceed then there would be prejudice to HMRC and (given the weakness of the Appellant's case) that prejudice to HMRC

outweighs the prejudice to the Appellant. Even if we had accepted that the Appellant did not know about the assessments until 19 July 2016, there is still no good explanation for any part of the subsequent very lengthy delay. Far too much time passed without action. It is not in the interests of justice for this application to be granted. The application is refused.

36. We informed the parties at the conclusion of the hearing of our decision that the application would be dismissed and that our written decision would follow.

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 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.

JANE BAILEY

TRIBUNAL JUDGE
RELEASE DATE: 05 NOVEMBER 2019