



**TC07850**

*Value Added tax – notice to register – assessment for VAT – penalty for failure to register – whether assessment appealable without filing VAT returns – no – permission for late appeal – refused*

**FIRST-TIER TRIBUNAL**

**Appeal number: TC/2019/00877**

**TAX CHAMBER**

**BETWEEN**

**SYED HUSSAIN**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR**

**HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE IAN HYDE**

**Sitting in public using the Tribunal video platform on 17 September 2020**

**Imran Shan for the Appellant**

**Olivia Donavon, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents**

## **INTRODUCTION**

1. This appeal concerns whether the appellant's appeal against notification of liability to be registered for Value Added Tax and assessments undeclared VAT and penalties should be either stuck out on the grounds that the appeal did not comply with the conditions for appealing as set out in Rule 20 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rule 2009 ("the Tribunal Rules") or, in the alternative, the appellant's application to appeal was late refused.

## **Facts**

2. Having heard the parties and evidence from the appellant, I find the facts sufficient to determine these preliminary issues as set out below.

3. The Appellant ran a second hand car business during the period covered by this appeal.

4. HMRC investigated the appellant's income tax position in 2014 in respect of a number of prior tax years but that investigation had concluded by the time the VAT investigation started.

5. On 8 May 2014 in a meeting between HMRC and the appellant's then adviser, Mr McKenna, about the income tax investigation HMRC warned Mr McKenna, that the appellant's turnover put him on the limit for VAT registration and any additional turnover may have VAT implications. HMRC advised Mr McKenna that the appellant should register for VAT as quickly as possible.

6. In May 2017 HMRC officers initiated a VAT inspection of the business and made formal requests for documents.

7. In October 2017 a Mr O'Donnell was appointed by the appellant to act for him in respect of the VAT investigation.

8. On 19 March 2018 HMRC notified the appellant that, based on estimated turnover for the period, the appellant was liable to be registered for VAT from 1 December 2011 until 28 August 2017, the date on which the appellant had advised HMRC that a company had been established to operate the business. Further, whilst the letter was not a demand for VAT to be paid, the VAT arrears for this period was £84,267 ("the Registration Letter").

9. On 1 April 2018 Mr O'Donnell requested an extension of time to 16 April 2018 to meet his client and respond to HMRC's letter of 19 March 2018.

10. On 5 April 2018 HMRC agreed to the extension of time.

11. On 17 April 2018 HMRC wrote to the appellant notifying the appellant that due to his failure to file VAT returns from 1 December 2011, HMRC, pursuant to Section 73(1) Value Added Tax Act 1994 ("VATA"), have assessed the underpaid VAT at £84,267. The letter notified the appellant of his right to ask for a different officer to review the decision or to appeal to the Tribunal in either case within 30 days ("the VAT Assessment").

12. On 25 June 2018 HMRC issued a notice of penalty assessment under Schedule 41 Finance Act 2008 for the appellant's failure to notify HMRC of his liability to be registered and in the amount of £53,088.21. The notice advised the appellant of his right to ask for a different officer to review the decision or to appeal to the Tribunal in either case within 30 days ("the Penalty Assessment").

13. On 22 October 2018 HMRC notified the appellant that an application for summary warrant had been made to recover monies owed to HMRC.

14. On 28 November 2018 the appellant asked HMRC for copies of all relevant correspondence.

15. On 30 November 2018 HMRC supplied to the appellant by email copies of correspondence including the Registration Letter, the VAT Assessment and the Penalty Assessment.

16. On 5 December 2018 the appellant sent a number of emails to HMRC enclosing evidence as to his parents' medical position by way of extenuating circumstances.

17. On 6 December 2018 HMRC advised the appellant that it was not clear what the emails of 6 December related to and no action would be taken.

18. On 12 February 2019 the appellant appealed to this Tribunal:

(1) In the box "what is your dispute about?" the appellant included "HMRC claim you owe money and a penalty or surcharge".

(2) In the box "what is the penalty or surcharge amount?" the appellant inserted "53088.21"

(3) In the box "what is the amount of tax?" the appellant inserted "143564.01"

(4) In the box "reason for late appeal" the appellant inserted "CFSS 1922518-Syed Hussain I refer to the above reference and to the HMRC enquiry". I note that the reference number is the one given to the appellant by HMRC to be used for the purposes of the VAT investigation.

(5) The notice of appeal enclosed a large number of documents relating to the VAT investigation and the prior income tax inquiry but also the Registration Letter, the VAT Assessment and the Penalty Assessment.

19. On 20 July 2019, prior to serving its Statement of Case in the appeal, HMRC applied for the appeal to be struck out on two grounds being;

(1) The notice of appeal sought to appeal matters that were not appealable and in any event was not in the required form

(2) In the alternative, the appeal was late and permission to appeal late should not be granted by the Tribunal

### **The notice of appeal**

#### ***HMRC's arguments***

20. Ms Donavon for HMRC criticised the contents of the notice of appeal on two grounds.

21. First, the notice of appeal did not fulfil the requirements of Rule 20(2)(d) and (3) of the Tribunal Rules.

22. Rule 20 provides insofar as relevant:

"20(2) the notice of appeal must include-

...

(d) details of the decision appealed against

(3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain"

23. The appellant enclosed with the notice of appeal a large number of attachments, including documents relating to the earlier investigation into the appellant's income tax position. Not only were these documents irrelevant, they obscured the decision being appealed sufficient to breach the requirements of Rule 20.

24. Second, as regards the VAT Assessment, Section 83(1)(p)(i) VATA requires that in order to bring an appeal in respect of VAT assessed under Section 73(1), the relevant VAT returns must have been filed the relevant returns and the appellant in this matter has not done so.

25. Section 83(1), insofar as relevant provides:

“.....an appeal shall lie to the tribunal with respect to any of the following matters-

...

(p) an assessment

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act

....”

26. HMRC argued that, as the appellant still has not filed returns for the periods covered by the VAT Assessment, the appellant cannot appeal the VAT Assessment. HMRC accepted that this point did not apply to the notification to register and the penalty issues.

### ***Appellant's arguments***

27. Mr Shan for the appellant noted that the appellant had not had any professional representation at the time of submitting the notice of appeal. The documents relating to the income tax investigation had been included to try and show that the appellant's tax affairs had been resolved by the earlier income tax enquiry.

28. Mr Shan did not dispute that the appellant had still failed to complete the relevant VAT returns.

### ***Decision on the notice of appeal***

29. I do not accept that the appellant's notice of appeal failed to comply with the conditions set out in Rule 20 of the Tribunal Rules. Ms Donavon accepted during the hearing that the relevant letters and notices from HMRC containing the decisions relevant to this appeal were included with the notice of appeal. Whilst the material relating to the income tax investigation was irrelevant the information included on the face of the notice of appeal was sufficient to identify which decisions were being challenged.

30. On HMRC's second point I agree with HMRC that Section 83(1)(p) is clear so that, not having filed the return, the appellant is not entitled to appeal the VAT Assessment. This does not affect the notification to register and the penalty issues and so, but for my decision on the late appeal point below, the appeal would have proceeded subject to a direction that the appellant was not entitled to appeal the VAT Assessment.

### ***Late appeal***

#### ***The appellant's arguments***

31. Mr Shan argued that because of his father's behaviour the appellant did not receive HMRC's correspondence and so could not appeal in time. He should therefore be allowed to appeal late.

32. The appellant gave oral evidence as to the reasons why his appeal was late.

33. He explained that during the time period of October 2017 to October 2018 he did not receive any post from HMRC and therefore was unaware of the decision letters. During this time his mother and father were living in his house. His mother suffered serious medical conditions requiring constant care. His father suffered dementia but had to look after his wife,

the appellant's mother, and there was significant pressure on the family as a whole at this time although the appellant accepted that he continued to work. In the period October 2017 to October 2018 the appellant's father hoarded all the post sent to the house under his bed, not only letters from HMRC but other important correspondence such as medical appointment letters for his wife. The appellant did not think the lack of post was strange because he did not get much post anyway, for example he banked on line.

34. It was only the service of the letter of 28 October 2018 by recorded delivery that alerted the appellant to the problem. After he realised the problem he asked HMRC for copies of all correspondence and started an appeal.

35. The appellant accepted that the letters from HMRC had been sent to the right address. The appellant also accepted that his agent had been copied in on all correspondence. The appellant had not chased his agent or HMRC during this period to find out what was happening and had assumed that the agent was dealing with matters.

### ***HMRC's arguments***

36. HMRC argued that the appellant's appeal of 12 February 2019 was very late. The relevant decisions which were appealed were contained in the Registration Letter of 19 March 2018, the VAT Assessment of 17 April 2018 and the Penalty Assessment of 25 June 2018.

37. In respect of each decision the time limit to appeal was 30 days and so the delay in appealing was between 9 months for the Registration Letter and 6 months 18 days for the Penalty Assessment Letter.

38. In the course of the hearing Ms Donavon accepted for the purposes of this appeal that the Registration Letter could not be treated as a decision letter as it did not include any notification of a right to appeal or, as required by Section 83G VATA, a right to review. Rather, the time limits for appealing ran from the date of the VAT Assessment of 17 April 2018. This brought the longest period of delay down to 8 months.

39. Ms Donavon argued that the principles on late appeals set out in *Romaserve (Property Services) Ltd v HMRC* [2015] UKUT 254 and *Martland v HMRC* [2018] 178 applied.

40. Under *Romaserve*, permission to appeal late should only be granted exceptionally and a delay of three months or more is "serious and significant".

41. Under the three stage test in *Martland*, applying the first stage the delay in this appeal of between 6 and 8 months was serious and significant and so the Tribunal should not go any further and should refuse permission to appeal irrespective of any reason for the delay.

42. If the second and third stages of *Martland* needed to be considered, there is no good reason for the delay. Even if, according to the appellant's evidence, his father hoarded post delivered to the house so the appellant did not know about the letters from HMRC, the letters were properly served on the appellant and the appellant should have ensured he got those letters. Further, the appellant should have checked with his agent as to progress of the investigation.

### ***Decision on late appeal***

43. Section 83 VATA provides insofar as relevant:

“(1) An appeal under section 83 is to be made to the tribunal before—

(a) the end of the period of 30 days beginning with—

(i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or

(ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision, or

(b) if later, the end of the relevant period (within the meaning of section 83D).

(2) But that is subject to subsections (3) to (5).

(3) ....

(4)....

(5)....

(6) An appeal may be made after the end of the period specified in subsection (1)...if the tribunal gives permission to do so.

(7)....”

44. Where a penalty is imposed under Schedule 41 Finance Act 2008, paragraphs 17 and 18 of Schedule 41 provide for appeals;

“17(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

18(1) An appeal is to be brought to the First-tier Tribunal.

(2) An appeal shall be treated for procedural purposes in the same way as an appeal against an assessment to the tax concerned (except in respect of a matter expressly provided for by this Act).

45. An appeal in respect of a VAT penalty therefore follows the rules for a VAT appeal and so section 83 applies.

46. Under Rule 20(4) of the Tribunal Rules provides:

“(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”.....

47. The relevant test as to whether to admit a late appeal is as set out in *Martland* being:

“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 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 all “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.”

48. The assumption, as set out in *Martland*, is that there should be no permission to appeal late unless the Tribunal is persuaded otherwise. The delay of between 8 months and 6 months was serious and significant.

49. As to a reason for the delay, the burden of proof is on the appellant to show a good reason. I accept that the appellant’s father might have hidden post but I do not accept he was so successful that during the year the appellant both did not receive anything or that the appellant was not alerted to the problem, for example by seeing his father take the post or by some issue arising because the post was being ignored. Further, the appellant’s agent received copies of the correspondence from HMRC and, indeed, on 1 April 2018 Mr O’Donnell asked for an extension of time from HMRC to meet with his client and respond to the Registration Letter. The appellant’s argument relies upon his agent, having received the Registration Letter then receiving copies of assessments from HMRC for tax and penalties in excess of £140,000 and not telling his client. I therefore find as a fact that the appellant’s father was hoarding post but the appellant was aware of the serious VAT issues with HMRC. I therefore find that the appellant has failed to show there is a good reason for the delay.

50. On the third stage in *Martland*, HMRC did not make any submissions as to prejudice, relying on the point that having established a significant delay the second and third stages in *Martland* did not apply. I do not agree with HMRC’s interpretation, the Upper Tribunal’s guidance is that the Tribunal “is unlikely to need to spend much time on the second and third stages”. However, the appellant did not raise any specific arguments as to prejudice either, although as with any appellant not being able to contest the significant VAT and penalties assessed by HMRC must necessarily prejudice the appellant.

51. Applying the balancing exercise required by *Martland* to the long delay where no good reason has been shown and no prejudice beyond the normal, I refuse the appellant’s application for permission to appeal and under Rule 20(4) refuse to admit the appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

52. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

**IAN HYDE**

**TRIBUNAL JUDGE**

**RELEASE DATE: 21 SEPTEMBER 2020**