



Neutral Citation: [2024] UKFTT 00783 (TC)

Case Number: TC09273

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

In public by remote video hearing

Appeal reference: TC/2023/08379

VAT – application to bring a late appeal – application refused

Heard on: 31 July 2024

Judgment date: 29 August 2024

Before

**TRIBUNAL JUDGE NIGEL POPPLEWELL
MR CHRISTOPHER JENKINS**

Between

ARISTON DEVELOPMENT LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Aaron McNeil director of the appellant

For the Respondents: Mr Thomas Brown Litigator of HM Revenue and Customs’
Solicitor’s Office

DECISION

INTRODUCTION

1. This decision deals with an application by the appellant (or “**the company**”) for permission to make an out of time appeal against a VAT assessment (“**the assessment**”) issued to the appellant in an amount of £159,813, on 30 September 2020. The appeal to the tribunal was made on 19 May 2023.

THE LAW

2. There is no dispute about the relevant law. Under section 83G (1) Value Added Tax Act 1994, the appellant had 30 days beginning with the date on which it was notified of the assessment to appeal against it. That appeal must be made to the tribunal. Under section 83G (6) the tribunal has discretion to give the appellant permission to make an appeal after the end of that 30 day period.

THE EVIDENCE AND THE FACTS

3. We were provided with a bundle of documents including authorities. Mr Aaron McNeil gave oral evidence on behalf of the company on which he was cross examined by Mr Brown. From this evidence we find as follows:

(1) The appellant receives money from the government via Strode college (“**Strode**”) which it uses to train ex-offenders. To do this it uses the services of self-employed lecturers and employs administrative staff.

(2) Strode receives money from the government on a monthly basis. It deducts 25% of the amount which it receives and passes on the remaining 75% of it to the appellant. It does not invoice the appellant for that 25%.

(3) The appellant has not accounted for VAT on the money it receives. We are not entirely clear of HMRC’s detailed analysis but what is clear is that they have based the assessment on the sales declared in the appellant’s VAT returns.

(4) It seems to be HMRC’s view that the money received from these sales is consideration for a taxable supply of services by the appellant to Strode and have issued the assessment on that basis.

(5) Mr McNeil told us that this is the standard way of remunerating providers such as the company. He has been involved in a number of companies in this field for several years. None of the colleges for whom either he or the company has engaged with has ever supplied a VAT invoice.

(6) The company registered for VAT following Mr McNeil’s attendance at a class designed to assist individuals starting up in business. He was advised and assisted by his personal accountant who then became the company’s accountant (“**the accountant**”).

(7) The assessment was issued following an enquiry into the appellant’s tax affairs. The assessment refers to notes “attached concerning your rights of appeal”. HMRC provided no evidence that such notes were included with the assessment, nor what those notes contained. Mr Brown told us that the notes would have given information to the recipient of their right

of appeal within 30 days. That of course is not admissible as evidence of fact that such notes did contain that information nor that they were sent to the appellant.

(8) Following the issue of the assessment, correspondence and discussions took place between HMRC and the accountant. In an email dated 22 November 2022 to HMRC, the accountant explained the way in which funds were transferred from the college to the appellant and that the college did not supply a tax invoice. In that email the accountant stated that “Ariston is strongly appealing the assessments based on best judgment because there is no output VAT received yet and not accounted.....”.

(9) There was further correspondence in January and March 2021 and then nothing until August 2022 when the appellant wrote to HMRC enclosing a copy of the 26 March 2021 letter and asking for a response. There was a further delay until April 2023 when HMRC wrote to the appellant explaining that their stance on the assessment had not changed and advised the appellant to make a late appeal. The appellant notified its appeal to the tribunal on 19 May 2023.

(10) HMRC say they did not receive the appellant’s letter of 26 March 2021 until they received a copy of it enclosed with the appellant’s letter of 17 August 2022. The letter of 17 August 2022 is headed “appealing against the vat assessment of October 2020”.

(11) Mr McNeil’s evidence was that he did not receive notes of how to appeal and had to search online, using Google, to find out how to appeal. On obtaining that information, the company decided to proceed down the route of applying for ADR.

(12) In an email dated 30 November 2022, HMRC explained why they were not prepared to accept the appellant into the ADR process. Basically, this was because the appellant had not made a valid appeal by that time.

(13) It was Mr McNeil’s evidence that he had applied for ADR in early 2021. It was also his evidence that one of the reasons for the delay in appealing was because he and the accountant were trying to get information from Strode. One of the reasons there was a long delay between the appellant’s letter of 26 March 2021 and its letter of 17 August 2022 was because the appellant had been visited several times by field officers and he was in discussions with them regarding the VAT situation.

DISCUSSION

4. When deciding whether to give permission to make a late appeal, the tribunal is exercising judicial discretion, and the principles which should be followed when considering that discretion are set out in *Martland v HMRC* [2018] UKUT 178 (TCC), (“*Martland*”) in which the Upper Tribunal considered an appellant’s appeal against the FTT’s decision to refuse his application to bring a late appeal against an assessment of excise duty and a penalty. The Upper Tribunal said:

“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.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice - there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal".

5. In *HMRC v BMW Shipping Agents* [2021] UKUT 0091, the Upper Tribunal relevantly said this:

52. "We will approach the third *Martland* stage by performing, as *Martland* requires, a balancing exercise. In that balancing exercise, the need for litigation to be conducted efficiently and at proportionate cost and for directions to be complied with must be given particular weight. However, it remains a balancing exercise which invites, among other considerations, a consideration of the nature of the reasons for the breach of direction and the results that would follow if the appeal is, or is not, reinstated".

Submissions

6. In summary Mr Brown submitted:

(1) The appeal to the tribunal was made two years six months and 19 days after the expiration of the statutory time limit. This is serious and significant. No good reasons have been given for it.

(2) The notice of assessment had notes attached to it that stipulated the time limits for providing extra information and requesting an independent review. It also provided details of the time limits to bring an appeal. The appellant has never made HMRC aware that the notes were not attached.

(3) The appellant's explanation in its notice of appeal basically said that the delay in appealing was due to HMRC's failures to respond to correspondence sent by the appellant.

This is clearly not the case. The appellant failed to supply information in response to requests for it from HMRC. It seems to take the appellant over a year to follow up its letter of 26 March 2021 with the subsequent letter of 17 August 2022.

(4) The appellant was professionally represented and the accountant should have advised the appellant to make a timely appeal.

(5) Time limits should be respected and the appellant has failed to do this. Allowing the appellant to bring a late appeal will prejudice other taxpayers who have brought timely appeals. To the extent that the merits of the case can be considered, the appellant's case is weak. There has been no challenge to the best judgment assessment and no information has been provided by the appellant, so far, to displace it.

7. In summary, Mr McNeil submitted as follows:

(1) Whilst he received the assessments, he was not notified of his appeal rights at that time.

(2) The reason there was a delay between the letters of March 2021 and August 2022 was because he was trying to obtain information from Strode and was discussing the position with HMRC officers who came to visit him.

(3) From the research that he and the accountant had done online, it appeared that there were two routes of appeal, one to the tribunal and one via ADR. They decided they wanted to adopt the ADR route.

Our view

8. It is for the appellant to persuade us that we should exercise our discretion in its favour. The principles we adopt when exercising this discretion are the *Martland* principles set out above.

9. The first of these is to consider the length of the delay. The delay is approximately two years and six months. This is serious and significant and requires us to go on to consider the other two *Martland* criteria.

10. The reasons given for the delay appears to be these. Mr McNeil and the accountant were not sure how to appeal against the assessment and so consulted Google. This told them that they could either appeal or go for ADR and they chose the latter. Once that had been rejected, in November 2022, an appeal was then lodged with the tribunal.

11. We would observe that there is a considerable delay between the rejection of the ADR application on 30 November 2022 and 19 May 2023 when the appeal was lodged with the tribunal, and no explanation was given for this delay.

12. It was the appellant's evidence that the Google search was made in early 2021. We find that difficult to square with his evidence that that then led to the application for ADR. That application was rejected on 30 November 2022. On his evidence this would have been nearly 2 years after the original application, and we simply cannot believe that HMRC took that long to process the application and reject it. We think it far more likely that the application was made earlier in 2022, and the Google search which led to the application was made shortly before that.

13. What is clear however is that the accountant made it plain to HMRC that the appellant did not agree with the assessment, and in the email dated 22 November 2020 stated that the appellant was appealing the assessment.

14. It might, therefore, have been open to the appellant to say that one reason for not having appealed to the tribunal until May 2023 was because he thought a valid appeal had already been made in November 2020. But he did not tell us this. There is no evidence that the appeal to the tribunal was late because the appellant believed a valid appeal had been made in November 2020.

15. We now turn to the final stage of the *Martland* test which requires us to undertake an evaluation of all the circumstances. This is a balancing exercise taking into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost. Statutory time limits are to be respected. We can have regard to any obvious strengths or weaknesses of either party's case.

16. The appellant was professionally represented both at the time that it received the assessment and subsequent thereto (Mr McNeil's evidence was that the Google research into how to appeal against the assessment was undertaken by both him and his accountant).

17. Mr McNeil has never suggested, for a moment, the accountant has let him down, or blamed him for having failed to submit a timely appeal. But even if he had, the general principle in these late appeal cases, as set out in the Upper Tribunal decision in *HMRC v Katib* [2019] UKUT 0189 ("*Katib*"), is that failings by a taxpayer's adviser is treated as a failure by the taxpayer. So, the failure to submit the appeal on time, even though the appellant was professionally advised, is treated as failure by the appellant.

18. Mr McNeil presented as an intelligent and commercially savvy businessman. We are slightly surprised the combined intellectual capital of the accountant and Mr McNeil himself failed to elicit, from the Google search, the fact that an appeal must be made in VAT cases not to HMRC, but to the tribunal. This is the mistake that has been made in this case.

19. Had this been a direct Tax case in which an appeal must be made, in the first instance, to HMRC, then we would have treated the email of 22 November 2020 as such an appeal, and although that falls after the 30 day deadline, we would not have considered that delay to have been so serious and significant. And would not outweigh the prejudice to the appellant of denying it the right to bring an appeal.

20. But this is a VAT case. The accountant should have been aware that in these circumstances, the appeal must be made to the tribunal. That failure is attributable to the appellant.

21. At this final evaluation stage, therefore, we take this into account and weigh it in the balance of prejudice against the failure to conduct litigation efficiently, to respect time limits, and the impact that denying permission would have on the appellant.

22. Clearly denying permission will have a significant financial impact on the appellant, but as was made clear in *Katib*, that is simply a consequence of having failed to make a timely appeal, and, as in *Katib*, we do not think that this has sufficient weight to overcome the delay in bringing the appeal, and the reasons for that delay.

23. We accept Mr McNeil’s evidence that one of the delays in the process was due to his attempts to obtain information from Strode. But this could have been done after an appeal had been made to the tribunal as part of ongoing discussions with HMRC. There is no evidence that the reason that the appeal was not made was because of the difficulty in obtaining this information. We do not know when the information was in fact obtained, but on the basis that it was before or as part of the application for ADR which was denied in November 2022, there was still a significant delay between that and May 2023 when the appeal was actually made.

24. In truth, we suspect that the reason for the delay was that Mr McNeil was concentrating on his business rather than on the assessment. That is wholly understandable. But it is not a good enough reason to displace the delay at the final evaluation stage of the *Martland* test.

25. As far as the merits of each sides case is concerned, we have very little information. The appellant did not address us on the point. We do not know whether it says that it made no supplies at all or that any supplies it did make were not Vatable. There seems to be a suggestion in the accountant’s email of November 2020 that any taxable outputs would be matched by corresponding deductible inputs. But there is little technical analysis of that assertion in the papers. HMRC simply say the appellant’s position is weak but give no technical reasons for that submission. We have therefore placed little weight on any obvious strengths and weaknesses of the parties’ respective positions at the final evaluation stage.

DECISION

26. For the foregoing reasons we reject the appellant’s application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

27. 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.

**NIGEL POPPLEWELL
TRIBUNAL JUDGE**

Release date: 29th AUGUST 2024