



**TC02743a**

**Appeal number: TC/2012/05857**

*PROCEDURE – application for permission to appeal out of time – discretion of tribunal – overriding objective – time should not be extended*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**AQUA PRODUCTS LIMITED**

**Appellants**

**- and -**

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

**TRIBUNAL: JUDGE JONATHAN CANNAN**

**Sitting in public in Birmingham on 16 January 2013**

**Andrew Young of counsel instructed by Neil Davies & Partners LLP for the  
Appellant**

**Gary Griffin of HM Revenue & Customs for the Respondents**

## DECISION

### *Background*

1. This is an application by the Appellant for permission to appeal out of time. The notice of appeal relates to assessments to corporation tax for accounting periods 30 September 2002 to 30 September 2005 together with associated penalties for delivering incorrect corporation tax self assessments in those periods and failing to deliver corporation tax returns for later periods. I was told that the amount of tax presently in issue is £100,497, including a small assessment for Class 1 NIC. The total amount of penalties in issue is £39,430.
2. I was not taken specifically to the decisions giving rise to the right of appeal but it appears that they were made in September and October 2009. The appellant had 30 days in which to appeal, that is until 29 October 2009 to appeal the tax assessments and until 19 November 2009 to appeal the penalties. I set out below the chronology of events leading to the lodging of the notice of appeal on 24 May 2012. It was common ground that the notice of appeal to the Tribunal was some 2½ years late.
3. The notice of appeal contained the appellant's application for permission to appeal out of time. Broadly it asserts that there was a good reason why the appeal was not made in time. The respondents lodged a notice dated 2 August 2012 opposing that application. It asserted that the appellant had failed to prosecute the appeal with reasonable diligence.
4. Both parties produced skeleton arguments on the day of the hearing. In addition to the broad issues raised previously, both parties sought to rely on substantial additional arguments.
5. The appellant's skeleton included an argument that the 30 day time limit for appealing contained in the Taxes Management Act 1970 was inconsistent with the appellant's Article 6 right to a fair trial in circumstances where the matter under appeal related to a penalty which was a criminal charge for Article 6 purposes. Mr Young effectively argued that the appellant has an unqualified right to a hearing and invited us to disapply the 30 day time limit.
6. No prior notice of that issue had been given to the respondents and both parties agreed that I should deal with the appellant's application on the basis of the Tribunal's general discretion to give permission for a late appeal. I should deal with that as a preliminary issue and only if I did not grant permission on that basis would it be necessary at a later date to deal with the Article 6 argument.
7. During the course of the hearing it became apparent that the respondents intended to submit that there was no merit in the appeals. Again, no advance notice had been given of that argument. In certain circumstances the merits of the underlying appeal may be relevant to the discretion to give permission for a late appeal. However given that the argument was being raised for the first time at the hearing I indicated that was not prepared to hear submissions on the merits of the underlying appeals.

### *Discretion of the Tribunal*

8. Both parties agreed that the most relevant authority as to the basis on which the First-tier Tribunal should exercise its discretion in cases such as this is the decision of Morgan J sitting in the Upper Tribunal in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC). At [34] and [37] he said this:

*“34. Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (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? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.*

...

*37. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision.”*

9. *Data Select* concerned the 30 day time limit applicable in relation to appeals in VAT matters. The same principles apply in relation to the 30 day time limits for appealing direct tax assessments and penalties generally, including the assessments and penalties in the present case.

### *Findings of Fact*

10. There was no substantial dispute between the parties as to the facts. The appellant relied on 3 witness statements. One from Mr Tarvinder Singh a director of the appellant, one from Mr Vincent Curley a tax adviser who acted on behalf of the appellant in a separate excise duty appeal and one Mr Hasmukh Patel an accountant who acted on behalf of the appellant.

11. Mr Curley and Mr Patel were not available for cross-examination, however Mr Griffin did not suggest that he took issue with their evidence. Mr Singh was available for cross-examination. Mr Griffin did not seek to cross-examine him but he did give some oral evidence because there were a number of areas where I required

clarification of matters referred to in his witness statement. Based on the evidence before me I make the following findings of fact.

12. The appellant was a wholesaler of alcoholic drinks. On 2 December 2011 HMRC presented a winding up petition against the appellant in relation to the tax and penalties referred to above. In fact I understand that the petitioned debt was somewhat greater than the figures given above but has been reduced following various adjustments. As a result of the petition the appellant ceased trading in December 2011. The petition itself first came on for hearing on 30 January 2012.

13. There was no enforcement action by HMRC prior to the presentation of the petition. Following presentation of the petition the appellant sought professional advice. However Mr Singh suffered the death of an uncle on 18 February 2012. This caused him distress and he also had to spend a long period of time in India sorting out family affairs. These matters meant that there was a period of delay before the notice of appeal was lodged on 24 May 2012.

14. The period between November 2009 and December 2011 and the surrounding circumstances were explained as follows.

15. The enquiry into the appellant's corporation tax returns was commenced in September 2005 and concluded in 2009 with the decisions referred to above. At the time the assessments were made and the penalties imposed the appellant was notified as to its rights of appeal and the statutory 30 day time limit which applied.

16. In the period November 2006 to February 2007 the appellant had made various claims for excise duty drawback in the ordinary course of its business. These claims totalled approximately £164,000 ("the Drawback Claims"). HMRC refused the Drawback Claims in September 2007. The appellant had instructed Vincent Curley in relation to the Drawback Claims and in November 2007 an appeal was lodged to the VAT & Duties Tribunal. Those proceedings continued and in due course the appeal was listed for a 3 day hearing to take place in November 2010.

17. In September 2010 HMRC conceded that the appellant was entitled to the drawback monies in full. The appellant is now pursuing its costs of that appeal. I was also told by Mr Young that it intends to pursue a claim for misfeasance against HMRC.

18. As a result of HMRC's failure to pay the Drawback Claims the appellant's business was severely affected. This included the period from November 2009 to September 2010. Mr Singh introduced monies to fund the appeal in relation to the Drawback Claims. That appeal was substantial and required significant funding.

19. Meanwhile the appellant had instructed Gilbert Tax Consultants in relation to the corporation tax enquiry. In or about August 2009, following the issue of closure notices, Mr Singh gave instructions to Gilbert Tax to appeal the decision in the closure notices. He also instructed Mr Patel of Trinity Accountancy Services ("Trinity") to assist Gilbert Tax. Having given those instructions Mr Singh assumed that the appeals had been lodged. The evidence before me included the note of a telephone call between HMRC and Gilbert Tax on 1 October 2009 during which Gilbert Tax were told that the corporation tax assessments had been issued and the intention was to raise a penalty determination. Gilbert Tax stated that they would

forward an appeal to HMRC. The legislation requires that step prior to notifying an appeal to the Tribunal.

20. Trinity told Mr Singh in August 2009 that they were not prepared to work on the appeal until outstanding fees for other work had been paid. They were however prepared to do general accountancy work and prepare the statutory accounts. Neither the appellant nor Mr Singh was in a position to fund Trinity's work on the appeal.

21. The penalties were assessed in October 2009. Most of the sum assessed was for filing an incorrect return. HMRC could assess such penalties where the conduct of the company was fraudulent or negligent (*Paragraph 20 Schedule 18 Finance Act 1998*). The evidence before me was that HMRC imposed the penalty because errors in the returns were due to the company's negligence rather than any allegation of fraud.

22. Despite the position of Trinity, Mr Singh maintained that he continued to assume that Gilbert Tax were handling the appeal in relation to corporation tax and penalties. Mr Griffin did not challenge this evidence and I find that Mr Singh did assume that Gilbert Tax were dealing with an appeal. In answer to my questions Mr Singh was rather vague as to how long he laboured under this mistaken assumption. He said that it was a matter of months and I accept that evidence.

23. There was no evidence before me as to how Mr Singh eventually realised that Gilbert Tax had not lodged an appeal. Mr Griffin referred me to a letter dated 24 March 2010 in which HMRC indicated that there had been no appeal against the bulk of the corporation tax assessments or against the penalty determinations. In the absence of any other evidence and doing the best I can with Mr Singh's evidence I proceed on the basis that the appellant through Mr Singh assumed until the end of March 2010 that Gilbert Tax had lodged an appeal.

24. There was no evidence before me as to what discussions took place with Gilbert Tax or Trinity once Mr Singh realised that the appeal had not been lodged. In any event Mr Singh maintained and I accept that there were no funds to instruct professional advisers to lodge an appeal.

25. There was no evidence that Mr Singh asked his professional advisers what he should do in circumstances where the appellant could not fund an appeal. Nor did he ever indicate to HMRC that he wished to appeal the corporation tax and penalties but was unable to do so because of a lack of funds.

26. In the period following September 2010 when HMRC conceded the Drawback Claims the appellant used the monies recovered to pay creditors, including suppliers. There were no funds to pursue the appeal.

27. The first intimation to HMRC that the appellant intended to appeal the assessments and penalties to the Tribunal was on or about 30 January 2012 in connection with the first hearing of the petition.

#### *Outline of Parties' Submissions*

28. I deal only with the parties' submissions in so far as they are relevant to the question of discretion. Mr Young's submissions strayed into the issue of convention rights which I do not consider form part of the issue for determination in this part of

the application. I say nothing further in relation to those submissions which may be the subject of a further hearing.

29. The essence of Mr Young's submissions was that the failure to appeal in time was primarily due to what he described as HMRC's unlawful conduct in withholding the Drawback Claims. That caused severe cashflow difficulties for the appellant and meant it did not have funds to pursue the present appeal. He also relied on the fact that in so far as the appeal includes an appeal against penalties the proceedings should be viewed as criminal proceedings. In this respect he relied upon the decision of the ECHR in *Västberga Taxi Aktiebolag and Vulic v Sweden* (Application no 36985/97).

30. He further submitted that it is impossible to have a fair trial of the penalties if the appellant is unable to challenge the underlying assessments. The appellant would be severely prejudiced if time for appealing was not extended.

31. Mr Griffin accepted the factual basis on which the appellant put its case, although he did not accept that the financial difficulties were "caused" by HMRC. He submitted that HMRC had a right to investigate the Drawback Claims.

32. Mr Griffin submitted by reference to CPR 3.9 that it is not in the interests of the administration of justice to permit appeals after long periods of delay and in particular there is a public interest in the finality of the decisions of HMRC. He particularly relied on the long period of delay and the absence of any good reason.

#### *Decision*

33. For the purposes of exercising my discretion I adopt the approach set out by Morgan J in *Data Select*. It is for the appellant to satisfy the Tribunal that permission for a late appeal should be granted.

#### (1) Reason for Not Appealing in Time

34. I make no findings in relation to whether HMRC was entitled to adopt the stance it did in relation to the Drawback Proceedings. The real question is whether, in the position it found itself in, the appellant was justified in taking the approach it did. Namely not appealing until after a winding up petition had been presented.

35. I take into account that the appellant had professional advisers acting throughout the period from November 2009 to May 2012. However the first real intimation to HMRC that the appellant disagreed with the assessments and the penalties was not until January 2012. Leaving to one side the period from February 2012 to May 2012, I am not satisfied that the appellant had a good reason for not lodging an appeal or at least intimating an appeal to HMRC in the period November 2009 to January 2012.

36. It seems to me that a short discussion between Mr Singh and either Gilbert Tax or Trinity might be expected to have led to appropriate advice without incurring any significant fees. Throughout this period Trinity were acting for the company at least in relation to the preparation of company accounts. Mr Patel was not available to give oral evidence but again one might expect that in the course of his work on the accounts he would have to consider the liabilities of the company, including those liabilities arising out of the assessments and the penalties.

37. If Mr Singh had sought advice he may well have been advised to lodge an appeal with the Tribunal and then ask the Tribunal to stay it pending resolution of the appeal in relation to the Drawback Claims. Alternatively to make it clear to HMRC that he disputed the assessments and the penalties but was not in a position to pursue an appeal until his Drawback Claims had been finally resolved.

38. I accept that Mr Singh and Trinity are not tax experts. However I am not satisfied that the appellant through Mr Singh acted reasonably in the position it found itself in. Mr Singh ought to have addressed the circumstances specifically with Gilbert Tax and Trinity.

39. One of the CPR factors is whether the failure to comply with the 30 day time limit was intentional. Once Mr Singh became aware that Gilbert Tax had not lodged the appeal, it does appear that he took a conscious decision not to appeal. HMRC also wrote to the appellant on 24 March 2010 summarising the position that no appeals had been received in relation to the bulk of the assessments or in relation to the penalty determinations and that they were final.

40. Against the background of a 30 day time limit and the appeal being more than 2 years out of time by January 2012, I do not accept that the appellant had a good reason for not appealing throughout the period from January 2012 to 24 May 2012. I do not consider that the loss of Mr Singh's uncle and his time in India attending to family affairs can justify this further period of delay. One of the CPR factors is whether the application for relief has been made promptly. I was told that the significance of the failure to appeal only became apparent when the appellant sought advice in relation to the petition. Even taking into account the reasons given, I cannot say that the appellant acted promptly during the period from January 2012 to 24 May 2012.

41. It was no part of the appellant's case that it had not been properly advised by its professional advisers, save in the period from August 2009 to Spring 2010 when it is implicit from the evidence before me that Gilbert Tax at least bore some responsibility for the delay. However the bulk of the period of 2½ years is the responsibility of the appellant.

#### (2) Period of Delay

42. The Notice of Appeal in the present case is some 2½ years out of time. By any reckoning that is an inordinate period of time in the context of a 30 day time limit. The purpose of a 30 day time limit is clearly to encourage the early resolution of disputes.

#### (3) Prejudice to the Appellant

43. In my view this is the most significant factor in favour of the appellant's application. The appellant is plainly prejudiced if it is prevented from appealing the corporation tax assessments and the penalties. It loses the opportunity of setting aside through the appeal process liabilities of approximately £140,000 together with interest thereon. That in turn may lead to the compulsory winding up of the appellant.

44. In addition Mr Young submits that the appellant will be denied the opportunity of a fair trial in relation to the penalties which themselves amount to a criminal charge

for the purposes of Article 6. I accept the submission that the fact part of the sum appealed is a penalty gives rise to further prejudice above and beyond the assessment of tax. I also accept that the penalty in this case is treated as a criminal charge for Article 6 purposes and will not be subject to a hearing on the merits if time is not extended. However it is appropriate in this context to take into account the seriousness of the conduct relied on to support the penalty. In this case the penalty has not been imposed as a result of fraud. It was imposed on the basis that HMRC considered the appellant had been negligent.

#### (4) Prejudice to the Respondents

45. It was not suggested by Mr Griffin that the period of delay has led to any specific prejudice to the respondents, for example any adverse effect on the evidence or the recollection of witnesses. Nevertheless there is the prejudice recognised by Morgan J in *Data Select* that there is a public interest in the finality of decisions and the respondents were entitled to assume that the assessments and the penalties were final.

#### (5) Merits

46. For the reasons given above I did not permit Mr Griffin to advance a case that there was no merit in the appeal. The appellant contends that the corporation tax assessed is not due and the penalties should be reduced to nil. Indeed the appellant contends that far from having a corporation tax liability for the relevant years it has overpaid tax.

47. I express no view on the merits of the appeal but I assume for present purposes that the appeal would have at least a reasonable prospect of success if permission is given for a late appeal.

#### (6) CPR 3.9

48. The discussion above covers all the relevant factors set out in CPR 3.9.

#### *Generally*

49. I have considered all the evidence and submissions before me in the context of the overriding objective of dealing with cases fairly and justly. The factors described above do not all pull in the same direction. I have considered all those factors and in the end I have reached the conclusion that the balance falls in favour of the respondents. If it is solely a matter of discretion, permission for a late appeal should not be granted.

50. In the absence of any other matters therefore I would refuse the appellant's application for permission to appeal out of time. However, as stated above I have dealt with the exercise of discretion as a preliminary issue. I have not yet dealt with Mr Young's submission that as a matter of law the appellant is entitled to a hearing of its appeal notwithstanding the 30 day time limit for appeals.

51. It seems to me that if Mr Young makes good that submission, and I express no view on the prospects, then it would fall to the Tribunal to disapply the 30 day time limit which would leave no time limit within which to notify an appeal against a penalty. To that extent the appellant is not relying on its application to extend the time



for appealing. I will hear the parties as to the appropriate direction to be made in the present circumstances. The parties have permission to restore the application for that purpose and for the purpose of hearing further argument in relation to Article 6.

52. By way of postscript, I am conscious that this decision may not enable the High Court to finally deal with the winding up petition at the next hearing on 28 January 2013. I will however direct that the hearing of the remaining issues be expedited to be heard on the first available date.

53. 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.

**JONATHAN CANNAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 10 June 2013**