



TC05446

Appeal number: TC/2015/06525

EXCISE DUTIES – application to appeal out of time – lack of funds and similar cases being appealed – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WILLIAM MARTLAND

Applicant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at Fox Court on 29 March 2016

Christopher Snell, for the Applicant

**Christie Monaghan, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION on PRELIMINARY ISSUE

Introduction

- 5 1. This is an application by the applicant to bring an appeal out of time. the substantive appeal relates to the raising of an excise duty assessment and an excise wrongdoing penalty.

Background

- 10 2. The Respondents (HMRC) issued the applicant with an assessment in respect of excise duty on a load of mixed beer brought into the United Kingdom on 18 December 2013 on a vehicle driven by the applicant. It appears that the importation was a ‘mirror load’ as the Administrative Reference Code (ARC) used for the import had been used on a previous occasion. The load and the vehicle were accordingly seized at the border. Neither the seizure of the load nor the seizure of the vehicle was
15 challenged by any person.

3. The CMR and the Electronic Movement Control System showed the haulier as “Walker Transport”; the applicant advised HMRC that he had been engaged by “T & C Metals & Haulage” to drive the load. He was paid cash in hand and had no documentary evidence of employment.

- 20 4. HMRC were unable to establish contact with either Walker Transport or T&C Metals & Haulage.

25 5. On 17 May 2014, HMRC wrote to the applicant to inform him that they intended to issue him with an assessment to excise duty on the basis that he was the person ‘holding the goods intended for delivery’ under Regulation 13(1) & (2) of the Excise Goods (Holding, Movement & Duty Point) Regulations 2010. A wrongdoing penalty was issued under Regulation 41(4)(1)(a) Finance Act 2008 on the basis that the applicant had acquired possession of the goods as he had physically carried the goods.

30 6. On 17 June 2014, the applicant’s solicitors wrote to HMRC to advise that they had been instructed on the applicant’s behalf. HMRC requested written authorisation from the applicant to enable them to respond to the solicitors’ correspondence.

7. The assessment for excise duty of £24,694 and a penalty of £9.507 was raised on 30 June 2014.

35 8. A letter of authority from the applicant in respect of his solicitors was received by HMRC on 20 July 2015.

9. The applicant requested a review of the decision to issue the assessment and penalty on 27 August 2015. On 22 September 2015 HMRC requested that the applicant provide reasons for the late review request.

10. On 1 October 2015, the applicant’s solicitors wrote to HMRC to advise that they had not been in receipt of funds or instructions and so had not been able to take action earlier.

11. HMRC rejected the late request for a review on 5 October 2015.

5 12. The notice of appeal in respect of the assessment and penalty was submitted on 29 October 2015.

Applicant’s submissions

13. On behalf of the applicant, Mr Snell submitted that the applicant is a man of limited means, and that his bank account is generally overdrawn. The effect of the
10 appeal not being allowed to continue would be “financially ruinous” on the applicant and he would more than likely be made bankrupt.

14. It was submitted that the applicant had a prime facie case on the facts, following recent caselaw in the First Tier Tribunal, as the applicant was merely simply the driver of the vehicle and so should not be considered to be ‘holding’ the seized load.
15 There had been no suggestion that he was complicit in the duplicate use of the ARC number. The decision in *Elnagy* [2012] UKFTT 269 (TC) had concluded that extension of time should be granted as a result, in part, of the merits of the substantive case in that matter.

15. On the basis that there is a prima facie case and permission is currently pending
20 on a number of appeals on the point to the Upper Tier Tribunal, it was submitted that any substantive case in this matter would be stayed such that HMRC would not be prejudiced if the appeal was permitted to be made out of time as they would not have to divert resources during the stay. Once the Upper Tier Tribunal had reached a decision, the substantive appeal in this matter would, it was submitted, be likely to be
25 dealt with by consent so that, again, no resources would need to be diverted.

16. It was also submitted that the existence of statutory provisions allowing for late appeal mean that HMRC should not be entitled to consider a matter as closed.

17. It was submitted that the possible bankrupting of an individual where the relevant assessments may not be valid should be regarded as contrary to the
30 administration of justice, and that refusal to extend time would provide HMRC with a windfall to which it may not be entitled. It would be unreasonable for HMRC to be entitled to a windfall as a result of a technical failure by the applicant.

HMRC’s submissions

18. For HMRC, it was submitted that the length of the delay was substantial and,
35 accordingly, such a delay must weigh heavily against the granting of an extension of time to appeal (as noted in *John O’Gaunt Golf Club* TC/2014/04510 at paragraph 21).

19. HMRC submitted that the purpose of the time limits is as set out in *John O’Gaunt* at para 21: “there is no dispute that the time limits laid down by parliament are there in the public interest to promote legal certainty and security, and that the default position is that they are to be respected unless there is good reason to the contrary”. The purpose of the time limits was not simply to assist HMRC but also to ensure that the wider tax system operated correctly; it was not in the interests of justice generally to permit delays.

20. It was submitted that the underlying principles in this case were not technical. Regardless, an inability to articulate legal arguments did not affect the ability to make an appeal; HMRC noted that the applicant had corresponded with them when he chose to do so, as he had both written and telephoned HMRC prior to the assessment being issued. It was submitted that the applicant could question the assessment and raise arguments as to why they were not correct on his own account. In addition, it was submitted that the role of the tribunal in this hearing was not to consider the merits of the substantive matter but to determine whether the application for extension of time to appeal should be allowed.

21. Despite the communication prior to the assessment, there had been a long gap between the issuing of the assessment and the penalty on 30 June 2014. The next communication had been on 7 July 2015, with a letter from the solicitors with regard to a letter of authority. It was submitted that lack of funds would not have prevented the applicant from writing or calling to ask how to deal with the matter. Instead, he had completely failed to communicate with HMRC for over a year.

22. It was further submitted that the evidence as to the applicant’s lack of funds was very sparse, consisting of an unsigned witness statement and details of a single bank account. No statement had been made on oath to the effect that this was the applicant’s only bank account, for example. It was submitted that the financial position should not be the determining factor in any case, as the applicant could have taken other action.

23. It was submitted that the consequences to HMRC of extending the time limit should not be underestimated; it would cause a diversion of funds to have to deal with the substantive appeal. The fact that other cases on similar facts had not yet been decided should not be a green light to ignore time limits. It was submitted that to allow an extension of time because other cases were still being heard would create a difficult precedent in general.

35 **Discussion**

24. In considering whether or not to allow the appeal in this case to proceed out of time, the Tribunal are bound in the first instance to apply the overriding objective set out in Rule 2 of the Tribunal Rules, to deal with cases fairly and justly.

25. With that in mind, the decision whether or not to give permission to bring a late appeal is then principally a balancing exercise considering the questions set out in the

decision of Morgan J in the Upper Tribunal case of *Data Select Limited v Revenue & Customs Commissioners* [2012] UKUT 187 (TCC). (at paragraph 33):

(1) What is the purpose of the time limit?

(2) How long was the delay?

5 (3) Is there a good explanation for the delay?

(4) What will be the consequences for the parties of an extension of time?

(5) What will be the consequences for the parties of a refusal to extend time?

10 26. The *Data Select* decision also held that in an application for an extension of time to make an appeal pursuant to a statutory provision “the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r3.9, is the correct approach to adopt” (paragraph 37 of the decision).

15 27. CPR r3.9 requires that “the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need for litigation to be conducted efficiently and at proportionate cost; and to enforce compliance with rules, practice directions and orders.”

20 28. The application of CPR 3.9 has been considered in a number of cases, most recently in the Court of Appeal decision in *BPP Holdings v The Commissioners for Her Majesty’s Revenue and Customs* [2016] EWCA Civ 121.

29. In the *BPP Holdings* case, the court held (at paragraph 37 and 38) that they could:

25 ... detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and ..., it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness ... The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular
30 case but also the impact of the non-compliance on the wider system ...

30. With the comments in *BPP Holdings* in mind, turning to the questions set out in *Data Select*:

Purpose of the time limit

35 31. There was no particular disagreement that the purpose of time limits is as set out in cases such as *John O’Gaunt* where the judge noted that (para 21):

there is no dispute that the time limits laid down by parliament are there in the public interest to promote legal certainty and security, and that the default position is that they are to be respected unless there is good reason to the contrary

32. Similar points are, of course, made in *Data Select* and *BPP Holdings*. Accordingly, extension of time limits should be exceptional, rather than the rule.

Length of the delay

5 33. The assessment was issued on 30 June 2014; the deadline for the appeal was therefore 30 July 2014. The appeal was submitted on 29 October 2015, almost 15 months after the appeal deadline. This is clearly a significant and serious delay.

Explanation for the delay

10 34. The explanation given for the delay is that the applicant could not afford legal representation earlier, although he had initially instructed solicitors when HMRC first advised him that an assessment and penalty would be issued.

15 35. Limited information as to the applicant's finances has been provided and, in any case, an applicant's financial position cannot be determinative. There is no requirement for an appellant to be legally represented in bringing an appeal before this tribunal: there has been no indication that, for example, he sought pro bono assistance.

36. It was accepted that the applicant could have appealed in person; however, it was submitted on his behalf that the issues in the substantive case are relatively technical and that the applicant was not sufficiently educated to be able to deal with them.

20 37. Regardless of the technicalities of the matter, there has been no explanation as to why the applicant could not have continued to communicate with HMRC or otherwise obtained advice as to how to proceed to ensure that the time limits were met. The applicant had been advised by solicitors at the time the assessment was issued, and presumably could have asked them what his options were when they informed him that they were unable to continue to act.

38. Accordingly, I do not consider that it has been shown that a lack of funds for representation is a reasonable excuse for the delay in bringing this appeal.

Consequences of an extension of time

30 39. Clearly, an extension of time would potentially benefit the applicant, allowing him to bring his appeal.

40. It has been submitted for the applicant that an extension of time will not prejudice HMRC, as there is a prima facie case and similar cases are being appealed to the Upper Tribunal, so that the matter should not be regarded as closed.

35 41. The question of merit of the prima facie case was raised in *Elnagy*, as set out in the applicant's submissions. This tribunal is not bound by the decision in *Elnagy* but I note in any case that the decision in that case considered that the applicants had a

prima facie case because statutory requirements had clearly been exceeded by the respondents and also granted the extension of time because the applicants had been unaware of their right of appeal and had apparently been misled by their advisers.

5 42. The circumstances in this case are clearly different: the evidence provided and the state of case law do not indicate such a clear prima facie case although that same evidence does not indicate however that the case is not without merit. It has not been suggested that the applicant was unaware of his right of appeal, or that he was misled by advisers.

10 43. On the basis of the recent case law discussed in submissions and the information provided, this case seems neither very strong nor very weak and so I have concluded that no significant weight for or against the extension of time should be given to the strength or otherwise of the applicant's case in the substantive appeal.

15 44. Nevertheless, I do not consider that the fact that there are similar cases which may be appealed should be regarded as meaning that HMRC cannot be entitled to regard the matter as closed, nor should that fact mean that time limits can be breached.

20 45. The applicant submitted that the statutory provisions permitting late appeals also mean that HMRC should not be entitled to regard a matter as closed; I do not agree. Such a position would be clearly contrary to the purpose of the time limits which is, as noted above, to promote legal certainty; that is, to provide assurance that a matter is closed after the time limits expire.

Consequences of a refusal to extend time

25 46. The submissions in respect of the applicant's financial position are noted, but payment of the duty and penalty is a necessary consequence of a failure to appeal in time without no reasonable reason for the delay.

47. It has been submitted on behalf of the applicant that it would be unreasonable for HMRC to be entitled to a potential windfall as a result of a technical failure by the applicant, that the procedural rules should not permit a potential misapplication of the law in a case where the legal principles are not settled.

30 48. I do not consider that this is a sufficient reason for extending time to appeal, which should be the exception rather than the rule as was made clear in *Data Select* and other cases. As stated in *BPP Holdings*, "the interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system". To permit an extension of time of more than a year
35 because there is potential legal uncertainty in the subject matter of the substantive appeal would have a significant impact on the wider system and not just on the parties involved in this case.

Decision

49. Considering the various questions in *Data Select*, and all the circumstances of the case, I conclude that the statutory deadline for making an appeal should not be extended in this case. This appeal is therefore struck out on the basis that it is made out of time under Rule 20 of the Tribunal Rules.

50. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 24 OCTOBER 2016