



Neutral Citation: [2024] UKFTT 00182 (TC)

Case Number: TC09096

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video/telephone hearing]

Appeal reference: TC/2023/01163

Application for permission to bring late appeal - VAT – s73 assessment & Sch 41 penalty – appeal almost 32 months late – Appellant claimed not to understand and not required to register for VAT – caselaw all decided pre-Covid19 and lockdown – delay very serious and very lengthy – Tribunal bound by Martland guidance – application dismissed

Heard on: 19 February 2024

Judgment date: 26 February 2024

Before

**TRIBUNAL JUDGE ALASTAIR J RANKIN MBE
MR JOHN WOODMAN**

Between

RECEP ACAR

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Ensar Umur of Remedy Legal Services (Birmingham) Ltd

For the Respondents: Ms Anne Raggatt, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The form of the hearing was with the consent of the parties by video using the Tribunal video hearing system. The documents to which we were referred were an electronic Hearing Bundle containing 259 pages, a Pre-decision letter from HMRC dated 3 March 2020, a Revised Turnover document and a Revised Rolling 12-month document.
2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
3. The Appellant by way of a Notice of appeal dated 15 March 2023 appealed against a decision by HMRC dated 22 July 2020 to assess him under section 73 of the Value Added Tax Act 1994 (VATA 1994) to VAT amounting to £69,094.00 in respect of the period 1 December 2014 to 31 October 2017 and against a Penalty for Schedule 41 Finance Act 2008 (FA 2008) of £55,275.20 issued on 16 December 2020.
4. The letter from HMRC dated 22 July 2020 clearly informed the Appellant that if he wanted a review he should write to a named individual at HMRC “within 30 days” and if he wished to appeal to this Tribunal his appeal must be received by the Tribunal within 30 days. However, due to Covid-19 HMRC allowed an additional three months to appeal decisions.
5. On 21 August 2020 HMRC sent a letter to the Appellant with factsheets FS13 (Compliance checks: publishing details of deliberate defaulters) and FS14 (Compliance checks: managing serious defaulters). On 16 October 2020 the Appellant provided an account statement from 1 April 2014 to 31 October 2017 from N & B Foods Limited. HMRC had originally requested the invoices in October 2019 but as the information was not forthcoming the decision had been issued on 22 July 2020.
6. On 12 November 2020 HMRC Officer Purohit informed the Appellant that the documents would be reviewed and a reply would be sent by 11 December 2020. On 15 December 2020 Officer Purohit informed the Appellant that the decision remained unchanged following the receipt of the documents on 16 October 2020 and on 16 December 2020 the Schedule 41 penalty was issued to the Appellant.
7. On 25 December 2020 the Appellant wrote to HMRC offering £600 as full and final settlement. On 29 January 2021 Officer Purohit informed the Appellant that she was unable to accept £600, provided the contact for HMRC’s debt management and reminded the Appellant that he could appeal against the penalty. Officer Purohit also confirmed that the VAT registration checks were now completed.
8. On 28 April 2022, a letter was received from Mr Ensar Umur of Remedy Legal Services (Birmingham) Ltd informing HMRC that his client wished to appeal the penalty and asking for all HMRC files including all invoices from N & B Foods. On 7 July 2022 Officer Dhinsa sent a form 64-8 to Remedy Legal Services (Birmingham) Ltd to be completed. No response was received.

THE LEGISLATION

9. Section 73 of VATA 1994 allows HMRC to make an assessment where either no VAT return has been submitted or the return submitted is incorrect or incomplete. Section 83(1) provides a right of appeal to this Tribunal against various matters, including VAT assessments.

10. Section 83C (1) VATA 1994 provides for a 30-day time limit within which to request a review of an appealable decision while section 83D allows for HMRC to extend the time limit within which to request a review.

11. Section 83G(6) VATA 1994 provides that, where no review has been requested, or HMRC have agreed to undertake a review, an appeal may be made out of time if this Tribunal gives permission to do so.

12. Section 98 VATA 94 provides for valid service of notices by post to a person's last or usual residence or place of business.

13. Schedule 41 to FA 2008 provides for penalties for failure to notify HMRC. Paragraph 17 of Schedule 41 provides a right of appeal against penalty notices issued under Schedule 41. Paragraph 18(1) provides that penalty notice appeals shall be treated in the same way as an appeal against an assessment of the tax concerned.

CASELAW

14. The approach to compliance with time limits when commencing an appeal to this Tribunal has been considered in detail in the case of *William Martland v The Commissioners for HM Revenue and Customs* [2018] UKUT 0178 (TCC) ("Martland") which concerned an appeal to the Upper Tribunal against a refusal by the First-tier Tax Tribunal to grant permission to make a late appeal. The Upper Tribunal in *Martland* discussed the leading case law and confirmed that the three-stage process in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 ("Denton") should be applied by this Tribunal when considering whether it should allow a late appeal to be commenced. In *The Commissioners for Her Majesty's Revenue & Customs v Websons (8) Limited* [2020] UKUT 0154 (TCC) ("Websons (8)") the Upper Tribunal confirmed that *Martland* still applies.

15. The Upper Tribunal, in *Martland* stated the starting point for considering applications to allow a late appeal is:

"29...the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission."

16. In *Websons 8* the Upper Tribunal stated:

"45. The need to give particular importance to the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected was emphasised by the Upper Tribunal in *HMRC v Hafeez Katib* [2019] 0189 UKUT (TCC) where it found at [17] that the FTT made an error of law in that case "in failing to... give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion".."

17. The Upper Tribunal in *Martland* confirmed the three-stage process this Tribunal should follow when considering if an out of time appeal should be permitted:

"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. ...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."

EVIDENCE ON BEHALF OF THE APPELLANT

18. The reason for the Appellant's late appeal were stated to be as follows:

"The Appellant initially received HMRC Notices during lockdown and wrote and emailed the HMRC telling them that he wished to appeal and asked them to review. The Appellant only received acknowledgment from HMRC of his correspondence however received no further communication until 10 days ago. As far as the Appellant is concerned, he has appealed within the time limits."

19. The grounds for the Appellant's appeal were stated to be as follows:

"1. The Appellant does not fully understand the HMRC decision of tax and penalties. It is not clear which amount is tax, which the Appellant disputes, and which amount is for penalties.

2. The Appellant submits that his business was never required by law to register for VAT, if the HMRC decision relates to the same, therefore he is not liable to pay tax or pay late filing penalties or failure to disclose.

3. The Appellant submits that his account of events and explanations were not taken into account by the HMRC adequately when they made their decisions."

20. Mr Umur advised the Tribunal that there was no delay by his client. During the Covid-19 epidemic and lockdown it had not been possible to log on to the Tribunal's website. He had tried to do so on several occasions.

21. Secondly Mr Acar and Mr Umur found HMRC's correspondence confusing. Mr Acar, when he telephoned to HMRC thought he was appealing the assessment.

22. Thirdly Mr Umur informed the Tribunal that Mr Acar's accountant had not given any advice to him.

23. Mr Umur pointed out to the Tribunal that at paragraph 29 the Upper Tribunal in *Martland* had stated that there was no requirement that the circumstances must be exceptional before the FTT can grant such permission. (see paragraph 15 above). The overriding objective of this Tribunal was for justice and fairness. Mr Umur claimed he had requested information from HMRC in a letter dated 28 April 2022 but this had not been forthcoming.

24. Finally Mr Umur stated that Mr Acar did not have to register for VAT and that if his appeal was successful there would be no harm to anyone else.

EVIDENCE ON BEHALF OF HMRC

25. Ms Raggatt referred the Tribunal to the letter dated 22 July 2020 which imposed the assessment of £69,094.00 and in particular to the fact that it stated that a request for a review must be in writing to HMRC within 30 days and an appeal to this Tribunal must be received by this Tribunal within 30 days. No written request for a review had been received by HMRC until Mr Umur wrote to HMRC on 28 April 2022.

26. Mr Acar had written to HMRC on 25 December 2020 offering to pay £600.00 towards the penalty amount of £55,275.20 but did not mention appealing the penalty.

27. HMRC had responded by letter dated 29 January 2021 advising Mr Acar that they could not accept the £600.00 offered and if he wished to appeal to this Tribunal he should follow the details as explained in the penalty assessment letter.

28. Ms Raggatt also referred the Tribunal to letters from HMRC dated 11 August 2022, 12 September 2022 and 27 September 2022 all addressed to Mr Acar informing him that he owed at least £124,670.69 including interest and that these should have alerted him and Mr Umur that his appeal was not progressing. However, the Tribunal pointed out to Ms Raggatt that these three letters were all addressed to Mr Acar at an address that he had left in February 2018.

29. HMRC had sent a further letter to Mr Acar, correctly addressed, on 27 January 2023 advising him that he owed £124,568.11 including interest yet Ms Raggatt pointed out that the Notice of appeal was not received until 15 March 2023.

DISCUSSION

30. Adopting the three stage approach recommended by the Upper Tribunal in *Martland*, the appeal against the decision dated 22 July 2020 was notified to the Tribunal almost 32 months after the expiration of the statutory time limit and even if the additional three months allowed due to the Covid-19 epidemic is taken into consideration it was still nearly two and a half years late. Mr Acar did not claim that he did not receive the decision letter. The decision to assess him for £69,094.00 was confirmed by HMRC in their letter to him dated 15 December 2020.

31. The penalty notice issued on 16 December 2020 and confirmed by a Manual payment advice dated 23 December 2020 both of which were also received by Mr Acar as he thanked HMRC for their “well timing” in his response dated 25 December 2020 in which he also wished HMRC a Merry Christmas.

32. Mr Acar was again advised by HMRC in their letter dated 29 January 2021 that if he wished to appeal either the assessment or the penalty he should appeal to the tribunal and “please follow the details as explained in the penalty assessment letter issued to you”. If the Tribunal was to consider the 30 day time limit only started when this letter was issued the Notice of appeal was over two years out of time. If the Tribunal were to decide the time limit started to run from 27 January 2023 when HMRC again wrote to Mr Acar the Notice of appeal was still outside the 30 day time limit.

33. The Tribunal considers the delay in submitting the Notice of appeal to be both very serious and very significant.

34. Mr Umur claimed he had been unable to access the Tribunal's website during the whole of the Covid-19 epidemic and the various lockdowns. The Tribunal is unable to accept this claim as the members of the Tribunal have dealt electronically with numerous matters during the Covid-19 and lockdowns. The Tribunal was not given any evidence of Mr Umur's involvement on behalf of Mr Acar prior to his letter to HMRC dated 28 April 2022. Even if the Tribunal's website was down during this period it was not down for the whole of the period from 22 July 2020 to 15 March 2023.

35. The Tribunal finds that no adequate reason has been given for the delay.

36. Finally, considering "all the circumstances of the case" Mr Umur did not produce any evidence to contradict the claim by HMRC that Mr Acar's turnover during the period 1 December 2014 to 31 December 2017 warranted an assessment of VAT amounting to £69,094.00.

DECISION

37. Several cases already referred to indicate that this Tribunal should presume that time limits should be honoured though the Upper Tribunal in *Martland* at [29] stated "there is no requirement that the circumstances must be exceptional before the FTT can grant such permission."

38. Mr Umur in his submission to the Tribunal pointed out that the various cases dealing with the time limit were all decided before the Covid-19 epidemic and lockdown. This Tribunal is obliged to follow the advices given by the Upper Tribunal in the various cases already referred to – *Denton, Martland, Websons 8 and Katib* – and does not have the authority to override existing authorities nor does this Tribunal consider that the Covid-19 epidemic and lockdown provide a reason for doing so if we did have authority.

39. Having decided that the delay in submitting the Notice of appeal was both very serious and very lengthy, having found no good explanation for the delay and having received no evidence to indicate that Mr Acar might be successful in his appeal the Tribunal has decided to dismiss the application for permission to appeal out of time.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

40. 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.

**ALASTAIR J RANKIN MBE
TRIBUNAL JUDGE**

Release date: 26th FEBRUARY 2024