



Neutral Citation: [2024] UKFTT 00884 (TC)

Case Number: TC09304

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video/telephone hearing]

Appeal reference: TC/2022/13454

LATE APPEAL – Martland test applied – application allowed in part

Heard on: 18 September 2024

Judgment date: 1 October 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

METER SQUARED LIMITED (IN LIQUIDATION)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Nicholls, instructed by the appointed liquidator Begbies Traynor (Central) LLP

For the Respondents: Mr Corps, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was a video hearing using Microsoft Teams. A face-to-face hearing was not held because it was expedient not to do so. The documents to which I was referred were contained in a bundle prepared by HM Revenue & Customs (**HMRC**) of 369 pages and a small bundle submitted by the director of Meter Squared Ltd (**Appellant**) of 9 pages.
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 hearing was listed to consider an application made by the Appellant to bring an appeal relating to VAT assessments issued on 16 September 2019 by HMRC for periods 08/15, 05/16, 11/16 – 02/19. The appeals were lodged with the Tribunal and the associated application to bring them late was made on 20 September 2022.
4. For the reasons I explained in an ex tempore judgment and as set out below I find that the appeals for the assessments for periods 02/18 – 11/18 (**Allowed Periods**) inclusive were not brought out of time. I refused to admit the appeal in respect of periods but refused the application in respect of periods 08/15, 05/16 11/16 – 11/17 and 02/19 (**Other Periods**).

BACKGROUND

5. Following submission of the period 08/18 VAT return which showed a repayment to the Appellant, HMRC notified that they wished to undertake a compliance check into the return. HMRC encountered considerable difficulties in obtaining the information necessary to undertake the check. HMRC had to issue a formal notice to produce documents pursuant to Schedule 36 Finance Act 2008, those notices were ignored and the Appellant was penalised for its failure to comply with them. Finally, on 21 February 2019 the Appellant supplied some documentation.
6. Despite the provision of some information and documentation, following a visit on 18 July 2019 and further correspondence HMRC formed the view that the Appellant's VAT returns both the Allowed and Other Periods contained inaccuracies. In particular there were discrepancies between the annual accounts and the VAT returns for the years ended 30 November 2017 and 18, missing purchase invoices, inappropriate claims to input tax in respect of expenses incurred by sub-contractors and claims to input tax on private expenditure. Assessments were raised on 16 September 2019 and duly notified to the Appellant. The letters of assessment and the computer-generated notifications all informed the Appellant of their right to request a review of the assessments or to make an appeal to the Tribunal.
7. On 3 October 2019 the Appellant was also notified that HMRC proposed to issue penalties which were then duly issued on 19 November 2019. Further penalties were issued on 20 January 2020.
8. On 15 October 2019 HMRC received an email from the Appellant's bookkeeper. The email:
 - (1) Explained that certain works carried out in period 11/18 related to a property in France, the Appellant contended that such suppliers were properly zero rated and had therefore not been included in the return;

- (2) Accepted that input tax claims in respect of a number of invoices in periods 05/16 and 02/19 had been incorrectly made;
 - (3) Provided evidence of input tax entitlement in respect of electricity supplies received from Eon;
 - (4) Explained that there was a discrepancy between the 2018 annual accounts and declared turnover because the accounts had grossly miststaeed work in progress for that year. HMRC were informed that new accountants had been appointed and it was proposed that the accounts would be restated and provided to HMRC once prepared.
9. HMRC amended the assessments allowing input tax recovery in respect of the Eon invoices. HMRC did not respond formally on either of the explanations provided regarding the work to the French property or as regards the proposed restatement of the 2018 accounts.
 10. There was no further correspondence between the parties until June 2022. On 15 August 2022 restated accounts and a revised corporation tax assessment was sent by the Appellant to HMRC.
 11. Following that correspondence, and in accordance with the guidance provided by HMRC, on 22 September 2022 the Appellant submitted its appeal and associated application for the appeal to be admitted out of time.
 12. The Appellant entered creditors' voluntary liquidation on 7 October 2022.
 13. HMRC object to the application to bring an out of time appeal and, request further and better particulars should the appeal or any part of it be admitted.

TEST TO BE APPLIED FOR ADMITTING APPEAL OUT OF TIME

14. The test to be applied by the Tribunal in connection with a an application to bring an out of time appeal is as provided by the Upper Tribunal (“UT”) in the case of *Martland v HM Revenue and Customs* [2018] UKUT 178 (TCC) (“*Martland*”).
15. The UT considered the relevant authorities of the Court of Appeal and Supreme Court and the appropriate test when considering a failure to make an in time appeal. The UT summarised the approach taken in the authorities:

“[40] In *Denton*, the Court of Appeal was considering the application of the later version of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to “restate” the principles applicable to such applications as follows (at [24]):

“A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' ... If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b) in Rule 3.9(1)]”

[41] In respect of the “third stage” identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) “are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered.

[42] The Supreme Court in *BPP* implicitly endorsed the approach set out in *Denton*. That case was concerned with an application for the lifting of a bar

on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FTT

[43] ... The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders".
..."

16. The UT then concluded that a similar approach should apply to the Tribunal.

17. When applying the *Martland* test it is clear, following the guidance provided by the UT in *Muhammed Hafeez Kantib v HMRC* [2019] UKUT 189 (TCC) (*Kantib*) that the acts and failures of a representative are to be assimilated to those of the appellant save in exceptional circumstances and/or where the failure of the representative can be reasonably excused.

PARTIES SUBMISSIONS

18. The Appellant, though its liquidator, invites me to allow the appeal to be admitted out of time. They accept that a delay of almost three years is both serious and significant with the consequence that the first stage of the *Martland* test was properly determined against them.

19. The explanation for the delay was reliance on the previous accountant who had not brought the appeal and seriously delayed in the restatement of the 2018 accounts. It appeared implicit that the Appellant accepted, in light of *Kantib*, that such an explanation did not provide an adequate reason for the delay with the consequence that if the appeals were to be admitted it would be on the basis of the balancing exercise to be carried out at stage 3 of the *Martland* test.

20. As regards stage 3 the Appellant accepted that the assessments had been raised in exercise of HMRC's best judgment but contended that they were overstated and, if permitted to challenge the assessments, penalties and certain decisions of HMRC regarding the construction industry scheme, it was possible, if not likely, that HMRC would not be a creditor and a fairer distribution of the limited assets would be achieved. The Appellant considered that despite it now being 5 years since the assessments were issued there was no serious prejudice to HMRC, rather HMRC would remain a creditor for sums not properly due.

21. HMRC contend that the period of delay is significant and serious and that there is no justified explanation for the delay. As regards the balance of prejudice HMRC reinforce the requirement that weight should be given to the need to enforce statutory time limits and that litigation be conducted efficiently and at proportionate cost. HMRC emphasised that a considerable period had elapsed since the assessments had been issued and HMRC were entitled, in the interests of all taxpayers, not to be required to divert resources to defending assessments which should be considered to be final.

APPLYING MARTLAND

22. Before considering the *Martland* test I considered it appropriate to give some careful consideration to the email of 15 October 2019 in which the Appellant provided an explanation for why the assessments for periods 02/18 – 11/18 were overstated both by reference to supplies they considered to be zero rated and due to errors in the valuation of work in progress in the accounts. The email did not state that it was a request for review. It did attach some evidence that a property referenced was located in France and promised was that the accounts for the period to 30 November 2018 would be restated and provided as soon as they were available (they were, in the end, provided nearly 3 years later).

23. I considered, maybe generously, to view that letter might be reasonably inferred to be a valid request for review. It challenged the assessments, provided an explanation for why they were wrong (albeit without material substantiation) and was made within 30 days of the date on which the assessments were raised.

24. When HMRC accepted the Eon invoices they did not formally refuse to consider the other points made in the email – those points were somewhat left hanging. Whilst the Appellant’s delay in providing further information was inexcusable it does not change my view that there had been a challenge to the assessments of which HMRC were aware, such that HMRC could not properly have concluded that the matter was final. HMRC could have closed the door by refusing to consider the points raised in absence of further information or explanation, but they did not do so. On the basis that there was a request for review which had not been actioned by HMRC I do not consider that the appeals in respect of the Allowed Periods are actually out of time and the appeals in respect of them should be allowed to proceed, subject to the directions issued with this decision.

25. As regards the Other Periods, as indicated above the Appellant accepts that the delay was serious and significant and that there is no reasonable explanation for it (or not least one which, in light of *Kantib* I can accept). I therefore have to consider all of the circumstances.

26. In doing so I have had regard to the following facts and matters:

(1) When undertaking the balancing exercise particular importance should be given to the requirement to enforce compliance and for efficient litigation.

(2) The Appellant was appropriately notified of its right to ask for a review or lodge an appeal.

(3) The email of 15 October 2019 is evidence that the Appellant was aware of its rights.

(4) The email did not address specifically the assessments for the Other Periods and it is therefore reasonable for HMRC to have concluded that the Appellant accepted those assessments such that a challenge to them now puts an increased burden on HMRC at the expense of other taxpayers.

(5) A refusal to reinstate will deprive the Appellant of a right to challenge the assessments for those periods when there might have been a legitimate challenge to them.

27. Given my conclusion that the email of 15 October 2019 was sufficient to “rescue” the Allowed Periods I consider it reasonable, and in accordance with the overriding objective, to conclude that the Appellant’s failure to address the Other Periods means that they should not be allowed to do so now. For the Other Periods the application is therefore refused.

28. I note that the Tribunal has not received any appeal in respect of the penalties nor concerning construction industry scheme payments. I therefore have no jurisdiction to even consider whether such appeals should be accepted but note that as any appeals in respect of the penalties will now be more than 5 years late it is highly unlikely that a late appeal would be admitted.

29. As a post-script however, Mr Corps confirmed that in the event that the appeal in respect of the assessments for the Allowed Periods succeeds in whole or in part, the quantum of the penalties will be adjusted to reflect the revised assessments despite there being no appeal against the penalties.

HMRC APPLICATION FOR FURTHER AND BETTER PARTICULARS

30. In the event that the appeal were admitted HMRC sought further and better particulars of the appeal.

31. The grounds of appeal provided with the notice of appeal do not satisfactorily set out the basis on which the appeal is brought. However, taken with the email of 15 October 2019, and limited to the periods 02/18 – 11/18 there is more clarity.

32. As communicated in the hearing I am prepared to allow the appeals in respect of the Allowed Periods to proceed on the basis that the Appellant accepts that the assessments were raised in exercise of HMRC’s best judgment and that the challenge to them is limited to an argument that the assessments are overstated because 1) supplies subject to the assessments should properly be zero rated and/or 2) turnover in the accounts to 30 November 2018 as originally prepared was overstated and should not therefore form the basis of further assessment to VAT. I have therefore made directions requiring the Appellant to provide further and better particulars of those grounds together with the evidence to support them.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

33. 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.

**AMANDA BROWN KC
TRIBUNAL JUDGE**

Release date: 01st OCTOBER 2024