TC04123

Appeal number: TC/2014/01271

INCOME TAX – VAT – Procedure – Application for a late appeal – Whether appeal against income tax assessments subject to a s 54 Taxes Management Act 1970 agreement – Data Select v HMRC applied – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KEVIN MARSHOM **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
MR SIMON BIRD

Sitting in public at Eastgate House, Newport Road, Cardiff on 31 October 2014

Martyn Arthur, of Martyn F Arthur Forensic Accountant Limited, for the Appellant

Christine Cowan and Elizabeth McIntyre, of HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by Mr Kevin Marshom for permission to make late appeals against direct tax assessments, a closure notice, VAT assessments and penalties.

2. At the commencement of the hearing Mrs Christine Cowan, who appeared for HM Revenue and Customs ("HMRC"), explained that the VAT assessment issued on 27 July 2011 included an assessment, in the sum of £7,042, in respect of Mr Marshom's 07/07 VAT accounting period and although the assessment had been made within the statutory time limit Mr Marshom had not received notification until later and therefore HMRC were withdrawing that assessment together with the associated misdeclaration penalty for that period. Consequently the application concerns the following direct tax and VAT assessments and penalties:

(1) Notices of further assessments for 2005-06, 2006-07 and 2007-08 issued by HM Revenue and Customs ("HMRC") on 24 July 2012;

(2) Closure Notice for 2008-09 issued by HMRC on 24 July 2012;

(3) Penalty Determinations for 2005-06, 2006-07 and 2007-08 issued by HMRC on 31 July 2012;

(4) Notices of amended further assessment for 2005-06, 2006-07 and 2007-08 issued by HMRC on 29 January 2013;

(5) Penalty Determinations for 2005-06, 2006-07 and 2007-08 issued by HMRC on 29 January 2013;

(6) Notice of amended penalty assessment for 2008-09 issued by HMRC on 29 January 2013;

(7) VAT assessment in VAT accounting period issued by HMRC on 27 July 2011; and

(8) VAT assessment in respect of the VAT issued by HMRC on 30 August 2012.

3. Under s 31A of the Taxes Management Act 1970 ("TMA"), in direct tax cases notice of an appeal must be given "within 30 days after the specified date" which, in the present case is the date on which the assessments were made. Similarly for VAT purposes, s 83G of the Value Added Tax Act 1994 ("VATA" provides for a 30 day period in which an appeal may be made. However, an appeal may be made after 30 days if the Tribunal gives permission to do so (see s 49(2)(b) TMA and s 83G(6) VATA).

4. In this case Mr Marshom's Notice of Appeal to the Tribunal is dated 5 March 2014.

5. As different circumstances apply to the direct and indirect tax appeals it is appropriate to consider each in turn.

6. Direct Tax Assessments/Penalties. On 26 October 2010 HMRC commenced an enquiry into Mr Marshom's 2008-09 self-assessment tax return. During the course of the enquiry HMRC corresponded with Wandle House Associates Chartered Accountants, Mr Marshom's then accountants, and all letters from HMRC were copied to Mr Marshom. During the course of the enquiry HMRC attended a meeting with Mr Marshom, his father and a Mr Carter-Pegg FCA of Wandle House Associates at the accountant's office. Following further correspondence the enquiry was closed by the issue of a closure notice, under s 28A TMA, on 24 July 2012 and the issue of estimated assessments for 2005-06, 2006-07 and 2007-08 together also on 24 July 2012. Penalty Determinations for 2005-06, 2006-07 and 2007-08 were issued by HMRC on 31 July 2012.

7. On behalf of Mr Marshom Wandle House Associates appealed against the closure notice on 3 August 2012 and the assessments and penalties on 20 September 2012. Further correspondence ensued and in a letter of 4 December 2012 Mr Bullock, HM Inspector of Taxes, wrote to Wandle House Associates setting out his:

> "… computations for 2005-06 to 2008-09 of:
>
> (a) The revised assessable profits to include the additions proposed.
>
> (b) The additional Income Tax and Class 4 national insurance contributions.
>
> (c) Computations of the interest charges that arise. This computes interest assuming payment in full by 1 January 2013. …
>
> (d) The revised penalties based on the sums on the figures at (a) above.
>
> (e) A summary of the total additional sums due."

8. Having received this letter and spoken to Mr Marshom, Mr Carter-Pegg (of Wandle House Associates) told Mr Bullock, of HMRC, during a telephone conversation on 18 December 2012, that Mr Marshom agreed with the proposed additions of further liability as set out in the 4 December 2012 letter. Therefore, on 29 January 2013 Mr Bullock wrote to Mr Marshom as follows:

> "Following my conversation with your accountant on 18 December 2012 he agreed with the proposals that I made in my letter of 4 December 2012 to make amendments to your returns for the years 2005-06 to 2008-09."

Copies of the revised notices of assessment and penalty determinations were enclosed with the letter and copies of the letter and enclosures were also sent to Mr Carter-Pegg. The covering letter sent to Wandle House Associates and all assessments referred to the appeal being settled under s 54 TMA. Additionally the assessment also stated:

> **What to do if you disagree**
>
> If you have changed your mind and wish to withdraw from the agreement settling the appeal, you need to write to us within 30 days of the date of this letter, telling us why.

9. For HMRC, Mrs Cowan submitted that is was not open for Mr Marshom to appeal against the direct tax assessments and penalties as these appeals had been settled by agreement and were therefore final and conclusive. She relied on s 54 TMA which provides that where an appeal settled by agreement it is treated:

> … as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

10. Mr Martyn Arthur, who appeared for Mr Marshom, accepted that where an appeal had been settled by agreement it could not be reopened but contended that in this case Mr Carter-Pegg did not have the authority to reach an agreement on Mr Marshom's behalf and, as such, no settlement had been reached.

11. With regard to the issue of Mr Carter-Pegg's authority to reach a settlement with HMRC on behalf of Mr Marshom we find ourselves in an almost identical situation to Bingham LJ (as he then was) who giving the judgment of the Court of Appeal in *Inland Revenue Commissioners v West* [1991] STC 357 said, at 361:

> "Speaking for myself, I must confess to very serious scepticism as to whether [an accountant] lacked authority to act as he did, since on the face of it it would seem an astonishing thing for an experienced professional accountant to write letters quite clearly claiming to have authority which he entirely lacked. It is, however, unnecessary to reach a final opinion on the matter because the Crown relies on an alternative argument to the effect that whether or not [the accountant] actually had authority, he was certainly, so it says, "held out" to the inspector as having authority and the inspector acted on that basis."

Similarly in the present case while we would have some serious scepticism as to the assertion that Mr Carter-Pegg, a fellow of the Institute of Chartered Accountants of England and Wales, did not have express authority to act as he did we have no hesitation finding that, as can be seen from the correspondence and the fact that a meeting was held at the offices Wandle House Associates attended by Mr Marshom, that Mr Carter-Pegg was held out by Mr Marshom as having the authority to act on his behalf in his dealings with HMRC.

12. Accordingly we find that the direct tax appeals have been settled by agreement under s 54 TMA and consequently should be treated as if "the Tribunal had determined the appeal". Therefore, as these appeals have been determined and cannot be reopened it follows that an application for permission to appeal out of time is wholly inappropriate and cannot succeed.

13. We therefore dismiss the application in respect of the direct tax assessments and penalties

VAT Assessments

14. Unlike the direct tax assessments there has been no agreement under s 85 VATA, the VAT equivalent of s 54 TMA, in respect of the VAT assessment. Therefore as the appeals have not been determined it is open for us consider whether permission should be granted for an extension of time to enable them to be made. Although we were not referred to *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC), given the decision of Judge Bishopp in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC), we have adopted the same approach to the application for an extension of time as set out by Morgan J in that case where he said, at [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."

15. As Judge Bishopp said in the *Leeds City Council* case, at [24] the purpose of the time limit;

> "… is to require a party asserting a right to do so promptly, and to afford his opponent the assurance that, after the limit has expired, no claim will be made."

16. In this case there was a significant delay between the date of the assessments and date of appeal which can be measured in years rather than months or weeks, a breach not of any rule, practice directions or order but an Act of Parliament which requires appeals to be made within 30 days

17. As for the reasons for the delay, Mr Arthur submitted that although his firm had notified that it been instructed to act for Mr Marshom on 10 July 2013 it had not been possible to submit an appeal before 5 March 2014 as sufficient information had not been provided by HMRC to enable an appeal to be made until 26 February 2014 when "further copies" of the amended notices of the direct tax and VAT assessments were provided by HMRC.

18. However, we do not consider this to be a good reason. Although the correspondence between HMRC and Mr Arthur's firm is mainly concerned with whether there had been an agreement under s 54 TMA with regard to the direct tax assessments it is apparent from Mr Arthur's letter of 22 August 2013 that he was aware of the VAT assessments at that time. In any event Mr Marshom, who had been provided with copies of the VAT assessments, would have been aware that there were outstanding VAT assessments when he instructed Mr Arthur to represent him. In the circumstances especially given Mr Arthur's experience of dealing with cases such as this, something he emphasised before us, we consider that even if Mr Marshom was unaware of the statutory time limit Mr Arthur would have been and therefore conscious of the need for a timely appeal to the Tribunal. In summary we found there was significant delay and no good explanation for it.

19. Turning to the consequences for the parties, if the extension of time is granted Mr Marshom would be able to pursue his appeal and he will be prejudiced if an extension is refused. However, given the length of the delay there would also be prejudice to HMRC if the appeal were allowed to proceed out of time.

20. Having carefully considered all the circumstances of the case, in particular the length and inadequate explanation for the delay we dismiss the application to extend the time limit for an appeal to be made in the case of the VAT assessments.

Right to apply for Permission to Appeal

21. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 11 November 2014