[2018] UKFTT 299 (TC)

TC06529

Appeal number: TC/2017/08374

VALUE ADDED TAX – application to make a late appeal – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AIM FM LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Taylor House, Rosebery Avenue, London on 23 April 2018

Mr Ian Clayton Richardson, director of the Appellant, for the Appellant

Mr Christopher Foulkes, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is an application by the Appellant to make a late appeal to the Tribunal in relation to the Respondent's decision to deny an input tax claim. The Respondents have objected to the application and ask for the appeal to be dismissed.

Background and preliminary issues

2. On 15 June 2017 the Respondents ("HMRC") made a decision to deny the input tax claim in the sum of £1,946,180 made by the Appellant ("AIM"). This was on the basis that HMRC are satisfied that the transactions to which the input tax relates are connected with fraudulent evasion of VAT, and that AIM knew or should have known that this was the case.

3. On 27 February 2018 the First-tier Tax Tribunal dismissed the Appellant's application to make a late appeal against HMRC's earlier decisions of 27 October 2016, 19 January 2017 and 18 April 2017 which similarly deny input tax claims, in the aggregate sum of £7,380,382.60, made by AIM ("the first FTT decision"). The facts found in relation to the first FTT decision are also relevant to this decision and are referred to below in this context.

4. Mr Ian Clayton Richardson ("Mr Richardson") advised the Tribunal during the hearing that he was working with his lawyers, LGSA Solicitors ("LGSA"), to agree fee arrangements for the firm to represent AIM and that he would like an adjournment for legal representation. LGSA was been appointed to act for AIM in 2017 but did not attend the hearing on 27 February 2018 (that led to the first FTT decision) because their fee was not agreed. Mr Richardson told the Tribunal on 27 February 2018 that he was looking for new representatives and asked for an adjournment. This was refused and the hearing proceeded on 27 February with Mr Richardson representing AIM.

5. I noted that AIM had not asked for an adjournment prior to this hearing and that it had the opportunity to appoint representatives or agree a fee with LGSA prior to the hearing. It was aware of the issues given the first FTT decision and Mr Richardson's opening submission proved that he is articulate and able, as noted in the first FTT decision. The prejudice to AIM of continuing with this hearing was reduced by the fact that the events and claims relevant to the late appeal application, and the importance of the hearing of the application for the late appeal, are within AIM and Mr Richardson's knowledge and recent experience. The prejudice to HMRC if the hearing were to be adjourned would be considerable. I concluded that in these circumstances and taking account of the requirements of the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("Tribunal Rules"), it would not be in the interests of justice to adjourn the hearing.

6. Some minutes later Mr Richardson took a message on his mobile phone and advised the Tribunal that a family situation had arisen. Mr Richardson was asked if he wished to continue with his submissions on a number of occasions and confirmed that he was able to do so without further access to his mobile phone for the duration of the hearing.

Facts found

7. I find the following facts from the evidence in the Tribunal's bundle, Mr Richardson's evidence at the hearing and the witness evidence of Matthew Elms, the HMRC officer who made the decision the subject of the late appeal:

5 7.1 AIM has traded in catalytic converters, go pro cameras, SD cards, Intel servers, Sony playstations (EU spec) and silver grains/granules. In 2017 it traded in goods including metals such as copper bars and silver grain/granules.

7.2 Mr Richardson is the sole director and shareholder of the company and
10 stated that he is responsible for sales. He is a mechanical engineer with a degree. The majority of his work is carried out in meetings or on phone calls. Helen Rumsay is responsible for administration matters and is based at the company's premises at Unit 14 Whittenham Close, Slough. Demi Ponds reports to Helen Rumsay and is also based at the Slough premises. There are
15 others involved in the business at the Slough address and Mr Richardson is regularly at these premises. He suggested to HMRC on 23 June 2017 that he would like to increase the size of the Slough premise. AIM's registered office is at Kemp House, 152 City Road, London. This address is a serviced office address at which AIM rents rooms when it has meetings in London.

20 7.3 AIM was added to the MTIC Monitoring Project by HMRC with effect from 26 January 2016. Officer Elms was the allocated higher officer for AIM until 1 July 2017. The first monitoring visit was made by Officer Elms on 6 April 2016. The visit was to AIM's premises at Unit 14 Whittenham Close, Slough. During the visit Mr Richardson signed a form completed by Officer
25 Elms to notify HMRC that AIM's principal place of business was the Slough address. This was because the Kemp House address was the registered office but not the principal place of business.

7.4 Between 27 October 2016 and 22 April 2017 HMRC issued the decisions
30 dated 27 October 2016, 19 January 2017 and 18 April 2017 and VAT 655 notice of assessments pursuant to each decision.

7.5 Helen Rumsay was away from the Slough office for much of 2016 because she had complications in her pregnancy. She was only able to attend the
35 office periodically in 2017 and returned to work in 2018. This has caused difficulties in the administration of AIM's business. By October 2016 AIM was using external accountants to assist with VAT matters. As noted in the first FTT decision, AIM appointed Gilbert Tax Consultants LLP based in Leeds ("Gilbert Tax") at some time before HMRC received the form 64-8
40 on 24 May 2017. On 7 June 2017 Gilbert Tax submitted a late appeal in relation the decisions and assessment the subject of the first FTT decision referred to in paragraph 7.4 above.

7.6 On 15 June 2017 HMRC notified the decision made by Officer Elms to deny AIM's input claim for the period 02/17, the decision the subject of this appeal. The letter referred to the judgment of the European Court of Justice in the joined cases of *Axel Kittel v Belgian State* and *Belgian State v Recolta Recycling SPRL* (C439/04 and C-440/04) that a taxable person's right to deduct input tax should be refused where the person knew or should have known that it was participating in a transaction connected with fraudulent evasion of VAT. The letter stated that HMRC had undertaken an extended verification of the transactions to which the input tax claim related and they were satisfied that the transactions were connected with fraudulent evasion of VAT and that AIM knew or should have known that this was the case and accordingly the claim to input tax was denied. The letter noted the opportunity to request a review and the 30 day time limit for making an appeal. The letter was sent by 2nd class recorded post to AIM's Slough address. The letter was recorded as being signed for by Demi Ponds, a member of AIM's staff, and was therefore delivered to AIM.

7.7 On or around 22 June 2017 Office Elms issued a VAT 655 notice of assessment pursuant to the decision made on 15 June. It was sent to AIM's Slough address.

7.8 On 23 June 2017 Officer Elms visited AIM's Slough address and met with Mr Richardson and Craig Tully, a partner in Gilbert Tax. Officer Elms handed over a copy of the decision letter of 15 June 2017 in the meeting. The letter was taken by Craig Tully of Gilbert Tax. The meeting continued for some time but Mr Richardson left the room for periods of time to take phone calls.

7.9 At some time before 1 September 2017 AIM instructed LGSA to represent the company in relation to matters that included the decision the subject of this appeal. On 1 September 2017 HMRC emailed a copy of the decision letter of 15 June 2017 to LGSA, copying in AIM, as they had informed on a call that AIM had not received the decision.

7.10 LGSA wrote to HMRC on 30 October 2017 stating that none of HMRC's decision letters or assessments had been issued to the correct address because AIM's registered address is Kemp House and section 98 Value Added Tax Act 1994 requires service at the trader's registered address. HMRC responded on 31 October 2017 that the letters and notices of assessments had been issued to AIM's principal place of business. HMRC noted that its decision dated 15 June 2017 had not been appealed. On 1 November 2017 LGSA informed HMRC that AIM was not aware of HMRC's decision of 15 June 2017 until it was emailed to them on 1 September 2017.

7.11 LGSA submitted a notice of appeal against the decision of 15 June on 1 November 2017. The notice of appeal did not include a statement of truth.

7.12 HMRC have not received correspondence from LGSA since 22 November 2017. As noted in paragraph 4 above, LGSA did not attend the hearing on 27 February or this hearing.

5 **Relevant law**

8. Section 98 Value Added Tax Act 1994 ("VATA") provides that any notice, notification, requirement or demand to be served on any person for the purposes of the VATA may be served, given or made by sending it by post in a letter addressed to that person at the last or usual place of business of that person.

10 9. Section 83(1)(c) VATA provides that a taxpayer may appeal to the Tribunal against a decision in relation to "the amount of any input tax which may be credited to a person". Section 83G VATA provides that an appeal is to be made to the Tribunal before the end of the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates, or within 30 days beginning with
15 the date of the document notifying the conclusion of a review if one was required or requested. Section 83G(6) VATA provides that an appeal may be made after the end of the relevant 30 day period if the Tribunal gives permission to do so.

10. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("Tribunal Rules") provides that where an enactment provides for a person to make or
20 notify an appeal to the Tribunal, the appellant must start proceedings by sending or delivering a notice of appeal to the Tribunal within any time limit imposed by that enactment. If the appeal to the Tribunal is made later than the time specified it must include a request for the Tribunal to give an extension of time and provide the reason why the notice of appeal was not provided in time. If the Tribunal does not extend the
25 time for the notice of appeal it must not admit the notice of appeal.

11. The Tribunal must seek to give effect to the overriding objective when it exercises any power under the Tribunal Rules. The overriding objective is set out in rule 2 of the Tribunal Rules ("rule 2") as follows:

> "(1) The overriding objective of these [Tribunal Rules] is to enable the
> 30 Tribunal to deal with cases fairly and justly.
> (2) Dealing with a case fairly and justly includes—
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> 35 (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the
> 40 issues."

12. The decision of Morgan J in the Upper Tribunal in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) ("*Data Select*") sets out the five questions that the Tribunal

should ask itself when asked to extend a time limit under a provision such as section 83G VATA. These are as follows:

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?

13. In *Denton v TH White Ltd (and related appeals)* ("*Denton*") [2014] EWCA Civ 906 the Court of Appeal provided guidance on how the provisions of Civil Procedure
10 Rule ("CPR") 3.9 should be given effect by first instance judges considering an application for relief from sanctions. The new CPR 3.9, which came into force in April 2013, requires the court to consider all the circumstances of the case when considering an application for relief for a failure to comply with a rule or direction, including the need to enforce compliance with rules or directions. The Court of
15 Appeal's guidance (at paragraph 24) is that a judge should consider an application for relief in three stages. The first stage is to identify and assess the seriousness and significance of the failure to comply. The second stage is to consider why the default occurred. The third stage is to evaluate all the circumstances of the case in order to enable the court to deal justly with the application.

20 14. In *R (oao Dinjan Hysaj) v SSHD* [2014] EWCA Civ 1633 ("*Dinjan Hysaj*") Moore-Bick LJ said that "only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered" on applications for extensions of time.

25 15. In *Romasave (Property Services) Limited v HMRC* [2015] UKUT 0254 (TCC) ("*Romasave*") the Upper Tribunal considered an application to make a late appeal under section 83G VATA. It noted that the approach described by Mr Justice Morgan in *Data Select* had been endorsed in Upper Tribunal decisions, and that the three stage process in *Denton* also provides helpful guidance for tribunals. In considering the
30 length of the delay the Upper Tribunal made the following comment (at paragraph 96):

"In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

35 16. In *BPP Holdings Limited v HMRC* [2017] UKSC 55 ("*BPP*") the Supreme Court considered a number of Upper Tribunal and Court of Appeal decisions in cases that post-dated the introduction of the new CPR 3.9, including *Denton*, in order to determine whether the Tax Tribunal should follow a similar approach to that required by CPR 3.9. Lord Neuberger concluded that the guidance given by Judge Sinfield in

HMRC v McCarthy & Stone (Developments) Ltd and another [2014] UKUT 196 (TC) and by Ryder LJ in the Court of Appeal hearing of *BPP* should be adopted. This guidance is that while the CPR do not apply to tribunals, there is no justification for a more relaxed approach to compliance with rules and directions in tribunals than in courts.

Submissions

17. AIM claimed on the notice of appeal that the decisions and assessments issued by HMRC, including the decision of 15 June 2017, had not been served on AIM in accordance with section 98 VATA because they were not addressed to its registered office. The notice claims that the decision of 15 June was not received by AIM until it was served by email on 1 September 2017 and that the appeal was made within a reasonable time after the email was received.

18. AIM submits that the total amount of the VAT under appeal is substantial, being £1,946,180, and that the consequences of refusing to accept the late appeal would make the Appellant liable to meet the assessment and, if not able to do so, would be made bankrupt.

19. AIM claimed at the hearing that the reason for the late appeal is that they relied on Gilbert Tax to do whatever was necessary to appeal against the decision of 15 June 2017. Mr Richardson claims that AIM also relied on LGSA to file the appeal within the time limit and that he had not understood that LGSA had also failed to lodge the notice of appeal within the time limit until this was made clear at the hearing.

20. HMRC submit that notice of the decision of 15 June 2017 and the subsequent were served on AIM in June 2017. The appeal is seriously and significantly late and no good reason has been given for failing to abide by the statutory time limit. HMRC invite the Tribunal to refuse AIM's application to make its appeal out of time.

Discussion

21. AIM has claimed that it did not receive the decision until 1 September 2017 and that its appeal has been made within a reasonable period of time after its receipt. I have found (paragraph 7.6 above) that AIM accepted delivery of the decision letter of 15 June 2017 when the registered letter was signed for by one of its employees. Mr Richardson confirmed at the hearing that AIM's representative, Craig Tully of Gilbert Tax, took the further copy of the decision letter at the meeting held at AIM's office on 23 June 2017. This confirmed the finding in paragraph 7.8 above. Mr Richardson said that he did not read the letter until it was sent on 1 September, but he was present at the meeting on 23 June 2017 when Mr Elms explained that it related to the denial of an input tax claim for another period.

22. Although it is not relevant given my finding that HMRC's letter of 15 June 2017 was received by AIM and its representative by post and in person in June 2017, I note for completeness that there is no requirement that a decision must be sent by post to a taxpayer to its registered office, but rather that it must be notified. Section 98 VATA allows service to be made by addressing a letter to the taxpayer's usual place of

business, but it does not prescribe this method of service. In this case the notice of the decision was delivered in accordance with section 98 to the taxpayer's usual place of business in Slough and it was delivered in person on 23 June 2017.

23. I have applied the Tribunal Rules and the guidance provided in *Data Select*, *Denton* and *BPP* to the facts of the case in considering this application.

Purpose of time limit

24. The purpose of the time limit to make an appeal is to provide finality. This allows the HMRC to close their files and deal with other cases. This is in the public interest and is in accordance with the guidance provided in *BPP* (summarised in paragraph 15 above).

Length of the delay

25. The delay in this case is over three months and is therefore "serious and significant" as described in *Romasave.*

Explanation for the delay

26. I have found that AIM received the decision letter of 15 June 2017 on two occasions in June 2017. The first reason for the delay cited in the notice of appeal, that the letter was not received until 1 September 2017, is therefore not accepted.

27. At the hearing Mr Richardson sought to place responsibility for the delay in making the appeal solely on his advisers. I do not accept that this is a good explanation for the delay for following reasons.

28. Gilbert Tax took a copy of the decision letter at the meeting on 23 June 2017. Gilbert Tax was AIM's representatives at the date of the meeting and it had filed an appeal in respect of the decisions the subject of the first FTT decision earlier that month. It was therefore competent to file an appeal if it was engaged and paid to do so. The first FTT decision records that Mr Richardson became concerned about their abilities, but at this hearing Mr Richardson said that the person dealing with their matters at Gilbert Tax was away in April and May 2017 and that was the reason for the delay and why he decided to appoint LGSA. As Mr Tully of Gilbert Tax attended the meeting in June 2017 this cannot explain the delay or why there was a delay in filing an appeal after the meeting of 23 June 2017.

29. Mr Richardson appointed LGSA at some time prior to 1 September 2017. LGSA then took over two months to file the appeal, but no explanation is provided for the failure to file an appeal until 1 November 2017.

30. Mr Richardson did not explain why he didn't take action to contact HMRC or to appeal against the decision, especially given the amounts involved. He was acutely aware of need to file an appeal because of the appeal made in relation to the earlier decisions. He was aware of the time limits because he provided the explanation for the delay in relation to the earlier decisions. The explanation in relation to the earlier

decisions was that Helen Rumsay was absent from the office in 2016, but by 2017 AIM had appointed lawyers and tax representatives whom Mr Richardson seeks to blame. The common factor is that Mr Richardson remained responsible for and familiar with the issues concerning the appeals throughout 2016 and 2017 and there is no good explanation for the delay in these circumstances.

Consequences of an extension of time / refusal to extend time

31. If I allow AIM to make a late appeal it would be able to challenge HMRC's decision and HMRC would have to use significant resources to respond to the appeal. The consequence of not allowing the late appeal is that AIM will not have the opportunity to challenge the decision in relation a very substantial sum but, as noted in the first FTT decision, this is not a case in which the strength of the company's case is obvious or has "a significant part to play when it comes to balancing the various factors" as stated in *Dinjan Hysaj*. The consequences for Mr Richardson and AIM of refusing the application should have prompted earlier action to appeal against the decision within the time limit given their knowledge and recent experience with the earlier decisions.

32. I have concluded that based on the all the circumstances of the case and the overriding objective in rule 2 it would not be in the interests of justice to allow a late appeal in these circumstances.

Decision

33. For the reasons set out above I refuse permission to appeal to the Tribunal out of time.

34. This document contains full findings of fact and reasons for the 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 8 JUNE 2018