



[2019] UKFTT 0665 (TC)

**TC07440**

**VAT – application for permission to make late appeal – refused – appeal dismissed**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/01355**

**BETWEEN**

**DALCHINI SPICE LIMITED**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE DR KAMEEL KHAN**

**SUSAN STOTT, ACCOUNANT**

**Sitting in public in Peterborough on 19 September 2019**

**The Appellant did not appear**

**Ms Fatouma Yusuf, Presenting Officer, for the Respondents**

## DECISION

### INTRODUCTION

1. This is an application dated 9 August 2017 for permission to make a late appeal in respect of 19 Default Surcharges for the periods from 08-14 to 02-18.

For 11-16 to 10-17 there was no surcharge.

For 02-16-04 – 16-11-17 and 02-18 the returns were filed late.

For the 14 appealed periods from 11-15 to 02-18 - 10 of these periods have been filed on or before their respective due dates, with 4 filed after the due date.

2. For all 14 periods payment was received after their respective due dates.

### Schedule of defaults and payments below:

**Appellant DALCHINI SPICE LTD**  
**Tribunal Reference TC/2019/01355**  
**VAT Registration Number 1834164 07**

Def No	Period Period Dates	Due Date	Amount Paid by Due Date £	Amount Paid After Due Date £	Date payment received - method	Date Return Received	Tax Assessed Tax on Return	Surcharge Document Issued	Surcharge Issued date	Rate	Amount £0.00
1	08/14 01/06/14 – 30/08/14	07/10/14	0.00	0.00	Nil Return	24/11/14	0	V160 Withdrawn By letter	17/10/14 28/08/19	FD	0.00 - FD
2	07/15 01/05/15 – 31/07/15	07/09/15	0.00	2661.34	07/12/15 FPS	28/08/15	2661.34	V161 Amended by letter	11/09/15 28/08/19	2 FD	0.00 0.00 - FD
3	08/15 01/06/15 – 30/08/15	07/10/15	0.00	2864.29	07/12/15 FPS	28/09/15	2864.29	V161 Amended by letter	16/10/15 28/08/19	5 2	0.00 0.00
4	09/15 01/07/15 – 30/09/15	07/11/15	0.00	2999.71	07/12/15 TPS	02/11/15	2999.71	V162 Amended by letter	12/11/15 28/08/19	10 5	299.97 0.00
5	10/5 01/08/15 – 31/10/15	07/12/15	0.00	3230.57	27/07/16 TPS	30/11/15	3230.57	V162 Amended by letter	11/12/15 28/08/19	15 10	484.58 323.05

**Appellant DALCHINI SPICE LTD**  
**Tribunal Reference TC/2019/01355**  
**VAT Registration Number 1834164 07**

Def No	Period Period Dates	Due Date	Amount Paid by Due Date £	Amount Paid After Due Date £	Date payment received - method	Date Return Received	Tax Assessed Tax on Return	Surcharge Document Issued	Surcharge Issued date	Rate	Amount £0.00
6	11/5 01/09/15 – 30/11/15	07/01/16	0.00	2308.86	27/07/16 TPS	23/12/15	2308.86	V162	15/01/15	15	346.32
7	12/15 01/10/16 – 31/12/15	07/02/16	0.00	1682.02	27/07/16 TPS	27/01/16	1682.02	V162	12/02/16	15	252.30
8	01/16 01/11/15 – 31/01/16	07/03/16	0.00	1488.61	27/07/16 TPS	26/02/16	1488.61	V162	11/03/16	15	223.29
9	02/16 01/12/15 – 28/02/16	07/04/16	0.00	1406.42	27/07/16 TPS	08/04/16	1406.42	V162	15/04/16	15	210.96
10	03/16 01/01/16 – 31/03/16	07/05/15	0.00	1650.14	27/07/16 TPS	29/04/16	1650.14	V162	13/05/16	15	247.52

Def No	Period Period Dates	Due Date	Amount Paid by Due Date £	Amount Paid After Due Date £	Date payment received & method	Date Return Received	Tax Assessed Tax on Return	Surcharge Document Issued	Surcharge Issued date	Rate	Amount £0.00
11	04/16 01/02/16 – 30/04/16	07/06/19	0.00	2091.35	03/11/16 TPS	01/07/16	1690.00 2091.35	V166 V163	17/06/15 01/07/16	15 15	253.50 313.70
12	05/16 01/03/16 – 31/05/16	07/07/16	0.00	2039.92	03/11/16 TPS	01/07/16	2039.92	V162	15/07/16	15	305.98
13	06/16 01/04/16 – 30/06/16	07/08/16	0.00	2104.31	03/11/16 TPS	28/07/16	2104.31	V162	12/08/16	15	315.64
14	07/16 01/05/16 – 31/07/16	07/09/16	0.00	1685.34	09/12/16 TPS	01/09/16	1685.34	V162	16/09/16	15	252.80
15	08/16 01/06/16 – 30/08/16	07/10/16	0.00	1664.93	09/12/16 TPS	05/10/16	1664.73	V162	14/10/16	15	249.70

Def No	Period Period Dates	Due Date	Amount Paid by Due Date £	Amount Paid After Due Date £	Date payment received & method	Date Return Received	Tax Assessed Tax on Return	Surcharge Document Issued	Surcharge Issued date	Rate	Amount £0.00
16	09/16 01/07/16 – 30/09/16	07/11/16	0.00	1824.23	11/12/19 TPS	27/10/16	1824.23	V162	11/11/16	15	273.63
17	10/16 01/08/16 – 31/10/16	07/12/16	0.00	2009.06	09/12/16 TPS	30/11/16	2009.06	V162	16/12/16	15	301.35
18	11/17 01/09/17 – 30/11/17	07/04/18	0.00	3345.06	11/01/18 DD	08/01/18	3345.06	V160	17/01/18	FD	0.00 - FD
19	02/18 01/12/18 – 28/02/18	07/04/18	0.00	2477.23	13/04/18 DD	10/04/18	2477.23	V161	13/04/18	2	0.00

## **Appellant's submissions**

3. The appellant acknowledged that the appeal is being made out of time. The appellant's director, Mr Mohammed Choudhury, had believed that his accountants and fellow director Dhobir Ali, had been dealing with the "paperwork" and was not aware "the VAT returns were not submitted". He also said that Mr Ali had resigned as a director and had "not signed off" because of his father's illness.

4. The appellant did not say that the Surcharge Notices were not received or were late. Mr Choudhury submitted that trading has been difficult throughout this period and that his priority has been surviving and keeping the business going. It would seem that money and cashflow was an issue for the business.

5. VAT was paid monthly rather than quarterly. We understand the appellant was directed to submit monthly returns by HMRC to protect the Revenue. Except four, all surcharges related to late payment.

The appellant has not acknowledged that his appeal is three months late.

## **HMRC's submissions**

6. For HMRC it was submitted that the time limit for making an appeal, 30 days after the Review Decision on 1 November 2018, means that the appeal should have been lodged by 1 December 2018. The appellant appealed three months and four days late on 5 March 2019.

7. The appellant has provided no real explanation of why payments were late. The information on his fellow director resigning and the accountants not submitting returns on time is not correct or true.

## **Discussion**

8. In considering whether to exercise this Tribunal's discretion in an application for permission to make a late appeal, the five questions set out in the Upper Tribunal's decision in *Data Select [2012] UKUT 187* are relevant:

9. Firstly, what is the purpose of the time limit? The time limits are set down in order to provide finality to both parties. The time limit allows HMRC to close a case and move on to deal with other matters, and it gives certainty about the costs involved in an appeal.

10. Secondly, how long was the delay? In this case, the delay was 98 days. Judge Berner, in the case of *Romasave [2015] UKUT 254*, noted that time limits should generally be respected and that, "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". The delay in this case must be taken to be a serious and significant delay.

11. Thirdly, is there a good explanation for the delay? The main submission of the appellant that the director dealing with the matter had resigned is not true. There is no evidence that Mr Ali had resigned and his name still appears at Company's House as a director.

12. There is also no evidence the accountants have been involved in filings of returns and in any event, this matter concerns payment of VAT. There were only four late filings but all payments, normally handled by the appellant, and not the accountants, were late.

13. The Notice of Appeal is not supported by relevant documentation and the appellant made no effort to communicate with HMRC or to enter into time to pay arrangements, which would have been the reasonable thing to do in the circumstances.

14. In addition, HMRC submitted that the appellant had clearly received correspondence relating to the penalty and that this should have prompted the appellant to check the status of the appeal.

15. Fourthly, what will be the consequences for the parties of an extension of time? The consequence for HMRC will be that they will have to incur costs in reopening the case and dealing with the matter at tribunal. The consequences for the appellant are that he will have his appeal heard.

16. Lastly, what will be the consequences for the parties of a refusal to extend time? The consequences for HMRC are that they will not have to incur any further costs in this matter and the case will be closed. The consequences for the appellant are that they will not have their appeal heard.

17. It would seem sensible that given the length of the delay and the lack of adequate explanation for that delay, the application should be dismissed.

18. The purpose of this Tribunal is to give effect to the overriding objective of dealing with cases fairly and justly in granting permission to make a late appeal.

19. The Tribunal must consider all of the circumstances of the case in a balancing exercise. The points made in *Data Select* are very relevant since they were approved in *Romasave*. It must be remembered that none of the factors listed above are to be given any special weight, as explained in the case law.

20. Judge Berner in *Romasave* referred to guidance from the Court of Appeal in *Denton v T H White Ltd (and related appeals)* [2014] EWCA Civ. 906 at [24]:

"... we propose to restate the approach that should be applied in a little more detail. 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....".

21. In the case of *BPP Holdings* ([2016] EWCA Civ. 121) the court held that strict approach to compliance with rules should apply in the First Tier Tribunal which is "the efficient conduct of litigation at a proportionate cost". Taken together, the cases suggest that granting permission to appeal out of time is only granted exceptionally and should not be routinely given.

22. While a distinction can be made with that case which was concerned with breaches of court and Tribunal rules rather than time limits for an appeal from a decision of HMRC, it is clear from Mr Justice Morgan's comments in *Data Select* that similar principles apply when conducting the balancing exercise in relation to an appeal against a decision made by HMRC.

23. When considering the overriding objective of dealing with cases fairly and justly, it is required that the litigation, in this case by HMRC, must be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

### **Balancing exercise**

24. The permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely.

A late appeal is not automatically lost because the time limit is not met. As much detail as possible should be provided to explain the delay. In considering the case, all circumstances must be considered, not as a checklist as such but an understanding of the reasons for the delay and if the appellant acted reasonably when confronted by the delay. The past compliance history is also relevant as is the prospects of success of the case and whether one party would be disproportionately affected by a time extension.

In effect, any prejudice to the appellant must be considered against the need for efficient litigation.

25. In this case there is very little prospect of success and the reasons for the delay simply do not make sense. It is more likely that an appeal was lodged when the debt management letters started to come in. This is not a reason for a late appeal.

### **Length of the delay**

26. Following *Romasave*, the delay in this case (being 98 days) is both serious and significant. The appellant received 16 consecutive surcharge liability notices since registration in April 2014 and therefore had significant experience of the Default Surcharge Regime.

27. It is therefore reasonable to expect the appellant would have been aware of their obligations and understood the financial consequences if VAT payments were made late. The onus is on the appellant to prove he is a prudent and diligent business person, to ensure the necessary compliance with the tax law.

28. The principal reason for the delay, according to the appellant, is that the accountants or other director was dealing with submitting returns and they had not done their job.

These surcharges are about payment of VAT not filing of returns and payment is normally the responsibility of the appellant. The delay in appealing has not been explained and no documentation has been provided to support the reasons which were given.

### **All Circumstances**

29. Looking at the overall position, there is a clear impression that the appellant has clearly had financial difficulties and used the VAT funds to keep the business afloat. He acknowledges this in a call to HMRC on 6 September 2018 when he said he could not afford the surcharges and the business was only “just surviving”.

30. All the circumstances point to a business in trouble with poor hygiene record and customers drifting away. This may be the real reason for the payment defaults. As regards the appeal, it seems that no one took responsibility for payment and returns and other creditors were making demands for payment. The VAT was the only source of money available to the business and it was used to pay other creditors and not HMRC.

### **Conclusion**

I have considered the factors which need to be balanced in coming to a decision in accordance with the overriding objective of dealing with cases fairly and justly I cannot see any good reasons for the delay and there is no reasonable excuse in law.

**Right to apply for permission to appeal**

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.

**JUDGE DR KAMEEL KHAN  
TRIBUNAL JUDGE**

**Release date: 05 November 2019**