[2021] UKFTT 146 (TC)

TC08115

LATE APPEAL – Martland considered – length of delay is serious and significant – no good reason for delay – in all the circumstances, extension of time not justified – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/09126

BETWEEN

WESTMORE GROUP LIMITED

Appellant

-and-

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

TRIBUNAL: JUDGE DAVID BEDENHAM

The hearing took place on 7 April 2021. With the consent of the parties, the form of the hearing was video with the parties attending through the Tribunal video platform. A face to face hearing was not held because of the ongoing Covid 19 pandemic and social distancing guidance.

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.

Jiten Shah, JMS Accounting Services, for the Appellant

Hannilee Fish, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. By decision dated 20 September 2018, HMRC denied the Appellant a VAT credit in the sum of £55,849.44 claimed in period 04/18. That decision was upheld on review notified on 16 November 2018 (which Mr Shah confirmed was received on or about 18 November 2018). As made clear at the end of the review letter, the Appellant had 30 days from the date of the review letter to file an appeal with the Tribunal. However, no appeal was filed until 7 November 2019 (i.e. almost 11 months late).

2. The Appellant, through Mr Shah, now says that it should be permitted to appeal out of time because:

   (1) it has a strong case on the merits; and

   (2) the delay in filing the appeal was because of Mr Shah's ill health.

3. The Appellant did not file any witness statements in support of its application. Instead Mr Shah sought to intersperse his oral submissions with factual evidence. I permitted this approach, but it was far from ideal. Given that the Appellant relies on Mr Shah's illness as the reason why its appeal was filed almost 11 months late, it would have been helpful if Mr Shah had provided in writing a clear and detailed chronology of events surrounding his illness and any incapacitation or time away from work. I was not provided with any evidence from the Appellant's directors/controlling minds.

4. I also note at this point the following:

   (1) On 9 November 2020, the Tribunal directed that:

      (a) by 18 December 2020, each party to send to the other party and the Tribunal a list of the documents on which that party wished to rely in relation to the application for permission to appeal out of time along with copies of any documents on the list that had not already been provided to the other party; and

      (b) by 22 January 2021, HMRC to serve upon the Appellant and file with the Tribunal an electronic bundle of documents containing all of the documents and correspondence on each party's list of documents.

   (2) Also on 9 November 2020 the Tribunal asked the parties to, by no later than 23 November 2020, provide certain listing information so as to assess whether this matter was suitable for hearing by way of video.

   (3) On 23 November 2020, Mr Shah sent to the Tribunal an email providing the listing information. That email also stated "the Appellants will be presenting a cross index bundle consisting of various pages relating to this matter, the stated legislation, the case law, the electronic version will contain links to various documentation."

   (4) On 2 December 2020, HMRC sent to the Appellant and the Tribunal their list of documents.

   (5) On 29 December 2020, the Tribunal wrote to Mr Shah stating that the Appellant's list of documents had still not been provided despite it being due on 18 December 2020 and warned "if you do not provide a List of Documents, the judge at the hearing may not permit you to use in evidence to support your case any documents other than those produced by the other side, and the bundles at the hearing may not include the documents to which you wish to refer".

(6) Despite the above, the Appellant did not provide a list of documents such that the electronic bundle prepared by HMRC contained only those documents that HMRC wished to rely on (although helpfully, this included the correspondence that had passed between Mr Shah and HMRC in the period 20 September 2018 to 7 November 2019).

(7) At 1:08am on 7 April 2021 (i.e. in the early hours of the day of the hearing of the Appellant's application), Mr Shah emailed to my judicial email address (copying in HMRC) 23 multipage PDF files, a Word file of "extract of relevant legislation" and an excel "index" to the documents provided.

(8) I asked Mr Shah why these documents had been provided at such a late stage and he told me that because of his illness he has only been attending his office two days per week and usually had meetings on those days so had not had time to provide the documents earlier.

(9) I was less than impressed with Mr Shah's explanation for non-compliance with the 9 November 2020 direction and the extremely late production of documents. Nonetheless, in circumstances where Mr Shah stated that the Appellant wanted to rely on those documents and given that HMRC did not object to the documents being admitted late, I decided to permit the Appellant to rely on those documents.

(10) Remarkably, during his submissions/evidence Mr Shah failed to make even a single reference to any of the late filed documents.

(11) On 14 April 2021 (i.e. 7 days after the hearing), Mr Shah emailed to the Tribunal a "Discharge Summary" relating to a medical emergency that occurred in December 2019. Quite apart from the fact that this material was provided after the hearing, Mr Shah made no attempt to explain the relevance of this material given it was said to relate to a medical emergency that occurred *after* the appeal was filed.

BACKGROUND

5. The Appellant purchased a care home which it proceeded to convert into residential flats. The Appellant sought to deduct as input tax VAT paid by it on supplies relating to the conversion. HMRC formed the view that input tax could not properly be claimed by the Appellant.

6. The following was apparent from the correspondence and documentation that I was provided with:

7. On 20 September 2018, HMRC denied the Appellant a VAT credit in the sum of £55,849.44 claimed in period 04/18.

8. On 3 October 2018, the Appellant (through Mr Shah) requested that a review of the decision be undertaken. The Appellant's position was summarised as follows:

> "The original property when acquired was a commercial property used by the former owner in his business activity of provision of care services with nursing, and when acquired by my client it was purchased as a going concern.
>
> As a result, the whole of VAT claimed should be allowable on the basis, including various costs of professional fees paid at various stages during the conversion & rebuild stage as these were at the request of the lender for release of further advances, which are normally released by lenders at stages depending on the progress of the development."

9. On 16 November 2018, HMRC notified the Appellant that the decision had been upheld on review. The review letter stated:

> "Because the building has been used for a relevant residential purpose, a care home, and has been lived in within the last ten years it cannot therefore, be classified as non-residential as described in Schedule 8, Group 5, Note 7 of the VAT Act 1994…
>
> The conversion of the property does not therefore constitute a non-residential to residential conversion under Schedule 8, Group 5, Item 1(b) and zero rating is not applicable. As such the sale of the freeholds in the flats is an exempt supply. Supplies are exempt for VAT in the UK if they are otherwise within the scope of UK VAT [and] fall within any of the groups of Schedule 9 of the VAT Act 1994 as introduced by section 31 of the VAT Act 1994. Schedule 9, Group 1 specifies those supplies of land and buildings that are exempt from VAT.
>
> Based on the fact that the supplies of the freeholds in the flats were exempt supplies the VAT incurred by [the Appellant] on the conversion costs is fully attributable to those exempt supplies. The supplies made by [the Appellant] are therefore not supplies against which input tax is deductible, section 26(2) of the VAT Act 1994 refers…"

10. The review letter concluded with the following:

> "If you do not agree with my conclusion you can ask an independent tribunal to decide the matter…If you want to appeal to the tribunal, you must write to the tribunal within 30 days of the date of this letter…"

11. On 13 April 2019, Mr Shah wrote to the original decision making officer offering a "final chance to resolve this matter before we take it to tribunal".

12. On 18 April 2019, the original decision maker replied stating that the review decision stood.

13. On 9 May 2019, Mr Shah wrote to the original decision maker stating:

> "…is your opinion the same following the FTT decision on 29th April 2019, Christopher Swales (2019) TC 007116 (UKFTT 0277).
>
> I still believe that HMRC are incorrect and my client is entitled to VAT refund on all costs…"

14. Also on 9 May 2019, Mr Shah asked the original decision maker for a face to face meeting.

15. On 13 May 2019, the original decision maker replied as follows:

> "I have looked at the Christopher Swales [decision]...this appears to deal with the DIY builders' scheme…
>
> At your request my decision on your client's claim had been subject to formal review. The conclusion to this review was detailed in my colleague's letter of 16/11/2018.
>
> While I am happy to consider any new information I am bound by the guidance and legislation set out in the review conclusion letter. This means that if the facts of the situation have not changed since the review then I cannot change the decision set out in my colleague's letter."

16. The Appellant's appeal was filed on 7 November 2019.

17. In its notice of appeal, in the section headed "reason for late appeal", the Appellant stated:

"We have been liaising with VAT inspector for over 12 months, first it took over 4 months for the inspector to decide he cannot accept our claim, then it took another 8 weeks for the Review to take place.

Then we argued against the review for another 8 weeks, as the review basically said word for word what the VAT Inspector had already told us."

18. The Appellant's Grounds of Appeal were stated as follows:

"Client bought a care home, which was substantial and specially adapted for people with disabilities, and for provision of people with day care services. This was classed as a commercial property by local authorities and was classed by council as C2. Our client went through several hurdles, with consultations with Wandsworth Council, Planning Committee, Head of Adult Services (Wandsworth Council, Quality Care Commission, before it could be classed as C3, our client needed a Decommissioning Report from Council.

We are claiming that the property was a commercial property for the preceding 10 years prior to conversion to residential properties.

Regardless of this, residential conversions and sale of the completed units are zero rated for VAT purposes (Taylor Wimpey Case (2017)).

On this basis, our claim for a refund of VAT suffered on all materials and improvements costs should be allowed, and our client entitled to the said refund."

THE APPELLANT'S SUBMISSIONS

19. In a skeleton argument dated 1 April 2021 (signed by Mr Shah), the Appellant stated:

(1) The property was a commercial property and, therefore, there was a non-residential to residential conversion under Schedule 8, Group 5, Item 1(b) such that the supply would be zero-rated and input tax could properly be deducted. In support of that contention, the Appellant stated that others (estate agent, valuer, conveyancers, local authority and Homes England) had categorised the property as purchased by the Appellant as "commercial". The Appellant further referred to a number of Tribunal decisions.

(2) In a section headed "grounds for late Appeal", it was stated:

"In March 2018, I (Jiten Shah), sole proprietor of JMS Accounting Services, and accountant and agent for the Appellant was diagnosed with Kidney disease. I had a surgical procedure done on 29th March 2018, had to rest for few weeks. Then in December 2019, I had my 2nd heart attack and had to have 2 heart operations, whilst recovering, we had Covid 19.

In short, I have been severely ill which had hampered matters, and also there have been several delays on the part of HMRC. When it was requested for an independent review, it took HMRC 7 weeks to respond, and when they did response, I had the heart attack shortly afterwards. The Review itself was very biased, and failed to apply the relevant legislation.

…

Our client should be entitled to claim VAT on all costs incurred, this would also include fitting (*Taylor Wimpey Case [2018]).*

The delays were avoidable, but should not affect my client's rights to the claim.

HMRC's arguments have been baseless and in contradiction and inconsistent with the relevant legislation and case law."

20. At the hearing, Mr Shah told me:

(1) Since 2014, he has suffered various significant medical issues and emergencies.

(2) He was hospitalised between 2 December 2018 and 19 December 2018.

(3) He returned to work on 6 January 2019.

(4) He did not file the appeal in January 2019 because he "was not feeling well enough". He then said, "I accept I could have filed it, but I was not feeling up to it."

(5) In February 2019, he was hospitalised for a one-week period.

(6) On 16 March 2019, he was hospitalised for a two-day period.

(7) He was hospitalised again in late March 2019.

(8) Mr Shah accepted that on 13 April 2019 he was working and emailed HMRC. He did not file the appeal at that point because he thought he could resolve the matter by further dialogue with HMRC.

(9) On receipt of HMRC's email of 18 April 2019, he still thought that he could resolve the dispute by dialogue with HMRC.

(10) In the period May to August 2019, he was at home recuperating but was "working on and off". During this period Mr Shah "kept thinking that [he] would be able to [file the appeal]".

(11) Mr Shah accepted that on 9 May 2019 he was working and emailed HMRC. He did not file the appeal at that point because he thought he could resolve the matter by further dialogue with HMRC and had formed the view that Tribunal appeals take a long time to be determined.

(12) On receipt of HMRC's email of 13 May 2019, he did not file the appeal because he "did not know what state [his health] would be in by the time it got before the Tribunal".

(13) When asked why he had not told the Appellant to seek alternative representation or file the appeal itself, Mr Shah stated "I didn't want to lose the client and lose business".

(14) He accepted that following HMRC's email of 13 May 2019, he should have filed the Appellant's appeal and there was "no reasonable reason" for him not having filed the appeal.

(15) In July 2019, he travelled to Dubai for medical reasons.

(16) The Appellant relied on him. He told them to 'bear with me, I'll sort this all out."

(17) In October 2019, advice was taken from counsel.

(18) The appeal was filed on 7 November 2019.

21. Mr Shah made no oral submission as to the merits of the Appellant's appeal beyond stating that it was clear cut and he could refute all of HMRC's arguments.

22. The documents provided by the Appellant (in the early hours of the day of the hearing) consisted of correspondence with HMRC and documents and legislation relating to the substantive issues in dispute. As I have observed above, Mr Shah did not take me to any of these documents or make any specific submissions based on them.

HMRC'S SUBMISSIONS

23. HMRC's submissions were as follows:

(1) the delay in appealing to the Tribunal was 11 months. This is significant and serious;

(2) no good reason has been advanced for the delay. It is clear that Mr Shah was working throughout 2019 and could have filed the appeal which is not a complicated process;

(3) taking into account all the circumstances, the application to admit the late appeal should be refused. There needs to be finality to this matter; and

(4) the merits of an appeal should only be taken into account if they are clear cut. In the present case, the Appellant's case is not clear cut (although HMRC was not in a position to make any submissions as to the substance of the appeal).

RELEVANT LAW

24. In *Martland v HMRC* [2018] UKUT 178 (TCC), the Upper Tribunal held at paragraph 44 that when considering applications for permission to appeal out of time, the Tribunal can usefully follow the three-stage process set out in *Denton and Ors v TH White Limited and Ors* [2014] EWCA Civ 90.

DISCUSSION AND DECISION

25. The first stage of the *Denton/Martland* process requires me to identify the breach and assess its seriousness. The breach in question is the failure to file an appeal within the statutory deadline. The Appellant should have filed its appeal with the Tribunal by 16 December 2018. The appeal was not filed until 7 November 2019. I consider a delay of this length to be significant and serious.

26. The second stage of the *Denton/Martland* process requires me to consider the reasons why the default occurred.

27. Mr Shah knew from the review letter that there was a deadline for appealing such that the appeal needed to be filed by 16 December 2018. Despite that, he did not file the appeal. No good reason for that failure was established in circumstances where, despite his various medical issues, he was working in November 2018 and at various points in 2019, and was not incapacitated such as to mean he could not file the appeal. To the extent that Mr Shah sought to justify the delay on the basis that he was hoping to settle the issue by way of further dialogue with HMRC, I do not consider this is a good reason for failing to comply with the statutory deadline. Further, and in any event, Mr Shah accepted that by May 2019, at the very latest, HMRC had made clear that they were maintaining their position and there was, even on Mr Shah's view, no "reasonable reason" for not filing the appeal at that stage.

28. Nor am I satisfied that the Appellant can distance itself from the failure by Mr Shah to file the appeal in time. No evidence was provided by the Appellant's directors in relation to the what communications passed between them and Mr Shah (nor were these communications

provided to the Tribunal), whether they followed up with Mr Shah about filing the appeal and, more importantly, why (despite the clear deadline set out in the review letter) they did not (regardless of what they were being told by Mr Shah) take steps to ensure an appeal was filed – either by causing the Appellant to file it directly or instructing a new representative to file the appeal.

29. The third stage of the *Denton/Martland* process requires me to consider all the circumstances of the case so as to ensure that the application is dealt with fairly and justly. In addition to the seriousness of the breach and the absence of a good reason for it, I also consider that the need for finality of litigation points towards refusing the application.

30. I acknowledge that refusing this application means that the Appellant will be unable to proceed with its appeal. But this cannot, in and of itself, justify admitting a late appeal.

31. I have also considered whether the Appellant should be disadvantaged for what it would say is principally (if not wholly) Mr Shah's failure. However, for the reasons explained at paragraph 28 above, I am not satisfied that the Appellant has established that it can distance itself from its representative's actions or has established that it took all reasonable steps to ensure that the appeal was filed in time (or, at least, much earlier than November 2019).

32. I do not consider that this is a case where the merits of the Appellant's appeal are so clear cut that it would be appropriate to factor in those merits when deciding whether to extend time.

33. For all the reasons above, the Appellant's application is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

DAVID BEDENHAM
TRIBUNAL JUDGE

RELEASE DATE: 04 MAY 2021