Neutral Citation: [2022] UKFTT 215 (TC)

Case Number: TC08538

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/00907

Excise duty – application for late appeal – Martland applied – application refused

Heard on: 21 June 2022
Judgment date: 04 July 2022

Before

TRIBUNAL JUDGE ABIGAIL MCGREGOR
CELINE CORRIGAN

Between

CORK BONDED WAREHOUSE LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: David Bedenham, of counsel, instructed by the Appellant

For the Respondents: Patrick Boch, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video), with all parties attending remotely by Tribunal video hearing system. A face-to-face hearing was not held because it was considered expedient to do so. The documents to which we were referred were a bundle of documents containing 144 pages, as well as 3 witness statements (the admission of which we return to later) and an authorities bundle of 69 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.

BACKGROUND

3. This decision concerns an application for the admission of a late appeal.

4. Cork Bonded Warehouse Limited, the Appellant, ("CBW"), operates an approved (bonded) warehouse in Cork, Republic of Ireland.

5. As part of its business, CBW stores and moves alcoholic goods that are in duty suspense.

6. On 28 November 2019, HMRC assessed CBW to excise duty in the sum of £156,282.67. (Assessment 1). Then on 26 March 2020, HMRC assessed CBW to excise duty in the sum of £489,765.86 (Assessment 2). Both assessments relate to movements of duty suspended goods traveling between CBW's warehouse and a bonded warehouse in Spain. HMRC assert that the goods were diverted in the UK, creating a duty point and that CBW is liable for the excise duty because it provided the movement guarantee for the movements.

7. CBW, following a review, appealed in time against Assessment 1. That appeal has progressed to the stage of a Statement of Case from HMRC but has been stayed pending the outcome of this application for late appeal. This decision does not in any way concern Assessment 1; its existence is included for context.

8. This decision relates to CBW's appeal against Assessment 2, which was made late. We announced our decision to refuse the application at the hearing, with full reasons to follow.

9. We were listed also to hear an application for hardship in relation to Assessment 2. We did not hear any evidence as to hardship because of our decision to refuse to allow the application for a late appeal.

EVIDENCE

10. In addition to the bundles referred to above, we heard oral evidence from Mr Lynch, a consultant at Francis Wilks and Jones, a firm of solicitors who were CBW's agent in the UK dealing with the Assessments. He was cross-examined by Mr Boch and answered questions from the panel.

11. A few days prior to the hearing, three witness statements were submitted:

(1) A short witness statement from Mr Lynch;

(2) A second witness statement from Mr Harry Golden (Director of CBW), with a series of exhibits; and

(3) A third witness statement from Mr Golden which related to a decision of the Irish Revenue on Friday 17th June, i.e. was a new development.

12. There had not been directions to exchange witness statements and therefore they were not late. However, exhibits attached to Mr Golden's second witness statement were submitted

late and a number of them were items that could and should have been included in the appellant's list of documents in accordance with the directions.

13. We did not have course to make a decision on the admission of this late evidence since it related only to the hardship application.

FACTS

14. The following were undisputed facts related to the steps up to the making of the appeal:

(1) As noted above, Assessment 2 was issued on 26 March 2020;

(2) On 21 April 2020, Mr Lynch, on behalf of CBW, requested, by email, an extension of time until 8 May 2020 to provide further information to HMRC;

(3) On 23 April 2020, the officer at HMRC, Brian McNarry, emailed Mr Lynch requesting clarification as to whether the further information related to a request for a formal independent review or for the original decision-making officer (i.e. Mr McNarry) to review;

(4) Later on 23 April 2020, Mr Lynch responded by email confirming that he was providing further information for the decision-making officer to review;

(5) On 24 April 2020, Mr McNarry emailed to agree to the extension of time until 8 May 2020;

(6) On 7 May 2020, Mr Lynch, on behalf of CBW, provided, by email with a link to a web-based drive containing further information to Mr McNarry for his review;

(7) On 8 May 2020, Mr McNarry emailed to request the documents in a different format since he could not access the web-based drive. The documents were provided by Mr Lynch (the bundle of documents did not record the format they were provided);

(8) On 12 June 2020 at 18:13, Mr McNarry sent an email to Mr Lynch. I will set out the full details of this email below because it is essential to the decision;

(9) On 23 March 2021 Mr Lynch, on behalf of CBW, submitted a notice of appeal against Assessment 2 to the Tribunal. It acknowledged that the appeal was late and included a letter setting out the reasons for the late appeal.

15. The email of the 12 June 2020 was as follows:

(1) From: Brian McNarry;

(2) To: Mr Lynch (there were no further addressees)

(3) Subject: Copy of Review of additional information provided.

(4) Body: Dear Andy

> I have sent this reply to your client via our Mutual Assistance team for issue
> and sent this copy to you for your records
>
> Kind regards
>
> Brian

(5) Attachment entitled: "20200612 Cork Bonded Warehouse Reply to request to review addit info.pdf

LAW

16. Both parties were in agreement as to the relevant law on an application for late appeal, albeit with different interpretations and means of applying it.

17. Under section 16 of Finance Act 1994, a taxpayer that has not taken up the offer of an independent review must make their appeal within 30 days of the date of the document notifying the appellant of the decision.

18. The Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 gave specific guidance to this Tribunal on consideration applications for permission to appeal out of time, which is binding on us. I set out the section from paragraph 44 in full:

> 44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> > (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
> >
> > (2) The reason (or reasons) why the default occurred should be established.
> >
> > (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.
>
> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:
>
> > "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. 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 at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."
>
> *Hysaj* was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which

concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore- Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.

PARTIES ARGUMENTS

Arguments on behalf of CBW

19. Mr Bedenham submitted in relation to the first stage of the *Martland/Denton* test, that it is acknowledged that the delay in this case was significant – the appeal being filed just over 8 months late.

20. In relation to the second stage of the test, Mr Bedenham submits that the reason for the delay was that CBW did not receive a copy of the 12 June 2020 letter and the copy of the letter sent to Mr Lynch was missed due to an oversight.

21. Mr Bedenham submits that this was a good reason in these particular circumstances because:

(1) Mr Lynch was working at home during the first COVID lockdown without administrative support;

(2) The email referred to "mutual assistance" and Mr Lynch read that as meaning he had been copied into some correspondence relating to mutual assistance;

(3) The email said that the letter was being sent to the client, but it was never received; and

(4) At no point in the ongoing discussions with HMRC in relation to the appeal against Assessment 1 did anyone at HMRC make reference to the fact that no appeal had been filed against Assessment 2.

22. Mr Bedenham invited us to ask ourselves the question "Was what happened understandable and forgivable?" and ask the Tribunal for forgiveness for the late appeal, bearing in mind the unprecedented circumstances of the stay at home order and that not everyone was set up for working at home, particularly at the beginning of the pandemic.

23. In relation to the third stage, Mr Bedenham submitted that all of the elements in stage 2 should be taken into account again in stage 3 even if we do not accept that they gave a good reason, but also submitted that we should take the following into account:

(1) The importance of complying with deadlines is not determinative;

(2) The ongoing appeal against Assessment 1, which relates to activities in the same period, means that HMRC will not be unduly affected by having this assessment added to the appeal. The evidence they need to disclose will need to be disclosed anyway;

(3) That appeal hasn't progressed to the exchange of evidence stage, so joining the two cases would only add the delay of amending the statement of case;

(4) Assessment 2 is for a significant sum of money, with significant consequences of the business of CBW;

(5) Failure to overturn Assessment 2 may also have wider ramifications for CBW's approval by the Irish Revenue, such as whether CBW is a fit and proper person, and its relationship with its bank;

(6) The cause of the delay was a genuine oversight, not a culpable error or a deliberate attempt to reopen a closed case;

(7) The appellant is clearly committed to pursuing the appeal rather than simply deferring the point at which payment must be made (asserting that the taxpayer's offer to pay some money as security for the appeal at the opening of the hearing was evidence of this).

24. Mr Bedenham invited us to consider stage 3 of this test as a question of justice; asking ourselves whether justice would be done by shutting CBW out from its appeal, bearing in mind the limited harm to HMRC, who need to conduct the defence of the appeal against Assessment 1 anyway. He submitted that it would be remarkable if the Tribunal is shut out from hearing the full extent of CBW's appeal against the factual circumstances around both Assessments because of an honest mistake.

Arguments on behalf of HMRC

25. Mr Boch submitted that the delay of over 8 months was both significant and serious.

26. On the second stage, he submitted that none of the reasons given were good reasons, highlighting in particular that:

(1) It is not clear what kind of additional administrative support would have avoided the problem and how that can justify the agent's failure;

(2) The 12 June 2020 email was:

(a) not ambiguous or confusing;

(b) sent directly to Mr Lynch, not copied to him;

(c) addressed to him by name;

(d) clear in its title that it was a development in that case;

(e) clear in the title of the document attached which taxpayer it referred to and that it was the response to the additional information provided;

(3) Any responsible adviser would have opened the attachment and acted upon it;

(4) Failure to open an attachment is a failure of the adviser; and

(5) If this were found to be a good reason, it would encourage carelessness.

27. It is strange to assert HMRC's failure to ask questions of the appellant during the course of discussions regarding Assessment 1. HMRC are not responsible for checking whether a taxpayer wishes to appeal against one of their decisions;

28. Mr Boch also highlighted that there were differences between the original comments made in the notice of appeal and in the witness statement of Mr Lynch; and that these conflicted with a note of a telephone call that was apparently made by Mr Lynch to Mr McNarry on 19 March 2021.

29. With regard to the third stage, Mr Boch submits that having failed at stages 1 and 2, the appellant is on the back foot and that, following *Denton* would need to show something exceptional to outweigh the first two stages.

30. He submits that Mr Bedenham's interpretation of the third stage is "ambitious" and that:

(1) Facilitating a culture of compliance is important;

(2) The fact that there is another appeal regarding Assessment 1 should not be a relevant factor because that should not be to their advantage, by contrast with another taxpayer with only one appeal ongoing;

(3) While the value of the case is a relevant factor, it is not sufficient to tip the balance in the taxpayer's favour;

(4) No evidence has been submitted of the potential ramifications to the wider business of CBW of not allowing the appeal to proceed and such issues are not unique to CBW.

FINDINGS OF FACT

31. While the background facts were not in dispute, we heard evidence from Mr Lynch and there was some contention about what happened around both the receipt of the 12 June 2020 email and in March 2021.

32. We find the following facts, based on the evidence we heard:

(1) Mr Lynch received the email on 12 June 2020 and opened it on his phone, while he was working from home during the COVID pandemic work from home order;

(2) It arrived after the end of the working day on Friday;

(3) When he started work again on the Monday after the weekend, he had forgotten about the email, did not look at it again and did not open the attachment;

(4) He did not follow up with HMRC about Assessment 2 again until March 2021;

(5) At a conference with Counsel in March 2021 a question was asked about the appeal against Assessment 2, which reminded Mr Lynch of it;

(6) He immediately telephoned Mr McNarry in a panic (Mr Lynch's own words) before looking back at his file;

(7) After the telephone call he looked back at the file, realised his mistake and submitted the appeal as soon as he could.

33. Mr Lynch explained that he felt the pandemic had affected his focus and that he did not have the administrative support, such as someone to file papers, copy and print documents and

generally take things off his hands. He said that being at home affected him quite badly with regards to his approach and organisation of his work. He accepted that he had made a mistake.

34. He also explained that he understood that a lot of HMRC matters went on hold during the pandemic while HMRC staff were redeployed to dealing with the furlough scheme and other matters. Therefore he wasn't surprised that nothing was happening on Assessment 2. He just sat back and waited.

DISCUSSION AND DECISION

35. As set out above, the approach we have to follow in deciding this application is that in *Martland.*

36. There is no dispute that the delay of over 8 months is both significant and serious.

37. The next question we must ask ourselves is what the reason for the delay is. We note that this is not the same as deciding whether the reason is a good one. It is purely an exercise in establishing the reason for the delay.

38. We considered Mr Lynch's evidence regarding the impact of the pandemic on him and his approach to work. We accept his evidence and find that the reason for the delay was a mistake on the part of Mr Lynch. He opened the email but did not open the attachment, digest its contents or take the action he should have taken.

39. The third stage is to take all the factors into account. It is at this stage that we must consider whether the reasons for the delay were good ones, in amongst all the other relevant circumstances. We consider each of the circumstances presented to us in turn in the paragraphs that follow, but first wish to address Mr Boch's assertion that where there has been a serious and significant delay, there will need to be something exceptional about the other circumstances in order to tip the balance.

40. We refer to paragraph 32 of *Denton v White* [2014] EWCA Civ 906, which is the Court of Appeal decision we are required to follow as a result of the guidance in *Martland* set out above:

> We can see that the use of the phrase "paramount importance" in para 36 of Mitchell has encouraged the idea that the factors other than factors (a) and (b) are of little weight. On the other hand, at para 37 the court merely said that the other circumstances should be given "less weight" than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule. It is striking that factor (a) is in substance included in the definition of the overriding objective in rule 1.1(2) of enabling the court to deal with cases justly; and factor (b) is included in the definition of the overriding objective in identical language at rule 1.1(2)(f). If it had been intended that factors (a) and (b) were to be given no particular weight, they would not have been mentioned in rule 3.9(1). In our view, the draftsman of rule 3.9(1) clearly intended to emphasise the particular importance of these two factors.

41. Factors (a) and (b) are referring to paragraph 3.9 of the civil procedure rules, which specifically identifies the need for (a) litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules, practice directions and orders. While the CPR does not apply to this Tribunal, the guidance in *Martland* shows us that we should adopt the same approach to considering applications for late appeals.

42. This guidance tells us that "paramount importance" is not an appropriate approach and therefore we also take issue with Mr Boch's assertion of the need for something "exceptional" to overcome those two factors. However, these two factors are to be given "particular weight" when we are weighing all the circumstances of the case.

43. Our first circumstances is whether we find the reason for the delay a good one. Fundamentally this element of the question comes down to whether Mr Lynch had a good reason for failing to open and act upon the attachment to the email. It is clear from the other correspondence on the file that Mr Lynch was conducting email exchanges without issue, including providing access to documents via an external link and then, when HMRC were unable to access it, providing documents in an alternative format.

44. While it is widely known that HMRC officers were diverted to work on pandemic-specific projects and that there was some delay in dealing with ongoing matters, again, we do not accept that this justifies the original mistake of not opening the attachment and addressing its contents, nor for failing to follow up at all for a period of 8 months.

45. We take guidance from *Mitchell*, which was quoted by the Court of Appeal in *Denton v White* and identified (in paragraph 24) as "substantially sound":

> But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner.

46. The impact of the pandemic on Mr Lynch personally would seem to us to fall squarely into this example. If Mr Lynch was struggling to keep on top of his workload due to the impact of home-working, it was his responsibility to do something about it, particularly by the middle of June 2020 when the circumstances had been persisting for 3 months.

47. Mr Bedenham conceded in this skeleton that actions of an adviser are generally treated as actions of the litigant in accordance with *HMRC v Katib* [2019] UKUT 189. We see no reason to depart from this authority here. We were provided with no evidence regarding the actions of CBW during this period, save a witness statement from Mr Godden that stated that the letter from HMRC was never received.

48. We prefer Mr Boch's characterisation of the June 2020 email to Mr Lynch. It was not ambiguous or confusing.

49. Equally we agree with Mr Boch that it was not for HMRC to follow up on matters – any accusation of failure to follow up clearly falls more squarely on the appellant's side of the fence given it is an assessment against them.

50. We therefore find that CBW did not have a good reason for the delay, and this is a factor that weighs against allowing the application for late appeal.

51. Next, we consider Mr Bedenham's assertion that a failure to comply with deadlines is not determinative. This is an assertion that we must agree with since there would be no concept of an application for a late appeal if that were not true. While it is not determinative, we are

reminded by Mr Boch that protecting a culture of compliance is important in the efficient progress of litigation. The lateness of the appeal and non-compliance with deadlines is clearly a factor that weighs against the taxpayer in our balancing exercise.

52. Thirdly, we consider the relevance of the Assessment 1 appeal. Mr Boch suggested that considering the relevance of an ongoing appeal in Assessment 1 would somehow put CBW at an unfair advantage when compared with another taxpayer. We do not accept this proposition. Stage 3 is for us to take all the relevant circumstances into account and the existence of an appeal relating to the same set of facts over the same period is, in our view, a relevant circumstance in that balancing exercise. The other appeal has been stayed to wait for this appeal to join it if we allow the application and the additional burden on HMRC of amending the statement of case would not be a significant one given the similarity of factual circumstances. We therefore find that this is a factor in favour of allowing the application for late appeal.

53. Fourthly, we consider the size of the assessment that would be under appeal. We agree that this is a relevant factor, which weighs in favour of allowing the application, but that the favour given is negligible, given the size of the assessment should also have been a factor that encouraged compliance with deadlines by the appellant.

54. Mr Bedenham also asserted that there were other knock-on effects on CBW, such as the possible loss of approval from the Irish Revenue and a deterioration in the relationship with its bank. As Mr Boch submitted, we were given no evidence of these potential effects. While we accept that it is possible that the potential effects are realistic, even if we had seen evidence of them, these possible effects were things that should have sharpened the minds of CBW in ensuring that an appeal was brought. We therefore give no weight to this submission in our balancing exercise.

55. The final two factors submitted by Mr Bedenham (that this was a genuine mistake and not a culpable error and there was genuine intention to pursue the appeal rather than a cynical attempt to delay payment) both seem to us really to be the absence of negative factors. A culpable error or a deliberate attempt to reopen previously closed proceedings would indeed have been factors weighing against the taxpayer. These accusations have not been levelled at CBW. However, we do not find that their absence is a factor weighing in their favour. We therefore given no weight to this factor in our balancing exercise.

56. During the cross-examination of Mr Lynch Mr Bedenham, quite rightly, reminded the Tribunal of the important rule in rule in *Browne v Dunn* [1893] 6 R 67 HL, under which the tribunal is not entitled to disbelieve a witness's evidence on a point unless it has been specifically challenged in cross examination. Mr Boch stopped short of challenging Mr Lynch's evidence in this way and we accepted the evidence as it was presented by Mr Lynch. We therefore do not find that possible inconsistencies between that evidence and earlier correspondence is a relevant factor beyond the admission by Mr Lynch that he had made a number of mistakes, which, as we have set out above, we have not found to be a good reason for the delay.

57. Finally, we note that neither party asserted that CBW's case on the substantive appeal would be either particularly strong or particularly weak, we therefore do not find this factor weighs either for or against CBW.

58. Having taken all the circumstances of the case into account as we have set out in this decision, we came to the conclusion that the factors weighed against the taxpayer.

59. Therefore the application for permission to bring the appeal late is denied.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

60. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

Release date: 13 JULY 2022