TC03880

Appeal number: TC/2013/06459, TC/2013/06460 & TC/2013/06462

Import VAT – VAT input tax claim – application to Tribunal made out of time - should Tribunal allow to proceed – yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

TIGA AERO SERVICES LTD
ATLANTIC EUROPEAN SERVICES LTD
SOUND MOVES (UK) LTD **Applicants**

- and -

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

TRIBUNAL: JUDGE ALISON MCKENNA
MR RICHARD THOMAS

Sitting in public at Bedford Square on 17 July 2014

Barbara Belgrano of counsel, instructed by Mishcon de Reya for the Applicants

Alan Bates of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This matter concerns the Applicants' request for permission to make a late appeal.

2. On 31 July 2013 HMRC rejected the Applicants' claim for input tax in respect of the import VAT which the Applicants had paid following receipt of three C18 Post Clearance Demand Notes issued by HMRC. Their appeals to the Tribunal should have been made within 30 days of HMRC's decision but they were each made on 12 September 2013, 12 days out of time. HMRC objects to the Applicants' appeals being heard out of time and so the Tribunal must now decide whether to exercise its discretion to allow the appeals to proceed out of time.

3. Both parties were represented by counsel who made full and helpful submissions on the law.

Background

4. The factual background to the substantive dispute between the parties was not in dispute before us. We summarise this as follows, relying gratefully for this purpose on Ms Belgrano's skeleton argument.

5. On 21 March 2011 the National Import Reliefs Unit ("NIRU") issued a C18 Post Clearance Demand Note ("C18 Note") for £279,428.92 to bring to account the import VAT for 44 imports Sound Moves (UK) Limited ("Sound Moves"). The charges had been suspended on import following claims made by Sound Moves to Onward Supply Relief in 2008, 2009 and 2010.

6. By letter dated 25 May 2011 Sound Moves requested a departmental review of the C18 Note. The review letter dated 27 June 2011 reduced the C18 Note issued to Sound Moves to £236,467.82 because 11 entries on the C18 Notice schedule related to imports declared by agents other than Sound Moves. Accordingly Post Clearance Demand Notes were issued to Sound Moves' associated companies: (1) Atlantic European Services Limited ("Atlantic") for £16,764.24 and (2) Tiga Aero Services Limited ("Aero") for £26,196.85. The review letter also sets out that, "*The declarant, SMUL, was therefore the importer of the goods under the OSR procedure and the demand has been issued accordingly.*"

7. Sound Moves appealed against HMRC's 21 March 2011 decision following HMRC's review. Following discussions between NIRU and the Applicants' solicitor, the C18 Note amounts were further reduced to:

(1) Tiga: £20,200.89 for period 07/11

(2) Atlantic: £13,398.63 for period 07/11

(3) Sound Moves: £185,834.38 for period 05/11

8. On or around 26 August 2011, the Applicants requested a reconsideration of their cases. The disputed C18 Notes was reconsidered by HMRC Policy Section for Onward Supply Relief.

9. On 6 June 2012 HMRC Policy emailed the Applicants' solicitor stating that :

> "...we have considered at length the issue of retrospective compliance with OSR but have decided that it is not appropriate...
>
> With regard to whether the VAT due may subsequently be recovered as input tax as a cost of the business, we are still awaiting for out VAT policy colleagues to finalise their decision on this matter. We expect that this may take another month. I can only apologise for this lengthy delay."

10. On 9 August 2012 Sound Moves withdrew its appeal against the C18 Note. By letter dated 26 November 2012 the Applicants made a claim for (and sought clarification in respect of) the deduction of input tax paid in respect of the import VAT on the C18 Notes. The Applicants requested that HMRC issue C79 documentation for those entries or in the alternative, that HMRC confirm deduction by exception on the basis of alternative evidence.

11. By letter dated 28 December 2012 HMRC responded and referred the Applicants to published guidance relating to claims for input tax deduction and, in particular, to evidence of payment of VAT by reference to a C79 or commercial documentation. The letter went on to state that:

> "To summarise, as you will determine from the guidance highlighted above there is a great deal to think about. Our guidance INS12705 confirms as follows;
>
> In the absence of a C79 to evidence the payment of VAT, commercial documentation may be accepted to support claims for input tax, provided it provides all the necessary information.
>
> I am sorry I am unable to give you a more favourable reply. My advice is to refer to our published guidance as referred to above and make a decision on that basis.
>
> As an added reassurance at some point in the future a VAT Officer will visit your clients' offices to look at their records. The guidance that confirms this can be found below. This will present an opportunity for them to discuss and raise any issues they may have then."

12. On 28 March 2013 the Applicants made claims, by way of voluntary disclosure, for input tax previously under-claimed by them in respect of the C18 Notes for the following amounts:

(1) Tiga: £20,200.89 for period 07/11

(2) Atlantic: £13,398.63 for period 07/11

(3) Sound Moves: £185,834.38 for period 05/11

13. On 19 June 2013 an officer of HMRC visited Sound Moves' premises in relation to the claims. By letter dated 31 July 2013, HMRC's officer wrote to the Applicants rejecting the input tax claim in full on the ground that the goods concerned on which the import VAT related were not attributable to any supply made by the Appellants. HMRC decided that:

> "...[the relevant] goods were not imported for the use of...[the Appellants'] business as they were acting as a freight forwarder...
>
> HMRC Public Notice 702 section 2.4 states that if you act as a shipping or forwarding agent for an importer you cannot claim the VAT as input tax because the goods are not imported for the purposes of your business.
>
> In the light of the above your claim is rejected. I believe your best recourse on this matter is with your customer and not HMRC"

14. The letter of 31 July 2013 included the following paragraph:

> "If you disagree with our decision, regarding this decision, you will need to write to us within 30 days of the date of this notice, telling us why you think this decision was wrong and we will look at it again. If you prefer, we will arrange for a review by an HMRC officer not previously involved in the matter. You will the have the right to appeal to an independent tribunal. Alternatively you can appeal direct to the tribunal within 30 days of this notice".

15. By Notice of Appeal dated 12 September 2013, Sound Moves, Tiga and Atlantic each appealed against HMRC's July 2013 decision. The reason given on each Applicant's appeal form for the late submission of the appeal was:

> "Due to the holiday commitments, the Appellant was unable to meet with their representatives within the relevant time limit".

16. On 7 November 2013 the Tribunal wrote to each Applicant acknowledging receipt of the Notice of Appeal. The Tribunal directed that the three appeals be heard together and that HMRC *"shall provide a single Statement of Case to the Appellants and the Tribunal within 60 days of the date of the Directions"* (i.e. by 6 January 2014).

17. On 5 December 2013 HMRC filed a Notice opposing the applications for the appeals to be heard out of time on the grounds, inter alia, that *"the decision to issue the C18 (the disputed debt), was more than two years ago and as such the appeal should be struck out"*. On 19 May 2014 HMRC made an application to extend the time for filing its statement of case "*...until 60 days after permission to appeal is granted...*" on the grounds that:

> "...these appeals were submitted significantly out of time and we do not yet know whether the Appellants will be given permission to

appeal. As such the Respondents respectfully submit that it would be premature to file a statement of case at this point and would impose an unnecessary additional burden on both the Tribunal and the Respondents."

The Law

18. Section 83G of the Value Added Tax Act 1994 ("VATA 1994") provides that:

> "(1) An appeal under section 83 is to be made to the tribunal before –
>
> (a) the end of the period of 30 days beginning with-
>
> (i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates
>
> …
>
> (6) An appeal may be made after the end of the period specified in subsection (1)…, if the tribunal gives permission to do so."

19. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that:

> "(1) The overriding objective of these Rules is to enable the 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;
>
> (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 issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally."

20. Rule 5 of the Procedure Rules provides that:

> "(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> ...
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;
>
> ..."

21. As of November 2010, rule 20 of the Procedure Rules provides that:

> "(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.
>
> ….
>
> (4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal –
>
> (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
>
> (b) unless the Tribunal gives such permission, the Tribunal must not admit the notice of appeal."

22. Counsel referred us in their submissions to a number of decisions of the Upper Tribunal and of the Court of Appeal concerning the approach to be taken by a court or tribunal to the exercise of its discretion in relation to litigation deadlines. These included the Upper Tribunal's decisions in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC) ("Data Select"), *O'Flaherty v HMRC* [2013] UKUT 0161 (TCC) ("O'Flaherty"), *Graham (t/a Xs and Os Amusements (formerly Satellite Amusements) v HMRC* [2014] UKUT 0075 (TCC) ("Graham") and *HMRC v McCarthy and Stone (Developments) Ltd* [2014] UKUT 196 (TCC) ("McCarthy and Stone"). We were also referred to the Court of Appeal's decisions in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 ("Mitchell") and the joint judgments in *Denton, Decadent Vapours Limited* and *Utilise TDS Limited* [2014] EWCA Civ 906 ("Denton"). We were also referred to the decision of a differently constituted panel of the First-tier Tribunal in *Peter Arnett v HMRC* [2014] 209 (TCC), which Mr Bates submitted was wrongly decided and we were told HMRC has appealed, but we are not bound to follow First-tier decisions in any event. We consider these cases below (but do not repeat the citations).

Submissions

23. At the hearing before us, Mr Bates helpfully clarified that HMRC now accepted that the issue before the Tribunal was whether the appeal notices which were 12 days late should be allowed to proceed. He did not pursue the argument (referred to at [17] above) that the appeal was against the C18 Notices and so was two years out of time. It was agreed by the parties that the import tax had been paid by the Applicants and that the substantive issue to be determined (if permission to appeal is given) is the input tax claim referred to at [12] above.

24. Ms Belgrano asked the Tribunal to have regard to the overall time-line for this matter, including the fact that the Applicants had waited from August 2011 to December 2012 for confirmation of HMRC's policy position in relation to this matter (paragraphs [8] to [11] above), they made an input tax claim by way of voluntary disclosure in March 2013 (see paragraph [12]) which had generated a visit from HMRC in June 2013 (see paragraph [13]) but thereafter had been given no time scale for a response. As a result, the letter of 31 July 2013 had come as something of a surprise. Ms Belgrano submitted that it had been stamped as received on 7 August and thereafter both clients and advisers had been on holiday so it was not possible for them to meet during the 30 days before which the appeal should have been filed. She also drew the Tribunal's attention to HMRC's own late application for an extension of time to file its Statement of Case, and submitted that this delay had occurred in breach of the Tribunal's directions (see paragraphs [16] and [17]).

25. Ms Belgrano accepted that the Applicants' Notices of Appeal had not only been filed late but had also been submitted with the wrong decision appended to them and that the grounds of appeal had referred in more detail to the C18 decision in 2011 than they did to the 2013 decision under appeal. Mr Bates submitted that the grounds of appeal were so inadequate that, if the Tribunal were to grant permission to proceed out of time, HMRC will immediately apply for the appeals to be struck out. Ms Belgrano submitted that the more appropriate way to proceed would be for HMRC to seek further and better particulars of the grounds of appeal.

26. Ms Belgrano had not produced a witness statement or any other evidence giving further details of the reason for the delay in filing the appeals. The only information before the Tribunal as to the cause for the delay was the brief statement given at [15] above. She was unable to explain why exactly the same statement had been given in relation to each of the three separate appeals.

27. In relation to the Tribunal's exercise of its discretion, Ms Belgrano referred us to the Court of Appeal's very recent decision in *Denton.* She explained that this decision given by Lord Dyson , the Master of the Rolls, comprised three appeals which had been used by the Court of Appeal as a guidance case in which to clear up some of the confusion which had followed the Court of Appeal's earlier decision in *Mitchell.* She noted that the court had heard interventions from the Law Society and the Bar Council before issuing its decision.

28. Ms Belgrano referred us in particular paragraphs [24] to [38] of *Denton*, which set out a three stage test for the court in considering all the factors to which it is bound

to have regard under CPR 3.9. The first stage is to identify the seriousness and significance of the breach in relation to which relief from sanctions is sought. The second stage is to consider why the default occurred and the third stage is to evaluate all the circumstances of the case so as to deal justly with the application of the factors relevant to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with the rules. At [24] Lord Dyson MR makes clear that if the breach is neither serious nor significant then the court is unlikely to need to spend much time on the second and third stages.

29. In noting that neither the *Mitchell* nor the *Denton* appeals concerned the late commencement of proceedings, Ms Belgrano submitted that there was less need for the Tribunal to apply a strict approach where the issue was a short delay in commencing proceedings which could not be described as coming as a surprise to the Respondent. She submitted that in this case the delay was not significant or serious and that it had not jeopardised a hearing date. There had been a short period during which the Applicants had been unable to meet with their advisers and the appeals had been submitted promptly once that communication problem had been resolved.

30. Ms Belgrano reminded the Tribunal that the Upper Tribunal in *O'Flaherty* had confirmed that there was no need to establish exceptional circumstances or a reasonable excuse for the Tribunal to exercise its discretion to allow a case to proceed out of time. She submitted that there would be a great injustice to the Applicants if not allowed to proceed, whereas there is negligible prejudice to HMRC in being required to respond to an appeal made only 12 days late and in respect of which it has been in correspondence for some years. This was not a case where HMRC had closed its books and was entitled to view the matter as completed because the litigation deadline had passed. She referred us to *Denton* at [9] where the Court of Appeal had referred to the "*substantial extra work and extra costs*" incurred by the other party as a result of the non-compliance in *Mitchell*. She submitted that this was not such a case.

31. Mr Bates reminded the Tribunal that the background to the judgment in *Mitchell* was the need for the courts to bring to an end the casual approach to litigation which had been adopted in some quarters. He suggested that this casual approach was evident in this case, as not only were the appeals filed late but the grounds were so unclear that they looked like they were an appeal against the 2011 decision; the reasons given for the delay were sparse and the application did not even refer to the relevant authorities in asking the Tribunal to exercise its discretion.

32. Mr Bates' submission was that *Mitchell* was still the right approach (as confirmed in *Denton* at [24]) but that *Denton* provides further guidance on the approach to be taken. Referring to *Denton* at [45], he submitted that the starting point is for the Applicant to make a coherent case for why the time limit should be extended. HMRC took the view that there had been no such approach in this case. He submitted that the Applicants could have written to HMRC and asked if it agreed to an extension of time for filing the applications to the Tribunal.

33. Turning to the three stage approach in *Denton*, he submitted that the delay in this case was serious and significant. Any delay in commencing proceedings should be put into this category because the time limits have been prescribed for a good reason and any other approach would, he submitted, be inconsistent with *Mitchell*. The second stage is of course to ask why the default occurred, but in this case the Applicants have not provided sufficient detail for the Tribunal to be able to weigh up this factor. Mr Bates submitted that when the Court of Appeal in *Denton* referred to all the circumstances, it was referring to the record of compliance of the party in breach of the rules, not inviting that party to "sling mud" at their opponent. In these circumstances HMRC's own delays prior to the commencement of litigation were not a relevant factor. The third stage requires the court or tribunal to have in mind the need to encourage compliance with the rules. HMRC's case was that the Applicants had taken a casual approach to litigation in this case and that the Tribunal should take a view about it.

Conclusion

34. We note that the question of whether to allow an appeal to proceed out of time is a matter for the Tribunal's discretion. We remind ourselves that we are required to carry out a balancing exercise, taking into account all the circumstances of the case.

35. We also note that whilst the Tribunal's procedure is governed by Tribunal Procedure Rules and not by the Civil Procedure Rules, we are bound by a number of Upper Tribunal decisions (including *Data Select*, *O'Flaherty* and *McCarthy and Stone)* to include the factors set out in CPR 3.9 when considering all the circumstances of the case. It is significant to the reading of that line of authorities that the wording of CPR 3.9 changed after *Data Select* was decided, because the new CPR 3.9 gives more weight to factors concerned with the efficient conduct of litigation and the need to enforce compliance with the rules.

36. The three cases considered by the Court of Appeal in *Denton* concern procedural errors within existing proceedings (the service of witness statements, the filing of a costs budget and the payment of fees). The matter which concerned the court in *Mitchell* was the late filing of a costs budget, so we note that the court authorities are concerned with compliance with the procedural timetables for existing proceedings other than with the time limits for the commencement of litigation. We also note that they are concerned with the exercise of a discretion derived from the procedural rules themselves, rather than one conferred by statute. We regard the Applicants' application in this case as involving a significantly different issue to those before the Court of Appeal because it turns not on the issue of the efficient conduct of existing litigation but rather on the issue of whether the Tribunal should exercise the discretion conferred upon it by statute so as to "shut out" the Applicants from litigating at all. We find that were we to take that course there would be an undoubted prejudice to the Applicants and we take this finding into account in conducting our balancing exercise.

37. In *McCarthy and Stone* the Upper Tribunal doubted whether, in view of the changed wording of CPR 3.9, it was still appropriate for the Tribunal to work through

the list of factors listed in the previous version of CPR 3.9, as had been decided in *Data Select.* In the case before us, both counsel submitted that it was now appropriate for the Tribunal to follow the three stage approach set out by the Court of Appeal in *Denton* (although they advocated for different conclusions to that process). It seems to us that the correct approach for us to take is to have regard to all the relevant factors in the case (including, where appropriate, the matters set out in the previous version of CPR 3.9) but to consider such matters in the course of applying the three stage process as set out by the Court of Appeal in *Denton.*

38. Taking that approach, we consider firstly whether the delay in filing the Notices of Appeal in this case is serious and significant. Our starting point is that a failure to meet a deadline set by Parliament is always a serious and significant matter. However, we note that Parliament has also given the Tribunal discretion to allow such a case to proceed. In this case, we note that there has been a long correspondence between the parties about matters of policy. We note that HMRC's letter of 31 July 2013 does not appear to shut the door on further correspondence (see [14] above) because it offers to look at the matter again or to conduct a formal review and then refers to the right of appeal to the Tribunal. We are somewhat mystified by the application of a time limit of 30 days to the offer to look at the issue again informally rather than to the offer of a formal review but, whilst the letter is clear that an appealable decision has been made, we find that it is unclear whether the long informal correspondence is regarded by HMRC as having been concluded. It seems to us that, on receipt of the letter, the Applicants' had three options: further discussions on an informal basis; a formal review; or application to the Tribunal. We do not know why, faced with those three options, the Applicants opted for the final one but did so outside the statutory time limit. Mr Bates suggested that they should have spoken to HMRC but we tend to think they should have spoken to the Tribunal. They might, for example, have made a prospective application for an extension of time rather than applying after the time limit had passed. However, in the particular circumstances of this case, it seems to us that the failure to file the applications with the Tribunal within 30 days is not to be regarded as serious and significant in relation to the progress of the case by both parties and when viewed in the round. We note in reaching this conclusion that the breach had no impact on future hearing dates, did not disrupt ongoing litigation and that HMRC, having indicated its willingness to engage in further informal discussions on a novel area of policy, would not have closed its books entirely. Having reached this conclusion, we are minded to allow the applications to proceed, but in case we are wrong we have gone on to consider stages two and three.

39. Turning to stage two, we have scant information about the reason for the breach. We accept that HMRC's letter came "out of the blue" and we accept that it arrived in August when many of the company directors and their advisers would have been on holiday. But we are dealing here with substantial commercial enterprises which could be expected to deploy other people to the necessary tasks. We have some sympathy with Mr Bates' characterisation of the Applicants and their lawyers as having taken a casual approach to the commencement of this litigation in the absence of any evidence as to why no steps at all were apparently taken during the period of the delay. We find that the Applicants have made a weak case in relation to stage two.

40. In considering the third stage we note that at [31] the court in *Denton* made clear that an application for relief from sanctions should not automatically fail where the breach is serious and significant and there is no good reason for it. It is made clear that CPR 3.9 requires the court to consider all the circumstances of the case, albeit that the factors other than the need for the efficient conduct of litigation and the need to encourage compliance with the rules should be given less weight than those two considerations. In considering all the circumstances of the case (other than those to which we have already had regard in stages one and two) we note that the Applicants, having got off to a poor start, did make a relatively expeditious application to the Tribunal once they had been able to meet and make the decision to do so. We also note, as stated above, that the consequences for the Applicants of refusing them permission to proceed would be seriously prejudicial, whereas, in view of the short period of delay and its apparent willingness to continue to conduct informal discussions, we find that HMRC would not be so prejudiced. At this stage we do not need to form any firm conclusions about the merits of the Applicants' case. It has not been well-articulated in the grounds of appeal but we note that there has been a lengthy and high-level correspondence between the parties and we are satisfied, for the purposes of deciding this application, that there is a serious substantive issue to be heard. We have considered the need for litigation to be conducted efficiently and for compliance with the rules to be enforced, but we must also take into account the fact that we are exercising a discretion conferred by statute in relation to the commencement of proceedings outside the statutory time limit. This raises different factors from those considered by the Court of Appeal in *Mitchell* and *Denton.* Taking all these factors and weighing them in the balance, we conclude that it would be fair and just to allow the Applicants' applications to the Tribunal to proceed in this case.

41. We note that at [41] the court in *Denton* made clear that it was inappropriate for litigants to seek to take advantage of mistakes by opposing parties in the hope of a windfall strike out or other litigation advantage and at [42] that a contested application for relief from sanctions should be an exceptional occurrence because the parties should work together to avoid satellite litigation. We express the hope that the parties can work together to agree directions for the production of further and better particulars of the grounds of appeal before any further consideration is given by HMRC to an application for a strike out of the Applicants' cases.

42. 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.

ALISON MCKENNA
TRIBUNAL JUDGE

RELEASE DATE: 11 August 2014