



Neutral Citation: [2024] UKFTT 001102 (TC)

Case Number: TC09376

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video

Appeal reference: TC/2023/17106

*LATE APPEAL – appeal in relation to TBC - application for permission to make late appeal -
Marland considered - length of delay serious and significant – no good reason for delay –
prejudice to parties considered – whether appropriate to admit late appeal in all the
circumstances – application refused – appeal not admitted*

Heard on: 30 September 2024
Judgment date: 9 December 2024

Before

TRIBUNAL JUDGE GREG SINFIELD

Between

MERCIUM LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Nurul Ali, director of Mercium Limited

For the Respondents: James Abernethy, counsel, instructed by the General Counsel and
Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision concerns an application by Mercium Limited ('Mercium') for permission to make a late appeal against a decision by the Respondents ('HMRC') dated 2 October 2023 and a C18 Demand issued on 5 October 2023. For the reasons set out below, Mercium's application for permission to make a late appeal is REFUSED.

2. With the consent of the parties, the hearing was held remotely by video over Microsoft Teams. A face to face hearing was not held because it was more practical for the parties to attend remotely. The documents to which I was referred were an electronic hearing bundle of 452 pages and a skeleton argument prepared by HMRC of 12 pages.

3. 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 FACTS

4. I was not provided with any witness evidence and the background facts below are based on the selection of documents in the hearing bundle provided by HMRC.

5. Between 19 and 26 August 2021, Mercium completed customs declarations in its own name in relation to six customs import entries for, in total, 25 importations of goods by Guangzhou Lina Trade Co Ltd ('GLTC'). Although the declarations were in its name, Mercium was acting as agent of a freight forwarder called Dakun Supply Chain Management Co Ltd ('DSCMC') which was, in turn, acting as an agent on behalf of GLTC. Mercium was an indirect representative in relation to the declarations.

6. In April 2022, HMRC (Officer Anne Downham) contacted Mercium by telephone regarding checks on some imports and exports for GLTC. Following that initial contact, HMRC requested and Mercium provided some information in an exchange of emails in June.

7. In July, HMRC asked for contact details of the director of GLTC which Mercium provided. Later in July, HMRC asked Mercium to provide the signed authority for it to complete import declarations on behalf of GLTC. Mercium provided copies of the power of attorney which it had with its client, DSCMC, which in turn had a power of attorney from GLTC. Mercium's power of attorney with DSCMC contained an explanation of indirect representation which stated:

"In the case of Indirect Representation, Declarations are made by the Customs Representative in their own name and on behalf of the represented party.

In this case, the Customs Representative is the Declarant. From a legal point of view, the Customs Representative is the declaring party and is responsible for meeting its legal customs obligations.

The Customs Representative's role, in this case, is to provide professional services related to the execution of customs procedures. The client remains solely liable for its acts and accuracy of any information provided on the Customs Declarations, keeping records and payment of any Customs Duty or VAT."

8. On 10 August 2022, HMRC asked Mercium to confirm the delivery address for GLTC. Mercium replied with the address details on 8 November 2022.

9. There was no further contact between HMRC and Mercium until 12 January 2023 when HMRC sent Mercium a letter. The letter set out HMRC's concerns that the GLTC import transactions had been declared with incorrect values and were linked to import fraud. In the

letter, HMRC asked Mercium to provide evidence of payment of the invoiced amounts by GLTC supported by bank statements. Mr Ali of Mercium stated that the company had never received this letter. In the circumstances of this case, whether the letter was or was not received by Mercium makes no difference.

10. On 7 June 2023, HMRC (Officer Veronica Foss) sent Mercium a letter stating that they had discovered an error in relation to import duty and VAT due on the GLTC imports and that £9,368.37 was now due. The letter included a Customs International Trade Schedule which stated:

“We wrote to you on the 12 January 2023 regarding our doubts that the declared values of goods imported by you represented the full amount paid or payable for those goods. We told you that these doubts had been informed by comparing the values declared by you to the values declared at importation by other importers for goods comparable to those you have imported.

The difference between the values declared by you as declarant agent for your client and the values declared by other importers is significant. We therefore consider the declared values to be incorrect. Such comparatively low values are reasonable grounds for doubting the customs values declared.

...

I asked you to provide any information or evidence you wished me to take into account when considering the validity of the values declared by you.

To date, although you have supplied me with the documentation you hold, this does not provide full evidence of the value of the goods. Therefore, my doubts regarding the values declared by you at importation have not been dispelled.

...

The methodology I intend to apply in order to determine the duty payable on the imported goods is based on an analysis of recent and comparable imports of a particular commodity originating from a particular country. From this analysis we are able to identify comparable imported goods based on the type of import declaration being assessed. We use the outcome of this analysis to determine a reasonable threshold which identifies imports that we believe to be instances of under-declaration. Our detailed analysis of the relevant import codes indicates that the use of this methodology represents a reasonable legitimate value of these imports.

We have applied this methodology to the goods as set out in the attached schedule (these being the goods tested and other similarly low valued goods for which no evidence to dispel my doubts has been presented) and accordingly I intend to issue a post-clearance demand in the sum of £1078.02 import duty and £8290.35 import VAT”

The Schedule then set out in detail the valuation methodology applied by HMRC to determine the duty and VAT payable on the imported goods and the calculations.

11. On 20 June, Mercium replied by email to Anne Downham asking HMRC to show the calculations and methodology used to arrive at the conclusion that the values declared were significantly low. Anne Downham forwarded that email to Veronica Foss who replied on 22 June. After a further exchange confirming that Mercium understood HMRC’s email protocol, HMRC provided an updated version of the letter of 7 June which was dated 27 June and included the schedule of entries which had been omitted from the original. The Customs International Trade Schedule included with letter was identical to the one sent with the letter of 7 June.

12. On 28 June, Mercium emailed HMRC to say that they had sent the documents to their customer, DSCMC. Mercium emailed HMRC again on 30 June to say that GLTC had become bankrupt and was no longer trading. The email included the following:

“Given that the importer is bankrupt, we have no way to recover the debt that would be owed to us should we pay this post declaration demand. Please could you advise what is the HMRC legal position for such a scenario where a company/trader is bankrupt, does the joint liability element still apply for customs debt on the indirect representative?”

13. HMRC responded on 5 July in an email that stated:

“If an agent makes a customs declaration as an indirect representative of the principal, the agent and principal will be jointly liable for any customs debt. HMRC may seek payment from either the agent or the principal.”

14. There was no further contact between HMRC and Mercium until 2 October 2023 when HMRC sent Mercium a decision letter. The letter referred to HMRC’s letter of 27 June and stated that they intended to issue a post-clearance demand for £9,368.37. The letter stated:

“What to do if you disagree

I’m now offering you a review of my decision.

You can (either):

- accept my offer of a review
- appeal to an independent tribunal

If you want to do either of these, you must do so within 30 days of the date of this letter.

...

If you accept my offer of a review

An impartial officer who works for HMRC’s Solicitor’s Office and Legal Services (SOLS) team and who specialises in review work will take a fresh look at my decision. They are known as ‘review officers’.

The review officer will write to let you know the outcome of their review within 45 days, unless they agree a longer period with you. If they agree with my decision, they’ll uphold it and explain why. If they do not agree, they’ll either cancel or vary my decision and explain why.

If you disagree with the outcome of the review, you can still appeal to the tribunal. You must do this within 30 days of the date of the letter telling you the outcome of the review.”

15. The letter then set out how to accept the offer of a review and then stated:

“If you want to appeal to an independent tribunal

If you do not want to accept my offer of a review, or you disagree with the outcome of it, you can appeal to an independent tribunal. They will then determine the matter.

Your request must reach HM Courts and Tribunals Service within 30 days of the date of this letter. Or within 30 days of the date of the letter that tells you the outcome of the review.

If you want to appeal to HM Courts and Tribunals Service, please make sure you include with your request a copy of the letter, assessment, or other

decision that you want to appeal against. If you do not, HM Courts and Tribunals Service may reject your appeal.”

16. On 26 October, Mercium emailed HMRC to acknowledge receipt of the decision letter of 2 October. In the email, Mercium listed their correspondence (there is a mistake in one of the dates but nothing turns on that). Mercium asked if they were liable for the debt as the importer was now bankrupt and no longer trading although they included, in the list of correspondence, the email of 5 July in which HMRC explained that an indirect representative is jointly liable with the importer for any customs debt. Mercium asked for details about the valuation methodology and offered to provide further information.

17. HMRC acknowledged receipt of the email on 30 October and replied substantively on 2 November confirming that, as Mercium had acted as an indirect representative, it had joint and several liability. The email also stated:

“Now the Decision letter has been issued, your options are to request an independent Review or an Appeal, details are in the decision letter I have sent you.”

And said again at the end:

“Please note, as covered above, as the decision letter has been issued if you wish to contest the decision you should either request an independent Review or an Appeal.”

18. On 13 November, Mercium emailed HMRC as follows:

“We would like to contest this decision and request either an independent review or an appeal.

Based on your email, my understanding is that we are being held jointly and severally liable. Therefore, we need to understand what evidence we can provide to demonstrate that the goods are not undervalued.

Please let me know the next steps. I look forward to hearing from you.”

19. On 16 November, HMRC replied and referred Mercium to the information contained in the decision letter of 2 October and enclosed a copy.

20. On 24 November, Mercium sent a notice of appeal to the First-tier Tribunal (Tax Chamber) (‘FTT’). The notice of appeal of 24 November was not accepted by the FTT and was returned to Mercium. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (‘the FTT Rules’) provides that a notice of appeal must include certain information and be accompanied by a copy of any decision appealed. HMRC understood that the notice of appeal was rejected because it did not include the decision letter. Mr Ali did not contend that the decision letter had been included. The position is not entirely clear as the hearing bundle did not contain a copy of the letter from the FTT rejecting the notice of appeal but I consider it more likely than not that Mercium did not provide a copy of the decision letter with its notice of appeal. In addition, if the notice of appeal is provided after the time for appealing has expired, rule 20 states that it must include a request for permission to make a late appeal. The notice of appeal of 24 November wrongly stated that the appeal was in time and did not include any application for permission to make a late appeal. The standard letter sent by the FTT when rejecting a notice of appeal explains that the notice was incomplete because it did not include specified information required by rule 20 of the FTT Rules and invites the appellant to re-submit the notice of appeal. before an appeal can be accepted.

21. On 28 November, Mercium emailed HMRC to say they had “requested a review/appeal” and attached a copy of the notice of appeal dated 24 November. The email also said:

“We understand that, given the issuance of the decision letter, any additional information required for the review process should be directed to the review officer, we will of course endeavour to gather the additional information specified for the review officer.”

22. The notice of appeal dated 24 November and the email of 28 November showed that Mercium had not read (of if they had read it, had not understood) the letter of 2 October which clearly set out the difference between a review and an appeal and that, if a person requests a review, they cannot pursue an appeal to the FTT until the review has concluded. The letter of 2 October had also clearly stated that any appeal to the FTT should include a copy of the decision being appealed against.

23. On 22 December 2023, Mercium lodged another notice of appeal with the FTT. Whether the relevant appealable decision was the decision of 2 October or the C18 Demand of 5 October, Mercium’s appeal was either 51 or 48 days late. This notice of appeal correctly stated that the appeal was not in time and set out the reasons why the appeal was late as follows:

“We were going back and fourth [sic] with HMRC, the inspector dealing with the inquiry changed, see attached time line,

Date From Details

07/06/2023 HMRC Letter received

22/06/2023 HMRC Email from veronica – handed from Anne Downham

22/06/2023 US Email to Veronica confirm Email protocols

22/06/2023 HMRC Email from Veronica Confirming Email acceptance protocol

26/06/2023 US Requesting calculation and methodology – no response.

30/06/2023 US Informed HMRC importer is bankrupt

05/07/2023 HMRC Email from Vernica [sic] explaining sub agent

26/07/2023 US Anne Downham - Requesting POA – no other information.

No further request received information”

24. In an email to HMRC Solicitor’s Office dated 9 February 2024, Mercium further explained the reasons for the delay in appealing:

“Explanation for Delay in Appeal Submission

Thank you for your communication regarding the timeline for submitting our appeal. I wish to provide a detailed explanation for the delay, highlighting our initial interactions and the subsequent miscommunications that contributed to the situation.

1. Our initial correspondence was with Ann Downham, to whom we raised queries regarding post-declaration check – as you will see from the timeline below, we did not receive a response. This led to a significant delay in communication.

2. The case was then transferred to Veronica Voss [sic], but we were not notified of this change, causing further delay.

3. After reaching out to Veronica Voss [sic] on 30/06/2023 with additional details, we received no reply.

4. Instead we received the decision letter dated 02/10/2023, this gave until the 01/11/2023 to make an appeal. We immediately sought clarification on the methodologies used and responded on 26/10/2023.

This left us in a position where we were not aware of our position and therefore could not confidently lodge an appeal.

5. Notably, Veronica Voss [sic] contacted us on 02/11/2023, a day after the deadline for an appeal submission, leaving us without the necessary time or information to lodge an appeal.

6. Unaware of the full findings, we expressed our intention to appeal on 13/11/2023 and formally submitted our appeal thereafter.

We believe these circumstances highlight the challenges we faced in obtaining the necessary information from HMRC to proceed with an appeal in a timely manner.

We appreciate your understanding and request guidance on how to move forward given these extenuating circumstances.”

25. The notice of appeal contained nine grounds of appeal. However, grounds 1 - 5 and 7 - 9 are either questions or requests for further information rather than challenges to HMRC’s decision on the facts and/or law. Ground 6 appears to be a challenge to the valuation method used by HMRC but it lacks any detail merely asserting:

“Mercium does not agree with HMRC decision, not accept Alibaba and other prices as evidence, HMRC argue that the Alibaba prices lack the necessary elements to determine the final transaction figure under Valuation Method 1, however need to give us guidance of what cost.”

LEGISLATION – MAKING OR NOTIFYING AN APPEAL

26. Rule 20 of the FTT rules prescribes what a person must do to start appeal proceedings as follows:

“(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.

(2) The notice of appeal must include—

- (a) the name and address of the appellant;
- (b) the name and address of the appellant’s representative (if any);
- (c) an address where documents for the appellant may be sent or delivered;
- (d) details of the decision appealed against;
- (e) the result the appellant is seeking; and
- (f) the grounds for making the appeal.

(3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain”

LEGISLATION – TIME LIMITS FOR APPEALING

27. The decision of 2 October 2023 was appealable under section 16 of the Finance Act 1994 (‘FA 1994’). The time limit for making an appeal under section 16(1B) FA 1994 is 30 days. Accordingly, the time for appealing expired on 1 November 2023. However, on 5 October, HMRC issued the C18 Demand for additional customs duty and VAT of £9,368.37 in total. In the letter that accompanied the C18 Demand, HMRC stated that the time limit for appealing

was 30 days from the date of that letter, ie 4 November. In the circumstances of this case, nothing turns on whether the time limit for appealing expired on 1 November or 4 November.

28. Section 16(1F) FA 1994 states that an appeal under section 16(1B) may be made after the time for appealing has expired if the FTT gives permission. Where a tax statute says that an appeal may be made out of time with the permission of the FTT, rule 20(4) of the FTT Rules applies:

“(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 appeal.”

CASE LAW ON PERMISSION FOR LATE APPEALS

29. The Upper Tribunal has given guidance on the correct test to be applied when considering an application for permission to make a late appeal in *Martland v HMRC* [2018] UKUT 178 (TCC) (*‘Martland’*) at [23] – [47], the essence of which is summarised at [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 v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926]:

(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.”

30. The Upper Tribunal observed at [45] that the balancing exercise in stage three of the *Denton v TH White Ltd* process 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.

31. The decision of the Upper Tribunal in *HMRC v Katib* [2019] UKUT 189 (TCC) (*‘Katib’*) at [17] shows that, as a matter of principle, the need for statutory time limits to be respected is a matter of particular importance to the exercise by the FTT of its discretion to admit a late appeal.

DISCUSSION

32. Applying the three-stage approach required by *Martland*, I first consider the seriousness and significance of the failure to comply with the original time limit. The relevant time limit is 30 days from the date of the disputed decision. The purpose of the time limit is to promote

the efficient disposal of proceedings and provide some finality to litigation before the FTT. In this case, the appeal was either 51 days or 48 days late which was significantly outside the 30-day time limit. In my view, such a delay cannot be described as anything other than serious and significant. To his credit, Mr Ali did not try to persuade me otherwise.

33. The second stage is to consider the reason for the failure to comply with the time limit. In this case, I heard a lot about communications between Mercium and HMRC leading up to the decision letter of 2 October 2023. I accept that there were some gaps in the communications and some lack of understanding in the initial correspondence. However, that is not relevant to the issue that I must consider. The only question is why did Mercium not file a notice of appeal within the time limit? The actions that Mercium needed to take to request a review or lodge an appeal were clearly set out in the letter of 2 October. Mercium seems to have wanted to continue the correspondence in order to try and find a solution that did not involve it being held jointly and severally liable for the duty and VAT in relation to the imports on behalf of GLTC which was by then bankrupt. If it had wanted to continue to discuss the position with HMRC, Mercium should have requested a review and made further representations to the independent review officer. It did not do so. Mercium does not seem to have appreciated that the time limit for appealing started to run from the date of the decision letter and continued to run unless and until HMRC agreed to conduct a review. Not making an appeal in the hope that a solution might be found carried a serious risk that the time to appeal might run out and that is what happened. I do not accept that there was anything complicated or difficult about the process for requesting a review or appealing to the FTT which had been clearly set out by HMRC in the decision letter of 2 October and referred to in other correspondence. In summary, I do not consider that there was any good reason why Mercium did not appeal to the FTT in time.

34. The third stage is to consider all the circumstances of the case, balancing 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. I accept that there would be some prejudice to HMRC and the public interest if I were to grant permission for Mercium to make a late appeal. There is also an obvious prejudice to Mercium if I refuse to grant it permission to make the appeal late because it will be unable to put forward its case at a hearing and, if successful, no longer be liable to pay the amount of duty and VAT. However, the balance of prejudice between the parties is not the only issue. In considering the prejudice to the parties, I take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and to ensure that statutory time limits set by Parliament in legislation are observed and are not extended without good reason. As explained above, there was no good reason for the failure to notify the appeal within the time limit. To allow Mercium to make a late appeal now would be to ignore the clear time limits in the relevant legislation and possibly encourage others to do the same. The decision of the Upper Tribunal in *Katib* shows that, as a matter of principle, the need for statutory time limits to be respected is a matter of particular importance to the exercise by the FTT of its discretion to admit a late appeal. I also accept the submissions made by HMRC that Mercium's grounds in the notice of appeal for challenging the decision and the C18 Demand are weak. I consider that, in all the circumstances, the lack of any good reason for the delay and the need to ensure that time limits are observed outweigh any prejudice to Mercium of not permitting its appeal to proceed.

DECISION

35. For the reasons set out above, I have decided that this is not a case where it is appropriate to give permission to make a late appeal and the appeal cannot be admitted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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.

Release date: 09th DECEMBER 2024