



TC03025

Appeal number: TC/2012/06917

Late appeal – 4 indications by accountant Notice would be lodged – 9 months late – no understanding of time limits or purpose of Notice

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR ALEXANDER McMULLAN

Appellant

- and -

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN

**Sitting in public at Tribunals Unit, 3rd floor, Bedford House, 16-22 Bedford Street,
Belfast, BT2 7DS on 16 October 2013**

Mr Savage of James Savage & Co for the Appellant

Mr Maurice Chapman and Mr Paul O'Reilly for the Respondents

DECISION

1. This was an application to allow a late appeal by the Appellant against the
5 decision of the Respondents to impose a penalty determination of £45,604 for failure to declare a capital gains tax liability in his tax return for the year ended 5 April 2006.

2. The penalty was issued under section 95 of the Taxes Management Act 1970 and determined in accordance with section 100(1) of the Taxes Management Act 1970. The capital gain was £586,099 and resulted in a tax liability of £228,031.

10 3. By letter dated 3 December 2010 the Respondents proposed a 40% penalty. However this was subsequently reduced to 20%. By letter dated 13 May 2011 James Savage & Co (the Accountants) on behalf of the Appellant, wrote to the Respondents requesting a review by someone who had not previously been involved with the case. This review was carried out by Mrs Helen Durkin, Appeals and Reviews Higher
15 Officer who by letters dated 25 August 2011 advised the Appellant and the Accountants that she had concluded that the omission of the capital gain from the tax return for the year ended 5 April 2006 constituted negligence, agreed that the penalty loading of 20% was appropriate and that the amount of £45,604 was due and payable.

4. In her letter dated 25 August 2011 Mrs Durkin clearly stated that if the
20 Appellant did not appeal to the independent Tribunal within 30 days of the date of her letter she would assume that the Appellant agreed with her conclusion and the matter would be treated as settled. She would then arrange for the penalty to be collected.

5. The Accountants wrote to Mr O'Reilly of the Respondents on 9 November 2011
25 advising that the Appellant was dissatisfied with Mrs Durkin's review conclusion decision. The letter continued by informing Mr O'Reilly that the Appellant had instructed the Accountants to write to HM Courts and Tribunal Service to have an independent Tribunal decide the matter of Mrs Durkin's decision and hoped to complete and lodge the necessary forms within seven days. A medical report dated 9 November 2011 from the Appellant's General Practitioner was enclosed with the
30 letter indicating that the Appellant was suffering from basal cell carcinoma.

6. Mr O'Reilly had a telephone conversation with the Accountants on 15
December 2011 during which they advised that they had prepared the Notice of Appeal and wished to fax it to Mr O'Reilly for onward transmission to the Tribunal. Mr O'Reilly explained to the Accountants that the Notice of Appeal needed to be sent
35 directly to the Tribunal, that they should ensure they used the appeal form supplied by the Tribunal and that they should give an explanation why the appeal was being made out of time.

7. Mr O'Reilly had another telephone conversation with the Accountants on 20
January 2012 during which the Accountants advised that the appeal would be
40 submitted shortly but they were having difficulty in contacting the Appellant due to his health problems. Mr O'Reilly advised the Accountants that in the circumstances of the case HMRC would not object to the late appeal so long as it was submitted

without delay though it would still be necessary for the Accountants to explain to the Tribunal why the appeal was late.

5 8. The Accountants wrote to Mr O'Reilly by letter dated 2 August 2012 which date Mr O'Reilly had changed by hand to 2 March 2012. During the hearing Mr Savage confirmed the letter had been incorrectly dated and accepted the date stamp of the Respondents on the original letter clearly stated 5 March 2012. Most of this letter related to other matters of both the Appellant and his wife but the final paragraph stated that the Accountants were now in receipt of the necessary documentation for the submission to the Appeals Tribunal which they would submit within seven
10 working days.

15 9. Mr O'Reilly had a further telephone conversation with the Accountants on 20 March 2012 during which he asked the Accountants if the appeal had been submitted to the Tribunal. The Accountants replied that they were still waiting on one further piece of information. Mr O'Reilly advised the Accountants that this should not delay the submission of the appeal and urged the Accountants to submit the late appeal immediately as the Respondents could not hold off finalising records for the enquiry much longer. The Accountants stated that they would send the appeal immediately.

20 10. By letter dated 30 March 2012 addressed to the Accountants Mr O'Reilly noted that due to the ill health of the Appellant the Accountants had been unable to submit their appeal. However as the Respondents were bound to exercise fair and equitable treatment in all cases then unless an appeal was lodged with the Tribunal within 14 days, the Respondents would have no alternative but to oppose an application that the appeal be admitted out of time.

25 11. By letter dated 18 April 2012 the Tribunals Service returned to the Accountants their Notice of Appeal dated 28 March 2012 though neither party at the hearing was able to advise the Tribunal when the Accountants sent the Notice to the Tribunals Service. The Notice was returned as a hard copy of the HMRC decision letter had not been included.

30 12. By letter dated 21 June 2012 Mr O'Reilly advised the Accountants that as no appeal had been lodged with the Tribunal and in the absence of any further correspondence from either the Appellant or the Accountants, the Respondents considered the appeal against the penalty determination settled and were arranging for the collection of the penalty charge.

35 13. Whether the letter dated 21 June 2012 spurred the Accountants to action they did resubmit under cover of a letter dated 29 June 2012 the Notice of Appeal together with a hard copy of the decision letter and other documents.

40 14. I have rehearsed at some length the history of this matter as it is important that the Appellant, the Accountants and the Respondents all appreciate the timescale. During the hearing Mr Savage repeatedly tried to produce evidence why the original imposition of the penalty was wrong. He did not appear to understand despite

repeated explanations that the hearing was simply to determine whether the appeal should be admitted.

15. As a general rule when a tribunal is asked to extend a relevant time limit the following questions arise: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time.

16. It is clear to me that the purpose of the time limit is to introduce certainty into the tax regime. The delay in this case was inordinate: the Notice of Appeal should have been lodged with the Tribunal within 30 days of 25 August 2011 but was not properly lodged until 29 June 2012. Although the Appellant and Mr Savage suffered from ill-health the Accountants do not appear to have understood that all that was necessary to comply with the time limit was the submission of the Notice of Appeal. It was not necessary to have all the evidence available to support the appeal before the Notice was lodged.

17. In addition the Accountants advised Mr O'Reilly on 9 November 2011 that they hoped to lodge the Notice of Appeal within 7 days, on 15 December 2011 that the Notice of Appeal had been prepared for transmission by fax, on 20 January 2012 that the appeal would be submitted shortly and on 2 March 2012 that the appeal would be submitted within 7 working days. Yet the Notice of Appeal with the correct supporting document was not submitted until 29 June 2012. The Accountants appear to me to have had a total disregard to the statutory time limits despite repeated advice from the Respondents.

18. Mr Chapman helpfully referred me to the decision of Mr Justice Morgan in the Upper Tribunal in the case of Data Select Limited and The Commissioners for Her Majesty's Revenue and Customs [2012]UKUT 187 (TCC). In accordance with the decision of the First Tier Tribunal that it was undesirable to open up a dispute after a considerable period of time I have decided that the application to extend the time and allow a late appeal should be refused.

19. Accordingly the application is unsuccessful.

20. 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.

**ALASTAIR J RANKIN
TRIBUNAL JUDGE**

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RELEASE DATE: 29 October 2013