TC03791

Appeal number: TC/2013/06565

TYPE OF TAX – Application for permission to make a late appeal against an assessment to capital gains tax for 2006/07 – application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR CHIRAG PATEL **Appellant**

- and -

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

TRIBUNAL: JUDGE JUDITH POWELL
MR JOHN NISBET

Sitting in public at Bedford Square, London on 23 April 2014

Mr P Patel for the Appellant

Mr Matthew Mason for the Respondents

DECISION

1. This is an application by Mr Patel to submit a late appeal against the 2006/07 assessment issued by HMRC under section 29 Taxes Management Act 1970. The Tribunal granted this application and announced its decision at the hearing on Wednesday 23 April 2014 for the reasons we set out here in full.

2. The background facts are as follows. On 13 February 2013 HMRC wrote to the Appellant and his representative. The letter was entitled "Compliance Check" and explained that HMRC intended to carry out a compliance check to establish if there was any additional tax for him to pay. The letter explained that HMRC understood, from information held by them, that the Appellant had been involved in property transactions in recent years and that gains on property disposals and rental income may not have been declared. HMRC enclosed a copy of a letter they had sent the same day to the Appellant's representative which contained details of the information they wanted to receive by 13 March 2013. Essentially the information requested was for details of all properties owned (solely or jointly) by the Appellant during the period 6 April 2006 and 5 April 2012 inclusive together with completion statements for acquisition and, where appropriate, disposal, plus other information relevant to the computation of any gain and rental income.

3. On 4 March 2013 the Appellant's representative apparently contacted HMRC to say that the information held by HMRC was limited and that the Appellant would have full knowledge. The time limit afforded to HMRC for making an assessment for the year 2006/07 was due to expire and, on 27 March 2013, having heard nothing further from the Appellant or from his representative, HMRC issued a protective assessment (which was copied to the Appellant's representative) in respect of a gain on the sale of a property, 162 Tyneham Road SW11 5XR. This assessment was accompanied by a letter from HMRC which explained they were raising a protective assessment to protect their position in relation to 2006/07; the assessment was based on evidence held by HMRC of the acquisition cost and subsequent disposal for a higher amount. The letter explained that if the Appellant thought the assessment was wrong in any way he or his adviser should write and say so within 30 days.

4. The Appellant's representative had in fact written a short letter to the Respondents on 25 March 2013 which apologised for their delay and explained they were going through the information with the Appellant and hoped to respond "within the next three weeks". We assume this was not received prior to the issue of the assessment but we note that it contained no useful information at that stage about the sale of the property in question; however it (and the conversation on 4 March) did show an ongoing dialogue between the Appellant's representative and the Respondents. The next letter from the Appellant's representative was written on 16 May 2013 – we note this is more than 30 days after the date of the assessment. In that letter the Appellant's representative apologised for the delay which he said was caused by the Appellant having to "muster old information and documents". A revised calculation of the gain was attached. This was less than the assessed gain and the cover letter explains that the Appellant was sure there was more expenditure that

would have further reduced the gain (we were told at the hearing the Appellant thought there was no gain) but he was unable to locate any documentary evidence.

5. On 12 June 2013 HMRC wrote to the Appellant concerning the possibility of him being liable for a penalty for his failure to declare the gain and they also wrote to the Appellant's agent to explain that the time limit for making an appeal had passed but referring to the possibility of him making a late appeal provided that both there was a reasonable excuse and the appeal was made as soon as possible after the excuse ended. On 29 July 2013 HMRC spoke direct with the Appellant who said he had passed the correspondence to his representative. The following day the Appellant rang HMRC to say the representative was on holiday for three weeks and asking for an extension of time to respond which was refused although HMRC's officer indicated that as he was himself away for a few days he would expect a reply on his return which was 5 August 2013. On 8 August 2013 the representative called HMRC whose officer said no appeal had been made and that he had outlined the possibility of making a late appeal in his June letter. The representative apparently promised to send in an appeal and said he was meeting his client shortly.

6. On August 19 2013 the Appellant's representative submitted a formal appeal. The reason given for the late appeal was that the matter and information requested were from many years ago and the information had not been straightforward to obtain. The Respondents refused to accept the late appeal on that basis as they did not accept the Appellant had a reasonable excuse and the Appellant applied to this Tribunal to rule that HMRC must accept it.

7. Mr Patel, the Appellant's representative, explained that after the Respondents wrote to his client in February 2013, he had meetings with him and the client was sure at that stage he had made a loss rather than a gain and was trying to establish this by locating the relevant paperwork. He submitted that the letter of 16 May 2013 constituted both an appeal and the provision of information to support the computation, that the Inspector appeared to have agreed the numbers by this stage and that there had been full cooperation by the Appellant and his representative.

8. In opposing the Appellant's application Mr Mason said the grounds of appeal to the Tribunal refer to an oversight by the representative and the Appellant in failing to make a formal appeal on time and an oversight is not a reasonable excuse and neither is the previous reason given for the failure which is that there were problems in getting the necessary information. The Appellant could, he submitted, have promised to submit supporting information at a later date. He suggested that a reasonable excuse must be based on an event outside the control of the Appellant. Mr Mason submitted that the appeal was some 114 days late as it was not made until 19 August 2013.

9. Mr Mason referred us to several authorities governing the Tribunal's powers to give permission to make a late appeal.

10. First, the case of *Former North Wiltshire District Council* [2010] UKFTT 449 where it was said at paragraph 56 that the Tribunal Procedure (First-tier Tribunal)

(Tax Chamber) Rules 2009 (the "Rules") which govern the tribunal empower us to extend the time in appropriate cases and we should exercise the discretion to do so in order to give effect to the overriding objective in rule 2(1) of the Rules to deal with cases fairly and justly. In that case the tribunal also accepted (paragraph 59) that in the exercise of its discretion to give effect to the overriding objective it must pay particular attention to whether the Appellant has shown good reason for the delay in lodging the appeal and whether extending time would be prejudicial to the interests of good administration and legal certainty. We note that in paragraphs 59 to 61 the tribunal rejected the submission that the tribunal should not take account of the merits of the proposed appeal at all but also said that even where the merits are high this cannot be a factor to trump all other factors. There the tribunal balanced its assessment of the Appellant's culpability in delaying appealing and the prejudice to HMRC in terms of the public interest in good administration and legal certainty and on the other hand the loss and injury that would be suffered by the Appellant if an extension of time was refused.

11. Secondly, he referred us to the case of *Obhloise Benjamin Ogedegbe* [2009] UKFTT 364 where the tribunal held that the power to extend time for making an appeal should only be granted exceptionally and that there must be at least an arguable case for making the appeal.

12. Finally he drew our attention to the Upper Tribunal decision in the case of *McCarthy & Stone (Developments) Limited Monarch Realisations No 1 PLC (In administration)* PTA/345/2013. This case considered the powers of the Upper Tribunal and whether these rules are influenced by the Civil Procedure Rules ("CPR") which do not apply to the Upper Tribunal. In that case the Upper Tribunal agreed that the CPR do not apply to the Upper Tribunal and that the overriding objective in the Upper Tribunal Rules requires the Upper Tribunal to avoid unnecessary formality and seek flexibility in proceedings (which may mean that an unrepresented Appellant is granted relief from a failure to comply with the rules including time limits in circumstances where a more experienced and better resourced party is not) but that the overriding objective does not require the time limits in those cases to be treated as flexible. The Upper Tribunal should not adopt a more relaxed approach to compliance than the courts which are subject to the CPR and that the comments of the Court of Appeal in the case of Mitchell are also useful guidance and the tribunal referred at paragraph 33 of their judgement to what the Court said in [49] of Mitchell "the most important factors are the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules practice directions and orders".

13. As far as the Rules themselves are concerned Mr Mason drew to our attention that Rule 2 imposes the overriding objective "fairly and justly" to deal with cases, that Rule 5(3)(a) allows extensions unless this would conflict with an enactment setting down a time limit and that Rule 20(4) allows extensions even where a time limit is imposed.

14. In summary Mr Mason submitted that case law shows the courts to be reluctant to exercise a discretion to exercise their discretion to extend time limits and that these exist to provide finality and are in the general interest of the public.

15. We decided that we would allow the application. In particular we concluded that the letter of 16 May 2013 was an appeal against the assessment. We do not see how it could otherwise be regarded. It contained evidence of expenditure and provided a revised computation showing a smaller gain and the amount of tax believed to be due. We can see that the 16 May letter was still outside the 30 day limit for making an appeal but the surrounding correspondence shows the Appellant and his representative cooperated from the outset and although the letter of 25 March did not contain any useful information it did indicate that the representative and the Appellant were trying to comply with the enquiry letter. We did not accept there was a 114 day delay before the appeal was made – it was far less than that if the letter of 16 May represented the appeal which it must have done and we accept what Mr Patel said that this is very different from the very substantial delay in the case of Ogedegbe and where there was apparently no realistic chance of success. We make no finding about the accuracy of the revised computation contained in the 16 May letter from the Appellant's representative but we do find that there was ongoing correspondence from him which gave the appearance, at least, of being relevant to his challenge to the appeal. We concluded that allowing this appeal would be consistent with the overriding objective to deal fairly and justly with this case and in so concluding we take into account the important factors mentioned by the Upper Tribunal in the case of McCarthy.

16. 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.

JUDITH POWELL
TRIBUNAL JUDGE

RELEASE DATE: 8 July 2014