TC04008

Appeal number: TC/2013/09220

Income Tax - Application to appeal to the First-tier Tribunal out of time - Application Refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

AERON MATHERS **Applicant**

- and -

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

TRIBUNAL: JUDGE HOWARD M. NOWLAN
MR CHARLES S. BAKER

Sitting in public at 45 Bedford Square in London on 18 August 2014

Michael Edhouse of MJ Edhouse & Co, accountants, on behalf of the Appellant

Christine Cowen of HMRC on behalf of the Respondents

DECISION

1. This was an Application by Mr. Aeron Mathers ("Mr. Mathers") to appeal out of time against the assessments and penalties in respect of income for the tax years 2003/4 to 2006/7. The Application was strongly resisted by HMRC. The only question for us to decide was whether we should grant Mr. Mathers' Application to appeal out of time (we might immediately add, very seriously out of time), rather than to consider the merits of any possible appeal. It was obviously appropriate, however, to seek to understand the history, including thus the points that remained in dispute as well as the various delays and disputes that had already been a feature of this enquiry by HMRC into the various tax years. On our calculation, the total amount at stake, including additional tax and penalties, was the significant sum of £53,393.58.

2. In this Decision, we will deal separately with:

- some indication of the various points that either have been, or that remain, in dispute;
- a summary of the stages and delays in progressing this dispute, and the matters therefore material to the delay in applying to appeal to the Tribunal;
- our understanding of the tests that we should consider in dealing with this application to appeal out of time; and
- our Decision.

The points that have been, and those that remain, in dispute

3. Mr. Mathers had been a plumber. It seemed that much of his work consisted of fitting bathrooms for B&Q on a sub-contract basis when B&Q has contracted to sell a fully-fitted bathroom to a customer. Mr. Mathers had suffered some accident, presumably at some time in 2003, with the result that he suffered severe pain and was unable to undertake as much of the fitting work as he normally undertook. Accordingly, his profit for the period 2003/4 was much less than it had been in earlier years, since he had had to sub-contract much more of the work to others rather than do the work himself. It was this reduction in profit that led HMRC to undertake an enquiry into the relevant return.

4. The calculation of the profits as a plumber remained one of the points in dispute, because HMRC were disallowing many claimed costs as many appeared to be estimates, and the actual invoices for materials costs and certificates from sub-contractors were not available. We understand that many of Mr. Mathers' papers, including invoices and receipts, were said to have been destroyed when a tenant in one of the properties that we will mention shortly packed Mr. Mathers' belongings in a house that had been let to the tenant into a black plastic bag and, after a period, threw away the plastic bag and contents. The various certificates from sub-contractors had apparently been furnished to B&Q and no copies retained.

5. Following his injury, and in view of other health problems, it seems that Mr. Mathers largely gave up the plumbing business and turned his attention to property investment and to letting properties. Three categories of property were mentioned to us during the hearing. The first were some chalet bungalows, presumably very near the sea, either in or close to Clacton. The second category were three houses in Hemel Hempstead that had been sub-

divided with each floor being let to a tenant, and some of the facilities being shared. The third property was one in Cyprus.

6. HMRC had been suspicious that rental must have been concealed in relation to the Clacton properties. They had apparently been inherited by him, or given to him, and they were said to have been in a poor state. They were very small wooden structures, looking like seaside chalets. We were never given the detail but they seemed to have been let to some housing trust (with which it was possible that Mr. Mathers was connected) at a rent of £100 a year for each of the five properties, i.e. £500 in total. The deal seemed to be that the trust would improve the properties, whereupon Mr. Mathers would presumably benefit on the expiry of the leases. We could not possibly consider whether any undertakings to improve the properties might constitute deemed premiums, a proportion of which might rank as income, because we were given no detail of the length of term of the leases or the terms of any obligation to undertake work. It did however seem that the properties were now worth roughly £30,000 each, though whether and when Mr. Mathers might either acquire vacant possession or be able to re-set the rents was never mentioned.

7. There had been a number of disputes between Mr. Mathers and HMRC in relation to the Hemel Hempstead properties. Some had been resolved between the parties even prior to HMRC reviewing the officer's original decision on closing the enquiry, but other disputes remained, largely in relation to estimated costs for repairs and maintenance. One particular claim related to a deduction claimed for £5,000 on refurbishing a kitchen, which HMRC had disallowed either or both because they were questioning whether the expenditure was capital or income, and because there were again no invoices or other proof of the costs having been incurred.

8. The Cyprus property was of a different nature. HMRC had seen web pictures of the various properties after they had been built, one of which they had assumed that Mr. Mathers owned, and when no rent had been declared in respect of it, they assumed that rent had simply been concealed. This emerged not to be the case. Mr. Mathers had simply bought an option or contract to acquire one of the properties before they had been built, and had then paid two or three further calls for further amounts during the building period. When the properties were completed, and the final call was made for the balance of the price, Mr. Mathers was unable to afford that call and therefore sold his contract. We were not told whether he made a gain or a loss on so doing, and we were not told whether anything had been omitted from any return in respect of this property on its sale. All that we gathered was that the one-time expectation that Mr. Mathers must have received, and not declared, rent was obviously wrong, and this had been settled during the enquiry period. Mr. Mathers had criticised HMRC for raising, so he claimed, time-wasting enquiries in relation to the Cyprus property, but when he had failed to respond to earlier letters and notices from HMRC in relation to both the Cyprus property and other properties, we consider that HMRC's enquiries were perfectly legitimate.

9. There was also a reference to some properties in Liverpool and Latvia, with HMRC suggesting that some rent in respect of them may not have been included in returns.

10. A very major aspect of the dispute in relation to undeclared income was the suggestion by HMRC that no evidence had been produced to account for numerous of the credits to the eight bank accounts that Mr. Mathers had with Halifax Bank and others with HBOS and Abbey National (Santander). It was claimed by Mr. Mathers and his accountant that many

of the credits simply reflected moneys being moved from one account to another, though it seems that HMRC were not satisfied that they had been given evidence of the matching debits to other accounts. Other credits were said to reflect non-taxable deposits made by tenants. We were not taken to any of the doubtless complex detail of movements in these bank accounts. One of HMRC's concerns was the issue of whether Mr. Mathers derived any benefit from the quite significant rentals that the housing trust, to which leases of the Clacton properties had been granted for negligible rent, itself derived from those properties. We learnt nothing about this issue.

The course of the enquiries

11. The first enquiries (into the returns for 2003/4 and 2004/5) were opened on 4 September 2006 and, according to HMRC, Closure Notices were issued on 12 May 2009. HMRC asserted in their Statement of Case that there had been no agreement with, and very little cooperation from, Mr. Mathers, and that nothing further would be gained by prolonging the enquiries.

12, Mr. Mathers appealed, out of time, in respect of the adjustments in the Closure Notices on 24 August 2009, but HMRC accepted the Appeals. Little further progress seems to have been made and the decision maker issued a letter on 6 August 2010 setting out in some detail HMRC's current view of the matter. Attached to that letter were 14 schedules of calculations.

13. In a letter dated 19 August 2010, the Appellant requested a statutory review. The review took some time, and a letter of 3 September 2010 confirmed a telephone conversation, agreeing to an extension of time for the review. We were shown the very full review letter which was issued on 23 February 2011. Several adjustments were made in the review. It was accepted that the rent in respect of the Clacton properties was indeed no more than £500; some matters in relation to other let properties were agreed, and some contentions by HMRC dropped, and certainly HMRC accepted that no rent had ever been received in respect of the Cyprus property. Insofar as conclusions in the enquiry resulted in some of HMRC's claims being abandoned (for instance that particular receipts must have been rent) it seems that this did not result in the overall claims being reduced, because concluding that particular receipts were not of undeclared rent simply raised the amount of the credits to bank accounts that had not remotely been accounted for. We understand that the additional assessments, identified by the original decision, were actually materially increased during the review. Furthermore it was at this stage that the hitherto unspecified penalties were issued. This accordingly resulted in the total debt in respect of assessments and penalties being the figure recorded in paragraph 1 above.

14. The letter of 3 September referred to in the previous paragraph, which was sent to both Mr. Mathers and his accountant, indicated two reasons as to why the review would be somewhat delayed. The first was to allow HMRC to issue penalty determinations so that those could be considered by the reviewer alongside the main matter. Secondly it was to afford "you and your client time to collate any further evidence relating to the case which may materially affect the amounts assessed." Later in the same letter, the reviewer said"… as indicated above, I will be happy to consider any further representations or documents you may wish to consider as part of this review." Then again "… I would ask that you let me have any submissions in good time to allow me time to give them proper consideration." Thus both Mr. Edhouse and Mr. Mathers could be in no doubt that this was their opportunity

to give a full response to the HMRC decision of 6 August. They did not make any representations and the statutory reviewer proceeded without the benefit of their comments on the HMRC calculations.

15. When the letter summarising the full outcome of the review was issued on 23 February 2011, its final paragraphs made it clear that if Mr. Mathers was not satisfied with the outcome of the review, he should appeal to the Tribunal within 30 days. The letter gave the web address and the phone number of the Tribunal, and also said that "if you do not appeal to the Tribunal within 30 days of the date of this letter I will assume that you agree with my conclusion and the matter will be treated as settled by agreement under section 54(1) TMA 70".

16. On 21 March 2011, Mr. Edhouse wrote to HMRC and said that "[he was] writing to confirm that [his] client does not agree with your conclusions and an appeal will be made to the tribunal." A hand-written PS to the letter said "Due to a sudden bereavement in my family in the north of England I am a little late in sending this letter to you as I had to attend to matters in Halifax West Yorkshire."

17. It seems either that no actual Notice of Appeal was sent to the Tribunal, or (according to Mr. Edhouse's contention), the Tribunal must have lost it. We will revert to this in giving our decision.

18. Four months later, on 12 July 2011, HMRC sent a letter to both Mr. Mathers and his accountant which should certainly have alerted them to the fact that, if a Notice of Appeal had been sent to the Tribunal, something had clearly gone wrong with the submission. The letter said that "in the absence of any further correspondence from you or your accountant the file has been returned to me to implement the relevant amendments." Much of the letter then dealt with the required adjustments. The final three paragraphs were as follows:

> *"Finally I would remind you that in the absence of a reply, within 30 days, to the reviewer's letter of 23 Feb 2011 the matter was deemed to be settled by agreement under s.54(1) TMA 70.*
>
> *Your only recourse of further appeal at this stage would be to the Tribunal Service, although any appeal to them should have been made within 30 days of the reviewer's letter of 23 February. Further information about the tribunal service can be found at www.tribunals.gov.uk/tax or you can telephone them on 0845 223 8080.*
>
> *I have copied this letter to your adviser Mr. Edhouse."*

19. Nothing then happened for 10 months. On 23 May 2012, Mr. Mathers sent a complaining letter to HMRC, the essence of which is illustrated by the following paragraphs:

> *"I have spoken to my accountant again and he has advised me that he wrote to the commissioners some time last year.*
>
> *I would like to make a complaint about the way this investigation is being handled. The ground of the complaint are.*

The Inland Revenue are costing me a lot of money by letting this investigation run on for years and years.

……

So now please tell me what is required to do to get this investigation tied up and sorted.".

20. On 7 June 2012, HMRC replied, indicating that if Mr. Mathers wished to continue the dispute his only resort was to write to the Tribunal service in the manner already indicated in the two previous letters dated 23 February 2011 and 12 July 2011. The letter clarified that the General Commissioners had been replaced by the Tribunal Service in April 2009, albeit of course that the earlier two letters had anyway made clear that the appeal would have to be made to the Tribunal Service, at the website or phone number given.

21. On 27 November 2013, the Tribunal Service in Birmingham received a Notice of Appeal from Mr. Mathers. The grounds of appeal were various suggestions of inaccuracy in the findings of the original officer and the reviewer. The Notice went on to explain the late application to appeal in the following terms:

"My accountant is:
Michael Edhouse of 90 Horse Road, Hemel Hempstead, Herts, HP1 1PX
My accountant has informed me that he sent off the documents to the tribunal service in 2011 within the time limits.
We have not received any response back from you.
This is the reason I am filling out this form personally, as time is ticking on and now we are in 2013. We would also like to take this opportunity to enclose a letter of complaint that I sent to HMRC to show that there are many things they have done unprofessionally and not to mention making up figures as they go along. Please find this letter enclosed."

22. In the hearing before us, two points were stressed.

23. First, it was claimed that the explanation for the fact that this enquiry had gone off the rails was that Mr. Edhouse had ample information with which he could have responded to HMRC, and explained all their remaining concerns, but he was waiting for HMRC to itemise the claims that they still advanced. He alleged that they never gave this summary or listed the questions that they wanted resolved, and this is why he never had the opportunity to advance answers, many of which he suggested he would have had. In part, the answers looked as if they were going to refer to debits to bank statements where expenditure had been incurred, and it would have remained to be seen whether HMRC would have found information of this nature satisfactory in sustaining claims for deductions either from rental income or from the profits as a plummer.

24. The other point that emerged before us was that Mr. Edhouse said not only that he had sent the original Notice of Appeal to the Tribunal Service (as distinct from the Commissioners), but he said that he expected that the Notice had been lost because matters were in some chaos, following the change from the General and Special Commissioners to the First-tier Tribunal. When we asked whether he had any evidence that the original Notice of Appeal had been submitted, he said that he did have a copy of the covering letter and the

Notice at home, but that he had not brought it with him. He had, however, compiled a very substantial file designed to make numerous complaints about the conduct and findings of HMRC, but had not thought it material to bring a copy of the original Notice.

The tests that we must apply

25. We have considered the tests and general approach that we must adopt in dealing with applications to appeal out of time. In particular we have read the full decisions in *HMRC v. McCarthy & Stone (Developments) Limited*, [2014] UKUT (TCC) 0196, *Data Select Limited v. HMRC* [2012] UKUT 187 (TCC) and *Leeds City Council v. HMRC* [2014] UKUT 0350 (TCC). There is no need for us to explain our full understanding of the correct approach to adopt, but briefly we consider the main points to be that:

- even if Tribunals are not required to follow the full requirements of the latest guidance given to the higher courts in terms of seeking to ensure much stricter adherence to time limits and other directions, in order to ensure the efficient and most cost-effective conduct of litigation, we must certainly pay some regard to that intended stricter adherence to such matters;
- as Tribunals, we are entitled to approach matters slightly more flexibly than the higher courts are now encouraged and directed to do;
- we must certainly not, however, allow litigation to be side-tracked by other parties in litigation seeking to rely on, and exploit, trivial procedural steps that their opponents may have failed to address; and
- in considering generally how to deal with late applications (for instance to bring an appeal, as in this case) we should still address the list of points summarised by Mr. Justice Morgan in *Data Select.* Those points are that we should address the questions:

> *"(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 a refusal to extend time or the grant of such an extension?*

- We also consider it appropriate in this case to pay some regard to whether we consider that the Applicant was likely to have been able to raise valid and compelling points, should an appeal proceed, particularly because it seemed that the tax and penalties being imposed would be a serious matter for the particular appellant; and
- It is also relevant to pay some regard to the whole conduct of the enquiries, and to the issue of whether there have been repeated delays, non-cooperation and failures to advance points, arguments and explanations at many earlier times.

Our decision

26. The dominant feature of this Application is that the delays by the Applicant and his accountant, and the failures to remedy and rectify delays on numerous occasions, have been quite extraordinary.

27. On being given precise details of how to appeal, and a direction to appeal within 30 days, in the letter of 23 February 2011, there was a delay of nearly 3 years before the notice was sent to the Tribunal in November 2013.

28. This is particularly odd in the light of the letter sent to HMRC within the 30-day time limit indicating that Mr. Mathers would indeed appeal. We do not know with certainty whether a Notice of Appeal was sent to (and thus lost by) the Tribunal or whether it was assumed wrongly by Mr. Edhouse that the appeal would be before the General Commissioners, or whether the formal Notice of Appeal was entirely forgotten. We are, however, far from satisfied with the explanation given by Mr. Edhouse that he had a copy of the original Notice of Appeal at home but had forgotten to bring it to a hearing, whose ambit was simply to consider whether to allow Mr. Mathers to appeal out of time. Our decision on whether a Notice of Appeal was originally given is that it has not been established, to the standard of reasonable probability, that the Notice was given to the Tribunal.

29. Regardless of whether some original Notice of Appeal was submitted or not, it must have been glaringly obvious to both Mr. Edhouse and his accountant that something had gone wrong with the intended or actual submission when HMRC made this clear in their letter of 12 July 2011. Notwithstanding this, absolutely nothing appears to have been done, in terms of enquiring with the Tribunal whether they could find a Notice of Appeal, or providing a copy, or indeed (only 4 months late at the time) sending a replacement notice. Nothing was then done for 10 months, whereupon Mr. Mathers' letter to HMRC of 23 May 2012, referred to in paragraph 19 above, complained about the conduct of HMRC and mentioned that a notice had been sent to "the Commissioners", but he made no reference to the fact that for 10 months it must have been clear to both Mr. Mathers and his accountant that the first Notice had not been received. These delays, in responding to information that the Notice of Appeal had not been received, further confirm our conclusion that the Notice would not have been properly submitted in the first place. Had Mr. Edhouse been convinced that the Notice had been submitted to the Tribunal on time, surely it would be obvious that this should be explored with the Tribunal as soon as it was mentioned that no Notice of Appeal had been filed.

30. When, yet again, HMRC informed Mr. Mathers and his accountant that their only recourse was to apply to the Tribunal for leave to appeal out of time, this letter being sent only two weeks after the letter from Mr. Mathers mentioned in paragraphs 19 and 29 above, a further delay of 16 months occurred before the Notice of Appeal was actually sent to the Tribunal in November 2013.

31. We can obviously reach no other conclusion than that the delays were unusually long; they appear to be entirely the fault of either or both of the Applicant and his accountant; and the really extraordinary thing about the delays is that when it was made perfectly clear to both of them that matters had gone off the rails, they made no attempt to rectify matters for very long periods of time.

32. Turning now to the significance of, and the reason for, the 30-day time limit for applying to appeal, there are several very obvious important justifications for that rule. It is in nobody's interests for disputes to be dragged out for extended periods. Particularly in a case like this, it would not only contribute to the costs of disputes if an appeal to the Tribunal could be brought after an extended period, but when documents have already been lost, one relevant bank has proved incapable of providing replacement bank statements prior to some particular date, and the people who had handled this dispute at HMRC may well have retired or moved to different duties, it is vital that an appeal should be known to be in the Tribunal list to enable preparations to be made in a timely manner. It is simply unacceptable for

HMRC to tell the Applicant on several occasions that the matter will be closed unless he appeals within 30 days, whereupon Mr. Mathers, who has been told on at least two occasions in the very clearest terms that the original Notice of Appeal (if there was one) has been mislaid or misdirected, does nothing for well over two years.

33. We are marginally influenced by the earlier conduct of this dispute. There appears to be considerable evidence that Mr. Mathers' tax returns had been deficient, and on several early occasions during the enquiry period, HMRC found Mr. Mathers to be uncooperative and HMRC had to resort to statutory powers to gain information. The constant argument advanced by Mr. Mathers' accountant that all the confusion resulted from the fact that HMRC failed to list points of contention or failed to ask for explanations for matters in the bank statements that they could not reconcile seems incredible. Either Mr. Mathers or his accountant could at any time have supplemented information and sought to persuade HMRC that the obvious points that they were maintaining were incorrect. At the commencement of the review they were clearly invited to do this, and neither of them advanced any further fact or argument. Particularly in a case such as this where HMRC officers have spent countless hours on an enquiry, it is ridiculous for the full facts not to be divulged at that stage so that they can be considered by people who are thoroughly familiar with every aspect of the case. In contrast it would be far less satisfactory to fail to communicate at that stage and expect to put further information to a Tribunal that would have only a short time to assimilate all the information.

34. In an Application of this nature, we can and should give some attention to the likely outcome of an appeal were we to grant the requested Application. In this regard, there are certainly no issues set out in the statutory review conclusion letter of 23 February 2011 where HMRC are plainly wrong. Broadly the two issues in contention relate to claims for expenditure where those claims have to date been rejected largely on account of lack of evidence, and claims that Mr. Edhouse could provide schedules accounting for hitherto unexplained credits to the numerous bank accounts, disabusing HMRC of the belief that such credits represent undeclared income. When various attempts have already been made to establish both these doubtful points, and when Mr, Mathers and Mr. Edhouse have ignored appropriate calls to advance further information, and when now very considerable further time has elapsed since the date of the disputed expenses and bank account credits, we are far from convinced that this was a case where the late appeal would have been likely to benefit Mr. Mathers.

35. We regret to say that this is a case where if the taxpayer loses vital information, fails to advance arguments and reconciliations in a timely manner, fails to cooperate and then completely ignores time limits for a period of years, such a taxpayer runs the risk of losing his opportunity to advance all the defences that he might, with greatly more efficiency on his part, have been able to advance.

36. In the light of the manifest failings by the taxpayer, and possibly by his accountant as well, and the extraordinarily long delay that occurred before a Notice of Appeal was sent to the Tribunal, we refuse the application for this appeal to proceed out of time.

Right of Appeal

37. 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.

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HOWARD M. NOWLAN

TRIBUNAL JUDGE

RELEASED: 11 September 2014