



TC06086

Appeal number: TC/2016/02207

Procedure – Application to set aside decision – late application - extension of time allowed – set aside refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr ERROL ALMOND

Appellant

- and -

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

JUDGE ABIGAIL MCGREGOR

Having considered an application by the Appellant, Mr Errol Almond, to set aside the decision of the Tribunal released on 16 May 2017, the Tribunal decides as follows.

DECISION

1. This decision concerns an application to set aside an earlier decision of the
5 Tribunal on the Appellant's substantive appeal.

2. I have considered the application without a hearing on the basis of the written
submissions received from the appellant as they were clear and I did not consider it
necessary to put the parties to the time and expense of an oral hearing on what I
consider to be a straightforward application.

10 3. The respondents were given an opportunity to respond to the application, but
made no submissions.

4. The essence of the application is that the Appellant has obtained what he
considers to be new and convincing evidence which, if it had been before the Tribunal
at the original hearing, may well have resulted in a different decision on the appeal.

15 **The facts**

5. The Appellant's appeal related to discovery assessments for each tax year from
2002-03 to 2006-07 and 2010-11 and penalty assessments for failure to notify in
respect of each tax year from 2002-03 to 2006-07. His appeal was heard in the First-
20 tier Tribunal on 7 November 2016 and 24 February 2017 and a full decision of the
Tribunal, issued on 16 May 2017 (the '**Decision**'), allowed the appeal in part.

6. The appeal concerned undeclared income from property rentals.

7. On 11 July 2017, Mr Almond submitted an application to the Tribunal to set
aside the decision of the Tribunal.

Late application

25 8. Under Rule 38(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber)
Rules 2009, a person seeking to apply for a decision to be set aside must make a
written application to the Tribunal so that it is received no later than 28 days after the
date on which the Tribunal sent notice of the decision to the party.

9. The 28 day time limit in this case expired on 13 June 2017. Therefore the
30 application to set aside was made a little under a month late.

10. In the application, the only reference to this lateness is: "I did go to the Tax
Office first thinking they might be able to adjust accordingly however they advised
me to ask the Court to set aside."

11. Since the respondents have not made any response to the application to set
35 aside, they have not made any submissions on the lateness of this application.

12. I cannot verify Mr Almond's assertion that he contacted the "Tax Office", by which I assume he means HMRC, first.

13. The Tribunal has a discretion as to whether to allow an extension of a time limit, but it must exercise that discretion judicially, with a mind to the overriding objective in Rule 2 to deal with cases fairly and justly.

14. The Upper Tribunal, in *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC) considered the question of extensions of time, and confirmed that the Tribunal should follow the approach set out in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC), as summarised in the following passage:

10 "[34] ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a
15 general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following 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 an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those 5 questions.

20 [35] The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker* [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see *Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc* [2007] STC 1196.

30 [36] I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [23]-[24] which is in line with what I have said above."

15. I will therefore consider each of the 5 points in turn:

(1) The purpose of the time limit is to enable the parties to litigation to have finality of litigation after a particular period of time;

40 (2) The delay was just under a month;

(3) The explanation for the delay was that Mr Almond had contacted HMRC first believing that they had the power to further amend his tax assessments - Mr Almond is representing himself and is therefore likely not to be familiar with Tribunal procedure;

(4) The consequences for the parties of an extension of time will be to allow Mr Almond the opportunity to have his application for set aside addressed, but for HMRC will be to open them up to potential further litigation (if, for example, this Tribunal determined that a rehearing was necessary); and

5 (5) the consequences for the parties of a refusal to extend time are not simply the reverse of allowing it because it would not necessarily mean the end of litigation, since even if this application fails, Mr Almond may still appeal the substantive decision (noting that the 56 day period for appealing is deferred by virtue of Rule 39(2)(c) to 56 days after a notification of the refusal to set aside a
10 decision).

16. On balance I find that the relatively short delay does not put HMRC at a substantial disadvantage and therefore allow an extension of time for the application.

Application for set aside

17. Mr Almond asks for the Tribunal decision to be set aside for two reasons:

15 (1) the Decision allowed Mr Almond a deduction for his mortgage interest based on the only evidence before the Tribunal, being a mortgage statement just before it was redeemed (Spring 2009), whereas Mr Almond argues that the mortgage interest paid in earlier years was much higher and he can now provide evidence of the mortgage rate in March 2008, which was higher; and

20 (2) Mr Almond asks the Tribunal to reconsider the part of the Decision that did not allow Mr Almond a deduction for property maintenance and repair expenses because he was not able to provide any evidence of the expenditure incurred on the grounds that he is a credible person and has proved HMRC wrong on several other counts.

25 18. My consideration of the application under Rule 38 requires me to consider whether one or other of the specific conditions set out in Rule 38(2) of the Tribunal Procedure Rules was satisfied, and whether it is "in the interests of justice" for the decision to be set aside.

19. The conditions in Rule 38(2) are as follows:

30 "(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;

(c) there has been some other procedural irregularity in the proceedings; or

35 (d) a party, or a party's representative, was not present at a hearing related to the proceedings."

20. Mr Almond does not identify a specific condition, but I believe it is a fair assumption that he is arguing that (b) above is satisfied, on the basis that the new

evidence on the mortgage interest rates was not sent to the Tribunal at an appropriate time, i.e. at or before the hearing of the appeal.

21. Rule 38(2)(b) was considered in *Daksha Fraser (as representative partner for Starlight Therapy Equipment Partnership) v Revenue & Customs* [2012] UKFTT 189 (TC) by Judge Poole who said:

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"35. The conditions in Rule 38 (2) which might most obviously be said to be satisfied in this case are those contained in Rule 38 (2)(a) or (b) - on the basis that "a document" (i.e. the new evidence which the appellant now seeks to put forward) "was "not sent to a party" [i.e. HMRC]" or "was not sent to the Tribunal at an appropriate time" (i.e. before the Tribunal was making its decision on the appeal).

36. However, I consider that a failure to send the new evidence would need to be in the nature of a "procedural irregularity" before it can satisfy the condition in (2)(a) or (b), because of the wording of paragraph (2)(c), which refers to "some **other** procedural irregularity" in a way which implies that (2)(a) and (2)(b) are considered to be specific examples of procedural irregularity.

37. It follows that the condition in Rule 38 (2)(a) or (b) is only satisfied if the representative's failure to submit full evidence in support of the original appeal can be regarded as a "procedural irregularity". Whilst his failure to submit full evidence at the correct time might certainly be considered procedurally inadequate, I do not consider it to have been a procedural irregularity - the question of what evidence should be submitted in support of an appeal is a matter for each party to decide for himself in conjunction with his advisers, and I do not see how a decision to submit what turns out to be inadequate evidence could be regarded as giving rise to a "procedural irregularity"."

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"40. The requirement in rule 38(1)(a) of the TPRs (that it must be "in the interests of justice" to set a decision aside) requires a broad balancing of the various factors involved.

41. It might be said that it will always be in the interests of justice to consider new evidence before reaching a final decision, and that argument has some force. It is however only half the story. It could not be right that a party should be permitted to re-litigate the same dispute repeatedly simply on the basis of bringing forward some new evidence every time the result went against him.

42. The function of the Tribunal is to provide efficient resolution of disputes between taxpayers and HMRC. Whilst some latitude may be allowed for taxpayers who are inexperienced in presenting their case, it would completely undermine the Tribunal's function if it were routinely to allow losing parties (whether taxpayers or HMRC) to re-litigate appeals on the basis that they did not feel they had put sufficient evidence before the Tribunal when it first heard the appeal. Parties should be well aware that an appeal offers a one-off opportunity to put their case as best they can, not an opportunity to hope for a successful outcome on the basis of minimal effort and then make a

better second attempt if the first fails, possibly followed by an even better third attempt, and so on. To put it in layman's terms, an appellant must realise that the appeals system gives him one bite at the cherry unless a very good reason can be shown why he should have a second."

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22. I respectfully agree with the views of Judge Poole and in this case I see no element of procedural irregularity in the simple fact that Mr Almond failed to produce the evidence that he required in order to prove his case on the amount of the mortgage interest or any documentary evidence at all about the maintenance and repair expenditure. Mr Almond had ample time to produce evidence to support his own position and has failed to do so. I conclude that the conditions of Rule 38 (2) are not satisfied in this case and therefore the application to set aside is refused.

23. 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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**ABIGAIL MCGREGOR
TRIBUNAL JUDGE**

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RELEASE DATE: 31 AUGUST 2017