



TC06213

Appeal number: TC/2017/03117

PROCEDURE – application for permission to notify late appeal – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BARI CHOHAN

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Darlington on 19 September 2017

There was no appearance by the Appellant

Mr Aidan Boal of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. This is my decision with full written findings and reasons on an application by the Appellant (“Mr Chohan”) for permission to notify an appeal to the Tribunal out of time. A summary decision was previously released on 22 September 2017. The decisions of HMRC which Mr Chohan seeks to appeal are income tax discovery assessments for 2007-08 to 2012-13 totalling £98,761 and penalties totalling £56,155. The assessments were dated 15 February 2014 and the penalties were dated 12 February 2014.

2. When the appeal came on for hearing at 10am there was no appearance by Mr Chohan. The appeal had been lodged by his accountants, messrs Adams Irving Majeed chartered certified accountants. However, that firm was never properly authorised to act as his representative in the appeal proceedings. As a result, all correspondence from the Tribunal has been sent to Mr Chohan at the address shown in the notice of appeal. Nevertheless, I caused enquiries to be made of the accountants and the Tribunal office was told that they had not been instructed by Mr Chohan in relation to the hearing and had not been aware that it was taking place.

3. The Tribunal file shows that Mr Chohan was notified of the hearing by email dated 29 July 2017. HMRC also sent a copy of the bundle of documents to Mr Chohan at the address given by him on his notice of appeal. In the covering letter dated 1 September 2017 HMRC referred to the hearing taking place on 19 September 2017.

4. In all the circumstances I was satisfied that reasonable steps had been taken to notify Mr Chohan of the hearing and that it was in the interests of justice to proceed with the hearing pursuant to Tribunal Rule 33.

5. Mr Chohan’s notice of appeal against the assessments and the penalties was notified to the Tribunal on 12 April 2017. As appears below, it was 3 years out of time.

Late Appeals

6. The procedure for making appeals against income tax assessments and penalties is set out in the *Taxes Management Act 1970* (“TMA 1970”). Section 31A TMA 1970 requires a notice of appeal to be given in writing to HMRC within 30 days of the date on which the notice of assessment was issued. It provides as follows:

“ 31A Appeals: notice of appeal

(1) Notice of an appeal under section 31 of this Act must be given -

(a) in writing,

(b) within 30 days of the specified date,

(c) to the relevant officer of the Board.”

7. Where a notice of appeal has been given to HMRC, there is provision either for a statutory review by HMRC or for the appellant to notify the appeal to the tribunal. HMRC may offer the taxpayer a statutory review, or the taxpayer may ask for a review. Alternatively, the taxpayer may simply notify the appeal to the tribunal. Section 49A TMA 1970 provides as follows:

“ (1) This section applies if notice of appeal has been given to HMRC.

(2) In such a case—

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),

(b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or

(c) the appellant may notify the appeal to the tribunal (see section 49D)...”

8. Section 49D provides as follows:

“ (1) This section applies if notice of appeal has been given to HMRC.

(2) The appellant may notify the appeal to the tribunal.

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

(4) Subsections (2) and (3) do not apply in a case where –

(a) HMRC have given a notification of their view of the matter in question under section 49B, or

(b) HMRC have given a notification under section 49C in relation to the matter in question

(5) In a case falling within subsection (4)(a) or (b), the appellant may notify the appeal to the tribunal, but only if permitted to do so by section 49G or 49H.”

9. Section 49H makes provision for notifying an appeal to the tribunal after a review has been offered but not accepted by the taxpayer. In those circumstances it provides that the taxpayer may notify the appeal within the “acceptance period”, which is defined as the period of 30 days beginning with the date of the document by which HMRC notified the taxpayer of the offer to review the matter in question. Where the acceptance period has ended, section 49H(3) provides that the taxpayer can notify the appeal to the tribunal only if the tribunal gives permission.

10. In determining an application for permission to notify a late appeal pursuant to section 49H(3) it is appropriate to consider the 3-stage test set out in *Denton v TH White Limited [2014] EWCA Civ 906* in relation to relief from sanctions:

(1) Stage 1 is to assess the seriousness or significance of the breach.

(2) Stage 2 is to consider why the breach occurred.

(3) Stage 3 is to consider all the circumstances of the case so as to deal justly with the application.

11. In relation to Stage 3 it is necessary to have regard to the factors set out by the Upper Tribunal in *Data Select Limited v Commissioners for HM Revenue & Customs [2012] UKUT 187 (TCC)* and to the observations of the Supreme Court in *BPP Holdings Ltd v Commissioners for HM Revenue & Customs [2017] UKSC 55* supporting a strict approach to compliance with time limits. In *Data Select Ltd*, Morgan J stated as follows:

“ 34. ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a 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 questions.

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*.

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.

37. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision.”

12. The approach of Morgan J in relation to VAT appeals is equally applicable to appeals against income tax assessments and penalties.

Reasons

13. The grounds on which Mr Chohan seeks permission to notify a late appeal are set out in his notice of appeal which states as follows:

“In May 2014 [Mr Chohan] was not living at his home address in Middlesbrough, as he was living in West Midlands and was mostly abroad in Europe, Kenya, Uganda and Du Burundi. So [Mr Chohan] was not able to make an appeal in time, as he did not receive the assessments and notice in time ... The tax liability, if any is negligible compared to the HM Revenue & Customs Assessments.”

14. Based on the documentary evidence adduced by Mr Boal for HMRC I wholly reject the factual basis on which the present application is made. It is clear from the documents that the assessments and penalty determinations were sent to Mr Chohan and his then accountant in February 2014. Indeed, on 27 February 2014 Mr Chohan contacted HMRC on receipt of the assessments and penalty determinations to say that he would be appealing. On 3 March 2014, his accountants submitted an appeal to HMRC and no doubt for good measure on 10 March 2014 Mr Chohan himself also submitted an appeal to HMRC.

15. On 1 May 2014 HMRC issued a letter to Mr Chohan and to his accountants setting out their view of the matter pursuant to section 49A TMA 1970. The letter set out Mr Chohan’s rights either to request a review of the assessments and penalty determinations pursuant to section 49C or to notify an appeal to the Tribunal within 30 days pursuant to section 49H. He did neither, and on 3 June 2014 HMRC wrote to Mr Chohan and his accountants stating that the time limit to request a review or notify the appeal to the Tribunal had expired. The accountant contacted HMRC on 1 July 2014 to say that he had not received any records from Mr Chohan.

16. It is clear therefore that Mr Chohan had received and was aware of the assessments and penalty determinations. He was also aware that he had until 31 May 2014 to notify an appeal to the Tribunal but failed to do so until April of 2017. The period of delay is therefore some 3 years. It is clear that the period of delay in notifying the appeal to the tribunal amounts to a serious and significant breach of the time limit in section 49H TMA 1970. Indeed, the Upper Tribunal in *Romasave (Property Services) Limited v Commissioners for HM Revenue & Customs [2015] UKUT* referred to a delay of 3 months as being serious and significant.

17. I have had regard to the purpose of the time limit, the length of the delay, whether there is a good explanation for the delay, the consequences for the parties if time is extended and the consequences for the parties if the extension of time is refused.

18. The purpose of the 30 day time limit is to promote finality and certainty in the interests of justice. The delay in this case is approximately 3 years. That is an inordinate amount of time in the context of the correspondence which took place in 2014. It must be considered a serious failure on the part of Mr Chohan.

19. The explanation offered by Mr Chohan in his notice of appeal for that delay is simply untrue. No other explanation for the delay has been offered. I am not satisfied that there is any good reason or explanation for the delay in notifying the appeal to the tribunal.

20. I take into account that the effect of extending time would be to remove the finality and certainty that HMRC were entitled to expect. I also take into account that if I do not extend time then there will be no adjudication on the merits of Mr Chohan’s appeal against the assessments and the penalties and that the quantum of the

sum in dispute is large. There was no material by reference to which I could form any view as to the merits of Mr Chohan's appeal. I shall assume therefore that he would have at least a reasonable prospect of success. Mr Chohan will therefore suffer prejudice if time is not extended.

21. The absence of any explanation for the delay and the period of the delay weigh heavily in the balance. Taking into account all the circumstances it is clear to me that Mr Chohan should not be given permission to notify a late appeal to the Tribunal. In the circumstances I refuse the application and the appeal cannot be admitted.

22. 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.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 13 NOVEMBER 2017

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