



**TC06220**

**Appeal number: TC/2017/00669**

*Procedure - application for permission to appeal out of time against discovery assessments and penalties - factors to be weighed in exercise of Tribunal's decision - guidance in Data Select considered - length of delay and merits of case considered - application refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PETER NOEL FISHER**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**Sitting in public at the Magistrates Court, Market Place, Hull on 11 September  
2017**

**The Appellant in person**

**Mr Paul Hunter, Officer of HMRC, for the Respondents**

## DECISION

5 1. This is an application for permission to make a late appeal by Mr Peter Noel Fisher ('the Appellant') against:

(i) Discovery assessments made under s 29 TMA for the years 2004-05 to 2008-09 inclusive relating to previously undisclosed rental income

(ii) Penalty determinations under s 95 TMA for the same years totalling £2,349 under s 7 TMA 1970, for failing to notify a chargeable source of income.

10 (iii) Interest that has accrued

2. HMRC object to the application.

3. The tax due under the Assessments are:

Year	Tax
2004-05	£950.40
2005-06	£712.80
2006-07	£950.40
2007-08	£792.00
2008-09	£864.00
	£4269.60

### Background

15 4. A compliance check was completed on the Appellant on 23 January 2012 as a result of information received that he owned a property other than his private residence. This property was later identified as 56 The Close, Cottingham, Hull ('the Property'). During the compliance check the Appellant disclosed to HMRC that he had been renting the property out and had failed to notify to HMRC chargeability of  
20 this rental income for the years 2004-05 to 2008-09 inclusive

5. Discovery assessments were issued on 11 May 2012. The Appellant had 30 days from that date to appeal against the decision (s 16(18) Finance Act 1994),

6. On 11 June 2014 failure to notify (FTN) penalties were issued under s 7 of TMA 1970. The penalties were issued pursuant to Schedule 41 of the Finance Act 2008.  
25 FTN penalties are tax-gearred penalties which are based on the amount of tax or duty that is not paid at the right time because of the failure.

7. A Notice of Appeal against the discovery assessments and the penalties was not lodged until 10 December 2016.

8. The point at issue is whether the Appellant should be granted permission to appeal given the excessive length of time between the tax being assessed and penalties charged and the filing of the late appeal.

### **Evidence before the Tribunal**

5 9. In order for HMRC to be compliant with the Public Records Acts 1958 and 1967, the Data Protection Act 1998 and the Freedom of Information Act 2000, it is HMRC's policy to retain documents for a maximum of four years unless there is an express reason for their retention evident at time of disposal review.

10 10. In this case, at the time of disposal review, some four years after issuing the assessment, the Appellant had not made any appeal to HMRC. Accordingly, in order to be compliant with the above legislation, HMRC disposed of all records in relation to this case.

15 11. HMRC were however able to produce copy self-assessment statements for the years in question showing the amount of the discovery assessments, the penalties and accruing interest.

20 12. The Appellant produced copy hospital appointment letters and evidence of his benefits entitlement. He was able to provide copy correspondence relating to the purchase and sale of the Property. He did not produce any copy bank statements, mortgage account statements, tenancy agreements, statements or other information which may have assisted him in showing the correct amount of rent received from the Property and any relevant deductible expenses.

### **Relevant regulations**

13. Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009/273 provides that:

25 20(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the Permission of the Tribunal -

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

30 (b) unless the Tribunal gives permission, the Tribunal must not admit the appeal.

### **The Appellant's case**

35 14. The Appellant contends that he should be allowed to file a late appeal on the grounds that he was incapacitated with a back injury which involved numerous hospital appointments and required him to take various medications, as a result of which he was unable to file an appeal earlier.

15. With regard to the substantive appeal, it is the Appellant's contention that he should not have to pay the assessments and penalties because he does not believe they

have been correctly assessed and in any event he has insufficient funds having been incapacitated for an extended period.

16. The Appellant says that the rental income was not as much as HMRC assert. It was only let out between May 2007 and December 2008. He had purchased the Property, which was a former local authority property, under the right to buy scheme, with his mother and late stepfather in 1982. His mother had lived in the property until she passed away in 2005. In 2004 on the initial breakdown of his marriage the Appellant moved into the Property until 2006, when he and his wife were reconciled. He re-mortgaged the Property for approximately £106,000 to buy another property. Unfortunately his marriage failed and following divorce proceedings he was left with virtually no assets other than the Property on which he had to maintain mortgage payments of around £500 per month. The Property remained empty until May 2007 when it was let out at £400 per month, which only covered the interest on the mortgage. In December 2008 the tenant was ordered to vacate the Property by the Court preliminary to a financial settlement in the divorce proceedings in order that it could be sold. The Property then remained empty until sold in September 2009 for £120,000. After repayment of the mortgage the Appellant's wife received the majority of the net equity of £11,300 and the Appellant was left heavily in debt. He produced a copy of his conveyancing solicitor's completion statement to verify the figures.

17. The Appellant says that he has suffered from a back injury since 2006 and has not worked since December 2014. He had an operation on his spine in October 2015 which was unsuccessful. He is currently in receipt of employment support allowance and the personal independence payment and says he struggles to make ends meet. He has no savings. The total amount claimed by HMRC including interest is £8,250.17 as at the date of his appeal, and he has no means whatsoever of paying this. He says it is very unfair; he has not received the rental income which HMRC claim, and what he did receive was used to pay the interest on the mortgage. He has been on strong painkillers and antidepressants for the last three years.

### **30 HMRC's case**

#### *Substantive issues and merits of the appeal*

18. With regard to the substantive issues, Mr Hunter for HMRC said that the onus of proof rests with HMRC to show that the discovery assessments and penalty determinations were validly made. Once that onus has been discharged the onus of proof passes to the Appellant to show that he has been overcharged by the discovery assessments and penalty determinations. The standard of proof is the ordinary civil standard of the balance of probabilities.

19. The Appellant had a duty to maintain records in order to comply with his obligation to make full and accurate returns of his income. He has failed to provide any primary evidence to show that the assessments were not correctly raised. Section 50(6) TMA places the ultimate onus on the Appellant to show that the assessments are incorrect and he has failed to do that.

20. Lack of funds to discharge an assessment or penalty is expressly disallowed from being used as a reasonable excuse by virtue of s 22(2)(a) of the Finance Act 2016.

21. In any event the grounds of appeal indicate that Appellant accepts that he received rental income, was aware of his obligation to inform HMRC of his tax liability arising from his rental income, but simply chose not to do so. He is also unable to state what the rental income was or what allowable deductions there might have been.

22. Although HMRC does empathise with the Appellant and his health difficulties, that is not itself a valid ground of appeal against the assessments or penalties,

### *The late appeal*

23. The case law concerning the approach to granting permission for late appeals was set out in *Data Select Limited v HMRC* [2012] STC 2195, a case before the Upper Tribunal. At [37] of his decision, Morgan J held that the correct approach was to consider the overriding objective and all of the circumstances of the case. Morgan J referred to CPR rule 3.9 being the rule prior to amendment in April 2013, which listed the following circumstances:

- a. The interests of the administration of Justice;
- b. Whether the application for relief has been made promptly;
- c. Whether the failure to comply was intentional;
- d. Whether there is a good explanation for the failure;
- e. The extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
- f. Whether the failure to comply was caused by the party or his legal representatives;
- g. Whether the trial date or the likely trial date can still be met if relief is granted;
- h. The effect which the failure to comply had on each party;
- i. The effect which the granting of relief would have on each part.

Mr Justice Morgan also said:

“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 (a firm)* [2002] EWCA Civ 645, [2002] 3 All ER 490, [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 Value Added Tax and Duties Tribunal to the High Court: see *Revenue and Customs Comrs v Church of Scientology Religious Education College Inc* [2007] EWHC 1329 (Ch), [2007] STC 1196.

36. 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.....”

24. Morgan J also identified, at [34], five questions that a court or tribunal would generally ask itself:

- 5           a. What is the purpose of the time limit?  
          b. How long was the delay?  
          c. Is there a good explanation for the delay?  
          d. What will be the consequences for the parties of an extension of time?  
          e. What will be the consequences for the parties of a refusal to extend time?
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### **Conclusion**

25. Time limits are generally to be adhered to unless good reason can be shown why they should be overridden. *Ogedegbe* [2010] TC 00302 and *O’Flaherty v HMRC* [2013] UKUT 0161 (TCC)

15 26. However, it is necessary for the Tribunal to take into account the overriding objective of the 2009 Rules and actively exercise its discretion under Rule 5(3) of those Rules. For that purpose a balancing exercise must be conducted, taking into account all relevant circumstances and the factors set out in *Data Select*, including the arguable merits of each party’s case.

20 27. Addressing in turn, each of the factors referred to in *Data Select*.

(1) What is the purpose of the time limit? Generally the purpose of adherence to time limits is finality and certainty, which is necessary for HMRC to efficiently operate the taxation system. Time limits are also necessary for the efficient organisation of the Tribunal appeals system. With particular reference to the CPR rules, time bar provisions are intended to maintain the interests of the proper administration of justice, although this factor is more generally referable to litigation in order to prevent one party from not observing, to the possible detriment of another, a procedural obligation.

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(2) How long was the delay? The delay in appealing the assessments was over four and a half years. The delay in appealing the penalties was over two and a half years.

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(3) Is there a good explanation for the delay? The explanation given for the late appeal is that the Appellant suffered health conditions which prevented him from lodging an appeal any earlier. However although evidence of numerous hospital appointments, mainly in respect of his back problems, has been provided, these equally show that he was able to attend those appointments, follow medical advice and take prescribed medication.

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(4) What will be the consequences for the parties of an extension of time? To allow a late appeal would be prejudicial to HMRC, as by complying with internal policy and legislation in relation to data handling, HMRC would be at a disadvantage in their ability to present a case with relevant evidence that could be viewed as both fair and just, to both parties. The Appellant’s non-compliance with his obligations would

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potentially be rewarded, by him having an unfair advantage in any litigation. Given that the Appellant's case is distinctly lacking in merit the prejudice caused to HMRC in allowing the application could be significant.

5 (5) What will be the consequences for the parties of a refusal to extend time? To refuse the application would allow the assessments which in the absence of evidence from the Appellant showing otherwise, have been properly raised and for them to be collected along with penalties and interest.

10 28. Generally, as already stated, an extension of time is the exception rather than the rule. I have some sympathy for the Appellant. It is quite possible that the discovery assessments have overestimated his rental income and not taken into account relevant deductible expenses. However, although unlikely, it is possible that the assessments underestimated the net rental income. The Appellant was legally obliged to maintain records but has not done so. He has not produced any evidence which shows or even suggests that the assessments are incorrect. If he had produced copy bank and mortgage statements, or witness statements from individuals who could substantiate what he is saying, that may have presented an arguable case for allowing the application; but he has not done so.

15 29. He must also show that the reason which prevented him from filing an appeal continued throughout the whole period of delay. He has not done that. He has not explained why he was able to lodge an appeal in December 2016 but not earlier. All the supporting evidence supplied by the Appellant with his grounds of appeal appear to postdate by over three years the period in which it would be expected that he should have made an appeal, the earliest dating to 7 March 2015.

20 30. Therefore I do not think that this is a case in which in the interests of justice I should exercise the Tribunal's discretion to allow the application and permit the appeal to be made after the expiry of the normal time limit.

25 31. The application for permission to appeal out of time is therefore refused.

30 32. 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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**MICHAEL CONNELL  
TRIBUNAL JUDGE**

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**RELEASE DATE: 15 NOVEMBER 2017**