[2017] UKFTT 867 (TC)

TC06262

Appeals numbers: TC/2015/03327 & 04227

PROCEDURE – application for admission of late application for permission to appeal – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR PETER BROWNE **Appellant**

- and -

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

TRIBUNAL: **Judge Peter Kempster**
Mr Ian Perry

Sitting in public at Centre City Tower, Birmingham on 28 November 2017

The Appellant appeared in person

Ms Gillian Clissold (HMRC Solicitor's Office and Legal Services) for the Respondents

DECISION

1. This is an application by the Appellant ("Mr Browne") for permission to bring an out of time application for permission to appeal against an earlier decision of this Tribunal.

Facts

2. In May 2015 Mr Browne appealed against tax charges assessed by the Respondents ("HMRC") in relation to certain pension fund transfers. By an authorisation dated 18 May 2015 Mr Browne appointed Mr Martyn Arthur as his professional representative to act on his behalf in the appeals.

3. The appeals were heard by the Tribunal (Judge John Walters QC and Mr William Silsby) sitting in Cardiff on 18 April 2016. Mr Arthur represented Mr Browne, and Mr Browne gave evidence. There were some subsequent written submissions, at the invitation of the Tribunal.

4. On 17 August 2016 the Tribunal issued a full reasons and findings decision ("the Decision"). The determination was that the appeals were allowed in part – the appeal against a charge on unauthorised member payments (s 208 Finance Act 2004) was dismissed but the appeal against a charge to an unauthorised payment surcharge (s 209 FA 2004) was allowed. The final paragraph of the Decision stated:

> "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."

5. The Tribunal sent (on 17 August 2016) the Decision by email to HMRC and to Mr Arthur's firm. Correct email addresses were used and neither email was "bounced back" as undeliverable. A copy of the Decision was not sent to Mr Browne. The covering letter included the following:

> "A Tribunal determined the above proceedings on 18 April 2016. Enclosed is a copy of the decision notice. Please note that this is a full decision notice.
>
> Also enclosed is an information sheet which explains what you may do if you are not satisfied with the decision. Please note the following important points:
>
> 1. If you wish to appeal you must ensure that you make an application for permission to appeal in writing and ensure that your application is received by the Tribunal within 56 days after the date of this letter; …"

6. On 23 February 2017 HMRC wrote to Mr Browne stating:

> "**Self Assessment Tax Returns - years ending 5 April 2010 and 5 April 2011**
>
> I am writing following the conclusion of Tribunal proceeding in respect of your case.
>
> As you are aware, your appeal against the unauthorised payment charges (40% of the unauthorised payments received in 2009/10 and 2010/11) was dismissed but your appeal against the unauthorised payment surcharges (15%) was upheld.
>
> I have now amended our assessment/enquiry amendments as follows:
>
> *2009/10* The Revenue Assessment for £64,613 has now been amended to £46,991.
>
> *2010/11* The Revenue Amendment for £ 11,619 has now been amended to £8,450.
>
> The above charges have now been released for collection and revised self-assessment statements are enclosed. …"

7. On 3 April 2017 Mr Browne emailed Mr Arthur's firm:

> "I hope your well. Following on from the Tribunal held in April 18th 2016 with Martyn
>
> I wonder have we had any result notified as I have heard nothing from anyone and it's nearly one year on.
>
> I know Martyn was going to provide some further information to the tribunal subsequent to the hearing.
>
> Also HMRC have re issued me with demands for outstanding self assessement amendments on this matter."

8. Also on 3 April Mr Arthur emailed a holding reply to Mr Browne promising to reply shortly.

9. On 25 April 2017 Mr Browne emailed Mr Arthur's firm:

> "Haven't heard back from anyone as yet. Just wondered what was happening whether anything has been heard from last years Tribunal in April 16 and Martyn's view as to what's going on?"

10. In the hearing bundle was a letter/email from Mr Arthur to the Tribunal dated 25 April 2017 – this document is not on the Tribunal's case file. It states:

> "The taxpayer has approached us concerning the closing comments of the tribunal in relation to the ability to further obtain tax relief.
>
> We will be grateful to obtain your views on this."

11. On 26 April 2017 Mr Arthur emailed Mr Browne:

> "Please find the enclosed Tribunal decision we apologise that you are now only receiving this document. It is normal for Tribunal to send the decision to the taxpayer and a copy for us.
>
> We have wrote to HMRC I have included a copy of the letter we have sent.
>
> Please let me know your thoughts on what you would like to do next."

12. On 27 April 2017 HMRC wrote to Mr Browne (copy to Mr Arthur) stating:

> "You should be aware that there was a final Tribunal Decision on your case on 18 April 2016 a decision notice was issued to your agents, Martyn F Arthur on 17th August 2016 (copy enclosed). As far as we are aware, neither you nor your agent have made an application to the Upper Tier Tribunal, therefore HMRC consider this matter to be concluded."

13. On 29 April 2017 Mr Browne replied stating that he only heard of the Decision on 26 April, and asking for the assessments to be amended.

14. On 20 May 2017 Mr Browne wrote to the Tribunal making a "further appeal notification", which the Tribunal (correctly, in our view) took as an application for permission to appeal the Decision out of time ("the Application"). Mr Browne stated:

> "I am writing to you now re further appeal application to the First-tier Tribunal and/or a decision on the Following points re the First Tier Tribunal.
>
> I was not notified by the Tribunal or the Tax inspector re the Tribunal Decision and only found out the decision following my own enquiries on the 26th April 2017 thus the reason for this late appeal.
>
> This application relates to the original decision from myself the Appellant Peter Browne.
>
> The Decision of the Tribunal in not allowing the Pension Transfer to stand changed the case in how the Tax assessment should I believe have been established
>
> In as much as I should have been allowed to account for an allowable 25% Tax Free Lump Sum which the Tax Inspector has not allowed.

> This should be the Assessment had the decision of the Tribunal been known, ie Not allowing the Transfer. Clearly the implication is that any unauthorised payment would refer to any amount exceeding the 25% allowable tax free lump sum for the following reasons …"

15. On 2 June 2017 the Tribunal notified the Application to HMRC, inviting representations. On 7 June HMRC replied objecting to the Application, for stated reasons.

16. On 29 July 2017 the Tribunal notified the parties that a hearing of the Application was listed for 13 September in Birmingham. On 3 August HMRC requested a postponement on grounds of unavailability. On 4 August Mr Browne objected to the postponement application. On 10 August Mr Arthur emailed the Tribunal asking for the hearing to be relocated to Cardiff. On 11 August the Tribunal notified the parties that the hearing was postponed, and asked for dates to avoid for a relisting.

17. On 14 August 2017 Mr Arthur emailed the Tribunal stating that his firm was no longer instructed and asking that his letter dated 10 August be ignored.

18. The hearing was relisted for 28 November 2017 and proceeded with Mr Browne appearing in person.

Law

19. Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("the Rules") states (so far as relevant):

> "**39 Application for permission to appeal**
>
> (1) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.
>
> (2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 56 days after the latest of the dates that the Tribunal sends to the person making the application …
>
> (a) where—
>
> (i) the decision disposes of all issues in the proceedings; …
>
> full written reasons for the decision; …
>
> (4) If the person seeking permission to appeal sends or delivers the application to the Tribunal later than the time required by paragraph (2) or by any extension of time under rule 5(3)(a) (power to extend time)—
>
> (a) the application must include a request for an extension of time and the reason why the application notice was not provided in time; and

(b) unless the Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Tribunal must not admit the application.

(5) An application under paragraph (1) must—

(a) identify the decision of the Tribunal to which it relates;

(b) identify the alleged error or errors in the decision; and

(c) state the result the party making the application is seeking."

20. Rule 5 of the Rules states (so far as relevant):

"**5 Case management powers**

…

(3) In particular, … the Tribunal may by direction—

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit; …"

21. Rule 11 of the Rules states (so far as relevant):

"**11 Representatives**

(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.

(2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party to the proceedings written notice of the representative's name and address.

(3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement.

(4) A person who receives due notice of the appointment of a representative—

(a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party; and

(b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party. …"

Appellant's case

22. Mr Browne submitted as follows.

23. He had become aware of the Decision only in April 2017. The Tribunal had not sent a copy to him and neither had Mr Arthur. He had appointed Mr Arthur only up to the conclusion of the Tribunal hearing of the appeals. He had paid Mr Arthur and expected to be kept up to date by him. The only explanation he had received from Mr Arthur was in the correspondence quoted above. He assumed there was inefficiency in Mr Arthur's office.

24. He had not received HMRC's letter dated 23 February 2017.

25. He had attempted to find any reported decision on his appeal on the internet but could not trace one.

Respondents' case

26. For HMRC, Ms Clissold submitted as follows.

27. HMRC objected to the Application. It was very late; the deadline for an application for permission to appeal had been 12 October 2016; the Application was filed 31 weeks late. The case law authorities emphasised the importance of finality of litigation and the need not to undermine certainty. It would not be fair or just to require HMRC to reopen the litigation.

28. The Decision had been published on the Tribunal's website soon after its issue in August 2016, and then was publicly available. It was not credible that Mr Browne would not have checked on progress more than one year after the hearing. He had not exercised the diligence expected and required of a taxpayer.

29. HMRC had been entitled to understand that Mr Arthur had been acting for Mr Browne up to August 2017. If Mr Arthur's firm had not done as it should then Mr Browne would have to approach Mr Arthur for a remedy.

30. The proposed grounds put forward by Mr Browne had no merits. Also, Mr Browne was seeking to raise new grounds of appeal not advanced in the April 2016 hearing.

Consideration and Conclusions

Approach

31. The deadline for an application for permission to appeal is set by Rule 39(4) and any extension thereof is a discretion given to the Tribunal by Rules 39(4) and 5(3)(a).

32. The approach to be taken in deciding whether to exercise that discretion was set out by Morgan J in *Data Select Ltd v Revenue and Customs Commissioners* [2012] STC 2195:

> **"[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 (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]** 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 Comrs for Aberdeen City* [2005] CSOH 135 at [23]–[24], [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 s 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. None the less, 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.

> **[38]** As I have indicated, the FTT in the present case adopted the approach of considering all the circumstances including the matters specifically mentioned in CPR 3.9. It was not said that there was any error of principle in that approach. In my judgment, the FTT adopted the correct approach."

33. Subsequent to *Data Select* CPR 3.9 was rewritten; the new CPR 3.9 states:

> "3.9 Relief from sanctions
>
> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

34. In *Revenue and Customs Commissioners v BPP Holdings Ltd and others* [2016] STC 841 Ryder LJ (at [44]) endorsed Morgan J's approach in *Data Select*, and (at [16]) confirmed that the stricter approach to compliance with rules and directions required by *Mitchell v News Group Newspapers Ltd* [2014] 2 All ER 430, and *Denton v TH White Ltd* [2015] 1 All ER 880 also applied in Tribunal proceedings. In *Denton* Lord Dyson MR and Vos LJ stated:

> "[24] … A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages r 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application, including [factors (a) and (b)]'. ..."

35. Accordingly, in determining Mr Browne's application we shall consider the five questions directed by *Data Select* and also the three stages directed by *BPP*.

Discussion

36. We address two matters concerning Mr Browne's contention that he has, in effect, been let down by his advisers.

37. First, Rule 11(4) is clear that where a party appoints a representative in proceedings then the other party and the Tribunal must deal with that representative, and may assume that the representative remains authorised until contrary written notification is received. Accordingly, both the Tribunal and HMRC were correct (indeed, required) to deal with Mr Arthur, rather than Mr Browne when issuing the Decision and in consequent correspondence, up to mid-August 2017.

38. Secondly, if Mr Browne's contention is correct (on which we express no opinion) then it provides no justification for favouring the interests of Mr Browne over those of HMRC. This is supported by the following caselaw. In *Training in Compliance Ltd v Dewse* [2001] Cr App Rep 46 Peter Gibson LJ stated (at [65])

> "It seems to me that, in general, the action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself. So far as the other party is concerned, it matters not what input the party himself has made into what the legal representatives have done or have not done. The other party is affected in the same way; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up in considering separately the conduct of the legal representatives from that which the party himself must be treated as knowing, or encouraging, or permitting."

39. In *Mullock v Price (t/a Elms Hotel Restaurant)* [2010] All ER (D) 11 (Jan) Ward LJ quoted the above passage with approval and stated (at [22]):

> "… I respectfully agree. It seems to me wrong that a party should shield behind his representatives.
>
> [23] I say that it is wrong essentially for two reasons. First, the language of CPR 13.3 is explicit: it requires "the person seeking to set aside the judgment" to make the application promptly. So it focuses on that person's action. Secondly, the Civil Procedure Rule in fact impose duties on the parties to the litigation, and it seems to me that must mean the parties themselves irrespective of the help and advice they are or are not receiving. Their duty under CPR 1.3 is this "The parties are required to help the court to further the overriding objective." One of those objectives is of course to ensure that the case is dealt with expeditiously, and I am therefore quite satisfied that it was the duty of Mr Price, a personal duty, to ensure that the case was dealt with expeditiously and in the particular circumstances of this case to act promptly …"

40. In *Hayden v Charlton* [2011] All ER (D) 57 (Jul) Toulson LJ stated (at [42]):

> "This leads me to another consideration. If the appeals are dismissed, the claimants will have the opportunity of some redress against their former solicitor. I recognise that a negligence claim against his firm is a far from perfect remedy, because it is not the equivalent of a judgment declaring that the defendants' allegations are false, but it at least some

> remedy. If the actions are restored, the defendants will have no remedy against the prejudice which they have already suffered in the two respects which I have identified, namely, the burden and strain of conducting the litigation and the prolongation of the uncertainty of the litigation in a matter affecting their freedom of speech. They have no right to claim compensation for these matters from the claimants' former solicitor, nor can they be adequately compensated by an award of costs."

Consideration of specific factors

41. On the five questions directed by *Data Select*:

(1) *Purpose of time limit* – The statutory time limit for applying for permission for an onward appeal is important for the orderly administration of both the tax system and the justice system. Subject to any such successful application, the decision of the First-tier Tribunal finally determines the dispute between the taxpayer and HMRC, and both parties are entitled to rely thereon and consider the matter closed. Here the appeals were allowed in part and thus the deadline protected the taxpayer as much as HMRC; if HMRC asked to be allowed to apply for permission for an onward appeal seven months after expiry of the deadline then the taxpayer would understandably feel aggrieved.

(2) *Length of delay* – The Decision was issued on 17 August 2016 and thus the 56 day deadline in Rule 39 expired on 12 October 2016. Taking Mr Browne's letter to the Tribunal dated 20 May 2017 as the application for an extension of time, the Application is over 31 weeks late. In *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2016] STC 1 the Upper Tribunal stated (at [96]):

> "The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

We consider a delay of more than seven months in the context of a time limit of 56 days is also clearly serious and significant.

(3) *Explanation for the delay* – The only explanation provided by Mr Browne is that, in effect, he has been let down by Mr Arthur. No explanation has been provided by Mr Arthur, other than his comment to Mr Browne that Mr Arthur expected the Tribunal to have sent a copy of the Decision to Mr Browne.

(4) *Consequences of granting the application* – HMRC were entitled to believe that any challenge to the Decision would be timely. As already mentioned, part of the appeals was decided against HMRC and they also

had to consider whether to file an application requesting permission for an onward appeal against the aspects of the Decision that were adverse to them. HMRC were entitled to consider the matters in dispute finally determined (both as to the aspects decided in their favour and those against them) once the deadline for an onward appeal had expired. Reopening the litigation would require matters already fully litigated and decided to be reassessed. We have cited above (at [36-40]) the caselaw emphasising that the prejudice to HMRC is equally as important as any caused to Mr Browne.

(5) *Consequences of refusing the application* – The matters in dispute have been considered in depth and determined by the Tribunal, after a hearing at which both parties were present. There is no indication that Mr Arthur, as Mr Browne's professional adviser and Rule 11 representative, thought any aspect of the Decision warranted an application for an onward appeal on a point of law, as required by s 11 Tribunals, Courts and Enforcement Act 2007.

42. On the three stages directed by *BPP*:

(1) *Seriousness and significance* – As discussed above, the delay in filing the application for permission was both serious and significant.

(2) *Why the default occurred* – As discussed above, there is no explanation offered for why an application for permission to appeal could not have been filed in time by Mr Browne's Rule 11 representative. We understand Mr Browne's feeling that he has been let down by his adviser but that is a matter for him to take up with Mr Arthur. We have not heard Mr Arthur's side of the story. At best there appears to have been a breakdown in communication.

(3) *Evaluation of all the circumstances* – We must balance all the above considerations (without attaching special weight to any in particular) in the light of the overriding objective (to deal with cases fairly and justly). The delay is very long. There is no adequate explanation for it. HMRC were entitled to assume that both parties had accepted the Decision (both the aspects in their respective favours and detriments) once the deadline expired. The appeals have received a full hearing of all aspects with both parties present, and a full findings and reasons decision issued. As already stated, there is no indication that Mr Arthur, as Mr Browne's professional adviser, thought any aspect of the Decision warranted an application for an onward appeal.

Conclusions

43. For the above reasons we have decided that it would not be just and fair to permit a late application; we have decided not to exercise the discretion conferred by Rule 5(3)(a) and accordingly we refuse the Application.

Decision

44. As stated to the parties at the conclusion of the hearing, the application for admission of a late application for permission to appeal is REFUSED.

45. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 12 DECEMBER 2017