



**TC06545**

**Appeal numbers: TC/2016/00610, TC/2016/00619 and TC/2016/01571**

*PROCEDURE – applications for permission to notify late appeals –  
applications refused - appeals struck out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**JANE TWEDDLE and NIGEL TWEDDLE as individuals      Appellants  
and t/a QUALITY USED FURNITURE WAREHOUSE**

**- and -**

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

**TRIBUNAL: JUDGE ANNE SCOTT**

**Sitting in public at Carlisle on Monday 11 June 2018**

**There was no appearance by or for the Appellants**

**Mrs C Robertson, Officer of HMRC, appeared for the Respondents**

## DECISION

### **Preliminary issues**

#### *Absence of the appellants*

- 5 1. As there was no appearance by or for the appellants, Mrs Robertson requested that the appeals be decided in the absence of the appellants. I am satisfied that on 23 April 2018 all of the appellants had been notified of the time and date of the hearing. The notifications stated “If you do not attend, the Tribunal may decide the matter in your absence”.
- 10 2. The previous hearing listed for 26 January 2018 had been postponed at the request of Mrs Tweddle on the afternoon of 25 January 2018. She knows how to contact the Tribunal. There was no contact on this occasion.
- 15 3. There is a history of non-compliance with HMRC and the Tribunal in this matter. These appeals relate to penalties imposed in terms of Schedule 55 Finance Act 2009 (“Schedule 55”). On 21 September 2016 the Tribunal had written to all of the appellants indicating that their agent had withdrawn from acting and gave the appellants 14 days within which to respond to the Tribunal. They did not.
- 20 4. On 28 October 2016, the Tribunal issued Directions striking out those elements of the appeals that related to late payment penalties, apparently leaving only the question of daily penalties imposed under paragraph 4 of Schedule 55. There appears to have been no response to those Directions albeit that Direction 3 stated that any party might apply at any time for the Directions to be amended, suspended or set aside.
- 25 5. The Tribunal Service corresponded with the appellants on 19 February, 8 March and 20 March 2018 requesting that a questionnaire be completed in regard to the appeals. There was no response and accordingly the appeals were listed for an oral hearing on 11 June 2018.
- 30 6. In all these circumstances, having had regard to Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) I decided that it was appropriate to proceed to decide the appeals in the absence of the appellants.

#### *Previous Directions*

- 35 7. I observe that the Directions dated 28 October 2016 stated that the strike out of the appeals was predicated on correspondence dated 21 September 2016 which stated that failure could result in the partial strike out of the appeals. However, the correspondence dated 21 September 2016 did not issue that warning in accordance with Rule 8 of the Rules. In those circumstances I decided that the appeals should be treated as being in respect of all outstanding penalties. HMRC had adopted the same approach in preparation of the Bundle.

## Background

8. Mr and Mrs Tweddle had filed their self-assessment tax returns and the tax return for the partnership Quality Used Furniture Warehouse for the year 2012/13 on 24 September 2014. Mr Tweddle is the representative partner. The due date for filing was 31 January 2014.

9. HMRC levied £100 late filing penalties imposed under paragraph 3 Schedule 55 in the sum of £100 on 18 February 2014, daily penalties under paragraph 4 Schedule 55 amounting to £900 and 6 month late filing penalties amounting to £300 on 18 August 2014 on each of the individuals and the partnership.

10. The due dates for appeals were therefore 20 March 2014 for the £100 late filing penalties and 17 September 2014 for all of the other penalties. The date that appeals were received by HMRC was 29 September 2014.

11. The appeals against the £100 late filing penalties in each case were rejected by HMRC as being out of time. Therefore the appellants are being deemed to be making an application for an extension of time for notification of an appeal in terms of Section 49 of the Taxes Management Act 1970 (“TMA”).

12. HMRC accepted that the appeals against the daily penalties and the 6 month late filing penalty were timeously made to them. However, those appeals were rejected by HMRC in each case on 24 October 2014. The appellants were told that they could either request a review or appeal to the Tribunal and that was by no later than 23 November 2014.

13. In the case of the partnership only, Mr Tweddle requested a review on 18 November 2014. The conclusion of the review was issued on 2 January 2015 upholding the penalties and indicating that an appeal to the Tribunal would have to be lodged within 30 days. On 2 February 2015, the appellants’ agent wrote to HMRC requesting reconsideration of that decision.

14. On 3 February 2015, HMRC wrote to the appellants and the agent stating that only one review was possible but although the appellants would be out of time for appealing to the Tribunal they could still do so. They did not.

15. The appeals for Mrs Tweddle and the partnership were received by the Tribunal on 1 February 2016 and the appeals for Mr Tweddle on 14 March 2016. The reason given for the late application to the Tribunal for the partnership and for Mrs Tweddle was that “I was not aware until recently I could appeal further”. In the case of Mr Tweddle the explanation given was that he thought that the partnership appeal submitted on 1 February 2016 would cover both himself and the appeals.

16. The last remaining issue is that, in respect of Mrs Tweddle, her Notice of Appeal encompassed late payment penalties for the year 2012/13 amounting to £51 in each case for the 30 days late penalty and the 6 month late penalty. No appeal has ever been received by HMRC against these late payment penalties.

## HMRC's application

17. This hearing related to HMRC's application dated 13 May 2016 to the effect that there should be a preliminary hearing in respect of all of the appeals to establish whether or not the appeals should be admitted late. As far as the late payment penalties for Mrs Tweddle were concerned, HMRC sought strike out of the appeals in that regard in terms of Rule 8 of the Rules on the basis that since no appeal had been received by HMRC then in accordance with Section 49 TMA the Tribunal has no jurisdiction.

## Discussion

18. Dealing first with the late payment penalties, it is certainly the case that if no appeal had been lodged with HMRC, as it appears there was not, then the Tribunal has no jurisdiction. Accordingly that element of the appeals is struck out.

## Application for admission of a late appeal

### The Law

19. The Tribunal's power to admit a late appeal is contained in Section 49 Taxes Management Act 1970 which reads as follows:-

#### "49 Late notice of appeal

(1) This section applies in a case where—

(a) notice of appeal may be given to HMRC, but

(b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if—

(a) HMRC agree, or

(b) where HMRC do not agree the tribunal gives permission."

20. Although this appeal was heard in Carlisle, the taxpayers are based in Scotland and therefore the applicable law is Scots law. The general approach to such discretionary decisions in Scotland is set out by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City*<sup>1</sup> ("Aberdeen") and in particular at paragraphs 22-24. Those read as follows:-

"[22] Section 49 [of the Taxes Management Act] is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate

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<sup>1</sup> 2006 STC 1218

time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.

5 [23] Certain considerations are typically relevant to the question of whether proceedings  
should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by  
s49, these include the following; it need hardly be added that the list is not intended to be  
comprehensive. First, is there a reasonable excuse for not observing the time limit, for example  
because the appellant was not aware and could not with reasonable diligence have become  
10 aware that there were grounds for an appeal? If the delay is in part caused by the actings of the  
Revenue, that could be a very significant factor in deciding that there is a reasonable excuse.  
Secondly, once the excuse has ceased to operate, for example because the appellant became  
aware of the possibility of an appeal, have matters proceeded with reasonable expedition?  
Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is  
15 refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed  
to proceed, or if permission is refused? The public interest may give rise to a number of issues.  
One is the policy of finality in litigation and other legal proceedings; matters have to be brought  
to a conclusion within a reasonable time, without the possibility of being reopened. That may  
be a reason for refusing leave to appeal where there has been a very long delay. A second issue  
is the effect that the instant proceedings might have on other legal proceedings that have been  
20 concluded in the past; if an appeal is allowed to proceed in one case, it may have implications  
for other cases that have long since been concluded. This is essentially the policy that underlies  
the proviso to s33(2) of the Taxes Management Act. A third issue is the policy that is to be  
discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and  
it should be respected in any decision as to whether an appeal should be allowed to proceed late.  
25 Fifthly, has the delay affected the quality of the evidence that is available? In this connection,  
documents may have been lost, or witnesses may have forgotten the details of what happened  
many years before. If there is a serious deterioration in the availability of evidence, that has a  
significant impact on the quality of justice that is possible, and may of itself provide a reason for  
refusing leave to appeal late.

30 [24] Because the granting of leave to bring an appeal or other proceedings late is an exception  
to the norm, the decision as to whether they should be granted is typically discretionary in  
nature. Indeed in view of the range of considerations that are typically relevant to the question,  
it is difficult to see how an element of discretion can be avoided. Those considerations will  
often conflict with one and another, for example, in a case where there is a reasonable excuse  
35 for failure to bring proceedings and clear prejudice to the applicant for leave but substantial  
quantities of documents have been lost with the passage of time. In such a case the person or  
body charged with the decision as to whether leave should be granted must weigh the  
conflicting considerations and decide where the balance lies.”

40 21. I was not referred to the case but I agree with the decision of Judge Berner at  
paragraph 36 in *O’Flaherty v HMRC*<sup>2</sup> and that reads:-

45 “I was referred to ... where Sir Stephen Oliver refused permission to appeal out of time. In  
the course of his decision, Sir Stephen made the point that permission to appeal out of time  
will only be granted exceptionally. It is in my view important that this comment should not be  
thought to provide a qualitative test for the circumstances the FTT is required to take into  
account. It should properly be understood as saying nothing more than that permission should  
not routinely be given; what is needed is the proper judicial exercise of a discretion, taking  
account all relevant factors and circumstances.”

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<sup>2</sup> 2013 UKUT 01619 (TCC)

22. He goes on to record at paragraph 37 that: -

“Time limits are prescribed by law, and as such should as a rule be respected”.

I agree entirely.

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23. Paragraph 38 reads:-

10 “These references to permission being granted exceptionally should not be elevated into a requirement that exceptional circumstances are needed before permission to appeal out of time may be granted. That is not what was said in *Ogedegbe* nor in *Aston Markland*, and it is not the case. The matter is entirely in the discretion of the FTT, which must take account of all relevant circumstances. There is no requirement that the circumstances must be exceptional.”

That is the approach which I adopt.

15 24. I have considered, and weighed in the balance, all of the relevant circumstances including, but not restricted to, the circumstances identified in *Aberdeen*. In so doing, I have concurrently applied the three stage process set out by the Court of Appeal in *Denton & Others v T H Whyte & Another; Decadent Vapours Ltd v Bevan & Others* and *Utilise TDS Ltd v Davies & Others* (“Denton”)<sup>3</sup>. The first of those is to identify the seriousness and significance of the failure to lodge an appeal in relation to which  
20 the relief sought. The second is to consider why the default occurred and the third is to evaluate all the circumstances of the case so as to deal justly with the application of the factors.

25 25. HMRC relied upon and referred me to *Romasave (Property Services) Ltd v HMRC* (“*Romasave*”)<sup>4</sup>.

25 26. I am bound by and entirely agree with Judges Berner and Falk at paragraph 96 of *Romasave* which reads:-

30 “... 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.”

## Discussion

*Is there a reasonable excuse for not observing the time limits?*

35 27. It is clear from the explanation attached to Mr Tweddle’s appeal that Mr and Mrs Tweddle suffered a significant house fire on the night of 17 April 2013 at 1.00am whilst sleeping in their home. They had to stay in a holiday let for a total of seven and a half months following the fire and their belongings were in storage remotely. During that period from April to November 2013, Mr Tweddle continued to trade in

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<sup>3</sup> 2014 EWCA Civ 906

<sup>4</sup> 2015 UKUT 254

his catering business whilst they both endeavoured to renovate their home. On moving back into their home their belongings were all in a state of confusion so they state that it took time to sort matters out, that was only achieved by March 2014. April 2014 was the beginning of the busy period yet again which left them with little time to do the tax returns but they say that they did them as soon as possible. Lastly they pointed out that Storm Desmond flooded their shop on 5 December 2015.

28. Whilst I sympathise with them in relation to Storm Desmond it has very little bearing on these appeals since it occurred long after the defaults.

29. It is clear that by the deadline for appealing the £100 late filing penalty which was 20 March 2014, the appellants, by their own admission, had been able to sort their belongings. They then focussed on their business. The answer is actually to be found in the agent's letter of 2 February 2015 to HMRC when they indicated in relation to the filing of the returns that "The client had a lot of other things on their mind given the shock and disruption the fire caused them then regrettably, but understandably, the preparation of the accounts and tax returns was not of an immediate concern". It would seem that the same applied to the penalties.

30. At no stage, prior to submission of the returns, did they or their agent contact HMRC. It would have been prudent to have done so.

31. I simply do not accept the assertion that they were not aware of their appeal rights. HMRC had made that entirely explicit in their various letters and those were copied to their agent. Their agent is a professional accountant.

32. Although they should have been aware that they should appeal to the Tribunal in November 2014 the letter of 3 February 2015 was in unambiguous terms and made it explicit that, although out of time, an appeal could be made. There has been absolutely no explanation as to why it took the appellants until 2016 to lodge appeals with the Tribunal. In all these circumstances I do not accept that there was a reasonable excuse for not observing the time limits.

*Did matters proceed with reasonable diligence once the excuse had ceased to operate?*

33. Since I find that there was no excuse at any stage the answer must be no. Furthermore the Tribunal's own records show a history of no cooperation with the Tribunal. That is what led to the purported Strike Out in October 2016.

*Is there a prejudice to one or other party if the appeal proceeds or is refused?*

34. I agree with Dyson LJ in *Cook* at paragraph 22 which reads:-

"... there was prejudice to HMRC in not being able to close its books. Thirdly, there is a public interest in these cases in achieving finality in litigation. There is a public interest in promoting the policy that challenges to assessments by way of appeal should be brought in the short period specified by the statute."

35. There would undoubtedly be prejudice to the appellants if the appeals are not allowed to proceed as they would be unable to litigate. On the other hand, if the applications are granted then there will be considerable cost to the public purse.

*Are there considerations affecting the public interest?*

5 36. There is undoubtedly the issue of the policy of finality in litigation and other legal proceedings and the delay in this matter is very significant. As can be seen from para 24 above, *Romasave* suggests that a delay of 90 days is serious and significant and in these appeals the delay for the £100 late filing penalties was almost two years and for the other penalties it was in excess of a year.

10 *Has the delay affected the quality of available evidence?*

37. The primary evidence in this case would be the appellants' own evidence. Since they have failed to cooperate with HMRC or the Tribunal, it is very difficult to form an opinion on that. The prospects of further cooperation seem unlikely given the history.

15 38. In the recent Supreme Court judgment of *Global Torch Ltd v Apex Global Management Ltd (No 2)* Lord Neuberger said at [29] and [30] that the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to considering whether time should be extended unless the party concerned has a case whose strength would entitle him to summary judgement. That is patently not  
20 the case here.

### **Conclusion**

39. Every application for admission of a late appeal depends on its own facts and circumstances. At all stages in the consideration of this matter I have had Rule 2 of the Rules very much in mind. It is imperative that any decision should be fair and  
25 just. I have weighed every factor and authority that was brought to my attention in the balance. Taxpayers are expected to act with reasonable prudence and diligence in dealing with their affairs. Patently, the appellants have not done so since at least March 2014.

30 40. On the balance of probability, I find that appellants have not discharged the onus of proof in establishing good reason for extending the time limits in the circumstances of this case. I decline to exercise my discretion and the application for permission to notify late appeals is refused.

41. In the circumstances I therefore strike out the appeals.

35 42. 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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**ANNE SCOTT**

**TRIBUNAL JUDGE**

**RELEASE DATE: 20 June 2018**

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