[2018] UKFTT 526 (TC)

TC06696

Appeal number: TC/2017/07705

INCOME TAX – permission to make late appeals – appeals made four and a half years after the relevant assessments were made – permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN CASTLE **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 22 August 2018

The Appellant represented himself

Mr Anthony O'Grady, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to the question of whether the Appellant should be given permission to appeal against discovery assessments made by the Respondents on 15 November 2012 in respect of the tax year of assessment ending 5 April 2005 through to the tax year of assessment ending 5 April 2011 (the "relevant assessments") even though the earliest date on which the Appellant might be said to have given notice to the Respondents of his wish to appeal against any of the relevant assessments is 15 May 2017.

2. The tax years to which the relevant assessments relate, together with the income tax and national insurance contributions which have been assessed in respect of them in the relevant assessments, is as follows:

Tax Year Ending:	Amount of income tax and national insurance:
5 April 2005	£6,393.00
5 April 2006	£6,545.70
5 April 2007	£6,870.90
5 April 2008	£7,166.10
5 April 2009	£6,661.04
5 April 2010	£6,994.16
5 April 2011	£7,449.72

Background

3. The background to this decision is somewhat unusual to say the least.

4. The pertinent facts may be summarised as follows:

(a) On 13 December 2011, Mrs Courtney, an Officer of the Respondents, wrote to the Appellant informing him that he was being made the subject of a compliance check because the Respondents had information to suggest that he was in receipt of income that he had not declared to the Respondents;

(b) At the time, the Appellant had not filed any tax returns with the Respondents and that remained the case as of the date of the hearing;

(c) In her letter of 13 December 2011, Mrs Courtney asked the Appellant either to let Mrs Courtney know his ten digit unique tax reference number or to contact her by telephone on the telephone number provided in the letter. It also warned the Appellant that any failure to respond to the letter could lead to a range of possible consequences, including the issue of assessments by the Respondents;

(d) On 18 January 2012, Mrs Courtney sent a chasing letter to the Appellant as she had had no response to her initial letter;

(e) On 28 February 2012, Mrs Courtney wrote to the Appellant once again referring to her two earlier letters and to telephone messages which Mrs Courtney had left for the Appellant in the period since she had first written. The letter reminded the Appellant that he had a duty to declare to the Respondents any income he received and then asked the Appellant some questions in relation to the Appellant's employment status and possible income and benefits that he might have received;

(f) On 4 April 2012, Mrs Courtney eventually managed to speak to the Appellant. He admitted that he had received her letters but had not got around to replying to them. During the course of that telephone conversation, the Appellant provided Mrs Courtney with a limited amount of information in relation to his employment history. The note of the telephone call made by Mrs Courtney records that a number of questions were not satisfactorily answered during this call, including the nature of the Appellant's activities since leaving his employment at a company called Cheale Meats in 2003 and how the Appellant was servicing his mortgage;

(g) On the same day, Mrs Courtney wrote to the Appellant asking for further information and enclosing a questionnaire;

(h) On 15 May 2012, the Respondents issued an information notice under Schedule 36 FA 2008, requiring the Appellant to provide certain information and, when the Appellant had failed to comply with that notice despite a warning letter on 17 July 2012, on 2 August 2012, the Respondents issued a penalty of £300 in respect of the Appellant's failure to comply with the information notice;

(i) On 18 October 2012, Mrs Courtney sent a letter to the Appellant to the effect that this was a final warning before the issue of formal discovery assessments. In that letter, Mrs Courtney alluded to the fact that she had received information from a third party to the effect that the Appellant was in receipt of self-employment income from a skip hire business and that the decision to issue discovery assessments was being made on that basis;

(j) On 15 November 2012, the relevant assessments, which are the subject of this decision, were issued;

(k) On 31 January 2013, Mrs Courtney wrote to the Appellant confirming the issue of the relevant assessments and also that, as no appeals had been received, the amounts shown in the relevant assessments were now due and payable;

(l) Whilst nothing further has occurred in relation to the relevant assessments since 31 January 2013, there have been further developments in relation to the tax affairs of the Appellant since then because the Appellant became the subject of an investigation by the Respondents'

Fraud Investigation Service the result of which was that he went to prison for tax evasion. In preparing for the criminal trial, the Respondents examined the bank statements of the Appellant and reached conclusions as to the amount of income tax and national insurance which were due in respect of three of the tax years of assessment which are the subject of the relevant assessments – the tax years of assessment ending 5 April 2009, 5 April 2010 and 5 April 2011 - and two later tax years of assessment - the tax years of assessment ending 5 April 2012 and 5 April 2013;

(m) The conclusions drawn by the Respondents as to the amount of tax and national insurance which were due in respect of the tax years of assessments in question were as follows:

Tax Year Ending:	Amount of income tax and national insurance:
5 April 2009	£64,279.21
5 April 2010	£0.00
5 April 2011	£3,223.64
5 April 2012	£33,338.90
5 April 2013	£33,227.04

(n) However, due to an error on the part of the Respondents, although the figures set out in paragraph 4(m) above were recorded in the self-assessment record which the Respondents maintain in relation to the Appellant – with the result that, in that record, in respect of the tax years of assessment ending 5 April 2009, 5 April 2010 and 5 April 2011, the revised figures set out in paragraph 4(m) above replaced the figures set out in paragraph 2 above and, in respect of the tax years of assessment ending 5 April 2012 and 5 April 2013, the figures set out in paragraph 4(m) above were inserted, the Respondents failed to issue either revised assessments in respect of the tax years of assessment ending 5 April 2009, 5 April 2010 and 5 April 2011 or new assessments in respect of the tax years of assessment ending 5 April 2012 and 5 April 2013;

(o) As a result of that failure, the income tax and national insurance which are shown in the self-assessment record which the Respondents maintain in relation to the Appellant as being due by the Appellant in respect of the five tax years of assessment in question are not supported by any assessments which have been made on the Appellant hitherto;

(p) On 6 April 2017, the Respondents made a statutory demand in respect of the aggregate amount shown in the self-assessment record which the Respondents maintain in relation to the Appellant. The aggregate amount in question was £220,835.80. The statutory demand said on its face that the appropriate court to which to apply in order to get the statutory demand set aside was the Southend-On-Sea County Court;

(q) On 15 May 2017, the Appellant's representative, Haines Watts, wrote to the Respondents, challenging the quantum of the debts shown in the statutory demand in respect of the tax year of assessment ending 5

April 2005 through to the tax year of assessment ending 5 April 2009 and the debts shown in respect of the tax years of assessment ending 5 April 2011, 5 April 2012 and 5 April 2013;

(r) Although it seems likely that, in writing that letter, Haines Watts were intending to challenge the statutory demand, as opposed to any of the assessments on which that statutory demand was based, the Respondents have indicated that they are prepared to treat that letter as a notification to the Respondents of the Appellant's wish to appeal against those of the relevant assessments which relate to the tax years of assessment to which reference was made in Haines Watts' letter – that is to say, the tax year of assessment ending 5 April 2005 through to the tax year of assessment ending 5 April 2009 and the tax year of assessment ending 5 April 2011; and

(s) Notice of the Appellant's appeals was given to the First-tier Tribunal on 23 August 2017 although the grounds of appeal refer to the figures set out in the statutory demand and not to the figures set out in the relevant assessments.

5. It can be seen from the above description of the events which have occurred that the tax affairs of the Appellant are in something of a muddle and that the blame for this cannot be laid entirely at the Appellant's door. Clearly, the Respondents have erred in failing to issue revised assessments in respect of the tax years of assessment ending 5 April 2009, 5 April 2010 and 5 April 2011 and new assessments in respect of the tax years of assessment ending 5 April 2012 and 5 April 2013, in each case to reflect the conclusions reached by the Respondents in the course of the criminal trial and shown in the self-assessment record which the Respondents maintain in relation to the Appellant. The upshot of that failure is that the statutory demand is completely out of kilter with the assessments which have hitherto been issued to the Appellant.

The relevant issue

6. Be that as it may, the sole question for me to determine in the context of this decision is whether I should give permission to the Appellant to make a late appeal in relation to the assessments issued to him in respect of the tax year of assessment ending 5 April 2005 through to the tax year of assessment ending 5 April 2009 and the assessment issued to him in respect of the tax year of assessment ending 5 April 2011. The letter from Haines Watts did not refer to the tax year of assessment ending 5 April 2010 because no figure for that tax year of assessment was recorded in the statutory demand. (As noted in paragraph 4(m) above, the conclusion drawn by the Respondents in the course of the criminal trial was that no amount of income tax or national insurance was due in respect of the tax year of assessment ending 5 April 2010.) The failure of Haines Watts to refer to the tax year of assessment ending 5 April 2010 in their letter of 15 May 2017, although entirely understandable given that they were trying to challenge the figures set out in the statutory demand, means that the assessment in respect of that tax year of assessment cannot on any basis be regarded as having been the subject of an appeal. Therefore, it remains final, as noted in Mrs Courtney's letter of 31 January 2013. If the statutory demand had included the

figure of £6,994.16 to which reference is made in the assessment in respect of that tax year of assessment, then it seems likely that Haines Watts would have included a reference to it in their letter of 15 May 2017 and it would then have fallen to be considered in this decision in the same way as the other relevant assessments. As it stands, the Appellant is in the odd position of owing tax and national insurance in respect of the tax year of assessment ending 5 April 2010 of £6,994.16 even though, if one looks at the conclusion drawn by the Respondents for the purposes of the criminal trial, he ought to owe no tax or national insurance in respect of that tax year of assessment.

The parties' submissions

7. In relation to the remaining assessments, the case presented by the Respondents was that:

(a) The position here is governed by Section 49 Taxes Management Act 1970 (the "TMA 1970");

(b) Under that section, if no notice of appeal is given to the Respondents within the requisite time limit, notice of appeal may still be given after that period as long as the Respondents agree or the First-tier Tribunal gives permission;

(c) Section 49(3) requires the Respondents to give permission for a late appeal as long as the appellant in question makes a request in writing to allow the late notice of appeal and the Respondents are satisfied that the appellant in question has a reasonable excuse for not giving the notice before the relevant time limit and gave the notice without unreasonable delay after the reasonable excuse ceased;

(d) In this case, Section 31A TMA 1970 required the notices of appeal against the relevant assessments to be given in writing within thirty days of the date on which the relevant assessments were issued;

(e) The earliest date on which the Appellant could be said to have given notices of appeal to the Respondents was 15 May 2017 when Haines Watts sought to challenge the figures in the statutory demand;

(f) That was some four and half years after the final date on which the Appellant was entitled to give notices of appeal to the Respondents;

(g) The Appellant had no reasonable excuse for a delay of that length and therefore the Respondents were not required to agree to the late notice by Section 49(3) TMA 1970;

(h) Moreover, the extent of the delay was such the Respondents did not agree to the late notices and urged me not to give permission for late notices to be given;

(i) In urging me not to give permission for the late notices, the Respondents relied on a number of decisions of the higher courts– those decisions' being the decisions of the Upper Tribunal in *Data Select*

Limited v The Commissioners for Her Majesty's Revenue and Customs [2012] STC 2195 ("*Data Select*"), *BPP Holdings Limited and others v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 121 ("*BPP*") and *Romasave (Property Services) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 254 (TCC) ("*Romasave*").

(j) In the view of the Respondents, those decisions establish that, in considering whether I should give permission for late notices of appeal to be given, I need to take into account the purpose of the time limit, the length of the delay, the explanation for the delay, the consequences for the parties if I give permission and the consequences for the parties if I refuse to give permission;

(k) The Respondents said that, applying those criteria in the present case, the purpose of the thirty day time limit is to provide certainty and finality to the process of issuing and challenging assessments and, in that context, the period of over four and a half years which passed between the date when the relevant assessments were issued (15 November 2012) and the date when, on a generous construction of the Haines Watts letter of 15 May 2017, the Appellant gave notice that he wished to appeal against the relevant assessments, was far too long. The Respondents pointed out that, in *Romasave*, the Upper Tribunal had observed that, in the context of an appeal right which must be exercised within thirty days from the date of the document notifying the decision, a delay of more than three months could not be described as anything but serious and significant and therefore, in that context, the present delay was of such a magnitude that I should not contemplate giving permission, particularly as the Appellant had not provided any explanation for his delay. The Respondents added that, were I to give permission for the late appeals, the Respondents would find it hard to defend the appeals because the passage of time meant that its documentation in relation to the relevant tax years of assessment was necessarily limited, whereas, were I to refuse permission, the Respondents would be able to close their books on the basis that all matters would then be settled; and

(l) The Respondents also referred in their submissions to Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"), which requires me to deal with cases fairly and justly in accordance with the overriding objective of the Tribunal Rules, to Rule 20 of the Tribunal Rules, which contains a power for me to give permission for a late appeal to the First-tier Tribunal and to Rule 5(3) of the Tribunal Rules, which allows me to extend the time for complying with any Rule or direction unless such extension would conflict with a provision in another enactment setting down a time limit.

8. For his part, the Appellant explained that he had no real excuse for his failure to engage with the Respondents in the period leading up to the issue of the relevant assessments or most of the time thereafter except that he had been unable to obtain the relevant paperwork from his contractor and therefore concluded that there was no

point in communicating with the Respondents until he received that information. However, he pointed out that he was in prison for some of the period of the delay, albeit that that was not until relatively late in that period.

Discussion

9. I would start my analysis by saying that I believe that the arguments made by the Respondents set out in paragraph 7 above do not take into account the difference between permission to allow late notices of appeal to the Respondents – which is the matter to which this decision relates – and permission to allow late notices of appeal to the First-tier Tribunal, which is a quite separate matter.

10. Permission to allow late notices of appeal to the First-tier Tribunal in the case of income tax assessments is dealt with in Sections 49G(3) and 49H(3) TMA 1970 and also in Rules 5(3) and 20 of the Tribunal Rules, to which reference is made in paragraph 7(l) above. And it is the exercise of my powers under those provisions to which the cases cited in paragraph 7(i) above are primarily relevant. In other words, those cases relate to the operation of the rules governing the conduct of litigation before the First-tier Tribunal. Both *Data Select* and *Romasave* related to whether or not to extend the time period for notifying a VAT appeal to the First-tier Tribunal and *BPP* related to the non-compliance by the Respondents with procedural rules. Thus, those cases would be directly in point if this decision concerned the exercise of my power to allow late notices of appeal to be given to the First-tier Tribunal. They are not directly in point in relation to the question which is before me in the present case – namely, whether to give permission for late notices of appeal to be given to the Respondents.

11. Having said that:

(a) I believe that the principles which are set out in those cases can reasonably be applied by parity of reasoning in a similar manner in determining whether or not to give permission for late notices of appeal to be given to the Respondents; and

(b) In any event, I agree that I need to take into account the overriding objective which is set out in Rule 2 of the Tribunal Rules in exercising my discretion as to whether or not to give permission for late notices of appeal to be given to the Respondents.

12. Secondly, I think that the Respondents are being a little disingenuous when they say that, if I refuse permission for late notices of appeal to be given to the Respondents in this case, the Respondents will be able to close their books and that, in that event, nothing further will need to be done in relation to the tax years of assessment to which the relevant assessments relate. That may be true in relation to the tax year of assessment ending 5 April 2005 through to the tax year of assessment ending 5 April 2008 but it is not true in relation to the tax years of assessment ending 5 April 2009 and 5 April 2011. This is because, as noted above, in relation to those tax years of assessment (and the tax year of assessment ending 5 April 2010), the Respondents have not yet issued assessments which correspond to the conclusions

reached by the Respondents in the course of the criminal trial and shown in the self-assessment record which the Respondents maintain in relation to the Appellant. It follows that, no matter what I decide, there is going to need to be some form of reckoning pursuant to which assessments are issued to reflect those conclusions.

13. Having said all of that, I do not think that I can reasonably give permission for late notices of appeal to be given by the Appellant to the Respondents in relation to the assessments in respect of the tax year of assessment ending 5 April 2005 through to the tax year of assessment ending 5 April 2009 and the assessment in respect of the tax year of assessment ending 5 April 2011. This is because, recognising the principles set out in the cases described above, the extent of the Appellant's failure to engage with the Respondents at all for such a prolonged period, both before and after the relevant assessments were issued, means that it would be neither fair nor just for me to give permission for the late notices in this case. The Respondents are entitled to assume that assessments which have not been the subject of notices of appeal for such a long period are not at this point going to be the subject of a hearing.

14. I would add that I believe that, in any event, the Respondents have been very generous in interpreting the letter of 15 May 2017 from Haines Watts to be a request to make late appeals against the relevant assessments. A much more likely interpretation of that letter is that it is an appeal against the statutory demand and the figures set out in that statutory demand. It is not a notice of appeal against any of the relevant assessments.

15. For the reasons set out above, I do not give permission for late notices of appeal to be given to the Respondents in relation to any of the relevant assessments. This means that the relevant assessments will be final and, insofar as there is a difference between the amount shown in a relevant assessment in respect of any tax year of assessment and the amount shown in respect of that tax year of assessment in the statutory demand, it is the former amount which will prevail over the latter amount, subject always to the Respondents' powers to issue further assessments in relation to the relevant tax year of assessment.

16. I would conclude by urging the Appellant to be more communicative with the Respondents in relation to his tax affairs going forward (even if he feels that he does not have the information needed in order for the Respondents to determine his tax liabilities in respect of any tax year of assessment or the wherewithal to discharge those tax liabilities) and also, to the extent that he can afford to do so, to engage a professional adviser to assist him in sorting out the position in relation to all of the tax years of assessment covered by the relevant assessments and subsequent tax years of assessment. At the very least, he should expect to receive further assessments in respect of the tax years of assessment ending 5 April 2012 and 5 April 2013 reflecting the conclusions reached by the Respondents in the course of the criminal trial and shown in the self-assessment record which the Respondents maintain in relation to the Appellant and, when he does so, he should immediately indicate his wish to appeal against those assessments if he does not agree with them.

17. 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 Rules. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 29 August 2018