[2018] UKFTT 630 (TC)

TC06781

Appeal number: TC/2017/07801

PROCEDURE – Late Appeal – Application for permission to notify a late appeal to the Tribunal – TMA 1970 s 49 - Permission refused – Late appeal not allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR BARRY SMITH **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MRS SONIA GABLE JP

Sitting in public at the Tribunal Hearing Centre, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on Tuesday 17 July 2018, with further written submissions from the Respondent dated 23 July 2018, the Appellant dated 24 July 2018, and the Respondent dated 13 September 2018

Mr Jon M Dickinson ACCA, an Accountant, of Proactive Chartered Accountants Ltd, on behalf of the Appellant

Miss Mary Hendrick, an HMRC Litigator and Officer of HMRC, appeared for the Respondents

DECISION

1. This is our case-management decision in relation to an application for permission to make a late appeal.

2. Paragraph 20(4) of the *Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* provides as follows:

> "(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
>
> (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

3. Section 49 of the *Taxes Management Act 1970* reads:

> "|49. **Late Notice of Appeal**
>
> (1) This section applies to 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.
>
> (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
>
> (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
>
> (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
>
> (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
>
> (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
>
> (8) In this section 'relevant time limit', in relation to notice of appeal, means the time before which the notice is to be given (but for this section).

4. It is appropriate at this point to record that HMRC's position was that Condition A was satisfied, but that neither Condition B nor Condition C were satisfied.

5. We were initially in some doubt as to whether our jurisdiction under section 49 was fully appellate or was of a narrower, judicial-review type. We invited further written submissions on the point.

6. HMRC's written submissions were dated 23 July 2018. In substance, HMRC submitted that the Tribunal's jurisdiction in this regard was fully appellate. HMRC drew attention to the decision of the Upper Tribunal in *William Martland v HMRC* [2018] UKUT 0178 (TCC) (Judge Roger Berner and Judge Kevin Poole). Following the guidance in Paragraph [44] of *Martland*, HMRC invited us consider (i) the length of the delay; (ii) the reasons for it; (iii) all the circumstances of the case, including the prejudice to each party, and bearing in mind the need to conduct litigation efficiently and at proportionate cost, and for statutory time limits to be respected.

7. The Appellant's written submissions were dated 24 July 2018. They went significantly beyond the permission which had been given and sought to raise a new argument, which was this appeal is in fact subject to TMA 1970 s 49D and not to some other section, and no review of HMRC's decision had been done, and hence (as we understood it) time had not begun to run against the Appellant at all.

8. In the circumstances, we considered it appropriate to afford HMRC an opportunity to respond. We asked HMRC for its position in relation to the following questions:

(1) Whether the Appellant could raise this new argument at this point;

(2) If the Appellant could raise the new argument at this point, HMRC's position on whether TMA 1970 s 49D applies to this case;

(3) The effect, if any, if HMRC did not offer a review in its letter of 16.10.17. Was HMRC obliged to offer a review of its decision?

(4) HMRC's position in relation to *Scanwell Freight Services [2014] UKFTT 106 (TC)* and the reliance placed upon it by the Appellant.

9. We made those directions of its own initiative. HMRC applied to extend the time for compliance, which we granted, given that the Appellant had not sent its submissions to HMRC, but only to the Tribunal.

10. HMRC responded on 13 September 2018:

(1) It had no objection to the Appellant's new argument;

(2) This decision under challenge is an assessment. The right of appeal arises under section 31 of the *Taxes Management Act* 1970. Notice of Appeal under section 31 must be given within 30 days: section 31A(1)(b). No such notice was given. Therefore, TMA section 49 applies. Notice may be given after the relevant time limit only if HMRC agree (which they do not), or the Tribunal gives permission: TMA section 49(2)(b). TMA s 49D does not apply since it only applies if a Notice of Appeal has been given to HMRC within the appropriate time limit.

(3) HMRC did not offer a review because the Notice of Appeal was not made in time in accordance with TMA section 31A. The offer of a review is dependant on a Notice of Appeal being given in time: TMA s 49A(1);

(4) *Scanwell* is not relevant.

Does TMA s 49D apply?

11. The decisions under challenge are assessments. Some of these are at pages 24-33 of the hearing bundle. The first letter of 25 June 2015 (at page 23 of the bundle) enclosed '*Tax Assessments to collect the additional duties due for the years ended 5 April 2011, 2012, and 2013'*. The second letter of 25 June 2015 (at page 25 of the bundle) enclosed '*Revenue Assessments for the years ended 5 April 2011 and 2012 and a closure notice with amendment for the year ended 5 April 2013'*. The closure notice is dated 26 June 2015. The Notice of Assessment for the year ended 5 April 2011 is at page 28.

12. These are assessments to tax which are not self-assessments. Accordingly, the right of appeal arises under section 31(1)(d) of the *Taxes Management Act* 1970.

13. Notice of Appeal under TMA 1970 section 31 must be given within 30 days: section 31A(1)(b).

14. No such notice was given.

15. Therefore, TMA section 49 applies. Notice may be given after the relevant time limit only if HMRC agree (which they do not) or the Tribunal gives permission: TMA section 49(2)(b). That decision whether to give permission is the exercise upon which we are engaged.

16. TMA s 49D does not apply since it only applies if a Notice of Appeal has been given to HMRC within the appropriate time limit.

17. We agree that *Scanwell* is not relevant. It is a decision which deals with a VAT decision, and with different primary legislation (namely, *Finance Act 1994* section 16). Moreover, it antedates the decisions of the Court of Appeal in *R (on the application of Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472 and the Upper Tribunal in *Martland*, both of which are binding on us, and both of which lay down guidance as to the approach to be adopted in considering late appeals.

What is the law?

18. We are satisfied that our jurisdiction is of the wider, fully appellate, kind: see (for example) the decision of the Upper Tribunal (Judge Roger Berner) in *Dominic O'Flaherty v HMRC* [2013] UKUT 0161 (TCC). That means that we are not limited to considering whether HMRC's decision as to Conditions A, B and C was reasonable or unreasonable/flawed in a public law sense, but have a much wider discretionary power.

19. In exercising our discretionary power, the relevant principles which we must apply are conveniently set out in the recent decision of the Upper Tribunal in *William Martland v HMRC* [2018] UKUT 178 (TCC). This decision not only binds us, but also contains (at Paragraphs [23]-[47]) a careful and comprehensive review of the authorities.

20. At Paragraph [26] the Upper Tribunal referred to the judgment of Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City [2006] STC 1218*. That case concerned the self-same section 49, and included (at Paras. [22]-[24]) a useful analysis of the way in which the judicial discretion to permit the making of late tax appeals ought to be exercised:

> "[22] Section 49 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 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.
>
> [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 section 49, 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 aware that there were grounds for an appeal? If the delay is in part caused by the act 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 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 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 s 33(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. 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.

[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 another, for example in a case where there is a reasonable excuse 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."

21. The Upper Tribunal also had regard to what was said by Morgan J in *Data Select Limited v Commissioners for Revenue & Customs* [2012] STC 2195, who, when considering a late VAT appeal (where the relevant provisions are very similar) said this (at [34] to [37]):

"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."

22. At Paragraphs [44] and [45] the Upper Tribunal concluded its discussion of the legal principles applicable to applications for permission to submit a late appeal, by saying:

"When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton and others v T H White Limited and others* [2014] EWCA Civ 906: … (i) Establish the length of the delay; (ii) the reason (or reasons) why the default occurred; (iii) evaluation of "all the circumstances of the case". This will inevitably involve a balancing exercise which will essentially

assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission….That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected".

23. Having identified the relevant law, we move on to identify relevant facts.

Stage 1 – What was the length of the delay

24. On 25-26 June 2015, HMRC sent Mr Smith notices of assessments of his allowable travel expenses for the years 2010/11, 2011/12 and a closure notice for 2012/13.

25. On or about 9 February 2017, HMRC, as petitioning creditor, and seeking to rely on the sums which were so assessed, presented a bankruptcy petition against Mr Smyth.

26. On 6 June 2017, Mr Smith sent his appeal to HMRC.

27. On 16 October 2017, HMRC rejected Mr Smith's appeal as out of time.

28. On 20 October 2017, Mr Smith appealed online to this Tribunal.

29. The giving of the assessments on 25 July 2016 triggered a 30 day period in which the assessments could ordinarily have been challenged. We discount that initial one month period.

30. The delay was therefore from the end of July 2015 to 6 June 2017.

31. This was a delay of about 1 year and 10 months (about 22 months).

32. We have no hesitation in finding that this delay was a long one.

Stage 2 - What was the reason or reasons for the delay

33. This is the real heart of this dispute.

34. The reason for late appeal is set out, in full, as follows:

"Mr Barry Smith was undergoing an extremely hostile divorce during the period in which the assessment was first raised. As a result of this, he suffered tremendous stress, financial and emotional difficulties and was also forced to leave his home. He was forced to move over an extended period of time between a number of temporary residences while staying with relatives and as a result of this his ability to gather evidence and receive information from HMRC was severely compromised"

The divorce

35. No documentary evidence has been put before us in relation to the matrimonial proceedings.

36. But if, as is said, there was a Restraining Order in place, the terms of which prevented Mr Smith was going to the former matrimonial home (Sequoia Park), which allowed his former wife to hoard letters which had been sent to him, there is no evidence that there was ever any application to vary that order or to set it aside.

37. However, and in any event, HMRC's Note of Phone Call at page 64 of the bundle records a call to Mr Smith made on 10 June 2014 where Mr Smith is recorded as saying that he had moved addresses, had just called at his previous address to pick up his mail, and had received 'the penalty notices'. Hence, on his own case, Mr Smith, on 10 June 2014, had received at least some of the mail being sent to him at the former matrimonial home, including correspondence from HMRC.

38. No medical evidence has been placed before us to show that the stress of his divorce put Mr Smith in the position where he was genuinely incapable of attending to his tax affairs.

The change of address

39. On 12 June 2014 – that is to say, just over a year before the assessments in dispute in this case were made - Mr Smith told HMRC that he had changed his address to 17 Hill View, which was his mother's address. Thereafter, HMRC wrote to Mr Smith at that address. Even if Mr Smith did not live at Hill View, it was the address which he had given to HMRC, it was a residential house to which post was normally delivered, and it was occupied by Mr Smith's mother who would recognise post addressed to her son, and would therefore not dispose of it, but who would keep it to give to Mr Smith whenever he went to see her. Before us, Mr Smith accepted that, if that letter had reached his mother's house, she would have given it to him. Nothing was placed before us to suggest that there were any difficulties in receiving post there.

40. Against this background, the point about the inability to collect mail from Sequoia Park simply falls away.

The role of Mr McGuinness, and HMRC's alleged waiver

41. Shortly thereafter, Mr Smith consulted one Mr Declan McGuinness and arranged for him to 'look after' Mr Smith's tax return. On 30 June 2014, Mr McGuinness spoke to HMRC which said that it would not issue further daily penalties so long as it got a response to its inquiries by the end of August 2014.

42. We reject any suggestion that Mr Ray Jones at HMRC promised to waive the penalties. He did not. It is quite clear from the notes which we have seen that he made a pragmatic, narrow, time-limited, concession in relation to daily penalties only, and

only for a period of a few weeks so as to allow Mr Smith and Mr McGuinness some breathing space in which to sort out Mr Smith's tax affairs.

43. Nothing was received by HMRC in that time limit. Mr McGuinness spoke to HMRC on 16 September 2014 and said that he had not received anything from Mr Smith.

44. Before us, but not in his Grounds of Appeal, the Appellant sought to lay the blame on Mr McGuinness. It was said on Mr Smith's behalf that Mr McGuinness did not do a great job, and had made claims to Mr Smith that he had 'sent stuff' when he hadn't. But there is nothing before us from Mr Smith in terms of documents as to anything which passed between him and Mr McGuiness, and so there is nothing to corroborate or substantiate what was said to us. We were not told in any greater detail what Mr McGuinness was alleged to have said, or when, and in particular when Mr Smith came to realise that Mr McGuinness said that he had 'sent stuff' when he had not.

45. On 30 June 2014, Mr McGuiness wrote to Mr Smith that *'I need you to sit down with me and discuss appointment books, mileage records, company receipts etc ASAP, preferably before you go on holidays'*. We do not know whether such a meeting took place, but it does not seem likely given that Mr McGuinness told HMRC on 16 September 2014 that he had not received anything from Mr Smith. Mr Smith had been invited by his own representative to sit down, and two whole months later had not done so.

46. Nor can Mr Smith seek, as an excuse (let alone a reasonable one) to rely on the fact that Mr Jones ceased to be the officer attending to his affairs. Miss McDonald took over in January 2015, and wrote to Mr Smith and Mr McGuinness telling them so. The transition was orderly. The position was that Mr Smith had not provided HMRC with the documents and information which it had asked for, and which had been promised months earlier.

47. What is before us is a note from HMRC of a phone call between Mr McGuinness and Officer McDonald dated 17 March 2015. Mr Smith had been given an extention of the time limit to 27 February 2015, but had still not provided any information. Mr McGuinness told Officer McDonald that Mr Smith had been difficult to get hold of, and that he had received a 'stroppy' email from Mr Smith the previous week, and that 'it was really in Mr Smith's hands'. We asked Mr Smith about that note, and whether he agreed with what he said. He did not.

48. There is nothing in the exchanges between Mr McGuinness and Officer McDonald in which it is asserted that HMRC had agreed to waive penalties. If Mr Smith or Mr McGuinness genuinely believed that HMRC had waived penalties, then the discussions make no sense at all.

49. HMRC's Officer O'Shea picked up the baton in May 2015. On 11 May 2015, she wrote that she intended to 'progress matters towards conclusion'. On 12 May 2015, she wrote to Mr Smith (at 17 Hill View), copied to Mr McGuinness, that she intended,

within 30 days, to issue a closure notice and amendment for 2012/13, and tax assessments for 2010/11 and 2011/12.

50. On 5 June 2015, Officer O'Shea sent a Penalty Explanation to Mr Smith at 17 Hill View.

51. There is still the unexplained failure of Mr Smith, from or or about 9 February 2017 (when HMRC presented its bankruptcy petition against him) to 6 June 2017 – that is to say, a period of about four complete months – before Mr Smith sought to appeal to HMRC.

52. It is extremely difficult to understand why Mr Smith, against the backdrop of enforcement action of this kind, which on any view posed serious personal and professional consequences, being taken by HMRC, on the basis that the assessments against him constituted a debt, should still have failed to appeal to HMRC. That failure is thrown into even higher relief on the basis, as Mr Smith told us, he was professionally represented, by lawyers, in relation to the bankruptcy proceedings.

53. We do not accept that any of the reasons put forward – whether taken singly, or collectively – amount to a good explanation for the 22 month delay which we have identified.

Stage 3 – all the circumstances of the case

54. On 25 June 2015, Notice of Assessments for 2010/11 (£3,400), 2011/12 (£3,440), and 2012/13 (£3,712) were sent to Mr Smith at 17 Hill View. It was said that penalty assessments amounting to £2,453 would also be sent under separate cover. These were calculated at 23.25% of Potential Lost Revenue, giving discounts for telling, helping, and giving. The total sum in dispute is therefore approximately £12,000.

55. The purpose of the statutory time limit is that it is desirable not to re-open matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled. There is a strong public interest in an individual's tax affairs not remaining open for longer than is necessary. This is for the advantage both of HMRC and individual taxpayers. The extension of time here is about 22 times the time limit.

56. What is the prejudice to each party? If permission is refused, then the assessments and the penalties will stand. Mr Smith will remain liable to HMRC in the sums assessed and imposed by way of penalties.

57. The consequence of granting permission will be that the matter will return to HMRC for further consideration.

58. HMRC would have to revisit an inquiry which began in January 2013, and which was made longer and more complicated by Mr Smith's fairly comprehensive and long-standing failure to co-operate with HMRC, in terms of failing to provide it with the information and documents which it was requesting. Whilst the failure was not complete, it was substantial. It led to the issue of an information notice in June 2013.

Requests for information went unacknowledged or unanswered, despite repeated extensions of time given to Mr Smith.

59. Mr Smith would have an opportunity to place further information and material before HMRC to seek to displace the assessment. However, this is not a strong feature of this case.

60. As matters stand, Mr Smith seems to have little to no further contemporary, corroborative, documentation as to his expenses over and above the bundle of receipts provided in mid 2013, and the letter containing postcodes of sites where he had worked. All that seems to be new are the photograph of a vehicle odometer and the single-sided 'Example of weekly travel commitments – week beginning 29 May 2017' which were both attached to his accountants' letter dated 6 June 2017.

61. They are not even potentially decisive documents. As such, even now, Mr Smith does not have anything even remotely approaching a full suite of documents which would allow him to substantiate his claims for deductible expenses, nor does he have any other potentially decisive information which has not previously been put before HMRC. Mr Smith appears to accept that there will still be sums to pay.

62. As we understand it, the bankruptcy petition is stayed pending the determination of this application, and therefore it is fair to assume that, if the petition sum is not paid, then the bankruptcy proceedings will continue. But we do not know the petition sum, how much of this is money owed to HMRC, and whether there are other supporting creditors.

Conclusion

63. Considering the length of the delay (which is long), the reasons for the delay (which are not good ones), and having weighed up all the above factors, we refuse to extend the time for appealing.

64. For the above reasons, the Appellant's application for permission to notify his appeal to the Tribunal after the relevant time limit is refused.

Application for permission to appeal

65. This document contains full findings of fact and reasons for the decision.

66. Any party has the right to apply for permission to appeal against this decision 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.

DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 22 October 2018