[2018] UKFTT 747 (TC)

TC06880

Appeal number: TC/2018/04637

INCOME TAX – penalties for late filing of return – whether permission should be given for late notification of the appeals against the penalties - no

FIRST-TIER TRIBUNAL
TAX CHAMBER

TOYOSI OGUNTADE **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE
MR NICHOLAS DEE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 12 December 2018

The Appellant represented himself

Ms Rosemary James, Officer of HM Revenue and Customs, for the Respondents

DECISION

Background

1. This decision relates to appeals which were received by the Respondents from the Appellant on 11 May 2018 against three penalties which have been issued to the Appellant for a failure to file his tax return in respect of the tax year of assessment ending 5 April 2012. The tax return in question was not filed until 9 April 2018.

2. The three penalties in question are as follows:

   (a) a penalty of £100 pursuant to paragraph 3 of Schedule 55 to the Finance Act 2009 (the "FA 2009"), notice of which was issued to the Appellant on 29 October 2013;

   (b) a penalty of £300 pursuant to paragraph 5 of Schedule 55 to the Finance Act 2009 (the "FA 2009"), notice of which was issued to the Appellant on 29 April 2014; and

   (c) a penalty of £300 pursuant to paragraph 6 of Schedule 55 to the Finance Act 2009 (the "FA 2009"), notice of which was issued to the Appellant on 28 October 2014.

3. Under paragraph 21 of Schedule 55 to the FA 2009, an appeal against a penalty which has been imposed under that schedule for the late filing of a tax return is to be treated in the same way as an appeal against the tax in question.

4. Sections 31 et seq. of the Taxes Management Act 1970 (the "TMA 1970") govern the process of making appeals against assessments to income tax and, under Section 31A of that Act as it applies in relation to penalties, notice of an appeal against a penalty must be given within 30 days of the date on which the notice imposing the penalty was issued. Section 49 of the TMA 1970, as it applies in relation to penalties, provides that notice of an appeal against a penalty may be made after that 30 day limit only if the Respondents agree or, where the Respondents do not agree, the First-tier Tribunal gives permission.

5. In this case, the 30 day time limit for giving notice of an appeal against the penalties set out above expired on 29 November 2013, 29 May 2014 and 28 November 2014 respectively. As such, the Appellant's notice of appeals of 11 May 2018 were between three and a half years late and four and a half years late.

6. Not surprisingly, the Respondents have said that they do not agree to the late notice of the appeals, given the time which has elapsed since the expiry of the 30 day time limit in each case. This means that it is necessary for us to consider whether we should give permission for the late notice of the appeals.

7. In addition to objecting to the late notice of the appeals, the Respondents have said that, in the event that we decide to give permission for the appeals to proceed despite the late notice, they wish to apply for the Appellant's case to be stayed,

pending the decision of the Upper Tribunal in the case of *Goldsmith v The Commissioners of Her Majesty's Revenue and Customs* [2018] UKFTT 005 (TC) (Upper Tribunal reference number UT/2018/0037) ("*Goldsmith*"), which would have a direct bearing on the outcome of the Appellant's appeals were the appeals to proceed.

The relevant facts

8. So far as concerns our decision as to whether or not to give permission for the late notice of appeals, the relevant facts are as follows:

(a) the Appellant has, since 6 December 2012, lived at the same address, which is Flat 11, Strafford House, Grove Street, London SE8 5RD;

(b) that is the same address as the one on the Respondents' files and the one to which the Respondents have addressed all of the correspondence in relation to this matter;

(c) on 17 July 2013, following a request which they had made to the Appellant for voluntary payment of the shortfall in the income tax which had been deducted at source in respect of the tax year of assessment ending 5 April 2012, the Respondents sent a manual tax return to the Appellant in relation to the tax year of assessment in question;

(d) on 29 October 2013, 29 April 2014 and 28 October 2014, the Respondents issued to the Appellant the penalties which are the subject of this decision;

(e) on 4 December 2013, 30 November 2014 and 16 June 2015, the Respondents sent to the Appellant statements of account which detailed the penalties that (in the case of the statement of 4 December 2013) were in the course of arising or (in the case of the other two statements) had arisen as a result of the Appellant's failure to file the relevant tax return;

(f) the Appellant says that he did not receive either the manual tax return which was sent to him on 17 July 2013 or the statements of 4 December 2013 or 30 November 2014 but he does not deny that he received the penalty notices referred to in paragraph 8(d) above or the statement of 16 June 2015 referred to in paragraph 8(e) above;

(g) on 20 January 2017, the Appellant called the Respondents and was told that his tax return for the relevant tax year of assessment was overdue and needed to be completed to avoid further charges;

(h) the Appellant did not take any action in relation to filing the relevant tax return or appealing against the penalties and, on 1 March 2018, the Respondents sent to the Appellant a further statement of account which detailed the penalties that had arisen as a result of the Appellant's failure to file the relevant tax return;

(i) on 16 March 2018, the Appellant called the Respondents once again and, once again, was told that he needed to file the relevant tax return. Following that call, the Appellant was unable to file the relevant tax return on-line and so he called the Respondents again on 21 March 2018 and was told that, because of the time which had now elapsed since the tax year of assessment in question, he would need to file the relevant tax return in paper form;

(j) on 9 April 2018, the Appellant filed the relevant tax return in paper form;

(k) on 25 April 2018, the Appellant called the Respondents once again and was told that a repayment of income tax which was due to him in respect of another tax year of assessment – the tax year of assessment ending 5 April 2017 - was not going to be paid to him because it had been set off against the penalties in respect of his failure to file the relevant tax return. On that call, the Respondents reminded the Appellant of the outstanding penalties and explained to the Appellant the process for making appeals against the penalties; and

(l) on 11 May 2018, the Respondents received the Appellant's notice of the appeals against the penalties.

The relevant law

9. The principles that we should apply in determining whether or not to give permission for the late appeal in this case have been established by a number of decisions of the higher courts, one of which is the recent Upper Tribunal decision in *Martland v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 178 (TCC) ("*Martland*").

10. In their decision in that case, the Upper Tribunal referred to several earlier decisions – most notably, the judgment of Lord Drummond in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 and the judgment of Morgan J in *Data Select Limited v The Commissioners for Her Majesty's Revenue and Customs* [2012] STC 2195 – and concluded that those cases required the following questions to be addressed in each such case:

(a) what is the purpose of the time limit?

(b) how long was the delay?

(c) is there a good explanation for the delay?

(d) what will be the consequences for the parties of an extension of time? and

(e) what will be the consequences for the parties of a refusal to extend time?

11. The Upper Tribunal in *Martland* made it clear that, in answering these questions, one needs to consider the overriding objective of the Tribunal Rules, as set out in Rule 2 of those rules - to the effect that the First-tier Tribunal should deal with

cases fairly and justly - and the matters listed in Rule 3.9 of the Crown Procedure Rules (the "CPR") – that is to say, all of the relevant circumstances, including the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules.

12. The Upper Tribunal in *Martland* added that the reference to Rule 3.9 of the CPR shows that the case law in relation to an application for permission to make a late appeal is really just part of the wider stream of case law on relief from sanctions and extensions of time in connection with the procedural rules of the courts and tribunals. In *Martland*, it was noted that the key cases in that stream of authority so far as an application for permission to make a late appeal is concerned are the Court of Appeal decision in *Denton v TH White Limited* [2014] EWCA Civ 906, [2014] 1 WLR 3926 ("*Denton*") and the Supreme Court decision in *BPP Holdings Limited v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 55, [2017] 1 WLR 2945 ("*BPP*").

13. In *Denton*, the Court of Appeal was considering the application of the CPR to cases in which relief from sanctions for failures to comply with various rules of court was being sought. It said that, in any such case, the judge should address the application for relief from sanctions in three stages as follows:

> (a) identify and assess the seriousness and significance of the failure which has engaged Rule 3.9 of the CPR;
>
> (b) consider why the default occurred; and
>
> (c) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application and, for this purpose, giving particular weight to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules.

14. The Supreme Court in *BPP* implicitly endorsed the approach in Denton.

15. The Upper Tribunal in *Martland* concluded that, when the First-tier Tribunal is considering an application for permission to give notice of an appeal out of time, it needs to remember that permission should not be granted unless the First-tier Tribunal is satisfied on balance that it should be. The Upper Tribunal went on to say that, in considering that question, the First-tier Tribunal "can usefully follow the three-stage process set out in Denton", which is to say:

> (a) establish the length of the delay because, if it was very short, then the First-tier Tribunal "is unlikely to need to spend much time on the second and third stages" (see Denton at paragraph [28]), although the Upper Tribunal in *Martland* made it plain that this should not be taken to mean that permission may be granted in cases of very short delays without moving to a consideration of those latter two stages;
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> (b) establish the reason for the delay; and
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> (c) evaluate all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the extent of the

detriment to the applicant in not giving permission and the extent of the detriment to the party other than the applicant of giving permission.

16. The Upper Tribunal in *Martland* reiterated that the evaluation at the stage mentioned in paragraph 15(c) above "should take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost, and for the statutory time limits to be respected".

17. The Upper Tribunal in *Martland* made two final points in relation to the exercise by the First-tier Tribunal of its discretion in deciding whether or not to permit a late notice of appeal.

18. First, the Upper Tribunal held that the First-tier Tribunal can have regard to any obvious strength or weakness in the applicant's case because that is highly relevant in weighing up the potential prejudice to the parties of the relevant decision. In other words, where the First-tier Tribunal refuses an application for permission to give late notice of an appeal, there is much greater prejudice to an applicant with a strong case than there is to an applicant with a weak case. The Upper Tribunal cautioned against such a process's descending into a detailed analysis of the underlying merits of the appeal but it did say that, if an applicant's case was hopeless, then it would not be in the interests of justice for permission to be granted because that would lead the time of the First-tier Tribunal to be wasted. However, in most circumstances, an appeal will have some merit and so, without conducting a detailed evaluation of the merits, the First-tier Tribunal should at least form a general impression of the merits of the appeal and allow the parties an opportunity to address that question in outline.

19. Secondly, the Upper Tribunal said that the shortage of funds and the consequent inability of the applicant to appoint a professional adviser should not, of itself, carry any weight in considering the reasonableness of the applicant's explanation of the delay. Nor should the fact that the applicant is self-represented. This is because the appealable decisions of the Respondents generally include a clear statement of the relevant appeal rights and it is not a complicated process to notify an appeal to the First-tier Tribunal, even for a litigant in person.

20. Finally in this context, mention should be made of the statement in paragraph [96] of the Upper Tribunal decision in *Romasave (Property Services) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0254 (TCC) ("*Romasave*") to the effect that a delay of more than three months "cannot be described as anything but serious and significant".

The Appellant's grounds

21. The terms of the Appellant's appeals are somewhat confusing because he appears to be focusing on the tax refund which was due to him in respect of the tax year of assessment ending 5 April 2017 and not on the issue which caused the penalties to be issued – namely, the failure to file his tax return for the tax year of assessment ending 5 April 2012 for such a protracted period – or on the reasons for the lateness of the notice of his appeals against the penalties. The appeals letter does

not give any reason for the lateness of his appeals although it concludes by saying that he can't afford to pay the penalties because of his financial situation.

22. At the hearing, the Appellant conceded that he had been dilatory in both filing the relevant tax return and appealing against the penalties. He accepted that he had received the penalty notices and the statements of 16 June 2015 and 1 March 2018 and that he had spoken on the telephone to the Respondents on 20 January 2017 and been told both that he needed to file the relevant return and that the penalties had arisen.

Discussion

23. Applying the principles set out above, the first stage in the process of determining whether or not to give permission for a late notice of an appeal is to establish the length of the delay. In this case, the delays have been very substantial. Indeed, the delays – which are between three and half years and four and a half years – are considerably longer than the delay of more than three months which the Upper Tribunal in *Romasave* said "cannot be described as anything but serious and significant".

24. Turning then to the second stage in the process – the reasons for the delays - the Appellant has not provided any cogent reasons for his failure to make appeals against the penalties in question (or, for that matter, his failure to file the relevant tax return).

25. The final stage in the process is to evaluate all the circumstances of the case, which includes weighing up the length of the delays, the reasons for the delays, the extent of the detriment to the Appellant which would be caused by our not giving permission and the extent of the detriment to the Respondents which would be caused by our giving permission. In conducting that process, we are required:

> (a) to take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost and for the statutory time limits to be respected;
>
> (b) without descending into a detailed examination of the Appellant's case, to have regard to any obvious strength or weakness in that case because that is highly relevant in weighing up the potential prejudice to the parties of our decision; and
>
> (c) not to make any material allowance for the fact that the Appellant is a litigant in person because it is not a complicated process to notify an appeal to the First-tier Tribunal, even for a litigant in person.

26. In this case, if we refuse permission to the Appellant to pursue the appeals, there is a clear and obvious detriment to the Appellant in that he will be unable to challenge the penalties and will become liable to pay them. However, subject always to the possibility that the Upper Tribunal in *Goldsmith* will uphold the decision of the First-tier Tribunal in that case, the Appellant appears to have a very weak case in disputing the penalties. He does not deny that he has been dilatory in filing the relevant tax return and that he has received many reminders of the need to do so. So the only

meaningful prospect of his succeeding in the appeals depends on a favourable decision by the Upper Tribunal in *Goldsmith* and that is presently uncertain.

27. In addition, we need to consider the detriment to the Respondents if we give permission for the late appeals in this case. The Respondents were perfectly entitled to believe that, once the time limit for making an appeal against each penalty had expired, the Appellant was not going to appeal against the relevant penalty. The purpose of the time limit for giving notice of an appeal is to provide finality for the Respondents in the exercise of their powers. Moreover, respect for statutory time limits was expressly stated by the Upper Tribunal in *Martland* to be an important consideration in our evaluation.

28. We are also required not to make allowances for the fact that the Appellant is a litigant in person. In this case, the Appellant could easily have addressed the issue of the penalties much earlier than he actually has done and he had plenty of opportunities to do so, given the correspondence he received.

Conclusion

29. Our conclusion in this case is that, after taking into account all the factors which we are required to consider in our evaluation, this is not an appropriate case in which permission to give late notice of the appeals should be given. The length of the delay in giving notice of the appeals and the detriment which the Respondents would suffer if we were to give permission and thereby enable the Appellant to dispute penalties which the Respondents fairly considered to be beyond dispute mean that, notwithstanding the possibility that the appeals in this case might benefit from the decision by the Upper Tribunal in *Goldsmith*, this is not an appropriate case in which to give permission for the late notice of the appeals.

30. We therefore do not give our permission for the Appellant to give late notice of the appeals and the appeals are therefore dismissed.

31. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 18 DECEMBER 2018