



TC06916

Appeal number: TC/2017/09114

INCOME TAX – penalty for a failure to take, within the time allowed, the necessary corrective action following the receipt of a follower notice - application for permission to give late notice of appeal to the First-tier Tribunal – permission denied

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SIMON COOPER

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE TONY BEARE

**Sitting in public at Taylor House, 88 Rosebery Avenue EC1R 4QU on 11
December 2018**

Mr Nicholas Davies for the Appellant

Mr Christopher Shea, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This decision relates to an appeal made on 14 December 2017 against the conclusions which were set out in a review conclusion letter from the Respondents of 23 August 2017 in relation to a penalty which was issued to the Appellant on 22 May 2017 for a failure to take the “necessary corrective action” in relation to a “denied advantage” (each as defined in Section 208 of the Finance Act 2014 (the “FA 2014”)) within the time allowed by that section.

Background

2. The background to the appeal to which this decision relates is as follows:

(a) the Appellant made a claim for loss relief in respect of the tax year of assessment ending 5 April 2005 as a result of his participation in a tax avoidance scheme known as the “Manufactured Interest Payment S G REPO Kevin”;

(b) on 20 February 2006, the Respondents opened an enquiry into the Appellant’s tax return for the tax year of assessment in question;

(c) a closure notice in relation to that enquiry, which denied the loss relief in question, was issued on 7 June 2011 and the Appellant appealed against that closure notice on 14 June 2011;

(d) before that appeal had been determined, a decision in another tax appeal led the Respondents to serve a follower notice (an “FN”) on the Appellant on 29 April 2016;

(e) the Appellant made no representations in relation to that FN, although he was entitled to do so pursuant to Section 207 FA 2014, and, as a result, the date by which the Appellant was required to take the “necessary corrective action”, as outlined in Section 208 FA 2014, to avoid becoming liable to a penalty under Section 208 FA 2014 was 2 August 2016;

(f) the Appellant submits that he did take the “necessary corrective action” by that time because, on 26 May 2016, he sent a form by way of recorded delivery to the Respondents which indicated his agreement to relinquish the tax advantage to which the scheme was intended to give rise. The Appellant also points out that he was prompt in paying the additional tax which arose as a result of the denial of that tax advantage;

(g) the Respondents submit that they have no record of receiving the relevant form on that date. They add that the Appellant ought to have been aware by no later than 8 July 2016 that the Respondents had not received the relevant form because they spoke to the Appellant on the telephone on that date and made it clear that the relevant form had not been received. The Respondents point out that not only has the Appellant been unable to produce any evidence that the relevant form was sent to the

Respondents on 26 May 2016 – whether in the form of a recorded delivery slip or witness statement from the member of his staff whom he says that he asked to send the relevant form by way of recorded delivery – but also that the Appellant has not produced a copy of the relevant form as executed on 26 May 2016;

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(h) the Appellant said at the hearing that he had relied on a Mr Scott Clark, his financial adviser (“Mr Clark”) for all advice in relation to the scheme. It was Mr Clark who suggested that the Appellant might like to participate in the scheme and it was Mr Clark to whom he turned for support in relation to the FN and the form which was required to be submitted to take the “necessary corrective action” in relation to the FN. The Appellant says that he knows very little about taxation matters and that he simply forwarded to Mr Clark any correspondence which he received from the Respondents in relation to the scheme;

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(i) at the hearing, the Appellant provided evidence from his emails to show that he had written to Mr Clark on the afternoon of 26 May 2016 for help in filling in the relevant form and to show that, following his telephone call with the Respondents on 8 July 2016, he had sought the help of Mr Clark in dealing with the relevant form and Mr Clark had told him to let Mr Clark deal with the matter;

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(j) on 8 September 2016, the Respondents wrote to the Appellant to say that he was now liable for a penalty for failing to take the “necessary corrective action” by 2 August 2016. The Appellant said at the hearing that he had simply passed this letter on to Mr Clark;

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(k) on 16 September 2016, Mr Clark telephoned the Respondents to say that the Appellant had previously sent the relevant form to the Respondents and that he would send another copy of the form by way of recorded delivery;

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(l) on 10 February 2017, when the Respondents had received nothing from the Appellant or Mr Clark, they issued a further letter to the Appellant to inform him that they intended to charge him a penalty;

(m) on 10 March 2017, a copy of the relevant form, executed by the Appellant on 9 March 2017, was sent by Mr Clark to the Respondents;

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(n) on 22 May 2017, the Respondents issued the penalty which is the subject of this decision;

(o) on 18 June 2017, the Appellant appealed against the penalty;

(p) On 26 June 2017, the Respondents issued a letter setting out their current view of the matter and offering a statutory review, which the Appellant accepted;

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(q) On 23 August 2017, the Respondents issued their review conclusion letter, upholding their original decision; and

(r) On 14 December 2017, the Appellant notified his appeal against the penalty to the First-tier Tribunal.

The issues

3. There were two issues to be addressed at the hearing.

4. The first was whether I should give permission for late notice of the appeal to be given because:

(a) by virtue of Section 49G of the Taxes Management Act 1970, the Appellant was not entitled to have his appeal heard by the First-tier Tribunal without that permission if he notified his appeal to the First-tier Tribunal after 22 September 2017 (30 days after the date of the review conclusion letter); and

(b) by virtue of Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Tribunal Rules”), if a notice of appeal is given after any time limit which is set out in the relevant enactment but the enactment makes provision for late notice of an appeal to be given with the permission of the First-tier Tribunal, then the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided on time and, unless the First-tier Tribunal gives that permission, the First-tier Tribunal must not admit the appeal.

5. The second was whether, assuming that I was prepared to give such permission, I should uphold the Appellant’s appeal on one of two grounds – that is to say that I should find that, on the balance of probabilities, either:

(a) the Appellant did take the “necessary corrective action” before 2 August 2016 by executing and sending to the Respondents the relevant form on 26 May 2016; or

(b) if not, the Appellant’s failure to do so was “reasonable in all the circumstances” (as set out in Section 214(3)(d) of the FA 2014) because he was entitled to rely absolutely on Mr Clark to deal with the relevant form on his behalf and therefore that he should not be blamed for the failings of Mr Clark.

Should I give permission to appeal?

The relevant principles to be applied

6. There is no dispute between the parties as to the relevant principles that I should apply in determining whether or not to give permission for the late notice of appeal in this case.

7. These principles 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*”).

8. 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?
- 10 (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?

9. 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.

10. 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 give late notice of an 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 give late notice of an 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*”).

11. 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:

- 35 (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.
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12. The Supreme Court in *BPP* implicitly endorsed the approach in Denton.

13. The Upper Tribunal in *Martland* concluded that, when the First-tier Tribunal is considering an application for permission to give late notice of an appeal, 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;

(b) establish the reason for the delay; and

(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.

14. The Upper Tribunal in *Martland* reiterated that the evaluation at the stage mentioned in paragraph 13(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”.

15. 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 late notice of an appeal.

16. 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.

17. 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.

18. 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 arguments of the Appellant

19. Mr Davies, on behalf of the Appellant, submitted that it would be appropriate for me to give permission for the late notice of appeal in this case because:

(a) the delay in the Appellant's notifying his appeal to the First-tier Tribunal was only 82 days and therefore short of the three months which was stated by the Upper Tribunal in *Romasave* to be serious and significant. The delay was therefore not serious or significant and very little time needed to be spent on the second or third stages set out in *Denton*;

(b) in any event, the Appellant had relied on Mr Clark to notify the First-tier Tribunal of his appeal within the relevant time limit and such reliance was entirely reasonable as Mr Clark had previously submitted the Appellant's appeal against the penalty within the requisite time limit and accepted the Respondents' offer of a review within the requisite time limit; and

(c) taking all the circumstances of the case into account, it would not be fair or just to refuse permission for late notice of appeal to be given. In particular, the Appellant would suffer serious and significant detriment if he were to be denied the ability to have his appeal heard because he would become liable to a substantial penalty whereas the potential detriment to the Respondents of my giving permission for late notice of the appeal to be given was less material, given that the Respondents had already been paid the tax in question and this was simply an administrative error in failing to file the relevant form on time.

My decision in relation to the application for permission to make a late appeal

I am afraid that I do not agree with the submissions made by Mr Davies.

21. In the first place, I do not agree that *Romasave* establishes that the delay in this case was not serious or significant. *Romasave* merely says that a delay of over three months is serious and significant. It leaves at large the question of whether a shorter delay might also be serious and significant. In this case, the delay was 82 days, which is only just less than the three months which was being considered in *Romasave*. Moreover, as Mr Shea rightly pointed out, these circumstances do not involve a period of 82 days from the date of the review conclusion letter to the date on which

the notice of appeal was given to the First-tier Tribunal. On the contrary, the circumstances involve a period of 82 days beyond the 30 day notice period for which the legislation provides. That is a meaningful delay whichever way one looks at it. So I consider that the delay in this case was serious and significant notwithstanding that it fell slightly short of the magical three month mark considered by the Upper Tribunal in *Romasave*.

22. Secondly, I consider that it was not at all reasonable for the Appellant to rely on Mr Clark to submit the notice of appeal on his behalf without himself taking steps to ensure that this was done in good time. It is worth bearing in mind in this context that it was Mr Clark whose advice had led to the Appellant's participation in the tax avoidance scheme in the first place. More significantly in this context, according to the Appellant's own evidence at the hearing, it was his reliance on Mr Clark over the period from 8 July 2016 – when it became clear from the call between the Appellant and the Respondents that the Respondents were still awaiting a completed form which would comprise the taking of the “necessary corrective action” – and 10 March 2017 – when Mr Clark finally submitted such a form on the Appellant's behalf – which had led to the relevant penalty in the first place.

23. I find it incredible that, after the various failures on the part of Mr Clark which the Appellant alleges to have occurred in relation to the lodging of the relevant form, the Appellant was still willing to rely on Mr Clark to submit his notice of appeal within the 30 day time limit. Indeed, in response to my question at the hearing, the Appellant admitted that his trust in Mr Clark had been shaken by Mr Clark's failure to lodge the relevant form in time, to which the obvious next question is why did the Appellant then rely on Mr Clark to submit his notice of appeal on time?

24. Thirdly, Mr Shea explained at the hearing that the execution and lodging of the relevant form is more than just a minor administrative act. Instead, it is fundamental to the process of cancelling the tax advantage in question because it evidences the relevant taxpayer's agreement to giving up the tax advantage – without the execution of that form, the Respondents might subsequently face a claim from the relevant taxpayer to pay back the tax and to continue with his or her appeal. So the Respondents were entitled to expect that act to be done within the specified time limit and to impose a penalty for any failure to do so.

25. Mr Shea pointed out that, although the penalty in this case is high, the Appellant could have avoided the penalty altogether if he had taken responsibility for executing and sending the relevant form to the Respondents between 8 July 2016 – when he was told that no such form had been received – and the deadline of 2 August 2016. In addition, even if he had missed that deadline, the Appellant could have significantly reduced the penalty if he had reacted to the letter from the Respondents of 8 September 2016 and executed and sent the relevant form to the Respondents at that stage because, in that event, the penalty would have been mitigated by a much more significant percentage than it has been. The fact that the relevant form was not sent until 10 March 2017 has contributed meaningfully to the large quantum of the penalty.

26. Finally in this case, I am mindful of the statement made in *Martland* to the effect that the factors which need to be weighed in the balance at stage three of the *Denton* stages in deciding whether or not to give permission for late notice of an appeal include the likelihood that the appeal will succeed.

5 27. In this case, because, at the hearing, I reserved my decision in relation to whether or not to give permission for the late notice of appeal, I heard the submissions of Mr Davies and the evidence of the Appellant in relation to the grounds of appeal mentioned in paragraph 5 above.

10 28. In relation to the first of those grounds – that is to say, the assertion that the Appellant did take the necessary corrective action prior to 2 August 2016 by executing and sending the relevant form to the Respondents on 26 May 2016 - I am afraid that, in the absence of:

15 (a) any evidence in the form of a recorded delivery slip or a witness statement from the member of staff who is alleged to have been tasked with sending the executed relevant form to the Respondents on 26 May 2016 by way of recorded delivery;

(b) a copy of the relevant form as executed on that date; or

(c) a covering letter of the type that accompanied the completed form which was sent to the Respondents on 10 March 2017,

20 I think that it would be something of an uphill battle for the Appellant to persuade a First-tier Tribunal at a hearing of the substantive appeal that, on the balance of probabilities, the relevant form was in fact sent on 26 May 2016.

25 29. In his evidence at the hearing, the Appellant said that he was vague about which forms were which and did not in his own mind connect the form which was the subject of the call from the Respondents on 8 July 2016 with the form that he alleges that he sent on 26 May 2016 (which is why he didn't say to the Respondents on that call that he had already sent in the form). It is very hard then to place much weight on his assertion that the form which he says that he despatched by recorded delivery on 26 May 2016 was the form in which he indicated his agreement to relinquish the tax advantage to which the scheme was intended to give rise.

30 30. In addition, in relation to the second of those grounds, it would in my view be extremely difficult, if not impossible, for the Appellant to persuade any such First-tier Tribunal that it was reasonable in all the circumstances for him to have failed to take the "necessary corrective action" before he actually did so on 10 March 2017 given that he knew on and after 8 July 2016 that the relevant form was outstanding and he received reminders to that effect on 8 September 2016 and 10 February 2017. At the very least, even if he was unaware that he would need to sign the form before it was submitted, which seems unlikely, one would have expected the Appellant to have been chasing Mr Clark to submit the form on his behalf and confirming that that had been done. There is no evidence to that effect whatsoever. Instead, it appears that the Appellant simply left it to Mr Clark to deal with the outstanding form. Given these facts, I very much doubt that the relevant First-tier Tribunal would find the failure to

take the “necessary corrective action” prior to 10 March 2017 to be “reasonable in all the circumstances”.

31. It follows that, in my view, the Appellant has a very weak case in relation to the substantive issues which are relevant to the appeal and this also militates against my giving permission for the appeal to proceed.

Conclusion in relation to the application for permission to give late notice of the appeal

32. Taking into account the extent of the delay, the reasons for the delay and all the circumstances in this case, and paying particular attention to the two factors identified in Rule 3.9(1) of the CPR as they apply in relation to an application to give late notice of an appeal - the need for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected – as I am required to do by the superior courts, I consider that it is not appropriate to give permission for late notice of appeal to be given in this case.

Should the Appellant’s appeal be upheld

33. It follows from my conclusion in paragraph 32 above - to the effect that this is not an appropriate case to give permission for late notice of the appeal to be given - that I do not need to address the substantive issues which have been raised by the Appellant in relation to this appeal.

34. However, as I have intimated in paragraphs 28 to 31 above, I believe that I would have had some difficulties in finding for the Appellant on those issues if I had been prepared to give permission for late notice of the appeal to be given.

Conclusion

35. I have some sympathy for the Appellant in this case because the penalty in question is significant and could so easily have been avoided or reduced if he had shown a little more rigour and determination in sorting out the issues which arose in the wake of the failed scheme. I accept that he has not acted with any malice. On the contrary, he has acted in good faith in paying promptly the additional tax which was required by the FN which he received. However, no doubt due to a combination of overwork and unfamiliarity with the tax system, he failed to take sufficient interest in those issues or to display the assiduousness that might have been expected of someone in his position in dealing with them. As such, he cannot in my view be said to have done all that he should have done (and could easily have done) to avoid, or at least reduce, the penalty in this case.

36. 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.

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**TONY BEARE
TRIBUNAL JUDGE**

RELEASE DATE: 03 JANUARY 2019

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