[2019] UKFTT 29 (TC)

TC06925

Appeal number: TC/2018/05836

INCOME TAX – penalty for failure to make returns – application to bring a late appeal – dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMES CRAWFORD **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
MR NOEL BARRETT

Sitting in public at Manchester on 7 January 2019

Ms Nash, accountant, for the Appellant

Ms Ellwood, presenting officer, for the Respondents

DECISION

Background

1. This decision relates to an application by the appellant, Mr Crawford, for permission to make a late appeal against late filing penalties for the 2013/14 and 2014/15 tax years amounting to £3,200. The penalties were issued on various dates between 18 February 2015 and 21 February 2017.

2. The respondents, HMRC, object to the application on the grounds that the appeal to HMRC was not made until 4 April 2018 and was, at a minimum, made more than a year after the expiry of the 30 day period within which Mr Crawford was entitled to appeal.

Relevant law

3. s49 of the Taxes Management Act 1970 states:

> "|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.
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> (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. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") provides that, 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 approach which should be taken by the First-tier Tribunal in deciding whether or not to grant permission for a late appeal was set out by the Upper Tribunal in the case of *Martland* [2018] UKUT 178 (TCC), at [44] to [46] as below:

> "44. 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:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will 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.
>
> 45. 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. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.
>
> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal."

Appellant's case

6. The appellant's grounds of appeal were as follows:

(1) He believed that no returns were due as he had spoken to HMRC and had been told that a return was not required;

(2) HMRC accepted that returns were not due for 2016/17 and 2017/18 and made that decision based on criteria which were no different from those applying in 2013/14 and 2014/15;

(3) As the returns for 2013/14 and 2014/15 had to be submitted before HMRC would consider an appeal against the penalties, he was forced into making late returns. Had HMRC accepted that the returns had not been received, they could have re-issued the returns with a later date allow in him to file returns within the three months of re-issue so that penalties need not have arisen;

(4) The returns showed negligible income and there has been no loss to HMRC.

7. In subsequent correspondence and in the hearing, Mr Crawford added the following submissions:

(1) Between July 2013 and May 2016, the address to which HMRC appear to have sent all correspondence was a multiple-occupancy house at which his ex-girlfriend had previously lived. Mr Crawford had not lived there, and his ex-girlfriend had moved out in May 2013. He did not understand why or how HMRC had that address on file for him. At during that period he had lived at four other addresses;

(2) Mr Crawford had telephoned HMRC in January 2014 when he was filing his 2012/13 tax return and was advised that he did not need to complete a return.

(3) Mr Crawford had used his parent's address as the correspondence address for Companies House and HMRC could have obtained that address to use it for correspondence.

(4) From May 2016, the correspondence addressed used by HMRC has been the address at which he now lives. That property was purchased by Mr Crawford's grandmother in January 2015. Mr Crawford did not move in until October 2016 as the property was under extensive refurbishment from January 2015 until that date. It was not clear how or why HMRC had changed the address on file in May 2016 as Mr Crawford had not advised them of his change of address.

(5) It was only when he moved to his current address that Mr Crawford started to receive correspondence from HMRC. Mr Crawford had not previously received any correspondence from HMRC. He was not aware of the outstanding returns and penalties until he was contacted by HMRC's Debt Management unit in August 2017. Since receiving that contact, he had done his best to bring his affairs up to date.

(6) Had he received his returns when they were sent, he could have completed them easily as they were very simple return. He had no reason not to complete the returns.

(7) Mr Crawford has had an agent appointed throughout the period and HMRC had never contacted his agent either.

(8) There has been criticism of the Post Office's record of post delivery by the Office of National Statistics.

(9) From August 2017, it took some months for Mr Crawford's new agent to obtain information from Mr Crawford's previous agents in order to be able to register as his agent with HMRC and obtain information from HMRC to enable the returns to be completed. In addition, Mr Crawford did not keep copies of his bank statements as these had all been available online. However, as he had closed the bank account that he had used at the time, it had taken some time to obtain the remaining information to allow the returns to be completed.

(10) The penalties could not be appealed until the returns had been completed and the delay was therefore only because of the time taken to obtain the necessary information.

HMRC's case

8. HMRC opposed the application to make a late appeal for the following reasons:

(1) Following the decision in *Martland*, which summarised the case law in this area, the delay in filing the appeal was considerable and more than the three month delay in the case of *Romasave*, [2015] UKUT 254 (TCC), which was regarded as serious and significant.

(2) HMRC had only been advised of two addresses for Mr Crawford during the relevant period. It was Mr Crawford's responsibility to notify HMRC of any change of address.

(3) The address on file from July 2013 seemed to have been notified to HMRC by Mr Crawford's then advisers, as the address was updated within a few days of Form 64-8 being received in relation to that agent. There were no details on record to indicate why the change of address to Mr Crawford's present address was made from May 2016. However, when advised of new addresses, HMRC have no choice but to act on the change.

(4) None of the correspondence sent to Mr Crawford has been returned to HMRC undelivered. As the correspondence was sent to the address on record for HMRC, and was not returned undelivered, it must be regarded as deemed to have been served on Mr Crawford in the ordinary course of post under s7 Interpretation Act 1978.

(5) The following correspondence was sent to Mr Crawford's present address:

(a) A 60-day daily penalty reminder letter send on 5 July 2016;

(b) Two late filing penalty notices on 12 August 2016 and one late filing penalty notice on 21 February 2017;

(c) A statement issued on 9 March 2017 detailing all of the late filing penalties;

(d) Self-assessment debt letters from HMRC Debt Management on 21 October 2016 and 25 November 2016;

9. HMRC submitted that:

(1) Mr Crawford had not demonstrated that he had a reasonable excuse for the late submission of the appeal;

(2) HMRC had a legitimate expectation of finality in relation to this matter

(3) The length of the delay was serious

10. HMRC requested that the late appeal application be refused.

Discussion

Length of the delay

11. Applying the principles set out in *Martland* and noted above, the first stage in the process of determining whether or not to give permission for a late appeal is to establish the length of the delay.

12. In this case, the delay has been very substantial. The appeal was made more than one year after the last of the penalty notices was issued and more than three years after the first penalty notice appealed against was issued. Both of these periods 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".

Reasons for the delay

13. The second stage in the process is to consider the reasons for the delay. The reasons given were that:

(1) Mr Crawford received no correspondence from HMRC about the penalties or the need to file returns;

(2) Once Mr Crawford became aware of the penalties and the need to file returns, it took considerable time to obtain the necessary information from the bank;

14. With regard to the failure to receive correspondence, we note that Mr Crawford states that he has been resident at his current address since October 2016 and that, although Mr Crawford states that he does not know how HMRC have that address for correspondence, it has nevertheless been the correspondence address used by HMRC since before October 2016.

15. A number of pieces of correspondence were sent to that address between October 2016 and March 2017 with information about the penalties, including a penalty notice, a statement of liabilities and two debt letters. None of this correspondence was returned to HMRC undelivered.

16. Mr Crawford stated that he had had a firm of accountants acting for him from 2013 onwards, and that those accountants had also not received any correspondence from HMRC. However, we note from HMRC's Self-Assessment records that the accountants whose details were registered with HMRC in July 2013 were subsequently noted on HMRC records as having ceased to act for Mr Crawford in August 2015. A letter from those accountants to Mr Crawford's present accountants, dated 2 October 2017, advised that they "only had dealings with Mr Crawford for a short period and that was over three years ago". No other accountant was registered on HMRC records as an agent for Mr Crawford until the appointment of the accountants advising him in the appeal in 2017.

17. We consider, therefore, that Mr Crawford has not established that there was a good reason for the delay throughout the period of the delay. Regardless of any problems that may have existed with previous correspondence addresses, it is clear that several pieces of correspondence from HMRC were sent to Mr Crawford's correct address in late 2016 and early 2017 and were not returned undelivered. No submissions were made to indicate that there were any other problems with correspondence to that address.

18. We do not consider that it is plausible that all of these pieces of correspondence were undelivered and failed to be returned to HMRC as undelivered. In addition, Mr Crawford's statement that he had an accountant throughout and that they had not been communicated with by HMRC is not supported by the evidence on HMRC's records and from that accountant. We find, therefore, that Mr Crawford was aware of the penalties by March 2017 at the latest, over a year before the appeal was submitted. He did not take any action in relation to the penalties until August 2017, five months later, and we do not consider that he has a good reason for that delay and so consider that Mr Crawford has not established that he has a good reason for the delay in appealing.

19. There were further delays once Mr Crawford's current accountants had been appointed and we note that no evidence was put forward to support the contention that the delays were caused by difficulties obtaining information to enable the returns to be submitted, nor why estimated returns were not submitted in order to allow the penalties to be appealed.

All of the circumstances of the case

20. The final stage in the process is to 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 Mr Crawford which would be caused by our not giving permission and the extent of the detriment to the HMRC which would be caused by our giving permission. We also note, as set out in the Upper Tribunal decision in *Martland*, that the starting point is that permission should not be granted unless this Tribunal is satisfied on balance that it should be.

21. In conducting that process, we are required:

(1) 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; and

(2) without descending into a detailed examination of Mr Crawford'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 the our decision.

22. Mr Crawford's case with regard to the substantial appeal is broadly the same as that set out above: that he has a reasonable excuse for the late filing of his returns because he had not received correspondence from HMRC. We do not consider, as is set out above, that Mr Crawford has a particularly strong case given that a reasonable excuse must exist throughout the period of default.

23. A refusal to give permission would be a clear and obvious detriment to Mr Crawford in that he will be unable to challenge the assessments in question. However, in view of the length of the period of delay and the lack of a good reason for the delay throughout the period of delay, we believe that that detriment does not outweigh the potential detriment to HMRC if we were to give permission for the late appeal.

Conclusion

24. Taking into account all of the factors which we are required to consider, we conclude that it would not be appropriate to give permission for a late appeal and the appeal is therefore dismissed.

25. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 09 JANUARY 2019