[2019] UKFTT 325 (TC)

TC07153

INCOME TAX – Section 49 Taxes Management Act 1970 -Penalties for late filing of Income Tax Returns - Application for Appeal to be admitted late - Reasonable Excuse - No - Application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/08274

BETWEEN

DANIEL TURNER **Appellant**

-and-

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

TRIBUNAL: PRESIDING MEMBER: MR G. NOEL BARRETT
MEMBER: MRS ELIZABETH BRIDGE

Sitting in public at Nottingham Justice Centre on 15th May 2019

Appellant not in attendance

Miss Muston litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

INTRODUCTION

1. The substantive appeal in regard to this matter is an appeal against penalties that HMRC have imposed on the appellant under Schedule 55 of the Finance Act 2009 ("Schedule 55") for failing to submit completed self- assessment tax returns on time, for the tax years ending 5 April 2014, 5 April 2015 and 5 April 2016.

2. The appellant appealed to HMRC on 25th October 2018, but his appeal was rejected by HMRC under cover of their letter of the 21st November 2018, on the basis that the 30 day deadline for making an appeal had elapsed and the appellant had not provided any reasonable excuse to explain why his appeal was late.

3. The appellant then appealed to this tribunal on the 21st December 2019 on the basis that; he had been told he could not appeal until his outstanding tax returns had been received and processed; he had sent in his returns on numerous occasions; and had also asked for a Government Gateway ID on numerous occasions in order to enable him to file his returns on line.

PRELIMINARY MATTER

4. As the appellant was not in attendance, the Tribunal wished to establish that proper notice of the hearing had been given to him

5. We noted from the file that the tribunal had written by email to the appellant on 29th January notifying him of the hearing date.

6. We could not however ascertain, whether the letter had or had not been addressed to the correct email address for the appellant.

7. We asked the tribunal clerk to contact the appellant by telephone to check as to whether or not the appellant had received notice of and was therefore aware of this morning's hearing?

8. The tribunal clerk confirmed to us that he had spoken to the appellant and that the appellant had in turn confirmed that he had received notice of this morning's hearing.

9. The appellant at first said variously; that he had an appointment to attend hospital today, but couldn't say what time his appointment was; that he had to collect his daughter from school later this afternoon; that it said on the letter notifying him of the hearing, or within the accompanying guidance booklet, (both as emailed to him), that he did not need to attend the hearing today. He also confirmed that he had not troubled to notify either the tribunal or the respondents of his intention not to attend the hearing today.

10. We offered to delay the start of the hearing, to enable the appellant, who lives at quite close proximity to the hearing venue, to attend.

11. The appellant then said that his ulcerated colitis had flared up recently and that he didn't wish to attend or to apply for an adjournment of the hearing and moreover that he was willing to allow the hearing to proceed in his absence.

12. We decided in the circumstances in accordance with section 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, that the appellant had been properly notified of the hearing and that it was in the interests of justice to proceed with the hearing in the appellant's absence.

LATE APPEALS - APPLICABLE LAW AND DISCUSSION

13. The time limit for the making of appeals to HMRC in this case, is 30 days from the date of each of the penalty notifications. However, the Tribunal can give permission for the bringing of a late appeal (Rule 20(4) of the Tribunal's Rules).

14. The appellant appealed to HMRC in respect of each of the penalty notifications, on 25 October 2018. By that time his appeal against the first penalty notification dated 18 February 2015 was 1,315 days late and his appeal against the final penalty notification dated 22 March 2018 was 217 days late.

15. Overall during the period 18 February 2015 to 22 March 2018, 12 separate penalty notices were levied against the appellant

16. The appellant does not dispute that he received the various penalty notices, nor seemingly that he received Notices to File Tax Returns in each of the years in question, the grounds of his appeal being firstly; that he had been told that he could not appeal until all his tax returns had been received and processed

17. There are two tribunal cases on this first point; *Garnmoss Ltd t/a Parnham Builders –v- HMRC [2012] UKFTT 315 TC ("Garnmoss")* where Judge Hellier said at page 3 paragraph 12:

> "What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. Thus the default cannot be ignored…."

18. And *Coates –v- HMRC [2012] UKFTT 477 (TC) ("Coates")* where Judge Brannan states at paragraph 32:

> "The test contained in the statute is not whether the tax payer has an honest and genuine belief but whether there is a reasonable excuse."

19. Whilst these are both First Tier Tax Tribunal decisions and we are not bound to follow them, we see no good reason to depart from them.

20. Secondly; the appellant appeals on the grounds that he sent in his tax returns on numerous occasions and had also asked for Government Gateway identification on numerous occasions.

21. As the appellant has not attended the hearing today, no further evidence has been provided by the appellant as to why his appeal is so late.

22. The case law concerns the bringing of appeals to the Tribunal late or failing to comply with directions on time, the principles remain the same as to the bringing of appeals to HMRC late.

23. In Data Select v HMRC [2012] UKUT 187 (TCC), the Upper Tribunal stated at [34]:

> "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."

24. In Romasave (Property Services) Ltd v Revenue And Customs [2015] UKUT 254 (TCC), the Upper Tribunal said at [88]-[92]:

> "In recent times there has been some debate, both in this tribunal and in the courts, as to the correct approach to application for relief from sanctions, which approach has translated across to applications of this nature as well [that is, applications for permission to bring a late appeal]. … It is not necessary for us to describe the history of this debate. The outcome, in our view, is that in this tribunal, and in the FTT, the factors identified by the courts in the revised form of CPR 20 r 3.9 as having particular weight or importance, that is to say the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, are relevant factors, but have no special weight or importance. The weight or significance to be afforded to those factors, along with all other relevant factors, in applying the overriding objective to deal with cases fairly and justly, will be a matter for the tribunal in the particular circumstances of a given case. …"

25. Further at paragraph 96 the Upper Tribunal said;

> "In the context of an appeal right which must be exercised within 30 days from the date of the documents notifying the decision, a delay of more than three months cannot be described as anything but serious and significant"

26. We note, that in Secretary of State for the Home Department v SS (Congo) and others [2015] EWCA Civ 387 the Court of Appeal, at [105], has similarly described exceeding a time limit of 28 days for applying to that court for permission to appeal by 24 days as significant, and a delay of more than three months as serious.

27. It has been well rehearsed that time limits imposed by law should generally be respected. In this case it took 1,315 days for the appellant to notify HMRC of his appeal against the earliest penalty and 217 days in relation to the latest penalty.

28. In our view those delays cannot again be described as anything but significant and serious.

29. Although each case must be considered in its own context, we can find nothing in this case which would alter our findings in this respect. As the court in SS (Congo) observed, and HMRC have submitted one universal factor in this respect is the desirability of finality in litigation.

30. Sir Stephen Oliver, the former president of this Tribunal, sitting in the First-tier Tribunal, in Ogedegbe v Revenue and Customs Commissioners [2009] UKFTT 364 (TC) {discussed in Markland v Revenue and Customs Commissioners [2011] UKFTT 559 (TC) and by this tribunal in O'Flaherty v Revenue 10 and Customs Commissioners [2013] UKUT 0161 (TCC)} confirmed that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and should not be granted routinely.

31. In BPP Holdings v Revenue And Customs [2016] EWCA Civ 121, the Court of Appeal addressed the question whether

> "the stricter approach to compliance with rules and directions made under the CPR as set out in Mitchell v News Group Newspapers Ltd [2014] 1 WLR 795 and Denton v TH White Ltd [2014] 1 WLR 3926 applies to cases in the tax tribunals". Noting that there were conflicting decisions of the Upper Tribunal, the Senior President of Tribunals (with whom Richards and 20 Moore-Bick LJJ agreed) said at [16] that "the stricter approach is the right approach".

32. At [37]-[38] it was added that:

> "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in Mitchell and Denton. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation."

33. In BPP Holdings, the Court of Appeal was dealing with the consequences of non-compliance with a direction of the Tribunal, rather than with non-compliance with the time limit for bringing an appeal. However, Romasave found that the principles from the former translated across to the latter: see paragraph 24 above.

34. The approach in Denton requires the court or tribunal to address the issue of relief from sanctions in the following three stages: (i) identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages rule 3.9(1); (ii) consider why the default occurred; (iii) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including the factors in sub-paragraphs (a) and (b).

35. Relevant factors identified in the pre-April 2013 version of rule 3.9(1) CPR are (a) the interests of the administration of justice; (b) whether the application for relief has been made promptly; (c) whether the failure to comply was intentional; (d) whether there is a good explanation for the failure; (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol; (f) whether the failure to comply was caused by the party or his legal representative; (g) whether the trial date or the likely trial date can still be met if relief is granted; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party.

36. The post-April 2013 version of rule 3.9(1) CPR requires consideration of "all the circumstances of the case, so as to enable [the court or tribunal] to deal justly with the application", including the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders."

37. Most recently in William Martland v HMRC [2018] UKUT 178 (TCC) the Upper Tribunal considered the case law and the post April 2018 CPR rules again and at paragraph 44 of its decision approved the threefold test established previously in Denton (see paragraph 34 above).

BURDEN AND STANDARD OF PROOF

38. Where the appellant argues that he has a reasonable excuse for the late submission of his appeal to HMRC then the evidential burden of establishing that reasonable excuse falls on the appellant, the standard of proof being the normal Civil Standard Civil Standard ie on the balance of probabilities.

FINDINGS OF FACT

39. We find that the appellant was clearly confused as to his understanding that his Tax Returns all had to be received and processed before he could appeal any penalties.

40. We are not prepared to accept following both *Garmoss* and *Coates* that the appellant's confusion as to the operation of the legislation, no matter how genuinely held, can amount to a reasonable excuse.

41. The respondents confirmed that they had not been able to find any record of the appellant having previously filed any of his Tax returns "on numerous occasions" nor either had they been able to locate any record of the appellant having tried to log on or having applied for a Government Gateway identification "on numerous occasions".

42. We accept the respondent's evidence in this regard.

43. It is unfortunate in this case that the appellant has not provided any further evidence as to the reasons he failed to appeal within time, or even within a relatively short period thereafter and further that he has chosen not to attend this appeal hearing to provide any such further evidence, if he has any.

44. This is despite the appellant being in full knowledge that his appeals were late and that HMRC opposed the bringing of the appeals for this reason.

45. The respondents have submitted, in regard to the threefold test established in Denton and confirmed most recently in Martland and we accept that:

(1) The failures by the appellant of between 1,315 days and 217 days are both significant and serious

(2) The appellant has not (as he must) established a reasonable excuse.

(3) It would be unjust, after such a lengthy delay, as a result of prejudice to HMRC in relation to both time and resources to allow the Application.

46. As it is, there is little if anything for us to "balance". We accept that there will be prejudice to HMRC if the application is granted and the appeal is allowed to proceed late because of the need for litigation to be conducted efficiently and at proportionate cost, for statutory time limits to be respected and for there to be finality in litigation.

47. Equally we recognise that there will be prejudice to the appellant if we refuse his application, as he will not then have the opportunity to appeal against the penalties which have been imposed against him.

48. However it is belief that even if the substantive appeal was allowed to proceed late, that there is an extremely weak prospect of the substantive appeal being successful.

49. It is our view therefore, that any prejudice to the respondents in our allowing the application would be far greater than any prejudice to the appellant in refusing the application.

50. It is for the appellant to satisfy the Tribunal that he has a reasonable excuse for appealing late. However he has not provided us with any documentation or further explanation to show any such reasonable excuse to persuade us that this application to appeal late should be granted.

51. Just as we do not have sufficient evidence to establish a reasonable excuse for a late appeal, nor do we have sufficient evidence to enable us to find any special reasons existing which would persuade us to grant the application.

DECISION

52. For the reasons we have given, we do not grant the appellant's application to make a late appeal and the application is therefore refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

53. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

MR G. NOEL BARRETT
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 23 MAY 2019