



TC07247

Appeal number: TC/2018/02913

INCOME TAX – late appeal – substantial delay – no good explanation for delay – balancing all the circumstances – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EMAKPO EJETA

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at London on 11 March 2019

Ms Inglis, Counsel for the Appellant

Mr Williams, of HMRC Solicitors Office, for the Respondents

DECISION

Background

1. This is an application for permission to bring a late appeal against tax assessments and associated penalties for the tax years 2002-3 to 2011-12 inclusive. The total amount of the assessments and penalties was £109,769.28.
2. It was not disputed that the assessments to tax were issued on 8 January 2015 and the notices of penalty assessment issued on 9 January 2015 (for tax years 2003-4 to 2009-10) and 20 January 2015 (for tax years 2010-11 and 2011-12). The assessments included in each case an offer of review. The deadline for appealing was also included.
3. The appellant's representative wrote to HMRC on 30 March 2017, asking HMRC to reopen the case. On 27 April 2017, HMRC replied explaining that the appeal deadline of 30 days had passed and that the options which remained open to the appellant were to make a late appeal to HMRC directly, or to appeal to the Tribunal.
4. The appellant appealed to this Tribunal, with an application for permission to make a late appeal, on 30 November 2017.

Relevant law

5. s31A Taxes Management Act 1970 ("TMA 1970") requires that notice of an appeal is given in writing to the relevant officer of the Board within 30 days of the date on which the notice of assessment was given.
6. ss 49–49I TMA 1970 then apply where a notice of appeal is given late. The relevant section in this case is s49H which states (as relevant):
 - (1) This section applies if:-
 - (a) HMRC have offered to review the matter in question (see section 49C, and
 - (b) the appellant has not accepted the offer.
 - (2) The appellant may notify the appeal to the tribunal within the acceptance period.
 - (3) But if the acceptance period has ended, the appellant may notify the appeal to the tribunal only if the tribunal has given permission.
 - (4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

Approach to be taken

7. s49H TMA 1970 gives the tribunal power to grant permission to notify a late appeal to the tribunal. The approach to such applications for permission to notify late appeals has recently been set out by the Upper Tribunal in *Martland v HM Revenue & Customs* [2018] UKUT 178 (TCC). The Upper Tribunal reviewed the authorities and set out the approach to be taken as follows:

“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 ...”

Discussion

8. The following sections set out the facts and consideration of the relevant issues, adopting as the approach described by the Upper Tribunal in *Martland*: firstly, establish the length of the delay; secondly, establish the reason or reasons why the delay occurred; and then, thirdly, by reference to all of the circumstances undertake a

balancing exercise assessing the merits of the reason for the delay and the prejudice to the parties caused by granting permission.

Length of the delay

9. The assessments and penalties were issued in January 2015; the appellant did not contact HMRC until 30 March 2017, over two years later. There has clearly been a significant and serious delay.

Reasons for the delay – appellant’s case

10. The grounds of appeal set out in the appeal to the Tribunal state that the appellant “was ill-advised previously”. In the hearing

11. In the hearing, it was explained that the delay was due to the appellant’s poor health and to efforts by his accountants to ascertain the appellant’s true tax liability and then attempt to resolve the dispute with HMRC.

12. With regard to the appellant’s health, it was submitted that in January 2015 the appellant was suffering from significant mental health difficulties which prevented him from dealing with his affairs. It was submitted that around that time the appellant was also under severe pressure as a result of bankruptcy proceedings and the risk of losing his home. The bankruptcy proceedings were brought by the London Borough of Lewisham, in respect of council tax arrears. HMRC were also a creditor in those proceedings.

13. A note from a psychotherapist was provided, which set out the appellant’s symptoms and stated that the appellant had attended counselling between January 2014 and January 2015, when treatment ended. It was submitted that the note did not indicate that the appellant was cured when the treatment ended and it was submitted that the appellant did not make a full recovery until considerably later. In November 2017, in evidence relating to his bankruptcy proceedings, the appellant stated that he had by then made a full recovery.

14. The appellant had instructed his accountants in September 2016 to put his tax affairs in order. As there were a substantial number of outstanding tax returns, the accountants require time to collect and collate the necessary records. The accountants notified HMRC of their appointment and over the next several months sought to persuade HMRC to re-open the appellant’s case as their tax calculations differed substantially from HMRC’s assessments. It was submitted that it was reasonable for a delay of a few months to have occurred between the accountants being instructed and the appeal being submitted.

15. In the hearing, the appellant further explained that the address which HMRC had as his correspondence address was that of his parents, which he had used for important correspondence. However, his parents had cut off contact with him in 2010 and did not resume contact until 2014, so that he had not received correspondence from HMRC. The appellant stated in the hearing that he had not known of the HMRC

debt until he was advised of the debt by his trustee in bankruptcy when he was discharged from bankruptcy in June 2016, and he instructed his accountants when he found out.

Reasons for the delay – HMRC’s case

16. HMRC submitted that the appellant had not established a good explanation for the delays. Being badly advised was not a good reason for a failure to respond to the HMRC enquiries during 2014, including Schedule 36 Notices, or to the assessments and notices in January 2015.

17. In addition, the appellant’s evidence was that he appointed accountants to deal with his tax affairs in October 2016, and that the delay between that date and March 2017 was due to their needing to get information. It was submitted that no explanation had been given as to why the appeal was not brought earlier, as it was not necessary to have the full details to be able to appeal.

18. With regard to the appellant’s mental health, HMRC submitted that the appellant had not established that his condition prevented him from appealing throughout the period of delay. The note from his psychotherapist does not state that the appellant was incapable of responding to HMRC’s assessments, and the note states that the appellant’s treatment ended, having shown improvement, at about the time the assessments were issued. It was submitted that there was no evidence in respect of this ground to explain why the appeal was not filed until more than two years after the assessments and notices were issued.

19. HMRC noted that the appellant’s explanation that he had not received correspondence from HMRC due to his dispute with his parents had not been raised before the hearing. They submitted that the appellant chose to continue to use that address and that it cannot be a good reason for the delay that the appellant used an address that he could not access.

20. HMRC also noted that the appellant’s explanation that he was not aware of the debt until June 2016 had also not been raised before, and no evidence of this had been given. In addition, it was submitted that no explanation had been given for the several months delay in appointing accountants.

Reasons for the delay – discussion

21. Although mental health problems are capable of being a good reason for a delay in making an appeal, the evidence from the appellant’s psychotherapist states that the appellant’s treatment was completed in January 2015 and that he had by then made progress in dealing with his problems. No further medical evidence was provided, nor further details as to the resolution of the illness other than the appellant’s own statement that he had made a full recovery at some point before November 2017. I consider that the appellant has not established that his mental health problems persisted throughout the period of delay and so cannot provide a good reason for the delay.

22. The appellant's submission that he did not receive correspondence from HMRC due to the dispute with his parents is also not a good reason for the delay. The appellant's evidence was that the dispute occurred between 2010 and 2014; the assessments and notices were not issued until January 2015 and HMRC's records (in the tribunal bundle) showed that the address had been provided to HMRC in 2012. Even if the dispute had continued for longer, it was the appellant's responsibility to provide HMRC with an address to which he had access.

23. The appellant's submission in the hearing that he had not known about the HMRC debt until he was discharged from bankruptcy in June 2016 is simply not credible, given that HMRC were one of the two creditors in those proceedings. Even if his submission was intended to mean that he had assumed that the bankruptcy proceedings would remove his liability to HMRC and the June 2016 discovery was that it had not been removed, it still took him a further three months to appoint accountants to deal with his tax affairs and no explanation was given for this delay. In the case of *Romasave* [2015] UKUT 254 (TCC) a three month delay was described as "serious and significant".

24. The mistaken belief of the appellant's accountants that a full explanation of the appellants tax position was needed before an appeal was made is also not, in my view, a good reason for the delay but in any case simply extended a delay for which no good reason has been established.

25. I find, therefore, that the appellant has not established that there was a good reason for the delay which continued throughout the period of the delay.

Considering all of the circumstances – appellant's case

26. The appellant submitted that HMRC would not be prejudiced by allowing the appeal to proceed, but that the appellant and his family, including two young children, would suffer considerable injustice and would lose their family home as the trustees in bankruptcy would force the sale of the house. The appellant's house has been repossessed and the appellant is living with family at present.

27. It was submitted that the assessments (and penalties) arose because the appellant had believed that, as he did not make any profits from his property business, he did not need to file tax returns. His tenants had failed to make rental payments. The appellant's evidence was that his tax affairs were just a mistake, and this was the first time it had happened; he explained that he didn't gain anything and hadn't claimed anything from the government. He had had hardly any profit after the costs of doing up the properties; he explained that he had been young and stupid. The appellant believed that HMRC had not taken into account the costs of the mortgage and other costs, and he just wanted the opportunity to get the right amount and pay that. He had already been forced to sell other properties to clear some of his debts.

28. It was also submitted that there were significant discrepancies between the assessments and the information put together by the appellant's accountants for the periods in question.

Considering all of the circumstances – HMRC’s case

29. HMRC submitted that the starting point set out in case law and summarised in *Martland*, at §29, is that permission to make a late appeal should not be granted.

30. In this case, given the serious delay, there would need to be extraordinary prejudice to the appellant to outweigh the overall circumstances of the case. The appellant had had a property portfolio for a decade, buying and selling properties and renting them out, but had failed to submit tax returns during that time and had failed to engage with the enquiry, and had not given a good explanation for this or the delay in making the appeal. It was submitted that his financial history was not one of an unsophisticated taxpayer and that there had been a wilful failure to deal with his tax returns.

31. HMRC submitted that, although they had not considered it in detail, the appellant’s case did not indicate obvious strengths and that – for example - the evidence did not support the appellant’s claims for principal place of residence relief as the electoral roll did not show him as present at the relevant addresses and, in one case, shows other people as resident there. Although the appellant had provided utility bills, there was only one bill per property rather than multiple bills for any of the properties. In addition, no primary evidence had been provided to support the claimed rental income.

32. HMRC submitted that although the appellant claims that the HMRC debt would make the difference as to his house being sold by the trustee in bankruptcy, this is a consequence of bankrupt and HMRC had not filed the petition. In addition, the appellant has been able to make payments of £105,000 in respect of the bankruptcy within a few months of being discharged from bankruptcy. HMRC submitted that the appellant had not provided any evidence to show that he could not make further such payments.

33. With regard to prejudice to HMRC, it was submitted that the time limits exist for a reason, including the need for finality in litigation and observation of the proper appeals process. The time limits allow HMRC to move on to deal with other things, as well as ensuring fairness towards other taxpayers who do adhere to the time limits. If permission were given, HMRC would have to litigate a matter considered closed in February 2015.

Considering all of the circumstances – discussion

34. Considering all of the circumstances, I start from the Upper Tribunal’s confirmation in *Martland* that the Tribunal 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” and that the starting point is that permission to appeal should not be granted unless the Tribunal is satisfied that it should be.

35. I have established that the delay was significant and serious and that no good reason has been provided to explain all of the delay.

36. If permission is refused, the appellant states that he will lose his family home, which had been repossessed but not sold by the trustee in bankruptcy. No evidence was provided to the tribunal as to the appellant's current financial position although information relating to the bankruptcy included a witness statement from the appellant that included the information that he had been able to make payments of £60,000 to the trustee (no information as to the source of those funds was included in the statement) and that a further £45,000 had been realised by the sale of property.

37. There was no evidence put forward to show that the appellant's case was particularly strong; although an application to make a late appeal does not require a detailed analysis of the case, the appellant simply stated that HMRC had not given credit for reliefs. HMRC submitted that there was some evidence that not all of the reliefs had been correctly claimed and that no primary evidence had been referred to in support of the appellant's income. Overall, I did not consider that the merits of the case were clearly strong or clearly weak and so did not give this particular weight in balancing the circumstances.

38. Also to be considered is the need for HMRC to have finality in the case and for time limits set out in statute to be respected. HMRC were clearly entitled to believe that the matter had been closed in February 2015 and granting permission to bring a late appeal would involve them in time and costs to litigate the matter.

Decision

39. Taking into account all of the circumstances of the case, this is not an appropriate case for permission to be given to bring a late appeal and so the appeal is dismissed.

40. 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: 01 JULY 2019