



[2019] UKFTT 527 (TC)

Application to strike out appeal against revenue determination. Held: application succeeded as revenue determination not an appealable decision. Application for permission to appeal out of time. Held: delay was serious and significant, no good reason provided and balance of prejudice lay with HMRC- therefore permission refused.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07323

Appeal number: TC/2019/02087

BETWEEN

VIVIAN JOAN MOORE

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE MALEK
DEREK ROBERTSON**

**Sitting in public at Alexandra House 14-22 The Parsonage Manchester M3 2JA on 2
August on 2019**

Ms. Moore in person

Mr. Wilby, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. In line with the decision made by Judge Bailey on 18 June 2019 This hearing concerned itself with:

- (1) the Respondent's application to strike out the Appellant's appeal against
 - (a) the Revenue Determinations for 2011/12, and
 - (b) the Higher Income Child Tax Benefit charge ("HICBC") for 2016/17 and 2017/18, and
- (2) the Appellant's deemed application for an extension of time to appeal against the 2011/12 penalties.

2. Accordingly, this is not a hearing of the substantive appeal.

BACKGROUND FACTS

3. It is common ground that the Appellant was required to submit a tax return for the tax year 2011/12 and this was due at the latest by 31 January 2013. This return remains outstanding.

4. The Respondent imposed penalties under schedule 55 / 56 of the Finance Act 2009 as follows:

Date	Year	Description	Amount	Years late
12/02/13	2011/12	Late filing	£100	5yrs 10m
14/08/13	2011/12	Daily	£900	5yrs 4m
14/08/13	2011/12	6m late filing	£300	5yrs 4m
25/02/14	2011/12	12m late filing	£300	4yrs 9m
20/10/15	2011/12	30 day late payment	£159	3yrs 1m
20/10/15	2011/12	6 m late payment	£159	3yrs 1m
20/10/15	2011/12	12 late payment	£159	3yrs 1m
Total			£2,077	

5. The Respondent thereafter opened an enquiry into the Appellant's tax affairs and raised a determination under Section 28C of the TMA 1970.

6. In 2018 the Respondent identified that the Appellant became liable to pay HICBC in 2016/17 and made an assessment in the sum of £592 for that period under section 29 of the TMA 1970. The Appellant does not dispute the amount assessed, but wished to discuss a repayment plan on the basis that she cannot afford to make the payment.

7. On 17 January 2019 the Appellant appealed the abovementioned penalties, the determination and the assessment for HICBC and sought to do so out of time.

8. On 15 May 2019 the Respondent made an application to strike out the Appellant's appeal and further objected to the Appellant bringing her appeal late. This application culminated in the hearing before us.

ISSUES AND DECISION

9. The issues for us to determine were clearly identified by Judge Bailey and can be expressed as follows:

- (1) Should we consider the appellant's appeal out of time?
- (2) Do revenue determinations represent decisions that are appealable to this tribunal?
- (3) Does the Tribunal have jurisdiction to impose, amend or set any terms in relation to time to pay?

Appeal out of time

10. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules") and section 31(1) of the Taxes Management Act 1970 (the "TMA 1970") together provide that an appeal must be made within 30 days of the Respondent's decision / notice of assessment. It is common ground that this has not happened.

11. Rule 20(4) deals with the position when late appeals are notified and provides:

If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal—

- (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
- (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.

12. In coming to a decision as to whether or not we should exercise our discretion to give permission we are not confined to the matters set out in s.49 of the TMA 1970 (i.e. whether or not there was a reasonable excuse for the delay) and our discretion is at large [see *O'Flaherty v Revenue and Customs Commissioners - [2013] STC 1946*]. Our discretion must be exercised in light of the overriding objective as set out in rule 2 of the Rules and the principles established in *Denton v White [2014] EWCA Civ 906* [see paragraph 44 of Tribunal Judge Berner's decision in the Upper Tribunal in *William Martland v The Commissioners for HM Revenue and Customs: [2018] UKUT 0178 (TCC)*].

13. Stage 1 of the *Denton* procedure requires us to look at the seriousness and significance of the breach. In this instance there has been delay in the appeals being notified ranging from 3 to 6 years. This cannot be anything other than serious and significant. It is clearly not a case where there has been a small slip which is more form than substance.

14. Stage 2 requires us to examine the reasons for the delay. These were not elaborated on by the Appellant before us and are confined to those set out in the Appellant's grounds of appeal. The reasons that we surmise from the grounds of appeal are:

- (1) the Appellant lost records when her husband's firm shut down and / or these were soaked by her autistic daughter accidentally, and

(2) that she had no spare income to pay the HICBC assessment and would like to pay in stages.

15. Whilst we have considerable sympathy with the Appellant's complaints with regards to the confused way in which her enquiries were dealt with by HMRC we cannot discern any good reason for the delay in bringing the appeals. Whilst records can be lost or accidentally destroyed and whilst this might explain the reason why returns were not made it does not explain why this appeal was not notified earlier or as soon as the first penalty came to the Appellant's notice. Accordingly, we can find no good reason for the Appellant's delay.

16. The last stage of the *Denton* process is to look at all the circumstances including the need to deal with cases fairly and justly and particularly the factors set out at CPR 3.9 (1) (a) and (b). It is appropriate under this heading to consider the relative prejudice to the parties. The prejudice to the Appellant is obvious: she will be denied the right to argue the merits of her substantive appeal. Whilst this is not the forum to embark upon a forensic examination of the merits of the substantive appeal we are, in our judgment, entitled to form a preliminary view of those merits. In our view no arguable substantive grounds are demonstrated and thus any potential prejudice to the Appellant is thereby emolliated. The prejudice to the Respondent is equally obvious. Parties to litigation generally, and in these proceedings, should be entitled to rely upon time limits (subject to appropriate safeguards and oversight by the courts and tribunals) as a means of giving finality. The Respondent should not have to meet extremely stale appeals just in the same way that a tax payer should not have to meet stale assessments.

17. Taking into account all the circumstances of the case we are led to the inevitable conclusion that permission for the Appellant to pursue her appeals out of time should not be given.

Revenue determinations

18. The established facts are that the Appellant failed to file a tax return for the period 2011/12, she was contacted and asked to submit such a return and when no return was submitted the Respondent raised a determination under section 28C of the TMA 1970.

19. Under section 28C(5)(b) of the TMA 1970 the Appellant was entitled to supersede the determination by submitting a self-assessment return within 12 months of being notified of the revenue determination. No such return was filed and the determination has become final.

20. HMRC submit that revenue determinations such as the one in question do not constitute an appealable decision under section 31 of the TMA 1970. They rely upon the Upper Tribunal decision in *Michael Bartram v HMRC UKUT 184 (TCC)* where Tribunal Judge Clarke concluded that:

No appeal lies to the FTT against a determination made under s 28C TMA 1970... The FTT was therefore required, pursuant to Rule 8(2)(a) of the FTT Rules, to strike out Mr Bartram's appeal against the determinations which he sought to contest on appeal.

21. We agree with the Respondent. The decision in *Bartram* is binding upon us and we are therefore obliged to strike out that part of Ms. Moore's appeal.

HICBC assessment

22. As set out earlier in the decision the Appellant does not dispute the amount of HICBC assessed. She merely wants more time to pay.

23. HMRC submit that this tribunal has no jurisdiction to impose, vary or set any terms with regards to payment in the event that the assessment itself is not appealed.

24. We have to agree with this position. Nowhere in this hearing was it argued or established that HMRC's decision to enter into or refusal to enter into a "time to pay" arrangement with a taxpayer represented a decision that was appealable to this tribunal.

25. Accordingly, that aspect of the appeal must be struck out.

CONCLUSION

26. For the reasons set out above we do not give permission for the Appellant to pursue her appeal out of time in front of this tribunal. Given this decision it was not, strictly speaking, necessary for us to consider HMRC's applications to strike out those parts of the appeal that related to its determination and the assessment relating to HICBC. However, we did so for the sake of completeness and concluded that the applications to strike out in respect of both matters should succeed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

27. 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.

**ASIF MALEK
TRIBUNAL JUDGE**

Release date: 12 August 2019