



TC07512

Appeal number: TC/2018/06434

PROCEDURE – application to appeal out of time to Tribunal against closure notices and Schedule 24 penalties – five months delay in filing appeal – no reasonable excuse for that delay – application dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AMRIK SINGH SIDHU

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JANE BAILEY
MS JANE SHILLAKER**

Sitting in public at Centre City Tower, Birmingham on 2 December 2019

Mr Vaghela, accountant, for the Appellant

Mr Khan, presenting officer, for the Respondents

DECISION

Introduction

1. The matter before us is the Appellant's application to appeal to the Tribunal out of time against closure notices and Schedule 24 penalties for the tax years 2014/15, 2015/16 and 2016/17.

Background to this application

2. On 12 October 2018, Vaghela & Co (Services) Ltd ("Vaghela") filed a Notice of Appeal with the Tribunal on behalf of the Appellant. Although Vaghela had ticked two boxes to indicate that it was enclosing a copy of HMRC's original decision letter and review conclusion letter, no copy of any decision under appeal was provided with the Notice of Appeal.

3. As Rule 20(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Procedure Rules") requires a copy of the decision appealed against to be provided, on 15 October 2018, the Tribunal emailed Vaghela to ask it to provide a copy of a written record of any decision which was under appeal.

4. On 12 March 2019, the Tribunal received the re-submitted appeal, together with copies of six HMRC letters dated 22 June 2018, and a Review conclusion letter dated 12 September 2018. In a covering letter dated 7 March 2019, Vaghela stated:

We regret the delay in re-submitting the Notice of Appeal as the filing clerk had inadvertently filed the papers away, which were discovered by Mr Vaghela today.

We trust you will accept our re-submitted Appeal. We are really sorry to have caused any inconvenience to the Tribunal due to our oversight.

5. On 8 April 2019, the Tribunal acknowledged receipt of the appeal, assigned it to the Standard category, and noted that the appeal included an application to appeal out of time. The Tribunal notified the appeal to HMRC and required a Statement of Case to be filed no later than 7 June 2019.

6. On 3 June 2019, HMRC objected to the appeal proceeding on the basis that the appeal had been made out of time.

The relevant Tribunal rules

7. Where the Tribunal receives an appeal outside the deadline for appealing against the decision which is challenged, then Rule 20(4) of the Tribunal Procedure Rules applies:

(4) 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.

The relevant test to apply

8. The Tribunal has the power to extend the time for a taxpayer to make an appeal but must decide, in each case, whether it would be appropriate to do so given the particular circumstances of that case. When a party is late in undertaking any action, the onus of proof is upon that party to explain the reasons for their delay and to make the case for being given relief from their failure to comply with the relevant time limit.

9. The Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) considered what the First-tier Tribunal should consider when deciding whether an extension of time should be granted. The Upper Tribunal stated:

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.

10. In order to apply this *Martland* guidance, we set out a brief factual background which will enable us to consider the extent of the delay and whether there are reasons for all or part of that delay. We will then be able to weigh all the circumstances.

Evidence before us

11. Ten days before the hearing, the Appellant filed and served a statement of the evidence he wished to give at the hearing. The Appellant was present at the hearing, and answered questions from the panel, but was not formally called to give oral

evidence. There was no dispute between the parties as to the factual background to this application.

Findings of fact

12. On the basis of the limited documents before us, and the submissions of the parties, we find as follows:

Background to the appeal

- a. The Appellant is a retired police officer who has let residential properties and garages since the early 1990s. He has around 20-25 properties. Initially he managed all these properties himself but after a while, and certainly from 2007/08, it became too much for him and he used the services of a letting agent.
- b. The Appellant also cares for his brother (who has severe learning difficulties and who is bed bound and incontinent) and, from about 2018, the Appellant has also looked after his elderly mother who had become very ill.
- c. Until he engaged Vaghela in March 2017, the Appellant completed his tax returns himself, using paper forms. In his tax returns the Appellant claimed he had not made rental profits in any of the almost 30 years in which he had acted as a landlord.
- d. The Appellant had been out of the UK between November 2015 and February 2016. When he returned to the UK the Appellant found that a garage where he had kept his paperwork had been flooded, and all the papers that had been kept there had been destroyed.
- e. On 23 February 2016, the Appellant filed his tax returns for 2011/12, 2012/13 and 2013/14. On 17 March 2016, the Appellant filed his tax return for 2014/15. These returns were filed despite the records for these years having been destroyed in the flood.

HMRC enquiries

- f. On 6 January 2017, HMRC opened an enquiry into the Appellant's tax return for 2014/15. HMRC asked the Appellant to provide information and a number of documents to support the figures in his tax return. Instead of telling HMRC that his paperwork had been destroyed, the Appellant asked HMRC for more time to supply the material requested. The Appellant told us he asked for more time in the hope that some of his papers might be found to have been stored elsewhere.
- g. In March 2017 the Appellant instructed Vaghela to help him. This instruction came at the same time that HMRC issued the Appellant with a formal information notice. On 28 April 2017, HMRC issued a penalty for non-compliance with that information notice. It was not until about June or July 2017 that the Appellant informed HMRC about the flood, and that he no longer had all the paperwork that he held prior to February 2016. Some limited information was provided to HMRC at this point.

- h. On 14 June 2017, the Appellant filed his tax return for 2015/16. On 31 January 2018, the Appellant filed his tax return for 2016/17. On 14 July 2017 and 9 March 2018 respectively, HMRC opened an enquiry into each of these two later returns.
- i. There was a meeting between the Appellant and HMRC in February 2018, but no further evidence of expenses for any tax year was produced either at that meeting or subsequently.

Closure Notices

- j. On 22 June 2018, HMRC issued closure notices for the years 2011/12 to 2016/17. The closure notices were sent to the Appellant, and copies sent to Vaghela. In the closure notice issued for 2014/15, HMRC disallowed a large proportion of the expenses claimed on the basis that there was no evidence to support the amounts claimed. As only very limited evidence was provided for 2015/16 or 2016/17, HMRC applied the same percentage reduction forward to 2015/16 and 2016/17. HMRC also applied the same percentage reduction back to 2011/12 to 2013/14.
- k. On 22 June 2018, HMRC also issued Schedule 24 penalties to the Appellant for the six years 2011/12 to 2016/17 on the basis that the Appellant had acted deliberately. HMRC took the view that the Appellant had submitted tax returns containing expenses claim figures which he knew he could not support.
- l. On 26 June 2018, Vaghela appealed against the penalties issued. On 4 July 2018, and on the assumption that Vaghela was appealing against the closure notices as well, HMRC issued their view of the matter. In this View of the Matter, HMRC noted that no evidence of expenses had been provided even for periods after the flood.
- m. On 27 July 2018, Vaghela appealed to HMRC against the closure notices issued to the Appellant, and sought a review. HMRC treated the appeal as being against both the closure notices and the Schedule 24 penalties.
- n. On 12 September 2018, HMRC issued their review conclusion. The review officer upheld the decision to issue closure notices for 2014/15, 2015/16 and 2016/17 on the basis that there was insufficient evidence to support the property expenses claimed in the Appellant's tax returns. The Schedule 24 penalties for these three years were also upheld. The reviewing officer cancelled the closure notices for 2011/12, 2012/13 and 2013/14 as no enquiry had been opened into these years.

The 2018 appeal to the Tribunal

- o. On 12 October 2018 (the final day for an in-time appeal against HMRC's review decision), the Tribunal received a Notice of Appeal from Vaghela, sent on behalf of the Appellant. The outcome sought was for all expenses claimed to be allowed and for losses brought forward to be relieved against future profits. Although Section 20 of the Notice of Appeal form (the document checklist) explained to prospective appellants that a copy of the decision appealed against

must accompany the form, no copy of any decision was submitted with this Notice of Appeal. The Notice of Appeal form was sent under cover of a letter from Vaghela which requested that the Tribunal advise Vaghela of the appeal reference number which had been allocated.

- p. On 15 October 2018, a Tribunal clerk emailed Vaghela, stating:

APPELLANT: Amrik Singh Sidhu
OUR REF: TC/2018/06434

Your original documents are returned herewith.

Please note that the original time limit to apply to the Tribunal still applies. If you re-submit your appeal and it is outside this time limit, you must complete section 6 (time limit for making an appeal) on the Notice of Appeal form.

Your Notice of Appeal has been returned for the following reasons:-

Required information

You have not included:

Details of the decision appealed against.

A copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain.

Please ensure ALL documentation, including the notice of appeal, decision and supporting documents are returned as the Tribunal does not keep copies. Please quote our reference number.

- q. A clerk at Vaghela was responsible for checking emails. When this email was received by Vaghela, it was filed. Mr Vaghela was not told by the clerk of its contents. The clerk did not understand the contents of the email.
- r. The Tribunal also returned the physical appeal papers to Vaghela. When these papers were received through the post by Vaghela, a different clerk opened the post and filed the papers. This clerk did not understand the significance of the appeal papers being returned, and Mr Vaghela was not told the appeal had been returned.
- s. Although a properly filed appeal would have resulted in Tribunal Directions being issued, and (in all likelihood) a Statement of Case being filed by HMRC within 60 days of those Directions, it was not until 7 March 2019 that Mr Vaghela looked through his files to check on the progress of the appeal. Mr Vaghela did not check in January 2019 because he was busy filing tax returns before the 31 January filing deadline, and he was away for the first two weeks of February 2019. No other member of staff checked with the Tribunal or HMRC at any time to ask why no Directions or Statement of Case had been received.
- t. On 7 March 2019, Mr Vaghela discovered the email and returned papers which had been filed by the two clerks. Vaghela resubmitted the appeal under cover of

the letter set out at paragraph 5 above. This resubmitted appeal was received by the Tribunal on 12 March 2019, exactly five months after the deadline for making an appeal.

- u. On 8 April 2019, the Tribunal acknowledged the appeal and notified HMRC.

Discussion and decision

13. Having set out that factual background, we follow the three stage process described in *Martland*.

The period of delay

14. HMRC issued their review conclusion letter on 12 September 2018. The deadline for an in time appeal was 12 October 2018.

15. The Tribunal did receive an appeal from the Appellant on 12 October 2018 but that was incomplete because no copy of the decision under appeal was provided. This omission was not rectified until 12 March 2019 when the Appellant received a complete appeal.

16. Therefore, the period of delay runs from 12 October 2018 to 12 March 2019 (when the Tribunal was in possession of a complete appeal). That is a period of five months. In the context of a 30 day deadline, and when delay in excess of three months is considered to be “serious and significant”, delay of five months is also serious and significant.

The explanation for the delay

17. The explanation for the delay is very simple: cumulative failures on the part of Vaghela. The firm failed to include a copy of the decision under appeal when the appeal was submitted in October 2018, failed to act when the Tribunal emailed the firm to notify that the appeal was incomplete, failed to act when the hard copy appeal was received back by the firm, and failed to check on the progress of the appeal until five months after it had first been submitted.

18. Mr Vaghela submitted that human errors happen. While we agree that we all occasionally make mistakes, there was a series of errors made by Vaghela in respect of this appeal. We do not consider that the oversight, inadequate training or inadequate office procedures which occurred here amounts to a reasonable excuse for five months of delay.

Evaluating all the circumstances

19. An important part of this evaluation is to consider the prejudice to each party if we do, or do not, allow this application.

20. We look first at the prejudice to HMRC if the application is allowed. More than six months passed between HMRC issuing their review decision in September 2018,

and HMRC receiving notification from the Tribunal in April 2019 that an appeal had been made. If a substantive appeal proceeds, HMRC will expend time and public resources on a matter they were entitled to consider settled. There is also prejudice to the general body of taxpayers who expect the rules they follow and respect, to be upheld.

21. Looking at the contrary position, if we do not allow the Appellant's application, then he will be prejudiced by losing the opportunity to argue his substantive case. The value of that opportunity depends on the strength of that case. In assessing the relative strength of the Appellant's substantive case, we are not required to conduct a mini-trial.

22. The burden of proof is upon the Appellant in respect of the closure notices. No evidence has yet emerged to support the expenses claimed. The Appellant's case is that he has no evidence to support his expenses claim for 2014/15 as his papers were lost in the flood. Some (possibly all) of the 2015/16 documents were also lost. However, any documents relevant to 2016/17 came into existence after the flood. The Appellant told us that all his documents are now with Vaghela; Mr Vaghela told us that he would have to check what was available. If there was any evidence available to support the Appellant's expenses claims in his 2016/17 tax return, we would have expected that to have been put to HMRC when the appeal was first made to them. In the absence of evidence, it is difficult to see how the Appellant could hope to be successful on appeal.

23. The burden of proof is upon HMRC in respect of the deliberate penalties. It is possible that a Tribunal might be persuaded that HMRC had not made out the case that the Appellant's behaviour was deliberate but, in considering that point, the Tribunal would want to understand how the Appellant could have completed his tax returns without any of the documents which support his claims. We conclude that the Appellant's prospects of success are weak.

24. In considering the possible prejudice to the Appellant, we bear in mind that it is clear from the way that this application has been argued that Vaghela accepts that it is entirely responsible for the failure to submit the Appellant's appeal on time. Therefore, if we do not allow this application then, although the Appellant loses his opportunity to make his case before the Tribunal, the Appellant does have a remedy against Vaghela, should he choose to pursue it.

25. Mr Vaghela also drew attention to the Appellant's personal circumstances and asked that we take those into account. While we have sympathy for the difficulties the Appellant must face in providing care for his brother and mother, especially while himself suffering from depression, we do not consider that the Appellant's personal circumstances are relevant to why there was delay here; nor are they relevant to the Appellant's prospects of success at a substantive hearing.

Conclusion

26. Our starting point in this application is that permission should not be granted unless we are satisfied on balance that it should be. The onus is upon the Appellant to persuade us that permission should be granted. In undertaking this evaluation, we

bear in mind that in making any decision under the Tribunal Procedure Rules, we should have regard to the over-riding objective to deal with cases fairly and justly.

27. The delay is serious and significant, and we do not consider that a series of mistakes in handling a file constitutes a reasonable excuse for any part of that delay. We consider that there is limited prejudice to the Appellant given both the weakness of his case and the availability of an alternative remedy, and that any prejudice which the Appellant might suffer in this case is outweighed by the prejudice which would be suffered by HMRC and the general body of taxpayers.

28. We bear in mind Mr Vaghela's submission was that if the application is not allowed there will be injustice and also the Appellant's statement (in his witness statement) that permission should be granted so that natural justice could be seen to be done. We do not agree that it is a breach of natural justice or an injustice for the Tribunal to apply the rules relating to the time limits to this application. We note the comment of the Court of Appeal in *HMRC v BPP Holdings Limited* [2016] EWCA Civ 121 that there is no justification for a more relaxed approach to compliance with rules and directions in the tribunals than in the courts.

29. Weighing these factors, we conclude that the application should be refused.

30. We informed the parties at the conclusion of the hearing of our decision that the application would be dismissed and that our written decision would follow. On 4 December 2019, a summary decision was issued to the parties.

The Appellant's request for a full decision

31. On 11 December 2019, the Tribunal received a request from the Appellant for a full decision.

32. 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.

**JANE BAILEY
TRIBUNAL JUDGE**

RELEASE DATE: 19 DECEMBER 2019