[2020] UKFTT 0110 (TC)

TC07604

INCOME TAX – late appeal – whether or not valid in-time appeal filed by email – held not – whether or not late appeal should be permitted – held yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02748

BETWEEN

JEFFREY JOHN JAMES ASHFIELD **Appellant**

-and-

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

TRIBUNAL: JUDGE PHILIP GILLETT

Sitting in public at Taylor House, London on 17 February 2020

The Appellant appeared in person

Paul Marks, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This was an application for permission to notify an appeal to the tribunal after the expiry of the post review period under s49G(3) Taxes Management Act 1970. HMRC have objected to this application.

FACTS

2. There was no disagreement between the parties as regards the underlying facts in this case. I received oral submissions from Mr Ashfield and Mr Marks and find the following as matters of fact:

(1) Following an investigation into Mr Ashfield's tax affairs, on 12 April 2013, HMRC issued closure notices for 1999-00 and 2002-03 and discovery assessments for 2000-01, 2001-02, 2004-05 and 2005-06 assessing additional tax totalling £208,751.59.

(2) On the same date they also issued penalty assessments totalling £177,397 in respect of those years.

(3) Significant potential interest charges have also accrued since that time.

(4) An appeal was initially lodged with HMRC on 1 and 3 May 2013, and on 27 December 2013 an appeal was also lodged with the tribunal and a reference number was allocated, being TC/2014/01378.

(5) On 1 July 2014 Mr Ashfield withdrew this appeal because he was offered a statutory internal HMRC review of the original decision and was informed by HMRC that he could not have an internal review while an appeal to the tribunal was outstanding.

(6) On 19 January 2015 HMRC issued their review conclusion letter which upheld the original decisions. It should be noted that the reason for the lengthy delay in HMRC carrying out this review was the untimely death of the officer who was initially allocated to carry out the review.

(7) On 20 February 2015, Mr Ashfield's accountant, Ms Underdown, attempted to file an appeal with the tribunal by email. There is however no record that this was received by the tribunal. Importantly, it appears that Ms Underdown's email was more than 10MB in size, because it included four appeals, and it is likely that this would have been rejected by the tribunal's firewall.

(8) Ms Underdown did not receive any acknowledgement from the tribunal but it is unlikely that she realised that she should have received one.

(9) In July 2015 HMRC referred the debt to their debt management department who sent a demand to Mr Ashfield. At this point, Ms Underdown contacted the HMRC review officer, Mr Boyle, explaining that an appeal had been lodged with the tribunal and asking him to suspend collection of the debt.

(10) Mr Boyle had no record of Ms Underdown's appeal to the tribunal and she therefore sent him a copy of her email to the tribunal of 20 February 2015. This email was also blocked, this time by HMRC's firewall, but Mr Boyle received a notification to this effect and therefore contacted Ms Underdown who then sent the email in four separate emails, which were not blocked by the firewall.

(11) Mr Boyle acknowledged receipt of this email on 15 July 2015 and said that he would pass it on to Mr Voke, the HMRC officer who had taken the original decisions, so that he could instruct HMRC's litigation department.

(12) No further communication was received by Mr Ashfield or Ms Underdown from either HMRC or the tribunal until February 2019, when HMRC's debt management department contacted Mr Ashfield to advise that the debt had been released for collection.

(13) On 28 February 2019, Ms Underdown sent a letter to the tribunal which enclosed a copy of her email to the tribunal dated 20 February 2015 in which she had attempted to lodge the appeals, thus effectively lodging an appeal with the tribunal.

(14) On 31 May 2019, Ms Underdown emailed the tribunal with the following:

> "It appears that no further action has been taken with this case until after Mr Voke's departure from HMRC (retirement). Mr Boyle and Mr Voke were both aware that this case was taken to tribunal."

(15) On 22 August 2019, HMRC filed an objection notice to Mr Ashfield's notices of appeal objecting to the apparent lateness of the appeal.

THE LAW

3. The approach to be taken by the First Tier Tribunal when deciding whether or not to accept the late notification of an appeal was very helpfully summarised by the Upper Tribunal in the case of *Martland v HMRC* [2018] UKUT 178 (TCC) at paras [44] to [46] 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. In *Hysaj*, Moore-Bick LJ said this at [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

DISCUSSION

4. There are essentially two questions which I must address when considering this request for permission to notify a late appeal to the tribunal:

(1) Was the email allegedly sent to the tribunal by Ms Underdown on 20 February 2015 a valid appeal, and

(2) If that was not a valid appeal should the tribunal now grant permission for a late notification of an appeal.

Validity of initial appeal

5. I will deal first with the question as to whether or not the email sent to the tribunal on 20 February 2015 constituted a valid appeal.

6. Under Rule 20(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009:

> "A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal."

7. Rule 20(2) goes on to set out clear requirements as to what the notice of appeal should include but it does not include any provision as to how any such notice must be delivered, whether by normal post or email or facsimile or any other form of communication.

8. As is well known, s7 Interpretation Act 1978 provides that a notice or other document will be deemed to have been served, if it is sent by the conventional postal service, when a properly addressed and stamped letter is posted, but in this case the purported notice of appeal was sent by email, and the Interpretation Act does not assist me regarding service by email.

9. Mr Marks referred me to guidance provided by HM Courts and Tribunals Service regarding how documents can be served on the courts and in this guidance, is a clear statement that the total size of an email, including any attachments, must not exceed 10 MB.

10. Mr Marks also referred me to CPR Practice Direction 5A – Court Documents which contains rules for the service of documents by facsimile. This states, at 5.3(3):

> "A party filing a document by fax should be aware that the document is not filed at court until it is delivered by the court's fax machine, whatever time it is shown to have been transmitted from the party's machine."

11. A facsimile is not of course the same as an email but Mr Marks suggested that an email was perhaps closer to a facsimile in nature than it was to a conventional letter. The treatment of a conventional letter accorded to it by the Interpretation Act owes much to the fact that a person entrusting a letter to the postal services, with the correct postage and address, is in effect entrusting that letter to an agent, who is obliged by law to deliver it to the addressee. Unless a person's email server can be treated as having that same duty of delivery as is ascribed to the Royal Mail, then I do not believe that s7 Interpretation Act can be of direct relevance to the submission of an appeal by email.

12. In this case there is a further complication in that the email may have reached the server of the tribunal but was unable to be delivered to its intended recipient because the email was blocked by the tribunal's firewall. In other words the document may have reached the tribunal but did not reach the addressee. Such a fine distinction must however be a matter of speculation because I did not receive any direct evidence to confirm that this is what had happened in this case. Indeed, I do not have any direct evidence that the notice of appeal did not reach the addressee. All I have found as a matter of fact is that the tribunal did not acknowledge receipt of the notice, which is a strong indication that the notice did not receive the intended addressee.

13. In the absence of prior legal guidance as to what might constitute service of a notice by email I have come to the conclusion that the provisions of the Interpretation Act cover only a very specific form of communication, where the document to be communicated is entrusted to someone, ie, Royal Mail, who is under a legal obligation to deliver that document to the addressee. In this context Royal Mail is therefore acting as the agent of the sender, and is deemed to have delivered it to the addressee, at least in the absence of clear evidence to the contrary.

14. This is not the case with an email. The provider of the sender's server or other internet service provider is not under any such legal obligation to deliver the document to its intended recipient. The problems with the correct delivery of electronic material are well known and anyone hoping to rely on email as a consistent and reliable provider of delivery services knows that they are taking a risk in this regard.

15. In summary therefore, I have come to the conclusion that in order for a notice to be validly served by email then it must actually be received by the intended recipient. It is not in my view sufficient for the notice to be received by the tribunal's server, even if I were able to make such a finding of fact.

16. I also find that, on the balance of probabilities, the notice of appeal sent on 20 February 2015 was not received by the tribunal service and that therefore the notices of appeal which Ms Underdown attempted to serve on 20 February 2015 were not validly served.

Consideration of late appeal

17. Having decided that a valid notice of appeal was not properly served on the tribunal I must therefore consider if this is a case in which I should give permission for the late notification of an appeal and I will consider the questions set out in *Martland* in order.

18. Firstly, the length of the delay, being in excess of four years, is without doubt extremely serious and significant.

19. However, the reason for the delay was quite simply that Mr Ashfield, or at least his accountant, Ms Underdown, believed that a valid appeal had been served on the tribunal, on 20 February 2015. It is true that she did not receive an automatic acknowledgment from the tribunal of the receipt of her email, but unless she was familiar with the workings of the tribunal it is unlikely that she would have known that this is what she should expect. Indeed, most organisations, including HMRC, do not send out an automatic acknowledgement to every email they receive, so I cannot judge her harshly for failing to realise that the lack of an acknowledgement from the tribunal was something about which she should have been concerned.

20. She had a second opportunity to realise that there was a problem when she attempted to send copies of the notices of appeal to Mr Boyle, who noticed that the email to him had failed to pass through the HMRC firewall and had notified Ms Underdown accordingly. At that point she might have asked herself whether or not the tribunal service might have a similar firewall, which would have prevented the delivery of the notices of appeal, but she did not.

21. I would also note that neither Mr Boyle nor Mr Voke said to Ms Underwood that they had not been notified of an appeal by the tribunal service, and that this might have indicated that the notices of appeal had not been received. Neither Mr Boyle nor Mr Voke was under any obligation to let Ms Underdown know that they had not been notified of an appeal by the tribunal service and I do not judge them harshly for not doing so. I merely point out that it does not appear that any party to these events, either Ms Underdown or Mr Boyle or Mr Voke, considered that the notices of appeal might not have been received by the tribunal.

22. I must now consider the possible prejudice to either party should I decide to grant or not to grant permission for Mr Ashfield to make a late appeal.

23. Mr Marks argued that for HMRC they would have difficulty in providing witness evidence from the officer who had taken the original decisions because Mr Voke had now retired and would quite possibly find difficulty in recalling precisely why he had taken these decisions some years previously. Mr Marks did not however indicate that HMRC did not still have the relevant files, although he did say that they might take some time to recover from storage.

24. As regards Mr Ashfield however he faces demands from HMRC totalling in excess of £386,000 plus interest, which are substantial sums for an individual, by anyone's standards. The potential prejudice to Mr Ashfield therefore, if I were to refuse permission for a late appeal, would be severe in the extreme.

25. As regards the merits of the case I am of course asked not to indulge in a mini-trial. However, it would appear that Mr Ashfield provided HMRC with a large quantity of documents but disputes how they have used those documents and the way in which they have calculated the tax liability from the documents which he provided. He did not retain copies of the

documents because HMRC asked for original documents, which I can only describe as unwise, but he was hopeful that he could now obtain copies of the documents from HMRC as part of the appeals process and would be able to demonstrate the errors in HMRC's calculations once he had access to those documents. He gave an example of one way in which he believed HMRC had misused his figures and was confident that there were other similar errors in HMRC's approach.

26. On balance therefore, I believe that Mr Ashfield may have an arguable case.

27. In summary I find that:

(1) The length of the delay, at over four years, was extremely serious and significant.

(2) The reason for the delay was however the belief held by Mr Ashfield's accountant that a valid appeal had been made on 20 February 2014, within the appropriate time limit.

(3) Mr Ashfield's case is arguable and is not without any reasonable prospects of success.

(4) Most importantly, if I deny permission for a late appeal, the potential prejudice to Mr Ashfield is extremely serious, resulting in a debt of in excess of £386,000 plus interest.

DECISION

28. Therefore, given the amount of money at stake, and the reasons for the very long delay in notifying this appeal to the tribunal, I have decided that permission for the late notification of this appeal should be GRANTED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 21 FEBRUARY 2020