



[2020] UKFTT 0132 (TC)

TC07625

Appeal number: TC/2019/06495

*INCOME TAX – application for permission to make a late appeal to HMRC
– Martland applied – application refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DHIRAJ SHETTY

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at London on 7 March 2020

The Appellant appeared in person

Ms Gray, presenting officer, for the Respondents

DECISION

1. This is an application for permission to make a late appeal to HMRC in respect of surcharges and penalties relating to two Accelerated Payment Notices (APNs).

Background

2. The appellant (Mr Shetty) was issued with two APNs on the following dates:

- (1) 27 January 2014: in respect of the 2009/10 tax year
- (2) 9 January 2014: in respect of the 2010/11 tax year

3. The payment due date for both APNs was originally set as 6 July 2015.

4. Representations were submitted against the APNs on 2 July 2015. The representations made were that:

- (1) Mr Shetty intended to be a claimant in a judicial review and requested a delay in reconsideration until those proceedings had been concluded;
- (2) Condition C had not been met as the APN did not explain whether HMRC had concluded that the arrangements were notifiable; and
- (3) The disputed tax in the APN was incorrect.

5. HMRC issued a conclusion letter in respect of the representations on 15 September 2015, addressing the representations and confirming the validity of the APNs.

6. The due date for payment of the APNs were extended to the date 30 days after HMRC notified Mr Shetty of its decision.

7. As payment had not been received by 19 October 2015 (allowing an extra four days for post) HMRC issued the following surcharges and penalties:

- (1) 3 December 2015: surcharge for 2009/10 APN.
- (2) 3 December 2015: penalty for the 2010/11 APN.
- (3) 9 September 2016: second penalty for the 2010/11 APN.
- (4) 21 September 2016: second surcharge for the 2009/10 tax year APN.
- (5) 2 November 2016: third penalty for the 2010/11 APN.

8. The statutory deadlines for appeal of these surcharges and penalties is 30 days after the surcharge or penalty was imposed and were therefore:

- (1) In respect of the surcharge and penalty issued on 3 December 2015: 2 January 2016
 - (2) In respect of the second penalty: 9 October 2016
 - (3) In respect of the second surcharge: 21 October 2016
 - (4) In respect of the third penalty: 2 December 2016
9. On 10 August 2016 the APN for the 2010/11 was amended to reduce the amount; the first late payment penalty for that year was recalculated accordingly.
 10. Mr Shetty appealed to HMRC against the surcharges and penalties by email on 19 July 2019.
 11. On 24 July 2019 HMRC issued a decision letter, rejecting the late appeal.
 12. Mr Shetty appealed to this tribunal on 7 October 2019.

Submissions and evidence

13. Mr Shetty submitted that he had a reasonable excuse for the late appeal because:
 - (1) he had had medical issues when the APNs were issued;
 - (2) there were a series of corrections to one of the APNs;
 - (3) there was confusion and delay in dealing with HMRC.

Medical issues

14. Mr Shetty stated that he had been unable to deal with the appeal as he had had sciatica and subsequently tuberculosis, as follows:
 - (1) Mr Shetty stated that the sciatica had started in June 2015; he produced review notes from a consultant dated August 2015 and submitted that he had had a long recovery period, longer than claimed by HMRC, and that his physical health had been very bad in this period.
 - (2) The tuberculosis had been serious and it had taken a long time to recover, beyond the timescale described by HMRC. He submitted that tuberculosis treatment usually took six months but, in his case, it had taken over nine months. He had also been mis-diagnosed at first when blood tests had been taken in July 2016, when the medical report shows that he had had fever for two weeks. He had been on intensive medication and the illness and treatment had had an impact both physically and emotionally. He submitted that a letter from his doctor in June 2017 also showed that he had been dealing with side effects of the medication.
 - (3) Mr Shetty also submitted that, when discharged from treatment in October 2017, he was still not completely well. There was still fluid in his lungs, but the treatment could not be extended further. He submitted that the symptoms to be

looked out for described in the discharge letter in October 2017 were in fact ongoing at that time.

(4) Mr Shetty explained that, as an IT consultant, he could and did work from home both whilst employed and whilst self-employed. This saved him the physical exertion of commuting and meant that there was no disruption to his business as a result of his health problems.

(5) Although he could still work, the health problems caused substantial stress (together with family and mortgage obligations) both whilst ill and through the long recovery afterwards. He submitted that, had he been able to work properly, the company turnover would have increased rather than remaining constant between incorporation and 2019.

15. HMRC submitted in respect of the medical issues that:

(1) The consultant report on Mr Shetty's sciatica, dated 19 August 2015, states that he had improved a lot and was mobile. The evidence provided in relation to sciatica indicates that Mr Shetty had physiotherapy treatment between August and November 2015.

(2) Shortly after the issue of the first surcharge for 2009/10 and the first penalty for 2010/11, Mr Shetty wrote to HMRC requesting acknowledgement of a witness statement and court order regarding interim relief from recovery of the APN amounts flowing from related judicial review proceedings to which he was a claimant. These were said to have been previously submitted on 19 October 2015.

(3) Mr Shetty's medical evidence shows that he was diagnosed with tuberculosis on 2 August 2016. On 5 August 2016, Mr Shetty called HMRC to follow up a response to a letter from his employer sent in May 2016.

(4) On 9 November 2016, Mr Shetty called HMRC again to enquire into the outstanding amounts of his APNs.

(5) The discharge letter issued by the respiratory consultant on 10 October 2017 states that Mr Shetty was "very well and active", after having undergone nine months of treatment for tuberculosis.

(6) During this period, Mr Shetty had worked for an employer until June 2015. In the 2015/16 period he had earned approximately £24,000 from this employment.

(7) In June 2015 Mr Shetty had incorporated a personal service company, for which he was the sole director and employee. That company registered for VAT in June 2015. The VAT returns for the company show an annual turnover in excess of £160,000, including for the period in which Mr Shetty was undergoing treatment for tuberculosis.

(8) HMRC submitted that the evidence showed that Mr Shetty was able to work throughout this period and that he was able to deal with tax matters as well, given his communications with HMRC.

(9) HMRC further submitted that the medical evidence provided by Mr Shetty did not explain why he was unable to appeal the initial surcharge and penalty, the time limit for both of which was 2 January 2016. This was several months before the diagnosis of tuberculosis and after the end of treatment for sciatica.

(10) HMRC submitted that Mr Shetty's medical issues did not therefore constitute a reasonable excuse for the late appeal as they did not operate to prevent him from submitting his appeal on time or earlier.

16. HMRC also submitted that Mr Shetty had had an agent, AML Tax, dealing with his tax affairs during this time, who were in correspondence with HMRC and in this correspondence appeared to be able to accept and act on instructions from Mr Shetty.

17. Mr Shetty explained that AML Tax were his employer at the time that he entered into the arrangements that led to the APNs and that they were not his agents, nor authorised to advise him. They had the information relating to the arrangements and so he had to go to them for help with dealing with HMRC. Mr Shetty did not know why AML Tax had described him as a client, when he was simply a former employee. AML Tax had acted for him in respect of the judicial review proceedings only. HMRC responded that AML Tax were clearly assisting Mr Shetty at the relevant time, whether as agent or former employer.

18. Mr Shetty also explained that another accountancy firm described by HMRC as his agents acted for him as bookkeepers, and only for a short period of time. HMRC responded that this accountancy firm is the accountant on record as Mr Shetty's agent.

Errors in APN calculation

19. Mr Shetty submitted that the APN had been corrected four times by HMRC between 2015 and 2019, as follows:

(1) He had originally asked his employer to provide HMRC with evidence of the incorrect amount in July 2015 but no changes were made.

(2) In May 2016, HMRC accepted that there was an error and reduced the amount in the APN and the associated penalty.

(3) In June 2019, a statement from HMRC Debt Management included the original incorrect amount.

(4) The incorrect amount in the statement from Debt Management was corrected in August 2019.

20. Mr Shetty also noted that he did not consider that any new information had been given to HMRC to correct the APN in August 2016 as all of the relevant information would have been in the self-assessment system.

21. HMRC explained that the reduction in the APN in August 2016 was given following the provision of an explanation as to why the figures were correct, and that this explanation was new information.

22. Mr Shetty submitted that, per *Graham* ([2018] UKFTT 661) a penalty can be challenged where there is an obvious mistake in the calculation. Mr Shetty also cited the case of *O'Neill* ([2018] UKFTT 33) in support.

23. HMRC submitted that there was no “obvious mistake” in the calculation in this case; the reduction was given when further information had been provided to HMRC and not as a result of any error made by HMRC. When the representations had been made in July 2015, the only alternative figure proposed by AML Tax had been zero: the additional information which led to the amendment was not provided until May 2016.

24. HMRC also submitted that whilst Debt Management had used the earlier uncorrected figure by mistake in June 2019, this did not provide a reason for delay in appealing.

25. HMRC also submitted that, if Mr Shetty believed that there was an error in the calculation, this was a matter that should be dealt with by appealing the penalties rather than a reason for delaying such an appeal.

Issues dealing with HMRC

26. Mr Shetty submitted that HMRC did not deal with the issues in a timely and straightforward manner; when corresponding with Debt Management, issues would be transferred to Counter Avoidance and Counter Avoidance would send matters on to the Contractor channel.

27. HMRC submitted that Mr Shetty clearly had a fair understanding of the various departments and the interaction between them and did not appear to be confused. In addition, each penalty letter sent to Mr Shetty had an address on it. Even if he had been confused, he could have sent an appeal to the address on the letter; indeed, he could have responded to any part of HMRC to appeal.

Approach to be taken

28. HMRC submitted that the approach to be taken by the tribunal is that set out in *Martland* ([2018] UKUT 178) and that the starting point is that permission to appeal late should not be granted unless, on balance, the tribunal is satisfied that it should be. In *Romasave* ([2015] UKUT 254) the Upper Tribunal had held that permission to appeal out of time should only be granted exceptionally.

29. In *Martland*, the Upper Tribunal considered that the three-stage process in *Denton* ([2014] EWCA Civ 906) should be followed, so that the tribunal should consider:

- (1) The seriousness or significance of the delay;
- (2) The reason for the delay; and

(3) Evaluate all of the circumstances of the case, balancing the merits of the reasons given for the delay and the prejudice to the parties in granting or refusing permission. 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.

Relevant law

30. s49 of the Taxes Management Act 1970 (“TMA 1970”) provides:

“49 Late notice of appeal

49(1) This section applies in a case where-

- (a) notice of appeal may be given to HMRC but
- (b) no notice is given before the relevant time.

49(2) Notice may be given after the relevant time limit if-

- (a) HMRC agree, or
- (b) where HMRC do not agree, the tribunal gives permission.

...

49(8) In this section “relevant time limit”, in relation to notice of appeal, means the time before which the notice is to be given (but for this section).”

Discussion

31. The question for this Tribunal is whether Mr Shetty should be permitted to make a late appeal to HMRC. In determining this, the approach set out by the Upper Tribunal in *Martland* is clearly appropriate.

Is the delay serious and significant?

32. It was not disputed that the statutory time limit for appealing the first surcharge and penalty was 2 January 2016, and the time limit for appealing the third penalty was 2 December 2016. Mr Shetty appealed to HMRC on 19 July 2019.

33. The delay in bringing the appeal was therefore between 31 and 42 months. The Upper Tribunal in *Romasave* stated (§96) that “a delay of more than three months cannot be described as anything but serious and significant”. The delay in this case is therefore clearly “serious and significant”.

What is the reason given for the delay?

34. The reasons given by Mr Shetty for the delay are that he had medical problems; that there were errors in the calculation; and that there was confusion and delay in dealing with HMRC.

Evaluation of the circumstances

35. It is clear that Mr Shetty had medical problems between 2015 and 2017. However, I do not consider that the evidence shows that Mr Shetty was prevented by these medical problems from filing the necessary appeals on time, as follows:

(1) The evidence as to sciatica was that it required treatment between August 2015 and November 2016. The evidence as to tuberculosis shows that symptoms (even if originally misdiagnosed) did not appear until late June or early July 2016. The first appeal deadline was 2 January 2016 and so the medical evidence does not provide a reasonable excuse for the delay in appealing the first surcharge and first penalty.

(2) The consultant dealing with Mr Shetty's tuberculosis stated, in October 2017, that "he remains well and active".

(3) Throughout the period in which Mr Shetty had tuberculosis, he continued to work as the sole employee of his company. His company VAT returns show turnover in excess of £160,000 per year.

(4) HMRC evidence, which was not disputed, clearly shows that Mr Shetty was able to contact HMRC during this period to discuss his tax affairs.

36. The medical problems also do not provide any reason for the delay in making the appeal between (at the latest) October 2017 when the consultant discharged Mr Shetty in respect of his tuberculosis, and the making of the appeal in July 2019.

37. Any dispute as to the amount in the calculation was resolved by August 2016 and, in any case, would be grounds for making an appeal rather than delaying the making of an appeal. so I do not consider that such dispute provides a good reason for the delay. The amendment of the calculation was not the result of an "obvious mistake", such as in *Graham* and so does not provide support for the strength of Mr Shetty's case. The case of *Onillon* similarly does not provide support for the strength of Mr Shetty's case, as I do not consider that the dispute as to the amount of the calculation means that it was reasonable for Mr Shetty to have failed to appeal the penalties on time.

38. Whilst HMRC may have passed queries between different departments, I do not consider that this provides a good reason for the delay in appealing: Mr Shetty was clearly able to communicate with HMRC in respect of his tax affairs during this period and he did not dispute that he had contact details on the penalty letters which would have enabled him to appeal the penalties.

39. With regard to the prejudice to the parties, if I refuse permission to appeal then Mr Shetty will be unable to challenge the surcharges and penalties further. Whilst it is not appropriate to conduct an exhaustive analysis of the merits of the substantive appeal, the circumstances should be reviewed to determine if there is clearly a strong case, where there may be greater prejudice to an appellant in refusing permission to appeal.

40. Although there was limited information as to the grounds on which Mr Shetty appealed the surcharges and penalties, it appears that the appeal was based on his belief that the APNs were on hold and that Debt Management had refused to provide a time to pay arrangement for the APNs. HMRC had refused the time to pay arrangement because the APNs due date for payment had already passed. It is not clear that Mr Shetty would succeed in challenging the surcharges and penalties on this basis and so I consider that refusing permission to appeal would not amount to a demonstrable injustice to Mr Shetty.

41. There is a principle that litigation should be finalised as expeditiously as is reasonably possible, as noted in *Martland*. HMRC are entitled to expect that an appellant will appeal within the statutory time limits and so, if no appeal is made, that the matter has become final. If permission were granted, HMRC would be required to reopen a case and expend time, at least, on a matter that they had been entitled to consider final.

Decision

42. Considering the approach set out in *Martland*, this is a serious and significant delay. I do not consider that the reasons given are reasonable excuses for the delay and, balancing all the circumstances, I do not consider that the prejudice to Mr Shetty in refusing permission to make a late appeal to HMRC outweighs the other circumstances in the case and as such I should not depart from the starting point set out in *Martland* that permission to appeal late should not be granted.

43. For the reasons stated, the application for permission to make a late appeal is refused.

44. 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: 6 MARCH 2020