



[2020] UKFTT 0137 (TC)

TC07631

INCOME TAX – application for permission to appeal out of time – appeal against penalties under Schedule 55 Finance Act 2009 – late filing of tax returns for the years 2010/11, 2011/12 and 2012/13 – whether a reasonable excuse for late filing

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019 06094

BETWEEN

SALIK AHMED

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
MR LESLIE BROWN**

Sitting in public at Newcastle upon Tyne on 26 November 2019

Alik Ahmed for the Appellant

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

DECISION

INTRODUCTION

1. This is an application for permission to appeal out of time against penalties charged under Schedule 55 to the Finance Act 2009 (“FA 2009”) for the late filing of tax returns for the years 2010/11, 2011/12 and 2012/13 (“the three tax years”).
2. If we conclude that the application should be allowed, it would then be necessary to consider whether Mr Ahmed (“the Appellant”) had a reasonable excuse under paragraph 23 of Schedule 55 FA 2009 for the late filing of his returns.
3. For the reasons given below, we refuse the application for permission to appeal out of time.

THE FACTS

4. The Appellant ran an Indian takeaway restaurant business.
5. The Appellant has suffered from ill-health for a number of years, the nature of which has fluctuated (see below).
6. He had major surgery in April 2008, after which he found it difficult to work.
7. The details of the three tax returns and the penalties in question are as follows:

Tax Year	Return Issue Date	Return Due Date ¹	Return Received Date	Late Filing Penalty	Daily Penalty	Six Month Penalty	Twelve Month Penalty	Total
2010/11	06/04/11	31/01/12	19/01/15	£100	£900	£300	£300	£1600
2011/12	06/04/12	31/01/13	19/01/15	£100	£900	£300	£300	£1600
2012/13	06/04/13	31/01/14	19/01/15	£100	£900	£300	n/a	£1300
								£4500

8. HMRC issued a notice to file tax returns to the Appellant on 6 April 2011, 2012 and 2013 respectively under section 8 Taxes Management Act 1970 (“TMA”). There is no dispute that these notices were received.
9. HMRC’s telephone records note that the Appellant telephoned HMRC on 17 April 2012 to discuss his outstanding tax returns and stated that he was trying to deal with the matter as best he could.
10. The returns for those three tax years were not filed by the deadlines of 31 January 2012, 31 January 2013 and 31 January 2014, respectively. Therefore, penalty notices were issued on 12 February 2012, 20 March 2012, 13 September 2012, 28 March 2013, 14 August 2013, 25 February 2014, 18 February 2014 and 18 August 2014.
11. The Appellant telephoned HMRC 17 March 2014 and was advised that he needed to set up a “time to pay” arrangement if he could not afford to pay his tax liabilities.

¹ these dates are for online filing. If the Appellant file a paper return it would be due the previous 31 October.

12. Next, on 17 September 2014 incomplete returns were received by HMRC for the three tax years but the returns were sent back to the Appellant because pages from the returns were missing.

13. The Appellant filed complete tax returns for the three tax years on 19 January 2015.

14. On 10 July 2015, HMRC received, from the Appellant's agent, an appeal against the late-filing penalties for the three tax years. The grounds of appeal were that the Appellant was late in filing his tax returns because of his ill-health and an ongoing heart problem from which he had suffered since 2010. It was stated that "his tax returns and all other things in his life were put on hold until his health improved earlier this year." Various letters from the NHS were attached.

15. On 17 August 2015, HMRC replied to the appeal against the late filing penalties. HMRC rejected the appeals because they were out of time.

16. The Appellant's accountant, Mr Stenton wrote to HMRC on 24 August 2015 arguing that the Appellant had a reasonable excuse for missing the deadline to appeal the late filing penalties for the three tax years. Mr Stenton wrote:

"Mr Ahmed had heart surgery in 2010. Ongoing heart problems, which put his business affairs on hold, affected his personal life. He still suffers from this condition but his health improved late 2014 and he was able to resume with his business affairs and complete the outstanding Tax Returns."

17. HMRC replied to Mr Stenton on 5 November 2015 stating that they could not accept the Appellant's appeal because the deadline for making an appeal had passed. The letter stated that if the Appellant did not agree with HMRC, the appellant could ask this Tribunal to review their decision. The appellant, the letter said, needed to write to them by 5 December 2015. If the Appellant did not send an appeal to the Tribunal by 5 December 2015, the letter stated that HMRC would treat the appeal as settled and he would have to pay the penalties.

18. On 20 May 2019, the Appellant's new agent (Mr Burns) wrote to HMRC appealing against the penalty assessments for the three tax years. The letter attached an email from the Appellant's son to Mr Burns regarding the Appellant's severe medical problems and said that medical reports were available if required. The enclosed email was from Mr Alix Ahmed, the Appellant's son, who represented his father at the hearing before us. The email attached original medical records. Mr Alix Ahmed said that his father had had issues with medication resulting in his condition deteriorating and him being unable to have a clear line of thought.

19. On 16 August 2019, HMRC wrote to the Appellant explaining that the deadline for appealing the penalties had passed. The letter invited the Appellant to write to HMRC if the Appellant thought he had a reasonable excuse for the late appeal.

20. The Appellant appealed to this Tribunal on 15 September 2019. The notice of appeal stated that the Appellant had suffered from poor health following his angioplasty operation in late April 2008. He said that his health had deteriorated between 2010 and 2014 with many conditions highlighted in his attached summary of his medical records. The Appellant noted that he had been suffering from sleep deprivation as a result of these conditions and was consequently suffering from poor memory. It was because of these health conditions that he was unable to submit the tax returns for the three tax years and make subsequent appeals. The Appellant said that his health condition fluctuated from week to week leading him to feel lost and in many instances he was unable to sleep. He was not able to work during these years and relied on his son for financial support. His wife and son had been caring for him since his initial operation and he was now able to appeal against the penalties. He had finally started to work

again in 2018 in order to help his son, who had been forced to move to a low-paid job in Bristol and was struggling to make ends meet.

21. In the documents attached to the notice of appeal, there was also mention of the fact that the Appellant had suffered a bereavement (his mother's death) in February 2013, requiring him to travel to Bangladesh. The Appellant stated at the hearing that he thought he was in Bangladesh for approximately six months, but we think that (according to his medical records) the period seemed to have been shorter – probably four months.

22. At the hearing, the Appellant through his son, stated that the reason for the late-filing of the returns for the three tax years and the late appeal was due to the Appellant's ill-health and continuing heart problems following the angioplasty surgery in April 2008 and May 2009. It was said that the Appellant's health deteriorated (particularly between 2010-2014) with the result that tax returns and other matters were put on hold until his health improved in late 2014 or early 2015. His health would fluctuate from week to week during this time. In particular, the Appellant suffered from sleep deprivation (as a result of his medication) and anxiety which affected his memory.

23. The Appellant had prepared a "Timeline" giving details of his medical conditions from 29 April 2008 to December 2014 and from which we summarise the main points below. We have referred to the various medical conditions where there was supporting documentary evidence. The main points were:

(1) The Appellant was diagnosed with coronary atherosclerosis in April 2008 and had an operation on 29 April 2008.

(2) In May 2009 the Appellant had a balloon angioplasty performed. He was diagnosed with type II diabetes in October 2010 and attended A&E due to chest pains in November 2010.

(3) In May 2011, the Appellant saw a consultant cardiologist. The consultant stated that Mr Ahmed "was pleased to say that he has remained well over the previous 4 to 5 months.... He can walk any distance he likes, even up inclines. However he feels that he tires easily as compared to previously... In view of the absence of symptoms I have not changed any of his medications. I shall review him in a year's time because of the fact that he has a left main stent in situ and history of insistent restenosis."

(4) November 2011, the Appellant was diagnosed with adhesive capsulitis after experiencing pain in his right shoulder. The Appellant was referred to a physiotherapist.

(5) In December 2011, the Appellant suffered from a skin condition on the heel of his left foot causing pain and issues in walking.

(6) In February 2012 the Appellant was diagnosed with sub-acromial bursitis in his right shoulder. The consultant stated: "I explained that we can inject this in clinic today but I also explained to him that this will improve regardless whether he has an injection or not although the injection will speed up the process. He was quite keen on leaving it for now and continuing his physiotherapy exercises that he has been taught and he will reassess the situation if the shoulder pain was to accumulate."

(7) In May 2012, the Appellant had another appointment with his consultant cardiologist. The consultant's notes state that the Appellant was pleased to state that he was "able to walk any distance he likes on [sic] flat surface or on inclines without any problems... His only issue was with intolerance to his statin medications, he reported bleeding from his mouth whilst he was taking Pravastatin. This improved after switching

to Simvastatin. He believes that Simvastatin caused sleeplessness initially but the symptom gradually improved and he is able to tolerate it better.”

(8) In December 2012 a report from the NHS Diabetic Foot screening service indicated that the skin condition on the Appellant’s left foot could not be treated and he was advised to use moisturiser.

(9) In June 2013 the Appellant had his annual diabetic review.

(10) In February 2014 the Appellant was referred to podiatry for deep fissures in his heels and a rash on his left foot.

24. The Appellant suffered particularly from insomnia often being awake throughout the night and suffering from anxiety lest he should pass away during the night.

THE LATE APPEALS

25. The table below, which was not in dispute, sets out the position as regards the penalty and appeal dates:

Tax Year	Penalty Notice Date	Last Day to Appeal	Appeal Received
2010/11	Late filing penalty 20/03/12	19/04/12	10/07/15
2010/11	Daily penalty 13/09/12	13/10/12	10/07/15
2010/11	Six month penalty 13/09/12	13/10/12	10/07/15
2010/11	Twelve month penalty 28/03/13	27/04/13	10/07/15
2011/12	Late filing penalty 12/02/13	14/03/13	10/07/15
2011/12	Daily penalty 14/08/13	13/09/13	10/07/15
2011/12	Six month penalty 14/08/13	13/09/13	10/07/15
2011/12	Twelve month penalty 25/02/14	27/03/14	10/07/15
2012/13	Late filing penalty 18/02/14	20/03/14	10/07/15
2012/13	Daily penalty 18/08/14	17/09/14	10/07/15
2012/13	Six month penalty 18/08/14	17/09/14	10/07/15

THE LEGISLATION

26. The statutory provision which permits us to consider an application for giving a late notice of appeal is section 49 of the Taxes Management Act 1970 (“**TMA 1970**”) this reads as follows:

“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).”

The authorities

27. The most recent relevant authority is the Upper Tribunal (Judge Berner and Judge Poole) decision in *Martland v HMRC* [2018] UKUT 178 (TCC). In that case, the Upper Tribunal noted that under the relevant statutory provision, section 16 of the Finance Act 1994, the discretion of the First-tier Tribunal (“FTT”) was “at large”. The same is true in respect of section 49 TMA. The Upper Tribunal analysed the authorities and set out the principles to be applied by the FTT in considering an application for permission to appeal out of time:

“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.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT’s consideration of the reasonableness of the applicant’s explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that “being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules”; HMRC’s appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.”

DISCUSSION

28. As regards the late appeals, the length of the delay is substantial. HMRC made a number of penalty assessments which were issued between 20 March 2012 and 18 August 2014. Thus the last day to appeal the final penalty was 17 September 2014.

29. HMRC refused the Appellant’s late appeal on 17 August and 5 November 2015. The Appellant, however, did not file his appeal with this Tribunal until 15 September 2019.

30. We have carefully considered all the evidence put before us, particularly that concerning the Appellant’s ill-health and his absence in Bangladesh following the death of his mother. Looking at that evidence in the round, we do not consider that the various medical conditions from which the Appellant suffered should have prevented him from filing a notice of appeal on time. His medical conditions in the period 2012-2014 generally show an improvement. Even as regards his period of absence from the UK, when he had to visit Bangladesh, we would have expected him to have appointed someone (possibly a family member) to deal with his affairs in his absence. In any event, the Appellant did not file his appeal with this Tribunal until September 2019 – a delay of almost 4 years after HMRC (in August and November 2015) refused his late appeal. No reason was given for the second substantial delay. There was no evidence that any of the medical conditions from which the Appellant suffered prevented him from pursuing the appeal in this period.

31. Accordingly, we have come to the conclusion that we should refuse the Appellant’s application for permission to appeal out of time.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

**GUY BRANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 09 MARCH 2020