TC07760

Income tax – application for permission to notify late appeal to the Tribunal – Martland applied – application refused and appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/01644

BETWEEN

YVONNE KING **Appellant**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE
SIMON BIRD

Sitting in public at Centre City Tower, Birmingham on 20 February 2020

The Appellant did not appear and was not represented

Pallavika Patel, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This decision concerns the hearing of the Appellant's application for permission to notify her appeal to the Tribunal outside the relevant time limit.

2. The Appellant failed to attend the hearing but the Tribunal was satisfied that reasonable steps had been taken to notify the Appellant of the hearing and that it was in the interests of justice to proceed with the hearing. A telephone call was made to the Appellant's representative, who indicated that he had only returned from holiday today and neither he nor the Appellant was planning to attend the hearing. A previous belated application to postpone the hearing had been refused.

3. Following the hearing on 20 February 2020, a summary decision refusing the Appellant's application was issued to the parties on 4 March 2020. On 3 April 2020 the Tribunal received an application for full findings of fact and reasons for the decision. This application was received just outside the relevant 28 day time limit, but in view of the dislocation caused by the pandemic, I formally admitted the application, extending the relevant time limit.

4. These are accordingly the full findings of fact and reasons for the summary decision issued on 4 March 2020.

THE FACTS

5. HMRC issued their statutory review letter, confirming the liabilities previously imposed, on 4 October 2017. The time limit for appealing to the Tribunal therefore expired on 3 November 2017. The notice of appeal was received by the Tribunal on 22 February 2018. The period of delay was therefore a little over three and a half months.

6. The reasons given for the delay in the notice of appeal were as follows:

> I was ill following the continued harassment from HMRC what has been going on for 7 years. I was not able to return to work until recently.

7. No further argument or evidence of the Appellant's illness was provided.

8. In her representative's letter to HMRC dated 4 December 2017, it was stated that "the reason you have had no response [to the statutory review letter dated 4 October 2017] is that neither ourselves or our client have received a copy of this letter". This letter was acknowledging receipt of a further letter dated 22 November 2017 from HMRC which enclosed a copy of the earlier statutory review letter dated 4 October 2017 and notified the Appellant that her appeal was therefore being treated as "settled by agreement under section 54(1) Taxes Management Act 1970".

9. We accept, on the basis of this correspondence, that neither the Appellant nor her representative received the statutory review letter until 3 or 4 December 2017.

THE LAW

10. The correct approach to applications such as the present is set out in the decision of the Upper Tribunal in *Martland v HMRC* [2018] UKUT 0178 (TCC), mainly in paragraphs [44] to [47], which say this:

> 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.
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> 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

11. Adopting the three stage process approved in *Martland*, our findings are as follows.

The length of the delay

12. As set out at [5] above, the length of the delay was a little over three and a half months. This is clearly a significant period.

The reasons for the default

13. We have accepted (see [9] above) that neither the Appellant nor her representative received the statutory review letter until 3 or 4 December 2017. We therefore consider the Appellant to have had a good reason for the delay up to that time.

14. There remains the period from 3 or 4 December 2017 up to 22 February 2018. The reason given for this period of delay, as stated at [6] above, was as follows:

> I was ill following the continued harassment from HMRC what has been going on for 7 years. I was not able to return to work until recently.

15. No further detail or evidence of the Appellant's illness were provided.

Evaluation of all the circumstances of the case

16. In carrying out this evaluation, we are mindful of "the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected" (see *Martland* at [45]).

17. Having been notified of the original decision, and that it was about to be enforced, we would have expected the Appellant to have treated it as a matter of some urgency to notify her appeal to the Tribunal (indeed her representatives said in their letter dated 4 December 2017 that "It will be our intention to appeal to the first tier tribunal and we will do so immediately"), yet there was a delay of well over two months before she did so. Even allowing for the Christmas break, this is still a significant and serious delay.

18. In respect of this period of delay, her stated reason (see [6] above) could possibly have been given some weight if she had provided any kind of evidence to support it. However she has not. In the absence of any detail of the illness referred to, or evidence (such as a note from her doctor) as to its duration, nature and effect on her, we are unable to give it much weight in the overall evaluation of the circumstances of the case.

19. If permission for the late appeal is granted, HMRC will be required to devote further time and resources to litigating a matter which ought properly to have been decided, but that is always a consequence of such decisions and there is nothing special that marks this case out.

20. If permission is refused, the Appellant will be deprived of the opportunity to advance her arguments against a significant liability to tax and penalties, but that is always a consequence of such decisions and there is nothing special that marks this case out.

21. It is clear that the Appellant is going to be able to adduce little or no documentary evidence in support of her arguments (she has not asked for any extra documents to be included in the hearing bundle) and she would therefore have to rely largely on oral testimony to convince a Tribunal of the merits of her case. The events involved took place between 2004 and 2011 and clearly there are likely to be difficulties with the freshness and reliability of any unsupported oral evidence.

22. We considered briefly the merits of the Appellant's underlying case. As set out in the notice of appeal, her grounds were that:

> The assessments are disputed and not agreed. I did not make the level of profits stated and have been subject to continued persecution by HMRC who refuse to accept any view except their own.

23. In her witness statement, she expanded somewhat on these grounds as follows:

> 1. I commenced trading as a hairdresser in June 2004 and engaged the services of an accountant, Vickers Reynolds & Co who I believed were dealing with all my tax filing obligations and provided them with all business records which they retained.
>
> 2. I only became aware that they were not filing returns for me when I was visited by HMRC on 26/1/11 and immediately engaged the services of another accountant.
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> 3. I was unable to recover any records from my previous accountant and it is my belief that they ceased to trade.
>
> 4. I refer to the documents bundle prepared by HMRC and believe that it contains a full version of all the correspondence in this matter.
>
> 5. Rather than go through all of the correspondence in this matter I would prefer to focus on the matters in dispute.
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> 6. HMRC put forward proposals for settlement which I did not consider correct and my accountant put forward various points at issue in his letter dated 7/9/15 (C125 and 126) these related to the following
>
> - Loan interest on the purchase of the business
> - Capital allowance expenditure
> - Business build up comments
> - Queries relating to PAYE income HMRC wish to assess.
>
> 7. In his letter he also proposed profit figures to HMRC on the basis that the method used by HMRC was incorrect as they were using an RPI figure working backwards and that the business was built up gradually from the commencement.
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> 8. I now refer to HMRC letter of 29/9/15 (C135) in which HMRC asked for some further information and also admitted that they had estimated the PAYE income for the years 2008/09 to 2010/11.

> 9. I now refer to my accountants letter in reply dated 26/11/15 (C137) in which he provided further information and would draw your attention to point 4 where he stated, quite correctly that I had not received any PAYE income in the periods referred to.
>
> 10. I now refer to HMRC's response dated 6/1/16 where they accept the Capital Allowance claim but provide no evidence re PAYE income allegation but again repeat that it is estimated, there is no proof backed up by any submitted forms P35 to support HMRC's claim on this point.
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> 11. I now refer to HMRC's summary of the position as they see it (C223 to 230) the summary of HMRC's position is at C226 at the top of the page.
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> 12. I dispute the figures put forward for self employed profit on the basis that they are estimated and in my view incorrectly calculated and believe that the figures put forward in my accountants letter dated 7/9/15 for the reasons outlined in correspondence.
>
> 13. I believe that the capital allowance calculation which was not agreed with my accountant needs to be revised as an agreement of our figures put forward some years profits are covered by personal allowances.
>
> 14. No allowance has been made for loan interest which was I believe not disputed by HMRC.
>
> 15. The amounts referred to as PAYE income are incorrect and should be reduced to nil as HMRC has no proof regards this. I refer to point 17 of the witness statement of Mr Bowden where he states this was reviewed and amended, it was not.
>
> 16. At tribunal my accountant will make detailed agreement regarding the incorrect calculation of the Business profits.

24. Essentially, the Appellant is arguing that (a) she was unaware that no tax returns were being made on her behalf until November 2011, (b) she is unable to provide any business records, (c) HMRC should have allowed a deduction of an unspecified amount in respect of interest incurred on a loan used to acquire the business, (d) inadequate deductions have been allowed for capital allowances, (e) profits for the earlier years would have been lower as the business would have been built up after its acquisition, (f) the PAYE earnings figures used by HMRC were unreliable, and (g) HMRC's proposed figures for self-employed earnings were estimated, wrong and should be replaced by unevidenced proposals provided by her accountants.

25. The Appellant (rightly, in our view) does not argue that HMRC's assessments have no rational basis or are arbitrary or capricious. She simply asserts they are wrong and should be replaced by other figures for which she has provided no supporting evidence. The difficulty that she has is that the burden therefore lies on her to satisfy the Tribunal that HMRC's figures are wrong, and without any documentary evidence to support her assertions that is likely to be difficult for her. Whilst we do not consider her appeal to be entirely hopeless, therefore, we certainly do not consider it to be "really strong". To the extent that an assessment of the strength of her appeal is a factor in our overall evaluation, therefore, we give it little weight (and such weight as it has would count against her).

DECISION

26. The starting point is that we should not grant permission for the appeal to be admitted out of time unless we are satisfied on balance that it should be granted (see *Martland* at [44]).

27. Having established the period of delay, and the fact that we consider a good reason has been provided for the period of delay up to 3 or 4 December 2017, we must evaluate all the

circumstances to decide whether we should permit the appeal to proceed in spite of the delay between 3 or 4 December 2017 and 22 February 2018.

28. In all the circumstances set out above, we did not consider a good case has been made out for the time limit to be extended. Permission for the appeal to be admitted in spite of its late notification to the Tribunal was therefore REFUSED. Since the Tribunal therefore has no jurisdiction to consider the appeal, we also directed that it be STRUCK OUT pursuant to Rule 8(2)(a) of the Tribunal's procedure rules.

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.

KEVIN POOLE

TRIBUNAL JUDGE

RELEASE DATE: 26 JUNE 2020