



TC07902

Appeal number: TC/2019/06706

Procedure - application for permission to appeal - appeal to HMRC out of time - whether reasonable excuse - Income tax - Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file self-assessment returns for 3 years and late payment penalties - appeal to HMRC out of time - Martland considered - Application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

XINYU ZHANG

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

Sitting in public at Tax Appeals, Centre City Tower, Birmingham on 14 February 2020

The Appellant in person

Miss Anna Muston of the Solicitors Office and Legal Services, HM Revenue and Customs for the Respondents

DECISION

The Application

1. This is an application by Xinyu Zhang (“the appellant”) to admit an appeal under Rule 20(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and extend time to give notice of appeal under Rule 5(3)(a), against late filing penalties charged under Schedule 55 to the Finance Act 2009 (‘FA 2009’) and late payment penalties charged under Schedule 56 FA 2009, for the years 2012-13 to 2014-15.
2. HMRC oppose the application.
3. It is HMRC’s understanding that the appellant is only appealing against the appellant’s late filing and late payment penalties for the tax years 2012-13, 2013-14 and 2014-15, as stated in his appeal to HMRC dated 20 March 2019 amounting to £4,630. However, in his appeal to the Tribunal he has not specified which years are under appeal and has stated that he is appealing a figure of £7,282.77. HMRC say that this figure reflects the total amount owed by the appellant and includes further penalties for the 2010-11 and 2016-17 tax years and also the interest incurred on these. HMRC’s submissions only relate to the penalties and tax years previously specified as being under appeal, as these are the only years that have been reviewed.
4. The appellant agreed at the hearing that the application to permit a late appeal was against the penalties charged for years 2012-13 to 2014-15 (‘the penalty years’).

Background

5. The appellant has been registered on HMRC’s self-assessment system since 7 October 2005 as a self-employed market trader, a jewellery importer and then a director from 7 July 2009.
6. The appellant’s returns for the penalty years were, if filed electronically, due no later than 31 January in the year following each tax year.
7. The penalties for late filing of a return can be summarised as follows: [Schedule 55 FA 2009]
 - (i) a penalty of £100 is imposed under Paragraph 3 of Schedule 55 FA 2009 for the late filing of the Individual Tax Return.
 - (ii) If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
 - (iii) If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.

- (iv) If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

Filing date and Penalty date

8. Under s 8(1D) TMA 1970 a non-electronic return must normally be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.
9. The appellant's tax returns for the penalty years were filed late as follows:
- 2012-13 - filed on 31 July 2016
 - 2013-14 - filed on 14 August 2016
 - 2014-15 - filed on 9 September 2016.
10. Penalties of £100, £900, £300 and £300 were imposed, under (i), (ii), (iii) and (iv) [paragraph 7 above] for each of the penalty years save for year 2014-15 for which penalties were imposed under (i), (ii) and (iii) A total of £4,500 late filing penalties have therefore been imposed.
11. Late payment penalties totalling £130 were imposed in respect of year 2012-13.
12. The appellant contacted HMRC in July 2014 following receipt of the penalties for not filing his 2012-13 return. HMRC advised him that he had to file his return before they could consider any appeal.
13. The appellant failed to file his 2013-14 and 2014-15 returns and further penalties were issued as set out in paragraph 10 above.
14. Nothing further was heard from the appellant until 20 September 2016 when he wrote to HMRC appealing against all the late filing and payment penalties. He said:
- “I was involved in an event which happened in June 2012 with Staffordshire police. In early 2013, as requested by police, I had a civil interview with my solicitor Mr. Simon Leech from Walters & Palskitt Solicitors, and left all sales records and purchasing receipts with the police for further investigation. I contacted HMRC and explained the situation. However, I was advised that I could not appeal until I was able to file the returns. This police case was finally closed in April 2015, but I did not receive my paper back until early 2016. After received all paper work, it took me ages to sort out them. ...I had to compare bank statement, other records. I filed my returns as quickly as I could after that.”
15. HMRC responded to the appeal on 20 October 2016, saying that the appellant had not shown a reasonable excuse for filing his returns late. He could have lodged provisional figures estimating the tax and making payment by the due dates. Furthermore, any

reasonable excuse that he might have had, did not continue throughout the period of default. HMRC offered him a review if he was unhappy with the decision.

16. The appellant responded to HMRC's decision on 18 November 2016 when he requested a review.
17. HMRC issued their review conclusion letter on 11 January 2017. The letter was sent to the appellant's registered address in Tredington Close, Selly Oak, Birmingham, B29 4NP, being the same address used in earlier correspondence. The letters notified appellant that he had 30 days from the date of the letter to appeal to the Tribunal if he did not agree with HMRC's review conclusion.
18. Following the appellant's failure to file his 2016-17 returns, 30 and 60 day penalties were issued in June and July 2018.
19. The appellant did not contact HMRC again until 5 March 2019. He was informed that his appeal had already been reviewed in October 2016, and that he would need to appeal to the Tribunal.
20. On 16 January and 27 February 2019, HMRC issued debt enforcement letters to the appellant via their Debt Management division.
21. On 20 March 2019, the appellant appealed the penalties again to HMRC on nearly identical grounds of appeal to those contained in his letter of 20 September 2016.
22. HMRC's review department, after some internal delays, picked up the appeal on 4 September 2019 and responded to the appellant on 27 September 2019, informing him that his appeal had already been reviewed in January 2017 and he was therefore not entitled to another review and if he was still unhappy with the decision then he should make an application to the Tribunals Service to appeal out of time.
23. The appellant notified his appeal to the Tribunal on 30 October 2019. His grounds of appeal were that the review conclusion letter of 11 January 2017 had not been received by him.
24. Under s 49G of the Taxes Management Act 1970, the appellant had 30 days to notify his appeal to the Tribunal. As he had appealed to the Tribunal after that time limit, the appeal can only be heard by the Tribunal if it gives permission.

Relevant legislation

Taxes Management Act 1970 ('TMA 1970')

Section 8 - Personal return- provides as follows:

- (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of

income tax for that year,] he may be required by a notice given to him by an officer of the Board-

- a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and
- b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

- (a) the 31st January next following the year of assessment, or
- (b) where the notice under this section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

- (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
- (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above “relevant statement” means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

(1D) A return under this section for a year of assessment (Year 1) must be delivered-

- (a) in the case of a non-electronic return, on or before 31st October in Year 2, and
- (b) in the case of an electronic return, on or before 31st January in Year 2

Section 31A TMA - provides that notice of appeal must be given within 30 days after the specified date.

Section 49 TMA - Late notice of appeal

(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 limit.

(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.
- (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
- (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
- (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
- (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
- (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
- (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).

Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 (SI2009/273)

Rule 20(1) of the Tribunal Rules provides that a notice of appeal must be sent or delivered to the Tribunal within the time limit imposed by an enactment.

Relevant authorities relating to applications for permission to appeal

25. A number of decisions have clarified the approach to be applied in applications for relief from sanction.
26. The Court of Appeal heard three conjoined appeals: *Denton v TH White Ltd, Decadent Vapours Ltd v Bevan* and *Utilise TDS Ltd v Davies* [2014] EWCA Civ 906.
27. The Court of Appeal was unanimous in allowing all three appeals and took the opportunity to clarify that a three-stage approach is now required to applications for relief (at [24]):
- “A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the “failure to comply with any rule, practice direction or court order” which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate “all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]”.”
28. In respect of the “third stage” identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) “are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered”.
29. The other factors that are relevant in stage 3 will vary from case to case. The promptness of the application is a relevant circumstance to be weighed in the balance. Other breaches by the defaulting party may be considered at this stage.

30. The Supreme Court in *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1WLR 2945 implicitly endorsed the approach set out in *Denton*. The case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FtT.

31. In *Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (TCC) the Upper Tribunal endorsed the approach in *Denton* applying the three stage approach [at 43 to 45].

"43.Whether considering an application which is made directly under rule 3.9 (or under the FtT Rules, which the Supreme Court in BPP clearly considered analogous) or an application to notify an appeal to the FtT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions - especially where the sanction in question is the striking out of an appeal (or, as in BPP, the barring of a party from further participation in it). The clear message emerging from the cases - particularised in *Denton* and similar cases and implicitly endorsed in BPP - is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".....

44. 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. When considering "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."

32. In undertaking a balancing exercise, 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.

33. In *Romasave (Property Services) Ltd v Revenue and Customs* [2015] UKUT 254 (TCC), the Upper Tribunal stated at paragraph 96 [221] that;

"The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which

must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.”

34. Following *Martland*, the Upper Tribunal in *HMRC v Katib* [2019] UKUT 0189 (TCC), re-emphasised the importance of taxpayers adhering to statutory time limits at paragraph 17:

“We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion...”

The appellant’s case

35. The appellant says that after the police returned his papers in July 2016, he filed his returns as quickly as he could. His reason for the delay in appealing to Tribunal is that he had not received HMRC’s review conclusion letter in January 2017.
36. He says that he had telephoned HMRC to chase for the review decision but has not been able to provide any specific dates as to when those calls were made. HMRC have no record of any such calls.

HMRC’s case

37. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.
38. There is no statutory definition of “reasonable excuse”. Whether or not a person had a reasonable excuse is an objective test and “is a matter to be considered in the light of all the circumstances of the particular case” (*Rowland v HMRC* (2006) STC (SCD) 536 at paragraph 18).
39. The period that has not been accounted for by the appellant is 11 January 2017 to 5 March 2019.
40. The appellant’s stated reason for the delay in appealing to Tribunal is that he did not receive HMRC’s review conclusion letter in January 2017. HMRC's response is that the review letter was issued to the address held on record in Tredington Close, Selly Oak, Birmingham, 829 4NP. Under s 115 TMA, if correctly addressed, correspondence is deemed to have been served on the customer. Undelivered and returned correspondence is recorded by HMRC and there are no notes on the appellant’s records to show that any mail was returned undelivered. Therefore, all correspondence issued to the appellant is deemed to have been served within the ordinary course of post-delivery in line with s 7 of the Interpretation Act 1978.
41. The appellant was issued a notice to file on 6 April 2017, for the 2016-17 tax year, which he failed to file before the deadline of 31 January 2018 and was issued with penalty

notifications and reminder letters from 13 February 2018 to 10 August 2018. Throughout this year, no communication was received from the appellant. He filed his 2016-17 return on 14 October 2018 which demonstrates that he was aware of his tax responsibilities at this time.

42. HMRC's view is that if the appellant had not received a review letter that he was expecting to be issued with, then a reasonable taxpayer would contact HMRC to enquire about the status of that letter. Having received penalties for previous years and being in the process of appealing these, a reasonable and prudent taxpayer would endeavour to file on time so as not to incur further penalties. However the appellant ignored his filing obligations and therefore incurred further penalties. Furthermore he has not been proactive in appealing. The appellant did not communicate with HMRC until 5 March 2019, after receiving debt enforcement letters from HMRC's Debt Management.
43. The appellant has been registered on HMRC's self-assessment system since 7 October 2005 as a self-employed market trader, a jewellery importer and then a director from 7 July 2009. Since his registration for self-assessment with HMRC on 7 October 2005, the appellant has had a history of late filing and non-compliance with his tax responsibilities.
44. According to HMRC records the appellant lived at 59 Reservoir Road, B29 6ST from 26 February 2007 to 10 March 2014, and this is the address which HMRC issued the 2012-13 Notice to file. The appellant's address then changed to 6 Tredington Close, B29 4NP on 10 March 2014, and this is the address that HMRC has held on its records since then. The appellant has never stated that he did not receive any other correspondence from HMRC, other than the review letter of 11 January 2017.
45. HMRC consider that the appellant has received all the correspondence that HMRC has issued to him over the years under appeal. If he had read this correspondence than he would have been aware of his tax responsibilities, the deadlines involved and the penalties for not complying with those deadlines.

Conclusion

46. The application before me is for permission to bring a late appeal. The Tribunal is not at this stage considering, in any detail or substance, the merits of the appeal.
47. The burden of proof lies with the appellant to demonstrate why the Tribunal should exercise its discretion to admit an appeal that is brought late. To satisfy this, the Appellant must show good cause for the delay in lodging his appeal.
48. The purpose of the time limits to bring an appeal is to provide finality and certainty to both the appellant and HMRC.
49. The conditions that need to be met for HMRC to accept a notice of appeal out of time are set out in s 49(4) to s49(6) TMA 1970; namely, that HMRC are satisfied that there was reasonable excuse for not giving notice before the relevant time limit, or where the appellant has made a request in writing to HMRC to give the notice of appeal, the request was made without unreasonable delay after the reasonable excuse ceased.

50. Rule 20(1) of the Tribunal Rules provides that a notice of appeal must be sent or delivered to the Tribunal within the time limit imposed by an enactment, which in this case is 30 days from the appellant's receipt of the review decision. If outside this time limit I have to consider the factors outlined above in paragraphs 25 to 34 in deciding whether a reasonable excuse has been shown for the delay in appealing to HMRC and the Tribunal.

Seriousness and significance of the lateness

51. In addressing the seriousness and significance of the lateness, the case of *Romasave (Property Services) Ltd* (paragraph 96) found that "a delay of more than three months cannot be described as anything but serious and significant".

52. In this case, the appellant was notified of the assessments and penalties in each penalty year and the review decision letter was issued on 11 January 2017. However, the appellant did not appeal the assessments to HMRC until 20 March 2019 or the Tribunal until 22 October 2019. These are clearly significant and serious delays.

Reason for the delay in appealing

53. I do not accept that the appellant did not receive HMRC's review conclusion letter of 11 January 2017. In any event as HMRC say, had he not received the letter he should have contacted HMRC to enquire about the status of the review and the reason for the apparent delay.

The circumstances and merits of the case

54. Permission should not be granted unless the FtT is satisfied on balance that it should be. When considering "all the circumstances of the case", this will involve the balancing exercise to 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.

55. The reason for the delay in the appellant submitting his returns for the appeal years cannot be accepted. He failed to file his returns during a period when he was receiving penalties. He had also been informed that he could file provisional returns pending the return of his papers to him by the police.

56. The appellant received his papers from HMRC in April 2015 but he did not file any of the late returns until mid-2016. Clearly any reasonable excuse that might have existed did not continue throughout the period of default and this was further compounded by the delay in appealing to the Tribunal.

57. A consideration to be taken into account is the consequences for both parties if an extension of time is granted/refused. The obvious consequence for the appellant is he would lose the opportunity to bring the appeal and the penalty would stand.

58. If the application was refused, the appellant would be prejudiced in not being able to have his appeal heard. However, the appellant had every opportunity to appeal in time and had

been notified of his rights of appeal but has chosen not to do so within the deadlines. He only appealed to HMRC to delay enforcement action from HMRC's debt management team.

59. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.
60. In all the circumstances of the case I am not satisfied that there is any reason to allow the application. The application for leave to bring the late appeal is therefore refused.
61. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE : 27 OCTOBER 2020