TC08064

PENALTIES – application to make a late appeal – reliance on an adviser – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/08217

BETWEEN

SHAFIQUE UDDIN **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE FAIRPO

The hearing took place on 3 November 2020. With the consent of the parties, the form of the hearing was held using the Tribunal video platform. A face to face hearing was not held because of the ongoing restrictions arising from the OCVID-19 pandemic. The documents to which I was referred were included in an electronic bundle of 145 pages, an authorities bundle of 161 pages together with the appellant's skeleton argument.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Watkinson, Counsel for the Appellant

Ms Donovan, litigator, for the Respondents

DECISION

Introduction

1. This is an application to make a late appeal in respect of two Personal Penalty Liability Notices ("PPLN") issued by HMRC on:

(1) 16 June 2017 in the amount of £78,432.44 in respect of corporation tax; and

(2) 30 June 2017 in the amount of £134,073/91 for VAT

in relation to assessments raised on Kazitula Limited. The appellant is the director and sole shareholder of Kazitula Limited.

2. It was agreed by the parties that the approach to be taken by this Tribunal in considering this late appeal was the three part test set out by the Upper Tribunal in *William Martland v HMRC* [2018] UKUT 178 (TCC) ('*Martland*') §§44-46:

> "44. In considering applications for permission to appeal out of time, it must be 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."

Whether the appeal was in fact late

3. In the hearing there was some discussion between the parties as whether the appeal was in fact out of time. The appellant submitted that HMRC should have taken an item of

correspondence from the appellant dated 4 July 2017 as a request for a review and that a subsequent letter from HMRC dated 19 July 2017, not included in the bundle and apparently not available to the appellant, had apparently confirmed that they would review the matter. HMRC had failed to undertake this review. Where a review conclusion is not provided within 45 days or some other agreed time, the review is to be treated as having concluded that the decision must be upheld and HMRC must notify the taxpayer of that conclusion. The period for bringing an appeal is then 30 days from the date of that notification. As no notification was issued, that 30 day period has not started to run and so this would not be a late appeal.

4. HMRC submitted that the correspondence dated 4 July 2017 was not an appeal nor a request for a review and that the subsequent letter of 19 July 2017 did not agree to undertake a review. It was stated that this letter confirmed only that the request for an extension of time was granted in respect of the provision of new information by the appellant.

Discussion

5. Given that the matter appeared to depend on the contents of the letter of 19 July 2017, HMRC were directed to provide a copy of that letter to the appellant and the appellant was given the opportunity to provide written submissions on this point, with HMRC having the right to also provide written submissions.

6. The parties subsequently emailed the Tribunal to advise that the letter of 19 July 2017 "does not assist" with regard to this matter.

7. The correspondence dated 4 July 2017 is a handwritten note from the appellant's accountants, written on the Personal liability notice dated 30 June 2017 and addressed to the appellant. The notice states that if the recipient disagrees with the notice, they can send any new information relating to the matter for the officer to consider. Also, they can ask for an HMRC officer to carry out a review of the decision or appeal to this Tribunal to decide the matter. The letter states that a review request or an appeal to the Tribunal must be made by 30 July 2017.

8. The handwriting additions mark a figure 1 next to the line regarding the provision of information and underlines the words "any new information". There is also a figure 2 marked next to the line regarding a request for a review and the words "carry out a review of my decision" are underlined.

9. The note then states, as relevant (and as written) that

> "1. Our client do <u>not</u> agree with your decision and will be able to send you further information to challenge the [VAT and corporation tax assessments]… we are gathering all the relevant records and will write to you hopefully by 15 August 2017. We trust that you will able to give a further extension until then …
>
> 2. Subject to above after we have sent the relevant information to you, we may ask for HMRC officer to carry out the review."

10. Having considered this note, I do not consider that this is an appeal to HMRC or a request for a review of the two PPLNs. The annotations make it clear that the accountant is opting to provide more information in relation to both PPLNs, given the reference to the two assessments. The accountant states that they will subsequently consider whether to request a review. They also ask for an extension of time to provide information although no specific deadline for that is included in the letter. This could also be interpreted as a request for an extension of time to request a review. It was not disputed that the accountant did not in fact

provide any further material, request a review, or correspond further with HMRC following this note.

11. I noted that HMRC's Objection to the late appeal included the statement that "On the 4 July 2017, HMRC received an appeal from [the accountants], this was against a PPLN". The appellant submitted that this meant that HMRC acknowledged that the correspondence dated 4 July 2017 was an appeal. HMRC submitted that it was not possible to appeal against a PPLN and that the note of 4 July 2017 could not be regarded as a request for a review.

12. I consider that the statement in the Objection was made in error in the preparation of the Objection as the parties agreed that subsequent correspondence did not assist further, such that the contemporaneous correspondence is not consistent with HMRC having agreed to treat the note of 4 July 2017 as an appeal.

13. As the parties agree that the subsequent correspondence did not include any clear reference to a review being undertaken by HMRC, I find that no review was requested by the appellant and, as such, the deadline for making an appeal in respect of these PPLNs remains 30 days after the date of the PPLN.

Length of the delay

14. It was not disputed that the delay in this case was serious and significant.

15. The PPLNs had been issued in June 2017; the appeal to this Tribunal was made on 19 November 2018, some sixteen months after the 30-day deadlines for making an appeal in respect of each of the PPLNs had expired.

The reason for the delay

Appellant's submissions and evidence

16. The appellant submitted that the delay arose because the appellant's representative had misled him. He had provided the assessments and the penalties to the accountant who had advised that he would resolve them. The appellant was struggling with his health at the time.

17. The appellant was reliant on his accountant due to mental health issues at the time, but over the next few months he and his son enquired of the accountant as to the progression of the resolution of the penalties and were told that the matter was in hand and not to worry. He believed that his accountant had been corresponding with HMRC to resolve any issues relating to the assessments and the penalties.

18. The appellant stated that he was not aware that there was a 30 day deadline for requesting a review or making an appeal. If he had been so aware, he would have sought to appeal the assessments and penalties as he considered that these were arbitrary and unrepresentative of the business.

19. It was not until he was advised on 6 July 2018 that the Insolvency Service were seeking to bring disqualification proceedings against him that the appellant realised something was wrong. The appellant then instructed solicitors in late July 2018 and Counsel in early September 2018. It took some time to gather all of the relevant documents for these instructions.

20. It was only once he was advised by the solicitor and Counsel that the appellant became aware of the importance of the PPLNs and the assessments in the decision of the Insolvency Service to seek disqualification proceedings against him.

21. The appellant was separately advised by his accountant in mid-October 2018 to agree a settlement with HMRC in order to prevent disqualification proceedings. The Insolvency

Service subsequently advised the appellant that settlement would not prevent such proceedings.

22. Given the conflicting advice from his accountants and his solicitor, the appellant then reviewed all of the information available to him in October 2018 and concluded that, although he had believed that the appellant had appealed the PPLNs (and the assessments), he had not in fact done so. The appellant then appealed to the Tribunal.

23. It was submitted that the appellant had a good reason for the delay. Although he had relied on his adviser, he had done what was expected of him in routinely checking on progress. This could therefore be distinguished from the case of *HMRC v Katib* [2019] UKUT 189 (TCC) ('*Katib*') as there was no reason to consider that the appellant's accountant was being negligent.

24. It was also submitted that HMRC could have verified the position by contacting the accountant as it was clear that no privilege was being claimed in respect of correspondence.

HMRC submissions

25. HMRC submitted that it was clear from the decision in *Katib* that the failings of an adviser should be attributed to the appellant.

26. Although the appellant had argued that he was misled by the accountant, he had not provided any copy correspondence to support that contention.

Balancing exercise

27. Having established that there was a serious and significant delay, and the reasons given for that delay, it is necessary to consider all of the circumstances of the matter.

28. I note that, as confirmed in *Martland* (§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" and that (§45) the "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."

Prejudice to the parties

29. I consider that 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 unusual in this case in respect of that. I should note that I do not agree with the appellant's contention that HMRC were aware that the matter would be appealed as a result of the note dated 4 July 2017 referred to above.

30. If permission is refused, the appellant will be deprived of the opportunity to advance his arguments against the penalties and will bear the financial consequences of doing so, but that is also always a consequence of such decisions and there is nothing unusual in this case in respect of that sufficient to outweigh the general rule that statutory time limits should be respected.

Is there a good reason for the delay?

31. The Upper Tribunal in *Katib* noted that

> 49. …in most cases, a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers …"

> 54 …when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant."

32. The Tribunal was provided only with cursory information about communications with the accountant: the appellant stated that he had enquired as to the progression but no details were given as to when or how regularly such enquiries were made. No copies of any correspondence were provided.

33. The appellant also makes reference to his state of health as a reason for relying on the adviser, but again provides no details as to his health conditions and why they meant that he had to rely on his adviser.

34. Finally, I note that the appellant also states that he was unaware that there was a deadline for appealing or requesting a review, although the PPLN sent to him clearly states the relevant deadlines. There was no indication that he had asked his adviser what steps should be taken. As such, it appears that he left everything to his adviser and that any enquiries made were cursory enquiries rather than specific requests for information on the steps being taken with regard to the PPLNs.

35. Case law such as *Katib* has established that reliance on an adviser may, in some circumstances, be a relevant consideration when considering all of the circumstances of the case. However, given the particular importance of respecting time limits, I do not consider that the appellant's reliance on his adviser in this case displaces the general rule noted in *Katib* that an appellant should bear the consequences of his adviser's failings.

Merits of the case

36. The appellant acknowledged that there were no particularly strong merits advanced for either side in respect of the substantive case.

Decision

37. Taking all of the circumstances into account, I do not consider that this is an appropriate case for permission to be given to bring a late appeal and so the appeal is dismissed.

Right to apply for permission to appeal

38. 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: 25 MARCH 2021