



[2022] UKFTT 00078 (TC)

TC 08409/V

CAPITAL GAINS TAX – permission to appeal out of time – Martland applied

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2021/01615

BETWEEN

SAMIRAH PATEL

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE MARILYN MCKEEVER

The hearing took place on 18 February 2022. The form of the hearing was V (video). All parties, including Representatives for the Appellant and HMRC attended remotely. The Appellant did not attend the hearing. The hearing was held on the Tribunal’s VHS platform. A face to face hearing was not held because of the ongoing pandemic and it was considered in the interests of justice that the hearing be held remotely. The documents to which I was referred are those contained in a combined Hearing and Authorities bundle of 185 pages.

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 Mohamed Vankad, accountant, for the Appellant

Ms Maria Spalding, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. The substantive issue in this case is the Appellant's claim for Principal Private Residence (PPR) relief in relation to a capital gain realised on the sale of a property in the 2016-17 tax year. HMRC raised a "discovery assessment" in relation to £49,511.48 capital gains tax under section 29 Taxes Management Act 1970 (TMA) on 7 May 2020. The Appellant seeks permission to appeal out of time against this assessment and HMRC object to the application.
2. The Appellant did not attend the hearing, but Mr Vankad, who had acted for the Appellant throughout, was able to clarify matters raised in the Notice of Appeal, at the hearing. Mr Vankad's explanations are included in my findings of fact.

THE FACTS

3. Not all of the correspondence mentioned below was contained in the Hearing Bundle and much of the chronology is derived from HMRC's Notice of Objection dated 5 August 2021. There was no suggestion that any of this was incorrect and I find as a fact that the course of correspondence proceeded as set out below.
4. On 28 February 2019 HMRC opened an enquiry on the basis of information that the Appellant may have realised gains on, and received rent from, a property in Waltham Forest which had not been declared on her tax return.
5. On 5 June 2019, the Appellant's representative Mr Vankad of Ayaz & Co, claimed PPR relief on the Appellant's behalf. HMRC issued a "view of the matter" letter on 4 December 2019 which concluded that the acquisition and sale of the property was property development and PPR relief was not due. This was followed by a closure notice on 20 January 2020 refusing the relief and stating that £49,511.48 capital gains tax was due.
6. Mr Vankad appealed the closure notice on 2 March 2020 and requested a statutory review. HMRC's review conclusion letter of 17 April 2020 cancelled the assessment on the basis that it was procedurally incorrect. The closure notice purported to be a closure notice issued under section 28A (1B) and (2) TMA of an enquiry opened under section 9A TMA when the assessment should have been made under the section 29 TMA "discovery assessment" provisions. The 17 April letter made it clear that that decision did not preclude HMRC from considering whether further decisions should be issued.
7. On 7 May 2020, HMRC issued a new notice of assessment in the same sum as before, but now, correctly, under section 29 TMA.
8. Mr Vankad appealed this decision and requested a statutory review on 13 May 2020.
9. The review conclusion letter of 14 July 2020 upheld the decision. This was addressed to the Appellant, but Mr Vankad confirmed that he had received a copy. The review conclusion letter set out the Appellant's rights of appeal and, in particular, it stated that the statutory period for making an appeal was 30 days from the date of the letter, but in light of Covid-19, HMRC would not object to late appeals made to the Tribunal where the appeal is made within three months of the end of the 30 day appeal period.
10. The Appellant's representative submitted an appeal to the Tribunal on 12 May 2021. The time limit for the appeal (including the concessionary three month extension) expired on 13 November 2021. The Appellant's appeal is, accordingly, 183 late, even allowing for the extended concessionary time limit.
11. Mr Vankad was the sole director of a small firm of accountants. Apart from himself, there were two other staff members. In the light of the Covid-19 pandemic and lockdown Mr Vankad

placed himself and his staff on furlough for a period starting in the first week of April 2020 and ending towards the end of December 2020 when vaccinations began. Because of the Furlough conditions, he said that he and his staff were not allowed to work.

12. The firm told all clients, of whom there were more than 100, in April 2020 that the members of the firm would not be working and the office would be shut. This was done by WhatsApp or text message rather than letter or email. Whilst Mr Vankad could not recall whether Ms Patel had responded, he believed that she would have been informed of the situation along with all the other clients.

13. Neither Mr Vankad nor his staff worked at home during the period when the office was closed. They had not done it before and were not prepared for remote working. In any event, as they were furloughed Mr Vankad said they were not permitted to work. Mr Vankad also said that working from home would have been difficult for him because of his personal circumstances and that he was looking after three young children as a single parent. Nor could he have delegated the matter to his staff (even if they had been working) as he was the only person in the firm with experience of enquiry and Tribunal work.

14. He and the staff went to the office occasionally to take the post from the post box and open it, and Mr Vankad would check that the premises were secure from time to time. He confirmed that the post had been opened and he had seen the review conclusion letter (although he could not recall when), but he could not deal with correspondence for Ms Patel or any other client.

15. Once lockdown ended, that is, when the firm returned to the office in December 2020, there was an enormous backlog of correspondence as none of it had been dealt with for eight or nine months and it took them a long time to work through it all. Indeed, they were still catching up. This was the reason why the firm had failed to comply with the timescale imposed by the Tribunal for submitting listing information. It was also owing to the backlog of work and correspondence and the time it took to catch up following the return to the office that he was unable to submit the Notice of Appeal on the Appellant's behalf until 12 May 2021, well after the extended time limit.

THE LAW

16. The law is not in dispute. As HMRC have objected to a late appeal, the Appellant may not proceed unless this Tribunal gives permission for the appeal to be heard out of time under section 49G TMA.

17. The approach to an application to appeal to the Tribunal out of time is contained in case law and I consider the relevant cases in the discussion below.

DISCUSSION

18. The Upper Tribunal has recently considered the approach to granting permission to bring late appeals in the case of *William Martland v The Commissioners for HMRC* [2018] UKUT 0178 (TCC) ("*Martland*").

19. The Upper Tribunal stated, at paragraph 29 that:

“...the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission.”

20. The Upper Tribunal went on to confirm the three-stage test as set out in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 at paragraph 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.”

21. I will consider first the length of the delay.

22. In the Upper Tribunal case of *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 (TCC) (“*Romasave*”), the Tribunal stated, at paragraph 96 that:

“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.”

23. In the present case, HMRC had extended the 30 day time limit on a concessionary basis, to recognise the difficulties caused by the pandemic. The Appellant had 120 days to submit an appeal without HMRC raising an objection to a late appeal. The Notice of Appeal was not submitted until 183 after the extended time limit.

24. This delay is clearly serious and significant.

25. I now turn to the reason for the delay.

26. The reason put forward by Mr Vankad, as Ms Patel’s agent, was essentially that owing to the pandemic his office was shut down and neither he nor any of the staff did any client work between the beginning of April 2020 and the end of December 2020. Further delays were caused by the “catching up” necessary when they did return to the office.

27. Having decided to put the firm on furlough, Mr Vankad’s comments indicate that no attempt was made to work remotely or to work occasionally in the office. The firm’s incoming post was opened and Mr Vankad was aware of the review conclusion letter and the time limits and still took no action. I recognize that he had a difficult personal situation, but there was no attempt even to contact HMRC to explain the position, nor is it a difficult process to submit an appeal online, which Mr Vankad could have done on his visits to the office to check its security.

28. Although the letter was not in the bundle, HMRC’s Notice of Objection states that the second assessment, under the correct provision of the TMA, was dated 7 May 2020 and that Mr Vankad appealed the assessment to HMRC and requested a review on 13 May 2020. There was no suggestion this was incorrect and it indicates that Mr Vankad was doing some work in the relevant period.

29. Further, Mr Vankad says it took many months for them to catch up when they did return to the office so he was unable to submit the appeal until he did, in May 2021. I would have expected that, on returning to the office, the firm would have given immediate priority to those

matters where deadlines had already expired, yet it took them nearly five more months to deal with the appeal.

30. Turning to Ms Patel herself, she was not at the hearing, so we were unable to ask what she had done on receiving HMRC's letters. From the papers before me, Ms Patel does not seem to have done anything, but just left it to Mr Vankad. I do not know how experienced Ms Patel was in tax matters, but she was able to buy a property and renovate and sell it. If she had done this herself, it suggests that she had sufficient experience of financial matters to deal with her own tax affairs, and if she had had assistance with property matters, she could also have sought advice about tax. The review conclusion letter of 14 July 2020 was addressed to Ms Patel and even if she did not fully understand the technical arguments in it, it was clear that HMRC were seeking nearly £50,000 in tax and that there was an opportunity to appeal within a time limit. She had been notified that Mr Vankad's office was shut (although as noted, he had dealt with previous correspondence), but she could have sought advice from her parents (with whom she was living), Mr Vankad or another adviser. Once the office reopened, she could have pressed Mr Vankad to deal with her case. There is no evidence that she did.

31. In all the circumstances I conclude that there was no good reason for the delay which occurred.

32. Finally, I must conduct the balancing exercise referred to in *Martland*, taking account of "all the circumstances of the case".

33. In *Martland* at paragraphs 45 and 46, the Tribunal gives guidance on how the balancing exercise should be carried out:

"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. ... 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."

34. Ms Spalding emphasised the need for finality in dealing with a taxpayer's affairs and that after delays of the length in this case, HMRC were entitled to consider the matter closed.

35. In *Martland*, the Upper Tribunal said "the purpose of the time limit is to bring finality, and that is a matter of public interest, both from the point of view of the taxpayer in question and that of the wider body of taxpayers."

36. Ms Spalding submits that HMRC should be entitled to rely on the time limits set out in legislation for the purpose of allocating resource in administering the tax system and should not normally be required to defend appeals after an excessive gap between the expiration of the time limit and the appeal.

37. If the application is granted, HMRC would therefore be prejudiced as they are entitled to expect finality after this length of time and if the application is allowed they will have to divert resources to defend an appeal which they were entitled to consider closed, especially given the significant length of the delay.

38. HMRC further submit that other taxpayers will be prejudiced as the Respondents' and this Tribunal's resources, which would otherwise have been used in respect of those who have made appeals in accordance with statutory time limits, will be diverted to consider the Appellant's appeal.

39. On the other hand, if the application is not granted, Ms Patel will be prejudiced as she will not be able to pursue her claim for PPR relief and will have to pay the full amount of capital gains tax due.

40. Although I have not set out the background to the substantive case in this decision, HMRC did include an account of the circumstances and their reasons for rejecting the PPR relief claim and this was also dealt with in some detail in the review conclusion letter of 14 July 2020. As set out in *Martland*, it is not appropriate for me to carry out a detailed analysis of the substantive case, and I have not done so, but having considered the information available, it does not seem to me that the Appellant's case is such a strong one that it should override the particular importance of respecting time limits emphasized in *Martland*.

41. Having considered all the circumstances of the case and carried out the requisite balancing exercise, I have concluded that I should reject the application for permission to appeal out of time in this case.

DECISION

42. For the reasons set out above I have decided not to grant the Appellant permission to appeal late.

Accordingly, I dismiss the application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. 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.

**MARILYN MCKEEVER
TRIBUNAL JUDGE**

Release date: 22 FEBRUARY 2022