



Neutral Citation: [2022 UKFTT 00273 (TC)]

Case Number: TC08565

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal references: TC/2021/03080
TC/2021/03081

Income tax – penalty for failure to make returns – application for late appeal – Martland and Katib applied – appeals between one and four years late – whether good reason for delay – no - application denied

Heard on: 21 July 2022
Judgment date: 15 August 2022

Before

**TRIBUNAL JUDGE RACHEL GAUKE
CAROLINE SMALL**

Between

**LEILANI MITCHELL
MARK HEAD**

Appellants

and

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

Representation:

For the Appellant: Sheryl Macaulay of Douglas Home & Co Ltd, Chartered Accountants

For the Respondents: Maria Spalding, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an application by Ms Mitchell and Mr Head to bring late appeals against late filing penalties imposed under Schedule 55 to the Finance Act 2009 (“FA 2009”). The penalties relate to the tax years 2014-15, 2016-17 and 2018-19 and total £4,400.
2. Having heard and considered the evidence and arguments of both parties, we have concluded that permission to make late appeals should be refused, for the reasons we set out below.

THE FORM OF HEARING

3. The hearing was conducted by video link on the tribunal’s Video Hearing Service. The documents to which we were referred were a bundle containing 103 pages for Ms Mitchell, a bundle containing 63 pages for Mr Head, HMRC’s statements of reason, and a separate bundle of legislation and authorities. The appellants did not attend the hearing to give evidence.
4. 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.

THE PENALTIES UNDER APPEAL

5. The penalties under appeal for Ms Mitchell were as follows.

Tax year	Date imposed	Type of penalty	Amount of penalty
2014-15	17 February 2016	Late filing penalty	£100
2014-15	12 August 2016	Late filing daily penalties	£900
2014-15	12 August 2016	Six-month late filing penalty	£300
2014-15	21 February 2017	12-month late filing penalty	£300
2016-17	13 February 2018	Late filing penalty	£100
2016-17	31 July 2018	Late filing daily penalties	£900
2016-17	10 August 2018	Six-month late filing penalty	£300
2018-19	12 February 2020	Late filing penalty	£100
		Total	£3000

6. The penalties under appeal for Mr Head were as follows.

Tax year	Date imposed	Type of penalty	Amount of penalty
2016-17	13 February 2018	Late filing penalty	£100
2016-17	31 July 2018	Late filing daily penalties	£900
2016-17	10 August 2018	Six-month late filing penalty	£300
2018-19	12 February 2020	Late filing penalty	£100
		Total	£1400

BACKGROUND FACTS

7. The appellants run a business providing training to enable their clients to obtain counselling qualifications. Since 2003 they have lived together at an address in Crowborough.

8. The appellants relied on an agent to file their tax returns for the years that are relevant to this application (2014-15, 2016-17 and 2018-19). The agent was Mr Bray of Garvey Bray Associates.

9. Mr Bray was diagnosed with cancer in 2016 and died in February 2020. In the intervening years he continued to work but also spent time in hospital.

10. Both appellants' tax returns for 2017-18 were filed on time, as was Ms Mitchell's return for 2015-16.

11. The due date for the submission of Ms Mitchell's tax return for 2014-15 was 31 October 2015 if filed as a paper return, or 31 January 2016 for an online submission. HMRC received the electronic return on 10 March 2017, over a year late.

12. The due date for the submission of both appellants' tax returns for 2016-17 was 31 October 2017 if filed as a paper return, or 31 January 2018 if online. HMRC received both returns online on 31 January 2019, one year late.

13. The due date for the submission of both appellants' tax returns for 2018-19 was 31 October 2019 if filed as a paper return, or 31 January 2020 if online. HMRC received Ms Mitchell's return online on 22 April 2020, and Mr Head's a day later on 23 April 2020. These returns were nearly three months late.

FACTS RELATING TO THE PENALTIES AND THE APPEALS

14. We make the following findings of fact.

15. On 25 March 2016, Mr Bray wrote to the appellants enclosing draft tax returns for 2014-15 and explaining that they would have to pay late submission penalties.

16. On 10 March 2017 (the same day on which Ms Mitchell's 2014-15 return was submitted online), Mr Bray wrote to HMRC to appeal the penalty that had been imposed on Ms Mitchell on 21 February 2017. The appeal did not refer to a reasonable excuse but was on the grounds that Mr Bray had submitted a paper return for 2014-15 on 30 March 2016. The appeal letter enclosed a copy of a covering letter addressed to HMRC and dated 30 March 2016. The covering letter stated: 'On behalf of Ms Mitchell I enclose herewith her Tax Return 2015, in paper form, with apologies for the delay'.

17. Mr Bray's appeal letter of 10 March 2017 states that on 30 March 2016 he also posted to HMRC (but in a separate envelope and to a separate HMRC address) a cheque for £1500. HMRC's self-assessment statement for Ms Mitchell dated 8 March 2018 shows that HMRC received a payment of £1500 on 4 April 2016.

18. On 25 April 2017, HMRC wrote to Ms Mitchell at her home address in Crowborough in response to the appeal by Mr Bray. The letter states that HMRC had considered her appeal against the late filing penalties, 6-month late filing penalty, 12-month late filing penalty and daily penalties for 2014-15. HMRC stated "I don't agree that you have a reasonable excuse because the paper tax return was due by 31/10/2015 even if the original tax return had been received it was still late".

19. HMRC's letter of 25 April 2017 informed Ms Mitchell that she could ask HMRC for a review of her case, or continue her appeal by asking the FTT to decide the matter. The letter stated that Ms Mitchell had 30 days in which to notify her appeal to the FTT and directed her to a website where she could obtain more information and download the appeal form. We were shown no evidence that either Ms Mitchell or Mr Bray responded to this letter, and we conclude that they did not.

20. Following Mr Bray's death in February 2020, the practice of Garvey Bray Associates was acquired by a firm of chartered accountants, Warren Day, in March 2020.

21. On 23 February 2021, Warren Day wrote to HMRC to appeal Ms Mitchell's penalties incurred "5.4.17 to date", totalling £1400. These are the penalties for 2016-17 and 2018-19. The appeal was on "compassionate grounds" on account of Mr Bray's illness.

22. On 17 March 2021, HMRC sent two separate letters to Ms Mitchell in response to the appeal by Warren Day. We were not told why there were two letters. One described the appeal as relating to 2016-17, the other as relating to both 2016-17 and 2018-19. Both letters said that the appeals would not be considered because they were late, and that HMRC did not agree that Ms Mitchell had a reasonable excuse for the delay.

23. Also on 17 March 2021, Warren Day wrote to HMRC to appeal Mr Head's penalties incurred "5.4.17 to date", totalling £1400. These are the penalties for 2016-17 and 2018-19. The appeal was on "compassionate grounds" on account of Mr Bray's illness.

24. On 31 March 2021, Warren Day wrote to HMRC again, this time on behalf of Ms Mitchell, asking HMRC to reconsider their decision that the appeal was late. This letter contains some further details of Mr Bray's illness, and added that Warren Day had acquired Mr Bray's practice in March 2020 just as the covid pandemic struck, meaning that Warren Day were only now becoming aware of the issue of late filing notices for the former clients of Mr Bray.

25. On 20 May 2021, HMRC wrote to Mr Head in response to the appeal by Warren Day. This letter stated that HMRC would not consider the appeal because it had not received written authority for Warren Day to act for Mr Head. We were not shown evidence that either Warren Day or Mr Head responded to this letter, and we conclude that they did not.

26. On 22 July 2021, HMRC wrote to Ms Mitchell, again refusing to accept her appeals for 2016-17 and 2018-19 on the grounds that they were late.

27. Some time before 19 August 2021, Warren Day ceased to act for the appellants, and Douglas Home & Co became their new agents.

28. On 19 August 2021, Douglas Home & Co appealed to the First-tier Tribunal ("FTT") on behalf of both appellants. The appeals related to 2016-17 and 2018-19 (for both appellants) and 2014-15 (for Ms Mitchell only).

29. We were shown evidence from HMRC's computer systems that the following were sent to the appellants' home address in Crowborough:

(1) Penalty assessments for each of the penalties set out in the tables in paragraphs [5] and [6] above: this is a total of 12 penalty assessments dating from between February 2016 and February 2020.

(2) For Ms Mitchell, two penalty reminders in 2016 and another two penalty reminders in 2018.

(3) For Mr Head, two penalty reminders in 2018.

(4) A number of self-assessment statements showing outstanding late filing penalties.

(5) A number of requests for payment from HMRC's debt management and banking service. We were not provided with a detailed explanation of HMRC's computer records relating to these requests but by way of example, Ms Spalding, for HMRC, explained that three such letters were sent to Ms Mitchell in 2018 and another two in 2019.

30. Each of these communications contained details of how to contact HMRC. The penalty assessments referred to the possibility of making an appeal and directed the recipient to information on the process for making an appeal.

31. Ms Macaulay accepted that these communications had been received by the appellants at their home address. We find, on the balance of probabilities, that this was the case.

32. Ms Spalding contended, and Ms Macaulay conceded, that at no stage since the imposition of the first of the disputed penalties have the appellants contacted HMRC, by telephone or by letter.

APPLICABLE LAW

33. The legislation relevant to this application can be described, in a shortened form, as follows.

(1) The combined effect of sections 31 and 31A of the Taxes Management Act 1970 ("TMA 1970") and FA 2009, Sch 55, para 21 is that an appeal against a penalty must be made to HMRC within 30 days of the date of issue of the penalty assessment.

(2) HMRC have the power, under TMA 1970, s 49(2)(a), to agree to a late appeal. If HMRC do not agree, the FTT has the power, under TMA 1970, s 49(2)(b), to give permission for the late appeal.

(3) Once an appeal against late filing penalties has been made to HMRC, there is a separate process of notifying that appeal to the FTT.

(4) In a case in which notice of appeal has been given to HMRC, TMA 1970, s 49A(2)(b) provides that HMRC may notify the appellant of an offer to review the matter in question. If HMRC offers a review and the appellant does not accept the offer, the effect of TMA 1970, ss 49C and 49H is that the appellant has 30 days from the date of the letter offering the review in which to notify the appeal to the FTT. Once the 30 days have elapsed, the appellant may notify the appeal to the FTT only if the FTT gives permission under TMA 1970, s 49H(3).

34. By applying for permission to make a late appeal, the appellants are inviting us to exercise our discretion under TMA 1970, s 49(2)(b) to permit the appellants to make late

appeals to HMRC, and under TMA 1970, s 49H(3) to permit the appellants to notify those appeals later than the applicable time limit.

35. In *William Martland v HMRC* [2018] UKUT 178 (TCC) (“*Martland*”), the Upper Tribunal provided guidance to the FTT as to the approach to adopt when considering whether to admit a late appeal. The Upper Tribunal said 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.”

36. We have applied these principles when determining how to exercise our discretion.

DISCUSSION AND DECISION

37. We remind ourselves that the Upper Tribunal in *Martland* said that “the starting point is that permission [to appeal out of time] should not be granted unless the FTT is satisfied on balance that it should be”. It is for the appellants to convince us that permission should be granted.

38. This application concerns both a late notification of an appeal to the FTT (of the 2014-15 penalties) and late appeals to HMRC (of the 2016-17 and 2018-19 penalties). In considering the application for both categories of late appeal, we have applied the three-stage approach in *Martland* to the facts, taking into account the parties’ submissions.

The length of the delay

39. Ms Mitchell’s appeal to HMRC against the 2014-15 penalties was made on her behalf by Mr Bray on 10 March 2017. This was an in-time appeal against the 12-month penalty but would have been late in respect of the other 2014-15 penalties. HMRC’s response on 25 April 2017 was that HMRC had considered her appeal against the late filing penalties, 6-month late filing penalty, 12-month late filing penalty and daily penalties.

40. We find that the effect of this letter was that HMRC had treated Mr Bray’s letter as an appeal against all the 2014-15 penalties (although it was not clear that this was his intention), and that, in accordance with TMA 1970, s 49(2)(a), HMRC had agreed to notice of this appeal being given after the expiry of the relevant time limits.

41. HMRC's letter of 25 April 2017 includes an offer to review the matter in question. This means that under TMA 1970, ss 49C and 49H, Ms Mitchell had 30 days in which to accept the offer of a review, or notify her appeal to the FTT.
42. The appeal of the 2014-15 penalties was notified to the FTT on 19 August 2021, over four years late.
43. In *Romasave Property Services Ltd v HMRC* [2015] UKUT 254 (TCC) ("*Romasave*"), the Upper Tribunal found that in the context of an appeal right which must be exercised within 30 days, a delay of more than three months was serious and significant. Applying this guidance, a delay of over four years is clearly serious and significant.
44. The appellants' appeals against the penalties for 2016-17 and 2018-19 should, under TMA 1970, ss 31 and 31A, each have been made to HMRC within 30 days of the date of issue of the relevant penalty assessment. They were in fact notified to HMRC by Warren Day on 23 February 2021 (for Ms Mitchell) and 17 March 2021 (for Mr Head).
45. There is a question as to whether (putting aside questions of lateness) Mr Head made a valid appeal on 17 March 2021. HMRC rejected it on the grounds that Warren Day had not completed the appropriate authorisation. If this appeal were not valid, this would mean that Mr Head did not appeal his penalties until the appeal to the FTT on 19 August 2021.
46. However, it is not necessary for us to determine whether the appeal on 17 March 2021 was validly made because even if it was, his appeals against the 2016-17 penalties were more than two years late and his appeal against the 2018-19 penalty was over a year late.
47. Ms Mitchell's appeals against the 2016-17 penalties were also more than two years late, while her appeal against the 2018-19 penalty was over 11 months late.
48. Again applying the guidance in *Romasave*, in the context of an appeal right which must be exercised within 30 days, all these delays must be regarded as serious and significant.

Reasons for the delays

49. At this stage of our decision, the question we must answer is why the appellants, whether acting themselves or through an agent, failed to appeal on time.

Appellants' submissions on the reasons for the delays

50. The appellants' case, as presented by Ms Macaulay and supplemented by the correspondence in the bundles, was that the appellants had placed all their faith in Mr Bray, and had been let down. Mr Bray's own default was to some extent the result of his illness, although the appellants also contend that he actively misled them.
51. Ms Macaulay submitted that the appellants did not have the expertise to prepare their own tax returns and it was reasonable for them to employ an adviser to do so on their behalf, and to place all their trust in him. By employing someone who they thought to be an expert, they had done all they could to comply with their tax obligations.
52. Ms Macaulay also submitted that when the appellants received the communications from HMRC (detailed at paragraph [29] above) they queried these with Mr Bray, but they believed his reassurances that their tax affairs were in order and that the problem was with HMRC.
53. Ms Macaulay further submitted that Mr Bray's illness meant that he was unable to deal with business matters properly and everything fell behind. It was not until Mr Bray died that the late returns came to light. Once the position was known, the appellants' new agent

(Warren Day) made an appeal. The appellants have been doing all they can to put their tax affairs in order.

54. The appellants' grounds of appeal also refer to the fact that Warren Day took over their affairs in March 2020, which was just as the covid pandemic struck. This resulted in late appeals being made as working practices at the time were severely affected.

55. Ms Macaulay accepted that at no stage had the appellants attempted to contact HMRC directly. She said that they did not know that it was possible for them to do this.

Decision on the reasons for the delays

56. We remind ourselves that the relevant question is why the appellants, whether acting through an agent or not, failed to appeal in time. Mr Bray, and subsequently Warren Day, were the appellants' agents and we must treat their acts or omissions as the acts or omissions of the appellants themselves. Therefore, it is not sufficient for the appellants to assert that they relied on their agents. We must also consider whether they had good reasons for this reliance.

57. In considering the appellants' submissions on this issue, we are significantly hampered by a lack of evidence. The appellants did not attend the hearing to explain the reasons for the delays. Their case was presented to us by Ms Macaulay, who had only begun to represent the appellants in 2021, whereas the delays dated back to 2017.

58. As a result, we have little first-hand evidence on the reasons for the delays. We would have liked to hear directly from the appellants about the degree of their reliance on Mr Bray, the nature of Mr Bray's reassurances and his explanations as to why HMRC was at fault, and whether they had ever instructed him to appeal against the penalties.

59. In relation to the penalties for 2014-15, Ms Macaulay accepted that Ms Mitchell received the letter from HMRC dated 25 April 2017. We would have liked to hear from Ms Mitchell what, if any, action she took on receipt of this letter: whether she attempted to access the website referred to by HMRC, whether she raised the matter with Mr Bray, and if so, what he told her. Unfortunately, we had no evidence on these questions.

60. Even if we accept the assertion that Ms Mitchell left everything up to Mr Bray and was assured by him that she did not need to take any action, we do not consider that it was reasonable for her to believe advice that flatly contradicted HMRC's letter of 25 April 2017. It was open to Ms Mitchell to provide us with evidence as to why this was a reasonable belief, but she has not done so.

61. In relation to the penalties for 2016-17, it is also relevant for us to take into account the penalty assessments, penalty reminders, self-assessment statements and requests for payment sent by HMRC to the appellants and detailed at paragraph [29] above. These numerous communications invited the appellants to contact HMRC, and alerted them that they could appeal the penalties. It was open to the appellants to provide us with evidence as to why it was, despite these communications, reasonable for them to believe Mr Bray's reassurances that he was discharging their tax compliance obligations properly and that they did not need to take any action. However, the appellants have not provided us with any first-hand evidence on this question.

62. This was not a case in which the appellants were relying on their agent to provide them with technical advice. They were relying on him to submit their tax returns, and they had copious evidence that he had not done so. Upon being notified that they were being charged with penalties that they did not believe were due, the reasonable course of action for the

appellants was to challenge those penalties, either directly or through their agent. They have not convinced us that there was a good reason for their failure to do so.

63. The late filing penalties for 2018-19 were imposed in February 2020 (the month of Mr Bray's death) and the deadline for appealing them was in March 2020, as the covid pandemic began. These penalties were appealed in February 2021 (for Ms Mitchell) and March 2021 (for Mr Head, putting aside the question of lack of authorisation). We accept that Mr Bray's death and the covid pandemic would have hindered Warren Day's ability to make these appeals on time.

64. Nonetheless, these penalty assessments were sent to the appellants at their home address, and were in respect of tax returns which Ms Macaulay told us that the appellants believed had been filed in time. The appellants have not explained to us why they did not appeal these penalties themselves. Ms Macaulay asserted that they did not realise that they were able to do so, but even if we accept this assertion, we do not agree that it amounts to a good reason, given the information provided with the penalty assessments about how to make an appeal. The appellants could also have instructed Warren Day to appeal the penalties on their behalf, but we have no evidence as to whether they did so.

65. We also have little evidence about the effect of Mr Bray's illness on his working practices. We have heard that he had cancer and ultimately passed away, but have little detail on how he conducted his practice in the intervening four years.

66. The Upper Tribunal in *Katib v HMRC* [2019] UKUT 189 (TCC) ("*Katib*") said that in most cases, in an application to make a late appeal, the failings of a litigant's adviser are regarded as failings of the litigant, and that "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".

67. We have been provided with no evidence of the exchanges and communications between the appellants and Warren Day. The only evidence we have of exchanges and communications between the appellants and Mr Bray is his letter to them of 25 March 2016. This casts no light on the reasons for the delays because it pre-dates the first of the missed deadlines in this case (for Ms Mitchell to notify her appeal of the 2014-15 penalties to the FTT) by more than a year, and in any event the letter is unhelpful to the appellants' case as in it Mr Bray tells the appellants that they will be incurring late submission penalties.

68. By choosing to give no first-hand evidence on any of these issues, the appellants have not enabled us to conclude that they had a good reason for the serious and significant delays in making or notifying any of the relevant appeals.

All the circumstances

69. At this stage we must conduct a balancing exercise, assessing the merits of the reasons for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

Prejudice to HMRC

70. Ms Spalding contended that, if we were to allow the late appeals, HMRC would be prejudiced because they would have to divert resources to defend an appeal which they were entitled to consider closed, especially given the significant length of the delay.

71. Ms Spalding further submitted that, if the application were to be allowed, other taxpayers would be prejudiced as HMRC's and the FTT's resources, which would otherwise have been used in respect of those who have made appeals in accordance with statutory time limits, would be diverted to consider the appellants' appeal.

72. We do not accept that HMRC would have to divert resources to defend this appeal, for the simple reason that they have already done so. Having set out her case in respect of the late appeal, Ms Spalding proceeded to set out her case in relation to the substantive penalty appeal. Both parties presented their case on the basis that, if we were to grant permission for a late appeal, we would go on to decide the substantive penalty appeal on the basis of the submissions and evidence that were before us at the hearing.

73. Similarly, the hearing of the substantive issue has already taken place, meaning that if we decide to grant the application, the FTT would not need to expend resources in conducting a further hearing. Some additional FTT resource would be needed to decide the substantive appeal, but we do not consider that this would have much effect on other FTT users.

74. On this issue we have therefore concluded that there would be no prejudice to HMRC and little prejudice to other FTT users that would result directly from the granting of the application for a late appeal.

Prejudice to the appellants: the 2016-17 and 2018-19 returns

75. When considering the prejudice to the appellants, *Martland* tells us that the FTT can have regard to any obvious strength or weakness in the appellants' case. We should not carry out a detailed analysis of the underlying merits of the appeal but, unless the appeal is hopeless, we should consider, at least in outline, the arguments of both sides so that the appellants have the opportunity to persuade us that the merits are strongly in their favour.

76. The appellants' case on the substantive penalty appeals is very similar to their arguments as to why they should be granted permission to make a late appeal. Ms Macaulay said that the appellants had entrusted the filing of their tax returns to Mr Bray and did not know that they had not been filed on time. This, she submitted, amounted to a reasonable excuse for the purposes of FA 2009, Sch 55, para 23.

77. Ms Spalding contended that FA 2009, Sch 55, para 23 provides that where someone (here, the appellants) relies on another person (here, Mr Bray) to do anything, that is not a reasonable excuse unless the appellants took reasonable care to avoid the failure. In the absence of evidence to demonstrate that the appellants took reasonable steps to ensure that their agent actually filed the returns, Ms Spalding submitted that this does not amount a reasonable excuse.

78. We cannot see that the appellants have a strong case that they had a reasonable excuse for the late filing of their returns for 2016-17. If they had a genuine belief that Mr Bray had filed those returns on time, that belief ceased to be reasonably held when they each received three sets of penalties and the associated penalty reminder letters as a result of the late filing of those returns.

79. The appellants' argument is potentially a little stronger in respect of the late filing of their returns for 2018-19. In this case, the due date for submission was 31 January 2020, and the returns were submitted on 22 and 23 April 2020. The appellants could have believed that the returns were submitted on time, and taken action to remedy the failure once they received the first late filing penalty. Without any direct evidence from the appellants as to what happened, however, we cannot regard them as having a strong case on this issue.

80. The Upper Tribunal in *Katib* said that at this, third, stage of the evaluation required by *Martland*, the fact that the appellants have been misled by an adviser can be a relevant consideration. We have taken this factor into account, but find that it is significantly counteracted by the consideration that a reasonable person would not unquestioningly accept the assurances of an adviser in the face of repeated evidence, in the form of the many communications from HMRC, that the assurances were incorrect.

81. We have concluded that it is not obvious that the appellants have a strong case in respect of the penalties for the late filing of their 2016-17 and 2018-19 returns, and we should therefore accord this little weight in the balancing exercise.

Prejudice to the appellants: the 2014-15 return

82. As described above, on 10 March 2017 Mr Bray wrote to HMRC, saying that he had submitted Ms Mitchell's 2014-15 return on paper on 30 March 2016. The paper return was due on 31 October 2015, so if it had been submitted on 30 March 2016 it would have been five months late. In this event, the six-month and 12-month late filing penalties would have been wrongly imposed, without the need for any consideration of whether there was a reasonable excuse.

83. However, it is not possible for us to conclude whether the return was, indeed, posted on 30 March 2016. There was no proof of postage, and sadly it is no longer possible to ask Mr Bray for his version of events. Ms Mitchell did not attend the hearing to tell us whether she had any recollection of signing a return in March 2016, or of Mr Bray assuring her that the return had been posted. Ms Macaulay was not in a position to provide us with any more information in this regard.

84. There is some evidence that the paper return was posted on 30 March 2016. Mr Bray's letter of 10 March 2017 enclosed a copy of his covering letter, dated 30 March 2016 and bearing the same address as his letter of 10 March 2017. The letter of 10 March 2017 was clearly sent to a correct address for HMRC, because HMRC responded to it. Also, HMRC cashed the cheque that Mr Bray said he had sent (to a different HMRC address) on 30 March 2016.

85. However, this evidence is not conclusive, and there is evidence pointing the other way. Ms Spalding said that HMRC had no record that they had ever received the paper return. Their records show that Ms Mitchell's return for 2014-15 was received on 10 March 2017, when Mr Bray "re-submitted" it online.

86. Ms Spalding said that the lapse in time meant that it would no longer have been possible for her to access the records for that year. We observe that Ms Spalding's difficulties in providing us with further information in respect of the filing of this return are largely the result of the excessive delay in the bringing of this appeal, and underline the importance of complying with statutory time limits. Parliament gave Ms Mitchell 30 days in which to challenge HMRC's decision of 25 April 2017. She did not do so until more than four years later. *Martland* tells us to take account of the need for litigation to be conducted efficiently. If so much time has passed that evidence can no longer be retrieved, this is clearly not conducive to efficient litigation.

87. We also take into account that Ms Mitchell was assessed to late filing penalties in respect of the 2014-15 return on 12 August 2016, but took no action until the 12-month late filing penalty was assessed on 21 February 2017. If Ms Mitchell believed her return to have been filed on 30 March 2016, we would have expected her to take some action when she received late filing penalties a few months later.

88. We have therefore decided that Ms Mitchell's case in respect of the penalties relating to her 2014-15 return cannot be described as strong, and so should be given little weight in the balancing exercise.

Balancing the circumstances

89. Having identified the circumstances, they must be balanced. In conducting this exercise, we must give particular weight to the need to comply with statutory time limits.

90. The delays in this case were serious and significant, indeed excessive, and we have found that the appellants have not given good reasons for those delays. This weighs heavily against the appellants.

91. We have found that there would be no prejudice to HMRC and little prejudice to other FTT users if we were to grant permission for the late appeals. Against this, however, we must balance the excessive delays and the need for statutory time limits to be respected as a matter of principle.

92. We have found that the appellants' case was not strong, and therefore we should not give this much weight in the balancing exercise. We accept that if permission is not given, the appellants will be unable to challenge the appeals, but this is the inevitable result of the application being refused.

93. We have concluded that the balancing exercise decides the application in favour of HMRC. We therefore refuse the appellants permission to notify their appeals late.

Inconsistency

94. Ms Macaulay made submissions on the topic of the alleged inconsistent treatment of Ms Mitchell and Mr Head in respect of their returns for 2014-15. She said that it was unfair that Mr Head's penalties were reduced to nil, while Ms Mitchell's were not, given that both appellants were in the same position.

95. Ms Spalding could not tell us anything about the reason for this different treatment other than that the penalties would depend on each appellant's circumstances in a particular year. HMRC's statement of reason for Mr Head says that some of his penalties were cancelled as under the old legislation the penalties were capped at the amount of tax due.

96. We explained to Ms Macaulay at the hearing that the FTT's jurisdiction is limited and that we are not able to consider a general contention that HMRC's behaviour was unfair. If we had granted permission for the appeals to be made late, our jurisdiction in this instance would have been limited to considering whether the penalty assessments in front of us had been correctly imposed.

97. We therefore reject Ms Macaulay's submissions on this issue.

DISPOSITION

98. For the reasons given above, the appellants' application for permission to notify their appeals late is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

99. 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.

**RACHEL GAUKE
TRIBUNAL JUDGE**

Release date: 15 AUGUST 2022