Neutral Citation: [2023] UKFTT 26 (TC)

Case Number: TC08685

FIRST-TIER TRIBUNAL
TAX CHAMBER

George House, Edinburgh

Appeal reference: TC/2020/03085

LATE APPEAL – Martland considered – length of delay is serious and significant – no good reason for delay – in all the circumstances, extension of time not justified – application refused

Heard on: 30 September 2022
Judgment date: 02 November 2022

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER: IAN MALCOLM

Between

MARISA LINCOLN
as LPR of MARTIN FALZON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Marisa Lincoln

For the Respondents: Bayo Randle of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appellant has made an application to make a late appeal and HMRC has formally objected to that. This hearing was listed purely to decide whether or not a late appeal could be made.

2. There is another appeal by Ms Lincoln which also relates to Inheritance Tax and Mr Falzon with reference TC/2021/01180 and dated 24 March 2021. It relates to a Review Conclusion letter issued by HMRC on 15 January 202. That appeal was more than two months late but HMRC have not objected to the late submission of that appeal on the basis that at that time HMRC had implemented a Covid related policy not to object if an appeal was lodged within three months of the end of the 30-day appeal period.

3. We had a Hearing Bundle extending to 558 pages and a Skeleton Argument from Mr Randle. In the course of the hearing Ms Lincoln lodged excerpts from other documents.

The background

4. The appellant, who is the Executrix of Mr Martin Falzon's estate and his legal personal representative ("LPR") had appealed against a Notice of Determination made pursuant to section 221 Inheritance Tax Act 1984 ("IHTA") that Mr Falzon was domiciled in the UK as at the date of his death on 30 April 2015, by virtue of the "deemed domicile" provision at section 267 IHTA.

5. The appellant received a statutory review conclusion letter on 2 August 2019 which confirmed that Notice of Determination. By virtue of section 223G (2) and (6) IHTA she had 30 days from that date to submit an appeal.

6. That letter inaccurately referenced section 49 of the Taxes Management Act 1970 ("TMA").

7. Allegedly, HMRC had issued a corrective letter to the appellant on 7 August 2019 in exactly the same terms with the only difference being that the statutory reference was to section 223 IHTA. We say allegedly because that letter was not in the Bundle and the appellant denied having received it. That is not material however. The point is that the appellant had been explicitly told that if she disagreed with the review conclusion she would have to appeal to the independent Tribunal within 30 days and if she did not then the matter would be determined in line with the HMRC officer's conclusion. The officer gave her the Tribunal website details and the telephone number for the Tribunal.

8. On 22 August 2019, the appellant wrote to HMRC at considerable length but stating explicitly that she did not wish to take the matter to the Tribunal as, in her view, it was "not a practicable step forward".

9. She continued to correspond with HMRC and on 20 July 2020 HMRC's complaints department wrote to her rejecting her complaints and pointing out that:

> "In his review conclusion letter, Mr Swinburne outlined what you needed to do if you disputed his decision, namely make an appeal to the tribunal. Without a valid appeal to the tribunal, the decision as set out in our Notice of Determination of 13 March 2019 is conclusive. Therefore Mr Booth has been quite correct not to discuss this matter further."

10. The appellant's Notice of Appeal was received by the Tribunal on 13 August 2020 and was therefore more than 11 months late.

The Law

11. If an appeal is not made within the specified time limit of 30 days then an appeal can only be made in terms of Section 223G IHTA if the Tribunal grants permission.

12. The proper approach to applications such as this one is set out by the Upper Tribunal in *Martland v HM Revenue & Customs*[1] ("Martland"). The Upper Tribunal reviewed the authorities and concluded as follows:

> "43.…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".
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> 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*:
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> (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.
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> (2) The reason (or reasons) why the default occurred should be established.
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> (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.
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> 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.
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> 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]:

[1] [2018] UKUT 178 (TCC)

> 'If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them.'

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that 'being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules'; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

13. Lastly, at all times we have had in mind Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") which reads:-

> "**2.—Overriding objective and parties' obligations to co-operate with the Tribunal**
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> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—
(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—
(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally."

Discussion

14. HMRC rely on *Martland* and rightly so since we are bound by it. We therefore consider the three tests enunciated therein.

The length of the delay

15. As we indicate at paragraph 10 above, the delay in this case was more than 11 months.

16. We were not referred to the case but the Upper Tribunal in *Romasave (Property Services) Limited v HMRC*[2] stated at paragraph 96:-

> "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."

17. Not only are we bound by that decision but we entirely agree. The delay in this case is more than three times that and is certainly both serious and significant.

What is the reason for the delay?

18. Shortly put, the appellant unilaterally decided that it was a waste of time to appeal to the Tribunal. She considered the Tribunal to be an extension of HMRC and she did not trust HMRC. She reiterated variations of that view both in the course of the hearing and in correspondence with the Tribunal administration before the hearing.

19. As she put it in her letter of 22 August 2019: "Attending a tribunal solely to adjudicate on the domicile matter would be seen as yet another travesty". She also argued that: "A tribunal hearing is likely to cause more deflection and is not anticipated to solve anything…"

20. The six page version of that letter which she produced to the Tribunal was described by her as being "abridged" so it may be that she had also advanced other arguments as to why she did not wish to appeal to the Tribunal. We do not know.

21. In her Notice of Appeal, she stated that:

> "…the invitation to take the matter to a tribunal became highly questionable especially since Mr Swinburne instructed me to make an appeal based on his letter".

[2] [2015] UKUT 254 (TCC)

He did not. He had simply stated, accurately, that if the review conclusion letter was not enclosed with her appeal the Tribunal might reject the appeal.

22. Repeatedly, we had to point out to the appellant that her complaints about HMRC, which had not been upheld by the complaints officer, could not be a reason for not appealing to the Tribunal. We also pointed out that the Tribunal has no jurisdiction in relation to complaints about HMRC's behaviour before an appeal is lodged with the Tribunal.

23. In her Notice of Appeal she had argued that one of the reasons for the late appeal was because she had "vast tracts of legal data" to consider and that had taken time. However, as Mr Randle pointed out, on 28 May 2019, she had written to HMRC saying the same thing and that was three months before the review conclusion letter was issued.

24. In his Skeleton Argument, Mr Randle had referenced seven letters from the Appellant in the Bundle dated between 2015 and 2019 putting forward legal arguments. The six page extract from her letter of 22 August 2019 quoted domestic legislation, the Double Taxation Treaty with Malta, the OECD Model Convention and case law ranging from the Special Commissioners to the Supreme Court.

25. The Notice of Appeal states that: "This is a case where the absolute, narrow letter of the law regarding domicile and foreign trust arrangements cannot be justly and honestly applied" and "This is a case where the absolute, narrow letter of the law cannot (S.267 IHTA84) be justly and honestly applied".

26. She had said in her letter of 22 August 2019 that: "It is a case where the *absolute* letter of the law cannot be justly and honestly applied". It can be seen that nothing had changed in the 11 months before she appealed to the Tribunal.

27. Lastly, she had argued that she had considered that legal costs would have been prohibitive. In fact, of course, she is unrepresented. As *Martland* points out at paragraph 47, that is not an argument for not complying with the rules and appealing to the Tribunal within the time limits.

What are the other circumstances of the case?

28. Mr Randle rightly pointed out there is no reasonable prospect of the appellant succeeding if the appeal were to be permitted to proceed. Section 267 IHTA deems that a taxpayer is domiciled in the UK in circumstances where they have been resident in the UK. The appellant does not deny that Mr Falzon was resident in the UK but argues that he was not resident by choice but only because of his health. In her words he was "trapped" in the UK because of his health. Sadly, for the appellant that is not an argument that has a reasonable, or indeed any, prospect of success since the law does not look at the reasons for residence but simply the fact of residence.

29. As can be seen, the appellant recognises that section 267 IHTA presents a problem for her but the issue is that the Tribunal cannot ignore the law and must apply it as it is enacted.

30. If the appeal were to be admitted HMRC would suffer prejudice since there would be cost and resource implications. HMRC would then have to apply to the Tribunal for strike out of the appeal in terms of Rule 8(3)(c) of the Rules on the basis that the appeal has no reasonable prospect of success. We agree.

31. Even if we are wrong in that, there would still be resource and cost implications arguing the merits of the appeal.

32. HMRC are entitled to expect finality in litigation. The appellant made it clear to HMRC in August 2019 that she had no intention of appealing to the Tribunal. That was her choice. To

change her mind some 11 months later with no good explanation as to why she had done so flaunts the explicit statutory time limit.

33. For the avoidance of doubt, complaints about HMRC are the antithesis of a good reason for not appealing to the Tribunal on time.

34. The case was not cited to us but the Upper Tribunal in *HMRC v BMW Shipping Agents Ltd* [2021]UKUT 91 (TCC) ("*BMW*") at paragraph 52 of their decision, said:

> "52. We will approach the third *Martland* stage by performing, as *Martland* requires, a balancing exercise. In that balancing exercise, the need for litigation to be conducted efficiently and at proportionate cost and for directions to be complied with must be given particular weight. However, it remains a balancing exercise which invites, among other considerations, a consideration of the nature of the reasons for the breach of direction and the results that would follow if the appeal is, or is not reinstated."

35. In this case there was no doubt as to the time limit for lodging an appeal with the Tribunal. The appellant simply did not see the point and did not want to do so until a very late stage. If we were to allow the late appeal in the circumstances of this appeal that would be contrary to the principle of ensuring that time limits are respected. Litigation should be conducted efficiently and at proportionate cost.

Decision

36. Having weighed every relevant factor in the balance, we have decided that the application should be refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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 SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 2 November 2022