



Neutral Citation: [2024] UKFTT 00906 (TC)

Case Number: TC09314

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[Location/By remote video hearing]

Appeal reference: TC/2023/02926

Application for late appeal. Application allowed.

Heard on: 30 August 2024
Judgment date: 1 October 2024

Before

TRIBUNAL JUDGE GETHING

Between

TJ STOUT

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Stout in person

For the Respondents: Ms Victoria Halfpenny litigator of HM Revenue and Customs'
Solicitor's Office

DECISION ON PRELIMINARY ISSUE

INTRODUCTION

1. Mr Stout seeks permission to appeal out of time against discovery assessments issued on 24 December 2019 under section 29 Taxes Management Act 1970 to recover High Income Child Benefit Charge (“HICBC”) in the sum of £8,223.00 for the years 2015/16, 2016/17 and 2017/18. The assessments to HICBC were accompanied by penalty assessments for failure to notify liability by filing self-assessment returns but those penalty assessments were later withdrawn by HMRC.
2. The Tribunal may give permission to appeal late under section 40(2)(b) Taxes Management Act 1970 if HMRC refuse to do so. The principles in *Martland v HMRC* [2018] UKUT 178 (TCC) (“*Martland*”) apply to the exercise of the Tribunal’s jurisdiction in this regard. HMRC object to the application for late appeal.
3. HMRC had sought to postpone the hearing of this application as no bundle had been prepared. Mr Stout wished to proceed as he had taken time off work to prepare and attend the hearing. HMRC did not renew their application to postpone at the hearing. Mr Stout had prepared a timeline and a written response to HMRC’s Notice of objection which he referred to during the hearing and sent it to the Tribunal and HMRC after the hearing.

THE FACTS

I make the following findings of fact:

4. Mr Stout has four children. They were born before the introduction of HICBC. He is a hardworking father but historically has not been a high earner and has periodically claimed child support and housing benefit to help him and his wife raise their family. Those benefits were tied to income and Mr Stout has had to monitor closely his income and notify changes to the relevant agency accordingly over the years. The same was not true of child benefit. Mr Stout’s eldest child was born in 2002 when child benefit was a universal benefit, not tied to income.
5. In 2018, when Mr Stout’s eldest child (a son) reached the age of 16 Mr Stout notified the Child Benefit Office and withdrew the claim for child benefit in respect of his son. His son decided to attend further education in October 2018 and Mr Stout sought to reinstate the child benefit in respect of his son. In applying for the reinstatement of child benefit, Mr Stout discovered that the rules had changed. Mr Stout said he became aware that a parent was no longer entitled to the child benefit in a year in which the parent or the parent’s partner earned at least £60,000. Mr Stout withdrew his claim for all child benefit with immediate effect.
6. Mr Stout has never had any income apart from his employment income. He has no savings. He has only ever paid tax through the Pay as You Earn system.
7. Mr Stout suffers from two conditions recognised under the Mental Health Act 2010, attention deficit hyperactivity disorder (“ADHD”) and generalized anxiety disorder (“GAD”) which impair cognitive functions, particularly decision making and managing complex, stressful situations. A key aspect of this is “analysis paralysis” where the overwhelming anxiety and stress from the situation rendered Mr Stout unable to take necessary actions, such as progressing an appeal. Mr Stout was able to perform everyday functions such as required for his work but is unable to perform complex tasks.
8. In September 2019, HMRC wrote a general letter concerning HICBC to Mr Stout. This was followed by the discovery assessments for £8,223.00 dated 24 December 2019.

9. On 12 February 2020, Mr Stout contacted HMRC by email and appealed the assessments and penalties.

10. HMRC replied with their view of the matter on 12 March 2020, under which they upheld the assessments to HICBC but cancelled the penalty assessments. That letter invited Mr Stout to ask for a formal review of the matter or refer the matter to the Tribunal.

11. Being told on 12 March 2020 that he had a liability of £8,223.00 caused Mr Stout's anxiety levels to surge. These feelings were compounded by feelings of isolation and despair when on 24 March 2020 the UK Government announced the first lock down in response to the Covid 19 global pandemic.

12. Mr Stout's mother's health deteriorated during the pandemic. She has Myalgic Encephalomyelitis and is bedridden. Concern for his mother's health exacerbated Mr Stout's feelings of anxiety and depression at that time.

13. On 20 May 2020 HMRC wrote to Mr Stout to advise him that as he had not appealed to the tribunal the appeal was now treated as settled by agreement under section 54 (1) TMA.

14. Mr Stout found the complexity of the issue and the process petrifying. He also found a lack of support at HMRC. He occasionally tried to make arrangements to pay the tax but was told he had to pay the full £8,223.00 in one year which was an impossibility for a man in his position with four children in school and higher education.

15. Mr Stout sought medical assistance throughout the spring and early summer of 2020 for his anxiety and depressive illness. His condition worsened from periodic feelings of anxiety to ongoing anxiety. He stopped taking the prescribed medication as it was not assisting. Mr Stout had provided HMRC with his medical records for the spring/summer 2020 as he was asked to do so. HMRC considered that as there were no medical records for later periods he no longer suffered from anxiety. Mr Stout explained that he had produced the records requested. He explained he still suffers from anxiety disorder and suffered throughout the period under review, which I understand and accept as a fact.

16. Mr Stout's anxiety increased when HMRC issued further assessments in respect of HICBC and penalties for failure to notify a liability for the years 2018-19 and 2019-20. AS Mr Stout had ceased all claims for child benefit these assessments were erroneous. Mr Stout found dealing with these assessments and debt collectors who visited his home and tried to impound his car, overwhelming. Dealing with these new assessments distracted Mr Stout from focussing on the assessments for 2015-16, 2016-17 and 2017-18 and the appeal. On 1 December 2021 Mr Stout contacted HMRC seeking advice on how to deal with the assessments for 2018-19 and 2019-20.

17. By April 2023 the assessments for each of 2018-19 and 2019-20 were vacated and penalties for failure to notify were reduced to zero and Mr Stout was able to focus again on the assessments for 2015-16, 2016-17 and 2017-18.

18. On 28 April 2023 HMRC received a letter from Mr Stout seeking to appeal the discovery assessments for 2015-16, 2016-17 and 2017-18. HMRC replied on 30 May 2023 explaining that HMRC had sent their review of the matter in 2020 and the only option was for Mr Stout to seek to lodge a late appeal with the Tribunal. Mr Stout made an appeal to the Tribunal on 8 August 2023 and asked for it to be considered late.

19. Mr Stout is a diligent citizen and has always complied with his obligations whenever he was able.

TAX JURISDICTION OF THE TRIBUNAL

“Section 49 Taxes Management Act 1970 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 the request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.”*

20. In *Martland* at [29] The Upper Tribunal indicated 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.

21. The Upper Tribunal set out the principles that this Tribunal must consider in determining an application for late appeal at [44],[45] and [46]:

“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:

(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. ...”*

MR STOUT'S POSITION

22. Mr Stout considers that the appeal should be allowed out of time.
23. Following the *Martland* principles the Tribunal must take into account all material circumstances in determining whether to allow an appeal out of time:
24. The length of the delay. Mr Stout accepts that the delay in the making of a written appeal to the Tribunal is significant and serious.
25. The reason for the delay in making a written appeal. Mr Stout was unable to make the appeal to the Tribunal before he did so as he had been suffering mental ill-health issues as described above, leading him to suffer analysis paralysis. His ability to progress the appeal improved only when the multiple and unnecessary assessments for 2018-19 and 2019- 20 were resolved in his favour. Mr Stout stated that he was a diligent citizen and has always complied with his obligations whenever he was able.
26. In relation to the balancing of the merits of the reasons for the delay, the prejudice caused to the parties of permitting and refusing a late appeal and all the circumstances, Mr Stout says that the balance points to permission being granted. In consequence, the application for permission to appeal out of time should be allowed.

HMRC'S POSITION.

27. HMRC state that following *Martland* the presumption should be that the statutory time limits should be adhered to unless the applicant can persuade the Tribunal that permission to appeal late should be granted. There is no need for the case to be exceptional. The Tribunal must however adopt a three-stage approach:
28. Establish the length of the delay. Even if the delay is short, if the taxpayer's appeal is unlikely to succeed other taxpayers will be prejudiced by HMRC diverting resources. In this case HMRC say the notices of appeal were 1,213 days late. Mr Stout did appeal to HMRC against the assessments in time, but after HMRC conducted a review of the matter Mr Stout failed to notify the Tribunal of his appeal. He appealed to the Tribunal on 8 August 2023. HMRC state that is more than 3 years and 3 months after the expiration of the statutory time limit to notify his appeal. HMRC conclude that the delay is serious and significant.
29. Establish the reasons for the delay. Mr Stout considers that there is a reasonable excuse and the principles of *Perrin v HMRC* [2018] UKUT 156 apply. HMRC recognise Mr Stout suffered mental ill-health in 2020 but do not accept that was a reasonable excuse for the delay given that his last medical appointment was June 2020 and he failed to take any action until April 2023. Further Mr Stout continued to work throughout the period. HMRC say that if Mr Stout was able to work he must have been able to make the appeal. Many taxpayers suffer ill-health but still comply with their tax obligations. Letters were sent to Mr Stout explaining what he needed to do to appeal in 2020 and there is no suggestion he did not receive them. HMRC conclude that there was no good reason for the delay.
30. Evaluate all of the circumstances of the case. HMRC cite from *Martland* at [45] and [46]. This involves a balancing exercise:

“which will assess the need to conduct all litigation 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.”

“In doing so the FTT can have regard to any obvious strengths or weaknesses of the applicant’s case: this goes to the question of prejudice- there is obviously a 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 that this does not descend into a detailed analysis of the underlying merits of the appeal.”

31. Taking the elements in turn HMRC say:

(1) The importance of finality is well established by the Tribunal and must be stressed following *HMRC v Kafeez Katib* [2019] UKUT (TC) 0189 (“*Katib*”), to bring finality, and that is a matter of public interest, both from the point of the taxpayer and the wider body of taxpayers. And that compliance ought to be expected unless there is good reason to the contrary. Also, the desirability of not reopening a matter that one party thought to be concluded after a lengthy interval must be considered following *Data Select Ltd v Revenue & Customs Commissioners* [2012] UKUT 187. HMRC say that they sent two letters, one on 12 March 2020 and the second on 20 May 2020 which explained what should happen next and HMRC should be entitled to consider the matter settled. To allow the appeal now would be inconsistent with both the principles of compliance with time limits and finality.

(2) The need for litigation to be conducted efficiently and at proportionate cost. HMRC say they will be prejudiced if the appeal is allowed as they would need to divert resources that would otherwise have been used in respect of those who have made appeals in time. The correspondence set out what needed to be done and by when. HMRC will bear the cost and burden of producing bundles. Defending late appeals is normally more resource intensive and creates issues in assembling evidence to meet the burden of proof on HMRC. Allowing the appeal in this case would be inconsistent with the principles of good administration of justice which require litigation to be conducted efficiently and at proportionate cost. In the context of the Tribunal rules HMRC say that the Tribunal may only exercise its discretion to extend the time for an appeal to ensure a just and proportionate result and give effect to the Tribunal’s overriding objective. In this context HMRC say that to allow the appeal in this case would be inconsistent with the principles of good administration of justice which require litigation to be conducted efficiently and at proportionate cost.

(3) All other circumstances-

(a) HMRC acknowledge if permission is denied Mr Stout cannot defend his position. This alone is not sufficient for the Tribunal to give permission to a appeal late.

(b) HMRC acknowledge that a detailed evaluation of the merits is not required but the Tribunal ought to allow the taxpayer the ability to explain its case so the Tribunal can form a general impression of the strength of the case to weigh in the balance. HMRC submit that Mr Stout’s case is very weak. He is appealing against assessments for HICBC issued under section 29 TMA and the assessments were made within the usual four year time limit permitted by section 34 TMA. He is being assessed for HICBC. The statutory requirements for liability to HICBC are met: Mr Stout’s spouse received child benefit, he earned more than £50,000 in the years in question, he earned more than his spouse in each of those years, and neither filed a self-assessment return in any of the years in question. Mr Stout is

liable to HICBC and ought to have given notice of liability within 6 months from the end of the year in question. HMRC say Mr Stout's case is very weak. Further there is no reasonable excuse or special circumstance provisions which can eliminate the liability to pay HICBC.

- (4) HMRC invite the Tribunal to deny the application.

DISCUSSION

32. The Tribunal must follow the three-stage process set out in the guidance of the Upper Tribunal in when considering whether to exercise the discretion to grant permission to make a late appeal late.

33. Stage One- identify the Delay

(1) The notices of assessment issued under section 29 TMA were dated 24 December 2019. The appeal period expired on 23 January 2020. Mr Stout appealed against the assessments to HMRC by email on 12 February 2020. Mr Stout read the text of the email to the Tribunal. The wording was simple. He appealed the recent decision of HMRC relating to overpaid child benefit. The decision he was referring to was the notice of assessment for HICBC issued under section 29 TMA.

(2) Upon receipt of Mr Stout's appeal HMRC undertook a review and wrote to Mr Stout on 12 March 2020 upholding the assessments and inviting Mr Stout to either request a formal review or refer the matter to the Tribunal.

(3) Mr Stout contacted HMRC on 28 April 2023 informing them of his wish to press on with the appeal and asking for assistance to get a tribunal hearing. On 30 May 2023 HMRC referred Mr Stout to the 2020 correspondence and the guidance on appeals. Mr Stout sent a notice of the appeal to the Tribunal on 8 August 2023.

(4) The delay in appealing to HMRC was 20 days.

(5) The last day to notify the appeal to the Tribunal was 11 April 2020. The appeal was made on 8 August 2023 which was 1,183 days late (not 1,213 days as calculated by HMRC) which is a serious and significant delay.

34. Stage Two- ascertain the reason for the delay

(1) The delay in appealing to HMRC against the assessments was short. It was less than 20 days but there was a further delay of 1,183 days in appealing to the Tribunal. Nevertheless, HMRC were aware of Mr Stout's dissatisfaction since 12 February 2020.

(2) Following the guidance of the UT in *Perrin*, in considering whether the excuse for the delay is reasonable the Tribunal must take into account the attributes of the taxpayer.

(3) Mr Stout is an honest witness, and I accept his evidence, in particular his evidence on his mental ill-health which was not challenged by HMRC.

(4) I accept that Mr Stout was a hardworking and diligent father who was on top of his responsibilities to notify the various government agencies involved in administering child credits and housing benefit. Immediately he discovered the child benefit rules had changed in October 2018 he withdrew all claims for child benefit. It is clear he had never heard of HICBC. And as a lifelong PAYE taxpayer he had no awareness of the need to file self-assessment returns.

(5) I accept Mr Stout's evidence of his mental health issues. ADHD and GAD which are recognised disabilities under the Mental Health Act 2010. He was asked and

provided information of his medical appointments in 2020 but he continued and continues still to suffer from these conditions. He informed the Tribunal of the cumulative impact of the confirmation on 12 March 2020 of the liability to pay £8,223.00 (as he had no savings and has four children at school/in further education), the impact of lockdown on 24 March 2020, his mother's ill-health, that he had analysis paralysis. He explained that he found the issues and procedures were terrifying and incomprehensible. He found a lack of help and assistance from HMRC staff and had no means to get professional assistance. He was able to perform everyday functions such as his work duties. But he was unable to deal with the appeal process. HMRC's letter of May 2020 said that as he had not appealed the matter was now settled.

(6) Mr Stout suffered further stress and anxiety when HMRC issued assessments in respect of child benefit for the years 2018-19 and 2019-20 and debt collection agents sought to seize his car.

(7) It was not until 28 April 2023, when the assessments concerning 2018-19 and 2019-20 were withdrawn by HMRC and the penalties were cancelled, that he had the psychological bandwidth to communicate with HMRC once more. HMRC replied by letter dated 30 May 2023 explaining he needed to appeal to the Tribunal. Mr Stout submitted his appeal to the Tribunal on 8 August 2023.

35. In all the circumstances I consider there was a reasonable excuse for the delay to notifying the appeal to the Tribunal. In particular:

(1) The delay between 11 April 2020 (the last day to notify the appeal to the Tribunal) and 28 April 2023 (when Mr Stout contacted HMRC again to progress the appeal).

(2) The delay of 33 days it took HMRC to reply and direct Mr Stout to the letters of 2020 and tribunal guidance.

(3) The delay of 70 days it took Mr Stout to review the guidance on appeals, and to understand he needed to seek permission to make a late appeal. It is a significant period but for a person with Mr Stout's mental health issues I find understandable and a reasonable excuse.

36. Stage Three - consider all the circumstances of the case including the prejudice to both parties and the merit of the reason for the delay.

37. The adherence to statutory time limits is of course important not just for HMRC but for the wider public for the efficient handling of the tax system and the efficient management of tax disputes. Allowing appeals late means HMRC need to reallocate resources from current cases to deal with cases HMRC had thought were closed. Officers must reacquaint themselves with the facts of the case of the late appeal which can be time consuming and burdensome for the officers concerned. Costs of appointing counsel may be incurred. HMRC are most certainly prejudiced by allowing a late appeal in most cases.

38. The prejudice to Mr Stout if his late appeal is not allowed, is that he is unable to present his case:

39. The discovery assessments issued to Mr Stout on 24 December 2019 were made under section 29 TMA. At that date, section 29 allowed HMRC to collect tax but only if a person had failed to make a return of taxable income to HMRC. Child benefit is not taxable income. HICBC is not taxable income, it is a charge to tax. The Court of Appeal confirmed in *HMRC v Jason Wilkes* [2022] EWCA Civ 1612 that the assessments made under section 29 to collect HICBC were invalid.

40. The legislation was modified retrospectively by Finance Act 2022 and validated otherwise invalid assessments under section 29 but not if an appeal had been made before 30 June 2021 on the ground that there had been no failure to make a return of taxable income. In the case of *Fera v HMRC* [2023] (TC) 08986, the FTT held that because the section 29(1) is so narrow, any appeal other than one that focuses on quantum only is, of necessity, an appeal on those grounds. The case of *Fera* is being appealed to the Upper tribunal and pro bono representation is being found for Mr Ferra. A direction has been issued by the FTT that all other cases on the issue have been stayed pending the outcome of the appeal.

41. If the decision in *Fera* is upheld, the section 29 assessments issued to Mr Stout may be invalid because he made an appeal to HMRC in February 2020. HMRC would be unable to collect the HICBC for the years 2015-16, 2016-17 and 2017-18.

42. There should be little prejudice to HMRC if this application is successful and Mr Stout is able to make an appeal. The facts are not disputed. The underlying issue is a legal issue: Did Mr Stout appeal to HMRC on 12 February 2020 and having regard to the terms of that appeal and section 29 TMA, can it be properly said that Mr Stout's appeal involves a challenge on the ground that there has been no failure to notify taxable income?

43. Without at this stage embarking on a detailed examination of the merits of Mr Stout's case, I find no obvious weaknesses in Mr Stout's case which ought to cause him to be deprived of putting that case forward.

44. I welcome that HMRC accept that the overriding objective of the Tribunal – to deal with cases fairly and justly, should be taken into account in reaching a decision to permit an appeal out of time. Although the delay in this case was very significant, having regard to all of the circumstances I consider it in the interests of justice that the late appeal be allowed.

DECISION

45. The permission to appeal late is granted.

46. I make the following directions:

(1) The appeal be stayed behind the case of *HMRC v James Fera*.

(2) Once the decision in *James Fera* is finally determined, if there is any dispute as to how the decision in *Fera* should be applied to this case, the appeal be heard by me.

TO APPLY FOR PERMISSION TO APPEAL

47. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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 Tribunal hereby directs that the 56 days within which a party may send or deliver an application for permission to appeal against a decision that disposes of a preliminary issue shall run from the date of the decision that disposes of all issues in the proceedings. 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.

**HEATHER GETHING
TRIBUNAL JUDGE**

Release date: 01st OCTOBER 2024