[2012] UKFTT 168 (TC)

TC01864

Appeal number:TC/2011/09855

PROCEDURE – Application for permission to extend the time for appealing – overriding objective – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER MACGREGOR **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public at Leeds on 30 January 2012

Mr Peter MacGregor appeared in person

Mrs N Newham of HM Revenue and Customs for the Respondents

DECISION

Background

1. The appellant seeks an extension of time in which to appeal against tax assessments and a closure notice amending certain self assessments ("the Assessments"). In each case the Assessments were notified to him on 21 July 2008. The tax assessments relate to tax years 2001-02 to 2003-04 and the closure notice relates to 2004-05. They show additional tax in respect of car and fuel benefits said to have been provided to the appellant as an employee of Movisys Limited. The appellant wishes to dispute the Assessments. The amount of tax in dispute is £4,184.

2. At the time of the Assessments in July 2008 section 31A Taxes Management Act 1970 ("TMA 1970") set a time limit for notifying an appeal to HMRC of 30 days from the date of the notice. There was provision for an appeal to be brought out of time in section 49 TMA 1970. By the time the appellant sought to bring his appeal section 49 had been amended by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009. Whilst the old provision is to similar effect, it is the section as amended which governs the present application. It provides as follows:

> *"49(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 request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.*
>
> *(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.*

(8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section)."

3. I shall set out below the detailed circumstances in which the appellant came to serve a notice of appeal against the Assessments. By way of background it is sufficient to say that the appellant sent an appeal to HMRC on 12 October 2011. In a letter dated 20 October 2011 Mrs Fannon on behalf of HMRC refused the late appeal. HMRC were not satisfied that the appellant had a reasonable excuse for not appealing within the 30 day time limit and noted that the appeal was some 38 months late. As a result the Appellant notified the appeal to the Tribunal pursuant to section 49D(2) TMA 1970. Rule 20 of The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Tribunal Rules") then provides as follows:

" *20(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.*

…

(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal—

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

4. Mrs Newman on behalf of HMRC accepted that the Tribunal has a general discretion as to whether or not to give permission for a late appeal and is not restricted to the limited grounds upon which HMRC can agree to a late appeal under section 49 TMA 1970.

The Tribunal's Discretion

5. There have been a number of cases recently before the First-tier Tribunal Tax Chamber which consider the nature of the tribunal's discretion to give permission for a late appeal. They have considered, in particular, the extent to which Rule 3.9 of the Civil Procedure Rules ("CPR") should be taken into account by the tribunal in dealing with such applications. They also consider the extent to which the merits of the underlying appeal are relevant to the decision. See for example *Pledger v HMRC [2010] UKFTT 342 (TC)* and *Former North Wiltshire District Council v HMRC* [2010] UKFTT 229 (TC). Further, the way in which a tribunal should exercise its discretion in such cases was considered by the Upper Tribunal (Administrative Appeal Chamber) in *Information Commissioner v PS [2011] UKUT 94 (AAC)*. Whilst

different Chambers of the First-tier Tribunal may have different rules and apply them in a different context to the Tax Chamber, the Upper Tribunal in that case included a helpful review of recent authorities from other jurisdictions. At the same time it endorsed the approach taken by the Tax Chamber in the two cases mentioned above.

6. In *Pledger v HMRC* Judge Poole declined to import any checklist of factors relevant to the exercise of its discretion in these circumstances. At paragraph 51 he said:

> "*In the light of the above, the Tribunal has adopted the approach that its discretion in permitting any part of the present appeal to proceed "out of time" is to be applied purely in line with its obligation under rule 2(3) of the Procedure Rules to deal with cases "fairly and justly.*"

7. The Tribunal in *Former North Wiltshire District Council v HMRC* [2010] UKFTT 229 took a similar approach. Having accepted that he was not obliged to consider the CPR Judge Walters QC said:

> " *56. … the Rules (which govern our procedure) simply empower us to extend time in appropriate cases and we should exercise the discretion to do so in order to give effect to the overriding objective in rule 2(1) of the Rules to deal with cases fairly and justly. We note, and respectfully adopt so far as it relates to the absence of any equivalent provision to CPR 3.9(1) in the Rules, the reasoning of Black J in R (oao Howes) v Child Support Commissioners (see: [35] and [36] above).*
>
> *57. Exercising our discretion to give effect to the overriding objective may however, and often will in practice, involve consideration of some or all of the criteria (a) to (i) set out in CPR 3.9(1).*"

8. Judge Walters QC also addressed the question of the extent to which the merits of the appeal were relevant to the question of whether to extend time:

> " *60. In applying the overriding objective to deal with cases fairly and justly, we consider that we ought to take account of all factors relevant to the proportionate exercise of our discretion (proportionality being an aspect of fairness and justice) and such factors will include a consideration of the merits of the proposed appeal so far as they can conveniently (and proportionately) be ascertained.*
>
> *61. While we recognise that even where the merits of the proposed appeal are high, in the sense that we can safely conclude that the appeal would be likely (or even certain) to succeed, this cannot be a factor to "trump" all other factors which we must consider (R (oao Cook) v General Commissioners of Income Tax – see above [45]), nonetheless we note that in R (oao Howes) Black J herself held that the Commissioner had to take into account, in the necessary balancing process, "the weighty fact that this was an appeal that he himself thought might have merit" (ibid. [41]).*
>
> *62. There is some force in Mr. Singh's point that it is generally easier than it is for this Tribunal on an original appeal, for a court to weigh up the merits of an*

appeal where an application is being made to appeal from a judicial determination already made, because the court will have to hand the judgment of the lower court which is sought to be appealed.

63. However in this case we are entirely satisfied that, absent the difficulties caused by the late appeal, the Appellant's appeals against the decisions 14 December 2007 and 7 July 2008 are appeals which have sufficiently good prospects of success to make a refusal by this Tribunal to entertain them a real and practical loss or injury to the Appellant."

9. In many cases it will not be easy to ascertain the merits of an appeal beyond perhaps being satisfied either that there is or there isn't a reasonable prospect of success. In most cases, and in the absence of cogent arguments otherwise, it seems to me that the tribunal should approach an application for permission to extend time on the basis that the appeal does have a reasonable prospect of success and that the Appellant will suffer prejudice if time is not extended. The application to extend time will not usually be an appropriate occasion on which to conduct an investigation of the merits. Having said that, if the tribunal is satisfied that there is no reasonable prospect of success it is difficult to see why the tribunal should give permission for a late appeal. Such an appeal could be struck out pursuant to rule 8(3)(c) of the Rules in any event.

10. That is the approach I have taken in the present case and neither party suggested I should do otherwise. I have assumed that if the appeal is allowed to proceed the appellant has at least a reasonable prospect of success. I set out below the circumstances which I have considered in the exercise of my discretion with a view to dealing with the application fairly and justly.

Chronology

11. The underlying facts were not in dispute and the following chronology is taken from the submissions of the parties and the documents provided to me at the hearing.

12. HMRC conducted an "employer compliance review" into the tax affairs of Movisys Limited. The appellant told me that he ran this company from home. The enquiry identified certain benefits in kind and payments paid by the company on behalf of the appellant and an assessment to Class 1A national insurance contributions was raised when the enquiry was finalised in 2006. The benefits comprised car and fuel benefits, household expenses paid by the company and entertaining expenses paid by the company. In the meantime Movisys entered some form of insolvency procedure in 2005, the appellant understands that it was wound up. The assessments were not appealed by Movisys but given that it was insolvent I do not consider that to be particularly significant for present purposes.

13. Details of the enquiry were passed to Mrs Fannon, an officer of HMRC dealing with personal tax matters. On 17 November 2006 she opened an enquiry into the appellant's tax return for 2003-04 and on 22 February 2007 provided computations showing additional tax due of £13,809.26. She invited the appellant to agree the

computations or to say why he disagreed and to provide supporting documentation. At that time and subsequently the appellant was represented by Pearson Associates ("Pearson"), a firm of chartered accountants.

14. Pearson entered into correspondence with Mrs Fannon. By letter dated 22 May 2007 they accepted that additional tax was due in relation to household expenses and entertaining expenses paid for by the company. They disputed that there was any car or fuel benefit provided. I understand that the amount of tax in relation to car and fuel benefit is £4,184. They continued:

> "*…whatever the position regarding the individual components of the computation the real issue is 'what can Mr McGregor afford' to pay as settlement … he has stated that if an amount of £7,000 can be agreed he will endeavour to ensure that the funds can be generated within the next 6 months.*"

15. Mrs Fannon replied on 26 June 2007 setting out her position in regard to the car and fuel benefit and asking for the documentary evidence relied on by the appellant in relation to the issue. In response to Pearson's proposal she stated as follows:

> "*I have noted your suggestion that your client would be able to offer £7,000 in settlement of my enquiries however until actual liabilities are established and agreed it is not possible to say whether the offer would be accepted.*"

16. By letter dated 21 August 2007 the appellant wrote to Mrs Fannon updating his address details and indicating that he had not received any correspondence in relation to the matter for the last 2 months. Mrs Fannon copied the appellant in with her letter to Pearson dated 26 June 2007. On 8 October 2007 she sent a further chasing letter to the appellant and Pearson. She explained the possibility of interest and penalties. She also re-stated her position in relation to agreeing the tax liabilities in the following terms:

> "*I understand from your tax advisers that the ability to pay any settlement may be an issue however it is important at this stage to establish and agree the amounts due and your co-operation in doing that plays a part in deciding the amount of the penalty to be charged. Once this has been done we can consider how the amounts are going to be paid.*"

17. On 19 October 2007 Mrs Fannon spoke with Alex Howarth, an accountant at Pearson. Mrs Fannon's note records:

> "*…we discussed the importance of agreeing additional tax due and I stated I could not consider interest and penalties and overall settlement figures until this had been done. Alex stated that Mr McGregor does not want to agree figures as he is not in a position to pay and feels by agreeing figures he will be pursued for amounts due… Alex is to discuss this further with Mr McGregor and try to get figures agreed.*"

18. On 2 November 2007 Pearson followed up the correspondence and the telephone conversation in a letter to Mrs Fannon in the following terms:

> "*Mr Macgregor still has concerns about the car and fuel benefit as stated in previous correspondence, and although he wants to bring the enquiry to an end as soon as possible feels that agreeing the assessment would weaken his position when negotiating an assessment. Mr Macgregor cannot afford to pay the assessed additional tax due which he has already stated when offering to pay £7,000 as settlement.*
>
> *In the circumstances we feel the only way forward here is to have a meeting to clarify the process on both sides so that hopefully we can arrive at a process that Mr MacGregor feels does not prejudice his position when negotiating a settlement.*""

19. Mrs Fannon replied on 12 December 2007:

> "*I appreciate your client's concerns about paying any additional liability however, as I have previously stated, his ability to pay does not change the process of establishing the omissions from his returns, the additional tax and interest due and any penalties due … Only then will we be in a position to negotiate a settlement. Please note that at this stage additional tax due and interest, which is a mandatory charge and cannot be waived in any way, would be agreed, leaving only the penalty to be negotiated.*"

20. Mrs Fannon went on to outline in the letter why she was seeking to assess car and fuel benefits and also set out in detail the evidence she required from the appellant if she was to give further consideration to the matter. She indicated that a meeting was not appropriate but would reconsider when the information was provided. She continued:

> "*I must again stress that your client's liability must be determined on fact and not his ability to pay any subsequent tax, interest or penalty and would ask you to take this into account when providing the information requested…*"

21. Following this letter matters seem to have stalled. None of the information requested by Mrs Fannon was provided and there was no response to the letter. On 30 May 2008 Mrs Fannon rang Pearson and in the absence of Mr Howarth spoke to Ann Bates, who I was told is Mr Howarth's assistant. Mrs Fannon was told that a letter was waiting to be sent to her. Pearson then faxed a letter to Mrs Fannon on the same day although the letter is dated 26 February 2008. It is not clear whether it had been sent in February but in any event Mrs Fannon does not appear to have received it until 30 May 2008. Nothing turns on when it was first sent, but the content of the letter is significant in terms of the present application:

> "*Thank you for your letter of 12 December 2007. Mr MacGregor has decided that, whilst he does not agree with the figures that you have assessed him on for the reasons highlighted in the earlier correspondence,*

he would like to bring this matter to a conclusion. In the interest of doing this he will accept the liability you have calculated on condition that this is taken into account when considering penalties."

22. Following receipt of that letter, Mrs Fannon issued the Assessments on 21 July 2008 and invited Mr MacGregor to provide details of his income and expenditure for the purpose of determining the appropriate penalty. The Assessments all explained the appellant's rights of appeal and the 30 day time limit which applied. No details of income and expenditure were provided and Mrs Fannon spoke to Ann Bates by telephone on 3 October 2008 in the absence of Mr Howarth. On 16 October 2008 a statement of assets and liabilities was provided but no details of income and expenditure. Mrs Fannon acknowledged this letter and requested the income and expenditure details by letter dated 24 November 2008. Again, nothing was received and Mrs Fannon followed this up with a telephone call to Mr Howarth on 18 February 2009. She was told that Mr MacGregor had been asked for the information but had not provided it. Eventually it was provided by letter dated 6 April 2009. By way of response Mrs Fannon wrote on 8 April 2009 to say that she had settled her enquiries on 25 February 2009. By this she intended to mean that she had decided not to charge a penalty although neither Mr MacGregor nor Pearson were told of this in terms until May 2010. That is unfortunate, but nothing turns upon it for this application, although as there is no penalty assessment it does mean that there is no appeal against any penalty.

23. Having told Pearson that her enquiries had been settled, Mrs Fannon indicated that she would pass their letter giving details of Mr MacGregor's income and expenditure to the Debt Management Office. It appears that HMRC Debt Management then took steps to recover the tax due, including the threat of bankruptcy proceedings. In response to that threat Pearson's wrote to the Debt Management Office on 19 April 2010 saying as follows:

"*Mr MacGregor did not agree with some of the points raised [during the enquiry] but went ahead with the closure of the enquiry as long as it did not prejudice his position when negotiating settlement. His stance was that whether the disagreed points were included or excluded from the subsequent assessment, he could not pay the assessed tax and had offered to pay £7,000 as settlement.*"

24. It is not clear how the debt management case continued although it appears that at some stage a bankruptcy petition was presented. On 20 August 2011 Mr MacGregor wrote a complaint to the Debt Management Office. Part of the complaint relates to the dealings with Mrs Fannon described above. The appellant stated in that letter as follows:

"*…as has been made clear in all correspondence over the past 5 years, your figures are in dispute.*

Despite this fact, my accountant and I were told unequivocally by Mrs Fannon (Washington Office) that there could only be a discussion once I agreed with HMRC figures …

I only agreed to the disputed figures on the basis that this was the only way the Harrogate Office [Debt Management] would discuss my case. It was a Catch 22 situation. They would only discuss anything provided I agreed with them. I was lead to believe that once I agreed they would listen to me and we could reach some agreement. But once I agreed there was no longer any discussion …

I now wish this for to go to a tribunal which is my right under HMRC procedures…"

25. This letter was then followed by the appeal sent to HMRC on 12 October 2011 and Mrs Fannon's letter dated 20 October 2011 refusing the late appeal as mentioned above.

Decision

26. The appellant seeks permission to make a late appeal. He accepts that the 30 day time limit to appeal the Assessments expired on 20 August 2008. I am prepared for the purposes of this application to treat his letter dated 20 August 2011 as his first request for an appeal to HMRC.

27. For the purposes of exercising my discretion I take into account the chronology which I have set out above in detail. I have not heard submissions on the merits and I accept that if the appeal is allowed to proceed then the appellant will at least have a reasonable prospect of success. I accept that he is of limited means and will therefore suffer prejudice if he is denied the opportunity to pursue this appeal. Whilst I have not seen any detailed evidence as to the appellant's financial position I accept that it may even cause his bankruptcy. I also take into account what the appellant told me about his personal circumstances when trying to negotiate a settlement of the debt. Namely that he was suffering personal difficulties whilst trying to look after elderly parents.

28. In addition to the prejudice of being denied the opportunity to pursue his appeal, the appellant also raises further matters in support of this application. It is his case that the reason he did not appeal the Assessments was because he had been led to believe that there was going to be a period of negotiation. He says that he has ended up in exactly the position he did not want to be in, namely he has prejudiced negotiations by agreeing the tax liability. In support of this application he produced a letter from Mr Howarth of Pearson dated 26 January 2012. Mr Howarth states that Mrs Fannon declined to have a meeting to discuss the disputed treatment of the car and fuel benefit. The Assessments were agreed simply to close the enquiry, subject to it not prejudicing the appellant in any settlement discussions.

29. I do not accept that this is a fair description of the circumstances in which the liability was agreed. Mrs Fannon made her position perfectly clear in the correspondence. She was not prepared to negotiate the tax liability. She wished to be

satisfied whether the tax was due or not as a matter of fact. To that end she had formed a view on the evidence available to her. If there was further evidence that the appellant could produce then she would take it into account. She set out in detail the nature of the evidence she wanted to see, at which stage she indicated she would reconsider whether a meeting was necessary. No such evidence was ever provided to Mrs Fannon and that is why there was no meeting. In my view Mrs Fannon was entitled to adopt that approach.

30. Mrs Fannon was also perfectly clear as to what could be the subject of settlement negotiations. It was the potential penalty and how the amounts due were going to be paid. She was also clear that the amount of tax and interest "*cannot be waived in any way*". In the light of Mrs Fannon's correspondence neither Pearson nor the appellant can have been in any doubt as to the basis upon which they were being invited to agree the tax liability. Indeed, the letter from Pearson dated 26 February 2008 demonstrates that they were well aware of what was being agreed when it states "*… he will accept the liability you have calculated on condition that this [ie his disagreement with the assessment] is taken into account when considering penalties*".

31. I find therefore that the appellant made a conscious and informed decision to accept the liability and not to appeal the Assessments. His did so following discussions with his accountants. There has been no lack of good faith on the part of Mrs Fannon or, on the material I have seen, any other officer or department within HMRC. It is only because the appellant has failed to come to any agreement with the Debt Management Office that he now wishes to re-open the basis on which he accepted the tax liability.

32. HMRC have a legitimate interest in the finality of assessments and there plainly comes a time when they are entitled to assume that an assessment is final. The appellant is exactly 3 years out of time for appealing which I consider to be an extremely significant delay. I have to ask myself whether there is any good reason for that period of delay. The reason for the delay is that the appellant accepted the Assessments in the hope that he would be able to negotiate the level of penalties and a compromise figure in satisfaction of the debt. In the event no penalties were imposed, but he has not been able to reach a compromise in relation to the debt. I do not consider that to be a good reason in the context of this application.

33. As indicated above, the discretion of the tribunal is at large and does not require me to decide the application solely on the basis of whether there was a "*reasonable excuse*" for the delay. Having said that, I am satisfied for the reasons given above that there was no reasonable excuse. Mrs Newman on behalf of HMRC suggested that I might accept that the appellant had a reasonable excuse for not lodging an appeal until 12 May 2010 when Mrs Fannon told Pearson that there would be no penalty charged. In my view however I do not think the appellant had a reasonable excuse even up to 12 May 2010.

34. I also take into account that there will be at least some prejudicial effect on the quality of the evidence. It appears to me that the issue between the parties will rely on both oral evidence from the appellant and from officers of HMRC, as well as

documentary evidence. The ability of HMRC to counter the appellant's case, including any documents and explanations in support which he failed to produce to Mrs Fannon, will be prejudiced by the passage of time.

35. There may be circumstances in which an appellant might be permitted to appeal out of time when he has agreed the underlying assessment. I am satisfied that the present circumstances do not fall into that category. For the reasons given above and taking into account all the circumstances the appellant's application for permission to extend the time for appealing is refused.

36. 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.

Jonathan Cannan

TRIBUNAL JUDGE
RELEASE DATE: 2 March 2012