TC03737

Appeal number: TC/2013/06345

INCOME TAX – application for extension of time limit – late appeal - lengthy delay - reliance on a third party - reasonable excuse-no-reasonable expedition – no - application refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DARREN CONQUER **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP
MRS CHARLOTTE BARBOUR, CA, CTA

Sitting in public at George House, 126 George Street, Edinburgh on Monday 7 April 2014

Kevin Clancy, for the Appellant

Chris Cowan, Officer of HMRC, for the Respondents

DECISION

The issue

1. The only issue considered by the Tribunal at this hearing, and therefore the subject matter of this decision, is the application for extension of the time limit for lodging the Notice of Appeal in this case; that is to say to allow the admission of a late appeal.

Preliminary matters

2. At the outset of the hearing Mr Clancy indicated that the facts in this case were not in dispute and that therefore he did not intend to lead Mr Conquer (the Appellant), who was present, as a witness. The Tribunal indicated that they did not consider that all the factual issues were beyond dispute and in that context referred to the letter from BDO LLP (the Appellant's current tax advisors) dated 16 July 2013 where they had intimated at paragraph (a) that the Appellant had "had periods of severe depression and illness" yet the medical records obtained by Mr Clancy's firm mentioned only a period of low mood in November 2012. Mrs Cowan confirmed that she too thought that a number of the assertions made by Mr Conquer, or those acting on his behalf, were certainly not agreed. After a recess, the Appellant returned and gave evidence.

Background

3. The Appellant filed both his 2007/08 and 2008/09 self-assessment tax returns on 22 April 2009. He indicated on both returns that he was in PAYE employment as an employee of Works Done Ltd; it transpired that he was in fact a director of that company. On 23 November 2009 HMRC wrote to the Appellant notifying their intention to enquire into those returns. That letter was copied to the Appellant's representative Brian Maloney of Brian Maloney & Co, Certified Accountants.

4. Mr Maloney has been the Appellant's representative for approximately 10 years. Although not a tax specialist, he is a certified accountant and he prepares the Appellant's tax returns and the accounts for the various companies with which the Appellant has been associated.

5. In the course of the inquiry into the Appellant's tax affairs the Appellant has also engaged firstly the services of Mr Cordiner of Abbey Tax Protection ("Abbey") then Mr Chadha of AKC Tax Services ("AKC") and most recently Mr Whyte of BDO LLP ("BDO").

6. The Appellant wrote to HMRC on 27 January 2010 indicating that due to ongoing health matters he wished to deal with queries by way of correspondence and on 22 February 2010 Mr Cordiner of Abbey Tax protection wrote to HMRC stating that they were acting in the matter. HMRC duly wrote to Mr Cordiner on 15 March 2010 requesting the relevant information which was not provided. The summary of the Appellant's health issues dated 26 June 2013, presumably produced for the sequestration proceedings, indicated that the Appellant had been discharged from the clinic in 2010 following his biceps tendon reconstruction at the end of 2009. Thereafter his recorded health problem was severe gastro oesophageal reflux symptoms and dysphagia for which he was treated in the form of Esomeprazole (which reduces acid production in the stomach). The next medical intervention was

on 28 March 2012 when he had an endoscopy and six days later on 3 April 2012 he had an emergency gall bladder removal.

7. Notwithstanding HMRC's use of formal powers, in the period between the opening of the inquiry and 8 December 2011 very little of the information requested was provided.

Progress of the inquiry

8. On 8 December 2011, HMRC wrote to the Appellant indicating that, having been in contact with Mr Cordiner, they had been advised that Abbey no longer acted for the Appellant. The letter pointed out that HMRC were disappointed to note that the Appellant had failed to cooperate with them and had failed to provide the items requested for the purpose of checking the two returns. The letter then set out at length the information that was required.

9. Undoubtedly part of that information related to bank statements (see paragraphs 63 and 64 below) but, in addition, HMRC had sought sight of all mortgage and re-mortgage application forms made by the Appellant in the four years ended 5 April 2009, sight of the company bank account statements (as opposed to the personal statements) and documentary evidence supporting payments made in respect of reimbursed expenses. In summary, HMRC had grave unresolved concerns as to (a) how the Appellant had managed to negotiate loans totalling £430,000 in 2007 when he had no declared income in his 2006 and 2007 tax returns, (b) how he could service the repayments of £2,572 per month on a declared income of £624 per month (before he received the proceeds of litigation in late 2008), and (c) how he could support his own and his family's life style.

10. The letter also pointed out that the 2010 self-assessment return had not been submitted and was therefore late and that the 2011 self-assessment return would be late if it was to be submitted on paper. That letter acknowledged that the Appellant had had health problems and requested a response before 9 January 2012. The Appellant responded on 20 December 2011 to which a response was issued by HMRC on 9 January 2012. The letter of 9 January 2012 from HMRC confirmed that the letter of 8 December 2011 had summarised the present position and that a particular concern was that the information and documentation sought in a letter to Abbey as long ago as 15 March 2010 had still not been provided.

11. Letters closing the enquiries into both the 2007/2008 and 2008/2009 returns were issued on 11 January 2012. Those closure notices indicated that further sums of £24,396.31 and £14,876.86 respectively were now due.

12. In a long telephone call on 17 January 2012, between HMRC and the Appellant, various issues were canvassed. In particular it was repeatedly pointed out to the Appellant that he was required to produce the relevant documentation. Arrangements were made to have a meeting where matters would be discussed in greater detail. On 1 February 2012, Mr Maloney wrote to HMRC confirming that the Appellant would provide additional information to support his contention that the tax being asked for was excessive and that that information would be supplied at the meeting scheduled for 15 February 2012. In fact, that meeting was cancelled by the Appellant on the basis that, for his birthday, he was going away with his wife for a few days. Another meeting was arranged for 28 February 2012 but that meeting was also cancelled by

the Appellant, as was a further meeting arranged for 7 March 2012. Mr Maloney asked in his letter of 1 February 2012 that it be treated as an appeal of the closure notices.

13. On 17 March 2012 the Appellant emailed HMRC seeking clarification of what was required and indicating that he was due to have a test in hospital on 28 March 2012 but would be free for a meeting in April 2012. On 24 April 2012 the Appellant instructed his secretary to email HMRC to say that he had had emergency surgery, was off work and would contact HMRC on his return to work to arrange a meeting. He did not.

14. On 18 May 2012, HMRC contacted Mr Maloney who said that Abbey had "walked away" and that the Appellant was dealing with matters himself. HMRC wrote to the Appellant but received no response. On 30 May 2012 HMRC telephoned the Appellant's office and his secretary confirmed that the Appellant was back to work on a limited basis. HMRC wrote to the Appellant and left messages on his mobile phone asking that he contact them to arrange a meeting. He did not.

15. On 26 June 2012 HMRC wrote to the Appellant at some length setting out the chronology and pointing out that over 29 months very little progress had been made and enquiring whether or not he wished to have the decision dated 8 December 2011 reviewed. The relevant time limits both in regard to review and appeal to the Tribunal were explicitly identified. That letter was copied to Mr Maloney. There was no response from anyone (see paragraph 18 below).

Grounds of appeal

16. By letter dated 4 April 2014 addressed to HMRC, Shepherd and Wedderburn, instructed by BDO, the Appellant's new agents, confirmed that the grounds of appeal are:-

(a) The letter of 26 June 2012 was never received, and

(b) The Appellant has suffered from ill-health over a considerable period of time, including the period between when the appeal ought to have been lodged and when the appeal was lodged.

17. That letter simply confirmed, in shorter form, what was contained in the Notice of Appeal prepared by BDO and dated 4 September 2013. The only other information in the Notice of Appeal was the assertion that with the assistance of BDO it would be possible to furnish the relevant information to HMRC. That has not happened.

Discussion

Letter of 26 June ("the letter")

18. We do not accept that the Appellant failed to receive the letter. Simply put his evidence in regard to that was unreliable, inconsistent and lacking in credibility.

(a) He was clear that he had not received the letter and did not recognise it.

(b) However, firstly, he conceded that Mr Maloney dealt with all of his affairs for him. The letter was copied to Mr Maloney.

(c) The Appellant confirmed that he appointed AKC on the advice of Mr Maloney because there was a problem, which needed urgent tax advice.

(d) AKC were appointed in July 2012 immediately after the issue of the letter.

(e) As indicated in paragraph 2 above, the factual matrix had not been challenged by, or for the Appellant. The record of telephone calls on 3 and 5 July 2012 are unequivocal in their terms. The Appellant had called HMRC, presumably in response to the letter. In the first call HMRC recorded that the Appellant had confirmed that he had appointed a new accountant. In the second, that the new accountant "had read my recent letter"…. and that "he could now resolve the problem". The Appellant blamed his previous accountant saying that he had not dealt with matters appropriately.

(f) We have no hesitation in finding that when the Appellant telephoned HMRC on those two dates, he knew about the contents of the letter.

(g) The letter was not returned in the post. Section 7 of the Interpretation Act 1978 means that since the contrary has not been proved, the letter is deemed to have been served.

(h) The Appellant has a history of failure to contact HMRC; the only previous evidenced contact, at his initiative, was when the closure notices were issued and the next when sequestration was imminent. It is inherently unlikely that he would have contacted HMRC out of the blue, or randomly for no reason. On the balance of probabilities, the only credible explanation is that he had received the letter.

(i) Latterly, in his oral evidence, he confirmed that whether or not he, personally, had received the letter, the issue of the letter had triggered the appointment of AKC since he had been made aware that he had a problem which required immediate action.

(j) In his oral evidence, the Appellant confirmed that he recognised the letter of 14 August 2012 from HMRC (see paragraph 37 below). The first line of that letter refers to the letter and it goes on to point out that the time limits have expired.

(k) Accordingly, his instructions to BDO and Shepperd and Wedderburn to the effect that the reason for the failure to lodge a Notice of Appeal timeously was a direct consequence of the failure to receive the letter can only be described as being disingenuous at best.

Ill Health

19. Certainly, the Appellant has endured significant medical problems. However, in that regard we do not accept all of his assertions as to the consequential impact. We made that clear in the course of the Hearing, giving him repeated opportunities to explain apparent discrepancies. The explanations proffered did not convince us.

20. His primary argument was that his ill health was such that he had been wholly unable to deal with the enquiry or lodge a timeous Notice of Appeal.

21. As we indicate at paragraph 2 above, at the outset of the Hearing, we indicated that the assertion in regard to severe depression did not appear to be supported by the medical reports. Notwithstanding the recess that point was not addressed. We had noted that he was not prescribed medication or treatment for depression. We intimated that in terms of Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 we are required to utilise any relevant specialist expertise, and it was made explicit that the Judge had considerable experience of disability.

22. It may well be the case that by November 2012 (long after the Notice of Appeal should have been lodged), he had low mood and was situationally depressed (which is not clinical depression) because of his financial issues but, the absence of any treatment (or indeed diagnosis of depression, as opposed to situational depression) would suggest that there would not be very marked functional impairment. Indeed, the GP confirmed only that as at 22 November 2012 "he was finding it difficult to work and his mood was down….He also had ongoing stresses about finances." That was months after the due date for the Notice of Appeal, which was conceded to be 26 July 2012.

23. Although he alleged orally, and it was averred in correspondence on his behalf, that he was on very strong painkillers, which affected his ability to function, according to the medical records, he was prescribed no such painkillers in June 2012 or indeed in the months prior to the removal of his gall bladder. That point was explicitly put to him. His response, which we found incredible, was that he had been wrong but he had not gone to the doctor and had been taking his mother's Tramadol with over the counter Paracetamol. The medical records show that subsequently he was consistently prescribed not only painkillers but also other medication. He has a long medical history and the various GP reports make it explicit that he sought advice on a variety of issues and was not always prescribed medication. It seems inherently unlikely that he would not have sought appropriate pain relief since he did so on many other occasions.

24. He averred in his oral evidence that in the period from December 2012 until June 2013 he had been unable to attend to his financial affairs because he was frequently in hospital for periods of two or three days. We put it to him that the GP records disclosed that he had been in hospital on three occasions being 26-27 April, 22-24 May and 30-31 May 2013. His answer was that he had also attended Accident and Emergency on occasion and he had had out-patient appointments.

25. The Appellant was asked about his health as at the date of the Hearing. He said that he had taken very strong painkillers and he had not eaten (because eating triggered unpredictable symptoms). He said that it was not a good day and he did not feel well. We pointed out that he was functioning very well, which he was. He dealt adeptly with questioning from his own lawyer and also cross examination let alone questions from the Tribunal. We make that finding in fact not least because it indicates his functional ability when on serious medication.

26. On 26 June 2013, almost a year after the Notice of Appeal required to be lodged, in a letter addressed to "To Whom It May Concern" (presumably in regard to the sequestration proceedings), his doctor stated:- "He says that his symptoms come on rapidly and unpredictably, but settle quickly." He also said that "…his symptoms have been very unpredictable and can last may be 2 or 3 days at a time". The Doctor stated that he could not issue an "On Soul and Conscience letter" stating that the

Appellant would be unfit on any particular day. Accordingly, we find that obviously, although the Appellant did not enjoy good health, the Appellant had significant periods when he was not substantially debilitated and he was therefore not majorly functionally impaired.

27. We wholly accept the opinion of his doctor when he states that the Appellant has "bouts of abdominal pain which require him to take fairly strong analgesia. He finds that his symptoms are unpredictable but disabling when he gets them." We find that as fact.

Capacity to manage his affairs

28. The picture painted in the letter from BDO, the letter from Shepherd and Wedderburn and the Notice of Appeal was of an Appellant who had been wholly unable to attend to his tax affairs for a period of more than 14 months, ie from receipt of the letter until the Notice of Appeal. We do not accept that. Why?

29. In his oral evidence the Appellant conceded that throughout the period, apart from when he was in hospital or signed off work particularly in January, February and June 2013 (and currently when he is in receipt of sick pay from a relative's company) he was working albeit for perhaps only a few hours per day. He states that he had not claimed benefits because he was either working as a kitchen designer or in receipt of sick pay.

30. As we indicate in paragraph 2 above, the factual matrix was not challenged and in the course of the hearing no reference was made to the note of telephone call dated 18 May 2012. We note that that recorded that "BM referred to DC's health issues, said that he did not have personal knowledge of how his health was but implied that possibly this is being used to avoid the situation". BM is of course Mr Maloney and DC the Appellant. This is another minor adminicle of evidence but it was not challenged.

31. After HMRC made the Appellant aware that there were outstanding tax returns on 8 December 2012, which letter was copied again to the Appellant and Mr Maloney (who apparently did the Tax Returns) on 26 June 2012, and also to AKC on 16 August 2012, the two outstanding tax returns were lodged online in late 2012. The Appellant was able to instruct AKC in July 2012 and Mr Maloney and AKC in the autumn. He confirmed that he had met with Mr Chadha more than once. However, he did not deal with the detail of the enquiry and in particular the Notice of Appeal. Why?

32. That question was explicitly posed and he said that he was focussing on his young family of three, his health and trying to work as a kitchen designer. It was not his first priority.

33. We have to look at the whole circumstances of this case. It is very clear that the Appellant is no naïve business novice. The Appellant has held directorships in a number of companies which have been either dissolved or liquidated. There are eight companies which have been dissolved and three companies which have been liquidated. He must have been aware of the relevance, and importance of deadlines.

34. Works Done Ltd is one of the three companies which was liquidated. In that regard we note that the tax deducted from the Appellant's income as a director of that company for the two years ended 5 April 2009 were not paid by the company to HMRC. The Appellant was the controlling director of that company and in the letter of 8 December 2011, HMRC notified their intention to seek payment of the underpaid tax, primary Class 1 NIC and interest from the Appellant. In that context it is also noted that the Appellant, in the full knowledge that he had not remitted the tax thereon in his capacity as controlling director, had nevertheless sought a repayment of that tax in his tax returns.

35. Clearly, the Appellant did suffer bouts of pain as we find as fact in paragraph 27 above, but we find as fact he was not so disabled that he was incapable of either working or attending to his own tax affairs.

Time Limits and the Appellant's knowledge thereof

36. The closure notices issued on 11 January 2012 made it explicit that the Appellant had 30 days from the date of those letters to appeal the decisions. That was done on his behalf by Mr Maloney. The letter issued on 26 June explicitly stated:

"Assuming you still disagree with our decision detailed in letters dated 8 December 2011 and 11 January 2012 you may now wish to consider having your case reviewed independently. You should let me know within 30 days of the date of this letter if you wish to have your case reviewed together with any representations you wish to make in support of your position. Alternatively you should notify your appeal to the Tribunal, again within 30 days of the date of this letter."

Neither the Appellant nor his representative took any action.

37. On 14 August 2012, HMRC wrote to both the Appellant and his representative pointing out that the 30 day period had elapsed and therefore matters should be considered as settled. As we indicate in paragraph 18 above the Appellant acknowledged that he had received that letter. Following a telephone conversation with Mr Chadha on 14 August 2012, and receipt of a signed mandate, on 16 August 2012, HMRC wrote to Mr Chadha enclosing copies of the letters of 26 June 2012 and 14 August 2012 and noted that he would be reverting to HMRC with any comments within two weeks. He did not.

38. On 8 November 2012 HMRC wrote to Mr Chadha indicating that they would be prepared to consider a late request for review if there was a reasonable excuse for the delay in not applying within the time limit. No response was received.

39. The next contact with HMRC on the Appellant's behalf was when BDO lodged a mandate on 13 June 2013. The Appellant could not recall when he had instructed BDO but said that Mr Maloney had recommended that he do so because of the problems with the closure notices. The Appellant states that BDO had received from him all the information that had been given to his previous advisers. At that point BDO were in communication with the Enforcement and Insolvency Division of HMRC who were enforcing the liabilities which arose as a result of the closure notices.

40. On 16 July 2013, BDO wrote formally to HMRC. We have dealt with paragraph (a) of that letter in paragraph 2 above. In paragraph (b) BDO allege that "by the later stages of HMRC's enquiries he was unrepresented". Certainly in December 2011 Abbey no longer acted for him but at all times he has been represented by Mr Maloney who is described as his tax adviser in his tax returns.

41. The assertion for the appellant that at that time the Appellant was unrepresented and not aware that an appeal and request for tax hold over required to be formally submitted, simply is not true. The lengthy note of the telephone conversation on 17 January 2012 (see paragraph 12 above), which has not been challenged, states amongst other matters that:-

"WE advised the procedure was that if DC did not agree with WE's closure notices then DC could submit an appeal within 30 days pointing out why DC disagreed with WE's decision. Matters would be reviewed and DC had the option of the case being heard by Tribunal and DC to provide evidence to support what he was saying. DC replied he understood the position but believed he nor HMRC did not really want or have to take case to Tribunal."

WE is HMRC and DC, the Appellant. In his oral evidence the Appellant confirmed that that telephone conversation did take place.

42. Therefore, we find that the correspondence has repeatedly identified the relevant time limits and those time limits were also orally intimated to the Appellant himself in January 2012 and that he knew about them.

The Law

43. The relevant Legislative provisions are not in dispute and can be found at item 2 in the List of Authorities annexed at Appendix 1.

44. The case law to which we were referred is also to be found in that Appendix together with a note of the other cases which we considered.

45. Lastly, that Appendix includes the relevant references to the Rules.

46. On any basis, the appeal of these two closure notices is very long overdue since it was only lodged some 14 months after the expiry of the due date for lodgement. Whilst the Tribunal is not bound by the decision of Sir Stephen Oliver in *Ogedegebe* we find that decision very persuasive and agree that whilst the Tribunal does have the power to extend the time for making an appeal, that should only be granted exceptionally and there must be at least an arguable case for making the appeal.

47. Similarly, we agree with paragraphs 41 and 42 of *Camps* where it is stated that:-

> "41 The Tribunal's starting point is that the normal statutory 30 day time limit on appeals serves an important purpose of producing finality and ensuring that HMRC can regard a taxpayer's affairs as closed unless an appeal has been lodged. Therefore permission to bring an appeal should not be granted lightly.
>
> 42 Against this background, the Tribunal must conduct a balancing exercise, considering *inter alia* the reason for the delay, and in particular whether it was

intentional; how long the delay lasted; the effect on either party if permission is allowed or refused, and the merits of the case."

48. The recent Upper Tribunal decision in *McCarthy & Stone* is concerned with procedural compliance in the context of litigation and makes it clear that the primary factors that require to be considered are the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, which of course, includes time limits.

49. The Tribunal does have discretion and, at all stages in consideration of this matter, we have had Rule 2 of the Rules very much in mind. We annex at Appendix 2 the full wording of Rule 2.

50. The Tribunal's discretion, in contrast to that of HMRC, is wide and extends beyond considering whether or not the Appellant had, or had not, a reasonable excuse for the late appeal. In that regard we considered all of the factors identified both in *Camps* and *Aberdeen City*, which is of course referred to in *Camps.* We looked at all of the circumstances obtaining in this matter from the outset of the enquiry.

Should the Application succeed?

51. Each application turns on its own particular circumstances and all relevant factors must be weighed in the balance.

Was there a reasonable excuse?

52. As we indicate above we did not find the Appellant to be a credible witness. We do not accept that he did not receive the letter. Since he acknowledges that (a) he received the subsequent letter of 14 August which refers not only to the letter but also to the time limits set out therein, and (b) by that time he had instructed AKC to act for him because he knew that there was a problem with the closure notices, we find that he knew that there were time limits within which he required to act or the closure notices would become final.

53. For the reasons set out in paragraphs 19-27 above, whilst we accept that the Appellant did have issues with ill-health, we do not accept that for a period of 14 months he was wholly unable to check whether or not a notice of appeal had been lodged. Therefore, looking at his grounds of appeal, we find that there was not a reasonable excuse for the extensive delay in this matter.

Reliance on a third party

54. We do accept that in certain circumstances, in the context of direct taxes, reliance on a third party can amount to a reasonable excuse and *Rowland v HMRC* [2006] STC (SCD) 536 is authority for that proposition. However, the crucial word, which was used in that case is "can". It is not that it *"will"* necessarily always be a reasonable excuse.

55. It is well established law that taxpayers have an obligation to act with reasonable prudence and diligence in dealing with their tax affairs. We find that this Appellant has neither acted with prudence nor diligence. He is, was and should have been very well aware of the time limits. He blandly stated that he relied on Mr Chadha, and before him, Abbey, to deal with HMRC. He says that he dispensed with their services

because they were not providing value for money. In the case of Abbey that may not be the case since (see paragraph 14 above), there is a suggestion from Mr Maloney that they resigned agency.

56. In the course of the hearing, the Appellant alleged that he had been let down by both Abbey and AKC. As far as Abbey are concerned, before the closure notices were issued, they were no longer acting, having apparently resigned agency. Accordingly, their actions or inactions, for whatever reason, can have no bearing on the submission of a late appeal.

57. The Appellant explained that he dispensed with the services of AKC at the end of 2012 because it appeared that nothing was happening and he was not getting value for money. He could not explain when he had first approached BDO and nor could he explain, when directly questioned, why he had not immediately appointed a new agent as soon as he dismissed AKC. His only explanation was that his tax affairs were not his priority.

58. Although the Appellant denied that he had only approached BDO because of the threat of sequestration, we do not accept that. BDO dealt with that before exploring the closure notices.

59. There is no explanation as to why the notice of appeal was only lodged in September 2013 when BDO had been appointed in June of that year. Certainly by no later than the issue of the letter of 16 July 2013 they, and the Appellant, were aware of the need to appeal HMRC's decisions. We do, however, note that on 6 August 2013 HMRC wrote to BDO stating that they would request debt management to withhold taking collection action for one month to enable the Appellant to apply for permission to make a late appeal. Collection of the debt would only be withheld if a notice of appeal was accepted. We assume therefore that it was only for that reason that the notice of appeal was lodged.

60. The Appellant appeared to have confidence in Mr Maloney, and BDO, who are still retained.

61. In any event at all times, Mr Maloney was aware of the time limits as he had received all correspondence, and he had lodged the original letter of appeal. He had repeatedly advised that specialist assistance be instructed for resolution of the enquiry but he dealt with routine matters such as the tax returns and accounts. Submission of a Notice of Appeal to the Tribunal is neither a specialist matter nor complicated. Unrepresented Appellants do so frequently. The time limits in this matter are straightforward and easily understood. They had been intimated repeatedly to the Appellant, quite apart from those acting on his behalf.

62. Failure of the agent(s), if there was such failure, to meet their obligations to the Appellant might entitle the Appellant to some recourse against the agent(s), but in the Tribunal's view reliance on a third party such as an accountant cannot relieve the Appellant of his own obligation to ensure that actions have or have not been taken. A prudent taxpayer, exercising due diligence and in the knowledge of simple time limits should have checked that appropriate action had been taken; we know that the Appellant met with AKC on Thursday 25 October 2012 and the question of documentary evidence was explored further. Clearly, the closure notices were discussed and it was only later that year that AKC ceased to act. The Tribunal does

not accept that the bare fact that responsibility had been entrusted by the Appellant to a third party of itself amounts to a reasonable excuse.

Have matters proceeded with reasonable expedition?

63. Even if it were to be accepted, which it is not, that there was a reasonable excuse until the point at which BDO were appointed, have matters proceeded with reasonable expedition since that juncture? The Appellant vehemently alleged that the delays were the fault of a combination of the Bank of Scotland (for failure to produce relevant information in the bank statements) and HMRC themselves. Whilst there may be issues with the quality of information available in the bank statements themselves, that is not the end of the matter. The bank statements had been available for a very long time. Mr Maloney confirmed to HMRC that the Appellant would provide further information at the aborted meetings, AKC confirmed that further information could be made available and lastly BDO, both in correspondence and in the Notice of Appeal, indicated that further information could, and would, be provided.

64. In the course of the hearing the Appellant repeatedly stated that there was nothing more to be provided since a fire had destroyed all his records and all that was available were the spread sheets, the bank statements and the other information which had already been given to HMRC. However, Mr Clancy helpfully told the Tribunal that in fact, he, having checked with BDO, could confirm that they had obtained information in regard to one account with Bank of Scotland and they were awaiting receipt of further information which they had requested. It is now eight months since BDO were instructed and matters appeared to have barely moved on.

The merits of the substantive appeal

65. The Appellant was adamant, repeatedly and vehemently, in his oral evidence, that no further information could, or would, be provided. We note that (a) much of the requested information relates to how he funded his borrowings and lifestyle and that should be within his knowledge, (b) part of the information apparently sought by BDO related to a financial settlement in November 2008, or later, following litigation, (c) all but a few months of the period covered by these appeals were before that time so it is unlikely that that was a significant source of relevant funding, and (d) the Appellant has failed even to produce any information or verification of the family loan requested in the letter of 8 December 2011. No new information has been produced for almost three years. On the balance of probabilities, primarily because of the Appellant's attitude to disclosure, we consider it fairly unlikely that significant progress would be made in any reasonable timescale.

66. We distinguish this case from *Elazoua* on a number of bases. These include:

(a) It certainly was not common ground that the assessments in question were likely to be excessive. On the face of it, the Appellant had been able to borrow substantial sums whilst apparently having little or no discernible income and there are substantial cash movements through the bank account for which no relevant verification has been produced.

(b) We consider it more likely than not that in this case the Appellant's first accountant had resigned agency and that the second had endeavoured to contact

HMRC when he had instructions. The problem would appear to be lack of instruction.

(c) It does not appear to us that there is any reasonable possibility of appropriate information being furnished to HMRC within any reasonable time scale.

(d) The Tribunal has an obligation to be fair and just to *both parties*. We have weighed every factor in the balance. We did not find the Appellant to be a credible witness. It seems clear to us that, whilst undoubtedly he has had issues with ill-health and that accounts for some of the delay in this matter and that is wholly acceptable, nevertheless there has been an almost complete lack of co-operation with HMRC and that was evidenced in his attitude at the Tribunal. He was insistent that it was the fault of HMRC that the matter had not been settled. We simply do not accept that. Each one of his four professional advisers have said that more information should be forthcoming and thus far it has not been provided. The Appellant's stance, notwithstanding what was said by Mr Clancy and had been written by BDO, was that there was no further information to be made available.

67. In summary we did consider the merits of the substantive appeal but consider that the prospects of success would be very limited if the Appellant declines to provide the information which has repeatedly been sought.

Public interest

68. We agree with the opinion of Lord Drummond Young in *Aberdeen City* where he stated "The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being re-opened". For all the reasons set out above we find that there is little prospect of matters being brought to a conclusion within any reasonable time scale. HMRC are entitled to finality in litigation and they would be considerably prejudiced if this late appeal were to be allowed. There would be further cost to the public purse.

Conclusion

69. Looking at the totality of the evidence available in this case, we find that on the balance of probability it is not in the interests of justice for permission for a late appeal to be given and therefore this application is refused.

70. 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, LLB, NP
TRIBUNAL JUDGE

RELEASE DATE: 18 June 2014

APPENDIX 1

List of Authorities

1. The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, Rules 2, 5 and 20 (the Rules).

2. Taxes Management Act 1970, sections 9A, 28A, 29, 31, 31A, 49, 49A, 49B, 49C, 49D, 49H, 50, 54, 118.

3. Section 7 Interpretation Act 1978.

4. *Her Majesty's Commissioners of Revenue and Customs*, Petitioners, 2005 SLT 1061

5. *Mr Fouad Elazoua v The Commissioners for Her Majesty's Revenue & Customs*, [2014] UKFTT 075 (TC). *("Elazoua")*

6. *Reg Camps t/a Reg Camps Transport v The Commissioners for Her Majesty's Revenue & Customs*, [2011] UKFTT 777 (TC). *("Camps")*

7. *Advocate General for Scotland v General Commissioners for Aberdeen City* (2006) STC 1218. *("Aberdeen City")*

8. *Ogedegbe v Commissioners for HMRC* 2009 UKFTT 364 (TC). *("Ogedegbe")*

9. *Mark Paterson Mandagie v HMRC* 2013 UKFTT 672 (TC). *("Mandagie")*

10. *HMRC v McCarthy & Stone (Developments) Ltd, Monarch Realisations No 1 plc* (In Administration) 2014 UKUT B1 (TCC). *("McCarthy & Stone")*

11. *R (on the application of Browallia Cal Ltd)v General Commissioners of Income tax* [2004] STC 2 ("*Browallia"*)

Appendix 2

Rule 2

Overriding objective and parties' obligations to co-operate with the Tribunal

(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.