[2017] UKFTT 498 (TC)

**TC05952**

**Appeal number: TC/2016/04695**

***INCOME TAX & NATIONAL INSURANCE CONTRIBUTIONS – VALUE ADDED TAX – application for permission to notify appeals late and to make appeals late –* Denton *considered – applications denied.***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

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| **STUART BROWNE T/A SOUND SOLUTIONS** | **Appellant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** | **Respondents** |

**TRIBUNAL: JUDGE RICHARD THOMAS**

**Sitting in public at City Exchange Leeds on 27 February 2017**

**The Appellant was not present nor represented**

**Mr Alan Hall, presenting officer, for the Respondents**

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DECISION

1. This was an application by Mr Stuart Browne ("the appellant") for permission to notify appeals to the Tribunal against assessments to income tax and Class 4 National Insurance Contributions ("NICs"), determinations made under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 ("PAYE Regulations") in respect of PAYE liabilities and decisions under s 8 Social Security (Transfer of Functions, etc) Act 1999 (Class 1 NICs), all of which were included in a Notice of Appeal given to the Tribunal on 1 September 2016.

2. This was also an application by the appellant for permission to make appeals to the Tribunal against assessments to Value Added Tax that were also included in the Notice of Appeal given to the Tribunal on 1 September 2016.

## Non-attendance

3. The appellant did not attend. The appellant had been in contact with the Tribunal to say that he was not attending because of illness. He had produced a letter from his GP to say he was not fit to work or to travel (by implication from the area around York where he lives to Leeds where the hearing was).

4. Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273 (L.1)) ("the FTT Rules") applies where the appellant does not attend. Before it can proceed the Tribunal must be satisfied that the appellant was notified of the hearing. In this case the tribunal is so satisfied.

5. Rule 33 further provides that if the appellant had been duly notified the hearing may proceed if it is in the interests of justice to proceed.

6. In my view as the appellant had set out in his Notice of Appeal the reasons why the appeals and the Notice of Appeal were made late, and as there was no indication in the communications from the appellant including the information from his GP when or indeed whether he would be fit to attend a hearing, the case could be dealt with by reference to those written grounds.

7. I therefore directed that the hearing should proceed.

## Evidence & facts

8. I had a bundle of correspondence between HMRC and the appellant and his accountants, a copy of the appeals and HMRC's statement of case.

9. I also had a witness statement from Mr Nigel Winckles an Inspector of Taxes who was investigating the appellant and his tax affairs under the Code of Practice 9 procedure, an investigation into civil (ie non-criminal) fraudulent evasion of tax.

10. From these documents and the witness statement I find the following facts relevant to the applications.

11. On 15 September 2014 Mr Winckles' predecessor had issued a "pre-decision letter" to the appellant. This summarised the conclusions that HMRC had reached in their investigation of the appellant's direct tax liabilities. The appellant was given 60 days to provide further information to displace HMRC's figures.

12. On 3 February 2015 Mr Winckles phoned the appellant's accountants and was told that no appeals would be submitted against HMRC decisions by them as the appellant had not contacted them and had not paid their fees.

13. On 20 February 2015 Mr Winckles had been sent by HMRC Debt Management & Banking unit ("DMB") copies of appeals for 2007-08 and 2008-09 against Regulation 80 (of the PAYE Regulations) determinations and corresponding NIC decisions.

14. Mr Winckles was also told by DMB that when the appellant was chased for outstanding income tax liabilities by them he said he had appealed. Mr Winckles had no trace of any such appeals.

15. On 27 February 2015 the appellant appealed against all decisions relating to his Regulation 80, NIC and income tax liabilities. Mr Winckles accepted these appeals although they were late.

16. On 30 April 2015 Mr Winckles sent a letter to the appellant with his "current view of the matter" and informed the appellant that he could ask for a review or notify his appeal, both within 30 days. The letter was sent to the appellant's home and business addresses.

17. On 19 July 2015 the appellant asked for an independent review of the HMRC direct tax decisions.

18. On 12 August 2015 Mr Winckles wrote to the appellant saying that although his request for an independent review was outside the statutory 30 day time limit following the issue of the formal decisions he was prepared to accept his late request for an independent review.

19. On 12 January 2016 the reviewing officer issued to the appellant the conclusion of her review of the direct tax decisions. The conclusion was to uphold the decisions and the letter notifying it informed the appellant that he could appeal to the Tribunal within 30 days of the date of the conclusion letter.

20. On 23 March 2016 HMRC (not the Tribunal) received a notice of appeal from the appellant. On 4 April 2016 Mr Winckles faxed to the appellant a reply saying that the appellant should contact H M Courts & Tribunal Service as a matter of urgency given that his "appeal" to HMRC was dated more than 30 days after the date of the conclusion letter. The same advice was repeated in letters sent on 5 April 2016.

21. On 20 May 2016 the appellant informed Mr Winckles that he was suing his accountants.

22. On 20 July 2016 Mr Winckles repeated the advice given in his fax and letters of 4 and 5 April.

23. On 3 August 2016 Mr Winckles sent a letter to the appellant setting out again the HMRC position in relation to his direct tax liabilities. In this he also referred to a VAT decision letter issued on 22 January 2015 and a conclusion letter following a review issued on 28 August 2015, to the effect that no appeal had been made against the review conclusion.

24. On 9 August 2016 Mr Winckles was telephoned by the appellant asking for a meeting to discuss the HMRC view. When Mr Winckles told him that there was no point and that he should contact the Tribunal, the appellant said that he would write "next week" to the tribunal.

25. The appellant also informed Mr Winckles that the reasons he had not appealed included being diagnosed with Parkinson's disease. He said that he was to leave for the airport in a couple of hours and he was travelling to Menorca, Ibiza and Sweden.

26. Mr Winckles received an email from a DMB colleague to say that the appellant had telephoned him on 22 August 2016 while he was at the airport going from one flight to another, and that he was making an appeal to the Tribunal. On 31 August he again telephoned the DMB colleague to confirm that the appeal had been submitted.

27. The Tribunal received the appeal on 1 September 2016.

## Discussion

28. I considered the case by reference to the three stages referred to at [24] in the Court of Appeal decision [2014] EWCA Civ 906 in *Denton v TH White Ltd* (and other cases heard with it) ("*Denton*"). I also had regard as part of that exercise to the well known five questions that Morgan J said should be used in a case of this sort in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) and the decision of Lord Drummond Young in *Advocate-General for Scotland v General Commissioners for the City of Aberdeen* [2006] STC 1218.

29. *Denton* stage 1 asks whether the delay was serious and significant. In my view it was serious and significant, the shortest delay being over 6 months (income tax and NIC) and the longest over a year (VAT). But although significant in terms of time, it was not serious enough that for example a hearing had to be postponed.

30. *Denton* stage 2 asks why the default occurred. The appellant's explanations are that he was unwell with quadruple heart by-pass and had been diagnosed with Parkinson's disease and that he was unable to get "any sense, rhyme or reason" from HMRC or his accountants or anywhere else.

31. I take judicial knowledge of the fact that when initially diagnosed Parkinson's disease is not usually such as to prevent a person seeing to their affairs. When HMRC were told of the diagnosis the appellant was dealing with HMRC and was about to go on a number of flights.

32. Nor is any information given as to when the by-pass operation took place or why it prevented the appellant making appeals. I further note that the papers before me showed that the appellant had on many occasions been informed by HMRC that he needed to make his appeal to the Tribunal and he, on many occasions, said that he was about to. At that time, in the period between the end of the review of his appeals and the lodging and notification of the appeals with the Tribunal, the appellant was clearly able to correspond with HMRC and talk to the officers dealing with his case. In my view the delay occurred simply because the appellant did not do what he had been advised to do or what he told HMRC he would do, and there were no health or other external circumstances preventing him from attending to his affairs, whether personally or through advisers.

33. At the third *Denton* stage I must consider all the circumstances of the case. This includes the prejudice to either party. The appellant could be severely prejudiced should I deny him permission as HMRC is seeking over £1 million from him which he asserts is not due. Of course I have no idea whether that figure is correct, or if excessive or understated which of those or by how much.

34. HMRC will be mildly prejudiced if I give permission. I say this because all the income tax and NICs has been released for collection, so giving permission may have the result that either the tax would need to be repaid or not pursued were the appellant to win on any matter at an appeal. HMRC would also have to devote resources to the appeal, though much of the work has been done.

35. The merits of an appeal should only weigh in the equation if they are all one way (see *Hysaj, R (on the Application of) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 at [46] to [48]). HMRC had previously sought to strike out the appellant's appeals under Rule 8(3)(c) of the FTT Rules (no reasonable prospect of success), but that application was not included in the matters set down for this hearing. But had it been I would not have acceded to it, for reasons I do not need to spell out, and so I do not think the merits or otherwise of the appeals can weigh with me.

36. Mr Hall was at pains to stress that this delay and the broken promises to appeal were symptomatic of the appellant's approach to his tax affairs, including that he had not filed an income tax return in 20 years. When dealing with relief from sanctions under the Civil Procedure Rules ("CPR") in the Courts, judges have mentioned that previous non-compliance with those rules may be taken into account at the third stage. And taking into account non-compliance with the FTT Rules is something that I may do in accordance with the overriding objective of the Tax Chamber found in Rule 2 of the FTT Rules, and in particular with the exhortation in Rule 2(4) to parties that they must co-operate with the Tribunal generally.

37. But what Mr Hall is referring to is not previous non-compliance with the Tribunal Rules, but with tax law. While that is not directly relevant to the particular delay here I think that I can take it into account in judging whether the appellant meant to keep his promises or was putting forward a convincing reason for delay. It

does also somewhat temper the prejudice that the appellant might suffer if I deny permission.

38. I must give especial weight to those factors and circumstances falling within CPR 3.9(1)(a) and (b) (efficient litigation at proportionate cost and enforcing compliance with rules).

39. In my view the only factor that is in the appellant's favour is the prejudice to him. But that is outweighed in my mind by the need to enforce compliance with rules whose purpose is to provide for finality in litigation. The delays here are too serious and significant and the explanations for the delay too weak to enable me to say that the prejudice to the appellant should outweigh all the other factors.

## Decision

40. I deny permission to notify the income tax and NIC appeals to the Tribunal.

41. I deny permission to make the VAT appeals to the Tribunal.

42. 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.

43. The appellant may also apply under Rule 38(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to set this decision aside on the grounds that neither the appellant nor any representative was present at the hearing. The application must be received by this Tribunal not later than 28 days after this decision is sent to that party. The appellant is also referred on this application to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)".

**RICHARD THOMAS**

**TRIBUNAL JUDGE**
**RELEASE DATE: 14 JUNE 2016**