[2017] UKFTT 600 (TC)

TC06042

Appeal number: TC/2016/04211

PROCEDURE – application for permission to give and notify late appeals – whether appeal late – requirement for HMRC to notify their view of the matter pursuant to section 49C(2) TMA 1970 – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHARON MYLER **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 10 April 2017 with further correspondence and written submissions from the Respondents on 21 June 2017 and from the Appellant on 18 July 2017.

Mr David Jones, tax consultant for the Appellant

Mr Philip Jones of HM Revenue & Customs for the Respondents

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DECISION

Background

1. This is an application by the Appellant for permission to give and notify late appeals to the tribunal. The Appellant is seeking to appeal two separate matters relating to tax years 2004-05 and 2005-06. The appeal in relation to 2004-05 concerns a discovery assessment to capital gains tax made on 27 July 2010 following the disposal of a property ("the Property Appeal"). The appeal in relation to 2005-06 concerns a closure notice dated 23 June 2009 in which HMRC refused a claim for loss relief relating to the disposal of an investment made by the Appellant in her self-assessment ("the Loss Appeal").

2. There is one notice of appeal to the tribunal, but in effect there are two appeals and I shall separately consider the circumstances in which each appeal was made. Both appeals arose out of matters coming to the attention of HMRC in the course of an aspect enquiry into the Appellant's self-assessment return for 2005-06. The enquiry commenced on 15 June 2007 and was conducted by a Mrs C Quirk. The circumstances of each appeal are as follows.

The Property Appeal

3. On 30 April 2009, shortly before the enquiry into the 2005-06 return closed, Mrs Quirk wrote to the Appellant to state that she had information that the Appellant's return for 2004-05 was inaccurate and that the Appellant had failed to disclose a chargeable gain. In the course of further correspondence Mrs Quirk indicated that this concerned the disposal of a property at 88 Market Street, Wigan ("the Property"). I understand that this was a commercial property let to a tenant for the purposes of a Bargain Booze franchise. On 10 November 2009 Mrs Quirk asked for details as to the Appellant's connection to the Property, including purchase details, sales details and use of the Property. She also asked for copies of the purchase and sale documentation.

4. On 2 December 2009 Mrs Quirk issued an information notice to the Appellant pursuant to Schedule 36 Finance Act 2008. The information was not provided and a penalty warning notice was issued on 29 January 2010. It is not clear what happened thereafter, but on 27 July 2010 Mrs Quirk issued a notice of assessment to capital gains tax. The gain assessed was £25,000. It appears that Mrs Quirk had information that the sale proceeds were £77,000 and the purchase cost was £45,000 although the source of that information is not clear from the documents retained by HMRC.

5. On 3 August 2010 Mr David Jones ("Mr Jones") on behalf of the Appellant sent an appeal to HMRC. He indicated that the assessment was excessive and that he would send a full computation within 30 days. No computation was sent, but on 13 September 2010 Mr Jones sought postponement of the tax due. He apologised for the delay and referred to family health problems. On 30 September 2010 Mrs Quirk wrote to say that she had first requested information relating to the disposal on 30 April 2009. She asked for information in the form of a full capital gains computation to be

provided by 19 November 2010. If the information was not received by that date the Appellant was given the opportunity to say whether she wanted the case reviewed or to appeal to the tribunal.

6. On 6 October 2010 Mr Jones wrote to say that he had been on holiday and would reply to Mrs Quirk's letter by mid-October. There was no reply and on 8 December 2010 Mrs Quirk wrote to the Appellant direct, with a copy to Mr Jones. She briefly set out the history of her contact in relation to the Property and asked how the Appellant wished to proceed, whether by way of review or tribunal. Again, there was no reply and on 19 January 2011 Mrs Quirk wrote to say that she had determined the appeal and confirmed the assessment. There was no further contact following that letter until the subsequent developments referred to below.

The Loss Appeal

7. HMRC's enquiry into the Appellant's 2005-06 return was an aspect enquiry into a claim for loss relief against general income made in that return. On commencement of the enquiry Mrs Quirk asked for details of the company shares which gave rise to a loss on disposal. On 26 June 2007 Mr Jones wrote to Mrs Quirk stating that the information for the loss claim had come from the Appellant's investment advisors. He would obtain the information from them and respond to Mrs Quirk's request accordingly. One of the issues referred to in the correspondence was Mrs Quirk's view that as the shares on which losses were realised were US shares, relief was not available. Mr Jones expressed the view that the investment was in a UK bond which held US shares so that relief was available for the loss on the bond.

8. No information was received by HMRC. On 13 September 2007 a notice requiring documents and information was issued pursuant to section 19A Taxes Management Act 1970 ("TMA 1970") and on 7 November 2007 a penalty warning letter was sent. On 20 November 2007 Mr Jones wrote objecting to Mrs Quirk's approach and indicated that he had requested the information from "Argent Holdings", who were said to be a large financial services company. It appears that the investment advisors were in fact called Arjent Services LLC ("Arjent"). Later in this chain of correspondence Mr Jones expressed his frustration that Arjent were failing to provide the necessary information.

9. In February 2008 Mrs Quirk asked for an authority from the Appellant to approach Arjent direct. An authority was eventually provided in August 2008 and in October 2008 Arjent sent Mrs Quirke a schedule detailing all "trades" for what was described as a "joint tenant" account in the period January 2003 to December 2005. The trades appeared to be in US company shares and bonds. The enquiry continued with Mrs Quirk questioning the Appellant's entitlement to loss relief under section 574 ICTA 1988. Mr Jones indicated that the schedule provided by Arjent did not match the summary that Arjent had sent to the Appellant and which formed the basis of the loss relief claim. Mr Jones indicated that he was seeking an explanation from Arjent. In the event no explanation was forthcoming and Mrs Quirk issued the closure notice on 23 June 2009. Her conclusion was to withdraw the relief claimed and the closure notice set out the Appellant's appeal rights.

10. No appeal was received in the 30 days following the closure notice and Mrs Quirk wrote on 13 August 2009 noting that there had been no appeal and raising the possibility of penalties. On 18 August 2009 Mr Jones wrote apologising for the delay which he said was due to the illness of his wife. He asked HMRC to accept a late appeal. On 17 September 2009 Mrs Quirk wrote to say that she did not consider there was a reasonable excuse for the lateness of the appeal. She told Mr Jones that if the Appellant wished to take the matter further then he should apply to the tribunal for permission to notify a late appeal.

11. There was no further contact following that letter and no application to the Tribunal until the subsequent developments which follow.

Subsequent Developments

12. In or about June 2015 HMRC were seeking to collect the tax arising from the matters described above and a statutory demand was issued. I understand that this comprised tax of approximately £13,000, late payment penalties of approximately £2,500 and interest of approximately £5,500. It is not clear what if any contact there was in relation to collection of the tax between 2010 and 2015.

13. In due course a bankruptcy petition was presented against the Appellant and in June 2016 a bankruptcy order was made. In the event the Appellant subsequently paid the sums claimed by HMRC in full and the bankruptcy order was annulled prior to the hearing of this application.

14. On 5 August 2016 the Appellant lodged her notice of appeal with the Tribunal covering both the Property Appeal and the Loss Appeal. The notice of appeal contained a number of reasons why the appeal was notified late. These included "extremely difficult family circumstances, failure of businesses, and huge difficulty in obtaining documentation". There was also reference to the death of Mr Jones' wife in 2011. At the hearing of the application the Appellant relied only on the difficulties in obtaining documentation.

Approach in relation to Late Appeals

15. The approach to applications to extend time was considered by Morgan J sitting in the Upper Tribunal in *Data Select Ltd v Commissioners for HM Revenue & Customs [2012] UKUT 187 (TCC)* where he said as follows:

> "34. … Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? And (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

> 35. The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see Sayers v Clarke Walker [2002] 1 WLR 3095; Smith v Brough [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc [2007] STC 1196.
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> 36. I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in Advocate General for Scotland v General Commissioners for Aberdeen City [2006] STC 1218 at [23]-[24] which is in line with what I have said above.
>
> 37. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

16. Rule 3.9 of the Civil Procedure Rules ("CPR") has been amended since the decision in Data Select and now reads as follows:

> " (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) For litigation to be conducted efficiently and at proportionate cost; and
>
> (b) To enforce compliance with rules, practice directions and orders."

17. Data Select is a decision of the Upper Tribunal and it is binding upon me. I must conduct a balancing exercise taking into account all the circumstances including the overriding objective of dealing with cases fairly and justly and ask myself:

(1) What is the purpose of the time limit?

(2) How long was the delay?

(3) Is there a good explanation for the delay?

(4) What will be the consequences for the parties of an extension of time?

(5) What will be the consequences for the parties of a refusal to extend time?

18. I also have regard to the decision of the Court of Appeal in *BPP Holdings Limited v Commissioners for HM Revenue & Customs [2016] EWCA Civ 121* which was concerned with non-compliance with Tribunal Rules and directions in the light of a divergent approach in the Upper Tribunal. It referred to the application by analogy of CPR 3.9 in Data Select although it did not consider the decision in Data Select in detail. The guidance given by the Court of Appeal was recently endorsed on further appeal to the Supreme Court at [2017] UKSC 55.

19. BPP Holdings was concerned with the imposition of sanctions for non-compliance with Tribunal directions. It clearly supports the application of the CPR to this Tribunal by way of analogy. The Court of Appeal was referred to the decision of Morgan J in Data Select but it decided that it was not appropriate to analyse that decision because it was not a case where there had been a history of non-compliance.

20. Prior to the decision of the Court of Appeal in BPP Holdings, the Upper Tribunal in *Romasave (Property Services) Limited v Commissioners for HM Revenue & Customs [2015] UKUT 254 (TCC)* considered and endorsed the approach in Data Select. Having considered the divergent approach in the Upper Tribunal to non-compliance with directions and relief from sanctions for breach it stated at [89]:

> " 89. It is not necessary for us to describe the history of this debate. The outcome, in our view, is that in this tribunal, and in the FTT, the factors identified by the courts in the revised form of CPR r 3.9 as having particular weight or importance, that is to say the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, are relevant factors, but have no special weight or importance. The weight or significance to be afforded to those factors, along with all other relevant factors, in applying the overriding objective to deal with cases fairly and justly, will be a matter for the tribunal in the particular circumstances of a given case."

21. It remains to be seen whether it is necessary in applications such as the present to give particular weight to the two factors identified in CPR 3.9, namely the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders. For present purposes I shall apply the decisions in Data Select and Romasave without giving any special weight to those two factors. Such an approach favours the Appellant in marginal cases.

22. In Romasave the Upper Tribunal gave additional guidance to the First-tier Tribunal as to how it should conduct the balancing exercise. At [92] to [94] it stated:

> " 92. … Nonetheless, helpful guidance can be derived from the three-stage process set out by the Court of Appeal in *Denton* in order to provide first instance judges with a "clear exposition of how the provisions of rule 3.9(1) should be given effect". Although the third stage of that guidance, as set out by the majority, includes the requirement to give particular weight to the efficient conduct of litigation and the compliance with

rules etc, and to that extent, for the reasons we have explained, would not have application in this tribunal or in the First-tier Tribunal, everything else said by the Court of Appeal translates readily into useful guidance on the approach to be adopted, in these tribunals as well as in the courts."

5 93. By way of summary, the majority in the Court of Appeal in *Denton d*escribed the three-stage approach in the following terms, at [24] (the references to "factors (a) and (b)" being to the particular factors referred to in CPR r 3.9):

> " We consider that the guidance given at paras 40 and 41 of *Mitchell* remains substantially sound. However, in view of the way in which it has been
> 10 interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant,
> 15 the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]'. …"

94. Once the factors (a) and (b) are afforded no special weight or significance, that
20 approach is no different in principle to that set out in *Data Select*. The seriousness and significance of the relevant failure has always been one of the factors relevant to the tribunal's determination. That is encompassed in the reference in *Data Select*, at [34], to the purpose of the time limit and the length of the delay. The reason for the delay is a common factor in *Denton* and *Data Select*, as is the need to evaluate the circumstances
25 of the case so as to enable the tribunal to deal with the matter justly."

23. In summary, therefore, the approach I shall take is as follows:

(1) I shall consider all the circumstances including the five factors set out by the Upper Tribunal in Data Select.

(2) In doing so, I shall take into account but not give special weight to the
30 need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with time limits.

(3) I shall also bear in mind the 3 stage process described by the Court of Appeal in Denton, that is:

(a) to identify and assess the seriousness and significance of the failure,

35 (b) to consider why the default occurred, and

(c) to evaluate all the circumstances of the case, so as to deal justly with the application.

Reasons – The Property Appeal

24. I set out in Appendix 1 to this decision relevant extracts from the TMA 1970.

25. The Property Appeal was given to HMRC on 3 August 2010, within the period of 30 days provided by section 31A TMA 1970. Section 49A(2) TMA 1970 provides that where an appeal is given to HMRC, the appellant may require HMRC to review the matter, HMRC may offer to review the matter or the appellant may notify the appeal to the Tribunal.

26. Following the hearing and in the course of writing this decision a number of issues occurred to me in relation to the appeal procedure and whether the Property Appeal was in fact late. Both parties were given an opportunity to make further submissions in writing.

27. HMRC offered a review by letter dated 30 September 2010, pointing out the alternative of notifying the appeal to the tribunal. Section 49C(2) provides that when HMRC notify the appellant of the offer of a review they must also notify the appellant of HMRC's view of the matter. In written submissions HMRC took the position that Mrs Quirk did not notify the Appellant of HMRC's view of the matter with the result, they say, that the offer of a review was not effective as such. Therefore none of the options in section 49A(2) were adopted until the Appellant notified her appeal to the Tribunal in August 2016. Further, HMRC's position is that in those circumstances TMA 1970 provides no statutory time limit for notification of the appeal to the Tribunal.

28. Section 49C(4) provides that where a review has been offered and not accepted within the "acceptance period" then HMRC's "view of the matter" is treated as final pursuant to a deemed settlement under section 54 TMA 1970. However section 49C(6) provides that sub-section (4) does not apply if the appellant notifies the appeal to the Tribunal pursuant to section 49H. Such an appeal must also be notified within the acceptance period. For these purposes the acceptance period is 30 days from the date of the document containing the offer of a review.

29. Section 49D(2) provides that the appellant can notify the appeal to the Tribunal where notice of appeal has been given to HMRC. That sub-section is excluded where HMRC have given a notification under section 49C. The notification under section 49C must be a notification of their view of the matter under section 49C(2). It is only where there is such a notification that section 49H is engaged and it is section 49H that includes the time limit by reference to the acceptance period. HMRC's view of the matter if clearly crucial to the procedure. It is that view which is included in the deemed settlement and it is notification of that view which engages the time limit in the acceptance period.

30. I am not sure that HMRC are right when they submit that if no view of the matter is notified to an appellant then the offer of a review is invalid. However on the face of it the offer does not have the effect of engaging the time limits described above. On that basis HMRC would be right to submit that there is no time limit for notification of the Property Appeal to the Tribunal. However even in the absence of an express time limit HMRC do not accept that the Property Appeal should be treated as in time. No reasoning was provided to support that submission, but it may be that principles of statutory construction may permit a reasonable time limit to be read into

the provision on the basis that otherwise the legislative purpose would be defeated. It is most unlikely that Parliament would have intended that an appeal given to HMRC could lie dormant indefinitely before being notified to the Tribunal.

31. In the end I do not need to consider such arguments of statutory construction.

5 32. It is section 49C(2) which requires HMRC to notify the Appellant their "view of the matter in question". The "matter in question" is defined by section 49I as "the matter to which an appeal relates". In the present case the matter to which the appeal relates is the capital gains tax assessment for 2004-05 on disposal of the Property. Mrs Quirks' letter dated 30 September 2010 read as follows:

10 > " I first requested information relating to a 2004-05 disposal on 30 April 2009 and given the delay I must ask that you provide the information necessary to settle the appeal (full capital gains tax computation) by 19 November 2010. If the information is not received by that date and your client is still dissatisfied with the assessment issued on 27 July 2010 you will need to confirm whether:
>
> 15
> - You want the case reviewed by a different officer.
> - You want the case reviewed by an independent tribunal.
>
> Failure to respond will result in me determining the appeal and releasing the tax for collection."

33. I am satisfied that Mrs Quirk's letter did notify the Appellant of HMRC's "view
20 of the matter", although it did not use those statutory words. In my experience HMRC's correspondence in these circumstances usually does use the statutory words. Whilst it is desirable for it to do so I do not consider that it is a statutory requirement. HMRC's view of the capital gains tax assessment was clearly that in the absence of information previously requested the assessment would stand.

25 34. The letter dated 30 September 2010 is unusual in another respect. The offer of a review was intended to take effect not on the date of the letter but on 19 November 2010 and only if the information requested was not provided by that date. I am satisfied that for the purposes of section 49C(8) the "date of the document" which marks the start of the 30 day acceptance period is properly taken as 19 November
30 2010 rather than 30 September 2010. The Appellant therefore had until 19 December 2010 to accept the offer of a review or notify her appeal to the Tribunal.

35. I am satisfied that the Appellant did not accept the offer of a review or notify her appeal to the Tribunal by 19 December 2010. The Appellant therefore requires permission to notify the appeal to the Tribunal pursuant to section 49H(3). I therefore
35 turn to consider the factors referred to above and all the circumstances of the case in deciding whether to grant permission to notify a late appeal.

(i) Purpose of the Time Limit

36. The purpose of the time limit of 30 days is clearly to promote finality. Morgan J in Data Select stressed the desirability of not re-opening matters after a lengthy

interval where one or both parties were entitled to assume that matters had been finally fixed and settled. In the present case I am satisfied that HMRC were entitled to assume from at least January 2011 that the capital gains tax assessment was final.

(ii) The period of Delay

37. The period of delay in the present case is from January 2011 to August 2016. It is a period of some 5½ years which is plainly a significant period and amounts to a 'serious breach' in the language of the Court of Appeal in Denton. Indeed, the Upper Tribunal in Romasave referred to a delay of 3 months as serious and significant.

(iii) Explanation for the Delay

38. The burden is on the Appellant to satisfy the tribunal as to any explanation for the delay. The explanation put forward by the Appellant is the difficulty she and Mr Jones had in obtaining documentation relevant to the purchase and disposal of the Property.

39. It was not entirely clear why there should have been any difficulty in ascertaining the purchase price and date, sale price and date and details of any relevant expenditure in connection with the Property. Nor is it clear why there should have been any difficulty establishing the use of the Property which would be relevant to the amount of taper relief available. Mr Jones told me that it was only in 2016 that the Appellant had been able to establish the purchase date through the website Rightmove.co.uk. Efforts to obtain details from the Appellant's solicitor were made, but the original firm of solicitors had amalgamated with another firm.

40. The substantive grounds of appeal in the Property Appeal are that the Property was owned jointly by the Appellant and her husband, business asset taper relief was available on disposal of the Property from the date of purchase on 12 April 2000 to the date of disposal in March 2005 and significant enhancement expenditure had not been taken into account. The only source of additional information identified was Rightmove to give the purchase cost and date of purchase. If the Property was owned jointly by the Appellant and her husband the Appellant would have been aware of that fact. Further, information in relation to the enhancement expenditure was obtained from the Appellant's annual accounts. There is no suggestion that information was not available at the time of Mrs Quirk's enquiry. Indeed at no time during the correspondence referred to above was Mrs Quirk told that the Property was jointly owned or that enhancement expenditure had been incurred.

41. I do not accept that there was any good reason why the information now relied upon in relation to the Property Appeal could not have been obtained at the time of Mrs Quirk's enquiry. Some of the information must have been available at that time, such as the fact that the Property was jointly owned. There is no explanation as to why Mrs Quirk was not given that information. Other information should have been available either from the Land Registry or from the solicitors acting in relation to the purchase and disposal of the Property. One reason given as to why it had not been obtained earlier was that the position in relation to Arjent was more pressing. That is not a good reason.

(iv) Consequences for the Parties of Extending Time

42. If the Appellant is given permission to make a late appeal then HMRC will lose the finality which for a long period of time they were entitled to expect. As a result of the delay HMRC are now unable to trace Mrs Quirk. I accept what I was told at the hearing that material from their files will have been destroyed, even though it has been possible to reconstruct the correspondence. The likely loss of material would prejudice HMRC if the appeal is permitted to proceed.

43. If permission is granted then the Appellant will have an opportunity to argue her appeal on the merits.

(v) Consequences for the Parties of Refusing to Extend Time

44. I am not in a position to readily assess the merits of the Appellant's proposed appeal. I assume that it would have at least a reasonable prospect of success. Essentially it is argued that the Property was owned jointly by the Appellant and her husband so that only half of any gain would be chargeable on the Appellant. There is also enhancement expenditure to be taken into account. In any event the Appellant contends that when the sale proceeds, purchase price and business taper relief are taken into account any gain would fall within the Appellant's annual exemption.

45. I shall assume that the Appellant would have a reasonably arguable case if the appeal proceeded. She will lose the opportunity to pursue that appeal if permission is refused.

46. As far as HMRC is concerned, they would retain the finality they have been entitled to assume since 2011.

(vi) Generally

47. I have had regard to the need to ensure compliance with time limits generally, and to the wasted costs and resources involved in applications such as the present. I have not given any special weight to the need for litigation to be conducted efficiently and at proportionate cost or to the need to enforce compliance with time limits, but I have treated both those factors as relevant considerations in the exercise of my discretion.

48. I must balance all the circumstances and factors described above. The length of the delay, the absence of any good explanation and the prejudice to HMRC weigh heavily in the balance. Taking into account the circumstances as a whole I do not consider that it would be fair and just to grant permission to notify a late appeal.

Reasons – The Loss Appeal

49. I turn now to consider Loss Appeal. The time limits for notifying that appeal to the Tribunal are clear. No appeal was given to HMRC within the period of 30 days provided by section 31A TMA 1970. HMRC did not agree to a late appeal under section 49 which means that the Tribunal has power to grant permission for a late appeal pursuant to section 49(2)(b). Whilst the Loss Appeal is to be considered

separately to the Property Appeal, there are relevant similarities and differences between the two appeals as follows:

50. The purpose of the time limit and the period of delay are similar to the Property Appeal. Similar consequences ensue if permission for a late appeal is granted and if it is not granted. The real point of difference between the Loss Appeal and the Property Appeal is the explanation for the delay.

51. The explanation put forward by the Appellant is the difficulty she and Mr Jones had in obtaining documentation from Arjent. In or about September 2003 the Appellant and her husband invested $140,000 though Arjent. That sum was what was left from an unsuccessful business venture in the United States. It is the Appellant's case that when the investment was realised in or about September 2005 a loss of $74,000 had been suffered. As mentioned above, Arjent produced information in relation to the investments to HMRC but the Appellant contends that it was inconsistent with information provided by Arjent to Mr Jones and on which the tax return entries were based. The Appellant's case is that she has been seeking to obtain information from Arjent to substantiate her claim to loss relief. Those efforts included telephone calls every year between 2011 and 2016. Arjent would not provide that information. It was only when Arjent went into liquidation in the summer of 2016 that a disgruntled employee released the information the Appellant had been requesting.

52. The Appellant's case is that the $140,000 was invested with Arjent in a bond rather than in individual US shares. Mr Jones referred me to the documentation the Appellant had received from Arjent. It included an application form signed by the Appellant and her husband on 7 December 2005 for a purchase of bonds for $66,000. It seems that was the disposal proceeds of the original $140,000 investment which was being re-invested. There was a fund transfer document for the original payment of $140,000 to Arjent on 25 September 2003.

53. The documentation now available includes account statements for April 2004, May 2004 and July 2004 from a company in New York called S W Bach & Company. The statements show balances brought forward, changes in asset values and balances carried forward together with all transactions in the period. The transactions in the period include those appearing in the documents provided by Arjent to HMRC in October 2008. It is not clear to me how these documents would assist the Appellant's case. Mr Jones suggested that the individual trades were transactions within the bond. I am not sure the documentation supports that analysis, but having said that I am not concerned with the merits of the appeal. I shall proceed on the basis that the Appellant would have a reasonable prospect of success if permission to give a late appeal is granted.

54. The Appellant told me that she had been contacting Arjent by telephone throughout the period 2011-2016. HMRC did not challenge that evidence and I accept it. Clearly the Appellant and her adviser ought to have obtained and retained sufficient evidence to justify the loss relief claim at the time the claim was made in the Appellant's 2005-06 return. I am surprised also that there is no correspondence between the Appellant and Arjent in the period 2011-2016. I sympathise with the

frustration the Appellant clearly encountered in her dealings with Arjent but I am not satisfied that occasional telephone calls over a period of 5 years amounts to a concerted attempt to obtain the information. It is relevant also that HMRC were not apparently told during that period that the Appellant was attempting to obtain information to justify the Loss Appeal.

55. I have conducted the same balancing exercise in relation to the circumstances of the Loss Appeal. The length of the delay and the prejudice to HMRC weigh heavily in the balance. The reasons relied on by the Appellant do provide some explanation of the delay, albeit not an explanation that I would describe as a good explanation. Taking into account the circumstances as a whole I do not consider that it would be fair and just to grant permission to give a late appeal.

Conclusion

56. For the reasons given above I must refuse the application for permission to give and notify a late appeal.

57. 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: 03 AUGUST 2017

ANNEX

The following provisions of the Taxes Management Act 1970 are referred to in this decision:

31A Appeals: notice of appeal

(1) Notice of an appeal under section 31 of this Act must be given—

(*a*) in writing,
(*b*) within 30 days after the specified date,
(*c*) to the relevant officer of the Board.

49 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 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).

49A Appeal : HMRC review or determination by tribunal

(1) This section applies if notice of appeal has been given to HMRC.

(2) In such a case —

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),
(b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or
(c) the appellant may notify the appeal to the tribunal (see section 49D).

(3) See sections 49G and 49H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.

(4) This section does not prevent the matter in question from being dealt with in accordance with section 54 (settling appeals by agreement).

49C HMRC offer of review

(1) Subsections (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.

(2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC's view of the matter in question.

(3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with section 49E.

(4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under section 54(1) for the settlement of the matter.

(5) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (4) applies.

(6) Subsection (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49H.

(7) HMRC may not notify the appellant of an offer to review the matter in question (and, accordingly, HMRC shall not be required to conduct a review) if —

(a) HMRC have already given a notification under this section in relation to the matter in question,
(b) the appellant has given a notification under section 49B in relation to the matter in question, or
(c) the appellant has notified the appeal to the tribunal under section 49D.

(8) In this section "acceptance period" means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question.

49D Notifying appeal to the tribunal

(1) This section applies if notice of appeal has been given to HMRC.

(2) The appellant may notify the appeal to the tribunal.

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

(4) Subsections (2) and (3) do not apply in a case where —

(a) HMRC have given a notification of their view of the matter in question under section 49B, or
(b) HMRC have given a notification under section 49C in relation to the matter in question.

(5) In a case falling within subsection (4)(a) or (b), the appellant may notify the appeal to the tribunal, but only if permitted to do so by section 49G or 49H.

49H Notifying appeal to the tribunal after review offered but not accepted

(1) This section applies if —

(a) HMRC have offered to review the matter in question (see section 49C), and
(b) the appellant has not accepted the offer.

(2) The appellant may notify the appeal to the tribunal within the acceptance period.

(3) But if the acceptance period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this section "acceptance period" has the same meaning as in section 49C.

49I Interpretation of sections 49A to 49H

(1) In sections 49A to 49H -
(a) "matter in question" means the matter to which an appeal relates; …