



TC06135

Appeal number: TC/2017/03351

PAYE – penalty appeal – whether out of time – yes – application for leave to appeal out of time – whether reasonable excuse – no – application for extension of time refused – application for strike out granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE JOHN LYON SCHOOL

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

The Tribunal determined the appeal on 27 September 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 19 April 2017 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 1 July 2017.

DECISION

Background

1. On 23 February 2017, the Debt Management Unit of the respondents (“HMRC”) issued a letter to the appellant referring to an overdue penalty of £800 and stating:

“Act now to avoid enforcement action. Please don’t ignore this letter.

If you don’t pay now we can pass your debt to a Debt Collection Agency, or we can enforce debts by seizing your assets and selling them by public auction, as the law allows”.

2. On 2 March 2017, the appellant wrote to HMRC stating that it had received a penalty notice and intimating that it wished to formally appeal that. On 22 March 2017, HMRC responded pointing out that the penalty notification had in fact been issued on 28 September 2009 and, given that there was a time limit of 30 days within which to appeal, the appeal was a late appeal which was not accepted. The appellant was advised to apply to the Tribunal Service to extend the time for lodging an appeal.

Notice of Appeal

3. The Notice of Appeal stated:

“The case is over 6 years old and unreasonable to be brought about after this time period and should be withdrawn.”

4. At box 6 in the Notice of Appeal, when asking to notify the appeal late, the appellant stated:

“The case relates to an amount due connected with a late P35 submission in 2009 ...”.

HMRC’s Statement of Case

5. HMRC applied for a Strike-out in terms of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) arguing that the penalty had been issued on 28 September 2009 in the sum of £1200 and part payment had been made on 12 March 2010. No part of the penalty had been appealed. HMRC argued that the application for leave to appeal out-of-time should be refused on the basis of the unreasonable delay.

The Facts

6. The appellant had been required to file an employer annual return (P35 and P14) for the year 2008-2009 and the filing date for the return was 19 May 2009. The return was not filed on time.

7. On 28 September 2009, HMRC issued a late filing penalty notice in the sum of £1200.

8. On 24 October 2009, HMRC sent a reminder to the appellant and the employer's annual return was filed on 24 December 2009.

9. Payment of £400 of the penalty was made on 12 March 2010.

5 10. On 10 December 2015, HMRC received a telephone call from the appellant regarding the outstanding amount of £800, for which a demand for payment had been received, and was advised that the amount due was for the balance of the 2008/2009 P35 late filing penalty. HMRC's records show that that telephone call had been triggered by a demand from the Debt Management Unit and that a similar demand had been received the previous year. HMRC apologised for not chasing payment before
10 that date. The appellant was requested to settle the debt within seven days in order to avoid recovery action.

11. Nothing further happened until the letter of 23 February 2017.

The Preliminary issue

15 12. As the appellant did not appeal the original penalty in 2009, and indeed paid part of it, there can be no valid appeal unless the application to extend the time for lodging an appeal is accepted.

20 13. HMRC take the very straightforward view that the extent of the delay in this appeal is so significant that, if the appeal was admitted, it will be contrary to the purpose of the time limit in the legislation and therefore contrary to the aims of the legislation.

14. The onus of proof lies with the appellant and if that is not discharged then the appeal falls to be struck out under the provisions of Rule 8(2)(a) of the Rules as the Tribunal would not have jurisdiction in the proceedings.

Discussion

25 15. HMRC produced no case law in support of their opposition to the application for a late appeal, however, the relevant cases are well known to the Tribunal.

16. The primary two cases are *Data Select v Revenue & Customs Commissioners*¹ ("Data Select") and *Romasave (Property Services) Ltd v HMRC*² ("Romasave"),

30 17. Under Rule 20(4) of the Rules, the Tribunal has discretion as to whether to admit a late appeal, and the relevant considerations to be addressed when considering whether to admit a late appeal have been set out by the Upper Tribunal in the following terms in *Data Select* at paragraph 34 which reads:-

¹ 2012 UKUT 187 (TCC)

² 2015 UKUT 0254 (TCC)

“Applications for extensions of time limits of various kinds are common place 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:

- 5
- (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.

10 18. Justice Morgan also emphasised at paragraph 37 of *Data Select* 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”.

19. I am bound by and entirely agree with Judges Berner and Falk at paragraph 96 of *Romasave* which reads:-

15 “... The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the Tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.”

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20. I also agree with the decision of Judge Berner at paragraph 36 in *O’Flaherty v HMRC*³ and that reads:-

25 “I was referred to ... where Sir Stephen Oliver refused permission to appeal out of time. In the course of his decision, Sir Stephen made the point that permission to appeal out of time will only be granted exceptionally. It is in my view important that this comment should not be thought to provide a qualitative test for the circumstances the FTT is required to take into account. It should properly be understood as saying nothing more than that permission should not routinely be given; what is needed is the proper judicial exercise of a discretion, taking account all relevant factors and circumstances.”

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21. He goes on to record at paragraph 37 that:-

“Time limits are prescribed by law, and as such should as a rule be respected”.

I agree entirely.

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22. Paragraph 38 reads:-

40 “These references to permission being granted exceptionally should not be elevated into a requirement that exceptional circumstances are needed before permission to appeal out of time may be granted. That is not what was said in *Ogedegbe* nor in *Aston Markland*, and it is not the case. The matter is entirely in the discretion of the FTT, which must take account of all relevant circumstances. There is no requirement that the circumstances must be exceptional.”

³ 2013 UKUT 01619 (TCC)

That is the approach which I adopt.

23. I have considered, and weighed in the balance, all of the relevant circumstances including, but not restricted to, the circumstances identified in *Data Select*. In so doing, I have concurrently applied the three stage process set out by the Court of Appeal in *Denton & Others v T H Whyte & Another; Decadent Vapours Ltd v Bevan & Others* and *Utilise TDS Ltd v Davies & Others* (“*Denton*”)⁴. The first stage is to identify the seriousness and significance of the failure to lodge an appeal in relation to which the relief is sought. The second is to consider why the default occurred and the third is to evaluate all the circumstances of the case so as to deal justly with the application of the factors.

24. Lastly, at all times I have had in mind Rule 2 of the Rules which reads:-

“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.”

What is the purpose of the time limit

25. I agree entirely with Judge Redston in *Norman Archer v HMRC*⁵ at paragraph 85 where she states in relation to a 30 day time limit that:

“Its purpose is to give finality, so that HMRC – the other party in the possible litigation – will know within that time limit whether or not they need to prepare for an appeal against their decision. The time limit is a ‘rule’ to ensure litigation ‘is conducted efficiently and at proportionate cost’”.

26. In this instance there was a 30 day time limit.

⁴ 2014 EWCA Civ 906

⁵ 2014 UKFTT 423 (TC)

How long was the delay?

27. The delay in this case is very, very significant at more than six years. That is extraordinarily long.

Is there a good explanation for the delay?

5 28. There is no explanation other than (a) it would be unreasonable to chase a debt after such a long period and (b) the suggestion that HMRC should withdraw their “claim” since its validity would be difficult to establish.

29. Clearly since part payment was made in 2010 there had been no intention to appeal at that stage.

10 30. Although intermittently HMRC have chased payment, the appellant made no contact with HMRC about this matter until 2015 and yet, despite being told to pay and the debt explained, no appeal was lodged. It does not appear that there was any intention to appeal in 2015.

15 31. I do not accept that there is any credible explanation for the failure to appeal before 2017.

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

20 32. Clearly if an extension of time is granted, the appellant would be placed in a position whereby it might be able to argue that the penalty is not payable but since it is conceded that the return was late, and no explanation has been offered for that, that might have little prospect of success. On the other hand there would be significant prejudice to HMRC. They had cause to believe that this matter had long since been closed. To litigate now would involve time, money and use of resource.

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

25 33. Clearly the appellant would be prejudiced because it would be unable to argue about the penalty. The argument that it is unfair would not assist because the decision of the Upper Tribunal in *HMRC v Hok*⁶ is binding on me and that makes it explicit at paragraph 58 that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

30 34. As far as HMRC are concerned their position would remain unchanged if an extension of time were not to be granted. The appeal would be struck out under the provisions of Rule 8(2)(a) since the Tribunal would not have jurisdiction.

⁶ 2012 UKUT 363

Conclusion

35. Every application for admission of a late appeal depends on its own facts and circumstances. The purpose of any time limit is to avoid delay and to provide certainty and, as a general principle, time limits provided by statute should be
5 observed unless there is a good explanation for the delay. At every stage in the consideration of this matter and when weighing the relevant factors in the balance, we have in mind Rule 2 of the Rules. It is imperative that any decision should be fair and just. Fairness is very much a two-way street.

36. In this case, there has been an extremely substantial delay with no action taken by
10 the appellant in the interim. I agree with the appellant that six years is an unreasonable period but the Tribunal has jurisdiction only in relation to matters concerning the original imposition of the penalty. There is no jurisdiction in relation to collection of a debt. The penalty became a debt because it was not appealed on time.

37. In all these circumstances I do not grant the application for an extension of time
15 and therefore the appeal is struck out as there is no valid appeal and the Tribunal has no jurisdiction.

38. This document contains full findings of fact and reasons for the decision. Any
20 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.

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**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 27 September 2017

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