



**TC06467**

**Appeal number: TC/2017/05632**

*INCOME TAX – whether taxpayer can appeal against amounts stated in a self-assessment – no – whether right of appeal against HMRC’s refusal to give relief under Schedule 1AB of TMA – no (applying the Court of Appeal’s decision in Raftopoulou) – whether Tribunal should exercise its discretion to permit a late appeal against penalties and surcharges – no – application dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**KEVIN GEORGE MUNN**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JONATHAN RICHARDS**

**Sitting in public at Taylor House, Rosebery Avenue, London on 21 March 2018  
(having deferred the release of this decision until after the Court of Appeal’s  
judgment in *Raftopoulou* was published)**

**The Appellant in person**

**Helen Davies, HMRC Solicitor’s Office, for the Respondents**

## DECISION

1. This is my decision on Mr Munn’s application under s49(2)(b) of the Taxes Management Act 1970 (“TMA 1970”) for permission to bring a late appeal.

### 5 Evidence

2. Mr Munn gave evidence orally at the hearing, although most of what he said amounted to submissions as to why he should be given permission to make a late appeal. I have accepted Mr Munn’s evidence, which was not challenged. However, that does not mean that I have accepted his argument that permission to bring a late appeal should be given.

3. HMRC did not rely on witness evidence. Mrs Davies made submissions, by reference to a bundle of documents, as to why Mr Munn should not be given permission to make a late appeal.

### Facts

4. Very few facts were in dispute. My findings of fact are set out at [5] to [15] below.

5. For seven months of the 2003-04 tax year, Mr Munn briefly carried on the business of a self-employed milkman. However, the business proved to be uneconomic and Mr Munn gave it up during that tax year.

6. Mr Munn could not afford to pay an accountant to prepare his 2003-04 tax return so he prepared it himself. He filed it, late, on 21 October 2005. He made at least two mistakes in that tax return:

(1) When recording the income from his business, he made a mistake involving decimal points. He recorded that income as £5,678,123. He meant to record a figure of £56,781.23.

(2) He claimed certain specific deductions (employee costs of £1,700, premises costs of £198,900 and relief for bad debts of £27,225). These expenses were similarly overstated (because he made the same mistake of omitting the decimal point that he made when recording profits of the business). However, he did not claim a deduction for a number of routine expenses that he incurred in connection with his business (for example the cost of milk that he bought).

7. HMRC’s routine checks on the tax return revealed Mr Munn’s mistake involving the decimal point. On 9 November 2005, HMRC exercised their power under s9ZB of TMA 1970 to correct obvious arithmetic errors. They recalculated the tax and national insurance that Mr Munn owed by proceeding on the basis that profits from his trade were £54,502. As a result, they concluded that Mr Munn owed of income tax and Class 4 national insurance contributions of £16,571.22 for 2003-04.

8. HMRC’s amendment under s9ZB corrected the error involving the decimal point. However, it did not result in Mr Munn being given relief for expenses that he would have incurred in connection with this trade, for example the cost of milk that he

purchased and costs associated with running his milk float. In saying this, I am not criticising HMRC: they could not have been expected to give Mr Munn relief for expenditure that he had not claimed not least since they could not have known the amount of that expenditure. Nor am I able to make a finding as to precisely what expenses Mr Munn did incur (and I do not need to do so for the purposes of Mr Munn's application to make a late appeal). However, as a general matter, I consider it highly unlikely that Mr Munn made £54,502 of profit in just 7 months of trading as a milkman particularly given his unchallenged evidence that he gave the business up because it was not economic. Therefore, I am quite satisfied that Mr Munn's true income tax and national insurance liability for the 2003-04 tax year was less than £16,571.22.

9. Mr Munn did not pay the tax and national insurance that HMRC calculated as due. Therefore, in 2005, HMRC charged him a first and second late payment surcharge, each of £828.56. Mr Munn was also, in 2005, charged two £100 penalties for filing his returns late and has been charged interest on the tax and penalties that he has not paid.

10. Unfortunately, Mr Munn does not appear to have followed anything like the correct procedure for dealing with the fact that he had submitted a self-assessment return showing more profit than he actually earned. He did not, for example, seek to amend his return within the appropriate deadline. Beyond a letter in September 2015 (of which I was not shown a copy), he engaged in little correspondence with HMRC on the issue until 2016, by which time HMRC had started enforcement action to collect the debt. He largely dealt with matters by contacting HMRC by telephone. Mr Munn's account of what he did was understandably highly general given that some of the events took place a long time ago. I have concluded that he took the following steps to try to deal with the situation:

(1) In December 2007, fully two years after HMRC amended his return and concluded that he owed £16,571.22 by way of income tax and national insurance, he telephoned HMRC to dispute the amount shown on his self-assessment. HMRC's record of that telephone call, which I have accepted as accurate since Mr Munn did not dispute it, indicated that Mr Munn agreed to put together figures relating to his cost of sales and then write to HMRC. Mr Munn has not denied HMRC's assertion that he never sent information to HMRC by way of follow up to this telephone call and I have concluded that he did not.

(2) On 1 October 2008, Mr Munn called HMRC saying that he had omitted his cost of sales from his 2003-4 return and agreed to write with details. I have concluded that he did not provide further details because the next communication from Mr Munn recorded in HMRC's records was on 18 November 2011 when he again telephoned HMRC to query the amount he owed.

(3) On 21 September 2015, Mr Munn appears to have written to HMRC to dispute the amount he owed. Neither party provided me with a copy of this letter.

(4) Between November 2015 and February 2016, Mr Munn made a number of telephone calls to HMRC to dispute the amount of tax that he owed, in

response to HMRC's threats of enforcement proceedings that involved a debt collector visiting his home.

11. On 23 February 2016, Mr Munn visited HMRC's offices in Hayes and obtained some help in making a claim for relief under Schedule 1AB of TMA 1970. I was not provided with a copy of Mr Munn's claim. On 4 April 2016, HMRC replied to the claim for special relief as follows:

Thank you for your letter received by HMRC on 4 March 2016.

Special relief is not applicable as you submitted a Self Assessment tax return. Special relief will only be considered where a Revenue Determination for the year was raised.

I have looked at your records as you have made several telephone calls to HMRC and discussed the tax due for 2003/04. During the telephone calls dated 14 February 2007 and 1 October 2008 you agreed to write [with] figures of costs of sales. These details were never received.

The position now is that it is too late for HMRC to consider any claim to overpayment relief. Any claims to overpayment relief would have been needed to be made within 4 years of the end of the relevant tax year or accounting period.

12. HMRC's letter is quite brief, uses a number of technical terms and requires some explanation. HMRC's reference to "special relief" is to the relief provided for by paragraph 3A of Schedule 1AB of TMA 1970 which permits HMRC to give relief for sums set out in HMRC determinations under s28C of TMA 1970. No time limit applies for making a claim for special relief, but statutory conditions do have to be met before special relief is available. For example, HMRC must consider that it would be "unconscionable" for them to seek to enforce or collect the tax in question (or to refuse to repay it if it has been paid already). Determinations under s28C can only be made where a taxpayer has not submitted a self-assessment return. Therefore, HMRC's point in the first paragraph of their letter is that, since Mr Munn did submit a tax return for 2003-04, HMRC did not make a determination under s28C for that tax year and it follows that special relief cannot be available.

13. HMRC's reference to "overpayment relief" is to the relief set out in paragraph 1 of Schedule 1AB. A claim for overpayment relief must be made no later than 4 years after the end of the relevant tax year. Therefore, in the final paragraph of their letter, HMRC refuse the claim for overpayment relief because it was made out of time.

14. HMRC took enforcement action to collect the debt that they regarded as due. On 19 April 2016, they issued a claim in the County Court. That was sent to Mr Munn's correct address, but Mr Munn did not respond to that claim by submitting a defence. On 13 July 2016, HMRC obtained judgment in default. It appears that Mr Munn was unsuccessful in his attempt to set aside the default judgment because, on 13 October 2016, HMRC obtained an Attachment of Earnings Order requiring Mr Munn to pay £180 per month to clear his debt to HMRC.

15. On 4 July 2017, Mr Munn submitted a Notice of Appeal to this Tribunal. He stated that he was "appealing against the amount of tax that HMRC are asking me to pay" and

set out a chronology of events. In his Notice of Appeal, Mr Munn explained that he was never sure what he needed to do to correct what he saw as the over-assessment that he had suffered. His central point was that it could not be right that he should be required to pay an amount that was clearly more than his true liability for 2003-04 and he repeated that point before me.

## Discussion

### *The relevant appealable decisions and the dates by which an appeal should have been made*

16. Mr Munn's application has come to the Tribunal as an application for permission to make a late appeal. However, before I can consider whether to give Mr Munn permission, I need to consider what precise HMRC decisions he is seeking to appeal against and whether the Tribunal has jurisdiction to consider an appeal against those decisions.

17. The position with the late payment surcharges is clear. Those surcharges were imposed under s59C of TMA 1970 and s59C(7) permits a taxpayer to appeal against such surcharges within 30 days of the date on which they are imposed. HMRC's decision to issue those penalties and surcharges are "appealable decisions" and the Tribunal has jurisdiction to hear an appeal against them.

18. The position regarding the two £100 late filing penalties is also clear. These penalties were charged under s93 of TMA 1970 (as in force for the 2003-04 tax year). Section 100B of TMA 1970 provided a right of appeal and the effect of s100B(1) TMA 1970 (which treated the appeal in the same way as an appeal against an assessment), and s31 of TMA 1970 was that the appeal had to be made within 30 days of the penalties being imposed. The Tribunal has jurisdiction to hear an appeal against the late filing penalties.

19. However, Mr Munn's complaint that he has been charged too much tax for 2003-04 is more complicated. There is no right of appeal to the Tribunal against a taxpayer's self-assessment to income tax. That follows simply because no right of appeal is given in the relevant statutory provisions and, since the Tribunal only has the powers that the statute gives it, it has no power to "fill the gap" and give a right of appeal that Parliament has not provided for. The figures to which Mr Munn objects strictly come from HMRC's correction of his return under s9ZB of TMA 1970 (although all HMRC did was to correct obvious arithmetic errors in figures that Mr Munn had himself provided). However, even though HMRC amended Mr Munn's figures, there is still no right of appeal to the Tribunal against the amended figures that HMRC used. If Mr Munn had objected to HMRC's corrections, he could have rejected them under s9ZB(4) of TMA 1970, but he cannot appeal to the Tribunal against them.

20. It follows, therefore, that there is no right of appeal against the amount of tax that was calculated using figures that Mr Munn provided in his tax return (as amended by HMRC under s9ZB(4) of TMA 1970). Therefore, the Tribunal has no jurisdiction to hear that aspect of Mr Munn's appeal, at least in the way that Mr Munn has put matters on his Notice of Appeal form. However, Mr Munn is not a tax specialist and I have,

therefore, considered whether he might have a right of appeal to the Tribunal against HMRC's refusal to grant him relief pursuant to Schedule 1AB of TMA 1970. I asked the parties for submissions as to whether there was a right of appeal against this decision at the hearing, but neither could assist. I have therefore considered the issue myself.

5 21. The point was considered in detail in the Court of Appeal's recent decision in *Raftopoulou v HMRC* [2018] EWCA Civ 818. In that decision, the Court of Appeal concluded:

10 (1) There can be an appeal against a refusal to grant relief pursuant to Schedule 1AB of TMA 1970 only where HMRC open an enquiry into that claim and issue a closure notice under paragraph 7 of Schedule 1A TMA 1970. In that case, the relevant appeal right is provided by paragraph 9 of Schedule 1A.

15 (2) To decide whether an enquiry has been opened and a closure notice issued, it is necessary to understand how the relevant documents would be read by a reasonable taxpayer (see [36] of the Court of Appeal's decision). The Court of Appeal found it difficult to think that the same document could ever amount to both a letter opening an enquiry and a closure notice, but did not rule out the possibility altogether.

20 (3) The 4-year time limit for claiming overpayment relief was absolute. Even if a taxpayer had a "reasonable excuse" for not claiming relief in that timescale, s118(2) of TMA 1970 does not result in the claim being in time.

22. The only document that could possibly be construed as a "closure notice" for the purposes of paragraph 7 of Schedule 1A of TMA 1970 is the letter of 4 April 2016 referred to at [11]. However, for it to be a "closure notice", HMRC must first have  
25 opened an enquiry into the claim (under paragraph 5(1) of Schedule 1A). However, Mr Munn has not produced any document that sets out HMRC's decision to open an enquiry. The letter of 4 April 2016 itself does not, viewed objectively, show an intention to open an enquiry (not least because it does not suggest that HMRC need any further information from Mr Munn). Therefore, no enquiry was ever opened under paragraph  
30 5(1) of Schedule 1A of TMA 1970 with the result that no "closure notice" was ever issued. Moreover, the Court of Appeal have given clear guidance that it is highly unlikely that the same document can ever both open an enquiry and constitute a closure notice. I have therefore concluded that HMRC have not issued a "closure notice" under Schedule 1A of TMA 1970 against which Mr Munn can appeal.

35 23. I have therefore concluded that:

(1) Mr Munn has no right to appeal against HMRC's decision that he owes tax and national insurance for the 2003-04 tax year as it flowed from amounts that Mr Munn included in his own self-assessment return for that year.

40 (2) Even if Mr Munn is treated as appealing against HMRC's refusal to grant special relief or overpayment relief, he has no right of appeal against HMRC's decision.

(3) There is a right of appeal against HMRC’s decision to charge penalties and surcharges. Mr Munn should have appealed against those penalties and surcharges no later than 30 days after they were imposed in 2005.

*Whether to grant Mr Munn permission to make a late appeal against the penalties and surcharges*

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24. Since there is no right of appeal against HMRC’s conclusion that Mr Munn owes tax and national insurance for the 2003-4 tax year, I do not need to consider whether I should give Mr Munn permission to bring a late appeal.

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25. I have a discretion, pursuant to s49(1)(b) of TMA 1970 whether to grant Mr Munn permission to make a late appeal against the penalties and surcharges. Mrs Davies submitted that I should approach the exercise of that discretion by considering the criteria set out in *Data Select v HMRC* [2012] UKUT 187 (TCC)<sup>1</sup> and, since Mr Munn did not argue otherwise, I will do so.

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26. The purpose of the 30-day time limit for appealing against the penalties and surcharges is obvious. There needs to be a cut-off date by which an appeal is brought as otherwise no HMRC could ever be final and decisions made a long time ago could be reopened.

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27. By virtue of s31A of TMA 1970, any appeal would have to be in writing. It is not straightforward to determine how late the appeal against the penalties and surcharges was because neither Mr Munn nor HMRC referred me to any written document that could be taken as an appeal against the penalties or surcharges earlier than the date of his appeal to the Tribunal dated 4 July 2017. It is for Mr Munn to make his case for permission. If he thought he had appealed in writing to HMRC against the penalties and surcharges earlier than 4 July 2017, he should have produced appropriate evidence. As matters stand, I can only conclude that the appeal against the penalties and surcharges was made in writing on 4 July 2017. That appeal was, therefore, well over 10 years late<sup>2</sup>.

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28. Mr Munn’s reasons for appealing late were that he was unfamiliar with HMRC procedure and with tax law. He also thought, from long passages without a communication from HMRC that the problems he was having had “gone away”. The Tribunal is sympathetic to taxpayers who, because they cannot afford professional representation, navigate the tax system themselves. However, it was not reasonable for Mr Munn to assume that his problems had “gone away” when he had failed to send HMRC information on the precise amount of his business expenses that he promised. Even though he is not a tax expert, he should have understood the central point that he would need to explain to HMRC the amount of business expenses that he was claiming

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<sup>1</sup> It is at least arguable that the decision of the Supreme Court in *BPP Holdings v HMRC* [2017] UKSC 55 requires me to take a slightly different approach from that set out in *Data Select*. However, since HMRC did not invite me to take a different approach, I will not do so.

<sup>2</sup> It is possible that the letter of 21 September 2015 referred to at [10(3)] above amounted to an appeal against the penalties and surcharges. However, since I was not shown a copy of that letter, I cannot conclude that it was an appeal. Even if it were an appeal, it would still have been well over 8 years late.

before HMRC could agree to reduce his tax liability. The reasons that Mr Munn has put forward for appealing late are nowhere near good enough to explain such a long delay.

29. If I deny Mr Munn permission to appeal late against the surcharges and penalties, then he will be denied the ability to make his arguments against them. From what he said at the hearing, I do not think he would have a strong case for appealing against the penalties or surcharges. He offered no explanation of why the tax returns were filed late, so I cannot conclude that he has an even arguable case that there was a “reasonable excuse” for the purposes of the late filing penalties. He accepted that he had still not paid the full amount of his tax liability. I have inferred that his reasons for not paying the liability on time were a combination of the fact that he did not have the money and that he did not believe that the amount claimed was due. However, that does not amount to a strong case to the effect that there was a “reasonable excuse” for late payment particularly when the period of non-payment has gone on for so long<sup>3</sup>.

30. If I allow Mr Munn permission to appeal late against the surcharges and penalties then HMRC would suffer undoubted prejudice. They would have the burden of proof on many issues and would need to produce records dating back over 13 years to prove their entitlement to the penalties.

31. Weighing up the *Data Select* criteria has led me to the clear conclusion that Mr Munn should not be given permission to appeal late against the penalties and surcharges that have been imposed.

### **Conclusion and right to apply for permission to appeal**

32. Mr Munn’s application for permission to make a late appeal is refused.

33. 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 RICHARDS**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 26 APRIL 2018**

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<sup>3</sup> Of course, the late payment surcharges have been calculated by reference to the tax unpaid of £16,571.22. I have concluded that Mr Munn’s true liability for the 2003-04 tax year would have been lower than this. However, since Mr Munn has no right to seek a formal determination from the Tribunal that the tax due was less than £16,571.22, I do not consider that he would have any realistic prospect of arguing, in an appeal against the surcharges, that the surcharges should have been calculated by applying 5% to a lower figure.