[2018] UKFTT 518 (TC)

# TC06687

**Appeal number: TC/2018/00266**
**TC/2018/01685**

*INCOME TAX – application to bring a late appeal*

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

**DAVID PAUL RAWLINGS** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE FAIRPO**

**Sitting in public at Plymouth on 6 July 2018**

**Mr Clarke, Counsel for the Appellant**

**Mr Nathoo, presenting officer for the Respondents**

DECISION

## Introduction

1. This is an application for permission to bring two joined appeals out of time in relation to:

(1) Assessments made on 18 November 2016 for income tax and National Insurance Contributions for the tax years ended 5 April 2011 to 5 April 2014; and

(2) An assessment made on 18 November 2016 for penalties in respect of income tax and National Insurance Contributions; and

(3) An amended assessment to penalties made on 29 March 2017 in respect of VAT; and

(4) An assessment made on 5 December 2016 in respect of VAT.

2. It was noted that there is a dispute between the parties as to whether this Tribunal has any jurisdiction to consider an appeal against the assessment made on 5 December 2016 but it was agreed between the parties that it was unnecessary to consider whether this Tribunal has jurisdiction for the purposes of determining whether an appeal may be made out of time in respect of the assessment.

3. The appeals were initially notified to the Tribunal on 6 December 2017 but, due to procedural errors in relation to the appeal documentation, were not accepted until 2 March 2018.

4. It is not disputed that the appeals should have been brought within thirty days of the date of the assessments and that they were in fact made between seven and eleven months late.

## Appellant's submissions

*Applicable tests*

5. It was submitted for the appellant that although s49 TMA 1970 restricts the ability of HMRC to allow an appeal out of time, the Tribunal is not so restricted and has a "general discretion at large" to allow an application to make a late appeal and that it should not be applied only in special or exceptional circumstances. The authority given for this was *Browallia* [2003] EHWC 2779 (Admin), and the comments of Evans-Lombe J at paras 12 to 18.

6. It was also submitted that *Cook* [2009] EWHC 590 provided guidance on the application of the Tribunal's discretion and should include the following (at paras 22-23):

(1) Whether there is a reasonable excuse for not following the time limit;

(2) Whether matters proceeded with reasonable expedition once any reasonable excuse had ceased to operate;

(3) Whether there would be prejudice to either party in allowing a late appeal to proceed, or if it is refused;

(4) Whether there would be considerations of public interest in allowing the appeal to proceed or in refusing permission;

(5) Whether the delay has affected the quality of the evidence that is available

7. It was submitted that the granting of permission to bring a late appeal as being "an exception to the norm" in para 24 of *Cook* did not mean that the discretion could only be exercised in exceptional circumstances.

8. It was also submitted that, as this a preliminary stage in the case and there has been no disclosure and no witness evidence, the appellant can only be reasonably expected to show that he has an arguable case.

*Reasons for the delay*

9. For the appellant it was submitted that it was the reasons for the delay in submitting the appeals after the issue of the assessment that mattered and not any matters that might arise in relation to the timing of the assessments themselves. It was noted in the grounds of appeal that the appellant had been in poor health at the time of the time that the original interaction with HMRC took place.

10. The appellant had relied wholly upon his advisers, although it was accepted that this did not absolve him of all culpability. It was accepted that the appellant would have done better if he was more engaged and had not second-guessed what was going on.

11. It was submitted that the appellant was not a "sophisticated" businessman. He had assumed that any correspondence sent to him had been received by his advisers. He did not understand tax processes and did not understand that there might be any difference between an appeal to HMRC or an appeal to the Tribunal.

12. At the time that the assessments were made, it was stated that the appellant had been disengaged by his previous advisers without notice or explanation, and this gave rise to at least some of the delay.

13. From February 2017, the appellant had a new adviser. This adviser had confirmed that the appellant was now engaged with the process and so it was submitted that it would be unfair to state that the appellant had not chased matters.

14. It was further submitted that, on 20 February 2017, the appellant met with Mr Yeo and relayed the contents of a telephone call with HMRC on 10 February 2017 in which the appellant had been advised by an HMRC officer that a tribunal appeal was needed. As such, it was submitted that Mr Yeo had then had the relevant information and should have established whether he was competent to deal with the matter. Mr Yeo should have appealed the assessments at that point, as already described.

15. It was submitted that it was clear that the new adviser, Mr Yeo, had taken the wrong approach to the appellant's tax affairs. In particular, he had misdirected his efforts to trying to chase HMRC whereas he should have submitted appeals to the Tribunal as soon as possible and should have made applications to have those appeals heard out of time. A letter from the adviser dated 16 April 2018 was provided to the Tribunal and it was submitted that this was a candid explanation of the adviser's involvement in which he accepted that he got things wrong. It was submitted that Mr Yeo was out of his depth and that any delays from February 2017 were entirely to do with errors made by Mr Yeo because he had not established that he was competent to deal with the matter.

16. In particular, he had either had inadequate instructions from the appellant's previous advisers or had misunderstood those instructions. There were various points in time at which the adviser could have brought the appeals but failed to do so. It was accepted that the adviser was probably out of his depth but that the appellant had no reason to know this and assumed that his adviser was acting correctly.

*Prejudice to the parties and public interest*

17. It was submitted that HRMC had not shown that there would any prejudice to them in allowing the late appeal. It was accepted that there was a need for finality in litigation but that permission to make a late appeal had been granted in many cases involving longer periods, in the order of years. It was submitted that this was in the middle ground in terms of the length of the delay. It was submitted that the appellant had actively participated and co-operated in the process and that something was being done, even if it was not the right thing.

18. It was also submitted that HMRC would not be prejudiced in reopening the case as the litigation would continue and matters would be the same as they would have been at the time the appeal should have been made.

19. In contrast, there was a clear prejudice to the appellant as he would be required to make a substantial tax payment and, as a result of the bankruptcy order made against the appellant in December 2017, there would financial and social stigma for the appellant. He would lose everything that he has, as his assets are considerably less than the amount for which the order was made. HMRC and other creditors would get only a partial amount of the sums owed to them. It could not be in the public interest for an otherwise avoidable bankruptcy to stand.

20. It was submitted that it was not sensible for the appellant to pursue any of his advisers, as professional negligence claims often do not succeed and, even if a claim did succeed, it would be unlikely to cover the total loss as it would be difficult to quantify the amount of the loss.

*Quality of evidence and strength of the appellant's case*

21. It was submitted that this was a case involving evidence which could be easily verified through bank statements and documents; it would not depend on witness

evidence which might have weakened as to reliability over time. It was accepted that such documents could have been produced in the course of the enquiry but it was submitted that that was done and dusted and not relevant to this application. It was submitted that Mr Yeo had undertaken a full reconciliation of the appellant's tax affairs and had checked the documents and confirmed that they support the position.

22. It was submitted for the appellant that the appellant should be given the opportunity to produce this evidence and that it may even be possible to resolve the appeals without requiring a hearing.

**HMRC's submissions**

23. HMRC submitted that the relevant case law that the Tribunal should consider in deciding whether to allow a late appeal was well established, and could be summarised as follows (as recently set out in *AIM FM* [2018] UKFTT 299):

(1) *Data Select* [2012] UKUT 187 set out the five questions which the Tribunal should ask itself when considering whether to extend a time limit;

(2) *Denton* [2014] EWCA Civ 906 provided guidance on how the rule in CPR 3.9 should be given effect;

(3) *Romasave* [2015] UKUT 0254 stated that a delay of more than three months cannot be described as anything but serious and significant. HMRC noted that the delay in this case was approximately 11 months;

24. HMRC submitted that the purpose of the time limits was to ensure finality in litigation.

25. HMRC submitted that, although the Tribunal has power to extend time limits, it should not do so in this case. HMRC submitted that the matter should be regarded closed: the appellant had had ample opportunity to provide information and had not done so. Further, it was not in the interests of justice to allow an extension of time after such a long delay, as there is a public interest in finality in litigation.

26. HMRC submitted that the appellant had not provided good reasons for the delay: the appellant had known that an appeal was needed and did nothing to ensure that the appeal was submitted. HMRC submitted that the appellant's grounds of appeal relating to ill-health were not supported by contemporaneous documentation, particularly the notes of the meeting with HMRC in May 2014 where the appellant confirmed that he had no health issues.

27. HMRC also submitted that the appellant's reliance on advisers could not amount to a reasonable excuse for the delay as the appellant was clearly aware that an appeal was needed and did nothing to ensure that an appeal was submitted.

28. HMRC submitted that reopening the case would involve significant resources for HMRC: it had been very difficult to obtain information from the appellant and so an appeal at this stage would have to involve substantial amounts of work, if the appellant provided further documentation.

29. HMRC considered that the appellant's submission that the history of the case was not relevant to this application was not sustainable: the delays in the making the appeal reflect the delays and failures in the case. Despite agreeing to provide information as far back as May 2014, little such information had been provided and HMRC had had to issue Schedule 36 notices and penalties in relation to failures to respond to such notices, and to obtain third party information notices from the Tribunal. HMRC submitted that the appellant had had opportunities to provide documents throughout the proceedings and had failed to do so. The appellant's contention that there are discrepancies in the assessment amounts do not provide a reasonable excuse for a delay of almost a year in making the appeal.

30. HMRC noted that there would be substantial consequences for the appellant but submitted that these arose from the appellant's failure to act during the investigation.

**Discussion**

31. It was not disputed that the appeals were made well out of time.

32. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("Tribunal Rules") provides that where an enactment provides for a person to make or 20 notify an appeal to the Tribunal, the appellant must start proceedings by sending or delivering a notice of appeal to the Tribunal within any time limit imposed by that enactment. If the appeal to the Tribunal is made later than the time specified it must include a request for the Tribunal to give an extension of time and provide the reason why the notice of appeal was not provided in time. If the Tribunal does not extend the time for the notice of appeal it must not admit the notice of appeal.

33. The Tribunal must seek to give effect to the overriding objective when it exercises any power under the Tribunal Rules. The overriding objective is set out in Rule 2 of the Tribunal Rules ("Rule 2") as follows:

> "(1) The overriding objective of these [Tribunal 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."

34. Although I note the appellant's submissions as to relevant case law, I consider that it is the more recent cases of *Data Select*, *Denton*, and *Romasave* set out below

which set out the considerations which should apply in deciding whether or not to grant permission to bring a late appeal.

35. I agree with the appellant's submission that permission to make a late appeal is an "exception to the norm". Indeed, this was recently confirmed in the Upper Tribunal decision in *Martland* [2018] UKUT 178 (TCC) at para 44-45:

> "When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be …
>
> That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. …"

36. The decision of Morgan J in the Upper Tribunal in *Data Select* [2012] UKUT 187 (TCC) sets out the five questions that the Tribunal should ask itself when asked to extend a time limit. These are as follows:

(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?

37. In *Denton* [2014] EWCA Civ 906 the Court of Appeal provided guidance on how the provisions of Civil Procedure ("CPR") Rule 3.9 should be given effect by first instance judges considering an application for relief from sanctions. CPR 3.9, which came into force in April 2013, requires the court to consider all the circumstances of the case when considering an application for relief for a failure to comply with a rule or direction, including the need to enforce compliance with rules or directions. The Court of Appeal's guidance (at paragraph 24) is that a judge should consider an application for relief in three stages:

(1) The first stage is to identify and assess the seriousness and significance of the failure to comply.

(2) The second stage is to consider why the default occurred.

(3) The third stage is to evaluate all the circumstances of the case in order to enable the court to deal justly with the application.

38. In *BPP Holdings* [2017] UKSC 55 the Supreme Court considered a number of Upper Tribunal and Court of Appeal decisions in cases that post-dated the introduction of CPR 3.9, including *Denton*, in order to determine whether the Tax Tribunal should follow a similar approach to that required by CPR 3.9. The Supreme Court agreed that while CPR 3.9 does not apply to tribunals, there is no justification for a more relaxed approach to compliance with rules and directions in tribunals than in the courts.

39. I considered the Tribunal Rules and the guidance set out in the case law above to the facts of this case as follows:

*Purpose of the time limit*

40. There is no dispute that the purpose of a time limit for making an appeal is to provide finality. This allows HMRC to close their files and deal with other cases. This is in the public interest and is in accordance with guidance provided in *BPP*.

*Length of the delay*

41. In *Romasave* [2015] UKUT 0254 (TCC) the Upper Tribunal considered an application to make a late appeal and, in considering the length of the delay the Upper Tribunal stated (at paragraph 96) that:

> "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."

42. The delays in this case were over three months and I agree that they are therefore "serious and significant" as described in *Romasave*.

*Reasons given for the delay*

43. It was submitted that part of the reason for the delay was that the appellant was disengaged by his previous advisers at the time of the assessment, without notice or explanation.

44. The initial assessments were made in early November 2016. Mr Yeo's letter of April 2018 states that he was engaged some three months later, in early February 2017, and that the former advisers had decided that they could not represent the appellant any longer due to his lack of contact. The appellant's grounds of appeal state that they disengaged the appellant and left him on his own. However, it is also clear from Mr Yeo's letter that the former advisers did not simply disengage from the appellant and leave him on his own but, instead, sought him new representation – Mr Yeo was "originally contacted by" the former advisers, not by the appellant. Further, the notes of a telephone call between the appellant and HMRC, the contents of which were not disputed, also makes it clear that, as at 10 February 2017, the appellant believed that his former advisers were still acting for him and so, again, I consider that any submission that delays were because he did not know what to do whilst unrepresented are not supported by the evidence.

45. Although more criticism was levied at the appellant's former advisers in submissions, it is not at all clear from the evidence provided that they were responsible for any delays in relation to the appeals as they were clearly attempting firstly to obtain information from him and later to obtain some form of assistance for the appellant at a point where they considered that they could not assist him further.

46. On the balance of the evidence provided, I consider it more likely that the appellant did not respond to his former advisers between the assessments being made and February 2017 and that any delays in making the appeals at that time were due to his lack of contact with them rather than to any inaction on their part.

47. I consider that the submission made for the appellant that, on 20 February 2017, he told Mr Yeo that a tribunal appeal was needed is not supported by Mr Yeo's letter in April 2018, which states that the appellant had advised him in that meeting that an overdue tax return needed to be completed and had given Mr Yeo some documents to enable the return to be completed.

48. Given that Mr Yeo is quite clear in that letter that he accepts responsibility for a number of failures, I see no reason why Mr Yeo would not have confirmed the appellant's submission on this point in that letter, nor why he would not have – as he says he did later – look into the process for making an appeal at that stage if the appellant had advised him that one was needed.

49. Further, the telephone call with HMRC on 10 February 2017 was initiated by the appellant to discuss a tax demand that he had received for £125,000. It is clear from Mr Yeo's letter that the appellant also did not inform him of this demand as Mr Yeo's letter states that it was not until May 2017 that Mr Yeo became aware of the extent of the tax debt owed by the appellant, as the result of a letter demanding full payment of the debt. Accordingly, I find that the appellant did not discuss the 10 February 2017 call with Mr Yeo at the meeting on 20 February 2017, and so did not advise Mr Yeo that an appeal to the tribunal was needed.

50. I also find that the appellant was aware from 10 February 2017 at the latest that an appeal was required to the Tribunal. He failed to communicate this to his new adviser, together with other information that might have alerted the adviser to the scale of the tax debt owed.

51. Further, having been told on 10 February 2017 than the only option to him now was to apply to the Tribunal for a late appeal, no evidence was provided to indicate that the appellant ever asked his adviser at any time why an application had not been made.

52. The appellant accepts that reliance on an adviser does not absolve him of culpability, but I find that his actions between the date of the assessments and the date of the appeal are not actions which can be characterised as reliance on an adviser but, instead, can only be described as a substantial failure to take actions which a reasonable taxpayer would have taken in the same circumstances.

53. Whilst there were clearly errors made by his adviser in the handling of the case, the appellant had been specifically advised of the necessary actions to be taken and had failed to communicate those to his adviser. I find that it was not the errors of the adviser that caused the delays in making the appeal but, instead, the appellant's failure to ensure that clear instructions given to him by HMRC on 10 February 2017 were followed either by himself or by his advisers on his behalf.

54. Whilst it was submitted that matters before the assessments were made are not relevant to the reasons for the delay in making these late appeals, it is notable that this is in fact a continuation of the same behaviour: the appellant told HMRC in the call on 10 February 2017 that he had ignored letters because he had assumed HMRC had got things wrong. He did not respond to Schedule 36 Notices for information. He did not contact his advisers.

55. Accordingly, I find that the appellant has not established a good reason for the delays in bringing the appeals.

56. Given that I have found that the appellant has not established a good reason for the delays, I do not need to consider whether the appeals were brought within a reasonable time of that reason ceasing to apply. However, for completeness, I find that the appellant knew on 10 February 2017 that appeals were required in relation to the first three assessments and so any good reason that could have been established would have expired on that date and I find that the appellant could not have established using the same facts that there was a good reason for a failure to bring an appeal on time for the fourth assessment in March 2017. I find that, as the applications were not made until (at the earliest) December 2017, they were not made with "reasonable expedition" following 10 February 2017, to use the term indicated on behalf of the appellant in the case of *Cook*.

*Prejudice to the parties*

57. If permission is given for the late appeals, the appellant will be able to challenge the assessments and HMRC will have to use significant resources to respond to the appeals.

58. There is, of course, the potential for substantial prejudice to the appellant if the application to bring the appeals out of time is not granted as he will not be able to appeal the assessments and the bankruptcy order will stand.

*Strength of the appellant's case*

59. Although the strength of the appellant's case is not a specific factor in the questions identified in *Data Select*, the Upper Tribunal in *Martland* concluded (at para 45) that

> the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one.

60. The submission for the appellant that the case can be readily resolved by documentary evidence is not supported by the history of failures to provide such evidence throughout this case. It is submitted that the appellant's new adviser, Mr Yeo, had fully established the position and confirmed that it was all evidenced. I note that it was separately submitted that Mr Yeo had made numerous errors in his

handling of matters for the appellant and that he was out of his depth so that it perhaps curious that the appellant seeks to rely on Mr Yeo's work in this context, although it was also submitted that the appellant only sought to criticise Mr Yeo's handling of the investigation and not his abilities as an accountant.

61. Far from being "done and dusted", I consider that it is relevant to an application to make a late appeal that the appellant has not produced the required evidence during the course of the enquiry when he was specifically requested to do so: there has to be a limit to a taxpayer's ability to extend the time available to provide evidence to HMRC. The appellant has given no good reasons as to why he could not or did not provide the evidence during the enquiry but would now be able to do so in a late appeal. Accordingly, I do not consider that the appellant has demonstrated that there is any obvious strength to his case.

*Balancing the circumstances of the case*

62. As noted above, the delay in bringing these appeals was significant and the appellant has not established a good reason for that delay. There is no obvious strength to the appellant's case.

63. The prejudice to the appellant if the permission is refused is clearly significant but that is only one of the factors to be balanced, and it is clear that such prejudice would arise from the actions – or failures to act – of the appellant. The consequences that would arise from a refusal to give permission should have prompted the appellant to act earlier.

64. There is a clear prejudice to HMRC from requiring them to now deal with assessments that were considered closed. That prejudice does not in any way arise from HMRC's actions in the course of this matter.

65. Having considered the various factors and circumstances of the case, I conclude that it would not be fair and just to grant permission for the appeal to be brought out of time.

**Decision**

66. The application for the appeals to be admitted out of time is REFUSED.

67. 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

68. "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ANNE FAIRPO**
**TRIBUNAL JUDGE**

**RELEASE DATE: 28 AUGUST 2018**