



TC06802

Appeal number: TC/2018/02472

**PROCEDURE – *application for permission to notify a late appeal –
application refused***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAUL ASKEW

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 18 September 2018

Mr C Urquhart of UWM Accountants for the Appellant

Mr M Mason of HM Revenue & Customs for the Respondents

DECISION

Background

1. This is an application by the appellant for permission to notify a late appeal to
5 HMRC. The appeal concerns income tax determinations under regulation 80 Income
Tax (Pay As You Earn) Regulations 2003, national insurance decisions under section
8 Social Security Contributions (Transfer of Functions) Act 1999 and associated
penalties. The determinations and decisions relate to tax years 2008-09 to 2012-13

2. The appellant was in business during the relevant tax years as a car mechanic,
10 carrying out MOT work. On 3 May 2013 Mr Forsythe of HMRC commenced an
employer compliance check into the appellant's business. There was a visit on 30 July
2013 attended by the appellant and his accountant, Mr Urquhart of UWM
Accountants. Amongst other matters, it was established that the appellant's previous
15 accountant had failed to make P35 end of year returns for 2008-09 and 2009-10.
Differences between the end of year returns for later years and the wages shown as
paid by the appellant in his self-assessment returns were identified. It was also
identified that the appellant used two MOT testers who were treated as self-employed.
Following the meeting, by letter dated 2 August 2013 HMRC requested certain
20 information and documents for tax years 2008-09 to 2012-13, including details of
differences and payments made to the MOT testers treated as self-employed for each
tax year.

3. The information requested was not provided by the appellant. As a result,
HMRC issued an information notice pursuant to Schedule 36 Finance Act 2008 on 6
November 2013 seeking forms P35 and P14 for all employees in 2008-09 and 2009-
25 10, together with the information and documents previously requested. The
documents and information were not provided. Some but not all of the documents and
information were later provided in March 2014.

4. On 12 November 2014 HMRC issued the determinations and decisions which
the appellant now seeks to appeal. An accompanying letter referred to the appellant's
30 appeal rights. The total amount of the determinations and decisions is £25,816.

5. Mr Urquhart told me that on 27 November 2014 he sent a letter to HMRC Local
Compliance which was a formal appeal against the regulation 80 determinations.
There is an issue as to whether this letter was ever sent by the accountants and/or
received by HMRC. HMRC say that they did not receive the letter and they did not
35 acknowledge it at the time.

6. On 17 December 2014 HMRC sent a penalty warning letter to the appellant. It
was copied to Mr Urquhart and indicated that a penalty of £15,360 for deliberate
failure to operate PAYE was being considered. There was a response from Charlotte
Flynn, one of the secretaries at UWM Accountants, emailed to HMRC on 23
40 December 2014. In a letter attached to the email Mr Urquhart stated that he hoped to
provide a substantive response and the bulk of the information required by HMRC by
6 January 2015. In the event, due to the illness of his wife over the Christmas and

New Year period, Mr Urquhart was unable to provide the documents and information by that date.

5 7. On 19 January 2015 Mr Forsythe emailed Charlotte Flynn of UWM Accountants stating that the documents had not yet been received and also noted that no appeal had been submitted in relation to the determinations and decisions.

10 8. Mr Urquhart told me that by this stage he had got the information HMRC required but because of the time of year he was tied up with self-assessment matters. He said that he had overlooked the fact that Mr Forsythe appeared to be under the impression that no appeal had been submitted, but he knew that the information Mr Forsythe had requested was going to be provided.

9. Mr Urquhart produced a letter dated 5 February 2015 addressed to HMRC Local Compliance providing details of total payments made to the two MOT testers treated as self-employed in tax years 2010-11, 2011-12 and 2012-13. The letter stated that no information was available for the two earlier tax years. The letter ended:

15 “It appears we have provided all the information to enclose enable you (sic) to complete your enquiry, should you require any further information please do not hesitate to contact us.”

20 10. This was part of the information which Mr Forsythe had first requested on 2 August 2013. HMRC say that they did not receive this letter and therefore there was no acknowledgement of receipt by them to the appellant or UWM Accountants. There is an issue as to whether this letter was sent by the accountants and/or received by HMRC.

25 11. On 11 February 2015 HMRC wrote to the appellant and UWM Accountants stating that the penalty warning letter dated 17 December 2014 had been issued in the wrong format. A detailed penalty explanation was attached identifying the potential lost revenue and penalties for each tax year. This was followed by a penalty determination sent to the appellant and UWM Accountants on 1 April 2015. The penalty determination included a reference to appeal rights and the time for appealing was noted as 4 May 2015.

30 12. There was no response to the penalty determination and on 9 June 2015 HMRC wrote to the appellant and UWM Accountants to say that the matter was now considered to be closed.

13. The appellant and Mr Urquhart told me that they did not receive the letters dated 1 April 2015 and 9 June 2015.

35 14. Mr Urquhart acknowledged that no notice of appeal against the penalty was ever sent to HMRC.

15. At some stage in 2015 the appellant disposed of his business. The appellant and Mr Urquhart told me that after 11 February 2015 they heard nothing concerning the matter until 2017 when HMRC’s enforcement office became involved. The appellant

also told me that in the 6 months prior to enforcement office becoming involved he made numerous attempts to contact Mr Forsythe by telephone to check what the situation was. It is not clear what it was that prompted these calls. The appellant told me that he knew that there would be some liability to tax and national insurance in relation to certain matters and began making payments in August 2017. The evidence of such payments was not challenged, and I accept it.

16. The appellant said that he told Mr Urquhart that he was trying to contact Mr Forsythe. Mr Urquhart told me that he did not make any attempt to contact Mr Forsythe during this period because he knew that everything had been provided to Mr Forsythe. Matters escalated and I understand that the appellant received a statutory demand. As a result, on 3 August 2017 Mr Urquhart wrote to HMRC asking for that letter to be treated as a late appeal against the decisions and determinations. It also referred to an earlier letter to enforcement office dated 21 June 2017 which was not in evidence before me. It is odd that Mr Urquhart's letter dated 3 August 2017 should seek to make a late appeal if he understood that an appeal had already been lodged on 27 November 2014.

17. I am satisfied that after August 2017 there was frequent contact between UWM Accountants and HMRC and it was clear from that time at least that the appellant wished to appeal the determinations, decisions and penalties.

20 *Decision*

18. The approach to an application for permission to make a late appeal to HMRC has recently been set out by the Upper Tribunal in *Martland v HM Revenue & Customs [2018] UKUT 0178 (TCC)*. The Upper Tribunal reviewed the authorities and concluded as follows:

25 “ 44. 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. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

30 (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

40 (3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

5 45. 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. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT’s deliberations artificially by reference to those factors. The FTT’s role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

10 46. In doing so, 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. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal ...”

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19. I set out in this section my consideration of the relevant issues, adopting as I must the approach described by the Upper Tribunal in *Martland*. In considering those issues I make relevant findings of fact by reference to the balance of probabilities.

20 *(1) Length of Delay*

20. The appellant does not contend that any appeal was notified to HMRC in relation to the penalty.

25 21. I am not satisfied that the appellant sent an appeal to HMRC against the PAYE determinations in the letter dated 27 November 2014. There is no evidence that it was properly posted to HMRC, and unlike other communications from the accountants at this time it was not sent by email. It may be that it was prepared but for some reason not sent. I also note that Mr Forsythe stated in his email dated 19 January 2015 that no formal appeal had been submitted in relation to the determinations and decisions. If an appeal had been lodged on 27 November 2014 then alarm bells should have rung in the absence of any acknowledgment by HMRC and on receipt of that email. Mr Urquhart said that the failure to challenge Mr Forsythe’s email must have been an oversight on his part because it was January and he was very busy with self-assessment work. Even if that is right, it does not explain why there was no reference to the existence of an appeal in any subsequent correspondence.

35 22. I am also satisfied that HMRC did not receive the letter from UWM Accountants dated 5 February 2015. The chain of correspondence indicates that it was not received by HMRC. There is no evidence that it was properly posted to HMRC, or sent by email. Again, it may be that it was prepared but for some reason not sent. It is notable that Mr Urquhart did not respond to the penalty warning letter sent to himself and to the appellant on 11 February 2015. I would have expected contact with HMRC relying on the fact that most of the information requested had been provided in a letter dated 5 February 2015 but there was no contact until 2017.

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23. The appellant's case is that neither he nor Mr Urquhart received HMRC's subsequent correspondence dated 1 April 2015 and 9 June 2015 in relation to penalties. I acknowledge that there is no evidence of posting by HMRC and Mr Urquhart told me that UWM Accountants has a system to log incoming post.
5 However, I was not provided with any details of that system or evidence as to how it was operating in 2015. There was evidence that UWM Accountants had misplaced a letter in connection with the enquiry given to them by the appellant in 2013. I also take into account that there was a history of the appellant not engaging in the enquiry. The need for documents and information had first been discussed at the meeting on 30
10 July 2013 and formally requested in correspondence dated 2 August 2013. In his evidence Mr Urquhart stated that he did not act for the appellant at the time of the meeting but later accepted that he was present as the appellant's accountany. Eventually it was necessary for HMRC to issue an information notice which itself was not complied with.

15 24. On balance, I am satisfied that it is likely the appellant and UWM Accountants did receive Mr Forsythe's letters dated 1 April 2015 and 9 June 2015.

25. The position therefore is that no appeal was notified to HMRC against the PAYE determinations, the NIC decisions or the penalties. Appeals against the determinations and decisions were not notified to HMRC until 3 August 2017. Those
20 appeals were therefore out of time by some 2 years and 8 months. No appeal specifically against the penalty has ever been notified to HMRC. If I were to assume that the letter from UWM Accountants dated 3 August 2017 was intended to be an appeal against the penalties, then that appeal was out of time by some 2 years and 3 months.

25 26. I am satisfied that these are significant delays which call for a good explanation. Indeed, the Upper Tribunal in *Romasave (Property Services) Limited v Commissioners for HM Revenue & Customs [2015] UKUT 254 (TCC)* referred to a delay of 3 months as serious and significant.

Reasons for the Delay

30 27. The appellant's explanation for the delay is that Mr Urquhart believed an appeal had been lodged against the determinations on 27 November 2014 and neither the appellant nor Mr Urquhart received the penalty warning or the penalty determination. Further, he considered that the information required by Mr Forsythe had been provided on 5 February 2015. The appellant and Mr Urquhart therefore considered
35 that the enquiry had effectively been resolved.

28. For the reasons given above I am not satisfied that the letters dated 27 November 2014 and 5 February 2015 were sent to HMRC. The appellant and Mr Urquhart should have realised that HMRC did not have the information they required, otherwise it would have been acknowledged by HMRC. It would also have been
40 relevant to disclosure for the purposes of the penalty warning letter dated 11 February 2015. The appellant and Mr Urquhart could not reasonably have considered that this correspondence had crossed in the post and that HMRC had everything they required

without confirming that with Mr Forsythe. There is no evidence that they ever tried to do so. Even if they had not received the letters dated 1 April 2015 and 9 June 2015, they could not reasonably have thought in the absence of further contact that the enquiry was closed. There was an onus on them to confirm the position.

5 29. In fact however, I am satisfied that the appellant and UWM Accountants did receive the subsequent correspondence dated 1 April 2015 and 9 June 2015. It seems to me that throughout the enquiry and following the determinations, decisions and penalty the appellant was content not to engage with HMRC.

10 30. As for attempts by the appellant to contact Mr Forsythe in the early part of 2017, the impression I received from the appellant's evidence was that he was increasingly desperate to contact Mr Forsythe over a period of some 6 months. However, that is difficult to reconcile with Mr Urquhart's evidence. Mr Urquhart told me that he was relaxed about the position because he believed all the information had been provided. On the evidence before me I do not accept that the appellant made any
15 serious attempts to contact Mr Forsythe prior to the involvement of enforcement office.

31. In the circumstances there was no good reasons for the periods of delay in lodging appeals against the determinations, decisions and penalty.

All the Circumstances

20 32. I take into account my findings as to the length of the delay, the absence of any good reasons for the delay and the importance of respecting statutory time limits referred to in Martland.

25 33. Clearly the appellant will be prejudiced if permission to lodge a late appeal is not granted. The appellant will lose his opportunity to challenge the determinations, decisions and penalty on the merits. I am satisfied that the appellant would have at least a reasonable prospect of successfully pursuing his appeal if time is extended. There is nothing to suggest that the appellant's case would be particularly strong or weak.

30 34. There is also prejudice to the respondents if permission is granted. HMRC will lose the finality which since at least May 2015 they were entitled to expect. The respondents would have to enquire into various matters including the status of the two MOT testers in relation to tax years going back to 2008-09. I am satisfied that the passage of time makes such enquiries more difficult.

Conclusion

35 35. Mr Urquhart submitted that it would be a gross injustice if the appellant is not permitted to challenge these matters on the merits. I do not agree. Taking into account all the factors described above I am satisfied that it is not appropriate to grant permission for the appellant to lodge a late appeal. In the circumstances I refuse the application.

36. 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.

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**TRIBUNAL JUDGE
JONATHAN CANNAN**

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RELEASE DATE: 06 November 2018