[2019] UKFTT 74 (TC)

TC06958

Appeal number: TC/2017/06550

INCOME TAX - application for permission to make late appeal against best of judgment assessments

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL MCLETCHIE **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MRS SONIA GABLE

Sitting in public at Glasgow on 24 October 2018

The Appellant in person

Paul Harbottle, Presenting Officer, for the Respondents

DECISION

Introduction

1. The Appellant applies to the Tribunal for permission to bring a late appeal against assessments to tax for 2011-12 and 2012-13.

Background

2. On 12 May 2014, officers of HMRC attended a meeting with the Appellant's agent. According to an HMRC file note of that meeting, the agent stated at the meeting that the Appellant was a new client who had approximately £200 million worth of funds offshore, which he wanted to transfer to the UK. The agent was proposing that the Appellant make a payment on account of £2 million, and then have a meeting with HMRC's Criminal Taxes Unit ("CTU").

3. In an e-mail dated 29 May 2014, the Appellant's agent arranged for a meeting to be held with HMRC on 6 June 2014. In a telephone call on 3 June 2014, the agent informed HMRC that the Appellant had informed him that he would bring a "cheque for 7 figs" to that meeting.

4. On 6 June 2014, the Appellant and his agent met with HMRC's CTU. At that meeting the Appellant said as follows. He had money invested offshore in the British Virgin Islands which may have a UK tax liability. He wished to disclose these funds in order to be able to bring them to the UK in order to fund investments and charitable work. He had 16 dormant UK companies waiting for the investment. He had a cheque for £2 million written out which he would pay to HMRC as soon as he was assured he would not be subject to a criminal prosecution.

5. Further details were not discussed at that meeting, given that the Appellant indicated that he would be submitting a voluntary disclosure. He was handed a copy of HMRC's Code of Practice 9 ("COP9") booklet.

6. Later the same day, the Appellant submitted a "Contractual Disclosure Facility Request to make a voluntary disclosure" form ("form CDF1").

7. In a letter dated 25 June 2014, HMRC advised the Appellant that his tax affairs would be investigated under COP9 as it was suspected that he had committed tax fraud. The letter offered him the opportunity to make full disclosure under a contractual arrangement that HMRC would not commence a criminal investigation for any tax fraud disclosed under the contract.

8. On 19 August 2014, the Appellant's agent informed HMRC as follows. The agent had the Appellant's outline disclosure, but wanted to submit it with the Appellant's payment on account. However, as it was uncertain at this stage whether that money would be paid to HMRC, or whether it even existed, the agent would submit the outline disclosure within a few days, with or without a cheque.

9. Under cover of a letter dated 26 August 2014 (but apparently only sent on 2 September 2014), the Appellant's agent submitted to HMRC the Appellant's outline disclosure. The covering letter indicated that the Appellant still intended to make a payment on account. It added that it was difficult detailing how the Appellant's income had been derived and that a more detailed explanation would be provided at a future meeting. The voluntary disclosure stated that for 20 years, the Appellant had been buying, selling and leasing instruments outside the UK, but that he was resident in the UK at the relevant time and that he had failed to notify HMRC of this income.

10. In a telephone call to HMRC on 2 September 2014, the Appellant's agent stated as follows. The Appellant was leaving the UK that day to meet the "paymaster", who was the person who held the money and opened the bank accounts. The money was now held in Australia. The Appellant was travelling to Australia on specified Cathay Pacific flights. The Appellant was insistent that he would make a payment on account of £2 million on return.

11. On 2 September 2014, HMRC sought confirmation from Cathay Pacific about the Appellant's flights. The following day, Cathay Pacific confirmed that the Appellant was flying to Australia with them, and gave details of his booking which was consistent with the information previously provided by his agent.

12. On 22 September 2014, HMRC advised the Appellant that his CDF outline disclosure had been accepted, but that a meeting to discuss its contents would not be set up until he made a payment on account.

13. On 2 October 2014, the Appellant's agent notified HMRC that the Appellant "allegedly is moving money as we speak to sort initial POA [payment on account] – I still have my doubts".

14. In a letter dated 7 October 2014, HMRC noted that the payment on account had not materialised, and that the outline disclosure was vague and lacking in detail. HMRC set out proposed steps to progress the matter, beginning with the making of a formal disclosure by the Appellant containing sufficient detail to enable matters to be settled.

15. On 27 October 2014, the Appellant's agent informed HMRC that the Appellant was not happy with the HMRC letter, and that he still proposed to make a substantial payment on account.

16. On 14 November 2014, at the Appellant's agent's request, HMRC provided details of a HMRC bank account into which a payment on account could be made.

17. In letter to the Appellant and his agent dated 7 December 2014, HMRC stated that given the lack of progress since the initial disclosure, HMRC would take steps to conclude the investigation by formal means.

18. In a letter dated 30 January 2015, HMRC stated that it proposed to raise best of judgment discovery assessments under s 29 of the Taxes Management Act 1970 for 2011-12 and 2012-13.

19. On 12 February 2015, HMRC issued the assessments. It is against these that the Appellant seeks to appeal. For each of the years 2011-12 and 2012-13, the Appellant has been assessed to some £34,000 in tax and NIC on a presumed income received of £100,000.

20. In March 2015, HMRC were advised of a change of agent for the Appellant.

21. On 8 April 2015, the Appellant himself sent an e-mail to HMRC, which stated amongst other matters the following: "I have no earnings to which I am liable for Tax, YET, the offshore company is the earner to which I have received nothing, no salary, no bonus, no dividends, and it will remain that way as long as whoever this invisble entity is continues to fight my making a living and funding my ideals".

22. On 22 April 2015, HMRC responded that the investigation had been closed due to the Appellant's non-cooperation, and that there were no matters in the Appellant's e-mail that changed HMRC's position.

23. Following some further e-mail exchanges between the Appellant and HMRC, in a form dated 6 May 2015 (said to have been received by HMRC on 14 May 2015), the Appellant appealed against 30 day late payment penalties for late payment of the tax to which he had been assessed. His reasons for appeal stated that he did not owe any tax and had no income which would attract tax.

24. On 1 June 2015, an HMRC "view of the matter" letter indicated that the HMRC position remained unchanged.

25. On 13 July 2017, the Appellant was contacted by HMRC by telephone. In that call, the Appellant maintained that he had appealed against the assessments at least 6 times. HMRC told him that he had only made one appeal, which had been against late payment penalties. The Appellant maintained that there was no debt to pursue.

26. In a letter to HMRC dated 13 July 2017, the Appellant maintained that his former agent had made an error, that he had no income on which tax was due, and that HMRC were abusing their position in pursuing him. This letter was treated by HMRC as a request for a late appeal.

27. On 21 August 2017, HMRC wrote to the Appellant advising him of the late appeal procedure.

28. In a notice of appeal dated 27 November 2017, the Appellant commenced the present Tribunal proceedings. The grounds of appeal stated amongst other matters that he had had no earnings for over 20 years.

29. On 15 March 2018, HMRC made an application, requesting that the question of whether or not the Appellant should be given permission for a late appeal be determined as a preliminary question. HMRC objected to the application for permission for a late appeal.

The hearing

30. A hearing of the application for permission to bring a late appeal was held on 24 October 2018. The Appellant attended in person and gave evidence, as did HMRC Officer Lynagh who issued the discovery assessments.

The evidence of the Appellant

31. In his oral evidence, the Appellant stated amongst other matters as follows.

32. He did appeal against the assessments within the 30 day time limit. He does not know what he can do to prove this as he did not send it recorded delivery. There has been a clash of personalities between him and the HMRC officer. He approached his former agent because he wanted to bring loan funds to the UK and wanted to ensure that they would not be taxed in the UK. He only signed the disclosure documents because he was advised to do so by his former accountant, but then decided not to proceed as he is not a criminal. Some time in the past, he had been convicted of fraud, but then subsequently acquitted on appeal, and for four and a half years he had been unjustly branded as a fraudster. On this occasion, he had borrowed £2 million, and wanted to get HMRC's clearance before bringing it in to the UK. Since the assessments were issued, he has received various other penalties. There is no evidence in the bundle that he ever earned £200,000. The trip to Australia was paid by someone else. The Appellant lives with his daughter and has no income. HMRC have no evidence that he ever received a penny. He is confident that he would win any appeal.

33. In cross-examination, the Appellant said amongst other matters as follows.

34. He confirmed receiving various items of correspondence from HMRC in the bundle. He maintained that he appealed against the assessments within 30 days. He maintained that he had been in constant communication with HMRC throughout, about twice a month. All that the HMRC case is based on is one form saying that he received enough commission to cover his modest lifestyle. That form was not completed in his handwriting and does not use his terminology. If the information in it was correct, he should have been taxed for a 20 year period. He can produce a lot of evidence but has not done so because this was not the hearing of the substantive appeal.

The evidence of Officer Lynagh

35. The witness statement of Officer Lynagh states amongst other matters as follows.

36. No appeals were received by HMRC from the Appellant against the assessments. The assessments were sent to the address for the Appellant then held on record by HMRC.

37. The Appellant is and has been the director of numerous limited companies as stated in his disclosure, none of which have ever filed any trading accounts and are

showing as dormant. He has never been on HMRC's PAYE or self-assessment systems as having any earned income. When the Appellant approached his former agent in May 2014, HMRC had no knowledge of him or any reason to commence any form of tax investigation.

38. The Appellant's pattern of travel to Australia was unusual and not what would be expected for a vacation of this distance. The trip was by business class.

39. Officer Lynagh discussed the figure for the discovery assessment with his case director prior to issue. It was decided that the disclosure indicated that the Appellant was involved in some kind of commission based venture for which there was UK tax liability, that the level of income was unlikely to be near the millions suggested by the Appellant, and that a figure of £100,000 whilst significant was modest by comparison with what the Appellant had suggested in his disclosure.

40. In cross-examination, Officer Lynagh amongst other matters confirmed that the Appellant's ticket to Australia had indeed been paid by a third party.

The Appellant's submissions

41. The Appellant's submissions are sufficiently set out above.

The HMRC submissions

42. The Appellant provided a notice of appeal to HMRC in excess of 2 years after the discovery assessments were issued, well outside the 30 day window under s 31A(1)(b) and (2)(a) TMA. The length of the delay is severe. The Appellant and his agent were both aware of the time limits. The Appellant's only ground for his application is his contention that he did in fact appeal within the 30 day time limit, but he has provided no evidence of this, and there is no evidence that he ever followed up on it. His explanation therefore does not carry weight. He has therefore not provided a reasonable excuse for the delay.

43. HMRC would suffer prejudice in reopening the appeal, as HMRC reasonably considered the investigation to be concluded over 2 years before the appeal was lodged. The time and resources required for preparing for the appeal are now much greater than they would have been if the appeal had been made on time, as the officers will need to meticulously review the case to refresh their memories after a 2 year delay.

44. With so much at stake for the Appellant, he could have been expected to pursue his case diligently, but instead his efforts have been minimalistic, suggesting that he is not serious about pursuing the appeal: reliance was placed on *Carr v Revenue and Customs* [2017] UKFTT 863 (TC).

45. To allow a late appeal solely on the grounds of the financial prejudice to the Appellant if a late appeal is not granted would significantly impact the volume of future late appeals. It would also convey a message of acceptability of late appeals.

46. The merits of the Appellant's case should only be considered to the extent that they are obvious and potent. In any event, the HMRC assessments are well founded.

Application for permission to bring a late appeal: applicable law

47. The time limit for the bringing of appeals in this case is 30 days from the date of the decision appealed against. However, the Tribunal can give permission for the bringing of a late appeal (Rule 20(4) of the Tribunal's Rules).

48. The starting point is that permission should not be granted unless the Tribunal is satisfied on balance that it should be. The Tribunal is required to conduct a balancing exercise, having regard to all factors that are relevant in the circumstances of the particular case. It is not necessary for the Tribunal to structure its deliberations artificially by reference to factors set out in previous cases. (*Martland v The Commissioners for HM Revenue and Customs* [2018] UKUT 178 (TCC) at [44]-[45]).

49. Relevant factors normally include the purpose of the time limit, the length of the delay, whether there is there a good explanation for the delay, and the consequences for the parties of an extension of time or a refusal to extend time (*Data Select v HMRC* [2012] UKUT 187 (TCC), the Upper Tribunal stated at [34]).

50. Relevant factors also include the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, but these do not have special weight or importance and the obligation of the Tribunal remains simply to take into account, in the context of the overriding objective of dealing with cases fairly and justly, all relevant circumstances, and to disregard factors that are irrelevant (*Romasave (Property Services) Ltd v Revenue And Customs* [2015] UKUT 254 (TCC) at [88]-[92]).

The Tribunal's findings

51. The assessments to which this appeal relates are best of judgment assessments. The law applicable to such assessments is well established.

52. Such assessments involve HMRC exercising their powers in such a way that they make a value judgment on the material which is before them. The exercise of that function by HMRC must be honest and bona fide, and there must be some material before HMRC on which they can base their judgment. However, bearing in mind that the primary obligation is on the taxpayer to make a return, HMRC should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which to their best judgment is due.

53. In an appeal against a best of judgment assessment, the burden of proof is on the taxpayer to establish the correct amount of tax due. In such an appeal, the HMRC officer's conclusions are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right. It is not for the Tribunal to

treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised.

54. The Tribunal accepts that HMRC are entitled to make a best of judgment assessment based on information voluntarily disclosed by the taxpayer himself or herself. Such voluntarily disclosed information may reveal that income which ought to have been assessed to tax has not been assessed, but may not be sufficient to establish the precise amount of that income. If so, HMRC are entitled to make a best of judgment assessment of the relevant amount. It is not a ground of appeal without more that HMRC made such an assessment without undertaking further investigations. This is because it is for the taxpayer, rather than HMRC, to produce evidence showing more precisely the amount of income in question.

55. Furthermore, if the taxpayer does wish to appeal against a best of judgment assessment on the basis that he or she has evidence showing that the HMRC assessment is wrong, the Appellant is required to do so within the time limit for bringing such an appeal, or must persuade the Tribunal that there are sufficient reasons for allowing a late appeal.

56. The principles relating to late appeals are set out above.

57. The hearing of an application for a late appeal is normally not an occasion for considering the merits of the appeal that the Appellant proposes to bring. In any event, the Appellant in this case has not demonstrated that he has any evidence that he would bring in a substantive appeal that would show positively what corrections should be made in order to make the assessments right or more nearly right.

58. In an application for a late appeal, the Tribunal is more concerned with the reasons for the lateness. The Appellant has not shown that he has good reasons for the very long delay in bringing this appeal. He claims that he has appealed multiple times already, but has produced no evidence of this, and HMRC deny receiving earlier appeals.

59. In the circumstances, the Appellant at first sight faces formidable obstacles in persuading the Tribunal to grant permission for a late appeal.

60. However, in deciding whether or not to grant the application, the Tribunal is not confined to the narrow question of whether or not the Appellant has a "reasonable excuse" for the lateness. The Tribunal must consider all relevant factors going to the fairness and justice of the proceedings.

61. The Tribunal considers that such factors include the following.

62. The assessments against which the Appellant seeks to appeal are in essence based on nothing other than statements made by the Appellant himself. As noted above, HMRC are entitled to make best of judgment assessments based solely on information provided voluntarily by the taxpayer. However, what the Tribunal finds to be striking in this case is that the information provided by the Appellant is extremely vague. Furthermore, the information provided by the Appellant has been

inconsistent, and ultimately, the Appellant completely withdrew the claim to have earned income on which UK tax was due. As the witness statement of Officer Lynagh states at paragraph 44, "The Appellant has given various statements which vary greatly from someone who has made vast sums to someone who has never earned any income".

63. In May 2014, when HMRC were first approached by the Appellant's agent, it was said that he had some £200 million of funds offshore. In his initial disclosure, the Appellant said that he set up a company called Filowater BV in the British Virgin Islands, and that he and this company generated income of around £300 million in 2011-12 and 2012-13. In his initial disclosure, he also said that he was the beneficial owner of this company, and that all other individuals involved in the company acted under his direction.

64. However, the Appellant's own agent appears to have expressed doubts to HMRC as to whether these funds really existed (see paragraphs 8, 9 and 13 above). Indeed, HMRC itself reached the conclusion that the information provided by the Appellant was not reliable. A letter dated 7 December 2014 from Officer Lynagh expressly states that "I have seen no evidence whatsoever that this type of income was generated or indeed ever existed". The witness statement of Officer Lynagh at paragraph 35(c) further indicates that HMRC expressly formed the view that any income earned "was not likely to be near the millions suggested by the Appellant".

65. It seems that HMRC have investigated to the extent that they have established that the Appellant has been the director of various limited companies, but that none of these have ever filed any trading accounts and are showing as dormant. HMRC do not suggest that they have any information that these companies have in fact ever traded or received any funds. There is no suggestion that HMRC have any evidence at all that the Appellant has ever received any funds of any kind.

66. The Appellant in his oral evidence spoke of a previous prosecution for fraud, which he says was subsequently overturned on appeal. However, there is nothing in the material to suggest that HMRC have confirmed whether or not the Appellant was in fact previously ever prosecuted for fraud, and there is no suggestion that his claims to this effect played any part in the HMRC decisions appealed against. Paragraph 15 of the witness statement of Officer Lynagh states that the Appellant was unknown to HMRC when he first approached them in May 2014, and that his approach to HMRC was completely voluntary. All that HMRC knew was that he had never previously been registered for PAYE or self-employment.

67. The only other evidence relied on by HMRC in making the assessment seems to have been the fact that the Appellant took a business class trip to Australia. However, HMRC have confirmed that that ticket was paid for by another person. Nothing else about the circumstances of that trip appear to be known, other than the HMRC note stating that the Appellant's agent had said that he had been told by the Appellant that the purpose of the trip was to see the "paymaster" in Australia where the funds were now being held.

68. It seems inexplicable, at least on the material presently available, why the Appellant would completely voluntarily approach HMRC to disclose undeclared income of hundreds of millions of pounds, and then subsequently deny that he had any income at all. It would be pure speculation on the part of the Tribunal to identify possible explanations.

69. One possible explanation might be that the Appellant was fantasising when he claimed to have been earning hundreds of millions of pounds. If that were so, this might also go some way to explaining why he did not appeal against the assessments sooner.

70. On the material before it, the Tribunal can go no further than to say that this is one possible explanation. However, given that the Appellant has been vague and inconsistent and found to be unreliable in his claims, given that there is no other evidence at all that the Appellant ever received any funds of any kind, and given the absence of any evidence suggesting any other possible reason why the Appellant would have voluntarily approached HMRC with a claim that he had earned hundreds of millions of pounds and then subsequently denied that this was the case, the Tribunal considers that it would be unjust in the circumstances not to allow this appeal to proceed. If it is possible that the Appellant never earned any income at all, and has now been assessed to tax of some £68,000 due to his own—inexplicable—vague and contradictory statements to HMRC which he now disowns, the Tribunal feels that he ought to be given an opportunity to establish that this is the case.

71. The Tribunal is not persuaded that HMRC would suffer prejudice in reopening the appeal. The only material relevant to this appeal appears to be that in the hearing bundle prepared for the hearing of the application for a late appeal. HMRC have already reviewed the case for purposes of that hearing. There was very little material that needed to be reviewed.

72. However, the Tribunal needs to make clear to the Appellant what it has said in paragraphs 51 to 54 above. In the appeal, the burden is not on HMRC to show that the assessments are correct. The burden is on the Appellant to show that they are wrong, and to show what income he really did earn in 2011-12 and 2012-13. Even if the Appellant says he earned nothing at all, he needs to produce positive evidence to prove that he earned nothing at all. Such evidence might include bringing witnesses to the hearing who have personal knowledge of his financial circumstances, and by producing documents which demonstrate his personal situation and finances in the years in question. If he does not bring any relevant evidence, or brings insufficient evidence, he must expect his appeal to fail. He should not expect an appeal to succeed on the basis of his own evidence alone. He should also give very serious consideration to having a professional representative at the hearing to present his case for him.

73. Although the burden is on the Appellant and not on HMRC to produce evidence, HMRC will nonetheless be entitled to produce evidence, if they so wish. It is a matter for HMRC whether or not they wish to undertake any further enquiries into the Appellant and his circumstances.

Conclusion

74. The application for permission to bring a late appeal is therefore granted.

75. Directions for the further progress of this appeal are issued with this decision.

76. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 01 FEBRUARY 2019