[2019] UKFTT 308 (TC)

TC07136

PROCEDURE – Income tax – whether permission should be given for late notification of appeals – decision of the Upper Tribunal in Martland considered – permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06037

BETWEEN

TONY ROSE **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 3 May 2019

Colin Anderson, of Colin Anderson Accountancy, for the Appellant

Sadia Shakeel, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Rose applied for permission to make late appeals against amendments to his self-assessment tax returns for the tax years 2015-2016 and 2016-2017 as further set out in the Relevant Facts below.

2. HMRC object to the application on the basis that Mr Rose has failed to prosecute his appeal with reasonable diligence as it was made 245 days out of time.

RELEVANT FACTS

3. The facts found in paragraphs 4 to 18 below are below are based on the bundle of documents prepared by HMRC. Mr Rose did not attend the hearing to give evidence.

4. Mr Rose is a self-employed bricklayer. He completed his own self-assessment tax returns for the tax years in issue, and dealt with the correspondence with HMRC which is referred to below.

5. HMRC wrote to Mr Rose on 17 May 2017 in relation to the tax year 2015-2016 informing him that the information he had provided (in a letter stated to have been received on 24 March 2017) was not all that HMRC needed to agree the figures in his tax return and setting out further information needed.

6. HMRC wrote to Mr Rose on 14 July 2017 in relation to the tax year 2015-2016 informing him that based on the information he had provided they believed the amount of expenses claimed was too high, and setting out the amendments proposed to be made.

7. Also on 14 July 2017, HMRC wrote to Mr Rose informing him that they were checking his tax return for the tax year 2016-2017.

8. HMRC issued a closure notice and amendments to Mr Rose's self-assessment on 21 August 2017 under s28A(1) and (2) Taxes Management Act 1970 ("TMA 1970") for the tax year 2015-2016. The closure notice states that if the taxpayer wants to appeal he should write to HMRC by 20 September 2017. That closure notice also stated that HMRC would be charging a penalty for the error in the tax return. Mr Rose has not appealed against that penalty and is not seeking permission to make a late appeal in respect thereof.

9. HMRC wrote to Mr Rose on 1 November 2017 in relation to the tax year 2016-2017 informing him that the information he had given them (in a letter dated 10 October 2017) was not enough for HMRC to agree the figures in his tax return. That letter goes on to set out the additional information required.

10. HMRC wrote to Mr Rose on 30 November 2017 in relation to the tax year 2016-2017 informing him that based on the information he had provided they believed the amount of expenses claimed was too high, and setting out the amendments proposed to be made.

11. HMRC issued a closure notice and amendments to Mr Rose's self-assessment on 11 December 2017 under s28A(1) and (2) TMA 1970 for the tax year 2016-2017. The closure notice states that if the taxpayer wants to appeal he should write to HMRC by 10 January 2018.

12. The bundles of documents provided by HMRC did not contain copies of any of the correspondence from Mr Rose to HMRC in respect of the enquiries into his self-assessments for the tax years 2015-2016 or 2016-2017, but HMRC's letters do refer to letters and information provided by Mr Rose during that time.

13. Mr Anderson wrote to the Tribunal on 13 September 2018 enclosing:

(1) Form 239 dated 3 September 2018 authorising Mr Anderson to act on Mr Rose's behalf in this appeal; and

(2) Notice of Appeal to the Tribunal dated 12 September 2018 together with supporting documentation.

14. The Notice of Appeal includes the following answers to the questions therein:

(1) Did you appeal the original decision to HMRC? "No." (The guidance notes next to this question state that "For direct tax or information notices, you must appeal to HMRC before you can appeal to the tax tribunal.")

(2) What happened after you appealed to HMRC? "My appeal to HMRC was late. I am applying to be allowed to make a late appeal to HMRC."

(3) Did you have a review of the original decision? "Yes."

(4) Are you in time to appeal to the tax tribunal? "No. I am late."

15. The bundle did not contain any other reference to a review of the original decision (either a request or a letter setting out the outcome of the review) and at the hearing Mr Anderson accepted that this was an error in the completion of the form and no review had been requested.

16. The Notice of Appeal explained that that the appeal was notified late as:

> "On advice of my peers I appointed an accountant to deal with my tax affairs originally to do my 2018 and future tax returns.
>
> On further discussion about my tax affairs my newly appointed accountant suggested that some of the findings by HMRC were possible to challenge.
>
> Since that meeting we have been putting together our case for appeal, some of it being hampered by the fact that some of the core records originally submitted to HMRC during the enquiries had not been returned."

17. Mr Rose states in the Notice of Appeal that the outcome sought is that his suggested revised computations for the tax years 2015-2016 and 2016-2017 (which were enclosed therewith) be accepted and his tax calculations be adjusted accordingly. The note prepared by Mr Anderson which accompanies these suggested revisions contains a brief explanation of the challenges made to HMRC's disallowances, and also states:

> "My client provided HMRC with a lot of paperwork and, after requesting it back on the closure of the enquiry he has only received a minimal amount back. Some only in the last few weeks. It has therefore been impossible to verify the enquiries team findings and therefore the following revised figures for the two years are based on the accounts prepared in 2018 from my client's books and records. The 2018 tax return has been filed with HMRC...
>
> My client is a lay person who thought, at the time, that he would be able to deal with, firstly, preparing his own tax return to the best of his ability and, secondly, the enquiry into his returns...in hindsight he realises he should have used a representative."

18. On 30 October 2018 HMRC notified the Tribunal that they object to the application for permission to lodge the appeal in a Notice of Respondents' Objection to Appellant's Application for permission to make a late appeal ("HMRC's Objection Notice"). HMRC's Objection Notice refers to s49 TMA 1970, noting that HMRC "may agree to accept an appeal" which has been made late if it is made in writing, if the appellant has a reasonable excuse for making the appeal out of time and has submitted their appeal to HMRC as soon as the excuse for the lateness has ceased. HMRC say that the reason given by Mr Rose is not a reasonable excuse. They go on to note that the Tribunal can give permission for the late notice of appeal

to be accepted by HMRC if they think it right to do so, but go on to contend that Mr Rose has failed to prosecute his appeal with reasonable diligence, in that it was "brought to HMRC 245 days out of time", and ask that permission be refused.

RELEVANT LEGISLATION

19. Section 31A TMA 1970 requires that notice of an appeal is given in writing to the relevant officer of the Board within 30 days of the date on which the notice of amendment was given.

20. Section 49 TMA 1970 then applies where a notice of appeal is given late. This provides:

> "**49 Late notice of appeal**
> (1) This section applies in a case where—
>
> (a) notice of appeal may be given to HMRC, but
> (b) no notice is given before the relevant time limit.
>
> (2) Notice may be given after the relevant time limit if—
>
> (a) HMRC agree, or
> (b) where HMRC do not agree, the tribunal gives permission.
>
> (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
>
> (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
>
> (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
>
> (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
>
> (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
>
> (8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section)."

HMRC'S SUBMISSIONS

21. HMRC's Objection Notice is summarised at paragraph 18 above.

22. At the hearing HMRC referred to the decision of the Upper Tribunal in *Data Select Limited v HMRC* [2012] UKUK 187 (TCC), in which Morgan J stated:

> "34… As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

23. Ms Shakeel stated that HMRC had considered each of these five questions and set out their position as follows:

(1) Purpose of the time limit – Ms Shakeel referred to the decision of the Tribunal in *Francis v HMRC* [2016] UKFTT 484 (TC) at 45 and stated that HMRC agreed with the Tribunal's conclusions in that case that the purpose of the time limit of 30 days is to provide both taxpayers and HMRC with certainty as to the "cut off" point when the

amount of tax asserted by HMRC to be due becomes certain and final. Parliament has set down what it regards as sufficient time for a taxpayer to consider whether he wishes to dispute a tax assessment and if so to make an appeal. The Tribunal stated, and HMRC submitted, that the taxpayer is required to act promptly if he wishes to make an appeal thereby providing efficiency in the conduct of the dispute (should there be an appeal) or finality (should there be no appeal).

(2) Length of delay – Ms Shakeel submitted that the decision of the Upper Tribunal in *Romasave (Property Services) Limited v HMRC* [2015] UKUT 254 (TCC) was relevant, and in particular referred to the statement at 96 that, in the context of an appeal right which must be exercised within 30 days of a particular decision, "a delay of more than three months cannot be described as anything but serious and significant". In the present case the delay was 245 days, which was both serious and significant.

(3) Explanation for the delay – Mr Rose's explanation for the delay as set out in his Notice of Appeal was not a good excuse. He had acknowledged that he was aware of the closure notices and should have acted in time.

(4) Consequences of an extension of time or a refusal to extend time (taking questions (4) and (5) together) – Ms Shakeel referred to the decision of the Court of Appeal in *BPP Holdings v HMRC* [2016] EWCA Civ 121 at 38 where the Senior President of Tribunals (in a judgement with which Moore-Bick LJ and Richards LJ agreed) stated the interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system. If an extension of time was allowed in the present case, this would prejudice HMRC and be unfair to other taxpayers who do appeal within the 30 day time limits as set by Parliament. Time limits give finality to both sides, and allow HMRC to move onto other cases.

Ms Shakeel referred again to the decision of the Tribunal in *Francis* at 50, where it was found that in considering the consequences of an extension of time or a refusal it must be relevant to consider whether the taxpayer's appeal would have any reasonable prospect of success if they were to be allowed to make a late appeal ultimately to the Tribunal. HMRC had considered this factor, and drew attention to the fact that Mr Rose would need to provide substantive evidence of his expenses having been incurred (as referred to in HMRC's letter of 30 November 2017 in respect of the tax year 2016-2017).

24. HMRC concluded that, in the interests of justice and fairness, permission should not be granted for a late appeal to be made to HMRC. HMRC have the right to expect matters to be dealt with in a timely fashion.

APPELLANT'S SUBMISSIONS

25. Mr Anderson submitted that Mr Rose, not having the benefit of professional advice during the period of the enquiry or within the 30 day period for appeals to be made in time, had assumed that he had no choice but to accept the amendments made by HMRC in the closure notices. It was only after the 30 day period had expired that he sought professional advice, which was at some point during summer 2018, and from that point Mr Rose had acted without unreasonable delay, albeit that he had been hampered by the delayed or non-return of documentation which, in Mr Anderson's submission, had been sent to HMRC as referred to in the papers accompanying the Notice of Appeal (see paragraph 17 above).

26. Mr Anderson addressed the five questions which HMRC had identified from *Data Select* as follows:

(1) Purpose of the time limit – He did not disagree with HMRC's position on the purpose of statutory time limits.

(2) Length of delay – He agreed that the appeal was very late, but denied it was significant in terms of the amount of money involved.

(3) Explanation for the delay – Mr Anderson suggested, although no evidence was presented, that Mr Rose had taken the view that the closure notices finished matters and he could do nothing to change the outcome. By the time Mr Rose instructed Mr Anderson, the 30 day time limit for appealing against each of the closure notices had already passed. Mr Anderson submitted that from summer 2018 to submission of the Notice of Appeal on 13 September 2018 he did act as quickly as possible in the circumstances. Mr Anderson referred to reasons given in the Notice of Appeal, and stated that HMRC had not returned all of Mr Rose's books and records and this had made it more difficult to re-build the accounts.

(4) Consequences of an extension of time or a refusal to extend time – An extension of time would allow Mr Rose to re-address the disallowances made by HMRC. Mr Anderson did argue that, as at the date of the hearing, some records had still not been returned by HMRC, but also agreed that there was no evidence of exactly what had been provided by Mr Rose to HMRC. Refusing an extension would prevent Mr Rose from being able to challenge the assessments.

DISCUSSION

Requirement to appeal to HMRC before appealing to the Tribunal

27. Section 49 TMA 1970 requires that a taxpayer seeking to appeal amendments made by a closure notice give notice of such appeal to HMRC. It states that notice may be given late if HMRC agree or, where HMRC does not agree, the Tribunal gives permission. HMRC is then required (by s49(3) to (6) TMA1970) to agree to notice being given late where:

(1) the taxpayer makes a request in writing to HMRC to allow the late notice of appeal (s49(4)); and

(2) HMRC are satisfied that the taxpayer has a reasonable excuse for not giving the notice before the relevant time limit and gave the notice without unreasonable delay after that reasonable excuse ceased (s49(5) and (6)).

28. HMRC's Objection Notice has been prepared on the implied assumption that Mr Rose has made a request in writing to HMRC that falls within s49(4). However, based on the evidence in the bundle, I am not satisfied that such a request was made. No copy of any such notice from Mr Rose (or Mr Anderson on his behalf) to HMRC is contained or referred to in the bundle, and the Notice of Appeal states that no appeal was made to HMRC.

29. HMRC's Objection Notice also proceeds on the basis that where the conditions in s49(4) to (6) are satisfied, they may agree to accept a late appeal – that is not correct. The language in s49(3) is clearly mandatory.

30. Nevertheless, given that HMRC did consider whether Mr Rose had given a reasonable excuse, and concluded that he had not, s49(5) is not satisfied in any event.

31. I only have jurisdiction to give permission for late notice of the appeal to be given to HMRC "where HMRC do not agree", by virtue of s49(2)(b) TMA 1970. Notwithstanding my conclusion in paragraph 28 above in relation to whether Mr Rose has made a request in writing to HMRC for the purpose of s49(4), I am nevertheless satisfied that HMRC have not agreed to such an appeal and therefore I have relevant jurisdiction. This is clear from HMRC's Objection Notice, which was made in response to the Notice of Appeal (sent by Mr Anderson to the Tribunal but then sent by the Tribunal to HMRC) in which Mr Rose asks to be allowed to made a late appeal to HMRC. It is not relevant that the question in the Notice of Appeal to which

this is given as the answer presupposes that the taxpayer has already appealed (directly) to HMRC.

Guidance from higher courts on whether to give permission for late appeals

32. HMRC based their submissions as to why the Tribunal should not give Mr Rose permission to notify his appeal late around the approach taken by the Upper Tribunal in *Data Select*. That approach, as well as the analysis in the judgement of Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218, was recently considered by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC).

33. *Data Select*, *Romasave* (to which Ms Shakeel referred) and *Martland* were dealing with a different situation to that in the present appeal, namely an application by the taxpayer in each case to make a late appeal to the Tribunal (rather than HMRC). *Aberdeen*, on the other hand, was an application for judicial review of the Commissioner's decision to permit appeals to be made to HMRC out of time. In *Martland*, the Upper Tribunal, whilst carefully analysing the guidance given in *Data Select* and *Aberdeen*, described the statutory provisions for these different appeal rights as being very similar. Accordingly, I have concluded that I should apply the principles explained in those decisions when deciding whether it is appropriate for me to give permission in the present appeal.

34. In *Martland* the Upper Tribunal gave guidance as to how this Tribunal should approach an application to allow the notification of a late appeal. It said:

> "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*:
>
> (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.
>
> (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.
>
> 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.
>
> 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. In *Hysaj*, Moore-Bick LJ said this at [46]:

"If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore- Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

Application of Martland

35. I have applied the three-stage process set out in *Martland*, which enables the factors raised in *Data Select* to be covered.

Length of the delay

36. The delay of 245 days was serious and significant, and I do not consider that the amounts of money involved are relevant when assessing the length of the delay.

Reasons for the delay

37. I am not able to conclude that Mr Rose had a good explanation for the delay. Mr Rose has not denied receiving the closure notices and they do set out the appeal rights and relevant

deadlines in relatively plain English, with a prominent heading "**What you can do if you disagree**". It is not the case that Mr Rose had attempted to appeal but did so incorrectly. He took no action following receipt of the closure notices. Accordingly, Mr Rose's lack of professional advice during the window for appeal is not of itself a good reason for the delay.

All the circumstances

38. The final stage in the process is to evaluate all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the extent of the detriment to Mr Rose which would be caused by my not giving permission and the extent of the detriment to HMRC which would be caused by my giving permission. I also note, as set out in the Upper Tribunal decision in *Martland*, that the starting point is that permission should not be granted unless this Tribunal is satisfied on balance that it should be.

39. In conducting that process, I am required:

(1) to take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost and for the statutory time limits to be respected; and

(2) without descending into a detailed examination of Mr Rose's case, to have regard to any obvious strength or weakness in that case because that is highly relevant in weighing up the potential prejudice to the parties of my decision.

40. There is no doubt that Mr Rose would be prejudiced if I refuse to grant him permission to notify the appeal after the time for doing so has passed because there will be no appeal. However, giving permission would prejudice HMRC and the public interest - there is a public interest in ensuring that time limits set by Parliament in legislation are observed and are not extended without good reason. To allow a late appeal for no good reason might encourage others to regard time limits as optional. As set out in paragraph 37 above, I do not consider that there is a good reason for the delay.

41. Furthermore, the information contained in the Notice of Appeal and re-iterated by Mr Anderson at the hearing indicates that Mr Rose would face some difficulty in succeeding on certain aspects of his substantive appeal. HMRC have made disallowances of expenditure on various grounds, but as regards disallowances of expenditure on materials, clothing and tools, this is on the basis that Mr Rose has not demonstrated that these expenses were paid and incurred. The Notice of Appeal and supporting documentation refer to insufficient records being available to Mr Rose and Mr Anderson to enable them to re-build the tax computations for 2015-2016 and 2016-2017. I make no finding on whether these records were sent to HMRC by Mr Rose and not returned or not sent to HMRC at all (as insufficient evidence was available to support a finding either way, which is unsurprising given that this was not a hearing on the underlying appeal) but in any event it is clear from the bundle (and acknowledged by Mr Anderson at the hearing) that Mr Rose does not have these records at this time. It would of course be possible for Mr Rose to give evidence as a witness at a substantive hearing on these matters and that may help to overcome the lack of records.

42. Mr Anderson drew my attention to the challenge proposed to be made to the disallowance of Mr Rose's travel expenses, referring me to the "24 month rule" on temporary workplaces, submitting that HMRC had incorrectly failed to apply this to Mr Rose. He submitted that this ground of appeal is unaffected by the difficulty of lack of records. Ms Shakeel noted that this rule applies to employees claiming travel expenses and questioned its applicability to self-employed workers such as Mr Rose.

43. Whilst I do not consider that Mr Rose's grounds for appeal are unarguable, I do not find them to be particularly strong.

CONCLUSION

44. Taking all of this together, I am not persuaded that the reasons for the delay and the possible strength of Mr Rose's case outweigh the principle that, after a period, there should be certainty as to the liability created by an assessment. I therefore refuse to give permission for these appeals to be brought late.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 10 MAY 2019