



[2019] UKFTT 0357 (TC)

TC07185

PROCEDURE – application for permission to notify a late appeal – Martland applied – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2017/07763

BETWEEN

JAWAD HUSSAIN

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MS LIZ POLLARD**

Sitting in public in Newcastle on 9 April 2019

Mr Tahir Rashid, accountant of ATS Associates for the Appellant

Mr Daniel Baird of HM Revenue and Customs Solicitor's Office and Legal Services for the Respondents

DECISION

FACTUAL BACKGROUND

1. The matter listed before us is the appellant's application to notify a late appeal, with the appeal to follow if permission for a late appeal is granted. The parties made a joint application for the substantive appeal to be postponed on the basis that several days prior to the hearing the appellant had stated his intention to provide further documentation and representations and to seek to settle the appeal. Whilst there was no real explanation as to why the appellant had left matters so late, for reasons given orally at the hearing we decided that we would postpone the hearing of the substantive appeal. Both parties were content to proceed with the appellant's application to notify a late appeal. HMRC opposed that application.
2. The decisions under appeal are discovery assessments ("the Assessments") and penalties ("the Penalties") for tax years 2008-09 to 2013-14. The appellant owns a property portfolio of some 80 properties. The Assessments include assessments for rental profits received by the appellant in those tax years and employment income and benefits from a company called Acorn Care and Nursing Limited ("Acorn"). The amount of rental income is not disputed but the appellant takes issue with the amount of allowable expenditure and the amount of deductible loan interest included in the rental profits assessed and the amount of employment income and benefits received from Acorn.
3. Mr Richard Wright commenced an enquiry under COP 9 into the tax affairs of the appellant and Acorn in January 2014. The appellant was represented during the enquiry by Mr Tahir Rashid, an accountant trading as a sole practitioner under the name ATS Associates. Mr Rashid continues to represent the appellant and appeared on behalf of the appellant at the hearing.
4. The result of the enquiry was that the Assessments were issued on 21 January 2016. The notices of assessment for each tax year explained that if the appellant disagreed with the assessment then he should send an appeal to HMRC within 30 days. The Penalties were issued on 20 January 2016 and also set out the appeal rights and 30 day time limit. The Penalties are based on alleged deliberate inaccuracies in the appellant's tax returns.
5. On 24 March 2016 Mr Rashid emailed HMRC to say that the appellant intended to appeal the Assessments and Penalties. However, no appeal was lodged. On or about 12 May 2016 HMRC issued a statutory demand to the appellant.
6. On 27 June 2016, some 4 months late, Mr Rashid wrote to HMRC to appeal against the Assessments and the Penalties. Mr Rashid explained that the appeals were out of time because of the exhaustive enquiries that had been necessary to finalise all the appellant's accounts. There was also reference to bereavements and personal issues. Mr Rashid said that there would be no further delays. HMRC accepted the late appeal and the appellant provided some further albeit incomplete evidence and information in support of the appeal.
7. In a letter dated 10 August 2016 Mr Wright accepted the figures for rental income provided by the appellant and reduced the Assessments for some of the tax years. Mr Wright did not consider that the evidence supported any increase in the amount of loan interest relief or other allowable expenditure for which credit had been given in the Assessments. He also did not consider that the evidence supported any amendment to the employment income and benefits from Acorn which were charged in the Assessments or any amendment to the Penalties. Mr Wright gave HMRC's "view of the matter" in this letter. At this stage the tax and penalties assessed were £288,788 and £109,080 respectively.
8. Mr Wright's letter informed the appellant that if he did not agree with Mr Wright's view of the matter then he had 30 days to either ask for a review or to notify the appeal to the tribunal.

It was not disputed before us that there was a 30 day time limit expiring on 9 September 2016 for the appellant to either accept the offer of a review or notify his appeal to the tribunal (see ss 49C and 49H Taxes Management Act 1970 (“TMA 1970”). In the event the appellant did neither.

9. The appellant paid a sum of £96,824 on account of the Assessments at some stage in September 2016.

10. A revised statutory demand was served on the appellant, although there appeared to be some issue as to when it was served. In any event a bankruptcy hearing was set for 31 July 2017. The appellant contacted HMRC’s debt management office in late July 2017 to say that he was disputing the amounts assessed and the hearing was adjourned to 23 October 2017. There was then some contact between Mr Rashid and Mr Wright. Mr Rashid spoke to Mr Wright by phone on 7 August 2017. He promised some further information but Mr Wright made plain to Mr Rashid that he was out of time to seek a review or appeal to the Tribunal. It was unlikely a review out of time would be permitted so his route would be to make a late appeal to the tribunal.

11. Nothing further happened until an email from Mr Rashid to Mr Wright dated 17 October, a few days before the bankruptcy hearing in which he said he wanted to discuss matters. There seems to have been a misunderstanding based on this email as to whether the appellant was accepting the assessments for 2008-09 and 2009-10 but nothing turns on this for present purposes.

12. Mr Rashid then emailed Mr Wright on 18 October 2017 to ask for a late review and stated that “further information and documentation to clarify the [appellant’s] actual position” was available. He gave the following reasons as to why the information might not have been available earlier:

- (1) The appellant had a long history of diabetes and from the summer of 2016 onwards he was under medical supervision.
- (2) The appellant was also diagnosed with a “frozen shoulder” for which he was forced to decline surgery because he was encountering marital difficulties and had to look after his 4 children.
- (3) The appellant had business problems in Jul 2016 which disrupted his working life.
- (4) The appellant was suffering from constant anxiety which led him not to prioritise his tax affairs.

13. On 19 October 2017 Mr Wright refused the request for a late review. He did not consider that the reasons given for not requesting a review in time amounted to a reasonable excuse.

14. The notice of appeal to the tribunal was lodged on 20 October 2017 and briefly referred to reasons why the appeal was notified late. Reference was made to the appellant’s health problems and marital issues. The grounds of appeal were essentially based on the fact that the appellant was prepared to put new figures forward for consideration. The grounds of appeal also disclose a misunderstanding as to the amount of the Penalties which were said to be approximately £300,000 was although that is not the case.

15. We were not told, but we assume the bankruptcy hearing listed for 23 October 2017 was adjourned.

16. During the course of the hearing Mr Rashid elaborated on the reasons previously given as to why no request for a review or notification of the appeal had been made by 9 September 2016. In particular, he explained that the business problems related to Acorn, a care business

which provided care services to people living in their own homes. It had approximately 50 employees and was contracted by local councils to provide care. The appellant and his wife were directors of Acorn and owned the shares between them. Acorn went into liquidation in the summer of 2016. HMRC were the largest creditor in relation to liabilities for corporation tax and PAYE. There was a suggestion that HMRC had petitioned for a compulsory winding up of Acorn, but a search at Companies' House shows that it entered creditors voluntary winding up on 15 August 2016. Some of the appellant's documents relevant to his tax affairs including certain bank statements were taken by the liquidator. The appellant was able to retrieve his bank statements within 2 or 3 months but it was only recently that he was able to retrieve documents relevant to his rental properties.

17. In the summer of 2016 the appellant set up a new company, Amna Care which was in the same business as Acorn. It was set up to purchase the assets of Acorn and it took over Acorn's employees. It is still trading today. Initially the appellant and his wife were both directors and owned the shares equally. The appellant stepped down as a director in October 2018 because of health issues, principally the pain in his arms and the stress associated with being a director. He continues to work in the business in a role which involves administration and compliance matters. The appellant stated that his main priority in the summer of 2016 was making sure that the service users did not suffer.

18. Mr Hussain told us that he did not know personally that there was a 30 day time limit for accepting the offer of a review or notifying the appeal to the tribunal. He acknowledged that he should have been aware but suggested that he put everything on hold in the summer of 2016.

19. Mr Rashid accepted that he and the appellant had "taken their eye off the ball", but maintained that there was no deliberate intention to delay making an appeal. Mr Rashid stated that he too had some issues in the summer of 2016, including nasal surgery in August 2016. Mr Rashid acknowledged that from his perspective as well, things just got put on hold.

20. Mr Rashid told us that based on the further documentation and information the tax due under the Assessments would be reduced. However, no further documentation or information has been provided to HMRC or the Tribunal. The appellant also strongly refutes that the inaccuracies in his tax returns were deliberate. Mr Rashid suggested that the true liability for tax and penalties, on the basis of careless inaccuracy, might be in the region of £130,000.

DECISION

21. Section 49H TMA 1970 gives the tribunal power to grant permission to notify a late appeal to the tribunal. The approach to such applications for permission to notify late appeals has recently been set out by the Upper Tribunal in *Martland v HM Revenue & Customs [2018] UKUT 178 (TCC)*. The Upper Tribunal reviewed the authorities and concluded as follows:

" 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 ...”

22. We set out in the following sections our consideration of the relevant issues, adopting as we must the approach described by the Upper Tribunal in *Martland*.

Length of Delay

23. We are satisfied that the delay in this matter between 9 September 2016 and late July 2017 when the appellant first intimated an intention to dispute HMRC's view of the matter is a serious and significant delay. 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. There was also a further delay between 7 August 2017 and 18 October 2017 when the first request was made for a late review.

Reasons for the Delay

24. The appellant's explanation for the delay is his various medical and marital issues in the summer of 2016. We note however that at this time the appellant was able to set up Amna Care and take over the business of Acorn. We are not satisfied that this provides a good reason for the failure of himself or Mr Rashid to ask for a review or notify the appeal to the tribunal by 9 September 2016. The appellant did not seek to blame Mr Rashid for the failure and he was right not to. The appellant himself ought to have been aware of the 9 September 2016 time limit. Nor do Mr Rashid's own problems amount to a good reason for the delay.

25. It seems to us that it was only when prompted by the threat of bankruptcy proceedings that the appellant gave his position in relation to the Assessments and the Penalties any serious consideration. Even then, when the first hearing was postponed in July 2017 no steps were taken to seek an out of time review until very shortly before the next bankruptcy hearing. Throughout this period, and even up to the date of the present hearing, the appellant has been promising further documentation and information which has never been produced.

26. Even if, which we are not satisfied is the case, the appellant was unable to access documents being held by the liquidator, that should not have prevented the appellant from seeking a review or notifying his appeal to the tribunal.

27. The delay is all the more culpable because it came on the back of a delay in first notifying his appeal to HMRC some 4 months late on 27 June 2016. At that time Mr Rashid said that there would be no further delays. Unfortunately, that proved to be an empty promise.

28. In the circumstances we do not consider that there was any good reason for the delay in notifying the appeal to the tribunal between 9 September 2016 and 20 October 2017

All the Circumstances

29. We take into account our findings as to the length of the delay, the absence of any good reason for the delay and the importance of respecting statutory time limits referred to in Martland.

30. We accept that the appellant will be prejudiced if permission to notify a late appeal is not granted. The appellant will lose his opportunity to challenge the Assessments and the Penalties on the merits. However, we do not consider that the appellant would have any realistic prospect of successfully pursuing his appeal if time is extended. In November 2018 the appellant served two witness statements in relation to the substantive appeal, from himself and from Mr Rashid. That is the evidence on which he intends to rely. Those witness statements come nowhere near establishing a prima facie case that the Assessments are excessive or rebutting the respondents' case that inaccuracies in the appellant's returns were deliberate.

31. We have not been provided with the further documentation or information that the appellant seeks to rely on in the substantive appeal, or any indication as to the nature of that material. Such material has been promised previously to HMRC and never provided. Based on what we have seen we do not consider that the appellant would have any reasonable prospect of succeeding on this appeal.

32. There is also prejudice to the respondents if permission is granted. HMRC will lose the finality which since at least September 2016 they were entitled to expect. Further, HMRC have used resources to pursue bankruptcy proceedings against the appellant which was the direct result of the appellant's failure to request a review or notify his appeal to the tribunal.

Conclusion

33. Taking all the circumstances into account we refuse the appellant's application for permission to notify a late appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 04 JUNE 2019