



TC07855

*INCOME TAX – Permission to appeal out of time -penalties for failure to make returns -
Schedule 55 of the Finance Act 2009*

FIRST-TIER TRIBUNAL

Appeal number: TC/2020/01522

TAX CHAMBER

BETWEEN

ASJAD PERVEZ

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 22 August 2020 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 16 April 2020 (with enclosures), HMRC’s Statement of Case acknowledged by the Tribunal on 15 June 2020, a further letter from the Appellant dated 6 July 2020, the Document Bundle of 50 pages prepared by HMRC (“the Bundle”) and the Legislation and Authorities Bundle of 164 pages also prepared by HMRC.

DECISION

INTRODUCTION

1. The Appellant is applying for permission to appeal out of time in relation to penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit annual self-assessment returns on time for the tax years 2010-11, 2011-12, and 2013-14 (“the relevant years”). Mr Pervez seemed to be under the impression that HMRC has also charged penalties for the late submission of his 2012-13 return, which he says he submitted in July 2013. HMRC has not sought penalties for that year and so it would seem that that return was submitted in time.
2. Mr Pervez also applies for permission to appeal out of time in relation to penalties which HMRC have imposed under Schedule 56 Finance Act 2009 (“Schedule 56”) for the late payment of tax for the years 2013-14 and 2014-15.
3. The penalties that have been charged, can be summarised as follows:
 - (1) Initial late filing penalties under paragraph 3 of Schedule 55 of £100 for each of the relevant years.
 - (2) “six month” penalties under paragraph 5 of Schedule 55 of £300 for each of the relevant years
 - (3) A “twelve month” penalty under paragraph 6 of Schedule 55 of £300 for 2010-11. The penalty charged is of the default amount and there is no suggestion that the Appellant deliberately withheld information.
 - (4) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 for each of the relevant years.
 - (5) A “thirty day”, “six month” and “twelve month” late payment penalty under paragraph 3 of Schedule 56 for 2013-14. Each penalty is £51.
 - (6) A “thirty day”, “six month” and “twelve month” late payment penalty under paragraph 3 of Schedule 56 for 2014-15. Each penalty is £52.
 - (7) The total amount of the penalties in issue is £7,309.
4. The appellant’s reasons for applying for permission to appeal against the penalties out of time seem to be the same as his substantive grounds for appealing against the penalties. They are set out in his Notice of Appeal dated 16 April 2020, the additional letter of 6 July 2020 and in his appeal to HMRC dated 9 September 2019.
5. The reasons for a late appeal can be summarised as follows:
 - (1) He engaged a bookkeeper/accountant to submit his tax returns. He was told he did not have tax to pay. Mr Perez thought the bookkeeper had submitted his tax returns as he had given the bookkeeper the information and paid him to do so but the bookkeeper had failed to submit the returns.
 - (2) Mr Perez said he was worried about the accuracy of the returns and contacted HMRC to be told no returns had been submitted. He managed to get his documents back after a struggle and he submitted the returns for 2010-11 and 2011-12, with the assistance of a friend of a friend, in October 2013.
 - (3) He then engaged, and paid, another bookkeeper/accountant to submit his 2013-14 tax return. When he came to submit his 2014-15 tax return online, he discovered that

the 2014 return had not been submitted and, as he had the figures, immediately submitted the return. As there is no late filing penalty for the year ended 2015, I infer this return was submitted on time. The Notice of Appeal indicates Mr Perez submitted it himself.

- (4) He did not think that he owed any tax as his income has been very similar over the last ten years and so did not pay any tax.
 - (5) He finds it difficult to deal with his tax affairs and he asked for help from HMRC to get his tax returns right but did not receive any help.
 - (6) He is out of a job because of the Covid-19 pandemic.
 - (7) As a result of all this, he has suffered a great deal of stress.
 - (8) He is on a low income and cannot pay these amounts.
 - (9) No tax was due for the years to 2010-11 to 2012-13 and only a small amount of tax was due for the other years.
6. The appellant's appeal to HMRC under section 31A TMA was made outside the statutory deadline. HMRC have not given consent under s49(2)(a) TMA for the late appeal. The appellant now applies to the Tribunal for permission to proceed with the late appeal under section 49(2)(b) TMA. HMRC object to the application.
 7. Penalty notices were issued as follows:
 - (1) 2010-11: Initial late filing penalty, 14 February 2012, daily late filing penalties, 7 August 2012, six month late filing penalty, 7 August 2012, twelve month late filing penalty on 19 February 2013.
 - (2) 2011-12: Initial late filing penalty, 12 February 2013, daily late filing penalties, 14 August 2013, six month late filing penalty, 14 August 2013.
 - (3) 2013-14: Initial late filing penalty, 18 February 2015, daily late filing penalties, 14 August 2015, six month late filing penalty, 14 August 2015, thirty day late payment penalty 23 February 2016, six months late payment penalty, 23 February 2016, twelve months late payment penalty 23 February 2016.
 - (4) 2014-15: thirty day late payment penalty 15 March 2016, six months late payment penalty, 12 August 2016, twelve months late payment penalty 21 February 2017.
 8. The appellant had 30 days from the issue of each penalty notice to appeal against the penalty to HMRC.
 9. The appellant appealed against all the penalties on 9 September 2019. Accordingly, the appeals were between two years and seven months and seven years and seven months late.
 10. HMRC rejected the appeals as out of time by two letters dated 13 November 2019, one in relation to late filing, the other in relation to late payment. It is unclear whether there was any further correspondence before the appellant appealed to the Tribunal on 16 April 2020. The Notice of Appeal stated that it was not out of time. HMRC have not challenged this and I am content to accept that the appeal to the Tribunal is in time.

FINDINGS OF FACT

11. HMRC's computer records show that the tax return for the year ended 5 April 2011, was submitted electronically on 8 October 2013. That return was one year and eight months late. The return for the tax year 2011-12 was also filed electronically on 8 October 2013. That return was accordingly, eight months late. The tax return for the year ended 5 April 2014 was submitted electronically on 31 January 2016. The return was one year late.
12. It appears that Mr Perez's tax return for 2012-13 was submitted on time as was the tax return for the year ended 5 April 2015.
13. The first question is whether the notices to file and penalty notices were sent to the appellant. HMRC do not keep copies of the actual notices sent to taxpayers, but their computer records show that notices to file a tax return and penalty notices were sent to the appellant at the address on record for him. The appellant's address was the same throughout the relevant period. I was provided with specimen copies of the various notices. The form of penalty notice not only sets out the amount of the penalty, it states that the taxpayer must submit their tax return and warns of further penalties if they fail to do so. It also sets out the 30 day deadline for appealing against the penalty. HMRC state that all notices to file, penalty notices and various statements of account were sent to the relevant address on record and that no correspondence has been returned undelivered.
14. HMRC submit that the provisions of section 115 TMA concerning service of the notices were complied with, and that the notices are deemed to have been delivered by virtue of section 7 Interpretation Act 1978. The provisions are:

“115.— Delivery and service of documents.

(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence:

(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person [by HMRC] may be so served addressed to that person—

(a) at his usual or last known place of residence, or his place of business or employment, or...

“7. References to service by post.

Where an Act authorises or requires any document to be served by post (whether the expression “serve” or the expression “give” or “send” or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”
15. Although the only evidence that the notices were sent are the computer records provided by HMRC, Mr Perez does not argue that he did not receive them. There is some evidence that he did receive notices to file in that he engaged the bookkeepers to submit the returns for him and/or did in fact submit the returns himself.
16. Over the five year period in question, the appellant was sent, notices to file, thirteen penalty notices, a number of penalty reminder notices and a number of statements of account. It is inherently unlikely that all of these would have gone astray.

17. I find as a fact that the appellant was aware of the penalties. HMRC's "SA Notes" (a record of contact with taxpayers) records a telephone conversation on 13 March 2014 when Mr Perez said he would write in to appeal against the penalties.
18. Mr Perez argues that he was not aware that the bookkeepers had not submitted his tax returns. The SA notes record a telephone conversation on 27 September 2012 in which HMRC informed Mr Perez that his tax returns for the years from 2007-8 up to 2011-12 remained outstanding. Mr Perez said he was registering to submit returns online and would submit the 07-08 and 08-09 returns on paper. The note continues "was with accountant and thought he had sorted out the mess he created but the accountant has not". The HMRC person gave advice about "appealing etc". Although the note does not mention penalties, by that date, Mr Perez had received initial, daily and six month penalties for the year ended 5 April 2011. I infer that the advice about appealing related to those penalties.
19. The Notice of Appeal indicates that in July 2013 Mr Perez contacted HMRC and was told that the earlier years' tax returns had not been submitted. As noted above, he was already aware of this.
20. I find that Mr Perez was aware in September 2012 that the tax returns up to 2011-12 had not been submitted, that he knew about the penalties and was given advice about appealing against them.
21. Having had one bad experience with an accountant who failed to submit a tax return, one would expect Mr Perez to have checked with the new bookkeeper that the 2013-14 return had been submitted in time. The Notice of Appeal states that Mr Perez only discovered it had not been submitted when he went online to submit his 2014-15 return on 31 January 2016. He must have been aware before that that something was wrong as he would have received the penalty notices for late filing of the 2013-14 return.
22. For the reasons set out above, I find that Mr Perez was well aware of the need to file tax returns for the relevant years and that he was also aware that penalties were accruing. In 2012 he received advice about appealing against the penalties and in 2014, he said he was going to make an appeal. He did not in fact appeal until September 2019.
23. The appeals against the penalty notices were, accordingly, between two years and seven months and seven years and seven months late.
24. Mr Perez also failed to pay the tax due for 2013-14 and 2014-15 on time. He entered into a payment agreement with HMRC but was unable to keep up the payments. He resorted to borrowing from family and friends to try and clear some of the arrears of tax and the penalties. HMRC's computer records show the tax remains outstanding and Mr Perez has not disputed this. I find that the tax for the years mentioned has been paid more than a year late or not at all.
25. Mr Perez has stated that he has been under severe stress. While I accept that that is the case, Mr Perez has not produced any evidence as to how that prevented him from making an appeal against the penalties.

DISCUSSION

26. I have concluded that the tax returns for 2010-11 and 2011-12 were submitted on 8 October 2013 and the return for 2013-14 was submitted on 31 January 2016. The returns were accordingly between eight months and one year and eight months late. I have also concluded that the appellant received some or all of the notices to file and the

- penalty notices and so was aware of the need to file tax returns and that penalties had been charged.
27. I have also found that the appellant has failed to pay the tax due for the 2013-14 and 2014-15 tax years and that he was aware it was due and that he was aware of the late payment penalties.
 28. I have found that the appeals to HMRC against the late filing and late payment penalties were between two years and seven months and seven years and seven months late.
 29. Accordingly, the appellant may not proceed with the appeals unless I give permission for the appeals to be heard out of time under section 49(2)(b) TMA.
 30. The Upper Tribunal has recently considered the approach to granting permission to bring late appeals in the case of *William Martland v The Commissioners for HMRC* [2018] UKUT 0178 (TCC) ("*Martland*").
 31. The Upper Tribunal stated, at paragraph 29 that:

“...the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission.”
 32. The Upper Tribunal went on to confirm the three-stage test as set out in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 at paragraph 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.”
 33. I will consider first the length of the delay.
 34. In the Upper Tribunal case of *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 (TCC), the Tribunal stated, at paragraph 96 that:

“In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.”
 35. The delays in appealing the penalty notices to HMRC varied from well over two years to well over seven years.
 36. These delays are clearly serious and significant.
 37. I now turn to the reasons for the delays.

38. Mr Perez has not offered any specific reason as to why he was unable to submit the appeals on time. The grounds of appeal stated in the Notice of Appeal are more relevant to the substantive appeal against the penalties were that to proceed.
39. While severe stress could be relevant, Mr Perez has not provided any evidence as to how that prevented him dealing with his tax affairs or the time scale of the stress or whether he sought any medical help for it. During this period it appears that he was able to deal with his tax and business affairs as he was able to carry on working and he did manage to submit his tax returns and in the case of the more recent ones, on time. Making an appeal is much simpler than submitting a tax return.
40. I do have some sympathy for the appellant. Completing a tax return can be daunting when one is not familiar with the system and I fully accept that he wants to meet his tax obligations and to be compliant. He engaged an accountant to help him, but he cannot abdicate all responsibility and rely on the accountant. At the very least, he should have checked that the return had been submitted. All the more so with the second accountant after his experience with the first.
41. But whatever Mr Perez's struggles with the tax system, it does not explain why he did not appeal against the penalties until September 2019 when he was advised about appealing in 2012 and said he was going to appeal in 2014.
42. Finally, I must conduct the balancing exercise referred to in *Martland*, taking account of "all the circumstances of the case".
43. In *Martland* at paragraphs 45 and 46, the Tribunal gives guidance on how the balancing exercise should be carried out:
 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. ...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."
44. HMRC emphasised the need for finality in dealing with a taxpayer's affairs and that after delays of the length in this case, they were entitled to consider the matter closed.
45. In *Martland*, the Upper Tribunal said "the purpose of the time limit is to bring finality, and that is a matter of public interest, both from the point of view of the taxpayer in question and that of the wider body of taxpayers."
46. HMRC submit that they should be entitled to rely on the time limits set out in legislation for the purpose of allocating resource in administering the tax system and should not normally be required to defend appeals after an excessive gap between the expiration of the time limit and the appeal. Such appeals are normally more resource intensive to defend and otherwise create issues in obtaining appropriate evidence in

meeting HMRC's burden to prove that penalties were correctly charged to the Appellant.

47. HMRC further submit that allowing a late appeal in this instance is contrary to the policy objectives of the legislation which set the deadline.
48. If the application is granted, HMRC would therefore be prejudiced as they are entitled to expect finality after this length of time, it would set a bad precedent for other taxpayers and it would consume excessive resources. In relation to the last point, I note that HMRC have already prepared a Statement of Case on the substantive merits, which reduces the weight of that factor.
49. If the application is not granted, Mr Perez will be prejudiced as he will lose the opportunity to challenge the penalties and will have to pay them. Mr Perez was on a low income and is now out of work, so this is likely to cause hardship.
50. However, even if the appeals proceeded, inability to pay cannot be a reasonable excuse in relation to the late filing or late payment penalties unless caused by circumstances beyond the taxpayer's control which is not the case here. The Covid related unemployment occurred long after the initial failure to pay the tax.
51. There was no tax to pay for some of the years in question and less than £1,100 in tax for each of the tax years where there was a liability.
52. Mr Perez considers that the amount of the penalties is disproportionate to the amount of tax due.
53. This issue of proportionality was considered by the Upper Tribunal in *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC). The context of that case was that the Upper Tribunal considered whether the fact that significant penalties had been levied for the late filing of returns where no tax was due was a relevant circumstance that HMRC should have taken into account when considering whether there were "special circumstances" which justified a reduction in the penalties. The Upper Tribunal concluded that the penalty regime set out in Schedule 55 establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear. Accordingly, the Upper Tribunal determined that the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate.
54. Similar arguments would apply to penalties under Schedule 56. Further, penalties for failure to pay tax on time are calculated by reference to a percentage of the tax due and so are even more clearly proportionate.
55. Although the size of the penalties and the fact that no or little tax was due is part of "all the circumstances" I must take into account, the penalties are not disproportionate for the reasons set out in *Barry Edwards* and accordingly, this factor does not carry a great deal of weight.
56. The length of the delay in appealing to HMRC is an important factor.
57. It is also important that Mr Perez was aware that the first accountant had not submitted his tax returns in 2012 but did nothing about it for nearly a year and that he failed to check that the second accountant had submitted the 2014 tax return.
58. A further important factor is that the appellant was advised of the possibility of appealing the penalties in 2012 (and the penalty notices themselves would have stated

his appeal rights) and he said he was going to appeal in 2014 but took no further action for five years. He did not provide any reason for the delay in appealing.

59. *Martland* warns against a detailed consideration of the merits of the substantive case in determining an application for permission to appeal out of time. The appellant's grounds for allowing the appeal to proceed out of time appear effectively to be the grounds for allowing the substantive appeal against the penalties. Without investigating the substantive merits in any detail, I conclude, from my consideration of the grounds of the application, that the strength of the appellant's substantive case is far below the level where it would significantly affect the balancing exercise.
60. Having taken all the circumstances, including the above matters, into account and having conducted the balancing exercise required by *Martland*, I have decided that it is not appropriate in the present case to grant permission to appeal to HMRC outside the permitted time limits.

CONCLUSION

61. For the reasons set out above, I have decided not to grant permission to appeal to HMRC out of time.
62. Accordingly, I dismiss the application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE

RELEASE DATE: 29 SEPTEMBER 2020