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INCOME TAX – permission to make late appeal – finding of fact that appellant had not filed the return on paper within the time limit – relevant case law on late appeals considered and applied – permission refused

FIRST-TIER TRIBUNAL **Appeal number: TC/ 2020/00901**

TAX CHAMBER

IONELIA MURGASANU **Appellant**

-and-

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the application on 4 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 Appellant's Notice of Appeal dated 2 March 2020, HMRC's Statement of Case dated 5 May 2020 and the Tribunal Bundle of documents prepared by HMRC.

DECISION

Introduction

1. HMRC issued Ms Murgasanu with penalties totalling £1,300 for the late submission of her 2016-17 self-assessment tax return. On 28 January 2019, Ms Murgasanu asked to appeal against the first of those penalties, for £100. On 5 February 2019, HMRC refused to consider her appeal because it was significantly after the statutory time limit of 30 days, and she had not provided a reasonable excuse. On 2 March 2019, Ms Murgasanu completed a Notice of Appeal to the Tribunal, saying that she was seeking to appeal against a penalty of £100.

2. Despite the fact that Ms Murgasanu only referred to one of the late filing penalties in her appeal to HMRC and her Notice of Appeal to the Tribunal, HMRC have assumed that she also wanted to appeal against the other penalties relating to the same tax year, and I have taken the same approach.

3. However, the Tribunal is only allowed to consider an appeal against an HMRC decision if (a) that appeal has been made within the statutory time limit, or (b) it is late, but the Tribunal has given permission for it to be made late.

4. I found as a fact that Ms Murgasanu's appeal was outside the statutory time limit. In order to decide whether to allow her to make her appeal late, I considered the guidance given by the Upper Tribunal ("UT") in *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*").

5. Having applied that guidance, I **REFUSED** permission for Ms Murgasanu to bring her appeal after the statutory time limit. I issued a summary decision on 13 August 2020, and on 7 September 2020 Ms Murgasanu applied for a full decision. This is that full decision.

The evidence

6. I was provided with a Bundle prepared by HMRC, which included:

   (1) correspondence between the parties, and between the parties and the Tribunal, including Ms Murgasanu's Notice of Appeal to the Tribunal;

   (2) screenprints from HMRC's computer system of Ms Murgasanu's "return summary" for 2016-17; the "return capture details"; the microfiche which shows that the Notice to File the tax return was issued; Ms Murgasanu's statement of account at various dates; HMRC's screens showing penalties, debt management and banking in relation to Ms Murgasanu, her SA Notes and her address details; and

   (3) various pro-forma HMRC documents.

7. On the basis of that evidence, I make the findings of fact set out below.

Findings of fact

8. HMRC sent Ms Murgasanu a Notice to File her 2016-17 tax return on 20 July 2017. The due date for the tax return to be filed in paper form was 31 October 2017. The due date for it to be filed by internet was 31 January 2018.

9. HMRC's system did not record Ms Murgasanu as having filed her return by the later of those two dates, and on or around 13 February 2018, they issued her with a £100 penalty. On 1 March 2018, HMRC sent her a Statement of Account which showed the penalty.

10. Her return continued to be registered as outstanding by HMRC's system, and on 5 June 2018, HMRC issued Ms Murgasanu with a warning letter that she was incurring daily penalties at the rate of £10 a day. A second warning letter was issued on 3 July 2018.

11. On 31 July 2018, HMRC issued Ms Murgasanu with daily penalties of £900 and on 10 August 2018, with a six month penalty of £300. On 6 September 2018, HMRC issued a further Statement of Account, showing all the penalties.

12. On 20 November 2018, HMRC's system recorded that her 2016-17 return had been filed by internet.

13. On 28 January 2019, Ms Murgasanu asked to appeal against the first of those penalties, for £100. On 5 February 2019, HMRC refused to consider her appeal because it was significantly after the statutory time limit of 30 days, and she had not provided a reasonable excuse.

14. On 18 February 2019, a debt collection agency acting for HMRC tried to collect £1,476.64, which clearly included the penalties.

15. On 2 March 2019, Ms Murgasanu completed a Notice of Appeal to the Tribunal, saying that she was seeking to appeal against a penalty of £100.

Whether Ms Murgasanu had sent in her return by the time limit

16. Ms Murgasanu said that she had sent in her 2016-17 return by post to HMRC's office in Cardiff on 26 October 2017 and provided a recorded delivery number. She said that the return had been signed as received by an individual called Greener at 7.31am.

17. HMRC did not accept that evidence. HMRC had no record of a paper return having been filed, and Ms Murgasanu did not provide any supporting evidence, such as a scanned copy of the recorded delivery slip, or a copy of the tax return (which she would have had to download from the internet, as she was sent a Notice to File).

18. Neither did Ms Murgasanu explain why, if in fact she had already sent the return to Cardiff and received a delivery confirmation, she did not contact HMRC after the first penalty was issued in February 2018, or at some later point during that year, given the numerous letters from HMRC and the increasing penalties. In total, HMRC sent Ms Murgasanu nine documents between the issuance of the first £100 penalty, and the electronic filing of her return. HMRC have also provided their contemporaneous call record, which shows that Ms Murgasanu did not make contact with them at any point during that period, to say she had already filed the return. Instead, she simply filed online, some ten months late. HMRC submit, and I agree, that this pattern of behaviour is clearly inconsistent with that of a person who had already filed her return many months previously.

19. It is for Ms Murgasanu to prove her case. Given the absence of any supporting documents; the lack of any explanation of her behaviour between February 2018 when the first penalty was issued and the filing of her return electronically in November 2018, and HMRC's own evidence that they had no record of the return having been received, I find as a fact that Ms Murgasanu did not file her return by post in October 2017. Instead, she filed it online on 20 November 2018.

The law

20. The relevant law is to be found partly within the legislation and partly in the case law.

The legislation

21. The penalties charged on Ms Murgasanu were levied under Finance Act 2009, Schedule 55 ("Sch 55"). Sch 55, para 20 gives a right of appeal against penalties charged under those provisions, and para 21(1) provides that:

> "An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal)."

22. The provisions about bringing appeals referred to in that paragraph are to be found in the Taxes Management Act 1970 ("TMA"). TMA s 31(1)(a) provides that a notice of appeal must be given "within 30 days after the specified date", and the remaining subsections say that the "specified date" is the date of issue.

23. TMA s 49 is headed "late notice of appeal" and begins

> "(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)."

24. Thus, Ms Murgasanu was required by law to make her appeals against the Sch 55 penalties within 30 days of the date they were each issued. Because she was outside that time limit, HMRC considered whether to agree to her making her appeal late, but found that she did not have a reasonable excuse. They thus refused her permission, and she applied to the Tribunal under TMA s 49(2)(b).

The case law

25. In *Martland* the UT said that when deciding whether to allow an appeal to be made after the statutory time limit, the Tribunal should:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason(s) why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to 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. In doing so the Tribunal 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".

26. The UT also said at [46]:

> "the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice…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."

27. In *HMRC v Katib* [2019] UKUT 189 (TCC) at [17], following *BPP Holdings Limited v HMRC* [2017] UKSC 55, the UT held that "as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance" (emphasis in original)..

Applying that approach to the facts

28. The first stage is the length of the delay. In *Romasave v HMRC* [2015] UKUT 254 (TCC), the UT said at [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."

29. Ms Murgasanu's delay in appealing was 321 days for the £100 penalty, 153 days for the daily penalties and 143 days for the six month penalty. These delays are much longer than the three month period considered in *Romasave*, so are clearly serious and significant.

30. The second stage is the reason why the delay occurred. Ms Murgasanu says that she did not appeal sooner because she had already submitted her return.

31. The third stage is to consider all the circumstances. I take into account in particular the following points:

(1) even if Ms Murgasanu had filed her return in October 2017 (which I have found as a fact was not the case), that would not explain why she did not contact HMRC to appeal the penalties within the time limit. As soon as she was issued with a penalty she could have contacted HMRC to explain her position, but did not do so;

(2) the need for statutory time limits to be respected, which must be accorded "particular importance"; and

(3) Ms Murgasanu's ground of appeal against the penalties was that she had already filed her return. On the basis of the evidence provided, including Ms Murgasanu's behaviour throughout the period from February to November 2017, I have found as a fact that this was not the case. Thus, were she to be given permission to appeal late, there would be an "obvious weakness" in her appeal and it would not succeed.

32. Weighting those factors in the balance and placing particular weight on the need for statutory time limits to be respected, the scales are heavily weighted against giving permission.

33. Taking into account all the circumstances, I therefore decided not to give Ms Murgasanu permission to make her appeal late.

Decision and appeal rights

34. Ms Murgasanu's application to make a late appeal is refused.

35. This document contains full findings of fact and reasons for the decision. If Ms Murgasanu is dissatisfied with this decision, she 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.

36. 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.

ANNE REDSTON
TRIBUNAL JUDGE

Release date: 10 OCTOBER 2020