



[2021] UKFTT 118 (TC)

TC08099

PROCEDURE – application for permission to appeal out of time – lack of communication from HMRC – whether good reason for substantial delay – no – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/01385

BETWEEN

STONE AND CHROME.COM LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The hearing took place on 1 March 2021. With the consent of the parties, the form of the hearing was held using the Tribunal video platform. A face to face hearing was not held because of the ongoing restrictions arising from the COVID-19 pandemic. The documents to which I was referred were included in an electronic bundle of 139 pages, including authorities.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Ms Brayne, accountant for the Appellant

Mr Davison, litigator for the Respondents

DECISION

Introduction

1. This is an application for permission to make a late appeal against a Notice of Determination for £2,201.50 issued by HMRC under Regulation 13 of The Income Tax (Construction Industry Scheme) Regulations 2005 for the tax year 2010/11.

Background to proceedings

2. The appellant registered for the Construction Industry Scheme (CIS) on 10 June 2008.
3. On 7 September 2012, HMRC issued the appellant with a warning letter informing them that HMRC intended to raise a Notice of Determination in respect of failures to make deductions in respect of CIS payments. The Notice of Determination was issued on 5 November 2012.
4. On 24 February 2020, HMRC wrote to the appellant reminding them of the amount due.
5. The appellant's representative contacted HMRC, advising that the appellant had no knowledge of the debt referred to.
6. HMRC forwarded a copy of their letter of 7 September 2012 to the appellant on 2 March 2020.
7. On 3 April 2020, the appellant appealed to this Tribunal.

Appellant's submissions

8. The appellant submits, in summary that the letter of 7 September 2012 was not received by the appellant and the copy provided in March 2020 was the first time that either the appellant or their representative was aware of the matter. They had received this copy letter when trying to obtain an explanation for a debt letter received from HMRC Debt Management in February 2020. The representative had acted for the appellant throughout, although the name of the representative had changed in the meantime due to a management buyout.
9. Although HMRC submitted that the matter had been followed up by telephone in 2014, the notes produced by HMRC indicated that the discussion was about quarterly direct debits relating to PAYE and not a CIS debt.
10. During the hearing, it was accepted that the appellant company was run at the relevant time in 2012 by Mrs Gibson-Brown, the wife of the present director, and an assistant. The assistant was dismissed in 2013, and Mr Gibson-Brown subsequently took over the running of the company due to poor record-keeping and administration by his wife and the assistant.
11. The appellant had retained records as required by law but, due to the length of time elapsed before HMRC pursued the matter, the relevant records were no longer available. Bank records for 2012 were, similarly, no longer available. The appellant was therefore unable to verify any of the relevant information.
12. The appellant had responded as soon as they found out about the debt in March 2020.

HMRC submissions

13. HMRC submitted as follows:

- (1) They had first written to the appellant in 11 July 2012, following a review of employer and CIS records. They had established that a particular individual had worked for the appellant as a subcontractor between August and December 2010 but that there were no entries in respect of this individual on the appellant's CIS returns.

(2) On 12 July 2012, a copy of the correspondence was forwarded to the appellant's representative.

(3) On 7 September 2012, HMRC issued the warning letter referred to in §3 above as no reply had been received.

(4) As no further reply was received, the Notice of Determination was issued on 5 November 2012.

(5) On 24 September 2013, HMRC contacted the appellant by telephone to chase the debt.

(6) On 30 April 2014, HMRC again contacted the appellant by telephone and provided a verbal warning regarding the debt.

(7) On 24 February 2020, HMRC wrote to the appellant to remind them of the debt due.

14. In the hearing, HMRC accepted that they had no explanation as to why there had been no written correspondence issued regarding the matter between 5 November 2012 and 24 February 2020. However, they submitted that there was no legal requirement for HMRC to chase a debt in order for it to remain due and payable.

15. They further submitted that the directors of a company have joint and several liability such that if Mrs Gibson-Brown was aware of the debt, that was sufficient. It was not relevant that she was not particularly good at dealing with administration.

Relevant case law

16. In *Martland v HMRC* [2018] UKUT 178 (TCC), the Upper Tribunal provided guidance on the correct approach to applications for permission to appeal out of time. The Upper Tribunal's guidance as to the approach to be taken is summarised at §44 of *Martland*:

“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 v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926:

(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.”

17. The Upper Tribunal noted (§45) that the 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.

Discussion

18. The starting point, as noted in *Martland*, is that permission to bring a late appeal should not be granted unless it is appropriate to do so, following the three stage approach to the matter.

Is the delay serious and significant?

19. The appealable decision was issued on 5 November 2012. I note that HMRC submitted that the delay ran from the issue of the warning letter on 7 September 2012, but it is clear from the copy correspondence in the bundle that the appealable decision is the Notice of Determination and not the warning letter. The appeal was brought in April 2020.

20. This is a delay of over seven years and cannot be regarded as anything other than serious and significant.

The reason for the delay

21. The appellant submitted that they had not received the letter of 7 September 2012 and had not appealed the matter as they were unaware that the Determination had been made by HMRC until the correspondence received in March 2020.

Evaluation of the circumstances

22. I note that HMRC submitted that there were a number of pieces of correspondence on this matter during 2012, sent to the appellant and also to their representative, and not simply a single letter. No specific submissions were made by the appellant with regard to these other items of correspondence, although I accept that the present director of the appellant was not aware that the Determination had been made. HMRC had invited the Tribunal to draw inferences from the fact that the present director was not present and did not give evidence, but I accept the appellant's representative's explanation that she was unaware that such evidence would be needed.

23. I also note the points made in the hearing about the poor record-keeping and administration by the director of the company at the relevant time. Given those points, and the fact that the relevant correspondence was not disputed to have been sent to the correct address for each of the appellant and the representative, and that none of the correspondence was returned undelivered to HMRC, I do not consider that the appellant has established that none of the relevant correspondence was received by the then director and so I consider that the appellant has not established that there was a good reason for the delay. A failure by that director to respond to correspondence cannot provide a good reason for delay in bringing an appeal.

24. I note also that there has been little or no communication from HMRC in the interim on this matter. HMRC accept that there was no written correspondence on the matter between November 2012 and March 2020. The copy notes of telephone calls provided by HMRC show that a call was recorded in respect of CIS on 24 September 2013, but the notes simply say that the customer was asked to call back: there is no indication that there was any information about the debt provided on that call. No call back is recorded on the notes. A call was also recorded on 30 April 2014, initially to Mrs Gibson-Brown, in which the notes record that "advised ... determination o/s PAYE began to explain 08/09 P35". That call was terminated as Mrs Gibson-Brown was not co-operating, but Mr Gibson-Brown called back on the same day. The notes of the call with Mr Gibson-Brown refer to recent payments made and to a direct debit to be taken but make no reference to any determination.

25. HMRC stated that there was no other determination outstanding in respect of the appellant at the time and so the "determination o/s" referred to in the call notes must relate to this CIS Determination, although it is not wholly clear from those notes.

26. Considering the prejudice to the parties, if I refuse permission to appeal then the appellant will be unable to challenge the determination further, although I note that the appellant no longer has any records from that period and so it is questionable whether they would be able to make any effective challenge to the determination.

27. There is a principle that litigation should be finalised as expeditiously as is reasonably possible, as noted in *Martland*. HMRC are entitled to expect that an appellant will appeal within the statutory time limits and so, if no appeal is made, that the matter has become final. If permission were granted, HMRC would be required to reopen a case and expend time, at least, on a matter that they had been entitled to consider final for many years.

28. However, although I note that there is no statutory requirement on HMRC to pursue a debt which has been notified to an appellant, it seems to me that in evaluating all of the circumstances, I have taken into account the fact that there was an unexplained interval of seven years in HMRC's written correspondence with regards to this matter, and an interval of over five years in any apparent communication by HMRC on this matter at all.

Decision

29. Taking all of the circumstances together, in the light of the very substantial delay and given that I do not consider that the appellant has established that there was a good reason for the delay, I do not consider that the remarkable lack of communication from HMRC is sufficient to displace the starting point that time limits should be respected and that permission to appeal out of time should not be granted.

30. The application is therefore refused.

Right to apply for permission to appeal

31. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 23 APRIL 2021