[2022] UKFTT 00021 (TC)

(TC) 08374/V

PROCEDURE - application by appellant to commence a late appeal - Martland considered - Katib considered - length of delay is serious and significant and ongoing - in all the circumstances fairness and justice do not support an extension of time - application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/04051

BETWEEN

JOSEPHINE DIXON **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT

The hearing took place on 27 August 2021 via the Tribunal video platform

Having heard Liban Ahmed, of CTM Tax Litigation Limited for the Appellant and Kane O'Leary, Litigator of HM Revenue and Customs' Solicitor's Office for the Respondents.

DECISION

INTRODUCTION

1. The hearing was in respect of HMRC's decision dated 29 October 2020 to refuse to consider out of time appeals of discovery assessments issued on 12 December 2019. The refusal was on the basis that the appellant had not established a reasonable excuse for the failure to appeal within the statutory time limit and nor had she appealed as soon as any excuse ended.

2. On 16 November 2020, the appellant lodged with the Tribunal a Notice of Appeal with an application to appeal "an assessment for income tax" late and on 26 January 2021, HMRC lodged with the Tribunal a formal Notice of Objection pointing out that there were seven discovery assessments and two included capital gains tax.

The background facts

3. On 12 December 2019, HMRC issued discovery assessments to the appellant for the tax years 2010/2011 to 2016/2017 covering income tax. The assessments for 2015/16 and 2016/17 included both income tax and capital gains tax.

4. The covering letters for each of the seven informed the appellant that she had 30 days from the date of decision to appeal. That deadline expired on 11 January 2020.

5. On 12 December 2019, HMRC also issued two penalty assessments. The first was for the years 2010/11 to 2016/17 in respect of rental income and the second for the years 2015/16 and 2016/17 in respect of capital gains tax. Those also carried a deadline of 30 days for appeal.

6. On 20 January 2020, HMRC received from the appellant herself, a letter dated 16 January 2020 appealing against the penalty assessments only. There was no request for an appeal or review of the discovery assessments. Indeed the appellant conceded that she had made mistakes with her tax affairs.

7. Although the appeal against the penalty assessments was out of time, on 31 January 2020, HMRC wrote to the appellant setting out in detail the reasons that the officer considered that her behaviour had been deliberate and offered the appellant a review of that decision. The deadline for response was again 30 days which expired on 1 March 2020.

8. On 24 February, the appellant's agent emailed HMRC, with a copy to the appellant, noting that HMRC had not changed their mind, requesting details of all sums outstanding and stating that the appellant would pay in instalments.

9. On 25 February 2020, HMRC emailed the agent with details of the outstanding debt and the telephone number of the Debt Management Unit ("DMU"). The appellant duly telephoned the DMU on both 26 February 2020 and 28 February 2020 seeking to make arrangements for payment to pay all of the tax and the penalties.

10. On 5 March 2020, there was a telephone conference between the appellant, her agent and HMRC. The purpose of the call was to discuss the CGT penalty. During the course of that call the appellant confirmed that she was not contesting the income tax and capital gains tax assessments and the income tax penalty and she would pay them. Only the capital gains tax penalty remained disputed on the basis that the appellant argued that her ex-partner should be held to be responsible. During that telephone call there was a lengthy discussion about the circumstances surrounding the capital gains tax penalty.

11. On 16 April 2020, the appellant's agent emailed HMRC requesting a review "…of her case". HMRC responded that day asking for confirmation that the review request related only to the deliberate penalty and asking why the review request was late. A deadline for response of 24 April 2020 was imposed.

12. On 6 May 2020, the agent responded stating that Covid had caused the delay as that had caused staff shortages and requesting an extension of time to 10 May 2020 to produce documentation. He did not answer the question about the penalty.

13. Covid as a reason for delay was accepted by HMRC and the matter was referred to the Solicitors Office for independent review. In that correspondence, HMRC again asked for confirmation that the independent review applied only to the deliberate penalty. There was no response and no documentation was produced.

14. On 7 May 2020 the appellant instructed new agents ("CTM") and forwarded some copy emails to them but not the correspondence in May.

15. In the course of either May or June 2020, the Solicitors Office contacted the appellant by telephone seeking an extension of time until the end of September 2020 to complete the review because of issues caused by Covid. It is argued by the appellant that there was one telephone call in May 2020.

16. In fact, the solicitor in question has recorded that he made a number of unsuccessful attempts to contact the appellant by telephone and when that was successful, eventually, she told him that she had changed agent and she would need to discuss the request with CTM. She did not revert to the solicitor and he called her again asking if she had discussed the matter with CTM. She said that she was waiting to hear from them. He made it clear to her that the appeal was only about penalties, as she seemed "uncertain" and she said that she would speak to CTM and she would supply additional information to support her appeal.

17. There was no further contact with either the appellant or any agent.

18. On 25 August 2020, CTM lodged an appeal which appeared to relate to the discovery assessments and all of the penalties but offered no explanation for the delay in so doing.

19. On 28 August 2020, HMRC replied asking why this late appeal had been lodged and pointing out that they required a response by no later than 11 September 2020. That letter was also copied to the appellant. It was four pages long, set out HMRC's view of the matter, asked for documentary evidence of the source of unidentified deposits in the appellant's bank accounts as those formed part of the discovery assessments, and also asked for documentary evidence of the agreement with the ex-partner. There was no reply. Nothing has been produced.

20. On 18 September 2020, a review conclusion letter was issued to the appellant and CTM in relation to the deliberate penalties. It upheld the original decision.

21. On 29 October 2020, CTM emailed HMRC asking that a decision be made on the "out of time" appeal dated 25 August 2020. It was argued that an appeal would have been made at the "commencement" of the review of the penalty but for the fact that the review officer had told the appellant that HMRC would review the tax liability. It was conceded that the appellant might have misunderstood the conversation.

22. HMRC responded that day writing to the appellant, and CTM, explaining in full why no late appeal would be accepted.

23. The appellant appealed to the Tribunal. The income tax at stake amounts to £6,710.54 and the capital gains tax to £22,068.

The appellant's arguments

24. In summary, the appellant's position is that she knows nothing about tax and she has been very badly let down by everyone but particularly by her previous agent. She states that she instructed CTM in May 2020 to appeal the tax liability.

25. She argues that she did not believe that she should pay tax because there was no profit element and she had been poorly advised by a cousin and by her previous agent. She still thought that her ex-partner should pay the capital gains tax and that she should not be liable for a penalty. She suffers from anxiety. She will be bankrupted if she has to pay the taxes and penalties.

26. She states that HMRC would have "automatically" accepted a late appeal at the time of the telephone call(s).

HMRC's arguments

27. HMRC argue that the Tribunal should follow the principles enunciated in *Martland v HMRC*[1] ("Martland"). The delay was long, the reasons given for the delay do not amount to a reasonable excuse, they certainly would not have automatically accepted a late appeal either in a telephone call or in May or June 2020, and to allow a late appeal would be inconsistent with the principles of good administration of justice.

Discussion

28. HMRC are correct in saying that the principles in *Martland* apply. Therefore, when considering the exercise of the Tribunal's discretion to grant permission for a late appeal the three stage process outlined in *Martland* should be followed, namely:

(a) Establish the length of the delay

(b) Establish the reasons for the delay

(c) Evaluate all of the circumstances of the case.

The length of the delay

29. HMRC argue that it is seven months and 14 days being the period until 25 August 2020. Mr Ahmed argues that it should be taken as being May 2020 when the appellant spoke to the review officer. Firstly, she did not speak to the review officer who is a woman. She spoke to a Mr Smalley from the Solicitor's Office of HMRC. I accept his very clear evidence that he spoke to her twice, he pointed out that the review related only to the CGT penalty and he told her to speak to CTM in both calls.

30. I do not accept Mr Ahmed's argument. I do not think that the appellant had any grounds for thinking that the review included the discovery assessments.

31. Even if I were to accept that argument, and I do not, that would still be a delay from 11 January 2020 to, at the very earliest, 10 May 2020 which is a total of 120 days.

32. As the Upper Tribunal pointed out in *Romasave (Property Services) Ltd v HMRC*[2] a delay of three months in the context of a 30 day time limit "…cannot be described as anything but serious and significant".

33. Lastly, on that issue, the appellant's witness statement states that she told CTM in May 2020 to appeal the discovery assessments and the other penalties. They did nothing until August 2020. The only explanation for the delay is the reliance on the appellant's discussion with Mr Smalley, which even CTM concede might have been a misunderstanding.

[1] [2018] UKUT 0718 (TCC)
[2] [2015] UKUT 0254 (TCC)

Reasons for the delay and other circumstances of the case

34. These two steps are inextricably interlinked so I address them together.

35. I do not accept the argument that HMRC would have admitted the late appeals in May 2020. It is comparatively rare for HMRC to accept delays in excess of three months unless there are very good reasons and none have been advanced to them in this matter until this application. As can be seen from the findings in fact even since 25 August 2020 there has been no timeous compliance with HMRC by the appellant or CTM.

36. I do not accept the argument that by writing in August 2020 CTM were in time because the review was only to be concluded in September 2020. The simple fact is that having been asked for further information to be provided by 11 September 2020, nothing was provided by that date and indeed nothing has yet been provided.

37. The explanations for the delay are not helpful for the appellant. She now says that she was given poor advice from her previous agent and that she knows nothing about tax. As the Upper Tribunal pointed out at paragraph 58 of *Katib v HMRC*[3]*:* " it cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal…" and at paragraph 59 that lack of knowledge of tax and reliance on an agent "…are not sufficient to displace the general rule" that the appellant should bear the consequences of failings by an agent. In any event, those alleged failings have not been established.

38. Although the appellant's oral evidence focussed primarily on the capital gains tax liability she did not address the terms of the Court Order dated 11 June 2015 which stated "The parties shall each be liable for 50% of the capital gains tax liability on both properties." Whether or not her ex-partner told their daughter that he would "sort" the capital gains tax liability, the fact is that he has not and she is liable for that tax regardless. As can be seen that is more than 76% of the outstanding liability.

39. As far as income tax is concerned, there is very little evidence beyond the appellant's argument that the rental received matched the outgoings so there was no profit. In HMRC's letter of 28 August 2020, they pointed out the previous agent had submitted accounts and that the discovery assessments had adjusted those to take into account unidentified deposits into the appellant's bank accounts. A response from CTM by 11 September 2020 was sought and they were asked to produce documentary evidence of the source of those deposits. Although that letter was copied to the appellant, there has been no response to that letter and nothing has been produced.

40. I observe that the appellant works in the financial sector. There is nothing particularly complicated about time limits clearly set out in letters. Furthermore, the letter of 28 August 2020 was expressed in plain English and clearly sets out the position, as HMRC saw it.

41. In summary, although I note the allegations about the previous agent, I cannot see any basis for challenging the capital gains tax assessments. Although it is possible that there might be an argument about income tax, I observe that in the year after the last discovery assessment the appellant included rental income of £11,323 in her 2016/17 tax return. The letter of appeal says that the cousin moved out in 2017 and the property was empty for six months until the appellant's son moved in, collected rent from friends and paid off the mortgage. By inference therefore the mortgage was still extant in 2016/17. Accordingly, the

[3] [2019] UKUT 0189 (TCC)

assertion of no income does not sit well with that tax return. There is simply insufficient evidence to suggest that the discovery assessments could be successfully challenged.

42. Lastly, I do not accept the argument that the discussion, during the telephone call with HMRC about how the appellant might have calculated the capital gains, points to HMRC at that stage looking at the tax liability. This is a specialist tribunal and it is exactly the type of discussion that I would anticipate in the context of considering whether a penalty was deliberate or careless.

43. I have annexed as an Appendix a quotation from *Martland.* As can be seen from paragraphs 43 and 45 when deciding whether or not to allow a late appeal it is particularly important to enforce compliance with rules.

44. Paragraph 46 of *Martland* makes it clear that the merits of the challenge to the discovery assessments (and the income tax penalties) should not carry much weight unless the grounds of appeal are either very weak or very strong. As can be seen, I consider the appellant's case to be very weak on the basis of the evidence that has been provided. It certainly could not be described as being very strong. However, I have discounted that factor.

45. Clearly the appellant would be prejudiced if the late appeals are not allowed to proceed because she would not be able to litigate.

46. On the other hand, if the application is granted there will be a considerable cost to the public purse. There is also a public interest in promoting the policy that challenges to assessments by way of appeal should be brought in the short period specified by the statute. Statutory time limits should be respected. HMRC are entitled to rely on the policy of finality in litigation and other legal proceedings which is in the public interest. The delay in this matter, even if it were to be taken as being only until May 2020, is both serious and significant.

47. Every application for admission of a late appeal depends on its own facts and circumstances. At all stages in the consideration of this matter I have had Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) very much in mind. It is imperative that any decision should be fair and just. I have weighed every factor and authority that was brought to my attention in the balance.

48. Taxpayers are expected to act with reasonable prudence and diligence in dealing with their affairs. Patently the appellant has not done so and still is not doing so since the information sought by HMRC on more than one occasion has not been produced.

49. Although the Court made it explicit that she had a liability to capital gains tax, she did not take advice on how to deal with that and is even now arguing that her ex-partner should bear the liability. That is a matter for them and them alone.

50. On the balance of probability, I find that the appellant has not discharged the onus of proof in establishing a good reason for extending the time limit in the circumstances of this case.

Decision

51. I decline to exercise my discretion and the application for permission to notify late appeals is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

52. 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 SCOTT
TRIBUNAL JUDGE

Release date: 11 JANUARY 2022

APPENDIX

43. The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".

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.
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> (2) The reason (or reasons) why the default occurred should be established.
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> (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.