TC03413

Appeal number: TC/2012/03074

CAPITAL GAINS TAX – INCOME TAX – application for an extension of time for the making of an appeal to the Tribunal – balancing exercise undertaken* – O'Flaherty v HMRC [2013] UKUT 161 (TC) *and* HMRC v McCarthy & Stone (Developments) Ltd *considered – Tribunal's discretion exercised to refuse an extension in the light of the overriding objective of the Tribunal's rules

FIRST-TIER TRIBUNAL
TAX CHAMBER

KEVIN COLLINS **Appellant**

and

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

TRIBUNAL: JUDGE JOHN WALTERS QC
MRS LESLEY STALKER

Sitting in public at Bedford Square, London on 17 February 2014

The Appellant in person

Dr L Jacobs, Presenting Officer, HM Revenue & Customs, for the Respondents

DECISION

Introductory

1. The appellant in this appeal, Mr Collins, applies to the Tribunal for an extension of time in which to bring his appeal. His notice of appeal states that the 'amount of tax or penalty or surcharge (if applicable)' appealed against is £1,611,477.74. This figure features in the documents served with the notice of appeal as the total debt payable by Mr Collins to HMRC as at 14 July 2011 in respect of:

> self-assessed tax and/or National Insurance Contributions ("NICs") for the years 1996/97 to 2002/03 inclusive (£706,290.88); and
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> for the years 2003/04 to 2005/06 inclusive (£215,818.83); and
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> interest thereon (£536,386.17 – including £741.18 interest in respect of self-assessed tax and/or NICs for the year 2006/07 of £90,297.80, which has been paid by or credited to Mr Collins); and
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> self-assessment penalties imposed for the year 1999/2000 (£200); and
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> interest on those penalties and on penalties imposed and paid by or credited to Mr Collins for the year 2006/07 (£122.08); and
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> further self-assessment penalties determined at dates from 15 May 2009 to 28 October 2009 (£12,780); and
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> interest on those penalties and on a penalty determined on 23 March 2009 and paid by or credited to Mr Collins (£711.19); and
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> self-assessment surcharges imposed for the years 1996/97 to 2005/2006 inclusive (£125,118.88); and
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> interest on those surcharges and on surcharges imposed for the year 2006/07 and paid by or credited to Mr Collins (£14,049.71).

2. Thus the matters in dispute relate to Mr Collins's tax and/or NICs liabilities for the years 1996/97 to 2005/06 inclusive and penalties and surcharges relating to those years, together with interest thereon.

3. Mr Collins's notice of appeal was signed by him and dated 4 March 2011. This cannot, however, have been the date on which the notice of appeal was submitted because the total debt which is the subject of the appeal is stated as at 14 July 2011, and correspondence apparently entered into by Mr Collins as late as 22 December 2011 appears to anticipate the appeal being made. At the hearing, Mr Collins accepted that the date (4 March 2011) on the notice of appeal may have been a mistake and further accepted that the appeal was not in fact entered before 6 January 2012.

4. The intended appeal is against three groups of administrative actions by the Respondents ("HMRC") – the appeals against interest, penalties and surcharges being of a supplementary nature.

5. The first group consists of amendments to Mr Collins's self-assessments for the years 1996/97 to 2002/03 inclusive, made under the provisions of section 9C(2) Taxes Management Act 1970 ("TMA") on an officer of HMRC forming the opinion that the amounts stated in the self-assessments as the amounts of tax payable were insufficient. These amendments were made on 2 April 2009.

6. The second group consists of discovery assessments made on Mr Collins for the years 2003/04 to 2005/06 inclusive, made under section 29 TMA. These assessments were also made on 2 April 2009.

7. The third group consists of a single discovery assessment made on Mr Collins for the year 2004/05 under section 29 TMA. This assessment was made on 6 November 2007.

8. As to the first group, Dr Jacobs, for HMRC, submits that the notices of amendment dated 2 April 2009 were validly served and received by Mr Collins and were validly appealed by him to HMRC on 28 April 2009 (Mr Collins's letter gives the date 28 April 2008, but this must be a mistake). In his letter, Mr Collins gave a general ground of appeal that the amendments (he called them 'assessments') did not reflect his capital gains or income for the tax years in question.

9. Dr Jacobs also submits that the final decision letter in relation to the amendments was validly served on Mr Collins on 6 January 2011, in which it was stated by the inspector, Jonathan Smith, that he had concluded his enquiries into Mr Collins's tax affairs concerning the tax years 1996/97 to 2005/06 inclusive. Mr Smith also stated that the amendments made on 2 April 2009 had been made to protect HMRC's position, and that following Mr Collins's appeal to HMRC Mr Collins had been invited to provide further details in support of his appeals, but no further information had been provided. The amendments made on 2 April 2009 therefore were confirmed and Mr Collins was informed that he could ask to have Mr Smith's decision reviewed or appeal to the Tribunal within 30 days of the date of the letter (section 31A TMA). Thus, the time limit for appealing to the Tribunal in relation to the first group expired on 5 February 2011.

10. Mr Collins replied to Mr Smith's letter of 6 January 2011 on 16 April 2011. He said that he had not received Mr Smith's letter until 16 April 2011 (the date of his own letter in reply) because it had been sent to his old address incorrectly and forwarded to him. He requested HMRC to carry out a review of Mr Smith's decision adding that '[i]n the alternative I would like to ask the tribunal to accept a late appeal'.

11. Mr Smith responded by a letter dated 6 May 2011 asking for the documentary evidence which Mr Collins had stated that he had, to demonstrate that he had not received Mr Smith's letter of 6 January 2011 until 16 April 2011. He added that

depending on the documentary evidence provided he may be prepared to accept a request for a review of his decision. The evidence was not provided by Mr Collins until 22 December 2011 and consisted of a copy Royal Mail Letter, which Mr Collins said arrived with Mr Smith's letter on 16 April 2011 from the National Returns Centre in Belfast. However that copy letter was undated except for a note handwritten by Mr Collins stating "Received 16/4/11 KC" and did not make any reference to any specific postal item, but contained language indicating that it covered an item of mail returned to sender, rather than a letter sent by HMRC to Mr Collins at a different address.

12. This evidence did not persuade Mr Smith to accept a late request for a review of his decision. The position remains that the time limit for appealing to the Tribunal was 5 February 2011 and Mr Collins's appeal was not made before 6 January 2012.

13. As to the second group (the discovery assessments made on Mr Collins for the years 2003/04 to 2005/06 inclusive, made under section 29 TMA on 2 April 2009), these were served by HMRC and appealed to HMRC by Mr Collins on 28 April 2009. Mr Smith invited Mr Collins to provide detailed information supporting any position that he wished to put forward. No information was provided. Mr Smith wrote to Mr Collins on 9 June 2009 confirming his view that the assessments were appropriate and informing him that he could, within 30 days, ask to have Mr Smith's decision reviewed or appeal to the Tribunal. Mr Collins wrote requesting a review on 7 July 2009. An independent review officer (Mr Hagan) was appointed and he wrote to Mr Collins on 21 July 2009 asking for any further representations that Mr Collins wished to make to be sent to him by 11 August 2009. No response was received from Mr Collins and on 24 August 2009 Mr Hagan wrote again to Mr Collins informing him that he had completed his review and that his conclusion was that the decisions in the letters dated 2 April 2009 should be upheld. The letter informed Mr Collins that he had 30 days to appeal to the Tribunal, that is, until 23 September 2009. Mr Collins wrote to Mr Hagan on 17 September 2009 stating that he had decided to appeal the decisions to the Tribunal. However, although the time limit for appealing to the Tribunal was 23 September 2009, as stated above, Mr Collins did not appeal to the Tribunal before 6 January 2012.

14. As to the third group (the discovery assessment made on Mr Collins for the year 2004/05 under section 29 TMA, made on 6 November 2007), Lawfords Consulting, then acting for Mr Collins, appealed the assessment to HMRC on 29 November 2007. On 25 February 2011, Mr Smith wrote to Mr Collins explaining that the assessment, to capital gains tax in respect of several disposals of shares in Meridian Petroleum PLC in the tax year 2004/05, which had not been included in Mr Collins's tax return, had become final because Mr Collins had not provided any further information concerning these disposals. The letter informed Mr Collins that he could, within 30 days, that is, on or before 27 March 2011, ask to have the decision to assess reviewed, or appeal to the Tribunal. This time limit was later extended to 4 June 2011.

15. Much of the correspondence appears not to have reached Mr Collins because he changed addresses more than once without timeously informing HMRC of his new address. However, on 28 October 2011, Mr Collins wrote to Mr Smith indicating that he wished to appeal against the assessment. On 3 November 2011, Mr Smith replied,

stating that he considered that all the assessments and amendments (including the discovery assessment for 2004/05) were final.

16. The time limit for appealing the assessment to the Tribunal was either 27 March 2011 or 4 June 2011. In the event, Mr Collins did not appeal to the Tribunal before 6 January 2012.

17. Mr Collins's applications for extensions of time to appeal came before Judge Demack on 3 October 2012. At that hearing, as before us, Mr Collins appeared in person and Dr Jacobs appeared for HMRC. It appears that Mr Collins said that he was not sure of the details of the subject of the various assessments and amendments. Judge Demack made Directions (released on 1 November 2012) requiring HMRC to provide Mr Collins with full details of the tax assessed and related penalty assessments by 31 October 2012, requiring Mr Collins to inform HMRC by 31 January 2013 which, if any, of the assessments were accepted and his reasons for not accepting such of the assessments as he did not accept. Judge Demack further directed that if Mr Collins failed to comply with the foregoing direction the appeal would be struck out without further directions, and that if he did comply with it 'the application presently before the Tribunal', that is, Mr Collins's application for an extension of time to serve his notice of appeal, 'shall be listed for hearing'. Judge Demack adjourned Mr Collins's application for an extension of time to serve his notice of appeal until 1 February 2013.

18. Mr Smith, for HMRC, wrote to Mr Collins following the hearing before Judge Demack, on 30 October 2013, a letter running to 12 closely typed pages explaining in detail HMRC's case. Three Appendices were attached to Mr Smith's letter.

19. Mr Collins responded, by a letter dated 20 January 2013, in compliance with Judge Demack's direction, that 'this was really the first time that I have been able to understand how these various assessments and amendments were arrived at'.

20. Mr Collins explained that he wished to appeal to the Tribunal against assessments and amendments as follows:

> Tax year 1996/97 – income from self-employment of £260,000. Mr Collins stated that the shares and loan treated by HMRC as his income were in fact held by Mr Collins on trust for an individual, now deceased, resident in South Africa. He proposed to obtain affidavit evidence from an officer of the South African trust company which provided the personal representative, now deceased, of the beneficial owner.
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> Tax year 1997/98 – income from self-employment of £225,000 and interest of £14,000. Mr Collins put forward a similar case to the effect that these estimates were incorrect and proposed to obtain similar evidence in support of his case.
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> Tax year 1998/99 – income from self-employment of £26,666 and interest of £14,267. Mr Collins stated that £10,000 of the alleged income from self-employment relates to shares acquired before the tax year for his benefit and merely put into his name in the tax year. The balance of the alleged income

(£16,666) was, he stated, an incorrect estimate because, contrary to HMRC's case, no mortgage payments were made by Mr Collins in that year. The tax charge in relation to interest of £14,267 was resisted on the same basis as in relation to the earlier tax years (see: above) – that no such interest accrued to Mr Collins beneficially. Mr Collins stated that he proposed to obtain affidavit evidence to substantiate his case from an officer of the South African trust company already mentioned. He also proposed to obtain evidence in relation to mortgage payments (or the absence of them) from a Gibraltar bank.

Tax year 1999/2000 – income from self-employment of £91,666 and interest of £7,547. Mr Collins stated that his case in relation to the interest was the same as stated above in relation to earlier years and the evidence he proposed to adduce would come from an officer of the South African trust company already mentioned. Of the alleged income from self-employment, his case was that £16,666 relates to mortgage interest which was never paid (as for the previous tax year), and the balance of £75,000 relates not to any receipt (as HMRC allege) but to an amount – actually £70,000 – borrowed from a gentleman now resident in Hong Kong. Mr Collins states that he proposes to obtain from that gentleman evidence to substantiate this part of his case.

Tax year 2000/01 – income from self-employment of £16,666 and capital gains of £851,917. Mr Collins stated that the alleged income from self-employment related to mortgage payments but that no such payments were made by him in the year. As to the capital gains, Mr Collins's case is that they relate to disposals of assets held by him on trust for the South African resident already referred to and that following the disposal, that person's representatives, the South African trust company, gifted back £433,000 to him. He proposes to substantiate this by evidence from an officer of the South African trust company.

Tax year 2001/02 – income from self-employment of £372,366. Mr Collins stated that this alleged income related in part to mortgage payments which, although made, were made from loans, not undeclared income, and, in part, to unidentified deposits, assumed by HMRC to be his undeclared income, which were actually sums loaned to him by the gentleman resident in Hong Kong mentioned above. He proposes to obtain evidence to this effect from that gentleman.

Tax year 2002/03 – income from self-employment of £34,257. Mr Collins stated, again, that this alleged income related, in part, to mortgage payments made from loans, not undeclared income, and in part to sums loaned by the gentleman resident in Hong Kong already referred to. He proposes to obtain evidence to this effect from that gentleman.

Tax year 2003/04 – income from self-employment of £130,383. Mr Collins stated that the position was the same as that stated above in relation to the tax year 2002/03.

Tax year 2004/05 – income from self-employment of £225,875 and capital gain of £821,375. Mr Collins stated that the position relating to the alleged income from self-employment was that same as that stated above in relation to the tax years 2002/03 and 2003/04. Mr Collins accepts that some liability to capital gains tax arises in this year (in respect of two disposals of shares in Meridian Petroleum plc) but does not agree HMRC's calculation of the amount of his liability.

Tax year 2005/06 – income from self-employment of £205,781. Mr Collins stated that the position was the same as that stated above in relation to the tax years 2002/03, 2003/04 and 2004/05.

21. As Mr Collins had not provided any further evidence (as opposed to indicating his proposals to obtain evidence from South Africa, Gibraltar and Hong Kong), HMRC's position remained that it supported the assessments and amendments in issue. Mr Smith informed Mr Collins by a letter dated 28 February 2013 that his application for an extension of time to file his notice of appeal would be relisted but suggested that Mr Collins may wish to apply for a further adjournment to enable him to gather the evidence and information required to substantiate his position.

22. The application was in the event relisted for hearing, before us, on 17 February 2014 – almost one year later – and still Mr Collins was not able to produce any further evidence or substantiating information.

23. The application comes before us under section 49 TMA (in relation to cases where a notice of appeal may be given to HMRC but no notice is given before the relevant time limit), section 49G TMA (in relation to cases where HMRC have concluded or are to be taken to have concluded a review) and/or section 49H TMA (in relation to cases where HMRC have offered a review but an appellant has not accepted the offer). In all cases permission for a late appeal is required. Under section 49 TMA that permission may be given by HMRC (on being satisfied that there was a reasonable excuse for not appealing in time) but in all cases, where HMRC have power to, but do not, give permission and where HMRC have no such power, the Tribunal can give permission.

24. In considering whether to grant Mr Collins's application, the Tribunal must have regard to the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") to deal with cases fairly and justly. Our specific jurisdiction to give permission that an appeal may be made or notified after the end of any period specified in an enactment is provided by rule 20(4) of the Rules.

25. The Upper Tribunal (Upper Tribunal Judge Berner) has recently had occasion to consider the parameters for the exercise of this jurisdiction by this Tribunal in *Dominic O'Flaherty v Revenue and Customs Commissioners* [2013] UKUT 161 (TC). In that case it was stated that this Tribunal must consider all material factors,

including the reasons for the delay in putting in the notice of appeal, whether there would be prejudice to HMRC in allowing a late appeal or demonstrable injustice to the potential appellant is not allowing a late appeal. This Tribunal must conduct a balancing exercise in which it considers, among other relevant material factors, the arguable merits of the appellant's case.

26. Upper Tribunal Judge Berner made reference to Morgan J's decision (sitting as an Upper Tribunal Judge) in *Data Select Limited v Commissioners of Revenue and Customs* [2012] UKUT 187 (TCC); [2012] STC 2195 in which he commended the approach of considering the overriding objective, to deal with cases fairly and justly, and all the circumstances of the case. Morgan J said that the matters listed in CPR rule 3.9 were included in the matters for consideration, and suggested that five questions should be answered in the course of the balancing exercise: (1) what is the purpose of the time limit in issue?; (2) how long is the delay?; (3) is there a good explanation for the delay?; (4) what will be the consequences for the parties of the grant of an extension of time?; and (5) what will be the consequences for the parties of a refusal to extend time?

27. Upper Tribunal Judge Berner stated in particular (*O'Flaherty* at [46]) that the Tribunal's discretion in exercising this discretion is not confined to, or at least primarily to, the question of whether the appellant had a reasonable excuse for the lateness of the submission of his notice of appeal.

28. In the oral hearing of Mr Collins's application, attention was addressed to the question of whether he had a reasonable excuse for the lateness of the submission of his notice of appeal. Although at the conclusion of the hearing we announced our decision not to allow Mr Collins's application, in preparing our full reasons for our decision (as requested by him) we have been able to take into account the authorities mentioned and all the circumstances of the case.

29. Also relevant is the recent decision of Upper Tribunal Judge Sinfield in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Limited, Monarch Realisations No. 1 PLC (in administration)*, where he refused HMRC permission to extend time for the filing of a notice of appeal which had been filed 56 days late. He made reference to the new version of CPR rule 3.9, which refers to all the circumstances of that case, but specifically only to the need for litigation to be conducted efficiently and at proportionate cost and to the need to enforce compliance with the rules, practice directions and orders of the court. The new version of CPR rule 3.9 had been considered by the Court of Appeal in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537, in which the Court of Appeal had adopted a tougher, more robust, approach towards enforcing compliance with the rules, practice directions and orders of the court.

30. While we recognise that CPR rule 3.9 (in either its old or its new version) does not form part of the Rules which govern the procedure of this Tribunal, we consider, having regard to *McCarthy & Stone* and to *Andrew Mitchell MP* that it is relevant for us to have regard to the fact that the Court of Appeal and the Upper Tribunal are

moving to a more robust practice in the exercise of discretions where compliance with rules, practice directions and orders are in issue.

31. We turn to a consideration of the questions posed by Morgan J in *Data Select Limited* in the context of this case.

32. First, what is the purpose of the time limit in issue? We are clear that the 30 day time limit which is laid down in the TMA is intended to bring efficiency to the conduct of appeal proceedings and to discourage stale appeals.

33. Secondly, how long is the delay? In this case the delay to be considered varies. In relation to the first group of decisions appealed against the delay was from 5 February 2011 to 6 January 2012, some 11 months. In relation to the second group of decisions, it was from 23 September 2009 to 6 January 2012, more than 2 years and 3 months. In relation to the third group decision, it was from either 27 March 2011 or 4 June 2011 to 6 January 2012. Giving Mr Collins the benefit of the doubt, this was a delay of just over 6 months. We consider that all these delays were considerable and none can be disregarded as being *de minimis*.

34. Third, is there a good explanation for the delay? Mr Collins makes much of the fact that he did not receive letters sent to him by officers of HMRC because he had changed address more than once. Dr Jacobs, for HMRC, accepts that Mr Smith's letter of 6 May 2011 (referred to above) was not received by Mr Collins but he makes the point that the assessments and all correspondence addressed to Mr Collins were sent by HMRC to him at the latest address for him which they held. Dr Jacobs produced a document entitled "History of correspondence addresses" in which three addresses for Mr Collins were recorded. He submits that a reasonable person, who was aware that there were open enquiries by HMRC into his/her tax affairs, would notify HMRC of any change of address within a reasonable time. We agree and find that Mr Collins did not notify HMRC of his changes of address in timeous fashion and cannot escape responsibility for the consequences that this has had, in terms of delay in the bringing of proceedings in this Tribunal.

35. Mr Collins also states that he was unable to understand the nature of HMRC's case before he received Mr Smith's letter dated 30 October 2012 sent in compliance with Judge Demack's Directions. We find that this cannot be taken at face value. Mr Smith in a letter dated 12 March 2009, preparatory to the amendments and assessments made on 2 April 2009 stated, *inter alia*, as follows:

> 'Despite repeated requests, as no documentation has been provided by yourself to the contrary, I intend to treat all deposits received into your personal bank account, … as taxable income (excluding for the time being deposits identified as originating from Venture Capital Ltd).
>
> Documentation acquired from the solicitors that acted for the purchaser in relation to the purchase of your house, 30 Winterbrook Road, indicates that you were the beneficial owner of the offshore company that purchased the property. As no evidence has been provided to the contrary, I intend to treat the initial capital invested and the subsequent repayments of the mortgage as originating from undisclosed taxable income (as I have been unable to identify any such repayments from your bank statements).

> As no evidence has been provided to suggest otherwise, I intend to treat all shareholdings that were held in your name as beneficially owned by you and that the total funding to purchase these shareholdings originated from undisclosed taxable income.
>
> Following from the point above, I intend to treat all gains made on the disposal of shareholdings held in your name as assessable to you personally.
>
> Again, as no evidence has been provided to the contrary, I intend to treat all loans granted by loans as assessable on you.'

36. In our view this letter made plain the basic reasoning behind the amendments and assessments in issue. We find that Mr Collins has been unable to give a good explanation for the delay.

37. Fourth, what will be the consequences for the parties of the grant of an extension of time? An extension of time would enable Mr Collins to conduct his appeal in this Tribunal. It would require HMRC, significantly after the time that they reasonably expected to be able to close their file on this matter, to devote time and resources to defending the appeal.

38. Fifthly, what will be the consequences for the parties of a refusal to extend time? The consequences will be the opposite of those considered in the last paragraph – HMRC would be saved from the need to devote time and resources to defending the appeal, but Mr Collins would be shut out from bringing his appeal.

39. Taking the above considerations into account, and conducting the necessary balancing exercise, we have no doubt that the balance comes down in favour of our refusing Mr Collins permission to bring a late appeal.

40. We are the more certain that this is the correct conclusion for us to reach when we consider the arguable merits of Mr Collins's case. He seeks to rely on evidence (not yet collected) from certain persons resident in South Africa, Gibraltar and Hong Kong to corroborate his story. In all the time that has elapsed since HMRC conducted their enquiries Mr Collins has not obtained even Witness Statements from these persons. He was not able to give us any realistic assurance that these persons or their representatives would attend to give live evidence and be cross-examined by HMRC at an appeal hearing. He did not give us any, or any reasonable, explanation for the fact that this evidence had not yet been collected. In all the circumstances we have formed the view that the arguable merits of his case are extremely slight.

41. For all the reasons given above, our decision is to refuse Mr Collins's application.

Further appeal

42. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 19 March 2014