



TC03627

Appeal number: TC/2013/03158

**Income Tax – Assessments under Section 29 of Tax Management Act 1970 -
whether they are determined - application for late appeal - application dismissed**

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OWEN O'HARA

Appellant

- and -

THE SERIOUS ORGANISED CRIME AGENCY

Respondent

TRIBUNAL: JUDGE IAN W. HUDDLESTON

Sitting in public at Belfast on 21 October 2013

Nicola Parslow, J. Friel, Officer, appeared on behalf of the Respondent

There was no appearance on behalf of the Appellant

DECISION

The Appeal

- 5 1. This is a case where income tax assessments have been made under Section 29 of the Taxes Management Act 1970 for the years 1997/8 through to 2009/10.
- 10 2. The Respondent is an enforcement authority which has certain revenue functions vested in it pursuant to the terms of Section 329 of the Proceeds of Crime Act 2002 one of which includes the power to assess income tax where an authorised officer has reasonable grounds to suspect that income arising to a person is chargeable to income tax and arises directly or indirectly as a result of that person or another's criminal conduct. In the present case income tax assessments were raised against Mr Owen O'Hara (the Appellant) because the Serious Organised Crime Agency ("SOCA") believe that there is a reasonable suspicion that Mr O'Hara received income which hasn't been declared to HMRC through his criminal activities which include drug
15 dealing and car "ringing".
3. The Appellant lodged a late appeal to which SOCA have objected.
4. The Appellant did not appear nor was he represented but having satisfied itself that notice had been served the Tribunal determined that in the interests of justice it would proceed.

20 *The Facts*

- 25 5. Mr O'Hara was convicted of the possession of class A and class B controlled drugs with intent to supply in May 2002 and received a 12 month prison sentence. During the investigation it became apparent that Mr O'Hara had not made any returns of income to HMRC whatsoever. A self assessment record had been set up on the 17 April 2002 as HMRC had been notified that Mr O'Hara had commenced trading as a self-employed contractor from the 19 January 1998. Tax returns for the years 1997/98, 1998/99, 1999/00, 2000/01 and 2001/02 were issued but never returned. HMRC subsequently cancelled these as a result of telephone calls received from the Appellant stating that he had not been self-employed since 1994 and indicating that
30 whilst he had been intending to start as a self-employed person at a later date did not in fact do so.
- 35 6. As part of the investigations, however, the Inspector traced substantial deposits which were made into Mr O'Hara's bank account in the period 2004 through to 2010. These ranged in amount from £43,000 to £148,000 annually. It also became apparent that Mr O'Hara had made a loan application on the 1 November 2000 in which he had declared to his prospective lender that he was in receipt of self-employed income for the years 1998 through to 2001 ranging from £17,896 to £28,224 p.a. SOCA had obtained a copy of that application through its investigations.
- 40 7. On the 10 August 2011 SOCA wrote to Mr O'Hara indicating that they had adopted the revenue functions of HMRC and would be responsible for assessing income during the period 1997 to 2010. On the 12 August 2011 assessments were

issued under Section 29 of the Taxes Management Act 1970 for each of those tax years.

8. Mr O'Hara and his accountant met with SOCA on the 26 September 2011.

5 9. On the 1 December 2011 a late appeal was made to SOCA in respect of the assessments. That appeal was made on the basis that "*the profits stated [in the assessments] are excessive*".

10 10. Subsequent letters were issued by SOCA on 11 January 2012, 3 February 2012 and 16 March 2012 but no response was received. In the absence of such a response a letter was issued under Section 49 (C) TMA 1970 on the 17 July 2012. The import of that letter was that it required the Appellant to either request a review or submit an appeal to the Tribunal within a period of 30 days (that period expiring 16 August 2012) failing which the appeals would be deemed to have been determined pursuant to Section 54 Taxes Management Act 1970. On the evidence presented to the Tribunal it would seem that Mr O'Hara neither responded to this letter nor did he request a review.

15 11. In due course HMRC issued a letter dated 25 January 2013 requiring payment of the outstanding liability by the 4 February 2013. Again on the evidence presented to the Tribunal no response was received nor was payment made.

12. Accordingly a Statutory Demand was served on the 27 March 2013.

20 13. On 30 April 2013, the Appellant's then instructed solicitors McNamee McDonald & Duffy, in place of his previous legal advisors John Fahy & Co, lodged an appeal. The appeal notice submitted disclosed the following reasons for the appeal.

25 "*I believed my previous advisors had appealed this matter or asked for review through SOCA. Only upon receipt of a Statutory Demand did I realise this was not the case. A Statutory Demand was served on 30 March 2013. I had requested my previous solicitor to deal with this also but realised he doesn't appear to have done so.*"

30 14. According to the evidence presented to the Tribunal there has been no further response or communication from the Appellant, his accountant or either of his legal advisors in the intervening period since the Notice of Appeal dated 30 April 2013.

The Appellant's Contentions

35 15. In essence the application for time to allow a late appeal seems, on the part of the appellant, to be based on the fact that Mr O'Hara was not aware that his previous advisor had failed to respond to SOCA's letter of the 17 July 2012 by either entering an appeal or requesting a review and that he was not aware of that fact until the Statutory Demand was served on him on 30 March 2013.

16. In respect of the assessments themselves, it would seem that Mr O'Hara (referring to earlier correspondence) has indicated that he considers the assessments are excessive.

40 *The Respondent's Contentions*

The Application to allow a Late Appeal

17. The Respondents contend that the onus of proof rests with the Appellant to justify why a late appeal should be allowed and, if it be the appellant's case, why the assessments themselves are excessive. It is the Respondent's case that notwithstanding earlier dialogue and considerable correspondence with the Appellant and/or his various representatives that no explanations have been advanced nor has any evidence been submitted to displace the onus of proof which falls on the Appellant in relation to either point.

18. Specifically as regards the late appeal the Respondent's case is that Mr O'Hara was issued with various letters including the decision letter of the 17 July 2012 which set out his options, the request for payment for the outstanding liability which was sent on the 25 January 2013 and then, ultimately, the Statutory Demand on the 27 March 2013.

19. The Respondent's view is that the Appeal was not entered until the 30 April 2013 ie. 8 months after the date upon which appeals could or should have been made to the Tribunal and that no evidence has been submitted to show what (if any) action Mr O'Hara took upon receipt of the letter or subsequently on receipt of the payment demand letter. In short the Respondents submit that the time limit of 30 days within which he was to respond is quite clearly stated and that as a matter of law and practice it exists so that there may be finality in terms of tax affairs generally. As regards this specific case HMRC argue that the assessments became final on the 16 August 2012 simply because the Appellant had failed to take any action in response to the decision letter of 17 July.

The Assessments

20. As regards the assessments themselves again the Respondents adopt a similar line of argument. An officer conducted a review of Mr O'Hara's known bank accounts and identified significant deposits which were made during the relevant years which the officer reasonably considered to be from a taxable source that had not been declared to HMRC. Those deposits together with Mr O'Hara's application for a loan form the basis of the information led to the basis upon the assessments for the relevant years were raised.

21. The Respondents also pointed to the fact that a meeting had been held with the Appellant and his advisors on the 26 September 2011 and that notwithstanding that and the subsequent correspondence nothing had been submitted by or on behalf of the Appellant to show that the basis of the assessments was incorrect or excessive. To assure their accuracy, evidence was adduced to the Tribunal that as regards the assessments various factors known to SOCA had been taken into account - for example the assessments themselves had, in fact, been reduced during the period that Mr O'Hara had served a prison sentence.

22. In asserting that the onus of proof fell on the Appellant and that he had failed to discharge it the Respondents sought an Order that the late application for the Appeal should be struck out on the basis that, firstly, there had been no good explanation

proffered for the delay and, secondly, that if the application was allowed there would be very little prospect of success in relation to the main appeal.

Decision

23. In the first place the Tribunal did satisfy themselves both by an examination of the papers and enquiry raised of the representatives for the Respondents that correspondence had been sent to both the Appellant and his known representatives. Indeed that formal correspondence had been followed up by telephone calls without result. The Tribunal, therefore, was satisfied that all reasonable efforts had been made to notify the Appellant and his representatives of the Appeal but in the event neither appeared. Indeed it seemed clear from the papers that there had actually been no contact from either the Appellant or his representatives from the initial letter of the 30 April 2013 (with appended appeal notice) which was lodged on behalf of the Appellant by Messrs McNamee McDonald and Duffy.

24. In matters where applications for late appeal are made the onus of proof clearly rests with the Appellant. In the present case the Appellant asserted on its appeal notice that the fault lay with its earlier advisors in that the Appellant believed that the earlier advisors, Messrs John Fahy & Co, had submitted a Notice of Appeal in response to the decision letter of the 17 July 2012. No evidence, however, was adduced to confirm that assertion nor, did the Appellant appear or call witnesses to the hearing to explain his position more fully. In the absence of such additional evidence the Tribunal finds that the onus of proof for the application to appeal out of time is not discharged and, therefore, on that basis grants the Respondent's application and strikes out the appeal.

25. We should say that in coming to this decision we have also referred to the guidance which is contained in the case of *Annie W. Gibbs v HMRC* [2013] UK FTT 236 and, in particular, to the oft quoted reference to *Data Select Limited* [2012] UK UT187 where directions were given to Tribunals such as this in terms of the questions which it must pose itself in cases such as the instant one. In summary those questions are as follows:-

- what is the purpose of the time limit?
- how long was the delay?
- is there a good explanation for the delay?
- what would be the consequences for the parties on extension of time?
- what would be the consequences for the parties of a refusal to extend time?

26. In the present case, as we have said, there appears to be no reason advanced for the various delays and as we have found, the continuance of the appeal largely falls at that first hurdle. In fact we have concluded that the Appeal itself was prompted as a result of anticipated enforcement action.

27. As regards the consequences for the parties to an extension of time we would have to say that on the evidence presented by SOCA it would seem to us that the appeal itself has very little chance of success. We find that the Appellant has been given more than ample opportunity of advancing evidence and/or possible explanations to bolster his assertion that the assessments themselves are excessive but that to date

neither he nor his instructed advisors, (either his accountants or his lawyers), have advanced any cogent reason or explanation for that bald assertion. As we have said, it rather seems to us that the appeal notice has been lodged as a consequence of the Statutory Demand itself and, we suspect, as a delaying tactic to the implementation of that Statutory Demand and its enforcement.

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28. For all of those reasons we allow the strike out application and strike out the appeal.

29. 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.

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**IAN HUDDLESTON
TRIBUNAL JUDGE**

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RELEASE DATE: 20 May 2014

