[2017] UKFTT 863 (TC)

TC06258

Appeal number: TC/2016/04712

INCOME TAX - application for permission to make late appeals against assessments and penalty determinations - application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PATRICK CARR **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

Sitting in public at Belfast on 3 August 2017

No appearance by or on behalf of the Appellant

Mr C Shea for the Respondents

DECISION

Introduction

1. Mr Patrick Carr (the "Appellant") applies for permission to bring late appeals against assessments dated 14 June 2016 issued by HMRC under s 29 of the Taxes Management Act 1970 ("TMA") in respect of tax years 2005-06 to 2009-10 inclusive, and against penalties issued under s 95 TMA in respect of the same years. The assessments total £779,786.04, and the penalties total £492,747.

2. For its part, HMRC contends that if permission to bring a late appeal were to be granted, the appeals should be struck out for failure to co-operate or for lack of a reasonable prospect of success.

Background facts

3. In a letter dated 14 April 2015, HMRC informed the Appellant that they suspected him of tax fraud, and enclosed a copy of HMRC's Code of Practice 9, used in cases of suspected serious fraud. The letter said that the Appellant had the opportunity to make a further disclosure within 60 days.

4. In a letter dated 3 July 2015, HMRC informed the Appellant that in the absence of a response from him, they would proceed to investigate the tax fraud that he was suspected of having committed.

5. HMRC subsequently tried unsuccessfully to arrange a meeting with the Appellant's agent, GP Boyle & Co.

6. In a letter dated 6 October 2015, HMRC invited the Appellant and his agent to a meeting on 25 November 2015.

7. On 18 November 2015, an officer of HMRC had a telephone conversation with the Appellant, who indicated that it was unlikely that he would attend the 25 November 2015 meeting.

8. On 23 November 2015, HMRC issued an information notice to the Appellant, requiring the production of certain records and information.

9. On 5 January 2016, HMRC issued a £300 penalty notice to the Appellant for failure to comply with the information notice.

10. In a letter to the Appellant dated 13 May 2016, HMRC stated that as there had been no cooperation from the Appellant to date, they would have no alternative but to raise discovery assessments under s 29 TMA based on information held by HMRC. The letter set out HMRC's view of the amount of additional tax and National Insurance contributions due from the Appellant, and stated that penalties under s 95 TMA would be imposed. The letter stated that these amounts related to the Appellant's additional income from self-employment due to the onward sale of illegal laundered fuel using Patrick Carr Haulage.

11. On 14 June 2016, HMRC issued the notices of assessment against which the Appellant now seeks to appeal.

12. In letters to the Appellant dated 16 and 17 June 2016, HMRC gave details of the penalty they proposed to impose.

13. On 21 and 22 June 2016, HMRC imposed the penalties against which the Appellant now seeks to appeal.

14. By a letter dated 23 June 2016, the Appellant's agent, GP Boyle & Co, stated that the Appellant wished to appeal against the assessments.

15. In a letter dated 29 June 2015, HMRC issued their view of the matter and offered the options of requesting a review or appealing "to an independent tribunal".

16. In a letter to HMRC dated 25 July 2015, the Appellant's agent stated that they wished to appeal "to an independent tribunal".

17. In a letter to the Appellant's agent dated 3 August 2016, HMRC stated that in order to appeal to the Tribunal, it was necessary to write directly to the Tribunal.

18. The Appellant commenced the present proceedings before the Tribunal on 1 September 2016, submitting separate notices of appeal in relation to the assessments and the penalties.

19. On 8 October 2016:

(1) HMCTS wrote to the Appellant stating that the Tribunal could communicate only with the Appellant directly unless the Appellant completed a form giving written notice of his representative; and

(2) the Tribunal issued a direction consolidating the appeals and requiring the Appellant to provide fuller grounds of appeal by no later than 28 days from the date of the direction.

20. In a letter dated 16 November 2016, HMRC applied for a hearing to consider HMRC's opposition to the late appeal, or alternatively, an HMRC application to strike out the appeal.

21. In a letter to the Appellant dated 4 January 2017, HMCTS noted that no response appeared to have been received from the Appellant to the 8 November 2016 letter, and requested the Appellant within 10 days to provide dates to avoid for the hearing requested by HMRC.

22. In a letter to the Appellant dated 24 February 2017, HMCTS informed the Appellant that the hearing had been listed for 10 April 2017.

23. At one point, HMRC requested a postponement of that hearing, on the ground that the HMRC representative was dealing with another case with a hearing on the

same date. However, it seems that the other case did not proceed, so that HMRC did not need to pursue the request for an adjournment on that ground.

24. Subsequently, on 6 April 2017, the Appellant's representatives, Tara Walsh Solicitors, requested a postponement on grounds of a bereavement affecting the principal of that firm. In a letter to Tara Walsh Solicitors dated 7 April 2017 advising that the postponement was granted, the Tribunal said that normally the granting of a postponement in such circumstances would be straightforward. However, it added that in this case it was unsatisfactory that Tara Walsh Solicitors had not earlier advised the Tribunal and HMRC that they now represented the Appellant.

25. On 15 June 2017, the Tribunal gave notice to the parties that the hearing had now been listed for 3 August 2017.

26. On 19 June 2017, Tara Walsh Solicitors sent an e-mail to HMCTS stating that they were not available before September and requesting an alternative date thereafter.

27. In a letter of the same date, HMRC opposed the Appellant's request for a postponement.

28. In letters to the parties dated 19 July 2017, HMCTS advised the parties that the application to postpone the hearing had been refused by a Judge and that the 3 August 2017 hearing would proceed, but that either party could renew an application to postpone at the start of the hearing.

29. At the hearing on 3 August 2017, there was no appearance by or on behalf of the Appellant. HMRC were represented by Mr Shea.

30. The Tribunal decided to proceed with the hearing in the Appellant's absence. It was clear from the fact of the Appellant's representatives' application for a postponement that they were aware of the scheduled hearing. The application for a postponement had been refused, and the Appellant's representatives' had been advised that the application could be renewed at the beginning of the hearing. The Tribunal considered that it would be contrary to the interests of justice to grant a postponement in such circumstances where the Appellant and his representatives simply failed to attend the hearing.

Application for permission to bring a late appeal: applicable law

31. The time limit for the bringing of appeals in this case is 30 days from the date of the decision appealed against (ss 49C(8), 49H(5) and 100B TMA). However, the Tribunal can give permission for the bringing of a late appeal (Rule 20(4) of the Tribunal's Rules).

32. In *Data Select v HMRC* [2012] UKUT 187 (TCC), the Upper Tribunal stated at [34]:

> Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

33. In *Romasave (Property Services) Ltd v Revenue And Customs* [2015] UKUT 254 (TCC), the Upper Tribunal said at [88]-[92]:

> In recent times there has been some debate, both in this tribunal and in the courts, as to the correct approach to application for relief from sanctions, which approach has translated across to applications of this nature as well [that is, applications for permission to bring a late appeal]. … It is not necessary for us to describe the history of this debate. The outcome, in our view, is that in this tribunal, and in the FTT, the factors identified by the courts in the revised form of CPR r 3.9 as having particular weight or importance, that is to say the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, are relevant factors, but have no special weight or importance. The weight or significance to be afforded to those factors, along with all other relevant factors, in applying the overriding objective to deal with cases fairly and justly, will be a matter for the tribunal in the particular circumstances of a given case. … Essentially, the matters listed in that former version [of CPR rule 3.9] are examples of factors that, depending on the nature of the case, might be relevant for the tribunal to consider. They do not represent a checklist to which a tribunal must adhere slavishly. The obligation remains simply to take into account, in the context of the overriding objective of dealing with cases fairly and justly, all relevant circumstances, and to disregard factors that are irrelevant. … If that is the approach adopted by the tribunal, there is no need to be over-prescriptive of the way in which it applies that approach.

34. In that case, it was added at [96] that:

> The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. 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. We note, although judgment was given only after we had heard this appeal, that in *Secretary of State for the Home Department v SS (Congo) and others* [2015] EWCA Civ 387 the Court of Appeal, at [105], has similarly described exceeding a time limit of 28 days for applying to that court for permission to appeal by 24 days as significant, and a delay of more than three months as serious.

> Although each case must be considered in its own context, we can find nothing in this case which would alter our finding in this respect. As the court in *SS (Congo)* observed, one universal factor in this respect is the desirability of finality in litigation, a factor that is present in this case: see *Data Select* at [37] above. We are also mindful of the comments of Sir Stephen Oliver, sitting in the First-tier Tribunal, in *Ogedegbe v Revenue and Customs Commissioners* [2009] UKFTT 364 (TC) (discussed in *Markland v Revenue and Customs Commissioners* [2011] UKFTT 559 (TC) and by this tribunal in *O'Flaherty v Revenue and Customs Commissioners* [2013] UKUT 0161 (TCC)) that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely.

35. In *BPP Holdings v Revenue And Customs* [2016] EWCA Civ 121, the Court of Appeal addressed the question whether "the stricter approach to compliance with rules and directions made under the CPR as set out in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3926 applies to cases in the tax tribunals". Noting that there were conflicting decisions of the Upper Tribunal, the Senior President of Tribunals (with whom Richards and Moore-Bick LJJ agreed) said at [16] that "the stricter approach is the right approach".

36. At [37]-[38] it was added that:

> There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
>
> A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.

37. In *BPP Holdings*, the Court of Appeal was dealing with the consequences of non-compliance with a direction of the Tribunal, rather than with non-compliance

with the time limit for bringing an appeal. However, *Romasave* found that the principles from the former translated across to the latter: see paragraph 33 above, and see by way of analogy *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, [2015] 1 WLR 2472 at [34].

38. The approach in *Denton* requires the court or tribunal to address the issue of relief from sanctions in the following three stages: (i) identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages rule 3.9(1); (ii) consider why the default occurred; (iii) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including the factors in sub-paragraphs (a) and (b).

39. Relevant factors identified in the pre-April 2013 version of rule 3.9(1) CPR are (a) the interests of the administration of justice; (b) whether the application for relief has been made promptly; (c) whether the failure to comply was intentional; (d) whether there is a good explanation for the failure; (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol; (f) whether the failure to comply was caused by the party or his legal representative; (g) whether the trial date or the likely trial date can still be met if relief is granted; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party.

40. The post-April 2013 version of rule 3.9(1) CPR requires consideration of "all the circumstances of the case, so as to enable [the court or tribunal] to deal justly with the application", including the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders."

Application for permission to bring a late appeal: the Appellant's submissions

41. The Appellant's notices of appeal state the following, in support of the application for a late appeal: "Original appeal made direct to investigating officer on 23-6-16. Reply letter from officer received on 3-8-16 directing that appeal should be made to tribunal directly".

Application for permission to bring a late appeal: the HMRC submissions

42. The offer of review was made by a letter dated 29 June 2016. The last day for notifying the appeal to Tribunal was therefore 29 July 2016. The Appeals were notified to Tribunal on 1 September 2016. The notification was therefore 33 days late.

43. The purpose of time limits is to give the parties the right to infer finality. Time limits imposed by law should generally be respected. To allow appeals beyond that period without good reason simply encourages those who wish to frustrate and delay HMRC in its administration of the Taxes Acts. A delay of 33 days is serious; it exceeds the period of the time limit itself.

44. The Appellant cannot rely on the fact that he originally told HMRC that he wanted to appeal to the Tribunal and that a reply from HMRC saying the appeal should be sent directly to the Tribunal was received only on 3 August 2016. The appeal process was explained in Form HMRC1 which had been sent to the Appellant with the pre-assessment and pre-penalty letters and was referred to in the assessment notices issued. The Appellant was professionally represented, and must have been aware of the correct procedures as he had previously notified appeals to the Tribunal against excise and VAT assessments arising out of the same facts. Reliance was placed on *Barett v Revenue & Customs* [2015] UKFTT 329 (TC).

45. The Appellant's appeals against VAT and excise assessments arising out of the same factual background were struck out due to the Appellant's failure to comply with directions; he thus has a history of failure to cooperate with the Tribunal. In the present case, the Appellant has already failed to comply with the direction requiring further and better particulars of the grounds of appeal. HMRC are not aware of the Appellant having replied to any correspondence from the Tribunal since the appeal was submitted. There is no reason to believe the Appellant is going to start cooperating with proceedings.

46. In a case such as the present, the assessments "are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right": *Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3. If the application is granted it is not known upon what basis the Appellant will dispute the assessments and penalties. As the Appellant has provided no evidence or indicated any intention to provide any evidence with which to dispute the assessments, his case must necessarily be very weak. There are no coherent grounds of appeal.

Application for permission to bring a late appeal: the Tribunal's findings

47. The Appellant has not in this appeal sought to justify a late appeal or to challenge his liability to any of the assessments or penalties on the basis that he was not properly notified or served with the decisions against which he appeals (compare the main issue in *Romasave*). The Tribunal accordingly proceeds on the basis that these were validly notified or served on the Appellant.

48. At the outset, the Tribunal considers the seriousness of the failure to comply with the time limit. By the time the appeal was submitted to the Tribunal, it was some 33 days late. The Tribunal accepts that this means that the Appellant took just over double the normal 30 day time limit to file the appeal. Such a delay cannot be considered trivial or *de minimis*. On the other hand, there is no limit to how long after the time limit an Appellant can seek to bring a late appeal, and this is not a case where the Appellant is seeking to appeal many months or even years after the time limit has expired.

49. As to the reasons for the delay, the Tribunal notes as follows. The HMRC letters to the Appellant dated 13 May 2016 and 17 June 2016 both state that they are

enclosing form HMRC1, which sets out the time limit for appealing to the Tribunal and the fact that appeals must be made directly to the Tribunal. Furthermore, it is also the case that the Appellant's agent at the time, GP Boyle & Company Limited, state on their letterheads that they are chartered accountants, and they should therefore have known the time limit and procedure for appealing to the Tribunal. The Tribunal is satisfied that no good reason has been established why the Appellant and his agent should have been unaware of the requirement for the appeal to be made within 30 days directly to the Tribunal, or why they should have been under any misapprehension that the procedure was to notify HMRC of the intention to appeal to the Tribunal.

50. Having said that, the fact remains that the Appellant's agent did inform HMRC within the 30 day time limit, by letter dated 25 July 2016, that the Appellant did intend to bring a Tribunal appeal. HMRC thus did have notice of this intention within the 30 days. This is a matter that the Tribunal can take into account in weighing the circumstances as a whole.

51. However, in a letter dated 3 August 2016, HMRC infirmed the Appellant's agent of the requirement to make the appeal directly to the Tribunal within 30 days of the decision appealed against. By that time, the appeal was already out of time. The 3 August 2016 HMRC letter did not, and could not, extend the time limit so as to give the Appellant an additional 30 days. Clearly, the Appellant's agent, and therefore the Appellant, were on notice at that point of the need to justify to the Tribunal the period of any delay, and consequently, the need to keep the period of any delay to a minimum.

52. Despite this, the appeals to the Tribunal were not filed until 1 September 2016. This is nearly a month after the date of the HMRC letter. The content of the notices of appeal are minimalistic. The grounds of appeal effectively state nothing other than that the Appellant disagrees with the decisions appealed against. The part of the notices of appeal dealing with the reasons for delay state in effect no more than that the letter from HMRC stating that the appeal had to be made directly to the Tribunal was received only on 3 August 2016.

53. The Tribunal places great weight on the amount at stake for the Appellant in this proposed appeal. All else being equal, the Tribunal would be reluctant to deprive the Appellant of an opportunity to appeal against HMRC decisions when so much is at stake for the Appellant, when the period of delay is some 33 days.

54. However, that consideration cuts both ways. With so much at stake for the Appellant, it is to be expected that he would be diligent in pursuing his appeals. In cases where an Appellant's conduct of an appeal is minimalistic and/or lackadaisical despite so much being at stake for the Appellant, the conclusion might be drawn that the Appellant is not serious about pursuing the appeal, and has no serious case with which to challenge the HMRC decision, but is simply using the appellate procedure to delay the consequences of the HMRC decision. One of the reasons why time limits exist for the bringing of appeals is to avoid such situations.

55. It is with that in mind that the Tribunal places particular weight on the failure of the Appellant to comply with the 8 October 2016 direction of the Tribunal, requiring the Appellant "to provide further and fuller grounds of appeal by no later than 28 days from the date of this Direction". Given the very minimalistic statement of grounds of appeal in the notices of appeal, the issuing of this direction is understandable. In any event, it is a direction of the Tribunal that has been issued, and with which the Appellant is bound to comply. Not only did the Appellant not comply with it within the 28 day time limit set in the directions, but the Appellant has even today not complied with it by giving fuller grounds of appeal. Nor has the Appellant given reasons for failing to comply with it, let alone reasons for failing to comply with it within the time limit set by the Tribunal. Nor has the Appellant ever applied for an extension of time for complying with it, or indicated when the Appellant will be in a position to comply with it. As matters stand even today, no indication has been given of the detail of the Appellant's proposed ground of appeal beyond the minimalist statement in his original notices of appeal.

56. There is has been no suggestion by the Appellant of any particular reasons why he could not have complied with the 8 October 2016 direction within the stipulated time limit. Nor has there been any suggestion by the Appellant of any particular reasons why he still could not have complied with the 8 October 2016 direction even after the stipulated time limit.

57. The Tribunal must view such a disregard of its directions very seriously. It must also view such a disregard of directions of this nature as pertinent to the application for permission to bring a late appeal. HMRC are entitled to notice of the grounds on which its decision are challenged, and these are required to be provided in the notice of appeal. Although the notices of appeal themselves may have been filed only 33 days late, the grounds of appeal have still not been provided. The period of delay in providing grounds of appeal is therefore a far more serious delay than just 33 days. The Tribunal finds that no good reason has been provided for the delay.

58. The Appellant has known since 16 November 2016 that HMRC was applying for a hearing to consider HMRC's opposition to the late appeal, or alternatively, an HMRC application to strike out the appeal. Given this knowledge, and given the amount at stake, it would have been expected that the Appellant, if serious about these proceedings, would have responded to show that he has an arguable appeal, and to seek to persuade the Tribunal that despite the initial delay in filing the appeal, he proposes to engage diligently with the appeal process. This is all the more to be expected, given that he has been represented professionally.

59. HMRC have also drawn the Tribunal's attention to Tribunal appeal numbers TC/2011/01839 and TC/2011/03025. These were appeals by the Appellant against assessments to VAT and excise duty. According to HMRC, the assessments in that case arose out of the same facts as the assessments appealed against in the present case, namely the discovery by HMRC of an illegal fuel laundering operation. A reading of a decision of the Tribunal released on 24 November 2016 appears to bear that out. In that decision, the Tribunal struck those appeals out, finding that there was "a complete lack of cogent reasons for the delay or failure to engage with HMRC or

the Tribunal … and more particularly failure to comply with very clear Directions". The Tribunal also found that there was "such a shoddy attitude to delay and compliance with a very clear direction of this Tribunal".

60. The assessments appealed against in those other appeals totalled over £500,000, such that the stakes for the Appellant in those other appeals were also very high.

61. In all the circumstances, the Tribunal is led to conclude in the present case that the Appellant has not demonstrated that he has a serious case to bring by way of challenge to the HMRC decisions to which the present appeal relates, or that he intends to engage seriously in substantive appellate proceedings. Given that the burden is on the Appellant to establish grounds for a late appeal, the Tribunal concludes that the Appellant does not have a serious case, and does not intend to engage diligently with the proceedings.

62. The Tribunal takes into account that there is no evidence of any specific prejudice to HMRC if the application were granted, beyond the inevitable consequence that they will have to litigate a matter that it would otherwise be entitled to regard as closed. There has been no suggestion, for instance, that the conduct of these proceedings would take longer or cost more as a result of the delay.

63. In all the circumstances, justification for a late appeal has not been established.

The HMRC application to strike out the appeal

64. Given the Tribunal's conclusion above, the HMRC application to strike out the appeals does not arise for consideration.

Conclusion

65. Having regard to all the circumstances and the case law referred to in paragraph above, the Tribunal finds that this application for permission to bring a late appeal should be refused.

66. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 05 DECEMBER 2017