[2018] UKFTT 438 (TC)

TC06628

Appeal number: TC/2017/04394

INCOME TAX– late appeal permission applications – appeals against penalties for failure to pay tax on time under Schedule 56 FA 2009 – no reasonable excuse for lateness of appeals or failure to pay tax – permission refused – appeals dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

KENNETH DYSON SHAW **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
DEREK ROBERTSON

Sitting in public at the Employment Tribunal, City Exchange, Leeds on 8 May 2018

The appellant was neither present nor represented

Mrs Rosalind Oliver, HMRC Solicitor's Office & Legal Services, for the Respondents

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DECISION

1. This was a hearing of applications by Mr Kenneth Dyson Shaw ("the appellant") for permission to give appeals to HMRC against penalties assessed under Schedule 56 Finance Act 2009 for his failure to pay tax by the relevant dates, and a hearing of appeals by the appellant also against such assessments. Those appeals were in time, or HMRC had agreed to their being given late.

2. On 11 May 2018 the Tribunal released our decision in summary form. On 7 June 2018 the appellant sent in an application for permission to appeal ("PTA") to the Upper Tribunal. We have treated this as an application for a decision with full written reasons, as it is a prerequisite for an application for a PTA that a party who has received a summary decision must request such a "full" decision before making the PTA application.

3. We take notice of the fact that despite the appellant being a tax adviser with clients, his knowledge of taxation procedures seems very limited. As a PTA application it is of course in time and indeed premature as the 56 day limit for making a PTA application only starts to run from the release of the full decision. The PTA application shows that the appellant ticked the box "Full written decision" in answer to the request "please tick the document which gives the decision against which you would like to appeal".

4. This is the full decision we have treated the appellant as requesting.

Introductory

5. On 4 May 2018 the Tribunal dealt with an application by the appellant for a postponement of the hearing. On the instructions of Judge Jennifer Dean he was asked to make the application at the start of the hearing which was listed for 2 pm on 8 May.

6. On the morning of the hearing the appellant informed the Tribunal that he would not be attending as all his paperwork was with the Ombudsman.

7. Judge Thomas instructed the Tribunal to email the appellant to reiterate that the Tribunal had directed that if he wanted a postponement he must attend and explain why.

8. Later in the morning he emailed the Tribunal again explaining that he would not be hearing from the Ombudsman until June and that Mrs Oliver of HMRC had agreed a postponement.

9. When the hearing started the appellant was not present, nor was anyone representing him. Mrs Oliver told us that she had not agreed to a postponement of this hearing – we note that she had agreed to a postponement of an earlier hearing which had been granted by the Tribunal.

10. It was obvious to us that the appellant was aware of the hearing. He had decided not to attend despite being told on two occasions that a postponement would only be considered if he attended.

11. We also noted from our papers that the Ombudsman, to whom the appellant had applied after the Revenue Adjudicator had not given him a favourable decision about his complaints against HMRC, was not considering, and like the Adjudicator had no jurisdiction to consider, the appeals and applications which were the subject of the hearing.

12. In these circumstances we considered it was in the interests of justice to proceed with the hearing.

Facts

13. We had in our bundle of papers a schedule prepared by Ms Oliver showing the situation relating to the appellant's undetermined appeals and applications.

14. This showed:

Tax year	**Penalty type**	**Amount £**	**Date issued**	**Date of appeal**	**HMRC response**
2010-11	30 day	137	10/4/2012	31/10/2014	refuse late appeal
2010-11	6 months	137	4/9/2012	31/10/2014	refuse late appeal
2010-11	12 months	130	14/8/2013	31/10/2014	refuse late appeal
2011-12	30 day	136	14/8/2013	31/10/2014	refuse late appeal
2011-12	6 months	136	14/8/2013	31/10/2014	refuse late appeal
2011-12	12 months	136	21/10/2014	31/10/2014	no reasonable excuse
2012-13	30 day	131	21/10/2014	31/10/2014	no reasonable excuse
2012-13	6 months	131	21/10/2014	31/10/2014	no reasonable excuse

2012-13	12 months	131	24/2/2015	15/10/2015	refuse late appeal
2013-14	30 day	96	17/3/2015	15/10/2015	refuse late appeal
2013-14	6 months	96	14/8/2015	15/10/2015	no reasonable excuse

15. In addition we examined bundles prepared by Mrs Oliver showing the documents relating to these appeals, as well as replies by a Complaints Officer of HMRC's Debt Management Unit on 23 August 2016 to the appellant (this was the second examination by HMRC of his complaint) and by the Revenue Adjudicator to the appellant on 11 May 2017. The appellant's complaint is now with the Parliamentary Ombudsman.

16. Both letters show that the predominant complaint of the appellant is about a letter from HMRC that was addressed to him, and which his wife opened, but which was intended for one of his clients. The letter was threatening to repossess the appellant's client's house if a debt of over £40,000 was not paid, but being addressed to Mr Shaw and referring apparently to his house being repossessed, rather than that of the client whose debt it was, it was he said seriously distressing especially for his wife. HMRC had accepted that their conduct was unacceptable and offered compensation of £50, which was increased to £125 after investigation by the Adjudicator. The appellant was seeking £4,500.

17. The complaints also covered the level of service the appellant received from HMRC when working on behalf of his clients. It is clear that he was very unhappy with HMRC's office closure programme and the fact that he cannot now talk to the local Inspector of Taxes.

18. He asked for £7,200 from HMRC for the time involved in dealing with HMRC on behalf of clients. The Adjudicator ruled that no compensation was due.

19. His third complaint was that after he was sent an SA Statement showing he owed £9,966.15 on 16 July 2015 he sent a cheque to HMRC for £115.46 with a letter stating:

> "Find enclosed a cheque for £115.46 to HMRC. This cheque is in full and final settlement of my account with the Inland Revenue"

20. HMRC's records show the cheque was passed to BankTec (their clearing agent) and his SA account was credited with the amount on 28 July 2015. The appellant contended that "under English law he no longer owed HMRC any further sums" because if they had not accepted the terms under which the cheque was sent they shouldn't have banked it.

21. The Adjudicator was unable to rule on whether he was right as that was a matter for (presumably) the County Court. She did say that HMRC followed their own policy and guidance on banking cheques with conditions, and so did not uphold the complaint.

22. The appellant had also complained to HMRC about the interest which he had been charged and the penalties for late payment that had been assessed on him. HMRC's letter said that interest is charged on all late amounts and that there is no right of appeal, although HMRC consider objections to interest. As to penalties the letter said that if the appellant thought he had a reasonable excuse he could appeal against the penalties within 30 days of the date on which they were charged, so "we have therefore had to reject your appeal".

23. The Adjudicator commented and said that HMRC had informed him of the correct procedure but the appeals were out of time.

24. We examined the letters of 31 October 2014 and 15 October 2015 by the appellant in which he had appealed. The only grounds were:

(1) Combining the penalties and interest into a single rate as a percentage of the tax works out the effective rate at 21.7% which was way above the Bank of England rate.

(2) He had set an invoice for his time.

(3) He had sent a cheque for £115.46 in full and final settlement.

25. No mention was made of the fact that many of the appeals were out of time or gave any reasons for the lateness beyond those shown above.

26. On 31 May 2017 the appellant sent the Tribunal a Notice of Appeal (undated). On 7 June 2017 the Tribunal returned the papers asking the appellant to provide reasons for the late appeals.

27. Further papers were received on 12 June 2017 including the Complaints officer's letter and the Adjudicator's decision letter, a debt management letter from HMRC of 19 January 2016, the invoices he had sent HMRC and his compensation request.

28. The caseworker said that there did not appear to be any appealable decision and returned the papers. On 13 July 2017 the appellant sent a letter from HMRC "confirming the facts" and refusing a request for a refund. He asked to go to a Tribunal.

29. The Tribunal clerk who replied to the appellant said that they had found in the papers his appeal to HMRC of 15 October 2015. Thus they said the Tribunal is treating the appeals as being against 2014-15 late payment penalties and a hearing would be arranged. [In fact there are no appeals for that year in issue]

Discussion – applications for permission to make late appeals

30. In their decision in *Martland v HMRC* [2018] UKUT 178 (TC) ("*Martland*"), the Upper Tribunal has given guidance to this Tribunal about dealing with applications of the type in this case. Their conclusion is that the appropriate approach (in England and Wales at least, where we were dealing with this case) to be taken is that set out in *Denton and others v T H White Ltd & others* [2014] EWCA Civ 906 ("*Denton*"), and in particular the consideration of the matter in three stages as set out in that case. I have little to go on, but must apply the 3 "*Denton* stages".

31. *Denton* Stage 1 is to ask whether the delay is serious or significant. In *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC) the Upper Tribunal held that a delay of 3 months in the context of a 30 day time limit to be serious and significant. The delays here in seven appeals vary from 6 months to 17 which we find is serious and significant.

32. *Denton* Stage 2 is to see what the explanation for the delay is. Here there is no explanation, whether in initial appeals or in the Notice to the Tribunal where he repeats all the matters he had referred to the Adjudicator.

33. In *Denton* at [35] the Court of Appeal made it clear that if the failure is not serious or significant relief is likely to be given. That is not this case. And it also says that if there is good reason for a serious or significant breach, relief is likely to be granted. Again that is not this case. But at [35] the court also makes the point that it does not follow that where this a serious and significant delay for which there is no good explanation the breach of rules cannot be relieved, or in this type of case, permission cannot be granted, and that is because it is always necessary to have regard to all the circumstances as that is *Denton* stage 3.

34. That having regard, as *Martland* points out, is something the Tribunal must do in exercising its discretion, and that it must carry out 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. … 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."

35. The circumstances I have taken into account are:

(1) The prejudice to HMRC should we give permission is non-existent as they were prepared to argue against the appeals.

(2) The prejudice to the appellant is that he would have to pay about £1,400 in penalties.

(3) The appeals would be hopeless.

36. In relation to the last matter, we have to an extent considered the merits of the appellant's case in the appeals. We have done this on the basis of guidance in *Martland* at [46].

37. Balancing these matters, and bearing in mind the need for litigation to be conduced efficiently and at proportionate cost and the need to obey statutory time limits, we refused permission for the appeals to be made late.

Discussion – appeals

5 38. Try as we might we can find no reasonable excuse for the failure to pay the tax in the Notice of Appeal or in earlier correspondence. The matters that the appellant has referred to the Adjudicator and now the Ombudsman include what is clearly a serious issue for the appellant, the letter which his wife read. We may (and indeed do) think that the distress caused merits more than £125 in compensation, but it is not our call.

10 39. Nor can we adjudicate on the issue of office closures, or the cheque in purported full settlement. The appellant may have a point about that – we do not know. But if for any court or tribunal, it would be a matter for the County Court if and when HMRC seeks to enforce the debt they say is due to them.

40. Nor can we consider interest objections.

15 41. The appellant is supposedly a tax adviser with several clients. To us it is inexcusable that someone who purports to advise about tax can show such a lamentable ignorance of tax law and procedure. There was not even the semblance of a reasonable excuse.

42. We therefore confirm the penalties the subject of appeals.

20 43. 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
25 accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD THOMAS
30 **TRIBUNAL JUDGE**

RELEASE DATE: 11 JULY 2018