[2019] UKFTT 224 (TC)

TC07071

Appeal number: TC/2018/08141

INCOME TAX - individual tax return - penalties for late filing - late appeal - application for permission to appeal out of time - application refused - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR MOHAMMED SHAFIQ **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 26 March 2019 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 4 December 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) prepared by the respondents on 9 January 2019 and correspondence between the parties.

DECISION

Background

1. This appeal is against a late filing fixed penalty of £100 and a late filing daily penalty of £900 which the respondents (or "**HMRC**") have assessed on the appellant for the late filing of his individual tax return for the tax year 2011-2012 (together the "**penalties**").

2. The appellant did not appeal against the penalties to HMRC until 8 October 2018 some five years after the due date on which the appeals should have been made. The appellant denies that he is out of time but in any event makes an application for permission that his appeal may be made out of time.

3. For the reasons given below I refuse that application and dismiss the appeal.

Findings of fact

4. I was provided with a bundle of documents from which I find the following facts:

(1) A notice to file a tax return for the tax year 2011-2012 was issued to the appellant on 6 April 2012. The due date for filing the completed return was 31 January 2013 for an electronic return. The return was filed electronically on 31 July 2013.

(2) HMRC issued a notice of penalty assessment for the £100 penalty on 12 February 2013 and issued a notice of penalty assessment for the £900 penalty on 14 August 2013.

(3) For the 2011-2012 tax year, the appellant employed an accountant, Mr Massi of SM Accounting, to deal with his tax affairs. He provided all of the letters that he received from HMRC to his accountant who told him that he would deal with his tax affairs.

(4) Mr Massi did not file the appellant's 2011-2012 tax return on time due to illness. The appellant was told by Mr Massi that the latter would pay the penalties and that his insurance company would pay them.

(5) Mr Massi passed away two years ago, and the appellant was told by Mr Massi's daughter after that that she would appeal against the penalties.

(6) On or around 4 June 2013 a 30 day daily penalty reminder letter was sent to the appellant advising him that his tax return for the tax year 2011-2012 was more than three months late.

(7) On or around 2 July 2013 a 60 day daily penalty reminder letter was sent to the appellant advising him that his return for tax year 2011-2012 was still outstanding.

(8) The appellant has previously been assessed to late filing penalties for tax years 1996-1997, 1999-2000, 2002-2003, 2003-2004, 2009-2010, 2010-2011, 2012-2013 and 2016-2017.

(9) The appellant appealed against the penalties by way of a letter to HMRC dated 8 October 2018.

The Legislation

5. The statutory provision which permits me to consider an application for giving a late notice of appeal is section 49 of the Taxes Management Act 1970 ("**TMA 1970**") this reads as follows:

"**49 Late notice of appeal**

49(1) This section applies in a case where-

(a) notice of appeal may be given to HMRC, but

(b) no notice is given before the relevant time.

49(2) Notice may be given after the relevant time limit if-

(a) HMRC agree, or

(b) where HMRC do not agree, the tribunal gives permission.

49(3) …

49(4) …

49(5) …

49(6) …

49(7) …

49(8) In this section "**relevant time limit**", in relation to notice of appeal, means the time before which the notice is to be given (but for this section)."

Case law

6. The principles which I should consider when dealing with an application such as this have been something of a moveable feast over the last few years. But the Upper Tribunal in the case of *Martland* (*William Martland v HMRC* [2018] UKUT 178) has undertaken a detailed review of the relevant authorities and has given extremely helpful guidance on the principles which I should adopt. The relevant extract from *Martland* is set out below.

"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.

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

(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.
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> 47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

Discussion

7. I am satisfied on the facts that an officer of the Board issued a notice to file to the appellant under section 8 TMA 1970 and, too, that that and the penalty notices given to the appellant satisfy the requirements of paragraphs 4 and 18 of schedule 55 Finance Act 2009.

8. I have considered the appellant's contention that his appeal is not out of time. This is misconceived. He had 30 days from the date on which he was given the relevant penalty notices in 2013 to make his appeal to HMRC. No appeal was made until 8 October 2018. As a matter of fact his appeal is late.

9. The justification given by the appellant for his late appeal is essentially that he had put his tax affairs, and given all correspondence he received from HMRC, into the hands of Mr Massi who was responsible for not only filing his tax returns but also with

dealing with HMRC on an ongoing basis. And Mr Massi accepted that it was his fault that the tax return was filed late and that he, Mr Massi (and his insurance company) would be responsible for the penalties.

10. I now consider the application of the Martland criteria to this justification.

Length of the delay

11. The delay was over five years. This is both serious and significant. There is a principle that litigation should be finalised as expeditiously as is reasonably possible. HMRC are entitled to expect that an appellant would appeal within the statutory time limits and so, if he fails to do so, they can put away their papers. In this case HMRC have clearly had to engage in this appeal notwithstanding that it should have been made over five years prior to the date on which was actually made.

Reasons for the delay

12. The appellant put his tax affairs in the hands of Mr Massi who, it seems, has let him down. We do not know why Mr Massi failed to file a tax return on the relevant date nor appeal against the penalties.

13. There are, obviously, good reasons why a taxpayer should put his tax affairs in the hands of a suitably qualified professional and equally good reasons why he can justifiably expect that tax professional to look after his tax affairs both as regards filing a tax return on time and dealing with correspondence as a taxpayer gives to him.

14. But if a taxpayer is on notice that that tax professional is not doing what he promised to do, then it is incumbent on that taxpayer to take steps to ascertain what that tax professional is doing and, if he is not doing what he promised, to take active steps to rectify the position.

15. And in the circumstances of this appellant, had he received no communications from HMRC following the initial notice to file, or if he had received correspondence from the court service, or HMRC, or indeed Mr Massi's daughter following the latter's promise to make an appeal, then I would have considerable sympathy with his position.

16. However, in this case the appellant received not just late filing notices from HMRC but also, in June and July 2013, reminder letters. It is all very well for the appellant to say that he gave these letters to Mr Massi. But he should have read them. It is not reasonable for a taxpayer simply to pass unopened correspondence from HMRC to his tax professional. Had he read those reminder letters, they would have put him on notice that an appeal against the £100 penalty had not been made by that date. The appellant had been assessed to late filing penalties for several previous tax years. I take from this that he would have been aware not only of his obligations to file a tax return on time, but also to appeal against such penalties. And so should have realised that these reminder letters indicated that no such appeal had been made. He should have questioned Mr Massi about this. There is no evidence that he did.

17. Furthermore, following Mr Massi's death, the appellant was told by Mr Massi's daughter that she would make an appeal. The impression I get is that this was shortly after Mr Massi's death. So the appellant could justifiably have expected some communications regarding this appeal (from either the daughter, HMRC or the tribunal).

18. But there is no evidence that he received any such communications. This should have put the appellant on notice that the appeal which he had been promised was going to be made might not have been. And he should have contacted the daughter to find out what the position was. There is no evidence that he did so.

19. In the context of reasonable excuse, reliance on the failure of another can be a reasonable excuse but only if a taxpayer takes reasonable care to avoid that failure. A similar principle is relevant when considering the reasons for the delay. It was wholly justifiable for the appellant to put his tax affairs in the hands Mr Massi and then his daughter. But the appellant should however have taken steps to ascertain, from both of them, in the light of HMRC's letters to him and lack of communication about the appeal, to find out what the position was regarding the appeal. It seems that he failed to take any such steps and thus, using the language of reasonable excuse, failed to take reasonable care to avoid the failure which had been perpetrated by his advisers.

The balancing exercise

20. I can consider the obvious merits of the appellant's appeal. I think that his appeal has a small chance of success. I have mentioned reasonable excuse already. Reliance on a failure by another (in this case by Mr Massi and his daughter) can be a reasonable excuse but only if the appellant took reasonable care to avoid that failure, and I do not believe that he has. I can see no special circumstances which apply to his circumstances. He has, it seems, been let down by his advisers but his remedy must be against them (something Mr Massi appeared to have accepted).

21. If I reject the application for permission to make a late appeal, the appellant loses his right to argue the substantive issues. But, as I say above, HMRC can rightly expect they would not have to deal with these some five years after the time when the appellant should have raised them. In my view, given the strength of HMRC's case and the obvious weakness of the appellant's case, there is a small prejudice to the appellant in denying him permission to appeal late. The balance of prejudice weighs in favour of HMRC.

Decision

22. In light of the foregoing I have decided not to give permission to the appellant to appeal out of time. Accordingly I dismiss his appeal.

Appeal rights

23. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 4 APRIL 2019