[2020] UKFTT 345 (TC)

**TC07825**

***INCOME TAX - application for permission to appeal out of time - penalties for late filing of tax returns***

**FIRST-TIER TRIBUNAL** **Appeal number: TC/2020/00835**

**TAX CHAMBER**

**BETWEEN**

**REGINALD ANGEL** **Appellant**

**-and-**

**THE COMMISSIONERS FOR**

**HER MAJESTY'S REVENUE AND CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE MARILYN MCKEEVER**

**The Tribunal determined the appeal on 22 August 2020 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the Covid-19 pandemic and the cancellation of all oral hearings and the Tribunal considered that it was able to decide the matter without a hearing. The documents to which I was referred are two Document Bundles of 139 and 274 pages respectively and six Authorities Bundles comprising in total 453 pages, all prepared by HMRC.**

## DECISION

### INTRODUCTION

1. Mr Angel applies for permission to appeal out of time in relation to penalties that HMRC have imposed under Section 93 Taxes Management Act 1970 ("TMA") and Schedule 55 of the Finance Act 2009 ("Schedule 55") for the failure to submit annual self-assessment returns on time for the tax years 2002-3 and 2005-2006 to 2013-2014 inclusive.

2. Before I begin my substantive decision, I would like to thank Amanda Baldwin of HMRC for the helpfulness of her Statement of Case. All too often I am left to search through large volumes of documents in order to establish the facts or check whether assertions or submission are substantiated. Ms Baldwin carefully cross referenced all her statements and assertions of fact and the facts which supported her arguments in her Statement of Case to the relevant page and line of the Documents Bundles. This was enormously helpful.

### FINDINGS OF FACT

3. The penalties that have been charged can be summarised as follows:

(1) Late filing penalties under section 93 TMA totalling £200 each year for the tax years 2002-3, 2005-6, 2007-8, 2008-9 and 2009-10. In 2006-7 there was only one penalty of £100.

(2) Initial late filing penalties under paragraph 3 of Schedule 55 of £100 for each of the tax years 2010-11 to 2013-14 inclusive ("the later years")

(3) "six month" penalties under paragraph 5 of Schedule 55 of £300 for each of the later tax years.

(4) "twelve month" penalties under paragraph 6 of Schedule 55 of £300 for each of the later tax years. The penalties charged are of the default amount and there is no suggestion that the Appellant deliberately withheld information.

(5) "Daily" penalties totalling £900 under paragraph 4 of Schedule 55 for each of the later tax years.

(6) The total amount of penalties is £7,500.

4. The appellant's reason for submitting a late appeal as set out in his Notice of Appeal dated 13 February 2020 is that he had no knowledge of penalties raised by HMRC until mid 2019.

5. The substantive grounds of appeal may be summarised as follows.

   (a) Mr Angel ceased self-employment in 2003-4 and notified HMRC. Since then all his income has been from employment and the tax has been collected under PAYE.

   (b) Since 2004-5 he has lived at various addresses and did not receive any communication from HMRC until mid 2019 when he received notice of penalties from HMRC for the years 2008 to 2014 for non-submission of tax returns.

   (c) No tax was due to HMRC at any time nor was there a requirement for him to complete a tax return.

   (d) HMRC have been collecting various penalties through Mr Angel's tax code at various periods.

6. The first penalty notice (the first late filing penalty for 2002-3) was issued on 17 February 2004. The most recent penalty notice (the twelve month late filing penalty for 2013-14) was issued on 23 February 2016.

7. Mr Angel appealed to HMRC in respect of all the late filing penalties by a letter of 22 June 2019. A taxpayer has 30 days from the date of issue of a penalty notice to appeal against it. The appeals were therefore between three years and fifty two days late and fifteen years and sixty-one days late.

8. On 4 November 2019, Mr Angel's accountant made a further formal appeal in relation to the tax years ended 5 April 2008 to 5 April 2014. The basis of the appeal was that Mr Angel had been working under PAYE throughout the period in question and in earlier years and there was no need for him to complete a tax return.

9. Mr Angel submitted tax returns for the years up to and including 2006-7. In the years under appeal, they were all submitted late; between one month late and over two years late. He was sent notices to file returns for the remaining tax years under appeal but has not submitted any further returns. So all returns from 2007-8 onwards are late.

10. The statements that all Mr Angel's income since 2003-4 was employment income taxed under PAYE is undermined by several pieces of evidence.

11. Mr Angel's own appeal letter to HMRC of 22 June 2019 states that between June 2011 and April 2013 he was self-employed but was paid via an umbrella agency and was not made aware that he was required to submit a tax return. It is unclear why he thought that he did not need to submit a return and given his history of self-employment he should have been aware that he had to submit a return.

12. Further, tax calculations and the tax return information held on HMRC's systems from the returns Mr Angel submitted in 2003-4, 2004-5, 2005-6 and 2006-7 all record substantial amounts of self-employment income and liability for Class 4 National Insurance Contributions. Mr Angel was clearly self-employed (as a builder) in these years and, therefore, required to submit tax returns for those years. By his own admission he was self-employed between 2011 and 2013. I do not know what his status was after that as no returns have been submitted.

13. In any event, where HMRC give notice to a taxpayer under section 8 TMA requiring him to submit a tax return, he must do so. HMRC contend they properly sent notices to file for all the years under appeal.

14. I have considered whether the notices to file and penalty notices were properly sent to the appellant. HMRC do not keep copies of the actual notices sent to taxpayers, but their computer records show that notices to file a tax return and the penalty notices were sent to the appellant for all the relevant years. I was provided with specimen copies of the various notices.

15. HMRC submit that the provisions of section 115 TMA concerning service of the notices were complied with, and that the notices are deemed to have been delivered by virtue of section 7 Interpretation Act 1978. The provisions are:

> "115.— Delivery and service of documents.
>
> (1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence:
>
> (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be

> given, sent, served or delivered to or on any person [by HMRC] may be so served addressed to that person—
>
> (a) at his usual or last known place of residence, or his place of business or employment, or…"

> "7. References to service by post.
>
> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

16. HMRC's records show that Mr Angel changed address frequently during the period in question. Between 12 March 2002 and 2020 he had 11 addresses (one of them appearing twice). There were some periods when Mr Angel's address was unknown.

17. HMRC state that none of the self-assessment tax returns/notices to file in the relevant period have been returned as undelivered nor have any been issued when Mr Angel's address was unknown.

18. HMRC's computer records show the dates that the penalty notices were issued between 17 February 2004 and 23 February 2016. As noted, the notices are computer generated and copies are not kept by HMRC.

19. The penalty notices would have been sent to the base address on HMRC's records. Where the actual address was unknown, the notices were issued to the last known address in accordance with section 115 TMA.

20. The second late filing penalty for 2002-3, issued on or around 3 August 2004 was sent to Mr Angel's last known address but was returned as unknown at that address. HMRC submit that section 115 TMA was still complied with.

21. HMRC have not identified any other penalty notices under appeal as sent when Mr Angel's address was unknown, nor have any other penalty notices been returned undelivered.

22. Mr Angel has been sent numerous statements of account which set out the accruing penalties.

23. For the purpose of this application to appeal out of time against the penalties, I do not, strictly, have to decide whether the notices were correctly served, but whether Mr Angel was aware that he needed to submit returns and that penalties were accruing and that he had limited time to appeal against them.

24. Mr Angel asserts that he had no knowledge of the penalties and had received no communication of any sort from HMRC until mid 2019.

25. Despite the frequent changes of address, it is not credible that every notice to file, penalty notice, statement of account and other communication over a period of thirteen years went astray and Mr Angel did not know that penalties were accruing.

26. There is also positive evidence that he did know about the penalties and had received correspondence from HMRC.

27. In the Notice of Appeal, Mr Angel states in the grounds of appeal that there was no tax due to HMRC (which was not correct) and that "HMRC have been collecting various penalties through my tax code at various periods".

28. HMRC's "SA Notes" record that on 2 February 2008, a debt was validated and correspondence sent to Mr Angel. On 11 February he telephoned HMRC referring to a form enclosed with the letter and offering to pay part of the debt.

29. Other entries in the SA Notes record as follows.

30. On 6 March 2008, Mr Angel's agent telephoned HMRC and a statement with a covering letter was sent to Mr Angel.

31. On 13 September 2011 a telephone message was left for Mr Angel about outstanding tax returns.

32. On 2 May 2012 Mr Angel telephoned requesting a Unique Taxpayer Reference number.

33. On 31 May 2016 Mr Angel telephoned HMRC following the receipt of correspondence demanding payment. Mr Angel was informed that a number of tax returns were outstanding and most of the debt related to penalties.

34. On 17 April 2019 Mr Angel telephoned HMRC about an outstanding debt restriction in his notice of coding and was informed that he had outstanding tax returns and unpaid penalties. He claimed he had never had any correspondence from HMRC.

35. He called HMRC again about the outstanding debt restriction in his tax code on 7 May 2019 and claimed he had no idea what it related to. He was again informed it related to outstanding tax returns and penalties and a statement of account was sent to the address he provided.

36. Having considered all the evidence, I conclude that, on the balance of probabilities, Mr Angel was aware of his obligation to submit tax returns and that penalties were accruing because the returns had been submitted late or not at all. It is not credible that Mr Angel did not receive any of the penalty notices or reminders and I find, on the balance of probabilities that he received at least some of them.

**DISCUSSION**

37. I have concluded that the tax returns for 2002-3, 2005-6 and 2006-7 were late and that no returns have been submitted for the other years under appeal. I have also concluded that Mr Angel received some or all of the notices to file and the penalty notices and that in any event, he was aware of his obligation to submit tax returns and knew that penalties were accruing.

38. I have found that the appeals to HMRC against the late filing penalties were between three years and 52 days late and fifteen years and 61 days late.

39. HMRC have refused to admit the appeals to it out of time.

40. Accordingly, the appellant may not proceed with the appeals to HMRC unless I give permission for the appeals to be heard out of time under section 49(2)(b) TMA.

41. The Upper Tribunal has recently considered the approach to granting permission to bring late appeals in the case of *William Martland v The Commissioners for HMRC* [2018] UKUT 0178 (TCC) ("*Martland*").

42. The Upper Tribunal stated, at paragraph 29 that:

> "...the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no

> requirement that the circumstances must be exceptional before the FTT can grant such permission."

43. The Upper Tribunal went on to confirm the three-stage test as set out in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 at paragraph 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."

44. I will consider first the length of the delay.

45. In the Upper Tribunal case of *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 (TCC) ("*Romasave*"), the Tribunal stated, at paragraph 96 that:

> "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."

46. The delays in appealing the penalty notices to HMRC varied from more than three years to more than fifteen years.

47. These delays are clearly serious and significant.

48. I now turn to the reason for the delays.

49. In the Notice of Appeal, Mr Angel states that his reason for appealing late is that he had no knowledge of penalties raised by HMRC until mid 2019. For the reasons set out above, I do not accept this.

50. Finally, I must conduct the balancing exercise referred to in *Martland*, taking account of "all the circumstances of the case".

51. In *Martland* at paragraphs 45 and 46, the Tribunal gives guidance on how the balancing exercise should be carried out:

> "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. 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."

52. HMRC emphasised the need for finality in dealing with a taxpayer's affairs and that after delays of the length in this case, they were entitled to consider the matter closed.

53. In *Martland*, the Upper Tribunal said "the purpose of the time limit is to bring finality, and that is a matter of public interest, both from the point of view of the taxpayer in question and that of the wider body of taxpayers."

54. HMRC submit that they should be entitled to rely on the time limits set out in legislation for the purpose of allocating resource in administering the tax system and should not normally be required to defend appeals after an excessive gap between the expiration of the time limit and the appeal. Such appeals are normally more resource intensive to defend and otherwise create issues in obtaining appropriate evidence in meeting HMRC's burden to prove that penalties were correctly charged to the Appellant.

55. HMRC further submit that allowing a late appeal in this instance is contrary to the policy objectives of the legislation which set the deadline.

56. If the application is granted, HMRC would therefore be prejudiced as they are entitled to expect finality after this length of time, it would set a bad precedent for other taxpayers and it would consume excessive resources. In relation to the last point, I note that HMRC have already prepared a Statement of Case on the substantive merits, which reduces the weight of that prejudice.

57. If the application is not granted, Mr Angel will be prejudiced in that he will be unable to challenge the late payment penalties and will incur the cost of paying them.

58. The appellant's substantive grounds of appeal state that he was an employee for the whole period under appeal, that he did not need to submit tax returns, that no tax was owing and that he did not receive any communications from HMRC until mid 2019. For the reasons set out above, I do not accept any of those assertions.

59. I have concluded that the appellant knew he needed to submit tax returns, that he was self employed for at least most of the years in question and knew that he had tax liabilities and liabilities for penalties.These are significant factors.

60. The length of the delay in making the appeal is also an important circumstance.

61. *Martland* warns against a detailed consideration of the merits of the substantive case in determining an application for permission to appeal out of time. Without investigating the substantive merits in any detail, I conclude, from my consideration of the grounds of the application, that the appellant's substantive case is, on the face of it, not particularly strong.

62. Having taken all the circumstances, including the above matters, into account and having conducted the balancing exercise required by *Martland*, I have decided that it is not appropriate in the present case to grant permission to appeal to HMRC outside the permitted time limits.

## CONCLUSION

63. For the reasons set out above, I have decided not to grant permission to appeal to HMRC out of time.

64. Accordingly, I dismiss the application.

## RIGHT TO APPLY FOR PERMISSION TO APPEAL

65. 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.

**MARILYN MCKEEVER**

**TRIBUNAL JUDGE**

**Release date: 26 August 2020**