

[2020] UKFTT 426 (TC)



TC07903

Appeal number: TC/2019/05191

Procedure - application for permission to appeal - appeal to HMRC out of time - whether reasonable excuse - Income tax - Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file self-assessment returns for 5 years - appeal to HMRC out of time - Martland considered - Application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANNETTE KEYWORTH

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

Sitting in public at Tax Appeals, Centre City Tower, Birmingham on 14 February 2020

The Appellant in person

Mr Omar Riaz of Solicitors Office and Legal Services HM Revenue and Customs for the Respondents

DECISION

The Application

1. This is an application by Annette Keyworth (“the appellant”) to admit an appeal under Rule 20(4)(b) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 and extend time to give notice of appeal under Rule 5(3)(a), against late filing penalties charged under Schedule 55 to the Finance Act 2009 (FA 2009) for the years 2009-10 to 2014-15 inclusive for failing to file her personal tax returns for those years on time.
2. HMRC oppose the application.
3. Although the appellant has included year 2014-15 in the appeal, HMRC have withdrawn the penalties for that year as the appellant was ill during the return period and HMRC consider that she has shown a reasonable excuse for the late filing of her return for that year.

Background

4. The appellant’s returns for 2009-10 to 2013-14, were, if filed electronically, due no later than 31 January in the year following each tax year. The penalties for late filing of a return can be summarised as follows: [Schedule 55 FA 2009]

For year 2009-10

- a first fixed penalty of £100 imposed under section 93(2) TMA 1970 for the late filing of an individual return. A second fixed penalty of £100 is imposed if the return has not been filed six months after the first penalty date.

For the years 2010-11 and later years

- a penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act (‘FA’) 2009 for the late filing of the Individual Tax Return.
- If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
- If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.
- If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

Filing date and Penalty date

5. Under s 8(1D) TMA 1970 a non-electronic return must normally be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The ‘penalty date’ is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.
6. A late filing penalty is chargeable where a taxpayer is late in filing their Individual Tax return.

7. Penalties totalling £200 were imposed for year 2009-10. Penalties of £100, £900, £300 and £300 were imposed, under (i), (ii), (iii) and (iv) above for each of years 2010-11 to 2013-14 inclusive. A total of £6,600 penalties have therefore been imposed.

The appellant's contentions

8. The appellant was within the Self-Assessment regime prior to the 2009-10 tax year. For the years under appeal she does not dispute that she was initially self-employed and under an obligation to file a personal return, although she says for a period from 2010-12 she was employed and paying PAYE. She was unaware that she would still have to file a return, even if she had no self-employed income.
9. She says that from April 2012 she received no income. She accepts that she received the penalty notices and should have realised that having received a 'notice to file' a return, she should have done so even if it was a nil return. She accepted that there been a history of non-compliance prior to 2010.
10. The appellant says that she had been very unwell in late 2015 and was unable to work or deal with her tax affairs. She acknowledges that HMRC have waived the penalties for the year 2014-15.
11. The appellant filed all her outstanding returns late on various dates between January 2015 and October 2017.
12. At the hearing the appellant acknowledged that her appeal to the Tribunal, having been made on 30 July 2019, was inordinately out of time and that the Tribunal's permission was required to bring a late appeal.
13. HMRC indicated that if the appellant's application to bring a late appeal was refused, they would take hardship into account when dealing with collection of the penalties.

HMRC's contentions

14. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.
15. The law specifies two situations that are not reasonable excuse:
 - (a) An insufficiency of funds, unless attributable to events outside the appellant's control and
 - (b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.
16. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland v HMRC* (2006) STC (SCD) 536 at paragraph 18).
17. HMRC's view is that the actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having

proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

Relevant legislation

Taxes Management Act 1970 ('TMA 1970')

Section 8 - Personal return- provides as follows:

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

- a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and
- b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

- (a) the 31st January next following the year of assessment, or
- (b) where the notice under this section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

- (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
- (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

(1D) A return under this section for a year of assessment (Year 1) must be delivered-

- (a) in the case of a non-electronic return, on or before 31st October in Year 2, and

- (b) in the case of an electronic return, on or before 31st January in Year 2

Section 31A TMA - provides that notice of appeal must be given within 30 days after the specified date.

Section 49 TMA - Late notice of appeal

(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 limit.

(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.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

(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).

Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 (SI2009/273)

Rule 20(1) of the Tribunal Rules provides that a notice of appeal must be sent or delivered to the Tribunal within the time limit imposed by an enactment

Relevant authorities relating to applications for permission to appeal

18. A number of decisions have clarified the approach to be applied in applications for relief from sanction.
19. The Court of Appeal heard three conjoined appeals: *Denton v TH White Ltd*, *Decadent Vapours Ltd v Bevan* and *Utilise TDS Ltd v Davies* [2014] EWCA Civ 906. The first was an appeal against the grant of relief. The second and third were appeals against its refusal.
20. The Court of Appeal was unanimous in allowing all three appeals and took the opportunity to confirm that a three-stage approach is now required in applications for relief.
21. The Court said (at [24]):

“A judge should address an application for relief from sanctions in three stages. The first stage is to 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). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and

third stages. The second stage is to consider why the default occurred. The third stage is to evaluate “all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]”.”

22. In respect of the “third stage” identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1):

“are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered”.

23. The factors that are relevant in stage 3 will vary from case to case. The promptness of the application is a relevant circumstance to be weighed in the balance. Other breaches by the defaulting party may be considered at this stage.

24. The Supreme Court in *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1WLR 2945 implicitly endorsed the approach set out in *Denton*. The case was concerned with an application for the lifting of a bar on HMRC’s further involvement in the proceedings for failure to comply with an “unless” order of the FtT.

25. In *Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (TCC) the Upper Tribunal also endorsed the approach in *Denton* applying the three stage approach [at 43 to 45]

“43.Whether considering an application which is made directly under rule 3.9 (or under the FtT Rules, which the Supreme Court in BPP clearly considered analogous) or an application to notify an appeal to the FtT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge’s decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions - especially where the sanction in question is the striking out of an appeal (or, as in BPP, the barring of a party from further participation in it). The clear message emerging from the cases - particularised in *Denton* and similar cases and implicitly endorsed in BPP - is that in exercising judicial discretions generally, particular importance is to be given to the need for “litigation to be conducted efficiently and at proportionate cost”, and “to enforce compliance with rules, practice directions and orders”. We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to “consider all the circumstances of the case”.....

44. 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. When considering “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.”

26. 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.

Conclusion

27. The application before me is for permission to bring a late appeal. The Tribunal is not at this stage, required to consider in any detail or substance, the merits of the appeal.

28. The burden of proof lies with the appellant to demonstrate why the Tribunal should exercise its discretion to admit an appeal that is brought late. To satisfy this, the appellant must show good cause for the delay in lodging his appeal.

29. The purpose of the time limits to bring an appeal is to provide finality and certainty to both the appellant and HMRC.

30. The conditions that need to be met for HMRC to agree to a notice of appeal out of time are set out in s 49 (4) to s49 (6) TMA; namely, that HMRC are satisfied that there was reasonable excuse for not giving notice before the relevant time limit, or where the appellant has made a request in writing to HMRC to give the notice of appeal, the request was made without unreasonable delay after the reasonable excuse ceased.

Seriousness and significance of the lateness

31. In addressing the seriousness and significance of the lateness, the case of *Romasave (Property Services) Ltd* (paragraph 96) found that:

“a delay of more than three months cannot be described as anything but serious and significant”.

32. In this case, the appellant was notified of the assessments and penalties in each year for which penalties have been imposed, but did not appeal the assessments to the Tribunal until 15 June 2019 This is clearly a significant and serious delay.

Reason for the default

33. The appellant does not offer any reason for the delay in lodging her appeal.

The circumstances and merits of the case

34. The appellant has offered little in mitigation. No substantive reason has been given for the late returns or the late appeal save for her illness in 2015, which HMRC have taken into account in waiving the penalties for 2014-15. The burden of proof is on the appellant to do so.

35. Permission should not be granted unless the FtT is satisfied on balance that it should be. When considering “all the circumstances of the case”, this will involve the balancing exercise to 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.

36. A consideration to be taken into account is the consequences for both parties if an extension of time is granted/refused. The obvious consequence for the appellant is she would lose the opportunity to bring her appeal and the penalties would stand.

37. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

37. Taking all the circumstances of the case into account, I am not satisfied that there is any reason to allow the application. The application for leave to bring the late appeal is therefore refused.

38. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE : 27 OCTOBER 2020

