



Neutral Citation: [2022] UKFTT 337 (TC)

Case Number: TC08594

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2020/04593

PROCEDURE – application for permission to appeal out of time – impact of COVID-19 lockdown restrictions on representative, in absence of evidence to demonstrate specific circumstances or detailed effects of the pandemic, not considered to be a good reason for delay – permission refused

Heard on: 26 May 2022

Judgment date: 20 September 2022

Before

TRIBUNAL JUDGE SUKUL

Between

DOMINIC KIERNANDER

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ms Harriet Brown, of counsel

For the Respondents: Ms Karen Powell, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The hearing took place on 26 May 2022. With the consent of the parties, the form of the hearing was video, conducted on the Tribunal's video platform. The documents to which I was referred were contained in the 568-page PDF hearing bundle. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
2. The matter before the Tribunal is the application of Mr Kiernander for permission to appeal out of time. The Respondents ('HMRC') oppose the application.
3. My decision is that Mr Kiernander's application for permission to appeal out of time is refused. My reasons are set out below.

LEGISLATION

4. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Tribunal Rules') provides:

“20(1) [A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.]

20(2) The notice of appeal must include—

- (a) the name and address of the appellant;
- (b) the name and address of the appellant's representative (if any);
- (c) an address where documents for the appellant may be sent or delivered;
- (d) details of the decision appealed against;
- (e) the result the appellant is seeking; and
- (f) the grounds for making the appeal.

20(3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain.

20(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal—

- (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
- (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.

20(5) When the Tribunal receives the notice of appeal it must give notice of the proceedings to the respondent.”

5. Section 49G of the Taxes Management Act 1970 ('TMA 1970') provides:

“49G Notifying appeal to tribunal after review concluded

(1) This section applies if –

- (a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or

- (b) the period specified under section 49E(6) has ended and HMRC have not given notice of the conclusions of the review.
- (2) The appellant may notify the appeal to the tribunal within the post-review period.
- (3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.
- (4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.
- (5) In this section “post-review period” means—
 - (a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6), or
 - (b) in a case falling within subsection (1)(b), the period that—
 - (i) begins with the day following the last day of the period specified in section 49E(6), and
 - (ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(9).”

BACKGROUND

6. The substantive matters of the appeal concern amendments under section 28A TMA 1970, made by HMRC on 18 January 2018 and 11 October 2018, to Mr Kiernander's self-assessment income tax returns for the years 2007-08 to 2009-10 and 2011-12 to 2015-15.

7. Following an appeal to HMRC, a statutory review was completed by HMRC on 26 August 2020. The review conclusion letter stated:

What happens next

If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. You must notify your appeal to the Tribunal in writing. The statutory appeal period is 30 days from the date of this letter. However, in light of Covid-19, HMRC will not object to late appeals made to the Tribunal where the appeal has been made within 3 months of the end of the 30-day appeal period.

If you choose to appeal to HM Courts and Tribunal Service you will need to attach a copy of this letter with your appeal. If you do not then they may reject your appeal. You can find out how to do this on the Tribunals Service website <https://www.gov.uk/tax-tribunal/appeal-to-tribunal> or you can phone them on 0300 123 1024.

You can find further information about appeals and reviews on the GOV.UK website www.gov.uk/tax-appeals/decision.

8. An appeal was made to the Tribunal on 6 August 2021, including an application for permission to appeal out of time which stated:

“We refer to your letter dated 29 December 2020 and we apologise for the delay in responding which is due to the difficulties caused by the pandemic.

We note your advice that the appeal dated 16 December 2020 was not accepted by the Tribunal because it did not include a copy of any written record of any decision appealed against, and any statement of reasons for that decision. We confirm that due to an administrative error and lockdown restricted working practices, a copy of HMRC's review conclusion letter dated

26 August 2020 was not included with the appeal made to the tribunal on 16 December 2020. We now wish to resubmit the appeal and request that the Tribunal looks sympathetically on the Appellant's error.

We would comment on your advice at points (a), (b), (c) and (d) of your letter as follows.

(a) We will now resubmit the entire appeal.

(b) We note that the original time limit to apply to the Tribunal still applies. Please see our comments below in the resubmission section of this letter.

(c) We are resubmitting all documentation in respect of the appeal.

(d) We have quoted the Tribunal's reference number, TC/2020/04593, given on your letter dated 29 December 2020.

Resubmission of an appeal

We wish to resubmit an appeal on behalf of the above-named appellant in relation to Closure Notices and Revenue Amendments dated 18 January 2018, 11 October 2018 and 16 November 2018 in respect of the years ended 5 April 2008, 5 April 2009, 5 April 2010, 5 April 2012, 5 April 2013, 5 April 2014, 5 April 2015, 5 April 2016 and 5 April 2017.

We ask the Tribunal to refer to the foot of page 6 and the top of page 7 of HMRC's review conclusion letter dated 26 August 2020. The review officer states:

"...in light of Covid-19, HMRC will not object to late appeals made to the Tribunal where the appeal has been made within 3 months of the end of the 30-day appeal period".

We understand that HMRC, by allowing an extended deadline, recognised that the various pandemic lockdown measures severely restrict and impede business activities and the normal interaction between the Appellant and its advisors. Accordingly, the Appellant's advisors believed that they were still in time to submit the appeal when they did, which was on 16 December 2020 (within three months of the end of the 30-day appeal period).

For this resubmission we formally request that the Tribunal grants additional time to make the appeal application which has been necessitated because of:

1. The Appellant's error in failing to include HMRC's review conclusion letter with its original application; and
2. The effect that lockdown has had on working practices in the period 1 January 2021 to the present time which led to the long delay in replying to the Tribunal's letter dated 29 December 2020. These difficulties included: restricted interactions with advisors, disruptions to interstaff communications, office closures and post not being collected for long periods."

9. HMRC were provided with a copy of the appeal by the Tribunal on 15 September 2021 and lodged their objection to the application for permission to make a late appeal on 28 October 2021.

THE EVIDENCE

10. The bundle of documents for the hearing comprised of late appeal documents (including the notice of appeal, reasons for late appeal, grounds of appeal, notice of objection and reply to the notice of objection), general correspondence between the parties regarding the late appeal, HMRC background documents, the Appellant's documents (which included Mr

Kiernander's witness statement and a psychological report regarding 4 sessions of CBT therapy undertaken by Mr Kiernander in 2018), legislation and caselaw.

11. The documents I have reviewed and from which I base the relevant findings include:
 - (1) A 'Review Conclusion' letter dated 26 August 2020 from HMRC to Freeman & Co (Accountancy) Ltd ('Freeman'), Mr Kiernander's then representative, referred to at [8] above;
 - (2) A late appeal letter dated 6 August 2021 to the Tribunal from Mr Kiernander's current representative, Hayden Wealth Ltd ('Hayden Wealth'), referred to at [9] above;
 - (3) The response to the notice of objection to the late appeal submitted on behalf of Mr Kiernander;
 - (4) Mr Kiernander's Witness Statement dated 11 May 2022;
 - (5) My notes of hearing dated 26 May 2022.
12. I am aware of, but have not seen, a letter dated 29 December 2020 from the Tribunal to Mr Kiernander.
13. I heard witness evidence from Mr Kiernander. The key parts of which were given as follows:

"I am a dentist and live in Tortola, in the British Virgin Islands.... my practice is - and has throughout the relevant period - been exceedingly busy...Due to the COVID-19 pandemic, I did not return to the UK to see my family or friends between August 2019 and July 2021, I had intended to stay in the BVI until Easter 2020 in order to save up money for the trip back to the UK, but by Easter 2020 COVID had hit and we were unable return, with the lifting of travel restrictions, I visited the UK for 2 weeks in July 2021... I was diagnosed as having clinical depression. Through a combination of cognitive behavioural therapy and psychotherapy I began to improve in my outlook on life in general, however I was still in a gloom. I attach a copy of my counsellor's report on my mental state. At my lowest point I did not open letters from HMRC, and can say in all honesty I have not read a letter in detail from them for about a decade. It can still take me many days to open such correspondence and even then I do not read the letters in any detail. I am simply not able to. From this I wish to make it clear that I am still not able to do so. Trying to read them causes the terrible feeling of panic to reoccur and I simply cannot address this. While I am better than I was at my lowest ebb, my mental health remains precarious and I am unable to deal with my affairs with HMRC without taking a knock. This is more severe the more attention that I pay to them. I assume this is why I did not properly understand that my appeal had not been accepted, because I was not properly reviewing correspondence. This is also why I am unable to say in any detail why it was not noticed sooner that the appeal had not been resubmitted; indeed, this is probably why it was not noticed sooner too. However, this was also due to the COVID-19 pandemic... COVID-19 has - in my view - prevented me from bringing my appeal in good time. Indeed, it has, given my personal circumstances, been absolutely catastrophic. In order to set out why this has been, I note the following dates (which are the relevant ones as I understand them): My notice of appeal was due by 26 December 2020; It was submitted by me without assistance or advice on 16 December 2020; I now know that the Tribunal wrote to tell me that it had not been accepted on 19 December 2020; and COVID-19 restrictions were in force - in some form or other - from September 2020 into the middle of 2021, with particularly severe restrictions in place around October and November 2020 and after Christmas 2020. This had the following

impacts which - when combined with my mental health - prevented me from submitting my appeal on time. I was not receiving mail regularly, (post from the UK to the BVI takes about 6 month, if indeed it arrives at all), particularly any mail that was sent to my family address in the UK. The Tribunal may recall at this time that the post was not itself terribly reliable. Combined with this the necessity with ensuring that mail was received by me in BVI meant that I was not able to deal with mail in the timescale that would have been required to submit the appeal in time. This is even before taking into account my mental health and the impact it has had upon my ability to deal with correspondence about my tax affairs. Secondly, the issue was not spotted, nor picked up, by my professional advisers. Again, this was exacerbated by the various work from home directives in the UK throughout the period in question and the delay in post being received and dealt with. Again, I do not know when my advisers might have been expected to spot this error. I cannot speak on why it was not subsequently pointed out to me by advisers sooner than it was only to say that I do not recall when I received and open the correspondence myself - if I ever did - and that due to my mental health if I did open the correspondence I did not read it properly. I certainly did not understand that my appeal had not been accepted until much later, in mid-2021. Once I understood this I submitted my application for permission to appeal out of time as soon as I was able.”

14. During cross-examination, Mr Kiernander confirmed that he is a dentist working in excess of 50 hours per week, including during the period in question. His mental health does allow him to work these hours because fillings and extractions are high volume basic dentistry. If he needed to find out about something he would ask another dentist and he keeps dental records. He thinks he received HMRC’s review conclusion letter but could not say for certain and he did not know if his agent received it as he had no interaction with them. He stated that he had no memory of lodging the first appeal and said that his agent did that. When he was referred to his witness statement, which states that he submitted the appeal himself, Mr Kiernander said he could not confirm that he had sent it. He did not remember submitting it. He did not believe it was him and he did not know who would have submitted it. He said that he did not know if the Tribunal sent a letter rejecting that appeal. He may have passed that letter to his advisors, he may not have opened it, and he may not have read it.

FINDINGS OF FACT

15. I have concluded, from the documents before me and the witness evidence I have heard, that:

- (1) In August 2020, the Appellant was represented by Freeman in relation to his tax affairs. HMRC sent copies of their correspondence dated 26 August 2020 to Freeman.
- (2) On 16 December 2020, an invalid Notice of Appeal was submitted in respect of Mr Kiernander’s appeal within the deadline to submit such a notice to the Tribunal.
- (3) On 26 December 2020, the deadline to submit a valid Notice of Appeal expired.
- (4) On 29 December 2020, the Tribunal wrote to the Appellant. That letter informed the Appellant that his Notice of Appeal was not accepted and advised him to re-submit a valid Notice of Appeal.
- (5) The Tribunal’s letter dated 29 December 2020 was passed to Hayden Wealth by Mr Kiernander and they were instructed to take conduct of the appeal.
- (6) HMRC’s Review Conclusion letter dated 26 August 2020 was also passed to Hayden Wealth by Mr Kiernander.

(7) On 6 August 2021 Hayden Wealth submitted an out of time Notice of Appeal to the Tribunal which attached HMRC's Review Conclusion letter.

(8) The reasons for the delay in submitting the appeal were those set out by Hayden Wealth in their letter dated 6 August 2021 accompanying the submission of the out of time Notice of Appeal.

(9) Mr Kiernander is a person living with mental health issues.

DISCUSSION

16. Without more, it is self-evident on the facts that the 6 August 2021 Notice of Appeal was submitted out of time. That said, it now falls upon me to give consideration to whether or not the time limit to submit the Notice of Appeal should be extended by the Tribunal. In that regard the starting point of my considerations is contained at [44] of the judgment in *Martland v HMRC* [2018] UKUT 178 (TCC) (*'Martland'*) namely that "permission should not be granted unless the FTT is satisfied on balance that it should be". It is clear that the burden to demonstrate that permission should be granted rests with Mr Kiernander.

17. With this premise in mind I should apply the three-stage approach to the facts and the evidence as propounded by the Upper Tier Tribunal in *Martland* namely:

"(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."

18. I have in my contemplation always the overriding objective of the FTT Rules, namely my obligation to deal with cases fairly and justly.

Length of the delay:

19. The parties accept that the deadline for submission of the Notice of Appeal to the Tribunal was 25 December 2020, that being 30 days from the date of HMRC's 26 August 2020 Review Conclusion letter, plus 3 months for HMRC's COVID-19 deadline extension.

20. The appeal which is the subject of this application was submitted on 6 August 2021. The length of the delay is therefore in excess of 7 months. I agree with the parties that the delay is 'serious and significant'.

Reason for the delay

21. The reasons Mr Kiernander has put forward for the delay include a lack of understanding of the requirements to submit a valid Notice of Appeal, COVID-19 lockdown restrictions and mental health factors.

22. Mr Kiernander set out unambiguously in his witness statement that "...My notice of appeal was due by 26 December 2020; It was submitted by me without assistance or advice on 16 December 2020". He goes on to say "I now know that the Tribunal wrote to tell me that it had not been accepted on 19 December 2020; and COVID-19 restrictions were in force - in some form or other - from September 2020 into the middle of 2021, with particularly severe restrictions in place around October and November 2020 and after Christmas 2020. This had

the following impacts which - when combined with my mental health - prevented me from submitting my appeal on time...”

23. However, in his oral evidence before this Tribunal Mr Kiernander stated that he had no memory of lodging the first appeal and that the appeal was made by his agent. He then said they he could not confirm that he sent it and that he did not remember submitting it. He did not believe it was him and he did not know who would have submitted it.

24. In her oral submissions, Ms Brown contended that Mr Kiernander was possibly mistaken on the point of who submitted the first appeal, but who submitted the appeal is irrelevant as it was only what happened afterwards that is relevant. I disagree with that submission. The question of who submitted the first appeal is relevant to the point of whether Mr Kiernander’s lack of understanding of the requirements to submit a valid notice of appeal was, in fact, a reason for the delay.

25. I am not satisfied, on the basis of Mr Kiernander's evidence, that he submitted the first appeal or that his lack of understanding of the appeal process had any part to play in the delay of the submission of the appeal. I accept that Mr Kiernander’s mental health condition may have affected the way in which he dealt with his tax affairs. However, in the absence of any detailed, reliable evidence as to when Mr Kiernander became aware of the submission of the invalid appeal, when he instructed Hayden Wealth to take action in respect of his appeal and the nature of those instructions, I am not satisfied that the reason for the delay concerned Mr Kiernander's mental health condition.

26. It seems to me, on a balance of probabilities, that the reason for the delay was clearly set out by Hayden Wealth in their letter accompanying the appeal, which concerned COVID-19 lockdown restrictions. It is a reasonable expectation, in my view, that had Mr Kiernander’s lack of understanding or mental health issues played a significant part in the delay, those circumstances would have been set out in the letter accompanying the late appeal. Hayden Wealth’s letter dated 6 August 2021 to the Tribunal described the “difficulties” associated with the delay in submitting the Notice of Appeal out of time. Mr Kiernander’s lack of understanding or mental health issues are not included in the list of difficulties stated by the representatives.

27. In these circumstances, and on the basis of the evidence before me, it is my finding that the reason for the delay was the difficulties caused to Hayden Wealth’s working practices by the consequences of the pandemic.

Overall circumstances

28. Following the three-stage approach suggested in *Martland*, having found that the appeal was significantly late and the reason for the delay was difficulties caused to Hayden Wealth’s working practices by the pandemic, I must now consider all the circumstances of the case to assess the merits of that reason and the prejudice which would be caused to both parties by granting or refusing permission.

29. On the issue of prejudice, HMRC are entitled to expect finality when the decision is not challenged within the statutory period. I recognise the need for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected. I am mindful of the comments of the Court of Appeal in *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121 where it was held that compliance must be expected unless there was “good reason to the contrary”.

30. I also take into consideration the significant prejudice Mr Kiernander will face if permission is refused as his appeal concerns a substantial sum, although I must also consider that serious financial consequences of not being able to appeal do not overcome the difficulties

in granting permission where delays are very significant and there is no good reason for them (see *HMRC v Katib* [2019] UKUT 0189 at [60]).

31. I am not satisfied, in the absence of further investigation, that the grounds of appeal are either very strong or very weak and I have declined to embark on a detailed investigation as I do not consider the merits of the substantive appeal to have a significant part to play when it comes to balancing the various factors that have to be considered (in accordance with *Martland* at [46]).

32. Turning now to the merits of the reason for the delay, Hayden Wealth’s letter dated 6 August 2021 states that, as a consequence of COVID-19 lockdown restrictions, its “working practices” were affected by “restricted interactions with advisors, disruptions to inter-staff communications, office closures and post not being collected for long periods”.

33. It is accepted that the delay of seven months is serious and significant within the context of the case. No authority has been produced supportive of any Tribunal’s acceptance of pandemic reasons for a seven-month delay by a professional firm in submitting an important document to a Tribunal.

34. I accept that there are certain circumstances where the effects of the pandemic could give rise to meritorious reasons for a delay. However, there is an absence of evidence in this case to demonstrate any specific circumstances or detailed effects of the pandemic that gave rise to this delay. On the basis of objective reasoning, and taking into consideration all the circumstances of this case, I do not accept the generic pandemic excuse given to be a good reason for such a delay.

CONCLUSION

35. Having considered the merits of the reason given for the delay and the prejudice which would be caused to both parties by granting or refusing permission, and having taken into consideration the overriding objective of the FTT Rules, I am not satisfied that, on balance and in the interests of fairness and justice, permission to appeal out of time should be granted in the circumstances of this case.

36. The application for permission to appeal out of time is therefore refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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.

**KIM SUKUL
TRIBUNAL JUDGE**

Release date: 20TH SEPTEMBER 2022