Neutral Citation: [2022] UKFTT 354 (TC)

Case Number: TC08607

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/04437

PROCEDURE – Late appeals – Martland and Katib considered – length of delay – serious and significant – no good reason for delay – application refused

Heard on: 16 August 2022
Judgment date: 22 September 2022

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

RICHARD BUCK

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Wendy Clothier, BSc

For the Respondents: Lucy Lawrence, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. On 27 November 2020, the appellant's representative lodged a Notice of Appeal with the Tribunal which indicated that it was a late appeal and on 1 December 2020, a formal application was lodged with the Tribunal.

2. The appellant seeks to appeal

(a) five Regulation 13 Income Tax (Construction Industry) Regulations 2005 Determinations for the years 2005/06 to 2009/10 inclusive, and

(b) two Section 98A Taxes Management Act 1970 ("TMA") Penalty Determinations.

3. On 4 March 2021, the respondents ("HMRC") lodged a Notice of Objection to the late Appeals.

4. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. A face-to-face hearing was not held because of the difficulty of ensuring the safety of all participants. The documents to which I was referred comprised a Bundle consisting of 414 pages.

5. 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.

The Regulation 13 Determinations ("the Determinations")

6. All of the Determinations were initially issued on 7 December 2011 and so the deadline for appealing was, in each case, 6 January 2012.

7. As I record in the findings in fact, as a concession, on 13 March 2015, HMRC amended the Determinations for 2008/09 and 2009/10 as forms CIS300 for those two years had been submitted in 2014. Therefore the deadline for appealing the Determinations for those two years was 12 April 2015.

The Section 98 Penalties ("the Penalties")

8. The original Penalties were issued on 1 October 2012 so the deadline for appealing those was 31 October 2012. Following receipt of the CIS300 forms HMRC issued amended Penalties for those two years on 12 March 2015 so the deadline for appealing those was 11 April 2015.

The facts

9. The Determinations were issued as part of a compliance review which had started early in 2009. The Determinations were issued because no returns had been submitted by the appellant by the due dates for each year. The compliance review was closed in November 2012.

10. On 30 September 2014, Ms Clothier telephoned HMRC stating that the appellant was due at a meeting with HMRC. She told Officer Garnett that she had lodged formal appeals with HMRC in Glasgow but had heard nothing. She indicated that she wanted to bring copies of correspondence to HMRC that day and Officer Garnett provided her name and direct dial number and said that she would take the papers from her. Ms Clothier did not visit the HMRC office.

11. However, she wrote to HMRC both on that day and on 21 October 2014 enclosing CIS300 returns for the periods 2008/09, 2009/10 and 2010/11.

12. On 18 November 2014, Officer Garnett wrote to her acknowledging receipt. She noted that a letter of 24 October 2012, apparently appealing the Penalties had not been received by

HMRC and pointed out that HMRC had written to Ms Clothier in November 2012 but no response had been received. Nevertheless the officer accepted the appeals of those Penalties.

13. She confirmed that the total penalties that would be chargeable under section 98A(2)(a) and (b) TMA would have been £43,200 and £97,500 respectively but she had been authorised to reduce the amount payable in accordance with section 102 TMA to £4,371.96 being the amount that would be charged under section 55 Finance Act 2009.

14. She intimated that although Ms Clothier had not requested postponement, she had temporarily postponed collection of £96,428.04 until the formal Penalties had been amended.

15. The CIS300 returns showed a liability of £13,719.25 so she sought immediate payment of £18,091.21 pointing out that interest might also be due.

16. She raised a number of issues. In particular, she pointed out that no appeals or postponement requests had been made in respect of the Determinations. In particular, she stated:-

> "Any late appeal will need to be accompanied with an explanation as to why the appeal was not made on time. I would add that it remains the responsibility of the individual to ensure that his/her affairs are up to date and that any appeal is submitted on time, any failures as a result of an agent or representative not taking action in time is not considered to be a reasonable excuse."

17. She pointed out that those amounts remained outstanding and that she was in correspondence with HMRC's Enforcement Office in that regard.

18. In addition she stated that there were no CIS returns for 2005/06, 2006/07 and 2007/08 and nor were there any P35s for those years.

19. There was no response.

20. Officer Garnett wrote to Ms Clothier again on 14 January 2015 and there was no reply to that. She also attempted to contact her by telephone but there was no response.

21. On 16 February 2015, Officer Garnett wrote again to Ms Clothier and confirmed again that no appeals of the Determinations had been received for the years 2005/06 to 2009/10. She stated that "as a concession" she was prepared to amend the Determinations for 2008/09 and 2009/10 given that she now had forms CIS300s for those years.

22. She accepted that the return for 2008/09 was accurate but pointed out the deficiencies in the return for 2009/10 confirming that the amendments would be in light of the sums that she considered should be due.

23. In light of that, she confirmed that the total penalties that would have been chargeable for those two years, under Section 98A(2)(a) and (b) TMA would have been £28,800 and £61,500 but she had been authorised to reduce the amounts payable to a total of £4,016.54 which would have been the amount that would have been chargeable under Section 55 Finance Act 2009.

24. Ms Clothier allegedly responded on 2 March 2015 but only in relation to the letters of 18 November 2014 and 14 January 2015. That letter was not received by HMRC. Her letter purported to appeal against "the reduction of the total penalties charged to £4,371.96". In fact, the amended Penalties, being £1,622 and £2,394 respectively, so a total of £4,016, were only issued on 12 March 2015 so no appeal was possible until then.

25. The letter concluded by stating that she formally appealed against the Determinations for the years 2005/06 to 2007/08 and she would be submitting the returns, which were many years late, within the next 30 days.

26. The amended Determinations for 2008/09 and 2009/10 were issued by HMRC on 13 March 2015. Neither was appealed until 2020.

27. On 1 October 2019, Ms Clothier wrote to HMRC and that letter was received on 8 October 2019. She stated that a bankruptcy petition had been presented which included the Determinations for 2005/06 to 2009/10. Although she said that she enclosed copies of the letters of 2 March 2015 and 15 April 2015, only the latter was included.

28. The letter dated 15 April 2015, which had not previously been received by HMRC, referenced the letter of 2 March 2015 and purportedly enclosed forms P35 for 2005/06 to 2007/08 and Schedules of Tax deducted from CIS 4 Holders. It did not refer to either the letter from Officer Garnett dated 16 February 2015 nor the amended Determinations or Penalties.

29. She stated that appeals in respect of 2008/09 and 2009/10 had been accepted but the appeals for the three earlier years had not been acknowledged as accepted. She reiterated that she had no record of receiving those Determinations.

30. In neither letter did Ms Clothier provide an explanation as to why the purported appeals were late.

31. The appellant himself, or possibly Ms Clothier, appears to have submitted forms P35 in late 2019 as HMRC wrote to the appellant on 2 December 2019 returning the copy forms P35 because he had not enclosed completed forms P14. He was asked to provide the completed forms as soon as possible. He was also asked to enclose a covering letter.

32. On 3 January 2020, HMRC wrote to Ms Clothier pointing out that appeals for the Penalties for 2008/09 and 2009/10 had been accepted but there was no record of receipt of any appeals against the earlier Determinations. Whilst HMRC acknowledged receipt of the copy of the letter of 15 April 2015 in 2019, there was no record of it or the letter of 2 March 2015 having been received prior to that.

33. Given that those purported appeals were dated a long time after the original Determinations were issued, HMRC requested:-

(a) Confirmation of appeals against 2008/09 and 2009/10 Determinations (being the amended Determinations);

(b) Confirmation of the reasons for the late appeals and why appeals were not made on time; and

(c) Confirmation of the Grounds for Appeal against the Determinations.

34. HMRC pointed out that HMRC did not have the P35 returns or the Schedules referred to in the letter of 15 April 2015 and that the only CIS300 returns which had been received were those for 2008/09 to 2010/11. She was asked for a response by 3 February 2020.

35. On 7 January 2020, Ms Clothier sent forms P35 and P14 for the years 2005/06 to 2007/08 to HMRC. That was sent to a different department of HMRC.

36. There was no reply to the letter of 3 January 2020 and therefore on 24 February 2020, HMRC wrote to Ms Clothier confirming that a late appeal must meet the conditions set out under section 49 TMA 1970.

37. In summary, HMRC pointed out that since the Determinations were raised in 2011, the earliest possible date that an appeal was even mentioned was more than three years later and it was four months after the letter of 18 November 2014 which pointed out the appeal process. The letter concluded by stating that the late appeals would not be accepted and pointed out that an application should be made to the Tribunal within 30 days of the date of the letter.

38. On 10 March 2020, Ms Clothier telephoned HMRC because a bankruptcy hearing was pending. On 11 March 2020, HMRC sent her a copy of the letter of 3 January 2020, both through the local post system and through the central system to ensure that she got it as quickly as possible. She acknowledges that she received it on 13 March 2020.

39. The bankruptcy hearing scheduled for 30 March 2020, was adjourned because of Covid-19.

40. On 3 September 2020, seeking an adjournment of a bankruptcy hearing scheduled for 9 September 2020, Ms Clothier wrote to the solicitors for HMRC acting in the bankruptcy enclosing a copy of a letter that she said that she had sent to HMRC dated 30 March 2020. She stated that she would be lodging a late appeal with the Tribunal that day. She did not. That letter of 30 March 2020 had not previously been received by HMRC.

41. The letter of 3 September 2020 was received by HMRC on 15 September 2020 and treated as an application for late appeals.

42. On 2 November 2020, HMRC wrote to the appellant rejecting the applications for late appeals. In that letter, the HMRC officer pointed out that properly addressed Notices of the amended Determinations were included in the copy correspondence provided by Ms Clothier. Those amendments had settled the appeals against the original Determinations for 2008/09 and 2009/10 in 2015. The amendments had not been appealed.

43. It was pointed out that the appellant had a history of non-compliance with statutory deadlines for not only CIS but also PAYE, VAT and Income Tax.

The Law

44. The Tribunal's power to admit a late appeal is contained in section 49 TMA which reads as follows:-

> "49. **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."

45. Section 49H TMA gives the Tribunal power to grant permission to notify a late appeal to the Tribunal. The proper approach to such applications is set out by the Upper Tribunal in *Martland v HM Revenue & Customs*[1] ("Martland"). The Upper Tribunal reviewed the authorities and concluded as follows:

> "43. …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".

[1] [2018] UKUT 178 (TCC)

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.

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.

46. Lastly, at all times I have had in mind Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) which reads:-

> "**2.—Overriding objective and parties' obligations to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
> (a) exercises any power under these Rules; or
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally."

Discussion

47. HMRC rely on *Martland* and rightly so. I therefore consider the three tests enunciated therein.

The length of the delay

48. The Determinations for 2005/06 to 2008/08 should have been appealed in January 2012 and the later two years by 12 April 2015. Officer Garnett's letter to Ms Clothier dated 18 November 2014 pointing out that appeals had not been lodged could not have been more explicit. Patently she received that letter because her purported appeal of the Penalties referenced the amount quoted in that letter and <u>not</u> the actual amount of Penalties referenced in the letter of 16 February 2015.

49. I have a problem with the letters of 2 March and 15 April 2015. It is inherently unlikely that they were received by HMRC before 2020 in the case of the former and 8 October 2019 in the case of the latter.

50. Officer Garnett had made it clear that the tax was outstanding and that she had instructed the HMRC Enforcement Officers to proceed. The alleged letter included no request for postponement of tax and no explanation of the reason for the late appeals. Even if it had been sent, which I do not accept, it was more than five months after Ms Clothier was aware that there were no appeals and had contacted HMRC in September 2014. That is a serious and significant delay.

51. Bankruptcy proceedings do not materialise out of nowhere. HMRC's enforcement officers will have been in correspondence for a considerable time prior to the proceedings in court. If those letters had been received by HMRC in 2015, it would be expected that they would have been actioned and furthermore that the appellant and/or Ms Clothier would have "chased" HMRC to action them. They did not.

52. It also seems very unlikely that the letter of 30 March 2020 was received by HMRC before 15 September 2020 when undoubtedly the application for the late appeals was received by HMRC. One problem is that the letter from HMRC dated 24 February 2020, to which the letter of 30 March 2020 purported to respond, stated explicitly that if the appellant disagreed

with the decision an appeal should be made to the Tribunal within 30 days. No appeal was made and nor was an appeal made on 3 September 2020 when she had stated in a letter to the Court that she would do so.

53. Given that the bankruptcy hearing was scheduled for 30 March 2020, but adjourned because of Covid-19, on the balance of probability a response to HMRC would have been expected to have been lodged before 30 March 2020 and it was for that reason that the officer had issued two copies of the letter to Ms Clothier on 11 March 2020.

54. Regardless, at an absolute minimum, the length of the delay for the appeals for the 2008/09 and 2009/10 Determinations was between 12 April 2015 and the beginning of April 2020. That is approximately five years. Even if the letter of 2 March 2015 had been received, which I do not accept, the delay for the first three years would have been more than three years.

55. I find that the delays for the earlier three years are from 6 January 2012 to at least the beginning of April 2020, which is more than eight years.

56. I agree with HMRC when they quote the Upper Tribunal in *Romasave (Property Services) Limited v HMRC*[2] where at paragraph 96 they state:-

> "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."

57. Not only am I bound by that decision but I entirely agree.

What is the reason for the delay? Is there a good explanation?

58. It was only in her letter of 30 March 2020 that any sort of explanation for the delay was offered and that was that the Determinations had not been sent to Ms Clothier. As HMRC pointed out in their letter of 2 November 2020, there was no requirement to send Determinations to an agent. Ms Clothier told the Tribunal that she could not recall why nothing had happened between January 2012 and September 2014.

59. As far as the period after September 2014 when Ms Clothier undoubtedly knew about the Determinations, and in particular the period after receipt of Officer Garnett's letter of 18 November 2014 is concerned, there is no explanation for the continuing delay let alone a good explanation.

60. Whilst it is noted that the appellant was ill in December 2014 and early January 2015, that still does not explain why appropriate action was not taken timeously in the years before or after that. Officer Garnett's letters in January and February 2015 and the issue of the amended Determinations and amended Penalty Notices should have triggered a response. Nothing appears to have been done.

61. Ms Cothier's illnesses cannot be an explanation since if she was unable to act for the appellant he should either have lodged appeals himself or instructed another agent. As can be seen from paragraph 47 of *Martland*, the absence of an agent should not carry much, if any, weight.

What are the other circumstances of the case?

62. To the extent, if any, that the appellant relies on the failure of Ms Clothier to act timeously, I pointed out that *HMRC v Katib*[3] is in point. Paragraph 49 reads:-

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[2] [2015] UKUT 254 (TCC)

[3] [2019] 0189 UKUT (TCC)

> "We accept HMRC's general point that, in most cases, when the FTT is considering an application for permission to make a late appeal, failings by a litigant's advisers should be regarded as failings of the litigant … Therefore, in most cases, a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers."

63. It may be that there is nothing in writing since we observe that the appellant apparently rents a room in Ms Clothier's building. However, we have absolutely no evidence as to what the appellant did or did not do at any time. Ms Clothier told the Tribunal that she could not remember what had happened in regard to the Determinations and Penalties.

64. Undoubtedly, if the appeal is not admitted late, the appellant would not be able to litigate and challenge the amounts and penalties in dispute. On the other hand, HMRC have the right to expect finality and for them those Determinations had been closed for very many years.

65. HMRC are entitled to expect that it is in the public interest that the policy of finality in litigation is upheld and that statutory time limits are respected. The appellant has a long history of significant compliance failures over very long periods of time.

66. The strength, or not, of the appellant's case is a relevant consideration but, as directed by *Martland*, there should not be a detailed analysis of the underlying merits. The prospects of success in that regard seem rather slim. The amended 2008/09 Determination was based on the figures in the CIS300 return which was provided by the appellant. There would not appear to be any grounds of appeal against that. Ms Clothier argues that the appellant has suffered significant tax deductions through the CIS Scheme as a Subcontractor and she attempted to claim credit against PAYE Tax and NIC deductions and CIS Tax deductions that the appellant has deducted from his workers. Since he is self-employed he cannot do that.

67. Ms Clothier argues that there must be a way of offsetting it but section 62(2) Finance Act 2004 means that he can only claim the tax through his own self-assessment tax returns. He has not done so.

68. If the appeals were to be admitted HMRC would suffer very significant prejudice since there would be cost and resource implications but, more importantly, the record retention policy would mean that it is very unlikely that any or all of the relevant documents still exist.

Decision

69. Having weighed every relevant factor in the balance, I have decided that the application should be refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 22nd September 2022