Neutral Citation: [2023] UKFTT 697 (TC)

Case Number: TC 08889

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2022/13215

INCOME TAX – permission to make a late appeal against an amendment to a SATR – amendment correct – permission denied – HMRC care and management powers considered

Heard on: 24 July 2023
Judgment date: 7 August 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR JAMES ROBERTSON

Between

LOUISE DUNCAN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Mr Liam Ellis litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. In this appeal the appellant appeals against the conclusion set out in a closure notice dated 11 July 2018 ("**the closure notice")** that additional income should have been included in her tax return for the year ended 5 April 2017, and the consequential amendment of that return by HMRC. She should have appealed against that conclusion by 10 August 2018. She did not appeal to HMRC until 30 June 2022.

2. This decision therefore deals with two matters. Firstly, whether we should exercise our discretion and allow the appellant to make a late appeal. Secondly, if we grant such permission, whether we should allow her appeal.

3. For reasons given later in this decision, we have not exercised our discretion in her favour. We reject her application to make a late appeal. But even if we had granted it, we would still have gone on and dismissed her appeal against the closure notice.

THE LAW

4. There was no dispute about the law. Under section 31(1)(a) Taxes Management Act 1970 ("**TMA**") an appeal can be brought against an amendment to a self-assessment included in a taxpayer's self-assessment tax return. Notice of an appeal under section 31 TMA must be given within 30 days of the date on which the notice of amendment was issued, but late notice may be given after that date if HMRC agree, or if HMRC do not agree, the tribunal gives permission.

5. When deciding whether to give permission, the tribunal is exercising judicial discretion, and the principles which we should follow when considering that discretion are set out in *Martland v HMRC* [2018] UKUT 178 (TCC), ("*Martland"*) in which the Upper Tribunal considered an appellant's appeal against the FTT's decision to refuse his application to bring a late appeal against an assessment of excise duty and a penalty. The Upper Tribunal said:

> "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*:
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> (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.
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> (2) The reason (or reasons) why the default occurred should be established.
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> (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.
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> 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".

6. In *HMRC v BMW Shipping Agents* [2021] UKUT 0091, the Upper Tribunal relevantly said this:

"52. We will approach the third *Martland* stage by performing, as *Martland* requires, a balancing exercise. In that balancing exercise, the need for litigation to be conducted efficiently and at proportionate cost and for directions to be complied with must be given particular weight. However, it remains a balancing exercise which invites, among other considerations, a consideration of the nature of the reasons for the breach of direction and the results that would follow if the appeal is, or is not, reinstated".

THE FACTS

7. We were provided with a bundle of documents. The appellant gave oral evidence. From this we find the following facts:

(1) During the tax year 2016/2017, the appellant was employed by three employers, namely TLT LLP, Metcalfe's, and Liberty Bishop.

(2) As well as receiving employment income from these three sources, the appellant owned a cottage which she let out and from which she received rental income. It was for this reason that she was obliged to complete a self-assessment tax return.

(3) Her 2017 self-assessment tax return only includes the income from Liberty Bishop. It does not include income from the other two employers. There is no dispute that the appellant received employment income from those two employers during the 2017 tax year, from which income tax under the PAYE system was deducted at source.

(4) The appellant employed an accountant to compile and submit her tax return. She provided him with the P60 given to her by Liberty Bishop. The P60 for the 2017 tax year contains an entry of 0.00 from previous employments and records only the employment income from Liberty Bishop.

(5) A letter dated 25 July 2018 from Liberty Bishop to the appellant records that when the appellant joined Liberty Bishop and provided them with her P45 from Metcalfe's, that P45 recorded the income from Metcalfe's and was put onto the Liberty Bishop system in July 2016. However, on 22 December 2016 HMRC updated the appellant's records on Liberty Bishop's system and her tax code was updated. For some reason her previous paid details were changed from £7,745.82 to 0. Liberty Bishop, perfectly properly, implemented this change with the

result that the appellant received a tax rebate in January 2017 of £960.60.

(6) HMRC opened a compliance check into the appellant's self-assessment tax return for the year ended 5 April 2017 which then closed by way of the closure notice. The conclusion in that closure notice was that the income from TLT and Metcalfe's had not been included in the appellant's tax return, and so they amended her return to so include it.

(7) Because of the tax rebate which the appellant had received in January 2017, this amendment had the effect of bringing the appellant into the payment on account regime under self-assessment. The detailed financial consequences are bewildering and are set out in, inter alia, HMRC's letter to the appellant of 18 July 2022 in which they reject her application to make a late appeal. Her self-assessment statement at July 2022 includes a bewildering array of payments including balancing payments, interest, and penalties each of which are of modest amounts. But collectively the appellant in July 2022 had an outstanding balance payable to HMRC of £2,138.09.

(8) On 2 August 2018 the appellant sent a letter to HMRC providing HMRC with a number of documents including her P60 from Metcalfe's and the aforesaid letter from Liberty Bishop and explained the background to the change in tax code and the repayment.

(9) On 20 August 2018 HMRC sent a letter to the appellant dealing with the issues which had been raised in that August letter.

(10) There then followed correspondence at which the various issues raised in the appellant's 2 August letter were discussed, but at no stage was there any clear appeal against the closure notice. Correspondence petered out after July 2019, and on 30 June 2022, the appellant finally appealed against the amendments made in the closure notice. HMRC, in their letter of 18 July 2022 refused to accept the late appeal, and on 23 August 2022 the appellant appealed to the tribunal in which she made an application to make a late appeal.

(11) The closure notice clearly sets out the appellant's appeal rights, and what she should do if she disagreed with the conclusion which HMRC had reached in that notice. The appellant was candid about the reason why she did not exercise her appeal rights on or before 10 August 2018. She had focused on the issues surrounding the P60 and she had overlooked the appeal rights which were at the back of the letter. She found the letter hard to read.

DISCUSSION

The closure notice

8. We start this discussion in reverse order. Since the third stage of the Martland test allows us to consider any obvious strengths and weaknesses in the parties' respective positions regarding the substantive appeal, we have decided to consider this before we consider the appellant's application to bring a late appeal.

9. As can be seen from the findings of fact in the previous section, there is no dispute between the parties that the employment income which the appellant received from TLT and Metcalfe's in the 2017 tax year, was not included in her 2017 tax return. It clearly should have been. And as a result, it seems to us that there are absolutely no grounds on which the appellant can successfully appeal against the amendment made to her tax return and which is set out in the closure notice. Her substantive appeal, therefore, against that amendment must fail.

The late appeal

10. we now turn to consider the three stage Martland test.

11. Firstly, we consider whether the delay in making the appeal is serious and significant. We find that it is. We have tried to construe an appeal from the letters sent by the appellant to HMRC but regret we cannot do so. We find therefore that the first appeal which she made against the conclusion in the closure notice was the appeal which she made on 30 June 2022. This is nearly 4 years late. That is serious and significant.

12. The reasons given by the appellant for the delay are understandable. However, they are not particularly strong reasons to militate against the seriousness and significance of the delay. She simply overlooked the section of the closure notice which explained to her what she should do if she disagreed. Although she vehemently disagreed with what HMRC had said, and expressed that disagreement in her subsequent correspondence to them, nowhere in that correspondence is there an appeal against the closure notice conclusion. So although she raised a number of issues with HMRC dealing in part with the changes in tax code, and the reasons why the P60 given to her accountant did not include the income from Metcalfe's and TLT, these cannot be construed as an appeal.

13. We wholly accept that the appellant engaged fully with HMRC concerning the broader issues surrounding her tax position. But we do not consider this is a good enough reason for failing to bring a timely appeal.

14. At the final evaluation stage, therefore, we do not think that the reasons outweigh the seriousness of the delay. Time limits must be respected. And in any event, as we have made clear earlier in this decision, the appellant's substantive appeal has no merit whatsoever.

15. We therefore reject the appellant's application to make a late appeal.

HMRC's care and management powers

16. Under s1 TMA, HMRC are responsible for the collection and management of income tax. Under s5 Commissioners for Revenue and Customs Act 2005, HMRC are responsible for the collection and management of revenue (including NICs) for which the Inland Revenue and HM Customs & Excise were previously responsible. Under s9 of that Act, HMRC may do anything that they think necessary or expedient in connection with the exercise of their functions, or incidental or conducive to the exercise of their functions.

17. In *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2006] STC 270 at [20-21] (House of Lords), Lord Hoffmann said:

> "[20] The commissioners are a statutory body created by the Inland Revenue Regulation Act 1890. They are charged by s 13(1) of that Act to 12 'collect and cause to be collected every part of inland revenue'. Section 1 of the 1970 Act gives them what Lord Diplock described in IRC v National Federation of Self-Employed and Small Businesses Ltd [1981] STC 260 at 269, [1982] AC 617 at 636, as:
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> 'a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection'".

18. It seems to us that something has gone very wrong with the ostensibly simple tax affairs

of the appellant. Whilst we have absolutely no power or jurisdiction to order or request that HMRC might consider exercising the discretion conferred on them by their care and management powers in favour of the appellant when reviewing the impact of this decision on her tax position, we suggest this might be an appropriate case for them to do so. The appellant, at the hearing, recognised that if she had to pay the tax, then so be it. What has confused (and, frankly, has confused the panel which has over 80 years of collective tax experience under its belt) and angered her is why HMRC changed her tax code, and the consequential impact that that has had on her tax position. She is willing to pay the tax (she accepts that this is partially offset by the rebate she received in January 2017) but feels very aggrieved that the change of code appears to have led to an incomprehensible array of interest and penalty payments which appear on her tax statement. We have not got anywhere near the bottom of why this has happened, but we cannot see that the taxpayer has done anything wrong in this case. She received employment income under deduction of PAYE and had a modest amount of rental income. Yet her tax statement has become a monster which is almost impossible to understand. The appellant fully engaged with HMRC following the closure notice with a view of sorting out her tax position. It seems to us that this is a paradigm example of circumstances in which HMRC might exercise their discretion in a taxpayer's favour and waive all interest and penalties.

DECISION

19. For the foregoing reasons we reject the appellant's application for permission to make a late appeal against HMRC's amendments to her tax return, set out in the closure notice. And, as set out above, even if we had granted that application, we would then have dismissed her appeal against that amendment.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

20. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 7 August 2023