Neutral Citation: [2024] UKFTT 00587 (TC)

Case Number: TC09226

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/00453

SDLT - Discovery Assessment – application to make a late appeal

Heard on: 12 March 2024
Judgment date: 26 June 2024

Before

TRIBUNAL JUDGE MCGREGOR

Between

Mr C and Mrs R O'Donnell

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Ciaran O'Donnell represented himself and his wife

For the Respondents: Mr Steven Dent, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

1. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing system. A face to face hearing was not held because a remote hearing was appropriate. The documents to which I was referred are a hearing bundle of 272 pages, supplementary documents being the original notice of appeal and supporting documents amounting to 34 pages and a further authority, and the Respondent's skeleton argument of 15 pages.

2. 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.

LAW

3. Paragraph 36G of Schedule 10 to Finance Act 2003 sets out the requirements for making an appeal against a discovery assessment relating to SDLT as follows:

> (1) This paragraph applies if—
>
> (a) HMRC have given notice of the conclusions of a review in accordance with paragraph 36E, or
>
> (b) the period specified in paragraph 36E(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 paragraph "post-review period" means—
>
> (a) in a case falling with sub-paragraph (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 paragraph 36E(6), or
>
> (b) in a case falling within sub-paragraph (1)(b), the period that—
>
> (i) begins with the day following the last day of the period specified in paragraph 36E(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 paragraph 36E(9).

4. Rule 20 of the FTT Rules provides:

> (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.
>
> …
>
> (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.

5. In summary therefore, I have a discretion to allow an application for a late appeal against an SDLT discovery assessment.

6. In exercising that discretion, I must follow the principles and guidelines set out by the higher Courts and Tribunals, summarised by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC). I set out the section from paragraph 44 in full:

> 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.

FACTS

7. The following background facts are found from the document bundle and skeleton argument submitted.

8. On 11 September 2009, Mr and Mrs O'Donnell bought a property in London.

9. On 6 October 2009, HMRC received an SDLT return relating to the acquisition of that property.

10. On 6 September 2011, HMRC made a discovery assessment for additional SDLT of £24,000 in relation to that acquisition. This letter was sent to Mr and Mrs O'Donnell and their solicitors at the time.

11. On 20 September 2011, the Appellants wrote to HMRC to advise they had passed the matter to their tax advisors, Cornerstone Tax, and provided authority for all future correspondence to be directed to them.

12. On 28 September 2011, Cornerstone Tax appealed to HMRC on behalf of the Appellants against the assessment.

13. On 30 September 2011, HMRC issued a letter in response, concluding the officer was entitled to make a discovery assessment. The Appellants were invited to produce further documents or evidence to support their appeal.

14. On 6 December 2012, HMRC received a letter of authority for RPC to act on behalf of the Appellants.

15. On 27 May 2022, HMRC issued View of the Matter letters to the Appellants concluding that the SDLT included on the return was incorrect. These letters were not sent to RPC or Cornerstone.

16. On 27 September 2022, HMRC issued a letter to the Appellants advising that the 30 day period for an appeal had expired and that therefore the appeal was deemed to have been settled.

17. On 30 September 2022, the Appellant wrote to HMRC regarding the 27 May 2022 letter and requesting that HMRC accept their late review request. The reason given for not having responded to the earlier letter was "we were unaware that a response was needed."

18. On 2 November 2022, HMRC refuse the late review request on the basis that the reason given was not a reasonable excuse for the lateness.

19. On 6 November 2022, Mr O'Donnell replied providing further reasons for the lateness, broadly as set out in his submissions below. This email was sent to the wrong email address and forwarded to the right one on 7 November 2022.

20. HMRC confirmed their refusal to accept a late request for review on 14 November 2022.

21. The O'Donnells then submitted an appeal to the Tribunal service on 1 December 2022.

22. This appeal was rejected by the Tribunal service on 14 February 2023 because it did not include an explanation of the reasons for the lateness of the appeal.

23. The Appellants submitted a further appeal, including the explanation for lateness on 15 February 2023.

PARTIES ARGUMENTS

24. Mr O'Donnell submitted the following in support of the application:

(1) The Appellants accept that the appeal was late;

(2) At the time of receipt of the view of the matter letter on 27 May 2022, Mr and Mrs O'Donnell remained under the impression that their appeal was being dealt with by a law firm, RPC, which had been acting for them alongside a group of other appellants, for approximately 10 years;

(3) Their experience over that 10 years was that RPC would respond to correspondence directly without reference to them and therefore they did not believe that they needed to take any action. HMRC had repeatedly over the 10 years sent correspondence to the O'Donnells which should have been sent to RPC and both RPC and the O'Donnells had sent correspondence to request that letters were sent to RPC only. After they received the 27 May 2022 letter, they believed that RPC were dealing with it, the appeal was in progress and they did not need to do anything;

(4) The email correspondence from RPC which would have alerted them to the fact that RPC was no longer acting, which had apparently been sent in August 2021, had not been received by Mr and Mrs O'Donnell. They have since been forwarded the email apparently sent but the email was sent on blind copy so there is no clear indication as to

whether it was sent to them. They have checked their email accounts and back ups but found no evidence of this email having been received;

(5) Their later behaviour, including the promptness of their actions, show that, had they been aware that RPC were no longer acting, they would clearly have taken the necessary action;

(6) It was not unreasonable for them not to have followed up with RPC before the 27 May 2022 letter because the dispute had been ongoing for over 10 years and had extended periods in which no developments occurred, in particular while other cases were proceeding through the Tribunal;

(7) If they had received the notice that RPC were no longer acting, they would have immediately contacted their tax advisers, Goldstone Tax Advisers (or their predecessors Cornerstone), to discuss joining a new group of taxpayers in the same boat. They would also have been aware that they needed to reply to the 27 May 2022 letter;

(8) As a qualified accountant looking after small companies, helping them with compliance and returns, Mr O'Donnell is acutely aware of the importance of deadlines and is also extremely diligent with his emails and filing. He argued that this supported his submission that if he had been aware that he was up against a deadline that he needed to act upon directly, rather than RPC doing it on his behalf, he would have taken the necessary action;

(9) When they received HMRC's follow up letter on 27 September 2022, they were shocked and immediately contacted Goldstone, to ask what had happened.

(10) They spoke to Goldstone on 30 September 2022, at which time Goldstone explained that RPC was no longer acting for the group of taxpayers and that therefore Mr and Mrs O'Donnell would need to make a late appeal themselves;

(11) They made an immediate request to HMRC for a late review and, when it became apparent that this was not going to be accepted, then made an appeal to the Tribunal;

(12) When that appeal was rejected by the Tribunal for lack of grounds, they again responded very quickly, submitting a new appeal with grounds the next day;

(13) They had repeatedly shown their keenness to appeal and the speed with which they intended to respond, which supports the fact that, but for the missed information regarding RPC's departure, they would have appealed on time;

(14) If HMRC had written again before the end of the 30 day window or shortly afterwards, they would have been alerted to the problem much earlier;

(15) The fact that HMRC's follow up letter was not sent for 4 months is also confirmation that HMRC had not been rushing to finalise any matters after the 26 June 2022, which reduces any prejudice to HMRC in proceeding with the litigation;

(16) Since their facts are very similar to the decision in *Brosch,* it would be unfair to allow their case to be decided based on a point of administration, rather than following the *Brosch* decision.

25. HMRC submits that:

(1) The length of the delay was significant, being from 26 June 2022 to 15 February 2023 i.e. 7 months and 20 days;

(2) The reasons for the delay are not accepted. The view of the matter letter was sent directly from HMRC to Mr and Mrs O'Donnell; it did not refer to a copy having been

sent to an agent, RPC or otherwise, but did suggest that if the taxpayer had an agent, they should show them the letter;

(3) The letter also contained a clear explanation of when a request for review or appeal could be made;

(4) The taxpayer is ultimately responsible for making their own appeal and a reasonable taxpayer would have contacted RPC to confirm the appeal was being made and followed up to check progress;

(5) Submitting a notice of appeal is not a complicated process and not one for which the O'Donnells needed professional advice;

(6) HMRC explained in correspondence in early November 2022 that the Appellants could apply to the Tribunal, but no such application was made until 15 February 2023;

(7) To allow the late appeal would require HMRC to divert resources to defend an appeal that they were entitled to consider was closed;

(8) While HMRC note that a detailed assessment of the merits is not necessary, their view is that the substantive appeal is weak and his very limited prospects of success;

(9) While there are groups of appellants, including one behind *Brosch*, given the first-tier decision in that case has already been heard, it would not be possible for the appeal in this case to simply be joined into that group, therefore there is no real benefit of joint case management. In addition, in accordance with the decision in *Websons*, the need for efficient litigation is not diminished because it could be conveniently heard with other cases;

DISCUSSION

26. On the first question of establishing the length of the delay and considering whether this delay was serious or significant, there was some disagreement about the period for the delay.

(1) The O'Donnells should have made their appeal to the Tribunal on 26 June 2022, being 30 days after the letter of 27 May 2022. They did not make a valid application for a late appeal until 15 February 2023. HMRC argue that this whole period, being over 7 months should be treated as the period of lateness.

(2) There were several periods within that 7 month period where the O'Donnells were waiting for responses from HMRC or the Tribunal – the period from 30 September to 2 November and from 7 November to 15 November when they waiting for HMRC's response to their request for a late review; and the period from 1 December 2022 to 14 February 2023 when the application to the Tribunal was under consideration before being rejected.

27. I find that the O'Donnells cannot have been expected to have been progressing matters during those periods, which add up to over 3 months – 116 days. However, they are also not absolved from responsibility for those delays because on both occasions the delay was caused by their having failed to explain fully why their applications were late.

28. On the first occasion, they may have been unaware of how much detail they needed to include in their email to HMRC, but on the notice of appeal to the Tribunal, they again failed to provide the explanation and this meant that a valid application to the Tribunal was not in fact made until 15 February 2023.

29. Even taking those days out of account, the delay was still over 3 months and I consider this to have been serious and significant.

30. On the second question, I find as a fact that the O'Donnells had a genuine belief that RPC were taking action on their behalf to the letter of 27 May 2022.

31. Turning to the third question I must make an evaluation of all the circumstances of the case, which will involve a balancing exercise between the merits of the reasons given for the delay and the prejudice that would be caused to both parties by granting or refusing permission. In conducting that balancing exercise, I must 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.

32. There are several factors of prejudice to consider. Firstly the prejudice to the Appellants in not being able to pursue their appeal. This factor weighs in support of allowing the late appeal.

33. On the other side, HMRC would be prejudiced by having to defend an appeal on a matter that they considered to be closed. Although there was a very long lead time for this appeal – stretching back to the acquisition of a property in 2009 and the discovery assessment raised in 2011, HMRC would have expected a response of some sort to their letter on 27 May 2022 and it is clear that, by 27 September 2022, HMRC considered the matter closed. This factor weighs against allowing the late appeal.

34. There was some discussion of the merits of the case, in particular its similarity to other cases proceeding through the tribunal system. I echo the comments quoted above of Moore-Bick LJ regarding an assessment of merits: "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." Mr O'Donnell did not accept HMRC's position but said that detailed consideration was outside the scope of this hearing. Without a detailed consideration of the merits, it is not appropriate to take this factor into account in the balancing exercise in this case.

35. Having decided above that the reason for the delay was a genuine belief that RPC were acting on their behalf, I must consider whether, in this balancing exercise, that belief was a reasonable one such as to constitute a good reason for the delay. While it may be true that RPC were taking actions on their behalf through this long period, I note that the letter of 27 May 2022 expressly refers to the taxpayer's need to contact their advisers to discuss what to do next. This should have indicated to them that they should at least check that RPC were continuing to take the necessary actions.

36. Mr O'Donnell explained that there had been earlier issues with HMRC sending things to them personally when they had requested that correspondence was sent to RPC. I saw no evidence of this request for HMRC to correspond only with RPC and not with the O'Donnells, but if correct, the receipt of a letter addressed to them without reference to being copied to their advisers and including the warning to show it to their advisers, would have been an even greater signal to Mr and Mrs O'Donnell that they should at least check in on what was being done.

37. Finally, while appointing an agent to conduct an appeal is entirely within the choice of a taxpayer, it does not remove all responsibility for action and decision making in relation to the person's tax affairs. A decision as to whether to request a statutory review or whether to appeal is one that a taxpayer would usually expect to be involved in.

38. In summary, I conclude that while the O'Donnells did have a genuine belief that RPC were still acting for them, it was not a reasonable course of action for the O'Donnells to do nothing in response to the 27 May 2022 letter.

39. Drawing these factors together in the balancing exercise, I do not consider that Mr and Mrs O'Donnell have established a good reason for the serious and significant delay and, in all the circumstances, I do not consider that it is appropriate to give permission for them to bring late appeals in this case.

DECISION

40. For the reasons set out above, Mr and Mrs O'Donnell's application for permission to notify the appeals late is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

41. 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.

ABIGAIL MCREGOR
TRIBUNAL JUDGE

Release date: 26th JUNE 2024