



Neutral Citation: [2024] UKFTT 00704 (TC)

Case Number: TC09251

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2023/08661

Income tax – application to make a late appeal – Martland considered – application refused

Heard on: 13 May 2024
Judgment date: 25 July 2024

Before

TRIBUNAL JUDGE MCGREGOR

Between

DAVID GEORGE DAVIES

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mrs Bethan Sharrock, of RedBook Accountants Limited

For the Respondents: Ms Maddie Di Benedetto, litigator of HM Revenue and Customs’
Solicitor’s Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) via Tribunal video hearing system. A face to face hearing was not held because a remote hearing was expedient. The documents to which I was referred are a bundle of 330 pages, containing both documents and authorities.

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.

BACKGROUND FACTS

3. I record first the background facts that I do not consider disputed and only those that are essential to understanding the application for permission to bring a late appeal.

4. This case concerns an application by the Appellant, Mr David Davies, for permission to make a late appeal against income tax assessments relating to the tax years 2011-12 to 2017-18 and penalties for failure to notify liability for income tax, for the tax years 2011-12 to 2015-16.

5. HMRC conducted a compliance check on Mr Davies commencing in July 2017 after discovering that Mr Davies was running a pub and receiving income from rental properties but had not been reporting any income tax to HMRC.

6. During the course of this compliance check, Mr Davies was being advised by an accountant. Given his professional conduct is subject to criticism in this decision but he was not present to defend these challenges, this decision will refer to him as Mr X.

7. After a series of attempts to obtain the necessary information from Mr Davies and Mr X, including a face to face meeting attended by them both, HMRC issued the assessments and penalties that Mr Davies now seeks to appeal, on 9 October 2019.

8. On 16 November 2021, RedBook Accounting Limited (RAL) called HMRC to notify them that they would be contacting the HMRC to find out how to make a late appeal.

9. On 18 February 2022, RAL submitted three of the missing tax returns and then a fourth on 24 February 2022.

10. On 11 October 2022, HMRC acknowledged the returns but refused to accept the return for 2016-17 because it was outside of the 4-year statutory window for making a late return.

11. On 17 June 2022, RAL submitted a letter to HMRC noting the desire to make an appeal against the assessments and penalties.

12. On 28 October 2022, RAL submitted a further letter noting the desire to make a late appeal to HMRC against the assessments and penalties.

13. On 16 February 2023, HMRC refused to admit the late appeal.

14. On 21 June 2023, RAL submitted a notice of appeal to this Tribunal seeking to make a late appeal pursuant to section 49 of the Taxes Management Act 1970 (TMA 1970).

LAW

15. Section 49 of TMA 1970 provides:

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.

16. 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.

17. In summary therefore, pursuant to section 49 TMA 1970 and Rule 20 of the FTT rules, I have a discretion to allow an application for a late appeal against HMRC assessments for income tax and penalties.

18. 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.

PARTIES ARGUMENTS

19. RAL submitted, on behalf of Mr Davies, that:

- (1) They were trying to work with HMRC to resolve the issues regarding the past for Mr Davies, but had reached a roadblock because the compliance check closed in 2019 and HMRC will not accept a late appeal;
- (2) Mr Davies acknowledges that there is tax to pay, but nowhere near as much as HMRC have assessed. They want to reach a more open and fair position for Mr Davies;
- (3) Mr X had not done his job properly, both failing to reply to HMRC and failing to explain the compliance check and its consequences to Mr Davies;
- (4) By the time Mr Davies realised that he wasn't getting what he needed from Mr X, it was March 2020 and lockdown was upon him. Due to his and his wife's ill-health, he had had to isolate and therefore could not do anything until November 2021, when RAL took over;
- (5) He accepts that there is additional tax to pay, but not as much as HMRC has assessed, therefore it would be fairer to allow his appeal to go ahead;
- (6) They have been unable to obtain any further information from Mr X as to the source of the delay on his part;
- (7) Mr Davies had put faith in his accountant, Mr X, and only found out later that Mr X had not done what he needed to do;
- (8) Mr Davies is not fully literate and therefore relies on his advisers to get things right for him;
- (9) If he is not allowed to proceed to have his appeal heard, he will lose everything and as an older man with health troubles, he will not be able to rebuild his business, but if it is allowed to proceed and he can show that his income tax position was much lower, then he will be able to continue and will remain a taxpayer.

20. HMRC's arguments were as follows:

- (1) Following the decision in *BPP Holdings v HMRC* [2016] EWCA Civ 121, compliance with deadlines should be expected unless there was a good reason to the contrary;
- (2) I must follow the three stage approach in *Martland*;
- (3) The delay in this case is both serious and significant because the gap between
 - (a) the date that an in-time appeal could be made of 7 November 2019 (being 30 days after 9 October 2019 issue of the assessments and penalties); and
 - (b) the date an appeal was made to HMRC on 28 October 2022, was 2 years, 11 months and 22 days;
- (4) Even if the earliest correspondence from RAL, being a letter dated 17 June 2022, was taken as an appeal, the delay was still 2 years, 7 months and 10 days.
- (5) Mr Davies has not established a good reason for the delay. They argue that:
 - (a) The failure of a taxpayer's agent is not, in and of itself, a reasonable excuse;
 - (b) All correspondence had been sent to Mr Davies directly, not to Mr X;

- (c) Decision letters with clearly explained appeal timelines were sent directly to Mr Davies;
- (d) Mr Davies was clearly aware of the compliance check and enquiries because he attended a face to face meeting with HMRC and signed a mandate to allow HMRC to contact his bank directly in order to obtain information;
- (e) The delay in moving on from Mr X to RAL was approximately 2 years and no explanation is given for that delay;
- (f) It is not the actions of a taxpayer taking reasonable care to appoint an agent and just assume they are doing things correctly and Mr Davies should not be able to avoid charges by blaming someone else;
- (g) Mr Davies received several threats of bankruptcy proceedings from HMRC, starting in December 2019 and then repeating in January 2020, October 2020 and 13 June 2022;
- (h) HMRC's view is that the real reason for seeking to appeal against the assessments was the bankruptcy threats, rather than an inability to contact a new agent;
- (i) On the third step of Martland, HMRC identified that there is public interest in bringing finality and HMRC would be prejudiced by diverting resources from other proceedings onto a matter that they should have been entitled to consider closed;
- (j) The prejudice to Mr Davies in not being able to bring his appeal is acknowledged, but does not outweigh the other factors;
- (k) The merits of the underlying appeal were not considered in detail, but HMRC consider them to be weak for a number of reasons, including there had been many opportunities to provide HMRC with information, including a formal information request that led to penalties being issue for non-compliance; and no reasons have being given for the failure to notify liability to income tax and therefore it is not clear what the appeal against the penalties would consist of.

EVIDENCE

- 21. In addition to the bundle, Mr Davies also gave oral evidence and was cross-examined by HMRC's presenting officer.
- 22. His evidence was that:
 - (1) Mr X had been the third accountant he had used after the retirement of his previous two accountants;
 - (2) He had approached Mr X because he had done the accounting for two other pubs in Neath;
 - (3) Mr Davies does not know how all the tax and accounting worked so he needed someone else to do it for him;
 - (4) He paid Mr X to do it for him, and thought that Mr X was sorting everything out;
 - (5) After a while, he concluded that Mr X seemed not to know what he was doing, something gave Mr Davies the impression that Mr X was "off";
 - (6) When asked what made him think that, Mr Davies replied that Mr X had turned up to his premises with the wrong accounts for a different pub and showed him the

wrong numbers. He couldn't remember when that had happened but it was a few years ago;

(7) When asked what he had been doing in January and February 2020, he replied that he had been calling Mr X but got no reply;

(8) When he received any letters from HMRC, he would call Mr X and arrange to meet up to hand over the letters – they would usually meet in the pub, or his house, or Mr X would come by and collect them, but Mr X didn't have an office;

(9) During COVID, he had had to isolate due to looking after his wife and because he had a heart attack and that things had just got on top of him over the last year or so;

(10) When asked, he explained that the heart attack had been 14 years ago and that he was now taking medication and had not had any more heart problems.

DISCUSSION

23. As to the first stage, I find that the delay has been both serious and significant. I consider that the first attempt at a written appeal by RAL was made on 17 June 2022, not 28 October 2022. However, at over two and a half years, this is still serious and significant.

24. Turning to the second stage, I need to consider what the reason for the delay was. Mrs Sharrock invited us to focus in on the failures of Mr X, particularly given how completely dependent Mr Davies is on his accountants, and the impact of COVID.

25. I accept Mr Davies evidence that tax and accounting is very much not his strong point and that he would be reliant on his adviser to complete the necessary forms for him.

26. However, Mr X had attended the face to face meeting with HMRC in June 2018 and therefore was certainly aware that there were substantial questions to be answered regarding his tax position going back over a number of years.

27. His evidence was also that he had been able to work out that Mr X was not doing the best job.

28. Therefore, I conclude that, while Mr Davies was reliant on Mr X for his accounting and tax services, this reliance was not total – he was aware that his tax position was not in a compliant state and aware that Mr X was not completely reliable. As a result I find that it was incumbent on Mr Davies to ensure that progress continued to be made to get his tax affairs in order and that he was capable of ensuring that this happened.

29. With regard to the impact of COVID, I accept that Mr Davies was in a vulnerable position regarding COVID and the need to isolate, however, I also note that the agent authorisation letter, signed by Mr Davies, appointing RAL was dated 22 January 2021. Given that Mr Davies had been able to find and appoint RAL in January 2021, the inability to do anything due to COVID restrictions certainly did not extend past that point.

30. I therefore do not find that there were reasons outside of Mr Davies' control that gave rise to the substantial delay in filing his appeal. No other reasons were given for the delay other than that things had got on top of him. While this might have been the case, it is not a good reason for failing to take action on a timely basis in regards to assessments for tax and penalties of well over £100,000.

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. I accept that there will be prejudice to Mr Davies. There is a considerable sum of tax and interest at stake, which he will be unable to challenge if the appeal is not allowed to proceed late.

33. There will also be prejudice to HMRC in having to resurrect their case in circumstances where HMRC had considered that the case was closed. They would have to divert resources away from other appeals and enquiries that have been dealt with on a timely basis.

34. There was some discussion of the merits of the case at the hearing. 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.” Given that this case is very clearly one that would be based on substantial factual evidence adduced to justify figures for income and expenditure over an extended period, none of which were in front of me, I consider that it is not appropriate in this case to take merits into account at all. I have therefore not weighed it all in the balancing exercise.

35. Drawing these factors together in the balancing exercise, I do not consider that Mr Davies has 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 him to bring a late appeal in this case.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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 MCGREGOR
TRIBUNAL JUDGE**

Release date: 25 July 2024