TC01410

Appeal number: TC2011/00889

Application for leave to appeal out of time – two year delay – application refused.

FIRST-TIER TRIBUNAL

TAX

KEVIN WELCH **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: LADY MITTING (TRIBUNAL JUDGE)

Sitting in Stoke on 20 May 2011

Mrs Clews appeared for the Appellant

Mr P Jones of the Solicitor's office of HM Revenue and Customs for the Respondents.

DECISION

1. On 22 September 2008, HMRC issued an assessment against Mr Welch in the sum of £5,522.08. Any appeal against the assessment should have been lodged within 30 days, i.e. by 22 October 2008. An appeal was received on the 19 October 2010 but was rejected by HMRC, as being out of time and they refused to accept a late appeal. I heard the application for admission of a late appeal on 20 May 2011. I rejected the application, giving my reasons orally with the consent of the parties. The Appellant has now requested full written reasons which I hereby give.

Legislation

2. Section 49 Tax's Management Act 1970 provides as follows:

> "(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
>
> (3) If the following conditions are met HMRC shall agree to notice being given after the relevant time limit.
>
> (4) Condition A is that the Apellant has made a request in writing to HMRC to agree to the notice being given.
>
> (5) Condition B is that HMRC are satisfied that there was a reasonable excuse for not giving notice before the relevant time limit.
>
> (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
>
> (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the Appellant whether or not HMRC agree to the Appellant giving notice of appeal after the relevant time limit.
>
> (8) In this subsection "relevant time limit", in relation to notice of appeal, means the time limit before which the notice is to be given (but for this section)."

3. Section 118 (2) Tax's Management Act 1970 provides:

> "For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

Chronological Background

4. On 11 July 2007, HMRC wrote to Mr Welch advising him that they intended to look again at his returns for the years ended 5 April 2001; 2002 and 2003 under the discovery provisions of Section 29 T.M.A. HMRC also copied Mr Welch into a letter of the same date written to his accountants, David Thomas, Business Services in which a number of questions were asked. In the absence of any response from the agents, HMRC wrote reminders dated 7 September 2007, 22 October 2007, 16 January 2008, 25 February 2008. HMRC also wrote direct to Mr Welch on the 28 March 2008 asking for a response. In response to the letter of 28 March, Mr Welch rang HMRC on 7 April to say that his agent was no longer acting for him and that he thought that everything had been sorted out. He was advised that that was not so.

5. On 10 April 2008, HMRC were notified that a new agent had been appointed and received a call on the 15 April 2008 from a Mr Jones of Tixall Accountancy. Mr Jones advised that he was now acting and would respond to HMRC. Three months elapsed with nothing further being heard and HMRC wrote again to Mr Welch on the 8 July asking for an agent authority. Still nothing was heard from either the agent or from Mr Welch and on the 18 August 2008, HMRC tried to telephone the two numbers it had for Mr Welch but both lines were dead. HMRC therefore wrote to Mr Welch on the 19 August advising that they had heard nothing and concluding "will you please telephone me within the next 14 days to avoid formal assessments/proceedings." Nothing was heard and the assessment was raised on the 22 September 2008.

6. Mr Welch telephoned on the 26 September 2008 to say that he thought that his agent had provided everything and that the case had been settled. It was made clear to him that this was not the case. On 30 September, Mr Welch telephoned to say that he would ask his agent to call and a phone call was received that day from Mr Jones who advised he was trying to obtain information from the previous agent. Still nothing further was heard and by letter dated 16 January 2009, copies of all earlier correspondence and the assessment were sent out to the agent. He was also expressly informed in this letter that no appeal had been lodged. Thereafter, despite telephone calls and reminders to agent and Mr Welch nothing further was heard and the job of the assessing officer was in effect over and the debt was in the hands of the Debt Management Unit.

7. Nothing further was heard until September 2010 when Messrs Clews & Co. became involved and the appeal was lodged.

8. It is therefore against this chronological background that the application for permission to appeal out of time falls to be considered.

9. I comment first, but briefly, on the merits of the appeal. No detailed evidence was given as the hearing was not concerned with the substantive issue. The assessment was made up on two elements – a suspected under declaration of Director's remuneration and an estimated capital gain on Mr Welch's disposal of his share-holding in K-Nex Ltd. HMRC based their figures on the very limited information which they did have as no employment page for 2002/03 had ever been completed or submitted and no capital gains tax computation was ever submitted for the sale of the shareholding. Information and clarification on both issues had been sought but none provided. Mr Welch no longer had any paperwork or records to support his appeal but maintained that he had made very little income and did not think that his shareholding would have triggered any capital gain. In fact, at one stage in correspondence, Mrs Clews suggested, "given that there is no evidence from either party to support the undeclared income, we feel it should be reduced to nil."

10. If leave to appeal out of time were given, the onus of proof in the substantive hearing would be on Mr Welch. If ever he had the documentation, he has it no longer and he therefore has virtually no prospect of success, given that he has no evidence to support his claim. In a further letter dated 15 September 2010 Mrs Clews suggested, "In light of how old this case is, would it be possible to render the case closed in the absence of Mr Welch being able to provide any evidence to defend his position?"

11. Again, it is bearing this factor also in mind that I consider the application.

Mr Welch's contentions

12. Mr Welch maintained that he had been naïve in his dealings with his tax affairs. He had believed that his agents were dealing with matters on his behalf but he accepted that he should have been more pro-active in chasing them up. He felt that the subjects of the assessment – especially the capital gains tax issue – were too complex and technical for him as a layman to understand and deal with himself. He therefore had, in his own mind, no alternative but to rely on his accountants. He had on occasion telephoned HMRC but had believed or got the impression that they did not wish to speak to him but would only deal with his agent. He had been assured by Mr Jones that he was dealing with everything properly and indeed whenever Mr Welch received anything from HMRC he took it round to Mr Jones. As far as merit was concerned, relying on an on-line company credit report, Mr Welch estimated his assessable income at £2,210 (he was only a director for 43 days of the assessable tax year) and he put in a draft capital gains computation showing a chargeable gain of nil.

Conclusions

13. Mr Welch clearly received the assessment. He accepts that he did and indeed he telephoned HMRC within days of having received it. The letter of assessment quite clearly advised Mr Welch of the need for him to give written notice of appeal within 30 days if he did not agree to the figures. For the next couple of years, Mr Welch

received regular statements from the Debt Management Unit so, clearly, must have been aware that his accountants had not resolved matters.

14. I do not know how far, if at all, the figures put in on the day would go towards resolving the substantive issue if leave to appeal were given but whatever was put in on the day could and should have been put in considerably earlier. There has to be a measure of finality in one's dealings with one's tax affairs. The public interest requires it.

15. It is no support to Mr Welch's claim that he relied upon his representatives. A tax payer cannot abdicate his responsibility by relying on his accountants. The ultimate responsibility always lies with the taxpayer and it is incumbent upon every taxpayer to keep tabs on his accountant and make sure that whatever needs to be done is being done. As I said previously, Mr Welch could not reasonably have thought that this was the case because of the many demands for payment which he received from the DMU. Mr Welch did not act as a reasonable diligent taxpayer should have done. There has been no good explanation as to why the appeal was not lodged within time and the appeal was not put in, "without unreasonable delay after the reasonable excuse ceased". Once Mr Welch realised that his representative was not acting properly on his behalf, he should thereafter have acted speedily to rectify his accountant's failure but unfortunately he did not.

16. For all these reasons I find that HMRC acted perfectly reasonably in refusing the application for a late appeal to be accepted and I also refuse it.

17. 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.

TRIBUNAL JUDGE:

RELEASE DATE: 22 AUGUST 2011