[2016] UKFTT 486 (TC)

**TC05236**

**Appeal number: TC/2016/01204**

***APPEALS – application for permission to bring appeal outside the time limit for doing so – permission refused***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**PATRICK NEWTON** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER**
**MS JANET WILKINS**

**Sitting in public at Northampton on 7 July 2016**

**No appearance by or on behalf of the Appellant**

**Mrs Linda Shepherd, presenting officer, for the Respondents**

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DECISION

## Introduction

1. The Appellant seeks to appeal against various notices dated 15 September 2010 issued under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003.

2. On 2 October 2015, the Appellant wrote to HMRC, seeking to appeal against those notices. By then, the appeal was out of time by over 5 years. The Appellant's letter set out his reasons for seeking permission to bring a late appeal.

3. In a decision dated 14 January 2016, HMRC refused to accept an out of time appeal. This decision was resent to the Appellant under cover of a letter from HMRC dated 26 January 2016.

4. In a notice of appeal dated 25 February 2016 initiating the present proceedings before this Tribunal, the Appellant states that he appeals against the "26 January 2016 decision". The substantive decision against which the Appellant seeks to appeal is the 14 January 2016 HMRC decision, refusing to accept the out of time appeal. The present Tribunal proceedings are thus in effect an application under s 49(2)(b) of the Taxes Management Act 1970 ("**TMA**").

## Applicable legislation and rules

5. Section 49 of the TMA states 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 appellant 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 reasonable excuse for not giving the 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 section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section).

6. Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules") states as follows:

(4) If the appellant provides the notice of appeal to the Tribunal later than the time required by paragraph (1) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—

(a) the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Tribunal must not admit the notice of appeal.

## The hearing

7. A hearing of the application for a late appeal was listed for 7 July 2016 in Northampton. At the hearing, there was no appearance by or on behalf of the Appellant. The Tribunal accordingly gave consideration as to whether to proceed to hear the application in the Appellant's absence.

8. The Tribunal noted that in a letter dated 16 May 2016, HMCTS informed the Appellant of the date, time and place of the 7 July 2016 hearing. That letter was sent to the Appellant to the e-mail address given by the Appellant in the notice of appeal. The letter itself also bore the street address of the Appellant given in the notice of appeal, although it is unclear whether the notice of hearing was sent only by e-mail, or whether it was also sent by post. The Tribunal considered that even if it was only sent by e-mail, reasonable steps had been taken to notify the Appellant of the hearing, and that this satisfied the requirement of rule 33(a) of the Rules.

9. For purposes of rule 33(b), the Tribunal was also satisfied that it was in the interests of justice to proceed with the hearing, having regard to the following. The Appellant had been advised by the 16 May 2016 HMCTS letter that if he did not attend the hearing, the Tribunal may decide the matter in his absence. The Appellant had not requested a postponement of the hearing. The Appellant therefore might not attend the hearing even if the matter were adjourned or postponed. Mrs Shepherd was present and had prepared for the hearing. Unnecessary adjournments or postponements on the day of hearing are inconsistent with the public interest in judicial efficiency. Rule 38 of the Rules makes provision for a decision of the Tribunal to be set aside in circumstances where the Appellant or his representative were not present at the hearing, if it is in the interests of justice to do so (rule 38(2)(d)). The Tribunal accordingly proceeded with the hearing.

## The Appellant's application

10. The Appellant's grounds in justification of allowing a late appeal, given in his grounds of appeal and in his 2 October 2015 letter to HMRC, are as follows. His father died suddenly in 2006 by drowning, and he spent most of his time going back and forth to Ireland to look after his family as his father's death went through the courts. This was a difficult time for the Appellant and he was diagnosed with depression. Subsequently, his brother died of cancer in 2009. He left matters with his accountant and presumed that his accountant was dealing with the matter. As he had heard nothing, he assumed that the matter had been resolved. In 2010, his step-brother was diagnosed with cancer. In 2011, his home suffered a severe flood. He subsequently changed accountants, and was under the impression that his new accountant was dealing with everything. After 2012 the Appellant himself was undergoing chemotherapy. He received letters from HMRC but was not mentally equipped to deal with matters buried his head in the sand. He is now fully recovered and looking to settle matters. Since 2015 he has been in continuous communication with HMRC seeking to resolve matters.

## The HMRC position

11. The HMRC position is as follow. HMRC empathises with the bereavements that the Appellant has suffered between 2006 and 2010. However, HMRC is not satisfied that this would have prevented the Appellant from appealing within the 30 day time limit. HMRC disputes the relevance of a flood in 2011. Although the Appellant says that he himself has also suffered ill-health, he has submitted tax returns for 2013-14, 2012-13, 2011-12 and 2008-09, suggesting that he was working during these years. During the period October 2010 to October 2015, communications in the form of letters, demand notices and telephone calls were undertaken by HMRC's Debt Management and Banking. The Appellant would have been well aware of the amounts due. There was no appeal until HMRC's Debt Management commenced bankruptcy proceedings. HMRC rely on *Ferguson v Revenue and Customs* [2016] UKFTT 393.

## The Tribunal's findings

12. The Tribunal has considered all of the material before it.

13. Section 49(2)(b) of the TMA does not contain a "reasonable excuse" test. It would seem to follow from the wording of that provision, and from the cases of *R (Browallia Cal Limited) v GCIT* [2003] EWHC 2779 (Admin) at [12]-[14] and *R (Cook) v GCIT* [2009] EWHC 590 (Admin) [2003] EWHC 2779 (Admin), that the discretion of the Tribunal under s.49(2)(b) of the TMA is at large, and involves a weighing of all relevant considerations.

14. In *Data Select v HMRC* [2012] UKUT 187 (TCC), it was said by the Upper Tribunal at [34]-[37] that:

> 34. ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a

> general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.
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> 35. The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker* [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see *Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc* [2007] STC 1196.
>
> 36. I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [23]-[24] which is in line with what I have said above.
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> 37. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision.

15. The Tribunal takes into account all of the matters identified in this quote, including the public interest in the finality of tax matters and in the finality of litigation, and that time limits for bringing appeals exist for a good reason. Indeed, that can be considered the starting point of any consideration of an application under s.49(2)(b). It is for the applicant to show reasons why an application to appeal out of time should be granted. The burden is not on HMRC to establish reasons why the extension should not be granted.

16. The Tribunal finds that each application to appeal out of time turns on its own particular facts and circumstances. Given that the Tribunal is not limited to a consideration of whether the Appellant has a "reasonable excuse" for the lateness, it will consider the circumstances as a whole, and not merely the soundness of the reasons for the lateness of the appeal.

17. While the burden is on the Appellant to show reasons why permission should be granted to appeal out of time, the strength of the considerations that must be established by the Appellant to justify permission being granted will depend on the strength of the countervailing considerations militating against the grant of permission.

18. The Tribunal has taken into account that the amount at stake is large from the Appellant's point of view, and the potential prejudice to the Appellant if an extension of time is not granted.

19. The Appellant has not advanced material from which the Tribunal could conclude that an appeal has prima facie merit.

20. A five year delay in bringing an appeal is an extremely long delay. Permission to bring a late appeal after such a long period may not be unprecedented, but it would only be in a rare case that a late appeal after such a long period of delay would be permitted. The Appellant has justified the delay with a very brief and general explanation of various personal difficulties he has had over the last years. While the Tribunal is sympathetic, it must take into account that no evidence of any of these difficulties has been provided, and only very general details. An applicant for a late appeal involving a delay of 5 years must be expected to present a much more detailed and evidenced case than the Appellant in this case has done.

21. Having weighed the circumstances as a whole, the Tribunal is not satisfied that the Appellant has established grounds justifying a late appeal. The applications is refused.

22. 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.

**DR CHRISTOPHER STAKER**
**TRIBUNAL JUDGE**

**RELEASE DATE: 13 JULY 2016**