[2018] UKFTT 347 (TC)

TC06562

Appeal number: TC/2018/01306

Stamp duty land tax – application for permission to notify a late appeal to HMRC – no grounds of appeal ever specified – no jurisdiction therefore to grant permission for such late notification – even if correspondence could be construed as constituting some basic grounds of appeal, permission would be refused in any event – Martland v HMRC considered – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARVIN ELLIOTT **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**

Sitting in Chambers on 20 June 2018

The Tribunal determined the application without a hearing on the basis of the documents in the Tribunal's file and written submissions received from HMRC. The appellant did not take up the opportunity offered to him, through his representative, of making submissions in reply. Neither party objected to the Tribunal's proposal that the matter be decided without a hearing unless either party objected to that course of action.

DECISION

Introduction

1. This decision relates to an application for permission to notify a late appeal in respect of an assessment to stamp duty land tax imposed by HMRC in consequence of their belief that the appellant had used an ineffective stamp duty land tax ("SDLT") avoidance scheme in his purchase of a property in Weybridge, Surrey.

The facts

Introduction

2. HMRC provided a written submission in support of their objection to the application made by the appellant for permission to notify a late appeal. Various copy documents were attached to that submission. A copy of it was provided to the appellant's representatives and they were required by the Tribunal (by letter dated 2 May 2018) to submit any representations in response within 28 days. No such representations have been received and accordingly I take it that the facts set out in HMRC's submission are not disputed.

3. The parties were informed that the Tribunal would make a decision on HMRC's objection without a hearing unless either party requested one or the Tribunal considered a hearing to be necessary. No such request was received. I consider this matter is capable of being resolved satisfactorily without the need for a hearing, and that it is in the interests of justice to do so.

4. I find the following facts

The appellant's purchase and HMRC's subsequent assessment

5. On 15 March 2012, the appellant completed his purchase of Deneside, Northfield, Weybridge, Surrey ("the Property") for £805,000. A stamp duty land tax return in form SDLT1 was submitted on his behalf by his solicitors Daybells LLP on 6 July 2012. This return gave a purchase price for the property of £85,000 and accordingly self-assessed the SDLT due as nil. In response to the question "Are you claiming relief?", the "No" box was marked on the return.

6. As part of its anti-avoidance activities, HMRC carried out a data matching exercise, to compare the prices shown on transfer deeds lodged with HM Land Registry with the consideration figures given on SDLT returns. They established the mismatch involved in the appellant's purchase of the Property. Accordingly, they wrote to the Appellant on 10 December 2015 sending him a discovery assessment for £32,200, being their calculation of the SDLT that should have been paid. In the letter notifying him of the assessment, HMRC said this:

> "If you would like to appeal against the enclosed discovery assessment then please notify me together with the grounds of your appeal in writing within 30 days of the date of this letter. It will help me when considering

your appeal if you could send me the documents and information listed on the enclosed schedule.

If you appeal I will consider any further information you send me to try to reach agreement with you. If we cannot agree, you can

- ask for my decision to be reviewed by an HMRC officer not previously involved in the matter, or
- notify your appeal to an independent tribunal.

If you opt for a review you can still notify your appeal to the tribunal after the review has finished.

You can find further information about appeals and reviews on the HMRC website http://www.hmrc.gov.uk/dealingwith/appeals.htm or you can phone the number on this letter. You can find out more about tribunals on the Tribunals Service website www.tribunals.gov.uk or you can phone them on 0845 223 8080."

The appellant's response to the assessment, and subsequent correspondence

7. In response, HMRC received a letter dated 1 February 2016 from Maxim Solicitors, who introduced themselves as having been instructed on behalf of the appellant. This letter read as follows:

"We have been instructed by Mr Marvin Elliott.

Our client has forwarded to us a copy of your letter dated 10 December 2015 raising a Discovery Assessment in respect of the SDLT paid by them on their purchase of the Property on 15 March 2012.

Our client wishes to Appeal against the Discovery Assessment and therefore please accept this letter as formal notice of appeal.

Your letter sets out various documents and information which are required in order for you to consider and deal with the Appeal. Such documentation and information would be contained in our client's original purchase file for the Property. The purchase was dealt with by Daybells Solicitors which we understand was sold to Nationwide Solicitors in January 2014. Nationwide Solicitors were subsequently intervened by the Solicitors Regulatory Authority ("the SRA") in October 2014. The Intervening Agents appointed by the SRA to deal with the closure of the Firm are Russell Cooke LLP. Accordingly, we will be writing to Russell Cooke LLP to retrieve our clients file. Once the file is received we will be able to furnish you with the documentation and information requested so that a final decision on our clients Appeal can be made.

However, in the interim, we would respectfully request and extension of time to deal with this matter and that no further enforcement action is taken.

We look forward to hearing from you."

8. On 2 March 2016, HMRC responded, acknowledging receipt of the appellant's appeal against the Discovery Assessment.

9. On 16 November 2016, HMRC wrote to the appellant direct, referring to the correspondence received from Maxim Solicitors, and saying that they were seeking written confirmation from Maxim of their authority to act on his behalf. On the same day, they wrote to Maxim Solicitors, asking them to "arrange to forward written authority, from all parties involved in the transaction that you act on their behalf."

10. On 6 December 2016, Maxim Solicitors sent a letter to HMRC enclosing a duly signed authority from the appellant in their favour, and asking HMRC to "let us know the procedure for lodging an appeal."

11. HMRC responded by letter dated 4 January 2017 to Maxim Solicitors. After acknowledging receipt of the form of authority, they said this:

> "Late appeals can be made after the 30-day appeal period has passed and may be accepted if you have a reasonable excuse why the appeal is late.
>
> If you wish me to consider a late appeal you will need to provide me with a full explanation of why your appeal has been sent in after the 30-day appeal period ended i.e why it is late and show that you appealed as soon as you could.
>
> You will also need to provide the grounds for the late appeal i.e an explanation as to why you disagree and all of the documents requested to support your appeal."

12. Having received no response, HMRC wrote again to Maxim Solicitors on 23 February 2017. They said that as they had received no response to their previous letter, the matter had now been passed to the Debt Management Unit, from whom the appellant would be hearing "in due course". A duplicate of this letter was sent direct to the appellant.

13. On 1 March 2017, the appellant called HMRC in response to HMRC's latest letter. He asserted that neither he nor Maxim Solicitors had received the earlier letter dated 4 January 2017 from HMRC. On 3 March 2017, HMRC wrote to Maxim Solicitors re-sending copies of the previous correspondence, having emailed them direct to the appellant at his request on 1 March 2017.

14. On 21 April 2017, Maxim Solicitors wrote a holding reply to HMRC, saying they were "reviewing the correspondence and will respond." They requested that no further enforcement action be taken for the time being.

15. On 9 May 2017, HMRC replied by letter, confirming that enforcement action would be postponed for a further 14 days and that "I look forward to hearing from you shortly."

16. On 7 June 2017, Maxim Solicitors sent a further holding letter, saying that the writer had been "away from the office for some time due to personal issues but has now returned. We are urgently reviewing the correspondence and will respond. In the interim, please refrain from taking any further enforcement action."

17. On 26 June 2017, HMRC replied, stating that "I have postponed further enforcement action for 30 days from the date of this letter upon which I will release the tax for collection. I look forward to hearing from you shortly."

18. In the absence of any response, on 21 August 2017 HMRC wrote again to Maxim Solicitors, stating that "I will postpone enforcement action for a further 14 days from the date of this letter upon which I will realise *[sic]* the tax for collection."

19. In the continued absence of any response, on 16 October 2017 HMRC wrote again as follows:

> "As I have not received a response to my letter dated 21 August 2017, I will not accept a late appeal and I have released the tax for collection."

20. A copy of this letter was sent to the appellant on the same day.

21. On 20 October 2017 Maxim Solicitors replied:

> "We are somewhat surprised by the contents of your letter as it refers to your previous letter of 21 August 2017 which we have no record of receiving. Accordingly, please can you send us a duplicate copy of your letter so we can respond.
>
> In the interim, please refrain from taking any enforcement action."

22. On 8 November 2017, HMRC wrote again, sending a further copy of their letter dated 21 August 2017. They went on to say this:

> "As I have extended the deadline for appeal several times I am now unable to agree to another extension and the charge will remain in place until I receive a valid and acceptable appeal.
>
> In order for me to accept your client's late appeal he will have to provide valid grounds for the appeal as set out in paragraphs 44(3) to (6) Schedule 10 FA2003. If he wishes to continue with the appeal he must state the grounds which either dispute the legal reasoning or the facts that the assessment is based upon. Please explain why he believes the amount of the SDLT assessed is not legally due. He will also need to provide me with a full explanation of why the appeal has been sent in after the 30-day appeal period ended i.e why it is late and show that he appealed as soon as you could.
>
> If your client fails to satisfy me he can appeal the refusal to the Tribunal."

23. The next material event was the receipt by the Tribunal, on 7 February 2018, of a letter from Maxim Solicitors dated 29 January 2018, which identified itself as "Formal

Notice of Appeal against the Discovery Assessment dated 10 December 2015 issued by HMRC". The letter went on to say this:

> "We are aware that this Notice of Appeal is being filed late and we would respectfully request the Tribunal to grant the Appellant Permission to make a late Appeal for the following reasons:
>
> 1. This firm did not act on the purchase of the Property.
>
> 2. Daybells Solicitors ("Daybells") acted for the Appellant in the purchase of the Property which completed on 15 March 2012. The Appellant used a Stamp Duty Mitigation Scheme operated by an independent Stamp Duty Mitigation Company to save a proportion of the Stamp Duty Land Tax ("SDLT") that otherwise would have been payable in respect of the purchase of the Property.
>
> 3. Daybells, was sold to Nationwide Solicitors in January 2014. At the time of sale all Daybells files were transferred to Nationwide Solicitors including all closed files.
>
> 4. Nationwide Solicitors were subsequently intervened by the Solicitors Regulation Authority ("SRA") in October 2014. At this point all Daybells and Nationwide files were transferred to the custody of the SRA.
>
> 5. Our Mr F Sheikh requested the Original Daybells purchase file initially from the intervening Agents Russell Cooke LLP from the SRA but without any success. Please find attached copies of the relevant correspondence which demonstrates that the Appellant has taken all reasonable and necessary steps to locate the file.[1]
>
> 6. Unfortunately, despite our best efforts to locate the file, the file is still missing and as such we are unable to advise the Appellant upon the success of appealing against the HMRC initial Discovery Assessment.
>
> 7. Please note that this Firm initially put HMRC on notice that the Appellant wished to Appeal their decision as long ago as 01 Feb 2016. In this regard we attach copy Letter Maxim to HMRC dated 01 Feb 2016 and response HMRC to Maxim 02 March 2016.
>
> 8. Without the file or any documents it is impossible to challenge HMRC's decision which in the Appellant's opinion is incorrect. The Appellant still wishes to Appeal the decision and hence we request the honourable Tribunal to allow him the Permission to make a late Appeal so that he can put forward his version of events before the Court to make a final decision."

[1] The relevant document included in the bundle was a copy of a letter to Maxim Solicitors from the SRA dated 5 August 2016, in which they responded to a request for the documents and stated that they had no record of the file which was being sought.

24. The above letter did not fulfil all the requirement to constitute a valid notice of appeal to the Tribunal. After the necessary further information was obtained, the letter and the subsequent information were notified to HMRC by the Tribunal on 21 March 2018.

25. On 5 April 2018 HMRC delivered their submission objecting to the late appeal.

The legislation

26. Schedule 10 of the Finance Act 2003 ("FA03") provides, so far as relevant, as follows:

> "**35** – (1) An appeal may be brought against –
>
> …
>
> (c) a discovery assessment
>
> …
>
> **36** – (1) Notice of an appeal under paragraph 35 must be given –
>
> (a) in writing
>
> (b) within 30 days after the specified date,
>
> (c) to the relevant officer of the Board.
>
> ….
>
> (4) In relation to an appeal under paragraph 35(1)(c) or (d) –
>
> (a) the specified date is the date on which the notice of assessment was issued, and
>
> (b) the relevant officer of the Board is the officer by whom the notice of assessment was given.
>
> …
>
> (5) The notice of appeal must specify the grounds of appeal.
>
> …
>
> **36A** – (1) This paragraph applies if notice of appeal has been given to HMRC.
>
> (2) In such a case –
>
> (a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see paragraph 36B).

(b) HMRC may notify the appellant of an offer to review the matter in question (see paragraph 36C), or

(c) the appellant may notify the appeal to the tribunal (see paragraph 36D).

…

36D – (1) This paragraph applies in a case where paragraph 36A applies.

(2) The appellant may notify the appeal to the tribunal.

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

…

44 – (1) This paragraph applies in a case where –

(a) notice of appeal may be given to HMRC under this Schedule or any other provision of Part 4 of this Act, but

(c) 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 sub-paragraph (4) was made without unreasonable delay after the reasonable excuse ceased.

(7) If a request of the kind referred to in sub-paragraph (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 paragraph "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this paragraph)."

Discussion and decision

No valid notice of appeal ever submitted to HMRC

27. It can therefore be seen that, to be a valid notice of appeal to HMRC under paragraph 36 above, such notice had to be given within 30 days after 10 December 2015 and it had to specify the grounds of appeal (see sub-paragraphs 36(1)(b) and 36(5)).

28. The letter dated 1 February 2016 to HMRC complied with neither of these requirements.

29. In order to establish whether permission ought to be granted under paragraph 44, it is necessary to establish at what point in time a notice of appeal was delivered to HMRC which (apart from being late) fulfilled the requirements of paragraph 35 to constitute a valid notice of appeal.

30. In the present case, that presents the appellant with a difficulty. None of the correspondence (with the possible exception of Maxim's letter dated 29 January 2018 to the Tribunal) said anything which could fairly be regarded as the appellant's "grounds of appeal" (i.e. the basis upon which it was being claimed that the appellant was not liable to pay the SDLT which had been assessed). The whole tenor of the correspondence (including the 29 January 2018 letter) was to explain why the appellant was not in a position to put forward any grounds of appeal – due to his inability to obtain the conveyancing file in relation to his purchase of the Property.

31. The nearest that the appellant comes to setting out "grounds of appeal" is the statement in that letter that "The Appellant used a Stamp Duty Mitigation Scheme operated by an independent Stamp Duty Mitigation Company to save a proportion of the Stamp Duty Land Tax ("SDLT") that otherwise would have been payable in respect of the Property." However, that letter went on to say "Without the file or any documents it is impossible to challenge HMRC's decision which in the Appellant's opinion is incorrect." This amounts to a statement that either the appellant has no grounds of appeal or, if he does, he does not yet know what they are and so is certainly unable to specify them.

32. Thus the appellant's application falls at the first hurdle. Before the Tribunal can give permission under paragraph 44 for a late appeal, the appellant must have notified an appeal to HMRC which (apart from being late) was a valid appeal under paragraph 36. In my view, this appellant has failed to do so; the appeal to HMRC did not comply with the requirements of paragraph 36(5) by failing to specify his grounds of appeal, nor was it given to HMRC (it was sent to the Tribunal). For this reason alone, his application must be dismissed.

Even if valid (but late) notification of appeal, should permission be given?

33. Even if I were to consider the letter dated 29 January 2018 to amount to a valid notice of appeal to HMRC in spite of the above defects, it would have been given something over two years outside the 30 day time limit.

34. When considering whether to grant permission in another "late appeal", the recent Upper Tribunal decision in *Martland v HMRC* [2018] UKUT 0178 (TCC) provided the following guidance (at [44] *et seq*) after reviewing the authorities (in that case, the issue was whether a late appeal to the Tribunal should be admitted, but I consider the same considerations should apply to the question of whether permission should be given for a late appeal to be notified to HMRC):

> "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."

35. Following this guidance, I consider that:

(1) The length of the delay was great. The due date for submitting a notice of appeal to HMRC was in January 2016. Even if the 29 January 2018 letter from Maxim Solicitors to the Tribunal is accepted as constituting a valid notice of appeal, the period of delay was over two years.

(2) The reason for the delay was a combination of circumstances. The most important feature was the appellant's adviser's failure to consider the relevant law and comply with it on time. However, HMRC's repeated extensions of time also contributed to some extent. It might be argued that the course of correspondence from HMRC could have led the appellant to believe, right up until HMRC's letter dated 8 November 2017, that the time limit for notifying an appeal was being extended. However, there could be no doubt of the position following that letter, and it was well over a further three months before the letter dated 29 January 2018 from the appellant's solicitors was received at the Tribunal.

(3) In the light of the facts as set out above, and having regard to the "particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected", and also bearing in mind the statement by the appellant's own solicitors that "without the file or any documents it is impossible to challenge HMRC's decision", in the exercise of my discretion I would not in any event grant permission for late notification of the appeal to HMRC.

Summary

36. In the absence of any valid notification of the appeal to HMRC, the Tribunal has no jurisdiction either to grant permission for late notification of such an appeal, or to consider the substantive appeal itself. Even if it were possible to construct a valid (but late) notification of an appeal to HMRC out of the desultory correspondence, the very earliest point at which it could be said that such notification took place was at least two years after the statutory deadline and, for the reasons set out above, I would not grant permission for such late notification in any event.

37. The application to the Tribunal is therefore DISMISSED.

38. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 25 JUNE 2018