



TC07854

*INCOME TAX – Permission to appeal out of time -penalties for failure to make tax return -
Schedule 55 of the Finance Act 2009*

FIRST-TIER TRIBUNAL

Appeal number: TC/2020/01376

TAX CHAMBER

BETWEEN

JUDAH DEVEREAUX

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

TRIBUNAL:

JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 22 September 2020 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 28 April 2020 (with enclosures), HMRC’s Statement of Case acknowledged by the Tribunal on 6 July 2020, the Document Bundle of 40 pages prepared by HMRC (“the Bundle”) and the Legislation and Authorities Bundle of 164 pages also prepared by HMRC.

DECISION

INTRODUCTION

1. The appellant is applying for permission to appeal out of time in relation to penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit annual self-assessment returns on time for the tax year 2015-16.
2. The penalties that have been charged, can be summarised as follows:
 - (1) Initial late filing penalty under paragraph 3 of Schedule 55 of £100.
 - (2) A “six month” penalty under paragraph 5 of Schedule 55 of £300.
 - (3) A “twelve month” penalty under paragraph 6 of Schedule 55 of £300. The penalty charged is of the default amount and there is no suggestion that the appellant deliberately withheld information.
 - (4) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55.
 - (5) The total amount of the penalties which remain in issue is £1,600.
3. The appellant’s reasons for appealing against the penalties out of time are the same as her substantive grounds for appealing against the penalties. They are set out in her Notice of Appeal dated 28 April 2020 and are set out verbatim below.
4. The reasons for a late appeal are as follows:
 - (1) “My mother died shortly before the tax return or payment deadline.
 - (2) I had an operation in hospital that prevented you from dealing with your tax affairs (sic).
 - (3) I have a serious, life-threatening illness.
 - (4) Service issues with HM Revenue and Customs (HMRC) online services subsequently a postal tax assessment was sent in.
 - (5) My home being demolished prevented me from completing my tax return.
 - (6) Delays related to a disability I have”
5. The appellant’s appeal to HMRC under section 31A TMA was made outside the statutory deadline. HMRC have not given consent under s49(2)(a) TMA for the late appeal. The appellant now applies to the Tribunal for permission to proceed with the late appeal under section 49(2)(b) TMA. HMRC object to the application.
6. Penalty notices were issued as follows:
 - (1) Initial late filing penalty: 7 February 2017
 - (2) Daily penalties: 11 August 2017
 - (3) Six month late filing penalty: 11 August 2017
 - (4) Twelve month late filing penalty: 20 February 2018.
7. The appellant had 30 days from the issue of each penalty notice to appeal against the penalty to HMRC.
8. HMRC’s Statement of Case indicates that the appellant appealed against all the penalties on 25 October 2019.
9. HMRC rejected the appeal as out of time by a letter dated 8 January 2020.

10. HMRC wrote another letter on 24 March 2020, part of which was attached to the Notice of Appeal which appeared to be a review letter which upheld the original decision. The Appeal to the Tribunal is therefore a few days out of time, but HMRC have not taken this point and I have decided it is in the interests of justice to proceed.

FINDINGS OF FACT

11. HMRC's computer records show that the tax return for the year ended 5 April 2016, was submitted in paper form on 25 April 2018. It should have been submitted by 31 October 2016. The return was accordingly, nearly eighteen months late.
12. The first question is whether the notice to file and penalty notices were sent to the appellant. HMRC do not keep copies of the actual notices sent to taxpayers, but their computer records show that notices to file a tax return and penalty notices were sent to the appellant. HMRC assert that the notices were sent to the addresses on record for the appellant on the relevant dates. I was provided with specimen copies of the various notices. The form of penalty notice not only sets out the amount of the penalty, it states that the taxpayer must submit their tax return and warns of further penalties if they fail to do so. It also sets out the 30 day deadline for appealing against the penalty. HMRC's records show two addresses for the period in question. The appellant's current address ("Forbes Close") as shown on the Notice of Appeal was effective from 10 December 2016 and the previous address ("Eastfield") from 2014 to August 2016. HMRC state that all notices to file and penalty notices were sent to the relevant addresses on record and that no correspondence has been returned undelivered.
13. HMRC submit that the provisions of section 115 TMA concerning service of the notices were complied with, and that the notices are deemed to have been delivered by virtue of section 7 Interpretation Act 1978. The provisions are:

"115.— Delivery and service of documents.

- (1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence:
- (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person [by HMRC] may be so served addressed to that person—
 - (a) at his usual or last known place of residence, or his place of business or employment, or...

"7. References to service by post.

Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

14. Although the only evidence of the issue of the notice to file and penalty notices and the addresses to which they were sent is contained in HMRC's computer records, the appellant does not deny receiving them. In addition, HMRC's records of taxpayer contact (the "SA Notes") show that the appellant telephoned them on 15 April regarding her 2015-16 tax return and explained she was having problems obtaining the password to submit the return online. She was given information about this. She also requested, and was sent, a paper tax return.

15. I therefore find that the appellant did receive the notice to file a tax return.
16. HMRC's computer records show that the penalty notices referred to above were issued. Although there is no additional evidence of this, the taxpayer does not dispute receipt of the notices.
17. According to the SA Notes, the appellant had other telephone contacts with HMRC in February 2017 and April 2018 when she was told that she still needed to submit a tax return for 2015-16. It seems that the appellant did not think she needed to submit a return for that year as she had ceased her self-employment in the course of the year. She was repeatedly told that she did need to submit a return and state the date of the cessation.
18. For the purposes of this application to appeal out of time against the late-filing penalties, I do not, strictly, have to decide whether the notices were correctly served, but, on the balance of probabilities, I find that they were correctly served and that the appellant was aware that she needed to submit returns and that penalties were accruing.
19. The appeals against the penalty notices were between 581 days and 960 days, or between eighteen and thirty months, late.
20. Ms Devereaux's Notice of Appeal asserts that she suffered a series of misfortunes including the death of her mother, illness, an operation, disability, her home being demolished and service issues with online tax filing.
21. All of these are, as set out on HMRC's website, *capable* of constituting a reasonable excuse. "Reasonable excuse" is relevant to the substantive appeal, but is not, of itself, the test as to whether I should permit a late appeal. However, the reasons for the delay in appealing are a very important factor to take into account and, as noted the grounds of appeal are the same for the permission to appeal application and the substantive appeal.
22. To the extent that the appellant's grounds mention timing, they relates to events occurring around the time of the return submission deadline. While this might be relevant to the substantive issue of late filing, it does not help with the late appeal against the penalties.
23. Ms Devereaux has not, unfortunately, provided me with any evidence about the various unfortunate events beyond the bare assertions set out above. I do not know when they occurred, how long they lasted for and how they prevented her from submitting her appeal in time. The burden of proving these things is on Ms Devereaux.
24. There is some evidence about the service issues as the SA Notes indicate that Ms Devereaux contacted HMRC about problems with obtaining her online ID and password. However, she appeared to be having the same problem two years later, and in any event, she had requested, been sent, and ultimately submitted a paper return. Again, this does not explain why she was unable to appeal against the penalties in time.

DISCUSSION

25. I have concluded that the tax return for 2015-16 was submitted on 25 April 2018 and was accordingly approximately eighteen months late. I have also concluded that the appellant received the notice to file and the penalty notices and had various telephone conversations with HMRC so that she was aware of the need to file a tax return and that penalties had been charged.

26. I have found that the appeals to HMRC against the late filing penalties were between eighteen and thirty months late.
27. Accordingly, the appellant may not proceed with the appeals unless I give permission for the appeals to be heard out of time under section 49(2)(b) TMA.
28. The Upper Tribunal has recently considered the approach to granting permission to bring late appeals in the case of *William Martland v The Commissioners for HMRC* [2018] UKUT 0178 (TCC) (“*Martland*”).
29. The Upper Tribunal stated, at paragraph 29 that:

“...the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission.”
30. The Upper Tribunal went on to confirm the three-stage test as set out in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 at paragraph 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.”
31. I will consider first the length of the delay.
32. In the Upper Tribunal case of *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 (TCC), the Tribunal stated, at paragraph 96 that:

“In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.”
33. The delays in appealing the penalty notices to HMRC varied from eighteen months to thirty months.
34. These delays are clearly serious and significant.
35. I now turn to the reasons for the delays.
36. I have set out above the various misfortunes which the appellant asserts she has suffered.
37. It is important to emphasise that, for the purposes of the present application, Ms Devoreaux’s problems must have been such as to prevent her making a timely appeal to HMRC. The issue whether she had a reasonable excuse for submitting her tax returns late is a different question and relates to a different time frame.

38. In considering whether to grant permission I would need to be satisfied that the appellant's problems had such an impact on her life and her ability to deal with her affairs that she was unable to deal with the relatively straightforward task of sending an appeal to HMRC, right up until 25 October 2019. Or if she was able to deal with that task before then, that she made the appeals without unreasonable delay after that point.
39. I have no evidence about any of the events/conditions at all.
40. To the extent that some of the issues were continuing, HMRC submit that a conscientious taxpayer who has an ongoing condition that prevents them carrying out their responsibilities would obtain assistance or make other arrangements to make sure deadlines are met. There is no evidence that Ms Devereaux sought any such assistance.
41. In the absence of any evidence, I am unable to conclude that Ms Devereaux had good reasons for failing to appeal in time.
42. Finally, I must conduct the balancing exercise referred to in *Martland*, taking account of "all the circumstances of the case".
43. In *Martland* at paragraphs 45 and 46, the Tribunal gives guidance on how the balancing exercise should be carried out:

"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. ...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."
44. HMRC emphasised the need for finality in dealing with a taxpayer's affairs and that after delays of the length in this case, they were entitled to consider the matter closed.
45. In *Martland*, the Upper Tribunal said "the purpose of the time limit is to bring finality, and that is a matter of public interest, both from the point of view of the taxpayer in question and that of the wider body of taxpayers."
46. HMRC submit that they should be entitled to rely on the time limits set out in legislation for the purpose of allocating resource in administering the tax system and should not normally be required to defend appeals after an excessive gap between the expiration of the time limit and the appeal. Such appeals are normally more resource intensive to defend and otherwise create issues in obtaining appropriate evidence in meeting HMRC's burden to prove that penalties were correctly charged to the Appellant.
47. HMRC further submit that allowing a late appeal in this instance is contrary to the policy objectives of the legislation which set the deadline.
48. If the application is granted, HMRC would therefore be prejudiced as they are entitled to expect finality after this length of time, it would set a bad precedent for other

taxpayers and it would consume excessive resources. In relation to the last point, I note that HMRC have already prepared a Statement of Case on the substantive merits, which reduces the weight of that factor.

49. If the application is not granted, Ms Devereaux will be prejudiced as she will lose the opportunity to challenge the penalties and will have to pay them.
50. I have considered the practical consequences of granting the application. HMRC say, in their Statement of Case that in the event the Tribunal does allow the late appeal, HMRC are content for the appeal to be treated as having been made to HMRC and for the Tribunal to consider the substantive dispute rather than having the appeal remitted for consideration. The Statement of Case goes on to provide HMRC's submissions on the substantive issues.
51. If I grant the application and go on to consider the substantive issues, I have no more information or evidence than I have set out above. I have noted that the considerations in relation to the substantive appeal are slightly different from those applicable to the application and that a different time frame applies but I am in no better position to find facts or reach a conclusion on the "reasonable excuse" issue than I am in relation to the application.
52. If I allow the application and, despite HMRC's invitation, remit the appeal for their consideration, it is uncertain what, if any, evidence the appellant would be able to obtain and submit.
53. What is certain is that this course of action would result in further significant delays for all parties and further significant costs for HMRC and potentially the Tribunal, contrary to the need for litigation to be conducted efficiently and at proportionate cost, which the Upper Tribunal in *Martland* considered to be of particular importance.
54. *Martland* warns against a detailed consideration of the merits of the substantive case in determining an application for permission to appeal out of time. The appellant's grounds for the substantive appeal are the same as the grounds for allowing the appeal to proceed outside the time limit and I have no evidence for any of them. Without investigating the substantive merits in any detail, I conclude, from my consideration of the grounds of the application, that the strength of the appellant's substantive case is far below the level where it would significantly affect the balancing exercise.
55. Having taken all the circumstances, including the above matters, into account and having conducted the balancing exercise required by *Martland*, I have decided that it is not appropriate in the present case to grant permission to appeal to HMRC outside the permitted time limits.

CONCLUSION

56. For the reasons set out above, I have decided not to grant permission to appeal to HMRC out of time.
57. Accordingly, I dismiss the application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

58. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE

RELEASE DATE: 29 SEPTEMBER 2020