Neutral Citation: [2022] UKFTT 00472 (TC)

Case Number: TC08669

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2022/2287

PERMISSION TO MAKE A LATE APPEAL – application of three stage test in Denton *(as applied by* Martland*) – delay of 59 days – delay due to a "mistake" by taxpayer's accountants – consideration of all the circumstances – application dismissed*

Heard on: 7 December 2022
Judgment date: 12 December 2022

Before

TRIBUNAL JUDGE ALEKSANDER

Between

MPTL LIMITED

Applicant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Liesl Fichardt and Emily Au of Quinn Emanuel Urquhart and Sullivan LLP, Solicitors

For the Respondents: Georgina Hirsch, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The form of the hearing was V (video) using HMCTS video hearing service. The documents to which I was referred are an electronic hearing bundle of 238 pages, an authorities bundle of 409 pages, and the applicant's written submissions of 24 pages.

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.

3. The hearing was to consider the Applicant's ("MPTL") application for permission to make a late appeal.

4. MPTL was represented by Ms Fichardt and Ms Au, HMRC was represented by Ms Hirsch.

BACKGROUND FACTS

5. Michael Lynagh used to be a professional rugby player. He is currently employed by Dow Jones. Independently of his employment with Dow Jones, MPTL provides his services as a "pundit" – particularly and predominantly to Sky.

6. MPTL have been in dispute with HMRC about the application of IR35 to the provision of Mr Lynagh's services. Determinations under regulation 80, Income Tax (Pay As You Earn) Regulations 2003 and decisions under section 8, Social Security Contributions (Transfer of Functions, Etc.) Act 1999 were made in 2020 and 2021. The amount of tax in issue is approximately £230,000 in income tax and NICs.

7. The determinations and decisions were subject to review. HMRC's review conclusion letter was dated 20 December 2021 and was sent to MPTL and copied to its then tax accountants. The letter upheld the application of IR35 and the determinations and decisions. The letter was lengthy and detailed, extending to 19 pages. It concluded with a section setting out MPTL's appeal rights as follows:

> **What happens next**
>
> 144. This now marks the end of my involvement in this matter and the responsibility for the case has reverted to Officer [redacted]. If you have any queries, please contact him on 03000 [redacted].
>
> 145. If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. If you want to notify the appeal to the tribunal, you must write to the tribunal within 30 days of the date of this letter. You can find out how to do this on the GOV.UK website www.gov.uk/tax-tribunal/appeal-to-tribunal or you can phone them on 0300 123
>
> 146. If you notify your appeal to the tribunal any postponement of the duties will continue until the tribunal decide the matter.
>
> 147. If you do not notify your appeal to the tribunal within 30 days of the date of this letter, I will assume that you agree my conclusions and the matter the tax will be treated as settled by agreement under Section 54(1) Taxes Management Act 1970, the NICs under Regulation 11 Social Security Contributions (Decisions and Appeals) Regulations1999.
>
> 148. You can apply for Alternative Dispute Resolution, or ADR. ADR may help to clarify the issues and resolve the dispute without the need for further litigation. You would need to make an application for ADR, which should include any further information that you do not think has been taken into

> account so far, and this would be considered by a panel who would decide whether this approach is appropriate in your case.
>
> 149. I enclose HMRC's factsheet FS21 which tells you about this process and you can find further details online at https://www.gov.uk/guidance/tax-disputes-alternative-dispute-resolution-adr including how to apply for ADR.
>
> 150. Your statutory appeal rights are not affected by an application for ADR; however, if you do decide to apply you must still notify your appeal to the tribunal within the time limit mentioned above. This is essential to ensure that your appeal remains open. When notifying your appeal to the tribunal, you should tell them that you have applied to HMRC for ADR.
>
> 151. I have copied this letter to the company agent […].

8. The time limit for filing a Notice of Appeal with the Tribunal was therefore 19 January 2022.

9. On 14 January 2022, HMRC wrote to MPTL's then tax accountants noting that if MPTL entered into a settlement agreement with HMRC, it might be eligible for overpayment and dividend reliefs. The letter went on to suggest that HMRC could prepare an illustration of the net liabilities, which would allow them to concentrate on reaching agreement on the ultimate calculation of the amount owed. The letter went on to state that if HMRC did not receive a response by 14 February 2022 – or a response that MPTL was not interested in settling – HMRC would continue with "the existing compliance check".

10. On 21 January 2022, the accountants wrote to HMRC as follows:

> Further to your letters dated 20 December and 14 January 2022, both our client and ourselves are still in disagreement with the outcome of the statutory review and the overall conclusion of the enquiry.
>
> We would therefore take this opportunity to request that this be further heard by a first tier tribunal.
>
> We look forward to your confirmation that this is acceptable and look forward to receiving confirmation of the tribunal case date in due course.

11. The accountants did not file a Notice of Appeal with this Tribunal.

12. At some point in early March 2022, MPTL instructed Quinn Emanuel Urquhart and Sullivan LLP ("Quinn Emanual"). Quinn Emanual emailed the HMRC responsible for the enquiries on 9 March 2022 to HMRC to ascertain the current position regarding HMRC's enquiries and the appeal, and enclosing form 64-8 signed on behalf of MPTL authorising HMRC to communicate with Quinn Emanual (HMRC will not communicate with representatives unless they have been authorised by the taxpayer). A follow-up email was sent on 15 March, and a response received the same day. The response apologised for the delay in responding which was due to the enquiry officer being on sick leave. Authorisation for communication by email was resolved that day, and HMRC emailed Quinn Emanuel on 16 March confirming that the tax had been postponed, but that HMRC had not been informed by HMCTS of any appeal having been made.

13. The Notice of Appeal was filed on 18 March 2022. As this was lodged after the expiry of the relevant time limit, MPTL also applied for permission for the appeal to be filed late.

THE LAW

14. Both parties are agreed that in deciding whether to grant permission for a late appeal, I need to apply the three-fold test in set out by the Upper Tribunal in *William Martland v HMRC* [2018] UKUT (TCC) at [44]-[46]:

> 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.

APPLICATION OF THE MARTLAND TESTS

Length of the delay

15. The parties agree that the delay is 59 days.

16. Ms Fichardt submits that HMRC's letter of 14 January 2022 led to some confusion, and she submits that this letter might reasonably be read as extending the deadline for any appeal to 14 February 2022. But I note that (a) the accountants responded on 21 January 2022 rejecting HMRC's offer and notifying that their client wanted to appeal to this Tribunal, and (b) no Notice of Appeal was ever lodged by the accountants by 14 February 2022.

Reasons for the delay

17. There is no evidence before me as to why the accountants did not file a notice of appeal (I have chosen not to name the accountants in this decision given that they have not had the opportunity to explain their actions before me). Ms Fichardt submits that the accountants made a mistake in not filing a Notice of Appeal within the relevant time limit.

18. Ms Fichardt also notes that HMRC did not respond to the accountants' letter of 21 January 2002, and (by implication) that a response from HMRC would have alerted them to the need to file a notice of appeal with the Tribunal. Ms Fichardt submits that the failure of HMRC to reply was due to the relevant officer being absent on sick leave.

19. Ms Hirsch submits that HMRC are under no duty to tell a taxpayer – especially one that is professionally represented – that they need to file a Notice of Appeal with the Tribunal. She also submits that notifying HMRC of their intention to appeal to this Tribunal is not an excuse for failure to go on to file the Notice of Appeal with the Tribunal.

All the circumstances of the case

20. Ms Fichardt and Ms Au make the following submissions for MPTL under this heading:

(1) HMRC have not been prejudiced by the delay. They submit that HMRC had already postponed collection of the tax in dispute by 16 March (presumably in response to the accountants' letter of 21 January notifying their intention to appeal), no enforcement or other action had been taken by HMRC, nor had HMRC incurred costs, and the relevant HMRC officer had been on sick leave. The fact that the notice of appeal had been filed late had, she submits, no adverse impact on HMRC.

(2) In contrast, the prejudice that would be caused to MPTL would be significant and serious. It would be prevented from appealing determinations and decisions giving rise to substantial amounts of taxation (approx. £230,000 in income tax and NICs). By being prevented from appealing, HMRC would become entitled to a substantial windfall.

(3) MPTL had been conscientious in dealing with this dispute. During February, Mr Lynagh was awaiting a response to his accountants' letter of 21 January. When it became apparent that no response was forthcoming, he instructed Quinn Emanuel to take over conduct of his dispute. Quinn Emanual have at all times acted diligently in seeking to ascertain the current position of the dispute with HMRC, and then – on finding out that no Notice of Appeal had been filed – proceeding to file with the Tribunal.

(4) MPTL's case has good prospects of success. Ms Au submits that its case can be distinguished from other appeals relating to the use of personal service companies contracting with Sky – such as *Alan Parry Productions Limited v HMRC* [2022] UKFTT 194 (TC) or *Little Piece of Paradise Limited v HMRC* [2021] UKFTT 369 (TC). In those cases, the income of the relevant individuals arose virtually entirely from their work as regular presenters for Sky, whereas in the case of MPTL, only a small proportion of Mr Lynagh's income arose through MPTL, as his principal employment was as a managing director of Dow Jones. Mr Lynagh appeared on Sky programmes as an *ad hoc* expert or punter, invited to appear on the programme as a guest, presenting his own expert views – unscripted – based on his own research and expertise. This contrasts with the other cases, where the individuals are regular presenters. In addition, MPTL provided Mr Lynagh's services to clients other than Sky (particularly during the Rugby World Cup). Ms Au submits that MPTL and Mr Lynagh were in business on their own account and she set out the reasons behind this submission, including that Mr Lynagh and MPTL invested its own capital into its business, provided equipment (paying for a home office and office equipment), and took financial risk, Mr Lynagh engaged in research to underpin his "punditry" in his own time using his own capital (using time that might otherwise have been utilised for other activities). Ms Au referred me to the recent judgements in *HMRC v Atholl House Productions Limited* [2022] EWCA Civ 501 (at [128] to [132]) and *Basic Broadcasting Limited v HMRC* [2022] UKFTT 48 (TC) (at [320] to [353]) which have elaborated on the factors to be considered when considering employment status. But Ms Au acknowledged that the terms of MPTL's contract with Sky were similar to the terms of the contracts Sky had with Alan Parry Productions Limited and with Little Piece of Paradise Limited.

21. Ms Hirsch makes the following submissions for HMRC under this:

(1) To the extent that there was any delay or failure to reply to the accountants' letter of 21 January 2022, this occurred after the deadline for filing an appeal had passed – and could not excuse the lateness in the filing. In any event, HMRC are under no duty to keep a taxpayer (especially one who is professionally represented) informed about the progress (or lack of it) in an appeal – and HMRC had notified Mr Lynagh and the accountants about the appeal process in the review conclusion letter.

(2) Quinn Emanuel were dilatory in dealing with filing the Notice of Appeal following being instructed. The Notice of Appeal was not filed until 18 March 2022. They could have filed the Notice shortly after they were instructed (if necessary, on a protective basis) rather than wasting time seeking to ascertain the status of the appeal with HMRC.

(3) There is no presumption of leniency for a delay caused by the incompetence of MPTL's advisors. There is no reason why HMRC should bear the burden of that error by having to defend an out of time appeal: MPTL's remedy for mistakes made by its advisors is against its advisors – not the grant of permission to file a late appeal.

(4) Failures by a taxpayer's advisor should be treated as failures of the litigant (*Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666, as approved in the tax context by the Upper Tribunal in *Katib* at [54]). MPTL cannot distance themselves from the failure of their advisors to meet statutory deadlines.

(5) The fact that denying MPTL the opportunity to have its appeal heard by the tribunal could be seen as providing HMRC with a "windfall" in terms of retaining the right to recover the disputed tax sums, without having to defend the appeal, should not weigh significantly in the assessment of balance of prejudice. In *BBP Holdings v HMRC* [2016] EWCA Civ 121, the Supreme Court dealt with the "windfall" argument as to balance of prejudice where a party is prevented from taking further part in proceedings, saying at paragraph 32:

> … it was pointed out that a debarring order represents an unjustified windfall for BPP. It is true that the debarring order will either improve BPP's prospects of success in the substantive surviving appeal (if the appeal goes ahead unopposed) or result in BPP succeeding on the appeal when it might not otherwise have done so (if HMRC concede the appeal). However, that point can always be made by a party facing a debarring order, and to give the point any weight, save perhaps in exceptional circumstances, would appear to me to undermine the utility of the sanction of a debarring order.

(6) The appeal would have had poor prospects of success, as the circumstance of this appeal similar contract to those in the appeals of *Little Piece of Paradise Ltd v HMRC*) and in *Alan Parry Productions Limited v HMRC*. She referred me to the extremely comprehensive rebuttal of MPTL's arguments contained in HMRC's review conclusion letter. She submits that the recent decisions in *Athol House* and *Basic Broadcasting* had limited relevance to the circumstances of MPTL's case.

(7) HMRC were prejudiced by MPTL's delay in filing the Notice of Appeal, as HMRC would be required to defend an appeal that it would not otherwise have had to defend.

DISCUSSION

22. I address each of the three parts of the *Martland* test in turn.

Length of delay

23. It is agreed that the length of the delay is 59 days, and I find that this is not "very short". Whilst it does not rank amongst some of the longest delays that this Tribunal has had to

consider, it is long enough to be considered serious and requiring time to be spent addressing the second and third stages of the *Martland* test.

Reasons for the delay

24. Ms Fichardt submits that the delay was caused as a result of a "*bone fide* mistake" by MPTL's then advisors. I would not agree with the description of the mistake being *bone fide*, given that detailed instructions on how to file an appeal (including a link to this Tribunal's website) were set out in HMRC's review conclusion letter. In any event, as the accountants are (according to their letterhead) a professional firm of chartered accountants, they ought to be aware of the procedure for filing tax appeals.

25. I agree with Ms Hirsch that HMRC are under no duty to tell a taxpayer – especially one that is professionally represented – that they need to file a Notice of Appeal with the Tribunal within 30 days of the date of the review conclusion letter, and that notifying HMRC of their intention to appeal to this Tribunal does not excuse a subsequent failure to file the Notice of Appeal.

26. But, even if HMRC were not under a duty to notify MPTL of the appeal process, in fact they had notified MPTL and the accountants of the procedure for appealing in the final paragraphs of the review conclusion letter.

27. For completeness, I do not accept Ms Fichardt's submission that HMRC's letter of 14 January 2022 somehow confused the picture. I accept that one possible interpretation might be that might have been perceived as extending the deadline for appeal to 14 February 2022, but even if it had, the accountants had not filed an appeal by that date either.

28. Fundamentally, there is no evidence before me which explains why the accountants did not file a Notice of Appeal with the Tribunal by 19 January or by 14 February 2022. But I am prepared to accept that it was a "mistake", and that there was no deliberate intention on the part of the accountants to disrupt the appeal process. But a "mistake" for which no explanation has been given is not a good reason for the failure to file the Notice of Appeal on time.

29. I find that there was no good reason for the delay in filing the Notice of Appeal with the Tribunal.

All the circumstances of the case

30. I agree with Ms Hirsch that MPTL cannot distance itself from the actions of its previous advisors. At least as regards straightforward matters, such as compliance with clear time limits, failures by MPTL's professional advisors are to be treated as failures by MPTL itself.

31. I accept Ms Fichardt's submission that it was reasonable for Quinn Emanuel to seek to ascertain the current status of the dispute before filing a Notice of Appeal with the Tribunal, rather than filing a protective Notice of Appeal as soon as they had been instructed – if it had turned out that the accountants had filed a Notice of Appeal, the second protective Notice is likely to have caused confusion and additional (and unnecessary) work for the Tribunal. The delay between Quinn Emanual's first email to HMRC on 9 March and the eventual filing of the Notice of Appeal on 18 March is just over a week. Whilst it might have been better if Quinn Emanuel had telephoned or emailed the Tribunal to see if a Notice of Appeal had been filed – (or contacted the Tribunal at the same time as they contacted HMRC), I do not regard the saving in time that might have occurred since Quinn Emanuel were instructed by MPTL to be particularly significant.

32. Ms Fichardt submits that MPTL will be prejudiced if its application is denied, as it will be prevented from pursuing its appeal. But, as noted in *Katib* at [60] this is a common feature in relation to all applications for permission to make a late appeal. So, in assessing that

prejudice, I must form a general impression of the strength or weakness of the MPTL's case and weigh that in the balance. On the basis of the papers before me, and the submissions of the parties, I find that the MPTL's prospects of success (if I were to grant permission) are not good. I appreciate that I have not had the benefit of hearing evidence (under cross-examination), nor have I heard comprehensive submissions – and this is neither the time nor place for that to occur. But as a matter of first impression, Ms Au's submissions as to why MPTL's circumstances can be distinguished from the circumstances in either of *Little Piece of Paradise Ltd v HMRC*) and in *Alan Parry Productions Limited v HMRC* are not particularly persuasive. Ms Au was unable to direct me to any evidence that would suggest that the review officer's conclusions were wrong. The points that she made in submissions were considered and addressed in the course of HMRC's review and (as a matter of first impression), there are no obvious errors in the reviewing officer's conclusions that are immediately apparent to me. Nor am I persuaded that the recent decisions in either *Athol House* or *Basic Broadcasting* are going to be of material assistance to MPTL's case. *Basic Broadcasting* is a first instance decision of this Tribunal, and the conclusions reached turn on the particular facts of that case. As regards *Athol House*, the issues before the Court of Appeal related to (a) a dispute about the genuineness of the terms of the contract concluded with the service company (not an issue in this case), and (b) the taking into account of the individual's other activities as an independent self-employed contractor (prior to the engagement through the service company) as part of the multi-factoral test in assessing employment status. Unlike Ms Adams in *Athol* (whose background was a freelance journalist) Mr Lynagh does not have a background of being (or having been) primarily freelance "pundit" or expert. Mr Lynagh's engagements outside MPTL are as an employee of Dow Jones – in a completely different line of work. So, a background of wider self-employment activities outside MPTL are not in issue in this case.

33. I do not agree with Ms Fichardt's submissions that because the relevant HMRC officer was on sick leave, HMRC have suffered no – or negligible prejudice. There is no evidence before me of the time for which the enquiry officer was not available because of illness. The only relevant period of delay due to his illness was from 9 March (when Quinn Emanual first emailed HMRC) to 15 March (when another officer at HMRC responded). I acknowledge that HMRC had already postponed collection of the tax in issue by the time the Notice of Appeal had been filed, and that (in consequence) they had taken no enforcement action, nor had they incurred time in pursuing MPTL for payment. But this is because the accountants notified HMRC of their intention to commence an appeal, and HMRC believed them. But the accountants never went on to file a Notice of Appeal. The point here (as in all cases where an application for a late appeal is filed) is that HMRC would be prejudiced by having to defend an appeal that – if time limits were observed – they would not otherwise have to defend.

Conclusions

34. I start by noting the statement in *Martland* that my starting point is that permission should not be granted unless I am satisfied on balance that it should be. The judgment of the Court of Appeal in *Denton* (which is applied in *Martland*) requires me to place particular weight on the two factors set out in CPR 3.9(1), namely:

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders

35. In this context, I agree with Ms Hirsch's submission that there is no presumption of leniency regarding time limits. As the Upper Tribunal stated in *HMRC v Katib* [2019] UKUT 189 (TCC) at [52], it is a material error of law

> to ignore the importance of respecting statutory time limits.

36. Standing back, I note that there has been a delay of 59 days for reasons which are described by Ms Fichardt as being a "mistake". I have found that there was no good reason for the delay. I have also found that MPTL cannot distance itself from the failure by its then accountants to file the Notice of Appeal on time.

37. As regards all the other circumstances, I find that they are not such as to persuade me to grant permission particularly once I take into account the particular importance of the need for statutory time limits to be respected, given the absence of any good reason for the delay.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

Release date: 12 DECEMBER 2022