Neutral Citation: [2023] UKFTT 00661 (TC)

Case Number: TC08882

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2022/12344

LATE APPEAL* - Martland *and* Katib *considered - length of delay serious and significant - whether good reason for delay - no - whether late appeal appropriate in all the circumstances - no - application refused - appeal not admitted

Heard on: 5 June 2023
Judgment date: 31 July 2023

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER: JAMES ROBERTSON

Between

JASON NICHOLAS JAMES

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant and his daughter

For the Respondents: Ms Sawdah Mia, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an application by the appellant for permission to give late Notice of Appeals against late payment penalties for the years 2016/17, 2017/18 and 2018/19 imposed under Schedule 55 of the Finance Act 2009 ("Sch 55") and totalling £21,141.

The form of hearing

2. The hearing was conducted by video link on the Tribunal's video hearing service. 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. We had the hearing bundle extending to 179 pages and a generic bundle extending to 255 pages. We had HMRC's Notice of Objection to the late appeal application and the appellant's response thereto with enclosures. We heard from all of those present.

Legal framework

4. Section 31A Taxes Management Act 1970 ("TMA") provides that an appeal must be made within 30 days of the assessment of the penalty.

5. Section 49 TMA states:

> "(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 (as amended) ("the Rules") provides:-

> "**20.— Starting appeal proceedings**
>
> **…**

(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal must be made or notified after that period with the permission of the Tribunal—

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

7. The Upper Tribunal has given guidance on the correct approach to be applied when considering an application for permission to make a late appeal in *Martland v HMRC* [2018] UKUT 178 (TCC) ("Martland") and the relevant paragraphs read:-

"43. The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".

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. 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."

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

Background

8. The appellant served in the British Army for 22 years and when he left in 2015/16 he became self-employed. He worked abroad. He hired an accountant in order to advise and help with his tax returns. He registered for self-assessment using his agent on 27 July 2015 but on 1 September 2015 the agent withdrew the taxpayer from self-assessment. However, in 2017 a new agent was registered by HMRC and a Non-Resident Capital Gains Tax return was received by HMRC on 18 July 2017.

9. The appellant's self-assessment notes ("SA notes") record that on 23 October 2018, the appellant was selected for a section 9A or section 12AC Taxes Management 1970 ("TMA") enquiry. The only information that we have about that enquiry is that it related to training days spent in the UK. The SA notes record that the enquiry for 2017 and 2018 was closed on 27 November 2019 and that there was "Yield £245,804". It is not clear from whence that figure is derived since the tax ultimately payable was £168,963.06. Interest accrued so the total amount that the appellant has paid to HMRC is £176,663.06.

10. On 12 December 2019, the appellant's then agent, having received the amendments to the tax returns, telephoned HMRC and asked about a time to pay arrangement. In January and February 2020 the agent is recorded as contacting HMRC in relation to Higher Income Child Benefit Charge ("HICBC") which had not formed part of the enquiry.

11. In the following months the appellant made a number of unsuccessful attempts to contact HMRC and arrange time to pay but unfortunately Covid intervened. He was given advice about HICBC. On 8 July 2020 assessments for HICBC were issued for 2016/17 and 2017/18.

12. The first late payment penalties for 2016/17 and 2017/18 were issued by HMRC on 18 February 2020. Further penalties were issued on 17 March, 4 August and 22 September 2020. In 2021, penalties were issued on 12 January and 16 February 2021. The penalties were 30 day, 6 month and 12 month late payment penalties in terms of sections 3, 4 and 5 of Sch 55.

13. On 22 July 2020, the appellant telephoned HMRC and told a technical officer that he had received notification of a late payment penalty dated in March 2020 but he had only just received it. He asked for details of the sums he owed HMRC. He said that he was expecting a call from HMRC.

14. In August 2020, he was still awaiting a call from HMRC and eventually on 24 August 2020 in a telephone conversation with the appellant, HMRC told him that the late payment penalties were "becoming due". In the interim the appellant had written to HMRC with a proposal for time to pay and on 3 September 2020, he received a reply but the details are not in the bundle.

15. On 26 and 27 January 2021, the appellant called HMRC about the tax due for 2019/20 and said that he had been dealing with a Mr Shah in HMRC's insolvency department but was unable to contact him.

16. On 5 February 2021, HMRC telephoned the appellant having been requested to do so by email. The appellant was attempting to sell his home in order to pay HMRC. HMRC warned the appellant about interest accruing but there appears to be no mention of late payment penalties.

17. The SA notes state that on 9 July 2021 the appellant telephoned HMRC again about the time to pay arrangement pointing out that he had not received a reply to an email that he had sent on 6 May 2021. That email is not in the bundle.

18. On 13 October 2021, it appears that the appellant wrote to HMRC and lodged an appeal in respect of the penalties. There are no records beyond an entry in the SA notes for 22 and 25 October 2021 stating that post appealing the penalties had been received. The inference from the SA notes is that the appeal was dated 20 October 2021 but HMRC have accepted that the appeal should be treated as having been made on 13 October 2021 and their calculations are based on that.

19. The SA entry for 27 October 2021, states that the late penalties had been appealed on 20 October 2021 and that self-assessment could not consider the appeals of the penalties until the tax had been paid in full. It goes on to state that an enquiry amendment was raised in November 2019. It records that:- "TTP app. to start Sep 2020. Letter seems to have bounced around". Ms Mia was unable to cast any light on that entry.

20. On 1 November 2021, the appellant telephoned HMRC in relation to a letter he had received relating to bankruptcy. He advised that he was selling his house and he was told to email HMRC with a new proposal for time to pay as the original arrangement had been cancelled.

21. On 22 November 2021, the appellant telephoned HMRC to say that he had sold his house and would make a bank transfer payment. He stated that he was homeless and living with his daughter. He also raised the question of his appeal of the penalties stating that he had sent emails but received no reply. He was told that a response would be sent.

22. On 24 November 2021, the appellant telephoned HMRC again and said that he had been trying to get help regarding his appeal and he had made payment of just under £170,000 after selling his home. He said that he had received an email from HMRC stating that the appeal would not be considered until he had paid in full. He reiterated that he wished to appeal the penalties.

23. He told the Tribunal that he did that because his accountant had told him that all penalty charges should be appealed once the outstanding tax had been paid. In the course of his many discussions with HMRC (with a Mr Z Shah) he had not been told that that was not appropriate.

24. HMRC advised that they would re-open the appeal once the tax payment was processed.

25. On 12 January 2022 he telephoned HMRC again asking for an update about his appeal.

26. The entry in the SA notes for 8 February 2022 states that in his appeal the appellant had said that he had been unable to agree payment with HMRC for the tax due. HMRC decided that that did not meet the reasonable excuse criteria in respect of the penalties and apparently issued a letter to the appellant advising that the appeal was rejected and all amounts remained due and payable.

27. On 17 March 2022, the appellant telephoned trying to chase progress of his appeal and he was told that the appeal had been rejected and it was explained to him how he could ask for a review of the decision. It seems that no letter had been received by him.

28. He contacted HMRC again on 6 April 2022 and indicated how much stress this was causing him. He wanted the penalties and interest to be waived so that he could try and arrange alternative accommodation.

29. On 11 April 2022, the appellant called HMRC again and the SA notes state that he said that although he had been advised that the appeal had not been successful and that he had been sent a response in writing, nothing had been received. He had tried to telephone HMRC on numerous occasions without success.

30. The entries in the SA notes for 11 and 12 April 2022 state that the penalty appeals were originally rejected as there was no reasonable excuse and the tax was still outstanding. There was a review request outstanding. It records that in reply to the appellant's appeal "… on 28 Oct [2021] a letter was issued saying the appeal cannot be dealt with as the tax is outstanding". The tax was paid on 23 November 2020.

31. On 25 April 2022 the appellant telephoned HMRC stating that he had still received no letters and he was told that HMRC would write to him.

32. The SA notes for 1 June 2022 state that the appeal of the penalties had been received on 20 October 2021 and the appellant had argued that he had not realised at the time that they were issued that he should have appealed them. He had offered to pay the tax once his house was sold and that had taken a long time to agree with HMRC. It had been difficult to contact HMRC during Covid. HMRC had not accepted that lack of funds was a reasonable excuse. They would send a letter the following day.

33. On 6 June 2022, the appellant called HMRC again because he had received a Statement of Liability. He was told that that had been issued on 31 May 2022 and the letter about the penalties had been issued on 2 June 2022. He was advised to appeal to the Tribunal. He explained that he was unable to pay the penalties because he needed a deposit for a property to enable him to move out of his daughter's house.

34. On 20 June 2022, the Tribunal received the Notice of Appeal.

Discussion

35. At the outset it is appropriate to say that we found the appellant to be a straightforward and honest witness. His tale is a sorry one. HMRC's recorded view that his "letter seems to have bounced around" is an understatement (see paragraph 19 above). As we explained in the course of the hearing this Tribunal has no jurisdiction in relation to HMRC's general interaction with taxpayers.

Martland

36. HMRC rightly argue that the three stage approach in *Martland v HMRC* [2018] UKUT 0178 (TCC) ("Martland") should be applied.

The length of the delay

37. HMRC have calculated that in respect of three of the penalties the delay is in excess of 18 months, in one it is in excess of 17 months, in three it is in excess of 13 months, in one it is in excess of 12 months, in three it is in excess of eight months and in one it is in excess of six months.

38. There is no doubt that in the context of a 30 day time limit for appealing, those are very serious and significant delays. In *Romasave (Property Services) Limited v HMRC* [2015] UKUT 254 (TCC) the Upper Tribunal found that a delay of three months was serious and significant.

The reasons why there was a delay

39. As can be seen above, the appellant has consistently told both HMRC and the Tribunal that the accountant(s) whom he employed for the tax returns for 2016/17 onwards, and in the enquiry, had told him that the penalty charges could only be appealed once the outstanding tax bill had been paid. He had discussed that with Mr Shah who had not told him that that was wrong.

40. The late payment penalties were certainly discussed with HMRC on more than one occasion and there is no record that it was drawn to his attention that he could or should appeal the penalties. However, HMRC are under no obligation to draw that to the appellant's attention. Although there is absolutely nothing in the bundle relating to the notifications given to the appellant, we are aware that all would have pointed out that there was a 30 day time limit for appealing.

41. In the course of the hearing we explained to the appellant that it is very well established that "When considering applications for permission to make a late appeal, failures by a litigant's advisers should generally be treated as failures by the litigant" (see the Upper Tribunal's decision in *HMRC v Katib* [2019] STC 2106 ("Katib") at paragraph 54).

42. In *Katib*, the Upper Tribunal had to consider the extent to which reliance on an adviser was a justifiable reason for failing to make an appeal on time. In that case, the adviser did not provide competent advice to Mr Katib, misled him as to what steps were being taken to appeal and failed to appeal on his behalf. That is more extreme than the situation in this case.

43. On the facts of that case, the Upper Tribunal concluded that the failings by the appellant's agent could not be relied upon by the appellant at any stage in the *Martland* analysis.

44. At paragraph 56 the Upper Tribunal observed that:-

> "…we consider that the correct approach in this case is to start with the general rule that the failure of [the adviser] to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by Martland. However, when considering the third stage of the evaluation required by Martland, we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration."

45. They went on to say at paragraphs 58 and 59:-

> "…the core of Mr Katib's complaint is that [the adviser] was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise.
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> 59. [Mr Katib's counsel] urged us to give particular weight to the FTT's finding, at [15], that Mr Katib did not have the expertise to deal with the dispute with HMRC himself, but that does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena. We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against [the adviser] or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of [the adviser's] failings and, if he wishes, pursue a claim in damages against him or [the adviser's] for any loss he suffers as a result."

46. We are bound by the decision in *Katib* and, as a result, we must find that the fact that the appellant was let down by his accountant(s) does not constitute a good reason for the failure to appeal.

47. The appellant has argued that Covid was a factor. Whilst undoubtedly, as can be seen, the appellant had enormous difficulty getting HMRC to respond, it was not the reason for the failure to appeal the penalties; that was the advice from the accountant(s).

48. Unfortunately for the appellant, the lack of funds cannot be a reasonable excuse for the delay because paragraph 16(2) of Schedule 56 Finance Act 2009 excludes that possibility

other than in circumstances that simply cannot apply in this instance. (In summary, it would have to be outside his control and not related to the tax demands.)

Evaluation of "all the circumstances of the case"

49. The third stage in the *Martland* three stage approach is to consider all the circumstances of the case, balancing the merits of the reasons given for the delay and the prejudice which would be caused to both parties by granting or refusing permission. In considering the prejudice to the parties, we must 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.

50. One of the factors that we must take into account is the merits or otherwise of the appellant's case on the penalties. *Martland* said at paragraph 46 that "The FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice".

51. As we pointed out in the course of the hearing, the burden of proof in relation to penalties lies with HMRC.

52. This is a very unusual case insofar as HMRC state that it is "paperless" and HMRC has had difficulty in locating copies of documents which can be printed out or put into a bundle. In their Notice of Objection they stated they were still trying to locate more documentation. We granted Ms Mia an adjournment in order to enable her to take instructions as to whether or not HMRC would be able to produce anything in the event of a substantive appeal.

53. She very frankly stated that it was hoped that that should prove possible but it was certainly not guaranteed. There is therefore the possibility of HMRC being unable to establish the amendments to the self-assessment returns which purportedly triggered the penalties. We observe that in the Notice of Objection there is a statement at paragraph 4 that there is more than one penalty for some failures to pay because of an enquiry amendment on 27 November 2019. There is no explanation beyond that.

54. However, there is no doubt that there was an enquiry and that it was closed with amendments to the returns and the tax has been paid. The penalties were obviously issued. The prospects of a successful challenge to the penalties is certainly not strong.

55. Clearly if the appellant does not have the ability to put HMRC to their proof he might suffer very significant prejudice and will be liable to pay a substantial sum of money. That, however, is a consequence of the failure to notify the appeals in time. It cannot be right that a delay which is significant and for which there was no good reason should be overlooked simply because the amount at stake is a very large amount or significant to the appellant.

56. Against that prejudice to the appellant, we balance the prejudice to HMRC and the public interest if the appeals are allowed to proceed after such a long period of delay and the need for statutory time limits to be respected.

Decision

57. For all the reasons set out above, we find that the appellant has not given a sufficiently good reason for a serious and significant delay in appealing the penalties and, in all the circumstances, it is not appropriate to give him permission to make late appeals in this case.

58. The application is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

59. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 31st JULY 2023