TC02115

Appeal number: TC/2012/01352

TYPE OF TAX – capital gains tax – returns admittedly omitted chargeable gains –assessment raised – not properly appealed for over 2 years – whether permission should be granted to bring a late appeal – balancing exercise undertaken – held permission should not be granted – appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

PATRICK WALLACE **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
HELEN MYERSCOUGH

Sitting in public at Colchester on 11 June 2012

S Najefy, for the Appellant

Mark Ratcliff, for the Respondents

DECISION

Preliminary

1. This was an Application for an extension of time to serve a notice of appeal. Before the hearing, the Tribunal saw Mr Najefy, who appeared for the Applicant, privately and informed him that the Tribunal Judge had acted as Counsel on the other side in recent litigation in which Mr Najefy and his firm were involved. He asked whether there was any objection to his hearing the Application and was assured by Mr Najefy that there was no objection. The Tribunal therefore proceeded to hear the Application.

The facts

2. From the documentary evidence produced by Mr Ratcliff and Mr Najefy, we find the following facts.

3. The respondent Commissioners ("HMRC"), by Officer Mrs Behan, on 27 August 2008 issued a notice of assessment for the year ended 5 April 2004 assessing profit from UK land and property of £5,000 and a taxable capital gain of £106,279.

4. Officer Mrs Behan's letter dated 27 August 2008 contained information on how to make appeals against the amendment and assessment.

5. Mr Wallace was required in the first instance, by section 31A Taxes Management Act 1970 ("TMA"), to give a notice of appeal *to HMRC* within 30 days after 27 August 2008, the date on which the notice of assessment was issued. This requirement was complied with, as an appeal dated 15 September 2008 was sent to HMRC. That notice of appeal did not give any grounds for the appeal but stated that information requested by Officer Mrs Behan in her letter dated 21 April 2008 could not be provided before 31 October 2008 by reason of holiday commitments and the time required for 'ascertaining and clarifying the position' regarding the date that Mr and Mrs Wallace transferred a particular property (29 Carnarvon Road, Stratford, London E15 ("the Property")) from their limited company (Brocks Construction Limited ("the Company")) and the value used at the date of the transfer.

6. By 16 April 2009, however, despite much chasing on the part of Officer Mrs Behan, the outstanding information had still not been received by her and on that date she wrote to Najefy & Co offering a review by an independent officer of HMRC. In that letter, as required by section 49C(2) TMA, Officer Mrs Behan notified Najefy & Co, on behalf of Mr and Mrs Wallace of HMRC's view of the matter in question – which was that in calculating the chargeable gain on the disposal of the Property no deduction could be allowed in respect of improvements, there having been no documents received by her to support the claim.

7. On 12 May 2009, within the statutory 'acceptance period' of 30 days, Najefy & Co wrote to Officer Mrs Behan accepting her offer of a review, stating that 'by 10 August 2009 at the latest' they would be able to let her have documents to support Mr and Mrs Wallace's claim for deduction in respect of improvements and proof that

rents on the Property were declared for tax purposes. Unfortunately that letter was not received by Officer Mrs Behan, but, following further correspondence, she agreed to arrange an independent review (her letter to Najefy & Co dated 16 July 2009).

8. It appears that a decision on review confirming Officer Mrs Behan's view of the matter was issued by Officer Miss Thorn of HMRC's Appeals and Review Unit on 14 September 2009. Najefy & Co complained (in a letter dated 12 October 2009) that the review was completed in the absence of further information which had not at that point been submitted, but was promised. On that date Najefy & Co sent the incomplete and defective notice of appeal to the Tribunal.

9. By section 49F(2), the conclusion of Officer Miss Thorn's review are treated as if they were an agreement in writing under section 54(1) TMA in settlement of the matter in question.

10. Settlement of appeals under section 54 TMA does not however have effect 'if, or to the extent that, the appellant notifies the appeal *to the Tribunal* under section 49G' TMA (see: section 49F(4) TMA) (emphasis added).

11. A notification of the appeal to the Tribunal under section 49G TMA can be made as of right if made within the 'post-review period' of 30 days – in this case, 30 days from 14 September 2009 (section 49G(2) and (5)(a) TMA).

12. Section 49G(3) TMA enables an appellant to notify an appeal to the Tribunal after the expiry of the 'post-review period' if the Tribunal gives permission.

13. The 'post-review period' in this case expired 30 days from 14 September 2009.

14. A notice of appeal against the assessment was sent to the Tribunal by Najefy & Co on 12 October 2009. The notice of appeal was however returned by the Tribunals Service on 10 November 2009 because Najefy & Co had not included in the notice any details of the decision appealed against, the result the appellant ("Mr Wallace") was seeking or the grounds for making the appeal. The Tribunal Service's letter of 10 November 2009 contained the following wording:

> 'Please note the original time limit to appeal to the Tribunal still applies. If you resubmit your appeal and it is outside of this time limit, you must complete section 5 (Time limit for making an appeal) of the notice of appeal form.'

15. It is relevant to note that rule 20 of the Tribunals Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") provides relevantly as follows:

> '(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.
>
> (2) The notice of appeal must include:
>
> (a) the name and address of the appellant;
>
> (b) the name and address of the appellant's representative (if any);

(c) an address where documents for the appellant may be sent or delivered;

(d) details of the decision appealed against;

(e) the result the appellant is seeking; and

(f) the grounds for making the appeal.'

16. Thus the notice of appeal sent on 12 October 2009 did not comply with rule 20(2)(d)(e) and (f).

17. An issue for us is whether the incomplete and defective notice of appeal sent by Najefy & Co to the Tribunal on 12 October 2009 constituted a notification of the appeal to the Tribunal within section 49G(2) TMA.

18. In one sense it was such a notification – in that the Tribunal was notified of the appeal. However the notice of appeal was incomplete and defective, in that it failed to comply with the requirements of rule 20(1) and (2) of the Rules, as stated above. It is clear from the wording of rule 20(1) and (2) that the rule is drafted in terms that make it apt to apply to a statutory notification of an appeal within, *inter alia*, section 49G(2) TMA and we conclude that a valid notification within section 49G(2) TMA must comply with rule 20 of the Rules. Any other conclusion would, in our judgment, be perverse.

19. It follows that the incomplete and defective notice of appeal sent by Najefy & Co to the Tribunal on 12 October 2009 (and given the reference number RTC-2009-00779 by the Tribunals Service) was not a notification of Mr Wallace's appeal within section 49G(2) TMA.

20. On this basis we conclude that no timeous notification of the appeal to the Tribunal was made by Mr Wallace.

21. Nothing further happened before 2010 when, relying on the settlement of the appeal under section 54 TMA, Officer Mrs Behan released the tax charged by the assessment for collection.

22. In 2011 a statutory demand under section 268(1)(a) of the Insolvency Act 1986 was issued against Mr Wallace by HMRC's Debt Management Enforcement Unit.

23. A further notice of appeal (this time complete) was sent by Najefy & Co to the Tribunals Service dated 6 January 2012. This caused HMRC's Debt Management Enforcement & Insolvency department to suspend action relating to the statutory demand.

24. In the notice of appeal, a request to appeal out of time was made and reasons why the appeal was made or notified late were given as follows:

> 'Appeal was first made to the Tribunal on 12 October 2009 (Reference RTC 2009-00779) requesting the time for making the appeal to be extended as our client was unable to obtain the relevant information about the property from his solicitors. This appeal was returned requiring

> further information on 10 November 2009. Our client was unable to resubmit the appeal as at that time he was diagnosed with cancer and undergoing continuous test [*sic*], consultancy and treatment which he continues to do so now.'

25. Thus the appeal (which should have been made by 14 October 2009) was made about 2 years and 3 months out of time.

26. The notice of appeal dated 6 January 2012 states that the outstanding issue in dispute between Mr Wallace and HMRC is the question of a capital gains tax deduction for £144,282 of improvement costs to the Property. HMRC have disallowed these costs in full by reason of there being no invoices in respect of them. Najefy & Co explain that the condition of the property required refurbishment for sale and that the enhancement and improvement works were carried out by Mr Wallace's own building company (the Company) and appropriate invoices were issued by the Company charging Mr and Mrs Wallace £144,282. Najefy & Co state that these invoices 'were issued a long time ago in 1996 and 2003'. The Company ceased trading in 2006 and was dissolved in January 2007 and Najefy & Co state that Mr Wallace is trying to retrieve the Company's old records to obtain copies of the invoices, which 'should satisfy the Inspector's requirements'. Najefy & Co state that Mr Wallace is of the opinion that with some help from his son he would be able to produce the invoices before the date of the hearing of the appeal. Najefy & Co explain that at first there was a confusion about the title of the Property, as the Property was in fact acquired in the name of the Company and 'shortly thereafter transferred in the names of Mr and Mrs Wallace. Hence there was a long delay as the partner in the Solicitors' firm left the practice and it took a while to locate the papers. Hence the transaction was omitted from Mr Wallace's personal tax return for the year 2003/2004.'

27. There is evidence of further chasing for the invoices by HMRC in 2012 culminating in a fax from Najefy & Co to HMRC dated 1 June 2012, attaching two copy invoices, purportedly issued by the Company to Mr and Mrs Wallace on 31 October 1997 and 6 November 2003 respectively.

28. At the hearing Mr Ratcliff, with Mr Najefy's agreement, asked us to disregard the fax and copy invoices on the basis that HMRC had concerns about their genuineness. We agreed to do so, with the result that we must consider this application for an extension of time for appealing to the Tribunal on the basis that no invoices have yet been submitted.

Discussion and Decision to strike out the appeal

29. In considering whether to allow an extension of time to appeal, the Tribunal has to undertake a balancing exercise, balancing on the one hand our assessment of the Appellants' culpability in delaying lodging their notice of appeal for over 2 years, and the prejudice to HMRC in terms of the public interest in good administration and legal certainty, which is undermined if permission is granted to bring an appeal so late, and, on the other hand, the loss and injury which would be suffered by the Appellants if an extension of time is refused.

30. In view of the continuing non-production of invoices allegedly issued to Mr Wallace by the Company – and therefore originally in Mr Wallace's possession (and not the Company's) – we conclude that Mr Wallace has not proved that real or significant loss and injury has been established by reason of the assessments appealed against. Mr Wallace has had literally years to produce invoices, and was chased for them time and again by HMRC. It must be assumed that, as a businessman, he must have appreciated the need to retain the invoices for tax purposes. There is, we conclude, no real basis on which we can assume that Mr Wallace would be able to prove at an appeal hearing that the disputed expenditure was incurred.

31. It is established by authority that even where the merits of a proposed appeal are high, in the sense that the Tribunal can safely conclude that the appeal would be likely (or even certain) to succeed, this cannot be a factor to 'trump' all other facts which we must consider (*R (oao Cook) v General Commissioners of Income Tax* [2009] EWHC 590 (Admin) where Dyson LJ (as he then was) mentioned the prejudice to HMRC which arises if appeals are sought to be brought out of time in 'not being able to close its books' and the public interest in 'promoting the policy that challenges to assessments should be brought within the short period specified by statute').

32. This is a case where (in the Tribunal's view, notwithstanding Mr Wallace's health issues) no reasonable excuse has been offered for Mr Wallace effectively refusing to cooperate with HMRC, and where the Mr Wallace accepts that his original return omitted reference to a significant chargeable gain realised on the disposal of the Property, and also, so far as we can see, significant rental income.

33. Mr Najefy submits that his firm's incorrect view that the appeal sought to be lodged by the incomplete and defective notice of appeal dated 12 October 2009 remained open should tell in Mr Wallace's favour. We do not agree. It was clear from the Tribunal Centre's response dated 10 November 2009 that the appeal proceedings had not been properly started. Nor can Najefy & Co's professed ignorance of the new appeals procedure introduced in 2009 tell against the prejudice which would be suffered by HMRC if an extension of time were granted to enable this appeal to be brought.

34. While we have sympathy with Mr Wallace's poor state of health, there is no evidence to suggest that it has prevented him from dealing on a timeous basis with his business and personal affairs.

35. In the result, we have concluded that Mr Wallace's culpability in delaying lodging his notice of appeal for well over 2 years (for which he and Najefy & Co are 100% responsible) and the prejudice to HMRC in terms of the public interest in good administration and legal certainty do in this case outweigh any counterbalancing factor in favour of extending time for Mr Wallace to bring his appeal.

36. Accordingly we refuse the Mr Wallace's application and the appeal will be struck out pursuant to rule 8(2)(a) of the Rules.

37. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 4 July 2012