TC02903

Appeal number: TC/2013/01951

INCOME TAX –enquiry – amendment to self assessment –application for permission to appeal out of time – refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

THOMAS BRODERICK **Appellant**

- and -

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

TRIBUNAL: JUDGE ALISON MCKENNA
ANNE REDSTON

Sitting in public at 45 Bedford Square on 20 August 2013

Joseph Howard of counsel, instructed by BKL LLP for the Appellant

Len Jacobs of HMRC for the Respondents

DECISION

1. This decision concerns an application for permission to appeal out of time. The Appellant asks the Tribunal to extend the period for appealing an amended assessment for the financial year ending 2003 which HMRC issued, following an enquiry, in July 2008. The amended assessment imposed an additional income tax liability of £10,480.64. Under s.31A of the Taxes Management Act 1970, the Appellant's appeal should have been made within 30 days of the date of the Closure Notice. The notice of appeal was sent to the Tribunal in March 2013, so this application is for permission to appeal some four and a half years out of time.

The Facts

2. There was no dispute as to the factual background to this application. The facts may be stated briefly as follows. The Appellant is an accountant. His self assessment return for the year ended 2003 was received by HMRC on 30 September 2006 (having been due on 31 January 2004). HMRC opened an enquiry into his self assessment return for that year in December 2006. HMRC sent the Appellant an information notice in January 2007, followed by penalty notices for non-compliance in March and May 2007. In July 2007, HMRC notified the Appellant that it could impose further penalties for continued non-compliance. In August 2007, the Appellant wrote to HMRC for the first time in relation to this matter, thanking it for its letter of December 2006 "and subsequent reminders" and apologising for the delay in replying. He explained that he had been unable to obtain documents from his former matrimonial home. He provided some information and calculations. In April 2008, HMRC wrote to invite his agreement to an adjustment to his return for 2003 but received no reply. In June 2008 HMRC wrote to him again and in July 2008 it issued the Closure Notice and amended assessment which is the subject of this application.

3. Between August 2008 and February 2013, HMRC sent the Appellant regular self assessment statements, each showing the outstanding liability from 2002-3 as remaining unpaid. In September 2009, HMRC initiated County Court proceedings against the Appellant for unpaid tax in the sum of £28,862. The Appellant settled the proceedings with a payment of that amount in December 2009. HMRC told the Tribunal that the settlement figure did not include the £10, 480.64 due as a result of the amendment to the 2003 return. HMRC subsequently served the Appellant with a bankruptcy petition in relation to other matters (but including this outstanding sum), following which he instructed professional advisers who lodged an appeal on his behalf.

The Grounds of Appeal

4. Although the grounds of appeal filed on behalf of the Appellant assert that the assessment was not validly served, the Appellant's counsel conceded before the Tribunal that the Closure Notice (which contained information about the right of appeal and time limits) and the enquiry amendment had been duly served on his client

by HMRC in July 2008. There was no issue as to the service of the self assessment statements either. The Appellant commented in his oral evidence to the Tribunal that his post had at times been wrongly addressed, but it transpired that he was referring to an error on the part of the Court Service in relation to the County Court proceedings and not to correspondence from HMRC.

5. The Appellant's grounds of appeal, as stated in his Notice of Appeal dated 13 March 2013, are said to be (i) procedural and (ii) technical. As noted above, the procedural point (invalid service) was no longer relied upon by counsel in making this application. The remaining technical ground relates to the alleged inaccuracy of the amended assessment. Mr Broderick had brought certain documents with him to the hearing which, it was submitted by his counsel, showed that he had a robust case to make in this regard. Mr Jacobs conceded, on behalf of HMRC that, having seen those documents outside the hearing room, it appeared that the Appellant had an arguable case (at least in relation to the tax charged on investment income received, which formed part of the disputed amount) in the substantive appeal if this matter were allowed to proceed.

The Law

6. The Tribunal may, by virtue of rule 5 (3) (a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, allow an appeal to proceed out of time if it decides to exercise its discretion so to do. In considering whether this application should be permitted to proceed out of time, we have had regard to Mr Justice Morgan's decision in *Data Select v HMRC* [2012] UKUT 187 (TCC), in which he held that the correct approach to an application to proceed out of time was for the Tribunal to consider the overriding objective of dealing with cases fairly and justly, and all the circumstances of the case, including the matters referred to at CPR rule 3.9, before balancing the various factors and reaching its conclusion.

7. Morgan J commented at [34] that

> *"Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay?(3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."*

8. Mr Howard referred us to some older authorities which cover substantially the same ground, but which pre-date the advent of the Tribunal and the particular procedural rules by which we are bound. We consider below each of the issues identified as relevant by Morgan J.

9. The purpose of time limits is to bring finality to proceedings and to enable the efficient organisation of the Tribunal system. In the context of this appeal, we note the public policy requirement for HMRC to be able to enforce assessments and collect tax, unless there is a good reason for matters to be re-opened after the period for appealing has passed.

10. As noted above, the delay in making this appeal was a long one of some four and a half years, running from 30 days after the date in July 2008 when HMRC issued the Closure Notice and amended assessment. We were told by HMRC that it has not been possible to retrieve the paper file containing all the enquiry papers, although a substantial amount of paper work has been produced from electronic sources. The availability of the evidence on which the appeal will turn after so long a period of delay is another relevant factor in the exercise of our discretion.

11. Turning to the reason for the delay, the grounds of appeal state that following Mr Broderick's letter to HMRC in August 2007 he did not receive any further correspondence and so had assumed that the enquiry had been closed with no adjustments. It also states that although the self assessment statements referred to the enquiry amendment, they did not make the debt apparent, as it was shown to have been cleared by payments in relation to later years. The application also states that when Mr Broderick instructed advisers, they asked HMRC to supply copy correspondence, which it then took some time to locate. An appeal was made to HMRC in February 2013, which was refused, so the appeal to the Tribunal was made in March 2013. In a letter to the Tribunal dated 8 April 2013, the Appellant stated that "*the assessment was never received by me, and if I had received it I would have appealed immediately….at that time I was in the process of separating from my partner and was not fully resident at the address to which it was allegedly sent*".

12. Mr Broderick gave evidence to the Tribunal on oath. His evidence was that, in the difficult period leading up to the breakdown of his relationship in 2009, he did not always receive the post that had been sent to him and delivered to 3 Alsford Close. He said he could only assume that this was because his former partner had "*thrown letters away*". He did not repeat the earlier explanation that he had not been "fully resident" at that address. He told the Tribunal that he lived at Alsford Close from 2006 to 2009. He added that if he had received the Closure Notice he would certainly have responded to it as he had (and still has) documentary evidence which demonstrates that HMRC's conclusions were incorrect. Mr Broderick told the Tribunal that he had not focused on his tax affairs during this period, and that he had been confused due to so many things going on at the same time. He explained that he had been distracted by the relationship breakdown, although he confirmed that he had not been diagnosed as suffering from any psychiatric condition at that time.

13. Mr Broderick told the Tribunal that in 2009 his relationship had finally broken down and he had moved to Ivy Drive. He said he had notified everyone of his change of address as mail had not been forwarded to him by his ex partner. He said that his life had settled down then, but that it had taken him a while to "*get back on top of things*". Mr Broderick did not seem to accept in his evidence to the Tribunal that he had received all the self assessment statements sent to him from the date he moved

into Ivy Close onwards. His evidence was that "*if*" he had seen the self assessment statements, he would have thought the figure shown as outstanding for 2003 was erroneous, because he thought that all his historic liabilities to HMRC had been cleared when he discharged the judgement debt in 2009. He said that he only became aware of the outstanding figure when his advisers in relation to the later bankruptcy proceedings told him about it. In answer to a question from the Tribunal, he said that he had not looked at his own on line account with HMRC, although from his business activities on behalf of clients he was aware that this service was available.

14. In answer to a question from Mr Jacobs, Mr Broderick said that he had thought that the issue in relation to the year ending 2003 had "*been resolved*". He confirmed that he had represented clients under enquiry and knew that enquiries ended with a Closure Notice. He said he had not thought to ask for the Closure Notice in relation to his own enquiry because *"I hadn't clicked to be perfectly honest"*. Mr Jacobs put to Mr Broderick that HMRC's records showed that an officer had left a message for him on the answer machine at his business premises on 27 March 2008 which had not been returned. Mr Broderick replied that he did not receive that message, which would initially have been listened to by his staff, or he would have returned the call.

15. If this appeal is permitted to proceed out of time, HMRC will be put to the considerable work of searching for and retrieving its records from the relevant period and in defending the appeal. It is not known whether all the relevant documents and witnesses would be available after this length of time. There would undoubtedly be a prejudice to HMRC in dealing with the appeal, but this must be weighed against the prejudice to the Appellant if he may not proceed with an appeal.

16. If the appeal is not permitted to proceed, the Appellant will face a tax liability of over ten thousand pounds, which he asserts is incorrect. Mr Howard submitted that if the appeal is allowed to proceed it is unlikely that it would result in a hearing because of the strength of the documentary evidence available to support the Appellant's case. However, we are unable to form that view at this stage and accordingly proceed on the basis that a full hearing will be required. There will be a prejudice to the Appellant if the appeal cannot proceed, as he will lose the opportunity to have the assessment amended, however, that must be weighed against his failure to take any reasonable action to challenge the assessment at an earlier stage.

17. CPR rule 3.9 provides as follows:

> Relief from sanctions
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> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
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> (a) for litigation to be conducted efficiently and at proportionate cost; and
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> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence.

18. We have considered those factors in our assessment of all the circumstances above. The overriding objective in rule 2 of the Tribunal's procedural rules requires the Tribunal to deal with cases fairly and justly, and the Tribunal must give effect to the overriding objective in exercising its case management powers, including the power to allow an appeal to proceed out of time.

Submissions

19. Mr Jacob's submission on behalf of HMRC was that this application should be refused. He asked the Tribunal to view the application in the context of Mr Broderick's poor history of compliance. He referred us to the finding of a differently-constituted First-tier Tribunal in case number TC/2012/01947, in which the Tribunal accepted that this Appellant has a poor compliance record. He informed the Tribunal that determinations had now been issued in respect of the Appellant's outstanding self assessment returns for the years ended 2009, 2010 and 2011. He further submitted that it was unreasonable for a person with Mr Broderick's qualifications and experience to suggest that he did not know enough about how HMRC enquiries worked to realise that an enquiry would not have "been resolved" without a Closure Notice being issued. He pointed out that even if there had been a problem with the receipt of the Closure Notice after it had been duly served, the multiple self assessment statements were more than sufficient to put the Appellant on notice that there was an outstanding issue and that he had failed to take any action in relation to that issue without any reasonable excuse.

20. Mr Howard summarised his client's approach to the period of delay in challenging the assessment as being that he had received correspondence from HMRC "physically but not mentally" so that "the penny did not drop" that there was an assessment to be challenged. Mr Howard further submitted on his client's behalf that there is a well-known syndrome known as "the cobbler's shoes" whereby a person concerned professionally with a type of business tended not to use his professional skills on his own account. He submitted that the Tribunal should take this syndrome into account in assessing the reasonableness of his client's behaviour from 2008 to 2013.

21. Mr Howard asked the Tribunal to accept Mr Broderick's evidence that he would have challenged the Closure Notice and assessment if he had been aware of it. He submitted that the availability to his client, throughout the whole four and a half year period, of documentary evidence to counter HMRC's assessment figure, was evidence tending to support the Appellant's contention that he had not received the Closure Notice. He asked the Tribunal to consider the likely strength of the substantive appeal in exercising its discretion to allow it to proceed out of time.

Conclusion

22. The Tribunal is mindful of the policy reasons for imposing time limits in litigation, referred to above. We are also mindful that this is a case involving a long period of delay in making the application. The undesirability of re-opening issues after such a long delay, and the prejudice to HMRC in having to re-open a matter

which it has been entitled to regard as closed, are both factors to be weighed by the Tribunal.

23. The Tribunal was sympathetic to the evident distress that the breakdown of his relationship had caused Mr Broderick. We find that the Closure Notice and assessment were duly served on him, but we accept his evidence that he did not see the Closure Notice during this time of turmoil. We can make no firm finding as to the reasons for that. However, even if this represents a good reason for his initial failure to appeal, the disruption of his mail would account, by his own evidence, for approximately one year out of the total four and a half years' delay in making this application. We must go on to consider whether it was reasonable for him to take no action after he had moved to a new address in 2009 and the disruption of his post had ceased.

24. Mr Broderick has advanced several explanations for his failure to act during this period. Firstly, that he had thought that the inquiry issue had "been resolved" after his letter to HMRC of August 2007. In view of Mr Broderick's professional skills and experience, it does not seem to us reasonable for him to have thought that an enquiry could simply end without a Closure Notice being issued. Indeed, he must have been aware that he could have required HMRC to provide him with one even during the period when he was not receiving his post. We also do not accept Mr Howard's submission as to the "cobbler's shoes" syndrome, which apparently invites us to apply a lower benchmark of reasonable behaviour to an accountant than to the reasonable taxpayer not so qualified. Accordingly, we do not accept this explanation for the delay after 2009. Another explanation put forward by Mr Broderick was that he simply did not focus on his tax affairs at this time. That explanation would appear to relate to the period during which he was resident at Ivy Close and was receiving the self assessment statements, but before he focused sufficiently to pay the judgment debt in December 2009. We do not accept that simply failing to focus, in the absence of any medical condition, is reasonable conduct. We would expect any reasonable taxpayer to pay proper attention to his or her tax affairs. The third explanation was that he had thought the figure on the self assessment statements was erroneous because he thought that all outstanding liabilities had been cleared in settling the judgment debt. We accept that there was some scope for confusion in relation to this issue, although presumably this excuse could only be applied after December 2009 when he paid the money. We take the view that a reasonable taxpayer, having discharged a debt but continuing to receive self assessment statements showing a liability figure, would have checked the position on line, or made enquiries of HMRC and/or taken advice, rather than simply doing nothing about it. A reasonable taxpayer would surely have wanted to know which liabilities a payment of over £28,000 had cleared and which it had not. The evidence before us was that Mr Broderick did absolutely nothing about this situation, despite being on notice from the continued receipt of statements showing the liability, until he was served with a bankruptcy petition in relation to other matters.

25. We conclude that there was no good reason for the delay between 2009, when Mr Broderick moved to a new address and started receiving his post again, and his response to the bankruptcy petition which was to instruct advisers to unravel the

serious situation that he was in. We find that that period of inactivity accounts for some three years' delay, in relation to which the Appellant has failed to advance a reasonable explanation to the Tribunal. We take into account a discernible pattern of failure by the Appellant to respond to HMRC, evident from his very late response to the correspondence from December 2006 in August 2007, and the findings of the differently constituted Tribunal referred to above.

26. We are in no position to make an informed evaluation of the merits of the Appellant's substantive appeal, although we entirely accept Mr Howard's assertion that his client's intention is to make a robust case. We also bear in mind Mr Jacob's fair concession that there would be an arguable case (at least in relation to the investment income included in the assessment) if this matter is allowed to proceed.

27. We have weighed all these factors into the balance but concluded that we should not exercise out discretion to allow this matter to proceed out of time. The very long period of delay in this case, the absence of a reasonable explanation for the delay, the lamentable history of non compliance from a professional person and the prejudice to HMRC of needing to defend such a late appeal outweigh, in our view, the prejudice to the Appellant in not being permitted to proceed. Accordingly we have decided that it is fair and just for us to refuse this application.

28. 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.

ALISON MCKENNA
TRIBUNAL JUDGE

RELEASE DATE: 30 September 2013