TC05369

Appeal number: TC/2015/07233

PROCEDURE – application for permission to notify a late appeal – discretion – Data Select Ltd v HM Revenue & Customs applied – BPP Holdings v HM Revenue & Customs considered – application refused – appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR MEHBOOB CHAWDHERY **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 20 July 2016

Mr Alan Fielding of Accountancy Made Simple (Prestwich) Ltd appeared for the Appellant

Mrs Catherine Douglas of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. The Appellant is Mr Mehboob Chawdhery who is in business as a taxi driver. He has notified an appeal to the Tribunal against decisions dated 6 May 2008 comprising a closure notice in relation to income tax year 2005-06 and discovery assessments for tax years 2002-03 to 2004-05. The appeal was notified on 18 December 2015 pursuant to section 49H Taxes Management Act 1970 ("TMA 1970"). As appears below it was notified out of time and this decision concerns the Appellant's application for permission to notify the appeal out of time.

2. The tax assessed by the decisions under appeal is as follows:

Tax Year	**Tax Assessed £**
2002-03	6,251
2003-04	3,558
2004-05	9,135
2005-06	244

3. The issue before me is whether I should give permission to the Appellant to notify a late appeal. The Respondents have objected to the Appellant's application for permission.

Applications for Late Appeals Generally

4. The approach to applications to extend time was considered by Morgan J sitting in the Upper Tribunal in *Data Select Ltd v Commissioners for HM Revenue & Customs [2012] UKUT 187 (TCC)* where he said as follows:

> "34. … 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.
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> 35. The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see Sayers v Clarke Walker [2002] 1 WLR 3095; Smith v

> Brough [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc [2007] STC 1196.
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> 36. I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in Advocate General for Scotland v General Commissioners for Aberdeen City [2006] STC 1218 at [23]-[24] which is in line with what I have said above.
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> 37. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

5. Rule 3.9 of the Civil Procedure Rules ("CPR") has been amended since the decision in Data Select and now reads as follows:

> " (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 –
>
> (a) For litigation to be conducted efficiently and at proportionate cost; and
> (b) To enforce compliance with rules, practice directions and orders."

6. Data Select is a decision of the Upper Tribunal and it is binding upon me. I must take into account all the circumstances including the overriding objective of dealing with cases fairly and justly in conducting a balancing exercise ask myself:

(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?

(5) What will be the consequences for the parties of a refusal to extend time?

7. I also have regard to the decision of the Court of Appeal in *BPP Holdings Limited v Commissioners for HM Revenue & Customs [2016] EWCA Civ 121* which was concerned with non-compliance with Tribunal Rules and directions in the light of a divergent approach in the Upper Tribunal. It referred to the application by analogy of CPR 3.9 in Data Select although it did not consider the decision in Data Select in detail.

8. BPP Holdings was concerned with the imposition of sanctions for non-compliance with Tribunal directions. It clearly supports the application of the CPR to this Tribunal by way of analogy. The Court of Appeal was referred to the decision of Morgan J in Data Select but it decided that it was not appropriate to analyse that decision because it was not a case where there had been a history of non-compliance.

9. Prior to the decision of the Court of Appeal in BPP Holdings, the Upper Tribunal in *Romasave (Property Services) Limited v Commissioners for HM Revenue & Customs [2015] UKUT 254 (TCC)* considered and endorsed the approach in Data Select. Having considered the divergent approach in the Upper Tribunal to non-compliance with directions and relief from sanctions for breach it stated at [89]:

> " 89. It is not necessary for us to describe the history of this debate. The outcome, in our view, is that in this tribunal, and in the FTT, the factors identified by the courts in the revised form of CPR r 3.9 as having particular weight or importance, that is to say the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, are relevant factors, but have no special weight or importance. The weight or significance to be afforded to those factors, along with all other relevant factors, in applying the overriding objective to deal with cases fairly and justly, will be a matter for the tribunal in the particular circumstances of a given case."

10. It remains to be seen whether it is necessary in applications such as the present to give particular weight to the two factors identified in CPR 3.9, namely the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders. For present purposes I shall apply the decisions in Data Select and Romasave without giving any special weight to those two factors.

11. In Romasave the Upper Tribunal did give additional guidance to the First-tier Tribunal as to how it should conduct the balancing exercise. At [92] to [94] it stated:

> " 92. … Nonetheless, helpful guidance can be derived from the three-stage process set out by the Court of Appeal in *Denton* in order to provide first instance judges with a "clear exposition of how the provisions of rule 3.9(1) should be given effect". Although the third stage of that guidance, as set out by the majority, includes the requirement to give particular weight to the efficient conduct of litigation and the compliance with rules etc, and to that extent, for the reasons we have explained, would not have application in this tribunal or in the First-tier Tribunal, everything else said by the Court of Appeal translates readily into useful guidance on the approach to be adopted, in these tribunals as well as in the courts."

93. By way of summary, the majority in the Court of Appeal in *Denton d*escribed the three-stage approach in the following terms, at [24] (the references to "factors (a) and (b)" being to the particular factors referred to in CPR r 3.9):

> " We consider that the guidance given at paras 40 and 41 of *Mitchell* remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]'. …"

94. Once the factors (a) and (b) are afforded no special weight or significance, that approach is no different in principle to that set out in *Data Select*. The seriousness and significance of the relevant failure has always been one of the factors relevant to the tribunal's determination. That is encompassed in the reference in *Data Select*, at [34], to the purpose of the time limit and the length of the delay. The reason for the delay is a common factor in *Denton* and *Data Select*, as is the need to evaluate the circumstances of the case so as to enable the tribunal to deal with the matter justly."

12. In summary, therefore, the approach I shall take is as follows:

(1) I shall consider the factors set out by the Upper Tribunal in Data Select.

(2) In doing so, I shall take into account but not give special weight to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with time limits.

(3) I shall also bear in mind the 3 stage process described by the Court of Appeal in Denton, that is:

(a) to identify and assess the seriousness and significance of the failure,

(b) to consider why the default occurred, and

(c) to evaluate all the circumstances of the case, so as to deal justly with the application.

Circumstances in which the Appeal came to be made

13. I make the following findings of fact as to the circumstances in which the Appellant came to notify his appeal to the Tribunal. These findings of fact are based on the correspondence and documents provided by both parties and on what I was told by Mr Fielding at the hearing. Mr Fielding was measured and frank in the way he set out the facts. I have no hesitation in accepting him as an honest witness who was seeking to assist the Tribunal.

14. Given the passage of time HMRC have little or no documentation from the original enquiry. From what documentation there is it can be seen that an enquiry into the Appellant's self assessment return for the year 2005-06 commenced on 21 August 2007. The Appellant was at that time represented by IH Shah & Co. The Inspector made a request for information and documents but there was no response. An information notice was issued on 1 October 2007 which was not complied with. A closure notice together with discovery assessments for the three previous tax years were issued on 6 May 2008 ("the Assessments").

15. The time for appealing the Assessments expired on 5 May 2008 and no appeal was notified to HMRC.

16. Nothing further seems to have happened until about April 2011 by which time Mr Fielding had been instructed. He agreed with the Inspector that a late appeal could be notified, although it is not clear on what basis. I shall assume there was a reasonable excuse for an appeal being notified late. The documents before me included a note of telephone conversation dated 26 May 2011 between the Inspector and a Mr Khan. Mr Khan appears to have been an agent of the Appellant at some stage, but this was after Mr Fielding had been instructed. The note suggests that the Appellant had not received any correspondence in connection with the original enquiry and indeed was not aware of the enquiry itself. It seems likely therefore that that was the basis on which the Inspector admitted a late appeal. On 22 July 2011 the Inspector asked Mr Fielding for sight of the Appellant's business records. There was no response, and the Inspector chased a response by letter date 7 September 2011.

17. By November 2011 there had still been no response and on 8 November 2011 the Inspector wrote to Mr Fielding stating that in the absence of a response he would write to the Appellant setting out his view of the matter and offering a review. That approach was intended to be pursuant to section 49C TMA 1970. On 23 November 2011 the Inspector wrote setting out the circumstances in which the original closure notice and discovery assessments had been issued. He referred generally to the appeal and to subsequent correspondence. The letter stated that if the Appellant did not agree with the Inspector's view then the Appellant could ask for a review or appeal to the Tribunal. In fact the letter did not actually state the Inspector's view of the matter and section 49C was therefore not engaged.

18. On 14 December 2011 Mr Fielding requested a review of the decision and indicated that he intended to submit further paperwork by 8 January 2012. On 19 December 2011 the Inspector wrote stating that a review could not begin until he had sent HMRC's view of the matter pursuant to section 49B(2) TMA 1970. He said that he would write to the Appellant with his view of the matter and offering a review but before doing so he would wait until after 8 January 2012.

19. It seems that Mr Fielding did not have the necessary paperwork and on 8 January 2012 he wrote stating that as the enquiry had been dealt with by a previous adviser he would be grateful if the Inspector could provide any paperwork previously submitted and notes of any meetings. That letter does not appear in HMRC's records and there was no reply to it. I infer that it was not received by the Inspector.

20. On 9 March 2012 the Inspector wrote to the Appellant stating that Mr Fielding had submitted a late appeal but that information requested by the Inspector had not been received. This time he set out his view of the matter, expressly stating that the Assessments were valid and correctly issued. He offered a review of the Assessments and indicated that in the alternative the Appellant could notify his appeal to the Tribunal.

21. On the same date the Inspector wrote to Mr Fielding with a copy of his letter to the Appellant and referring to his letter dated 19 December 2012 (sic). He must have meant 19 December 2011. The Inspector stated that he had not received the paperwork which Mr Fielding had said would be provided in his letter dated 14 December 2011 and as a result he had given his view of the matter.

22. The address used by the Inspector for the Appellant was an address in Broad Street, Stoke on Trent. The address used for Mr Fielding was an address in The Walk, Rochdale. Mr Fielding told me that neither of these letters arrived. He said that the Appellant's address in Broad Street had been a temporary address. It was a flat above a shop and mail was often lost. In early 2012 the Appellant moved to another address in Stoke and had not re-directed his mail. Also, on 1 January 2012 Mr Fielding had sold his practice and taken semi-retirement. He had moved address but he had retained a few clients including the Appellant. He told me that he had re-directed his mail, but he had no recollection of seeing the Inspector's letter dated 9 March 2012. He did not tell the Inspector or HMRC generally about his change of address or that of the Appellant. I accept what Mr Fielding told me in relation to these matters.

23. The Appellant did not accept HMRC's offer of a review contained in the Inspector's letter dated 9 March 2012. The effect of section 49(C)(4) TMA 1970 therefore was that the Inspector's view of the matter was to be treated as if it were contained in a settlement pursuant to section 54(1) TMA 1970, in other words a binding settlement. The Assessments therefore became final, subject only to the possibility of the Tribunal giving permission for late notification of an appeal pursuant to section 49H TMA.

24. On 29 June 2012 the Inspector wrote again to the Appellant at Broad Street. It is not clear whether a copy was sent to Mr Fielding. The letter stated that as the Inspector had not heard from the Appellant in connection with the appeals the tax chargeable was now due and payable. Again this letter was not received by the Appellant.

25. There was no evidence of any subsequent communication from the Appellant or Mr Fielding until about April 2015. By then HMRC were seeking to enforce the debt in Trent County Court. There was a hearing on 10 April 2015 attended by the Appellant and his accountant, who I assume was Mr Fielding. The hearing was HMRC's application for a charging order. The Appellant opposed the application but a final charging order was granted. A statutory demand was then issued in October 2015 and served on 2 December 2015.

26. There was plainly correspondence between Mr Fielding and HMRC debt collection office during 2015 although only part of it was in evidence before me. I am prepared to accept that Mr Fielding was seeking to challenge the Assessments during this period. On 12 November 2015 Mr Fielding asked for the dispute to be referred to HMRC's alternative dispute resolution process ("ADR"). It was not accepted for ADR because there was no appeal accepted by the Tribunal. That refusal led Mr Fielding to notify the Appellant's appeal to the Tribunal on 18 December 2015.

Reasons

27. I now turn to consider the factors referred to above and all the circumstances of the case in deciding whether to grant permission to notify a late appeal.

28. The time limit which applies is that in section 49C TMA 1970. The Appellant had 30 days from 9 March 2012 to accept the offer of a review or to notify his appeal to the Tribunal. He did neither. However section 49H provides that the Tribunal can give permission to notify an appeal after the acceptance period has ended. I shall approach the application on the basis described above.

(i) Purpose of the Time Limit

29. The purpose of the time limit of 30 days is clearly to promote finality. Morgan J in Data Select stressed the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled. In the present case I am satisfied that HMRC were entitled to assume after 5 June 2008 until approached by Mr Fielding in or about April 2011 that the Assessments had become final. HMRC agreed to accept a late appeal and offered a review in their letter dated 9 March 2012. Again, they were entitled to assume from 8 April 2012 onwards that the Assessments had become final.

(ii) The period of delay

30. The period of delay in the present case is from April 2012 to December 2015. Having said that it seems that there was contact between Mr Fielding and HMRC between April 2015 and December 2015 in which Mr Fielding was challenging the Assessments. I have therefore excluded that period of delay. However the delay is still some 3 years which is a serious and significant failure in the context of a time limit of 30 days. It also follows a period of almost 3 years between June 2008 and April 2011 when the Appellant had failed to notify an appeal. I appreciate that the Inspector accepted a late appeal and as I have said I infer that there was a reasonable excuse for the earlier period of delay. Even though there was a reasonable excuse for that delay, in my view there was then an onus on the Appellant to ensure that his appeal proceeded without further delay.

(iii) Explanation for the Delay

31. The burden is on the Appellant to satisfy me as to any explanation for the delay between April 2012 and April 2015. The explanation put forward is that the Appellant and Mr Fielding did not receive the Inspector's letters dated 9 March 2012 and 29 June 2012. That was no fault of the Inspector or HMRC. The Appellant and Mr Fielding each failed to notify the Inspector that they had changed address. Further, the Appellant failed to re-direct his mail, and must surely have known that mail to his Broad Street address had been going missing. That appears to have been what had happened during the original enquiry.

32. In addition, it ought to have been clear to Mr Fielding that he had not received a reply to his letter dated 8 January 2012. I appreciate that Mr Fielding had sold his practice and had become semi-retired in early 2012. However it does seem to me that he overlooked for a long period the fact that action was required in relation to the Appellant's file. I consider that there was an onus on Mr Fielding to contact the Inspector to seek a response to his letter dated 8 January 2012. He could not simply leave matters in abeyance, especially in light of the previous period of delay for which the Appellant had been granted an indulgence.

33. Further, the Appellant himself ought to have been pressing for a resolution of his dispute in relation to the Assessments. There was in my view an onus on the Appellant to be proactive, and to seek an update from Mr Fielding as to what was happening. He was not entitled, as appears to have been the case, to sit back and hope that the Assessments would not be pursued. That is what he did until 2015 when HMRC sought to enforce the debt by way of charging order and later a statutory demand as a precursor to bankruptcy proceedings.

(iv) Consequences for the Parties of Extending Time

34. If I give permission for the Appellant to make a late appeal then HMRC will lose the finality which for long periods of time they were entitled to expect. Mrs Douglas also relied on specific prejudice to HMRC over and above the loss of finality. In particular she said that HMRC's records were no longer available. There would have been a paper file but the Inspector could no longer find it. If time is extended I am satisfied that HMRC will have suffered prejudice in the form of lost documentation as a result of the Appellant's delay. I cannot say how serious that prejudice would be without a full consideration of the merits of the appeal which I am not in a position to assess on this application.

35. On the other hand, if permission is granted then the Appellant will have the opportunity to pursue his arguments. The issues in relation to the Assessments would be determined on their merits.

(v) Consequences for the Parties of Refusing to Extend Time

36. I am not in a position to readily assess the merits of the Appellant's proposed appeal, but I shall assume that he would have at least a reasonable prospect of

success. He would lose his opportunity to challenge the Assessments if time is not extended. I also accept that the sum in dispute is significant for the Appellant.

(vi) Generally

37. I have had regard to the need to ensure compliance with time limits generally, and to the wasted costs and resources involved in applications such as the present. I have not given any special weight to the need for litigation to be conducted efficiently and at proportionate cost or to the need to enforce compliance with time limits, but I have treated both those factors as relevant considerations in the exercise of my discretion.

38. I must balance all the circumstances and factors described above. Having done so I consider that the time for appealing should not be extended. This is a case where the length of the delay, the absence of any good explanation and the prejudice to HMRC weigh more heavily in the balance than the prejudice to the Appellant. It follows that even if the test to be applied is any stricter than that described in Data Select, the result would inevitably be the same.

Conclusion

39. For the reasons given above the application for permission to notify a late appeal is refused. In the circumstances I must strike out the appeal.

40. 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.

JUDGE CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 16 SEPTEMBER 2016