[2017] UKFTT 186 (TC)

TC05674

Appeal number: TC/2016/04377

STAMP DUTY LAND TAX – discovery assessment – review decision – appeal lodged with the tribunal late – application for permission to appeal out of time – whether application should be granted in circumstances – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

PARMINDER LALLY **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

Sitting in public at Fox Court, London on 13 February 2017

The Appellant appeared in person

Mr Peter Kane, HM Inspector of Taxes, appeared for the Respondents

DECISION

Introduction

1. This application, made on 15 August 2016, is the Appellant's application for an extension of time to file an appeal to this Tribunal. The Appellant's appeal concerns the imposition of a discovery assessment raised to recover Stamp Duty Land Tax ("SDLT") in the sum of £8,610. The Appellant's application for an extension of time is opposed by the Respondents.

Background chronology and legislation relevant to the time limits

2. On 8 September 2015 the Respondents issued a discovery assessment under the powers set out in Paragraph 28 of Schedule 10 to Finance Act 2003 ("Schedule 10") to recover SDLT which the Respondents alleged was unpaid by the Appellant in respect of a 2011 transaction.

3. Paragraph 35 of Schedule 10 provides that an appeal may be brought against a discovery assessment raised to recover SDLT. Sub paragraph 36(1) of Schedule 10 provides that a notice of appeal must be made in writing within 30 days of the issue of the discovery assessment. Grounds of appeal must be given.

4. On 20 October 2015 the Appellant's freshly instructed agent wrote to the Respondents to appeal against the discovery assessment. The Appellant's agent accepted that this request was late. On 11 March 2016 accepted the Appellant's request to appeal to them out of time, treated the appeal as a request for a review and sought clarification of the grounds on which the Appellant was appealing.

5. Paragraph 36B of Schedule 10 requires the Respondents to provide their view of the matter. This was done in a letter dated 10 May 2016. The Respondents then conducted a review in accordance with the provisions of Paragraph 36E of Schedule 10. The outcome of the Respondents' review was to uphold the original decision, and this was communicated to the Appellant by a letter dated 23 June 2016.

6. Paragraph 36F of Schedule 10 provides that the review conclusions are to be treated as if they were an agreement in writing under Paragraph 37 of Schedule 10 for the settlement of the matter; however, this does not apply if the Appellant notifies an appeal to the tribunal in accordance with Paragraph 36G of Schedule 10.

7. Paragraph 36G provides:

> **36G—**
>
> (1) This paragraph applies if—
>
> (*a*) HMRC have given notice of the conclusions of a review in accordance with paragraph 36E, or

(*b*) the period specified in paragraph 36E(6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

(3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this paragraph "post-review period" means—

(*a*) in a case falling with sub-paragraph (1)(*a*), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with paragraph 36E(6), or

(*b*) in a case falling within sub-paragraph (1)(*b*), the period that—

(i) begins with the day following the last day of the period specified in paragraph 36E(6), and

(ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with paragraph 36E(9).

8. On 15 August 2016 the Appellant emailed his appeal to the Tribunal. On his Notice of Appeal form the Appellant made an application for an extension of time in which to appeal. The Respondents notified the Tribunal that they opposed the Appellant's application.

Appellant's submissions

9. The Appellant had filed a statement with a bundle of documents prior to the hearing and asked to read out the final paragraph of that statement as his submissions. That paragraph is as follows:

> I would have appealed on time had HMRC's Review been thorough: their invention of a new discovery reason "moved the goalposts". This was unfair as it made points that we had not so far discussed. It was not so much a review as more of a "Can we now find a decent reason to justify a discovery assessment". My agent asked to engage with HMRC over this and was shut down. I feel that given the circumstances the reviewing office could have been more reasonable with my agents request for more time to discuss the points.

10. As it was clear from this statement that the author of this paragraph had not appreciated that the Respondents had no power to extend the time for the Appellant to appeal, I asked the Appellant if he knew why there had been a delay in submitting the

appeal to the Tribunal once the agent knew the Respondents could not extend time. The Appellant said that he had been advised by his agent to say that there was confusion over the dates in the letters but he himself did not know how this had arisen. The Appellant said that he had left matters in the hands of his agent.

11. In his Reply the Appellant submitted that there was a genuine dispute about the substantive issue which he would like to be heard.

Respondents' submissions

12. Mr Kane set out the Respondents' understanding of the background to the assessment, including the Appellant's use of an untested SDLT avoidance scheme. Mr Kane noted that the Appellant's appeal against the assessment was made late so the Appellant was aware of the need to act promptly in future. The appeal was in relation to the validity of the discovery assessment rather than the substantive issues so the review of the matter focussed only on these points. The Review decision went further and Mr Kane accepted there was the potential for confusion over the scope of the appeal. However, the Respondents' submission was that the correspondence sent to the Appellant was clear about the deadline for an appeal.

13. The Respondents accepted that the Tribunal had a wide discretion in relation to applications for an extension of time but submitted that the Appellant had no reasonable excuse for his delay and the application should be refused. The Respondents relied upon *Advocate General for Scotland v General Commissioners for Aberdeen City* [2005] CSOH 135 and *Ogedegbe v HMRC* [2009] UKFTT 364.

Facts found

14. The Appellant's submissions contained some oral evidence and I found the Appellant to be a truthful witness. On the basis of the Appellant's oral evidence and the documents before me, I found the following facts:

a. On 8 September 2015 the Respondents issued a discovery assessment upon the Appellant to recover SDLT in the sum of £8,610. This related to the Appellant's participation, in late 2011, in a SDLT avoidance scheme known as 3S.

b. On 15 October 2015 the Appellant appointed Ross Martin Tax Consultancy Limited as his agent. On 20 October 2015, Ms Ross Martin of Ross Martin Tax Consultancy Limited wrote to the Respondents to notify them of the Appellant's appointment of an agent and to appeal against the discovery assessment. It was accepted that this appeal was late but Ms Ross Martin sought the Respondents' permission to appeal out of time, on the basis of the "complexity of the issues involved".

c. After some correspondence between the parties, on 7 March 2016 the Appellant's agent wrote to explain that the reason for the Appellant's delay in appealing was that the discovery assessment had been sent to the wrong address. On the basis of this explanation the Respondents accepted the Appellant's request to appeal to them out of time. By letter dated 11 March 2016 the Respondents treated

the Appellant's appeal as a request for a review, and sought clarification from the Appellant's agent as to the grounds on which the Appellant was appealing.

d. By letter dated 7 April 2016 Ms Ross Martin provided the reasons why it said that the "discovery assessment fails on technical grounds". In that letter Ms Ross Martin also set out her reasons for considering that the 3S scheme in which the Appellant had participated was successful.

e. By letter dated 10 May 2016 Mr McColgan sent the Appellant his view of the matter. As the matter in question was the Respondents' decision to issue a discovery assessment, Mr McColgan focussed solely upon the technical grounds for raising the assessment. A copy of this letter was sent to the Appellant's agent on the same date.

f. Mr Street of the Respondents then conducted a review of Mr McColgan's decision. The outcome of Mr Street's review was to uphold the original decision; this was communicated to the Appellant by a letter dated 23 June 2016. Although Mr Street stated that the matter in dispute was the technical basis for raising the discovery assessment, after setting out his review of that matter Mr Street went on to comment about the effectiveness of the scheme which the Appellant used. Mr Street's review decision letter of 23 June 2016 concluded:

> **Next steps**
>
> 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 1024.
>
> *If you do not notify the appeal to the tribunal within 30 days of the date of this letter, the appeal will be determined in accordance with my conclusion, by virtue of Paragraph 36F Schedule 10 Finance Act 2003.*

g. On 19 July 2016 the Appellant's agent wrote to Mr Street. Ms Ross Martin's letter in full was as follows:

> Thank you for your decision of 23 June 2016.
>
> In the interests of saving each side the costs of an appeal we would like to take a final opportunity to see if we can settle this case informally. Would you please allow a further 60 days – so you may respond to this and then if you do not agree we will then make a formal appeal.
>
> - Mr Lally used took advantage of the SDLT rules in respect of his house purchase on 28 October 2011 and he paid no SDLT according to the legislation as it stood at that date.
>
> - His return took advantage of the rules which were blocked by Section 45 FA 2013 which was amended by Budget 2012 with retrospective effect to

21 March 2012: this was to close down further tax avoidance using the relief.

- Section 75A FA 2003 contains widely drafted general anti-avoidance legislation (the GAAR). This legislation has applied throughout. HMRC obviously did not wish to use this legislation to counter sub-sale relief cases which is why the changes that were made in Budget 2012 were retrospective.

- HMRC raised a discovery assessment in respect of Mr Lally's SDLT return on 8 September 2015. It was in time to do so however the assessment fails on technical grounds.

- Originally HMRC's argument was that Mr Lally's tax planning did not work, however we find nothing to say that this did not work as it was implemented before the law changed on 21 March 2012. Sterling Tax Strategies administrators say as much.

We consider that:

1) The tax planning that Mr Lally used was "prevailing practice" at the time: HMRC has not made a valid discovery (Sch 10 para 30(5)(b) FA 2003).

2) Even if the planning could not be described as "prevailing practice", the planning that was used did work in October 2011 and so HMRC cannot make a discovery: no tax is due, there is nothing to assess. HMRC has not made a valid discovery. The fact that the law changed afterwards shows that the government had accepted that the planning worked at the time. If the planning had not worked there was no reason to make the changes in Budget 2012.

If discovery is allowed on points 1 and 2 above

3) The tax planning worked and the GAAR is not effective against tax rules that work: the fact that HMRC had to amend s45 FA 2003 illustrates this.

In short the discovery fails: the planning followed the SDLT rules at the time of the transaction.

h. There is a faint date stamp showing that Ms Ross Martin's letter was received by the Respondents on 22 July 2016. By letter dated 25 July 2016 Mr Street responded to the Appellant's agent as follows:

My involvement with Mr Lally's case has now ended. If Mr Lally wishes to take his appeal further, he will now need to lodge an appeal directly with the tribunal. The statutory deadline for this appeal is 30 days from the date of the review conclusion letter. HMRC has no control over the length of the timeframe. Mr Lally had until 23 July 2016 to lodge an appeal, which has now passed. If Mr Lally wishes to continue with his appeal, he will need to lodge an appeal with the tribunal as soon as possible.

The following is from the tribunal's "Guidance notes on completing the Notice of Appeal", regarding late appeals:

> *If you have been unable to notify your appeal to the Tribunal within the appropriate time limit, you can ask the Tribunal for permission to notify your appeal late.*
>
> *You must provide reasons for the delay and why the Tribunal should give you permissions to make or notify your appeal late. The Tribunal will consider whether you have good reasons for making or notifying your appeal late and may or may not grant your request.*

Even if your client lodges an appeal with the Tribunal, there may be further opportunity for an informal settlement. However, any further grounds would need to be referred to the decision maker, Mr Eugene McColgan, and any consideration would be at his discretion.

If you do not notify the appeal to the tribunal the appeal will be determined in accordance with my review conclusion, by virtue of Paragraph 36F Schedule 10 Finance Act 2003.

i. Mr McColgan was apparently unaware of the correspondence between Mr Street and Ms Ross Martin. In order to establish whether an appeal had been made or the SDLT assessed could be released for collection, Mr McColgan wrote to the Appellant on 27 July 2016. That letter is as follows:

> I am following up on the decision letter issued by Mr David Street, the Reviewing Officer, on 23 June 2016.
>
> In his letter Mr Street advised that, if your client did not agree with his conclusions, he could ask an independent tribunal to decide the matter. To do so he must lodge an appeal with the tribunal within 30 days of 23 June 2016.
>
> Your client was advised that, if he did not notify the appeal to the tribunal within 30 days, the appeal will be determined in accordance with Mr Street's conclusion.
>
> To date I have not received notice of an appeal from your client. May I please ask you to let me know if he has done so.
>
> If I do not hear from you to that effect by 15 August 2016, along with a copy of the Notification of Appeal) I will consider that Mr Lally's appeal has been determined from 25 July 2016 in accordance with Mr Street's conclusion, by virtue of Paragraph 36F Schedule 10 Finance Act 2003.
>
> I will then refer collection of any outstanding tax and interest to our Debt Management Unit.

j. On 15 August 2016 the Appellant emailed his appeal to the Tribunal. On his Notice of Appeal form the Appellant made an application for an extension of time in which to appeal. The Appellant stated that the deadline for appealing was 15 August 2016 and, in response to the request for reasons why the appeal was notified late, the Appellant wrote:

> This deadline was given HMRC on 27/07/2016.

k. Also on 15 August 2016, the Appellant wrote to Mr McColgan to notify him that an appeal had been lodged. The Appellant also asked Mr McColgan to consider a hardship application.

l. On 8 November 2016 the Respondents notified the Tribunal that they opposed the Appellant's application for an extension of time in which to appeal.

Discussion and decision

15. In an application for an extension of time to submit an appeal to the Tribunal, the onus of proof lies with the Appellant. The standard of proof is the balance of probabilities.

16. Sub-paragraphs 36E(2) and (5) of Schedule 10 provide that an appeal against a review decision must be made to the Tribunal within a period of 30 days starting with the date of the review decision. Sub-paragraph 36E(3) provides that an appeal may be made outside the 30 days only if the Tribunal gives permission. The date of the review decision was 23 June 2016, and so the deadline for an in-time appeal was 23 July 2016. Although the Notice of Appeal was dated 11 August 2016, the Appellant emailed his appeal to the Tribunal on 15 August 2016. Therefore the Appellant filed his appeal 23 days after the deadline set out in Sub-paragraph 36E(5).

17. Rule 20 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 provides that the Tribunal must not admit an appeal made out of time unless it gives permission for that appeal to be admitted out of time. Rule 5 allows the Tribunal to extend the time allowed for complying with any rule unless that extension of time would conflict with another enactment. Here there is no conflict as Sub-paragraph 36E(3) allows the Tribunal to extend the time allowed.

18. The principles relevant to deciding whether to decide to extend the time allowed to appeal to the Tribunal are set out in *Data Select Ltd v Revenue and Customs Commissioners* [2012] STC 2195. At paragraph 34 Morgan J held:

> 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.

19. In undertaking the balancing exercise set out in *Data Select*, the Tribunal must have regard to the overriding objective of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 to deal with cases "fairly and justly". This includes "avoiding delay".

Purpose of the time limit

20. Applying the principles set out in *Data Select* here, I look first the purpose of the 30 day time limit for submitting an appeal. It is clear that this is to encourage a taxpayer to appeal without delay, if he intends to do so. Such a time limit also enables both parties to achieve finality, and allows the Respondents to collect the tax due, if there is no appeal within a reasonable time. As was said by the Tribunal in *Galvin v HMRC* [2012] UKFTT 280 (TC):

> Time limits exist to provide finality to legal proceedings to both sides, and allow HMRC to move on to other cases, something that is in the general public interest.

The extent of the delay

21. The Appellant's appeal was 23 days late.

Is there a good reason for the delay?

22. The explanation given for the delay in the Appellant's written submission, dated 26 January 2017, is that the Appellant would have appealed in time had the Respondents' review been more thorough but, as the review decision covered the substantive issue as well as the challenge to the discovery assessment on technical grounds, the Appellant wanted to engage with these additional points in correspondence before submitting an appeal.

23. There is a contradiction between the Appellant's contentions that, on the one hand, the reviewing officer was insufficiently thorough and, on the other hand, that there were new points raised in the review decision which should have been discussed further in correspondence. Assuming a typographical error so that the submission is that the delay was due to additional points being raised by the Respondents at the review stage, the Appellant's written submission suggests that the delay occurred as a result of the Respondents choosing not to grant the Appellant more time to appeal. However, as is clear from the legislation, only the Tribunal can allow an appeal to be submitted out of time. The Respondents did not pretend otherwise.

24. Mr Kane, for the Respondents, fairly accepted that the review letter had covered the substantive dispute as well as the technical dispute regarding the validity of the assessment, and that referring to the substantive issues could have caused confusion. I agree that the inclusion of additional points could have caused confusion about the issues in dispute, although Ms Ross Martin's letter of 19 July 2016 does not refer to

any such confusion. In that letter the Appellant's agent simply seeks an additional 60 days for "a final opportunity to see if we can settle this case informally".

25. However, even if the Appellant's agent was confused about the extent of the review decision and whether substantive as well as technical issues should be appealed, following receipt of the Respondents' letter of 25 July 2016, it is difficult to see how any confusion about the scope of an appeal could have caused the Appellant or his agent to be confused about the deadline for appealing. The two letters from Mr Street make it abundantly clear that if the Appellant did not accept the Respondents' view then he must appeal to the Tribunal, and that there was a deadline for that appeal. By the time the Appellant and his agent had received the 25 July letter it should have been clear that:

- The time allowed for appealing to the tribunal was 30 days, and that this deadline had already passed
- The deadline was fixed by statute and HMRC had no control over its length
- An appeal to the Tribunal should be lodged as soon as possible

26. I asked the Appellant if he knew why his agent had not taken immediate action once she had received the 25 July letter. The Appellant said that he had left matters in the hands of his agent and he was not able to explain why there was delay after the 25 July letter was received.

27. The Appellant did direct me to his agent's annotation of the letter of 27 July 2016. This annotation read:

> Confusion this end – taken to mean that deadline for appeal extended to 15/8/16.

28. The Appellant could not explain to me how the letter of 27 July 2016 might be read as suggesting that the deadline for appealing to the Tribunal had been extended to 15 August 2016.

29. In this application, it appears that the best case that can be put forward for the Appellant rests heavily upon the assertion that the Appellant's agent misunderstood the correspondence. In considering the credibility of this assertion, I bear in mind that the Appellant's agent is a professional representative. I would expect a person who holds herself out as providing a tax consultancy to have some knowledge of the tax system, including of the procedure for appealing to the Tribunal against a review decision of HMRC. But, even in the absence of that knowledge, given that the letters concern a decision regarding a discovery assessment imposed upon the Appellant, I would expect the Appellant and his agent to read the letters with some care and attention. Had care been applied by the Appellant's agent in reading the Respondents' letters then it must have been obvious that the Respondents were stating that they could not extend the deadline for appealing to the Tribunal. I do not consider it credible that the Appellant's agent, reading the Respondents' letters as a

whole, could have understood that an extension of time had been granted. All three letters clearly stated that the deadline for filing an appeal was 23 July 2016. Even if Ms Ross Martin had initially been under the impression that it was in the Respondents' power to grant an extension of time, she could not have continued holding that view once she had read Mr Street's letter of 25 July 2016. Unfortunately for the Appellant, who bears the onus of proof, Ms Ross Martin was not present at the hearing to provide oral evidence which might support the assertion that she mistakenly understood that an extension of time had been granted. In light of the correspondence as a whole, I do not find the unsupported assertion that Ms Ross Martin so misunderstood Mr McColgan's 27 July letter as to believe an extension had been granted, to be plausible.

30. It follows that I do not consider that the Appellant has put forward a good reason for his delay in submitting his appeal.

The consequences for the parties as a result of my decision

31. I consider the consequences to each party of granting, or not granting, the application for an extension of time. If the Appellant is not granted more time then he will lose the opportunity to argue that the discovery assessment raised upon him should be overturned. The tax at stake is £8,610. The Appellant indicated in 15 August 2016 letter to the Respondents that he could not afford to pay this sum.

32. If the Appellant is granted permission to appeal late then the Respondents, and the general body of taxpayers, will be put to the time and expense of responding to the Appellant's appeal. That expense is unlikely to be greatly diminished by the fact that the burden of proof on a substantive appeal lies with the Appellant, who has yet to produce any documents relevant to the underlying events which took place in 2011.

Balancing the relevant factors and the over-riding objective

33. As I noted above, the over-riding objective of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 is to deal with cases fairly and justly. In balancing the competing considerations, I bear in mind that, as Sir Stephen Oliver stated in *Ogedegbe v HMRC* [2009] UKFTT 364, extensions of time should be given as the exception and not as the rule.

34. I also bear in mind the comments of the Senior President of Tribunals in *BPP Holdings v HMRC* [2016] EWCA Civ 121 that no lesser standard of compliance is expected in the tribunal than in the courts:

> 37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in Mitchell and Denton. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the

policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.

38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the noncompliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.

35. In this case I have considered very carefully the explanations put forward for the Appellant's delay. Although the length of the delay is not particularly excessive, I do not consider that the Appellant has provided a credible explanation for why that delay occurred, particularly after receipt of the 25 July letter. I am satisfied that the Appellant will suffer some prejudice by losing the opportunity to appeal and that this may be marginally greater than the prejudice which would be suffered by the Respondents if they had to bear the costs of responding to the Appellant's appeal. However, in the absence of a good reason for the Appellant's delay, I conclude that the balance of factors is in favour of the Respondents.

Conclusion

36. Therefore, for the reasons set out above, I refuse the Appellant's application for an extension of time to appeal to this Tribunal. I outlined the basis of my decision to the parties at the conclusion of the hearing and informed the Appellant that I would produce a written decision for him to consider, with his agent, if he wished to appeal.

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.

JANE BAILEY

TRIBUNAL JUDGE
RELEASE DATE: 20 FEBRUARY 2017