TC06172

Appeal number: TC/2016/05897

VAT – procedure – appeal out of time – application to extend time for appeal – reasonable excuse – no – application refused – appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL AITKEN **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in Glasgow on Monday 16 October 2017

Mr T Milliken, for the Appellant

Mr M Mason, Presenting Officer for HMRC, for the Respondents

DECISION

The issue

1. This was a preliminary hearing to decide the appellant's application in the Notice of Appeal dated 24 September 2016. The appellant wishes to lodge an appeal against the Closure Notice under Section 28A(1) and (2) Taxes Management Act 1970 ("TMA"). That Closure Notice related to an enquiry into the appellant's self-assessment for the year 2006/07 following the issue of a Notice to the appellant in terms of Regulation 72(5) Condition B Income Tax (Pay As You Earn) Regulations 2003.

2. That enquiry had also established that amendments were required for the year 2005/06. A Notice of Assessment issued with the Closure Notice for 2005/06 was in the sum of £16,401.12. The Closure Notice for 2006/07 showed a small amount of additional tax due for that year. As at the date of the Closure Notice the total amount outstanding on the appellant's self-assessment account was £22,554.29 and that included penalties for late filing.

Background

3. No appeal was lodged with either the respondent ("HMRC") or the Tribunal and the days for lodging an appeal expired on 14 November 2008.

4. HMRC's records were routinely destroyed in accordance with normal practice in closed cases in 2014.

5. On 8 February 2016, the appellant's accountant wrote to HMRC because the Debt Management Unit of HMRC had served an Earnings Arrestment on the appellant's employer. The debt included the outstanding portions of the 2005/06 assessment. The accountants intimated that they wished to lodge an appeal so that the outstanding liability for the year 2005/06 could be suspended by Debt Management.

6. They advised that they had ceased acting for the appellant in 2009 but had been retained to act in this matter. I note from HMRC's screenshot that the agents had made contact with the case worker on 20 January 2009 in relation to debt recovery. HMRC's Debt Management then made contact with them. A Time To Pay agreement was put in place. Lawyers were subsequently instructed by the appellant.

7. On 12 May 2016, HMRC responded stating that the appeal was outwith the time limit and that the appellant had the right to appeal to the Tribunal.

8. On 20 October 2016, the representatives wrote to HMRC confirming that they had lodged the Notice of Appeal with the Tribunal on the previous day and seeking an amendment to the 2005/06 assessment.

Application for admission of a late appeal

The Law

9. The Tribunal's power to admit a late appeal is contained in Section 49 TMA which reads as follows:-

> "49 **Late notice of appeal**
>
> (1) This section applies in a case where—
>
> (a) notice of appeal may be given to HMRC, but
>
> (b) no notice is given before the relevant time limit.
>
> (2) Notice may be given after the relevant time limit if—
>
> (a) HMRC agree, or
>
> (b) where HMRC do not agree the tribunal gives permission."

10. The general approach to such discretionary decisions is set out by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City*[1] ("Aberdeen") and in particular at paragraphs 22-24 which read as follows:-

> "[22] Section 49 [of the Taxes Management Act] is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.
>
> [23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been

[1] 2006 STC 1218

concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late.

[24] Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one and another, for example, in a case where there is a reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies."

11. I was not referred to the case but I agree with the decision of Judge Berner at paragraph 36 in *O'Flaherty v HMRC*[2] and that reads:-

> "I was referred to *Ogedegbe* … where Sir Stephen Oliver refused permission to appeal out of time. In the course of his decision, Sir Stephen made the point that permission to appeal out of time will only be granted exceptionally. It is in my view important that this comment should not be thought to provide a qualitative test for the circumstances the FTT is required to take into account. It should properly be understood as saying nothing more than that permission should not routinely be given; what is needed is the proper judicial exercise of a discretion, taking account all relevant factors and circumstances."

12. He goes on to record at paragraph 37 that: -

> "Time limits are prescribed by law, and as such should as a rule be respected".

I agree entirely.

13. Paragraph 38 reads:-

> "These references to permission being granted exceptionally should not be elevated into a requirement that exceptional circumstances are needed before permission to appeal out of time may be granted. That is not what was said in *Ogedegbe* nor in *Aston Markland*, and it is not the case. The matter is entirely in the discretion of the FTT, which must take account of all relevant circumstances. There is no requirement that the circumstances must be exceptional."

That is the approach which I adopt.

14. I have considered, and weighed in the balance, all of the relevant circumstances including, but not restricted to, the circumstances identified in *Aberdeen*. In so doing,

[2] 2013 UKUT 01619 (TCC)

I have concurrently applied the three stage process set out by the Court of Appeal in *Denton & Others v T H Whyte & Another; Decadent Vapours Ltd v Bevan & Others* and *Utilise TDS Ltd v Davies & Others* ("Denton")[3]. The first of those is to identify the seriousness and significance of the failure to lodge an appeal in relation to which the relief is sought. The second is to consider why the default occurred and the third is to evaluate all the circumstances of the case so as to deal justly with the application of the factors.

15. Apart from *Aberdeen,* HMRC also relied upon and referred me to *Romasave (Property Services) Ltd v HMRC* ("*Romasave"*)[4].

16. I am bound by and entirely agree with Judges Berner and Falk at paragraph 96 of *Romasave* which reads:-

> "… The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the Tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

17. Lastly, at all times I have had in mind Rule 2 of the Rules which reads:-

> "**2.—Overriding objective and parties' obligations to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
> (a) exercises any power under these Rules; or
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally."

[3] 2014 EWCA Civ 906

[4] 2015 UKUT 254

The appellant's evidence

18. Mr Aitken briefly, and informally, gave evidence. He argued that he relied on firstly his accountants and then his lawyers and he had always been under the impression that the Closure Notice and assessment had been appealed verbally. He had indeed entered into a Time to Pay agreement which ran for some six or eight months in 2009 and he had repaid £500 per month. In his view he had considered that to be a goodwill gesture since he knew that some monies were due to HMRC.

19. After the accountants ceased acting he had employed lawyers because he thought that he might get a better outcome but that had not happened. Ultimately the lawyers had "got nowhere". They had advised him that HMRC probably did not consider the debt to be collectable and that therefore he should simply do nothing and deal with it, as and when, HMRC came back to him. He said that he had occasionally received self-assessment statements which showed the debt and he would then revert to his lawyers. There was no evidence as to the detail of anything done by the lawyers.

20. The first contact after 2010 with HMRC was when his salary was arrested and it was then that he had instructed Mr Milliken again.

Discussion

Is there a reasonable excuse for not observing the time limit?

21. It was argued for the appellant that the accountants had written to HMRC on 9 October 2008 disputing the figures proposed by HMRC in the course of the enquiry, but HMRC had not responded and had simply issued the Closure Notice and Notice of Assessment. Further correspondence with HMRC had not been fruitful and therefore HMRC had contributed to the delay because it was only in February 2016 that the appellant realised that there was no valid appeal.

22. I simply do not accept that argument. When the assessment was issued it was issued to the accountant together with a form entitled "Appeal against the Notice of Assessment and application to postpone payment of tax" which HMRC had prepopulated. The appellant had produced that with the Notice of Appeal. It had simply never been submitted. Furthermore the covering letter stated very clearly

> "If you think this Notice is wrong in any way, you should appeal in writing within 30 days from the date of issue of above. An appeal form is enclosed. If you have any doubts or do not understand this Notice please contact this office or your local tax office for advice".

23. The letter sent to the appellant himself on 16 October 2008 had a section headed in bold and underscored reading "Your right of appeal". That stated "Your appeal must be in writing and should state the grounds for your appeal. An appeal form, SA 536 is attached." It also pointed out the ability to appeal to the Commissioners and indicated where further information could be found.

24. Neither the appellant nor his representative should have been in any doubt about the need for a written appeal. Furthermore the fact that there was subsequent

correspondence with Debt Management and a Time to Pay agreement was entered into is self-explanatory. Both the appellant and his advisers should have been aware that the matter was being treated as a debt and not as a live issue.

25. Perhaps the appellant and his advisers did get muddled about what he should have done but firstly ignorance of the law can never amount to a reasonable excuse and secondly, the question as to whether a genuine mistake can amount to a reasonable excuse has been considered in *Garnmoss Limited t/a Parham Builders v HMRC*[5] where Judge Hellier said in the context of reasonable excuse for VAT default surcharges at paragraph 12:

> "What is clear is that there was a muddle and a *bona fide* mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. …".

In this case failing to submit a written appeal, even although HMRC had pointed out the need for that cannot amount to a reasonable excuse.

26. The fact that for unknown reasons HMRC did not pursue recovery of the debt between 2010 and early 2016, cannot alter the fact that there was no reasonable excuse.

Did matters proceed with reasonable diligence once the excuse had ceased to operate?

27. I have found that there was no reasonable excuse but even if I am wrong and there was a reasonable excuse, there was a long delay between February 2016 and the Notice of Appeal being lodged with the Tribunal. It was argued that the delay had arisen because the appellant had been working in Shetland which made it difficult to address issues and also archived files had to be retrieved.

28. Whilst it may be the case that the appellant and his advisers wished to ascertain what information was held in relation to the underlying substantive issue, nevertheless that does not explain why an application for leave to admit a late appeal could not have been lodged with the Tribunal using the information in the letter to HMRC dated 8 February 2016.

29. There was no explanation as to why the Notice of Appeal was dated and signed 24 September 2016, yet it was only lodged with the Tribunal on 19 October 2016. In the context of the original 30 day time limit, even the delay between either February 2016 or May 2016 to October 2016 is very significant. I say February since the appellant could have lodged the appeal with the Tribunal without first reverting to HMRC.

30. Matters did not proceed with due diligence.

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[5] 2012 UKFTT 315 (TC)

Is there prejudice to one or other party if the appeal proceeds or is refused?

31. Obviously the appellant would be prejudiced if he did not have the right to litigate. However, there is very significant prejudice to HMRC since all of the records in this matter were destroyed routinely in 2014. Apart from the electronic screenshots, HMRC have no evidence and no means of obtaining same.

32. I was not referred to the case but I agree with Judge Redston in *Norman Archer v HMRC*[6] where she stated:-

> "Parliament has set a 30 day time limit within which taxpayers can appeal discovery assessments or amendments to their self-assessment. Its purpose is to give finality, so that HMRC – the other party in the possible litigation – will know within that time limit whether or not they need to prepare for an appeal against their decision. The time limit is a 'rule' to ensure litigation 'is conducted efficiently and at proportionate cost'."

In my view the prejudice to HMRC far outweighs the prejudice to the appellant, not least because the absence of detailed records might make it very difficult for the appellant to discharge the burden of proof in any substantive litigation but HMRC would be forced into litigation.

Are there considerations affecting the public interest?

33. For HMRC, and the public interest which they represent, an extension of time would be vexatious when in their books this claim has already, and correctly, been discounted; and the unexpected costs to the public administration are not negligible.

Has the delay affected the quality of available evidence?

34. As I indicate above, it has a significant impact and that to the detriment of both parties. The Regulation 72 Notice related to a company called PB Scaffold Services Ltd, of which the appellant and his wife were directors. That company has long since been liquidated and HMRC hold no records. It may be that the appellant has some records but it can be seen from the limited correspondence that has been produced, that there would have been detailed calculations because HMRC had looked at round sum cash withdrawals and payments made on behalf of the directors, including restaurant bills, meals, gaming fees (betting) and air and ferry costs. Little or none of that information appears to be available.

Conclusion

35. Every application for admission of a late appeal depends on its own facts and circumstances. At all stages in the consideration of this matter I have had Rule 2 of the Rules very much in mind. It is imperative that any decision should be fair and just. I have weighed every factor and authority that was brought to my attention in the balance. Taxpayers are expected to act with reasonable prudence and diligence in dealing with their affairs. He chose to "let sleeping dogs lie" in the hope that HMRC

[6] 2014 UKFTT 423 (TC) at paragraph 85

would not progress matters. If he thought that an appeal was appropriate he should have pursed that avenue before October 2016.

36. On the balance of probability, I find that Mr Aitken has not discharged the onus of proof in establishing good reason for extending the time limit in the circumstances of this case. I decline to exercise my discretion and the application for permission to notify a late appeal is refused.

37. In the circumstances I therefore strike out the appeal.

38. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 18 OCTOBER 2017