



TC06234

Appeal number: TC/2017/1883

PROCEDURE – application for admission of late appeal – permission refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr DANA ALI

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: Judge Peter Kempster

Sitting in public at Centre City Tower, Birmingham on 15 November 2017

The Appellant appeared in person

Mrs Pallavika Patel (HMRC Solicitors and Legal Services) for the Respondents

DECISION

1. This is an application by the Appellant (“Mr Ali”) for permission to bring an out of time appeal against Income Tax assessments for tax years 2011-12 to 2013-14 and associated penalties.

Facts

2. The Respondents (“HMRC”) conducted an investigation of Mr Ali’s tax affairs and concluded that he had been conducting a trade but not declaring his profits. On 16 May 2016 HMRC wrote a detailed letter to Mr Ali explaining their conclusions, and also issued income tax assessments and penalty determinations. That letter invited Mr Ali to submit any comments by 17 June 2016.

3. On 2 June 2016 Mr Ali’s newly appointed adviser, Mr Ayyub, wrote to HMRC to introduce himself and request additional time (two to three weeks) to familiarise himself with the case. That letter stated that an authorisation (Form 64-8) was enclosed but the 64-8 is dated 28 July 2016 and was submitted later.

4. On 22 July 2016 HMRC wrote to Mr Ali stating that as no further information had been received, the conclusions in their 16 May letter stood.

5. On 29 July 2016 Mr Ayyub replied that he was still taking instructions, and requested that the case officer be changed.

6. On 19 August 2016 HMRC again confirmed that the conclusions in their 16 May letter stood. The letter invited a request for a formal internal review within 30 days, and stated that any appeal against the 16 May assessments would be late.

7. On 29 September 2017 Mr Ayyub wrote that he had not received any reply to his 29 July letter. On 6 October 2016 HMRC sent a further copy of their 19 August 2016 letter.

8. On 10 October 2016 Mr Ayyub wrote disputing the assessments. HMRC took this (correctly, in my view) as an appeal against the assessments, and on 19 October 2016 replied stating the appeal was late and they would not accept it. The letter stated, “If you disagree with this decision you have ... the right to apply to the tribunal for a late appeal.”

9. On 28 February 2017 Mr Ayyub filed at the Tribunal a notice of appeal on behalf of Mr Ali (“the Notice of Appeal”). In section 6 of the Notice of Appeal a box was ticked stating the appeal was not made or notified late. There were some problems with the Notice of Appeal – a copy of the disputed decision was not enclosed (Tribunal Procedure Rule 20 refers), and Mr Ayyub had incorrectly stated that he was a legal representative (Rule 11 refers) and provided no authorisation to act – but those matters were resolved in subsequent correspondence between the Tribunal and Mr Ayyub. The Tribunal also identified that, contrary to the statement on the Notice of Appeal, the appeal was out of time, and thus the permission of the Tribunal would be required.

10. HMRC objected to the application, and the application for permission to bring the appeal out of time comes before the Tribunal.

Appellant's case

11. Mr Ali submitted as follows.

5 12. He had passed all letters promptly to Mr Ayyub, expecting Mr Ayyub to deal with them as appropriate. Mr Ayyub still acted for him. Mr Ayyub was not present at the hearing as he had an appointment with another client.

13. Mr Ali did not know why the Notice of Appeal was not filed until February 2017; nor why the Notice of Appeal indicated that it was not late.

10 **Respondents' case**

14. For HMRC, Mrs Patel submitted as follows.

15 15. HMRC had concluded that Mr Ali had underdeclared his income and had been caught out. The investigation displayed a consistent lack of co-operation from Mr Ali; there had been delays throughout and it had been necessary to issue formal information notices (sch 36 Finance Act 2008 refers). Information had not been provided despite repeated requests and opportunities.

16. Mr Ali had been represented throughout by various professional agents.

17. All post had been sent to the addresses notified to HMRC and none had been returned as undeliverable.

20 18. No explanation had been received from Mr Ali or Mr Ayyub as to why the appeal was filed late with HMRC. Thus HMRC could not be satisfied that there was a reasonable excuse within s 49(5) TMA 1970. Similarly, no explanation had been received from Mr Ali or Mr Ayyub as to why the application to the Tribunal had been filed late.

25 **Consideration and Conclusions**

Approach

19. The time limit for an income tax appeal to the Tribunal is set by s 49H Taxes Management Act 1970. The discretion to admit appeals out of time is conferred on the Tribunal by s 49 TMA 1970.

30 20. The approach I am to take in deciding whether to exercise that discretion was set out by Morgan J in *Data Select Ltd v Revenue and Customs Commissioners* [2012] STC 2195:

35 “[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

5 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.

10 [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 (a firm)* [2002] EWCA Civ 645, [2002] 3 All ER 490, [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 Value Added Tax and Duties Tribunal to the High Court: see *Revenue and Customs Comrs v Church of Scientology Religious Education College Inc* [2007] EWHC 1329 (Ch), [2007] STC 1196.

20 [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 Comrs for Aberdeen City* [2005] CSOH 135 at [23]–[24], [2006] STC 1218 at [23]–[24] which is in line with what I have said above.

30 [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 s 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. None the less, 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.

40 [38] As I have indicated, the FTT in the present case adopted the approach of considering all the circumstances including the matters specifically mentioned in CPR 3.9. It was not said that there was any error of principle in that approach. In my judgment, the FTT adopted the correct approach.”

21. Subsequent to *Data Select* CPR 3.9 was rewritten; the new CPR 3.9 states:

“3.9 Relief from sanctions

- 5 (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.
- (2) An application for relief must be supported by evidence.”

10 22. In *Revenue and Customs Commissioners v BPP Holdings Ltd and others* [2016] STC 841 Ryder LJ (at [44]) endorsed Morgan J’s approach in *Data Select*, and (at [16]) confirmed that the stricter approach to compliance with rules and directions required by *Mitchell v News Group Newspapers Ltd* [2014] 2 All ER 430, and *Denton v TH White Ltd* [2015] 1 All ER 880 also applied in Tribunal proceedings. In *Denton*
15 Lord Dyson MR and Vos LJ stated:

20 “[24] ... 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 r 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)]'. ...”

25 23. Accordingly, in determining Mr Ali’s application I shall consider the five questions directed by *Data Select* and also the three stages directed by *BPP*.

Discussion

24. From a careful review of the above correspondence I consider:

30 (1) HMRC made fair and appropriate accommodation for Mr Ali’s instruction of a new adviser by extending the deadlines for replies to their letters, in particular the opportunities for Mr Ali to provide information that may affect the conclusions reflected in the disputed assessments.

(2) HMRC were correct to state in their 19 August 2016 letter that the deadline for submitting an appeal to HMRC had passed.

35 (3) HMRC were correct to state in their 19 October 2016 letter that the appeal to HMRC made on 10 October was out of time, and thus an application to the Tribunal for permission was necessary.

40 (4) Mr Ayyub is a Fellow of the Association of Chartered Certified Accountants (per letter dated 10 October 2016) and should have been aware of the 30 day deadline in s 49H TMA 1970. On the interpretation of the facts

most favourable to Mr Ali, the 30 days should run from HMRC's 19 October letter thus giving a deadline of 18 September 2016.

5 (5) The technical defects in the Notice of Appeal should not detract from it being taken to have been filed on 28 February 2017 (rather than the later dates at which those defects were cured). The Notice of Appeal does not request permission for a late appeal but taking it as such, it was filed over 23 weeks late.

Consideration of specific factors

25. On the five questions directed by *Data Select*:

10 (1) *Purpose of time limit* – The statutory time limit for notification of an appeal is important for the orderly administration of the tax system. Where a taxpayer disagrees with a decision of the tax authorities and intends to pursue the dispute to this Tribunal then it is important that the taxpayer puts the authorities on notice of that fact promptly, so that both
15 sides can seek to resolve the dispute (either inside or outside the Tribunal) and prepare their respective cases while matters are fresh in their minds.

(2) *Length of delay* – This is clearly serious, being over 23 weeks. In *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2016] STC 1 the Upper Tribunal stated (at [96]):

20 “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
25 delay of more than three months cannot be described as anything but serious and significant.”

(3) *Explanation for the delay* – No reasons have been given for the delay. Mr Ali admits frankly that he put matters entirely in the hands of Mr Ayyub and has no explanation. Mr Ayyub has provided no explanation
30 and did not attend the hearing to answer any questions. From the Notice of Appeal, it appears that Mr Ayyub was not even aware that he was submitting the appeal late.

(4) *Consequences of granting the application* – HMRC were entitled to believe that any challenge to their assessments would be (i) timely, and (ii)
35 supported by argument. Instead, nothing constructive happened until the late appeal to HMRC on 10 October 2016, and even after the filing of the Notice of Appeal it is not clear on what grounds the assessments are disputed. Mr Ayyub did not attend the hearing to explain matters or advance his client's case. There is no indication available to me that any
40 appeal if allowed in late would be pursued with any greater diligence than matters to date have been conducted.

(5) *Consequences of refusing the application* – The amount in dispute is significant. Although Mr Ali disputes the liabilities, information requested by HMRC has not been provided and opportunities to provide information to HMRC have not been taken.

5 26. On the three stages directed by *BPP*:

(1) *Seriousness and significance* – As discussed above, the delay in filing the appeal was both serious and significant.

10 (2) *Why the default occurred* – As discussed above, there is no explanation offered for either the lateness of the appeal to HMRC, or the lateness of the application to the Tribunal.

15 (3) *Evaluation of all the circumstances* – I must balance all the above considerations (without attaching special weight to any in particular). While I appreciate the seriousness for Mr Ali of a refusal to admit his appeal late, I have no doubt that is the best decision in accordance with the overriding objective (to deal with cases fairly and justly). The delays are very long. HMRC clearly stated in their 19 October 2016 letter that permission would be required from this Tribunal. Mr Ali has given no reason why the appeal was filed late with HMRC, or why the application to the Tribunal was filed so late.

20 *Conclusions*

27. For the above reasons I have decided not to exercise the discretion conferred by s 49 TMA 1970 and I shall refuse the application for admission of an out of time appeal.

Decision

25 28. The application for admission of a late appeal is REFUSED.

29. 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.

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Peter Kempster
TRIBUNAL JUDGE

RELEASE DATE: 22 November 2017