

[2018] UKFTT 254 (TC)



**TC06490**

**Appeal number: TC/2017/8073**

*Income Tax: application for permission to appeal out of time: s49 TMA.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**STEPHEN BOLLAND**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHARLES HELIER**

**Sitting in public in Cardiff on 17 April 2018**

**The Appellant in person**

**David Street for the Respondents**

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## DECISION

1. This Decision concerns Mr Bolland's application that the time in which he may  
5 appeal certain assessments and penalties be extended. It is not directly concerned with  
the substance of the assessments or the penalties.

2. Martyn Arthur had been acting for Mr Bolland in the appeal and prior to the  
hearing and had applied for the hearing to be adjourned. Mr Arthur was unwell and  
had not received notice of the hearing date. He was unable to attend.

10 3. Mr Bolland had received notice and was present for the hearing. It seemed to  
me that the nature of the application was such that its determination depended upon  
the factual evidence from HMRC and Mr Bolland and that it was in the circumstances  
just to continue with the hearing in Mr Arthur's absence.

### **The Assessments, the penalties and the applications**

15 4. On 14 July 2017 Mr Bolland wrote to HMRC to appeal against various  
assessment and penalties. HMRC say that these appeals were late and that the  
legislation permits them to be entertained only if HMRC agree or the tribunal gives  
permission. HMRC have not agreed to the late appeal, so Mr Bolland applies to this  
tribunal for permission. HMRC resist that application.

20 5. In more detail, Mr Boland's notice of Appeal and application related to:

(i) six assessments, one for each of the years from 2008/9 to 2013/13, made  
under section 29 Taxes Management Act 1970 ("TMA") and totalling  
£29,396.28

25 Sections 31A TMA provides that an appeal against a section 29 assessment  
must be made within 30 days after the assessment was issued.

HMRC say that these assessments were all issued on 21 July 2016 and that  
therefore any appeal had to be made by 20 August 2016. As a result they say  
that Mr Boland's appeals against these assessments were some 11 months late.

30 (ii) a penalty determination under section 7 TMA in relation to 2008/9 for  
£1,494

Section 100B TMA provides that section 31A applies in relation to appeals  
against a penalty under section 7. Thus the appeal must be made within 30 days  
of the issue of the penalty determination.

35 HMRC say that the penalty determination was issued on 21 January 2006 and  
that therefore any appeal had to be made by 20 August 2006. As a result they  
say that Mr Bolland's appeal was some 11 months late.

(iii) five penalty determinations made under Sch 41 Finance Act 2008 in relation to the years 2009/10 to 2013/14, totalling £11,321.45.

In paragraph 17 Schedule 41 provides that the requirements of section 31A TMA apply to an appeal against the assessment of penalties under Schedule 41. The appeal must therefore be made within 30 days of the issue of the assessment.

HMRC say that the assessments were issued on 21 July 2016 and that therefore Mr Bolland had until 20 August 2016 to make his appeal: and as a result this appeal was some 11 months late.

(iv) 11 penalty or surcharge determinations, three of which were made under Sch 36 Finance Act 2008 in relation to 2009/10 for the failure to comply with any information notice, and eight for late payment of tax of which four were made under section 59C TMA in relation to 2008/9 and 2009/10, and four were made under schedule 56 FA 2009 for the years 2012/13 and 2013/14; these 11 penalties totalled £3,268.98.

Paragraph 48 Sch 36 FA 2008 provides that notice of any appeal must be given within 30 days of the notification of the penalty under that schedule. HMRC say that the three Sch 36 penalties were issued on 20 July 2015, 23 March 2016, and 11 May 2016 so that appeals had to be brought respectively by 19 August 2015, 22 April 2016 and 10 June 2016. Thus they say that Mr Bolland's appeals against these penalties were respectively some 2 years, 15 months and 13 months late.

In relation to the 2008/9 and 2009/10 penalties made under section 59C, that section provides that an appeal may be made within 30 days of the issue of the penalty. HMRC say that these penalties were imposed on 4 October 2016 and 7 April 2017 so that time to appeal ran out respectively on 4 November 2016 and 7 May 2017 with the result that Mr Bolland's appeals against these penalties were respectively 7 and 1½ months late.

In relation to the other four late payment penalties assessed under schedule 56 2009 for 2012/13 and 2013/14, that schedule incorporates the section 31A TMA rule that an appeal must be notified within 30 days issue of the penalty. HMRC say that these penalties were issued in two batches: on 7 October 2016 and 7 March 2017 so that time ran out on 3 November 2016 and 6 April 2017 with the result that Mr Bolland's appeals were respectively 7 and 2½ months late.

6. Each of these penalty and assessment provisions incorporate the legislation in TMA relating to appeals. Section 49 TMA provides that an appeal may be made late if HMRC agree or if the tribunal permits. In Mr Bolland's case HMRC have not so agreed in relation to any of the assessments or penalties. Thus Mr Bolland can pursue an appeal only if the tribunal gives permission.

7. Mr Bolland sought such permission and the hearing was listed to consider whether it should be given.

## **The Approach to be taken by the tribunal to such applications**

8. Section 49 provides that HMRC shall agree to a late appeal if three conditions are met, one of which is that they are satisfied that there is a reasonable excuse for the delay. The power of the tribunal to permit a late appeal is not circumscribed: it confers a discretion which is at large.

9. In considering whether or not to exercise this discretion the tribunal must consider all material factors including in particular: the reasons for the delay, whether or not it would prejudice HMRC if the taxpayer were permitted to appeal out of time, and whether there would be demonstrable injustice to the taxpayer if permission were not given: the tribunal must conduct a balancing exercise (see paragraph [26] and [27] *O'Flaherty v HMRC* [2013] UKUT 161 (TCC)). The considerations referred to in the new civil procedure rules ("CPR 3.9") suitably adapted may be relevant to the matters which should be considered<sup>1</sup>: whilst these rules do not apply to tribunals there is no reason why the tribunal should adopt a more relaxed approach to compliance with rules than that which would apply in the England and Welsh Courts (see paragraphs [25] and [26] *BPP Holdings v HMRC* [2017] UKSC 55). The purpose of the time limit is relevant (*Data Select v HMRC* [2012] UKUT 187[34]); and while the circumstances in which the time limits have been relaxed have in some cases been described as exceptional, there is no requirement that exceptional circumstances are needed before permission to appeal out of time may be given (*O'Flaherty* [38]).

## **The Evidence and Findings of Fact.**

10. I heard oral evidence from Mr Bolland and, in relation to the operation of HMRC's systems, from Mrs Millwall, an officer of HMRC, and also from Mr Street. I had a bundle which included copy correspondence and printouts from HMRC's computer systems. I find as follows.

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1. <sup>1</sup> The factors which can be considered by analogy from the old and new CPR 3.9 are the following:

- (1) the interests the administration of justice, including in particular the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, such as time limits, practice directions and orders. ;
- (2) whether the application for relief has been made promptly;
- (3) whether the failure to comply was intentional;
- (4) whether there is a good explanation for the failure;
- (5) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre action protocol;
- (6) whether the failure to comply was caused by that party's legal representative;
- (7) whether the trial date or the likely trial date can still be met if relief is granted;
- (8) the effects to which the failure to comply had on each party;
- (9) the effect which the granting of relief would have on each party.

11. On 15 April 2005 one of HMRC's officers visited Mr Bolland at a unit in a business park in Ellesmere Port to enquire in relation to PAYE compliance. The officer sent minutes of the meeting with a letter to Mr Bolland at the Ellesmere Port unit. Mr Bolland received this letter.
- 5 12. On 12 May 2015 Mrs Sutton-King from HMRC wrote to Mr Bolland at 29 Gulls Way asking for information about his business and income. 29 Gulls Way was Mr Bolland's mother's address and Mr Bolland told me he had not received this letter.
- 10 13. Mrs Sutton-King left a telephone this message for Mr Bolland on 10 June 2015 and sent an information notice to 29 Gulls Way on 11 June 2015. Mr Bolland told me that he did not receive this letter. Mrs Sutton-King visited the Ellesmere Port unit on 6 July 2015 but did not find Mr Bolland there. She left a letter asking him to arrange an appointment.
- 15 14. On 20 July 2015 Mrs Stanhope from HMRC sent Mr Bolland a penalty notice (to 29 Gulls Way) for the failure to comply with the earlier information notice. Mr Bolland told me he did not receive this.
- 20 15. In 19 October 2015 Mrs Sutton-King visited the Ellesmere Port unit and found Mr Bolland there. Mr Bolland told her that 29 Gulls Way was his mother's address, and that he lived at 7 Colwyn Close, and had previously lived for four or five years with at 172a Eastham Rake. He gave Mrs Sutton-King details of his income, expenditure, assets and debts.
- 25 16. Mrs Sutton-King sent Mr Bolland, at 7 Colwyn Close, minutes of the meeting, and on 22 October 2015 a letter seeking further information. Mr Bolland received this letter but did not apply to it until 26 November 2015. In the meantime Mrs Sutton-King sent him, at 7 Colwyn Close (to which all subsequent letters were addressed) a final formal information notice on 24 November 2015. Mr Bolland told me he did not receive this.
- 30 17. Mr Bolland replied Mrs Sutton-King's letter of 22 October 2015 in November 2015 with schedules showing his income, expenditure and net profits for the years 2008/9, 2009/10, 2010/11, 2011/12, is 2012/13, 2013/14 and 2014/15.
- 35 18. Mr Bolland's presentation of his expenses in the schedules did not make clear whether the figures he provided were for one month's expenditure in each year multiplied by 12 (to obtain expenditure for the whole year) or of identical expenditure in each month of the year, and Mrs Sutton-King wrote to him on 10 December 2015 seeking clarification and supporting invoices. Mr Bolland told me he did not receive this letter for if he had he would have replied straight away.
19. Not receiving a reply to her letter Mrs Sutton-King issued a formal information notice on 11 February 2016. Mr Bolland told me that he did not receive this.
- 40 20. A penalty notice was sent for failure to comply with information notice on 23 March 2016 and a further one on 11 May 2016. On 21 June 2016 Mrs Sutton-King wrote to Mr Boland with her estimate of the tax calculations for the years 2008/9 to

2013/14 and, on 6 July 2017, wrote with her proposals for penalties. Mr Bolland told me that he did not receive either letter.

21. In the absence of a reply to those letters notices of assessment for 2008/9 to 2013/14 and of penalties were dispatched by HMRC on 21 July 2016. Mr Bolland told me that he did not receive these.

22. Following the issue of the assessment and penalties on 21 July 2016 further penalties assessments and determinations were sent to Mr Bolland on 7 October 2017. There were also visits to Mr Bolland's house from HMRC's debt management team, but they did not find him in. That team left an enforcement and insolvency warning letter at 7 Colwyn Close in November 2016. Further penalties and letters were sent to Mr Bolland on 7 and 29 March 2017 and on 3, 7 and 28 April 2017. On 14 June 2017 HMRC sent Mr Bolland an insolvency warning letter.

23. Mr Bolland received and reacted to the letter of 14 June 2017. On 5 July 2017 Mr Bolland called Mrs Sutton-King, and on 14 July 2017 wrote to appeal against the assessment and penalties.

24. Mr Bolland told me that the only documents he had received were:

- (1) the letters immediately following the April 2015 visit;
- (2) Mrs Sutton-King's letter 22 October 2015,
- (3) HMRC's letter of 14 June 2017 threatening bankruptcy, and
- (4) documents sent to him after his letter seeking to appeal of 14 July 2017.

25. Between the end of 2015 and June 2017 Mr Bolland said he had received no letters from HMRC, no phone calls and only one visit. That visit, he said, was at the end of 2015 or the beginning of 2016 when an officer of HMRC had come to ask for an answer to Mrs Sutton-King's question regarding the description of his business expenditure. HMRC had no record of such a visit.

26. Mr Bolland told me that he would have recognised HMRC's letters from their brown envelopes and logos. He told me that his practice would be to open such correspondence and to file it in the box file he kept for accounting and HMRC documents. He had searched that file a few weeks prior to the hearing and there were no other letters there.

27. 7 Colwyn Close is a semi-detached house in Mr Bolland's sole occupancy; only infrequently were letters addressed to him delivered to the house next door; he had no problems with the receipt of utility bills and bank statements.

28. With his letters of appeal of 14 July 2017 Mr Bolland included detailed accounts for the years 2008/9 to 2013/14. The following table compares the net profit shown by those accounts with the profits on which the 21 July 2016 assessments were made:

Year	Mr Bolland's figures	Assessed profits
2008/9	10,446	23,650
2009/10	10,151	24,007
2010/11	10,400	24,167
2011/12	10,580	24,496
2012/13	10,515	24,636
2013/14	10,005	24,900
<i>Total</i>	<b>62,097</b>	<b>145,853</b>

29. The difference represents income taxes and £17,000.

30. Mr Bolland told me that his net assets were about £5,000.

31. Mr Bolland told me, and I accept, that his mother was elderly and despite a close connection did not always pass on to him letters sent to him at her address.

## Discussion

### (i) *The posting of the documents by HMRC*

32. In the description of the assessments and penalty notifications and time limits at paragraph 5 above I set out HMRC's account of when assessments and notifications were made..

33. Mr Bolland accepted that these documents had been posted, but I considered that in circumstances where he was unrepresented I should determine whether or not HMRC's evidence showed that to be the case.

34. The evidence before me that these documents were sent consisted of: the copies of them in the bundle, some entries in the print out of Mr Bolland's statement of account, and the evidence of Mrs Millwall and Mr Street of the practice within HMRC in relation to the writing and dispatch of letters and other communications

35. I noted that whereas letters and some penalty notifications had a salutation at the end and the name of the officer who had signed them, the section 29 assessment letters and the schedule 41 penalty assessments did not carry at the end the name of an officer or any final salutation, despite (in the case of the section 29 assessments) being written in the first person. I was however persuaded by Mrs Millwall's evidence that this did not mean that these documents were drafts which had not been sent, but that it was customary for such letters not to bear the name of the assessing officer.

36. Overall the evidence convinced me that it was likely that these documents (other than those which had been hand delivered) and the others mentioned above had been posted, pre-stamped, to Mr Bolland at either 7 Colwyn Close or 29 Gulls Way as the case may be.

5 (ii) *The receipt or non receipt of the documents by Mr Bolland*

37. Section 7 Interpretation Act 1978 provides that, unless the contrary shown, a document which is shown to have been posted properly pre-stamped and addressed is deemed to have been served at the time it would have been would have arrived in the ordinary course of the post. I have found that HMRC did post the documents described in this decision and that they were pre stamped and properly addressed (that is to say addressed in a legible manner to a real address). Therefore I must work on the basis that unless it is proved that they were not delivered, they were in fact delivered.

38. The evidence that they were not delivered was limited to Mr Bolland's oral evidence that he did not receive many of these documents. I do not discount this evidence because it was only oral evidence, but I must ask whether it is sufficient to conclude on balance that they were not received.

39. The position differs as between those sent to Colwyn Close and those sent to Gulls Way

20 (a) The letters sent to and left at 7 Colwyn Close

40. It seems to me that it is likely that Mr Bolland *did* receive these documents and that he lost them, mistook them for junk mail, or for some reason he ignored or forgot about them. I so find because I accept Mrs Millward's evidence that almost all HMRC's letters are successfully delivered, and whilst I could accept one or two of the letters which were sent to Mr Bolland might have strayed in the post, I find it very unlikely that so many of these letters would have done so. There were at least 11 letters which contained penalty notifications and assessments (those of 23 March 2016, 27 July 2016, 4 October 2016, 11 May 2016, 7 October 2016, 7 March 2017 and 7 April 2017) together with six other letters, all of which were sent to 7 Colwyn Close.

41. I find therefore that Mr Bolland did receive the letters sent to 7 Colwyn Close and that their content came, or should reasonably have come, to Mr Bolland's attention.

(b) The letters sent to 29 Gulls Way

35 42. I have found that Mr Bolland did not live at Gull's Way at the relevant time but that his mother lived there.

43. Mr Street drew my attention to section 115 TMA which provides that a notice which may be given under the TMA such as an assessment or a penalty notification is validly served if posted to the taxpayer's last known place of residence or his place of



business or employment. He says that 29 Gulls Way was the last address HMRC had for Mr Bolland at the time, and therefore that the penalty notice was legally served.

44. I accept that 29 Gulls Way was Mr Bolland's last known place of residence and therefore that the notices sent there before he told Mrs Sutton-King of his actual  
5 address were properly served. However that does not mean that they came to his attention. It is only if it was likely that his mother sent or gave them to him that such would be the case. HMRC submit that there was a close relationship between Mr Bolland and his mother and that it was therefore likely that she did pass them on to him. I accept however that his mother was elderly and may have lost or forgotten the  
10 letters. I find it likely that he did not actually receive them.

*(iii) Balancing the various considerations*

(a) documents sent to Colwyn Close

45. The following considerations are relevant.

46. I take into account the purpose of the time limit which is plainly to ensure that  
15 the after the expiry of the limit HMRC can regard the matter as closed. Limits are imposed in the interests of good administration of the tax system. It is in the interests of good administration that times limits prescribed by statute should be complied with.

47. There would be some prejudice to HMRC in extending a limit in particular in  
20 relation to the allocation of resources to the appeal, although it could not be said that the amounts of money involved in this case would materially affect budgetary considerations..

48. Mr Bolland's application was made fairly promptly after the receipt of a final  
bankruptcy warning but was not made promptly after expiration of the time limits. These were clearly explained in the assessments and penalty notices.

25 49. The delay in making an appeal to HMRC was significant in most cases.

50. Whilst I do not conclude that Mr Bolland deliberately intended to appeal out of  
time there was no good explanation for his failure to deal with these letters. To my mind the lack of a good explanation weighs heavily in the balance. Mr Bolland's failure to report his taxable income for 2008/9 onwards does not assist his case.

30 51. The giving of permission would not disrupt any existing arrangements for an appeal.

52. What of the injustice which might accrue to Mr Bolland if he were denied  
permission to appeal out of time? There are two components:

35 (1) he would face a tax bill of some £20,000 more than he would have had to pay had his figures had been used to calculate his liability. If it were obvious that he had a strong case that would be an injustice, particularly for a person of limited means. But whilst he figures he had latterly given to Mrs Suttton- King

were detailed I had no way to assess their accuracy so I cannot say that he did or did not have a strong case;

5 (2) he would remain liable for the penalties for failure to comply with information notices, failure to notify chargeability and late payment of tax. The liability for these penalties depended in some cases on the tax which was properly due for each year and also the circumstances of the default. As to the first of these I am unable to determine whether there would be an injustice for the same reasons as in (1); as to the second there was nothing in the  
10 circumstances which indicated that there was a meritorious case for elimination of or reduction in the penalties.

53. Taking all this together I concluded this is not a case where additional time should be permitted to make an appeal in relation to the documents sent to Colwyn Close. The possible injustice which might accrue to Mr Bolland was not sufficient to outweigh the lack of any good explanation for the delay and the interests of  
15 compliance with time limits.

(b) the documents sent to 29 Gulls Way

54. These I have found were unlikely to have been seen by Mr Bolland. He therefore has a good reason for not having appealed in time.

55. The fact that he did not receive the letter of 12 May 2015 requesting  
20 information or the information notice of 11 June 2015 may be a good reason for his failure to comply with that notice. As a result he may have a good defence to the penalty notice of 20 July 2015 for £300.

56. The telephone call of 10 June 2015 which Mrs Sutton-King made to Mr Bolland and the message she left for him to call her, and the visit HMRC's officials paid to the  
25 unit at Ellesmere Port on 6 July 2015 does not detract from this conclusion since there was no evidence that by then he had been made aware of the information notice.

57. In these circumstances (taking into consideration so far as relevant the matters in the previous section) it seems to me that the balance is in favour of giving Mr Bolland permission to appeal out of time against the penalty assessed by the notice of  
30 20 July 2015..

### **Conclusions**

58. I give permission for Mr Bolland to make an appeal out of time against the penalty notice of 20 July 2015.

59. I refuse the application for an extension of time in which to make all the other  
35 appeals.

### **Rights of Appeal**

60. 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

5 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.

**CHARLES HELLIER**  
**TRIBUNAL JUDGE**

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**RELEASE DATE: 8 May 2018**