



**TC06944**

**Appeal number: TC/2018/1907**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

*Income Tax- Procedure – application to make a late appeal. Permission refused.*

**DICKSON ETUHU**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHARLES HELLIER**

**Sitting in public at Taylor House EC1R on 4 September 2018**

**Jitender Thind of SRN Sonico, chartered accountants, for the Appellant**

**Kate Murphy for the Respondents**

## DECISION

1. Mr Etuhu applies for permission to bring late appeals against: (i) an assessment under section 29 TMA 1970 for 2011/12 and (ii) amendments to his self assessment made by a closure notice for 2012/13.

2. The assessment and amendment brought into charge to tax a benefit in kind which HMRC contended had been provided to Mr Etuhu by his employer in each of those years.

3. I heard oral evidence from Mr Etuhu and from Mr Thind and had before me a bundle of correspondence.

### **Findings of Fact**

4. Mr Etuhu is a footballer. For some years before 2013 he played for Fulham FC. In the latter part of 2013 he moved to play for Blackburn. In January 2015 he moved to play for a club in Sweden.

5. At some time before 2013 Mr Etuhu married. But the marriage went sour. From about 2013 to the beginning of 2017 there was acrimony between Mr and Mrs Etuhu and negotiations for a divorce which was finalised in 2017.

6. Prior to their marital difficulties Mr and Mrs Etuhu had arranged to build a house in Kingswood. It was to be called Kingswood House. While it was being built, and up to 2013 Mr and Mrs Etuhu rented, and lived at, Oak Grove, which was nearby. The construction work had finished by July 2014, following which the house was complete but empty.

7. When Mr Etuhu moved to play for Blackburn he rented first one (and then later a different) apartment there. By this time their marriage was in difficulties and Mrs Etuhu and the children did not accompany him to Blackburn but remained in Oak Grove. I did not get the impression that Mrs Etuhu ever took up residence in Kingswood House. Later Mrs Etuhu moved to Wilmslow where she had been brought up.

8. Mr Etuhu used the services of an agent in matters which related to his employment. He understood that the agent engaged an accountant to deal with his tax affairs. It appeared that the accountant who was engaged up to early 2013 was Cadishead Accountancy Services Ltd; but Mr Etuhu did not recall any direct dealings with them. He told me that since all his income was paid under PAYE by the club for which he played from time to time, his tax affairs were not particularly complex. He had never been asked to make any tax payments. When he got a P60 at the end of a year he would give it to the agent.

9. In 2013, after a conversation with a friend, Mr Etuhu decided to take greater control of these matters. He engaged a new agent and asked Mr Thind of Sonico to act for him in his tax affairs.

10. In October 2013 Mr Thind wrote to Cadishead: indicating that he was now to act for Mr Etuhu, asking whether they had any objections and asking for copies of previous tax returns. In reply he received a letter from Cadishead and a copy of a previous tax return. Cadishead did not indicate that there were any matters of concern or dispute with HMRC (despite the fact that, as I relate below, HMRC had written to Cadishead about Mr Etuhu's affairs before that time). After this letter Cadishead had no further communication with Mr Thind and did not forward to him any letters from HMRC which they later received relating to Mr Etuhu.

11. Two years later in September 2015, Mr Thind obtained a signed agent authority form, a 64-8, from Mr Etuhu. He sent it to HMRC on 17 May 2017, when he enclosed it with his letter of that date. Mr Thind told me that the delay in submitting the form was because he was waiting for Mr Etuhu to take action.

12. Mr Etuhu told me, and I accept, that while he was living with his wife and in the period from 2013 up to the settlement of their divorce, his wife dealt with all the bills (save one electricity bill for Kingswood House). He would send her money to cover these and other expenses. He understood that after his wife moved to Wilmslow post for Oak Grove and then Kingswood House was forwarded to Wilmslow, and that she dealt with it there.

13. HMRC's interest in Mr Etuhu's tax affairs started in 2013. On 16 September 2013 they wrote to Mr Etuhu at Oak Grove saying that they intended to enquire into his tax return in relation to the payment of agent fees by Fulham FC and the receipt of image rights. The writer said:

"Following an HMRC review with your former employer, Fulham FC I have discovered that agents fees payments have been made by Fulham FC in connection with your employment by the Club.

"As I now understand the situation the following amounts have been paid by Fulham FC to the Football Agent who acted in the extension of your contract in September 2010.

2011/12 - £93,600.

"Accordingly I think that the above amounts should have been reported on your tax returns for those years because such payments are taxable on you as a benefit. I cannot see, however, that you have made any mention of them on your tax return as it is. Can you please let me have your agreement to these figures?

"Alternatively if you cannot agree could you please let me have your detailed reasons as to why not and also let me have all the information detailed ... on the attached schedule of information".

14. Mr Etuhu told me that he did not receive this letter. It was sent to Oak Grove at a time when he was living in Blackburn separately from his wife who was still at Oak Grove.

15. On the same day to HMRC sent a letter to Cadishead about the years 2011/12 and 2012/13, explaining that the enquiry related to payments to agents and requesting information and copies of agreements. No reply was received. (I note this letter was

sent before Mr Thind notified Cadishead and that he was taking over the role of accountant for Mr Etuhu.)

16. On 10 October 2013 HMRC's Hannah Boon rang Cadishead who told her that they were no longer acting for Mr Etuhu and that Sonico had made a clearance request (which I understood to be the letter sent by Mr Thind and referred to at paragraph 10 above).

17. On 5 November 2013 HMRC wrote to Mr Etuhu at Oak Grove asking for details of his new accountants.

18. On 29 November 2013 HMRC sent a formal information notice to Mr Etuhu at Oak Grove asking for documents which had previously been sought informally. Mr Etuhu told me that he did not see this. HMRC received no reply.

19. On 3 February 2014 HMRC wrote to Cadishead with copies of the letters sent to Mr Etuhu on the same day. Those letters, I believe, assessed penalties for the failure to comply with the Information Notice. It was odd that this letter was sent to Cadishead - being sent after HMRC had been told that they were no longer acting for Mr Etuhu - but at that stage Sonico had not been in contact with HMRC to say that they were acting instead. HMRC received no reply from Cadishead, and Cadishead did not forward the letter to Mr Thind.

20. On 13 March 2014 HMRC wrote to Mr Etuhu at Oak Grove. The letter explained that on 3 February 2014 they had written charging a £300 penalty for failure to comply with the Information Notice, and indicated that further daily penalties were being assessed. Mr Etuhu told me that he did not see this letter. His recollection was that his wife was still at Oak Grove at this time.

21. On 28 July 2014 HMRC wrote Mr Etuhu, this time at Kingswood House rather than at Oak Grove, asking him to get in contact about "an important issue". There was nothing on the evidence before me to indicate how HMRC had been notified of the Kingswood House address. It would not have appeared on P14 forms sent by his employers to HMRC.

22. On 11 September 2014 HMRC wrote again to Mr Etuhu that Kingswood House. The writer, Hannah Boon, said:

"Following our recent telephone conversation, please find enclosed copies of the correspondence originally sent to yourself and Cadishead... on 16 September 2013.",

and explained that Cadishead had said that they were no longer acting for him. It repeated the request for information.

23. Mr Etuhu was living at in Blackburn at this time and did not tell me that he had received this letter. HMRC received no reply. In the papers before me there was no note of the earlier telephone conversation related in the letter between Hannah Boon and Mr Etuhu. Mr Etuhu did not indicate to me that he had made any special arrangement to ensure that he received this letter.

24. On 23 October 2014 Hannah Boon attempted to ring Mr Etuhu, and left a voicemail. No return call was received.

25. HMRC sent a further information notice to Mr Etuhu at Kingswood House on 27 October 2014, and on 27 July 2015, a letter threatening further penalties. At these  
5 times Mr Etuhu was living in Blackburn and his wife in Wilmslow.

26. On 10 March 2015 HMRC wrote Mr Etuhu at Kingswood House with an assessment for 2010/11 made under section 29 Taxes Management Act 1970 for some £50,000. And, on 24 August 2015 (following a warning letter of 27 July 2015), HMRC wrote to him at that address closing their enquiry into the 2011/12 year and  
10 amending Mr Etuhu's self-assessment income tax due by increasing it by some £23,400. The letters explained that an appeal could be made, and needed to be made within 30 days of the date of the respective letters.

27. Mr Etuhu was playing in Sweden at the time of these letters were sent. He did not recall receiving them.

15 28. HMRC then proceeded to attempt to collect taxes and penalties which had been assessed on Mr Etuhu. They approached the Swedish tax authorities who arrived at his house in Sweden in May 2017 to possess it. Mr Etuhu telephoned Mr Thind when this happened who in turn contacted HMRC International Division and was told the story behind the assessments.

20 29. On 17 May 2017 Mr Thind wrote to HMRC (enclosing the delayed form 64-8) contesting the tax liability. He said that it was based on a form P11 D for Mr Etuhu filed by Fulham FC which wrongly characterised the payments which had been made to the agent involved in the renegotiation of Mr Etuhu's contract as a benefit in kind  
25 taxable on Mr Etuhu. Whilst an agent had acted in the transaction he said it had acted for the club, not for Mr Etuhu. He enclosed a copy of the contract between Fulham FC and Mr Etuhu. At the end of the contract it said:

“Did player use the services of an agent... No

If yes name of agent

Did the Club use the services of an agent .. . Yes

30 If yes, name of agent ... Neil Fewings WMG.”

30. In a letter of 20 October 2017 to HMRC Mr Thind said:

35 "Please note that it was only recently that we have got to the bottom of the error on the P11D liability. I know it is not relevant but another footballer at player has just had his liability amended following the same rules. ...

40 “Mr Etuhu is not aware of the tax rules as he is a football player. He believed that what Fulham filed was correct as they were a big club and knew all the rules from their accountants. It is only now when the issue was mentioned by another player that we looked closely at the rules and discovered the error made by Fulham.”

31. HMRC took Mr Thind’s letter as an appeal against the section 29 assessment and the closure letter; but in a letter of 2 November 2017 refused to agree to late appeals.

5 32. On 14 March 2018 Mr Etuhu applied to the tribunal for permission to appeal late.

### **The parties' arguments**

10 33. HMRC say that Mr Etuhu’s appeal to HMRC against the section 29 assessment was 2½ years late, and that his appeal in relation to the closure notice was two years and one month late. In addition they note that the application to the tribunal to make a late appeal was made more than three months after HMRC's letter refusing permission (the letter of 2 November 2017).

15 34. Mrs Murphy says that, on the basis of Mr Etuhu’s evidence to the tribunal, the reason that the appeal was made late was that Mr Etuhu did not receive HMRC's letters, but she says that he should that he should either have made arrangements for his post to be redirected, or should have notified HMRC of his addresses from time to time.

20 35. Mrs Murphy says that HMRC were entitled to assume that the issue was settled: to give permission to appeal out of time would deprive them of the legal certainty to which they were entitled. She says that given the investigation conducted by HMRC, the substantive appeal would have little chance of success.

25 36. Mr Thind says that to refuse permission would deprive Mr Etuhu of the right to be taxed properly. He says that the evidence of the terms of Mr Etuhu's contract with Fulham FC show that the agent was acting for the club so that the cost was not a benefit in kind of Mr Etuhu's employment.

37. In relation to the delay in notifying the appeal to the tribunal's Mr Thind says that the letter of 2 November 2017 that was not received either by him or by Mr Etuhu.

### **Discussion**

30 38. In *Martland v HMRC [2018] UKUT 178 (TCC)* the Upper Tribunal gave guidance as to how this tribunal should approach an application to allow the notification of a late appeal. It said:

35 “44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton:

40 (i) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to

spend much time on the second and third stages”– though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(ii) The reason (or reasons) why the default occurred should be established.

(iii) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT’s deliberations artificially by reference to those factors. The FTT’s role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant’s case; this goes to the question of prejudice –there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal...”

39. I therefore consider below: (1) whether the relevant delay was serious, (2) what the reasons were for the delay, and (3) all the other circumstances including: whether or not on the evidence available, the applicant had, at first sight, a good case, the policy of legislation to provide legal certainty after a period, and the detriment which might accrue to either party as a result of giving or refusing permission.

40. The period of delay in making the appeals to HMRC was serious and substantial. In this context I must note that the explanation of the delay given by Mr Thind in his letter of 20 October 2017, namely that they had only recently "got to the bottom of the error in the P11D liability, related only to the period after May 2017 when Mr Thind started his investigation. The period from May to October was not short but even discounting it the delay was serious.

41. The causes of the delay in making an appeal to HMRC appear to me to be:

(i) that Mr Etuhu did not make arrangements to ensure that official correspondence was forwarded to him at his address from time to time (that is particularly relevant in relation to the letter of 11 September 2014 referred to at paragraph 22 above);

(ii) that Mr Etuhu's wife did not forward to him all the letters from HMRC addressed to him at Oak Grove or Kingswood House;

(iii) that Cadishead did not forward to Mr Thind letters HMRC had sent them after 2013;

(iv) that Mr Thind did not alert HMRC to the fact that in 2013 he had been appointed as Mr Etuhu's accountant until 2017.

5 42. I accept that 2013 to 2017 was a difficult time for Mr Etuhu personally, that in that period dealings between him and his wife were not easy, and that he moved around a lot in this period. However overall I did not consider that those circumstances and the causes described above provided a particularly good reason for the delay in the making of his appeal.

10 43. The broad effect of the benefits code in ITEPA 2013 is that the cost to an employer of providing a benefit to an employee is part of the taxable income of the employee. It seems to me that when an agent is engaged in relation to the renegotiation of a contract and is paid by the club there at (at least) four possibilities:

15 (i) that the agent is engaged and paid by the club to act for the club in negotiations with the player. In this case there is no benefit provided to the player;

(ii) that the agent is engaged and paid for by the club but is instructed (or used) by the club to act for the player. In this case the benefit of the agent's services accrue to the player and may be a taxable benefit;

20 (iii) that the agent is engaged by the player to act for him but is paid by the club. In this case the benefit of the payment accrues to the player and may be a taxable benefit; and

(iv) that the agent is engaged and paid by the player and acts for him in the negotiations. In this case no benefit arises.

25 44. Of these there was no evidence that (iv) was the case, and the terms of Mr Etuhu's contract, quoted at [29] above, indicate that (iii) was not the case. That leaves (i) and (ii). Whilst the terms of the contract might be read as suggesting that (i) was the case, they are not in my opinion conclusive that the agent did not act on behalf of the player. On the other hand the evidence of the nature of HMRC's discussions with  
30 the club (of which the only evidence was the letter of 16 September 2013 (quoted at [13] above)) were not conclusive that (ii) was the case.

45. Thus on the evidence before me I cannot conclude that either HMRC or Mr Etuhu appear to have a strong case. I am thus not able to conclude that particular unfair detriment would arise to Mr Etuhu if permission were refused.

35 46. I also bear in mind that the determination of how the agent acted in the negotiations could depend on evidence consisting of the recollection of events which occurred almost 6 years ago. Such evidence may well not be of the highest quality.

## **Conclusion**

40 47. Taking all this together I am not persuaded that the reasons for the delay and the possible strength of Mr Etuhu's case outweigh the principal that, after a period, and particularly after a long period, there should be certainty as to the liability created by



an assessment. I therefore refuse to give permission for these appeals to be brought late.

**Rights of Appeal**

48. This document contains full findings of fact and reasons for the decision. Any  
5 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)”  
10 which accompanies and forms part of this decision notice.

**CHARLES HELLIER  
TRIBUNAL JUDGE**

15

**RELEASE DATE: 25 JANUARY 2019**