[2020] UKFTT 0020 (TC)

TC07526

Application – Permission to make a late appeal – Refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01449

BETWEEN

CATHAL CONWAY **Appellant**

-and-

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

TRIBUNAL: JUDGE ABIGAIL HUDSON
ANN CHRISTIAN

Sitting in public at 2 Piccadilly Plaza on 18 October 2019

We heard Maura Logan, Counsel for the Appellant and Phil Jones, Litigator of HM Revenue and Customs' Solicitor's Office for the Respondents. The Appellant failed to attend the hearing but his representative assured us that he was aware of the hearing and not intending to be present. The Tribunal was satisfied that reasonable steps had been taken to notify the Appellant of the hearing and that it was in the interests of justice to proceed with the hearing.

DECISION

INTRODUCTION

1. The Tribunal decided that permission to appeal out of time should not be granted.

2. A summary decision was sought at the hearing by both parties, with a full decision subsequently requested.

BACKGROUND

3. This substantive appeal is against assessments for the years 2007/8 to 2011/12, all issued on the 23rd October 2014.

4. The appellant did not appeal to the Tribunal until 8 March 2019 some four and a half years after the due date on which the appeals should have been made. The appellant makes an application for permission that his appeal may be made out of time.

5. For the reasons given below we refuse that application and dismiss the appeal.

Findings of fact

6. We were provided with a bundle of documents from which we find the following facts:

(1) Mr Conway was a self-employed subcontractor who had been trading continually since 2001. He had engaged A. Ali and Co to act as his accountants and gave them his records, documents and bank statements for the preparation of his tax returns.

(2) In 2008/9 he states that he engaged subcontractors and informed his accountants, who advised him that they would set up and administer the CIS scheme on his behalf. He provided all information to his accountants monthly and they advised how much was payable. He paid that to Ali & Co.

(3) HMRC became suspicious that Ali and Co were filing returns with excessive claimed expenditure and that it was proposed that assessments be made for the years 2007/8 to 2011/12. It is agreed that Ali and Co acted fraudulently.

(4) Mr Conway engaged Chartwell Financial – his current accountant – on 27 April 2014, who liased with HMRC.

(5) Many of Mr Conway's records had been given to Ali and Co and not returned.

(6) Since no evidence of expenditure could be provided HMRC proposed making an assessment restricting the level of expenses to 10% of turnover for each tax year. Chartwell suggested the use of 20% instead. HMRC used the 10% figure.

(7) HMRC issued assessments for the years 2007/8 to 2011/12. Chartwell asserted that in 2008/9 Mr Conway had engaged three subcontractors who Ali and Co had mistakenly classified as employment costs. Chartwell sought review on the basis of that issue and the percentage.

(8) HMRC did not alter the assessments and Chartwell were notified of that by telephone call in March 2015.

(9) The Appellant was fully aware by 2014/15 that the assessment had been issued. He was aware of the amount of the assessments and surcharges, and aware of the method used to calculate the same. In particular, he was aware that due to lack of evidence, no allowance had been made for the use of sub-contractors during 2008/09.

(10) The appellant appealed against the penalties to the Tribunal by notice dated 8 March 2019. It does not appear that an appeal was ever made to HMRC. It is arguable that the

Tribunal therefore does not have jurisdiction to consider this appeal (*Flash Film Transport Limited v HMRC TC/2018/05262*, para 75, s49D TMA 1970)

7. Having heard from Mr Donohue of Chartwell Financial we consider that although discussions were ongoing with HMRC at the end of 2014 and beginning of 2015, no formal written review or appeal was sought at that time. The Appellant did not seek to challenge the conclusions of HMRC's assessments in 2015. It is not clear to us what the precise date of the expiry of the time limit to appeal was, but in relation to the assessments it is likely to have been 30 days after 23 October 2014. In relation to the surcharges it is likely to have been in mid-2015.

The Legislation

8. The statutory provision which permits us to consider an application for giving a late notice of appeal is section 49 of the Taxes Management Act 1970 ("**TMA 1970**") this reads as follows:

"49 Late notice of appeal

49(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.

49(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.

49(3) …

49(4) …

49(5) …

49(6) …

49(7) …

49(8) In this section "**relevant time limit**", in relation to notice of appeal, means the time before which the notice is to be given (but for this section)."

Case law

9. The principles which we should consider when dealing with an application such as this have been something of a moveable feast over the last few years. But the Upper Tribunal in the case of *Martland* (*William Martland v HMRC [2018] UKUT 178*) has undertaken a detailed review of the relevant authorities and has given extremely helpful guidance on the principles which I should adopt. The relevant extract from *Martland* is set out below.

"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*:

(1) 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.

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

(3) 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. In *Hysaj*, Moore-Bick LJ said this at [46]:

"If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

DISCUSSION

10. We are satisfied on the facts that assessments were issued for the tax years 2007/8 to 2011/12 on 23 October 2014.

11. The appellant accepts that the appeal is made out of time.

12. The justification given by the appellant for his late appeal is essentially that he has obtained new and compelling evidence to establish that amounts were paid to subcontractors and those should be allowed as an expense against profits.

13. We now consider the application of the *Martland* criteria to this justification.

Length of the delay

14. The delay was four and a half years. This is both serious and significant. There is a principle that litigation should be finalised as expeditiously as is reasonably possible. HMRC are entitled to expect that an appellant would appeal within the statutory time limits and so, if he fails to do so, they can put away their papers. In this case HMRC have clearly had to engage in this appeal notwithstanding that it should have been made over four years prior to the date on which it was actually made. In addition there is a clear potential for prejudice to the respondent in that the paper file on this case was held in a basement in York which then suffered a serious flood. I am told and have no reason to doubt that all of the paper documentation held by HMRC in relation to this matter has been lost to that flood.

Reasons for the delay

15. The appellant was fully aware of the assessments in 2014 and was aware that due to a lack of evidence no allowance had been made for the use of subcontractors. Despite that, it then took until 2017 for potential witnesses to be identified and until December 2017 for those witnesses to provide statements. It then took a further four months before those statements were sent to any party within HMRC. In the event they were sent to the enforcement department. Mr Conway must have been aware in 2014 of which contractors he had previously used, certainly he has not suggested that he somehow learned of their identity more recently. No explanation has been offered as to why it took him three years to provide those witness statements. We are told that the witnesses were not particularly enthusiastic to assist but even so three years is an inordinately long period of time. We are satisfied that the delay has been unreasonable.

16. Mr Conway has been represented throughout by the same accountant and has made no effort to correspond with HMRC in relation to appealing these matters between 2015 and 2017. He has received a wealth of documentation directed at collecting the monies owed and has clearly been concerned at the size of the debt, yet has not made more significant efforts to appeal.

17. Mr Conway has at no point explained his failure to lodge an appeal within the time limit. He disagreed with the method of calculation in 2014 but did not pursue an appeal. The

implication of the evidence given by Mr Donohue is that he chose not to appeal because he did not feel that he could succeed without evidence of his contentions. In our judgment that is not a reasonable excuse for failing to appeal on time.

The balancing exercise

18. The Appellant has now served two statements in which the witness states that he worked as a sub-contractor for the Appellant in 2008/09. The Appellant is unable to say how much was paid to those witnesses or when. They therefore carry little evidential weight. Those witnesses must have existed in 2014/15 and no explanation has been offered as to whether those names were considered or investigated by the Respondent at that time, and what conclusions the Respondent arrived at, which lead to no allowance being offered for the use of sub-contractors. The Respondent has little of the documentation generated within the assessment process but we are told that some names were given to the Respondent at the time of assessment. The flood which has destroyed the paper file may well have explained what investigations were carried out but the Respondent is now deprived of that information.

19. Notwithstanding the fact that the turnover for 2008/09 is documented as being significantly more than in other years, we do not consider that the merits of the case being advanced by the Appellant are particularly strong. Certainly, he remains unable to assign a figure to the use of any sub-contractors. The information that he now supplies can be summarised as an assertion that such a high turnover must have been contributed to by the use of sub-contractors. The Appellant made that assertion in 2014 and is therefore in no better position. Mrs Logan asserts that the facts are agreed in this case and allowing Mr Conway to reopen matters would easily result in agreement. We disagree. The facts are not agreed, and the figures are no less vague than in 2014. Mr Conway is unable to place a figure on any subcontractor payments and has not even been able to offer an estimate. The witness statements are imprecise and not compelling, and on the evidence of Mr Donohue the statements are provided by reluctant witnesses. It is highly unlikely that Mr Conway could succeed at appeal in this case. We consider that refusing permission to appeal does not amount to a demonstrable injustice to the Appellant.

20. If we reject the application for permission to make a late appeal, the appellant loses his right to argue the substantive issues. But, as we say above, HMRC can rightly expect they would not have to deal with these some four years after the time when the appellant should have raised them. In our view, given the strength of HMRC's case and the obvious weakness of the appellant's case, there is a small prejudice to the appellant in denying him permission to appeal late. The balance of prejudice weighs in favour of HMRC.

21. In light of the foregoing we have decided not to give permission to the appellant to appeal out of time. Accordingly we dismiss his appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

22. 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.

ABIGAIL HUDSON
TRIBUNAL JUDGE

Release date: 13 January 2020