[2020] UKFTT 0032 (TC)

TC07538

INCOME TAX – Section 49 Taxes Management Act 1970 - Penalties for late filing of Income Tax Returns – Reasonable Excuse - Schedule 55 Finance Act 2009 - Application for Appeal to be admitted late - - No - Application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/05852

BETWEEN

SIMON CHANEY **Appellant**

-and-

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

TRIBUNAL: PRESIDING MEMBER: MR G. NOEL BARRETT
MEMBER: MISS SUSAN STOTT FCA

Sitting in public at Leeds Magistrates Court and Family Hearing Centre on 9th January 2020

Mr J Brizzolara FCA Accountant for the Appellant

Miss Costello Presenting Officer of HM Revenue for the Respondents

INTRODUCTION

1. The substantive appeals in regard to this matter are appeals against penalties which HMRC have imposed on the appellant under Schedule 55 of the Finance Act 2009 ("Schedule 55") for failing to submit completed self- assessment tax returns on time, for the tax years ending 5 April 2015, 5 April 2016 and 5 April 2017.

2. The appellant through his accountant appealed to HMRC by letter dated 26 June 2019, but his appeals were rejected by HMRC under cover of their letter of 28 August 2019, on the basis that the 30 day deadline for making the appeals had elapsed and the appellant had not provided any reasonable excuse for not appealing within the 30 day time limit

3. The appellant then appealed to this tribunal, (which appeal was generated on 2 September 2019), firstly applying for leave to appeal out of time; and secondly if that application was granted, to appeal against the penalties imposed in the substantive matters.

4. The grounds of the appellant's appeal are firstly; that he had little experience and was confused by HMRC's procedures which he found complex and secondly; that he had employed a bookkeeper to assist him, which bookkeeper then failed to file his returns for him and misled him as to the nature of the penalties that were accruing against him.

LATE APPEALS AND RELIANCE ON ADVISERS - APPLICABLE LAW AND DISCUSSION

5. The time limit for the making of appeals to HMRC is 30 days from the date of each of the penalty notifications. However, the Tribunal can give permission for the bringing of a late appeal if it exercises its discretion so to do under Rule 20(4) of the Tribunal's Rules.

6. There is no indication within the First Tier Tribunal Rules as to how this statutory discretion should be exercised.

7. Both the Courts and the Upper Tribunal have however determined late appeals, so as to provide guidance and avoid the obvious unfairness which could arise through the exercise of completely unfettered judicial discretion on an arbitrary case by case basis.

8. The First Tier Tribunal (FTT) is bound by this guidance.

9. The starting point when considering applications for late appeals is that permission should not be granted by the FTT unless the FTT is satisfied on balance that it should be.

10. In Data Select v HMRC [2012] UKUT 187 (TCC), the Upper Tribunal stated at [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 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."

11. In Romasave (Property Services) Ltd v Revenue And Customs [2015] UKUT 254 (TCC), the Upper Tribunal said at [88]-[92]:

> "In recent times there has been some debate, both in this tribunal and in the courts, as to the correct approach to application for relief from sanctions, which approach has translated across to applications of this nature as well [that is, applications for permission to bring a late appeal]. … It is not necessary for us to describe the history of this debate. The outcome, in our view, is that in this tribunal, and in the FTT, the factors identified by the courts in the revised form of CPR 20 r 3.9 as having particular weight or importance, that is to say the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, are relevant factors, but have no special weight or importance. The weight or significance to be afforded to those factors, along with all other relevant factors, in applying the overriding objective to deal with cases fairly and justly, will be a matter for the tribunal in the particular circumstances of a given case. …"

12. Further at paragraph 96 the Upper Tribunal said;

> "In the context of an appeal right which must be exercised within 30 days from the date of the documents notifying the decision, a delay of more than three months cannot be described as anything but serious and significant"

13. We note, that in Secretary of State for the Home Department v SS (Congo) and others [2015] EWCA Civ 387 the Court of Appeal, at [105], has similarly described exceeding a time limit of 28 days for applying to that court for permission to appeal by 24 days as significant, and a delay of more than three months as serious.

14. It has been well rehearsed that time limits imposed by law should generally be respected. By the time the appellant's accountant appealed, on the appellant's behalf, to HMRC on 26 June 2019 the appeal against the earliest of the penalties imposed for late filing of the appellant's 2014/15 self-assessment return was over 1,185 days late and the latest of the appellant's appeals for the late filing of his 2016/17 self-assessment return, was over 365 days late.

15. In our view those delays cannot again be described as anything but serious and significant.

16. Although each case must be considered in its own context, we can find nothing in this case which would alter our findings in this respect. As the court in SS (Congo) observed, and HMRC have submitted one universal factor in this respect is the desirability of finality in litigation.

17. Sir Stephen Oliver, the former President of this Tribunal, sitting in the First-tier Tribunal, in Ogedegbe v Revenue and Customs Commissioners [2009] UKFTT 364 (TC) {discussed in Markland v Revenue and Customs Commissioners [2011] UKFTT 559 (TC) and by this tribunal in O'Flaherty v Revenue and Customs Commissioners [2013] UKUT 0161 (TCC)} confirmed that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and should not be granted routinely.

18. In BPP Holdings v Revenue and Customs [2016] EWCA Civ 121, the Court of Appeal addressed the question whether

> "the stricter approach to compliance with rules and directions made under the CPR as set out in Mitchell v News Group Newspapers Ltd [2014] 1 WLR 795 and Denton v TH White Ltd [2014] 1 WLR 3926 applies to cases in the tax tribunals". Noting that there were conflicting decisions of the Upper Tribunal, the Senior President of Tribunals (with whom Richards and Moore-Bick LJJ agreed) said at [16] that "the stricter approach is the right approach".

19. At [37]-[38] it was added that:

> "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in Mitchell and Denton. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation."

20. In BPP Holdings, the Court of Appeal was dealing with the consequences of non-compliance with a direction of the Tribunal, rather than with non-compliance with the time limit for bringing an appeal. However, Romasave found that the principles from the former translated across to the latter: see paragraph 11 above.

21. The approach in Denton requires the court or tribunal to address the issue of relief from sanctions in the following three stages: (i) identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages rule 3.9(1); (ii) consider why the default occurred; (iii) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including the factors in sub-paragraphs (a) and (b).

22. Relevant factors identified in the pre-April 2013 version of rule 3.9(1) CPR are (a) the interests of the administration of justice; (b) whether the application for relief has been made promptly; (c) whether the failure to comply was intentional; (d) whether there is a good explanation for the failure; (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol; (f) whether the failure to comply was caused by the party or his legal representative; (g) whether the trial date or the likely trial date can still be met if relief is granted; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party.

23. The post-April 2013 version of rule 3.9(1) CPR requires consideration of "all the circumstances of the case, so as to enable [the court or tribunal] 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."

24. Most recently in William Martland v HMRC [2018] UKUT 178 (TCC) the Upper Tribunal considered the case law and the post April 2018 CPR rules again and at paragraph 44 of its decision approved the threefold test established previously in Denton (see paragraph 21 above).

25. Schedule 55 para 23(1) of the Finance Act 2009 provides that;

> "liability to a penalty …… does not arise where the [tax payer] satisfies …….the Tribunal he has a reasonable excuse for the failure"
>
> And at para 23(2) (b)
>
> "where the [tax payer] relies on any other person to do anything, that is not a reasonable excuse unless the [tax payer] took reasonable care to avoid the failure"

26. Muhammed Hafeez Katib v HMRC [2019] UKUT 189 (TCC) provides useful recent guidance from the Upper Tribunal in regard to reliance upon a professional adviser.

At para 58 the Upper Tribunal said:

> "…. The core of Mr Katib's complaint is that Mr Bridger was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal either by enabling the client to distance himself from the activity or otherwise"

BURDEN AND STANDARD OF PROOF

27. Where the appellant argues that he has a reasonable excuse for the late submission of his appeal to HMRC then the evidential burden of establishing that reasonable excuse falls on the appellant, the standard of proof being the normal Civil Standard ie on the balance of probabilities.

REASONABLE EXCUSE TEST

28. Judge Medd in *The Clean Car Company Limited v C&E Commissioners* [1991] VATTR 234 is widely applied in the field of tax and has been approved subsequently many times. Judge Medd stated;

> "…the test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself in at the relevant time, a reasonable thing to do… the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer … such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously.

FINDINGS OF FACT

29. *The appellant confirmed that he is a bricklayer and said that he had little experience of* matters involving his tax and/or HMRC and that he relied 100% on his bookkeeper. He said that office affairs didn't come in to his affairs very much.

30. He also said that his partner helped him and kept all his receipts for him for his accounts.

31. The appellant also confirmed in evidence that he knew that had to file self-assessment returns for the tax years 2014-15, 2015-16 and 2016-17.

32. He confirmed that he had found a bookkeeper, off the internet, who was in Bramley, Leeds, which was fairly local to him. She was called "Paula" but he couldn't recollect her surname.

33. The appellant accepted that he had received, opened and read the various penalty notices received from HMRC, before handing them on to his bookkeeper.

34. Overall, during the period concerned in addition to receiving notices to file a self-assessment return for each of the three tax years under appeal, it is clear from the bundle that the appellant would have received 11 separate penalty notices.

35. Mr Chaney said that he didn't in fact know and that the amounts being demanded by HMRC from him were penalties.

36. We note however from the specimen notices within the bundle that all of the notices issued by HMRC to the appellant refer to late filing penalties.

37. The appellant confirmed that he thought that his bookkeeper had matters in hand and that when he asked her about the amounts he was being asked by HMRC to pay, his book keeper had told him to pay them.

38. He also confirmed that he had signed everything she (his bookkeeper) had asked him to sign.

39. He mentioned, when asked by Mr Brizzolara, that he couldn't understand why his 2014-15 return had been rejected and returned to him and that despite telephoning HMRC on several occasions seeking guidance, he had found HMRC's attitude to be intimidating and thought he was "up against a brick wall"

40. None of these telephone conversations are recorded on the "SA Notes" however we accept that if Mr Chaney had phoned HMRC's general help line, then his conversations with HMRC would not have been recorded on the SA Notes.

41. We note from the bundle that during the course of this appeal, HMRC invited Mr Brizzolara to provide them with details of the approximate dates and times when these telephone calls took place, so that they could try and trace them. However Mr Brizzolara declined to provide this information.

42. Mr Chaney did not provide any explanation of what actions he had taken, with either his bookkeeper or directly with HMRC in order to progress the submission of his self-assessment returns for the 2015-16 and 2016-17 tax years.

43. We also note from the bundle that Mr Chaney actually paid a substantial part of the penalties then outstanding to HMRC, in the sum of £3,380.20, in March 2018.

44. We accept that which Mr Chaney told us in his evidence in paragraphs 29 to 33, 35, and 37 to 39 above.

CLOSING SUBMISSIONS

45. The respondents have submitted, in regard to the threefold test established in Denton and confirmed most recently in Martland that:

(1) The failures by the appellant of between at least 1,185 days and 365 days are both significant and serious

(2) The appellant has not (as he must) established a reasonable excuse for his delay in bringing these appeals.

(3) It would be unjust, after such a lengthy delay, as a result of prejudice to HMRC in relation to both time and resources and in view of the weakness of the substantive appeals, to allow the application to appeal late.

46. Mr Brizzolara when asked to make a closing statement and or submissions on the law, said that he had not had time to read the bundle or the case law contained therein and that the appeal itself had already cost his client £400. He then repeated that which his client had stated in his notice of appeal, namely that his client had been confused and intimidated by HMRC and their processes; that the inadequacy of their response indicated their failings; that Mr Chaney had the right to be helped and supported by HMRC and that HMRC had bullied a weak and unfamiliar tax payer.

47. He asked if he could complain about HMRC to the Tribunal in this regard. We informed him that we had no jurisdiction to hear complaints about HMRC and that he would have to pursue any complaint his client may have through HMRCs own complaints process.

DECISION

48. In accordance with the threefold test established in Denton; Firstly, we accept that the failures by the appellant of between at least 1,185 days and 365 days are both significant and serious,

49. Secondly it is our finding that the appellant clearly knew that he needed expert assistance with his tax affairs, whilst it is unfortunate for him that he selected an incompetent bookkeeper, it is clear from Katib that tax payers cannot simply abrogate their taxation responsibilities by employing an adviser, no matter what their competencies. It should not have taken Mr Chaney over 3 years to realise this, nor given what is stated on the penalty notices, that the amounts he was being asked to pay and indeed actually paid to HMRC, were penalties.

50. We do not accept as a responsible trader conscious of and intending to comply with his obligations regarding tax, with his experience and other relevant attributes, placed in the situation he found himself in at the relevant time, that Mr Chaney took reasonable care to avoid the failures of his bookkeeper.

51. Thirdly, and in conducting a balancing exercise, it is our belief that even if the substantive appeals were allowed to proceed late, that there is an extremely weak prospect of those substantive appeals being successful.

52. It is also our view therefore, that any prejudice to the respondents in our allowing the application would be far greater than any prejudice to the appellant in refusing the application.

53. It is also clear to us and has previously been established by the Upper Tribunal that there is a need for litigation to be conducted efficiently and at proportionate cost, for statutory time limits to be respected and for there to be finality in litigation.

54. It is for the appellant to satisfy the Tribunal that he has a reasonable excuse for appealing late. However he has not provided us with either documentation or testimony to satisfy us that any such reasonable excuse does exist, such as to persuade us that this application to appeal late should be granted.

55. We may add that it is perhaps unfortunate for the appellant, that Mr Bizzolara chose not to look at or research the relevant case law and seemed unfamiliar with the required tests propounded in Denton, in regard to the bringing of late appeals.

56. For the reasons we have given, the appellant's application to make a late appeal is therefore refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

57. 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.

58. forms part of this decision notice.

MR G. NOEL BARRETT

TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 16 JANUARY 2020