[2020] UKFTT 0074 (TC)

# TC07569

**Appeal number: TC/2018/06608**

***INCOME TAX – penalties for the late filing of individual tax returns for three tax years – late appeal – permission to bring the late appeal refused – in any event no reasonable excuse or special circumstance – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**SIMON JEREMY SUTTON** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE NIGEL POPPLEWELL**
**DAVID BATTEN**

**Sitting in public at Bristol on 8 March 2019**

**The Appellant in person**

**Mrs Rosemary James, Officer of HM Revenue and Customs, for the Respondents**

DECISION

## Background

1. This appeal concerns the late filing of individual tax returns for the three tax years 2013/2014, 2014/2015 and 2015/2016. The respondents (or "**HMRC**") claim to have visited penalties for this late filing on the appellant. These penalties (the "**penalties**") amount in total to £4,500. These break down into £1600 for late filing and daily penalties for 2013/2014, the same amount for 2014/2015, and £1300 for 2015/2016 (there being no 12 month late filing penalty assessed on the appellant for that tax year).

2. The appellant appealed against the penalties on 27 October 2017. HMRC say that the appeal is late. So, as a preliminary issue, we need to decide whether we should give the appellant permission to bring his appeal out of time.

3. For the reasons given below we have decided not to give the appellant that permission. And so we dismiss his appeal.

## Evidence and findings of fact

4. We were provided with a bundle of documents. The appellant gave oral evidence. He struck us as a thoroughly truthful and honest witness and we accept his evidence. From the evidence we find the following facts:

(1) The appellant was the sole shareholder and director of a company called imperium business solutions Ltd ("**IBS**") which built IT systems. That company ceased to trade in 2013/2014 but was succeeded by a second company, IAM technologies Ltd ("**IMT**") which ran a slightly different business, that of developing IT. IMT is still extant and, we understand, is going from strength to strength. The appellant owns 60% of the shares in IMT, the remaining 40% being owned by three other shareholders.

(2) At the relevant time, each company employed about four people but it was the appellant who was responsible for the day-to-day running of each company.

(3) He instructed Christopher Brown of Christopher R Brown Ltd chartered accountants ("**Mr Brown**") to be his personal accountant and to look after his personal tax affairs. He also instructed him to look after the accounts and tax affairs of IBS. When IBS closed, he instructed Haines Watts to deal with the accounts and tax affairs of IMT, but retained Mr Brown as his personal tax adviser.

(4) Notices to file tax returns and the notices assessing the penalties was sent to both the appellant and to Mr Brown. Any notices sent the appellant were passed on to Mr Brown by the appellant. He relied on Mr Brown to deal with his tax affairs and only became involved, practically, when HMRC's debt management unit became involved and he was visited by an enforcement officer.

(5) An appeal against the penalties was sent by way of a letter dated 27 October 2017 by Mr Brown to HMRC. It is not at all clear to us what prompted this appeal

given that it predates the visit to the appellant's premises of 6 December 2017. However, on that date, HMRC wrote to the appellant indicating that he owed £8,788.67 which the appellant said that he paid at that time. In light of this, he thought that he had discharged his liability is to HMRC but in August 2018 he received another visit from an enforcement officer following which that officer wrote to the appellant in a letter dated 6 August 2018 explaining that the appellant owed a further £5534.06. The appellant wrote to HMRC on 22 August 2018 explaining why he had had issues with paying HMRC money which HMRC claimed that he owed. In that letter he states that "Christopher Brown accountants lost control of the situation despite making excessive charging and were replaced as company accountants but retained for personal tax which of course has proved to be a huge error as the investigation progressed. I do not want to openly criticise the accountants or pension advisers is that could present legal implications moving forward. I have however indicated to your team that I intend to put all into the hands of Tax Assist Accountants who will investigate and bring matters to a conclusion. This will cost me a further £700 payment to Christopher Brown accountants to sign off the account and for the three past filings which were all late but showed nil tax due".

(6) Following the appeal against the penalties made by Mr Brown to HMRC on 17 October 2017, HMRC wrote to the appellant on 22 November 2017 explaining that the appeal was late and there were not prepared to accept that late appeal.

(7) The appellant notified his appeal to the tribunal on 16 October 2018. The grounds of appeal are set out by reference to his letter to HMRC dated 22nd of August 2018.

(8) The appellant has been in the self-assessment regime since September 2001. The only sources of income that he had for the three years 2013/2014 - 2015/2016 were dividends from the relevant company. The amount of tax payable on these dividends under self-assessment for the three tax years in question was zero in each year.

(9) HMRC's documentary evidence shows that notices to file tax returns for the three tax years were sent to the appellant on 6 April 2014, 2015 and 2016 in respect of each of those tax years. Computer printouts indicating this have been provided as, too, have pro forma notices to file. HMRC's documentary evidence that notices of penalty assessment were sent to the appellant at his correct address comprises copies of computer records showing the dates on which those notices were sent out, together with a printout of the records of the addresses held by HMRC at the relevant times. They have also provided pro forma notices. HMRC operate a return letter scheme and the only evidence that a letter was returned under this scheme having been sent to the appellant reflects a letter sent in August 2013 which was returned following the appellant's change of address in that month.

(10) The due date for submitting an online return for 2013/2014 was 31 January 2015; for 2014/2015 it was 31 January 2016 and for 2015/2016 it was 31 January

2017. The returns for all three years were filed online on the same day – 27 October 2017.

## The Law

### Legislation- the penalties

5. A summary of the relevant legislation is set out below:

*Obligation to file a return and penalties*

(1) Under Section 8 of the Taxes Management Act 1970 ("**TMA 1970**"), a taxpayer, chargeable to income tax and capital gains tax for a year of assessment, who is required by an officer of the Board to submit a tax return, must submit that return to that officer by 31 October immediately following the year of assessment (if filed by paper) and 31 January immediately following the year of assessment (if filed on line).

(2) Failure to file the return on time engages the penalty regime in Schedule 55 Finance Act 2009 ("**Schedule 55**" and references below to paragraphs are to paragraphs in that Schedule).

(3) Penalties are calculated on the following basis:

(a) failure to file on time (i.e. the late filing penalty) - £100 (paragraph 3).

(b) failure to file for three months (i.e. the daily penalty) - £10 per day for the next 90 days (paragraph 4).

(c) failure to file for 6 months (i.e. the 6 month penalty) - 5% of payment due, or £300 (whichever is the greater) (paragraph 5).

(d) failure to file for 12 months (i.e. the 12 month penalty) - 5% of payment due or £300 (whichever is the greater) (paragraph 6).

(4) In order to visit a penalty on a taxpayer pursuant to paragraph 4, HMRC must decide if such a penalty is due and notify the taxpayer, specifying the date from which the penalty is payable (paragraph 4).

(5) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(6) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20).

(7) On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

*Special circumstances*

(8) If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16).

(9) On an appeal to me under paragraph 20, I can either give effect to the same percentage reduction as HMRC have given for special circumstances. I can only change that reduction if I think HMRC's original percentage reduction was flawed in the judicial review sense (paragraph 22(3) and (4)).

*Reasonable excuse*

(10) A taxpayer is not liable to pay a penalty if he can satisfy HMRC, or this Tribunal (on appeal) that he has a reasonable excuse for the failure to make the return (paragraph 23(1)).

(11) However, an insufficiency of funds, or reliance on another, (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and are statutorily prohibited from being a reasonable excuse. Furthermore, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

**Legislation – late appeal**

6. Section 31A TMA 1970 requires a notice of appeal against an assessment to be given in writing to the relevant officer of the Board within 30 days on which the notice of assessment was given to a taxpayer. The legislation which deals with late appeals is set out in section 49 TMA 1970.

**"**49. Late notice of appeal

(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 limit.

(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.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

(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)."

7. Paragraph 21 of Schedule 55 deals with appeals against penalties levied under that schedule.

"21

(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act."

**Case law – notification of the penalties**

8. As can be seen from [5(4)] above, in order to visit a penalty on a taxpayer under paragraph 4, HMRC must make a decision that such a penalty should be payable, and give an appropriate notice to the taxpayer.

9. These issues were considered by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ("***Donaldson***").

10. The Court of Appeal decided that:

(1) The high level policy decision taken by HMRC that all taxpayers who are more than three months late in filing a return will receive daily penalties constituted a valid decision for the purposes of paragraph 4.

(2) A notice given before the deadline (i.e. before the end of the three month period (and so issued prospectively) was a good notice. In Mr Donaldson's case, his self-assessment reminder and the SA326 notice both stated that Mr Donaldson would be liable to a £10 daily penalty if his return was more than three month's late and specified the date from which the penalties were payable. This was in compliance with the statute.

(3) HMRC's notice of assessment did not specify, however, the period for which the daily penalties had been assessed. On this it agreed with Mr Donaldson. However, there is a saving provision in Section 114(1) of the TMA 1970 which the Court of Appeal held applied to the notice. And so they concluded that the failure to specify the period for which the daily penalties had been assessed did not invalidate the notice.

**Case law – late appeal**

11. In considering whether to admit a late appeal to the FTT, the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) ("***Martland***") considered that the approach to applications for relief from sanctions under CPR rule 3.9 should apply to applications for permission to appeal to the FTT outside the relevant statutory limit. The Upper Tribunal went on to say:

"40. In *Denton*, the Court of Appeal was considering the application of the later version of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [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 rule 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)]"."

41. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered."

42. The Supreme Court in *BPP* implicitly endorsed the approach set out in *Denton*. That case was concerned with an application for the lifting of a bar on

HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FTT.

43. In its previous form, the "checklist" of items in CPR rule 3.9 can be seen to bear a number of similarities to the questions identified in *Aberdeen* and *Data Select*; to that extent, it is easy to regard them as little more than an aide memoire to help the judge to consider "all relevant factors" (and indeed, the list was preceded by the general injunction to "consider all the circumstances"). The question that naturally arises is whether the changes to CPR rule 3.9 and the evolving approach to applications for relief from sanctions under that rule also apply to applications for permissions to appeal to the FTT outside the relevant statutory time limit. We consider that they do. Whether considering an application which is made directly under rule 3.9 (or under the FTT Rules, which the Supreme Court in *BPP* clearly considered analogous) or an application to notify an appeal to the FTT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions – especially where the sanction in question is the striking out of an appeal (or, as in *BPP*, the barring of a party from further participation in it). The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".

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."

47. *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.

> 48. 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."

12. It is clear that a taxpayer may have a reasonable excuse for failing to file his returns on time if he can show that he has relied on an agent and that it was, in the circumstances, a reasonable thing for him to do. However, when considering reliance on an agent as a reason for failing to make a timely appeal, the bar has been set very high by the Upper Tribunal.

13. In the case of *HMRC v Mohammed Hafeez Katib* [2019] UKUT 0189 (*"Katib"*) the Upper Tribunal had to consider the extent to which reliance on agent was a justifiable reason for failing to make a timely appeal. On the facts of that case, the Upper Tribunal concluded that failings by the appellant's agent could not be relied upon by the appellant at any stage in the *Martland* analysis. The Upper Tribunal said this:

> "53 The first stage of the *Martland* examination can be addressed briefly. Mr Katib's delay in appealing against the PLNs was, at the very least, 13½ months. That was "serious and significant". The real question is how the second and third stages of the evaluation should be performed, having regard to the particular importance of statutory time limits being respected.
>
> 54. It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant. In *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666, when considering the analogous question of whether a litigant's case should be struck out for breach of an "unless" order that was said to be the fault of counsel rather than the litigant itself, Ward LJ said, at 1675:
>
> > Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. *The basis of the rule is that orders of the court must be observed* and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself. [emphasis added]

55. We do not accept Mr Magee's general argument that this approach simply involves attributing the actions of legal representatives to their clients and has no bearing on the question whether incorrect advice provided to a client can be a good reason for the client's default. Given the importance of adhering to statutory time limits, we see no reason why a litigant who says that a representative failed to file an appeal on time should necessarily be in a different position from a litigant who says that a representative failed to advise adequately of the time limits within which an appeal should be brought. In any event, it seems from [7] of the Decision that the FTT found that Mr Bridger had been instructed to appeal against the PLNs on Mr Katib's behalf but failed to do so and, therefore, Mr Katib is not simply complaining that Mr Bridger provided defective advice".

**Case law – reasonable excuse**

14. In the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156 the following guidance was given to the FTT when it needs to consider a reasonable excuse defence:

> "81 When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. "

**Case law – special circumstances and proportionality**

15. The issue of special circumstances and proportionality in the context of late filing penalties has been most recently, and definitively, considered by the Upper Tribunal in

the case of *Barry Edwards v HMRC* [2019] UKUT 131 ("***Edwards***"). The relevant extracts are set out below:

> "66. We agree with Mr Ripley that the reasoning of *Bosher* is not applicable in relation to the question as to whether a penalty imposed pursuant to Schedule 55 to FA 2009 is disproportionate. Under paragraph 16 of that Schedule, the FTT has, in contrast to penalties imposed under s 98A TMA 1970 in respect of the CIS scheme, been given a limited power to consider whether there are special circumstances which would justify a reduction in the amount of the penalty. It is in the context of that specific jurisdiction that the question of proportionality must be considered. We did not take Mr Carey to argue to the contrary. It is therefore clear that the FTT erred by determining that it had no general power to reduce a penalty on the grounds that it is 10 disproportionate on the basis of the reasoning of the Upper Tribunal in *Bosher*……
>
> 72. In our view, as the FTT said in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase. In support of that approach the FTT referred to the observation made by Lord Reid in *Crabtree v Hinchcliffe* at page 731D-E when considering the scope of "special circumstances" as follows:
>
> > "The respondent argues that this provision has a very limited application… I can see nothing in the phraseology or in the apparent object of this provision to justify so narrow a reading of it".
>
> 73. The FTT then said this at [101] and [102]:
>
> > "101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.
> >
> > 102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."
>
> 74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration……..
>
> 84. However, we were referred to HMRC's guidance on the Schedule 55 FA 2009 penalty regime, as it relates to late filing penalties. It is clear from that

guidance that the aim behind the Schedule 55 penalty regime is to penalise taxpayers who fail to comply with their obligations once a notice to file is issued and to incentivise them to comply with future notifications that they must file a tax return (and pay any tax due) on time. In our view, a penalty regime which seeks to incentivise taxpayers to comply with a requirement to file a return is a legitimate aim, regardless of whether it is subsequently determined that any tax is due. The purpose of the requirement to complete a tax return is so that HMRC is in a position to ascertain whether tax is due from a particular taxpayer. If the taxpayer does not comply with the requirement to file a return, then HMRC is clearly not going to be in a position to ascertain easily whether tax is in fact due. A taxpayer who does not think he should be within the self assessment regime when he receives a notice to file because as a matter of course he will have no further tax to pay should enter into a dialogue with HMRC with a view to being removed from the requirement to file rather than take no action in response to 35 the notice. That is precisely what ultimately happened in this case.

85. In our view, there is a reasonable relationship of proportionality between this legitimate aim and the penalty regime which seeks to realise it. The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear.

86. In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty……..”

**Burden and standard of proof**

16. It is for the appellant to show why we should give him permission to bring his appeal out of time. As part of this, however, HMRC will need to establish that the penalties have been properly assessed and notified to the appellant. Given, too, that we are able to consider obvious merits of the appellant’s case at the evaluation stage when deciding whether to give permission, we will need to consider whether HMRC have given valid notices to file to the appellant.

17. If we do give the appellant permission, and come to the conclusion that valid notices to file were given to him, then the burden shifts, and it will be for the appellant to show that, for example, he has a reasonable excuse for having failed to submit his tax returns, or that there are special circumstances.

18. In each case the standard of proof is the balance of probabilities i.e. whether it is more likely than not.

**Discussion and conclusion -late appeal**

19. As we have said above, it is for the appellant to show why we should give him permission to appeal out of time. But at this stage, we simply have HMRC's assertion that his appeal has been made late. In order to test that we need to make a finding as to whether the notices of penalty assessment against which the appeal is being made were actually given to the appellant in the first place.

20. HMRC have provided a pro forma notices to file which they say were sent to the appellant, and they also say that these notices fulfil the relevant requirements for notification of penalty assessments as set out in schedule 55 as interpreted in *Donaldson.* These, they say, would have been sent to the correct address they had on their records at that time.

21. The appellant has not seriously challenged HMRC's position that valid penalty assessments were made and given to him. We are still obliged to come to a finding on that point. In light of the evidence, it is our view that valid penalty assessments were made and notified to the appellant and/or Mr Brown, his agent at the relevant time. We say this on the basis of the documentary evidence provided by HMRC. In our view it is more likely than not that their automated system operated properly in the circumstances of this case and that the notices which their records suggest were sent to the appellant were so sent and did contain the relevant information (namely that set out in the pro forma notices provided to us). They were sent to the correct address and it is our view too, that the appellant received them and when he did so he passed them on to Mr Brown.

22. In light of this we now turn to the appellant's application for permission and apply the principles set out in *Martland.* Our first task is to establish the length of the delay and decide whether that delay is serious or significant.

23. Appeals against the penalty notices should have been made 30 days after they were issued by HMRC. The records show that those notices were issued for the 2013/2014 tax year in February 2015, August 2015, and February 2016. For the 2014/2015 tax year, they were issued in February 2016, August 2016 and February 2017. For the 2015/2016 tax year, they were issued in February 2017 and August 2017. The appeal to HMRC was made on 27 October 2017.

24. So it can readily be seen that the appeal against the penalties issued for 2013/2014 is between approximately 31 months and 19 months late. For 2014/2015, it was made between 19 months and 7 months late. For 2015/2016 the appeal was made between 7 months and 1month late.

25. All of these are serious and significant delays save, perhaps, for the appeal against the daily and six month penalties for 2015/2016 which was only made about a month late.

26. We then turn to the second stage of the process, namely to ascertain the reasons why the default occurred. The appellant spelt this out in grounds of appeal (which referred to his letter to HMRC of 22 August 2018), namely that his accountants lost control of the situation. In his oral evidence the appellant confirmed that he had placed responsibility for everything to do with his tax affairs in the hands of Mr Brown, and

he therefore expected that gentleman to deal with the penalty notices and to make a timely appeal if appropriate. As can be seen from the foregoing, no such timely appeal was made.

27. It is clear from the decision of the Upper Tribunal in *Katib* that where an appellant seeks to rely on failure by an agent to make a timely appeal, that failure should generally be treated as a failure by the appellant. The starting point is the general rule that the failure by an adviser to advise an appellant of a deadline for making an appeal or to submit a timely appeal on appellant's behalf is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland.* It can however be considered at the third stage of the evaluation since, as the Upper Tribunal recognised "exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration."

28. It is true that in *Katib* the adviser behaved in a most bizarre fashion, which is not ostensibly the case with this appeal. But as Mrs James has pointed out the appellant would have received notices regarding the penalties during 2015, 2016, and 2017 which should have put him on notice that Mr Brown was not doing his job properly. And this should have prompted the appellant to have contacted Mr Brown to find out what was going on. And if not Mr Brown, then the appellant could have contacted HMRC. However there is no evidence that he did either.

29. It seems to us that he has been let down by Mr Brown, but we are bound by the principle set out by the Upper Tribunal in *Katib*, namely that a failure by an agent to submit a timely appeal is not a good reason for failing to make that timely appeal.

30. We now come to the third stage of the *Martland* process, which requires an evaluation of all the circumstances of the case which, in turn, involves a balancing exercise assessing the merits of the reasons for the delay and the prejudice which would be caused to both parties by granting or refusing permission. And we remind ourselves that when undertaking this balancing exercise we 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. When undertaking this evaluation we can have regard to any obvious strengths or weaknesses of the appellant's case.

31. The appellant has taken no point as to whether valid notices to file his returns were served on him, and we think it is more likely than not that they were. The appellant's reasons for failing to file his returns on time are the same reasons for not putting in a timely appeal; namely that he had put his tax affairs in the hands of Mr Brown and relied on Mr Brown to submit his tax returns on time. It is clear that those tax returns were not submitted on time.

32. It is clear that reliance on agent may comprise a reasonable excuse for failing to submit tax returns on time. The bar here is lower than reliance on an agent as a reason for making a late appeal. However an appellant cannot simply devolve responsibility for submitting his returns to an adviser and then do nothing more. The appellant must take reasonable care to avoid the agents failure to submit his returns on time. In our view this appellant did not do this. He has been in the self-assessment system since 2001. He knows the score. He received penalty notices from HMRC during 2015, 2016, 2017. The earliest of these for the late filing of the tax return for 2013/2014 was sent

to him on 18 February 2015. Further notices were sent in August 2015. That should have put the appellant on notice that something was not right regarding his tax returns and, as mentioned above, should have prompted an approach to Mr Brown to find out what was going on. That would have been the behaviour of a reasonable taxpayer. But there is no evidence that the appellant did this. This might be understandable given his view that it was up to Mr Brown to deal with his tax affairs, and the appellant's evidence that he was heads down running the company is entirely credible. However it is our view that the reasonable taxpayer in the appellant's position would have poked his head above the parapet, in light of the notices of the penalty assessments; taken a greater interest in his tax position; and ascertained precisely what Mr Brown was doing in that regard.

33. So we do not think that the appellant has a reasonable excuse for failing to submit his tax returns on time. Nor do we think that there are special circumstances on which the appellant can rely to justify a reduction in the penalties. The circumstances which might be relevant are, firstly, reliance on Mr Brown and, secondly, the fact that the amount of tax payable in each of the three years was zero. This is linked to a suggestion that in his circumstances the penalty regime has operated in a disproportionate manner towards.

34. As regards the fact that the amount of tax for the three years were zero and the penalty regime has operated disproportionately towards him, we are bound by the sentiments expressed by the Upper Tribunal in *Edwards*. The penalty regime in Schedule 55 is a proportionate regime, and its application to a taxpayer who owes no tax is not disproportionate.

35. Unfortunately, too, reliance on agent cannot in our view comprise a special circumstance. Frankly it is all too common to find taxpayers being let down by their advisers, and the circumstances in which the appellant found himself are not out of the ordinary. They are not sufficiently special as to warrant a reduction in the penalty.

36. And so at this stage of the evaluation exercise, it seems to us that there are obvious weaknesses in the appellant's underlying appeal against the penalties. Even if we were to allow him to bring his appeal out of time, we would dismiss his appeal. In these circumstances the appellant is not prejudiced by not granting permission.

37. The behaviour of a tax advisor towards a taxpayer is something which can, however, be considered at this third stage of the *Martland* evaluation. In *Katib* the taxpayer complained that his adviser was incompetent, did not give proper advice, failed to appeal on time and told the taxpayer that matters were in hand when they were not. It is in these circumstances that the Upper Tribunal said that "in other words, he did not do his job. That 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 the 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."

38. We are conscious that litigation must be conducted efficiently and statutory time limits must be respected. In the case of this appeal, those time limits have not been so respected. It is the appellant's case that this is the fault of his agent. But for the

foregoing reasons set out in this decision, we do not think that this justifies that disrespect. And this is the case for all of the penalties including those where the appeals are only just over a month late.

## Decision

39. So we dismiss the appellant's application to allow him to bring his appeal out of time.

40. Had we decided to give him permission to appeal out of time, we would then have gone on to dismiss his appeal against the penalties. We have set above our finding that HMRC had given the appellant notices to file his tax returns for each of three years, and that the appellant has no reasonable excuse for having failed to file them on time, and there are no special circumstances which might reduce the penalties.

## Appeal rights

41. 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.

**NIGEL POPPLEWELL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 07 FEBRUARY 2020**