



TC07872

CGT – Discovery Assessment – penalties – late appeal – three year delay – no reasonable excuse – no special circumstances – permission refused - appeal dismissed

Appeal number: TC/2019/05436

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr BRENDAN BUTLER

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN MANUELL
 Miss PATRICIA GORDON**

The hearing took place on 29 September 2020. The Tribunal heard the Dr Maurice Laverty for the Appellant and Mr Mark Boyle, Litigator, of HM Revenue and Customs' Solicitor's Office for the Respondents.

With the consent of the parties, the form of the hearing was by remote video link using the Tribunal video platform. The Tribunal had decided a remote hearing was appropriate and so had granted the request. The documents to which the Tribunal were referred consisted of the agreed bundle as prepared by HMRC, together with a further bundle from the Appellant, both in electronic form

The hearing was held in public and there were several observers online.

DECISION ON LATE APPEAL

1. The Tribunal decided as a preliminary issue that the late appeal should not be allowed to proceed and that time should not be extended. The Appellant had made an application dated 5 August 2019 included in his Notice of Appeal of that date for permission from the Tribunal to commence a late appeal against the Discovery Assessment and Penalty Decisions dated 16 June 2016 for the tax year 2006/2007, issued under section 29 and section 95(1)(a) of the Taxes Management Act 1970 (“TMA 1970”). Section 49(2)(b) of the TMA 1970 requires an appellant whose appeal is late to obtain permission to proceed from the First-tier Tribunal.
2. HMRC’s position was in summary that the Appellant had been unable to show a reasonable excuse for his delay in filing his appeal, or any part of such delay. Nor had he shown any substantive basis for his appeal, which had no prospect of success.
3. Dr Laverty addressed the Tribunal on behalf of the Appellant. In summary he submitted that the Appellant would suffer a grave injustice if his late appeal were not allowed to proceed. HMRC had behaved badly in various ways. The appeal had been served late but the Appellant had been seeking redress from HMRC for a long time and had made well founded complaints. All HMRC’s figures were wrong, as was their whole approach. The appeal should be allowed to proceed to a full hearing so that the Appellant could give evidence.
4. Mr Boyle for HMRC relied on his skeleton argument dated 1 September 2020. The Appellant had been informed by HMRC in 2014 that a check of his taxes would be made pursuant to Schedule 36 of the Finance Act 2008 concerning property sales he had made in 2006/2007 and his resulting liability to CGT. Correspondence followed. On 16 June 2016 HMRC served a Notice of Assessment of £66,684.40 and a penalty determination of £30,007, which penalty on a subsequent review dated 8 August 2016 was reduced to £27,307. The Notice of Assessment stood unchanged. On 12 August 2016 the Appellant applied to HMRC for Alternative Dispute Resolution (“ADR”), which was refused on 8 September 2016. On 9 September 2016 HMRC wrote to the Appellant stating that as no appeal to the Tribunal had been made, the matter was considered settled pursuant to section 54 of the TMA 1970.
5. On 26 September 2016 the Appellant lodged an appeal with the Tribunal. On 1 October 2016 the Tribunal wrote to the Appellant declining to accept the appeal because, contrary to the Tribunal’s Procedure Rules, no copy of the HMRC decision appealed against had been provided.
6. On 25 April 2019 the Appellant filed a complaint with HMRC. On 20 June 2019 HMRC informed the Appellant that the matter had been concluded in September 2016 as no appeal to the Tribunal had been made. A substantive response to the complaint was made by HMRC on 8 July 2019. On 15 July 2019 the Appellant

indicated that an appeal to the Tribunal would be made and on 5 August 2019 Notice of Appeal was lodged.

7. Mr Boyle submitted that the Appellant's delay was serious, as authorities such as *Romasave* [2015] UKUT 254 (TCC), *Martland* [2018] UKUT 178 (TCC), *Perrin* [2018] UKUT 156 (TCC) and *Katib* [2019] UKUT 189 (TCC) showed. The appeal deadline applicable was 7 September 2016. HMRC had been entitled to consider that the matter was closed.

8. Applying the three stage test laid down in *Martland* (above), the almost three year delay was serious and significant, and no reasonable excuse had been shown. The complaints process was separate from the appeal process. No explanation had been provided as to why an appeal had not been resubmitted in 2016. As to the third test, evaluation of all of the circumstances, compliance with statutory deadlines and the Tribunal's rules was important, litigation had to be conducted efficiently and at proportionate cost. The Tribunal was not required to conduct a detailed examination of the underlying merits. HMRC's submission was that the case was weak, no new evidence had been produced which showed that HMRC's Discovery Assessment was mistaken and the penalty unfounded. The Appellant's case had been advanced on contradictory grounds. He had (for example) never applied for rollover relief. There was no prospect of success.

9. In reply Dr Laverty reiterated the injustice the Appellant faced if his appeal were not allowed to proceed. The appeal was late as had to be accepted but it was wrong, unfair and against the Appellant's human rights that he should be denied the opportunity to prove his case.

10. The chronology outlined by Mr Boyle on behalf of HMRC was not challenged and the Tribunal finds that it is correct. The law outlined by Mr Boyle was stated accurately and was not challenged on the Appellant's behalf. No authorities were referred to by Dr Laverty. *Martland* (above) provides the structure to be followed when considering whether to admit the late appeal.

11. The Appellant accepts that his appeal was late. No explanation has been provided for the serious and significant delay, let alone a satisfactory one. In particular, no satisfactory explanation has been provided for the failure to serve a copy of the HMRC decision appealed against with the Notice of Appeal lodged on 26 September 2016. It should be noted that the defective Notice of Appeal was already 19 days late: the 30 day deadline was 7 September 2016. The defective Notice of Appeal was only served after HMRC had notified the Appellant on 9 September 2016 that the matter was considered closed.

12. As the Tribunal pointed out during the hearing, rule 20(3) of The Tribunal (First-tier Tribunal) (Tax Chamber) Procedure Rules 2009 "the Appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the Appellant has or can reasonably obtain" is important. The Tribunal needs to know whether it has jurisdiction in a proposed appeal, whether the appeal is in time and which

category of appeal applies. The relevant decision was dated 8 August 2016 and the Appellant had a copy of it. No reason was given why a copy of HMRC's decision was not served as required, either with the Notice of Appeal or promptly after the Tribunal's letter to the Appellant.

13. The obvious conclusion to be drawn from the Appellant's failure to lodge a valid appeal in October 2016 after the Tribunal had informed the Appellant that his appeal was invalid and had not been accepted was that he had decided that any appeal would fail and that it would simply waste time and money to pursue it. Given the obvious weakness of the Appellant's case, and the fact that he had been receiving professional advice since at least 2014, that conclusion was open to HMRC. (It should be noted that Dr Laverty was not advising the Appellant in 2006/2007 and had no responsibility for the Appellant's Self Assessment returns at that time.)

14. Dr Laverty submitted that HMRC were aware that the Appellant was pursuing various avenues of redress, including a complaint to HMRC and seeking help from the Appellant's MP. That is so. Those were matters for the Appellant to pursue as he saw fit. They were and are not the province of the Tribunal. The appeal process is wholly separate and independent from HMRC and is governed by statute and the Procedure Rules. There is nothing to prevent an appellant from pursuing a complaint to HMRC simultaneously with an appeal to the Tribunal, although perhaps the more usual course is to pursue a complaint *after* an appeal. The Tribunal finds that the fact that the Appellant made one or more complaints to HMRC did not place HMRC on notice that an appeal was or would still be pursued to the Tribunal. The Tribunal finds that there was no reasonable excuse for the delay in serving Notice of Appeal.

15. Reaching the third *Martland* test, an evaluation of all of the circumstances, is an exercise involving judicial discretion in which the interests of justice must be carefully considered. Dr Laverty did not specify which of the Appellant's human rights was or were breached. None is obvious to the Tribunal. No new evidence was produced on the Appellant's behalf to support any of his assertions concerning his property activities in 2006/2007 and their taxation consequences. There were no illustrative calculations produced to show what tax, if any, was payable on his own case, or what reliefs were available. The Appellant has had years to produce evidence to show that HMRC's calculations are somehow in error. Dr Laverty, seeking to assist the Appellant in any way he can, has propounded various alternatives at various times as his correspondence with HMRC produced to the Tribunal shows, but none is supported by firm evidence. As HMRC point out, the Appellant's claim that he was a property developer in 2006/2007 is contradicted by the fact that the property company he identified as the vehicle was not incorporated until 2014. There was no evidence that HMRC had somehow misadvised or misled the Appellant as to his tax affairs.

16. The Tribunal finds that the Appellant's substantive case is not supported by evidence of any persuasive value. It would now be difficult to delve back some 14 years, especially without good quality records. HMRC would be required to deploy considerable resources, unexpectedly. HMRC were in this instance fully entitled to consider the matter closed in 2016. The interests of other users of the Tribunal would

be compromised by allowing a late appeal where there had been such flagrant and inexcusable breaches of time limits and of the Tribunal Procedure rules.

17. The late appeal is not admitted and no further action will be taken on it by the Tribunal. The appeal stands dismissed.

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.

**TRIBUNAL JUDGE MANUELL
RELEASE DATE: 8 October 2020**

**Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal)
(Tax Chamber) Rules on 28 October 2020**