[2020] UKFTT 458 (TC)

TC07933

INCOME TAX – individual tax return – late filing penalties under Schedule 55 Finance Act 2009 - application for permission to make a late appeal – Martland applied – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/01684

BETWEEN

HANS SOLVKJAER **Appellant**

-and-

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

TRIBUNAL: JUDGE NATSAI MANYARARA

The Tribunal determined the appeal on 17 August 2020, without a hearing, under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases), having first read the Notice of Appeal (with enclosures) and HMRC's Statement of Case (with enclosures).

DECISION

Introduction

1. This was the Appellant's application for permission to make a late appeal against penalties charged for the late filing of self-assessment tax returns.

Background facts

2. In July 2015, the Appellant purchased a parking space for rental income from a company known as Park First Limited. The parking space was said to guarantee an income of £1,600, for the first two years. The Appellant completed the purchase on 15 August 2015. The Appellant was then advised to complete an online Non-Resident tax form by Park First Limited. Park First Limited further informed the Appellant that he would not pay tax on his income in the United Kingdom, but that income tax would be due in his country of domicile. Park First Limited then sent the Appellant the guidelines to follow in completing the form. The Appellant's self-assessment record was set up on 2 February 2016.

3. A notice to file for the 2016 tax year was issued to the Appellant by HMRC on 6 April 2016. The notice to file was issued to the address at URB Las Salinas. The filing date for this return was 31 October 2016 for a paper return, or 31 January 2017 for an electronic return. As the return had not been received by the due filing date, HMRC issued a notice of penalty assessment for the £100 late filing penalty. On 6 June 2017, a 30-day penalty reminder letter was issued to the Appellant. HMRC then issued a 60-day penalty reminder letter on 4 July 2017. As the return had still not been received six months after the penalty date, HMRC issued a notice of penalty assessment on 15 August 2017, in the amount of £300. Daily penalties in the amount of £900 were also issued on 15 August 2017. On 20 February 2018, HMRC issued a 12-month penalty assessment. Statements of account were also sent to the Appellant on 7 March 2017, 6 March 2018, 11 September 2018, 5 March 2019, 16 April 2019, 10 September 2019 and 19 March 2020. The late filing penalty, daily penalty and six-month penalty for the 2016 tax year were cancelled on 24 March 2017 and 17 September 2017. HMRC also cancelled the penalties for the 2015 tax year.

4. A notice to file for the 2017 tax year was issued to the Appellant by HMRC on 6 April 2017. The filing date for this return was 31 October 2017 for a paper return, or 31 January 2018 for an electronic return. As the return had not been received by the due filing date, HMRC issued a notice of penalty assessment on or around 13 February 2018, for the £100 late filing penalty. On 5 June 2018, HMRC issued a 30-day penalty reminder letter. HMRC then issued a 60-day penalty reminder letter on 3 July 2018. As the return had still not been received six months after the penalty date, HMRC issued a notice of penalty assessment on 10 August 2018, in the amount of £300. Daily penalties were issued on 31 July 2018 and a 12-month late filing penalty was issued on 19 February 2019. Statements of account were also sent to the Appellant on 6 March 2018, 11 September 2018, 5 March 2019, 16 April 2019, 10 September 2019 and 19 March 2020.

5. A notice to file for the 2018 tax year was issued to the Appellant by HMRC on 6 April 2018. The filing date for this return was 31 October 2018 for a paper return, or 31 January 2019 for an electronic return. As the return had not been received by the due filing date, HMRC issued a notice of penalty assessment on 26 March 2019, for the £100 late filing penalty. On 4 June 2019, HMRC issued a 30-day penalty reminder letter. HMRC issued a 60-day penalty reminder letter on 2 July 2019. As the return had still not been received six months after the penalty date, HMRC issued a notice of penalty assessment on 9 August 2019, in the amount of £300. Daily penalties in the amount of £900 were also issued on 9 August 2019. On 18 February 2020, a 12-month late filing penalty was issued. Statements of account were also sent to the Appellant on 5 March 2019, 16 April 2019, 10 September 2019 and 19 March 2020.

6. A notice to file for the 2019 tax year was issued to the Appellant by HMRC on 6 April 2019. The filing date for this return was 31 October 2019 for a paper return, or 31 January 2020 for an electronic return. As the return had not been received by the due filing date, HMRC issued a notice of penalty assessment on 12 February 2020, for the £100 late filing penalty.

7. Prior to this, on 4 February 2020, the Appellant's base address was changed from URB Las Salinas 4W4B, Spain, to Markvangen 6, Denmark, following the Appellant's letter to HMRC on 3 February 2020, advising that he had moved from Spain two years prior to the date of his letter.

8. On 12 May 2020, the Appellant appealed against the penalties.

Evidence

9. Neither party has requested an oral hearing. In determining this application, I have had the benefit of reading HMRC's Statement of Case, the Appellant's notice of appeal and the Court Bundle, consisting of 112 (together with the correspondence included therein).

10. HMRC's case can be summarised as follows:

(1) HMRC's records show that the Appellant has had two separate addresses. The Appellant's first address was URB Las Salinas, from 2 February 2016 to 3 February 2020. The Appellant then moved to the address known as Markvangen 6.

(2) The notices to file were issued to the addresses held on record at the relevant time. Penalty notices were also issued to the notified address and effectively served pursuant to the provisions of section 7 of the Interpretation Act 1978. No correspondence was returned undelivered.

(3) Statements of account were issued to the Appellant on 5 March 2019, 16 April 2019, 10 September 2019 and 19 March 2020.

(4) On 29 May 2020, HMRC declined to agree to a notice of appeal being given after the expiry of the relevant time limit.

(5) The Appellant was correctly made aware of both the requirement to file a tax return and of the accruing penalties.

11. The Appellant's grounds of appeal can be summarised as follows:

(1) He did not purchase his parking space until August 2015 and he did not receive an income from it until August 2016.

(2) Alternatively, there has been no income and therefore no tax to pay.

(3) He has tried to contact HMRC for years, with no luck. On several occasions, he tried to explain to HMRC that he filled out a Non-Resident's Tax Form. He does not have a national insurance number and it was therefore impossible for him to complete a tax return.

(4) He does not know where HMRC obtained their figures. He does not owe any tax.

Decision

12. The Appellant seeks permission to make a late appeal against penalties charged for the late filing of self-assessment tax returns.

13. The application for permission to make a late appeal is governed by s31A of the Taxes Management Act 1970 (hereinafter referred to as 'TMA 1970'). This permits taxpayers to appeal, but the appeal must be made within 30 days after the date the notice of the penalty or surcharge is given to the taxpayer. Section 49 TMA 1970 permits, in one of two situations, a taxpayer to lodge a late appeal. The first circumstance in which a taxpayer is permitted to lodge an appeal late is where HMRC are satisfied that there is a reasonable excuse for not giving the notice in time and that the appeal was lodged without unreasonable delay after the excuse ceased (s 49(5) and (6) TMA 1970). The second circumstance in which an appellant can lodge an appeal late is where this Tribunal 'gives permission' (s 49(2)).

14. It is well established that the Tribunal must take all relevant matters into account when exercising its discretion to admit a late appeal: *Data Select Ltd v Revenue and Customs Commissioners* [2012] STC 2195. While this means that the Tribunal might, in appropriate circumstances, grant leave to appeal out of time to a taxpayer without a reasonable excuse, it also means that the Tribunal will take all matters into account and so a taxpayer with a reasonable excuse will not necessarily be granted permission to appeal out of time. There are no fetters given in the legislation on the exercise of discretion by the Tribunal.

15. The Appellant should have taken two distinct steps in order to get the appeal before the Tribunal:

(1) Firstly, he should have appealed to HMRC under s31A TMA 1970. There is a deadline in s31A (30 days after the penalty notice was issued) for the appeal to be made to HMRC and both HMRC and the Tribunal have power under s49(2) TMA 1970 to extend that deadline.

(2) Secondly, after appealing to HMRC, the Appellant needs to notify the appeal to the Tribunal. If the Appellant has either offered, or requested, an HMRC review, there is a deadline for doing so. However, if no review has been offered or requested, there is no deadline. The relevant deadlines (applicable to situations where reviews have been offered or requested) are set out in s49G and s49H TMA 1970.

16. The Appellant's appeal to HMRC under s31A TMA 1970 was made outside of the statutory deadline for appealing. HMRC have refused consent under s49(2)(a) TMA 1970. For the following reasons, I have decided not to give permission for the appeal to be notified late:

17. The principles applicable to determining the issue of delay have been the subject of much adjudication. In *BPP Holdings v Revenue and Customs Commissioners* [2017] SC 55, a direction had been made by the First-tier Tribunal indicating that HMRC would be barred from participating in proceedings if the direction was not adhered to. This was the relevance of the strict approach in adhering to time-limits. The differences in fact in *BPP Holdings* and the appeal before me does not however negate the principle established in relation to the need for statutory time limits to be adhered to. In *BPP Holdings,* the court endorsed the approach described by Morgan J in *Data Select*. Mr Justice Morgan described the approach in the following way:

"[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.

…

[37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. None the less, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been

finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeal against a judicial decision."

18. In the context of an application to make a late appeal, the obligation is simply to take into account of all of the relevant circumstances and to disregard factors that are irrelevant.

19. Helpful guidance can also be derived from the three-stage process set out by the Court of Appeal in *Denton and others v T H White Limited and others* [2014] EWCA Civ 906 for a clear exposition of how the provisions of rule 3.9(1) should be given effect. Although the third stage of that guidance, as set out by the majority, includes the requirement to give particular weight to the efficient conduct of litigation and the compliance with rules etc., by way of summary, the majority in the Court of Appeal in *Denton* described the three-stage approach in the following terms, at [24] (the references to "factors (a) and (b)" being to the particular factors referred to in CPR r 3.9):

> "We consider that the guidance given at paras 40 and 41 of Mitchell remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. 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)]". …"

20. Once the factors (a) and (b) are afforded no special weight or significance, that approach is no different in principle to that set out in *Data Select*. The seriousness and significance of the relevant failure has always been one of the factors relevant to the Tribunal's determination. That is encompassed in the reference in *Data Select*, at [34], to the purpose of the time limit and the length of the delay. The reason for the delay is a common factor in *Denton* and *Data Select*, as is the need to evaluate the circumstances of the case so as to enable the Tribunal to deal with the matter justly.

21. The approach to the consideration of an application to extend time should now follow that set out by the Upper Tribunal in *Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (TCC). That case itself concerned a late appeal to the First-tier Tribunal ('FTT'). The approach adopted followed from a consideration of authorities, including *BPP Holdings*. *Martland* held that the principle of fairness and justice is applicable, as a general matter, to any exercise of a judicial discretion. Applying the three-stage approach adopted in *Denton*, the Tribunal in *Martland* set out the following staged approach:

(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 tribunal is unlikely to need to spend much time on the second and third stages

– though this cannot be taken to mean that applications can be granted for very short delays without moving on to a consideration of those stages.

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

(3)The tribunal 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 reasons given for the delay and the prejudice which would be caused to both parties by granting or refusing the extension of time.

22. In respect of the first stage, there can, in my view, be no argument but that the delay in making an application to appeal was serious and significant. The delay in this appeal is set out below:

Tax Year	Penalty date	Date of Appeal to HMRC	Date of Appeal to Tribunal	Number of days late
2015-16	20/02/2018	12/05/2020	05/05/2020	781
2016-17	13/02/2018	12/05/2020	05/05/2020	788
2016-17	31/07/2018	12/05/2020	05/05/2020	621
2016-17	10/08/2018	12/05/2020	05/05/2020	611
2016-17	19/02/2019	12/05/2020	05/05/2020	418
2017-18	26/03/2019	12/05/2020	05/05/2020	383
2017-18	09/08/2019	12/05/2020	05/05/2020	246
2017-18	09/08/2019	12/05/2020	05/05/2020	246
2017-18	18/02/2020	12/05/2020	05/05/2020	54

23. 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.

24. In relation to the second stage, and the reasons why the default occurred, the Appellant argues in his grounds of appeal that he has not received any income and he therefore has no tax to pay. He further argues that he completed a Non-Resident tax form and does not have a national insurance number, therefore he has not been able to file a tax return online. He concludes by saying that he has tried to contact HMRC. I will return to consider the grounds of appeal later.

25. I turn to the third stage in the process; that of having regard to all the circumstances and the respective prejudice to the Appellant and to HMRC. The Upper Tribunal in *Martland* made clear, as is apparent from the recent authorities, that the balancing exercise at this stage should take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost and for statutory time limits to be respected. In that regard, I accept that if the Appellant is unable to pursue his application, he will not have an opportunity to obtain permission to appeal and potentially challenge the decision. The courts and tribunals have consistently emphasised the public interest in the finality of litigation, and the purpose of a time limit being to bring finality: see, for example, *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 and *Data Select*.

26. Having considered all of the evidence, I am satisfied that the balance between the prejudice to the Appellant, the prejudice to HMRC and the administration of justice through the finality of litigation falls firmly on the side of an extension of time being refused. The case of *Global Torch Ltd v Apex Global Management Ltd and others (No 2) [2014] 1 WLR 4495*, at [29], referred to the merits of the underlying case generally being irrelevant. As Moore-Bick LJ said in *Hysaj, R (in the application of) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, at [46], only where the court (or tribunal) can see without much investigation that the grounds of appeal are either very strong or very weak that the merits will have any significant part to play when it comes to balancing the various factors at stage-three of the process. That should not involve any detailed analysis of the underlying merits.

27. I am satisfied that all of the notices were sent to the address that HMRC had on file for the Appellant and there is no suggestion that they were returned undelivered. The Interpretation Act 1978, at section 7 (which relates to service by post), provides that:

> "Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

28. The notices are therefore deemed to be received. That the Appellant had moved to a different address is not something that HMRC would have been aware of without the Appellant notifying HMRC of the fact, in a timely manner. There is no evidence before me upon which to base a finding that the Appellant informed HMRC that he had moved from Spain to Denmark prior to his letter of HMRC. In any event, the letter dated 13 October 2019 from the Appellant to HMRC confirmed that he had received the post from his old apartment in Spain. I find that HMRC would not have been aware that the Appellant had moved without the Appellant informing HMRC of that fact at the time of his move.

29. The Appellant does not argue that there were defects in the penalty notices or in the procedure that HMRC followed when issuing them. In any event, such arguments were considered, and rejected, by the Court of Appeal in *Donaldson v The Commissioners for HM*

Revenue & Customs [2016] EWCA Civ 761. I am bound by that decision. I am satisfied that the penalty notices were sent to the postal address linked to the Appellant's account. This, I find, should have triggered further action on the part of the Appellant.

30. Returning to the Appellant's grounds of appeal, the Appellant refers to his attempts to contact HMRC. The documentation before me however shows that by a letter dated 28 November 2017, the Appellant contacted HMRC to raise the issue of a lack of a Unique Taxpayer Reference ('UTR'). The Appellant further argued that he did not have a national insurance number. On 22 December 2017, a temporary national insurance number was issued to the Appellant, together with a letter which included instructions on how to complete the tax return. I find therefore that the Appellant was equipped with the tools he required to complete his tax return(s) following the notices to file.

31. As a non-UK resident, the Appellant is not able to file a tax return online by using HMRC's online services. This is why a paper return was sent to the Appellant. If the Appellant had wanted to file a tax return online, the Appellant would have had to purchase commercial software. The information regarding this is on the GOV.UK website. The national insurance number held by the Appellant was only a temporary number as the Appellant is a non-resident. A full national insurance number cannot be obtained for the completion of a tax return.

32. The Appellant further argues that he did not purchase his parking space until August 2015. The letter dated 16 August 2017 from HMRC to the Appellant confirmed that the Appellant was not expected to complete a tax return for the 2015 fiscal year. HMRC further confirmed that they had cancelled all outstanding penalties for the earlier period due to the problems that the Appellant had faced. HMRC provided a temporary national insurance number and confirmed that the Appellant was required to complete a tax return for the 2016 and 2017 fiscal years to avoid any further charges. A paper return for the 2016 tax year was issued. I have had the benefit of seeing the corresponding Self-Assessment notes relating to the Appellant, in this regard.

33. The Appellant has referred to the advice he received from Park First Limited in relation to his tax status. In *Muhammed Hafiz Katib v HMRC* [2009] UKUT 189 (TCC), the Upper Tribunal concluded that the lack of experience of the appellant and the hardship that is likely to be suffered was not sufficient to displace the responsibility on the appellant to adhere to time limits. The duty remains on the Appellant to ensure that his tax obligations are adhered to. As the Tribunal in *Martland* noted, at [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 Hysaj1 referred to at [15(2)] above.

34. Nor should the fact that the applicant is self-represented. Moore-Bick LJ went on to say in *Hysaj,* 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" …"

35. I find that whilst the Appellant may have honestly believed that he could obtain a national insurance number as a non-resident and that he was not required to file a tax return if he was not receiving an income, having registered for self-assessment and in the absence of a request that any tax returns be withdrawn, in my judgment it was not objectively reasonable to for the Appellant to have failed to consider the ramifications of self-assessment. In those circumstances, the initial belief is not objectively reasonable. I am not told of any efforts by the Appellant to inform himself of the requirements of self-assessment, other than to rely on the information given to him by Park First Limited, who are not said to be tax advisers. Following that initial failure to file, the first filing penalty notice was sent to the Appellant on 6 April 2016. I conclude that the notice should have prompted further action on the part of the Appellant, which would have avoided the subsequent set of penalties.

36. As the Upper Tribunal in *Romasave (Property Services) Limited v Revenue and Customs Commissioners* [2015] UKUT 0254 (TCC) held, at [96]:

> "permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely."

37. It is important that time-limits are observed and so leave to appeal out of time should therefore only be exceptionally granted. HMRC, and therefore the public in general, have the right to finality in tax affairs: where a taxpayer does not observe the time limits that should ordinarily be the end of any dispute over liability. I have balanced the competing interests and the arguments presented by the parties. Having considered all of the evidence before me, cumulatively, I hold that the application to make a late appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

38. 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.

JUDGE NATSAI MANYARARA

TRIBUNAL JUDGE

RELEASE DATE: 11 NOVEMBER 2020