



[2021] UKFTT 0090 (TC)

TC08073

***PENALTIES FOR LATE FILING AND LATE PAYMENT-late appeal to HMRC-HMRC
objection to late appeal-whether Tribunal should give permission for a late appeal***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/02035

BETWEEN

CHRISTOPHER BREARLEY

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE MARILYN MCKEEVER

1. The hearing took place on 26 February 2021. The form of the hearing was V (video). All parties attended remotely. The hearing was held on the Tribunal's video platform. A face to face hearing was not held because of the cancellation of all face-to-face hearings in the light of the Covid-19 pandemic and it was considered to be appropriate and in the interests of justice for the hearing to be held as a video hearing. The documents to which I was referred are a Documents and Authorities Bundle of 418 pages and the Appellant's Skeleton Argument and the Respondents' Skeleton Argument. Owing to technical problems which arose after Mr Alder had completed his submissions for the Appellant, it was not possible to continue the hearing. The Tribunal gave Directions for HMRC to put their submissions, and for the Appellant to put his reply, in written submissions and the Tribunal also considered HMRC's submissions of 5 March 2021 and the Appellant's subsequent but undated further submissions.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Nick Alder, accountant, for the Appellant

Ms Pembe Ramadan, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an application to the Tribunal for permission to appeal out of time to HMRC under section 49 of the Taxes Management Act 1970 (TMA). The substantive appeal relates to late filing and late payment penalties for the tax years 2015-16 and 2016-17 (the relevant years) totalling £33,651.

THE LAW

2. Section 31 TMA gives a taxpayer the right to appeal against an assessment to tax.
3. Section 31A TMA requires that an appeal must be made to HMRC within 30 days of the date when the notice of assessment was given.
4. If the taxpayer does so, there are further provisions concerning HMRC's decision and a review of such a decision and a subsequent right of appeal to this Tribunal.
5. A taxpayer cannot appeal to the Tribunal unless he has first appealed to HMRC.
6. Section 49 TMA deals with the situation where no notice has been given to HMRC within the time limit. Section 49 provides:

"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. HMRC must agree to accept the late appeal if the conditions about reasonable excuse (for the late appeal) are satisfied and otherwise have a discretion to accept the late appeal.

8. If HMRC do not agree to accept the late appeal, the taxpayer can only proceed if the Tribunal gives permission. The Tribunal's discretion is not limited by reasonable excuse. The Tribunal must consider all the circumstances in coming to its decision.

THE FACTS

9. Mr Brearley was an employee, taxed under PAYE for many years. In 2014, he was made redundant from his employment and joined TranScrip Partners LLP, as a partner, on 1 July 2014. He was, accordingly, self-employed and required to submit tax returns.

10. Mr Brearley did not attend the hearing and did not give evidence. Mr Alder commented that Mr Brearley was brilliant at his job, but was less good at administration and left it to others to deal with his tax affairs.

11. At all events, Mr Brearley did not submit tax returns for the years 2014-15 or the relevant years. HMRC issued notices to file for the relevant years. Although the only evidence is the entries on HMRC's computer, it was not disputed that they were issued, and I accept that they were. The 2015-16 tax return should have been submitted by 31 January 2017 and the 2016-17 return should have been submitted by 31 January 2018.

12. HMRC initially sent Mr Brearley fixed penalty notices under schedules 55 (late filing) and 56 (late payment) Finance Act 2009. The Bundle included a list of penalties issued to Mr Brearley between 5 April 2015 and 5 April 2017. Mr Alder was Mr Brearley's agent at the time and so he received copies of the notices. Mr Alder confirmed that he had contacted Mr Brearley about the penalty notices. I therefore find that Mr Brearley was aware that penalties for late filing and late payment were accruing.

13. Mr Brearley's grounds of appeal in the substantive case, that is the matters which he submitted gave him a reasonable excuse for the late filing and late payment of the returns, were that he believed the accountant to TranScrip were preparing tax returns on behalf of all the partners and he did not therefore have to deal with it himself or arrange for Mr Alder to deal with it. He simply assumed that the partnership accountants were handling his returns. Mr Alder, in correspondence with HMRC had also stated that Mr Brearley had had a number of serious family illnesses to contend with over the period and had several house moves.

14. On 13 July 2018 HMRC wrote to Mr Brearley asking him to submit the outstanding returns and warning him that if he did not do so, HMRC would issue determinations estimating the tax due. The returns were not submitted and on 9 August 2018, HMRC issued a determination for 2014-15 in the sum of £43,042.11. This prompted Mr Brearley to consult Mr Alder and the tax returns for the years 2014-15 to 2017-18 were filed on 31 January 2019. The 2015-16 tax liability was paid on 1 February 2019 and the tax for 2016-17 was paid on 6 February 2019.

15. On 14 February 2019 HMRC wrote to Mr Brearley to say that they were considering issuing further, tax based, penalties for late filing for the year 2014-15 on the basis that Mr Brearley had "deliberately" withheld information.

16. On 19 February 2019 HMRC issued additional tax based penalties for late filing and late payment for the tax years 2015-16 (£18,141) and 2016-17 (£15,308). Ms Ramadan's Skeleton Argument referred to other penalties issued on 23 April 2019 (2016-17 six month late filing penalty of £101) and 23 May 2019 (2016-17 30 day late payment penalty of £101) but I did not have copies of those notices in the Document Bundle. Mr Brearley's Skeleton Argument also referred to these penalties and I find that they were issued.

17. On 12 March 2019, Mr Alder wrote to HMRC in relation to the 2014-15 return denying that Mr Brearley had deliberately withheld information and explaining why the returns and payment had been late. He also said:

“We also believe that Mr Brearley had good grounds for a reduction, if not cancellation of the penalties for lateness of information being submitted and we will deal with that in a separate appeal.”

18. It seems that this was referring to the penalties for 2015-16 and 2016-17.

19. Mr Alder did not appeal to HMRC, but he submitted an appeal against penalties of £44,934 directly to the Tribunal on 14 April 2019. These were the penalties for 2014-15 (which had not yet been assessed) and the penalties for the relevant years (which had been assessed). This was appeal number TC/2019/02363.

20. The Tribunal wrote to Mr Alder on 9 May 2019. The letter noted that the appeal had stated that there was a review conclusion letter, but despite the Tribunal having requested a copy of this letter, Mr Alder had sent only a letter from HMRC responding to his letter of 12 March (which was not a review conclusion letter. Indeed, HMRC had not issued a decision letter). The Tribunal indicated that there was no appealable decision and returned the appeal. Mr Alder did not take any further action.

21. On 23 May 2019 HMRC wrote to Mr Brearley to say they intended to charge a penalty of £11,624.66 for late filing/payment for the tax year 2014-15 on the basis of “deliberate” behaviour. On 20 June 2019, Mr Alder appealed against this penalty to HMRC explaining that Mr Brearley had not acted deliberately and giving the reasons why he filed late. On 4 July 2019 HMRC replied confirming their original decision and offering a review.

22. On 1 August 2019, Mr Alder appealed to the Tribunal (appeal number TC/2019/05082) against the penalty of £11,624.66 for the year 2014-15. He asked that the appeal was dealt with in conjunction with the appeal number TC/2019/02363 which “we are still awaiting to hear about”.

23. The Tribunal responded on 19 September 2019 saying that the appeal (TC/2019/05028) had been assigned to proceed under the standard category. The letter went on to say:

“The Tribunal notes the request for this appeal to be dealt with in conjunction with TC/2019/02363. However, that appeal was rejected by the Tribunal and returned to the appellant’s representative on 24 April 2019. As the appeal was not resubmitted to the Tribunal it does not have a live appeal under the TC/2019/02363 reference”

24. In other words, whilst an appeal in respect of the 2014-15 penalties had been made to HMRC and subsequently the Tribunal, no appeal to HMRC had been made in respect of the relevant years.

25. On 24 March 2020, HMRC wrote to the Tribunal to say that HMRC had decided to withdraw the late filing penalty for the 2014-15 tax year and the hearing which had been arranged should be cancelled. On the same day, the Tribunal confirmed that the appeal was effectively allowed and the hearing was cancelled.

26. Also on 24 March, Mr Alder wrote to HMRC requesting confirmation that the penalties for the relevant years had also been withdrawn.

27. On 25 March 2020, HMRC wrote to Mr Alder to say that only the 2014-15 penalties had been withdrawn and stated:

“The withdrawal does not apply to subsequent years or any other late filing or payment penalties as HMRC does not appear to have received an appeal against these.”

28. The letter also set out information about how to appeal to HMRC.

29. On 14 April 2020, Mr Alder formally appealed against the penalties imposed for the relevant years. The reason he gave for the appeal being late were that:

“...we had appealed to the First Tier Tax Tribunal in connection with a decision made by an officer of HMRC...that the reasons that these Tax Returns were submitted late was as a result of “deliberate behaviour”, and until the outcome of the decision by the Tax Tribunal as to whether or not it would uphold the decision or reject it, has meant that we did not feel that we could lodge an appeal at the time that the surcharges were raised.”

30. On 11 May 2020 HMRC wrote to Mr Alder rejecting the appeals for the relevant years as they were late.

31. Mr Alder replied on 21 May 2020 setting out why he considered Mr Brearley had a reasonable excuse for the late appeal. The letter gave the grounds as follows:

“To this end we believe that until such time as The Tax Tribunal heard the basis of our clients appeal against a penalty levied on him by HMRC for "deliberate" behaviour for withholding the submission of his outstanding tax returns, we were not in a position to appeal against the Surcharges for 2014/15, 2015/16 and 2016/17. As you are aware, on 24th March 2020, Ms G Milner of HMRC's Solicitors Office and Legal Services acknowledged and accepted the fact that our client's behaviour had not been deliberate and withdrew the claim and penalty assessment previously raised by HMRC.

This therefore led to the letter that was sent to HMRC on 14th April 2020, which was within 30 days of the decision by Ms Milner being notified to ourselves, requesting HMRC to accept a late appeal against the three years in question....”

32. He also referred to the difficult period Mr Brearley had experienced with family illnesses and so on and Mr Brearley’s belief that the partnership accountants were dealing with his tax returns. These reasons go to the substantive appeal against the late filing penalties rather than the lateness of the appeal.

33. On 11 June, Mr Alder submitted the appeal on Mr Brearley’s behalf to the Tribunal which included an application to appeal to HMRC out of time. This application was formally opposed by HMRC on 11 August 2020.

SUBMISSIONS

34. Mr Alder’s submissions, both at the hearing and in his subsequent written submissions focussed on the allegations of “deliberate” behaviour and the basis on which HMRC had withdrawn those penalties and the substantive reasons for the late filings and late payment. He considered that the Appellant had a strong substantive case: if HMRC had found there was a reasonable excuse in relation to 2014-15 then that reasonable excuse should be regarded as ongoing for 2015-16 and 2016-17.

35. His reason for the late appeal to HMRC was that he did not consider it appropriate to appeal against the penalties for the relevant years while the appeal on the deliberate issue was ongoing.

36. Ms Ramadan submitted that the fact HMRC exercised their discretion to cancel the 2014-15 penalties did not require them to accept that excuse in relation to the relevant years. Further HMRC submit that the reasons given by the Appellant span a five year period from 2014-2019 and even if there had been a reasonable excuse for the relevant years (which HMRC do not accept) to begin with, the Appellant did not remedy the failure within a reasonable time of the excuse ceasing.

37. Nor do HMRC consider that the Appellant had a reasonable excuse for the delay in appealing to HMRC. The fact that an appeal in relation to one year was ongoing did not make an appeal in relation to other years inappropriate.

DISCUSSION

38. I have found that HMRC issued penalties for late filing and late payment for the relevant years on 2 February 2019, 23 April 2019 and 2 July 2019. The respective penalties should have been appealed by 21 March 2019, 23 May 2019 and 1 August 2019.

39. The Appellant appealed against all the penalties on 21 May 2020, which was between eight and a half months late at the shortest and one year 25 days late at the longest.

40. The Upper Tribunal considered the approach to granting permission to bring late appeals in the case of *William Martland v The Commissioners for HMRC* [2018] UKUT 0178 (TCC) (“*Martland*”).

41. The Upper Tribunal stated, at paragraph 29 that:

“...the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission.”

42. The Upper Tribunal went on to confirm the three-stage test as set out in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 at paragraph 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.”

43. I will consider first the length of the delay.

44. In the Upper Tribunal case of *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 (TCC) (“*Romasave*”), the Tribunal stated, at paragraph 96 that:

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

45. The delays in appealing the penalty notices to HMRC varied from over eight months to over a year.

46. These delays are clearly serious and significant.

47. I now turn to the reason for the delays.

48. I am unable to see why Mr Alder did not consider it appropriate to appeal against the penalties for the relevant years while the appeal against the “deliberate” penalties were ongoing.

49. Mr Alder stated that he was intending to appeal against the penalties for the relevant years in his letter to HMRC of 12 March, but he did not do so. However, on 14 April 2019 he sought to appeal the penalties directly to the Tribunal without first having appealed to HMRC. The Tribunal wrote to him on 9 May 2019 stating that there was no appealable decision. In further correspondence on 19 September 2019, the Tribunal again told Mr Alder that the appeal in relation to the relevant years had been rejected and there was no live appeal in relation to those years. Despite this, Mr Alder still failed to appeal to HMRC.

50. Mr Brearley himself seems to have been passive throughout the period. At least, there was no correspondence or any other evidence in the bundle that he had been involved in the process.

51. In summary, I find that there was no good reason for the delay in making the appeals and that Mr Alder should have been alerted to the fact that he needed to do something else by the correspondence with the Tribunal in May and September 2019.

52. Finally, I must conduct the balancing exercise referred to in *Martland*, taking account of “all the circumstances of the case”.

53. In *Martland* at paragraphs 45 and 46, the Tribunal gives guidance on how the balancing exercise should be carried out:

“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. ... 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."

54. HMRC emphasised the need for finality in dealing with a taxpayer's affairs and that after delays of the length in this case, they were entitled to consider the matter closed.

55. In *Martland*, the Upper Tribunal said “the purpose of the time limit is to bring finality, and that is a matter of public interest, both from the point of view of the taxpayer in question and that of the wider body of taxpayers.”

56. HMRC submit that they should be entitled to rely on the time limits set out in legislation for the purpose of allocating resource in administering the tax system and should not normally be required to defend appeals after an excessive gap between the expiration of the time limit and the appeal. They would be prejudiced as they would need to divert resources which could otherwise have been used on other, in time, cases, to a matter they were entitled to consider closed.

57. HMRC further submit that allowing a late appeal in this instance would be inconsistent with the principles of good administration of justice which require litigation to be conducted efficiently and at proportionate cost.

58. If the application is granted, HMRC would therefore be prejudiced as they are entitled to expect finality after the expiry of the time limits, it would set a bad precedent for other taxpayers and it would consume resources which ought to be deployed elsewhere.

59. If the application is not granted, Mr Brearley will be prejudiced in that he will be unable to challenge the late filing and late payment penalties, which are substantial, and will incur the cost of paying them.

60. Mr Brearley's main substantive ground of appeal is that he thought that the partnership accountant was preparing his returns and dealing with his tax affairs. I noted that the present penalties were additional tax based penalties which were charged once the tax returns had been submitted and I found that Mr Brearley had had notice of the fixed late filing penalties, which had accrued over a period of several years before the returns were submitted. I do not find it credible that he could have continued to believe that his returns were being dealt with in the light of this and, ultimately, it is Mr Brearley's responsibility to ensure that his returns are submitted, and tax paid, on time.

61. The length of the delay in making the appeal is also an important circumstance especially in the light of the correspondence between the Tribunal and Mr Brearley.

62. *Martland* warns against a detailed consideration of the merits of the substantive case in determining an application for permission to appeal out of time. Without investigating the substantive merits in any detail, I conclude, from my consideration of the grounds of the application, that the Appellant's substantive case is, on the face of it, not particularly strong.

63. Having taken all the circumstances, including the above matters, into account and having conducted the balancing exercise required by *Martland*, I have decided that it is not appropriate in the present case to grant permission to appeal to HMRC outside the permitted time limits.

DECISION

64. For the reasons set out above, I have decided to refuse the Appellant's application to appeal to HMRC out of time.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

65. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATED: 31 MARCH 2021