



Neutral Citation: [2022] UKFTT 202 (TC)

Case Number: TC08527

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2019/01914

Capital gains tax - Application for permission to appeal late – Martland applied – permission granted

Heard on: 13 May 2022

Judgment date: 27 June 2022

Before

**TRIBUNAL JUDGE ABIGAIL MCGREGOR
SONIA GABLE J.P.**

Between

BARBARA DE'ROY BADEJO

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ms De'Roy Badejo represented herself

For the Respondents: Mr Joshua Gyazi, litigator of HM Revenue and Customs' Solicitor's Office

DECISION ON PRELIMINARY ISSUE

INTRODUCTION

1. Ms De’Roy Badejo (the “Appellant”) disputes an assessment to capital gains tax in respect of the disposal of a buy to let property in the tax year 2005/06. This application is for permission to appeal against the assessment outside of the statutory time limit.

PROCEDURAL HISTORY

2. There is a relatively complex procedural history for this case, not all of which needs to be rehearsed here, but there are elements that are relevant to the decision, so we record them here.

3. The first hearing in this case was in August 2019 and was a case management hearing considering, among other things, the calling of witnesses.

4. On 30 August 2019, a witness summons was issued to Mr Anthony Abiona to attend the hearing of this application in January 2020.

5. A hearing was held on 6 January 2020. Mr Abiona did not attend, notifying the Tribunal at the last minute of his reasons for non-attendance, which were not accepted by the Tribunal. No decision on the application for permission to appeal late was made following this hearing.

6. On 4 February 2020, a decision was issued by Judge Brannan, referring Mr Abiona to the Upper Tribunal regarding his non-compliance with the witness summons.

7. On 17 February 2020, the Upper Tribunal issued directions to the First-tier Tribunal and Mr Abiona.

8. On 30 September 2020, the application was stayed due to the Appellant’s ill-health for 6 months. A further stay for the same reason was issued on 14 July 2021, expiring on 17 January 2022.

9. A further witness summons was issued to Mr Abiona on 6 April 2022 requiring him to attend the hearing on 13 May 2022.

NON-ATTENDANCE OF WITNESS

10. Mr Abiona did not attend the hearing on 13 May 2022 and had not given any indication to the Tribunal or Ms De’Roy Badejo prior to the hearing of his reasons for non-attendance. Given that this was the second time that Mr Abiona had failed to attend, we had to decide whether to proceed in his absence.

11. We concluded that on balance, we should proceed with the hearing, taking into account the following factors:

- (1) Both parties wished to proceed with the hearing of the application;
- (2) Given two incidents of non-attendance, a further adjournment was unlikely to result in the successful attendance of Mr Abiona;
- (3) We had documentary evidence in front of us that supported at least some of the points that Ms De’Roy Badejo wished to make by means of questioning Mr Abiona;
- (4) Ms De’Roy Badejo’s health issues (to which we return later in this decision) mean that expecting continued attendance at hearings for the same issue would be an unnecessary burden on her.

EVIDENCE

12. The evidence we had in front of us was a further source of confusion and frustration.

13. Mr Gyazi had submitted electronic bundles to the Tribunal and Ms De’Roy Badejo on 3 May 2022.
14. This bundle, which ran to 320 pages, included a number of documents that had not been included in the bundle prepared for the 2019 and 2020 hearings, which had been in paper form.
15. The submission of this bundle was late – it should have been provided at least 14 days before the hearing. No explanation of the lateness was given at the time of submission. After further requests, it was asserted that it related to issues with software, but no evidence of this was given.
16. Despite being asked before the hearing, Mr Gyazi struggled at the hearing to identify which documents had been added to the bundle. They were all pieces of correspondence between the Appellant and HMRC.
17. After some lengthy discussions, we noted the numbers of the new and late documents and considered them in the context of Mr Gyazi’s submissions so that we could assess whether they should be admitted late.
18. We concluded that evidence that post-dated the appeal made to HMRC in October 2017 was irrelevant to the question of the lateness of that appeal.
19. We also concluded that the evidence in the correspondence that pre-dated that appeal was not in relation to a disputed fact and therefore there was no prejudice or advantage in admitting or refusing the evidence (see paragraph 39 below).
20. Finally, there was a bundle of documents, being screen shots of messages and emails between Ms De’Roy Badejo and Mr Abiona, that had been submitted by Ms De’Roy Badejo to HMRC (to a different presenting officer) and the Tribunal, with an express request that they be added to the Bundle following the January 2020 hearing.
21. These documents were very significant to the Appellant’s case but had not been added to the bundle. Mr Gyazi did not appear to have been aware of these documents, although he did not object to their admission.
22. While HMRC cannot be seen as a single homogenous group which knows all things sent to it, in this instance, we can and should expect that documents submitted in the context of a hearing of a specific application within an open dispute were recorded within HMRC’s file on the matter and that when Mr Gyazi took on responsibility for presenting the case, he was provided with those documents. No explanation was given by Mr Gyazi for why the documents were not included in the bundle.
23. Since the documents had been provided well before the hearing, we obtained copies of the documents for the panel and for HMRC during the hearing and considered them as part of Ms De’Roy Badejo’s case.

BACKGROUND FACTS

24. While we did not hear full argument on the underlying subject matter, we find the following background facts based on the evidence presented to us, as far as is relevant for the purposes of deciding this application:
25. Ms De’Roy Badejo owned a property in Thamesmead, London, which she had rented out. She disposed of the property in the tax year 2005/06.
26. She did not include any figure for capital gains in relation to that property in a tax return for that period.

27. HMRC opened an enquiry and there was an exchange of documents and information between Ms De’Roy Badejo (and her agent, Mr Abiona) and HMRC during the course of 2012 and 2013.
28. HMRC issued an assessment for capital gains tax and penalties on 21 August 2013.
29. An appeal was received by HMRC on 26 October 2017.
30. HMRC refused to admit the late appeal on 9 January 2019.
31. Ms De’Roy Badejo made an application to the Tribunal requesting that it rules that HMRC must accept the late appeal on 27 March 2019.
32. Further findings of fact are made in the remainder of the decision where relevant to the question at hand.

APPLICATION FOR LATE APPEAL

33. As per the guidance of the Upper Tribunal in *Martland v HMRC* [2018] UKUT 0178, we must follow the approach in *Denton v White* [2014] EWCA Civ 90 (“*Denton*”) in deciding whether to allow the application requiring HMRC to consider the late appeal.

34. This is to:

- (1) establish the length of the delay and whether it is serious and/or significant;
- (2) establish the reason(s) why the delay occurred; and
- (3) evaluate all the circumstances of the case, using a balancing exercise to 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, and in doing so 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”.

Appellant’s submissions

35. Ms De’Roy Badejo submitted that:

- (1) She believed that her agent, Mr Anthony Abiona, had, according to her instructions, submitted an appeal against the 2013 assessment within the time limit;
- (2) She believed this because he told her, repeatedly, that he had done so;
- (3) When she became aware, due to correspondence from HMRC stating that they had not received the appeal, she had followed up with Mr Abiona, who again asserted that he had made the appeal;
- (4) When HMRC continued to state that they had not received it, she had requested that Mr Abiona make a renewed/refiled late appeal;
- (5) She had not sought to change her adviser when it became apparent to her that Mr Abiona was failing in his duties to her because:
 - (a) She had already paid him to do it and she did not have additional funds to pay for it again;
 - (b) he had all of her records and was not forthcoming in providing them back to her; and
 - (c) she was suffering from significant physical and mental ill-health which she was prioritising, making it difficult for her to pursue alternative options, including finding another agent or submitting the appeal herself.

HMRC submissions

36. HMRC submit that:

- (1) The delay of over 4 years from the expiry of the time limit to the submission of the late appeal is serious and significant;
- (2) No explanation of the lateness was given in the letter submitted to HMRC in 2017;
- (3) HMRC informed Ms De’Roy Badejo on a number of occasions that no appeal had been received by them and that any appeal would need to explain the reasons for the delay;
- (4) She should have changed her agent when it became apparent that there was a problem, particularly in light of the fact that Mr Abiona had not provided her with any concrete evidence of the submission of an appeal;
- (5) In the evaluation of all other matters, HMRC highlighted that:
 - (a) Time limits had not been met by Ms De’Roy Badejo;
 - (b) To allow the application would result in a diversion of resources away from other taxpayers and their disputes, particularly given the original case worker had moved on from the department; and
 - (c) The Appellant’s case, based on the evidence provided in the notice of appeal, is weak, in particular:
 - (i) Insufficient evidence is provided of the enhancement works carried out on the property; and
 - (ii) The issue of the conveyancing solicitor having stolen the funds from the sale of the property is not relevant to the calculation of the capital gain and is only potentially relevant to the calculation of interest, which is not within the jurisdiction of the Tribunal.

DISCUSSION

Length of delay

37. The delay between the deadline of 30 days after the issuing of the assessment in August 2013 and the late appeal in October 2017 is over 4 years. By any calculation this is a serious and significant delay.

Reasons for the delay

38. We find the following additional facts in this regard:

- (1) Mr Abiona had informed Ms De’Roy Badejo on more than one occasion, in writing, via email and other messaging systems, that he had made an appeal against the capital gains assessment;
- (2) The first written evidence before us was from 9 June 2015, in which Mr Abiona stated “The appeal was sent by post a while ago”;
- (3) Emails from Ms De’Roy Badejo from that period show that she was still under the impression that Mr Abiona had submitted the appeal but that HMRC had not received or had lost it;
- (4) Previous experience of lost letters within HMRC led Ms De’Roy Badejo to believe that this was a serious possibility;

(5) Ms De’Roy Badejo only became aware that the appeal had not been received as a result of letters from HMRC;

(6) She continued to pursue Mr Abiona to submit or refile the appeal to HMRC throughout 2015 to 2017 when it was finally submitted.

39. It was the point at (5) above that was set out in the letters that HMRC sought to include in late evidence. HMRC had wanted to include the letters to show that Ms De’Roy Badejo had been aware from late 2014 that the appeal had not been received. However, this was not in fact disputed by Ms De’Roy Badejo – she confirmed that this is how she found out about the lack of receipt of any appeal.

40. HMRC stated that the 2017 appeal did not include any reasons for the delay. This is undoubtedly true – there is no explanation at all in the appeal filed to HMRC. However, this is not surprising in the context of a finding that Mr Abiona had been telling Ms De’Roy Badejo for some time that he had already filed it. He was unlikely to admit his own mistake as the reason for the late filing of the appeal.

41. Clearly the evidence of Mr Abiona, had he attended the hearing as he had been summoned to do, might have been valuable in cementing our conclusions on these matters.

42. However, given the other evidence we have, we do not hesitate in finding that Ms De’Roy Badejo believed, with foundation, that an appeal had been submitted and, once she established that it had not (because she was informed by HMRC), she took steps to get it submitted.

43. In other circumstances, it might have been the case that using another agent when the shortcomings of the existing one became apparent, would have been a reasonable course of action, however, we find, in light of the Appellant’s substantial medical challenges over this period, that this was not an avenue realistically open to her.

44. Ms De’Roy Badejo had brought with her to the hearing a full suitcase of medical notes spanning at least the last 15 years. There was some confusion about the relevance of her health issues to the question at hand.

45. Ms De’Roy Badejo clearly feels that HMRC have been either dismissive or disingenuous about her health issues. She also, understandably, does not want to share unnecessarily her private medical history.

46. For that reason, we will not set out any medical details in this decision, but I do note that I saw first-hand a sample of medical notes that showed evidence of substantial physical and mental ill health over a sustained period from at least 2008, including in-patient surgery during late 2013, which clearly had a debilitating effect on the Appellant’s ability to work and, at times, conduct any elements of her life without substantial pain and difficulty.

47. These difficulties are one of the reasons that she engaged a professional agent to help with her tax affairs, having apparently been encouraged to do so by an HMRC officer dealing with her case. It has, unfortunately, turned out not to have been ultimately very helpful to Ms De’Roy Badejo’s to have instructed Mr Abiona.

All the circumstances of the case

48. Following the guidance in *Martland* we must consider all other circumstances, including the merits of the case and the need for efficient litigation.

49. Given the ongoing correspondence that has ensued regarding the Appellant’s case throughout the period from 2013 to date, we do not find that it would be a substantial detriment to HMRC to continue the case. It is unlikely that anyone dealing with Ms De’Roy Badejo from within HMRC over the last several years would have been under the impression that the dispute

had come to an end. This is not an example of a case that HMRC considered to be long closed, only for the taxpayer to seek to reopen it many years later.

50. The fact that the original investigating officer has moved on is not an uncommon feature of disputes with HMRC and would not weigh heavily against proceeding.

51. Efficient proceedings moving towards a resolution are important, but HMRC has contributed to overall delays in the progress of this case and therefore we do not find that this factor is significant.

52. As to the merits of the case, the Upper Tribunal in *Martland* cautions us against descending into a detailed analysis of the underlying merits of the appeal, instead encouraging us to consider obvious strengths or weaknesses and to avoid enabling a “hopeless” case being pursued.

53. The essence of the underlying dispute is the purpose of expenditure on a rental property, in particular, whether amounts were spent on ‘enhancement’, which would reduce the capital gain, or repairs, which would not. There is an additional point about what happened to the proceeds of sale. We did not fully explore either issue, but it seems to us that the question of enhancement vs repairs is very much a question of fact that will be based on the evidence that the appellant can put forward to support her appeal against HMRC’s assessment. We do not see that this can be classified as a ‘hopeless’ case. We therefore do not think that the merits of the case is a significant factor weighing in either direction in this application.

DECISION

54. Having weighed all of these circumstances against each other, we allow the Appellant’s application and require HMRC to consider the late appeal against the 2005/06 assessment.

DIRECTIONS

55. In order to progress this case towards a hearing, it is directed that the Respondents send or deliver to the other party and the Tribunal a statement of case no later than 56 days after this decision is released to the parties.

56. Any party may apply for this Direction to be amended, suspended or set aside or for further Directions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

57. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

**ABIGAIL MCGREGOR
TRIBUNAL JUDGE**

Release date: 01 JULY 2022