Neutral Citation: [2023] UKFTT 288 (TC)

Case Number: TC08759

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/01045

PROCEDURE – application for late appeal of tax assessments – was there a valid timeous appeal – no – can an appeal of an assessment be lodged before the assessment is issued – no – Martland considered – no good explanation for the delay – appeal dismissed – was a penalty notice issued – no – no appealable decision on penalties

Heard on: 16 August and 29 December 2022
Judgment date: 13 March 2023

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

LALJI VEKARIA

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Conrad McDonnell of Counsel instructed by Proximo Legal Services

For the Respondents: Ayo Wilson-Lawal, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal took a most unexpected direction. I had thought that the issue was an application for a late appeal which is what the Notice of Appeal had indicated. The Notice of Appeal identified tax due of £133,270.55 and a penalty of £85,787.55 and asked "…the FTT to remit the additional tax and consequent penalty as unfair and illegal".

The context and the hearing

2. On 29 March 2021, the appellant's then solicitors lodged an application seeking permission for a late appeal pursuant to section 49 Taxes Management Act 1970 ("TMA"). It is not disputed that the appeal is against assessments for the years 2015/16 and 2016/17. Nothing has been paid and no applications for postponement have been lodged. The appellant is currently defending a Bankruptcy Petition at the instance of HMRC. That includes the sums due in terms of the assessments. It also includes sums due for a penalty which was allegedly issued on 2 May 2019.

3. On 14 June 2021, the respondents ("HMRC") lodged a Notice of Objection ("the Objection"). The Objection referred to the application for a late appeal included in the Notice of Appeal stating that the appellant sought "…permission to commence a late appeal against the Assessments dated 29 April 2019 and Penalty dated 02 May 2019".

4. On 8 February 2022, the appellant, having appointed new agents, lodged a reply ("the Reply").

5. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. A face-to-face hearing was not held because of the difficulty of ensuring the safety of all participants.

6. The documents to which I was referred in the course of the hearing comprised a Bundle consisting of 358 pages. That was the second Bundle that had been lodged with the Tribunal; the first had extended to 363 pages. Unfortunately it transpired at the end of the hearing that there was a third version of the Bundle which extended to 360 pages which had not been forwarded to me. Certainly, Mr McDonnell did not appear to have it since it contained a copy of a letter on which he relied which did not appear to have been lodged. Only the first Bundle included the Reply. That third Bundle was ultimately received. I had a Skeleton Argument for the appellant.

7. 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.

8. I heard evidence only from Mr Nasser Amin who is partly qualified as an ACCA accountant and has been a tax manager for four and a half years with the firm of accountants which had represented the appellant until recently.

9. The appellant did not offer any evidence.

10. When drafting the full reasons for the decision, unsurprisingly, I checked the third Bundle carefully.

11. Both parties seem to have assumed that penalty assessments were issued on 2 May 2019. The appellant refers to penalties of £85,787.55 in the Notice of Appeal (which does not equate to the information in the Bundle) and HMRC state at paragraph 19 of the Objection that penalties were issued on 2 May 2019.

12. Pages 162-173 in the Bundle include a letter of 2 May 2019 and Penalty Schedules. Those are not penalties as page 163 makes explicit.

13. On 25 August 2022, I therefore issued Directions requiring the parties to lodge with each other and the Tribunal a Statement of Agreed Facts and in the event that such a Statement could not be agreed, then Submissions addressing the issues in relation to penalties.

14. On 30 September 2022, HMRC lodged the Statement of Agreed Facts and the appellant's submissions, a copy of the Bundle referred to therein and a copy of the Notice of Penalty Assessment together with a copy of the audit trail of the actions taken by the HMRC officer.

15. The Statement of Agreed Facts, which had not been agreed by Mr McDonnell but by Mr Ian Bates from the appellant's solicitors, appeared to be in conflict with the submissions. It was clear from Mr McDonnell's submissions that he was arguing that the penalty, now stated to be £78,854.56, had not been issued whereas the second agreed fact stated that it was issued on 2 May 2019.

16. On 20 October 2022, I therefore directed that HMRC should lodge with the Tribunal a Response which they did on 11 November 2022.

17. On 18 November 2022, the appellant lodged a written reply from Mr McDonnell together with a further authority, *Anstock v HMRC* [2017] UKFTT 307 (TC) ("Anstock").

18. Both parties agreed that these further submissions should be decided on the basis of the papers.

Mr McDonnell's arguments on the assessments

19. Mr McDonnell, who had only latterly been instructed prior to the hearing , said that his arguments were novel, and that was undeniably the case, but despite his best endeavours, and those endeavours were inventive, he did not succeed for the reasons set out below.

20. There are three limbs to the appellant's case argued in the alternative, namely:-

(a) HMRC's letter dated 28 March 2019 ("the March letter") contained assessments and they were appealed in time in Mr Amin's letter dated 15 April 2019 ("the April letter").

(b) HMRC issued two assessments on 29 April 2019 and the April letter, which predated and anticipated them, was an in-time appeal against those assessments, and

(c) It was reasonable for the appellant to believe that the assessments had been appealed in time and even if it is now held that they were not, then in all the circumstances the Tribunal should extend the time limit under section 49 TMA.

HMRC's arguments on the assessments

21. The primary argument was to rely on the three questions posed by *Martland v HM Revenue & Customs*[1] ("Martland") in the context of the facts in this case.

22. HMRC then went on to rely on *HMRC v Katib*[2] ("Katib") to argue that the appellant could not rely on alleged failings by his agent(s).

23. The earliest date on which any appeal was lodged was 1 June 2020 which was very much out of time.

[1] [2018] UKUT 178 (TCC)
[2] [2019] 0189 UK UT (TCC)

The facts

The correspondence

24. On 22 December 2017, in accordance with Code of Practice 9 ("COP9"), HMRC, suspecting that the appellant may have committed tax fraud sent an opening letter. The appellant was offered a Contractual Disclosure Facility contract ("CDF") and the response to that offer was due by 20 February 2018.

25. On 21 February 2018, the appellant's then agent, to whom we will refer to as "KBM", confirmed that the appellant rejected the CDF.

26. On 4 May 2018, a meeting was held with the appellant, his partner and Mr Amin of KBM.

27. On 27 July 2018, HMRC wrote to Mr Amin and to the appellant enclosing Notes of the meeting and requested that they be checked and signed; if they were not challenged they would be assumed to be correct. HMRC also asked Mr Amin to provide the following:

> (1) Copies of Barclays Bank Statements covering the period from 6 April 2010 to 5 April 2014.
>
> (2) Copies of his working papers used in the preparation of the Self-Assessment Returns for the years commencing 6 April 2010 onwards.
>
> (3) Copies of the rental agreements for each of the properties, a breakdown of the amount received each year from 6 April 2010 onwards and supporting documentation for any expenses claimed.
>
> (4) A list of all bank accounts held by the appellant and his wife either separately or jointly.

28. No reply was received by HMRC.

29. On 30 October 2018, HMRC wrote to the appellant stating that Mr Amin had failed to reply to the letter of 27 July 2018 and issued an Information Notice under paragraph 1 of Schedule 36 Finance Act 2008. The deadline for a response was 30 November 2018. That was copied to Mr Amin. The information sought was the statutory records, copies of rental agreements for each of the properties, a breakdown of the rent received in each year from 6 April 2010 and supporting documentation for any expenses claimed. A list of all bank accounts held jointly or separately was requested.

30. There was no response.

31. In the interim, Officer Peoples had emailed Mr Amin on 16 November 2018, to which he responded, stating that she would be out of the office for a few weeks and he should contact Officer Bingham in her absence with his response.

32. On 5 December 2018, Officer Bingham issued a penalty notice to the appellant, with a copy to Mr Amin, in the sum of £300 for failure to comply with the Information Notice. A further copy of the Information Notice was issued and the appellant was warned that if the information was not provided by 5 January 2019 further penalties would be imposed.

33. On 7 and 8 January 2019, the officer contacted Mr Amin's office by telephone to enquire when the information would be supplied. The response to the first call was to say that Mr Amin was not known to them but then HMRC were told that he was not in the office and they had no information as to when he might return. In response to the call the following day, the HMRC officer was again told that Mr Amin was not in the office but was given the number to contact another member of staff in the Luton office. That telephone number was inoperative.

34. On 10 January 2019, the HMRC officer called again and was told that Mr Amin was busy on the other line. After 10 minutes the call was disconnected. She attempted to call the appellant but the call would not connect. The officer again attempted to contact Mr Amin and having failed, emailed him on 11 January 2019 asking him to call her.

35. Mr Amin did call later that day and advised that the appellant had gone to India in early December and had not returned. However, he confirmed that he would be meeting with him on 22 or 23 January 2019. No reason was given for the failure to produce the information. Officer Bingham indicated that the information would have to be lodged with HMRC by 13 February 2019.

36. Mr Amin then emailed HMRC later that day referencing the telephone call and confirming that he would "update" the officer by 24 January 2019 after he had met the appellant.

37. Mr Amin states that he wrote to HMRC on that day (the "January letter"). He sent the letter to "Dear Linda" and addressed it to "Fraud Investigation Team" at "BX9 1LE". No letter from either Officer Peoples or Officer Bingham had come from that address. The only reference in the letter was the CFS reference. Neither the appellant's name nor his UTR were quoted.

38. The letter read:

> "Further to June Email on 16/11/2018, she has asked me to send you the response as she is off for few weeks. Please see below the Responses:
>
> 1. Please see enclosed the workings for the tax year 2016/17 and 2015/16 as requested by June.
> 2. Attached are the bank statement for the 4 years from 2010 to 20214 (sic).
> 3. Rental income is deposited into the bank statements as well.
> 4. As per client these are the only accounts they use.
>
> As per the client, the additional deposits for both tax years recorded as income are loans received by the client for the development of the properties.
>
> If you require any further information please let me know.".

HMRC have no record of receiving that letter.

39. On 14 January 2019, Officer Bingham issued a penalty notice to the appellant in the sum of £720 for failing to comply with the earlier Information Notices issued on 30 October 2018 and 5 December 2018. She stated that no information had been provided. A copy was sent to KBM.

40. The penalty was assessed at £20 per day starting from 6 December 2018 to 10 January 2019. The appellant was warned that if the information was not provided by 13 February 2019, further penalties of up to £60 per day would be charged.

41. On 28 March 2019, no further information having been provided, Officer Peoples wrote to the appellant intimating that the intention was to raise Discovery Assessments under the provisions of section 29 Taxes Management Act 1970 ("TMA"). The appellant was offered the opportunity to comment and/or to provide further information within 30 days. HMRC's Factsheets on Decisions, Compliance Checks and Penalties were enclosed for information. That letter was copied to KBM.

42. What is important is that in that letter the Officer said:-

(a) "I am writing to advise that I intend to raise…Discovery Assessments"

(b) "I intend issuing assessments in 30 days"

(c) "If I raise the assessments…"

(d) "I will advise you of [penalties] before the assessments are issued".

(e) "Before I issue the assessments" I will give you the opportunity to comment.

43. The Factsheet HMRC1 enclosed therewith explained what could be done if a taxpayer disagrees with a decision and wishes to appeal to the Tribunal. Amongst other things it states:-

(a) "when we make a decision which you can appeal against, we'll write and tell you…and tell you about your rights of appeal…".

(b) It explained the review and appeal rights and the relevant time limits of 30 days in each case.

(c) It explained how to appeal to the Tribunal.

(d) It stated:- " If the decision is about a direct tax matter, you can usually ask us to postpone part or all of the tax in dispute until the appeal is settled."

44. HMRC state that they received no response but, in his witness statement dated 16 November 2021, Mr Amin alleges that he had sent the April letter to HMRC stating:-

"Further to your letter dated 28th March 2019 with assessment raised. Our client would like to appeal these based on our letter and workings sent to you on 11/01/2019 enclosed I have not received your response to the letter dated 11/01/2019.

I have provided you the bank workings already confirming the loan amount received by the client and these cannot be treated as income for his tax computations.

Can you therefore reverse these assessment and confirm the same back to us and if you need anything further please let me know."

45. That letter looks very similar to the letter allegedly sent on 11 January 2019 to Officer Bingham and is addressed, inaccurately, in the same way.

46. On 29 April 2019, Officer Peoples issued Notices of Assessment for the years ended 5 April 2016 and 5 April 2017 to the appellant. Copies of the correspondence was sent to Mr Amin. The assessments were in the sum of £72,777.37 and £52,338.60. The review and appeal rights, including the time limits of 30 days were made explicit.

47. On 2 May 2019, Officer Peoples wrote to the appellant indicating that she intended to issue inaccuracy penalties totalling £78,854.55 (being £45,849.74 for 2015/16 and £33,004.81 for 2016/17). There was a further penalty for under assessment for 2014/15 in the sum of £960.58.

48. The appellant was requested to respond with any relevant information that he wished to be considered by 29 May 2019. He was told not to pay the proposed penalties in the interim. A copy was sent to Mr Amin.

49. HMRC state that they received no response but, in his witness statement dated 16 November 2021, as with the April letter, Mr Amin alleges that he sent a letter to HMRC on 10 November 2019 ("the November letter") stating:-

"Further to our (sic) dated 15 April 2019, I have not received any response back from you. Can you please confirm if the assessments are revised and confirm the same back to us.

If you need anything further please let me know."

50. The November letter is very similar to the April and January letters and is addressed, inaccurately, in the same way.

51. There appears to have been no further correspondence until, on 1 June 2020, Mr Amin wrote to HMRC stating that he was "in the process of disputing the assessment". That letter did not carry the correct reference and was only received in the correct department of HMRC on 24 November 2020.

52. Prior to the hearing HMRC had made an application to include that letter in the Bundle on a redacted basis. That was opposed. HMRC argued that they had wanted it admitted on the basis that the earliest date that the appellant had appealed was 1 June 2020.

53. Ultimately HMRC did not insist on that letter being exhibited although it is referenced in the IDMS notes (see paragraph 63(c) below).

54. Therefore, that letter has not been produced and I have only HMRC's reply dated 2 December 2020. That letter was to KBM pointing out that the wrong reference had been used and it was that that had caused the delay in replying.

55. It stated that HMRC considered that:-

(a) the investigation had been settled,

(b) whilst it was noted that Mr Amin was "in the process of disputing the assessment", HMRC were not aware of any appeal having been made in relation to the assessments or the penalties,

(c) the appellant was out of time to appeal to HMRC, and

(d) an application would need to be made to the Tribunal.

The Self-Assessment Notes ("the Notes")

56. I observe from the notes that by 1 July 2019 the investigation had been closed. On 15 July 2019, HMRC telephoned the appellant with a view to collecting the outstanding debt. The appellant disputed the amounts, said that his accountant was in direct contact with the compliance team. He said that there was an appeal outstanding. He was advised that there was no record of an appeal and it was suggested that he speak to his accountant.

57. By 31 October 2019, HMRC were seeking to collect £219,058.10.

58. KPM were removed as representatives on 2 March 2020 and the new agent details were received and noted by HMRC.

The new representatives in 2020

59. In or about March 2020, HMRC filed a Bankruptcy Petition. The first hearing was listed for 8 April 2020.

60. On 4 April 2020, the appellant's new solicitors ("Lords") wrote to the solicitors acting for HMRC in the bankruptcy hearing stating that they confirmed that the appellant had "instructed his accountant to apply for of (sic) the re-assessment of the debt with a view to negotiate a settlement" with HMRC.

The IDMS notes

61. HMRC's Debt Management Unit have what is described as the Integrated Debt Management System ("IDMS") which contains notes of all relevant contacts and that is designed to be read not only by HMRC but also by the taxpayer involved.

62. The notes that have been produced relate to HMRC's Bankruptcy Petition and run from 6 July 2020 to 21 May 2021.

63. The relevant entries are that:

(a) On 9 November 2020, Lords sent an email to HMRC intimating that the appellant wished to appeal the assessments which by then formed part of the Bankruptcy Petition.

(b) On 18 November 2020, Lords were emailed by HMRC to advise that they required to lodge an appeal to the Tribunal as any appeal would be out of time.

(c) Mr Amin's letter of 1 June 2020 (see paragraph 53 above) is noted as having been received. The notes record another issue about settlement and that has not been challenged but the objection to the lodgement of that letter suggests a dispute so, as it is not material, I do not record it. I observe that it is consistent with paragraph 52 above.

(d) With a hearing in the bankruptcy listed for 13 January 2021, on 11 January 2021, those in HMRC handling the bankruptcy noted that no appeal had been received from the appellant although Lords had sent an email dated 7 January 2021 intimating that they would be appealing. At that stage the debt was £219,058.10. A 12 week adjournment in the bankruptcy proceedings was agreed as an appeal was anticipated.

(e) On 12 January 2021, Lords had sought an adjournment in the bankruptcy proceedings and intimated that they would submit an appeal to the FTT.

(f) On 1 March 2021, HMRC noted that there had been no contact from the appellant or Lords and therefore contacted the FTT who confirmed that no appeal had been lodged. HMRC emailed Lords asking for an update as to whether an appeal had been lodged.

(g) On 8 March 2021, HMRC again reviewed the position and nothing had happened.

(h) On 12 March 2021, Lords intimated that they were "trying to get extension from the Tribunal to submit" an appeal.

(i) On 18 March 2021, HMRC wrote to the appellant stating that a hearing in the bankruptcy would proceed on 31 March 2021.

(j) On 26 March 2021, Lords called HMRC advising that they were "in the process" of appealing to the FTT. Lords were told that the FTT reference would have to be in the hands of HMRC before 30 March 2021, which failing, HMRC would seek a bankruptcy order.

The First Issue – Was the March letter an assessment or did it contain assessments as argued for the appellant?

64. It was argued that the March letter, read with the Factsheet was confusing and would be read as being an assessment by a non-tax specialist.

65. Quite apart from the fact that Mr Amin has been a tax manager with a firm of accountants, with more than one office, for a number of years, he told the Tribunal that part of his work involved tax investigations. By definition he should have known about how to appeal HMRC's decisions.

66. The fact that he is only part qualified as an ACCA accountant does not detract from that.

67. I cannot accept Mr McDonnell's argument that the March letter would have been understood to have been an assessment. It opens by stating: "I am writing to advise you that I intend raising" Discovery Assessments and that "The assessments will bring into charge". It went on to state that Officer Peoples intended issuing the assessments in 30 days time. Under the heading "Interest" she stated "If I raise the assessments you will be charged interest …".

68. She went on to explain that penalties would be due under Schedule 24 Finance Act 2007 and "Once the level of the penalty has been determined I will advise you of this before the assessments are issued."

69. Under the heading "What you need to do" she pointed out that before she issued the assessments, she would like to give the appellant the opportunity to comment and/or enter into a contract. She concluded by stating that if she did not hear within 30 days she would assume that the calculations were agreed and she would then issue the assessments. The letter is written in very plain English.

70. She enclosed factsheets. Mr McDonnell argued that that seemed to suggest that something needed to have been done in response to the March letter.

71. I cannot agree. The factsheet HMRC 1 describes what a taxpayer can do if they disagree with an HMRC decision and how to appeal to the Tribunal. It is clear that "when we make a decision which you can appeal against, we'll write and tell you … and tell you about your rights of appeal." The taxpayer is advised to write to HMRC within 30 days and seek a review. Alternatively the taxpayer can then appeal to the Tribunal and again the taxpayer is advised to write to the Tribunal within 30 days of the decision letter.

72. Lastly, of note, it points out that "If the decision is about a direct tax matter, you can usually ask us to postpone part or all of the tax in dispute until the appeal is settled."

73. Although the sums involved in this matter are very large, no such application was made.

74. There are no rights of appeal articulated in the March letter.

75. Mr McDonnell argued that all of the essential ingredients of an assessment, including a decision to assess, the reasons for it, the tax year(s) involved and the supporting tax calculation for the precise amount assessed were in that letter.

76. I agree with him that, looking at *Hallamshire Industrial Finance Trust Limited v IRC* [1979] 1 WLR 620 at page 625 where Browne-Wilkinson J held that while there is no particular form for an assessment, it should at its minimum state the amount of tax payable. Further, in *Baylis v Gregory* [1989] AC 398 the Court of Appeal held that a valid assessment must specify the year of assessment to which it relates. One can see that there are few, if any, formal requirements for an assessment.

77. However, although I was not referred to it I am very conscious of Lord Dunedin's very well-known statement in *Whitney v Commissioners of Inland Revenue* [1925] UK HL TC 10 88 when describing the three stages in the imposition of a tax. The second stage is the assessment and he states very clearly that "But assessment particularises the <u>exact</u> sum which a person is liable to pay". (emphasis added)

78. The March letter simply does not do that. It indicates the sum that HMRC think is <u>likely</u> to be due but invites comment and further submissions and says that, effectively, the issue is open for discussion.

79. I find that the March letter is not an assessment and nor does it contain assessments.

The second issue – Did the April letter appeal the assessments issued two weeks later?

80. I have great difficulty with this argument. In *Whitney* Lord Dunedin had said four sentences before the sentence that I quote in paragraph 77 above that:

> "A statute is designed to be workable; and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

81. So what does the statute say? Sections 31 and 31A TMA, insofar as relevant read:-

"31 Appeals: right of appeal

(1) An appeal may be brought against-

…

(d) any assessment to tax which is not a self-assessment.

31A Appeals: notice of appeal

(1) Notice of an appeal under section 31 of this Act must be given-

(a) in writing,

(b) within 30 days after the specified date,

(c) to the relevant officer of the Board.

…

(4) In relation to an appeal under section 31(1)(d) of this Act [(other than an appeal against a simple assessment)]

(a) the specified date is the date on which the notice of assessment was issued, and

(b) the relevant officer of the Board is the officer by whom the notice of assessment was given."

82. That is extremely clear and the appeal must be after the issue of the assessment. Furthermore it must be sent to the relevant officer of the board. Accordingly the argument that an appeal can simply be sent to HMRC and it can be expected that it would be forwarded to the correct department cannot be correct. Not only are these issues clear from the wording of statute but it would make a nonsense of the statute if taxpayers could lodge pre-emptive appeals sent to any office of HMRC.

83. I find that the April letter did not appeal the assessments.

The third issue - Application for admission of a late appeal

84. Mr McDonnell argued that it was reasonable for the appellant to believe that the April letter had been received by HMRC and that an appeal had been lodged.

85. I disagree. As can be seen from paragraph 56 above, the Notes, which have not been challenged, show that the appellant himself was told in July 2019 that no appeal had been lodged and he was advised to speak to his accountant.

86. It is not disputed that *Martland v HM Revenue & Customs* [2018] UKUT 178 (TCC) is the relevant authority on the factors to be considered and I quote the relevant sections below but there is also other law on the admission of late appeals to be considered.

The Law

87. The Tribunal's power to admit a late appeal is contained in section 49 TMA which reads as follows:-

"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."

88. Section 49H TMA gives the Tribunal power to grant permission to notify a late appeal to the Tribunal. The proper approach to such applications is set out by the Upper Tribunal in *Martland*. The Upper Tribunal reviewed the authorities and concluded as follows:

> "43. …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."

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.

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 *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.

89. Lastly, at all times I have had in mind Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") which reads:-

"**2.—Overriding objective and parties' obligations to co-operate with the Tribunal**

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—
(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—
(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally."

Discussion

90. HMRC rely on *Martland* and rightly so. I therefore consider the three tests enunciated therein.

The length of the delay

91. At an absolute minimum, even if it were to be accepted that an appeal was notified to HMRC on 1 June 2020 then, for the assessments issued on 29 April 2019, the delay was one year and two days after the expiry of the statutory time limit of 30 May 2019.

92. I agree with HMRC when they quote the Upper Tribunal in *Romasave (Property Services) Limited v HMRC* [2015] UKUT 254 (TCC) where at paragraph 96 they state:-

> "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."

93. Not only I am bound by that decision but I entirely agree. The delay in this instance is both serious and significant.

What is the reason for the delay? Is there a good explanation?

94. The argument advanced in the Grounds of Appeal was that the appellant had never received any correspondence from HMRC notifying him of the rejection of his agent's request for review of the assessment and the 30 day time limit to appeal. As I indicate he was certainly told there was no appeal. Furthermore, HMRC never rejected a request for a review. They never received the April or November letters.

95. I therefore turn to Mr Amin's evidence. At paragraph 7 of his witness statement, Mr Amin states that "After a considerable exchange of correspondence between me and HMRC. I received a provisional assessment from HMRC … dated 28 March 2019." He said that he treated that as being the final assessment. As I have indicated, from the wording of the letter it is absolutely clear that it is not.

96. It is also clear that there certainly was not extensive correspondence with HMRC.

97. He states that he "forwarded" to HMRC the April letter which he states was an appeal against the assessment. HMRC did not receive that letter.

98. He goes on to say that he received no response to that alleged letter from HMRC. However, of course, as can be seen the actual assessments were sent to him on 29 April 2019 and the penalty explanation on 2 May 2019.

99. He further alleges that he sent a "chaser" letter on 10 November 2019 and that certainly also was not received by HMRC. He concedes that neither letter named the taxpayer or provided the taxpayer's 10 digit Tax Reference Number ("the UTR"). Neither was addressed to the officer investigating the matter. Furthermore, they were simply addressed to Fraud Investigation Service, HMRC, with no address other than a postcode and it was the wrong postcode.

100. In any event, even if he had sent those letters, and I do not accept that he did, the letters are irrelevant. There was no appealable decision issued until 29 April 2019 so he could not appeal in advance of that date. Furthermore, the "chaser letter" was sent 195 days after the appealable decision which is a serious and significant delay. In addition, neither letter contained the Grounds of Appeal in accordance with section 31A(5) TMA 1970.

101. Even the letter of 1 June 2020, which HMRC have very liberally treated as being an appeal, has not complied with the provisions of section 31A(a)-(c) and section 31A(5) TMA.

102. In any event, Lords had been instructed by the appellant in April 2020 and, given that the bankruptcy proceedings related in part to the matters covered by the assessments and penalty, they should have been aware that there were no extant appeals. Quite why a letter was only issued by the accountant in June 2020 is a mystery.

103. I have narrated the history of the significant delays in an application to the Tribunal being lodged as it is indicative of the appellant's lack of engagement in this matter.

104. To the extent, if any, that the appellant relies on the actings of either Mr Amin or his current agent, we agree with HMRC that *HMRC v Katib* [2019] 0189 UK UT (TCC) is in point. HMRC relied on paragraph 49 which reads:-

> "We accept HMRC's general point that, in most cases, when the FTT is considering an application for permission to make a late appeal, failings by a litigant's advisers should be regarded as failings of the litigant …Therefore, in most cases, a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers."

105. As HMRC point out the appellant has produced no evidence of his communications with the agent or indeed with HMRC.

106. In summary I find that there is no explanation for the delay, let alone a good one.

What are the other circumstances of the case?

107. I simply do not accept the appellant's arguments that the appellant has "remained a responsible Tax Payer". The Findings in Fact make it clear that apart from attending the initial meeting in the investigation there has been no cooperation with HMRC. The Notes of Meeting do not support the assertions that the appellant had offered to provide corroborative evidence and produced a loan agreement etc.

108. The appellant has been given various opportunities, either himself or via his agent to comment on the assessments and penalties but nothing was done. He failed to comply with the Information Notice. He should have been aware of his rights to appeal.

109. Undoubtedly, if the appeal is not admitted late, the appellant would not be able to litigate and challenge the amounts in dispute. On the other hand, HMRC have the right to expect finality and for them those assessments had been closed for more than a year.

110. HMRC are entitled to expect that it is in the public interest that the policy of finality in litigation is upheld and that statutory time limits are respected.

111. The strength, or not, of the appellant's case is a relevant consideration but, as directed by *Martland*, there should not be a detailed analysis of the underlying merits.

112. In any event, there cannot really be an analysis of the merits since there was no information provided to HMRC and there has certainly been no information provided to the Tribunal.

113. In terms of section 50 TMA the burden of proof in relation to the assessment lies with the appellant. There has been no compliance with repeated requests for evidence. The prospects of success in that regard therefore seem rather slim. If the appellant had had evidence to show that the assessments were incorrect or inaccurate, one would have expected that to have been produced. Nothing has been produced.

Decision

114. Having weighed every relevant factor in the balance, I have decided that the application for a late appeal in relation to the assessments is refused.

The Penalty

115. I have not corrected the punctuation or grammar but the Statement of Agreed Facts reads:-

> "(1) On 2 May 2019, a Penalty explanation letter was issued to the appellant and his accountant as seen on pages 161-172 of the original bundle. This provided a deadline to the appellant to provide further information by 29 May 2019 as seen at page 161.

(1) On 2 May 2019, a Penalty Assessment Notice was issued to the Appellant, to the same address as the earlier assessments and the penalty explanation letter, in the sum of £78854.56.

(2) The Penalty Assessment Notice was issued manually due to technical difficulties with the Respondents system on 02 May 2019.

(3) On 02 December 2020, the Decision Makers manager contacted the Appellant's Accountant stating the penalty notice was sent to the appellant on 02 May 2019 as seen at page 174.

(4) The Appellant's Solicitor has advised that neither the Appellant nor his Accountant have received copies of the letters dated 02 May 2019 and the Appellant solicitor has confirmed that the Penalty Assessment Notice was only made available to him on 21 September 2022 and that penalty assessment notice had not appeared in any earlier bundles."

116. There was a footnote to paragraph 2 which explained that the penalty notice had been obtained from storage and was attached to the email enclosing the Agreed Facts.

117. As I have indicated Mr McDonnell does not agree that a penalty notice was issued by HMRC on 2 May 2019. He argues that no copy of any penalty notice was received by the appellant prior to 21 September 2022 when the HMRC solicitor had emailed a copy of what has now been provided.

118. I agree with Mr McDonnell that the burden of proof of both issue and service of the penalty notice falls upon HMRC. He relies on *Anstock* for the proposition that HMRC must discharge the burden of proof through evidence and not through the assertions of their advocate. Whilst, of course, that is persuasive and I agree, nevertheless, I prefer to rely on the Upper Tribunal at paragraphs 51 to 55 of *Edwards v HMRC* (20190 UKUT 131 (TCC) ("Edwards") where Mr Justice Nugee and Judge Herrington made it explicit that:-

(a) "An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate", and

(b) When considering whether HMRC had issued, in that case a Notice to File, in order to draw an inference that the document was "put in the post by HMRC in an envelope with postage prepaid, properly addressed to the appellant …a Court or Tribunal may only draw proper inferences … if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn". (emphasis added)

119. I am afraid that HMRC's response in relation to the appellant's submissions on the penalties was supported by very limited documentary evidence. The "audit trail" which is derived from HMRC's computer system and purports to show HMRC's internal processes, does not assist me. Mr McDonnell is entirely correct to state that there is no evidence on the meaning of various messages in that audit trail. Furthermore, in my view, it certainly raises questions such as item 38 which suggests that the taxpayer's address was amended. There is no evidence in the Bundles that the taxpayer's address was amended.

120. It is blandly stated at paragraph 10.1 that the appellant contacted HMRC's Debt Management Team by telephone but there is no record of that. There are numerous other assertions which are entirely unsupported by evidence.

121. They allege that the Notice was issued manually because of an unexplained system error and make statements about their SAFE system. That is quite simply not evidence.

122. HMRC have produced a letter to the appellant dated 12 September 2019 warning him of bankruptcy and there is a Schedule attached to that showing the alleged penalty of £78,854.55. I note that it states that that penalty is for the period ended 5 April 2017. In fact, the penalty is in two parts and the larger portion is for the period ended 5 April 2016. HMRC have also produced the Creditor's Bankruptcy Petition which refers to the penalty. HMRC rely on those for an argument that the appellant had failed to challenge the penalty and must have known about it (or, in fact them). As can be seen from the rest of this decision the appellant's engagement at any stage has been negligible. That certainly does not prove that the penalty was issued.

123. I simply do not understand their submission that the unsigned letter to the appellant's agent dated 2 May 2019, which has been produced in the Bundle, establishes that the Notice was sent to the agent. (They do acknowledge that the one line letter has no salutation, does not identify the writer, has no signature and includes a spelling mistake.) They do not acknowledge that it is headed "Copy of penalty calculation summary", says it encloses "copy of correspondence" with the appellant and that the following documentation in the Bundle is another copy of the penalty explanation.

124. It seem illogical that the Officer would issue a penalty assessment on the same day as the penalty explanation letter giving the appellant time to respond until 29 May 2019.

125. In summary, on the balance of probability, I do not accept that the penalty was issued on 2 May 2019. It certainly cannot be said that the only inference from the documentation is that the penalty notice was issued on 2 May 2019. On the contrary, the inference from the documentation is that the penalty notice was not issued on that date.

126. I therefore find that HMRC has failed to establish that a penalty notice was issued on 2 May 2019. Therefore there is no appealable decision on that issue before this Tribunal.

Decision

127. The appeal is dismissed *quoad* the tax assessments and to the extent that the pleadings related to the purported penalty, those are struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

128. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 13th MARCH 2023