



Neutral Citation: [2024] UKFTT 00015 (TC)

Case Number: TC09020

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/13714

*Income tax – higher income child benefit charge – permission to make a late appeal*

**Heard on:** 5 December 2023

**Judgment date:** 22 December 2023

**Before**

**TRIBUNAL JUDGE MCGREGOR**

**Between**

**PAUL TOMAS**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Paul Tomas

For the Respondents: Maria Spalding, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) via the Tribunal video hearing system. A face to face hearing was not held because a remote hearing was appropriate. The documents to which I was referred are a document bundle of 313 pages, containing both the notice of appeal and HMRC's Notice of Objection to the late appeal.
2. 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.
3. This decision concerns an application by Mr Tomas to make a late appeal against assessments and penalties relating to the Higher Income Child Benefit Charge (HICBC).

### BACKGROUND FACTS

4. The following background facts were not in dispute:
  - (1) HMRC issued HICBC assessments and failure to notify penalties to Mr Tomas on 7 May 2021;
  - (2) Mr Tomas appealed to HMRC on 1 October 2021;
  - (3) HMRC rejected Mr Tomas' appeal as being out of time on 14 October 2022;
  - (4) Mr Tomas told HMRC on 10 November 2022 that he wanted to appeal against that refusal to the Tribunal;
  - (5) On 26 November 2022, Mr Tomas submitted his appeal to the Tribunal.

### LAW

5. Section 31A(4) of the Taxes Management Act 1970 ("TMA 1970") provides that an appeal against an assessment (other than a simple assessment) must be made in writing within 30 days of the date on which the notice of assessment was issued to the relevant HMRC officer who issued the notice.
6. Section 49 of TMA 1970 provides that where notice of appeal to HMRC has not been given within the time limit, it may be given after the relevant time limit if either HMRC agree or the Tribunal gives permission.
7. The Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 gave specific guidance to this Tribunal on consideration applications for permission to appeal out of time, which is binding on us. I set out the section from paragraph 44 in full:

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.

#### **PARTIES' ARGUMENTS**

8. Mr Tomas submitted that he had thought, until 1 October 2021, that he was already in an appeals process with regard to his HICBC assessments.

9. He submits that this position was supported by the fact that:

(1) He had developed the view that he was already in an appeals process before 6 May 2021, which is the reason he questioned why more interest charges were coming through in a telephone call on 6 May 2021, the day before the assessments were issued;

(2) The letters chasing payment stopped after that phone call, so he thought they must be under appeal;

(3) He had been told by a person on the telephone “way back” that he was already in an appeals process but he didn't keep records of the phone calls he made or actions that he took so he can't remember exactly when;

(4) He spoke to various departments within HMRC, including one called “Tax Appeals” and then all the chasing stopped;

(5) At some point he also submitted an online appeal using an online form, but he thinks it may not have been related to these HICBC assessments;

(6) It was only when he was sent notice of two new fines that he called HMRC on 1 October 2021 and it was finally explained to him that he had not appealed against his HICBC assessments; and

(7) He then made the appeal on the same day.

10. HMRC submitted that:

(1) Mr Tomas does not acknowledge in his notice of appeal to the Tribunal that the appeal was late or give any grounds for the lateness;

(2) The information provided to Mr Tomas in all of the notices of assessment for HICBC and associated penalties couldn't have been clearer as to what he needed to do if he disagreed with HMRC's decisions – each letter clearly explained the appeal rights, process and time limits;

(3) Calls to HMRC about unrelated matters, such as the late penalties for the self-assessments in later years that were discussed on the call on 6 May 2021, are not relevant to the matters in this appeal;

(4) A telephone call to HMRC could never have constituted an appeal;

- (5) The delay is serious and significant because it was 3 months and 25 days after the end of the statutory time limit;
- (6) No reasonable explanation has been given as to why there was such a delay;
- (7) HMRC would be prejudiced by having to divert resources in order to prepare a bundle for a case that goes back more than 6 years and they considered was closed;
- (8) The appeals have a very limited likelihood of succeeding because there is no reasonable excuse given for not having notified liability for HICBC and the assessments are protected assessments under section 97 of Finance Act 2022 because no appeal was made until 1 October 2021, such that it is impossible for the appeal to meet the criteria to proceed on validity grounds under that section;
- (9) Unfairness is not a ground for discharging assessments or penalties;
- (10) It is not for HMRC to calculate a person's adjusted net income because the taxpayer has the best information available to them to work out if HICBC is relevant to them, therefore any arguments based on HMRC not having contacted him sooner are not viable.

#### DISCUSSION

11. I must follow the stages of the *Martland* test.
12. Firstly, I must consider whether the delay is serious and significant. Mr Tomas had 30 days from 7 May 2021 in which to submit his appeal to HMRC.
13. In order to assess whether he was late, I must first address the question of whether an appeal was already in existence prior to the 1 October 2021 appeal that was in the bundle. This is a question of fact.
14. I will turn to Mr Tomas' belief in the appeal in the later discussion, but for the purpose of establishing whether the appeal was late, I find that there had not been an earlier appeal made to HMRC. An appeal can only be made once a decision is issued, which in this case was 7 May 2021. Since Mr Tomas' evidence was that he already thought he was in an appeal process before that date and we had not evidence of an appeal being made between 7 May and 1 October, I find that there was not an appeal made against the decision of 7 May 2021 until 1 October 2021.
15. The appeal was therefore late by nearly 4 months.
16. HMRC were operating a concessionary practice at that time, recognising the impact of the coronavirus pandemic, in which they would not object to a late appeal if it was made within 3 months. This meant, effectively, that HMRC were agreeing to extensions of time under section 49 of TMA 1970 of a further 2 months.
17. However, this did not extend the statutory time limit and the 1 October 2021 appeal did not fall within this concessionary extension in any event.
18. I find that the delay of nearly 4 months was serious and significant.
19. Looking at the second stage of the test, I must consider what reasons are given for the delay. The reason put forward by Mr Tomas comes down to his submission that he thought he was already in an appeal.
20. Mr Tomas gave evidence that he had considered that he was already in an appeals process. That he held this belief was supported by the notes of the telephone call he made to HMRC on 1 October 2021, which recorded that he told the call handler that he believed he had appealed but that his case was on hold due to a Tribunal case. The call handler explained

that there were no discussions of a Tribunal case in his case notes and that he was now out of time to make an appeal, but could submit a late appeal explaining the circumstances.

21. Mr Tomas's appeal letter to HMRC dated 1 October 2021 also included his assertion that he had, up until that day, been under the impression that he was already in an appeal process because someone at HMRC had told him this on a previous telephone call.

22. Moving on to an evaluation of all the circumstances of the case, I must, as set out in *Martland*, 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. Both of these factors weigh in support of refusing the application for a late appeal.

23. I must also consider, without undertaking a full analysis of the underlying appeal, the broad merits of the appeal. I agree with HMRC, that there are very limited avenues for such an appeal to be successful with regard to the validity of the discovery assessments. There may be slightly more possibility of success with regards to the failure to notify penalties, however, even in that context, Mr Tomas has accepted that he received the various letters and notifications which sought to alert him to the likelihood of the liability. Therefore the underlying merits of the case would be another factor pointing towards refusing the application for a late appeal.

24. Considering the merits of Mr Tomas' reasons for the delay, I acknowledge that making an appeal to HMRC is not a matter for every day and taxpayers are very often in new territory when it comes to challenging decisions of HMRC. Some of the terminology used has technical meaning that may not immediately be obvious to an ordinary taxpayer.

25. However, weighed against that are the fact that Mr Tomas' recollections of what actions he undertook that would have resulted in him being part of an appeal process, were limited and vague. In addition, the letters issued to Mr Tomas were very clear in setting out what he needed to do in order to make an appeal, including expressly stating that it needed to be in writing and within the specified time limit.

26. On balance, I find that Mr Tomas had expressed his disagreement with HMRC's position regarding HICBC prior to the assessments being issued. However, once he received the letters dated 7 May 2021, he cannot have, reasonably, been in any doubt that he needed to contact HMRC again in writing in order to challenge the decisions. This factor therefore weighs against granting the application to make a late appeal.

27. Weighing these factors together, the weight of the arguments to refuse the application outweigh those that would lead to the granting of the application.

28. On that basis, I refuse the application for permission to bring a late appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

29. 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.

**ABIGAL MCGREGOR  
TRIBUNAL JUDGE**

**Release date: 22<sup>nd</sup> DECEMBER 2023**