



Neutral Citation: [2024] UKFTT 00117 (TC)

Case Number: TC09059

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video hearing]

Appeal reference: TC/2022/13097

PROCEDURE – Relief from sanctions - Application for an extension of time to file Statement of Case by HMRC – Martland applied - length of delay 64 days – serious and significant - administrative oversight –no good reason - balance of prejudice to the parties – application ALLOWED

Heard on: 16 January 2024

Judgment date: 7 February 2024

Before

JUDGE NATSAI MANYARARA

Between

MARIE GUERLAIN-DESAI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Patrick Cannon of Counsel, Cornerstone Tax

For the Respondents: Miss Nooulanne Saeed, 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). The documents to which I was referred were included in the Document Bundle consisting of 388 pages; which included HMRC's Application Notice dated 18 August 2023 and the Appellant's objection, dated 14 September 2023. 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.

2. This is HMRC's application for an extension of time to file their Statement of Case, and relief from sanctions. The Appellant objects to the application. There is no rule requiring me to hand down a full decision, which would be published, as this is not a decision which disposes of all of the issues under appeal. The parties have, nevertheless requested a full decision.

BACKGROUND FACTS

3. On 15 January 2021, the Appellant purchased a property known as Durford House, for the sum of £3,160,000. The property is described as "a substantial country property built in 1928". The property is set within the private estate of Durford Wood, in a secluded position.

4. On 18 January 2021, the Appellant submitted a Stamp Duty Land Tax ("SDLT") return on the basis that the property transaction was residential. On 1 April 2021, the Appellant's agents ("Cornerstone") wrote to HMRC with a view to reclassifying the property on the basis that it also consisted of non-residential property. This re-classification was attributable to the 12 acres of mature woodland which formed part of the price. An amended SDLT return was, therefore, submitted.

5. On 13 December 2021, HMRC opened an enquiry into the SDLT return. This was closely followed by a closure notice, on 25 February 2022, amending the return such that an additional £225,250 SDLT became payable.

6. On 17 March 2022, the Appellant appealed to HMRC. HMRC offered a review on 30 March 2022, which was accepted by the Appellant on 22 April 2022; the conclusion of which was notified on 8 June 2022. The Appellant was advised to notify her appeal to the First-tier Tribunal ("FtT") within 30 days if she disagreed with HMRC's conclusions. No appeal was notified by the deadline. A notice of appeal was subsequently lodged on 8 July 2022, seeking permission to appeal out of time. The reasons for the late appeal were said to have been due to an administrative error on the part of the Appellant's agents, when an individual had left their employment and failed to notify the appeal.

7. Following a hearing on 13 April 2023, the FtT (Judge Brown KC) gave permission for the Appellant to appeal out of time. Judge Brown KC found that whilst the delay of 42 days was serious and significant, with no good reason having been provided for the delay, the balance of the prejudice to the Appellant was such that the application should be granted. On 17 April 2023, HMRC were directed to deliver a Statement of Case within 60 days (i.e., by 15 June 2023).

8. On 7 August 2023, a letter was sent by the FtT requesting that HMRC respond to the direction as no Statement of Case had been forthcoming from HMRC. On the same date, HMRC requested permission to deliver the Statement of Case on 18 August 2023; which is the subject of this Decision.

THE APPLICABLE LAW

9. The principles applicable to determining the issues of extension of time, and delay, have been the subject of much consideration and adjudication.

10. The general sphere of litigation was considered in *BPP Holdings v R & C Comrs* [2017] UKSC 55 (*BPP Holdings*), where a direction had been made by the FtT indicating that HMRC would be barred from participating in proceedings if the direction was not adhered to. This was as a result of the relevance of the strict approach to adhering to time limits. In *BPP Holdings*, the key question was the proper approach of tax tribunal in cases where there has been a breach of an order. This included consideration of the issue of whether the FtT was right to debar HMRC from further participation in the substantive proceedings for their serious and prolonged breach of an order requiring them to give proper particulars of their pleaded case against BPP.

11. The court endorsed the approach described by Morgan J in *Data Select Ltd v R & C Comrs* [2012] STC 2195 (*Data Select*), which considered the principle to be applied to an application to extend time where there had been no history of non-compliance. Mr Justice Morgan described the approach in the following way:

“[34] ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions...”

12. It is well established that the obligation upon the FtT is to take into account all of the relevant circumstances, and to disregard factors that are irrelevant, when exercising its discretion: *Data Select*.

13. Helpful guidance can also be derived from the three-stage process set out by the Court of Appeal in *Denton & Ors v T H White Ltd & Ors* [2014] EWCA Civ 906 (*Denton*), in the context of the Civil Procedure Rules (*CPR*). Although the third stage of that guidance, as set out by the majority, includes the requirement to give particular weight to the efficient conduct of litigation and the compliance with rules etc., by way of summary, the majority in the Court of Appeal in *Denton* described the three-stage approach in the following terms, at [24] (the references to “factors (a) and (b)” being to the particular factors referred to in *CPR* r 3.9):

“We consider that the guidance given at paras 40 and 41 of *Mitchell* remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the “failure to comply with any rule, practice direction or court order” which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate “all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]”. ...”

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

15. The approach to the consideration of an application to extend time should now follow that set out by the Upper Tribunal in *Martland v R & C Comrs* [2018] UKUT 178 (TCC) (*'Martland'*). That case itself concerned a late appeal to the FtT. The approach adopted followed from a consideration of authorities, including *BPP Holdings*. *Martland* held that the principle of fairness and justice is applicable, as a general matter, to any exercise of a judicial discretion. Applying the three-stage approach adopted in *Denton*, the Upper Tribunal in *Martland* set out the staged approach, at [44], as follows:

“44... 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.”

16. This approach was confirmed by the Upper Tribunal in *Websons (8) Ltd v HMRC* [2020] UKUT 0154 (TCC).

THE SUBMISSIONS

17. Both parties are in agreement that the principles in *Martland* are applicable to the circumstances of this application.

HMRC's submissions

18. On behalf of HMRC, and in respect of the length of the delay, Miss Saeed accepts that the delay is serious; albeit that she submits that it is not significant. She nevertheless, acknowledged the delay to the proceedings as a result of the default.

19. In relation to the reasons for the delay, Miss Saeed submits that HMRC missed the FtT's direction in relation to the Statement of Case. In further amplification of this submission, she states that this was due to an administrative error, and an unintended oversight. She elaborated by saying that any correspondence received by HMRC from the FtT is put into a Case Management System ('CMS'), which stores and records cases. She added that an individual is then assigned to manage the system, and that they will have access to the system. Miss Saeed further added that whilst there had been an administrative oversight, HMRC nevertheless acted promptly once the error/oversight was identified.

20. In respect of the third stage, Miss Saeed highlighted the prejudice to HMRC in light of the amount of tax in question. She concluded by saying that it was in the interests of justice that the case should be heard together with the submissions made in HMRC's Statement of Case, which has now been delivered.

Appellant's submissions

21. On behalf of the Appellant, and in respect of the first stage, Mr Cannon agreed with Miss Saeed's description that the delay was serious, but added that the delay should further be categorised as significant. In further amplification of this submission, he highlighted that the Statement of Case should have been delivered by 15 June 2023 and was only delivered on 18 August 2023, following a further prompt by the FtT on 7 August 2023. He emphasised that the

length of the delay was greater than the original time permitted to deliver a Statement of Case in any proceedings. He, therefore, submitted that this was not an oversight that HMRC had picked up, but a prompted compliance from the FtT.

22. In respect of the second stage, he submitted that no good reason had been given for the delay. In this regard, he argued that a degree of alacrity would have been expected of HMRC in light of HMRC's forceful opposition to the Appellant's own application for permission to appeal out of time. He added that HMRC routinely appear in the FtT and are a highly experienced, and resourceful, party in FtT proceedings; therefore, errors of the nature identified in this application should not occur. He further added that HMRC should be judged by the same standard as any other litigant.

23. In respect of the final stage, Mr Cannon submitted that the Appellant's application for permission to appeal out of time had been granted because the Appellant's case was found to be an arguable case, in light of the issues involved. He added that the conclusions reached by the FtT on that occasion were based on an informed evaluation of the issues and evidence. He concluded by saying that the position is finely balanced, but emphasised HMRC's experience as a litigator in submitting that such errors as have occurred should not occur.

24. Following completion of the hearing, I reserved my decision which I now give with reasons.

DISCUSSION

25. This is HMRC's application for an extension of time to file and serve their Statement of Case. I have derived considerable benefit from hearing the submissions made by Miss Saeed and Mr Cannon, and from considering the case law. I am grateful to both representatives for their succinct submissions.

26. In respect of the first stage, there can, in my view, be no argument but that the delay in delivering the Statement of Case by HMRC was both serious and significant. Whilst Miss Saeed submitted that the delay was not significant in light of the fact that it was under 90 days, that is not the benchmark by which a significant delay must be considered. The length of the delay is to be considered by reference to the time-limit. This was confirmed in *Romasave (Property Services) Ltd v Revenue & Customs Comrs* [2015] UKUT 254 (TCC) (*'Romasave'*), at [96], in the context of the time-limit for submitting an appeal. There, the Upper Tribunal held 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.”

27. The context in *Romasave* is distinctly different to the circumstances of this appeal. HMRC's position is further aggravated by the fact that a prompt was necessary from the FtT before HMRC sought to rectify the default. In *Secretary of State for the Home Department v SS (Congo) & Ors* [2015] EWCA Civ 387, the Court of Appeal, at [105], has described exceeding a time-limit of 28 days for applying to that court for permission to appeal by 24 days as significant and a delay of more than three months as serious. It is, therefore, plain from the relevant authorities that a delay of this nature can be both serious and significant, in the context of a 60-day time-limit. The time for filing the Statement of Case was no later than 15 June 2023, following a direction of the FtT on 17 April 2023. The Statement of Case was, in fact, only filed on 18 August 2023 following further correspondence from the FtT on 17 August 2023.

28. The direction of the FtT was clear in terms of when the Statement of Case was required. Furthermore, I find considerable force in Mr Cannon's submission that having forcefully

opposed the Appellant's own application for an extension of time to appeal, it is reasonable to expect that HMRC would have proceeded to act in a timely manner in preparation for a substantive hearing.

29. In relation to the second stage, and the reasons why the default occurred, I am not in agreement with Miss Saeed's submission that "*mistakes happen*", despite the fact that the oversight was against a background of compliance with all other directions issued by the FtT. Mr Cannon drew an analogy with the remarks made by the FtT when allowing the Appellant's application for permission to appeal out of time (in these proceedings), where Judge Brown KC said this:

"33. The explanation for the delay was honest but does not present a good reason for the delay. It is true that human error and oversight will occur but sometimes we have to live with the consequences of the error. Not realising the time and missing the train does not mean the train should have waited for me – I have missed the train and must accept the consequences of that."

30. I echo Judge Brown's observations. I nevertheless acknowledge that there has been no other delay by HMRC in these proceedings and, indeed, the default was rectified as soon as correspondence was received from the FtT in August 2023. I accept that Miss Saeed has provided a frank and truthful explanation of what caused the delay in delivering the Statement of Case, and she has not attempted to bolster HMRC's position.

31. I find force in Mr Cannon's submissions that HMRC is an experienced litigator with considerable experience before the FtT; and with sufficient resources to conduct litigation. As such, I find that there is no good reason for the failure to act on the direction issued. The explanation that one particular individual within HMRC was tasked with the duty of accessing the CMS and responding to the FtT's direction does not absolve HMRC from ensuring that directions are complied with in a timely manner. There is an expectation of diligence and prudence in complying with directions issued by the FtT. It is a truism that directions made by the FtT are meant to be complied with: *Eclipse Film Partners No. 35 LLP v HMRC (No. 2)* [2010] UKFTT 448 (TC).

32. I, therefore, turn to the third stage of the process; that of having regard to all the circumstances and the respective prejudice to the parties.

33. The courts and tribunals have consistently emphasised the public interest in the finality of litigation, and the purpose of a time-limit being to bring finality: see, for example, *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 and *Data Select*. The Upper Tribunal in *Martland* made clear, at [45] – [46], as is apparent from the authorities, that the balancing exercise at this stage should take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost, and for time limits to be respected. The case of *Global Torch Ltd v Apex Global Management Ltd & Ors (No 2)* [2014] 1 WLR 4495, at [29], referred to the merits of the underlying case generally being irrelevant at this stage

34. As Moore-Bick LJ said in *Hysaj, R (in the application of) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 (*'Hysaj'*), at [46], it is only where the court (or tribunal) can see without much investigation that the grounds of appeal are either very strong, or very weak, that the merits will have any significant part to play when it comes to balancing the various factors at stage-three of the process. That should not, however, involve any detailed analysis of the underlying merits. In so doing, the FtT can, however, have regard to any *obvious* strengths or weaknesses in the applicant's case.

35. The starting point is that there should be compliance unless there is a good reason to the contrary. The interests of justice are not just in terms of the effect on the parties in a particular case, but also the impact of the non-compliance on the wider system; including the time

expended by the tribunal in securing compliance with procedural obligations. Even in the tribunals, where flexibility of process is a hallmark of the delivery of specialist justice, a litigant is expected to comply with the rules and orders and a State party should neither expect, nor work on, the basis that it has some preferred status; it does not.

36. Having considered all of the evidence, I am satisfied that the balance between the prejudice to the Appellant, the prejudice to HMRC and the administration of justice through the finality of litigation falls firmly on the side of an extension of time being granted. In that regard, I accept that if HMRC are unable to rely on their Statement of Case, they will not have an opportunity to defend the decision on the basis of all of the arguments presented in the Statement of Case, which have already been canvassed with the Appellant in correspondence between the parties and are not new arguments, but more detailed arguments. That the Appellant's application to make a late appeal was admitted is not determinative of the outcome of the substantive appeal. Both parties have now delivered detailed written submissions in their respective cases. The strengths and weaknesses of both parties' cases are finely balanced. The case requires consideration of the basis upon which the property was sold and the terms on which the Durford Wood estate is managed, and used. I hold that:

- (1) the delay was 64 days;
- (2) whilst the explanation for the delay did not represent a good reason for the delay, the default is against a background of compliance in other respects and the oversight was immediately rectified;
- (3) no individual litigator, or system, is infallible and draconian measures are disproportionate;
- (4) the amount of tax at stake is not insignificant and the issues are important – with case law falling either side of the dividing line; and
- (5) HMRC have the duty to ensure that the correct amount of tax is collected (no more or no less).

37. This is, unfortunately, a case where both parties have defaulted in the past. I am satisfied that the outcome of this appeal will inevitably require detailed consideration of the written cases presented by both parties, which are in turn highly relevant to the determination of the important issues identified therein. I, therefore, exercise my discretion to permit HMRC to file their Statement of Case and to rely on it at a substantive hearing.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

38. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**NATSAI MANYARARA
TRIBUNAL JUDGE**

Release date: 07th FEBRUARY 2024