TC03046

Appeal number: TC/2012/08279

CGT – appeal – notification of appeal to tribunal - permission to notify after time limit in s 49H TMA – permission refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

FOLARIN BAMGBOPA **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER
DEREK SPELLER

Sitting in public in Sutton on 1 October 2013

Frederico Singarajah, instructed by APM Consultants, Chartered Certified Accountants, for Appellant

Karen Weare for the Respondents

DECISION

1. Mr Bamgbopa seeks permission to notify an appeal against an assessment to the tribunal outside the normal time limits in section 49H Taxes Management Act 1970 ("TMA").

The legislation.

2. Section 31 TMA provides a right of appeal against an assessment made by HMRC. Section 31A provides that notice of any such appeal must be given in writing to HMRC within 30 days of the notice of assessment. Section 49A provides that if notice of appeal has been given to HMRC then:

> "(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),
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> (b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or
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> (c) the appellant may notify the appeal to the tribunal (see section 49D)."

3. Section 49C provides that if HMRC offer a review and the appellant does not accept that offer within a period of 30 days of the date of the offer of the review then, unless the appellant notifies the appeal to the tribunal under section 49H:

> "HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under section 54(1) for the settlement of the matter.",

and the appellant may not give notice under section 54(2) to resile from that agreement. (Section 54 provides that an agreement between the taxpayer and HMRC takes effect as if it were a decision of the tribunal.)

4. Section 49H applies where a review has been offered and not accepted. It provides that in such circumstances the appellant may notify the appeal to the tribunal, but, as a result of section 49D and 49H(2), he must do so within 30 days of the date of the offer of a review.

5. Thus if, after having made an appeal to HMRC, the taxpayer receives an offer of a review, he has two choices if he wishes to dispute HMRC's view: either he may accept the offer of the review (and either accept the result of the review or after the review, notify his appeal to the tribunal) , or he may notify the tribunal of the appeal; but he must do one of those within 30 days of the offer: otherwise the matter is treated as concluded on the basis of HMRC's view of it.

6. However, section 49H (4) provides that an appeal may be notified to the tribunal after the end of the 30 day period if the tribunal gives permission.

7. It is that permission that Mr Bamgbopa seeks in this application.

8. Before leaving the legislation we note the provisions of section 49 TMA. This permits a notice of appeal to be given to HMRC after the relevant time if either HMRC agree, or the tribunal gives permission. This section is not directly relevant to the appeal, since the question before us is not whether late notice of appeal may be given *to HMRC*, but whether the appeal may be *notified* late to the tribunal. The section does not permit HMRC to give extra time for the acceptance of an offer of review or for the notifying of an appeal to the tribunal. As a result, if a taxpayer fails to accept an offer of review or fails to notify his appeal to the tribunal within the 30 day period, or wishes to do so, his only route to pursue his appeal is to seek permission from the tribunal so to do.

9. In *Marijus Leliunga. HMRC [2010] UKFTT 229 (TC)*, a case we were referred to by Mr SX, the tribunal (Judge Aleksander and Philip Gillett) set out its approach to the exercise of the tribunal's discretion under section 49 in relation to the giving of permission to make a late appeal to HMRC. We accept that the principles applied by the tribunal in that case apply equally to the exercise of the tribunal's' discretion under section 49H. The tribunal said:

> "[13] Section 49 requires the taxpayer to satisfy HMRC that he had a reasonable excuse for the delay, and that the request to appeal late was made without unreasonable delay after the reasonable excuse ceased (section 49(5) and (6)). No such conditions attach to the Tribunal's discretion to permit a late appeal.
>
> "14. Rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Tribunal Rules") gives the Tribunal discretion to "extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit". Tribunal Rule 20(4) provides for the Tribunal to apply Tribunal Rule 5(3)(a) to allow for an extension of time for the filing of an appeal. In considering whether to extend a time limit, the Tribunal is required to seek to give effect to the overriding objective set out in Tribunal Rule 2.
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> "15. We note that the Taxes Management Act 1970 was amended with effect from 1 April 2009 to take account of the creation of this Tribunal. The Act, prior to its amendment, included similar provisions which gave the general and the special commissioners (the predecessors to this Tribunal) discretion to extend the time limit for filing appeals. Case law relating to the exercise of discretion by the appeal commissioners to extend time limits is therefore of relevance to the discretion to be exercised in this case.
>
> "16. We also note that the Civil Procedure Rules 1998 ("CPRs") were introduced in 1999 which changed the factors to be taken into consideration by the English courts in exercising their discretion to extend time limits. In particular CPR 3.9(1) sets out a list of factors to be considered by the court when exercising discretion (amongst other things) to extend any time limit. The overriding objectives set out in Tribunal Rule 2 are modelled on the overriding objectives set out in Rule 1.1 of the CPRs. We therefore take account of the

approach taken by the courts under the CPRs in considering whether and how to exercise our discretion.

"17. CPR Rule 3.9(1) reads as follows:

> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
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> (a) the interests of the administration of justice;
>
> (b) whether the application for relief has been made promptly;
>
> (c) whether the failure to comply was intentional;
>
> (d) whether there is a good explanation for the failure;
>
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
>
> (f) whether the failure to comply was caused by the party or his legal representative;
>
> (g) whether the trial date or the likely trial date can still be met if relief is granted;
>
> (h) the effect which the failure to comply had on each party; and
>
> (i) the effect which the granting of relief would have on each party.

"18. We were referred to the decision of the Court of Session (Outer House) in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2005] TC 391 and a decision of the High Court in *R (oao Cook) v General Commissioners of Income Tax* [2009] EWHC 590. We derive from these cases the principle that the Tribunal has to take account of all factors relevant to allowing an extension to a time limit – which would include (but are not limited to) the express statutory conditions in section 49(5) and (6) that apply to HMRC. This is consistent with the approach taken in the CPRs. In particular CPR 3.9(1)(d) addresses whether there was a good explanation for the failure (in other words, was there a reasonable excuse), and CPR 3.9(1)(b) addresses whether the application was made promptly (in other words was there unreasonable delay)."

The Evidence and our Findings of Fact

10. We had before us a bundle including copy correspondence and heard the oral evidence of Mr Bamgbopa. We find as follows.

11. Mr Bamgbopa and a Mr Adegbite entered into a partnership to acquire, develop and dispose of 43 Marmora Road. They bought it in July 2002, renovated it and converted into three flats which they sold in 2003/4. It was their only venture together. It did not go well. They had disagreements. There was litigation between them.

12. Mr Bamgbopa reported no profit for this venture in his 2003/4 tax return. He reported no loss either. His computations before us suggest that he would claim a loss.

13. On 5 June 2007 HMRC wrote to Mr Bamgbopa asking whether he had disposed of any property in 2003/4. On 9 July 2008 HMRC sent a notice of assessment (the "First Assessment") to Mr Bamgbopa which included capital gains tax (CGT) on a gain of £42,100 on 43 Marmora Road. The assessment specified the amount of CGT due on this gain. Mr Bamgbopa gave notice of appeal to HMRC on 18 September 2008 against that assessment.

14. Mr Bamgbopa was working abroad between October 2008 and January 2011, returning to the UK for periods of a week or two every eight weeks or so. He gave instructions to his accountants by telephone in this period.

15. Mr Bamgbopa's accountants wrote to HMRC on 18 September giving some details of the transactions involving Marmora Road. They wrote again on 19 November 2008 saying that the total profit of the venture was £51,161 of which £33,157 had been remitted to Mr Adegbite as his share of the profit. They said that the remaining £18,014 attributable to Mr Bamgbopa was offset by further costs incurred by him.

16. On 17 February HMRC wrote with their calculations. On 3 March 2009 the accountants wrote to HMRC saying that the venture was trading venture not assessable the CGT.

17. On 19 May 2009 HMRC wrote the accountants saying that the appeal against the CGT assessment had not been settled. The letter (the "Review Offer Letter") says:

> "However the appeal against the capital gains assessment on 43 Marmora Road has still not been agreed. You have not supplied any evidence of the expenditure claimed as requested in my letter of 17 February 2009 and so I must consider the capital gains assessment on that property to be correct. You have made an appeal and I enclose [a] leaflet which tells you about the new tribunal service for the settlement of disputes.
>
> "You can either ask for a review to be made or you can appeal direct to the Tribunal. If you do not respond within 30 days then I will consider the appeal to be settled. A copy of this letter has been sent to your client."

A letter of the same date to Mr Bamgbopa made no mention of review or appeal. Mr Bamgbopa told us that on the basis of the letter to him he instructed his accountants to seek an extension of time: documents relating to Marmora Road were with the solicitors who had acted for him on the litigation with his partner and he was having difficulties in obtaining them..

18. In response to the Review Offer Letter the accountants wrote to HMRC on 10 June 2009 asking for "some more time to chase the solicitors to retrieve the documents" (the Extra Time letter").

19. HMRC's response was to send the taxpayer a letter headed "Notice of Assessment" for 2003/4 dated 23 June 2009. This included the same £42,100 of capital gains and set out the CGT thereon in an amount equal to that in the First Assessment but was for a different total amount of tax amount because the amounts of other items liable to income tax had been changed. The letter said:

> "If you think this notice is wrong in any way, you should appeal in writing within 30 days from the date of issue above. An appeal form is enclosed. If you have any doubts or do not understand this notice please contact this office or your local tax office for advice.
>
> "[Details about making payment]
>
> "Notes on the assessment.
>
> "This notice determines your appeal under section 54 Taxes Management Act 1970."

20. The next correspondence was almost a year later when on 27 April 2010, the accountants wrote with further information.

21. HMRC replied on 2 June 2010 that they regarded the appeals as being settled since no review had been sought or appeal notified to the tribunal.

22. On 11 June 2010 Mr Bamgbopa wrote explaining his absence from the UK and providing more documentation.

23. On 29 July 2010 Mr Bamgbopa took a large bundle of relevant documents to HMRC's offices in Croydon and left them there with the reception desk. Mr Bamgbopa recalls that in a telephone call on 2 August 2010 with Mr Tunstall at HMRC (a call noted in HMRC records) that he told Mr Tunstall that the documents had been delivered.

24. From August 2010 to early 2012 no further correspondence on the amount of the assessment passed between the parties, but there were proceedings in the county court for recovery of tax by HMRC.

25. On 21 June 2012 Mr Bamgbopa wrote seeking a review. On 6 June HMRC replied saying that the request was out of time.

26. On 17 July 2012 Mr Bamgbopa applied to the tribunal to notify his appeal outside the statutory time limit.

The parties' arguments

27. Mr Singarajah says:

> (1) HMRC unfairly proceeded to issue the Second Assessment without referring to the Extra Time letter;

(2) Mr Bamgbopa was not in the UK and had instructed accountants to deal with the matter in his absence. He was under the genuine misapprehension that he remained able to proceed with a review or an appeal to the tribunal;

(3) real prejudice would be suffered by the applicant if permission was refused: HMRC would suffer none because the correct amount of tax would in the end be collected; and

(4) there was no concern about loss of evidence. The documents were available; indeed the effluction of time resulted in more documents being available.

28. Miss Weare says that the appeal should have been notified by 18 June 2009. It was not. There was no reason to give permission to extend the time limit which had been imposed by statute in the interests of finality in litigation.

Two Preliminary Points

29. There are two issues we should mention. The first relates to the coming into force of sections 49A to 49I, and the second to the nature of the Review Offer letter and the Second Assessment.

30. Sections 49A to 49I came into force on 1 April 2009. The First Assessment was made and an appeal against it made to HMRC before that date. The provisions of these sections applied thereafter so far as concerns the matters at issue in this appeal were not affected by the transitional provision in Sch3 of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.

31. The Review Offer letter is dated 23 May 2009 after sections 49A-I came into force. It does not formally use the words of section 49C: it does not say "this is notification that I am offering you a review under section 49C", but it tells the taxpayer that he "can either ask for a review or …appeal direct to the tribunal" and that if he does not respond his appeal is considered settled – as would be the effect under the combined effect of section 49C(4) and section 54. It also sets out, as required by section 49C(2) HMRC's view of the matter in question, namely that the writer considers the "capital gains assessment on that property to be correct". It seems to us that this was an offer of review within section 49C.

32. The Second Assessment letter is headed "Notice of Assessment for the year ending 5 April 2004" as was the First Assessment. But it also purports to "determine your appeal under section 54". If it is truly an assessment it does not determine an appeal but permit one to be made; if it is an agreement under section 54 it cannot be an assessment; if it is notification of a deemed agreement under section 54 then the words found earlier in the letter:

> "If you think this notice is wrong in any way, you should appeal in writing within 30 days from the date of issue above. An appeal form is enclosed."

make no sense. Further whilst the total tax is different from the first assessment there is no change in the CGT assessed.

33. These considerations lead us to the following conclusions:

(1) the letter, despite its heading, is not a notice of assessment in relation to CGT, since the CGT has already been assessed in the same amount as in the First Assessment (If it were a separate assessment of the CGT time to appeal against it would have run out and we would not, because of the delay extend that limit);

(2) since there was no actual agreement, the reference to section 54 cannot be to an agreement actually made under that section. It must therefore be an attempt to refer to the deemed s 54 agreement brought about by section 49C;

(3) so far as CGT was concerned it was therefore a communication that the 30 day time limit of the Review Offer letter had run out;

(4) but the enclosing of an appeal form and the advice to appeal in writing made clear that the writer thought an appeal would nevertheless be possible so long as made within 30 days;

(5) as a result it is very likely that, had an appeal been made or notified within those 30 days, this tribunal would have given permission for the appeal to be notified out of time.

34. In other words although it is a somewhat confusing letter, it makes clear to the reader that he needs to move speedily if he is to pursue his appeal.

Discussion

(a) The prospects of success on the substantive appeal

35. The degree of prejudice which would be suffered by Mr Bamgbopa is affected by the strength of his case on the substantive appeal.

36. It seemed to us that the venture entered into by Mr Bamgbopa and his partner was clearly an adventure in the nature of trade. It had all the hallmarks of such a venture: a property purchased to convert and sell, the absence of intermediate income, the absence of any other purpose for holding the property other than the making of a profit on its sale, the nature of the work done, and the short period of ownership all pointed squarely to trade.

37. Any income or expense which is to be taken into account in computing the profits of a trade is excluded from CGT computations (sections 37 and 39 TCGA). It is likely that the proper taxation of this venture would leave no sum liable to CGT.

38. The profits and losses of a trade are calculated after deducting expenses wholly and necessarily incurred for the trade; the CGT rules are different and may be more restrictive in a case such as this. Thus the profits liable to income tax would be likely to be less.

39. The accounts for the venture and the supporting papers suggested it was likely that Mr Bamgbopa would be able to show that the income tax on the profits (or loss) of the venture were substantially lower than the CGT assessed.

(b) the prejudice Mr Bamgbopa would suffer

40. Any prejudice Mr Bamgbopa would be likely to suffer as a result of permission to notify his appeal out of time not being given might be offset by any claim he might have in damages against his accountants.

(c) The actions taken in relation to the appeal.

41. No action was taken to seek a review or to notify the appeal after the Review Offer Letter. Nor was any such action taken after the Second Assessment. If the accountants had misunderstood the Review Offer letter its import would have become abundantly clear when the Second Assessment was received. At that stage, had the Review Offer Letter been misunderstood, a speedy application for permission to notify the appeal would have been likely to have been sympathetically received: the review system was new and the notification would have been only a few days out of time. But nothing was done.

42. This inaction may have arisen because:

(1) the accountants did not understand the law or the effect of the Review Offer letter;

(2) the accountants understood the law and that letter and hoped nevertheless for some indulgence;

(3) Mr Z, either having been advised as to the effect of the law, or having not been or not been accurately so advised, gave instructions not to seek a review or notify the appeal.

But whichever of these was the case none of them seem to us to provide a substantial reason for giving permission to notify the appeal more than two years out of time.

43. We accept that it would have been better if HMRC had replied to the Extension of time letter saying that they could or would not grant the extension of time sought. But the Second Assessment was clear notification that they would not, even if it did not say so in terms. In any event HMRC had no power to do so. The reference in that letter to section 54 echoed the reference to the appeal being treated as settled in the earlier letter. The position clear: something had to be done quickly if the appeal was to be pursued. But nothing was done.

44. Even if there was uncertainty following the Second Assessment letter, HMRC's letter of 2 June 2010 made their position absolutely clear; the application to notify late was made two years later.

(d) Weighing the various factors

45. It seems to us that the following factors point to refusing permission: (i) time limits are enacted with the purpose of bringing a measure of finality and should only be extended for good reasons; (ii) the application for permission to notify the appeal out of time was not made promptly: it could sensibly have been made shortly after the receipt of the Second Assessment; and (iii) although there was not evidence to suggest that the failure to notify the appeal in time was intentional, there was no good explanation offered to us for the failure – in particular the difficulty in obtaining documents was not relevant to the administrative process of asking for a review or notifying an appeal: the documents could have been sought later.

46. The only factor pointing to giving permission was the prejudice Mr Bamgbopa might suffer if permission was withheld. We have found that it is likely that he would be liable to a significantly greater tax liability than if his liability were properly determined, but if the failure to notify the appeal in time was as a result of the accountants' misunderstanding of the law or the effects of the letters or their failure properly to advice Mr Bamgbopa then Mr Bamgbopa may have a remedy against them, and if the failure resulted from his ignoring their correct advice then it seems just that he should bear the consequences of his actions.

Conclusion

47. As a result we decline to give permission to notify the appeal out of time.

48. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 14 November 2013