[2019] UKFTT 0239 (TC)

TC07085

Appeal number: TC/2018/01457

Procedure - application to admit late appeal against assessments, closure notices and penalties - source of monies deposited into life policies unexplained - substantial delay in bringing appeal - Martland considered - application disallowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN MURPHY **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER JO NEILL

Sitting in public at Tribunal Tax Service, Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 12 September 2018

Mr Andrew Michael, Accountant, for the Appellant

Ms Ros Kernohan of Solicitors Office and Legal Services, HM Revenue and Customs, for the Respondents

DECISION

The Application

1. This is an application by John Murphy ("the appellant") to admit an appeal under Rule 20(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and to extend time to appeal under Rule 5(3)(a) against a decision by the Respondents ("HMRC") to issue discovery assessments for 2003-04 to 2008-09 (inclusive) and closure notices for 2009-10 and 2010-11. The decisions were issued in February 2013.

2. HMRC oppose the application.

3. The appellant has included the penalties imposed by HMRC in his appeal to the Tribunal. His earlier appeal received and rejected by HMRC made no reference to penalties.

4. The point at issue is whether the appellant should be given permission to notify a late appeal.

Background

5. On 12 August 2011, HMRC opened an enquiry into the appellant's self-assessment tax return for the year ended 5 April 2010.

6. On 6 February 2015, following the identification of unexplained deposits into insurance policies, HMRC issued discovery assessments and closure notices to the appellant. The assessments were issued under s 29 Taxes Management Act, 1970. Closure notices were issued under s 28A (1) & (2) Taxes Management Act, 1970.

7. On 12 and 13 March 2015, HMRC issued penalties for the period 2003-04 to 2007-08 under s 95(1)(a) Taxes Management Act, 1970. The penalties for 2008-09 to 2010-11 were issued under Schedule 24 Finance Act, 2007.

8. The assessments and penalties are shown in the following table.

Tax Year	HMRC decision	Date issued	Appeal deadline	Date of appeal	Days late
2003-04	Assessment	06/02/2015	08/03/2015	07/02/2018	1067
2003-04	Penalty	12/03/2015	11/04/2015	19/02/2018	1045
2004-05	Assessment	06/02/2015	08/03/2015	07/02/2018	1067
2004-05	Penalty	12/03/2015	11/04/2015	19/02/2018	1045
2005-06	Assessment	06/02/2015	08/03/2015	07/02/2018	1067
2005-06	Penalty	12/03/2015	11/04/2015	19/02/2018	1045
2006-07	Assessment	06/02/2015	08/03/2015	07/02/2018	1067
2006-07	Penalty	12/03/2015	11/04/2015	19/02/2018	1045

2007-08	Assessment	06/02/2015	08/03/2015	07/02/2018	1067
2007-08	Penalty	12/03/2015	11/04/2015	19/02/2018	1045
2008-09	Assessment	06/02/2015	08/03/2015	07/02/2018	1067
2008-09	Penalty	13/03/2015	12/04/2015	19/02/2018	1044
2009-10	Closure Notice	13/02/2015	15/03/2015	07/02/2018	1060
2009-10	Penalty	13/03/2015	12/04/2015	19/02/2018	1044
2010-11	Closure Notice	13/02/2015	15/03/2015	07/02/2018	1060
2010-11	Penalty	13/03/2015	12/04/2015	19/02/2018	1044

9. The appellant did not appeal any of the decisions within the 30 day time limit imposed under s 31(a) Taxes Management Act 1970.

10. In 2013, the appellant appointed Delta Ash, accountants to act as his agent. They arranged a meeting with HMRC on 11 December 2013. On the morning of the meeting Delta Ash telephoned HMRC to cancel the meeting.

11. On 28 May 2015 KBMD accountants, who had been appointed as the appellant's new agent, wrote to HMRC saying:

> "in order that we can agree/disagree with your assessments please let us have copies of [our client's] tax returns for the years ended 2004 – 2011. We will then be able to reconcile the assessments and penalty determinations and advise our client accordingly."

12. The documentation requested by KBMD was supplied by HMRC on 5 June 2015, with an explanation that no returns had been submitted for the years 2003-04 and 2004-05. HMRC pointed out that the appeal period against the assessments had expired in March 2015.

13. KBMD responded on 16 June 2015 conceding that the appellant's self-employment income had not been declared during the years in question, but raised enquiries with regard to HMRC's figures in respect of the assessments.

14. On 24 June 2015, HMRC replied saying that the main subject of the enquiry related to a surrender of three offshore chargeable event policies with Canada Life by the appellant and his wife. The surrender values had been charged equally between them. No documentation had been provided by the appellant's previous accountant to identify the source of capital paid into the policies, although it had been agreed by telephone on 17 September 2014 that the funds would have come from the appellant's undeclared income.

15. On 25 November 2015 Andrew Michael & Co accountants, who had been appointed as the new agent for the appellant, wrote to HMRC requesting copies of all relevant documentation.

16. On 5 February 2016 HMRC supplied relevant copy correspondence to the appellant's agent. The agent says however that they were not provided with copy assessments, and in the meantime had to obtain copies from the appellant's accountants.

17. On 7 February 2018 the agent submitted a late appeal and postponement application, saying that subject to postponement of £37,199.09 of the assessments, the appellant was content to pay the balance of £5,189.24 as shown in the schedule below.

Year of Assessment	Assessment	Postpone	Due
2003-04	6409.60	6409.60	Nil
2004-05	7029.50	7029.50	Nil
2005-06	6999.10	6999.10	Nil
2006-07	5570.90	4830.16	740.74
2007-08	4920.50	4486.00	434.50
2008-09	4577.36	4344.36	233
2009-10	5384.37	2680.17	2704.20
2010-11	1497.00	420.20	1076.80
Total	**42388.33**	**37199.09**	**5189.24**

18. On 13 February 2018 HMRC rejected the appellant's proposals and the appeal on the basis that it was out of time.

19. On 19 February 2018 the assessments, closure notices and penalties were appealed to the Tribunal Service, with a request that the Tribunal accept the late appeal.

The Relevant Legislation

Section 31A Taxes Management Act, 1970

Section 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.

The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

Overriding objective and parties' obligation to co-operate with the Tribunal.

2. (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.

Case Management Powers

5.(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedures.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside another direction.

(3) In particular and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction:

(a) extend or shorten the time for complying with any rule, practice direction or direction unless such extension of shortening would conflict with a provision of another enactment setting down a time limit.

Starting Appeal Proceedings

20.(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal:

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time, and

(b) unless the Tribunal gives such permission the Tribunal must not admit the appeal.

Civil Procedure Rules

The CPR's are not binding on the Tribunal but reference to the rules and how they have been amended, is necessary to understand the changes in the approach to applications for permission to bring a late appeal or relief from sanction.

The rule before the Jackson reforms came into force on 1 April 2013 set out the circumstances that the court must take into consideration on any such application, as follows:

Rule 3.9 of the CPRs in its original form reads as below:

> (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 -
>
> (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.

With effect from 1 April 2013 Rule 3.9 and factors (a) to (i) were removed by the Civil Procedure (Amendment) Rules 2013 with a material change to its substance.

CPR 3.9

> (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 of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.

Case law authorities

20. A number of recent decisions have clarified the approach to be applied in applications for permission to bring a late appeal and for relief from sanction under CPR r. 3.9.

21. The Court of Appeal heard three conjoined appeals: *Denton v TH White Ltd, Decadent Vapours Ltd v Bevan and Utilise TDS Ltd v Davies* [2014] EWCA Civ 906. The first was an appeal against the grant of relief. The second and third were appeals against its refusal.

22. The Court of Appeal was unanimous in allowing all three appeals and took the opportunity to clarify the approach that had been advanced in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 A three-stage approach is now required to applications for relief.

23. The Court took the opportunity to clarify the principles applicable to such applications as follows (at [24]):

> "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)]"."

24. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered".

25. The first stage is a departure from the test of 'triviality' referred to in *Mitchell*, which the Court concluded had caused difficulties in its application. The Court accepted that in many circumstances the most useful measure would be to determine whether the breach imperilled future hearing dates or otherwise disrupted the conduct of litigation generally. If the Court concludes that the breach was neither serious nor significant, relief will usually be granted and it is unnecessary to devote time on stages 2 and 3. At stage 1, only the breach that resulted in the sanction should be considered. Other breaches by the defaulting party fall to be considered at stage 3.

26. The Court of Appeal was divided on the issue of how much importance should be placed on (a) and (b) of Rule 3.9. The majority view was that these two factors are of particular importance and should be given particular weight.

27. The other factors that are relevant in stage 3 will vary from case to case. The promptness of the application is a relevant circumstance to be weighed in the balance. Other breaches by the defaulting party may be considered at this stage.

28. The majority expressed concern that some judges were adopting an unreasonable approach to CPR r. 3.9. In particular, they were approaching applications for relief on the basis that, if the breach was not trivial and there was no good reason for it, the application must fail. This had led to decisions which were manifestly unjust and disproportionate.

29. The court also noted that litigation cannot be conducted efficiently and at proportionate cost without cooperation between the parties and their lawyers. This applies to litigants in person as much as to represented parties. CPR r. 1.3 specifically requires the parties to assist the court in furthering the overriding objective.

30. With this in mind, the court expressed the view that parties should not act opportunistically or unreasonably in opposing applications for relief. The court will now expect parties to agree applications for relief where (a) the breach is neither serious nor significant, (b) there is a good reason for the breach, or (c) it is otherwise obvious that relief should be granted. The court will also expect parties to agree reasonable extensions of time of up to 28 days under the new CPR 3.8(4), which states:

> "… unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date."

31. The Court of Appeal was critical of the 'satellite litigation' and uncooperative attitude that the *Mitchell* decision had fostered. In its view, a contested application for relief should be very much an exceptional case. This is because (a) compliance should be the norm, and (b) parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even when a breach has occurred.

32. The Supreme Court in *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1WLR 2945 implicitly endorsed the approach set out in *Denton*. The case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FtT.

33. In *Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (TCC) the Upper Tribunal also endorsed the approach in *Denton* applying the three stage approach [at 43 to 45]

> "43. ……Whether considering an application which is made directly under rule 3.9 (or under the FtT Rules, which the Supreme Court in BPP clearly considered analogous) or an application to notify an appeal to the FtT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions - especially where the sanction in question is the striking out of an appeal (or, as in BPP, the barring of a party from further participation in it). 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. 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. When considering "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."

34. 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.

35. The Upper Tribunal in *Romasave (Property Services) Limited* [2015] UKUT 254 (TCC) stated:

> "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."

Appellant's case

36. The appellant's notice of appeal to the Tribunal, as stated by his agent, are:

> "Mr and Mrs Murphy invested funds in life insurance with Canada Life in May 2003.
>
> HMRC issued assessments ... on those funds where HMRC believe the funds came from trading income.
>
> Most of the monies invested in Canada Life were non-taxable savings, made from their wedding, children's money, christenings, birthdays, name-days and cash gifts received from Mr and Mrs Murphy's family.
>
> We have previously asked HMRC to supply us with the assessments raised but we have only received them in January 2018 and we have appealed against those assessments on the 7th February 2018.
>
> We have now received a letter from HMRC dated 13th February 2018 and this is attached for your attention together with our appeal letter dated 7th February 2018."

37. At the hearing Mr Michael appearing on behalf of the appellant said that delays in bringing the appeal were exacerbated by HMRC's failure to provide details of the assessments and penalties when requested. The appellant's case is that his agent had

requested copies of the assessments, but only received them in January 2018, and timeously appealed those assessments in February 2018.

HMRC's case

38. The appellant has not appealed the assessments or penalties within the necessary 30 day time limit under s 31A TMA 1970. The allowing of an extension of time should be the exception rather than the norm.

39. The appellant's case appears to be that he was under the misimpression that his earlier agent had raised an appeal on his behalf and that his agent had raised the appeal with the Tribunal without undue delay upon realising that this was not the case. HMRC assert that this explanation is not sufficient to constitute a good reason for the delay. The appellant has not provided any explanation of the circumstances which might have supported his alleged misunderstanding that an appeal had been lodged and the time period during which the alleged misunderstanding covered.

40. HMRC assert that the appellant, either directly or through his representative, was fully aware of the absence of any appeal:

- On 5 June 2015 HMRC wrote to KBMD, which explained the process for making a late appeal and referred them to relevant guidance at ART G 2240.
- On 14 September 2015 following a request from KBMD for a meeting, HMRC wrote to them to confirm HMRC's view that the matter was closed. This letter again made reference to the late appeal process and guidance ART G 2240.
- On 29 January 2016 Andrew Michael & Co, the appellant's current representatives, were informed via telephone of the action needed to make a late appeal and were provided with relevant guidance.
- On 5 February 2016 copies of all relevant correspondence were forwarded to Andrew Michael & Co. This included the letters of 5 June 2015 and 14 September 2015 which again explained the late appeals process and also stated specifically "Please note that this enquiry was closed and settled in March 2015".
- On 6 November 2017 an application for alternative dispute resolution was made. ADR wrote to the appellant on 30 November 2017 to say that there were no open appeals to be determined.

It is therefore not credible that the appellant was unaware no appeal had been raised for the duration of the delay. It had been perfectly clear throughout the delay period that no appeal was in place.

41. It is over three years since the original decisions were made and over seven years and eight months since the initial check into the appellant's tax position in 2011. The earliest year assessed ended more than fourteen years ago.

42. The HMRC officer responsible for the case and who issued the decisions which the appellant is now attempting to appeal is no longer employed by HMRC and has not worked for HMRC since November 2017.

43. There is a public interest in the finality of decisions. It would be prejudicial to the general body of taxpayers for appeals to be raised in ordinately outside statutory time limits, which would also be disruptive of the appeals procedure.

44. The appellant's representatives have failed to respond to HMRC's request for information on multiple occasions, which ultimately led to HMRC's decision to close the enquiry and raise the assessments. Whilst the appellant alleges that funds have been derived from a non-taxable source, he has produced no evidence to support this.

45. HMRC submit that the burden of proof in this matter lies with the appellant to demonstrate why the Tribunal should exercise its discretion to permit relief from sanctions or to admit an appeal that is brought late. To satisfy this, the Appellant must show good cause for the delay in lodging his appeal.

Conclusion

46. In determining applications for permission to bring a late appeal, the Tribunal must have regard to the length of the delay, the reason for the default and the circumstances of the case.

Length of delay

47. The discovery assessments were raised on 6 February 2015. The penalties were issued on 12 and 13 March 2015. The appeal to the Tribunal was brought on 19 February 2018, almost three years out of time. Clearly the delay was significant and serious. The enquiry into the appellant's self-assessment returns had been ongoing since August 2011.

Reason for the default

48. The appellant has not offered any reasonable explanation for delivering incorrect self-assessment returns for the period 2005-06 to 2010-11 and delivering no returns for years 2003-04 and 2004-05.

49. The fact that HMRC may have supplied only part of the documentation requested by the appellant's current agent in material terms is not of any significance for the reasons explained by HMRC. The documentation was requested several years after the decision. The appellant or his previous agents would have had copies in any event.

The circumstances of the case

50. The Tribunal cannot consider the merits of the case in any detail. However, the appellant's explanation as to the source of monies paid into his life policies is not supported by documentary evidence, e.g. copy bank statements or statements made by third parties. There is no evidence to substantiate his assertion that the monies were not derived from the appellant's undeclared income. In fact his agents KBMD, in June 2015, agreed that.

51. The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration is a relevant consideration. There is compelling evidence that to allow the application would be prejudicial to the interests of good administration.

52. HMRC will be prejudiced if the application were to be allowed, particularly in circumstances where no convincing explanation has been given for the delay and the merits of the appeal are so tenuous. Time and costs will be incurred in litigating a case, which in our view is too late to appeal. A three year delay following expiration of the time within which an appeal should be brought is not a trivial default. There is no good reason to allow an application to bring a late appeal. It would be manifestly unjust to do so.

53. For the reasons set out above, the application for permission to bring a late appeal is refused.

54. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2019