[2020] UKFTT 309 (TC)

TC07791

INCOME TAX – Permission to appeal out of time -penalties for failure to make returns - Section 93 of the Taxes Management Act 1970 and Schedule 55 of the Finance Act 2009

FIRST-TIER TRIBUNAL **Appeal number: TC/2020/00980**

TAX CHAMBER

BETWEEN

LEE THOMPSON **Appellant**

-and-

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 22 July 2020 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 10 February 2020 (with enclosures), HMRC's Statement of Case (with enclosures) dated 22 May 2020, the Document Bundle of 100 pages prepared by HMRC and the Legislation and Authorities Bundle of 196 pages also prepared by HMRC

DECISION

INTRODUCTION

1. The Appellant is applying for permission to appeal out of time in relation to penalties that HMRC have imposed under Section 93 Taxes Management Act 1970 ("TMA") and Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit annual self-assessment returns on time for the tax years 2009-10 to 2013-14 inclusive.

2. Mr Thompson failed to submit tax returns for earlier years also. HMRC raised Revenue Determinations for the years 2007-8, 2008-9 and 2009-10. The Determinations stand unless displaced by a subsequent tax return.

3. During the years in question Mr Thompson was resident in Ireland, having left the UK in 2002. He continued to own rental properties in the UK and so was a "Non-resident Landlord". He should therefore have continued to submit UK tax returns and pay tax on his rental profits.

4. Mr Thompson does not dispute the amount of tax due. He has paid this. His appeal relates solely to the penalties for late submission of the returns.

5. The penalties that have been charged can be summarised as follows:

   (1) Late filing penalties totalling £200 under section 93 TMA for the tax year 2009-10

   (2) Initial late filing penalties under paragraph 3 of Schedule 55 of £100 for each of the tax years 2010-11 to 2013-14 inclusive ("the later years")

   (3) "six month" penalties under paragraph 5 of Schedule 55 of £300 for each of the later tax years

   (4) "twelve month" penalties under paragraph 6 of Schedule 55 of £300 for each of the later tax years. The penalties charged are of the default amount and there is no suggestion that the Appellant deliberately withheld information.

   (5) "Daily" penalties totalling £900 under paragraph 4 of Schedule 55 for each of the later tax years.

   (6) The total amount of penalties stated in the Notice of appeal includes 30-Day, six months and 12 months late payment penalties, each for £47, for the tax year 2013-14 ("the late payment penalties").

   (7) The total amount of the penalties is £6,741.

6. The appellant's reasons for appealing against the penalties out of time are similar to his grounds for appealing against the penalties. They are set out in his Notice of Appeal dated 10 February 2020.

7. The reasons for a late appeal can be summarised as follows:

   (1) Mr Thompson was not aware that he had to submit UK tax returns in relation to his UK properties on the basis there was no liability due as he had rental losses along with the personal allowances. This is essentially the same as a further ground that he "…was of the understanding that as he had a net rental loss, he did not need to file a UK tax return".

   (2) Mr Thompson's UK tax affairs were fully up to date when he left the UK in 2002.

   (3) His previous accountant did not advise him to file a UK tax return.

(4) He only became aware that he should file UK tax returns when he contacted his new accountants, HLB Ryan, on 24 January 2016.

(5) Mr Thompson acted reasonably and in good faith given his ignorance as to the requirements under the UK tax system.

(6) He will be outside the time limit for claiming a credit for the UK taxes against his Irish tax liability.

8. In the substantive grounds of appeal against the penalties, the Notice of Appeal states "He assumed that as he had returned to Ireland, his country of birth, that he simply had to file details on his worldwide income, here [in Ireland] which he did. When he realised there was a requirement to also file UK tax returns, he contacted [HLB Ryan] and the position was rectified immediately". It goes on to object to the amount of the penalties as being disproportionate.

9. There is an inconsistency between the substantive grounds and the reasons for lateness. In the former, Mr Thompson states that he did not think he had any obligation to submit UK tax returns as he was submitting tax returns in Ireland. In the latter, he states that he did not think he had to submit UK tax returns because he had rental losses/available allowances which meant he did not have any tax liability. This implies that he recognised he would need to submit returns if he had a liability.

10. The appellant's appeal to HMRC under section 31A TMA 1970 was made outside the statutory deadline. HMRC have not given consent under s49(2)(a) of TMA 1970 for the late appeal. The appellant now applies to the Tribunal for permission to proceed with the late appeal under section 49(2)(b) TMA. HMRC object to the application.

11. The earliest penalty notice date was 15 February 2011 when notice of the First Late Filling Penalty for 2009-10 was issued. The second Late Filing Penalty notice was issued on 2 August 2011.

12. Further penalty notices were issued as follows (being the initial late payment penalty, the six month penalty, the daily penalties and the twelve month penalty respectively for each of the later years:

    (1) (2010-11): 14 February 2012, 7 August 2012, 7 August 2012 and 19 February 2013.

    (2) (2011-12): 12 February 2013, 14 August 2013, 14 August 2013 and 25 February 2014.

    (3) (2012-13): 18 February 2014, 18 August 2014, 18 August 2014 and 24 February 2015.

    (4) 2013-14: 18 February 2015, 14 August 2015, 14 August 2015 and 23 February 2016.

13. HMRC also issued notices in respect of the late payment penalties on 6 December 2016.

14. The appellant had 30 days from the issue of each penalty notice to appeal against the penalty to HMRC.

15. The date of the appeal to HMRC in respect of all the late filing penalties was 11 March 2016. The appeals were therefore between 211 and 1,852 days late; a minimum of seven months late and a maximum of over five years.

16. The notices in respect of the late payment penalties were issued on 6 December 2016, after the accountants had appealed the late filing penalties. Although he amount of the

late filing penalties was included in the total penalties in the Notice of Appeal, it does not appear, from the correspondence in the Document Bundle that any appeal was made to HMRC in respect of them. I will treat the Notice of Appeal as constituting an appeal to HMRC and an application for permission to appeal against these penalties out of time. This would make the appeal more than three years late.

17. It is also not clear what happened about the appeal against the 12 month late filing penalty for 2013-14 ('the in-time penalty') which was the only penalty which was appealed to HMRC within the time limit. This was acknowledged in HMRC's letter of 7 April 2016. The remaining correspondence in the Document Bundle relates to HMRC's refusal to accept the late appeals in relation to all the other penalty notices.

18. Two further letters of 7 April 2016 informed the appellant that he was out of time to appeal the various penalties. These were standard form letters which referred to the tax years generically and made no separate mention of the in-time penalty. The letter did not offer a review by HMRC, but stated that the appellant could appeal to the Tribunal and if he wished to do so, must so so by 7 May 2016.

19. The Notice of Appeal states that there was a review and Mr Thompson received a review conclusion letter. This was not attached to the Notice of Appeal (as it should have been) and was not otherwise included in the Document Bundle. HLB Ryan wrote to HMRC on 20 July 2016 in response to the 7 April letters enclosing schedules of Mr Thompson's rental income and UK tax liabilities for the years in question and stating that Mr Thompson did not think he had to file UK tax returns because he was under the impression that he had no liability as he had made rental losses. It would appear that HMRC treated this as a request for a review, even though it was out of time and responded on 16 September 2016. Although this letter was not in the Bundle, HMRC's letter of 17 August 2017 said that their letter of 16 September 2016 reiterated that it was too late for them to accept the appeals against the penalties and that Mr Thompson could appeal to the Tribunal to review the decision. If he wished to do so, he must do so by 16 October 2016. The August 2017 letter said that if he did want to appeal to the Tribunal he would need to explain why he had not appealed within the time limit.

20. HMRC wrote again to HLB Ryan in response to their letter (not in the Bundle) referring to the letters of 7 April and 16 September 2016 and indicating that the position had not changed.

21. In their letters, HMRC indicate that they will only accept a late appeal if the taxpayer has a "reasonable excuse" for not appealing in time and if the taxpayer in fact appealed within a reasonable time of the excuse ceasing. These are conditions (B) and (C) set out in section 49(5) and (6) TMA. The existence of a "reasonable excuse" is also the test for whether an in time appeal against a penalty should be allowed. HMRC did not consider that the information provided by the appellant or his accountant evidenced a reasonable excuse for the delay in making an appeal. As noted above, Mr Thompson's grounds for appealing late are substantially similar to his grounds of appeal against the penalties, essentially, that he did not know that returns were required. It may be inferred that HMRC would have refused the appeal against the in time penalty on the basis that Mr Thompson did not have a reasonable excuse for failing to submit the returns. This is confirmed in HMRC's Statement of Case which included submissions on the substantive appeal in case I should decide to allow Mr Thompson to make a late appeal. This states that HMRC do not regard Mr Thompson as having a reasonable excuse for failing to submit his tax returns on time.

22. I will therefore treat HMRC as having refused to allow Mr Thompson's appeal against the in-time penalty. This is confirmed by the Self Assessment Statement which was attached to HMRC's letter of 7 April 2016 which showed the in-time penalty as still outstanding. The 7 April letter made it clear that the time limit for an appeal to the Tribunal was 30 days from the date of the letter. Even if the September letter is regarded as the relevant refusal, the appellant should have appealed to the Tribunal by 16 October 2016.

23. The Notice of Appeal to the Tribunal was dated 10 February 2020. I will treat this as including an appeal to the Tribunal against the in-time penalty.

24. The appellant's appeals to the Tribunal were more than three years late. By 16 September 2016 it was clear that HMRC would not admit the appeals and HMRC informed HLB Ryan that if they wanted to pursue the matter they needed to appeal to the Tribunal by 16 October 2016. No explanation has been given for the further delay of three years and three months before the submission of the Notice of Appeal. Mr Thompson can now only appeal to the Tribunal if I give permission under section 49G(3) TMA.

FINDINGS OF FACT

25. The appeals against the penalty notices, up to and including the six month and daily penalties for 2013-14 were between seven months and more than five years late. On the basis that the in-time penalty was appealed in time to HMRC, but the appeal was refused by HMRC on 16 September 2016 at the latest, the appeal to the Tribunal against that penalty was more than three years and three months late.

26. No tax returns were submitted for tax years up to 2008-9 and HMRC made Determinations instead. HMRC's computer records show that the tax returns for the years ended 5 April 2010, 2011 and 2012 were submitted on paper on 27 December 2016. The returns for the tax years 2012-13 and 2013-14 were filed electronically on 5 December 2016. The returns were accordingly, between 675 days and 2,250 days late.

27. The first question is whether the notices to file and penalty notices were properly sent to the appellant. HMRC do not keep copies of the actual notices sent to taxpayers, but their computer records show that notices to file a tax return and penalty notices were sent to the appellant at the address on record for him. I was provided with specimen copies of the various notices. The computer records also show that numerous penalty reminders were also sent.

28. HMRC submit that the provisions of section 115 TMA concerning service of the notices were complied with, and that the notices are deemed to have been delivered by virtue of section 7 Interpretation Act 1978. The provisions are:

> **"115.— Delivery and service of documents.**
> (1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence:
> (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person [by HMRC] may be so served addressed to that person—
> (a) at his usual or last known place of residence, or his place of business or employment, or…"

> **"7. References to service by post.**
> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then,

> unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

29. The address which HMRC had on record for Mr Thompson, between August 2005 and November 2015 was in Reginald Street, Dublin. From 25 November 2015, the address shown was in O'Curry Road Dublin. All the correspondence up to that point had been sent to the Reginald Street address. None of the correspondence had been returned as not known at that address.

30. HLB Ryan's letter to HMRC of 23 March 2017 states, without any particular context, that Mr Thompson's "previous postal address" was Reginald Street and that this changed to a flat in Castleforbes, Dublin in 2008. I do not know when in 2008 the change took place.

31. There is, however, no suggestion, from Mr Thompson or his accountants that he did not receive the various notices.

32. HMRC's records note a telephone call from Mr Thompson on 4 September 2015 in which he called about the amount outstanding on self-assessment and penalties from 04/05. This indicates that he was receiving correspondence from HMRC.

33. For the purposes of this application to appeal out of time against the penalties, I do not, strictly, have to decide whether the notices were correctly served, but whether Mr Thompson received at least some of them so that he was aware that he needed to submit returns and that penalties were accruing.

34. Taking all the above into account, I find that on the balance of probabilities, Mr Thompson did receive some or all of the notices sent to him by HMRC so that he was aware of the need to file tax returns and the penalties.

35. HLB Ryan's letter of 20 July 2016 sets out their computations of the net rent on Mr Thompson's UK properties and the UK tax due.

36. The gross rents in the years in question varied between approximately £20,000 and £26,000 a year. For the tax years 2003-4 to 2008-9 inclusive, the expenses combined with losses brought forward meant that there was either a rental loss or a small profit which was covered by Mr Thompson's personal allowance. Accordingly there was no UK liability.

37. For the tax years from 2009-10 to 2013-14 Mr Thompson made higher rental profits as a result of a reduction in mortgage rates and he did have modest UK tax liabilities. The figures were as follows:

    (1) 2009-10: Taxable income-£6,008. Tax liability £1,201.60.

    (2) 2010-11: Taxable income-£2,770. Tax liability-£554.

    (3) 2011-12: Taxable income-£5,698. Tax liability-£1,139.56.

    (4) 2012-13: Taxable income-£1,169. Tax liability-£233.84.

    (5) 2013-14: Taxable income-£4,713. Tax liability-£942.60.

DISCUSSION

38. I have concluded that the tax returns for 2009-10 and the later years were submitted in December 2016 as set out above and were accordingly between 675 days and 2250 days

late. I have also concluded that some or all of the notices to file and the penalty notices were received.

39. I have found that the appeals to HMRC against the late filing penalties (except for the in-time penalty) were late by between 211 and 1,852 days. I have further found that Mr Thompson's appeal to the Tribunal (to the extent it is relevant) was more than three years and three months late.

40. Accordingly, the appellant may not proceed with the appeals to HMRC or the Tribunal (as the case may be) unless I give permission for the appeals to be heard out of time under section 49(3)(a) TMA or 49G(3) TMA as applicable.

41. The Upper Tribunal has recently considered the approach to granting permission to bring late appeals in the case of *William Martland v The Commissioners for HMRC* [2018] UKUT 0178 (TCC) ("*Martland*").

42. The Upper Tribunal stated, at paragraph 29 that:

> "...the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission."

43. The Upper Tribunal went on to confirm the three-stage test as set out in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 at paragraph 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."

44. I will consider first the length of the delay.

45. In the Upper Tribunal case of *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 (TCC) ("*Romasave*"), the Tribunal stated, at paragraph 96 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."

46. The delays in appealing the penalty notices to HMRC varied from seven months to over five years. The further delay from HMRC's refusal to accept the appeals to the appeal to the Tribunal was over three years.

47. These delays are clearly serious and significant.

48. I now turn to the reasons for the delays.

49. No reasons have been given for the delay in appealing to the Tribunal.

50. In relation to the appeals to HMRC, as noted, the reasons for the late appeal set out in the Notice of Appeal are similar to the substantive grounds of appeal against the penalties.

51. The substantive grounds of appeal state that the appellant assumed that on his return to Ireland he had only to submit tax returns in Ireland and he did not realise that he had to file returns in the UK also. For the reasons set out below. I do not accept this.

52. His grounds for making a late appeal seem to presuppose that there was an obligation in general to submit UK tax returns but that he thought that he did not need to do so because he had rental losses as well as personal allowances and so had no tax liability.

53. HMRC's records show that Mr Thompson had a number of contacts with HMRC both before and during the years in question. The Self Assessment Statement attached to the letter to HLB Ryan of 7 April 2016 shows that in March and September 2006 HMRC issued first and second late filing penalties to Mr Thompson for 2004-5. In 2007, two further penalty notices were issued in relation to the tax year 2005-6. A further penalty was issued in March 2008. It is reasonable to assume that these were sent to the address on record, which was the Reginald Street address from August 2005 onwards. HMRC had other addresses for Mr Thompson from 2002 when he returned to Ireland which suggests he was in contact with HMRC as he had updated his address on several occasions.

54. Mr Thompson did not inform HMRC of the "change in postal address" to Castleforbes in 2008 but as set out above, I have concluded that he continued to receive correspondence from HMRC.

55. In any event, four, and possibly five, penalty notices were sent to Mr Thompson before the change of postal address. There is no suggestion he did not receive them. This should have alerted him to the fact that he still had UK tax obligations.

56. This is supported by HMRC's notes of contact which record that on 12 October 2006 Mr Thompson telephoned HMRC re "penalties etc." and was advised to submit his tax return for 2004-5 before appealing.

57. On 24 January 2012, HMRC telephoned Mr Thompson. Mr Thompson confirmed that he still received income in the UK and the HMRC officer "gave warnings of determinations and that they would be raised today but amended once returns are in."

58. HMRC telephoned Mr Thompson again on 15 September 2014 when he said it was not convenient to speak and that he would call back. He did not.

59. There are two records for 4 September 2015. It is not clear whether these were separate phone calls. Essentially Mr Thompson called about the amount of tax outstanding and the penalties from 2004-5. He said he wanted a breakdown. One record states that he wanted to appeal as he did not think they were due. The other states that he had called to see if [the income] needed to be declared in the UK. It seems the person who spoke to him consulted a technical colleague but Mr Thompson rang off whilst he was on hold. On 7 September 2015 a statement was sent "as requested" and on 9 September 2015 HMRC tried to call Mr Thompson and left a message for him to call back.

60. Mr Thompson next contacted HMRC on 19 February 2016 "re penalties" and was told he would need to submit tax returns for them to be reviewed. A further note for 19 February 2016 (possibly of a different call) records that Mr Thompson called HMRC and was told that he needed to speak to "technical" as he [Mr Thompson] did not think that he needed to pay tax as he declared it on his Irish returns. It is noteworthy that this was

after he had consulted HLB Ryan and had been advised that he must submit UK tax returns. HLB Ryan, who prepared the Notice of Appeal, state in the grounds for the late appeal application "It was only when our client contacted us on 24th January 2016, that he became aware of this [the need to file UK tax returns]".

61. I conclude that Mr Thompson was receiving correspondence from HMRC from 2006 onwards stating he owed late filing penalties. HMRC's records show that notices to file returns and penalty notices were properly sent to Mr Thompson and he has not denied receiving them. In addition, he had a number of contacts with HMRC by telephone when he was told he needed to submit returns. It was clear he was aware of the penalties as they were the reason for his telephone calls.

62. The call in September 2015 appears to be the first time he queried whether the tax was due and he failed to follow this up for five months despite being sent the statements he had asked for and being asked to call HMRC back.

63. I conclude that Mr Thompson was aware that he needed to file UK tax returns and that penalties for failing to do so were accruing. In the light of the above, I do not accept that he thought he did not have to submit returns as he was resident in Ireland.

64. Mr Thompson also states that thought he did not have to submit returns because he had no liability. HLB Ryan's letter of 20 July 2016 states:

> "Our client did not file his UK tax returns as he was under the impression that he had a net rental loss"

65. As set out in paragraph 36 above, there was in fact no liability for the tax years up to 2008-9 as a result of losses and/or the availability of the personal allowance. This did not, of course, mean that Mr Thompson did not need to submit a tax return.

66. As set out in paragraph 37 above, from 2009-10 Mr Thompson did have taxable income. This largely arose from a decrease in mortgage interest rates which significantly reduced the expenses which could be set off against the rent and increased the profits.

67. It is difficult to understand how Mr Thompson could be "under the impression" that he had a net rental loss for the later tax years. It is stated that he filed his tax returns in Ireland and paid taxes on his worldwide income. It appears that he paid Irish tax on the rental profits. The telephone calls with HMRC record him telling them that he declared the income in Ireland. In 2012 Mr Thompson confirmed to HMRC that he was still receiving income from his UK properties. A further ground for allowing the late appeal to proceed is that he is now out of time to claim double tax relief for the UK taxes in Ireland. Mr Thompson had an accountant. His accountant's failure to advise him to file a UK tax return is a further ground for the application.

68. I conclude that Mr Thompson knew that he had net rental profits for the relevant years.

69. Finally, I must conduct the balancing exercise referred to in *Martland*, taking account of "all the circumstances of the case".

70. In *Martland* at paragraphs 45 and 46, the Tribunal gives guidance on how the balancing exercise should be carried out:

> "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. …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."

71. HMRC emphasised the need for finality in dealing with a taxpayer's affairs and that after delays of the length in this case, they were entitled to consider the matter closed.

72. In *Martland*, the Upper Tribunal said "the purpose of the time limit is to bring finality, and that is a matter of public interest, both from the point of view of the taxpayer in question and that of the wider body of taxpayers."

73. HMRC submit that they should be entitled to rely on the time limits set out in legislation for the purpose of allocating resource in administering the tax system and should not normally be required to defend appeals after an excessive gap between the expiration of the time limit and the appeal. Such appeals are normally more resource intensive to defend and otherwise create issues in obtaining appropriate evidence in meeting HMRC's burden to prove that penalties were correctly charged to the Appellant.

74. HMRC further submit that allowing a late appeal in this instance is contrary to the policy objectives of the legislation which set the deadline.

75. If the application is granted, HMRC would therefore be prejudiced as they are entitled to expect finality after this length of time, it would set a bad precedent for other taxpayers and it would consume excessive resources. In relation to the last point, I note that HMRC have already prepared a Statement of Case on the substantive merits, which reduces the weight of that prejudice.

76. If the application is not granted, Mr Thompson will be prejudiced in that he will be unable to challenge the late payment penalties and will incur the cost of paying them. He has paid the actual tax liabilities and is out of time to claim double tax relief for some years so has suffered double taxation.

77. He considers that the amount of the penalties is exorbitant when compared with the amount of tax due (which for some years is no tax).

78. This issue of proportionality was considered by the Upper Tribunal in *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC). The context of that case was that the Upper Tribunal considered whether the fact that significant penalties had been levied for the late filing of returns where no tax was due was a relevant circumstance that HMRC should have taken into account when considering whether there were "special circumstances" which justified a reduction in the penalties. The Upper Tribunal concluded that the penalty regime set out in Schedule 55 establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear. Accordingly, the Upper Tribunal determined that the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate.

79. Although the size of the penalties in proportion to the tax due is part of "all the circumstances" I must take into account, the penalties are not disproportionate for the reasons set out in *Barry Edwards* and accordingly, this factor does not carry a great deal of weight.

80. Nor do I attach much weight to the fact that the previous accountant did not advise the appellant to file UK tax returns. It is the individual's responsibility to ensure he complies with his tax obligations.

81. I have concluded that the appellant knew he needed to submit UK tax returns and that he was aware that, for some of the years in question, there was a net rental profit. I consider that he was aware that he had UK tax liabilities. These are significant factors.

82. The length of the delay in making the appeals to HMRC and the further lengthy delay in appealing to the Tribunal, even after a professional representative was involved, are also important circumstances.

83. *Martland* warns against a detailed consideration of the merits of the substantive case in determining an application for permission to appeal out of time. As I have noted, the appellant's grounds for the substantive appeal are very similar to the grounds for allowing the appeal to proceed outside the time limit. Without investigating the substantive merits in any detail, I conclude, from my consideration of the grounds of the application, that the appellant's substantive case is, on the face of it, quite weak.

84. Having taken all the circumstances, including the above matters, into account and having conducted the balancing exercise required by *Martland*, I have decided that it is not appropriate in the present case to grant permission to appeal to HMRC or to the Tribunal outside the permitted time limits.

CONCLUSION

85. For the reasons set out above, I have decided not to grant permission to appeal to HMRC or to the Tribunal out of time.

86. Accordingly, I dismiss the application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

87. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE

RELEASE DATE: 29 JULY 2020