[2022] UKFTT 00012 (TC)

TC 08365

PROCEDURE – application for permission for late appeal against the HMRC decision to refuse to consider an appeal against a discovery assessment made under section 29 Taxes Management Act 1970 for chargeability to the High Income Child Benefit Charge – Martland followed and applied – permission granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/01490

BETWEEN

DARREN JORDAN **Appellant**

-and-

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

TRIBUNAL: JUDGE FIONAGH GREEN

The hearing took place on 26 November 2021. With the consent of the parties, the form of the hearing was A (audio)/V (video). Darren Jordan, Litigant in person and Maria Spading officer of HMRC attended remotely and the remote platform was the Tribunal video platform. A face to face hearing was not held because of the covid precautions and it was decided that all issues could be addressed and that a remote hearing was appropriate. The documents to which I was referred are contained in a bundle of 205 pages.

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.

Darren Jordan, the Appellant

Maria Spalding litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION on PRELIMINARY ISSUE

INTRODUCTION

1. Darren Jordan seeks permission to make a late appeal against HMRC's refusal to consider an appeal against a discovery assessment made under section 29 Taxes Management Act 1970 for chargeability to the High Income Child Benefit Charge (HICBC).

2. The Tribunal considered the facts in the light of the relevant case law, in particular Denton v TH White Limited [2014] EWCA Civ 906 ('Denton'), Martland v HMRC [2018] UKUT 0178 (TCC) ('Martland') and Katib v HMRC [2019] UKUT 189 (TCC) ('Katib' For the reasons set out in the main body of this decision, the Tribunal allows the Application.

The Evidence

3. HMRC provided the Tribunal with a hearing bundle of 205 pages which included

(1) The Notice of Appeal including the Application

(2) Correspondence between the parties including the assessment notice and self assessment notes

4. The parties were not directed to provide witness statements and none were provided.

5. Mr Jordan provided oral evidence, was cross-examined by Ms Spalding, answered questions from the Tribunal and gave further responses on re-examination. The Tribunal found Mr Jordan to be a credible witness.

Findings of Fact

6. These findings of fact are made on the basis of the evidence summarised above.

1. On 20 November 2018 HMRC issued a discovery assessment to Mr Jordan under section 29 Taxes Management Act 1970 for chargeability to HICB for the tax year 2016 – 2017 following a voluntary disclosure made by Mr Jordan. The assessment notice advised Mr Jordan that he had 30 days from the date of notification in which to disagree and that he could ask for a review by an HMRC officer not previously involved in the case or to ask an independent Tribunal to decide the matter. The time for so doing was by 20 December 2018. The assessment was sent to the correct address and I find that HMRC fulfilled the responsibilities under section 115 Taxes Management Act 1970 and it was deemed received in accordance with section 7 of the Interpretation Act 1978.

2. Mr Jordan was in contact with HMRC as confirmed by the self assessment notes. On 4 December 2018 Mr Jordan had telephoned HMRC in respect of the HICBC and was given a different telephone number to call. Mr Jordan also asked for advice about a

possible time to pay agreement. Mr Jordan again telephoned HMRC on 19 January 2019 explaining that he was new to self assessment and asking for assistance.

3. Mr Jordan was in further contact with HMRC by telephone on 16 February 2019 regarding his tax liabilities. HMRC issued a further letter on 28 February 2019 regarding self-assessment statements. On 14 April 2019 again by telephone, Mr Jordan advised HMRC that he wanted to appeal 'charges' and discussed the appeals process. On 15 August 2019 Mr Jordan again telephoned HMRC regarding his appeal and was provided with the CHB helpline and telephone number.

4. Mr Jordan submitted an appeal to HMRC by an undated letter received on 27 August 2019, 8 months and 8 days late.

5. The self assessment notes provided further information that Mr Jordan was again in contact with HMRC on 9 September 2019 'chasing appeal' and on 2 October 2019 the undated letter from Mr Jordan was received in the correct office of HMRC. Mr Jordan referred to his appeal and that he felt he had been unfairly treated as not previously notified about HICBC.

6. HMRC refused the appeal by letter on 8 November 2019 on the basis that it was significantly late. HMRC apologised for the delay in the response as the letter from Mr Jordan was redirected as it was received by the incorrect department. The letter explained to Mr Jordan that HMRC may accept a late appeal if there was a reasonable excuse for not appealing within the time limit and if the appeal had been made as soon as he could after the excuse ended but that HMRC was not satisfied that this was the case. The letter explained that HMRC had issued Mr Jordan with two educational letters dated 16 August and 8 October 2018. I find that Mr Jordan had made the voluntary disclosure for the amount of HICBC due for 2016 – 2017 on 7 November 2018 following receipt of the letters.

7. The letter of 8 November 2019 detailed the right of discussion with HMRC, or to ask for an independent review and/or to appeal to the Tribunal. The letter provided details of how to find out further information about appeals and reviews.

8. Mr Jordan lodged Notice of Appeal with the Tribunal on 6 March 2020, 120 days late. Mr Jordan, in his appeal notice, said that the original letter was not received and that he had to call HMRC for another copy and that he had also been asked to provide further information. Mr Jordan in his evidence to the Tribunal said that there were no difficulties with receipt of post and no contact with Royal Mail. I find as referred to above that the assessment was issued on 20 November 2018 and that HMRC fulfilled the responsibilities under section 115 Taxes Management Act 1970 and it was deemed received in accordance with section 7 of the Interpretation Act 1978.

9. Mr Jordan, in his Appeal Notice, said that he was not aware of any communication regarding possible tax discrepancies and that the family started to receive Child Benefit in 2005 and he was then earning a low wage in 2013 when the law regarding HICBC changed. Mr Jordan had been in contact with HMRC and accepted what he was told that he would have to pay and he confirmed this contact in his evidence to the Tribunal.

10. Mr Jordan, again by undated letter, received by the Tribunal on 11 February 2020, provided information that he was not aware of the appeals process and that he had made it clear to HMRC on every telephone conversation that he was not happy with the system but was advised that there was nothing that he could do to change the outcome. Mr Jordan said he did not earn over £50,000 until after 2012 and that the Child Benefit was in his partner's name and that he had not been notified of any changes. In his evidence to the Tribunal Mr Jordan said that he did not see any advice about his appeal rights and that he thought it best to speak to people. Mr Jordan felt pressured to pay his debt to HMRC and that it felt as if he was in the wrong. Mr Jordan had only realised that he could appeal by speaking to a colleague at work. Mr Jordan does not have any health difficulties but there had been redundancies at work and he felt pressure in respect of financial matters.

11. I find that the assessment was issued on 20 November 2018 and that Mr Jordan should then have been aware of his appeal rights.

12. Mr Jordan first informed HMRC of his dissatisfaction on 4 December 2018 and again on 19 January 2019 with the intention to appeal being clarified by him on 14 April 2019. Mr Jordan was 114 days late in notifying his appeal to HMRC. The undated letter confirming his appeal was not received by HMRC until 8 months and 8 days late. The telephone calls and evidence from Mr Jordan however did provide a reasonable explanation for the delay.

13. The Notice of Appeal to the Tribunal was 120 days late. The letter from HMRC of 8 November 2019 had detailed his appeal rights. Mr Jordan had understood that he had appealed to HMRC and had been seeking advice about the appeal process. It was not until he was advised by a colleague that he should appeal further that he did so.

The Tribunal Jurisdiction

7. An appellant is required under Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to bring an appeal within the time limits prescribed under section 31 Taxes Management Act 1970. The appeal must be made within 30 days of HMRC's decision.

8. The onus of proof is on Mr Jordan to demonstrate why the Tribunal should exercise its discretion and permit a late appeal.

The Legislation and Martland

9. In Martland the UT considered the same legislation in the context of an application to make a late appeal against an excise decision, and decided it by applying the principles set out by the Court of Appeal in Denton. In Martland at [44] of that judgment, the UT set out a three stage approach, namely:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason(s) why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to 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, and in doing so 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 Length of the delay

10. Mr Jordan submitted an appeal to HMRC by an undated letter 8 months and 8 days late. The 30 day time limit expired on 20 December 2018.

11. Mr Jordan lodged an appeal with the Tribunal on 6 March 2020, 120 days.

12. The Tribunal considered whether the delays were serious and/or significant.

13. Mr Jordan in his grounds of appeal submitted that he had not received the original letter, however in a later telephone call to HMRC on 24 February 2020 he was referring to the letter of 8 November 2019 and not the letter of assessment. HMRC did issue all correspondence including the assessment to Mr Jordan's correct address.

14. The UT had said in Romasave v HMRC [2015] UKUT 254 (TCC) at [96] that: "In the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

15. I considered the guidance given in Denton, where at [25]–[26] the Court of Appeal discussed Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537 and the related case law. In Mitchell the Court of Appeal stated that judges should begin their review by asking whether the breach can be regarded as "trivial"; they also used the words "minor" and "insignificant". In Denton at [26] the Court said: "…we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which 'neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation'. Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees."

16. Having taken into account this further guidance, my understanding is that I must decide whether the breach has (a) disrupted the progress of future litigation, either of the parties themselves, or of the Tribunal more generally, and/or (b) has been serious/significant in some other way.

17. Mr Jordan delayed appealing to the Tribunal, so the litigation had not begun. Although the addition of a new case to the Tribunal's workload would have some effect on other litigants, the factual and legal overlap with Mr Jordan's later appeal made this less significant than in most cases. Mr Jordan had been in contact by telephone with HMRC that he was not satisfied and asked for advice on what he should do. Mr Jordan then informed HMRC on 14 April 2019 that an appeal was to be made, so the other party was on notice that Mr Jordan intended to challenge the assessment. Taking into account all the above factors, I find that the delay in making the appeal against the assessment and in making his appeal to the Tribunal were both significant.

Reasons for the delays.

18. I first summarise the position of the parties as to the reasons for the delays, and then set out my conclusions.

Mr Jordan's position

19. Mr Jordan did contact HMRC by telephone and made it clear that he was dissatisfied with the assessment and asked for advice regarding an appeal. He informed HMRC that he would be appealing on 14 April 2019 having spoken to a work colleague. He was unclear about the process of the appeal. He was late in his appeal to both HMRC and the Tribunal but provided reasons as to his lateness.

HMRC's position

20. HMRC did not accept that Mr Jordan had provided a good reason for the delays. They submitted that Mr Jordan either knew or should have known about the potential impact of the delay and that there was no reasonable excuse. HMRC drew attention to the two further self-assessment statements on 22 November 2018 and 28 February 2019. HMRC said that there had not been any contact by Mr Jordan regarding an appeal however contact had been made by telephone and in clarification on 14 April 2019 by Mr Jordan. HMRC drew attention to the fact that Mr Jordan was negotiating an arrangement to pay tax and that he had ample information to allow him to submit an appeal. HMRC considered that Mr Jordan had just changed his mind and that in allowing an appeal to proceed that this would prejudice the decision making progress.

All the circumstances: the factors

21. The third step in the Martland approach is to consider all the circumstances, and then to carry out a balancing exercise. I have taken into account the factors set out below.

(1) The need for time limits to be respected, and good reasons.

Significant weight must be placed as a matter of principle on the need for statutory time limits to be respected. This was described as "a matter of particular importance" in Katib and that it would approach the exercise of its discretion by considering the five questions that Morgan J set out in Data Select Ltd v HMRC [2012] STC 2195: (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 (5) What will be the consequences for the parties of a refusal to extend time? At [27(2)], the Tribunal concluded that Mr Katib's delay was "serious" whether or not the delay was between 13½ months and 20 months (as Mr Katib submitted) or 20 and 24 months (as HMRC submitted). At [27(3)], the Tribunal considered whether Mr Katib had a good explanation for the delay. The Tribunal did not have the benefit of the decision of the Upper Tribunal (Judge Berner and Judge Poole) in Martland as it was released after the Decision.

(2) The starting point is that permission should not be granted unless the Tribunal is satisfied on balance that it should be. The reason (or reasons) why the delay occurred should be established and then the Tribunal can 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.

(3) The 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 Tribunal's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

Extent of prejudice to HMRC.

22. (1) HMRC have not prepared or served a Statement of Case in relation to this appeal, however the appeal is not particularly complex and as a result, allowing the Application would require HMRC to carry out relatively little extra work, and this reduces the extent of the prejudice.

(2) HMRC say that they would be unfairly prejudiced by the lateness of an appeal and that it would deny HMRC finality in the decision-making process. It is right that the finality would be delayed however the Tribunal must consider the overall fairness to the parties in a balancing exercise. I also have to weigh the fact that if permission were given HMRC would have to bear the cost of attending that hearing, including both Counsel's fees and the time cost of HMRC's staff

Extent of prejudice to other litigants

One of the factors which has to be considered is the extent of prejudice to other litigants. Granting permission to appeal means that the Tribunal will allocate time to this appeal, which will inevitably cause some delay to the litigation of other tribunal users. However, the amount of extra work required of the Tribunal will again be relatively small and the fact that the appeal could be stayed behind Wilkes.

Extent of prejudice to Mr Jordan

The inevitable consequence for everyone who loses a permission application is that HMRC's decision cannot be challenged in the Tribunal. In most cases, that also means that the sum demanded by HMRC becomes payable. In that sense, Mr Jordan's position is no different from that of most other applicants. However, the consequences of losing this permission application are likely to be particularly harsh for Mr Jordan as the decision in Wilkes has not been considered or even argued in his appeal. If the appeal is not allowed to proceed, Mr Jordan will be required to pay £2501.00 to HMRC. That is a significant prejudice, albeit one which is an inevitable consequence of losing an application for permission to make a late appeal. Mr Jordan was not represented and did not raise an issue regarding discovery assessments and HICBC. HMRC also did not raise the issue. The Tribunal has a duty to enable litigants in person to present their case and has to consider fairness in accordance with Rule 2 of the Tribunal Procedure (first-Tier Tax) Tribunal Rules 2009 and the interests of justice.

23. The Tribunal should take into account the merits of its case and I also considered the judgment in Wilkes. HMRC submitted that the appeal was without merit and would not succeed in the event that it was allowed to proceed. In Martland at [46] the UT said: "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…It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

24. In my judgment, it is not possible to say either that the merits of Mr Jordan's appeal are "overwhelmingly" in his favour, or that it has a "hopeless" case; he appears instead to have an arguable case. In addition, the key evidential issues are not in dispute, but the decision in Wilkes, if applied to Mr Jordan could have considerable impact. I therefore find that the merits are a factor to be weighed in the balance.

Balancing the factors

25. (1). Once the circumstances have been identified, they must be balanced. The consistent message from Denton, Martland and Katib is that particular weight is to be given to two factors: (1) for litigation to be conducted efficiently and at proportionate cost; and (2) to enforce compliance with rules, practice directions and orders.

(2). The following factors favour allowing the Application:

(1) there are reasons for the delay;

(2) if the Application were to be refused, Mr Jordan would be required to pay HMRC £2501.00 which is a significant sum to him and his family;

(3) allowing the Application will have little impact on the litigation with HMRC, or on other Tribunal users, because of: (a) the appeal would be stayed behind the further appeal of Wilkes which is progressing in any event; and (4) the time already spent by HMRC considering the evidence and the issues involved in this appeal, to the extent of filing a Statement of Case would not be too onerous.

Of those three factors, I hold significant weight to the third.

On the other side of the scales is Mr Jordan's failure to meet the statutory time limit which is a matter of particular importance and the prejudice to HMRC in not reaching finality at this stage. However, I must also take into account that there were reasons for the delays and the contact which Mr Jordan had with HMRC by telephone.

26. Having carried out the weighing exercise and giving due weight to the lateness, the balance clearly favours Mr Jordan, and I grant him permission to appeal.

DIRECTIONS –

1. The appeal is stayed behind the appeal of HMRC v Wilkes [2021] UKUT 150 (TCC) UT/2020/000354.
2. No later than 4 weeks from the date of the release of the further appeal in Wilkes, the Respondent is to provide the Statement of Case and any witness statements to enable the Tribunal to make Directions for the hearing.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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 Tribunal hereby directs that the 56 days within which a party may send or deliver an application for permission to appeal against a decision that disposes of a preliminary issue shall run from the date of the decision that disposes of all issues in the proceedings. 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.

FIONAGH GREEN
TRIBUNAL JUDGE

Release date: 16 DECEMBER 2021