Neutral Citation: [2023] UKFTT 270 (TC)

Case Number: TC08747

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/00430

Capital gains tax – application to make a late appeal – Martland applied

Heard on: 7 November 2022
Judgment date: 09 March 2023

Before

TRIBUNAL JUDGE MCGREGOR

Between

MR ENGIM CENKCI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Fikriye Nihat, of HV Akin & Co Accountants

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

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) via the Tribunal video hearing system. The documents to which I was referred are a bundle of 278 pages and a copy of the self-assessment record provided after the hearing.

2. 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.

3. This hearing concerned an application to make a late appeal against discovery assessments.

EVIDENCE

4. We heard from Ms Nihat, representative for the Appellant, who gave a mixture of evidence and submissions.

5. We did not have any witness evidence from HMRC or from Mr Cenkci himself.

6. We had evidence in the forms of exchanges of correspondence and, after the hearing, HMRC's log of telephone calls made in relation to Mr Cenkci's self-assessment record.

FACTS

7. The following are the uncontroversial background facts. Further findings of fact are made in the discussion below.

8. On 25 September 2019 HMRC sent an opening letter to Mr Cenkci informing him that they had received data from the Valuation Office Agency that showed he had made property purchases and sales that had not been recorded on his tax returns. The letter formally opened checks into returns related to the tax years 2007-08, 2010-11, 2012-13, 2014-15 and 2015-16 and requested a series of documents and information. The letter was also shared with Mr Cenkci's agent, Ms Nihat.

9. On 2 October 2019, Ms Nihat called the officer to acknowledge receipt of the enquiry letter.

10. Following a request for an extension to respond to the information request, HMRC issued a Schedule 36 information notice on 5 November 2019, which gave a further 30 days for compliance.

11. On 20 July 2020, HMRC issued discovery assessments for the tax years 2007-08, 2010-11, 2012-13, 2014-15 and 2015-16.

12. On 26 August 2020, HMRC issued a penalty assessment for 2007-08.

13. On 9 September 2020, HMRC issued penalty assessments for the remaining years.

14. On 9 February 2021, Ms Nihat contacted the debt management and banking (DMB) team at HMRC and stated that an appeal had been made against the discovery assessments.

15. On 23 April 2021, Ms Nihat contacted the DMB team at HMRC again and sent a copy of an appeal letter dated 27 July 2020.

16. On 7 May 2021, the HMRC officer who made the assessments sent a letter confirming that she had not received the appeal dated 27 July 2020 and had no record of it until 23 April 2021 when it was forwarded to her by the DMB team. The letter stated that if the Appellant

wished to appeal he would therefore need to make an application to this Tribunal for the appeal to be admitted late.

17. On 11 January 2022, a notice of appeal was submitted to the First-tier Tribunal.

PARTIES ARGUMENTS

Appellant's arguments

18. Ms Nihat submitted that the appeal is not late because it was made on 27 July 2020, which was 7 days after the assessments were raised.

19. She submitted that she got in touch with HMRC after receiving a demand letter from DMB and that this was 2-3 months after the assessments were raised.

20. She submits that between 20 July 2020 and 23 April 2021, she had several conversations with the HMRC officer regarding Mr Cenkci's capital gains and that she believed that the appeal was ongoing because the officer said that she was looking again at Mr Cenkci's tax returns.

21. She submits that she was also under the impression after 7 May 2021 that the HMRC officer was continuing to look at the tax returns and it was only once she realised that this was going nowhere that she decided to apply to the tribunal.

22. She submitted that collection of the debt was suspended throughout the period from 23 April 2021 to 11 January 2022 and that this would not have been the case if there was not an active ongoing appeal.

23. She submitted that the 27 July 2020 letter was sent by normal post from their office and that a copy was kept on file, but that there was no contemporaneous note in the file or correspondence with Mr Cenkci that confirmed the appeal letter was sent.

24. She submitted that it was not an expectation that taxpayers should send correspondence by registered post and that HMRC do not do so.

25. She refuted HMRC's submissions that the Appellant, through his agents, had failed to engage with the enquiry into his affairs. She submitted that they had replied to HMRC's request for information on 26 November 2019 but that HMRC had not received it so it had been emailed to them later on when the non-receipt was discovered.

HMRC arguments

26. HMRC's position is that they made many attempts to obtain information from the taxpayer and their agent but never got any information in response, including from a formal information notice.

27. HMRC submit that they did not receive an appeal dated 27 July 2020 until April 2021 when it was received via the debt management and banking team.

28. In HMRC's view, it was not credible that an appeal was submitted on 27 July 2020 and not followed up until April 2021.

29. Further, after receiving the letter in April 2021, HMRC encouraged the taxpayer to demonstrate that the letter of appeal was sent in July 2020, but no further information was forthcoming again.

30. HMRC argue that the taxpayer has the burden of showing that an appeal was sent to them on 27 July 2020 and the taxpayer has not met that burden.

31. Further, after HMRC's decision to refuse to admit the appeal on 7 May 2021, the taxpayer did not appeal to the Tribunal until 11 January 2022.

32. Having established that the appeal was made late, HMRC submit that the test in *Martland* should be applied and that:

(1) The delay was serious and significant;

(2) The taxpayer has no good reason for the default;

(3) There is a need to enforce compliance with time limits for efficient litigation.

DISCUSSION

33. I have to decide the following issues:

(1) Was an appeal made on 27 July 2020?

(2) If not, should the taxpayer's application for permission to make an appeal late be granted.

Was an appeal made on or around 27 July 2020?

34. I must answer this question first since, if an appeal was made to HMRC on 27 July 2020, there is no application for a late appeal.

35. Section 7 Interpretation Act 1978 provides:

> 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.

36. HMRC submitted that the burden is on Ms Nihat to show that the letter dated 27 Jul 2020 was sent by post, in which case it would be deemed to have been received under section 7 unless the contrary could be shown.

37. When asked during the hearing what the procedures were at her firm for sending of letters, Ms Nihat said that letters were sent in the normal post and a copy was kept on the client file. She stated that no other evidence of the letter having been sent was kept and there was no correspondence with Mr Cenkci at the time, in the form of a letter, email or file note, that confirmed the letter had been sent. Ms Nihat suggested that she may have telephoned to let him know but wasn't sure.

38. HMRC's submission was that the letter dated 27 July 2020 was not received until 23 April 2021. We have in the bundle, a letter from HMRC dated 7 May 2021 which refers to having received a copy of the letter on 23 April 2021 from a colleague in the DMB unit who had had a telephone call with Ms Nihat. However, I note that the self-assessment records, provided by HMRC after hearing on request, do not show any records of the telephone call on 23 April 2021, which shows that these records do not include conversations with members of the DMB team, only those in the self-assessment team.

39. The Appellant has not shown that the letter was addressed, pre-paid and posted and HMRC has not shown that it was not received. Therefore I do not find the deeming provision in section 7 of the Interpretation Act to be helpful.

40. However, I do agree with HMRC, that the burden here is on the Appellant to show that an appeal was made on 27 July 2020. I find that the Appellant has not met that burden. The first evidence of the existence of the letter was on 9 February 2021 when Ms Nihat spoke to the DMB unit.

41. On the balance of probabilities, I find that the letter dated 27 July 2020 was not sent at or around that time.

Application to make an appeal late

42. Having established that the appeal was not made on or around 27 July 2020, I must now consider whether to allow a late appeal.

43. The Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 gave specific guidance to this Tribunal on consideration applications for permission to appeal out of time, which is binding on me. I set out the section from paragraph 44 in full:

> 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.
>
> 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.
>
> 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."
>
> *Hysaj* was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). 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.
>
> 47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore- Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.

44. There are two periods of lateness:

(1) The period from 20 August 2020 (being 30 days after the assessments were issued) to 9 February 2021 (being the date that Miss Nihat spoke to the DMB unit); and

(2) The period from 7 June 2021 (being 30 days after HMRC indicated that they would not accept the late appeal) to 11 January 2022 (being the date that an appeal was lodged with the Tribunal).

45. Both of these periods exceed 5 months. There is no doubt that taken either on their own or together, these periods are both serious and significant.

46. Turning to the reasons for the delays. In the first period, Ms Nihat submits that the reason for the delay was that she believed she had submitted an appeal.

47. For the second period, Ms Nihat acknowledged that HMRC had not accepted a late appeal but she said that she had been told over the phone that HMRC were looking at the substantive issues concerning Mr Cenkci's tax returns and that she therefore did not feel the need to make an appeal to the Tribunal while HMRC were investigating the position.

48. She felt that her view that the matter was being investigated by HMRC was supported by the fact that collection of the tax due continued to be suspended during this time.

49. Ms Nihat also stated that she had several telephone calls with Ms McConachie, the HMRC officer dealing with the matter, during the course of this period. When pressed, Ms Nihat was very unclear about the dates of any of these telephone calls and stated that she did not have the relevant records with her at the hearing.

50. Ms Nihat's assertions about ongoing conversations with the case officer are to be contrasted with the self-assessment notes, provided by HMRC after the hearing, which showed:

(1) A call on 16 June 2021 from Ms Nihat to HMRC at which penalties were discussed, not the substantive matter under this appeal;

(2) A call on 9 July 2021 from Ms Nihat to HMRC during which she said that as she was getting nowhere, she had sent an appeal to the Tribunal and would let HMRC know when she had received acknowledgment from the Tribunal.

(3) An email on 24 March 2022 noting that the appeal had "at last" been allocated a hearing.

51. Ms Nihat was given an opportunity to respond to the information provided in the self-assessment notes after the hearing but the only response received was an email (received within the time limit set out in the directions) as follows:

> Dear Sir/Madam,
>
> I refer to the tribunal directions issued by Judge McGregor on 08.11.22.
>
> Please see attachments.
>
> Kind regards,
>
> F.Nihat

52. There were no attachments to the email. The Tribunal staff alerted Ms Nihat to the missing attachments, but no response was ever received.

53. While, as I have noted above, I am not satisfied that the self-assessment notes provided by HMRC necessarily show each and every communication between Ms Nihat and HMRC, it is the burden of the Appellant, through his agent, Ms Nihat, to show that the reason for the delay in making the appeal to the Tribunal was because the Appellant (or his agent) was under the impression that investigations were ongoing in HMRC. That burden has not been met.

54. As to the third stage of Martland, we must consider all other circumstances and balance them, together with the issues raised in the first two stages.

55. Firstly, of particular weight are the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

56. The other relevant circumstances include the significant prejudice to Mr Cenkci in not being able to bring his appeals. There are significant sums at stake for him.

57. I am not to make any detailed consideration of the merits of his case, but I do find that there was very little evidence of Mr Cenkci or his agents engaging with the detail of the substantive matter in the correspondence shown in the bundle. Ms Nihat was very focused during our hearing on the fact that Mr Cenkci had included several of the addresses as his residential address in his tax returns and that this was evidence that he had lived at the

properties (thereby being able to rely on principle private residence relief from capital gains tax).

58. HMRC pointed out that there had been numerous opportunities for Mr Cenkci to submit evidence that he had lived at the relevant properties but the lack of any response to their enquiries is what had led to the assessments being raised.

59. The absence of any actual evidence to support claims for principal private residence relief beyond identifying an address on his tax returns would make Mr Cenkci's prospects of success in the case very low.

60. There is prejudice to HMRC in allowing the appeal to proceed, both in further delay in collecting any tax due (Ms Nihat conceded that there would definitely be tax due in at least some years), and in having to prepare a case to be heard after extended periods of believing that the position was settled.

61. As noted above, it must be remembered that the starting point is that permission should not be granted unless I am satisfied on balance that it should be.

62. Taking all the relevant circumstances that I have set out into account, I find that the factors against granting permission outweight the factors in support of granting permission. I therefore refuse permission for an appeal to be made late.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

Release date: 09th MARCH 2023