Neutral Citation: [2024] UKFTT 1096 (TC)

Case Number: TC09370

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/16865

Permission to notify appeal to Tribunal after time limit – HMRC Notice of Requirement to give security for PAYE and NICs – jurisdiction of FTT in the substantive appeal – Martland considered – delay serious and significant, and without a good reason – need for statutory time limits to be respected – merits of case extremely weak – application dismissed

Heard on 21 November 2024
Judgment date: 6 December 2024

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

SETH MOFFETT RUSSELL
AVENIR EMS LIMITED

Appellants

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Liban Ahmed of CTM Tax Litigation Ltd, instructed by the Appellants

For the Respondents: Ms Vicki Anne Wood, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. Mr Russell is the owner and sole director of Avenir EMS Ltd ("the Company"). At all relevant times, the Company failed to pay significant amounts of PAYE and NICs. On 6 February 2023, HMRC issued Mr Russell and the Company (together "the Appellants") with a Notice of Requirement ("NoR") to give security for PAYE and NICs in the amount of £90,326.38. The Appellants were jointly and severally liable under the NoR to pay the security. A person who continues to trade without paying a security required by an NoR commits a criminal offence.

2. Guardian, a firm of Chartered Accountants acting for the Appellants, made in-time appeals to HMRC against the NoR. HMRC rejected their appeals on 20 April 2023 but offered to review the decision. In the same letter, HMRC told the Appellants that they could either request a statutory review or notify the appeal to the Tribunal, and that both options had a time limit of 30 days. There was further contact between HMRC and Mr Russell and/or Guardian, but there was no request for a statutory review, and no appeal was notified to the Tribunal.

3. At or around the end of October 2023, Mr Russell received a notice of prosecution on the basis that the Company had continued to trade despite not having paid the security. The Appellants then instructed CTM Tax Litigation Ltd ("CTM"), which filed an application with the Tribunal on 8 December 2023.

4. I agreed with Ms Wood (who appeared for HMRC) that the period of delay was serious and significant. I went on to find that there was no good reason for the failure to comply with the statutory time limit. Having taking into account all relevant matters, including the Tribunal's jurisdiction in appeals against NoRs (see §54ff), I refused the Appellants permission to notify their appeals to the Tribunal after the time limit. The application is therefore dismissed.

MR RUSSELL'S FAILURE TO ATTEND

5. At the inception of the hearing, Mr Ahmed, who represented the Appellants at the hearing, informed the Tribunal and Ms Wood that Mr Russell would not be attending because he had not realised he needed to be present. Mr Ahmed had just spoken to him and been told he was on the way to the airport, but he also said he was content for the Tribunal to continue in his absence.

6. I considered Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). Mr Russell had been notified of the hearing, and I decided it was in the interests of justice to proceed in his absence because:

(1) HMRC had prepared for the hearing and judicial time had been allocated to decide the application;

(2) Mr Russell had said he was content for the hearing to proceed;

(3) relisting would delay the determination of the applications, and both HMRC and the Ministry of Justice would incur further costs; and

(4) there would also be an adverse effect on the appeals and applications of third parties whose cases would be delayed in consequence.

THE APPLICATION

7. There were two preliminary issues with the application.

Late appeal?

8. When Mr Russell instructed CTM, he did not provide all relevant correspondence. Mr Ahmed therefore understood that no appeal had been made to HMRC against the NoR. In consequence, on 8 November 2023, CTM wrote to HMRC asking them to admit a late appeal. On 29 November 2023, HMRC refused, and on 8 December 2023, CTM applied to the Tribunal on behalf of the Appellants, asking the Tribunal to give permission for a late appeal.

9. It was however common ground at the hearing that Guardian had already made an in-time appeal to HMRC. The Appellants therefore did not require permission to make a late appeal; instead they needed permission to notify the appeals to the Tribunal after the statutory 30 day deadline. HMRC did not object to the application being treated as being for the Appellants to make their notifications late, and I agreed that this was in the interests of justice.

The parties

10. The application stated that the "taxpayer" was:

> "Seth Russell
>
> Avenir EMS Ltd"

11. The grounds of appeal, drafted by Mr Ahmed, were headed "Avenir EMS Ltd/Seth Russell" as "Appellants". On 19 January 2024, another Tribunal judge issued Directions in relation to the application; those Directions are headed "Seth Russell". HMRC's position (as set out in an Objection dated 23 February 2024) was that:

> "Having reviewed the papers Judge [name] decided that your submission is an application for permission to make a late appeal to HMRC by Seth Russell only."

12. I checked with the Tribunal's office in advance of the hearing; they confirmed that the only document issued on the date in question was the Directions. During the hearing, Ms Wood agreed that the application had been made on behalf of both the Appellants, and that the Directions had been given an incorrect heading by mistake. I agree. The purpose of this hearing was therefore to decide whether to give Mr Russell and/or the Company permission to notify their appeals late.

THE LEGISLATION

13. Taxes Management Act 1970, s 49H is headed "Notifying appeal to tribunal after review offered but not accepted", and it reads:

> "(1) This section applies if
>
> (a) HMRC have offered to review the matter in question (see section 49C), and
>
> (b) the appellant has not accepted the offer.
>
> (2) The appellant may notify the appeal to the tribunal within the acceptance period.
>
> (3) But if the acceptance period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.
>
> (4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.
>
> (5) In this section 'acceptance period' has the same meaning as in section 49C."

14. TMA s 49C(6) reads:

> "…'acceptance period' means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question."

15. It is thus clear that where, as here, HMRC offers to carry out a review of a decision, the statutory time limit is 30 days beginning with the date of the letter offering the review.

EVIDENCE

16. The Tribunal was provided with a bundle of 115 pages ("the Bundle"), which included much (but not all) of the correspondence between the parties. A further letter was handed up by Mr Ahmed and another was provided by Ms Wood.

17. The Bundle also contained some, but again not all, HMRC's notes of telephone conversations between Mr Russell and various HMRC departments; the content of these emails had been set out in correspondence and/or in submissions. There was no dispute that it would be in the interests of justice to see the originals, and Ms Wood managed to locate two of the missing call notes.

18. Mr Russell had prepared a witness statement before the hearing, but this had not been filed or served. Ms Wood did not object to it being handed up and I admitted it.

19. The Bundle contained references by both parties to the amount of money owed by the Company at various times. The evening before the hearing, Ms Wood had emailed to the Tribunal and Mr Ahmed a schedule setting out the Company's arrears ("the Schedule"). Mr Ahmed did not object to the Schedule being considered, and I admitted it into evidence.

20. However, because the Schedule showed that the Company had not paid its PAYE liabilities (contrary to the case Mr Ahmed had been about to make) he asked for the opportunity to take further instructions. I consented and directed a short adjournment. Having spoken to Mr Russell, Mr Ahmed informed the Tribunal and HMRC that Mr Russell had changed his evidence, see further §37 below.

21. Plainly, Mr Ahmed's report to the Tribunal as to his conversation with Mr Russell was hearsay. However, Rule 15(2)(a) allows the Tribunal to "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom". There was no reason to disbelieve Mr Ahmed's account of his conversation with his client, and I accepted his evidence.

22. I make the findings of fact set out in this decision on the basis of the evidence which has been accepted.

FINDINGS OF FACT

23. The Company was incorporated on 3 October 2017. At all relevant times, Mr Russell has been its sole director and the person with significant control. The Company specialises in the provision of lighting and electrical fittings.

24. On 27 February 2018, the Company was registered with HMRC as an employer. However, between that date and November 2022, the Company paid no PAYE or NICs. Specifically, in the tax years ending 5 April 2021 and 2022, the Company failed to pay over £28,000, and the pattern of non-payment continued into the following year.

25. By 14 November 2022, the PAYE and NICs arrears had reached £47,954.88. HMRC issued the Company with a warning letter, instructing it to pay the outstanding amounts by 24 November 2022, and advising that non-compliance might lead to the issue of an NoR.

26. By 6 February 2023, the arrears had increased to £73,833.38. On that date, HMRC issued the NoR, under which the Appellants were jointly liable to pay a security of £90,326.38 by 18

March 2023. That figure had been calculated as the sum of (a) the arrears, and (b) HMRC's estimate of the Company's PAYE and NICs liabilities for the next four months.

27. On 28 February 2023, Guardian appealed the NoR on behalf of the Appellants. The letter said that the Company had had trading difficulties, but was now "just starting to turn a corner". It asked HMRC to set aside the NoR and instead agree a Time to pay ("TTP") agreement for the arrears.

28. On 20 April 2023, HMRC issued "view of the matter" letters to both Appellants, in which:

(1) HMRC rejected the appeals and offered statutory reviews;

(2) said that no TTP could be considered until the Company had filed its VAT returns, none of which had been submitted;

(3) deferred the date for compliance with the NoR to 30 May 2023; and

(4) told the Appellants that they could either accept HMRC's review offer, or appeal to the Tribunal without a review, but in either case there was a thirty day time limit.

29. No statutory review was requested at any time by Mr Russell or the Company. The compliance date for notifying the appeals to the Tribunal was thus 19 May 2023.

30. On 27 April 2023, HMRC called Guardian and explained that a TTP could not be agreed on estimated figures, and that all the Company's VAT returns must be submitted before a TTP could be considered. Later the same day Mr Russell told HMRC that the missing VAT returns would be submitted, and that he would make payments towards the PAYE arrears in the meantime. When he was called by HMRC on 8 June 2023, Mr Russell repeated those promises.

31. On 11 July 2023, Guardian submitted the Company's VAT return for November 2021. Further letters followed about other VAT returns, and on 3 November 2023, Guardian told HMRC that they hoped to submit all outstanding returns "within the next few weeks".

32. Meanwhile, at or around the end of October 2023, Mr Russell received a notice of prosecution[1]. On 8 November 2023, Mr Russell instructed CTM on behalf of the Appellants.

33. As explained at §10ff, CTM was not provided with all the earlier correspondence, and Mr Ahmed understood that no in-time appeal had been made. On 16 November 2023, CTM submitted an application to HMRC to make a late appeal. That application was refused on 29 November 2023, and on 8 December 2023, CTM made its application to the Tribunal.

34. At or around the same time, the prosecution proceedings against Mr Russell were stayed, pending the Tribunal's decision on the application.

35. As at the date of this hearing, the Company had PAYE arrears of £223,279, around three times higher than those at the date of the NoR. In addition, despite Mr Russell's promises that he would pay off the earlier debts, this had not happened.

36. At some point after CTM had submitted the application, Guardian filed the remainder of the Company's outstanding VAT returns. However, as at the date of the hearing, the Company owed VAT of £179,524, and no VAT had been paid for any period except 8/23, when a partial payment had been made.

37. Mr Russell said in his witness statement that he had delayed the appeal process in order to give time to sort out a TTP arrangement with HMRC, and that he "knew the [C]ompany

[1] I was not told whether proceedings were also commenced against the Company, but nothing turns on that.

would be able to pay the arrears over time". However, as explained at §20, Mr Russell subsequently changed his evidence, and said:

(1) he and the Company had challenged the NoR because he was seeking to delay any prosecution action being taken against him personally; and

(2) at the time of his various conversations with HMRC, he had no genuine belief that the Company would be able to pay the arrears, even if a TTP could be arranged, because he knew the Company had insufficient funds.

38. I accept that evidence and find the above two points to be facts.

THE CASE LAW

39. In *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*") the Upper Tribunal ("UT") decided an application to make a late appeal against excise duty and a related penalty. The principles there set out have been applied and followed when deciding late notifications of appeals, including against income tax and NICs

40. In *Martland* at [37], the UT set out Rule 3.9 of the Civil Procedure Rules ("CPR"), which reads:

> "(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."

41. The UT then considered the authorities, in particular *Denton v TH White Limited* [2014] EWCA Civ 906 ("*Denton*") and *BPP v HMRC* [2017] UKSC 55 ("*BPP*"). The UT said*:*

> "[40] In *Denton*, the Court…took the opportunity to 'restate' 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)]".'
>
> [41] 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.'"

42. The UT noted at [42] that the Supreme Court in *BPP* had implicitly endorsed the approach set out in *Denton.* That Court also confirmed at [26] that "the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach". At [43] the UT said:

> "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'."

43. At [44] the UT set out the following three stage approach by way of guidance to this Tribunal:

(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".

44. The UT also said at [46]:

> "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."

45. I now apply the three stage approach in *Martland* on the basis of the facts in this case, taking into account the parties' submissions.

THE LENGTH OF THE DELAY

46. The delay ran from 19 May 2023 (30 days after HMRC's letter offering a statutory review) to 7 December 2023, when the application was filed. This was over six months. I agreed with Ms Wood that the delay was both serious and significant.

THE REASONS FOR THE DELAY

47. I have found as facts that:

(1) The NoR was appealed because Mr Russell was seeking to delay action being taken against him personally by way of criminal proceedings, by promising that the Company would:

(a) pay off the earlier PAYE debts; and

(b) make a TTP agreement once it had filed its VAT returns.

(2) In relation to the first promise, the Company did not pay its PAYE arrears, and in relation to the second, Mr Russell knew that the Company could not comply with a TTP agreement, and no such agreement was ever made

48. Mr Russell thus did not have a good reason for challenging the NoR. However, that is not the same as saying that he did not have a good reason for notifying his appeal to the Tribunal. In relation to that issue, the facts are as follows:

(1) Mr Russell was told by HMRC in their letter of 20 April 2023 that the next step was to ask for a review or notify the appeal to the Tribunal, he did nothing about either.

(2) In the subsequent exchanges with HMRC, neither he nor HMRC made any mention of a possible appeal, or to the statutory deadline.

(3) The application was only made after CTM had been instructed.

49. It is reasonable to infer that until Mr Russell spoke to CTM on 8 November 2023, he had not appreciated what was required, and I find that to be a fact.

50. That is not, however, a good reason for the failure. Mr Russell is able to run a business with a significant turnover, so must deal with correspondence on a regular basis. He either failed to read HMRC's letter of 20 April 2023, or having read it, failed to discuss the options with an appropriate adviser. Instead, he focused his efforts on delaying matters by making payment promises he knew the Company could not keep.

ALL THE CIRCUMSTANCES

51. The third step in the *Martland* approach is to consider all the circumstances, and then to carry out a balancing exercise.

The need for time limits to be respected

52. Significant weight must be placed as a matter of principle on the need for statutory time limits to be respected. In *Martland* at [46], this was described as a matter of particular importance. Here, the delay exceeded six months, with no good reason. This factor weighs heavily against the Appellants.

The merits

53. The UT said in *Martland* that there is "much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one". The merits of the appeal may therefore be a relevant factor in the balancing exercise.

54. Mr Ahmed submitted that, if permission were given, the Tribunal which heard the substantive appeal would have a supervisory jurisdiction, and could only consider facts and matters which existed at the time HMRC issued the NoR. He relied on *Boship v HMRC* [201] UKFTT 411 (TC), where the FTT had followed *Southend Football Club v HMRC* [2013] UKFTT 715 (TC), a decision of Judge Bishopp. However, *Southend* concerned the statutory provisions for giving security in VAT cases, rather than the PAYE provisions at issue in *Boship*.

55. In *D-Media Communications Ltd v HMRC* [2016] UKFTT 430 (TC) at [16]-[21], Judge Berner identified significant differences between the VAT and PAYE security provisions. He concluded that although the Tribunal had a supervisory jurisdiction over whether it was reasonable for HMRC to issue an NoR in the first place, its jurisdiction was appellate in relation to the amount of security, because Regulation 97V(5) of the PAYE Regulations 2003 (as amended) provides that the Tribunal may "vary the requirements" in an NoR. In *Quadragina*

v HMRC [2019] UKFTT 639 (TC) at [100] to [104], Judge Mosedale followed *D-Media*. Neither case appears to have been cited to the Tribunal deciding *Boship*.

56. For the purposes of this decision, I have taken the position set out in *D-Media* to be correct, so that if permission were to be given for the appeal to proceed, the Tribunal could only consider whether HMRC acted reasonably at the time the NoR was issued, and not subsequent developments. However, if the Tribunal decided that HMRC had acted reasonably, it could then consider the quantum of the security in the light of subsequent events.

57. When the NoR was issued on 6 February 2023, HMRC knew that the Company's PAYE and NIC arrears had reached £73,833.38, and also knew that there had been a long-standing pattern of non-payment. The amount of security required by the NoR took into account both the arrears and the expected future liabilities over the next four months.

58. The Appellants' case, as put in their grounds of appeal, was that HMRC should also have taken into account that the Company had good prospects of future business growth, and would soon clear the arrears. The grounds said (emphasis in original):

> "Mr Russell's position is that HMRC had no regard to the future financial position of the company, either short or long term. Had HMRC properly considered it, they could *not* have reached a conclusion that the [R]evenue needed to be protected by way of a security."

59. It was also part of the Appellants' case that the arrears had been caused by Covid, and would thus be reversed now it was possible to trade normally. However, as Ms Wood pointed out, the Company had also failed to pay its PAYE and NICs in 2018 and 2019, before Covid.

60. In the period between the warning letter and the issuance of the NoR, the arrears increased by £25,878.50 (from £49,954.88 to £73,833.38). The Appellants therefore did not respond to the warning letter by paying the shortfall, and neither did they provide HMRC with any evidence that the position would improve, such as copies of cash flow forecasts, new contracts with customers, or similar. After the NoR was issued, Guardian told HMRC that the Company was now "just starting to turn a corner", but this was an assertion unsupported by evidence.

61. In my judgment, a Tribunal considering the Appellants' appeals on the basis that it could take into account only the position at the time the NoR was issued, would decide that HMRC had acted reasonably: indeed, it would be very likely to find that issuing the NoR was the only reasonable course of action open to HMRC.

62. In relation to the quantum of the security the Tribunal has an appellate jurisdiction and so can take into account subsequent events. As the arrears have tripled since the NoR was issued, Ms Wood said HMRC would be likely to ask the Tribunal hearing the substantive case to increase the amount of the security. Thus, if the Appellants' application were to succeed, they were very likely not only to lose their substantive appeal, but have to pay a higher sum by way of security.

63. It follows that the Appellants' case on the merits is extremely weak. As the UT said in *Martland*:

> "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."

Other factors

64. In relation to the Appellants:

(1) They will suffer prejudice if permission to make a late appeal is refused, because they will be unable to appeal against the NoR. That is however an inevitable consequence of losing the opportunity to challenge any HMRC decision.

(2) A failure to obtain permission in this case means that criminal proceedings against Mr Russell will resume. That is plainly a serious matter, but given the lack of merits, granting permission to appeal would be likely only to delay the criminal proceedings.

65. In relation to HMRC:

(1) They will suffer prejudice if the Tribunal gives permission, because they will have to devote time and attention to defending the NoR before the Tribunal.

(2) If (as is very likely) HMRC succeed before the Tribunal in the substantive appeal, there will have been a further delay of at least several months and probably longer.

(3) Until the appeal is final, HMRC will be unable to (a) proceed with the criminal case and (b) take other legal action to recover the amount of the security.

66. Granting permission will also prejudice the position of other taxpayers, because both HMRC and the Tribunal will divert resources away from other cases to hear an unmeritorious appeal.

Balancing the factors

67. Once the circumstances have been identified, they must be balanced.

68. The delay was over six months, and so was plainly serious and significant; there was no good reason for that delay. It was the result of a failure to comply with the statutory provision setting a 30 day time limit, and the consistent message from *Denton, BPP* and *Martland* is that particular weight is to be given to the need to enforce compliance with statutory time limits. Added to that is the prejudice to HMRC and to appellants in other cases if permission were to be given.

69. On the other side of the scales is the prejudice to the Appellants if they lose this opportunity of appealing to the Tribunal because criminal proceedings will recommence. However, since their case on the merits is very weak, permission is highly likely only to delay that outcome.

70. The result of the balancing exercise is therefore clear: permission is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

71. 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 Tribunal 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 06th DECEMBER 2024