TC04073

Appeal number: TC/2013/09252

Strike out application for late appeal – original assessment in 2007 – whether deemed determination under TMA 1970 section 54 – allegations of duress – later attempts to revive appeal – complaints to Revenue Adjudicator – whether realistic prospect that appeal could be examined – extension of time not allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARY SANTO **Appellant**

- and -

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

TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MR MICHAEL SHARP FCA

Sitting in public at Ashford House, County Shopping Centre, Ashford, Kent on 8 October 2014

The taxpayer in person, assisted by Mr Simon Edwards of Precision Bookkeeping Limited

Mr J Kruyer of HMRC for the Crown

DECISION

1 This is an application by the commissioners to strike out the appeal, or alternatively to declare that the tribunal has no jurisdiction to hear it by reason of its having been determined by agreement pursuant to section 54 of the Taxes Management Act 1970. The appeal itself is dated 24 November 2013: Mr Edwards who lodged it for Mr Santo was unable to tell us what precise decision of the commissioners it was an appeal against, but it related to tax for 2004-05.

2 The history of the matter is that Mr Santo's self-assessment return for his income as a glazier for 2004-05 was the subject of an inquiry under section 9A of the 1970 Act leading to the issue of a closure notice, and an amendment being made to the amount of tax shown as due on 11 June 2007. The amendment showed a turnover of £62,572, a taxable profit of £50,000 and tax payable of £14,584. Mr Santo appealed on 12 December 2007 and on 10 January 2008 his assessment was amended to show tax of £2,454 payable. That is the figure at issue in this appeal; as we will see, it was paid in 2011.

3 Those are the basics of the case. For the rest, we were obliged to depend on Mr Santo's oral recollections of events, and a terse computer log relating to this taxpayer maintained by the commissioners. We were told that neither Mr Santo nor the commissioners had any papers relating to the 2004-05 assessments. In Mr Santo's case, this was because everything had been with a former accountant who had disappeared in dubious circumstances, and for the commissioners there was no explanation at all of why there were no papers or other records.

4 The log we have referred to had the following entries relating to assessments:-

11/06/2007	Revenue amendment made 2004-2005 . . . on instruction from Enquiry Officer.
12/12/2007	Appeals dealt with as per statement.
10/01/2008	Further assessments made for 03 & 04 and amendment for 05 on instruction from Enq Officer. Appeals closed for all years. Stmt issued to TP.
22/01/2008	Statement issued to TP.

5 Mr Santo's version of events is that a Mrs Christmas from the Revenue spoke to him by telephone in December 2007 and told him that he had to agree to the £14,000 figure or go back to the liability of £50,000 for which the Revenue had first contended; under pressure, he went along with the assessment for £14,000, as he conceived that he had no alternative. The Revenue's log and subsequent events, however, suggest that Mr Santo was treated as appealing against the assessment to tax of £14,584, that the total payable was reduced to £2,454 on 10 January 2008, and that he agreed. This is the basis of the Revenue's claim that section 54 intervenes to treat the appeal as having been determined by a tribunal.

6 By that time, Mr Santo was unwell. We did not go into the details of his illness but it was clear that it was serious, that it involved cancer and required surgery and that it has left him disabled. As a result, Mr Santo was not working and was

indeed on benefits for some while, and the tax was not paid. This situation continued until in December 2010 Mr Santo reached his 60th birthday and begun to receive his state pension, only to find by early 2011 that the outstanding tax was being deducted from it.

7 The Revenue log shows another three further telephone contacts between Mr Santo and the tax office in 2008, two in 2009, and five in 2010, none of them appearing to relate to the liability for 2004-05. For 2011 there are six entries, one of which on 19 August indicates a concern Mr Santo had about his pension, but it is not clear what his concern was. The entry does however record:

> TP also queried if he can take complaint for 04/05 further / sent letter to TP with Adjudicator's address as req'td.

8 Mr Santo confirmed this exchange and said that he had written to the Revenue Adjudicator, but had received no reply; he did not follow it up. Matters, so far as 2004-05 is concerned, then appear to go quiet again until on 21 May 2012 there are these entries:

21/05/2012	Ltr in re SA liabilities. Ltr somewhat garbles, but appears to want liabilities waived on the grounds that he was bullied by enquiry officer into accepting amounts of income assessed following cess of S9A enq. Ltr out advising cannot accept further appeal at this very late stage . . .
22/05/2012	confirmed with tp appeals letter received abd reply issued 21/05/2012 timescales given 8.57
28/05/2012	TP telin re appeal rejection can appeal to Ombusman (sic) info given re how to do so

9 Plainly, there was an appeal intended at this stage, but Mr Santo appears not to have been told of his right to appeal to the tribunal. The reference to the Ombudsman is presumably a reference to the Parliamentary Commissioner for Administration – who must be approached through the taxpayer's Member of Parliament. Mr Santo's recollection was that he did not pursue this avenue, or perhaps that he had done so but had had no reply.

10 Mr Santo says that he cast around for someone to help him and at last he was put in contact with Mr Edwards. This must have been early in 2013, because the Revenue log records Mr Edwards as asking for more information about the 2004-05 determination. As we have seen, there was no information available.

11 Section 54 of the Taxes Management Act 1970 provides:

> *Settling of appeals by agreement*
>
> 54(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.
>
> (2) Subsection (1) of this section shall not apply where, within thirty days from the date when the agreement was come to, the appellant gives notice in

> writing to the inspector or other proper officer of the Crown that he desires to repudiate or resile from the agreement.
>
> (3) Where an agreement is not in writing—
>
> (a) the preceding provisions of this section shall not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the inspector or other proper officer of the Crown to the appellant or by the appellant to the inspector or other proper officer; and
>
> (b) the references in the said preceding provisions to the time when the agreement was come to shall be construed as references to the time of the giving of the said notice of confirmation.
>
> (4) Where—
>
> (a) a person who has given a notice of appeal notifies the inspector or other proper officer of the Crown, whether orally or in writing, that he desires not to proceed with the appeal; and
>
> (b) thirty days have elapsed since the giving of the notification without the inspector or other proper officer giving to the appellant notice in writing indicating that he is unwilling that the appeal should be treated as withdrawn,
>
> the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and the inspector or other proper officer had come to an agreement, orally or in writing, as the case may be, that the assessment or decision under appeal should be upheld without variation.
>
> (5) The references in this section to an agreement being come to with an appellant and the giving of notice or notification to or by an appellant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the appellant in relation to the appeal.

12 Mr Kruyer, very properly, accepted that the claim that there had been an agreement within this section was essentially a speculation. Without seeing, as we cannot, any of the documents referred to in the log, we are unable on the basis alone of these brief entries to conclude on the balance of probabilities that a section 54 agreement existed. Had it done so, it is correct that that would dispose of the matter and that the tribunal would have no jurisdiction to reopen the appeal.

13 We pass on therefore to deal with the application for a late appeal. It is plain that Mr Santo has made repeated efforts to reopen his liability for 2004-05 and that he remains with a clear sense of injustice. We see his approach to the Revenue on 19 August 2011 as the first date on which it should have been recognised that a late appeal was being attempted. Taking account of Mr Santo's long illness and subsequent disability, and of his lack of means to seek professional advice, it is tempting to look sympathetically at the three and a half year delay from early 2008, even though it is very long.

14 In this case, however, it makes little difference whether we do so or not. We were referred to the decision of Morgan J in *Data Select Ltd v RCC* [2012] UKUT 187 at [34], where he observed:

> Although the FTT [in that case] gave permission to appeal to the Upper Tribunal in the belief that there was a lack of case law on the approach to be adopted to an application for an extension of time pursuant to s 83G(6), there was no real difference of approach between the parties before me. That is not surprising. Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit,

> the court or tribunal asks itself the following questions: (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? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions.

15 We must answer these five questions as follows:

(1) the purpose of the time limit is to ensure that tax disputes are resolved timeously, when the full facts are still available and to avoid uncertainty for taxpayers and for the exchequer;

(2) the delay is very long, at least three and a half years on the most favourable reading of events;

(3) there is hardly a good explanation for the delay, though there is perhaps an understandable explanation;

(4) an appeal progressing to a hearing at this time would stand no realistic chance of being able, in the absence of material relating to 2004-05, to reach a reliable or useful conclusion;

(5) for the taxpayer, there is a potential injustice, for which Mr Santo must himself take part of the blame for not pursuing the matter earlier and more vigorously; for the Revenue, there is no loss, except to their reputation for fair and competent administration – in failing to keep records for as long as they expect taxpayers to keep them.

16 Accordingly, the appellant's application for an extension of the time to appeal is dismissed, which makes it unnecessary to address the commissioners' application to strike the appeal out.

Further appeal rights

17 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing 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 the tribunal no 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.

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

RELEASE DATE: 14 October 2014