[2015] UKFTT 0351 (TC)

TC04535

Appeal number: TC/2014/06482 and TC/2014/06483

Income Tax – undeclared income – estimated assessments – application for appeals to be admitted out of time – delay – non co-operation – reliance on agent – applications refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEVEN DAVID SMITH and GRAHAM JAMES SMITH	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: IAN SHEARER

Sitting in public at Eagle Building, 215 Bothwell Street, Glasgow on Monday 29 June 2015

Paul Adams of Clyde Taxation Services, for the Appellants

Chris Cowan, Officer of HMRC, for the Respondents

DECISION

1. Mr Graham Smith and his son Mr Steven Smith lodged identical Notices of Appeal dated 1 November 2014 with HM Court and Tribunal Service. Those Notices of Appeal included applications for permission to make or notify the appeals late to the Tribunal (not HMRC). HMRC opposed those applications and this preliminary hearing related only to that matter.

2. The Notices of Appeal indicated that the appellants sought a review by HMRC at this late juncture having failed to request same timeously. It is not open to the Tribunal to make such a Direction. Either the appeals to the Tribunal are admitted late or they are not.

3. At the outset we made it explicit to the parties that this was not the forum to debate alleged possible deficiencies in compliance with HMRC's Compliance Handbook and the Taxpayer's Charter or the level of experience of the investigating officer. However, as we note below we did consider all pertinent circumstances.

History

Mr George Smith

4. On 16 November 2010 HMRC opened an inquiry into the appellant's tax returns for the year ended 5 April 2010. That inquiry was in terms of Section 9A of the Taxes Management Act 1970 ("TMA"). Unfortunately neither the appellant nor his agent responded to the request for information and on 30 December 2010 HMRC issued Notices under paragraph 1 Schedule 36 Finance Act 2008 requesting information by no later than 4 February 2011. The covering letter with those Notices drew to the appellant's attention the fact that there had been no response.

5. Nothing was produced in response to the Notices.

6. On 4 February 2011 HMRC wrote to the appellant and to his agent pointing out that nothing had been received and extending the time limit to 18 February 2011. That letter was a final warning and intimated that if the information was not furnished then a penalty of £300 would be imposed followed by further daily penalties of up to £60 a day until there was compliance.

7. There was no response. On 22 February 2011 HMRC wrote to the appellant and to his agent imposing the penalty and requesting the information by no later than 7 March 2011 and intimating that in the absence of compliance further daily penalties would be imposed. On 4 March 2011 the representative furnished some but by no means all of the information sought.

8. On 14 July 2011 an HMRC officer met with Mr George Smith and his representative. In the course of that lengthy meeting it became apparent that there were no complete records and that extensive further information was required.

9. Following that meeting on 22 July 2011 HMRC wrote to the representative asking for further documentary evidence and a response in regard to outstanding issues by no later than Friday 12 August 2011.

10. There was no response.

11. On 17 August 2011 HMRC wrote to Mr George Smith pointing out that there had been no response from the agent and enclosing another Notice under paragraph 1 Schedule 36 Finance Act 2008 and again pointing out that there would be penalties if the information was not provided by 21 September 2011. On 19 September 2011 the representative wrote enclosing some information but by no means all.

12. On 1 November 2011 HMRC wrote to Mr George Smith formally pointing out the remaining information that was required and stating that it was a final warning and the information should be provided by 15 November 2011. That letter was copied to the representative. There was not compliance. Accordingly on 17 February 2012 another penalty was issued and Mr Smith was asked to furnish the information by no later than 17 March 2012. That letter was copied to the representative.

Mr Steven Smith

13. On 1 March 2012 HMRC wrote to Mr Smith indicating that they were opening an inquiry in terms of Section 9A TMA into his self-assessment tax return for the year ended 5 April 2011.

Both appellants

14. Mr George Smith and his son Steven operated as taxi drivers in the Glasgow area.

15. On 26 July 2012 HMRC met with both Messrs Smith and their representative. On 27 July 2012 HMRC wrote to the representative setting out the further documentation and information which was required in respect of both appellants. There was no response.

16. On 14 September 2012 HMRC wrote to the representative pointing out that there had been no response and indicating that "as a concession and to prevent having to issue any further information notices" HMRC would be prepared to negotiate an agreed settlement. There was no response.

17. On 28 November 2012 HMRC wrote to both appellants stating that there had been no reply to any letters and that having reviewed the file there had been numerous delays which could not be allowed to continue. Accordingly the inquiries would be closed by formal notice and penalties imposed. The detail was explained to both appellants. The penultimate paragraph invited the appellants to either phone or write to HMRC. Neither appellant did so. The letters were copied to the representative.

18. On 14 December 2012 the representative wrote stating that the proposals outlined in the letter of 14 September 2012 were acceptable. HMRC responded on 19 December 2012 enclosing certificates of full disclosure for signature by the

appellants. These were not returned. On 25 January 2013 HMRC contacted the representative who said that he had been too busy to arrange for his clients to complete them. HMRC then indicated that they would issue the Closure Notice and discovery assessments and the appellants could appeal those decisions if they so wished.

19. On 30 January 2013 the decisions were issued. On 28 February 2013 the representative intimated that "our clients have asked us to lodge appeals against the Closure Notices. We will let you have further information in support of our appeals, in due course".

20. On 6 March 2013 HMRC wrote to both appellants indicating that their tax adviser had intimated that they intended to appeal the decisions but that he had not told HMRC what the grounds of appeal would be. A reply by no later than 20 March 2013 was sought.

21. On 12 March 2013 the representative simply said that he would furnish further information "as soon as possible". Nothing was provided. On 5 April 2013 HMRC wrote to both of the appellants stating that they could either request a review of the decision or notify an appeal to an independent tribunal within 30 days of the date of the letter. Nothing happened.

22. On 10 May 2013 HMRC wrote to both appellants referring to the said letter of 5 April 2013 and stating:

> "As you have not requested a review or taken your appeal directly to the Tribunal Services I must now assume that your appeal has been settled under Section 54(1) Taxes Management Act 1970 on the assessments and penalty determinations raised on 30 January 2013 for the years 2008/09 to 2010/11. Collection of the full liabilities will now be pursued".

A copy was sent to the representative.

23. HMRC put in place collection measures. Debt Management Unit pursued the appellants. There were letters and telephone calls.

24. In October 2014 Sheriff Officers called on the appellants and at that stage they sought advice from Mr Adams. Both appellants sent handwritten letters to HMRC indicating that they wished to appeal the decision of an assessment on 30 January 2013. HMRC refused to allow the late appeals. The Notices of Appeal were then lodged with the Tribunal by the new agent.

The Law

The Legislation

25. The relevant legislation is Section 49 TMA. In the case of both appellants neither had accepted HMRC's offer of a review of the decision. Accordingly Section 49H applies. Section 49H reads:-

"**49H - Notifying appeal to Tribunal after review offer but not accepted**

(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.

49C(8) – Defines acceptance period

'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."

The Case Law

26. The Tribunal has a very wide discretion. The case had not been cited to us but we drew the parties attention to *AG for Scotland v Gen Comms for Aberdeen City*[1] ("*Aberdeen"*) and in particular to the following paragraphs:

"[22] Section 49 [of the Taxes Management Act] is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.

[23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a

[1] 2006 STC 1128

reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late.

[24] Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one another, for example, in a case where there is a reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies."

27. We were not referred to the case but we agree with the decision of Judge Berner at paragraph 36 in *O'Flaherty v HMRC*[2] and that reads:-

"I was referred to … where Sir Stephen Oliver refused permission to appeal out of time. In the course of his decision, Sir Stephen made the point that permission to appeal out of time will only be granted exceptionally. It is in my view important that this comment should not be thought to provide a qualitative test for the circumstances the FTT is required to take into account. It should properly be understood as saying nothing more than that permission should not routinely be given; what is needed is the proper judicial exercise of a discretion, taking account all relevant factors and circumstances."

28. He goes on to record at paragraph 37 that:-

"Time limits are prescribed by law, and as such should as a rule be respected".

We agree entirely.

29. Paragraph 38 reads:-

"These references to permission being granted exceptionally should not be elevated into a requirement that exceptional circumstances are needed before permission to appeal out of time may be granted. That is not what was said in *Ogedegbe* nor in *Aston Markland*, and it is not the case. The matter is entirely in the discretion of the FTT, which must take account of all relevant circumstances. There is no requirement that the circumstances must be exceptional."

That is the approach which we adopt.

30. We have considered, and weighed in the balance, all of the relevant circumstances including, but not restricted to, the circumstances identified in *Aberdeen* (see

[2] 2013 UKUT 01619 (TCC)

paragraph 26 above). In so doing, we have concurrently applied the three stage process set out by the Court of Appeal in *Denton & Others v T H Whyte & Another; Decadent Vapours Ltd v Bevan & Others* and *Utilise TDS Ltd v Davies & Others* ("Denton")[3]. The first of those is to identify the seriousness and significance of the failure to lodge an appeal in relation to which the relief sought. The second is to consider why the default occurred and the third is to evaluate all the circumstances of the case so as to deal justly with the application of the factors.

Reasons for the failure

31. In these appeals this really encompasses most of the factors which fall to be weighed in the balance.

32. There was only one reason advanced for the failure to lodge appeals timeously and that was that both appellants relied on their former representative. They said that when they received letters from HMRC they physically took them down to their representative because he was quite difficult to contact by telephone. Apparently he always told them not to worry, that he had matters in hand and that he was negotiating with HMRC. They said that they did not ask for or obtain any written evidence of this, but they continued to pay the representative's fees. They said that fellow taxi drivers had assured them that the representative was good.

33. We have set out at length the detail of the history in these appeals because it is abundantly clear that HMRC repeatedly wrote to both appellants and told them that their representative had failed to provide any information. They can have been in absolutely no doubt of the position. They were wholly unable to explain why, in the face of the explicit letters from HMRC, they still apparently believed that matters were being negotiated with HMRC. Furthermore they were being chased for payment. They only took action when the Sheriff Officers arrived at their door. We do not accept the argument that HMRC failed to tell the appellants that their representative was not co-operating. HMRC did do so.

34. Taxpayers are expected to act with reasonable prudence and diligence in dealing with their affairs. In these appeals both appellants appear to have simply ignored their tax affairs. We do not find that they acted either prudently or diligently. HMRC had made it very clear to both appellants directly that there were time limits for seeking a review and/or an appeal and yet they did nothing other than pass the letters to their representative in the full knowledge that their representative had signally failed to co-operate with HMRC over a sustained period.

35. Even if they had relied on their representative, the fact that penalties were imposed, and collected, and that the Debt Management Unit were chasing them for payment should have alerted them to the need to take some action. They did not proceed with reasonable expedition.

[3] 2014 EWCA Civ 906

Prejudice

36. Clearly if the late appeals are not to be allowed then the appellants would be prejudiced because they would be unable to litigate. However, if the late appeals are to be allowed HMRC would be put to considerable expense in preparing for not uncomplicated appeals many years after the event.

37. Furthermore it is clear from the notes of the two meetings that there is extremely little available by way of records kept by the appellants. An example is that although Mr Adams attempted to advance an argument in regard to the daily meter reading, it is clear from the note of meeting, on 14 July 2011, that Mr George Smith would write down his daily meter readings on slips of paper and then throw them away. The accounts that had been produced by the previous representative had all apparently been produced on the basis of estimates. The notes of meeting make it clear that there are no receipts available for many of the expenses claimed.

38. The assessments were raised based on the limited information furnished to HMRC at the time.

39. No new information of any significance has been provided. Mr Adams had argued that one example of the assessments being over-stated was because the radio fees had been added back. Although we were not considering the substantive issues in these appeals it is perfectly clear from the papers before us that the contract income had been admittedly received under deduction of the radio fees and yet the then representative had claimed the same (estimated) deduction in the accounts. There cannot be a double deduction. We also accepted HMRC's argument that the takings for the other drivers who drove the taxis had been excluded from the assessments.

40. The onus would be on the appellant to establish in what way, if any, the assessments were over-stated. In the absence of any relevant records that is likely to prove extremely difficult. We find that HMRC would be significantly prejudiced if the appeals were to be allowed to proceed.

Public interest

41. The delay since the issue of the decisions on 30 January 2013 has been long and followed previous lengthy delays because of the failure of both appellants and their representative to co-operate to any reasonable extent with HMRC. There is a public policy of finality in litigation and legal proceedings whereby matters have to be brought to a conclusion within a reasonable time without the possibility of being re-opened. We agree with the Upper Tribunal in *Graham v HMRC*[4] when it states: "… time bar provisions satisfy the need for degree of legal certainty which should not be likely overridden. A good reason to do so is usually required." We agree with that. As we indicate above we find that there is no such good reason.

[4] 2014 UKUT 75

42. If, and to the extent that the appellants have been prejudiced by the alleged failings by their former representative it is for them to seek a remedy from him, if appropriate. The public purse should not be put to further expense particularly where Mr Adams concedes for the appellants that there was a "substantial" under declaration in the self-assessment returns.

Decision

43. In summary over a period of almost four years the appellants have notably failed to co-operate with HMRC's enquiries. They have only taken very limited action and at a very late stage.

44. In all of the circumstances outlined above we find that they do not have a reasonable excuse for failure to comply with the statutory time limits which have been imposed for good public policy reasons and that after such a long delay it is wholly inappropriate to allow the applications.

45. Accordingly the applications are refused.

46. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 16 JULY 2016