



TC06046

Appeal number: TC/2017/01522

*INCOME TAX – application to strike out appeal - application upheld –
permission given for late notice of appeal to be given to HMRC*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID FIORINI

Appellant

- and -

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

TRIBUNAL: JUDGE TONY BEARE

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on
26 July 2017**

Mr. S. Farooq for the Appellant

Mr. S. Goulding, Officer of HM Revenue and Customs, for the Respondents

1. This decision relates to an application by HMRC for a direction under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Tribunal Rules”) that an appeal notified to the Tribunal by the Appellant in respect of income tax assessments for the tax years of assessment ending 5 April 2012, 5 April 2013 and 5 April 2014 should be struck out.

Background

2. The relevant facts may be summarised briefly as follows. The income tax assessments referred to above were issued on 11 October 2016. No notification of any appeal against those assessments was submitted by the Appellant to HMRC within the 30 day time limit required by the legislation or indeed at any time to date. However, on 9 February 2017, the Appellant submitted to the Tribunal a notice of appeal against the relevant assessments. So the Appellant was 121 days late in giving notice of his appeal and gave that notice to the Tribunal and not to HMRC.

3. The Appellant has given the following reasons for the late notice of his appeal. His brother lost a long battle with cancer on 4 November 2016 and, in addition to dealing with his own grief, he has had to care for and help his 88 year old mother deal with the struggle of losing a son. He has also had a number of health issues including rheumatoid arthritis.

4. HMRC has not sought to challenge the veracity of the explanation given by the Appellant for the relevant delay. However, its position is as follows.

5. First, it points out that no notice of appeal has ever been submitted to HMRC – instead, the Appellant has instead sent a notice of appeal directly to the Tribunal. It then says that the Tribunal is precluded from hearing the relevant appeal because, under sub-section 49D(1) Taxes Management Act 1970 (the “TMA”), an appeal may be notified to the Tribunal only if a notice of appeal has previously been given to HMRC under Section 49 TMA. Under Rule 8(2)(a) of the Tribunal Rules, the Tribunal is obliged to strike out the whole or a part of proceedings if the Tribunal does not have jurisdiction in relation to the proceedings or the relevant part of them. Accordingly, HMRC says that the Tribunal is required to strike out this appeal on the basis that the failure on the part of the Appellant to notify HMRC of its appeal prior to giving notice to the Tribunal means that Section 49D TMA has not been engaged and therefore the Tribunal has no jurisdiction to entertain the appeal. Thus, the failure on the part of the Appellant to notify HMRC before submitting his notice of appeal to the Tribunal is fatal to the Appellant’s case. In support of this proposition, Mr. Goulding, on behalf of HMRC, cited the decision of Judge John Clark in the case of *K Thuishyanthan v HMRC* [2016] UK FTT 0186 (TC).

6. Secondly, HMRC says that, if its application to strike out the appeal should fail for any reason, then it does not agree to receiving late notice of the appeal despite the fact that it has the power to do so under Section 49 TMA. The

reason given by HMRC for that position is that it does not consider the reasons given by the Appellant to be an adequate excuse because those reasons did not entirely prevent the Appellant from entering an appeal in time. Mr. Goulding, on behalf of HMRC, pointed out that the Appellant was able to continue his trade during the relevant period. He also noted that allowing the Appellant to appeal late would be unfair to other taxpayers and prejudicial to HMRC.

- 5
7. So, although HMRC empathises with the circumstances of the Appellant, it does not consider the reasons given by the Appellant for the lateness of his notice to be sufficient.

10 Decision

8. With the greatest of respect to HMRC, I am afraid that I cannot agree with its approach in this case. I consider that an appeal which is made 121 days late in these circumstances is perfectly understandable. Moreover, I do not see why the fact that the Appellant continued his trade during the relevant period changes the position. The Appellant would have needed to carry on his trade in that period in order to support himself, whereas it is quite understandable that appealing against income tax assessments might not have been at the forefront of his mind at the relevant time. I therefore consider it to be regrettable that HMRC both has applied to strike out the relevant appeal and is opposed to the Appellant's application to submit a late notice of appeal to HMRC.

9. Unfortunately, as HMRC has submitted this application to strike out the relevant appeal on the grounds of jurisdiction and has not withdrawn that application, I am bound to apply the framework of the legislation set out in the TMA and the Tribunal Rules. And, in doing so, I must reluctantly agree with HMRC that the failure on the part of the Appellant to give notice of appeal to HMRC within the requisite timeframe means that the Appellant was not entitled to give notice of appeal to the Tribunal because Section 49D TMA was not engaged. I am therefore obliged to uphold the application to strike out the proceedings to which that notice of appeal relates. But I do so with great reluctance.

10. Having said that, it seems to me that the proceedings which I am striking out on the grounds of jurisdiction are the proceedings emanating from the notice of appeal which was erroneously given to the Tribunal by the Appellant on 9 February 2017. The very basis on which I am obliged to strike out those proceedings is that the Appellant has yet to submit any notice of an appeal to HMRC in relation to the assessments in question. So there is nothing to prevent the Appellant, at this late stage, from submitting to HMRC a notice of appeal, asking HMRC to agree to accept the late notice of appeal and then, when that is refused, applying to the Tribunal for permission to do so. HMRC has already indicated that it will not agree to the submission of a late notice of appeal in this case. However, under sub-section 49(2)(b) TMA, the Tribunal may give permission for notice to be given to HMRC after the relevant time limit. Once the submission of that late notice to HMRC has been permitted by the Tribunal,

the machinery set out in Sections 49A et seq. TMA will be engaged and the Appellant can in due course submit notice of his appeal to the Tribunal under Section 49D TMA.

- 5 11. Whilst that would certainly be the usual order of events, I have considered whether I am able to avoid extending the process any further by giving permission for late notice to the Appellant in advance of his submitting his notice of appeal to HMRC.
- 10 12. In considering my approach to this case, I have borne in mind the overriding objective of the Tribunal Rules, as set out in Rule 2 of the Tribunal Rules, which is to enable the Tribunal to deal with cases fairly and justly. Rule 2(2) of the Tribunal Rules expressly specifies that dealing with a case fairly and justly includes avoiding unnecessary formality and seeking flexibility in the proceedings. It also includes dealing with the case in ways which are proportionate to the importance of the case, the anticipated costs and the resources of the parties. I note also that, pursuant to Rule 5 of the Tribunal Rules, the Tribunal is entitled to regulate its own procedure, subject to the provisions of the Tribunals, Courts and Enforcement Act 2007 and any other enactment.
- 15 13. Bearing in mind Rule 2 and Rule 5 of the Tribunal Rules and the fact that HMRC has already pinned its colours to the mast and indicated that it will not agree to late notice of the appeal in this case, it seems to me that it would not be a sensible use of the Tribunal's time and resources (or the time and resources of the parties) for me merely to suggest at this stage that the Appellant should submit a notice of appeal to HMRC, then apply to HMRC for HMRC's agreement to the late notice and then (inevitably, when HMRC repeats its refusal) return to the Tribunal for permission to give the late notice when I can effectively expedite the process by giving permission now.
- 20 14. In this case, HMRC is already on notice (by virtue of the notice of appeal which was erroneously given to the Tribunal on 9 February 2017) that the Appellant wishes to appeal against the relevant assessments. Accordingly, I do not think that HMRC (or the general body of taxpayers) would be in any way disadvantaged if the Appellant were to be allowed to give a late notice of his appeal to HMRC as long as he does so within a reasonable time after the date of this decision.
- 25 15. Accordingly, I hereby give permission to the Appellant to give late notice of an appeal against the relevant assessments to HMRC as long as he does so by 5pm on the day falling three weeks after the date of this decision. Although the notice of appeal which is eventually submitted would be some eight months late, most of that period of delay will have been caused by the actions of HMRC in applying to strike out the Appellant's notice of appeal to the Tribunal.
- 30 40 Moreover, as HMRC has been on notice since 9 February 2017 of the Appellant's wish to appeal against the relevant assessments, I believe that the

additional period of delay since that date should be disregarded in exercising my discretion in this regard.

16. It might be said that the way in which Section 49 TMA is worded means that, by implication, the Tribunal cannot give permission for late notice of an appeal to HMRC until the relevant notice of appeal has been given to HMRC. Whilst I concede that the normal order of events would be for the relevant notice to be given to HMRC along with an application for HMRC to agree to the late notice, for HMRC then to refuse to agree to the late notice and for the appellant then to apply to the Tribunal for the Tribunal's permission to make a late appeal, there is nothing in the section itself which expressly precludes the Tribunal from giving permission to the late notice in advance of the notice's being given as long as HMRC has already said that it does not agree to the late notice. All that is necessary before the Tribunal can grant permission for the late notice is that HMRC must have refused to agree to the late notice (which HMRC has done in this case). So, given that the section itself does not preclude this course of action, I believe that it is both appropriate and in accordance with the Tribunal Rules as specified above.
17. 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 Rules. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 3 AUGUST 2017