



TC06312

Appeal number: TC/2017/03404

PROCEDURE – application to make late appeals - illness of applicant – appeals made between approximately five and one year late – burden of proof – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

COLIN BARFOOT

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at Taylor House, London on 22 January 2018

The applicant did not appear and was not represented

Steve Golding, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

Introduction

5 1. This is an application by Mr Colin Barfoot to make late appeals against assessments (under section 29 TMA 1970) for the tax years ended 5 April 2005 and 2006, an amendment to Mr Barfoot's return for the tax year ended 5 April 2007 (the assessments and the amendment totalling £16,946.24) and against 16 late filing penalties in respect of the applicant's failure to file tax returns for the tax years ended
10 5 April 2011, 2012, 2013 and 2014 (amounting in total to £6,400).

2. Originally, this application was due to have been heard in September 2017 but was postponed when Mr Barfoot produced medical evidence demonstrating that he was not fit for work. The hearing was rescheduled for 22 January 2018.

3. Mr Barfoot, however, did not attend the rescheduled hearing and neither did his
15 representative. Having reviewed the Tribunal's file I am satisfied that Mr Barfoot and his representative had been notified of the rescheduled hearing. Furthermore, the Tribunal clerk attempted to reach Mr Barfoot twice on the mobile telephone number contained on the notice of appeal. On both occasions, however, the call simply went through to voicemail. We checked with the Tribunal Service to ascertain whether they
20 been informed by Mr Barfoot or his representative that they did not intend to attend and were informed that there was no record of any contact. In all the circumstances, I concluded that it was in the interests of justice for the hearing to proceed in the applicant's absence.

Background

25 4. The assessments and amendment referred to above were issued in September 2009 after HMRC had opened an enquiry into the return for the year ended 5 April 2007 and issued a closure notice. In addition, late filing penalties under Schedule 55 FA 2009 were issued between 14 February 2012 and 23 February 2016 in respect of the tax years ended 5 April 2011, 2012, 2013 and 2014. Reviewing HMRC's
30 computerised records, I was satisfied that the penalty notices appeared to have been duly issued.

5. On 27 January 2017, Mr Barfoot's accountants, Hicks Chartered Accountants ("Hicks"), wrote to HMRC seeking to appeal the above assessments and penalties. The letter read as follows:

35 **"Late filing penalties for tax years 2010-11 to 2014-15ⁱ**
Determinations of tax for the tax years 2004-05 to 2006-07

We write to appeal against the penalties and determinations issued to our client the above tax years.

This is on the grounds that our client has been incapacitated both physically and psychologically which led to his tax affairs falling into arrears.

Determinations

5 Mr Barfoot submitted a tax return for 2006-07 which declared income from property as he was letting two rooms in his property. An enquiry was made into the tax return and the return was amended to show double the rent declared together with income from self-employment of £13,000. Whilst our client had four bedrooms he was only able to
10 rent two of the rooms due to the fact that his son was living with him following the breakdown of his marriage. The rents received in that period amounted to £7000, being £350×10 months ×2 rooms. Rent a room relief was deducted from the rents.

15 In terms of the self-employment, this was his first attempt to work after two years due to stress-related sickness from a previous employment. Mr Barfoot acknowledges that he invoiced £13,000 for a job however he was not paid for the work and this is now subject to a personal claim.

20 At the time of the enquiry and subsequent determinations for that year and the two prior years he was physically incapacitated following a fall in December 2006. This led to a subsequent alcohol dependency which meant that he was unable to manage his affairs or communicate with HMRC. He has not been able to work since the fall.

25 This continued until he stopped drinking on 10 December 2014 and sought professional help to bring his tax affairs up to date.

Please find attached copies of his medical history from my [sic] general practitioner to support the appeal.ⁱⁱ

30 We believe that it is reasonable to take [sic] view that the income declared on the original tax return filed reflects the correct position for 2006-07 and the two earlier years and we should be obliged if you would consider the appeal on this basis.

Late filing penalties

We appeal against the late filing penalties on the same basis as set out above.

35 Our client has expressed a willingness to address his tax affairs and the appointment of a professional adviser and the filing of his outstanding tax returns reflect this. He is seeking to settle his outstanding liabilities however should be made on a just and reasonable basis.

40 As you may be aware our client has been dealing with HMRC Debt Management and Enforcement who are copied in on this letter and there is a Court Adjournment hearing in February 2017 and we are naturally keen to have this matter resolved by that time.”

6. On 21 February 2017, HMRC wrote to Mr Barfoot replying to a letter from Hicks “of 11 November 2016”. A copy of Hicks’ letter was not made available to me
45 but the HMRC letter of 21 February 2017 acknowledged receipt of Mr Barfoot’s tax returns for the years 2007/08 to 2015/16. The HMRC letter confirmed that no late

filing penalties are being charged the year 2014/15 and also confirmed that the late filing penalties for the years 2008/09 to 2009/10 had been cancelled, and the payments on account for the year 2007/08 had also been reduced to nil.

5 7. By further letters of 21 February 2017, HMRC pointed out that Mr Barfoot was out of time to appeal against the late filing penalties.

8. On 18 April 2017, Mr Barfoot lodged a notice of appeal against the assessments, the amendment and late filing penalties on the following grounds:

10 “A tax return for 2006-07 was submitted on time however HMRC made an enquiry into the return and following very little response from me a determination was made for 2006-07 and for the previous two tax years.

15 The return declared income from rents and some benefits. The amended/determined return showed double the rent declared together with income from self-employment of £13,000. Whilst my property had four bedrooms I was only able to rent two of the rooms due to the fact that my son was living with me The rents received in that period amounted to £7000, being £350×10 months ×2 rooms. Rent a room relief was deducted from the rents. I have supporting records to reflect this.

20 In terms of the self-employment, this was my first attempt to work after two years due to stress-related sickness from a previous employment. I acknowledge that I invoiced £13,000 for a piece of work however to date I have never been paid and this is now subject to a personal claim.

25 I did not deal with the issues at the time as in December 2006 I was physically incapacitated following a catastrophic fall in December 2006 from which I have had numerous operations which continue to this day. As well as the ongoing medical appointments to manage my pain, it also led to a subsequent dependency on alcohol which meant that I was unable to manage his [sic] affairs or communicate with HMRC. I have not been able to work since the fall.

30 It was not until I stopped drinking on 10 December 2014 and sought professional help that I was able to bring my affairs up to date. It is obvious that despite the evidence and briefings both during and prior to several hearings at the Bankruptcy Central County Court oral and in writing that the Petitioner has failed to grasp the hour to hour intensity of both medical and mental trauma suffered by me during the last 11 years.

35 A medical history provided by my GP to support the appeal was not recognised by HMRC. This was brought about by informal and formal counselling but in particular by advice that my downward situation in health and debt could be addressed in a holistic basis and I would submit that I have made considerable progress on all fronts.

40 The Taxpayer’s charter indicates that a reasonable approach should be made which I believe should be to take the view that the income

declared on the original tax return filed reflects the correct position for 2006-07 and the two earlier years.

9. The notice of appeal then went on to state that Mr Barfoot was also appealing against the late filing penalties on the same basis as set out above.

5 10. I was also provided with a medical history dated 18 September 2017 from Dr May of The Elms Medical Practice which contained details of Mr Barfoot’s medical history, as follows:

“Please see below for a list of medical operations:

1974	Fracture of shaft of ulna
1979	Fracture of shaft of tibia
1979	Prmy open reduction of #+ internal fixation with plate NEC
1981	Removal of plate from bone
1981	Acute osteomyelitis
11/06/2008	Acquired spondylolisthesis
04/07/2008	Osteoarthritis NOS, of 1 st MTP joint
01/08/2008	Primary posterior interbody fusion of joint of lumbar spine
01/08/2008	Primary transforaminal interbody fusion joint lumbar spine
03/11/2008	Arthrodesis of first metatarsophalangeal joint of toe
17/03/2009	Arthrodesis of first metatarsophalangeal joint of toe
11/11/2010	Removal metalwork from bone
11/11/2010	Debridement of bone
05/05/2011	Complete tear, shoulder joint
02/02/2012	Arthroscopy NEC
13/02/2013	Complete tear, shoulder joint
02/05/2013	Arthroscopy NEC
21/11/2013	Revisional repair of rotator cuff NEC
21/11/2013	Arthroscopy NEC
12/04/2017	Left rotator cuff repair – complete tear
13/07/2017	Caudal epidural and right L5/S 1 nerve root injection

11. Clearly, Mr Barfoot has suffered for at least the last nine years from a succession of significant complaints in relation to his spine and shoulder.

The law

The time limits for making an appeal:

5 12. Section 31A(1) Taxes Management Act 1970 sets out the thirty day deadline for appealing a penalty notice to HMRC:

“31A(1) Notice of an appeal under section 31 of this Act must be given

- (a) in writing
- (b) within 30 days of the specified date
- 10 (c) to the relevant officer of the Board.”

The basis on which Tribunal can extend time for making appeals:

13. Section 49(1) and (2) Taxes Management Act 1970 set out the Tribunal’s general discretion for extending the deadline for making appeals. There is no statutory guidance as to the basis on which that discretion should be exercised.

15 “s 49 Late notice of appeal

- (1) This section applies in a case where-
 - (a) notice of appeal may be given to HMRC, but
 - (b) no notice is given within the relevant time limit.
- (2) Notice may be given after the relevant time limit if –
 - 20 (a) HMRC agree,
 - (b) where HMRC do not agree, the tribunal gives permission”

14. Section 49D Taxes Management Act 1970 sets out the basis on which the Tribunal can accept an appeal if an appeal has been made in time to HMRC but no review has been requested or offered by HMRC:

25 “49D Notifying appeal to the tribunal

- (1) This section applies if notice of appeal has been given to HMRC.
- (2) The appellant may notify the appeal to the tribunal.
- (3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question”

30 15. Section 49G Taxes Management Act 1970, this is the basis on which an appeal can be made to the Tribunal after a review has been carried out by HMRC:

“49G Notifying appeal to tribunal after review concluded

- (1) This section applies if-

- (a) HMRC have given notice of the conclusions of a review in accordance with section 49F, or
 - (b) the period specified in section 49E(6) has ended and HMRC have not given notice of the conclusions of the review.
- 5 (2) The appellant may notify the appeal to the tribunal within the post-review period.
- (3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.
- 10 (4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.
- (5) In this section “post review period” means-
- (a) in a case falling within subsection 1(a) the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6) or
 - 15 (b) in a case falling within subsection (1)(b) the period that-
- (i) begins with the day following the last day of the period specified in section 49E(6) and
 - (ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section
 - 20 49E(9)”

Basis on which the Tribunal can extend time for making an appeal:

16. There is no statutory definition of the criteria which should be applied to decide whether or not the deadline for making an appeal should be extended. Clearly, this Tribunal has a discretion which must be exercised judicially, taking account of all the relevant circumstances. Nonetheless, there are many authorities which have considered the question, including *Data Select v HMRC* [2012] UKUT 187 (TCC) (Morgan J).

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17. The Morgan J indicated that the questions that this Tribunal should ask itself in this context were as follows:

30 “[34] ... 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

35 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.

40 [35] The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker*

(a firm) [2002] EWCA Civ 645, [2002] 3 All ER 490, [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the Value Added Tax and Duties Tribunal to the High Court: see *Revenue and Customs Comrs v Church of Scientology Religious Education College Inc* [2007] EWHC 1329 (Ch), [2007] STC 1196.

[36] I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Comrs for Aberdeen City* [2005] CSOH 135 at [23]–[24], [2006] STC 1218 at [23]–[24] which is in line with what I have said above.

[37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. None the less, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision.

[38] As I have indicated, the FTT in the present case adopted the approach of considering all the circumstances including the matters specifically mentioned in CPR 3.9. It was not said that there was any error of principle in that approach. In my judgment, the FTT adopted the correct approach.”

18. In addition, I must bear in mind and apply the overriding objective to deal with cases fairly and justly.

Discussion

19. Dealing with the first of the issues mentioned by Morgan J in *Data Select*, I consider that the purpose of the time limits within which appeals against assessments, amendments and penalty notices must be made is to provide both HMRC and taxpayers with certainty about the cut-off point when the tax liabilities therein contained have become final. Parliament has prescribed a defined period of time to appeal a penalty notice in order to ensure a degree of certainty and that disputes are conducted efficiently.

20. Secondly, in relation to the length of delay, the period of delay in relation to the assessments and the amendment is substantial. The assessments for the 2005 and 2006 tax years were issued on 24 September 2009. The amendment to the return for the

2007 tax year was issued on 2 June 2009. There has, therefore, in relation to these matters been a delay of well over six years.

21. In relation to the late filing penalties, these have been issued over a period starting 14 February 2012 to 23 February 2016. As regards the latest of these penalties, the delay is almost one year. Even if the letter from Hicks of 11 November 2016, which I have not seen, amounted to or could be construed as a notice of appeal against the latest penalty it would be over eight months late. In my view, these delays were substantial.

22. Thirdly, I must consider the reasons for the delay.

23. Whilst I accept that Mr Barfoot clearly suffered from ill-health during the relevant period, there is no evidence to establish why his illness prevented him from lodging a notice of appeal or even arranging for someone to do this on his behalf.

24. As Judge Short noted [114] in *Jones v HMRC* [2017] UKFTT 856 (TC), lodging a notice of appeal is a relatively straightforward matter. It is much simpler to lodge a notice of appeal than it is, for example, to submit a tax return. It is simply a matter of sending a letter.

25. It is unfortunate that Mr Barfoot did not attend the hearing where these matters, particularly in relation to his health, could have been explored. Nonetheless, on the basis of the evidence before me I am not satisfied that a good reason for the failure to appeal the assessments, the amendment and the late filing penalties has been made out.

26. Fourthly, the consequences of granting permission to appeal out of time would, I think, potentially prejudice HMRC. A considerable amount of time has elapsed since the enquiry into Mr Barfoot's return for the year ended 5 April 2007, culminating in the issue of an amendment to the return on 2 June 2009. To reopen those matters (and the assessments for the two previous years) could well prejudice HMRC on the basis that, after so many years, the relevant personnel and supporting documents may no longer be available. I accept, however, that the degree of prejudice suffered by HMRC is likely to be less in relation to the late filing penalties.

27. Finally, as regards the fifth *Data Select* issue, the consequence of refusing permission to appeal out of time will be that Mr Barfoot's substantive tax and penalty liabilities will become final.

28. It is clear to me that the burden is upon Mr Barfoot to show the reasons why permission should be granted to appeal out of time. In my judgment he has failed to satisfy me that I should exercise my discretion to grant permission for a late appeal in this case.

29. For the reasons given above, this application is refused.

30. 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

5 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.

10 **GUY BRANNAN**
TRIBUNAL JUDGE

RELEASE DATE: 30 JANUARY 2018

ⁱ I was informed that the late filing penalties for the tax year ended 5 April 2015 had been withdrawn.

ⁱⁱ This was not enclosed with the documents provided to me.