



TC06769

Appeal number: TC/2017/08175

Income tax - assessments and penalties in respect of inaccuracies in the Appellant's self-assessment returns for 2011-12 and 2012-13 - s 28 Taxes Management Act 1970 and Schedule 55 to Finance Act 2009 - appeal to HMRC out of time - application for permission to appeal - whether reasonable excuse - guidance in Data Select and Romasave considered - application refused

FIRST-TIER TRIBUNAL

TAX CHAMBER

MICHAEL LALIC

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

Sitting in public at City Exchange, 11 Albion Street, Leeds on 23 April 2018

The Appellant in person

Ms Pallavika Patel, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. Mr Michael Lalic (“the Appellant”) applies for permission to appeal out of time
5 against the decision of the Commissioners (“HMRC”) on review, dated 9 February
2015 to issue assessments and penalty notices in respect of the Appellant’s self-
assessment tax returns for each of the years 2011-12 and 2012-2013 under s 28 Taxes
Management Act 1970 and Schedule 55 to Finance Act 2009.

2. HMRC object to the Appellant’s application and request that it be struck out.

10 **Background to the late application**

3. The Appellant is a taxi driver. In his 2011-12 return he recorded his turnover as
£36,130 with expenses of £32,956, including fuel costs of £20,174. His total net profit
for the year was shown as £3,174.

4. On 11th December 2013 HMRC commenced a Section 9a enquiry into the
15 Appellant’s return and requested the following information for the year to 5 April
2012:

- i. The business accounts for the taxi business together with an analysis of
drawings.
- ii. MOT certificates covering the whole period and any other mileage records
20 kept for all vehicles used in the taxi business.
- iii. All business records used in the preparation of the accounts to 5 April 2012,
sales invoices/records, bank statements, cheque book stubs, paying in slips,
purchase and expenses receipts and invoices.
- iv. Details of the make, model and purchase price and date of the vehicles used in
25 the business with details of how the purchase was funded.
- v. An analysis and supporting evidence of expenses of £32,956.
- vi. Bank account statements for all accounts into which payments were received
and expenses paid.
- vii. Statements or passbooks for any interest bearing accounts.

30 5. On 22 January 2014, as the Appellant had not provided any of the information
requested, HMRC issued a Notice to Provide Information under Schedule 36 Finance
Act 2008.

6. The Appellant provided most of the information requested on 23 January 2014,
35 although bank statements were missing for most of the period 2011-12 (6 April 2011
to 6 February 2012). Most of the statements provided were for 2012-13.

7. The Appellant lived in Rotherham and said that the vast majority of his jobs
were to Manchester airport, approximately 48 miles away. He provided totals for the
number of jobs undertaken and a total for some of the months, whereas HMRC had
40 requested full details of all the jobs undertaken and how he had arrived at his figures.

8. The Appellant produced receipts for fuel which totalled £15,671.98, being less than the amount claimed. HMRC observed that the amount claimed appeared very high and also disproportionate to his turnover. Also, dates on many of the receipts provided did not tally with the amount claimed. Additionally in several instances
5 there were more than one fuel purchases on the same day. On one occasion the Appellant's vehicle was filled at 17.43hrs in Mexborough and then again at Worksop 18.10hrs, which was inherently not feasible. HMRC said that it was therefore difficult to know whether the fuel purchases legitimately matched the claimed business mileage.

10 9. In the absence of further information and evidence from the Appellant, the Officer dealing with the enquiry provided a Business Economics Model using mileage figures on the MOT certificates to give a full breakdown of how she had worked out a revised turnover and fuel consumption figures. She allowed a 50% reduction for unengaged mileage and a further 10% reduction for private mileage and then
15 recalculated what she considered to be a realistic figure for fuel used. She took the amounts provided to calculate an average cost per job of £120 and then divided this by an average journey to Manchester Airport of 48 miles to arrive at a cost per mile. The Officer provided a copy of her tax calculations based on a revised turnover figure, after expenses, of £23,822.

20 10. On 17 March 2014, the Appellant was invited to provide any further evidence if he disputed HMRC's figures. Following a request from his appointed agent, Brearley & Co, he was allowed an extension of time until 24 March 2014 to forward the outstanding information, that is, the missing bank statements and details of all the jobs he had undertaken. In the event of default he was told that a £300 penalty would be
25 issued.

11. On 28 March 2014, as there had been no further response from the Appellant, a £300 penalty notice was issued with a Notice advising that daily penalties of £60 per day would accrue.

30 12. On 6 June 2014, HMRC commenced a Section 9a enquiry into the Appellant's 2012-13 return and, for the year to 5 April 2013 requested the same information as referred to in paragraph 4 above.

35 13. In 2012-13 the Appellant's mileage had increased significantly from the figures on the MOT certificates from 2011-12. However, the increase in mileage did not appear to be reflected in the turnover which was declared as £35,115, which was lower than in 2011-12. Expenses claimed were £26,812. The Appellant was asked to provide an explanation as to why his mileage had increased whereas his turnover had decreased. The Officer's provisional calculations gave a revised net turnover figure of £39,274.

40 14. On 21st July 2014 HMRC issued a letter, with proposed amendments for the years ending 5 April 2012 and 5 April 2013, based on the limited information supplied.

15. On 23 July 2014 the Appellant's agents requested an extension of time to 31 August 2014, to provide the outstanding information. HMRC agreed the extension and requested a 64 - 8 agent authorisation.
16. On 29 August 2014 the agent made representations regarding the Business Economics Model that HMRC had used. As a result the fuel charges were amended and agreed together with various other adjustments. With regard to the turnover, the agent stated that this should be amended to include 'pick up' journeys from Manchester airport for passengers returning from their holidays. They were however unable to provide any evidence in support.
17. On 21 October 2014, a further extension was agreed to allow time for the Appellant to provide the outstanding information by 7 November 2014.
18. On 14 November 2014 in the absence of any further information, HMRC advised the Appellant that they proposed to issue closure notices and seek penalties for inaccuracies in his returns, under Schedule 24 Finance Act 2007. For both years involved, HMRC said it was a prompted disclosure as the inaccuracies were only found as a result of HMRC opening an enquiry and checking the Appellant's records.
19. For 2011-12 year HMRC said the error had to be treated as careless, as the Appellant failed to demonstrate that the correct amount of expenses had been declared. He had not provided any explanation of the amounts claimed or supplied all the supporting evidence.
20. For 2012-13 year HMRC found the error to be deliberate. The Appellant's mileage almost doubled in that year and in the absence of any explanation of why that was the case, it was reasonable to assume that turnover had also increased. However the Appellant's declared turnover for that year was less than for 2011-12. In the Officer's opinion the Appellant must have known that his turnover and profit would increase if more mileage was being done.
21. For 'telling,' HMRC proposed a 5% reduction. The Appellant had not explained why his fuel costs were so high and how he had arrived at his income figures. He had provided some documents which enabled the Officer to do a Business Economics Model and for this she had allowed 5% reduction.
22. For 'giving,' HMRC proposed a 20% reduction. The Appellant did provide receipts, MOT certificates and insurance documents along with amounts for jobs undertaken. However, he failed to quantify some of these figures and did not send any further information or the outstanding bank statements despite numerous requests.
23. The Appellant was invited to settle the enquiry by means of a contract, to cover the tax, interest and penalty element. HMRC calculated the total amount, for the years 2011-12 and 2012-13 inclusive at £21,150. The Letter of Offer was open for acceptance no later than 14 January 2015.

24. In the absence of any response from the Appellant, on 9 February 2015 HMRC issued Closure Notices and Penalties for 2011-12 and 2012-13. The Appellant was advised that any appeal had to be submitted no later than 6 March 2015.

5 25. Nothing further was heard from the Appellant until, following pursuit of the outstanding tax, penalties and interest by HMRC's Debt Management Division, on 4 March 2016, the Appellant's agents submitted an Appeal on behalf of their client to HMRC, but without providing any reasonable excuse for the late appeal.

26. On 22 April 2016, HMRC responded to the agent rejecting the late appeal.

10 27. On 10 November 2017, the Tribunal Service received the Appellant's Notice of Appeal.

The evidence

15 28. The evidence before the Tribunal included a copy of the Notice of Appeal, copy correspondence between the Appellant and HMRC, copy Assessments, copy Penalty notices, copy documentation provided by the Appellant, copies of HMRC's calculations, relevant legislation and case law authority.

HMRC's submissions

29. HMRC refers to Part IV s 28A Taxes Management Act 1970. The Notice of Assessments take effect as at the date of issue and in accordance with the Interpretation Act 1970 Section 7:

20 "7. Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter
25 would be delivered in the ordinary course of post."

30. The Closure Notice was sent on 22 April 2016, stating that the Appeal was out of time. Under s 49G Taxes Management Act 1970 the Appellant had 30 days to notify an appeal to the Tribunal. This was not done until 9 November 2017.

30 31. The Closure Notices and enquiry conclusion letters were issued at the last given address at that point in time. They were correctly addressed and HMRC held no evidence of non-delivery.

32. The discretion to admit appeals out of time is placed on the Tribunal by s 49 Taxes Management Act ("TMA") 1970. The time limit for Income Tax appeal to the Tribunal is set by s 49H TMA 1970.

35 33. It was stated in *Romasave [Romasave (Property Services) Ltd v HMRC 2015 UKUT 254]* at [96] that:

“...Permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely.”

34. The approach to take in deciding whether to allow a late appeal is set out in the case of *Data Select Ltd v Revenue and Customs Commissioners* [2012] STC 2195, by Morgan J:

“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.” [1311]

35. The above approach was endorsed in *Revenue and Customs Commissioners v BPP Holdings Ltd and others* [2016] STC 841 per Ryder LJ:

“[16] The key question underlying the two decisions can be characterised in the following way: whether the stricter approach to compliance with rules and directions made under the CPR as set out in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 2 All ER 430, [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] EWCA Civ 906, [2015] 1 All ER 880, [2014] 1 WLR 3926 applies to cases in the tax tribunals. The two conflicting decisions of the UT on the point came to different conclusions. For the reasons I shall explain, I am of the firm view that the stricter approach is the right approach.”

36. [17] In *McCarthy & Stone* [2016] STC 841, Judge Sinfield held that it was appropriate for the tribunal to follow the *Mitchell* approach. His reasoning expressly recognised that the CPR do not apply to the tribunals and that there were clear differences in the words used in the Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2008/2698 (“UT Rules”) and in the CPR.

37. At [42]-[45] he held:

[42] “In my view, the new CPR 3.9 and the comments by the Court of Appeal in *Mitchell and [Durrant v Chief Constable of Avon and Somerset Constabulary]* [2013] EWCA Civ 1624, [2013] All ER (D) 186 (Dec)] clearly show that courts must be tougher and more robust than they have been hitherto when dealing with applications for relief from sanctions for failure to comply with any rule, direction or order. [Counsel for HMRC’s] answer to this point was that the Jackson reforms and CPR 3.9 do not apply to tribunals. He pointed out that the overriding objective in CPR 1 is in different terms to the overriding objective in r 2(3) of the UT Rules. From 1 April 2013, CPR 1.1 provides that the overriding objective is to enable the court to deal with cases justly and at proportionate cost. CPR 1 also provides that dealing with a case justly includes ensuring that it is dealt with expeditiously. [Counsel for the taxpayer] submitted that the courts and tribunals should not apply different standards to matters such as their attitude to the grant of an extension of time.

[43] I agree that the CPR do not apply to tribunals. I do not, however, accept that the differences in the wording of the overriding objectives in the CPR and UT Rules mean that the UT should adopt a different, ie more relaxed, approach to compliance with rules, directions and orders than the courts that are subject to the CPR ...

5 [45] The overriding objective does not require the time limits in those rules to be
treated as flexible. I can see no reason why time limits in the UT Rules should be
enforced any less rigidly than time limits in the CPR. In my view, the reasons given by
the Court of Appeal in Mitchell for a stricter approach to time limits are as applicable
to proceedings in the UT as to proceedings in courts subject to the CPR. I consider that
10 the comments of the Court of Appeal in Mitchell on how the courts should apply the
new approach to CPR 3.9 in practice are also useful guidance when deciding whether
to grant an extension of time to a party who has failed to comply with a time limit in
the UT Rules.”

15 38. HMRC refer to the case of *Advocate General for Scotland v General
Commissioners for Aberdeen City* 2006 STC 1218 in which Lord Drummond Young
opined as follows:

[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 s 49, these include the following; it need hardly be added that the
20 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
25 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
30 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 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
35 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 s 33(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
40 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
45 appeal late.”

Purpose of the time limit

39. There clearly is a purpose behind the statutory time limits and a Tribunal should only be prepared to relax those time limits if, having weighed up all of the factors, including the need for finality in tax matters, it is right to do so in order to deal with a case fairly and justly.

Length of delay

40. HMRC assert that there has been no reasonable excuse for not observing the time limit, especially considering the correspondence as outlined above. The initial Appeal to HMRC was made on 4 March 2016 (Closure notices were issued on 20th March 2015) and was over a year late. HMRC subsequently replied on 22 April 2016 advising that the appeal to HMRC was out of time and an appeal to the Tribunal should be made. An Appeal to the Tribunal was made on 9 November 2017; this being over a year after HMRC's letter dated 22 April 2016 and over two years after the date of the issue of closure notices.

41. In *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2016] STC 1 the Upper Tribunal states:

[96] "The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

Explanation for the delay

42. No reason(s) have been given for the delay. The Appellant claims not to have received the closure notices issued on 20 March 2015. All post was sent to the addresses notified for both the Appellant and the Agents and none have been returned as not delivered. No explanation has been offered for the further delay in appealing to the Tribunal.

Consequences of granting the application

43. There should be finality in litigation. Taxpayers are expected to act with reasonable prudence, diligence and timeously in dealing with their tax affairs. On 29 August 2014 Brearley & Co Accountants accepted the Economic Business Model and subsequently were asked to provide evidence in respect of disputed items, which to the date of the closure notices was not supplied.

Consequences of refusing the application

44. HMRC has never been supplied with the information requested. The amounts the Appellant wishes to appeal are large and currently being pursued by the Debt

Management Division of HMRC. It appears that it was only this that spurred the late appeal.

Conclusion

5 45. Rule 20(4) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides:

20(4) If the Notice of Appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the Permission of the Tribunal –

10 (a) the Notice of Appeal must include a request for such permission and the reason why the Notice of Appeal was not provided in time; and

(b) unless the Tribunal gives permission, the Tribunal must not admit the appeal.

15 46. Generally the purpose of adherence to time limits is finality and certainty, which is necessary for HMRC to efficiently operate the taxation system. Time limits are also necessary for the efficient organisation of the Tribunal appeals system. Generally, an extension of time is the exception rather than the rule.

20 47. Time limits are to be adhered to unless good reason can be shown why they should be overridden. However it is necessary for the Tribunal to take into account the overriding objective of the 2009 Rules and actively exercise its discretion under rule 5(3) of the Rules, for which purpose a balancing exercise must be conducted, taking into account all relevant circumstances and the factors set out above, including the arguable merits of each party's case, if appropriate.

25 48. The merits of Appellant's substantive appeal are at the very least questionable. Despite ample opportunity and many extensions of time, little or no evidence has been produced to show that HMRC's assessments are incorrect.

30 49. As stated above, generally an extension of time is the exception rather than the rule. In the overall context of the history of the matter and the lack of any significant merit in the substantive appeal, I consider that that this is not a case in which, in the interests of justice, I should exercise the Tribunal's discretion to permit the appeal to be made after the expiry of the statutory time limit.

50. The application for permission to appeal out of time is therefore refused.

35 45. 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.

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MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 15 OCTOBER 2018