



[2019] UKFTT 582 (TC)

**TC07376**

*INCOME TAX-late filing of P35's-appeal made very late-application for permission to appeal out of time-application refused-appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/04578**

**BETWEEN**

**CEREDIGION LIBERAL DEMOCRATS**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE NIGEL POPPLEWELL**

**Sitting in public at Cardiff on 2 September 2019**

**The Appellant did not appear and was not represented**

**Mr Christopher Evans, Officer of HM Revenue & Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. The substantive issue in this appeal concerns penalties arising from the late filing of two end of year P35 tax returns for the tax years 2008/2009 and 2009/2010 (the “**penalties**”). The penalties are £1200 for each of the two years. The respondents (or “**HMRC**”) had also assessed the appellant for a penalty for the late filing of a return for 2010/2011. The appellant has paid that penalty.

2. However the appellant has brought its appeal spectacularly late. So there is a second, preliminary, issue which I must decide; namely, should I give permission for the appellant to make a late appeal.

### NON ATTENDANCE

3. The appellant had written to the tribunal on two occasions indicating that no one from it would be attending the hearing. Both letters were written by the secretary of the appellant, Mr Ceredig Davies (“**Mr Davies**”). In those letters he told the tribunal that the appellant is a voluntary organisation, its officers have other jobs to which they were committed on the day of the hearing, the hearing is taking place 120 miles from the appellant’s base in Aberystwyth, there is little more than he could tell the tribunal over and above the information that he had already provided in writing, and that the appellant cannot afford professional representation. I had a due regard to Rules 2 and 33 of the First-tier Tribunal rules and decided that it was in the interests of justice to proceed with the hearing in the absence of the appellant.

### THE FACTS

4. I was provided with a bundle of documents. Mr Evans handed up some additional written evidence of contact between the appellant and HMRC. Neither party adduced any oral evidence. From the evidence before me I find as follows:

(1) The appellant is a voluntary organisation with officers being elected/re-elected periodically to undertake various duties. Getting volunteers, especially a competent treasurer who can deal with HMRC is difficult for the appellant.

(2) The appellant’s main function is to raise funds to assist in the political activities and promotion of the local Liberal Democrats; primarily to assist in the election of Liberal Democrat candidates to represent Ceredigion at Westminster, the National Assembly of Wales and members of Ceredigion County Council.

(3) For each of the tax years 2008/2009 and 2009/2010, the appellant had one employee. The appellant accepts that the submission of the P35 tax returns for each of these years was made late for that one employee.

(4) For the tax year 2008/2009, the P35 was due to be submitted to HMRC by 19 May 2009 but was not received by HMRC until 16 May 2015. Payment of the tax and National Insurance due in respect of that return was not made until 16 July 2019.

(5) The P35 due for the tax year 2009/2010 should have been submitted to HMRC on 19 May 2010. It was not received by HMRC until 5 April 2016. HMRC’s letter recording

this also records that the payment of the tax due in respect of this return was received by them on 28 August 2010. I am not sure whether this is correct, but nothing hangs on it.

(6) HMRC's records indicate to them that they notified penalties for the late filing of these P35's. For the tax year 2008/2009, HMRC issued three penalty notifications, each for £400, in September 2009, January 2010, and May 2010. For the tax year 2009/2010, HMRC issued three penalty notifications, each for £400, in September 2010, January 2011 and May 2011.

(7) On 7 March 2014 HMRC's records record that a letter was received from the appellant requesting confirmation of outstanding penalties and HMRC sent a letter to the appellant confirming the amounts of those penalties.

(8) HMRC's records also record that on 13 March 2014 Elizabeth Evans (chairwoman) telephoned HMRC regarding the 2008/2009 and 2009/2010 penalties for non-submission of end of year returns. She was given general advice and also advised to submit P 14/P 35's for each year and that she could also appeal against the penalties in writing.

(9) There was then a further contact between HMRC's debt collection unit and the appellant in October and December 2015 relating to the amounts due from the appellant.

(10) The current secretary of the appellant, Mr Davies, has also been the treasurer of the appellant since 2016.

(11) There seems to have been little contact between HMRC and the appellant between 2015 and a letter dated 13 February 2019 sent to the appellant from HMRC's Debt Enforcement and ADT unit. That letter included a schedule of liabilities for failure to submit the end of year returns for the years in question.

(12) Mr Davies was not aware of any of these foregoing historical issues and so, in March 2019, he wrote to HMRC seeking copies of all relevant correspondence relating to the matter, details of who correspondence was sent to and the dates of such correspondence. He wrote again to HMRC on 25th of March 2019 seeking further information about the background to the penalties and indicating that the appellant wished to appeal against the imposition of the penalties.

(13) HMRC, by way of a letter dated 6 June 2019, provided a comprehensive response to Mr Davies' request for information.

(14) HMRC wrote again to Mr Davies on 7 June 2019 thanking him for appealing against the penalties, and providing details of the dates on which the penalty notifications had, in their view, originally been sent to the appellant. They also told him that as the appeal had been received after the 30 day time limit, HMRC were treating it as a late appeal. They thought that the appellant had no reasonable excuse for making the appeal late and were not, therefore, prepared to agree that the appeal should be submitted late.

(15) Mr Davies responded to that letter on 29 June 2019. In that letter he indicated to HMRC that the appellant would take the matter of the penalties for 2008/2009 and 2009/2010 to the tribunal. However the appellant withdrew its appeal against the £400 penalty for 2011/2012, and enclosed a cheque, for that amount, with that letter.

(16) True to his word, Mr Davies appealed to the tribunal on 29 June 2019.

### **LATE APPEAL - THE RELEVANT LAW**

5. Section 31A TMA 1970 requires that notice of an appeal is given in writing to the relevant officer of the Board within 30 days of the date on which the notice of amendment was given.

6. Section 49 TMA 1970 then applies where a notice of appeal is given late. This provides:

“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 before the relevant time limit.

(2) Notice may be given after the relevant time limit if—

- (a) HMRC agree, or
- (b) where HMRC do not agree, the tribunal gives permission.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

(8) In this section “relevant time limit”, in relation to notice of appeal, means the time before which the notice is to be given (but for this section).”

7. The notice of appeal includes an application for this appeal to be made out of time. HMRC oppose that application. I have jurisdiction and discretion to grant the appellant that permission. The principles I should adopt when considering the exercise of that discretion are set out in the Upper Tribunal decision in *Martland v HMRC* [2018] UKUT 178. In that case the Upper Tribunal said:

44. “When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that

question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT’s deliberations artificially by reference to those factors. The FTT’s role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant’s case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:

“If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties’ incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them.”

*Hysaj* was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant’s appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT’s time is then wasted on an appeal which is

doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that “being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules”; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.”

8. In addition, the Upper Tribunal in *HMRC v Katib* [2019] UKUT 0189 (TCC), which concerned an appeal by HMRC against a decision of the Tribunal to give permission for the taxpayer to make late appeals, emphasised the importance of adhering to statutory time limits at [17]:

“We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion. We accept Mr Magee's point that the FTT referred to both BPP Holdings and McCarthy & Stone in the Decision. Paragraph 27 (1) of the decision (cited above) shows that the FTT seemed to have the point in mind. However, instead of acknowledging the position, the tribunal went on to distinguish the BPP Holdings case on its facts. Differences in fact do not negate the principle, and it is not possible to detect that the tribunal thereafter gave proper weight to it in parts of the decision which followed.”

## DISCUSSION

9. The onus is on the appellant to explain why I should exercise my discretion to give it permission to make a late appeal. When considering this application, I adopt the principles set out in *Martland*.

10. The first of these is to establish the length of the delay. If the penalty notifications were indeed sent to the appellant on the dates recorded by HMRC, then the appeal is very seriously late. It was made on 25 March 2019. HMRC's records are that the penalty notifications for 2008/2009 was sent in September 2009, January 2010 and May 2010. So around nine years late. The appeal against the penalties for 2009/2010 is around eight years late. So very serious and substantial delay in anyone's book. I am writing this decision whilst the US open tennis

championship is underway. It seems appropriate to adopt a tennis analogy. At this stage of the analysis, the appellant is 30 love down.

11. I now move on to the reasons for the delay. Mr Davies explains in his letters to HMRC and to the tribunal that it has not been easy to establish what had happened prior to his taking up the post of treasurer. The treasurer before last, as it were, was a meticulous gentleman and Mr Davies view is that had he been aware of the penalties he would have dealt with them. The treasurer immediately prior to Mr Davies provided no information to him about the penalties. In Mr Davies view the penalties are excessive given the amount of tax and National Insurance due; HMRC have been remiss in pursuing the debt; the appellant has paid the penalty for 2011/2012, and it now engages a payroll bureau (and indeed had done so since 2016) to deal with its PAYE affairs..

12. The appellant find it difficult to recruit and retain competent personnel and this has led to the matter of the penalties being overlooked. In Mr Davies words “our administrative systems have been found to be lacking hence our current situation with HMRC”

13. In considering these reasons, I say immediately that I consider that Mr Davies is wholly blameless in this saga. It is clear that as soon he became aware of the penalties, he engaged immediately with HMRC and sought to get to the bottom of the issue. I am certain that had he been aware of the penalties before February 2019 he would have acted in the same commendable manner.

14. But as an organisation the appellant was clearly made aware of its right to appeal against the penalties in March 2014. The HMRC contact records show that this was made clear to its then chairwoman Elizabeth Evans. Mr Davies has not suggested that Elizabeth Evans was not chairwoman at that time, and I find as a fact that she was. I also find as a fact that she was told that she could appeal against the penalties in the telephone conversation she had with HMRC on 13 March 2014. I doubt that anyone will ever know why an appeal was not made at that time. It would still have been late but much less so. Notwithstanding Mr Davies protestations, I can see no reason, let alone a good one, why no appeal was made either originally, or in March or April 2014. To continue the tennis analogy, the appellant is now 40 love down.

15. I now turn to the balancing exercise and an evaluation of all the circumstances of the case. I disregard the fact that the appellant is unrepresented. I take into account, and this weighs heavily against the appellant, that it was told that it could appeal against the penalties in March 2014. I can take into account any obvious strengths and weaknesses of the appellant’s case. There is to me one obvious strength. This lies in the fact that if HMRC are to succeed in the substantive appeal they must show that, on the balance of probabilities, valid penalty determinations were made and notified to the appellant. The penalties are raised under sections 98A (2)(a) and (3) Taxes Management Act 1970. Determination of the penalties is therefore subject to section 100 of that Act, which requires an authorised officer of the Board to make that determination. The notice of the determination must state the date on which it is issued and the time within which an appeal can be made. It must also be served upon a taxpayer.

16. All that HMRC have provided as evidence of the validity of the determinations and their notification to the appellant is the letter dated 7 June 2019 which simply sets out in tabular form the references of the penalty notifications and the dates that their records show that those penalty notices were sent. Mr Evans says that given the length of time that it is taken for the appellant to bring this appeal, many of the relevant original records have been destroyed. But the fact that HMRC are able to identify the dates and references of the penalty notifications, in

that letter, suggests to me that they do have some original information and that the contents of that letter is based on that primary material. HMRC have adduced no pro forma notices, in evidence, and submitted that the form of notices actually sent conformed to those pro forma's. So the question is whether, in the substantive appeal, HMRC could satisfactorily establish that an essential prerequisite for a successful defence of the appeal; namely that valid penalty determinations were made and notified to the appellant.

17. The appellant has not raise this as a ground of appeal, and, frankly, I would not expect it to. It is a highly technical matter. But that does not mean that HMRC are exonerated from their obligation to prove what I have mentioned above.

18. This is important for the taxpayer, and brings it back to 40-30. In terms of the balance of prejudice, there is considerable prejudice to the appellant if I deny it permission to appeal out of time since it is deprived of the opportunity of running this argument in its appeal. There will also be prejudice in that the appellant will not be able to run its argument that the penalties are disproportionate (although I think this is a weaker argument).

19. However prejudice has also been suffered by HMRC given the length of time that it is taken the appellant to bring the appeal. Had it been brought in time, it might have been that HMRC would have produced better evidence, and more primary material, on which I could conclude, one way or the other, whether a valid determination had been made in the first place, and if so, whether the notification of that determination complied with the relevant statutory provisions.

20. I am conscious that when conducting this balancing exercise I should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. This is a matter of particular importance when exercising my discretion. The Upper Tribunal in both *Martland* and *Katib* make it clear that compliance with administrative process and in particular compliance with time limits is just as important in the balancing exercise as the underlying merits of the appellant's case in the substantive appeal.

21. When weighing up and evaluating all the circumstances, it is clear to me the balance of prejudice favours HMRC. The appellant had failed to respond to the 30 day time limit for its original appeal. This is compounded by the further failure to appeal once Elizabeth Evans was told that she could appeal, in March 2014. The appeal is very seriously and substantial late, and HMRC have been prejudiced by this. I appreciate that in a voluntary organisation such as the appellant, it may be difficult to recruit and retain competent personnel. But since 2016, the appellant has outsourced its PAYE function, recognising that that might need professional help. Perhaps it should have recognised that somewhat earlier. But given that the chairwoman of the organisation had been told of her ability to appeal against the penalties in 2014, I am less sympathetic of the recruitment difficulties faced by the appellant than I would otherwise have been. In the final analysis, it is game to HMRC.

## **DECISION**

22. Accordingly, I reject the appellant's application for permission to bring its appeal out of time, and I dismiss its appeal.



**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

23. 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.

**NIGEL POPPLEWELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 16 SEPTEMBER 2019**