



[2019] UKFTT 610 (TC)

**TC07393**

*PROCEDURE – whether to give permission for late appeals to be made to HMRC – failure by taxpayer to cooperate with HMRC’s compliance check – permission refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/01120**

**BETWEEN**

**DHARMENDRA MODI**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE JEANETTE ZAMAN  
NOEL BARRETT**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 23  
September 2019**

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

**Miss Amy Biney, litigator of HM Revenue and Customs’ Solicitor’s Office, for the  
Respondents**

## DECISION

### INTRODUCTION

1. Mr Modi applied for permission to make late appeals to HMRC against assessments and penalties issued by HMRC for the tax years 2004-2005 through to 2012-2013 as further set out in the Relevant Facts below.

### NON-ATTENDANCE OF APPELLANT

2. Mr Modi did not attend the hearing and was not represented. Shortly after the hearing was scheduled to start the clerk was able to speak to Mr Modi on the mobile phone number he had provided. Mr Modi stated that he had not been aware that the hearing was that day, if he had been sent the information by email it may have gone to his “spam” folder and that he was not able to attend as he was on his way to another meeting to act as an interpreter.

3. We treated this conversation as a (very late) request for a postponement of the hearing. We reviewed the Tribunal file and were satisfied that Mr Modi had been informed of the date and location of the hearing. The file showed that he had been informed that he must assume that the hearing of the appeal is going ahead unless he is notified otherwise. We were satisfied that the postal address and email address being used by the Tribunal for communications were those that had been provided by Mr Modi in his Notice of appeal to the Tribunal.

4. We noted that the hearing had been scheduled to take place on 16 August 2019 but that on 14 August 2019 Mr Modi had emailed the Tribunal to seek a postponement of that hearing. That application had been based on two grounds:

(1) he had only found out about it when he received the bundle from HMRC dated 29 July 2019 and was not prepared. He had been told that day (ie 14 August) that he would have been notified of the date by email and, having checked, had just found that the email had gone into his spam folder; and

(2) he had an urgent medical condition and had just been referred for treatment which would take place on either 16 or 17 August 2019. He produced evidence supporting this urgent referral.

5. HMRC were notified of that application and did not oppose it. Judge Cannan allowed the postponement because of both Mr Modi’s medical grounds and HMRC’s lack of objection.

6. The new hearing date had been notified to Mr Modi by the Tribunal by email on 21 August 2019. Given that Mr Modi was by this stage well aware that some emails had ended up in his “spam” folder, he should have been alert to the need to check that folder regularly, and could, we considered, also have moved one or more of those earlier emails to his inbox thus reducing the risk that further emails from the same Tribunal email address would be identified by gmail as “spam”.

7. We were also mindful of the fact that the bundle of papers before us appeared to indicate a complete lack of cooperation by Mr Modi with HMRC’s compliance check and issue of assessments and penalty notices. There was nothing to suggest that, if we had postponed the hearing, Mr Modi would attend a re-arranged hearing.

8. Accordingly, and having regard to Rule 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Tribunal Rules”) we concluded that it was in the interests of justice that the hearing should proceed.

### RELEVANT FACTS

9. In the absence of Mr Modi, the only evidence available to us was the bundle of papers which had been prepared by HMRC. We make the following findings (with additional findings being made in the Discussion).

10. HMRC wrote to Mr Modi on 3 July 2015 informing him that they were conducting a compliance check as they had been told that he had received income from property lettings that had not been declared to HMRC. They asked for a response by 3 August 2015.

11. Following this, HMRC then sent the following to Mr Modi:

- (1) a notice to provide information on 6 August 2015,
- (2) a penalty notice for £300 on 18 September 2015, and
- (3) a further penalty notice on 6 November 2015 informing him that HMRC were now charging daily penalties.

12. There is no indication that Mr Modi responded to any of these letters or notices and we find that he did not.

13. On 4 March 2016 David Shave, a member of HMRC's debt collection team, visited the address held for Mr Modi. This visit is reported in an email from Mr Shave to HMRC's field force support team, copied to Sally Slater, the HMRC compliance caseworker who had been writing to Mr Modi. That email states that Mr Modi came to the door and said he doesn't understand why he owes this money and wants an explanation. He said he doesn't have any money even if he did want to pay it. Mr Shave checked that the mobile number they had on record was correct, and told him that Mrs Slater would call him to explain.

14. There was then further correspondence from HMRC to Mr Modi:

- (1) a letter from Mrs Slater dated 24 March 2016 stating that she had been trying to call him on the mobile number provided but had not received an answer, and summarising for him the letters to date (as well as enclosing copies);
- (2) a further letter from Mrs Slater dated 23 May 2016 which enclosed a factsheet on bringing matters to a conclusion and enclosing estimated computations setting out the tax due in respect of the sale of a property and rental income received prior to its sale covering the tax years 2004-2005 through to 2012-2013;
- (3) a letter dated 6 July 2016 setting out HMRC's position on penalties, for the tax years covered by both the old rules and the new rules. That letter stated that the tax geared penalty for the tax years up to and including 2008-2009 would be £14,274, and that for the later years would be £16,799.30. This was accompanied by penalty explanation schedules; and
- (4) on 31 August 2016 a letter issuing assessments and penalty notices:

<i><b>Tax year</b></i>	<i><b>Assessment</b></i>	<i><b>Penalty</b></i>
2004-2005	£1,320	£858
2005-2006	£5,280	£3,432
2006-2007	£5,280	£3,432
2007-2008	£5,280	£3,432
2008-2009	£4,800	£3,120
2009-2010	£3,707	£2,594.90
2010-2011	£3,707	£2,594.90
2011-2012	£4,688	£3,281.60
2012-2013	No copy of assessment	£8,327.90

15. Whilst the letter of 31 August 2016 does refer to an assessment having been made for the tax year 2012-2013, we do not have a copy of that assessment. All of the assessments which we have seen (including those assessing penalties) include a statement that Mr Modi can appeal to HMRC if he disagrees with the assessment and that he must write to HMRC within 30 days of the date of the assessment.

16. HMRC’s “SA Notes” indicate that Mr Modi called HMRC on 30 January 2018 about self-assessment and was advised to register online to be set-up for a tax account for the tax year 2016-2017. He then phoned again one year later, on 30 January 2019, noting that he was having problems with his online activation code. The notes state that his filing date was extended to 15 February 2019 in accordance with HMRC’s guidance and on 15 February 2019 he called again and the notes suggest he was still having difficulties with the activation code.

17. The bundle does not include anything which would enable us to infer that Mr Modi has submitted any self-assessment returns to HMRC in respect of any of the tax years from 2004-2005 to 2012-2013, and we find that, on the balance of probabilities, he has not done so.

#### **APPELLANT’S GROUNDS OF APPEAL**

18. Mr Modi gave Notice of appeal to the Tribunal on 22 February 2019 in which he included as reasons for lateness, grounds of appeal and desired outcome:

- (1) he did not know that he had to submit an appeal by a certain date;
- (2) he did not know that he needed to submit tax returns as for the period in question he was living in austerity;
- (3) he is diagnosed with ADHD and this meant he struggled with paperwork. He needed to go through 15 years of bank statements to demonstrate that he could appeal against the HMRC numbers and this was an immense task;
- (4) HMRC are claiming that he owed £100,973.10; he estimates that the actual figure could be £10,000 to £20,000;
- (5) paying the amounts claimed by HMRC would make him bankrupt, he would have to sell the family home and would become a burden on the state, living on benefits; and
- (6) he would like to reach agreement on an acceptable payment plan once an agreed amount has been decided.

#### **HMRC’S SUBMISSIONS**

19. HMRC object to the application, drawing attention to the three-stage process in *Martland* and noting that the appeal is more than two years and four months late. They do not consider Mr Modi has good reason for the delay, noting in particular that whilst HMRC sympathise with any medical condition Mr Modi has, no evidence has been provided of this and Mr Modi has some level of capability and could have instructed accountants to assist him with complying with his tax obligations.

20. Furthermore, HMRC note that numerous letters and telephone calls have been sent and made to Mr Modi to attempt to encourage compliance, and there has been a visit to him.

21. Mr Modi has not provided any information to seek to disprove the estimated assessments, and at the date of the hearing no self-assessment returns have been submitted.

#### **RELEVANT LEGISLATION**

22. Section 31A Taxes Management Act 1970 (“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 assessments and penalties are issued.

23. 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).”

## DISCUSSION

24. Section 49 TMA 1970 requires that a taxpayer seeking to appeal assessments which have been made gives notice of such appeal to HMRC. It states that notice may be given late if HMRC agree or, where HMRC does not agree, the Tribunal gives permission. HMRC is then required (by s49(3) to (6) TMA1970) to agree to notice being given late where:

- (1) the taxpayer makes a request in writing to HMRC to allow the late notice of appeal (s49(4)); and
- (2) HMRC are satisfied that the taxpayer has a reasonable excuse for not giving the notice before the relevant time limit and gave the notice without unreasonable delay after that reasonable excuse ceased (s49(5) and (6)).

25. In the present instance, there is nothing to suggest that Mr Modi has himself sent an appeal to HMRC. His first action would seem to be the submission of his Notice of appeal to the Tribunal on 22 February 2019. Given that the Tribunal has sent that Notice of appeal to HMRC, we consider that we can and should treat that Notice of appeal as the appeal by Mr Modi to HMRC.

26. In *Martland v HMRC* [2018] UKUT 178 (TCC) the Upper Tribunal gave guidance as to how this Tribunal should approach an application to allow the notification of a late appeal. It 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.”

27. 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.”

28. We have applied the three-stage process set out in *Martland* when considering whether to give permission

### **Length of the delay**

29. The assessments were issued on 31 August 2016. Any appeal should have been made by 30 September 2016, as was clear from the various assessments. Mr Modi gave Notice of appeal to the Tribunal on 22 February 2019, and treating that as his appeal to HMRC means that his appeal was more than 28 months late. Such a delay is undoubtedly serious and significant.

### **Reasons for the delay**

30. Of the points made by Mr Modi in his Notice of appeal (at [18] above), the following are potentially relevant to considering the reasons for the delay:

- (1) he did not know that he had to submit an appeal by a certain date;
- (2) he did not know that he needed to submit tax returns as for the period in question he was living in austerity; and
- (3) he is diagnosed with ADHD and this meant he struggled with paperwork. He needed to go through 15 years of bank statements to demonstrate that he could appeal against the HMRC numbers and this was an immense task.

31. Dealing with the first two points together, we cannot accept that these amount to a good reason for the delay. HMRC sent Mr Modi several letters (to an address at which Mr Modi was present when they visited and which is the same as that he provided on his Notice of

appeal) explaining that the compliance check had been opened and asking for information. Mr Modi may not have been aware of the need to submit tax returns initially (and we make no finding as to whether this lack of awareness would have been reasonable) but once HMRC opened their compliance check it was clear that he needed to provide information. He failed to respond to any of these letters. The assessments themselves were issued over a year later, and we find that they did state on them the time limit for submitting an appeal.

32. Mr Modi has not provided any evidence of his having been diagnosed with ADHD or as to the effect this has on him. We accept, for the purpose of this application only, that Mr Modi does have ADHD which results in him struggling with paperwork. Whilst the details of this would need to be explored if there was a question as to whether he had a reasonable excuse for late filing of self-assessment returns, we are not convinced that this condition alone could explain Mr Modi's failure to submit timely appeals against the assessments. The making of the appeals would be fairly straightforward, albeit that we accept that pursuing them successfully would then be a more difficult task. However, this then leads us to note that we see no reason as to why Mr Modi could not have instructed an accountant to help him prepare his self-assessment returns and also to help him deal with making the appeals. There is no evidence that he has attempted to do this.

33. In concluding that there is no good reason for the length of the delay, we are also influenced by the fact that the papers show an almost complete lack of cooperation from Mr Modi from the time HMRC first wrote to him on 3 July 2015. The only action he has taken in the four years since is:

- (1) he spoke to HMRC on the one occasion when they visited him at home,
- (2) he gave Notice of appeal to the Tribunal,
- (3) he has made three phone calls to HMRC since January 2018 trying to register to submit returns online for the tax years 2016-2017 and 2017-2018,
- (4) he applied for a postponement of the first hearing (in August 2019), and
- (5) he spoke to the Tribunal's clerk when contacted on the date of this hearing.

34. He has not provided HMRC with any of the requested information and nor has he submitted self-assessment returns for the years in question.

#### **All the circumstances**

35. The final stage in the process is to evaluate all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the extent of the detriment to Mr Modi which would be caused by our not giving permission and the extent of the detriment to HMRC which would be caused by my giving permission. We also note, as set out in the Upper Tribunal decision in *Martland*, that the starting point is that permission should not be granted unless this Tribunal is satisfied on balance that it should be.

36. In conducting that process, we are required:

- (1) to take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost and for the statutory time limits to be respected; and
- (2) without descending into a detailed examination of Mr Modi's case, to have regard to any obvious strength or weakness in that case because that is highly relevant in weighing up the potential prejudice to the parties of my decision.

37. Giving permission would clearly prejudice HMRC and the public interest - there is a public interest in ensuring that time limits set by Parliament in legislation are observed and are

not extended without good reason. To allow a late appeal for no good reason might encourage others to regard time limits as optional. We do not consider that there is a good reason for the delay.

38. Considering the potential prejudice to Mr Modi of refusing permission, we have sought to have regard to what he has told us of the merits of the substantive appeal. Mr Modi states that HMRC are claiming that he owes £100,973.10, whereas he estimates that the actual figure could be £10,000 to £20,000. Mr Modi has not provided any information which supports or explains the basis for his numbers. Whilst the difference in amount is certainly very significant, indicating that if Mr Modi were correct there would be considerable prejudice if he were not given the opportunity to challenge HMRC's assessments, we have no evidence on which to base a conclusion as to whether there is any potential merit in Mr Modi's position. We therefore do not place any weight on this factor in evaluating all the circumstances.

39. Mr Modi has also argued that paying the amounts claimed by HMRC would make him bankrupt, he would have to sell the family home and would become a burden on the state, living on benefits. We do not have any evidence in support of these arguments. However, even if this financial hardship were to be established, we do not consider that this would outweigh the need to respect the statutory time limits.

40. Taking all of this together, we are not persuaded that the reasons for the delay and the possible strength of Mr Modi's case outweigh the principle that, after a period, there should be certainty as to the liability created by an assessment. We therefore refuse to give permission for these appeals to be brought late.

#### **CONCLUSION**

41. We refuse permission for Mr Modi to make late appeals to HMRC against the assessments and penalties issued in respect of the tax years 2004-2005 to 2012-2013.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

42. 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.

**JEANETTE ZAMAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 02 OCTOBER 2019**