[2019] UKFTT 640 (TC)

TC07416

INHERITANCE TAX – Application for permission to notify appeal to tribunal outside the statutory time limit - Section 223G Inheritance Tax Act 1984 – Permission Refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/04037

BETWEEN

M G SMITH
AS ADMINISTRATOR OF THE ESTATE OF
F I SMITH (DECEASED) **Appellant**

-and-

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

TRIBUNAL: JUDGE ROBIN VOS
JOHN AGBOOLA

Sitting in public at Taylor House, London on 30 September 2019

Tony Court for the Appellant

Daniel Baird, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant, Mr Martyn Smith has applied in his capacity as an administrator of his mother's estate for permission to notify an appeal to the Tribunal outside the statutory 30 day time limit allowed by Section 223G Inheritance Tax Act 1984 (IHTA).

2. The underlying subject matter of the appeal is HMRC's refusal to allow the administrators' claim for his father's inheritance tax nil rate band to be taken into account in calculating the tax due as a result of his mother's death under the transfer of nil rate band provisions in Section 8A IHTA.

3. The nil rate band at the time was £312,000 and so the tax at stake is 40% of that amount – i.e. £124,800. A successful claim would also reduce the amount of interest payable by the estate on unpaid inheritance tax.

4. This decision however relates only to Mr Smith's application for permission to make a late notification over his appeal to the Tribunal. It does not therefore consider the underlying merits of the appeal except to the extent that this is relevant to the Tribunal's consideration as to whether to grant permission to appeal.

THE TRIBUNAL'S APPROACH TO LATE APPEALS

5. Mr Baird, on behalf of HMRC, referred to the guidance given by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 0178 (TCC) at [44]: -

> "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".

6. We also note a number of other points made by the upper Tribunal in Martland:-

(1) The "balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost, and for statutory time limits to be respected". [at 45].

(2) "The FTT can have regard to any obvious strengths or weaknesses 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". [At 46].

(3) "The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist". [At 45].

THE EVIDENCE AND THE FACTS

7. HMRC had produced a bundle of documents and correspondence for the hearing. Mr Court had also sent a bundle of correspondence to the Tribunal in advance of the hearing. Unfortunately, this had not been copied to HMRC. However, as it only contained copies of correspondence between Mr Smith/Mr Court and HMRC, Mr Baird had no objection to this correspondence forming part of the evidence before the Tribunal and we agreed that it should be admitted.

8. In addition, Mr Court, in presenting the Appellant's case, gave oral evidence as to his involvement in the dispute with HMRC including the reasons for his own delay in dealing with matters at certain times. Mr Court's evidence was not challenged by HMRC and we accepted at face value.

9. Mr Smith also provided a small amount of oral evidence at the hearing which was again unchallenged by HMRC and which we therefore accept.

10. Based on this evidence, we find the following material facts: -

11. Mr Smith's mother, Frances Irene Smith died on 29 November 2008.

12. Her estate was complicated by the fact that she died intestate and that there was no cash available to pay any inheritance tax. As a result of this, it was eventually agreed with HMRC that a grant could be issued on credit (ie that the inheritance tax did not need to be paid before the grant of representation was issued).

13. The administrators (being Mr Smith and his sister, Mrs Martha Horsford) submitted an inheritance tax return on 9 July 2014 and obtained a grant of representation on 3 September 2014.

14. HMRC raised three main issues in relation to the inheritance tax due as a result of Mrs Smith's death. Two of these were resolved but the third item, being the claim to transfer her late husband's nil rate band, could not be agreed.

15. At some point during the course of the discussions with HMRC, Mr Smith asked Mr Court to assist the personal representatives. Mr Smith and Mr Court are longstanding family friends, having been at school together. Mr Court has some background in tax although not in relation to inheritance tax. He has provided his assistance as a friend and not as a professional adviser.

16. The result of this was that, in June 2017, the Appellants notified an appeal to the Tribunal in relation to this point.

17. However, on 26 July 2017, HMRC wrote to Mr Smith pointing out that, as HMRC had not yet issued a notice of determination in respect of the additional tax due as a result of their refusal of the claim to transfer the nil rate band, there was nothing that the personal representatives were entitled to appeal against. In order to progress matters, HMRC organised the issue of the notice of determination on the same date and invited the personal representatives to withdraw their appeal to the Tribunal and, instead, to make an appeal to HMRC against the determination, possibly ask for an independent review, consider the option of asking for the matter to be referred to Alternative Dispute Resolution (ADR) or, if necessary, to make a new appeal to the Tribunal.

18. The Appellant, with the help of Mr Court, duly withdrew the appeal to the Tribunal, appealed to HMRC against their notice of determination and, in August 2017, requested an independent review.

19. HMRC issued their review conclusion letter on 17 November 2017. This letter upheld HMRC's refusal to allow the claim to transfer the nil rate band. The letter went on to say that if the personal representatives did not agree with the conclusion of the review, they should appeal to the Tribunal within 30 days. The letter referred to the possibility of applying for ADR but warned that, even if the personal representatives decided to apply for ADR, they must still appeal to the Tribunal within the 30 day time limit.

20. On 4 December 2017, Mr Court suffered some bleeding in his left eye. He was admitted to hospital overnight. He continued to have problems with his left eye which prevented him from dealing with matters outside his normal work until around May 2018.

21. In January 2018, HMRC wrote to both of the personal representatives and Mr Court to say that as no appeal had been made to the Tribunal, they considered the matter closed.

22. Mr Court contacted HMRC again on 11 May 2018 and on a number of subsequent occasions in May and July 2018 to explain that he had misunderstood the process and asked for the appeal to be reinstated so that the personal representatives could apply for ADR.

23. HMRC eventually responded on 24 September 2018 to explain that the only way for the personal representatives to progress matters was to make an application to the Tribunal for permission to bring a late appeal. If the Tribunal were to accept this, HMRC would then consider an application for ADR.

24. Mr Court wrote back to HMRC on 1 November 2018 with a further request for them to consider ADR. Mr Court was unable to produce a copy of this letter. However, in his oral evidence he confirmed having seen a copy of the letter in the past and that he had made a handwritten note on his file which confirmed the existence of the letter. Although HMRC were not able to confirm receipt of this letter, based on Mr Court's evidence, we are satisfied that, on the balance of probabilities, Mr Court did send this letter to HMRC.

25. No response was received from HMRC to Mr Court's letter of 1 November 2018. A further demand for the tax was received in January 2019 but no action was taken by Mr Court or by Mr Smith. Further correspondence from HMRC indicated that proceedings to recover the outstanding tax and interest would be initiated and in May 2019 HMRC initiated proceedings in the County Court.

26. As a result of this, Mr Court reviewed all the papers again, prepared a defence to the County Court proceedings and lodged the current application with the Tribunal on 7 June 2019 seeking permission to notify the appeal to the Tribunal outside the statutory time limit. The County Court proceedings have been stayed pending the outcome of this application.

27. Mrs Smith left her estate to her six children. Although, if the tax in dispute has to be paid, each of them will receive less than they had been expecting, none of them would suffer significant financial hardship as a result of this.

THE PARTIES' SUBMISSIONS

28. Both parties agreed that the delay from December 2017 to June 2019 in seeking to appeal to the Tribunal was significant.

29. Mr Court looked first at the delay between the review conclusion letter in November 2017 and the time he contacted HMRC again in May 2018. His explanation for this was the problems he had with his eyesight which made it impossible for him to deal with anything beyond the requirements of his job. Although he accepts in hindsight that the review

conclusion letter makes it clear that the personal representatives should lodge an appeal with the Tribunal if they wanted to take matters further, he suggested that the problem with his eyesight may have been a factor in him misunderstanding this and thinking that there was still an open appeal and the possibility of applying for ADR.

30. As far as the period between May 2018 and September 2018 is concerned, Mr Court drew attention to his attempts to contact HMRC in order to progress the appeal and/or apply for ADR.

31. Mr Court also concedes that, having read HMRC's letter of 24 September 2018 again, it is clear that an application to the Tribunal for permission to make a late appeal was required. His evidence however was that he had become so entrenched in his view that HMRC had not engaged with the arguments which he had put forward that he was convinced that there was still an open matter and that if an approach was made to the Tribunal this would effectively be to concede that the appeal somehow needed to be revived.

32. Mr Court therefore submits that there are mitigating factors in relation to the delay and that this should be sufficient for the Tribunal to give permission for the personal representatives to make a late appeal.

33. Whilst Mr Smith could not say that he and his siblings would suffer any significant financial hardship should permission make a late appeal be refused, he made the point that his mother's estate consisted primarily of land and property and that all of the family had worked on that property and therefore to some extent saw it as belonging to them.

34. As far as prejudice to HMRC is concerned, Mr Court submits that the dispute is essentially in relation to the interpretation of the relevant inheritance tax legislation. There is no significant divergence of views as to the relevant facts. On this basis, he argues that there is no significant prejudice to HMRC if permission to appeal is granted - for example there is no issue with having to try to establish facts after a long delay.

35. Finally, Mr Court referred to the merits of the underlying appeal. He explained briefly that in accordance with s8B(3) IHTA, the time limit for making the relevant claim was two years from the end of the month in which Mrs Smith died or, if later, the end of the period of three months beginning with the date on which the personal representative first acted as such.

36. HMRC's case is that the interaction of s199(4) IHTA and s272 IHTA means that an individual can become a personal representative before a grant of representation is made even though it is accepted that an administrator's authority derives from the grant. This would be the case where the relevant individuals had taken action in relation to the estate which amounts to what is known as intermeddling. HMRC say that the administrators intermeddled with the estate long before the inheritance tax return was submitted, that the result of the deeming provisions was that they were treated as personal representatives from the date of that intermeddling and that the three month time limit had therefore expired before the inheritance tax return was lodged.

37. The personal representatives' case is that there was no intermeddling and, even if there was, the deeming provisions only apply in relation to liability for inheritance tax and not to the provisions relating to the transfer of a nil rate band.

38. Mr Court submits that HMRC have not addressed the personal representatives' arguments in relation to the merits of the appeal and that the overwhelming likelihood is therefore that any appeal would be successful if permission to make a late appeal is granted.

39. Mr Baird started by looking at the purpose of the 30 day time limit for notifying an appeal to the Tribunal. He submits that this is related to the efficient administration of the tax system

and providing certainty and finality both to taxpayers and to HMRC. This purpose is therefore undermined if the time limits are not adhered to.

40. In support of this, Mr Baird referred to the decision of the Upper Tribunal in *Romasave (Property Services) Limited v HMRC* [2015] UKUT 0254 (TCC) where the upper Tribunal observed [at 96] that:

> "Time limits imposed by law should generally be respected…. A delay of more than three months cannot be described as anything but serious and significant…. One universal factor in this respect is the desirability of finality in litigation…. 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."

41. Turning to the reasons for the delay, Mr Baird accepts the impact of Mr Court's problems with his eyesight during the period following the issue of the review conclusion letter in November 2017 up to May 2018 when the further correspondence with HMRC took place. However, he submits that HMRC's letter of 24 September 2018 was clear as to what the personal representatives needed to do and that no reason had been given for the personal representatives' failure to apply to the Tribunal after that letter had been received.

42. Mr Baird also accepts that Mr Court's letter of 1 November 2018 may have been sent but argues that it is irrelevant given that HMRC cannot entertain an application for ADR once it considers a notice of determination to be final. In this case, HMRC believed the notice of determination to be conclusive in January 2018 as no appeal had been made to the Tribunal within 30 days of the review conclusion letter.

43. Mr Baird also points out that making an appeal to the Tribunal is a simple process and one which the personal representatives were aware of, having made a previous appeal in June 2017.

44. Turning to the impact on the parties of giving or refusing permission to make a late appeal, Mr Baird drew the Tribunal's attention to the acceptance that the beneficiaries of the estate would not suffer any significant financial hardship if the tax has to be paid.

45. On the other hand, he argues that allowing a represented appellant to continue with an appeal outside the statutory time limit would prejudice HMRC. He also referred to the fact that any witness evidence would be less reliable given the passage of time although, on being pressed in relation to this point, he accepted that it was unlikely that HMRC would be seeking to put forward any witness evidence.

46. A further element of prejudice put forward by Mr Baird was that HMRC had expended time and resources pursuing what it believed to be a final tax liability which would not have been the case had a timely appeal been made.

47. As far as the personal representatives' reliance on Mr Court is concerned, Mr Baird submits that the review letter of 17 December 2017 and HMRC's subsequent letter of 24 September 2018 were both clear as to the action which the personal representatives needed to take and that reliance on Mr Court did not therefore provide a good reason for the Tribunal to give permission for the appeal to proceed.

SHOULD PERMISSION TO MAKE A LATE APPEAL BE GRANTED

48. Having carefully considered all of the relevant circumstances, we have decided to refuse permission for the appellant to notify his appeal to the Tribunal outside the statutory time limit.

49. We are mindful of the Upper Tribunal's comments in *Romasave* [at 96] that permission to appeal out of time should only be granted exceptionally and that it should not be granted

routinely and in *Martland* [at 44] that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be.

50. In this case, the delay between the deadline for any appeal to the Tribunal (17 December 2017) and the application for permission to make a late appeal (7 June 2019) is almost 18 months. As both parties accept, that is a serious and significant delay.

51. Although the review conclusion letter in November 2017 explained that the next step was an appeal to the Tribunal, in the light of Mr Court's problems with his eyesight up to May 2018 and the subsequent efforts to clarify matters with HMRC culminating in their letter of 24 September 2018, we accept that there are reasons for the delay during this period which, in conjunction with the other circumstances of the case might well have persuaded the Tribunal to grant permission for a late appeal if the application had been made shortly after the September 2018 letter.

52. However, neither Mr Smith nor Mr Court were able to put forward any real justification for the delay in applying for permission to make a late appeal between October 2018 and June 2019.

53. We accept that it is possible that, as Mr Court said, he had become so entrenched in his view that HMRC had not engaged with his arguments in relation to the underlying merits of the appeal that he misunderstood HMRC's letter of 24 September 2018 and believed that ADR was still a possibility without any application to the Tribunal. However, HMRC's letter was very clear on this point and so, such a mistake, even taken in conjunction with the other circumstances of this case, would not, in our view justify granting permission to make a late appeal.

54. In any event, although Mr Court wrote to HMRC at the beginning of November 2018 to ask them again to consider ADR, his own evidence is that he did nothing in the first part of 2019 to follow this up, despite HMRC continuing to press for payment of the outstanding tax and interest.

55. It was only the issue of the County Court proceedings in May 2019 which prompted Mr Court to, in his words, take up the cudgels again which led to the application to the Tribunal in June 2019.

56. We have taken into account the possibility that Mr Smith was relying on Mr Court to take any action which was necessary in relation to the dispute with HMRC and that he did not appreciate that an application to the Tribunal was required in order to progress matters. However, again, the review conclusion letter and the letter of 24 September 2018 were both very clear on this point. The requirement to make an application to the Tribunal is not a complex issue and it is something which we would expect Mr Smith to understand once he read the letters. We note that there was no suggestion from Mr Court that Mr Smith did not know in the first half of 2019 that an application to the Tribunal was needed in order to progress matters.

57. Even though Mr Smith was to some extent relying on Mr Court's assistance, our view is that Mr Smith should have been aware of what was required and should have been more proactive in working with Mr Court to resolve the situation, particularly bearing in mind that Mr Court was assisting as a friend rather than taking responsibility as a paid adviser.

58. Looking at the other factors, it is clear that refusing permission to make a late appeal will mean that the estate has to pay more tax than might otherwise be the case. However, this is inevitably the case where permission to make a late appeal is refused and is not a factor which carries any significant weight in the absence of any evidence that paying the tax will cause some further significant prejudice to the appellant or, in this case, the beneficiaries of the estate.

59. Turning to the merits of the underlying appeal, we can see that the personal representatives have an arguable case but, having looked at the correspondence setting out the position of both sides, we cannot say that the appellant's case is either very strong or very weak. In accordance with the guidance in *Martland*, we do not therefore place significant weight on this point.

60. We accept that there is little prejudice to HMRC if we were to grant permission to make a late appeal. This is particularly the case given that the underlying dispute is a pure point of statutory interpretation based on what are essentially agreed facts. However, this does not in our view outweigh the other factors which point against granting permission for the personal representatives to make a late appeal.

61. As Mr Baird has pointed out, there is a purpose to the statutory time limit for making an appeal. Although the Tribunal has power to grant permission to make a late appeal, it is for the applicant to show why, in all the circumstances, it would be right to do so. For the reasons set out above, we do not believe that permission should be granted in this case.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 22 OCTOBER 2019