



[2020] UKFTT 00146 (TC)

**TC07639**

*PROCEDURE – application for permission to notify appeal out of time – Martland applied – belief that disagreement would be resolved without an appeal – relevance of the merits of the substantive appeal – application refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/06232**

**BETWEEN**

**TOM HERON**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE HEIDI POON  
SONIA GABLE**

**Sitting in public at Eagle Building, Glasgow on 28 February 2020**

**Tom Heron in person, and Paul Stevenson of Digits Accountancy Co Ltd, for the Appellant**

**Caitlin McDonald, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents**

## DECISION

### INTRODUCTION

1. This is a case-management decision in relation to Mr Heron's application for permission to notify an appeal to the Tribunal out of time. The respondents ('HMRC') had previously refused Mr Heron's appeal made to HMRC after the relevant time limits.

### RELEVANT LEGISLATION

2. Under s 49(2) of the Taxes Management Act 1970 ('TMA'), a notice of appeal may be given after the relevant time limit if –

(a) HMRC agree, or

(b) Where HMRC do not agree, the tribunal gives permission.'

3. The conditions that need to be met for HMRC to agree to a notice of appeal out of time are set out in s 49(4) to s 49(6); namely, that HMRC are satisfied that there was reasonable excuse for not giving notice before the relevant time limit, or where the appellant has made a request in writing to HMRC to give the notice of appeal, the request was made without unreasonable delay after the reasonable excuse ceased.

4. The Tribunal's discretion to exercise its case management powers by extending the time limit to admit a late appeal comes under Rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('Tribunal Rules'). Rule 20(4) clearly states that unless the Tribunal gives such permission, the Tribunal must not admit a late appeal.

### FINDINGS OF FACT

#### *Background*

5. On 21 March 2018, HMRC wrote to Mr Heron to carry out a check into his tax position in relation to the Self Assessment ('SA') return submitted for the year 2015-16. An information request schedule accompanied the letter, stating the information HMRC had received from the following employers' returns:

(a) DT Sports – pay of £3,262 with a tax refund of £5,787.40.

(b) Ministry of Justice – pay of £32,237.42 with PAYE of £11,388.65.

(c) Petrofac – pay of £64,597.61 with tax deducted of £22,433.15.

6. The enquiry focused on the discrepancies between the figures from the employers' returns of total income received of £100,097.03 and tax deducted of £28,034.40 and those declared in the SA return totalling £82,741 and tax deducted of £28,636. The figures from the SA return resulted in a tax repayment of £6,136.60 to Mr Heron.

#### *History of correspondence*

7. The chronology of the key stages in the parties' correspondence is as follows:

(1) The letter of 21 March 2018 asked for a response to the information request by 2 April 2018 on how Mr Heron arrived at his SA return figures, and a phone number was given to expedite the response.

(2) No response from Mr Heron to the letter of 21 March 2018.

(3) On 4 May 2018, Officer Moyo issued an Information Notice under Sch 36 to FA 2008 for compliance by 4 June 2018.

(4) No response from Mr Heron or compliance by 4 June 2018.

(5) On 11 June 2018, Officer Moyo wrote to give his view of the matter, and that from the figures held by HMRC, ‘additional tax arises from omitting employment income from DT Sports and understating employment income from Petrofac’, and that £7,566.30 was calculated to be the sum due.

(6) The letter of 11 June 2018 also raised the matter of assessing Mr Heron to a penalty under Sch 24, and a list of nine questions was included for his response so that HMRC ‘can give due consideration to the type of penalty that should be charged in this case’.

(7) HMRC’s Caseflow record shows the following communications:

(a) 25 June 2018 – an email from Mr Heron, (which is not included in the bundle but content of this communication was referred to in Officer Moyo’s refusal letter of 24 April 2019; see §14(1)).

(b) 17 July 2018 – the notes of the telephone call from Mr Heron state as follows:

‘I have received a call from TP today. TP is responding to my letter of 11 June 2018 ... TP is disputing that he owes additional tax. I have explained to TP that I have proposed to charge additional tax based on information I hold but because I received no response it means that TP is not challenging the information I hold. TP has apologised for not responding but has confirmed that he received my opening notice. TP has stated that his mother passed away in March and he has been heavily involved in arranging for her burial. TP has promised to email me the documents which he used to complete his return. TP believes his return is complete and correct as per his P60. I have sent TP our email protocol.’

(8) On 23 July 2018, HMRC issued the Penalty Explanation letter, stating in bold: ‘**You need to let us have any relevant information by 22 August 2018**’, that:

‘If you [Mr Heron] give us information that affects our view of the penalty shown in the schedule we’ll write to you again with our revised details.’

(9) No response to the letter of 23 July 2018.

(10) In September 2018, HMRC issued the discovery assessment and penalty notice.

### *The appealable decisions*

8. The substantive matters giving rise to the discovery assessment concern:

(1) The sum of £14,094 paid by Petrofac in October 2015 after the end of Mr Heron’s employment in August 2015, which was in relation to employment related securities. As such, the sum was taxable as employment income, but was omitted in the SA return.

(2) A total of £3,262 recorded as employment income by DT Sports with a total of tax refunded of £5,787.40. These are figures returned by DT Sports under Real Time Information (‘RTI’) to HMRC. The SA return stated earnings from DT Sports to be nil.

9. The dates of the appealable matters are as follows:

(1) On 13 September 2018, HMRC raised a discovery assessment under s 29 of the Taxes Management Act 1970 (‘TMA’) against Mr Heron in the sum of £7,563.30 for additional tax payable in relation to the tax year 2015-16.

(2) On 17 September 2018, HMRC issued a penalty notice under Sch 24 to FA 2007 for inaccuracy in the self-assessment return submitted for 2015-16. The penalty was assessed at 59.5% of the potential lost revenue (‘PLR’) of £7,563.30.

*The appeal to HMRC*

10. On 5 November 2018, HMRC's records show Digits Accountancy Ltd ('DAL') being registered as agent for Mr Heron.

11. On 12 February 2019, Mr Stevenson of DAL wrote to Officer Moyo on behalf of Mr Heron to ask if HMRC 'could review [his] investigation', giving as grounds for review:

(1) DT Sports – that Mr Heron was a director of the company and during a time of unemployment was included in the payroll, but that a year-end adjustment was filed to remove any income previously allocated to Mr Heron. A reconfiguration of the 2015-16 return on the software (BTC) which populates any PAYE income from HMRC's records shows no DT Sports income or tax.

(2) Petrofac – that Mr Heron had used the figures on his P45 for his return.

12. On 21 February 2019, Officer Moyo replied, treating the letter of 12 February 2019 as an appeal, and asked for the reason for the delay in making the appeal to be provided to HMRC by 21 March 2019

13. On 8 March 2019, Mr Stevenson gave the following reasons for the delay:

(1) It was 'a particularly difficult year' for Mr Heron with the death of his mother. Mr Heron 'concedes that he buried his head in the sand in regards [sic] to this matter'. When Mr Heron realised 'he needed help', he contacted DAL in November 2018.

(2) DAL 'had to wait until Mr Heron came in for a meeting ... to discuss the situation'; Mr Heron 'wishes to apologise for tardiness in replying. He understands the seriousness of this issue and takes full responsibility'.

(3) 'We feel that the client did not "carelessly or deliberately provide inaccurate information". All the details of my clients [sic] return where [sic] outlined in our letter dated 12 February 2019.'

14. On 24 April 2019, Officer Moyo refused the late appeal on the basis that he could not find reasonable excuse for the lateness, having considered the following:

(1) On 25 June 2018, Mr Heron confirmed to Moyo that he had received the letter of 11 June 2018, which contained details of what to do if Mr Heron disagreed. The three options were stated by Factsheet FS7, and the time limit to disagree was 30 days.

(2) On 1 August 2018, Mr Heron phoned Moyo and advised that he had failed to respond because he had been on holiday since 25 June 2018.

(3) During the phone call on 1 August 2018, Mr Heron was advised 'to read the penalty explanation letter of 23 July 2018 carefully and provide more information if [he] disagreed with the penalty assessment. No action was taken within 30 days.'

(4) Mr Heron confirmed that he received the s 29 assessment dated 13 September 2018 and had sought the service of a professional adviser in November 2018.

(5) The adviser did not inform HMRC that Mr Heron wanted to make an appeal until January 2019 (by a phone call) followed by the letter of 12 February 2019.

15. The refusal letter of 24 April 2019 concluded by advising Mr Heron of his right to apply to the Tribunal as follows:

'You have the right to ask an independent tribunal to rule that HMRC must accept your late appeal. To do this you should write to the Tribunal service [followed by details on how to apply to the tribunal].'

## Grounds of application

16. By notice of appeal dated 23 September 2019, the reason for the late appeal is stated as:

‘This has been going on for a considerable amount of time all of which has been extremely stressful to myself during a time of a family bereavement.

I have communicated with the HMRC officer in charge a number of times and he has not listened or taken into consideration any of the points raised. I was not aware [sic] the appeal was to be made in 30 days.’

17. For the substantive appeal, the stated grounds are as follows:

(1) ‘I completed my tax return in good faith and included all income from documents provided to me by employers.’

(2) ‘there was no intention to gain a rebate that was not due to me’;

(3) ‘it is stated that I carelessly or deliberately provide [sic] inaccurate information, this is simply not true.’

## Discussion

### *Case law authorities*

18. There is no guidance or restriction in the statute as to when the tribunal may give permission for a taxpayer to make a late appeal, as observed in the Upper Tribunal decision of *Martland v HMRC* [2018] UKUT 0178 (TCC) at [24]:

‘The statutory discretion conferred on the FTT in such cases is “at large”, in that there is no indication in the statute as to how the FTT should go about exercising it or what factors it should or should not take into account.’

19. The Upper Tribunal in *Martland* refers at [39] to the principles as developed in ‘the well-known and wider stream of authority on relief from sanctions and extensions of time in connection with the procedural rules of the courts and tribunals’, which are then summarised at [43] as follows:

‘The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for “litigation to be conducted efficiently and at proportionate cost”, and “to enforce compliance with rules, practice directions and orders”. We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to “consider all the circumstances of the case”.’

20. The three-stage approach in *Denton v TH White Ltd* [2014] EWCA Civ 906 is endorsed at [44] of *Martland* as a guidance for FTT to follow:

‘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.’

### ***The length of delay***

21. The dates of the appealable decisions are 13 September 2018 for the s 29 assessment, and 17 September 2018 for the Sch 24 penalty notice. The time limits for making an appeal against the respective decisions expired on 12 October 2018 and 16 October 2018.

22. The appeal was made in writing to HMRC by DAL’s letter dated 12 February 2019. The respective lengths of delay were 122 days in relation to the s 29 assessment, and 118 days for the penalty notice.

23. In the Upper Tribunal’s decision of *Romasave (Property Services) Limited v HMRC* [2015] UKUT 0254 (TCC) at [96], it was observed:

‘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.’

24. We agree with the observation in *Romasave* that a delay of 3 months is serious and significant in relation to the exercise of an appeal right that is a matter of material import. The delays in the present case were over four months in both instances.

25. We also note the elapse of a further five months after the issue of HMRC’s refusal letter of 24 April 2019 before the appeal was notified to the Tribunal on 23 September 2019, despite the details given on the refusal letter to apply to the Tribunal in relation to the late appeal.

### ***The reasons for the delay***

26. From the stated grounds for the application on the notice of appeal to the representations by Mr Heron and Mr Stevenson during the hearing, we consider the given reasons for the delay under the following headings.

#### ***Family bereavement***

27. While Mr Heron did not state the exact timing of his bereavement in his application or to the Tribunal, we have regard to two facts as imparted by him to HMRC.

(1) In his phone call on 17 July 2018, the notes from HMRC’s Caseflow referred to Mr Heron’s mother passing away in March 2018; (§4(8)).

(2) On 1 August 2018, Mr Heron called Officer Moyo, and during that call, Mr Heron informed Officer Moyo that he had been on holiday since 25 June 2018; (§14(3)).

28. Juxtaposing these two factual details, both of which originated from Mr Heron, albeit only made available to the Tribunal from HMRC’s records and not from Mr Heron himself, we do not consider that the bereavement in March 2018 could give rise to a good explanation for the delay in observing the time limits which expired in October 2018.

29. We note Mr Heron's involvement in arranging for his mother's burial (§7(7)), and for this reason, the bereavement might explain why there was no response to HMRC's letter of 21 March 2018. However, the bereavement was simply too remote in terms of timing to be a possible cause for the delay in making an appeal after October 2018, let alone the continual delay until 12 February 2019.

30. For the bereavement to be the reason for the delay in making an appeal, there must be some causal link between the cause and the delay. At the very minimum, the cause and the delay need to be coterminous. In the instant case, the bereavement and the time limits were over six months apart.

31. In any event, Mr Heron was able to take a long holiday in June and July of 2018. If the bereavement in March 2018 did not disrupt his holiday plan in the summer of 2018, then it could not have prevented the making of an appeal in the autumn of 2018.

*Unaware of the need to make an appeal*

32. To an objective observer, the chronology of communications between Officer Moyo and Mr Heron (at §7) would suggest that there had been a lack of substantive response at the material junctures in the course of the enquiry.

(1) There was no response to the opening letter of 21 March 2018, which might be explained by the timing of the bereavement.

(2) There was no response to the information notice of 4 May 2018, for which no good reason seems to have been given.

(3) There was no substantive response to the view of the matter letter of 11 June 2018. The email on 25 June 2018 from Mr Heron, and the phone call on 17 July 2018 did not seem to impart the substantive information requested.

(4) There was no response to the Penalty Explanation letter of 23 July 2018. Even if we take into account that Mr Heron was on holiday at the time, he would have returned from holiday in time to respond by 22 August 2018 as requested.

33. It would appear that Mr Heron had acknowledged this general lack of timely and substantive response, and had apologised to Officer Moyo on 17 July 2018 'for not responding' to the opening notice he had received. If there had been delay in closing the enquiry, that delay would seem to be largely due to the lack of response from Mr Heron.

34. During the hearing, Mr Heron emphasised that he was 'unaware of the seriousness of the matter', and that he was under the impression that 'by discussion and dialogue', the parties would 'get to the correct answer'.

35. As a matter of law, an enquiry has to come to a closure, and the enquiry officer must form a view on the evidence available to him. An enquiry is not an open-ended process that continues indefinitely until the taxpayer reaches an agreement with HMRC.

36. In the six-month period from the opening of the enquiry by letter dated 21 March 2018, to the issue of the discovery assessment and the penalty notice in September 2018, we observe that the standard procedure had been followed by the enquiry officer to ensure that Mr Heron was given adequate opportunity to put forward his position to HMRC on the substantive issues, and to provide any supporting evidence, before the discovery assessment was issued.

37. In the context of the interlocutory matter in front of us, we understand Mr Heron's point to be that he was unaware of the need to make an appeal because he was under the erroneous impression that any disagreement between him and Officer Moyo would be resolved eventually by simply going back and fro. It is not immediately obvious to us how this misunderstanding

supports his application. Insofar as this misunderstanding can be made relevant to his application, we interpret Mr Heron's pleading to be that his erroneous belief whereby any differences would be resolved 'by discussion and dialogue' had meant that he did not register the necessity of making an appeal.

38. An honest and mistaken belief cannot, of itself, amount to a good explanation for the delay. The reasonableness of his belief remains to be tested by an objective standard as set out in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 239:

'... can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view, it cannot. ... In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?'

39. However genuine Mr Heron's belief might have been, we do not consider it to be a good explanation for failing to register the necessity to appeal. Not only is such a belief not objectively reasonable, in the sense of being widely held by an average prudent taxpayer, but that such a mistaken belief would have been dispelled or rectified, if Mr Heron had given due regard to the written statements contained in the relevant decisions, namely that his appeal right had to be exercised within 30 days of the dates of those decisions.

40. In rejecting the proposition that such an unawareness could have given rise to a good explanation, we also have regard to the subjective attributes of Mr Heron as a taxpayer. In his professional capacity, Mr Heron functions at the level of a director, and acts on behalf of his employers (formerly Petrofac, and currently the Ministry of Justice) in procuring contracts of substantial value. He informed the Tribunal that as the Deputy Director Commercial with the Ministry of Justice, he had procured a contract for catering services for prisoners worth half a billion pounds, for which he was responsible for the tendering process and the selection of suppliers.

41. From these facts, we infer that Mr Heron is adept at reading terms and conditions, and attuned to their significance in the evaluation of tenders. Had Mr Heron taken similar care with the written statements contained in HMRC's correspondence, he would have come to the conclusion that there are time limits to be observed if he wanted to challenge the discovery and penalty assessments. The discordance between Mr Heron's behaviour as an employee-director in a highly responsible position and his behaviour as a taxpayer over these appealable matters is simply too pronounced for the Tribunal to accept that his mistaken belief was either reasonable or adequate to explain the delay in bringing an appeal.

42. In any event, by November 2018, Mr Heron had engaged the service of a professional agent, who can be expected to be aware of a matter such as the ordinary time limit of 30 days for appeal purposes. No good explanations have been given why a further three months elapsed before an appeal was brought in February 2019, or another five months passed after HMRC's refusal letter of 24 April 2019 before the appeal was notified to the Tribunal in September 2019. Whether it was the inability to fix a meeting with Mr Heron, or not realising the enquiry had already concluded with the issue of assessments, it seems to us that there was inadequate communication between the client and the agent to enable a timely appeal to be made or notified. Those failings are matters between Mr Heron and Mr Stevenson, and are failings that the Tribunal has no good reason to step in to rectify.



*All circumstances of the case*

43. The merits of his substantive appeal were repeatedly raised by Mr Heron and Mr Stevenson. It was asserted that the quantum of the discovery assessment is too high, and that Mr Heron was neither careless nor deliberate in causing the inaccuracies in the SA return.

44. The matter in front of us is procedural in nature, which means the merits of the appeal are of limited relevance, as stated by More-Bick LJ in the judgment of the Court of Appeal in *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 at [46]:

‘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.’

45. In relation to the discovery assessment, we have regard to the following facts, and are not persuaded that the grounds of appeal are ‘very strong’ as averred to make the prospect of the appeal a relevant consideration.

(1) The records HMRC relied on in raising the discovery assessment are third parties’ documents; that is, the employers’ returns, and as such, they provide a sound basis for quantifying the potential lost revenue that is the quantum of the discovery assessment.

(2) Mr Heron has already conceded that the £14,094 in relation to the employment related shares was taxable. The omitted earnings gave rise to the majority of the potential lost revenue, which was in effect clawing back the tax repayment that had been made to Mr Heron based on his SA return figures.

(3) As to the contention regarding the earnings from DT Sports, the incontrovertible fact remains that RTI monthly returns from November 2015 to February 2016 had been submitted; these were prepared by Mr Stevenson for DT Sports, and reflected the intention between Mr Heron and DT Sports at the time. It is not self-evident that any retrospective adjustment would be capable of displacing the figures on the RTI returns.

46. In relation to the penalty assessment, we are unable to assess the merits of the appeal without much investigation. Consequently, the prospect of this part of the appeal succeeding cannot be a factor which we take into account in considering all the circumstances of the case.

**DISPOSITION**

47. For the reasons stated, the application to notify an appeal out of time is refused.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

48. 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.

**DR HEIDI POON  
TRIBUNAL JUDGE**

**RELEASE DATE: 16 MARCH 2020**