



TC07792

*INCOME TAX – Permission to appeal out of time -penalties for failure to make returns -
Schedule 55 of the Finance Act 2009*

FIRST-TIER TRIBUNAL

Appeal number: TC/2020/01376

TAX CHAMBER

BETWEEN

MS I ZAICEVA

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 22 July 2020 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 18 March 2020 (with enclosures), HMRC’s Statement of Case acknowledged by the Tribunal on 1 June 2020, the Tribunal and Document Bundle of 34 pages prepared by HMRC (“the Bundle”), the Legislation and Authorities Bundle of 164 pages also prepared by HMRC and the Submission for the Appellant submitted by the Appellant’s representative, Toryglen Rights Project attached to their email of 1 July 2020.

DECISION

INTRODUCTION

1. The Appellant is applying for permission to appeal out of time in relation to penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit annual self-assessment returns on time for the tax years 2010-11 and 2012-13 (“the relevant years”).
2. Ms Zaiceva also applied to appeal out of time in relation to penalties imposed under section 93 Taxes Management Act 1970 (“TMA”) for 2009-10. Those penalties were, however, cancelled by HMRC and I do not need to consider them further.
3. The penalties that have been charged, and which remain in issue, can be summarised as follows:
 - (1) Initial late filing penalties under paragraph 3 of Schedule 55 of £100 for each of the relevant years.
 - (2) “six month” penalties under paragraph 5 of Schedule 55 of £300 for each of the relevant years
 - (3) A “twelve month” penalty under paragraph 6 of Schedule 55 of £300 for 2010-11. The penalty charged is of the default amount and there is no suggestion that the Appellant deliberately withheld information.
 - (4) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 for each of the relevant years.
 - (5) The total amount of the penalties which remain in issue is £2,900.
4. The appellant’s reasons for appealing against the penalties out of time are the same as her substantive grounds for appealing against the penalties. They are set out in her Notice of Appeal dated 18 March 2020 and in the submission prepared by her representative, the Toryglen Rights Project. (“the Submission”).
5. The reasons for a late appeal can be summarised as follows:
 - (1) The Notice of Appeal states that the appeal to HMRC was late because Ms Zaiceva was suffering from post-natal depression which gave her difficulty in understanding and dealing with all her tax affairs.
 - (2) She does not remember receiving any tax forms/returns to complete for the years in question.
 - (3) She remembers giving details of her income over the phone although she acknowledges that this may have been to the Tax Credit Office.
 - (4) She was very confused and suffering from mental health problems which persisted for a number of years.
 - (5) Ms Zaiceva’s representative expanded on these grounds in the Submission. They submitted that she should be allowed to make a late appeal to HMRC and that she had a “reasonable excuse” for not submitting her tax returns on time.
 - (6) The Submission states that the appellant was suffering from mental health problems at the relevant dates. This gave her difficulty in dealing with her affairs. She was depressed and her motivation and organisational skills were impaired. She was prescribed medication and referred to counselling. She was suffering from post-natal

depression and besides her medical problems had caring responsibilities for her child as a lone parent which also limited her ability to deal with matters.

(7) The appellant had no experience of dealing with these matters.

(8) Ms Zaiceva was in receipt of Tax Credits and had to report her annual earnings to the Tax Credit Office. She thought that by reporting her income to the Tax Credit Office, which was part of HMRC, she had provided enough information to HMRC to allow any tax liability to be calculated. She did not understand that she had to make a separate report to a different part of HMRC.

(9) Ms Zaiceva will suffer financial hardship if she cannot appeal as she has a low income and will have to pay significant sums to HMRC.

(10) There was no tax due in any of the years in question.

(11) The penalties are disproportionate to any errors the appellant made.

6. The appellant's appeal to HMRC under section 31A TMA was made outside the statutory deadline. HMRC have not given consent under s49(2)(a) TMA for the late appeal. The appellant now applies to the Tribunal for permission to proceed with the late appeal under section 49(2)(b) TMA. HMRC object to the application.
7. Penalty notices were issued as follows (being the initial late payment penalty, the six month penalty and the daily penalties respectively for each of the relevant years):
 - (1) (2010-11): 14 February 2012, 7 August 2012, 7 August 2012.
 - (2) (2012-13): 18 February 2014, 18 August 2014, 18 August 2014.
8. HMRC also issued a twelve month penalty for 2010-11 on 19 February 2013.
9. The appellant had 30 days from the issue of each penalty notice to appeal against the penalty to HMRC.
10. The appellant appealed against the 2010-11 penalties herself on HMRC's appeal form on 8 April 2019. The appeals were accordingly between six and over seven years late.
11. The Toryglen Law and Money Advice Centre (which I assume is part of the Toryglen Rights Project) ("Toryglen") appealed on the appellant's behalf on 1 May 2019 against "all penalty charges...in relation to any tax years where you felt that she had failed to submit the return on time". This was treated as an appeal against the 2012-13 penalties which were accordingly between four and a half years and over five years late.
12. The Bundle did not contain all the correspondence between the parties, but it included a standard form letter dated 31 July 2019 stating that the appellant was out of time to appeal the 2010-11 penalties and inviting her to demonstrate that she had a reasonable excuse for the failure to appeal on time and that she had made the appeal without unreasonable delay after the excuse ceased.
13. There was no copy of the letter rejecting the appeal against the 2012-13 penalties, but a letter of 25 February 2020 referred to a letter of 30 July 2019 which had stated she could not appeal against the 2012-13 penalties. HMRC's Statement of Case also stated that HMRC had declined to accept the appeal after the time limit on that date.
14. It seems that the appellant wrote to HMRC on 4 December 2019 but that letter is not in the Bundle. HMRC's 25 February 2020 letter was a response to that but dealt only with the tax year 2012-13. The letter stated that HMRC were still unable to accept the appeal and that the appellant had a right of appeal to this Tribunal and that she needed to write to the Tribunal by 26 March 2020.

15. The Notice of Appeal to the Tribunal was dated 18 March 2020 which was in time and I will treat it also as an in time application in relation to 2010-11 although there was no later letter dealing with that tax year in the Bundle.

FINDINGS OF FACT

16. HMRC's computer records show that the tax return for the year ended 5 April 2011, was submitted electronically on 26 September 2014. That return was two years and eight months late. The return for the tax year 2012-13 was filed electronically on 25 September 2014. That return was accordingly, nearly eight months late.
17. There are no penalties shown and no appeal in relation to the intervening tax year, 2011-12. The Bundle included a number of statements of account dated between June 2012 and September 2014. These clearly show the penalties in issue but do not show any money owing from 2011-12. I infer that Ms Zaiceva's tax return for 2011-12 was submitted on time.
18. The first question is whether the notices to file and penalty notices were sent to the appellant. HMRC do not keep copies of the actual notices sent to taxpayers, but their computer records show that notices to file a tax return and penalty notices were sent to the appellant at the addresses on record for her on the dates mentioned in paragraph 7 above. I was provided with specimen copies of the various notices. The form of penalty notice not only sets out the amount of the penalty, it states that the taxpayer must submit their tax return and warns of further penalties if they fail to do so. It also sets out the 30 day deadline for appealing against the penalty. HMRC's records show two addresses for the period in question. The appellant's current address as shown on the Notice of Appeal was effective from 24 April 2012 and the previous address from 2010. HMRC state that all notices to file, penalty notices and the statements of account mentioned above were sent to the relevant addresses on record and that no correspondence has been returned undelivered.
19. HMRC submit that the provisions of section 115 TMA concerning service of the notices were complied with, and that the notices are deemed to have been delivered by virtue of section 7 Interpretation Act 1978. The provisions are:

“115.— Delivery and service of documents.

(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence:

(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person [by HMRC] may be so served addressed to that person—

(a) at his usual or last known place of residence, or his place of business or employment, or...

“7. References to service by post.

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

20. In her grounds of appeal, Ms Zaiceva states that she does not remember receiving any actual tax forms or returns for the years in question. However, Toryglen’s appeal letter of 1 May 2019 states:

“My client advises me that she has been fined on a number of different occasions for failing to file a tax return on time. ...

My client cannot specify full details about the interest and penalty charges that have been applied as she does not **have** the correspondence.” (emphasis added)
21. If the appellant was arguing that she never received the tax forms, I would have expected the letter to say so. In the Notice of Appeal she says she does not “remember” receiving the notices but the Toryglen letter suggests that she did receive a number of penalty notices but no longer had them.
22. HMRC’s records do not show whether the appellant was sent a paper return for 2010-11, but they do show that she was sent a “full return” ie a paper return for 2012-13. The fact that the appellant did ultimately file the tax returns, albeit late, indicates that she did receive them. There is also a letter from HMRC in the Bundle dated 26 July 2018 which acknowledges receipt of the 2009-10 tax return (received October 2017) and cancelling the late filing penalties for that year.
23. The notices to file returns, penalty notices and statements of account (ignoring any reminders which may have been sent) amount to at least 14 documents. HRMC had the appellant’s correct addresses on file and the correspondence would have been sent to those addresses. It is inherently unlikely that none of them were sent or that none of them were received.
24. For the purposes of this application to appeal out of time against the late-filing penalties, I do not, strictly, have to decide whether the notices were correctly served, but whether Ms Zaiceva received at least some of them so that she was aware that she needed to submit returns and that penalties were accruing.
25. For the reasons set out above, I find that, on the balance of probabilities, Ms Zaiceva did receive some or all of the notices and other correspondence sent to her by HMRC so that she was aware of the penalties.
26. On this basis, the appeals against the penalty notices were between four and a half and seven years late.
27. Ms Zaiceva’s main ground for the application is that she was unable to deal with her tax affairs because of post-natal depression and other mental health issues.
28. Toryglen’s appeal letter states that the appellant’s son was born on 10 May 2010.
29. The Submission states that she was prescribed medication and referred to counselling. It does not state whether she underwent counselling.
30. It also states:

“It is submitted that the Appellant satisfies the requirement that she had a reasonable excuse for not submitting her accounts on time.

The Appellant was suffering from mental health problems at the relevant dates.”
31. It is not clear whether the “relevant dates” are the dates of the appeals to HMRC (in 2019) or the dates when the returns should have been submitted (in 2012 and 2014).
32. Whichever dates are intended, I was not provided with any evidence about Ms Zaiceva’s condition beyond the bare assertions set out above. While I accept the statements that

Ms Zaiceva had post-natal depression following the birth of her son in May 2010 and other mental health issues, I cannot make any findings of fact about the severity of the problems, the impact it had on her ability to deal with her affairs, the treatment given or the period of time for which the problems persisted and whether or how Ms Zaiceva's health improved over the period from May 2010 to the time of her appeals to HMRC in April and May 2019.

DISCUSSION

33. I have concluded that the tax returns for 2010-11 and 2012-13 were submitted on 26 September 2014 and 25 September 2014 respectively and were accordingly approximately two years and eight months and eight months late. I have also concluded that the appellant received some or all of the notices to file and the penalty notices and so was aware of the need to file tax returns and that penalties had been charged.
34. I have found that the appeals to HMRC against the late filing penalties were between over four and a half years and over seven year late.
35. Accordingly, the appellant may not proceed with the appeals unless I give permission for the appeals to be heard out of time under section 49(3)(a) TMA.
36. The Upper Tribunal has recently considered the approach to granting permission to bring late appeals in the case of *William Martland v The Commissioners for HMRC* [2018] UKUT 0178 (TCC) ("*Martland*").
37. The Upper Tribunal stated, at paragraph 29 that:

“...the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission.”
38. The Upper Tribunal went on to confirm the three-stage test as set out in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 at paragraph 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.”
39. I will consider first the length of the delay.
40. In the Upper Tribunal case of *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 (TCC), the Tribunal stated, at paragraph 96 that:

“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.”

41. The delays in appealing the penalty notices to HMRC varied from over four and a half years to over seven years.
42. These delays are clearly serious and significant.
43. I now turn to the reasons for the delays.
44. The main reason given is that Ms Zaiceva suffered from post-natal depression and other mental health problems. She also had caring responsibilities for her child which limited her ability to deal with matters. These are, of course, reasons that are *capable* of constituting a “reasonable excuse” and/or good reasons for making an appeal late.
45. It is important to emphasise that, for the purposes of the present application, Ms Zaiceva’s problems must have been such as to prevent her making a timely appeal to HMRC. The issue whether she had a reasonable excuse for submitting her tax returns late is a different question and relates to a different time frame.
46. In considering whether to grant permission I would need to be satisfied that the appellant’s problems had such an impact on her life and her ability to deal with her affairs that she was unable to deal with the relatively straightforward task of sending an appeal to HMRC, right up until April and May 2019. Or if she was able to deal with that task before then, that she made the appeals without unreasonable delay after that point.
47. I have no evidence about this at all.
48. There is however some evidence that the appellant *was* able to deal with financial matters during the period. She did, in fact, submit her tax returns for the relevant years in 2014. By that time therefore, she was able to deal with that task, which is more complicated than submitting an appeal against the penalties.
49. I have inferred, from the absence of penalties for 2011-12, that Ms Zaiceva submitted her return for that year on time, which would be by 31 January 2013 at the latest.
50. She also submitted her tax return for 2009-10 in 2017, eighteen months before she appealed against the penalties.
51. HMRC submit that a conscientious taxpayer who has an ongoing condition that prevents them carrying out their responsibilities would obtain assistance or make other arrangements to make sure deadlines are met. It is unclear whether Ms Zaiceva submitted the returns herself or obtained help to do so, but in either case, she was able to deal with the more difficult aspects of her tax affairs - submitting returns - at least five or six years before appealing against the penalties.
52. The appellant’s problems began in May 2010 when she suffered post-natal depression after her son’s birth. That was nine years before the appeal to HMRC. I am told that she obtained treatment for her mental health issues and in the absence of evidence to the contrary, it would be reasonable to expect there to be some improvement in her condition over that period. That there was an improvement, or that she obtained help to deal with her affairs, is suggested by the fact that she did eventually submit the tax returns.
53. Finally, I must conduct the balancing exercise referred to in *Martland*, taking account of “all the circumstances of the case”.
54. In *Martland* at paragraphs 45 and 46, the Tribunal gives guidance on how the balancing exercise should be carried out:

“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. ...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."

55. HMRC emphasised the need for finality in dealing with a taxpayer's affairs and that after delays of the length in this case, they were entitled to consider the matter closed.
56. In *Martland*, the Upper Tribunal said “the purpose of the time limit is to bring finality, and that is a matter of public interest, both from the point of view of the taxpayer in question and that of the wider body of taxpayers.”
57. HMRC submit that they should be entitled to rely on the time limits set out in legislation for the purpose of allocating resource in administering the tax system and should not normally be required to defend appeals after an excessive gap between the expiration of the time limit and the appeal. Such appeals are normally more resource intensive to defend and otherwise create issues in obtaining appropriate evidence in meeting HMRC's burden to prove that penalties were correctly charged to the Appellant.
58. HMRC further submit that allowing a late appeal in this instance is contrary to the policy objectives of the legislation which set the deadline.
59. If the application is granted, HMRC would therefore be prejudiced as they are entitled to expect finality after this length of time, it would set a bad precedent for other taxpayers and it would consume excessive resources. In relation to the last point, I note that HMRC have already prepared a Statement of Case on the substantive merits, which reduces the weight of that factor.
60. If the application is not granted, Ms Zaiceva will be prejudiced as she will lose the opportunity to challenge the penalties and will have to pay them, which she argues will cause her financial hardship. The Submission states she has a low income. I understand that the amount owing is already being collected through her PAYE coding.
61. The Submission also states that there was no tax due for the years in question.
62. Ms Zaiceva says she gave information about her income over the phone to the Tax Credits Office. The Submission suggests that she thought this was sufficient to enable HMRC to calculate any tax liability and that she did not understand that she needed to make a separate report to a different part of HMRC.
63. Whilst that might be relevant to the late submission of the returns, it is not a significant factor in the current application which relates to the penalties. In any event, even if she initially thought that she had done what was necessary, the fact that she received numerous letters from HMRC over a two and a half year period telling her that she needed

- to file a tax return and that she was being charged ever increasing penalties should have alerted her to the fact that she needed to take some further action.
64. She considers that the amount of the penalties is disproportionate given that no tax was due for the relevant years.
 65. This issue of proportionality was considered by the Upper Tribunal in *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC). The context of that case was that the Upper Tribunal considered whether the fact that significant penalties had been levied for the late filing of returns where no tax was due was a relevant circumstance that HMRC should have taken into account when considering whether there were “special circumstances” which justified a reduction in the penalties. The Upper Tribunal concluded that the penalty regime set out in Schedule 55 establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear. Accordingly, the Upper Tribunal determined that the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate.
 66. Although the size of the penalties and the fact that no tax was due is part of “all the circumstances” I must take into account, the penalties are not disproportionate for the reasons set out in *Barry Edwards* and accordingly, this factor does not carry a great deal of weight.
 67. The length of the delay in appealing to HMRC and in particular the length of the delay after the appellant had regained some capability to deal with her tax affairs, or had obtained help to do so, is an important factor.
 68. I have also considered the practical consequences of granting the application. HMRC say, in their Statement of Case that in the event the Tribunal does allow the late appeal, HMRC are content for the appeal to be treated as having been made to HMRC and for the Tribunal to consider the substantive dispute rather than having the appeal remitted for consideration. The Statement of Case goes on to provide HMRC’s submissions on the substantive issues.
 69. If I grant the application and go on to consider the substantive issues, I have no more information or evidence than I have set out above. I have noted that the considerations in relation to the substantive appeal are slightly different from those applicable to the application and that a different time frame applies but I am in no better position to find facts or reach a conclusion on the “reasonable excuse” issue than I am in relation to the application.
 70. If I allow the application and, despite HMRC’s invitation, remit the appeal for their consideration, it is uncertain what, if any, evidence the appellant would be able to obtain and submit after a lapse of time of this length.
 71. What is certain is that this course of action would result in further significant delays for all parties and further significant costs for HMRC and potentially the Tribunal, contrary to the need for litigation to be conducted efficiently and at proportionate cost, which the Upper Tribunal in *Martland* considered to be of particular importance.
 72. *Martland* warns against a detailed consideration of the merits of the substantive case in determining an application for permission to appeal out of time. The appellant’s grounds for the substantive appeal are very similar to the grounds for allowing the appeal to proceed outside the time limit and I have little or no evidence for any of them. Without investigating the substantive merits in any detail, I conclude, from my consideration of

the grounds of the application, that the strength of the appellant's substantive case is far below the level where it would significantly affect the balancing exercise.

73. Having taken all the circumstances, including the above matters, into account and having conducted the balancing exercise required by *Martland*, I have decided that it is not appropriate in the present case to grant permission to appeal to HMRC outside the permitted time limits.

CONCLUSION

74. For the reasons set out above, I have decided not to grant permission to appeal to HMRC out of time.
75. Accordingly, I dismiss the application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

76. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE

RELEASE DATE: 29 JULY 2020