



TC07875

*INCOME TAX – penalties for late filing – application for permission to appeal to HMRC
out of time – application refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/02064

BETWEEN

TEMITAYO OGUNYEMI

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 30 September 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 8 June 2020 (with enclosures), HMRC's Statement of Case (with enclosures) dated 24 July 2020, the document bundle of 61 pages compiled by HMRC and the appellant's reply dated 19 August 2020.

DECISION

Introduction

1. This is an application for permission to make a late appeal to HMRC against late filing penalties issued under various paragraphs of s55 Finance Act 2003 for the tax year ended 5 April 2014, as follows:

- (1) £100 initial late filing penalty issued under para 3 on 18 February 2015;
- (2) £900 daily late filing penalty issued under para 4 on 14 August 2015;
- (3) £300 six month late filing penalty issued under para 5 on 14 August 2015.

Background and facts

2. The appellant was issued with a notice to file a tax return for the year ending 5 April 2014 on or around 6 April 2014.

3. The due date for filing the return was 31 October 2014 for a paper return, or 31 January 2015 for an electronic return. The appellant did not dispute that she was required to submit a tax return.

4. HMRC's records show that the appellant's paper return was received by HMRC on 15 October 2015.

5. The appellant stated in correspondence with HMRC dated 28 April 2020 that she had filed her tax return on time "but was living abroad at the time in the Netherlands" and that it took "more than 2 weeks for post from the UK to reach" her at the time. She also stated in correspondence dated 13 May 2020 that the paper filing was done through her accountant "whom communication with is terrible" and that the nature of her work is very demanding.

6. The appellant's notice of appeal states that:

- (1) She called HMRC when she received a late filing penalty and explained that she was often away, and that she paid a £100 penalty when requested in 2014.
- (2) She received a letter regarding late filing penalties in 2017, which had been sent to her former address in the Netherlands. She had moved back to the UK and had notified HMRC of her change of address. She appealed the penalties but was told that she did not appeal in the 30 day time frame given.
- (3) There were postal delays in receiving correspondence in the Netherlands.
- (4) The nature of her work was such that she often travels to remote locations in Africa and even whilst in the UK has a substantial amount of work. She sometimes asks her husband to open her letters and deal with them accordingly. However, in her reply to HMRC's statement of case, the appellant stated that her husband was not allowed to open her letters, which caused delays in responding to mail whilst she was away.

7. The appellant wrote to HMRC on 28 April 2020 to appeal the penalties. On 7 May 2020, HMRC refused to accept the late appeal. The appellant wrote to HMRC again on 13 May 2020. On 22 May 2020 HMRC confirmed their refusal to accept the late appeal.

8. The appellant appealed to this tribunal on 8 June 2020.

9. HMRC submitted as follows:

- (1) Although copies of the penalty notices are not held on individual records by HMRC, HMRC records show that the penalty notices were issued on or around the dates stated above. The penalty notices were issued to the address in the Netherlands on

HMRC's records. No post was returned to HMRC and so the penalty notices were effectively served in accordance with the provisions of s115 Taxes Management Act (TMA) 1970 and s7 Interpretation Act 1978.

(2) In addition to the penalty notices, statements of account were sent to the appellant on 11 March 2015, 21 June 2015, 9 September 2015 and 7 December 2015. These clearly showed the relevant penalties. As noted above, no correspondence was returned to HMRC.

(3) On 7 January 2016, HMRC's Debt Management and Banking Department issued a letter to the appellant at the address in the Netherlands held by HMRC at the time. On 19 January 2016, HMRC's records show that the appellant contacted HMRC by telephone and stated that she did not agree with the late filing penalty and that she would submit an appeal in writing. No appeal was received and, on 6 January 2017, a further letter was issued to the appellant by the Debt Management and Banking Department.

(4) The appellant's address was changed on HMRC systems to an address in the UK on 24 April 2017. The change of address was initiated by a Real Time Information (RTI) payment submission by the appellant's employer. Further letters were issued to the appellant at this address by HMRC's Debt Management and Banking Department on 1 June 2017, 21 June 2017 and 19 July 2017.

(5) The appellant's address was changed on HMRC systems to another UK address on 27 September 2017. This change was also initiated by an RTI payment submission by the appellant's employer. A further letter from HMRC's Debt Management and Banking Department was issued at this address on 5 November 2018.

Discussion

10. Although the appellant stated in correspondence with HMRC that she had filed her tax return on time, she has provided no evidence to support that statement. Further, in her notice of appeal, the appellant accepted that she was late in filing her 2013/14 tax return.

11. I conclude therefore that her tax return for the tax year ended 5 April 2014 was filed late and that it was received by HMRC on 15 October 2015.

12. The appellant has not specifically disputed receiving penalty notices although she has stated that there were some delays in receiving correspondence. In her notice of appeal the appellant states that she received a letter about the late penalties in 2017 and does not state that this was the first that she knew of the penalties.

13. I conclude therefore that, on the balance of probabilities, the penalty notices were correctly issued and that the appellant received some or all of them. She was, in any case, aware by 2017 that late filing penalties had been issued.

14. I note that the appellant states in her notice of appeal that she "also appealed this new penalty" in connection with the letter received in 2017 but does not state when that appeal was made nor does she state that this was a different appeal to that notified to HMRC in 2020. The appellant's correspondence with HMRC does not make any reference to an earlier appeal and HMRC's records do not indicate that any such earlier appeal was received.

15. I note that the appellant states that she paid a late filing penalty of £100 but note also that she states that this was paid in 2014. As the penalties under appeal were not issued until 2015, I conclude that this payment must have been for an earlier failure to file her return on time.

16. HMRC have refused to accept the late appeal from the appellant and so she may not proceed with her appeals to HMRC unless I give permission for the appeals to be heard out of time under section 49(2)(b) TMA 1970.

17. The approach to be taken by this tribunal in considering late appeals was set out in *William Martland v The Commissioners for HMRC* [2018] UKUT 178 (TCC) (*'Martland'*). The Upper Tribunal noted that (§29):

“...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.”

18. The Upper Tribunal also confirmed the three-stage test set out in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 (§29):

“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.”

Length of delay

19. The delay between the deadline for appealing the penalty notices and the appeal to HMRC is over four years. Even considering only the appellant's own evidence, she was aware of the late penalties by 2017, three years before she made the appeal.

20. The Upper Tribunal concluded in *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254 (TCC) that (§96):

“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.”

21. The length of the delay in this case is clearly serious and significant.

Reasons for the delay

22. The appellant has given no clear reasons for the delay in making the appeal. She refers to delays with post in the Netherlands but does not explain why any delays in receiving post would lead to a delay of years in bringing an appeal. The appellant had, in any case, moved back to the UK in 2017.

23. The appellant also refers to being very busy with work, and to needing to travel extensively for work, but again does not explain how this leads to a delay of years in bringing an appeal.

24. The appellant states that she asked her husband to deal with her post when she is busy, but then stated in her reply that he was not allowed to open her post. In her reply, she also states that she relied on her husband and accountant to submit figures. I did consider whether the appellant had meant that she thought someone else was dealing with the appeal, but the conflicting statements mean that this is unlikely. In addition, her correspondence with HMRC does not say that she thought the appeal was being dealt with by someone else. The appellant was also clearly dealing with the late penalty notices herself in 2017 when she telephoned HMRC in response to their letter. Accordingly, I consider that this statement does not provide a reason for the delays in bringing the appeal.

25. Accordingly, I do not consider that the appellant has established any reason for the delays in appealing the penalty notices.

All of the circumstances

26. *Martland* advises that a balancing exercise is needed to consider all of the circumstances of the case and states (§45 and §46):

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.

27. HMRC submitted that they were entitled to rely on the time limits set out in the 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. They noted that the Upper Tribunal in *Martland* had confirmed that (§34):

“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.”

28. HMRC also submitted that it would be unfair on other taxpayers who had complied with the time limits to give permission for this late appeal.

29. If the application is granted, I consider that HMRC would be prejudiced as they are entitled to expect finality after this length of time, it would set a bad precedent for other taxpayers. Although HMRC indicated that it would consume resources to defend an appeal after this length of time, I note that HMRC had prepared a full Statement of Case on the substantive merits of the appeal, which reduces the weight of that prejudice to them.

30. If the application is not granted, the appellant will be prejudiced in that she will be unable to challenge the late payment penalties and will incur the cost of paying them.

31. The appellant's substantive grounds of appeal are effectively the same points noted above: that she was often away for work, that there were postal delays whilst she lived in the Netherlands, and she had never failed to pay her taxes and that she was only late in filing in 2013/14 for these reasons. In correspondence, she indicates that she may have had difficulties communicating with her tax agent. In her reply, the appellant also states that “that year” she

had to fly back to the UK regularly to deal with tenant problems at the rental property. She also states tht she was very busy because of problems involved with settling into a foreign country. However, in her grounds of appeal, the appellant states that she had moved country in January 2012, over two years before the end of the relevant tax year.

32. Accordingly, I do not consider that the appellant’s substantive grounds of appeal indicate that she has a strong case such that she would be significantly prejudiced if the application is not granted.

33. Considering all of the circumstances and noting that no good reasons have been given for the substantial delay in bringing this appeal, I do not consider that it is appropriate to give permission to make a late appeal to HMRC.

Decision

34. The application is therefore refused.

Right to apply for permission to appeal

35. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 10 OCTOBER 2020