[2020] UKFTT 422 (TC)

TC07899

Appeal number: TC/2019/04391

Procedure - application for permission to appeal - whether reasonable excuse for failure to appeal in time - discovery assessments and penalties - S29 Taxes Management Act 1970 and Schedule 55 to Finance Act 2009 - appeal to HMRC out of time - Martland considered - Application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARTIN WELLS **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER: SUSAN STOTT

Sitting in public at Darlington Magistrates Court, Parkgate, Darlington on 20 January 2020

Mr Nigel Kidwell of Counsel for the Appellant

Mr Adam Moore of Solicitors Office and Legal Services HM Revenue and Customs for the Respondents

DECISION

The Application

1. This is an application by Martin Wells ("the appellant") to admit an appeal under Rule 20(4)(b) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 and extend time to give notice of appeal under Rule 5(3)(a), against discovery assessments under s29 TMA 1970 and penalties charged under Schedule 55 to the Finance Act 2009 (FA 2009) for the years 2011-12, 2012-13, 2013-14

2. HMRC oppose the application.

3. The Appellant has included year 2014-15 in the appeal to which this application relates. This is a return which the appellant submitted, and it is not a matter related to the earlier discovery assessments. There may be an overpayment issue, but that is a separate matter and not related to the assessments and penalties. HMRC apply to strike out the application relating to year 2014-15.

Background

4. HMRC had information showing that the appellant worked for Anglian, a large double glazing company, and been paid on a self-employed basis, working in sales.

5. The appellant received a total of £71,344 from Anglian in years 2011-12, 2012-13 and 2013-14, but had not filed any self-assessment returns. A breakdown is provided below:

2011-12	£10,999
2012-13	£28,197
2013-14	£32,148

6. Under s 8(1D) TMA 1970 a non-electronic return must normally be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

7. On 24 February 2016, HMRC wrote to the appellant, accompanied by factsheets 9 and 18a advising him to submit his outstanding returns. HMRC stated that otherwise assessments would be raised based on the amounts as shown above.

8. HMRC say that their letters, sent over a prolonged period, were ignored although throughout the period, the appellant was engaged in regular remunerative work with Anglian. In the absence of information being provided by the appellant, HMRC can issue assessments to recover tax based on 'best judgement'.

9. HMRC estimated the level of expenses incurred by the appellant at 10% of his income which was considered reasonable in the absence of any evidence or returns. Discovery assessments for 2011-12, 2012-13 and 2013-14, were raised on 12 April 2016.

10. A deliberate penalty was issued on 18 April 2016. Notices to file for 2014/15 and 2015/16 were issued on the same date.

11. The assessments and penalties are set out below:

Liability	Date of issue	legislation	Tax due
Income tax and NIC	12 April 2016	S29 TMA 1970	2011-12 £725.46 2012-13 £5054.17 2013-14 £5804.91
Penalty	18 April 2016	Sched 55 FA 2009	2011-12 £431.64 2012-13 £2707.23 2013-14 £3153.92

12. On 19 May 2016 the appellant contacted the self-assessment call centre to advise that he had 'let things go' as his wife had suffered a brain haemorrhage, but that he wanted to bring everything up to date. He did not dispute the assessments and was going to talk to his accountant about getting the outstanding returns filed. The appellant was going to call back to ask for time to pay.

13. On 16 June 2016 the appellant's agent, Jones Harper filed the following returns:

2011-12	2012-13	2013-14
Turnover £10,999	£28,197	£32,148
Expenses £4072	£12,374	£12,374
Profit £6927	£15,823	£19,774
Less PA £7470	£8,105	£9,440
Taxable income £0	£7,718	£10,334
Tax @ 20% £0	£1,543.60	£2,066.80
NIC £0	£739.62	£1,081.71

14. Neither the appellant nor Jones Harper indicated any intention to appeal the earlier assessments.

15. The officer dealing with the assessments was not made aware by the agent or the appellant that these returns had been submitted, although apparently filed with the intention of displacing the assessments, which therefore lead to the appellant initially being charged twice on the same income. HMRC subsequently cancelled the tax arising on the returns, saying that they were out of time in any event.

16. On 31 January 2017 Harper Jones filed the appellants 2014-15 return.

2014-15
Turnover £42,721
Expenses £12,734

Profit £6,927
Less P A £10,000
Taxable income £19,987
Tax @ 20% £3,997.40
NIC £1,982.70

17. On 15 June 2017, Kyle Cannings accountants wrote to HMRC to say that that they had been appointed as new agents for the appellant and that they wished to amend the expenses as previously claimed for the years 2012-13, 2013-14 and 2014-15. The figures show in the returns are as set out in the table below:

2012-13	2013-14	2014-15
Turnover £28,197	Turnover £32,148	Turnover £42,721
Expenses £14,783	Expenses £17,802	Expenses £18,998
Annual Investments	Taxable Profits £14,346.00	Taxable Profits £23,723
Allowance £800	Tax £1,574.39	Tax £4,163.63
Taxable Profits £12,614	NICs: £593.19	NIC £1,419.03
Tax £1,352.61	Total Liability £2,167.58	Total Liability £5,582.66
NICs £450.81		
Total Liability £1,803.42		

18. They said that the reason for the late submission of the returns by the previous agent was because the appellant's wife had been diagnosed with a serious illness and his time was spent attending to her medical needs. They asked that this be taken into account in assessing any penalties. HMRC treated this an appeal against the assessments for the years 2011-12, 2012-13 and 2013-14, but said that the appeal had to be rejected as it was out of time.

19. With regard to the 2014-15 return, on 29 September 2017 HMRC incorrectly told the appellant that they could not accept the amendment to his 2014-15 return as they had previously raised a discovery assessment.

20. On 30 November 2017 HMRC wrote to the appellant to say that this was a mistake and apologised. They had not raised an assessment for 2014-15. However, the appellant was too late to make an amendment to his 2014-15 return. The deadline for amending the return expired on 31 January 2017. HMRC said that he could however make a claim for 'Overpayment Relief'. HMRC enclosed a separate letter explaining the procedure.

21. HMRC said that they would hold over action to recover the total tax outstanding for 30 days to allow the appellant time to pay and submit an Overpayment Relief claim, should he wish to do so. Although he had until 5 April 2019 to make, an Overpayment Relief claim for 2014-15 he was at liberty to send in his claim before HMRC recommenced collection of the tax due. Should he wish to discuss payment options for the total tax due you should call HMRC's Debt Management on 0203 7974455.

22. Nothing further was heard from the appellant and on 24 April 2019, HMRC commenced recovery action and served a statutory demand on the appellant.

23. In May 2019 the appellant lodged a set aside application with the County Court.

24. On 3 June 2019 the appellant submitted a special relief claim under Schedule 1AB Paragraph 3A TMA 1970 for 2011/12, 2012/13, 2013/14 and 2014/15.

25. On 25 June 2019 the appellant appealed to the Tribunal

26. Because the assessments had been formally appealed to the Tribunal, HMRC agreed to the appellant's application to set aside the statutory Demand.

27. The appellants claim for special relief was refused as it is a requirement that a 'determination' under section 28C TMA has been issued. No such 'determination' had been issued for any year under appeal. An assessment under s29 TMA is not a determination.

28. The appellant said in his appeal that from the period 2012 onwards he went through the most challenging and distressing part of his life. After a period of severe illness, his partner was diagnosed as having a critical brain condition which was followed by an extended period of convalescence from which she has not recovered. During much of this time apart from attempting to focus on some aspects of his working day, every single spare moment was devoted to the care of his partner.

29. He said that his brother had suffered a massive heart attack in April 2013. He was on a life-support machine for 4 to 5 weeks, during which period he had several more heart attacks. He remained in hospital for a further 7 to 8 weeks in intensive care and then a further 4 to 5 weeks remained hospitalised, during which time the appellant travelled to Sheffield every other day to assist and support his parents and family.

30. He said that he accepted that that he had allowed his personal and tax affairs to become stagnated and in arrears for a period of time. In cross examination he agreed that he had continued in remunerative employment throughout the appeal period but with Anglian's consent he had been able to spend more time at home with his wife. He agreed that he had not checked the returns prepared by Jones Harper before signing them and also said that he had no evidence to substantiate his increased expense claims "after all this time".

Relevant legislation

Taxes Management Act 1970 ('TMA 1970')

Section 8 - Personal return- provides as follows:

> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-
>
> a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and
>
> b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
>
> (1A) The day referred to in subsection (1) above is-

(a) the 31st January next following the year of assessment, or

(b) where the notice under this section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

(1D) A return under this section for a year of assessment (Year 1) must be delivered-

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

Section 29 - Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment-

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax

(2) [not applicable]

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above-

(a) in respect of the year of assessment mentioned in that subsection; and

(b) ... in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf

(5) The second condition is that at the time when an officer of the Board-

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

and the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

Section 31A TMA - provides that notice of appeal must be given within 30 days after the specified date.

Section 49 TMA - Late notice of appeal

(1) This section applies in a case where-

(a) notice of appeal may be given to HMRC, but

(b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if-

(a) HMRC agree, or

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

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

(8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section).

Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 (SI2009/273)

Rule 20(1) of the Tribunal Rules provides that a notice of appeal must be sent or delivered to the Tribunal within the time limit imposed by an enactment

Schedule 55 Finance Act ('FA') 2009

The penalties for late filing of a return can be summarised as follows:

i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.

ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.

iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.

iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

Relevant authorities

31. A number of decisions have clarified the approach to be applied in applications for relief from sanction. The principles enunciated by these decisions are applicable to applications for permission to appeal out of time.

32. In 2014 the Court of Appeal heard three conjoined appeals: *Denton v TH White Ltd, Decadent Vapours Ltd v Bevan and Utilise TDS Ltd v Davies* [2014] EWCA Civ 906. The first was an appeal against the grant of relief. The second and third were appeals against its refusal.

33. The Court of Appeal was unanimous in allowing all three appeals and took the opportunity to clarify the approach that had been advanced in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 A three-stage approach is now required to applications for relief.

34. The Court took the opportunity to clarify the principles applicable to such applications as follows (at [24]):

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"."

35. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered".

36. The first stage is a departure from the test of 'triviality' referred to in *Mitchell,* which the Court concluded had caused difficulties in its application. The Court accepted that in many circumstances the most useful measure would be to determine whether the breach imperilled future hearing dates or otherwise disrupted the conduct of litigation generally. If the Court concludes that the breach was neither serious nor significant, relief will usually be granted and it is unnecessary to devote time on stages 2 and 3. At stage 1, only the breach that resulted in the sanction should be considered. Other breaches by the defaulting party fall to be considered at stage 3.

37. The Court of Appeal was divided on the issue of how much importance should be placed on (a) and (b) of Rule 3.9. The majority view was that these two factors are of particular importance and should be given particular weight.

38. The other factors that are relevant in stage 3 will vary from case to case. The promptness of the application is a relevant circumstance to be weighed in the balance. Other breaches by the defaulting party may be considered at this stage.

39. The majority expressed concern that some judges were adopting an unreasonable approach to CPR r. 3.9. In particular, they were approaching applications for relief on the basis that, if the breach was not trivial and there was no good reason for it, the application must fail. This had led to decisions which were manifestly unjust and disproportionate.

40. The court also noted that litigation cannot be conducted efficiently and at proportionate cost without cooperation between the parties and their lawyers. This applies to litigants in person as much as to represented parties. CPR r. 1.3 specifically requires the parties to assist the court in furthering the overriding objective.

41. With this in mind, the court expressed the view that parties should not act opportunistically or unreasonably in opposing applications for relief. The court will now expect parties to agree applications for relief where (a) the breach is neither serious nor significant, (b) there is a good reason for the breach, or (c) it is otherwise obvious that relief should be granted. The court will also expect parties to agree reasonable extensions of time of up to 28 days under the new CPR 3.8(4), which states:

> "… unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date."

42. The Court of Appeal was critical of the 'satellite litigation' and uncooperative attitude that the *Mitchell* decision had fostered. In its view, a contested application for relief should be very much an exceptional case. This is because (a) compliance should be the norm, and (b) parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even when a breach has occurred.

43. The Supreme Court in *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1WLR 2945 implicitly endorsed the approach set out in *Denton*. The case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FtT.

44. In *Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (TCC) the Upper Tribunal also endorsed the approach in *Denton* applying the three stage approach [at 43 to 45]

> "43. ……Whether considering an application which is made directly under rule 3.9 (or under the FtT Rules, which the Supreme Court in BPP clearly considered analogous) or an application to notify an appeal to the FtT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions - especially where the sanction in question is the striking out of an appeal (or, as in BPP, the barring of a party from further participation in it). 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"……..."
>
> 44. 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. When considering "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FtT's deliberations artificially by reference to those factors. The FtT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist."

44. In undertaking this balancing exercise, 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.

Burden of proof

45. The onus lies with the appellant to demonstrate he has a reasonable excuse for his appeal having been made to HMRC and the Tribunal outside of the statutory time limits.

46. If this is met, the onus switches to HMRC to show that the discovery assessments were arrived at in accordance with legislation and within permitted time-frames.

47. If the tribunal is satisfied that HMRC have complied with the requirements of discovery, the onus remains with HMRC in relation to the penalty assessments.

48. Once HMRC have demonstrated the discovery and penalty assessments are valid the onus then switches to the appellant to show that the assessments are incorrect.

49. The standard of proof is the ordinary Civil Standard of the balance of probabilities.

The appellant's case

50. The appellant says that in 2012, he spent almost all his time attending to his wife's care and medical needs. He says that "there were huge additional costs and if one is either faced with the potential loss of one's wife/partner and all the extra expenses, or to make sacrifices just to focus on paperwork/ pay taxes, few would take the latter." In April 2013, he spent a considerable amount of time travelling to a Sheffield hospital where his brother was hospitalised. These difficulties lasted until 2014. Throughout this period the appellant accepts that he allowed his tax affairs to stagnate.

51. He had however relied on his accountant, Jones Harper, to complete any statutory requirements and deliver correct returns.

52. It was not until he changed accountants, when working with Kyle Cannings, that serious defects were discovered in the information previously submitted to HMRC by Jones Harper.

53. Mr Kidwell for the appellant argued that the appellant had 60 days from the notice of issue (12 April 2016), within which to challenge the assessments (s31AA TMA). The returns were filed on 16 June 2016 and so the 2012-13 and 2013-14 were filed only marginally outside the time limit. The 2011-12 return was filed shortly afterwards on 26 June 2016.

54. Mr Kidwell said that whether or not blame attaches to Jones Harper, it cannot be said that HMRC was unaware by June 2016 that the assessments were contested. A formal appeal had been filed promptly by Kyle Cannings upon their appointment. It was not obvious that HMRC had at any stage unequivocally rejected the appeals until commencing statutory demand procedure in 2019.

55. Mr Kidwell also argued that HMRC's position has not been entirely consistent. There is some evidence that HMRC gave the appellant the impression that the filing of revised returns would suffice to challenge the assessments. To that extent it can be argued that HMRC contributed to the delay in informally appealing the assessments.

56. Mr Kidwell asserts that defaults by advisors, in this case by Jones Harper, can provide sufficient reason for the delay in filing the returns and failure to submit a formal appeal in time.

57. Although the assessments were not formally appealed until 15 June 2017, Kyle Cannings filed the appeal and submitted revised returns for 2012/13 and 2013/14 within one day of their appointment on 16 June 2016. They therefore acted with reasonable expedition after any excuse the appellant may have ceased. (s49 (6) TMA).

58. The appellant would be prejudiced if permission to appeal is refused, as he has overpaid tax and HMRC would receive a tax windfall. If permission is given, HMRC can still contest the merits of the appeal, but at worst repays no more than the tax it has received in excess of that which the appellant's income would attract.

59. Furthermore insofar as HMRC's claim for penalties is maintained in the context of an overpayment of tax (if permission is refused), its windfall is the greater, and even harder to justify.

60. Has the delay affected the quality of the evidence? HMRC has the opportunity to challenge the evidence if permission is given for the appeal to proceed. Given that the relevant returns were filed two and a half years ago (revising returns filed more proximately still to the tax years in question), whatever the quality of the evidence, it cannot be said that any delay has affected that quality.

61. With regard to the overpayment claim for 2014-15, and HMRC's strike out application, Mr Kidwell argues that the appellant's application is sufficiently wide to encompass a claim for overpayment relief. The 2014-15 return was filed on time on 31 January 2017 and the amended return on 15 June 2017. For HMRC to accept one or the other requires a determination, and even if this is incorrect, if HMRC is resisting the overpayment claim, which is relatively modest, it is not known what the reason is in that regard. The claim is outstanding and should be considered under the provisions for determinations under 28C TMA: Special rules - Section 3A TMA, 'Recovery of overpaid tax'. HMRC's application to strike out the appellant's appeal should therefore be refused.

HMRC's case

62. The appeal to HMRC was not made until 15 June 2017, around 13 months late, and the appeal to the Tribunal was not made until 25 June 2019, around 37 months late). Both constitute serious and significant delay on the part of the appellant.

63. During the review process in which the appellant did not respond or cooperate, multiple factsheets explaining the appeals procedure were issued to the appellant.

64. It is only in 2019, when HMRC pursued the outstanding debts, that the appellant submitted an appeal to HMRC.

65. The appeal refers to his partner's ill health as a ground for the delay. Whilst HMRC sympathize with the appellant's difficult situation resulting from his partner's ill health, it happened in 2012 and so it is not clear how long that situation lasted, how it affected his day-to-day life or how it impeded his ability to file his tax returns on time, particularly given that during this time the appellant continued to work on a regular basis for Anglian. In fact, his turnover increased over the years under appeal.

66. The appellant also refers to his brother's hospitalisation in 2013 saying that this lasted for up to 18 weeks. HMRC does not accept this as a reasonable excuse for the same reasons as referred to above.

67. It should also be noted that at the time of the review in 2016 the 2014/15 return due on 31 January 2016 had not been submitted.

68. At no time before HMRC opened its enquiry and raised the assessments did the appellant contact HMRC and advise of his difficulties. The appellant was aware of his filing responsibilities and appears to have made an active decision not to adhere to them.

69. The appellant continued to work and HMRC does not view the appellant's situation as uncommon or exceptional, nor that it would have precluded him from meeting his filing obligations.

70. When the late appeal was refused, information explaining the tribunal appeals process was sent again to the appellant, but apparently ignored.

71. Even if the appellant initially had a reasonable excuse, which HMRC do not accept it is unlikely that such excuse would extend throughout the very prolonged period of time until the appellant raised an appeal with HMRC and then with the Tribunal.

72. Although this is an application for permission to appeal out of time, the merits of the appeal are very doubtful. The appellant has not provided any evidence to suggest that the discovery assessments are not reasonable and accurate. Furthermore he accepts that he cannot provide evidence to substantiate his increased expenditure claims.

73. The appellant has provided three alternative sets of figures, each one reducing the tax liability more than the last. The appellant has blamed his previous accountant for providing incorrect figures, but his current agent has submitted two different sets of figures.

74. The appellant contends that he has incurred expenditure equating to approximately half his income in all the years under appeal and in one year he asserts that he made zero profit. No reason or evidence has been forthcoming as to how an Anglian salesman could or would incur such excessive expenditure. HMRC contend that it is highly unlikely the appellant would have allowed himself to be exposed to such high levels of financial risk when only returning a modest or even zero profit.

Conclusion

75. The application before us is for permission to bring a late appeal. The tribunal is not considering, in any detail or substance, the merits of the appeal.

76. The burden of proof lies with the Appellant to demonstrate why the Tribunal should exercise its discretion to admit an appeal that is brought late. To satisfy this, the Appellant

must show good cause for the delay in lodging his appeal and in this regard, we must consider case law authorities as set out above.

77. The purpose of the time limits to bring an appeal is to provide finality and certainty to both the Appellant and HMRC.

78. The conditions that need to be met for HMRC to agree to a notice of appeal out of time are set out in s49 (4) to s49 (6); TMA namely, that HMRC are satisfied that there was a 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.

Seriousness and significance of the lateness

79. In addressing the seriousness and significance of the lateness, the case of *Romasave (Property Services) Ltd* (paragraph 96) found that "a delay of more than three months cannot be described as anything but serious and significant." In this case, the Appellant was notified of the assessments and penalties on 12 and 18 April 2016 respectively, but did not appeal these to HMRC until 15 June 2017, or lodge an appeal with the Tribunal until 25 June 2019. These are clearly significant and serious delays.

Reason for the default

80. The Appellant says that the delays were caused by him attending his wife's medical needs but he has not particularized how that prevented him from dealing with his tax affairs. Nor has he reconciled the fact that he continued to work during the entirety of the years under appeal. Neither has he provided any evidence to show why he could not have dealt with his tax affairs.

The circumstances and merits of the case

81. With regard to substantive issues, the appellant has not provided any detail of his claimed expenses for the years under appeal as set out in his tax returns, nor shown why HMRC's estimate at 10% of his earned income is incorrect. The burden of proof is on him to do so.

82. It is because of the importance of complying with statutory time limits, that when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant. Although the appellant claims that his first accountants made mistakes in the returns which they submitted on his behalf, it would seem unlikely that they simply overlooked his expense claims. In any event it is for the appellant to check the correctness of the returns when he signs them and authorises their submission to HMRC.

83. Permission should not be granted unless the FtT is satisfied on balance that it should be. When considering "all the circumstances of the case". This will involve the balancing exercise to 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.

84. A consideration to be taken into account is the consequences for both parties if an extension of time is granted/refused. The obvious consequence for the appellant is he would lose the opportunity to bring the appeal and the penalty would stand.

Decision

85. Taking all the circumstances of the case into account, we are not satisfied that there is any reason to allow the application. The application for leave to bring the late appeal is therefore refused.

86 With regard to the appellant's 2014-15 return, it is for him to submit (or resubmit if necessary) an overpayment claim should he wish to do so. HMRC have not, so far as the Tribunal is aware, refused an application, although in any event an over payment claim for 2014/15 should have been made no later than 5 April 2019

87. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE:23 OCTOBER 2020