



[2022] UKFTT 87 (TC)

**TC 08418**

*CASE MANAGEMENT – application for permission to appeal out of time – reliance on accountants – Katib considered and applied – application rejected*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/03615**

**BETWEEN**

**DARREN FITZPATRICK**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE NIGEL POPPLEWELL**

**Hearing conducted remotely by video on 28 February 2022**

**Andrew McKibbin counsel for the Appellant**

**Siobhan Brown officer of HM Revenue & Customs for the Respondents**

## DECISION

### INTRODUCTION

1. This is a case management decision. On 4 October 2013 the appellant was issued with a VAT assessment for £22,194. On 20 December 2013 he was issued with a penalty assessment for £13,942.50. On 16 May 2019 the appellant appealed against the assessments and as part of that appeal sought permission to bring his appeal out of time. I have to decide whether to grant that permission.

### THE LEGISLATION

2. There is no dispute between the parties regarding the relevant legislation. This can be summarised as follows. Under section 73 of the Value Added Tax Act 1994, HMRC have power to issue an assessment where they consider a trader owes them VAT. The trader has the right to appeal against that assessment to the Tribunal but that appeal must be made within 30 days from the date on which the appellant is notified of the assessment. However an appeal may be made after the end of that 30 day period if “the tribunal gives permission to do so”. HMRC also have power under Schedule 24 to the Finance Act 2007 to issue a penalty in respect of a VAT return which contains an inaccuracy. Such penalties are calculated as a percentage of the potential lost revenue, in other words (in this case) the over claimed input VAT reflected in those returns. A trader has the right to appeal to the Tribunal against a penalty assessment, such appeal being treated in the same way as an appeal against the assessment to the substantive VAT concerned.

### RELEVANT CASE LAW

3. The parties also agree that when considering this application, I am being asked to exercise judicial discretion. In exercising that discretion, the relevant principles which I should take into account are those set out in *Martland v HMRC* [2018] UKUT 178 (TCC), (“*Martland*”) in which the Upper Tribunal considered an appellant’s appeal against the FTT’s decision to refuse his application to bring a late appeal against an assessment of excise duty and a penalty. The Upper Tribunal said:

“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.

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.

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."

4. In *HMRC v BMW Shipping Agents* [2021] UKUT 0091, the Upper Tribunal relevantly said this:

52. "We will approach the third *Martland* stage by performing, as *Martland* requires, a balancing exercise. In that balancing exercise, the need for litigation to be conducted efficiently and at proportionate cost and for directions to be complied with must be given particular weight. However, it remains a balancing exercise which invites, among other considerations, a consideration of the nature of the reasons for the breach of direction and the results that would follow if the appeal is, or is not, reinstated."

5. However, neither party referred, in detail, to the Upper Tribunal decision in *HMRC v Katib* [2019] UKUT 0189 ("*Katib*") which is highly relevant (and which is binding on me) given that the main justification given by the appellant for bringing his appeal late is that he had been poorly advised by his professional advisers (his accountants) who were acting on his behalf and who he believed were dealing with the VAT matters (namely the VAT assessments and the penalty assessments).

6. In *Katib* the UT said this:

"49. We accept HMRC's general point that, in most cases, when the FTT is considering an application for permission to make a late appeal, failings by a litigant's advisers should be regarded as failings of the litigant and we will return to this issue in the "Disposition" section that follows. Therefore, in most cases, a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers.....

51. The first stage of the *Martland* examination can be addressed briefly. Mr Katib's delay in appealing against the PLNs was, at the very least, 13½ months. That was "serious and significant". The real question is how the second and third stages of the evaluation should be performed, having regard to the particular importance of statutory time limits being respected.

52. It is precisely 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. In *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666, when considering the analogous question of whether a litigant's case should be struck out for breach of an "unless" order that was said to be the fault of counsel rather than the litigant itself, Ward LJ said, at 1675:

Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. *The basis of the rule is that orders of the court must be observed* and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself. [emphasis added]

53. We do not accept Mr Magee's general argument that this approach simply involves attributing the actions of legal representatives to their clients and has no bearing on the question whether incorrect advice provided to a client can be a good reason for the client's default. Given the importance of adhering to statutory time limits, we see no reason why a litigant who says that a representative failed to file an appeal on time should necessarily be in a different position from a litigant who says that a representative failed to advise adequately of the time limits within which an appeal should be brought. In any event, it seems from [7] of the Decision that the FTT found that Mr Bridger had been instructed to appeal against the PLNs on Mr Katib's behalf but failed to do so and, therefore, Mr Katib is not simply complaining that Mr Bridger provided defective advice.

54. Nor do we accept Mr Magee's submission that the decision of the High Court in *Boreh v Republic of Djibouti and others* [2015] EWHC 769 establishes an "exception" to the principle where a representative misleads the client. Rather, we consider that the correct approach in this case is to start with the general rule that the failure of Mr Bridger to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland*. However, when considering the third stage of the evaluation required by *Martland*, we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration.....

59..... We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against Mr Bridger or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of Mr Bridger's failings and, if he wishes, pursue a claim in damages against him or Sovereign Associates for any loss he suffers as a result.....

60..... Turning to other factors relevant to that third stage, the FTT concluded that the financial consequences of Mr Katib not being able to appeal were very serious because his means were limited such that he would lose his home. That, the FTT

concluded, was too unjust to be allowed to stand. We have considered this factor anxiously for ourselves. However, again, when properly analysed, we do not think that this factor is as weighty as the FTT said it was. The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them.”

## **THE EVIDENCE AND FACTS**

7. I was provided with a bundle of documents. The appellant gave oral evidence. From the documentary and oral evidence I find the following:

(1) The appellant, trading as PDS services was registered for VAT with effect from 1 June 2010 and deregistered for VAT with effect from 31 March 2014.

(2) From the date of registration, to date, the appellant’s evidence was that he had engaged four different firms of accountants. The appellant’s main reason for the delay in bringing his appeal is that these accountants badly let him down. I am not prepared to identify them given that there is no evidence of the nature of the services which they were asked to undertake by the appellant, in the bundle. I shall simply refer to them as “Firm”. Firm 1 was engaged between 2010 and 2013, Firm 2 between 2013 and 2016, Firm 3 between 2016 and 2019, and Firm 4 between 2019 to 2020. These dates are approximate as the appellant was not able to provide evidence of precise dates. He appointed professional advisers to take care of his VAT affairs so that he could get on with running his business.

(3) HMRC’s notes of contact between the appellant and HMRC record an entry on 7 January 2014 in which the appellant advised that he had an argument with his previous accountant and now had a new accountant who was completing his books for him. He also advised that he was having trouble getting his paperwork from his previous accountant but he had now got this and had passed this to the new accountant and that the appellant would contact that accountant to find out when the accountant could submit the 9/13 VAT return. It also records that the appellant “will also have to arrange payment for all outstanding VAT”.

(4) Following a visit to the appellant’s premises in April 2013, and requests for information pursuant to that visit, on 4 September 2013 HMRC issued assessments for VAT for the periods 12/11 to 06/13, in the total amount of £22,194. The assessments also identify an amount of interest of £606.54. These assessments were for underpaid VAT arising from, in HMRC’s view, over claimed input VAT on fuel purchases which the appellant was not able to substantiate. The VAT assessments were issued to Darren Fitzpatrick, PDS Services, 122 Bryansford Road, Kilcoo. This was the business address for the appellant which HMRC had on their file, and the appellant accepted that this was his business address even though he did not accept that it was the address for PDS Services which he said was a separate business from his sole trading business in respect of which the VAT assessments had been raised.

(5) On 20 November 2013 HMRC issued, to the same address a penalty explanation letter, including a schedule identifying the amount of penalties which HMRC intended to charge, the reasons for them, and reflected that the behaviour which led to the inaccuracy was, in their view, careless.

(6) On 20 December 2013 HMRC issued a notice of penalty assessment for £13,942.50. That notice was addressed to the same address.

(7) Both the notes accompanying the VAT assessments and the notice of penalty assessments state that the appellant had 30 days from the date of receipt of the relevant notice to review the decisions and/or to bring an appeal to the Tribunal.

(8) The appellant's evidence was that if he had received these documents, he would have passed them on to his accountant. He also said that it was his understanding that his agents had been in touch with HMRC and they were undertaking correspondence in relation to his VAT affairs, on his behalf. However he also denied having received the assessments in the first place.

(9) HMRC's contact notes indicate that on 24 March 2014, HMRC spoke to the appellant and accepted part payment of £1,000 and HMRC's agent agreed to speak to the appellant/and his accountant again that week regarding the balance. Those notes further record that on 28 April 2014 the appellant called HMRC to make a payment of £500 and stated that his accountant was "dealing with" penalties.

(10) In or around 8 August 2014, the appellant entered into a time to pay arrangement with HMRC. The monthly payment was set at £1,100. This is evidenced in the contact notes from which it appears that prior to that date the appellant had sent HMRC £2,000, and the agent for HMRC agreed a time to pay for the balance at £1,100 per month the next payment being at the end of August and subsequent payments being on the 30<sup>th</sup> of each following month. The appellant was warned that they must be maintained otherwise proceedings would follow. The appellant's evidence was that he had always said that he would pay the VAT but he was disputing the penalties and interest.

(11) The appellant failed to adhere to the terms of the time to pay agreement. His evidence was that he was advised by his accountant not to make further payments. Recovery proceedings were commenced in the latter part of 2017. HMRC issued a statutory demand and commenced bankruptcy proceedings in July 2018.

(12) The appellant submitted a request for a review/appeal on 11 July 2018, recorded in the letter sent by Higher Officer McKeown of HMRC to the appellant on 1 November 2018.

(13) On 16 May 2019 the appellant appealed to the Tribunal.

## **DISCUSSION**

8. The burden of establishing that I should grant this application falls on the appellant who must show that, on the balance of probabilities, the facts and circumstances exist which enable me to exercise my discretion in his favour.

9. In exercising that discretion, I shall adopt the three stage test set out in *Martland*. I shall establish and consider the length of the delay and whether it is serious and significant; I shall consider the reasons given by the appellant for that delay; I shall then undertake an evaluation of all the circumstances which involves a balancing exercise, assessing the merits of the reasons given for the delay and the prejudice which would be caused to both parties by granting or refusing permission. In undertaking that balancing exercise, I shall take into account the importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

10. Dealing first with the length of the delay. It is HMRC's view that the delay beyond the 30 day appeal period against the assessments is 1,711 days, and it is 1,664 days after the 30 day appeal period in respect of the issue of the penalty assessments. These are clearly serious and significant delays and were not seriously challenged by the appellant. However, one element of the appellant's case is that he did not receive the notices in the first place. And thus time should not start to run until 1 November 2018 when he received his letter from Higher Officer McKeown. However, as HMRC point out, the appeal was not made until 16 May 2019 which is a delay of over six months. This too is a serious and significant delay. Furthermore, the appellant's evidence regarding receipt of the original assessments appears contradictory. On the one hand he denies receipt, on the other he says that had he received them he would have given them to his advisers, and, as I have already mentioned and which is dealt with in more detail below, it is those advisers who have let him down. Furthermore he said that his understanding was that his advisers had been in touch with HMRC who were corresponding with HMRC on his behalf in relation to his VAT affairs. This suggests that he passed the documents onto those advisers who then failed to take the appropriate action. Under section 7 of the Interpretation Act 1978, if HMRC have established that they have served the assessments on the appellant by properly addressing, pre-paying and posting a letter containing the assessment, then service is deemed to have been effected unless the contrary is proved. The appellant did not seriously challenge that HMRC had not sent the documents to him. His submission was that he did not receive them. However, that bold assertion does not comprise proof of non-receipt. The address on the assessments is, as the appellant accepts, his business address, and the fact that they were addressed to him personally but also to PDS Services, does not detract from the fact that they were sent to him at the correct business address. It is a long time ago, and given the appellant's evidence, it is my view that he is mistaken (due to the passage of time) and that it is more likely than not that he did receive those assessments and that he passed them on to his accountants. This is consistent with the entries in the contact notes which show that in April 2014, he was able to tell HMRC that his accountant was "dealing with" penalties and furthermore, he was able to come to a time to pay arrangement with HMRC in August 2014. These show that the appellant was aware of his obligation to pay VAT and penalties to HMRC which stemmed from those assessments. There is no indication that either the VAT assessments or the penalty assessments were returned to HMRC. I find as a fact, therefore, that the assessments for VAT and the penalties were properly and duly served on the appellant and therefore, when assessing the length of the delay that delay is between September 2013 and 16 May 2019 for the VAT assessments and between 20 December 2013 and 16 May 2019 for the penalty assessments. As mentioned above, these are serious and significant delays.

11. The appellant's main reason for this delay was that he had been poorly advised by the professionals who he had appointed to act on his behalf and he believed that those professionals were dealing with the matters for him. Following the bankruptcy proceedings, he realised that his professionals had not been dealing with his affairs properly and then took matters into his own hands. He appointed professionals so that he could get on with running his business. In his notice of appeal, the appellant also provided reasons for bringing a late appeal. These included the fact that, in essence, he thought that the debt that he owed had been "parked"; he had been waiting for resolution of the matter for some time; he found it difficult to have a meaningful conversation with the appropriate HMRC officer to resolve the situation.

12. As can be seen from the extract from *Katib* above, reliance on agent is not a good reason for bringing an appeal out of time. I am bound by *Katib*. The appellant has provided no documentary evidence of the basis on which he appointed his accountants, and so I am not able to review the detailed terms of such appointments and whether, as alleged by the appellant, they included bringing an appeal against the VAT and penalty assessments. But even if I accept

the appellant's evidence at face value, and it is clear from the contact notes mentioned above that the appellant had raised concerns about his accountants with HMRC in January 2014, failures by an appellant's advisers should generally be treated as a failure by the appellant. I accept that this is a generality, and that there may be circumstances in which that generality is displaced by evidence showing that even though an appellant has relied on an agent, that can still comprise a good reason for failure to submit a timely appeal. But unfortunately for this appellant, I have seen no evidence which might displace that general "principle" and allow me to find that the reliance on his accountants in his situation can comprise a good reason for failing to submit a timely appeal. Nor do I think that the other reasons given by the appellant for the delay are good reasons. He has provided very little evidence to substantiate his view that he thought the debt had been parked. He had entered into a time to pay agreement in August 2014 which required him to make payments of £1,100 per month and had been warned that proceedings would follow if he failed to keep up those payments. The appellant's evidence was that the reason he ceased to make such payments was on the advice of one of the firms of accountants. But if this was indeed the case, reliance on that accountant cannot, as mentioned above, generally comprise a good reason, and, once again, I have seen no evidence as to why, in the case of the appellant, the circumstances in which that advice was given might allow me to depart from that general principle. Furthermore, waiting for resolution of the matter and failing to establish a sensible dialogue with HMRC, from 2018 onwards, does not explain why (absent reliance on his advisers) the appeals were not made in time.

13. I now turn to the third stage, namely an evaluation of all the circumstances, undertaking a balancing act, and when doing so I take into account the need for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected. At this stage I can also consider the merits of the underlying appeal but only if I can see that without much investigation, either party has a very strong or very weak case. Little evidence was put to me regarding the strength of the appellant's case, although HMRC submitted that it was likely to be weak given that by entering into a time to pay arrangement the appellant has, effectively, accepted that he is liable for the VAT assessments. And indeed the appellant in evidence said that whilst he was content to pay the VAT, his objection was to the penalties and interest. It was submitted on behalf of the appellant that as far as the balance of prejudice was concerned, HMRC would not be prejudiced as they had known for some time that the appellant was seeking to appeal against the original decisions and, in any event, time periods had been suspended by the Tribunal pursuant to the Covid pandemic. The greater prejudice would be to the appellant to lose the opportunity of bringing an appeal and he will suffer serious financial detriment. But, as mentioned in *Katib* the lost opportunity to bring an appeal is a common feature which "could be propounded by large numbers of appellants". In the circumstances of *Katib*, the Upper Tribunal did not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant and there was no good reason for them.

14. I have considerable sympathy with the appellant who, from the evidence that I have seen, has been let down by his advisers. But as mentioned above, I am bound by the principles set out in *Katib*. Generally speaking, reliance on an adviser cannot comprise a good reason, and the appellant has been unable to provide any evidence, or good reasons, why that general principle should not be displaced in his circumstances. The delay in bringing his appeals is clearly serious and significant. When undertaking the balancing exercise at the final evaluation stage, I am acutely conscious that if I do not allow the appellant to bring his appeal out of time, there will be serious financial consequences for him. But, regrettably for him, binding case law shows that statutory time limits must be respected, and litigation must be conducted efficiently and at proportionate costs. And that in his circumstances, those financial consequences, and



the prospects of his succeeding in the substantive appeals, do not outweigh the serious and significant delay in bringing his appeals, and the lack of good reasons for that delay.

## **DECISION**

15. For the foregoing reasons I reject the application.

## **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

16. 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.

**NIGEL POPPLEWELL**  
**TRIBUNAL JUDGE**  
**Release date: 09 MARCH 2022**