



TC06894

Appeal number: TC/2017/06977

COPRORATION TAX – capital allowances claims – application to bring a late appeal – correspondence sent to wrong email address – whether appeal can be brought late – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SEP PROPERTIES LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public in Birmingham on 7 June 2018

**Mr Outhwaite, accountant, for the appellant
Ms Jones, presenting officer, for the Respondents**

DECISION

Introduction

- 5 1. This is an application to bring a late appeal in relation to a decision of HMRC in relation to capital allowances claims.

Appellant's submissions

2. The appellant set out the background as follows:
- 10 (1) An HMRC enquiry into capital allowances claims concluded on 20 November 2015. The appellant appealed the conclusion to HMRC on 14 December 2015 and requested a review of the decision.
- (2) HMRC issued a review conclusion letter on 21 June 2016, upholding HMRC's decision.
- 15 (3) A formal request for Alternative Dispute Resolution (ADR) was submitted to HMRC on 14 July 2016, as HMRC had indicated the possibility of the use of ADR in correspondence.
- (4) As an appeal to this Tribunal is a precondition to the use of ADR, the appellant appealed this Tribunal on 15 July 2016. The appellant accepts that this appeal was sent to an incorrect email address: taxappeals@hmrc.gsi.gov.uk rather than taxappeals@hmcts.gsi.gov.uk. The appellant accepts that no hard copy of the appeal was sent to the Tribunal by post.
- 20 (5) A copy of the appeal and covering email was submitted to the HMRC Reviewing Officer on 15 July 2016. HMRC were therefore aware of the appeal.
- (6) No further correspondence was received from HMRC until 8 June 2017, although there was a phone conversation with HMRC on 28 April 2017. That correspondence dealt with some administration matters and suspended a penalty as agreed in the review letter.
- 25 (7) The appellant then advised HMRC that they had submitted an appeal to the Tribunal and a request for ADR in June 2016 and had heard nothing since. HMRC responded with a copy letter (unsigned) dated 16 September 2016 rejecting the request for ADR on the grounds that there was no live Tribunal appeal. The appellant had not received a copy of that letter.
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3. The appellant accepted that, with hindsight, they should have pursued the matter earlier although they were aware that tribunal listings can take a while to come through. They accepted that the onus was on the taxpayer to follow up matters.
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4. On 5 September 2017, the appellant contacted the Tribunal as it was becoming apparent that there was an issue. They enclosed copies of the appeal documentation and copied this to HMRC. The Tribunal acknowledged receipt on 28 September 2017.

5. The appellant therefore submitted that an appeal had been made in time, albeit to the wrong email address, and that HMRC had been copied in to that appeal and so were well aware of it.

6. As soon as the appellant became aware that the appeal had been submitted to the wrong email address they notified the Tribunal.

7. The appellant submitted that, as HMRC had been aware of the appeal from the outset, it was not in the interests of justice to deny the application to make a late appeal in this instance and that the underlying complexities of the case should be allowed to be considered. In addition, if HMRC had not taken so long to follow up the penalty suspension in their review conclusion letter, the issue might have been spotted earlier. HMRC's delays in general in handling the dispute (including the twelve months taken to deal with the penalty suspension) meant that it was reasonable for the appellant to think that the matter was still underway.

8. The appellant submitted that the cases of *Data Select* [2012] STC 2195 and *Romasave* [2015] UKUT 254 (TCC) referred to by HMRC had very different fact patterns and submitted that those cases did not have any relevance to this case accordingly. The appellant further submitted that the circumstances of this case were so unusual that it could not be regarded as setting a precedent for the appeal to be allowed to proceed.

20 **HMRC's submissions**

9. HMRC noted that the delay in this case was 411 days: the appeal deadline was 21 July 2016, and the appeal was not notified to the Tribunal until 5 September 2017.

10. HMRC submitted that there was no good reason for the delay, as it related to the appellant's failure to take action as follows:

25 (1) The appellant did not receive any confirmation or other response from the tribunal when they submitted the original appeal documentation to the wrong email address. This should have alerted them to the fact that it had not been properly sent;

30 (2) The appellant states that they did not get HMRC's letter of 16 September 2016 rejecting ADR and so did not realise that the tribunal had not received their appeal. HMRC had advised the appellants by letter on 14 July 2016, in reply to the request for ADR, that the appellant should contact HMRC's ADR team if the appellant had not received a substantive response within 30 days. Even if the appellant had not received HMRC's subsequent letter, they did not
35 follow up the ADR team as requested. If they had done so, it would have been clear that the Tribunal had not received the appeal;

11. HMRC submitted that, once a review has been completed, the onus is on the taxpayer to take action. There is no requirement on HMRC to prod an appellant to pursue an appeal.

12. Considering the case law and, in particular, *Martland* [2018] UKUT 178 (TCC), the delay in this case was extremely significant. The reason given was administrative error but neither the Tribunal process nor the ADR process were pursued in a timely manner by the appellant.

5 13. The deadline set by statute should be met and only in exceptional circumstances should that deadline be extended. It was submitted by HMRC that there were no exceptional circumstances in this case.

Discussion

10 14. The case of *Martland* confirms that this Tribunal's statutory discretion in considering whether to admit a late appeal is "at large" and that statute does not set out any factors that should or should not be taken into account, nor does statute set down how the discretion should be exercised (§24). The Upper Tribunal considered the relevant case law that has developed in this area and set out the following points:

15 (1) The starting point is that permission should not be granted unless the Tribunal is satisfied on balance that it should be (§44);

20 (2) The three-stage process in *Denton* can usefully be followed, so that the Tribunal should establish the length of the delay, the reason why the default occurred and then evaluate all of the circumstances of the case by way of a balancing exercise to assess the merits of the reason for the delay and prejudice which would be caused to both parties by granting or refusing permission.

(3) The balancing exercise should 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.

25 15. The delay in this case is 411 days. That is, by any analysis, a serious and significant delay.

30 16. The reason for the delay is that the appellant originally submitted their appeal to an incorrect email address and did not realise that they had done so until more than a year had passed. However, I note that the appellant did not make any enquiries of the Tribunal as to the progress of the appeal during this time. The appellant has stated that they were aware that Tribunal listings can take some time to come through, but I do not consider that it is reasonable to make no enquiries as to the progress of an appeal for more than one year from the date of submission when there has been no contact from the Tribunal and no acknowledgement of the appeal had been received.

35 17. The appellant also did not make any enquiries of HMRC during that period as to the progress of their request for ADR, which might have brought the error to light earlier, despite having correspondence from HMRC advising them to contact HMRC if no response had been received within thirty days.

18. I note the appellant's argument that they had copied HMRC in on the appeal to the tribunal but consider that this does not mean that there was a good reason for the

delay; I do not consider that HMRC are required to follow up every intimation that an appeal will be made.

19. Accordingly, I do not consider that the appellant has put forward a good reason for a delay of 411 days in submitting their appeal.

5 20. If the application is refused, the appellant will lose its chance to contest tax and
penalty liabilities of approximately £770,000, which is clearly significant to it. Clearly
the appellant will suffer significant prejudice if permission is not given but a similar
consequence will always result from a failure to comply with the time limits for
10 appealing and similar applications. That is a prejudice which the appellant has
brought upon themselves by the delay.

21. For HMRC, this is an appeal which they considered had been settled some time ago and so, if the application were granted, they would be required to litigate a matter which they might reasonably have considered to have been final since July 2016.

15 22. The Upper Tribunal in *Martland* noted that Tribunal can have regard to any obvious strength or weakness of the applicant's case, but this should not descend into a detailed analysis of the underlying merits of the appeal. The appellant's grounds of appeal were that:

(1) The capital allowances elections which the appellant had entered into were invalid and should be set aside;

20 (2) The appellant disagrees with HMRC's view as to the applicability of s185 CAA 2001 as HMRC had no idea of the disposal values brought into account by the vendors;

(3) Some of the assessments were made out of time as the appellant had taken suitably qualified professional advice and had therefore not been "careless".

25 23. If this appeal were to proceed to a full hearing, it would appear that the appellant's central argument is that HMRC should not have accepted that capital allowances elections made by the appellant were valid and that HMRC have not followed their own guidance in accepting the validity of the elections. This appears to be a public law argument, which this Tribunal would not have jurisdiction to consider.
30 No further details were provided with regard to the arguments that the assessments were out of time.

24. As such, I do not consider that there is any obvious strength to the appellant's case that should be considered when considering all of the circumstances of the case.

35 25. In summary, I consider that the length of the delay was serious and no good reason was given for the length of that delay. The appellant will undoubtedly suffer prejudice if the appeal is not permitted to proceed but, considering and balancing the circumstances of the case, I consider that the prejudice to the appellant does not outweigh the fact that there has been a serious and significant delay in making the appeal for no good reason and that there would be a detriment to HMRC in allowing

the appeal to proceed. Accordingly, I find that this is a case in which the Tribunal's discretion to admit a late appeal should not be exercised.

Decision

26. The appellant's application is therefore refused.

5 27. 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
10 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.

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**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 20 DECEMBER 2018