Neutral Citation: [2023] UKFTT 753 (TC)

Case Number: TC08933

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2022/12889

DOTAS – permission to make a late appeal against the allocation of a scheme reference number – permission granted

Heard on: 17 August 2023
Judgment date: 07 September 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

HIVE UMBRELLA LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Andrew Wood of counsel instructed by the appellant

For the Respondents: Dilpreet Dhanoa of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision deals with an application by the appellant for permission to make a late appeal against the allocation of a scheme reference number by HMRC in respect of notifiable arrangements under section 311 Finance Act 2004 ("**FA 2004**").

THE LAW

Legislation

2. There is no dispute about the legislation which is set out in the FA 2004. Under section 311 FA 2004 HMRC have the power to issue a scheme reference number in respect of any notifiable proposal or notifiable arrangements to a person who is a promoter in respect of those arrangements (or a party to those arrangements where there is no promoter).

3. Where HMRC have so allocated a scheme reference number the person who has been notified of that number may, under section 311B FA 2004, appeal against the issuing of that notice (on certain limited grounds). Notice of appeal under subsection (4) must be given to the tribunal in writing before the end of the period of 30 days beginning with the day on which the person is notified of the number by HMRC. Under subsection (5): "Notice may be given after that time if the tribunal give permission".

Case law.

4. When deciding whether to give permission, the tribunal is exercising judicial discretion, and the principles which I should follow when considering that discretion are 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".

5. 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".

THE FACTS

6. There is no dispute about the background facts which can be simply stated.

7. HMRC wrote to the appellant on 24 June 2022. That letter is headed "Notice of potential allocation of scheme reference number". It notified the appellant that HMRC might allocate a scheme reference number to the arrangements which were then described in more detail in their letter. The letter also explained HMRC's reasons for suspecting that the appellant was a promoter of the arrangements. It told the appellant that if it did not agree that the arrangements were notifiable it needed to satisfy HMRC that that was the case and that it had until 24 July 2022 to do this. The letter went on to explain that if HMRC were not satisfied by the appellant's explanations as to why the arrangements were not notifiable or if HMRC received no reply by that date, they might allocate a scheme reference number to the arrangements. It went on to explain the consequences of such allocation. It told the appellant that it had no right of appeal against the notice contained in the letter.

8. The appellant did not reply to that letter on or before 24 July 2022, and so on 4 August 2022, HMRC allocated to the appellant a scheme reference number in respect of the arrangements identified in their letter of 24 June 2022. That allocation was set out in HMRC's letter of 4 August 2022 and clearly stated what the appellant then needed to do. There were three steps which the appellant needed to take by 3 September 2023. It set out, clearly, what the appellant should do if it disagreed with the decision to allocate the scheme reference number, one of which was that the appellant had a right to appeal to the tax tribunal. It made clear that the appeal should reach the tax tribunal by 3 September 2022.

9. On 10 August 2022, Vicky Chapman a director of the appellant sent an email to HMRC indicating that she had just received a load of scanned post from Regis, which included two letters from HMRC regarding the allocation of a scheme number and a request for information.

10. In an email to Martin Belli of HMRC counter avoidance (the HMRC officer who was responsible for issuing the scheme reference number) dated 11 August 2022, Andrew Wood (who represented the appellant in this application) told Officer Belli that he had been contacted "yesterday afternoon" by the appellant regarding the correspondence which culminated in the issue of the scheme reference number. The appellant had signed and sent a form of authority to Officer Belli enabling him to deal with Mr Wood, who also asked that the notice was withdrawn pending a full explanation of the arrangements.

11. That form of authority appears to have been received by Officer Belli on 22 August 2022, since on that date he sent an email to Mr Wood explaining that the reason he had issued the scheme reference number was because he had received no response to his letter of 24 June 2022. As far as he was concerned the letter had been sent to the appellant's correct address and he was unable to withdraw the scheme reference number which he had allocated. It went on to say that if the appellant disagreed with HMRC's decision to allocate the scheme reference number, it could appeal to the tax tribunal as outlined on pages 2 and 3 of the letter of 4 August 2022, and went on to inform Mr Wood that the appeal should reach the tax tribunal by 3 September 2022.

12. Mr Wood responded by way of an email dated 24 August 2022. In that email he asked whether it would be possible for the notice to be withdrawn and also that "My clients will be applying directly the tribunal appealing the issue of the SRN." He also asked that before publishing any information, Officer Belli might like to consider the appellant's response (to follow) to the letter of 24 June 2022. On 6 September 2022, Officer Belli confirmed that before publishing any information, HMRC would seek representations from the appellant.

13. In a letter dated 9 September 2022 from HMRC to the appellant, HMRC told the appellant that they were considering publishing information about both the arrangements and that the appellant was a promoter of those arrangements. They went on to explain what information HMRC might publish and where they might publish it. It also told the appellant that if it wanted to make representations regarding the decision to publish information, those representations should be received by HMRC on or before 10 October 2022.

14. Those representations were compiled by Mr Wood. They amount to 67 paragraphs (11 pages) and were sent to HMRC on 25 September 2022.

15. On 30 September 2022 the appellant (through the agency of Mr Wood) appealed to the tribunal against the allocation of the scheme reference number. The grounds of appeal are, essentially, the representations made by Mr Wood to HMRC on 25 September 2022.

16. On 23 February 2023 HMRC told the appellant that they were intending to publish the appellant's name, address and details of the notifiable scheme.

17. On 2 March 2023, the appellant's details were published on HMRC's website in the "Current list of names tax avoidance schemes, promoters, enablers and suppliers". As far as I am aware, these details are currently on HMRC's website.

18. On 24 March 2023 HMRC issued a stop notice prohibiting the appellant from promoting the notifiable scheme.

DISCUSSION

19. I am grateful to Mr Wood and Miss Dhanoa for their clear submissions both written and oral. Whilst I have been very much assisted by those submissions, I have not found it necessary to refer to each and every argument advanced or every one of the authorities cited in reaching my conclusions. I have of course considered each item of evidence.

20. Both representatives framed their submissions against the backdrop of the three *Martland* criteria, and I shall do the same in this decision.

The length of the delay

21. I start by considering the length of the delay. It is 27 days. It is Mr Wood's submission that that delay is not serious nor significant and so there is little need for me to move on to consider the second two stages of the *Martland* test. I do not think this is what *Martland* is saying. It clearly says that if the delay is "very short" then it is unlikely that I will need to spend much time on the second and third stages. And this is because a very short delay is likely to be neither serious nor significant. I appreciate that it does not then go on to say that anything other than a short delay is likely to be serious and significant, but the principle set out in *Martland* does not go anywhere near stating that if a delay is neither serious nor significant, one does then not go on to consider the second two stages of the test. Indeed, it specifically states that "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".

22. Mr Wood submits that 27 days is not serious or significant. He says the rule of thumb is that three months seems to be the watermark for a 30 day appeal window. 15 days has been held to be not serious or significant, and the delay is only 90% of the statutory window. He says that I should consider the concept of materiality, and that the delay is only likely to be serious and significant if it is material. In the context of this appeal, 27 days is immaterial.

23. Miss Dhanoa thinks there is little value in considering the length of delay as a percentage of a statutory window. Each case turns on its own facts. She cites the case in which a delay of 42 days was held to be serious and significant. It is her view that even if I were to decide that the delay was not serious or significant, I would still have to go on to consider the second two stages of the *Martland* test.

24. I agree that each case is fact specific. Nor do I draw any assistance from an analysis of the lateness as a percentage of the statutorily permitted appeal window. Nor, frankly, from other cases. But I do not think in either absolute or relative terms, a delay of 27 days is serious and significant. And I strongly suspect, from comments made by Miss Dhanoa at the hearing, that had the appellant been able to give a cogent reason for the delay, HMRC would not have challenged the appellant's application to make a late appeal. The issue in this case is not, frankly the length of the delay, but the paucity of reasons for it. I can understand why, therefore, Mr Wood has asked me to concentrate on the seriousness and significance of the delay and not on those reasons. And it is why he suggests that there is no need for me to move on to consider those reasons if the delay is not serious and significant.

25. But *Martland* does not say this. Indeed, it says the opposite. Even if this delay was very short (which it is not) I must still go on to consider the second two stages of the *Martland* test.

Reasons for the delay

26. So, I now move on to establish the reason or reasons why the delay occurred. It is interesting that at this stage, *Martland* does not require me to evaluate whether those reasons are good or bad. I simply need to establish what they are. The consideration of the qualities of those reasons is the function of the third stage of the *Martland* test when they are weighed in the balance and tested against all the circumstances of the case including prejudice and respect for time limits.

27. The appellant submits that there are a number of reasons for the delay. Firstly, the original correspondence was not received by the appellant as a result of postal problems with the serviced office provider. Secondly, the appellant was subject to a number of new complex legislative provisions including the issue of the scheme reference number and the associated naming and shaming provisions which needed some time for detailed consideration. Thirdly, we were told by Mr Wood (although there was no primary evidence of this either orally from the appellant or in the documents) that the appellant's director was gravely concerned that the naming and shaming process would have a terminal effect on the business and the director therefore focused her energies on dealing with that. This was a justifiable concern as evidenced by the decrease in the number of employees which had taken up the appellant's services since the details had been put on the website in the spring of 2023.

28. He cites these more as explanations rather than good reasons and submits that they do not reflect a disregard of statutory deadlines but arise from wholly understandable human error.

29. It is Miss Dhanoa's view that none of these comprise good reasons for the delay. She equates good reasons with reasonable excuse. There is no direct evidence that the appellant itself thought that the legislation was complicated nor that the director was focusing on the effect of the naming and shaming process. She sought professional advice. The appeal process is not complex. Whilst the appellant may not have immediately received the correspondence of 24 June 2022 and 4 August 2022, it is clear by 10 August 2022 that it had so received it. That gave the appellant ample time to lodge an appeal before the appeal window closed on 3 September 2022.

Evaluation of all the circumstances

30. Having rehearsed these reasons, I now need to undertake the final evaluation stage. I must essentially assess the merits of those reasons and balance them against the prejudice which will be caused to the parties by granting or refusing permission. And when undertaking that balancing exercise, I must be conscious of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. I can also have regard to any obvious strengths or weaknesses of the appellant's case.

31. I do not believe the reasons are meritorious. Even though the original correspondence of 24 June 2022 and 4 August 2022 did not come to the appellant's attention until 10 August 2022, it was able to instruct Mr Wood in a timely fashion so that on 11 August 2022 he was in a position to hold himself out to HMRC as having been instructed to deal with the matters set out in that correspondence on behalf of the appellant. I have no insight as to the nature of those instructions, nor do I have any right to know what they were. Nor do I have any idea as to whether there were any onboarding or other regulatory matters which needed to be completed before Mr Wood was able to carry out any detailed work in respect of the appeal. But the fact that the day after he was contacted by the appellant, he was able to write to HMRC telling them

that he was instructed suggests to me that with effect from that date he would have been able to start work in relation to an appeal.

32. Mr Wood is clearly a highly competent tax adviser This is evidenced by the detailed grounds of appeal submitted to the tribunal on 30 September 2022 which reflected his representations to HMRC on behalf the appellant of 25 September 2022.

33. HMRC's letter of 4 August 2022 clearly states not just that the appellant had an appeal right against the decision in that letter but also the date by when the appeal right should be exercised (namely 3 September 2022).

34. I am therefore at a loss to understand why no appeal was made within that time. Clearly the relationship between the appellant and Mr Wood is properly cloaked by professional privilege. But without an explanation as to why it was not possible for the appellant, or Mr Wood, to submit an appeal between 11 August 2022 and 3 September 2022, it is very difficult for me to credit the appellant with any justifiable reason for the delay.

35. As I mentioned earlier, even though the delay is not serious or significant, it must be considered in the context of the reasons for it. And I can divine no justifiable reason why the appellant, acting through Mr Wood, could not have submitted an appeal before 3 September 2022.

36. The delay in receiving the correspondence is largely irrelevant. Like Miss Dhanoa, I am not convinced that the blanket assertion that the appellant found itself subject to new complex legislative provisions carries any weight. No details of the complexity have been suggested as justifying the delay, but I suspect that the reason that the matter was put in the hands of Mr Wood was because of the complexity.

37. The general principle is that in most cases, in considering applications to permit a late appeal "…failings by a litigant's advisers should be regarded as failings of the litigant", (*The Commissioners for Her Majesty's Revenue and Customs v Muhammed Hafeez Katib* [2019] UKUT 0189 (TCC)) at (49) ("***Katib***").

38. I have seen nothing which suggests that the appellant is impugning its advisers. But the fact is that it was professionally advised with effect from 11 August 2022. This gave the appellant and those advisers at least three weeks in which to submit a protective appeal. It clearly did not need to set out the grounds of appeal in the detail that they were subsequently submitted to the tribunal. But I have been given no reasons why it would not have been possible to submit more modest grounds of appeal within that time window so as to ensure that the statutory deadline for bringing the appeal was met.

39. Similarly, there is no primary evidence that the appellant was concentrating efforts on mitigating the effects of HMRC's naming and shaming proposal. At that stage (August 2022) there had been no naming and shaming so nothing to protect the business from. Indeed, the best thing for the appellant to do, to protect the business, was to appeal against the allocation of the scheme reference number. And the director started this ball rolling by appointing a professional tax adviser the day on which the letter of 10 August 2022 came to her attention.

40. As is stated in *Katib,* any failure by that professional is attributed to the appellant. At this final evaluation stage, if I had evidence before me as to why the delay had continued right up until the date of the appeal on 30 September 2022, I could weigh it in the balance. But I have no such evidence. I have no evidence to explain why it was possible for Mr Wood to draft and

submit to HMRC on 25 September 2022 an eleven page document comprising representations on the allocation of the scheme reference number, but not possible for that document (or, more relevantly, a very slimmed down version of it) to be sent to HMRC on or before 3 September 2022.

41. So, I now turn to a consideration of the prejudice that might be caused to each party if I were to allow or reject the application. Mr Wood submits that the naming and shaming provisions are designed to prejudice a promoter, and indeed the evidence of fewer employees taking up the services of the appellant is evidence that it has been so prejudiced. He also submits that HMRC have not shown that they will suffer any prejudice notwithstanding Miss Dhanoa's submissions to the contrary. Miss Dhanoa submits that the appellant has not established that it is prejudiced either generally or specifically whereas HMRC has and will suffer prejudice. It is prejudicial in and of itself that HMRC should be required to expend time and resources to deal with an out of time appeal where there is no good reason for that. She also suggests that the appellant has not engaged meaningfully with HMRC prior to "this" which compromises and prejudices HMRC.

42. Dealing with this last point first, I cannot see there is any merit in it. It is clear that from 11 August 2022, the appellant, through Mr Wood did engage meaningfully with HMRC. Indeed, as is apparent from the foregoing provisions of this decision, it is a mystery to me as to why, having engaged meaningfully, no in time appeal was made.

43. Nor do I accept her submission that the appellant is not prejudiced. I cannot see any greater prejudice to a taxpayer of being named and shamed. For an individual, this would have personal ramifications. For a company it clearly has commercial ramifications. The purpose of these naming and shaming provisions is to, frankly, put promoters out of business. They are designed to publish to the world that HMRC treat those so named and shamed with suspicion, certainly as regards the notifiable arrangements. The intention is that the taxpayer, on notice of this, would not wish to employ that promoter as it would have a deleterious effect on that taxpayer's position, and would render that taxpayer more likely to be investigated by HMRC. And this is the case in respect of this appellant, whether or not the evidence, as submitted by Mr Wood suggests that there has been specific prejudice by dint of fewer employees taking up the appellant services since March 2023.

44. Nor, frankly, am I attracted to Miss Dhanoa's broad brush assertion that HMRC will be prejudiced by a 27 day delay. The same criticism as she levelled at Mr Wood's broad-brush assertion that one reason for the delay was complexity of new legislation can be made of her submission that HMRC are generally prejudiced by delay. HMRC also assert that other more compliant taxpayers are prejudiced if HMRC have to deploy resources to oppose an appeal which has been made by a non-compliant appellant. But in the context of the delay in this case, I do not see how either HMRC or compliant taxpayers will be prejudiced if I were to grant the appellant's application. I have been provided with no breakdown of HMRC's additional time and cost which it will incur if I were to grant this application over and above that which they would have incurred had the appeal been made on or before 3 September 2023.

45. Mr Wood makes two further points regarding the balance of prejudice. Firstly, given that HMRC is the sole arbiter as to whether there are notifiable arrangements, and whether they should issue a scheme reference number, the appellant's right of appeal is an important safeguard. I agree that a right of appeal is an important safeguard. But that doesn't take us much further. The issue in this case is that the appellant, by reason of its own delay, has deprived itself of that safeguard and must suffer the consequences. As it was said in *Katib,* (paraphrased)

a taxpayer who deprives itself of right to bring an appeal because of its own delay must take the consequences. The loss of an opportunity to run an appeal is simply an inevitable consequence of failing to make a timely appeal.

46. His second point is that the appellant's "breach" is "wholly technical", and so causes no prejudice to HMRC. What he means by this is that HMRC have always known that the appellant was intending to bring an appeal since it was made expressly clear to HMRC in his email of 24 August 2022 in which he says: "My clients will be applying directly to the tribunal appealing the issue of the SRN". His argument runs that since HMRC had known, before the appeal deadline, that the appellant was planning to appeal, they cannot now claim they are prejudiced given that all that happened is that the appellant has proceeded in the manner which it had notified to HMRC. HMRC had always known that an appeal was to be made, and the fact that it might have been made late cannot result in actual prejudice to HMRC.

47. I am sympathetic to this point. I have found that an any event, HMRC have not established that they will be prejudiced if I grant the application in the sense that they would have to expend time and effort which they would not have expended had the appeal been brought in time. And this finding is reinforced by the fact that HMRC were on notice, before the appeal deadline, that the appellant was intending to appeal. Mr Wood goes further and submits that the nature of the appellant's grounds of appeal had been communicated to HMRC as early as 24 August 2023. I am afraid that the evidence does not bear this out. Whilst it makes clear that the appellant intends to appeal, it does not set out the grounds of appeal which I do not believe were communicated to HMRC until Mr Wood's representations on 25 September 2022. But that does not detract from the cogency of his submission that HMRC had been on notice that an appeal was to be made well before the appeal deadline expired.

Conclusion

48. I have not found this decision an easy one. I have found that the delay is not serious and substantial. I have found that the reasons given for that delay are unmeritorious. I have found that by granting the appellant's application HMRC will suffer no prejudice whereas the appellant will suffer prejudice.

49. I am conscious that at the final evaluation stage the balancing exercise must take into account the particular need for litigation to be conducted efficiently, at proportionate cost, and for statutory time limits to be respected. I am also conscious that the starting point is that permission to make a late appeal should not be granted unless I am satisfied that on balance it should be.

50. Finally, I need to add to the mix that under the First-tier Tribunal Rules, which govern the discretion, I have to allow the appellant to bring an out of time appeal, there is an overriding objective to deal with cases fairly and justly.

51. I have come to the conclusion that I should allow the appellant's application. The delay is not serious and substantial. 27 days in the general scheme of things is not, in absolute terms, serious. Nor is it significant given the lack of prejudice to HMRC of allowing the application (bearing in mind that HMRC have not provided any evidence of any specific prejudice, and the fact that they were on notice before the appeal deadline that the appellant would bring an appeal). There would, on the other hand, be considerable prejudice to the appellant in denying its right of appeal given the impact that the naming and shaming has had, and will continue to have, on its business, when the underlying merits of whether the appellant should have been given a scheme reference number remains untested.

52. There are no good reasons for the delay. And any failings by the appellant's agent are generally attributable to the appellant. So, any failure to make a timely appeal by the agent is attributed to the appellant.

53. But at the final evaluation stage, I can consider all the circumstances of the case. And looking at this from the perspective of the appellant, I cannot see that it has done anything wrong. It put its affairs in the hands of an ostensibly highly competent agent on 10 August 2022, in good time to enable a timely appeal to be made. It enabled that agent to respect the time limit. Whilst I have been given no meritorious reasons as to why that time limit was not met, I do not think that it is fair and just to deny the application simply because of the lack of cogent reasons given that there is only a 27 day delay. I cannot see that this delay, or allowing the appeal to be brought out of time will result in litigation being conducted inefficiently or at disproportionate cost.

54. The final evaluation stage remains a balancing exercise. To my mind, even though there is a lack of meritorious reasons, the balance of prejudice outweighs that lack in view of the fact that the delay was only 27 days.

DECISION

55. I allow the appellant's application to make a late appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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: 07th SEPTEMBER 2023