



Neutral Citation: [2024] UKFTT 00461 (TC)

Case Number: TC09185

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video/telephone hearing]

Appeal References: TC/2022/13942
TC/2022/13943
TC/2022/13944

Late appeals -VAT assessment – 17 months late - penalty assessment – 12 months late - personal liability notice -4.5 months late – delay both serious and significant - 11 HMRC offers to present further evidence “if there was a reasonable excuse for lateness” – Appellant’s then adviser complained to HMRC and then ask for review etc – agreed this was the wrong way round - Martland, Katib and Ryan followed – applications dismissed.

Heard on: 27 March 2024
Judgment date: 30 May 2024

Before

TRIBUNAL JUDGE ALASTAIR J RANKIN MBE

Between

**THE TYRE COMPANY (NI) LIMITED
AND
BRENDAN McNEILL**

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Liban Ahmed of CTM Tax Litigation Ltd

For the Respondents: Ms Laura Woodsmith, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

1. The form of the hearing, with the consent of the parties, was by video using the Tribunal video platform. The documents to which I was referred were an electronic Hearing Bundle containing 686 pages and an electronic Appellants' Bundle containing 120 pages.
2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
3. The Tribunal decided that the three applications all dated 9 December 2022 seeking permission to commence late appeals should be refused.

FINDINGS OF FACT AND REASONS FOR THE DECISION

4. The Appellants were seeking permission to appeal against a VAT assessment dated 1 June 2021 for £181,264.00 (later amended on 9 August 2021 to £178,465.00), a VAT assessment dated 30 October 2021 for £12,698.00 and a penalty assessment dated 24 June 2022 for £117,117.14 all in relation to the first named Appellant and a Personal liability notice (PLN) dated 24 June 2024 for £115,164.50 issued to the second named Appellant.
5. Mr Ahmed referred me to various exhibits which he claimed proved that the Appellants had exported some tyres to the Republic of Ireland.
6. Mr Ahmed called Mr McNeill who confirmed that the information in his witness statement dated 15 December 2023 though not in fact signed until 25 March 2024 was true and correct. Ms Woodsmith did not ask Mr McNeill any questions.
7. I was referred to the Upper Tribunal decision in *William Martland v The Commissioners for HM Revenue and Customs* [2018] UKUT 0178 (TCC) where the Upper Tribunal confirmed the three-stage process in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 should be applied by me when considering whether I should allow a late appeal to proceed. In *The Commissioners for Her Majesty's Revenue & Customs v Websons (8) Limited* [2020] UKUT 0154 (TCC) the Upper Tribunal confirmed that *Martland* still applies.
8. In *Martland* the Upper Tribunal said:

“29. ...In *Romasave*, the Upper Tribunal said, after a review of the authorities, that “permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely.” In other words, the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission.”
9. The Upper Tribunal continued:

“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.”

10. Ms Woodsmith informed me that the Notices of appeal dated 9 December 2022 were around 17 months late in respect of the first assessment, around 12 months late in respect of the second assessment and around four and a half months late in respect of the penalty assessment and the PLN. Mr Ahmed accepted that the delay was both serious and significant.

11. The reason for the delay was that the Appellants’ then adviser, Mr Paul McCreesh, never asked for a review nor did he appeal to this Tribunal.

12. In *The Commissioners for Her Majesty’s Revenue and Customs v Muhammed Hafeez Katib* [2019] UKUT 0189 (TCC) (Katib) the Upper Tribunal said:

“59. Mr Magee urged us to give particular weight to the FTT’s finding, at [15], that Mr Katib did not have the expertise to deal with the dispute with HMRC himself, but that does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena. 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....”

13. Ms Woodsmith informed me that HMRC had given Mr McCreesh at least eleven opportunities to ask for a review or to appeal to this Tribunal but he did not do so apparently believing that pursuing a complaint against the HMRC officer was the better way to proceed and if necessary ask for a review or lodge an appeal after the complaint process had finished. Mr Ahmed accepted that this was the wrong way round. I found the tone of Mr McCreesh’s letters to HMRC unnecessarily harsh.

14. In *Ryan V Revenue and Customs Commissioners* [2012] STC 899 (Ryan) the Upper Tribunal said:

“[6] On the other hand I have to agree with Mr Ryan that if he was represented in the transaction by a solicitor, he should be entitled to expect the solicitor not merely to advise him of his obligation to submit a return but to perform the obligation for him. But that is not the same as saying that he has a reasonable excuse, within the meaning of the legislation. The plain purpose of the legislation is to encourage the prompt submission of returns by imposing penalties on those who submit them late. The penalty is imposed on the person concerned, and not upon his solicitor or any other representative. The purpose of the legislation would be defeated if a penalty could be escaped by the expedient of placing the blame on a dilatory solicitor. If Mr Ryan believes he has been let down by his solicitor, his remedy is to take the matter up with the solicitor.”

15. Adopting the advices quoted in *Katib* and *Ryan* I find there was no good reason for the delays. The references to solicitor in *Ryan* I consider should also apply to the Appellants' accountant, Mr McCreesh.

16. Finally I should consider "all the circumstances of the case". In *Katib* the Upper Tribunal continued:

"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."

17. In *Martland* the Upper Tribunal stated:

"34 ... the purpose of the time limit is to bring finality, and that is a matter of public interest, both from the point of view of the taxpayer in question and that of the wider body of taxpayers."

and

"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."

18. In *Katib* the Upper Tribunal stated:

"17. We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion."

19. The Court of Appeal stated in *BPP Holdings Limited v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ121:

"A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary ..."

20. Finally, in *Martland* the Upper Tribunal said:

"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. In *Hysaj*, Moore-Bick LJ said this at [46]:

“If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties’ incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them.”

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal. ... It is clear that if an applicant’s appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT’s time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents’ reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant’s case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.”

21. Mr Ahmed stressed to me that the evidence to which he had taken me during his submission was sufficient to show that the Appellants had an arguable case that the assessment and penalties were incorrect. He pointed out that Ms Woodsmith had not queried the various exhibits to Mr McNeill’s witness statement. However, in HMRC’s Notice of Objection they had pointed out several omissions from the evidence required to satisfy the requirements for exporting to the Republic of Ireland.

22. Mr Ahmed also claimed that by offering the Appellants several opportunities to present further evidence after the time limits had expired meant that HMRC were prepared to waive the time limits. I do not consider this to be correct as the various offers included “if there is a reasonable excuse for lateness” or similar wording.

23. As the delay in lodging the appeals is both serious and significant, as there is no good reason for the delay and considering all the other circumstances I have decided to refuse the Appellants’ applications.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

24. 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.

**ALASTAIR J RANKIN MBE
TRIBUNAL JUDGE**

Release date: 30th MAY 2024