



Neutral Citation: [2024] UKFTT 00619 (TC)

Case Number: TC09240

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2023/01322

*SDLT – Discovery Assessment – application to make a late appeal*

**Heard on:** 12 March 2024  
**Judgment date:** 25 June 2024

**Before**

**TRIBUNAL JUDGE MCGREGOR**

**Between**

**MR R & MRS E GOONESENA**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Ravi Goonesena, on behalf of himself and his wife

For the Respondents: Mr Omar Riaz, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing system. A face to face hearing was not held because a remote hearing was appropriate. The documents to which I was referred are a hearing bundle of 231 pages, a supplementary bundle of 71 pages and the Respondent's skeleton argument of 14 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.

### FACTS

3. The following background summary facts are not in dispute:

The Appellants, Mr and Mrs Goonesena, purchased a property in Guildford on 4 July 2008;

The Appellants submitted an SDLT return for the purchase reporting £1,386 of SDLT, based on a 1% rate of SDLT;

On 6 September 2011, HMRC issued a discovery assessment for additional SDLT of £33,613.12;

On 28 September 2011, Cornerstone Tax Advisers made an appeal against the assessment to HMRC on the Appellants' behalf;

The Appellants' appeal was put on hold while other litigation relating to SDLT was pursued;

On 20 June 2022, HMRC issued a view of the matter letter to the Appellants concluding that the Appellants were liable for the additional SDLT;

On 3 July 2022, Mrs Goonesena accepted HMRC's offer of a review of the decision on behalf of herself and her husband;

On 16 August 2022, HMRC issued review conclusion letters to the Appellants upholding the decision;

On 20 January 2023, HMRC issued individual settlement letters to the Appellants stating that the matter was now determined and that an amount of interest remained outstanding;

On 26 February 2023, the Appellants' agent submitted a late appeal to the Tribunal.

### LAW

4. Paragraph 36G of Schedule 10 to Finance Act 2003 sets out the requirements for making an appeal against a discovery assessment relating to SDLT as follows

(1) This paragraph applies if—

(a) HMRC have given notice of the conclusions of a review in accordance with paragraph 36E, or

(b) the period specified in paragraph 36E(6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period. (3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this paragraph “post-review period” means—

(a) in a case falling within sub-paragraph (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with paragraph 36E(6), or

(b) in a case falling within sub-paragraph (1)(b), the period that—

(i) begins with the day following the last day of the period specified in paragraph 36E(6), and

(ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with paragraph 36E(9).

5. Rule 20 of the FTT Rules provides:

(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.

...

(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.

6. In summary therefore, I have a discretion to allow an application for a late appeal against an SDLT discovery assessment.

7. In exercising that discretion, I must follow the principles and guidelines set out by the higher Courts and Tribunals, summarised by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC). I set out the section from paragraph 44 in full:

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. 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 (see [18] above). 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.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the

delay: see the comments of Moore- Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that “being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules”; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.

#### PARTIES ARGUMENTS

#### 8. Mr Goonesena submitted the following in support of the application:

The Appellants accept that the appeal was late;

At the time of the receipt of the review conclusion letter, he could see from the line of cases that been decided over the last few years that their chances of succeeding in their appeal were limited. This conclusion was based on his own reading of the cases and coverage of them, not on any advice from professional advisers;

In January 2023, he had been in discussions with HMRC about the calculation of interest on the SDLT assessment and then called Goldstone Tax Advisers to discuss it;

The Appellants had never engaged Goldstone as their advisers but they had been in touch with both Goldstone and Cornerstone Tax Advisers over the course of the dispute regarding the administration of the dispute and because they knew that these advisers had been involved in other related matters;

In that conversation in early 2023, Goldstone had mentioned the case of *Brosch v HMRC* [2023] UKFTT 945 (TC), which they told him was proceeding to the Upper Tribunal and advised Mr Goonesena that he should submit a late appeal;

The reason for not appealing on time was therefore that, at that time, they had not been aware of the possibility of pursuing the grounds of appeal that are being pursued in *Brosch* and only became aware of this possibility in late January, which is what prompted them to submit the late appeal;

With regards to all the circumstances of the case, it would be unfair for the Goonesenas' appeal to be decided on an administrative issue while a substantive appeal which covers the same factual and legal circumstances is being appealed to the Upper Tribunal;

It would be prejudicial to the appellants not to allow them to appeal a significant sum, relying on the decision in *Guerlain-Desai v HMRC* [2023] UKFTT 00374 (TC) in support of this submission;

With regards to the merits of the case, Mr Goonesena submitted that the counsel-approved disclosure which they attached to their SDLT return was a standard disclosure and was identical to the one being considered in *Brosch* and therefore their case would stand or fall on the basis of that case;

Although accepting the need for litigation to be pursued efficiently and that they had not met the deadlines, they submit that the balance is in favour of allowing the late appeal to proceed.

#### 9. HMRC submit that:

The delay is significant and serious because it was 5 months and 11 days between the review conclusion letter being issued on 16 August 2022 and the late appeal being made on 26 February 2023;

The reason for the delay is not a good one because it is incumbent on the taxpayer to consider the full context of the case at that time. HMRC note that the Goonesenas did not seek professional advice at that stage, which might have alerted them to the *Brosch* line of argument;

HMRC would be prejudiced by allowing the late appeal because they would need to divert resources to defend an appeal that they had, fairly, considered to be closed. With regards to the possibility of the Goonesenas' appeal being joined with the *Brosch* appeal, 10. HMRC submit that the opportunity for this has passed because the first-tier tribunal decision has already been published. Therefore the Goonesena's appeal would need to be case managed separately, even if it could be stayed behind any further appeal to the upper tribunal;

11. While accepting that it would not be appropriate to conduct a full merit assessment of the underlying appeal, HMRC submit that it has no reasonable prospect of success because the issue of the validity of discovery assessments following a disclosure with an SDLT return had already been decided against the taxpayers by the Upper Tribunal in *Carter & Kennedy* [2021] UKUT 0300 (TCC) and by the First-tier Tribunal in *Brosch*;

12. With regard to the decision in *Guerlain-Desai*, HMRC submit that the decision is not binding precedent and that the Tribunal took a wrong turn in the decision, specifically by:

putting too much weight on the financial consequences for the taxpayer in not being able to bring an appeal;

putting insufficient weight on the need to meet deadlines and conduct litigation efficiently; and

failing to explain why the factors in favour of allowing the application outweighed those against.

13. HMRC prefer the decision in *Elizabeth Green* [2022] UKFTT 00405 (TC) in which the Tribunal concluded that it cannot be right that the amount of money at stake could outweigh the other factors;

14. Even if *Guerlain-Desai* was correctly decided, HMRC submit that it can be distinguished on the facts because:

The delay in this case is much longer – 164 days versus 42;

The reasons for the delay are different – in *Guerlain-Desai* the reason was an administrative error by the taxpayer's advisers; whereas in this case there was a conscious decision not to appeal;

No weight was given to the merits of the appeal at all in *Guerlain-Desai*, but here the merits, or lack of them, are a further factor against granting the application.

#### DISCUSSION

15. On the first question of establishing the length of the delay and considering whether this delay was serious or significant, there was no dispute between the parties. The delay was over 5 months and this was both serious and significant.

16. On the second question, I find that the reason for the delay was that Mr and Mrs Goonesena had made a decision not to appeal in the period available because they considered that their appeal was likely to fail, but then discovered in early 2023 that there was a possible avenue for an appeal.

17. Turning to the third question I must make an evaluation of all the circumstances of the case, which will involve a balancing exercise between the merits of the reasons given for the delay and the prejudice that would be caused to both parties by granting or refusing permission. In conducting that balancing exercise, I must 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.

18. There are several factors of prejudice to consider. Firstly the prejudice to the Appellants in not being able to pursue their appeal, which has a substantial value. The parties had referred to the decisions of this Tribunal in *Elizabeth Green* and *Guerlain-Desai* regarding the importance of the value of the appeal. Since they are both decisions of this Tribunal, neither are binding on me. I prefer the approach taken in *Elizabeth Green* summarised in this short passage from paragraph 53 of that decision:

“it cannot be right that a delay which is significant and for which there was no good reason should be overlooked simply because the amount at stake is very large or significant to the would-be appellant.”

19. The value of the tax at stake makes the prejudice to the taxpayers of being unable to pursue their appeals a greater one, but in my view this factor is not a more or less important factor than others.

20. On the other side, HMRC would be prejudiced by having to defend an appeal on a matter that they considered to be closed. This was not a case where there were ongoing discussions with the taxpayer after the decision letter that could have indicated to HMRC that the case was still “live”. Mr and Mrs Goonesena had been engaging with HMRC throughout regarding appeal and internal review, but, once the final decision was issued, they stopped responding at all, for 5 months, despite settlement offer letters and pre-letters being received. This factor weighs against allowing the late appeal.

21. There was some discussion of the merits of the case at the hearing, in particular its similarity to other cases proceeding through the tribunal system. I echo the comments quoted above of Moore-Bick LJ regarding an assessment of merits: “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.” Given that one of the key factors identified by HMRC as showing very low chances of success, the existence or absence of a specific disclosure alongside the SDLT return, was a matter of factual dispute between the parties, I consider that it is not appropriate in this case to take merits into account at all. I have therefore not weighed it all in the balancing exercise.

22. HMRC also highlighted the fact that the Appellants’ decision not to bring an appeal was made without reference to professional advice. I consider that this is a relevant factor because they had decided to obtain professional advice at earlier stages of the dispute and indeed their discovery of the *Brosch* appeal came from later discussions with professional advisers. On that basis, the only reasonable inference is that it was a conscious decision not to obtain professional advice at that time. Mr Goonesena stated at the hearing that his decision not to appeal was based on his own reading of the cases that he was aware of and we accept that this evidence was truthful but also that this decision not to engage professional advice was a conscious decision and one that he must bear the consequence of.

23. Drawing these factors together in the balancing exercise, I do not consider that Mr and Mrs Goonesena had established a good reason for the serious and significant delay and, in all the circumstances, I do not consider that it is appropriate to give permission for them to bring late appeals in this case.

**DECISION**

24. For the reasons set out above, Mr and Mrs Goonesena’s application for permission to notify the appeals late is refused.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

25. 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.

**ABIGAIL MCGREGOR**  
**TRIBUNAL JUDGE**

**Release date: 25<sup>th</sup> JUNE 2024**