



TC01607

Appeal number TC/2011/02353

Application for late appeal – assessment for income tax – HMRC refuse to accept late appeal – permission to appeal sought from Tribunal – no convincing grounds put forward by the appellant -- leave to appeal refused – s 49 Taxes Management Act 1970

FIRST-TIER TRIBUNAL

TAX

MATTHEW SQUIRE

Appellant

- and -

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

Respondents

**TRIBUNAL : RAYNA DEAN FCA (PRESIDING MEMBER)
MICHAEL TILDESLEY (TRIBUNAL JUDGE)**

**Sitting in public at 4th Floor, City Exchange, 11 Albion Street, Leeds, LS1 5ES on 27
July 2011**

The Appellant did not appear

Tony Burke, Tribunal Case Worker, for HMRC

DECISION

Introduction

1. This is an application by Matthew Squire (“the Appellant”) for leave to appeal out of time under s 49 Taxes Management Act 1970 (as amended) (“TMA”) against
5 four assessments to income tax on property income covering the tax years 2002-3 to 2005-6.
2. The assessments were issued on 9 October 2008. The Appellant did not appeal within 30 days. HMRC treated his representative’s letter of 20 August 2010 as an appeal (almost 2 years late). HMRC did not agree to accept the late appeal. The
10 Appellant applied to the Tribunal for permission to appeal. The issue for the Tribunal is to decide whether we should exercise our discretion in favour of the Appellant.
3. The Appellant did not attend the hearing on 27 July 2011. The Appellant’s former accountant had contacted HMRC to advise that they were aware of the hearing but had been unable to obtain information from the Appellant, who was out of the
15 country. The former accountant would not be appearing for the Appellant. Given these circumstances HMRC applied for the application to proceed in the Appellant’s absence. The Tribunal granted HMRC’s request. The Tribunal was satisfied that the Appellant had been duly notified of the hearing and that it was in the interests of justice to proceed with the hearing.
- 20 4. HMRC was represented by Mr Tony Burke, Tribunal Case Worker.
5. HMRC presented us with a bundle of copy documents which we admitted in evidence. We heard no oral evidence. From that evidence we make a number of findings of fact.

The facts

- 25 6. We were told that HMRC received an annual statutory return of Housing Benefit under ss 18 and 19 TMA, identifying the Appellant as the landlord of 26 Woodside Crescent Halifax. He had been in receipt of rents for the tax years 2001-2 to 2005-6.
7. HMRC told us that the Appellant’s self assessment returns for those years did not declare any rental income. We were not provided with copies of any of those returns
- 30 8. On 5 February 2008 letters were sent to the Appellant and his accountant under the discovery provisions of s 29 TMA asking
 - (1) The address and the date the property was acquired.
 - (2) Whether the property was owned solely or jointly.
 - (3) For an income and expenditure account for each tax year in which the
35 property has been let since the date of acquisition.
 - (4) The reason for any gap between the acquisition of the property and the letting, or any other gaps.

(5) The circumstances surrounding the omission of the rental income.

9. Having received no reply HMRC sent reminder letters on 7 April 2008.

10. The Appellant telephoned HMRC on 9 April 2008 to say that the property had been let to his sister-in-law and he did not make any money out of it. He was trying to get the information requested.

11. On 22 May 2008 the Appellant's accountant asked HMRC to obtain information on mortgage interest from a building society. He was informed that it was the taxpayer's responsibility to provide the information. HMRC would write to the building society if they received a mandate signed by the taxpayer, and a form for that purpose was attached.

12. In the absence of any information, on 9 October 2008 HMRC issued notices of assessment for years 2002/03 to 2004/05. The letter to the Appellant states

“If you think this notice is wrong in any way you should appeal in writing within 30 days from the date of issue above. An appeal form is enclosed. If you have any doubts or do not understand this notice please contact this office or your local tax office for advice”.

13. The Appellant telephoned on 10 October 2008. The file note of this conversation suggests he was annoyed at the issue of the assessments. It states that he was advised to get in touch with his bank to provide the necessary information, and to appeal if he did not agree with the assessments.

14. Still no information was received, and on 19 November 2008 a letter was sent to the accountant informing them that the statutory appeal period had now passed. Any appeal would now be a late appeal and would need to provide the reason why the appeals are late. If HMRC did not think there was a good reason they could refuse to accept the late appeal, and “the application would then have to be heard by the Tax Appeal Commissioners to decide if it can be accepted”. HMRC telephoned the accountant on 27 January 2009 and was told they had been unable to obtain any information on which to base an appeal.

15. Further letters were sent concerning an assessment for the tax year 2006-7 (not the subject of this appeal) and eventually the Appellant telephoned on 27 August 2009. He confirmed that the property was let to his sister-in-law for approximately £50 per week, and said that he did not know the actual date rents started as it was “ages ago”. He said that he was happy to accept the figures for rental income provided by the local council on the return of Housing Benefit. Once again the Appellant was told to obtain information from the building society, and he agreed to contact his accountant.

16. On 12 October 2009 HMRC telephoned the accountant, who said he had not yet met with the Appellant.

17. Some 10 months later, in a letter dated 20 August 2010, the accountant stated that they had received information from the building society and enclosed computations of assessable income. These showed rental income received for the period, less figures

for mortgage interest, accountancy fees, wear and tear allowance of 10% of rental and, in two years, repairs and renewals. There was no documentary evidence to support any of the expenses deducted. The letter asked for amended assessments to be issued.

5 18. Mr Burke told us that HMRC would not have allowed the deductions for repairs and renewals in addition to the 10% wear and tear allowance. Neither would they have accepted the deductions for other expenses without supporting evidence.

19. HMRC responded on 22 September 2010 stating that they would treat the request for amended assessments as a late appeal. Further HMRC asked from the accountant
10 details of the appellant’s explanation. The accountant replied to say

“the reason he did appeal within the time limit is that he was working in France and no post was being forwarded to him Should there be a problem with the late appeals then obviously we can look into the matter further”.

15 20. In the absence of any other evidence on this point we take the accountant’s response to mean “the reason he did *not* appeal within the time limit is that he was working in France and no post was being forwarded to him”. This appears to be the first occasion on which HMRC were informed that the Appellant had been away from the UK.

20 21. On 18 November 2010 the request for a late appeal was refused by HMRC on the grounds that

(1) “The appeal is over twelve months old.

(2) Your client spoke to HMRC on 27 August 2009 and he was aware of the finality of the assessments and the necessity of filing an appeal. Your client had
25 said that he would speak to you about this matter, therefore the fact that your client was in France and did not receive correspondence is immaterial.”

22. A Notice of Appeal was received from the accountant on 25 February 2011. The reasons why the appeal was late were given as

30 “Appellant’s father ill and subsequently died. At all other times the Appellant was working abroad. He also advised that HMRC used the wrong address for correspondence”.

The Law

23. Section 49 TMA states

- 35 (1) “This section applies in a case where—
- (a) notice of appeal may be given to HMRC, but
 - (b) no notice is given before the relevant time limit.
- (2) Notice may be given after the relevant time limit if—
- (a) HMRC agree, or
 - (b) where HMRC do not agree, the tribunal gives permission.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

5 (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

10 (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

(8) In this section “relevant time limit”, in relation to notice of appeal, means the time before which the notice is to be given (but for this section).”

Mr Burke for HMRC directed us to s118(2), TMA which states

15 “For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be
20 deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased”.

24. In our view the requirement for “reasonable excuse” applies to HMRC’s agreement under Section 49(2) (b) TMA 1970, but not to the tribunal. Our discretion is at large: (see *R (on the application of Browallia Cal Ltd v General Commissioners of Income Tax* [2004] STC 296).
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25. Section 49I TMA 1970 states “In sections 49A to 49H, a reference to the appellant includes a person acting on behalf of the appellant”. In this case the appeals could have been, and in the event were, submitted by the accountant.

26. In exercising our discretion to give leave we are required to have regard to the overriding objective of dealing with cases fairly and justly (Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) This involves a balancing exercise having regard to the respective interests of the parties.
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27. In view of the similarity of wording between the overriding objective with that in Rule 1.1 of the Civil Procedure Rules (“CPRs”), the list of factors set out in CPR 3.9(1) provides useful guidance as to the factors to be taken into account by the Tribunal in exercising its discretion to grant leave to appeal. So far as material in this case, those factors are:
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- (a) The interests of the administration of justice;
- (b) whether the application for relief has been made promptly;
- 40 (c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

...

(f) whether the failure was caused by the party or his legal representative;

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...

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.

10 28. We also note Sir Stephen Oliver's remarks in *Ogedegbe* [2009] UKFTT 364 (TC) that the extension of time for making an appeal will be granted exceptionally. Moreover, there must be at least an arguable case for making the appeal.

Conclusion

29. We make the following findings of fact:

15 (1) The deadline for giving a notice of appeal against the disputed assessments was within 30 days of 9 October 2008 which was 7 November 2008.

(2) The Appellant received the assessments since he telephoned HMRC about them on 10 October 2008.

20 (3) The Appellant was advised in writing on 9 October 2008 about the time limit of 30 days, and the same information was relayed to the Appellant in person over the telephone on 10 October 2008.

(4) On 19 November 2008 HMRC informed Appellant that the time limit for submitting a notice of appeal had now passed, and any subsequent appeal would be treated as a late Appeal

25 (5) The Appellant did not formally submit a notice of appeal to HMRC. Instead HMRC treated the accountant's letter of 20 August 2010 as a late appeal.

(6) His appeal was late by 22 months.

30 (7) The Appellant's reason to HMRC for submitting a late appeal was that he was working in France but no post was forwarded to him.

(8) The Appellant's reasons to the Tribunal were different from those given to HMRC, namely, his father was ill, at all other times he was working abroad, and HMRC had the wrong address.

35 30. On the facts found we are satisfied that the Appellant knew of the requisite time limit in which to appeal but chose to ignore it. Given the Appellant's state of knowledge the Appellant's stated reasons of working abroad and HMRC having the wrong address have no factual foundation whatsoever.

31. The Appellant's has provided no details regarding the illness and death of his father and offered no explanation as to how this prevented him from submitting a notice of appeal on time. We note that he did not mention this reason when requesting HMRC's agreement to a late appeal.

5 32. We conclude that the Appellant has advanced no good explanation for submitting a notice of appeal 22 months late. The onus was on the Appellant to substantiate his grounds for leave to appeal out of time. He has failed to do that, and chose not to attend the hearing. There are no exceptional features to this case In those circumstances we refuse the application for leave to appeal out of time

10 **Decision**

33. For the reasons we have given, we refuse the Appellant's application for permission to appeal out of time.

15 34. 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.

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Michael Uddarley

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TRIBUNAL JUDGE
RELEASE DATE: 29 November 2011

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