



**TC01611**

Appeal number TC/2011/04533

*Permission to appeal out of time – whether granting permission is in the interest of justice – factors to be taken into consideration – leave to appeal out of time refused*

**FIRST-TIER TRIBUNAL**

**TAX**

**REG CAMPS  
t/a REG CAMPS TRANSPORT**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)  
SIMON BIRD (TRIBUNAL MEMBER)**

**Sitting in public at Eastgate House, Newport Road, Cardiff on 21 November 2011**

**The Appellant did not attend and was not represented**

**Jack Lloyd, of the HM Revenue & Customs Appeals and Reviews Unit, for the Respondents**

## DECISION

1. This is an Application by Mr Camps for leave to appeal out of time under Taxes Management Act 1970 ("TMA") s 49(2)(b). The Tribunal refused the Application.

### 5 **Procedural issue**

2. Neither Mr Camps nor his agent, David Sharrock of Sharrock & Sharrock Limited, attended the hearing.

3. The Tribunal noted that Mr Sharrock had been notified of the date and time of the hearing by letter dated 13 September 2011 from the Tribunals Service. The letter includes the warning that "if you did not attend the hearing, the Tribunal may decide the matter in your absence."

4. Included with the letter was the "Guidance for Tribunal Users on the Postponement of Hearings". No application for postponement was received by the Tribunal.

5. The Tribunal clerk endeavoured to contact Mr Sharrock using the number on the Notice of Appeal, but no reply was received. The clerk also checked the internet to see if he could locate another telephone number for Sharrock & Sharrock; he also used the internet to try and find a telephone number for Reg Camps Transport. Despite these efforts he was unable to make contact with either Mr Sharrock or Mr Camps.

6. The Tribunal considered whether or not to proceed with the hearing in the light of Rule 33 of the Tribunal Rules<sup>1</sup>. We decided that it was in the interests of justice to proceed, despite the absence of the Appellant and his representative.

### **The statutory provisions**

7. The taxpayer's right of appeal against the conclusions of an HMRC Review, and the time limit within which such appeals can be made are set out at Taxes Management Act 1970 ("TMA") s 49G:

#### **"Notifying appeal to tribunal after review concluded**

(1) This section applies if—

(a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or

(b) the period specified in section 49E(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.

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<sup>1</sup> Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

(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 (5) In this section "post-review period" means—

(a) in a case falling within subsection (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 section 49E(6)..."

10 8. The right of a taxpayer to appeal against a closure notice is set out, so far as relevant to this case, in TMA s 31:

**“Appeals: right of appeal**

(1) An appeal may be brought against—

(a) ...

15 (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return)..."

9. The normal time limit for an appeal against a closure notice is given by TMA s 31A:

**“Appeals: Notice of appeal**

20 (1) Notice of an appeal under section 31 of this Act must be given—

(a) in writing,

(b) within 30 days after the specified date,

(c) to the relevant officer of the Board.

(2)...

25 (3) In relation to an appeal under section 31(1)(b) of this Act—

(a) the specified date is the date on which the closure notice was issued, and

(b) the relevant officer of the Board is the officer by whom the closure notice was given.”

10. The provisions relating to late notices of appeal are at TMA s 49:

30 **“Late notice of appeal**

(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—

35 (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)."

### **The case law**

15 11. The Tribunal's statutory discretion is at large, and (in contrast to HMRC) we are not bound to consider only whether the Applicant has, or has not, a reasonable excuse for the late appeal (*R (on the application of Browallia Cal Ltd) v General Commissioners of Income Tax* [2004] STC 2).

20 12. However, we are bound by the Tribunal Rules. Rule 2 sets out the overriding objective, which is to deal with cases justly. Rule 5(3)(a) gives us discretion to "extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit". Rule 20(4) allows the Tribunal to apply Rule 5(3)(a) to permit an extension of time for the filing of an appeal. In considering  
25 whether to extend a time limit, the Tribunal is required to seek to give effect to the overriding objective set out in Rule 2.

30 13. In the case of *Marijus Leliunga v Revenue and Customs Commissioners* [2010] UKFTT 229 (TC) the Tribunal said that, given the correlation between the overriding objective in Rule 2 with that in Rule 1.1 of the Civil Procedure Rules ("CPR"), the provisions of Rule 3.9(1) of the CPR can be considered, although they are not binding on the Tribunal. We agree, and we take it into account when we exercise our discretion.

14. CPR Rule 3.9(1) provides:

35 (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –

- (a) the interests of the administration of justice;
- (b) whether the application for relief has been made promptly;
- (c) whether the failure to comply was intentional;
- 40 (d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

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

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(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 15. We also take into account the factors set out by Burton J in *R (on the application of Cook) v General Commissioners of Income Tax and another* [2007] STC 499. These are summarised in the headnote as follows:

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“Consideration of the merits of the case was an important part of the exercise of the commissioners' jurisdiction and a consideration of prejudice carried with it the question of whether the basic appeal was arguable, since the deprivation to a party of the opportunity of putting forward an arguable meritorious appeal was itself an obvious prejudice. That potential prejudice had to be balanced against a lack of explanation for delay on the part of the taxpayer in lodging his appeal and any prejudice to the Revenue and depriving of a party of the opportunity of putting forward an arguably meritorious appeal is itself an obvious prejudice.”

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16. Helpful guidance on when and whether to allow a late appeal was given in the judgment of Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [21]-[24]:

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[23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s 49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay....A third issue is the policy that it is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late....

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5 [24] Because the granting of leave to bring an appeal or other proceedings  
late is an exception to the norm, the decision as to whether they should be  
granted is typically discretionary in nature. Indeed, in view of the range of  
considerations that are typically relevant to the question, it is difficult to see  
10 how an element of discretion can be avoided. Those considerations will often  
conflict with one another, for example in a case where there is a reasonable  
excuse for failure to bring proceedings and clear prejudice to the applicant for  
leave but substantial quantities of documents have been lost with the passage  
of time. In such a case the person or body charged with the decision as to  
whether leave should be granted must weigh the conflicting considerations  
and decide where the balance lies.”

### **The evidence**

17. The Tribunal was provided the following documents:

- 15 (1) the HMRC review letter dated 10 June 2010;
- (2) Mr Camps’ Notice of Appeal to the Tribunal, submitted by Mr Sharrock;
- (3) Mr Lloyd’s letter of 14 July 2011 to the Tribunals Service setting out the  
reasons for objecting to the late appeal and HMRC’s request for a preliminary  
hearing, together with the letter from the Tribunals Service to Mr Sharrock dated  
20 13 September 2011. This enclosed Mr Lloyd’s letter and provided information  
about the hearing date, its location and related matters.

18. During the hearing we were also provided with screenprints headed “Action  
History” setting out the various contacts between HMRC and Mr Camps and/or Mr  
Sharrock.

19. Mr Lloyd also gave oral evidence on behalf of HMRC.

### **25 The years covered by the Application**

20. Mr Sharrock had appealed to the Tribunal by Notice of Appeal dated 12 June  
2011. On behalf of Mr Camps, he sought to appeal in relation to Mr Camps’s personal  
self-assessment returns for the eight years from 2000-1 through to 2007-08 inclusive.

30 21. The years 2000-1 through to 2005-06 had been the subject of an HMRC review,  
the conclusions of which were sent to Mr Camps by letter dated 10 June 2010. There  
is a 30 day time limit for appealing against the conclusions of an HMRC review.  
Since the Notice of Appeal was dated around a year after the review letter, the appeal  
was clearly outside the time limit.

35 22. In relation to 2006-07, the Tribunal was informed by Mr Lloyd that a Closure  
Notice had been issued in relation to Mr Camps’ return for that year, and that the date  
of the Closure Notice was 21 April 2010. The time limit for such an appeal is, as set  
out above, 30 days from the date on the Closure Notice. Mr Lloyd said that no appeal  
had been made to HMRC by or on behalf of Mr Camps in relation to 2006-07. The  
appeal had thus been made directly to the Tribunal by way of the Notice of Appeal.

23. In relation to 2007-08, Mr Lloyd said that no enquiry had been opened by HMRC into Mr Camps's self-assessment return. There was thus nothing against which to appeal.

5 24. We therefore took this as being an Application in relation to 2000-01 through to 2006-07 inclusive.

### **The facts**

25. From the evidence provided we found the following facts.

10 26. On 15 August 2006, HMRC opened an enquiry into Mr Camp's 2005-06 self-assessment return. As a result of these enquiries, HMRC became aware that Mr Camps had been trading since 2000-01.

27. Self assessment returns were subsequently completed by or on behalf of Mr Camps for the years from 2000-01 through to 2004-05. HMRC opened enquiries into these self-assessments.

15 28. In order to obtain further information about the years before 2005-06, on 6 December 2007 HMRC issued formal Notices under TMA s 19A. Because these Notices were not complied with by the due dates, on 12 February 2008 HMRC issued four penalty Notices, each of £50.

20 29. The information was still not provided; HMRC thus issued closure notices without having received the requested information, As a result, and in accordance with its litigation policy, the four penalties of £50 were cancelled.

30. In April 2010 HMRC issued Closure Notices for 2000-01 to 2005-06, increasing the amounts subject to tax by amendments which took account of the following:

25 (1) The inclusion within turnover of certain further amounts identified in Mr Camps' bank records.

(2) The disallowance of some motoring, travel, subsistence, financing and premises costs, together with certain other miscellaneous expenses.

(3) The disallowance of payments to subcontractors (£27,200) in 2004-05 and of wages amounting to £4,750 in 2005-06.

30 (4) The inclusion within Mr Camp's taxable income of the state retirement pension and incapacity benefit.

31. Mr Colin Ward of HMRC carried out a review of the amendments to Mr Camp's return. By letter dated 10 June 2010, all the amendments were upheld.

32. On 8 December 2010, Mr Sharrock called HMRC to see if any returns were missing.

35 33. On 5 May 2011 the HMRC distraint team called on Mr Camps. They gave him time to contact his accountant.

34. On 10 May 2011 the HMRC distraint team again visited Mr Camps. They spoke to Mr Sharrock to establish whether an appeal had been made to the Tribunal. They were told that Mr Sharrock would call them back the same day.

5 35. On 10 June 2011 the distraint team again called on Mr Camps. A Mr Gorvett called HMRC on Mr Camps's behalf, asking if HMRC had heard from Mr Sharrock. HMRC said that they had had no information about an appeal. Mr Sharrock then spoke to HMRC and said he had been off sick for the last two weeks; that the information was in his office and that he would call HMRC that afternoon with the date of his appeal letter.

10 36. Mr Sharrock completed a Notice of Appeal to the Tribunal dated 12 June 2011 and sent it by email on 14 June 2011.

### **Submissions on behalf of Mr Camps**

37. Mr Sharrock's submissions are set out in the Notice of Appeal. He says that the appeal was late for two reasons:

- 15 (1) the volume of data required by HMRC covering an eight year period; and  
(2) the illness "of the accountant concerned."

38. He further says that:

- (1) documents which were sent to HMRC have not been acted upon;  
(2) not enough time was given for Mr Camps to comply with the HMRC  
20 requests for information; and  
(3) the original self-assessments should be confirmed.

### **Submissions on behalf of HMRC**

25 39. Mr Lloyd said that under TMA s 49(3), HMRC were unable to accept a late appeal in relation to any of the years in question, as Mr Camps had no reasonable excuse for the late appeal.

40. He recognised that the Tribunal had a broader discretion, and submitted that:

- (1) The principle of finality in litigation was very relevant in this case: the enquiry was opened in 2007 and continued procrastination on the part of the taxpayer and/or his agent meant that four years had already elapsed.  
30 (2) The delay in making this appeal was not short: the Application is dated some eleven months after the expiry of the time limits.  
(3) Mr Sharrock's first reason for delay should be rejected; submitting a Notice of Appeal simply requires the completion of the form provided by the Tribunals' Service: there is no need to review a "volume of data".

(4) In any event, to the extent that a volume of data was involved in this case, it was the fault of Mr Camps: had he complied with his statutory obligations for earlier years, there would not have been such an historic backlog.

5 (5) Mr Sharrock's second reason was illness of the accountant, which Mr Lloyd understood to refer to Mr Sharrock himself. There was no specificity: what illness, for how long? The evidence available to HMRC was that, for two weeks at the end of May/early June Mr Sharrock said he had been sick. This does not explain an eleven month delay in filing the appeal.

10 (6) If Mr Sharrock had been seriously unwell for that period, it would be reasonable to expect him to have delegated his work responsibilities to someone else. Moreover, Mr Camps himself could have taken action to instruct another accountant; the letter of 10 June 2010 had been sent to him.

15 (7) The filing of the appeal appears to have been triggered by the distraint action taken by HMRC, rather than being consequent upon Mr Sharrock's recovery from a lengthy illness.

(8) Mr Sharrock has not indicated that there is any more material which should be considered in determining the case. The only records which have been provided to HMRC are bank statements and a few miscellaneous other documents; there appear to be no contemporaneous primary business records.

20 (9) In relation to the wages and sub-contractor payments, HMRC had asked for the names of the individuals to whom payments had been made, but this information had not been provided.

25 (10) Granting permission would be prejudicial to HMRC in their administration of the tax system generally, and in particular would encourage inappropriate and unjustified delays by taxpayers.

### **Discussion and decision**

41. The Tribunal's starting point is that the normal statutory 30 day time limit on appeals serves an important purpose of producing finality and ensuring that HMRC can regard a taxpayer's affairs as closed unless an appeal has been lodged. Therefore,  
30 permission to bring an appeal out of time should not be granted lightly.

42. Against this background, the Tribunal must conduct a balancing exercise, considering *inter alia* the reason for delay, and in particular whether it was intentional; how long the delay has lasted; the effect on either party if permission is allowed or refused, and the merits of the case.

35 43. We agreed with Mr Lloyd that the reasons given for delay were unconvincing, and found as follows:

40 (1) There was no substance in Mr Sharrock's claim that he was prevented from filing an appeal by the volume of documentation: at the stage of notifying the Tribunal of an appeal, all that is required is the grounds of that appeal, and these can be brief points of principle.

5 (2) The claim that “the accountant” (whom we, like Mr Lloyd, assume to be Mr Sharrock) had been prevented by illness from completing the Notice of Appeal, was wholly unparticularised. In this context we accept HMRC’s evidence, which shows Mr Sharrock calling HMRC some five months after the filing deadline and subsequently referring to a two week illness in May/June 2011.

44. We also take into account the fact that the delay was not short, but almost eleven months in duration, without any reasonable excuse for this delay. The application has not been made “promptly” – one of the factors considered by CPR 3.9(1).

10 45. We have considered the merits of the case. Mr Sharrock says that HMRC have not “acted upon” the documents submitted to them. Mr Lloyd says that only bank statements and a small number of other documents were received; that they had all been considered and that HMRC had asked for further evidence, which had not been supplied. Mr Sharrock does not specify which documents had not been properly  
15 considered, or particularised his objections. On the basis of the submissions made to us, we find that the merits of Mr Camps’s case to be weak.

46. We have also considered whether the failure to comply was caused by Mr Camps, or by Mr Sharrock. The CPR indicates that more latitude should be given in the latter situation. However, we agree with Mr Lloyd that Mr Camps was fully aware of the  
20 decision on 10 June 2010; that letter concludes with a clear statement of Mr Camps’s appeal rights and the time limits. We therefore think that this factor is of little weight.

47. Taking all these factors into consideration, in our view it is not in the interests of justice for permission for a late appeal to be given. We therefore refuse the Application.

25 48. 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  
30 “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 Redston**

40 **TRIBUNAL PRESIDING MEMBER**  
**RELEASE DATE: 1 DECEMBER 2011**