



TC01884

Appeal number: TC/2011/03297

Procedure – late application for full findings of fact and reasons for summary decision on default paper case – no good reason given for lateness – approach to extensions of time for such matters – application also received for permission to appeal, together with new evidence – premature, as no full findings of fact and reasons provided – treated as application to set aside original decision – failure to submit full evidence in support of original appeal does not amount to a procedural irregularity which could found such an application – interests of justice would in any event preclude the granting of such an application – application made late in any event and no permission to extend time would be given – factors to be taken into account in considering extensions of time limits under the Tribunal’s procedure rules – applications dismissed

FIRST-TIER TRIBUNAL

TAX

**DAKSHA FRASER (as representative partner for
Starlight Therapy Equipment Partnership)**

Appellant

-and-

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS
KEVIN POOLE (TRIBUNAL JUDGE)**

Respondents

TRIBUNAL:

ORDER

Having received a late application on 21 November 2011 for full findings of fact and reasons for a summary decision issued on 15 September 2011 and for permission to appeal against that decision, the Tribunal has **refused** the application. Full reasons for its refusal are set out below.

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DECISION

Introduction

1. This decision relates to an application made out of time on behalf of the
5 appellant for full written findings and reasons for the summary decision of the
Tribunal released on 15 September 2011.

2. That summary decision (“the Summary Decision”) related to an original appeal
against a late filing penalty of £100 per partner in respect of the late filing of the
partnership return of Starlight Therapy Equipment Partnership for the year ended 5
10 April 2009.

The original substantive appeal and its disposal

3. The essence of the substantive original appeal was as follows. The
representative (who was newly appointed) was attempting to deliver a partnership
return required by section 12AA Taxes Management Act 1970 (“TMA”) on behalf of
15 his client partnership. He did not have the unique taxpayer reference number for the
partnership, as a result of which he was unable to file the return online. In his original
submission to the Tribunal he said he had made “several attempts” to get this number
from HMRC, but without success. In the end, he filed the return in paper form on 29
20 January 2010 (before the online filing date of 31 January 2010 but after the paper
filing dated of 31 October 2009). However the return was unsigned and was therefore
rejected by HMRC, who issued penalty notices imposing a penalty of £100 on each
partner for late filing of the return on 16 February 2010. By 10 November 2010 the
return had still not been properly delivered.

4. On the basis of the evidence put before the Tribunal, the Summary Decision
25 dismissed the appellant’s appeal.

5. The Summary Decision, which was sent to the parties on 15 September 2011,
contained the usual final paragraph, which included the following text:

30 “A party wishing to appeal against this decision must apply within 28
days of the date of release of this decision to the Tribunal for full
written findings and reasons.”

The appellant’s applications

6. The appellant’s representative wrote in to the Tribunal by letter dated 15
November 2011 (received at the Tribunal on 21 November 2011) requesting full
findings of fact and reasons for the decision and also applying for permission to
35 appeal against it.

7. With his letter dated 15 November 2011, the representative also enclosed copies
of a significant volume of further evidence which had not been submitted with the
original appeal (only some of it relevant to the year under appeal, as it seems the

problem recurred the following year and various documents relating to that year were also copied to the Tribunal).

5 8. The time limit for receipt by the Tribunal of the application for full findings of fact and reasons for the original decision was 13 October 2011. It was actually received on 21 November 2011. The application was therefore received 34 days late. The Tribunal therefore responded by letter dated 13 December 2011 to the representative, asking for reasons why the application had been made late.

10 9. By letter dated 20 December 2011 (received at the Tribunal on 23 December 2011), the appellant's representative apologised for the lateness of his application, saying it was due to "tracing relevant papers which were inadvertently misfiled".

The appeals process

10. Under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the TPRs"), the procedure for appealing a decision of the Tribunal is clearly set out.

11. An original decision can take one of three forms:

15 (1) a simple decision, with no supporting findings of fact or reasons (this can only be done with the consent of both parties).

(2) a decision which includes only a summary of the findings of fact and reasons which support it. This is commonly called a "summary decision", and the vast majority of the Tribunal's decisions are issued in this form.

20 (3) a decision which is accompanied by full written findings of fact and reasons which support it. This is commonly called a "full decision". In general, only full decisions are published on the Tribunal's website.

25 12. A decision of the Tribunal can be appealed to the Upper Tribunal, but only with permission (which may be granted either by the Tribunal or by the Upper Tribunal). An appeal is only permitted on questions of law – the findings of fact made by the Tribunal are generally final.

30 13. The TPRs are drafted on the basis that a party cannot properly formulate an application for permission to appeal unless it has first received a full decision. Thus if a summary decision is issued, it will include a standard paragraph which notifies the parties that if they wish to appeal, they must first apply for a full decision. Once that has been issued, they may then apply for permission to appeal against it, stating the grounds of appeal.

35 14. There is a time limit of 28 days after the issue of a summary decision for the Tribunal to receive a request for a full decision (see rule 35(5) TPRs). This is a comparatively short time limit, because all that is required from the party concerned is a simple application in no particular form and giving no reasons. The standard wording included in every summary decision (including the one in this case) includes a specific reference to the 28 day time limit.

15. Once a full decision has been issued, a party has a further 56 days from the date on which it was sent to him to deliver an application for permission to appeal to the Tribunal (see rule 39(2) TPRs). Every full decision issued by the Tribunal includes a standard paragraph which notifies the parties of this time limit. A longer period than 28 days is appropriate because the party must have time to consider the full decision, perhaps take advice on it, and formulate a statement of his grounds of appeal which must be included in any application for permission to appeal.

Treatment of the appellant's applications

Application for full findings of fact and reasons for the decision

16. As mentioned above, no particular format is required for an application for full findings of fact and reasons for a decision. The letter from the appellant's representative dated 15 November 2011 was therefore perfectly satisfactory from this point of view. The only problem with it was that it was received 34 days late.

17. The Tribunal does have a general power to extend time limits, including the 28 day time limit for making an application for full findings of fact and reasons for a decision.

18. I consider the question of whether I should exercise this power later on in this decision, under the heading "Extension of time".

Application for permission to appeal against the summary decision

19. As will be apparent from the summary of the appeals process set out above, this application is incorrect, or at best premature. No application for permission to appeal can be made until a full decision has been issued, and of course no full decision has been issued in this case.

20. As it stands, therefore, this application must be refused.

Power to treat one kind of application as another kind of application

21. However, under rule 42 of the TPRs:

"The Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things."

22. This raises the question of whether the appellant's application for permission to appeal should be treated as being an application of one of the other kinds mentioned in rule 42.

(a) *Treat the application for permission to appeal as an application for a correction?*

23. In rule 42, the reference to a decision being "corrected" clearly refers to rule 37 of the TPRs, which allows for the quick and straightforward correction of a "clerical

mistake or other accidental slip or omission in a decision, direction or any document produced by [the Tribunal]”.

24. I do not consider there is anything in the Summary Decision which could require correction in this manner. Certainly nothing of that type was mentioned in the letter dated 15 November 2011 from the appellant’s representative.

(b) *Treat the application for permission to appeal as an application for a review?*

25. The reference in rule 42 to a decision being “reviewed” clearly refers to rule 41 of the TPRs. Rule 41 provides a mechanism whereby the Tribunal can, if it is satisfied (upon receiving an application for permission to appeal) that there was an error of law in its original decision, take action to correct that error (after seeking representations from the parties). In general, a review can only be undertaken upon receipt of an application for permission to appeal. In effect it represents a “short cut” to allow obvious errors of law to be corrected without the need to subject the parties to the formal appeals process in the Upper Tribunal.

26. I am not satisfied that there was any error of law in the Summary Decision and therefore even if I had power to undertake a review of it, I would not do so. I doubt whether I have the power in any event, as a review may only be undertaken “on receiving an application for permission to appeal” and, as set out above I consider the appellant’s application for permission to appeal in this case to be invalid because no full decision has yet been issued.

(c) *Treat the application for permission to appeal as an application for a set-aside?*

27. In his letter dated 15 November 2011, the appellant’s representative supplied new information (both in the body of the letter itself and in the form of attachments to it) which had not been supplied to the Tribunal in the original notice of appeal or in any other form before the Summary Decision was issued. The letter also said “[w]e would be grateful if the Tribunal can reconsider the matter in the light of the attached documents and information listed as under”.

28. This might be interpreted as a request for the Tribunal to re-hear the appeal afresh on the basis of the new evidence provided. Of course, because this appeal was dealt with as a default paper case and the appellant’s representative has made no request for an oral hearing, this amounts to a request for the Tribunal to reconsider the appeal as a default paper case on the basis of all the papers now supplied, rather than to hold a hearing (or re-hearing) of the appeal.

29. Having decided that the application cannot succeed as an application for permission to appeal, as an application for a correction or as an application for a review, it seems to me that the safest course is to treat it as an application for the Summary Decision to be set aside, which I now turn to consider.

Consideration of set-aside application

30. The TPRs do not contain a general power for the Tribunal to order a re-hearing or reconsideration of an appeal that has been decided.

5 31. However, rule 38 of the TPRs gives a mechanism for decisions to be set aside and remade, in whole or in part, in certain circumstances. The rule provides as follows:

“Setting aside a decision which disposes of proceedings

10 **38.** (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it if –

(a) the Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) is satisfied.

(2) The conditions are –

15 (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party’s representative;

(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;

20 (c) there has been some other procedural irregularity in the proceedings; or

(d) a party, or a party’s representative, was not present at a hearing related to the proceedings.

25 (3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.”

30 32. Before the Tribunal will set aside a decision and re-consider a case, therefore, it must first consider that it would be in the interests of justice for it to do so. Second, it must be satisfied that one of the conditions in Rule 38(2) is satisfied. Third, the party must have made its application so that it was received within the 28 day time limit set out in rule 38(3).

35 33. Clearly in this case, the application was not received within the 28 day time limit applying to set-aside applications (the same as the time limit for applications for full findings of fact and reasons). As mentioned above, it was received 34 days late. I consider the question of extension of this time limit in more detail below under the heading “Extension of time”.

34. Turning to the other requirements of rule 38, I find it convenient to take these requirements in reverse order, that is to say I consider first the conditions in rule 38(2) and then the general “interests of justice” requirement in rule 38(1)(a).

Is any condition in rule 38(2) satisfied?

5 35. The conditions in Rule 38(2) which might most obviously be said to be satisfied in this case are those contained in Rule 38(2)(a) or (b) – on the basis that “a document” (i.e. the new evidence which the appellant now seeks to put forward) “was “not sent to a party” [i.e. HMRC]” or “was not sent to the Tribunal at an appropriate time” (i.e. before the Tribunal was making its decision on the appeal).

10 36. However, I consider that a failure to send the new evidence would need to be in the nature of a “procedural irregularity” before it can satisfy the condition in (2)(a) or (b), because of the wording of paragraph (2)(c), which refers to “some **other** procedural irregularity” in a way which implies that (2)(a) and (2)(b) are considered to be specific examples of procedural irregularity.

15 37. It follows that the condition in rule 38(2)(a) or (b) is only satisfied if the representative’s failure to submit full evidence in support of the original appeal can be regarded as a “procedural irregularity”. Whilst his failure to submit full evidence at the correct time might certainly be considered procedurally inadequate, I do not consider it to have been a procedural irregularity – the question of what evidence
20 should be submitted in support of an appeal is a matter for each party to decide for himself in conjunction with his advisers, and I do not see how a decision to submit what turns out to be inadequate evidence could be regarded as giving rise to a “procedural irregularity”.

25 38. None of the other conditions in rule 38(2) seem to me to be relevant in this case – no other procedural irregularity is alleged and because this was a default paper case, there was no hearing (and therefore there is no question of any non-attendance at such a hearing). I therefore find that none of the conditions in rule 38(2) is satisfied in this case and therefore there is no question of setting the Summary Decision aside, even if the “interests of justice” test in rule 38(1)(a) were satisfied and an extension of the
30 time limit in rule 38(3) were granted.

39. In case I am wrong in my view on rule 38(2), however, I have also considered the “interests of justice” requirement of rule 38(1)(a) and later on in this decision (under the heading “Extension of time”) I consider the question of whether an extension of time should be granted for the time limit laid down in rule 38(3).

35 *Is the “interests of justice” test in rule 38(1)(a) satisfied?*

40. The requirement in rule 38(1)(a) of the TPRs (that it must be “in the interests of justice” to set a decision aside) requires a broad balancing of the various factors involved.

40 41. It might be said that it will always be in the interests of justice to consider new evidence before reaching a final decision, and that argument has some force. It is

however only half the story. It could not be right that a party should be permitted to re-litigate the same dispute repeatedly simply on the basis of bringing forward some new evidence every time the result went against him.

5 42. The function of the Tribunal is to provide efficient resolution of disputes
between taxpayers and HMRC. Whilst some latitude may be allowed for taxpayers
who are inexperienced in presenting their case, it would completely undermine the
Tribunal's function if it were routinely to allow losing parties (whether taxpayers or
HMRC) to re-litigate appeals on the basis that they did not feel they had put sufficient
10 evidence before the Tribunal when it first heard the appeal. Parties should be well
aware that an appeal offers a one-off opportunity to put their case as best they can, not
an opportunity to hope for a successful outcome on the basis of minimal effort and
then make a better second attempt if the first fails, possibly followed by an even better
third attempt, and so on. To put it in layman's terms, an appellant must realise that
15 the appeals system gives him one bite at the cherry unless a very good reason can be
shown why he should have a second.

43. In carrying out the balancing exercise, it seems to me that the starting point
should be that the burden lies on the party seeking to obtain a set-aside to justify its
argument. Bearing in mind that the purpose of the set-aside process is to correct
procedural irregularities, it seems to me that the "interests of justice" condition can
20 only be satisfied if some kind of procedural irregularity is established. I can find no
procedural irregularity in this case, but even if I could, it must be remembered that:

- (1) this is an appeal relating to a late filing penalty of £100 per partner,
- (2) HMRC have already applied a significant degree of effort and expense in
order to address the case that was put forward on behalf of the appellant,
- 25 (3) Even in the new papers submitted by the appellant's representative, the
point that the return was still outstanding as at November 2010 was still not
addressed.

30 44. In the context of such an appeal, it seems to me that the hurdle placed before an
appellant seeking to set the decision aside and to introduce new evidence should be
quite high. I do not consider the appellant can have cleared the hurdle in this case.

45. In summary, quite apart from the point that the relevant application was made
out of time (as to which, see below) I therefore consider that no power to set aside the
Tribunal's existing decision can arise as no procedural irregularity has occurred and in
any event it would not be in the interests of justice to do so.

35 **Extension of time**

Introduction

46. My findings under this heading are relevant to two possible extensions of time.
First, should time be extended for the appellant's application for full findings of fact

and reasons for the decision? Second, should time be extended for the application which I am treating as an application to set aside the Summary Decision?

5 47. The effect of refusing either extension of time, viewed on its own, would be to decide the appeal finally against the appellant. The position is therefore very similar (in practice, identical) to the situation where an appellant wishes to start an appeal after expiry of the statutory time limit for doing so. The case law which governs how judicial discretion is to be exercised in such cases should apply equally to these situations.

Extensions of time – applicable rules and case law

10 48. The Tribunal has power to allow extensions of time, and in an appropriate case it will do so. The relevant time limit is set out in the TPRs (rule 35(5) in the case of an application for full findings of fact and reasons, and rule 38(3) in the case of an application to set aside a decision). The TPRs also contain a general power to extend those time limits (in rule 5(3)(a)). In considering whether or not to exercise that
15 power, it is clear that the Tribunal must observe the “overriding objective” of the TPRs, which is set out in rule 2(1):

“The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.”

20 49. As is set out in rule 2(2)(a) of the TPRs, dealing with a case fairly and justly includes dealing with it:

“in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties”.

25 50. As has been made clear in numerous decisions of the Tribunal, time limits are there to be observed and will only be extended for good reason. In *Ogedegbe v HMRC* [2009] UKFTT 364 (TC), for example, the Tribunal said:

30 “While this Tribunal has got power to extend the time for making an appeal, this will only be granted exceptionally. Moreover, there must be at least an arguable case for making the appeal. In the present circumstances I cannot see that the Appellant has even an arguable case.”

35 51. By way of further example, in *GSM Worldwide Limited v HMRC* [TC/2010/07222, hearing 22 December 2010], the Tribunal said (in the context of an application for permission to make a late appeal under the Value Added Tax Act 1994):

“To allow the application I would have to be satisfied that there were exceptional reasons that, consistent with the obligation to deal fairly and justly with those parties, required me to extend what would otherwise be the statutory 30 days for appealing. I am unable to think of any good

reason that accounts for GSM's delay in lodging the appeal notice. For those reasons I dismiss the application."

52. A similar point was made in *R (on the application of Cook) v GCIT (No 2)* [2009] STC 1212, where Dyson J quoted extensively (with approval) from the earlier decision of Lord Drummond Young in *IRC for judicial review of a decision of the General Commissioners of Income Tax (Hugh Love)* [2006] STC 1218. In particular, he agreed with Lord Drummond Young's statement that:

10 "Section 49 [Taxes Management Act 1970] is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature: the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament."

20 53. Lord Drummond Young went on to examine the factors which he considered to be relevant when considering whether, exceptionally, to grant extensions of time limits for bringing proceedings. He made it clear he did not consider this to be a comprehensive list.

54. He named five factors, which can be summarised as follows:

25 (1) Is there a reasonable excuse for not observing the time limit? So for example, reasonable lack of knowledge of grounds for an appeal might be relevant, as might the fact that HMRC had contributed to the delay.

30 (2) If there was a reasonable excuse for the delay, did the appellant act reasonably promptly after that excuse ceased? For example, if the appellant only belatedly became aware of grounds for an appeal in spite of acting with due diligence, did he act swiftly to bring his appeal?

35 (3) Prejudice to the respective parties by either allowing or refusing permission for the appeal to proceed late. In this context, it is important to note that by definition an appellant will often suffer severe prejudice if he cannot bring his appeal out of time; for example he may suffer severe financial hardship, suffer distress on his property or be made bankrupt. I do not consider that prejudice of this type can be regarded as a decisive factor, otherwise there would be a permanent open door for late appeals in any large and serious case.

40 (4) The public interest. Here, he identified three elements. First, there is a general public interest in the finality of litigation, and this may militate particularly strongly against extending time when the delay has been a very lengthy one. Second, there is the possible effect on other litigation concluded in

the past if similar litigation is allowed to be re-opened. Third, there should be a general policy of respect for time limits laid down by (or, by extension, under the authority of) Parliament.

5 (5) Does the delay affect the quality of evidence available? Loss of documents and fading of witnesses' memories can lead to a serious deterioration in the quality of justice that is possible.

55. As Lord Drummond Young clearly stated, the above list is not intended to be comprehensive. A different range of factors may be in play in each case, and other factors have been taken into account in other cases. For example:

10 (1) in *Pledger v HMRC* [2010] UKFTT 342 (TC), in which the appellant had "deliberately embarked upon a course of delay and obstruction" the Tribunal declined to exercise its discretion to permit a late appeal after a review of the applicable law; the appellant's behaviour towards HMRC was clearly taken into account in reaching that decision.

15 (2) It is also clear from the above passage in *Ogedegbe* that an overall impression of the strength of the appellant's case may also be relevant.

(3) The length of the delay was also a factor in *GSM Worldwide*.

56. I would suggest that the present case throws up another potential factor to take into account, namely the size and seriousness of the matter in question. This could perhaps be regarded as part of the "public interest" consideration – just how much valuable time and resource of both the Tribunal and HMRC should be made available to reconsider an appeal against a penalty of £100 per partner?

57. Whilst all the above can provide pointers as to the issues for consideration in any particular case, it is clear that they are no more than that and the overriding rule remains that the relevant time limit will only be extended if good reason is shown why it should be.

Application of the law to the present case

58. In this case, the Appellants' applications were not received until 34 days after the expiry of a 28 day deadline. All that they were required to do within the deadline was:

(1) In relation to the application for full findings of fact and reasons, send a letter or email requesting them; and

35 (2) In relation to the application which I am treating as an application to set aside the decision, send a letter or email making the application, identifying the procedural irregularity upon which the application depended.

59. Misfiling of papers does not at first sight appear a particularly good or persuasive reason for missing such a straightforward deadline in either case.

60. The cases make it clear that the burden lies on the appellant to show that it is appropriate to extend a time limit, and that such extensions will be “exceptional”.

61. This is not a large and serious matter and enough public resource, both of the Tribunal and of HMRC, has already been devoted to its resolution. I see no good reason why I should exercise my power to extend time in all the circumstances.

Summary

62. The appellant’s application for full findings of fact and reasons for the Summary Decision was made 34 days after expiry of the 28 day time limit.

63. I see no good reason to extend that time limit and therefore the application is invalid.

64. The application for permission to appeal is invalid as it cannot be made until full findings of fact and reasons have been provided.

65. I have treated the latter application, in the alternative, as an application to set aside the Summary Decision.

66. That application was also made late and I see no good reason to extend the time limit for making it. Furthermore, I find it would in any event be without merit as no procedural irregularity in the appeal has been identified which could justify such an application, nor would I consider it to be in the interests of justice to order a set-aside in any event.

67. The appellant’s applications are refused. The Summary Decision is therefore final. Full findings of fact and reasons for that decision do not need to be provided and no application for permission to appeal against it can validly be made.

68. 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.

KEVIN POOLE
TRIBUNAL JUDGE
RELEASE DATE: 13 March 2012