



TC01968

Appeal number: TC/2012/00056

INCOME TAX – appeal against closure notices and assessments – appellant seeking permission of Tribunal to make a late appeal – whether assessments had been served on Appellant - balancing exercise in the light of the overriding objective - balance in favour of HMRC - permission to appeal refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NEIL GALVIN

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE ALEKSANDER
ANTHONY HUGHES**

Sitting in public at Bedford Square, London on 23 March 2012

The Appellant in person

Paul Reeve an officer of HM Revenue & Customs for the Respondents

DECISION

1. This is an application under section 49, Taxes Management Act 1970 for
5 permission to give notice of appeal against a closure notice and discovery assessments
after the expiry of the relevant time limit.

2. We heard evidence from Mr Galvin and had a bundle of correspondence before
us.

Background Facts

10 3. The background facts are not in dispute, and we find them to be as follows.

4. Mr Galvin submitted tax returns for the five years 1999/00 to 2003/04 on 31
January 2007. All the returns were late. An enquiry into Mr Galvin's tax return for
2000/01 was opened on 3 July 2007. Following a review of Mr Galvin's records by
the Inspector and a meeting with Mr Galvin and his accountant on 25 June 2008, the
15 Inspector identified a number of concerns. On 15 July 2008, the Inspector wrote to
Mr Galvin's accountant setting out his concerns and requesting further information
and documents. Various attempts were made, by letter and telephone calls, to obtain
the information, including the issue of information notices under section 19A Taxes
Management Act 1970 ("TMA"). The Inspector spoke to Mr Galvin's accountants by
20 telephone and were told on a number of occasions that the accountants had contacted
Mr Galvin by letter and telephone and had not been able to obtain positive responses
from him. After having chased for more than a year, the Inspector concluded that he
was not going to get a response from Mr Galvin or his accountant, and closed the
enquiry on the basis of the information that he had.

25 5. On 28 August 2009, the Inspector wrote to Mr Galvin and his accountant
outlining his proposals for a settlement. Having received no response, a closure notice
and additional assessments for the years 1999/2000 and the years 2001/02 to 2005/06
were issued on 7 and 8 October 2009. The Inspector did not make adjustments for all
of the issues identified in the letter of 15 July 2008, but only for a limited number of
30 points. These were £6150 of unidentified bankings; £1200 for use of his home; £2350
of payments to his former accountant (these payments had been accrued and claimed
in the prior year, and therefore there was double counting); £7364 for work at one
property (Delvino Road) where the Inspector had identified that the costs claimed
exceeded the amount invoiced; and £5637 for five boiler purchases where there was
35 no corresponding sales invoice. Profits for the year 2000/01 were increased by
£22,701 to £39,104. Adjustments were made by way of discovery assessments for the
other years as the returns for those years had been submitted on the same date with
similar amounts claimed as expenses and returned as profit, and Mr Galvin had not
40 stated that work, bookkeeping or accountancy matters were addressed any differently
in those years.

6. Any appeal against the closure notice and assessments should have been made by 6 or 7 November 2009, that is within 30 days of the date of issue of the closure notice and assessments. No such appeal was made.

5 7. On 9 February 2011, Mr Galvin's accountants wrote to HMRC enclosing some (but not all) of the information that had been requested during the course of the enquiry. This letter was treated by HMRC as a notice of appeal against the closure notice and assessments. As the notice was given after the expiry of the relevant time limits and no reasons were given for the delay, by a letter dated 18 February HMRC declined to accept the late appeal. On 4 March 2011 the accountant's again wrote to
10 HMRC outlining reasons for the delay. On 15 March 2011 HMRC responded, again declining to accept the late appeal. On 2 December 2011, Mr Galvin applied to the Tribunal for permission to give notice of appeal after the expiry of the relevant time limit.

15 8. Mr Galvin explained to the Tribunal that there were several reasons for his failure to respond to HMRC's enquiries and for the delay in filing the notice of appeal. In September 2008, Mr Galvin had a serious operation, which had various long-lasting consequences which he explained to us. Immediately after Christmas 2008, his youngest daughter (who lived with Mr Galvin and his wife) was attacked by her boyfriend, and ended up in hospital. She suffered various problems as a result of the
20 attack, and had to give up A levels. In June 2009 his other daughter was attacked by her partner, and had to move back to live with Mr Galvin. She had a son and was pregnant, and gave birth shortly after moving back. Mr Galvin has a modest two bedroom flat, and from 2009 this was occupied by Mr Galvin and his wife, his two daughters and his two grandsons. In November 2009 Mr Galvin's father was
25 diagnosed with cancer, and had to have a serious operation. The various members of his family relied upon his support, which placed Mr Galvin under severe stress.

9. At about the same time, due to the recession, Mr Galvin's work was dropping off, and he was getting behind with bills, adding to his stress. Mr Galvin admitted to us that his tax affairs got out of hand.

30 10. The first time Mr Galvin became aware that something was seriously amiss in relation to his tax affairs was when he received court papers in the Summer of 2010 relating to the recovery of tax arrears. Mr Galvin immediately contacted his accountant, and asked him to address the tax in issue. Mr Galvin provided some of the information that had been originally requested, and asked his accountant to
35 forward it to HMRC. Mr Galvin only realised later that the accountant had not made contact with HMRC at that point, but was waiting for all the outstanding information so that it could be lodged together. It was not until February 2011 that the accountants supplied to HMRC the information given to them by Mr Galvin. It was this communication that was treated by HMRC as an application to appeal late.

The Law

11. Section 31 TMA sets out a taxpayer's right of appeal against a closure notice or an assessment. The normal time limit for an appeal against a closure notice or an assessment is given by s31A TMA:

- 5 (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) [...]
- 10 (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.

15 12. The provisions relating to late notices of appeal are at s49 TMA:

- (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—
 - 20 (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.
- 25 (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
- (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
30 reasonable excuse ceased.
- (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.
- 35 (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).

13. 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.

14. Rule 2 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 sets out the Tribunal's overriding objective, which is to deal with cases fairly and 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 whether to extend a time limit, the Tribunal is required to seek to give effect to the overriding objective set out in Rule 2.

15. We note that the Taxes Management Act 1970 was amended with effect from 1 April 2009 to take account of the creation of this Tribunal. The Act, prior to its amendment, included similar provisions which gave the General and the Special Commissioners (the predecessors to this Tribunal) discretion to extend the time limit for filing appeals. It is clear, therefore, that case law relating to the exercise of discretion by the appeal Commissioners to extend time limits is therefore relevant to the question whether the Tribunal should exercise its discretion in this case. Guidance on when and whether to allow a late appeal was given in in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 where Lord Drummond Young said:

[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 actions 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. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that

has a significant impact on the quality of justice that is possible and may of itself provide a reason for refusing leave to appeal late.

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 how an element of
10 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
15 must weigh the conflicting considerations and decide where the
balance lies.

16. There has been a difference of approach taken between differently constituted
tribunals in the Tax Chamber of the First-tier Tribunal as to the extent to which the
criteria set out in paragraphs (a) to (i) in Civil Procedure Rule 3.9(1) provide useful
guidance in considering whether to extend time limits or grant permission for late
20 appeals. This has been considered by the Upper Tribunal (Administrative Appeals
Chamber) in the cases of *CD v First Tier Tribunal (CICA)* [2010] UKUT 181 (AAC),
Ofsted v AF [2011] UKUT 72 (AAC), and *Information Commissioner v PS* [2011]
UKUT 94 (AAC) (none cited to us). Given the similar phrasing of the rules relating
to extension of time across all the chambers of the First-tier Tribunal, those decisions
25 are binding upon us. In its decision in *Information Commissioner v PS*, the Upper
Tribunal considered with approval the approach adopted by the Tax Chamber in
Former North Wiltshire District Council v Commissioners for HMRC [2010] UKFTT
229 (TC). There the tribunal accepted a submission that it was not obliged to consider
the criteria set out in CPR 3.9(1) when deciding whether to grant an extension of time
30 to an appellant who has filed an out-of-time notice of appeal:

35 56. [...] the Rules (which govern our procedure) simply empower
us to extend time in appropriate cases and we should exercise the
discretion to do so in order to give effect to the overriding objective
in rule 2(1) of the Rules to deal with cases fairly and justly. We
note, and respectfully adopt so far as it relates to the absence of any
equivalent provision to CPR 3.9(1) in the Rules, the reasoning of
Black J. in *R (o.a.o. Howes) v Child Support Commissioners* [...].

40 57. Exercising our discretion to give effect to the overriding
objective may however, and often will in practice, involve
consideration of some or all of the criteria (a) to (i) set out in CPR
3.9(1).

17. The Tribunal must therefore 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
45 of the case.

HMRC's submissions

18. HMRC initially submitted that Mr Galvin had not provided a reasonable excuse for not making an appeal in time, and has not shown that the appeal was then made without unreasonable delay once the reasonable excuse had ceased. We held that this submission was not relevant to the decision of the Tribunal. Although the conditions in sub-sections 49(5) and (6) apply to HMRC, they do not apply to the Tribunal. The Tribunal's discretion is "at large", and has to be exercised in the light of our overriding objective to deal with cases fairly and justly.

19. HMRC then made the following submissions.

20. First, they submitted that Mr Galvin and his accountant had received the closure notice and assessments. They noted that although neither Mr Galvin nor his accountant had responded to correspondence during the course of the enquiry, none of the letters sent to the accountant and to Mr Galvin had been returned undelivered. The Inspector dealing with the enquiry had telephoned and spoken to Mr Galvin's accountant, who had not complained that letters had not been received. The closure notice and assessments were sent in the post to both Mr Galvin and his accountant, and were not received back as undelivered. HMRC consider it unlikely that both Mr Galvin and his accountant would have failed to receive only post from HMRC. HMRC do not accept that the closure notice and assessments had not been received, they consider it more likely that they, like the preceding correspondence, were ignored. In any event, say HMRC, they are deemed to have been delivered in the ordinary course of post (s7, Interpretation Act 1978 and see also s115 TMA).

21. Secondly, HMRC submit that the reasons given by Mr Galvin for failing to appeal in time do not stand up to scrutiny. The appeal was made 460 days late. The closure notice and assessments were issued on 7 and 8 October 2009. Circumstances arising before that date are not relevant to the reasons for the delay. Only circumstances arising in the period October 2009 to February 2011 are relevant. During that period there had been no contact with HMRC from either Mr Galvin or his accountant. Although HMRC recognise that Mr Galvin had serious problems during part of this period, those problems did not extend over the whole of the period from October 2009 to February 2011. And in any event, those problems did not prevent Mr Galvin from dealing with his tax affairs generally, as he continued to submit tax returns and those tax returns showed that he continued to work during that period.

22. Secondly, HMRC submit that time limits are set by Parliament, and as a matter of public policy should be respected. Our attention was drawn to the remarks of the Tribunal in *Pytchley* [2011] UKFTT 277 and in *Ogedegbe* [2009] UKFTT 364. Time limits exist to provide finality to legal proceedings to both sides, and allow HMRC to move on to other cases, something that is in the general public interest. HMRC have already expended significant energy and expenditure on this case – far more than should have been necessary – and a dilatory taxpayer and agent should not be allowed to have their case reopened unless there are exceptional reasons for so doing – and HMRC submit that there are no such exceptional reasons in this case.

23. Thirdly, HMRC submit that they would be prejudiced if the late application to appeal were allowed. During the course of the enquiry the Inspector offered to contact the owner of the Delvino Road property to ask him what he had paid Mr Galvin for the work done, but Mr Galvin never signed the mandate authorising the Inspector to approach the owner. HMRC contend that they would now face serious difficulties in trying to trace the owner of the property given the time that has elapsed (over ten years) since the work was done.

24. Finally, HMRC submit that Mr Galvin's prospects of success are slim. When HMRC issued the closure notice and assessments, they limited the adjustments that were made, and gave Mr Galvin the benefit of the doubt wherever relevant. HMRC did not assess penalties. Although Mr Galvin has now provided some of the information requested by HMRC during the course of the enquiry, the information provided relates to issues for which no adjustment was made in the closure notice and assessments, and so is irrelevant to his appeal.

15 **Mr Galvin's submissions**

25. Mr Galvin submitted that he had not received the Closure Notice nor the additional assessments. He submitted that the amounts were estimated, and that the missing information has now been provided to HMRC to allow assessments to be made on the basis of actual figures.

26. Mr Galvin submitted that the circumstances that pertained in 2009 onwards placed him under severe stress, and that this provides an explanation for his failure to provide the information requested, and for the delay in submitting his appeal.

27. Finally Mr Galvin acknowledges that he has not helped himself in this matter, but he believes that he has the right to pay the correct amount of tax, and not excessive estimates. He provided the information requested by HMRC to his accountant in the summer of 2010, but the accountant had not done what he had said he would do, and had not forwarded that information on straightaway to HMRC.

Conclusions

28. We find that Mr Galvin received the closure notice and assessments. We agree with the submissions of HMRC that it is unlikely that any disruption to their post would only have affected post from HMRC and not other mail. However section 7, Interpretation Act 1978 deals with the issues conclusively. Both a closure notice and an assessment can be sent by post (TMA s 115(2)). Section 7 states if a document is properly addressed, had the correct postage and was then posted, it is deemed to be delivered unless the recipient can rebut delivery. It reads:

“Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the

contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

29. The question as to what is required before a person can rebut the deeming provision was recently discussed in *Calladine-Smith v SaveOrder Ltd* [2011] EWHC 2501 (Ch) (not cited to us) in reliance on the Court of Appeal authorities of *Chiswell v Griffon* [1975] 2 All ER 665 and *R v County of London Quarter Sessions Appeal Committee, ex p Rossi* [1965] 1 All ER 670. At [26] of *Calladine-Smith* Morgan J said:

“if the addressee of the letter proves on the balance of probability that the letter was not served upon him then that matter has been proved and the section should be applied accordingly. Of course it is not enough simply to assert that someone did not receive the letter; the court will consider all the evidence and make its findings by reference to the facts which are established including issues as to the credibility of witnesses. That is the ordinary way in which a court goes about making findings of fact.”

30. Copies of the assessments and covering letters relating to the closure notice and assessments were included in the bundle of documents before us, and we find that those letters were posted to Mr Galvin at the addresses stated (being Mr Galvin's place of residence). Mr Galvin has not proved to us that they were not received by him, and we therefore find that they were received by him.

31. As regards his application for permission to appeal out of time, we are required to undertake a balancing exercise, considering *inter alia* the reason for delay; how long the delay has lasted; the effect on either party if permission is allowed or refused and the merits of the case.

32. We appreciate that Mr Galvin would have had a difficult time in both 2008 and 2009 – extending into part of 2010. However the dreadful pressures under which both he and his family suffered would have abated in the latter half of 2010, and there is no reason that would have prevented Mr Galvin from attending to his tax affairs in the second half of 2010 and early 2011.

33. We note the long delay between the issue of the closure notices and assessments, and point when Mr Galvin's accountant's wrote to HMRC (that letter being treated as the application to make an appeal). We agree with HMRC that this delay is likely to be prejudicial to HMRC's case given the difficulties that they may have in tracing a witness.

34. Finally, as regards the merits of Mr Galvin's appeal, it is not our role in considering this application to, in effect, hear and decide his appeal. However in undertaking the balancing exercise, the merits of Mr Galvin's are weighed in the balance (so that a truly hopeless case is unlikely to merit permission to appeal out of time. On the basis of the limited information we have, we consider that Mr Galvin's case is not wholly without merit, but it is not a strong one. We consider that it may not be straightforward for him to persuade a Tribunal to overturn the closure notice and assessments, given that HMRC gave Mr Galvin the benefit of the doubt when determining the amounts to assess.

35. Overall we consider that the interests of fairness and justice weigh against giving permission, and we therefore dismiss this application.

36. 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.

NICHOLAS ALEKSANDER

TRIBUNAL JUDGE

RELEASE DATE: 11 April 2012