



TC02245

Appeal number: TC/2012/04431, TC/2012/04432, TC/2012/05530

PROCEDURE – Application for permission to extend the time for appealing – jurisdiction of tribunal – whether taxpayer must apply to HMRC in writing before seeking permission from the tribunal – no, but there must be an oral request – overriding objective – application to extend time granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**ADVANCE CONSULTING (PARTNERSHIP) Appellants
ALAN ROTHWELL
JEAN HUTCHINSON**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public at Manchester on 4 September 2012

**Mr Julian Shaw of Counsel, instructed by Lopian Gross Barnett & Co
Chartered Accountants for the Appellants.**

Mr Philip Jones of HMRC for the Respondents.

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DECISION

Introduction

1. The appellants seek an extension of time in which to appeal against amendments in closure notices issued on 15 December 2008.
2. *Section 31A Taxes Management Act 1970* (“*TMA 1970*”) sets a time limit for giving an appeal to HMRC of 30 days from the date of the closure notice. It also provides that notice of an appeal must be given in writing. It must be given to the relevant officer who for present purposes is the officer who gave the closure notice.
3. There is provision for an appeal to be brought out of time in *section 49 TMA 1970*. By the time the appellants sought to bring their appeals *section 49* had been amended by the *Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009*. Whilst the old provision is to similar effect, it is the section as amended which governs the present application. It provides as follows:

“49(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) 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.

(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).”

Jurisdiction

4. Mr Jones on behalf of HMRC accepts that the Tribunal has a general discretion as to whether or not to give permission for a late appeal. In particular the tribunal is not restricted to the limited grounds upon which HMRC can agree to a late appeal

under *section 49 TMA 1970*. However at the hearing he took a preliminary point that no notice of appeal had been notified to HMRC pursuant to *section 31A TMA 1970*. A notice of appeal has to be in writing and there is no such document in the present appeals. He submits that before the lateness of an appeal can be considered a notice of appeal must be given.

5. I do not accept that submission. *Section 49* applies because no notice of appeal has been given to HMRC within the 30 day time limit. *Section 49(2)* makes provision for the giving of a notice of appeal after the relevant time limit. It does not say that the request to give a late notice of appeal must be in writing. HMRC are however directed to agree to a notice of appeal being given after the 30 day time limit where conditions A-C are met. If HMRC do not agree, for whatever reason, the jurisdiction of the Tribunal is then engaged. Condition A makes clear in terms that making a request for HMRC to agree that a late notice of appeal can be given is a separate step to the giving of a notice of appeal.

6. It is clear that there must be some request to HMRC for it to agree to a late appeal. The jurisdiction of the tribunal to give permission under *Section 49(2)(b)* only arises where HMRC does not agree.

7. I find as a fact that the appellants orally request HMRC to agree that they should be permitted to give notices of appeal after the 30 day time limit. They did so during the course of a telephone conversation between Mr Brimelow, the officer who issued the closure notices, and Mr Haggart of Lopian Gross Barnett, the appellants' accountants. The effect of that conversation was a refusal by Mr Brimelow to accept a late appeal and matters were left that he would provide copies of the closure notices so that the appellants could pursue an appeal to the tribunal. Mr Brimelow did not invite a written notice of appeal or indeed a written request for HMRC to agree that notice could be given after the time limit. In the circumstances no written request was made by the appellants.

8. HMRC say that time should not be extended because none of the conditions has been satisfied. Condition A requires a written request. I accept that there has been no such written request, but as Mr Jones accepted the jurisdiction of the Tribunal to give permission for a late appeal is wider than the jurisdiction of HMRC pursuant to *section 49(3)*. For example the tribunal does not have to be satisfied that the appellant had a reasonable excuse for not giving a notice of appeal in time (Condition B). Similarly, in my view the tribunal can extend time for giving a notice of appeal where Condition A is not satisfied. That is the position on the facts as I have found them. The absence of a written request is a matter I can take into account in exercising my discretion whether to give permission for a late appeal. It is not a pre-condition to the jurisdiction of the tribunal.

Decision

9. The appellants seek permission to make late appeals. They accept that the 30 day time limit to appeal the closure notices expired in January 2009. The notices of appeal to the Tribunal requesting permission to make late appeals were dated 8 March 2012. They pre-date the telephone conversation with Mr Brimelow referred to above, but this was because in or about February 2012 the HMRC Debt Management unit had indicated that the Appellants should appeal to the Tribunal. A period of some 3 years has therefore passed since the time for appealing expired.

10. There have been a number of cases recently before the First-tier Tribunal (Tax Chamber) which consider the nature of the tribunal's discretion to give permission for a late appeal. They have considered, in particular, the extent to which Rule 3.9 of the Civil Procedure Rules ("CPR") should be taken into account by the tribunal in dealing with such applications. See for example *Former North Wiltshire District Council v HMRC* [2010] UKFTT 229 (TC). In that case, having accepted that he was not obliged to consider the CPR, Judge Walters QC said:

" 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 (oao Howes) v Child Support Commissioners (see: [35] and [36] above).

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)."

11. That is the approach I have taken in the present case. I have also assumed that if the appeal is allowed to proceed the appellants at least have a reasonable prospect of success. I set out below the circumstances which I have considered in the exercise of my discretion with a view to dealing with the application fairly and justly.

12. The case put forward by the appellants is that they never received the closure notices dated 15 December 2008. Nor did they receive letters dated 16 October 2008 requiring certain documentation for the purposes of the enquiry which was in progress. The October letters indicated that if the documentation was not provided then closure notices would be issued. There were a total of 6 letters from Mr Brimelow which, assuming they were sent, were not received by any of the Appellants.

13. Mr Shaw pointed out that in the ordinary course he would expect a tribunal to be sceptical of such claims. However in the present case letters apparently sent by Mr Brimelow to Lopian Gross Barnett on 16 October 2008 and 15 December 2008 were also not received.

14. Mr Jones, on behalf of HMRC, described the system for sending out post from local offices of HMRC. Whilst I can accept that there were systems in place, I have no evidence as to whether those systems were working effectively in Mr Brimelow's office in late 2008. I also accept that HMRC's systems show that none of the letters were returned to HMRC as undelivered.

15. There is credible and reliable evidence from Mr Lopian that his firm did not receive either of the letters apparently sent at the same time as the letters and closure notices sent to the appellants. I accept Mr Lopian's evidence and I find as a fact that, for whatever reason, the letters and closure notices dated 16 October 2008 and 15 December 2008 were not received by the Appellants or by Lopian Gross Barnett. No criticism of Mr Brimelow should be taken to be implied by this finding of fact. I have no reason to think that Mr Brimelow acted otherwise than in good faith.

16. Mr Jones pointed out that during the 3 years since the closure notices were issued, the appellants have received self assessment statements of account which include reference to the adjustments arising from the closure notices. I accept that this was the case.

17. HMRC have a legitimate interest in the finality of assessments and there plainly comes a time when in ordinary circumstances they are entitled to assume that the adjustment arising from a closure notice is final. The appellant is 3 years out of time for appealing which I consider to be an extremely significant period. Mr Jones on behalf of HMRC did not identify any further prejudice HMRC would suffer if the appeals are allowed to go forward.

18. I have to ask myself whether there is any good reason for the failure to give notices of appeal during the period from January 2009 to March 2012. Having said that I am not restricted to simply considering whether there was a reasonable excuse for the failure.

19. One might have expected either the appellants or Lopian Gross Barnett to question why adjustments should appear on the statements of account. It is surprising that the adjustments were not questioned, but I also take into account that during the period of 3 years there was a complaint outstanding from the appellants in relation to the conduct of HMRC. I have no evidence as to the nature or substance of that complaint but I was told that it is yet to be resolved. Mr Rothwell had also received advice that he should not provide information and documents to Mr Brimelow until he had a full response to his complaint. His position was acknowledged by Mr Brimelow in a telephone call between the two on 29 August 2008. Matters were left that Mr Brimelow would contact Mr Rothwell again in due course. On 15 October 2008 Mr Brimelow phoned Mr Rothwell to explain that he would be writing to him and that unless supporting documentation was provided closure notices would be issued.

20. On the facts as I find them there was no further contact between Mr Brimelow and Mr Rothwell. One reason for this is that the letters in October 2008 and the closure notices in December 2008 were never received by Mr Rothwell.

21. Taking all these factors into account I would still have expected Mr Rothwell or Lopian Gross Barnett to have contacted Mr Brimelow after a period of apparent silence. In all the circumstances I find that the period of 3 years does count significantly against the appellants in relation to the permission they seek.

22. On the other hand, the fact remains that the appellants did not receive notification of the decisions they now seek to appeal. That is a strong factor in favour of the appellants' applications. The amounts involved are relatively modest in the region of £4,000 to £5,000 for each individual partner. Indeed Mr Shaw suggested this was one reason why the appellants did not act on the statements of account. I also take into account that the appellants have a reasonable prospect of succeeding if the appeals are allowed to go forward. They will suffer prejudice if I do not give permission for a late appeal.

23. I am required to carry out a balancing exercise in dealing with this application and there are factors weighing on both sides. It is finely balanced and it is an exceptional case. Taking all the circumstances into account I consider that it would be unfair to shut the appellants out from pursuing their appeals.

24. For the reasons given above I grant permission for the appellants to give notices of appeal to HMRC out of time. I direct that notices of appeal be given by the appellants to HMRC within 28 days from the date on which this decision is released and I extend the time for doing so accordingly.

25. This decision deals with the present appeals. It will now be a matter for HMRC to give due consideration to the notices of appeal.

26. 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.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 6 September 2012