



TC02492

Appeal number: TC/2011/09501

***INCOME TAX – Extension of time - Application – Appeal made out of time -
Whether extension of time to be granted – Rule 22 of 2009 Rules***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ELLENWELL PROPERTIES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: SIR STEPHEN OLIVER QC
ANTHONY HUGHES**

Sitting in public at London on 1 June 2012

**Philip Brown, counsel, instructed by King & King, chartered accountants, for
the Appellant**

**David Elson, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

5 1. Ellenwell Properties Ltd (“Ellenwell”) applies to appeal out of time against a
determination of the Board of HMRC refusing a claim for relief under paragraph 51
Schedule 18 Finance Act 1998. Relief had been claimed on the basis that Ellenwell’s
tax return for the accounting period ended 31 August 2004 (“the 2004 Period”) had
10 overstated the true liability as a result of an error in its accounts. It was further
claimed that Ellenwell’s tax return for the period ending 30 April 2005 had overstated
the tax liability as a result of the earlier error.

Summary of Case History.

2. Ellenwell’s tax return for the 2004 Period, accompanied by accounts and
computations in support, had been submitted by Ellenwell’s previous tax advisers in
15 August 2006. Following a change of advisers to King & King, Chartered Accountants
and Chartered Tax Advisers, amended returns and accounts were submitted showing a
downward revision of profit by some £260,000 for the 2004 Period. In due course
Ellenwell’s claim was formulated as a paragraph 51 (error or mistake) claim based on
the assertion that the closing stock for the 2004 Period had been overstated. Later it
20 was asserted that stock had incorrectly included assets properly to be regarded as
capital.

3. On 11 November 2010 a formal decision of HMRC was notified to King &
King rejecting Ellenwell’s claim. King & King wrote to HMRC on 17 February 2011
notifying Ellenwell’s appeals against that decision. A letter from HMRC dated 23
25 March 2011 states that – “the company’s late appeal applications against the refusal
of its claims under [paragraph 51] have been admitted”. The letter offers Ellenwell the
opportunity for the decision to be reviewed and explains the options, namely to accept
the offer or to notify the appeal to tribunal; either course must, it is explained, be
taken within 30 days, failing which the appeals will be treated as agreed in the
30 amounts assessed.

4. On 21 April 2011 a Mr S Kalinski of King & King called HMRC saying that he
wanted to make some points about ground rents which he believed had not been
correctly dealt with in the accounts; Mr Kalinski was reminded that the time to ask for
a review had almost ended. The same day Mr Kalinski wrote back stating that he had
35 “found as a regular principle the company always capitalised its ground rents and
brought the item forward in their stock”. He says that his point is based on the
decision of the House of Lords of 1940 in *Utting v Hughes* which, he says, “is that
ground rents must be capitalised at cost whichever is the lower. ...It appears to me
that nil is the cost of production and the ground rents are brought in as income”.

40 5. HMRC wrote back on 27 April 2011. Mr Kalinski was reminded that he had not
asked for a review. The letter explains that the “substantive nature of your new
argument is unclear to [the writer]”. The letter concludes with the words – “I would

be prepared to consider a late request for a review provided any such request is put in writing without any unreasonable delay”.

5 6. On 12 September 2011 Mr Kalinski writes to HMRC. His opening words are – “As explained to you, your letter of 27 April 2011 has never been seen.” His letter goes on to say – “The question of reviews of appeal to the First Tier arises, but we feel that the case can be settled by a meeting between HMRC and the client”.

10 7. HMRC responded at some length on 4 October. The letter states – “If your company would like to take up HMRC’s offer of a review it should expressly say so unambiguously and explain why the request is late. If the company does take up the offer and it is accepted then the Reviewer will be made aware of all the correspondence...”.

15 8. Mr Kalinski writes back on 5 October. He notes that there is “a petition against Ellenwell to be heard on 11 October. His letter ends with the words – “As you know, if we cannot reach agreement, then we must go through the consultative process and then the First Tier”.

9. On 6 October 2011, Mr Kalinski notifies HMRC that, on 4 October 2011, he had requested from Ellenwell’s previous auditors “a breakdown of the closing stock at the year ending 31 August 2005 and the period ended 30 April 2005”.

20 10. HMRC responded on 11 October reminding Mr Kalinski that he was out of time to ask for a review but telling him that if he were to ask for one he should do so “without further delay as the prospects of it being accepted will only diminish with the passage of time”.

25 11. Mr Kalinski writes on 7 November enclosing revised computations and stating – “What we have done is to utilise the same accounts with the adjustment of Utting brought in”. The letter concludes with the words – “...do we proceed to First Tier or Revenue Review? We should agree in advance the winding up petition so that the company’s position is not prejudiced of HMRC”.

12. HMRC replied on 8 November refusing to take further action.

30 13. A Notice of Appeal to the Tribunal dated 14 November 2011, with Mr Kalinski’s name as signatory, informs the Tribunal that the Decision appealed against was given on 9 November 2011 and that no offer of review has been made by HMRC. In the box headed – “Reasons why the appeal is made or notified late” are these words;

35 (1) *“It was appealed that Utting 1940 are applied to the company on the question of ground rents which we believe was wrongly included in closing stock. Amended accounts prepared and submitted to HMRC.*

(2) *Delay due to serious illness of partner concerned being..... . In addition a time at the company officer affected certain information. We would add that the*

director, Mr Grahame Ralph is a paraplegic and difficult to meet to discuss matters as wholly dependent on carers.”

Should time for appealing be extended?

14. The appeal was at least seven months out of time. We consider the letter of 23
5 March 2011 started the 30 day period running. In that letter HMRC made the
unqualified statement that Ellenwell had the options of either accepting the offer of
review or notifying the appeal to the tribunal. The letter states that the 30 day period
referred to in section 49C(8) of Taxes Management Act applies to both option and if
neither option is chosen, the appeals will be treated as agreed in the amounts assessed.
10 No later appeal is available unless the tribunal gives permission. Mr Kalinski took
neither course. Instead he phoned HMRC stating that he intended to raise some points
about ground rents. The letter from HMRC of 27 April does not read as a formal
extension of time to ask for a review or to appeal. It merely states that consideration
would be given to a late request for a review. The same applies to HMRC’s letter of 4
15 October 2011.

15. On 13 April 2012 the tribunal listed the hearing of Ellenwell’s application for
extension of time in which to appeal. The parties were notified by letter of that date
that the hearing would take place on 1 June. On 16 May Mr Kalinski wrote to the
tribunal. He states that – “Leaving aside the impossibility of obtaining any
20 information from the client on his attending First-tier, I would add that there were two
reasons for delay which should allow a late appeal”. The first reason was Mr
Kalinski’s illness which had kept him away from the office from February 2009 until
the end of that year. The second had been that, due to unpaid fees owing to
Ellenwell’s previous accountants, the information of the treatment of ground rents had
25 not come to light until Mr Kalinski had “obtained the opening trial balance as to work
in progress”. The tribunal considered the letter of 16 May and, observing that Mr
Ralph was unlikely to be required to give evidence personally, confirmed that the
hearing would go ahead on 1 June.

16. Should we exercise our discretion and extend time for appealing? We had
30 expected Mr Kalinski to attend the hearing and explain the position. In his absence we
are bound to draw inferences.

17. As we read the correspondence, Mr Kalinski was wholly responsible for the
delay causing the appeal to be out of time. He is a Chartered Tax Adviser and must be
taken to have understood what was written in HMRC’s letters of 11 November 2010,
35 23 March 2011 and 27 April 2011. Moreover he had been warned in the telephone
conversation with HMRC of 21 April of the imminent time limit for asking for a
review.

18. In October 2009 Mr Kalinski had notified HMRC that the profit of Ellenwell for
the 2004 Period should be revised from a profit of £178,667 to a loss of £81,333. He
40 should have had the material to substantiate that; but the signs are that he then had no
specific information about the make-up of Ellenwell’s profit for the 2004 Period.
Then he had advanced the argument in correspondence that the stock figure had
incorrectly included capital assets. Again, he should have had the material to

substantiate that. The impression we get is that he was making speculative and unsubstantiated claims. To an extent the objective of securing that Ellenwell deferred paying the due tax was achieved – at least until insolvency proceedings were commenced in 2011.

5 19. Why did Mr Kalinski leave it until 4 October 2011 before requesting the former
auditors for a breakdown of the closing stock for the 2004 Period? In what way did
the application of “*Utting*” affect the closing stock figures? (We were given no
10 explanation in Mr Kalinski’s letters of 21 April and 12 September 2011 as to what he
understood *Utting* to have decided and the facts of the present case to which it might
apply.) Why, in the Notice of Appeal, was the tribunal informed that the Decision
15 appealed against had been made on 9 November 2011? Why was the tribunal told that
no review had been offered, when it clearly had been offered in writing on two
occasions and reminders given on other occasions?

20. We infer that Ellenwell, its director (Mr Ralph) and its tax adviser (Mr Kalinski)
15 have been spinning things out and prevaricating for at least three years. They have put
up speculative and unsubstantiated arguments to keep HMRC at bay. Nor have they
been frank with the tribunal. Mr Kalinski, as an apparently experienced Chartered Tax
Adviser, may have had explanations for those matters. But, it seems, he deliberately
20 ducked the implications by not coming to the hearing and giving evidence.

20 *Conclusion*

21. For those reasons we are satisfied that it would not be appropriate to extend
time for Ellenwell to appeal. We therefore dismiss the application.

Application for permission to appeal

22. This document contains full findings of fact and reasons for the decision. Any
25 party dissatisfied with this decision has a right to apply for permission to appeal
against it pursuant to Rule 39 of the Tribunal Procedure Rules (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)”
30 which accompanies and forms part of this decision notice.

**SIR STEPHEN OLIVER QC
TRIBUNAL JUDGE**

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RELEASE DATE: 30 October 2012