



TC02771

Appeal number: TC/2012/09777

Application for permission to appeal out of time – appeal against penalties for incorrect or incomplete tax return – whether appeal lodged in time – factors to be taken into account in the exercise of Tribunals discretion to grant an extension of time – application dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LAURA ANNE DAVIDSON

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
HENRY RUSSELL**

Sitting in public at Bedford Square, London on 21 January 2013

The Appellant did not attend and was not represented

**Mr S Farooqui, Higher Officer of HM Revenue and Customs, for the
Respondents**

DECISION

1. This is an application for permission to make a late appeal by Laura Anne Davidson (“the Appellant”) and also a substantive appeal against penalty determinations for the years 2003-04 to 2007-08 inclusive. The penalties arose under s 95(1)(a) TMA 1970 for delivering to HMRC incorrect returns of income and gains. The penalties totalled £4,349.00.

2. The Appellant did not attend the hearing. She had written to the Tribunal explaining that she would be in East Africa at the time of the hearing assisting with Mental Health Legislation. She said she was extremely anxious that there should be some finality to the matter, and asked for the Appeal to be heard in her absence.

Factual background

3. The Appellant is a practising barrister. In 1996 she completed her pupillage, and in 1997 after a short period at the Bar, left to undertake a Masters degree at Cambridge University, followed by a PhD and a number of years teaching undergraduates. She returned to the Bar in late 2003. In her early years of practice she says her earnings were very low, and she could not afford to engage the services of an accountant. She therefore completed her own tax return for the year 2003-04. In early 2005 her Chambers closed, and because she had to return home to Northern Ireland where her mother was very ill, her papers and records were boxed up by the Clerk of Chambers and sent on to her new Chambers. It appears that in the process, some of her personal papers and records may have gone missing.

4. Later in 2005 the Appellant joined new Chambers and engaged the services of a firm of Chartered Accountants. She was informed of the ‘seven-year rule’, under which barristers are taxed on the amounts they receive or the amounts invoiced, whichever they choose. They can continue to do so for any accounting period ending not later than seven years after the date they start in practice (that is the date they are first available for fee earning work). The seven-year period continues to run even if the barrister takes a break from practice. Barristers must go on to the “true and fair” basis once the seven-year period elapses. The Appellant took the view, following advice from her accountants, that the seven-year period started in 2004 when she returned to the Bar from academia, not in 1996 when she was first called to the Bar.

5. Enquiries were opened into the Appellant’s 2004-05 tax return in January 2007, her 2006-07 tax return in April 2009 and her 2007-08 tax return in January 2010. Following a review of the Appellant’s business records the enquiry officer formed the view that the Appellant’s 2004-05 returns were incorrect and incomplete. Errors were found in respect of understated fees, the basis of calculation of her fee income, and the overall calculation of rents received from a property owned by the Appellant. Although HMRC could not open an enquiry into the Appellant’s 2003/04 return after 31 March 2006, because they discovered that tax may have been underpaid for that year, they were entitled to make a discovery assessment under Section 29 TMA.

6. It was subsequently established that the Appellant's total income had been understated for the years in question as follows:

2003-04 – understated income £6,198.00 – tax and NIC difference £1,756.80
2004-05 – understated income £10,436.00 – tax and NIC difference £2,886.80
5 2005-06 – understated income £18,383.00 – tax and NIC difference £6,395.09
2006-07 – understated income £15,000.00 – tax and NIC difference £6,123.57
2007-08 – understated income £591.00 – tax and NIC difference £234.61

7. The Appellant says that the understatement of her income arose mainly because
10 of her mistaken belief that she was only at the beginning of the seven-year period in 2003/04, and also because information relating to professional fees received and also rental income and expenditure on a property she owned when had gone astray when she moved chambers. She says it was because of this that mistakes must have been made in her income tax returns for the years in question.

15 8. In December 2010 the figures referred to in paragraph 5 above were agreed, and HMRC accepted that there was no suggestion the Appellant was guilty of any impropriety and that the incorrect or incomplete returns had arisen because of the mistakes she had made. HMRC issued closure notices for the years under enquiry
20 and raised discovery assessments for the years 2003-04 and 2005-06 in October 2010 and May 2011 respectively under s 29 TMA 1970. The Appellant did not appeal these further assessments and amendments within the statutory time period and as a result they became final and conclusive.

25 9. Penalty determination were issued to the Appellant on 10 May 2011 at 25% of the additional tax and Class 4 NIC due for the years in question, because her returns for the years in question were incorrect and incomplete as a result of negligent conduct on her part. The penalties imposed were:

2003-04 - £439.00
2004-05 - £722.00
30 2005-06 - £1,599.00
2006-07 - £1,531.00
2007-08 - £58.00
Total £4,349.00

35 HMRC say that appropriate levels of abatement had been applied to the penalties and explained to the Appellant.

40 10. The Appellant appealed against the penalty determinations on 12 May 2011. A review was offered which she accepted. A review was concluded on 2 December 2011 upholding the decision to charge the penalties.

11. The penalties for the years 2003-04 and 2005-06 were settled from credits on the Appellant's self-assessment account, but the penalties for 2006-07 and 2007-08 remain outstanding. They were informally postponed because the Appellant disputed all of the penalties.

12. HMRC informed the Appellant in its review letter of 2 December 2011 that if the Appellant did not agree with their conclusions she could ask an independent Tribunal to decide the matter, and in that event she had to write to the Tribunal within thirty days of HMRC's letter. HMRC gave the Appellant details of the website of HM Courts and Tribunals Service and also its telephone number. She was also informed that if HMRC did not hear from the Appellant and she did not appeal to the Tribunal within thirty days of the requisite period, HMRC would assume that she did not intend to appeal the decision and the matter would be treated as settled.

13. The Appellant says that she received HMRC's letter of 2 December 2011 a few days before she was due to take her annual leave and therefore immediately completed her notice of appeal and sent it to HM Courts and Tribunals Service. She says that at the time she was very busy and contrary to her usual practise, did not retain a photocopy of the notice of appeal. She did not notify HMRC that she had lodged an appeal with the Tribunal service.

14. On 23 January 2012 HMRC wrote to the Appellant reminding her that the postponed penalties had not been brought into charge to allow her the opportunity of referring her appeal to the Tribunal, and also asking for confirmation that she had lodged an appeal. On 29 February 2012 the Appellant replied to HMRC to say that she had appealed to the Tribunal, but she had not heard anything.

15. On 16 August 2012 the Appellant wrote to the Tribunals Service "to enquire about the delay in hearing my appeal.". On 11 September 2012 the Tribunals Service replied that there was no trace of the Appellant's notice of appeal having been received. The Appellant was supplied with a notice of appeal form, which she duly completed and returned to the Tribunals Service, dated 17 October 2012.

Relevant legislation (relating to the imposition of the penalties)

16. The penalties imposed by HMRC arose under s 95(1)(a) Taxes Management Act 1970 which states –

Section 95(1) "Where a person fraudulently or negligently

(a) delivers any incorrect return of the kind mentioned in section 8 or 8A of this Act he shall be liable to a penalty

(b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction or relief in respect of income tax or capital gains tax, or

(c) submits to an Inspector or the Board or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax

he shall be liable to a penalty ..."

17. The penalties were determined in accordance with the legislation at s 100(1) Taxes Management Act 1970 which states –

5 Section 100(1) “Subject to subsection (2) below and except where proceedings for a penalty have been instructed under 100D, an officer of the Board authorised by the Board for the purpose of this section may make a determination imposing a penalty under any provision of the Taxes Act and setting it at such an amount as, in his opinion, is correct or appropriate.”

The Parties Submissions

18. In her letter to the Tribunal the Appellant asked the Tribunal to take into account “..the exceptional, complex and difficult circumstances...” in which she had found herself between 2003 and 2006.

10 19. Mr Farooqui for the Respondents said that the Appellant had not appealed the assessments which gave rise to the penalties and that they had acted entirely in accordance with relevant legislation in imposing the penalties. Penalty abatements totalling 75% had been applied. He said that the Appellant was under a statutory duty to file a complete and accurate return of her income and gains and to keep such records as where necessary to enable her to do so. Her fee income was understated by 15 considerable amounts in the years in question and in 2004/05 details had been provided relating to ‘barrister expenses’ were, in fact, incorrect as they were ‘letting expenses’ which related to her property for the years 2004/05 to 2006/07.

20 20. Mr Farooqui said that guidance issued with tax returns to barristers, explained clearly and simply how the seven-year rule operated. The Appellant was also aware that the Bar Council of England and Wales issued guidance notes regarding the taxation of barristers and advocates which fully explained the seven year rule, and in particular that barristers must go on to the ‘true and fair’ basis by the seventh year practice. Mr Farooqui said that it was clear from the guidance that the seven-year 25 period began from the date the Appellant started in practice and that date was when she first made herself available for fee earning work; that is in 1996/07 when she was first called to the Bar. The seven-year period continued even though she took a break from practice. Moreover at no time had she contacted HMRC for advice.

Conclusion

30 21. Under Rule 5(3)(A) of the Tribunal Procedure (First tier Tribunal) (Tax Chamber) Rules 2009, the Tribunal has a general power to allow extensions of time. Under Rule 2(1) the overriding objective is to deal with cases fairly and justly. This involves a balancing exercise having regard to the respective interests of the parties. Having regard to the correlation between the overriding objective with that in Rule 35 1.1 of the Civil Procedure Rules in the exercise of its discretion, the Tribunal may have regard to the list of factors (set out in CPR 3.9 (1)) to be considered by a Court when considering its discretion to extend any time limit. So far as material in this case those factors are:

- (a) the interest of the administration of justice;
- 40 (b) whether the application for relief has been made promptly;
- (c) whether the failure to comply was intentional;

- (d) whether there is a good explanation for the failure;
- (e) whether the failure was caused by the party or his representative;
- (f) the effect which the failure to comply had on each party;
- (g) the effect which the granting of relief would have on each party; and
- 5 (h) whether the Appellant has a prima facie case

22. It is established law that time limits relating to the bringing of appeals must be observed and will only be extended for good reason. An extension will therefore only be granted exceptionally. Moreover, in addition to the factors outlined above, there must be at least an arguable case for making the appeal.

10 23. The burden of showing why the Tribunal should exercise its discretion to permit a late appeal falls on the Appellant. The Appellant argues that she made her appeal to the Tribunal within the necessary thirty-day period, but that her appeal notice must have been lost, either in the post or by the Tribunal Service. HMRC say that even if the Appellant had lodged her appeal timeously, as claimed, she must have known
15 that there was a problem in January 2012, having had no response to her notice of Appeal. She nonetheless did nothing until her letter to the Tribunal Service dated 16 August 2012.

24. It is a taxpayers responsibility to ensure that the tax return they file is correct and complete. The Appellant says she took professional advice from her accountant
20 in connection with the seven-year rule and this may have been inaccurate. However it is not known what information the Appellants accountants were given and why they may have concluded that the seven-year period did not start until 2004. In any event the responsibility for the information contained in the Appellant's returns remained with her.

25 25. The Appellant is unable to provide evidence that she lodged an appeal with the Tribunal Service within the necessary thirty-day period. HMRC had asked the Appellant to advise them if she decided to appeal the penalties but she did not do so. Even though the Appellant was supplied with a new notice of appeal by the Tribunal Service on 11 September 2012 she did not complete and return this to the Tribunal
30 until 17 October 2012

26. Whether or not the Appellant appealed in time, we take the view that she does not, in any event, have prima facie grounds to appeal the penalties. She returned an incorrect or incomplete income tax return for the years in question as a result of negligence on her part. Negligence is not defined in legislation but has a normal and
35 everyday meaning. The Appellant's fee income was significantly understated in 2003/04 and in 2004/05. Also her 2004/05 barrister expenses were incorrectly stated. She failed to keep adequate records to enable her to make accurate returns. Even if some of the Appellants earlier records had been mislaid, there would have been ways and means of being able to reconstitute some or all of those records. In fact, much of
40 the information needed to provide correct and complete returns was eventually furnished to HMRC in 2007. Therefore, there was no reason why she could not have

obtained and provided the same information at the time she completed her 2003/04 and 2004/05 tax returns.

27. In all circumstances the Tribunal refuses the Appellants application for permission to appeal out of time.

5 28. 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
10 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.

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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 1 July 2013