



**TC02956**

**Appeal number: TC/2012/06711**

*Income Tax– completion notice and discovery assessments – should appeal  
be permitted to proceed out of time - no*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DENNIS MCLOUGHLIN**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE ALISON MCKENNA  
                         JOHN ROBINSON**

**Sitting in public at Bedford Square on 3 October 2013**

**The Appellant appeared in person**

**Mr O'Grady of HMRC appeared for the Respondents**

## DECISION

1. This matter concerns an application by the Appellant for his appeal against a Closure Notice and four Discovery Assessments to proceed out of time. The Closure Notice was issued on 4 December 2009 and the Assessments were issued on 5 August 2009. The appeal should have been made within 30 days but in respect of the Discovery Assessments it was made 2 years and 75 days out of time and in respect of the appeal against the Closure Notice it was made one year and 319 days out of time. HMRC objects to these appeals being heard out of time and so the matter has come to the Tribunal to decide.

2. The underlying dispute between the parties concerns Mr McLoughlin's P11D form which did not include a fuel benefit in respect of a company car. The Tribunal was told that Mr McLoughlin had not objected to the HMRC officer's notes following a visit to the company in which he had accepted that he had personal use of the vehicle out of work hours. Mr McLoughlin has since stated that this was an error and that he had in fact only used the car for business purposes.

3. Mr McLoughlin represented himself in this application and the Tribunal was very sorry to hear from him that he has been receiving treatment for lung cancer. He told the Tribunal that his cancer was first diagnosed in February 2011. He said he had for many years relied upon an accountant (Mantz & Co) to deal with HMRC about his tax affairs but that the accountant had failed to appeal in time. He confirmed that he had passed all correspondence from HMRC to the accountant. After his diagnosis, Mr McLoughlin had received assistance from his Macmillan Nurse, who had helped him apply to the Tribunal.

4. Mr O'Grady, on behalf of HMRC, took the Tribunal through a very detailed history of correspondence and records of telephone conversations with Mr McLoughlin. He submitted that all documents had been sent to the correct correspondence address and that Mr McLoughlin's documented telephone calls to HMRC showed that he was aware of the discovery assessments from as early as July 2010. It is clear from the copy correspondence before us that the right of appeal against the assessments and the ability to apply to the Tribunal out of time was brought to Mr McLoughlin's attention on numerous occasions. Mr O'Grady submitted that Mr McLoughlin's reliance on his accountant to make the appeal for him did not constitute a reasonable excuse for the late appeal. He further submitted that allowing this matter to proceed out of time would prejudice both HMRC and the public interest.

### *The Law*

5. The Tribunal may, by virtue of rule 5 (3) (a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, allow an appeal to proceed out of time if it decides to exercise its discretion so to do. In considering whether this application should be permitted to proceed out of time, we have had regard to Mr Justice Morgan's decision in *Data Select v HMRC* [2012] UKUT 187 (TCC), in which he

held that the correct approach to an application to proceed out of time was for the Tribunal to consider the overriding objective of dealing with cases fairly and justly, and all the circumstances of the case, including the matters referred to at CPR rule 3.9, before balancing the various factors and reaching its conclusion.

5 6. In *Data Select Morgan J* commented at [34] that

10 *“Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay?(3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those*

15 *questions.”*

7. We note that the purpose of time limits is to bring finality to proceedings and to enable the efficient organisation of the Tribunal system. In the context of this appeal, we note the public policy requirement for HMRC to be able to enforce assessments and collect tax, unless there is a good reason for matters to be re-opened after the

20 period for appealing has passed.

8. As noted above, the delay in making this appeal was a long one. The availability of the evidence on which the appeal will turn after so long a period of delay is another relevant factor in the exercise of our discretion.

25 9. Turning to the reason for the delay, Mr McLoughlin explained that every time he received a letter from HMRC he gave it to the secretary at work, who passed it on to the company’s accountant. He said he did not think that the company accountant was also his personal accountant, but HMRC had been prepared to discuss Mr McLoughlin’s tax affairs with him and so it appears that he was treated as such. Mr

30 McLoughlin explained that he was not familiar with the tax rules and did not deal with the paperwork himself as he did not understand it. His business had been in scaffolding and he said he had worked hard to keep it afloat. The business has now ceased trading.

10. We must consider whether Mr McLoughlin’s total reliance on a professional adviser provides a good explanation for the delay in making his appeal. In general, we would expect a tax payer to pay reasonable attention to their own affairs, even where they have a professional adviser acting for them. We are most sympathetic to Mr McLoughlin with respect to his illness and if that was the sole reason for the late appeal it may very well be that we would allow him to proceed out of time. However,

35 we note that his diagnosis was made some fifteen months after the time limit for appealing had expired, so we must consider whether he behaved reasonably in the period before his diagnosis. During the period from August 2009 until the application to bring a late appeal was first made by the Accountant to HMRC in November 2011,

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we find that Mr McLoughlin failed to behave in the manner of a reasonable tax payer and to take reasonable steps to progress his tax affairs. He simply passed on all correspondence to a person who did not deal with it, and continued to do so after it must have been obvious that the Accountant was not taking the relevant steps to assist in his case. We conclude that that is not a sufficient excuse for us to allow a late appeal, taking into account the opposing interests of HMRC, the public interest, and the questionable prospects of a Tribunal being able to refer to all the relevant evidence and make findings of fact after so long a period of time. We accept that the consequence of our decision for Mr McLoughlin is that he will not now be able to appeal the underlying issue about the fuel benefit. We are not in a strong position to assess the likelihood of success of that appeal if it were allowed to proceed, but we note that the Mr McLoughlin would bear the onus of proving his case. It may well prove difficult for him to produce business records from a company which has ceased to trade and we note that no records to support Mr McLoughlin's case have been produced to HMRC in over five years' correspondence to date. In those circumstances, his prospects of success do not seem to be high.

11. In all the circumstances, we have concluded that this matter should not be permitted to proceed out of time.

12. 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.

**ALISON MCKENNA  
TRIBUNAL JUDGE**

**RELEASE DATE: 17 October 2013**