



TC03965

Appeal number: TC/2013/08106

INCOME TAX – Notice of Appeal; late appeal; application to make appeal out of time; reasons for lateness; reliance on third-party accountant; discretion of the tribunal; the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, as amended, Rules 5(3)(a), & 20(4); application refused.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TIAN CHAI CHEN

Appellant

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC, FCIarb

Sitting in public at George House. 126 George Street, Edinburgh on 23 June 2014

Elyas Khamisha, accountant, Glasgow for the Appellant

Linda McGuighan, Officer of HMRC, for the Respondents

DECISION

Introduction

5 1. This is an application to make an appeal out of time. The appeal relates to a
closure notice dated 2 November 2011 relating to the tax year 2008/09, and
assessments (two) relating to the tax years 2007/08 and 2009/10 all dated
2 November 2011, three penalty notices dated 21 June 2010, 21 October 2010 and
1 February 2001 (under Finance Act 2008 Schedule 36), a penalty determination
10 dated 7 November 2011 relating to the tax year 2007/08 (under TMA 1970 s95(1)(a)),
and two penalty assessments relating to the tax years 2008/09 and 2009/10 (under the
Finance Act 2007, Schedule 24). They amount in total to about £74,000 of which
about one half is attributable to penalties. The Notice of Appeal was lodged about
two years late.

15 2. A Hearing took place at George House, Edinburgh on 23 June 2014. The
Appellant (Mr Chen) was represented by Elyas Khamisha, a Glasgow accountant.
HMRC were represented by Linda McGuighan, a higher officer from the appeals and
review unit.

20 3. Neither party led formal evidence. Mr Chen was present (along with his wife)
and provided information from time to time during the Hearing. HMRC produced a
bundle of documents. Mr Chen did not produce any documents.

4. Mr Chen claimed that he could not read, write or speak English. Accordingly,
the Tribunal provided the services of an interpreter, Mr Jihe Jong, who translated the
proceedings as they occurred.

25 Grounds of Appeal

5. Mr Chen contends that HMRC's assessments were based on the business of a
third party and that the Tribunal should *look into this and review the case*. The
liability would have been *a lot less* if HMRC had known that Mr Chen was not
running the business and was not involved in it. Cash sales and credit card payments
30 did not go into his business account in September 2011. The grounds also assert that
Mr Chen left the business in June 2011.

6. The grounds of appeal offer no explanation for the lateness of the appeal. At
the Hearing, Mr Khamisha explained that Mr Chen, relied totally on his former
accountant, a man named Tsui from Edinburgh and really did not know what was
35 going on until after a charge for payment had been served by Sheriff Officers in
September 2013. That triggered further communication with HMRC and led to the
lodging, in November 2013, of the Notice of Appeal to which the present application
relates.

7. On the merits, the essential ground of appeal seems to be that the assessments
40 are excessive, overestimating turnover and underestimating outgoings. HMRC are

said to have based their assessments on figures for a business operated by a third party and not by Mr Chen. No other figures have been offered by Mr Chen. No documents have been produced and it is not all clear how Mr Chen will be able to show that the assessments are excessive or on what basis they should be re-calculated.

5 **Factual Background**

8. Mr Chen owns premises 35-37 High Street, Dunblane. It is subject to a standard security. Subject to one period which I shall mention below, he accepts that he has carried on business there as a Chinese restaurant and take-away since at least 2006. He has a large bank loan of some £110,000, secured by the premises. Between
10 about 2006 and 2011, his business accounts, VAT and tax were handled by Mr Tsiu. He prepared VAT calculations. Mr Chen paid the VAT regularly although there are currently about eight returns outstanding.

9. Mr Tsiu also prepared tax returns for the years 2008/09 and 2009/10 which Mr Chen submitted to HMRC. These returns contained estimated figures. Why they
15 did so and on what information and documentation they were based was not disclosed at the Hearing.

10. I raised the question of how Mr Chen dealt with suppliers, bills and accounts and the usual array of matters with which an ordinary trader has to deal in the course of carrying on business. He said that he always employed someone who could speak
20 and read English; and that that person read his mail to him. He also said that every six months or so he passed all correspondence to his accountant, Mr Tsiu, in whom he had complete trust and who advised him that all was well and not to worry.

11. Mr Chen submitted Self Assessment Returns for the tax years 2007/08, 2008/09 and 2009/10. As already noted, the returns for 2008/09 and 2009/10 contained
25 estimated figures. Accordingly, on 12 March 2010, HMRC wrote to Mr Chen stating that they were opening an enquiry into his 2008/09 return. Information was requested but not produced. This was followed by a formal notice under FA 2008, Schedule 36 paragraph 1, on 19 April 2010 to produce information. No information was produced and, on 1 June 2010, a penalty warning notice was issued, followed by a penalty
30 notice on 21 June 2010 (in the sum of £300). No information was produced and a further penalty notice was issued on 21 October 2010 (in the sum of £2260). These notices were addressed to Mr Chen and sent to his premises at Dunblane. HMRC did not have authority to issue them direct to Mr Tsiu although there appears to have been some telephone contact with him seeking information and warning of the
35 accumulation of penalties. In the absence of the production of the required information, a further penalty notice was issued on 11 February 2011.

12. HMRC visited the premises on 23 March 2011. They were unable to speak to Mr Chen, even although he lived in a flat above the restaurant premises. No progress was made. The papers before the Tribunal included a typewritten note of that visit.

40 13. A further visit took place on 9 September 2011. According to HMRC, Mr Chen was present and was able to answer the HMRC officer's questions with the assistance

of an individual who was working there who spoke better English than Mr Chen. A typewritten note of the visit, prepared by HMRC, disclosed that its purpose or one of its purposes was to *cash up the till*. The note records, in summary, that it was difficult to identify basic details about the running of the business, its employees and business records. Mr Chen produced a document which bore to state that Mr Chen had sub-let
5 the premises to a Mr Guoping Jiang from 19 June 2011 until 18 June 2013. More importantly, the note records that the HMRC officer stressed the importance of co-operation and the possibility of penalties in the event of failure to do so.

14. According to HMRC records, a telephone conversation took place with
10 Mr Chen's former agent on or about 5 October 2011, who advised HMRC that Mr Chen had purchased the business premises in 2006, that they were leased but that Mr Chen continued to be present on the premises.

15. No further information was produced. HMRC closed their enquiry on 2 November 2011. The closure notice dated 2 November 2011, assessed additional
15 tax of £16,364 for the tax year 2008/09. On the same date assessments were raised in the sum of £18,660 for the tax year 2007/08 and the sum of £18,762.65 for the tax year 2009/10. On 7 November 2011, a penalty determination in the sum of £11,196, was issued for the tax year 2007/08. On the same date penalty assessments were issued in the sums of £10,389 and £12,148 for the tax years 2008/09 and 2009/10. No
20 steps were taken at that stage to appeal the assessments or penalties. The closure notice and the notices of assessment give information as to what a taxpayer should do if he disagreed with HMRC's decisions.

16. HMRC's correspondence file disclosed that in January 2012, Mr Chen's address for correspondence was the Dunblane premises.

25 17. On 16 October 2013, HMRC wrote to Mr Chen at the Dunblane premises informing him that HMRC had applied to the Sheriff Court for a summary warrant. A charge was served by sheriff officers on 12 November 2013 in the total sum of £74,754.

Penalties

30 18. HMRC justified the penalties under s95 TMA on the basis that Mr Chen had negligently delivered an incorrect return for the tax year 2007/2008. HMRC justified the penalties under Schedule 24 FA 2007 on the basis that Mr Chen deliberately delivered incorrect returns for the tax years 2008/2009 and 2009/2010. The penalty determination and penalty assessments were issued on 7 November 2011. The basis
35 on which they were calculated was set out in HMRC's letter dated 3 November 2011 to Mr Chen, sent to the Dunblane premises.

19. In calculating the penalty determination for the tax year 2007/2008, HMRC have allowed an abatement of 40%. For the penalties assessed for the tax years 2008/2009 and 2009/2010, HMRC have allowed an effective reduction of 5.25%.
40 This is largely based on Mr Chen's lack of cooperation and failure to provide adequate explanations or assistance in quantifying understated income.

Internal Appeal

20. Mr Chen appealed *internally* to HMRC on 24 October 2013, but HMRC rejected the appeal on the ground that it was outwith the 30 day time limit. On 19 November 2013, Mr Chen appealed to this Tribunal.

5 **Submissions**

21. Mr Elyas Khamisha, on behalf of Mr Chen, explained that Mr Chen relied entirely upon his former accountant, Mr Tsui, who had premises in Edinburgh. Mr Tsui acted as Mr Chen's accountant between about 2006 and 2011. It is unclear who, if anyone, represented Mr Chen between 2011 and 2013 when Mr Khamisha was appointed. Every six months or so, Mr Chen passed all correspondence to Mr Tsui (Mr Chen cannot read English). Mr Chen trusted Mr Tsui to look after his affairs for him. Mr Tsui told Mr Chen not to worry. During that period, Mr Chen regularly accounted to HMRC for VAT although there are about eight VAT returns currently outstanding. Mr Tsui is still in business as is Mr Chen. Mr Khamisha has been in touch with him and requested Mr Chen's bank statements for the last five years. Mr Khamisha confessed that he did not know what records Mr Chen has or had apart from bank statements or what was sent to Mr Tsui. Some but not all documents have been passed by Mr Tsui to Mr Chen.

22. Mr Khamisha informed the Tribunal that Mr Chen always employed a bilingual member of staff who opened and read the mail to him. The business was sublet between June 2011 and October 2012.

23. As for the substantive grounds of appeal, Mr Khamisha submitted that HMRC figures were too high and do not take account of outlays. He did not dispute the factual background which I have set out above.

24. Ms McGuighan, on behalf of HMRC acknowledged that the Tribunal has a wide discretion, but submitted that Mr Chen had not demonstrated that there was a reasonable excuse justifying the late appeal. A reasonable excuse was an unforeseeable event, and reliance on the third party was not a reasonable excuse. The penalty notices made it clear that action was required. Mr Chen was aware of the situation from at least March 2010 and had to take responsibility for his own tax affairs. She drew my attention to the cases in the HMRC bundle which included *Ogedegbe v HMRC*¹ *O'Flaherty v HMRC*². She subsequently referred to *Mandagie v HMRC*³, *Conquer v HMRC*⁴ and *Bushell v HMRC*.⁵

¹ [2009] UKFTT 364 (TC)

² [2013] UKUT 0161(TCC)

³ TC/2012/08864, TC/2012/08866 22/11/13

⁴ TC/13/06345

⁵ [2010] UKFTT 577 (TC)

25. As for the merits, the assessments were made to best judgement on very limited information. Mr Chen has still not produced any adequate records.

Decision

5 26. The Tribunal has a wide discretion in relation to applications to extend the time for lodging a notice of appeal. The statutory period is 30 days from the decision being challenged. Here, that means that the present appeal is over two years late.

10 27. The general approach to such discretionary decisions is set out in *A G for Scotland v Gen Comms for Aberdeen City*.⁶ The court there observed that the facts typically relevant to the question whether proceedings should be allowed beyond the time limit included (i) whether there was a reasonable excuse for not observing the time limit, (ii) whether matters have proceeded with reasonable diligence once the excuse has ceased to operate, and (iii) whether there is prejudice to one or other party if the appeal proceeds or is refused. The court also noted that the various considerations often conflicted; they had to be weighed and a decision taken as to where the balance lies.⁷ That approach was favourably commented upon in *Leeds City Council v HMRC*.⁸ It is also consistent with the approach in *O'Flaherty v HMRC*.⁹

20 28. Later authorities, particularly in England, have emphasised the need to conduct litigation efficiently and at proportionate cost and that, generally, compliance with procedural rules should be enforced. However, I am not so much concerned with the conduct of litigation and its efficiency and cost but whether there should be any litigation at all.

25 29. Reliance on a third party is capable of constituting a reasonable excuse for failure to comply with a statutory time limit.¹⁰ However, I agree that a taxpayer has a general obligation to act with reasonable prudence and diligence in dealing with his tax affairs.¹¹

30 30. I consider that some care should be taken to remember that the discretion to allow a late appeal is wider than the discretion exercised when determining whether circumstances constitute a *reasonable excuse* for the purposes of specific legislation. The reasonableness of the excuse or whether it is exceptional is but one factor to take into account albeit an important one.¹²

⁶ 2005 SLT 1062 [2006] STC 1218

⁷ Paragraphs 22-24. *Conquer* paragraph 47 (a late appeal case)

⁸ [2014] UKUT 0350 (TCC) paragraphs 19 and 16 ([36])

⁹ [2013] UKUT 0161 (TCC) paragraphs 26-29

¹⁰ See *Conquer* at paragraph 54; and *Rowland v HMRC* [2006] STC 536

¹¹ *Conquer* at paragraphs 55 and 62

¹² *O'Flaherty* at paragraph 36

31. With regard to the authorities cited, the facts in *Mandagie*, were most unusual. The tribunal concluded that the appellant should not have relied on the accountant, whose conduct and evidence were criticised. The tribunal found that the appellant should have known that matters had gone seriously awry from an early stage and that
5 the appellant ought to have taken action himself. It was the appellant's obligation to act with reasonable prudence and diligence dealing with his tax affairs. The evidence of his dealings with the accountant was inherently inconsistent and lacked credibility. The tribunal concluded that it was not fair or just to allow the applications for the appeal is to be admitted out of time.

10 32. Of more interest is *Siobhan Helena Heaney Irving*¹³, where a statutory penalty was imposed for the failure to file a self-assessment tax return. The failure was caused by the appellant's reasonable and genuine reliance on her accountant. From a review of certain authorities in that case, it seems that there may be exceptional circumstances constituting a reasonable excuse for failure to file a self-assessment tax
15 return in time where the circumstances giving rise to the lateness are attributable to something outside the control of the taxpayer and his accountant. They were not however regarded as exceptional in that case.

33. In *Bushell* (late monthly returns under the CIS), the tribunal concluded (in relation to *reasonable excuse* for the purposes of s118 (2) TMA) that reliance on an
20 agent might be an excuse or a reason for non-compliance but such reliance is normal and customary and the statute could not have intended such reliance to constitute reasonable excuse in every case. In particular, the tribunal took the view that it could not have been the intention of legislation to permit the reliance on a competent person, who fails unreasonably to fulfil the task with which he is entrusted, to absolve
25 the principal in all cases. This is perhaps another way of saying that the reasonable excuse must be exceptional.

34. The factors focused on by the parties were the reason or excuse for not lodging an appeal timeously, and the merits of the appeal. Essentially, the excuse was that Mr Chen placed matters in the hands of his former accountant, Mr Tsui, and trusted
30 and relied on him to act competently and protect his interests.

35. I consider that Mr Chen might well have had a reasonable excuse for relying on Mr Tsui until the meeting on 9 September 2011, although at that stage the notices and other documents now sought to be appealed had not yet been issued. It appears that at the meeting HMRC officers stressed to Mr Chen the need for co-operation and action.
35 Although Mr Chen's ability to read letters appears to have been limited, he specifically pointed out at the tribunal hearing that he had his mail read to him before passing it every six months or so to Mr Tsui. He must therefore have appreciated the seriousness of the situation, but chose to leave matters in the hands of Mr Tsui and not follow matters up with him. The practice by Mr Chen of sending Mr Tsui
40 correspondence only every six months or so, of itself, displays a complete disregard for the proper management of his business affairs. How it was possible to render regular VAT returns yet fail completely to deal with his income tax affairs is difficult

¹³ [2011] UKFTT 785 (TC)

to fathom. In these circumstances, I consider that Mr Chen does not have any reasonable excuse for failing to deal with the issues raised in correspondence by HMRC. Accordingly, he does not have a reasonable excuse for failing to make a challenge within the statutory periods for appeal, the various assessments and notices issued in November 2011.

36. The nature or absence of a reasonable excuse is only one factor (but an important one) to be taken into account in deciding whether to allow a late notice of appeal. The other factor discussed at the hearing was the merits. It was clear that Mr Khamisha still, through no fault of his, did not have the necessary documents (if they exist) to mount a significant challenge to HMRC's assessments. It seemed highly questionable whether at any substantive hearing of the appeal (should it be allowed to proceed), Mr Chen would be able to produce any further credible information to show that the assessments were excessive and what the proper amount of tax payable should be. There was no challenge to the validity of the assessments or the penalties or how the penalties had been calculated. For aught yet seen, Mr Chen's prospects of success on the merits would therefore appear to be poor.

37. On the question of prejudice, which was not the focus of the parties' submissions, if the application to allow the late appeal is refused, Mr Chen will be deprived of the opportunity of challenging the assessments and penalties. He will be shut out of litigating as noted in *Tiago v HMRC*.¹⁴ However, the prospects of a successful challenge appear to be poor. Moreover, he may have a claim against his former accountant. On the other hand, the facts disclose that Mr Chen did receive all the relevant correspondence from HMRC and by September 2011, if not before, was or ought to have been aware of the seriousness of the situation. However, he let matters drift and continued to rely on Mr Tsui or possibly another (unidentified) accountant. That was, with hindsight, unfortunate but, in any event, was certainly not prudent.

38. On the question of prejudice I also have to consider the applicability of the overriding policy of finality in litigation.¹⁵ Here, the proposed litigation has not begun. However, HMRC's determinations remained unchallenged for about two years. HMRC were entitled to assume that matters had been finally fixed and settled or at least accepted.¹⁶ The delay has been very long. It can properly be described as serious and significant. It is questionable whether any reliable evidence can be produced by Mr Chen (the onus lying on him) to demonstrate his turnover, expenses and profits over the tax years in question. All this seems to me to amount to further factors which weigh against Mr Chen. Moreover, since the appeal was lodged in November 2013 (without a ground or statement in terms of Tribunal Rule 20(4) explaining its lateness), no further documentation or clarification of Mr Chen's income from his business at the Dunblane premises has been recovered or produced.

¹⁴ [2014] UKFTT 760 (TC) paragraph 36

¹⁵ *Aberdeen City* at 1068 E

¹⁶ *Leeds City Council* at paragraphs 16 and 19; this decision was given in the light of the Court of Appeal's decision in *Denton v TH White Ltd* [2014] EWCA (Civ) 906 which was more concerned with the efficient conduct of litigation than the question whether a party should be allowed to commence it late.

39. I have endeavoured to apply the overriding objective set forth in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) by dealing with this application fairly and justly. I have considered all relevant circumstances put before me, and while I have some sympathy for Mr Chen's position, that sympathy is limited and is not sufficient, having regard to those circumstances, to grant permission to Mr Chen for an appeal to be made or notified some two years after the expiry of the statutory period.

Result

40. The application for permission to make or notify a late appeal is refused.

41. 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.

J GORDON REID
TRIBUNAL JUDGE

RELEASE DATE: 27 August 2014