



**TC04001**

**Appeal number: TC/2010/05431**

*INCOME TAX – application for an extension of time to bring an appeal –  
balancing exercise considering relevant material factors undertaken –  
decision not to grant an extension of time – appeal struck out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MICHAEL HOWES**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN WALTERS QC  
MRS LESLEY STALKER**

**Sitting in public at Bedford square, London on 3 June 2014**

**The Appellant in person**

**David Linneker, HMRC, for the Respondents**

## DECISION

1. The appellant, Michael Howes, originally appealed against certain closure  
5 notices and assessments relating to the tax years 1999-2000 to 2004-2005 inclusive. His appeal (under the current reference number (TC/2010/5431) was heard by the First-tier Tribunal (Judge Aleksander and Mrs Stalker) on 17 November 2011, and that Tribunal released a Decision in principle on 7 March 2012. That Decision was that Mr Howes could not set losses arising from his farming trade against his  
10 employment and other income and that as no direction was issued by the Respondents (“HMRC”) under regulation 72 of the PAYE Regulations, HMRC could not assess Mr Howes to income tax in respect of earnings from his employment with Nirex UK Limited, to the extent that such tax should have been deducted from such earnings.

2. On 5 November 2013, Mr Howes served a Notice of Appeal against (according  
15 to the Notice of Appeal) a decision of HMRC dated 17 October 2013. The letter from HMRC to Mr Howes of that date (which is with our papers) did not contain an appealable decision. However, the correspondence between HMRC and Mr Howes which passed before that date and the extensive Grounds attached to the Notice of Appeal indicate that Mr Howes intends his appeal to cover three matters.

3. First, he intends to appeal against HMRC’s assessment to income tax of  
20 earnings from his employments with Buckholt Park Services Limited and Nirex UK Limited in the tax years 1996-97, 1997-98 and 1998-99, to the extent that such tax should have been deducted from such earnings, on the basis that no relevant direction has been issued by HMRC under regulation 72 of the PAYE Regulations. We refer to these issues below as “the First Potentially Appealable Issues”.  
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4. Secondly, he intends to appeal against late payment surcharges levied by  
HMRC in respect of the tax year 1999-2000 (which, as will be noted, was a period covered by Mr Howes’s original appeal). We refer to this matter below as “the Second Potentially Appealable Issue”.

5. Thirdly, he intends to appeal against an assessment which he says that HMRC  
30 made in 2013 for the tax year 2005-06 in the sum of £3,886.22, together with interest and surcharges. This was an assessment to income tax on profits from self-employment and UK pensions and state benefits, being an amendment to Mr Howes’s self-assessment for that tax year made in a closure notice issued on 11 August 2009.  
35 Mr Howes says that on 1 September 2009 he submitted amended accounts showing losses in a property development trade, which were apparently re-amended in 2011 when Mr Howes submitted another tax return for the tax year 2005-06. Mr Howes submits that these documents show ‘better information’ which ought to be taken into account in revisiting his tax liability for the tax year 2005-06. We refer to this matter  
40 below as “the Third Potentially Appealable Issue”.

6. The Notice of Appeal dated 5 November 2013 was received by the Tribunals  
Service and a letter dated 16 December 2013 was sent by that Service to HMRC in which it was stated that the Notice of Appeal would be treated ‘as a permission to

appeal application of the decision issued on 7 March 2012'. The Tribunals Service sent another letter (dated 17 January 2014) to HMRC in which the writer stated that he had been 'requested by the Duty Judge to contact you again and request your comments on the appellant's application requesting to appeal out of time to the Upper Tribunal'. An email from the Tribunals Service to HMRC of 4 February 2014 stated that the notice of appeal (presumably the Notice dated 5 November 2013) had originally been treated as a new appeal and registered under the registration number TC/2013/08017, but that that reference number had 'now been closed' and the notice of appeal would be treated as a permission to appeal application for the appeal with reference number TC/2010/05431.

7. Mr Linneker submitted that this treatment was inappropriate and we agree. The Notice of Appeal dated 5 November 2013 addresses different decisions from those adjudicated on in the appeal with reference number TC/2010/05431 which was the subject of the Tribunal hearing on 17 November 2011. It cannot be regarded as an application for permission to appeal against the Decision issued following that hearing.

8. Therefore we DIRECT that the Notice of Appeal dated 5 November 2013 should be accorded a new Tribunal reference number and be treated as a new matter.

9. Mr Linneker submitted, and we accept, that the Notice of Appeal dated 5 November 2013 raises the threshold issue of whether an extension of time should be granted to Mr Howes to bring an appeal against the decisions and assessments identified.

10. The First Potentially Appealable Issues, relating to the tax years 1996-97, 1997-98 and 1998-99, relate generally to the lengthy enquiry to bring Mr Howes's tax affairs up to date, which began in 2001 and concluded following the Decision released on 7 March 2012 by the Tribunal in the original appeal. We accept that time for appealing the First Potentially Appealable Issues started to run from 7 March 2012. It was not until 24 June 2013 that Mr Howes raised the First Potentially Appealable Issues with HMRC in a letter of that date. The appeal to the Tribunal was, of course, on 5 November 2013. The appeal was therefore over 18 months out of time.

11. The Second Potentially Appealable Issue concerns the tax year 1999-2000, which, as noted, was a tax year in respect of which Mr Howes's liability to income tax was before the Tribunal in the original appeal. Documentation before the Tribunal shows that following the Tribunal's Decision in the original appeal, the claim for income tax in respect of the tax year 1999-2000 was reduced from £8,945.60 to £526.40 and a liability in that sum was proposed to Mr Howes by HMRC in a letter dated 26 July 2012 for a settlement of his appeal in respect of that tax year pursuant to section 54, Taxes Management Act 1970. (The late payment surcharges relate to late payment of that tax – Mr Howes's tax return for 1999-2000 having been received by HMRC on 21 August 2001, which incurred late filing penalties.) The appeal in relation to the Second Potentially Appealable Issue ought to have been made within 30 days after 26 July 2012 and was not made until 5 November 2013 – it was therefore over 16 months out of time.

12. The Third Potentially Appealable Issue is, in effect, an attempt by Mr Howes to appeal against HMRC's refusal to accept a claim for relief from tax he has been assessed as liable to pay on the basis of his belief that such tax is not due. Such claims may be made in accordance with the provisions of Schedule 1AB to the Taxes Management Act 1970. One of those provisions (paragraph 3) is that a claim under the Schedule may not be made more than 4 years after the end of, on the facts of this case, the tax year 2005-06. By raising the issue for the first time with HMRC in 2011, Mr Howes was clearly out of time to make such a claim. At the latest, it was clear that HMRC would not accept any such claim as at 3 July 2013, the date of a letter from Mr Durrant, HM Inspector of Taxes, to Mr Howes in which he said:

15 "I do not accept you have valid appeals against decisions in respect of the years 1996-97, 1997-98, 1998-99 or 2005-06 or that appeals have been made within the time allowed under s.49(3) Taxes Management Act 1970. I am not satisfied that you had a reasonable excuse for not appealing within the time limit or that you appealed without unreasonable delay after the excuse ceased."

13. The appeal in relation to the Third Potentially Appealable Issue is therefore at least 3 months out of time.

14. As stated by the First-tier Tribunal in its Decision in *Kevin Collins v HMRC* TC03413 at [24] and following, in considering whether the Tribunal should grant an extension of time to appeal, it must have regard to the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to deal with cases fairly and justly. We must consider all material factors, including the reasons for the delay in putting in the notice of appeal, whether there would be prejudice to HMRC in allowing a late appeal or demonstrable injustice to the potential appellant in not allowing a late appeal. The Tribunal must conduct a balancing exercise in which it considers, among other relevant material factors, the arguable merits of the appellant's case.

15. We consider that the delays in bringing the appeals in respect of the issues identified by Mr Howes were considerable and cannot be regarded as *de minimis*. No adequate reason was advanced by Mr Howes to explain the delay in filing his notice of appeal. There would be prejudice to HMRC in allowing a late appeal because they reasonably have regarded the years in question as closed. There would of course be a potential injustice to Mr Howes if, being refused an extension of time to bring his appeal, he did in fact have a good or arguable case on the issues involved.

16. However, we are entirely satisfied that his case on the First, the Second and the Third Potentially Appealable Issues is weak.

17. In relation to the First Potentially Appealable Issue, Mr Linneker points out (and we accept) that the assessments issued by HMRC to Mr Howes in respect of the tax years 1996-97, 1997-98 and 1998-99 relate to income from self-employment as a sole trader, and that therefore regulation 72 of the PAYE Regulations cannot be in point. In the course of a long meeting on 17 September 2003, Mr Howes is recorded as saying that he 'was certainly deemed to be self-employed in the 1990s'. It is, in our judgment, too late for Mr Howes to bring this point into contention.

18. In relation to the Second Potentially Appealable Issue, it is clear that Mr Howes's tax return for 1999-2000 was filed very late and that liability to late filing penalties and late payment surcharges has almost certainly been incurred. At the hearing Mr Linneker fairly commented that the calculation of the surcharges did not 'look right'. Although our decision is to strike out the appeal (see below) we understand and expect that, as a matter of good administration, this matter will be looked into again by HMRC and a checked calculation will be produced.

19. In relation to the Third Potentially Appealable Issue, as we have pointed out, the claim to HMRC was apparently out of time by a considerable margin. We do not regard the claim as having any reasonable prospects of success.

20. Undertaking the necessary balancing exercise, and having particular regard to our estimate of the arguable merits of Mr Howes's case, our decision is that we should not grant an extension of time to bring any appeal to which the Notice of Appeal dated 5 November 2013 may be relevant and we refuse Mr Howes's application and strike out the new appeal.

21. 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.

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**JOHN WALTERS QC  
TRIBUNAL JUDGE**

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**RELEASE DATE: 10 September 2014**