



TC04726

Appeal number: TC/14/04577

INCOME TAX - whether appeal against enquiry conclusions or amendment to Self-Assessment and application to postpone payment of tax was out of time - appeal refused.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EDWARD MCCRORY

Appellant

- and -

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

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL, WS
MEMBER: PETER R SHEPPARD,
FCIS, FCIB, CTA**

**Sitting in public at George House, 126 George Street, Edinburgh on Monday 19
October 2015**

David Cheyne, Advocate, for the Appellant

Shari McMullen, Officer of HMRC, for the Respondents

DECISION

5 1. This is an appeal by Edward McCrory ["EM"] who carried on the business of construction/ground works, against a decision by HM Revenue and Customs ["HMRC"] to refuse an appeal to an enquiry amendment, closing a review of EM's 2006-2007 self-assessment return, issued on 2 March 2009 as the appeal was "out of time" and as no "reasonable excuse" had been provided. The review of the self-assessment return had been opened on 4 August 2008 and on 6 February 2009 HMRC 10 wrote to EM and to his agents detailing the adjustments they wish to make which related to expenses claimed.

15 2. HMRC say that they received no response to the letter of 2 March 2009, closing the review, within the 30 day period allowed, and so the appeal was out of time. The first communication they received regarding an appeal was on 12 January 2012. EM says that he lodged an appeal on 27 March 2009.

20 3. EM's agents were the firm of M J Lynas Limited ["ML"] of 192 Dukes Road Rutherglen, Glasgow whose sole director in 2009 was Marie Josephine Main ["MM"] who had practised as an accountant for 24 years and was a member of the Association of Accounting Technicians and who employed her husband Jason McTaggart Main ["JM"] as an accountant and tax adviser. JM had no professional qualifications and had acted for EM for 12 to 13 years.

The Facts

25 4. EM, MM and JM all gave evidence. There was an agreed statement that a Section 9A TMA 1970 enquiry was opened into EM's self-assessment tax return for 2006/2007 on 4 August 2008 by HMRC; that a Section 28A TMA 1970 closure notice was issued by HMRC on 2 March 2009 increasing EM's self-assessment tax return for 2006/2007 by £82,753.17; and that the appeal is relevant only to the 2 March 2009 closure notice and should not be confused with other enquiries/decisions made by HMRC in regards to EM. It was noted by the Tribunal 30 that HMRC and EM had also been in dispute in respect of EM's status under the Construction Industry Scheme and over issues relating to VAT.

35 5. The parties also agreed that the matter under dispute was whether or not HMRC had received a letter of 19 February 2009. HMRC say that this letter was supplied to HMRC for the first time at a meeting on 17 April 2015 and ML says that it was posted on 19 February 2009. Similarly HMRC say they have no record of receiving ML's letter of 27 March 2009 with an accompanying appeal document Form SA536 dated 26 March 2009. HMRC say they were supplied with this for the first time with a letter from ML dated 12 November 2014. EM says that it was sent on 27 March 2009

40 6. EM gave evidence that he had been telephoned by MM and asked if he could come to Glasgow, from Donegal, Ireland where he was currently resident, to sign an appeal form on 26 March 2009. It was explained that the reason for his having to travel from Ireland to do this was because of the 30 day time limit from the 2

March 2009 closure notice. EM arrived after normal office hours and MM remembers staying behind specifically to ask EM to sign the appeal form. The appeal form had been completed or pre-populated by JM and MM's sole function was to ensure that EM signed it. JM had not remained in the office to meet EM because he had to pick up his and MM's children.

7. EM remembered reading the form and signing it and also seeing an accompanying letter dated 27 March 2009 ["the appeal letter"], that is the day after the date of EM's signing the appeal form. The appeal letter was addressed to Karen Morrey at HMRC's offices at Cotton House, 7 Cochrane Street, Glasgow and referred to EM at an address in Rutherglen. It was explained that the HMRC computer system did not accept addresses without a postcode. Many addresses in Ireland at least in 2009 did not have postcodes so accordingly the Rutherglen address was used. The letter stated the grounds of appeal which were that a P35 return had been submitted for EM at the same time as his CIS 36 return showing the relevant PAYE expenses for employees; declined to accept the refusal to make amendments to EM's income and requested sight of EM's records to comment further. At the time EM's records were in the possession of HMRC.

8. EM stated that he "sort of" understood what he was signing and only added his signature and the date of signing and made the appeal on the advice of his accountants. EM signed the form and gave it to MM who said she would send it in "the first post in the morning". EM said he vaguely remembered signing other appeal forms but he did not have to travel to Scotland to sign them. EM stated that he had received many letters from HMRC as well as statements and demands and that he had not contacted HMRC about them when he received them but instead contacted ML when he did so. EM left these matters in the hands of ML.

9. MM gave evidence that she had been asked by her husband JM to ensure that EM signed the appeal form, and she saw him do so on 26 March 2009. The form had been completed by JM and not by her as EM was "JM's client". MM stated that EM had not seen the letter dated 27 March 2009 which JM had written and MM would not have signed it, following office procedures, until the next day, 27 March 2009. Accordingly MM stated that on 26 March 2009 the letter would not have been before EM but would have been on the desk of ML's secretary Janice Keenan ["JK"].

10. MM explained that the office procedures were that JK types letters, staples them to enclosures and annexures and then all these documents are passed to MM for signature even where, as is in the case of JM's letter of 27 of March 2009, MM was not the author. MM had no recollection of signing the specific letter of 27 March 2009 but stated she would have signed it and that the office procedure for processing mail worked well and without significant or major omissions. The only exception to MM signing all the mail was when she was absent from the office in July and August. MM was clear that the appeal form and the letter would have been sent on 27 March 2009

11. MM confirmed that she was fully familiar with HMRC's appeal procedures and accordingly would normally expect to receive a response to an appeal notice within 28 days. In MM's experience approximately one out of every 20 items of

correspondence with HMRC were not received and ML would normally send a reminder to or telephone HMRC. In order to remove this flaw ML had taken to sending all documents to HMRC by recorded delivery since 2011/2012.

5 12. MM stated that she did not chase up the lack of response within 28 days or thereafter to the appeal sent on 27 March 2009 as this was a matter for JM as EM was his client.

10 13. JM gave evidence that he had spoken to EM about making an appeal probably after receipt of a letter from HMRC on 2 March 2009 when he knew EM was in Ireland. JM considered this appeal was significant as it related to all of EM's tax matters including the Construction Industry Scheme and VAT and that EM had 30 days from 2 March in which to lodge an appeal.

15 14. JM did not consider he should have been at the meeting with EM to sign the form because he had spoken to EM on the telephone about the form and EM had met MM on a number of occasions before. JM was unclear whether the two dates in the appeal form being 6 March 2009 and 26 March 2009 were in his own handwriting.

20 15. JM confirmed that he had handwritten the letter which included the date 27 March 2009, on, he believed, 26 March 2009 and then passed it to JK for typing. The handwritten version would have been placed on the file. JM stated that he spoke to MM to confirm that EM had signed the form. JM could not remember if he had seen the signed form and he did not see the completed letter that was signed by MM.

25 16. JM stated that he regularly had occasions when letters were not received by HMRC and where he had not received letters allegedly sent by HMRC. JM stated this was the reason ML had later decided to use recorded delivery. JM confirmed that he assumed the posting date would be 27 March 2009 on the basis that EM had signed the form on 26 March 2009 and that MM would sign a letter on 27 March 2009 and that JK would post it on that date.

30 17. JM confirmed that he was familiar with the process of appeals with HMRC and that he would expect to receive a "view of the matter" letter and an offer of review. JM confirmed that he had not received this in respect of the appeal and letter dated 26 March 2009 and could not remember if he had done anything to follow this matter up.

35 18. HMRC referred JM to a letter from ML dated 16 January 2012 referring to a self-assessment statement dated 7 December 2011 which appealed the liability as nil as EM was standing by the original accounts submitted and hereby wishes "to go to a tribunal regarding this". This letter was addressed to HMRC in Newcastle which is their Debt Management Office ["DMO"]. JM stated that he did not mention that an appeal had already been made in relation to the amount claimed because it was a letter to the DMO.

40 19. JM was referred to a letter from HMRC to ML dated 21 February 2012 as they had been passed the letter of 16 January 2012 addressed to DMO. This letter stated "you would appear to be appealing an enquiry amendment issued on 2 March 2009,

you will however be aware that the timeframe for appealing this assessment lapsed some time ago”. JM confirmed he received this letter and replied to it on 12 March 2013.

5 20. The letter of 12 March 2013 referred to a Commissioner’s hearing date, for the assessment raised, which was scheduled for 26 March 2009 and which had been cancelled as a result of the transfer of tribunal functions which introduced the First-tier Tax Tribunal service. JM was asked why he had not mentioned the previous appeal in this letter and confirmed that confusion had clearly arisen

10 21. JM was referred to a letter from HMRC to ML dated 3 April 2013, which JM confirmed he had received and in which HMRC stated “the review of the 2007 self-assessment return was closed via an amendment on 2 March 2009. You wrote on 14 January 2012 appealing this assessment and were advised in my letter of 21 February 2012 that the late appeal was not being accepted”.

15 22. On 17 April 2013 ML wrote to HMRC, Local Compliance, replying to the letter of 3 April 2013. JM confirmed that within this letter he mentioned the lodging of the appeal form of 26 March 2009 and then referred to a letter from HMRC dated 8 June 2009 offering a review which ML exercised by letter of 2 July 2009. HMRC in cross examination suggested that this showed confusion by JM as the letter of 8 June 2009 did not refer to the appeal form of 26 March 2009 as this had not been received by
20 HMRC.

25 23. ML had also written a letter on 17 April 2009 to an HMRC DMO office in Bradford. Both letters from ML dated 17 April 2009 were passed to HMRC, Local Compliance and responded to by letter of 2 September 2013 which JM confirmed he had received. The letter stated “the review of EM’s 2007 self-assessment return was opened on 4 August 2008. On 6 February 2009 I wrote to both yourself and EM detailing the adjustments I proposed making, a copy of the schedule adjustment is enclosed.....As no response was received from either yourself or EM the review was closed on 2 March 2009, via amendment.....The first communication I received regarding the amendment was your letter of 12 January 2012 intimating that you
30 wished to appeal the amendment. My reasons for rejecting the appeal were given my letter of 21 February 2012.”

35 24. JM confirmed that an appeal was lodged dated 19 August 2014 appealing “self-assessment and VAT” stating the reasons for the appeal as “an appeal was due to be heard by the General Commissioners 26 March 2009. This was cancelled due to illness and holiday commitments of the Commissioners. This was not transferred under the Transfer of Tribunal functions through no fault of EM”. JM could give no explanation as to why this appeal was made over 11 months after HMRC’s letter of 2 September 2013.

Submissions by EM

40 25. EM says that the appeal letter was sent to HMRC on 27 March 2009 and that he came to Scotland to sign the appeal form on 26 March 2009. The form was predated

and pre-populated by JM. MM has a clear recollection of staying in the office to witness the signature. JM confirmed that he had discussed with MM that EM had signed the form and accordingly did not remove from the office process the letter to be dated 27 March 2009, which had been transcribed from his handwritten version
5 composed on 26 March 2009 with the consequence that it was dealt with through the office process which MM says would mean that she would receive the letter for signing on 27 March 2009 and that JK would post it the same day.

26. EM says that the explanation for the pre-dating of the letter, given the 30 day time limit from 2 March 2009, is credible and consistent and although there were
10 contradictions in the evidence of EM and MM as to whether EM saw the letter of 27 March 2009, MM witnessed the signing of the form.

27. EM says that it is simple matter of fact that the form was signed on 26 March 2009 and the letter on 27 March 2009 and that both the form and the letter were sent
15 to HMRC on that date because the office procedures at ML worked well and consistently.

28. EM says this appeal is not an application for an extension of time and makes no submissions on this matter as these are not relevant and in any event that evidence as to expenditure was given to HMRC.

29. EM says that the question before the Tribunal is whether or not the appeal was
20 timeously lodged and on the evidence put forward the appeal should be allowed.

Submissions by HMRC

30. HMRC say that neither EM nor ML made further enquiries when they received no response to the appeal form which both MM and JM of ML should have done. HMRC also questioned why an actual appeal was not made until three years later.

25 31. HMRC say that ML should have questioned why they received no intimation of an internal review when they knew the appeal process and had another appeal and review at a similar time. HMRC suggest that a prudent and responsible agent would have followed up and made enquiries for the lack of response to the appeal which EM states was lodged on 27 March 2009 and the matter of lodging of an appeal on that
30 date was not raised until 17 April 2013. HMRC say that the delay in addressing the matter was excessive and no reason was given.

32. HMRC say that the refusal to allow the appeal would mean that the matter could not be reviewed at that time and question what evidence could now be produced. HMRC say that no evidence was submitted during the period of the enquiry in any
35 event.

33. HMRC say that the Tribunal should consider the prospect of success if the Tribunal were to allow the appeal.

34. HMRC say that confusion has arisen on the part of the agent as to different tax matter appeals and the times they were made.

35. HMRC point out that even when they set out their position in a letter dated 2 September 2013 it was not until 11 months later that ML lodged a Notice of Appeal dated 19 August 2014, and no reason was given for this delay.

5 36. HMRC say that EM has not offered any compelling reason or reasonable excuse for acting outwith the time limits and request that the Tribunal dismiss the appeal.

Decision

10 37. The Tribunal considered the evidence put forward by EM and MM and noted the contradiction in relation to the evidence of whether or not EM saw the letter accompanying the appeal form. In other respects their evidence was clear and credible but the Tribunal found the evidence of JM vague and unconvincing and were clear that both dates written in the appeal form dated 26 March 2009 were in JM's handwriting.

15 38. It was clear to the Tribunal that EM's tax affairs were complex involving a number of different issues which ultimately would affect his self-assessment liability. It also seemed that confusion may have arisen as a consequence of an appeal to the General Commissioners set for 26 March 2009 which was the same date EM signed the appeal form and from which it became clear that the evidence concerned a separate tax matter.

20 39. The issue before the tribunal was the credibility of whether the appeal form and a covering letter had been sent on 27 March 2009, as claimed by EM, or not. The evidence given by MM and JM in relation to the fallibility and perfections and imperfections of their office procedure for drafting letters, approving them, and engrossing them on company writing paper and posting them was less than consistent. MM's view was that the system worked well with very few instances of mail not
25 being received by the recipient but JM's view was that missing correspondence was a regular occurrence and in order to avoid any dispute on their part, ML had changed their procedures so that all correspondence to HMRC was sent by recorded delivery. This new process had been introduced in 2011/ 2012.

30 40. The Tribunal also noted that at the outset of the appeal to the Tribunal, ML had stated that a number of documents had not been received by them but it had subsequently been established that they had received them.

35 41. The Tribunal then considered the response of ML to the subsequent correspondence which related to the 26 March 2009 appeal form and noted that the first reference to this was on 17 April 2013 over two years later. There was no prior mention of the appeal having been made in any letters to HMRC, Local Compliance or to the DMO, who forwarded letters addressed to them to Local Compliance. The Tribunal found this unconvincing and inconsistent with an appeal having been lodged on 27 March 2009.

40 42. JM stated that when he received correspondence from the DMO he would have responded by "telephone or letters" but supporting evidence of these was not produced to the Tribunal. JM could not provide an explanation as to why he had not

5 questioned the DMO about why they were demanding tax when an appeal of 26 March 2009 had been lodged. JM could provide no explanation as to why he had not followed up and taken any further action in respect of receiving no response from local compliance to the appeal notice and letter which he says were sent on 27 March 2009.

43. The Tribunal considered whether the appeal form and letter had been sent and had some doubts about the credibility of the witnesses relating to what had happened on 26 and 27 of March 2009.

10 44. The Tribunal considered that the actions of ML subsequent to 27 March 2009, were not consistent with the form having been submitted when MM and JM were fully acquainted with the procedures of HMRC in disputing tax assessments. ML took no further action to follow the matter up and did not reject demands for payment of tax of quite considerable amounts, until two years later at which time the time limits in which to make an appeal had been very evidently exceeded.

15 45. The Tribunal would have expected ML to have followed up the lack of response from HMRC within a reasonable period of time. The Tribunal does not regard a delay of over two years as being within a reasonable period of time. There was no explanation by EM or ML which would constitute a reasonable excuse for that delay.

46. The appeal is dismissed.

20 47. 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
25 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

30 **RUTHVEN GEMMELL**

TRIBUNAL JUDGE
RELEASE DATE: 20 NOVEMBER 2015