



TC4908

Appeal number: TC/2015/03682

*INCOME TAX – partnership – late appeal against assessment - section 49
Taxes Management Act 1970*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mrs Denise Pollard

Appellant

- and -

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

**TRIBUNAL: JUDGE Rachel Mainwaring-Taylor
 Mrs Sheila Cheesman**

Sitting in public at Fox Court, London on 7th December 2015

Ms Natalie Brown for the Appellant

Mr Steve Goulding of HM Revenue and Customs, for the Respondents

DECISION

1. The matter before the Tribunal was whether a late appeal dated 26th August 2014 against the partnership amendments for income tax issued by HMRC on 22nd July 2009 for years 1996/97 to 2004/05 inclusive and assessments for 2005/06 and 2006/07 issued by HMRC on 17th June 2009 could be accepted, as it was submitted outside the time limits set out in section 31A of the Taxes Management Act 1970.

Background and facts

2. The Appellant, together with her sister, Miss A J Struth, operates a restaurant partnership trading as Charlie Brown's Diner. The business was subject to HMRC investigations in 2008/09 and in the summer of 2009 HMRC made, variously, amendments to the partnership accounts, assessments and determinations for the years 1996/97 to 2006/07 inclusive:

(1) On 17th June 2009 HMRC issued notices of assessment under section 29(1) Taxes Management Act 1970 in respect of the years 2005/06 and 2006/07.

(2) On 22nd July 2009 HMRC issued notices under section 30B(2) Taxes Management Act 1970 in respect of the years 1996/97 to 2004/05 inclusive.

3. In accordance with section 31A Taxes Management Act 1970 an appeal should have been lodged within 30 days of the issue of each notice.

4. No appeals were lodged within the 30 day period. The Appellant lodged appeals (through her accountants, Channon & Co) on 26th August 2014, some five years after the 30 day time limit had expired. The only reason for the late appeal given in that letter was "we consider that the circumstances of this case are such that an appeal to a tribunal would seem to be appropriate and would likely be successful if a tribunal hearing took place in the future".

5. The Appellant's advisors, Channon & Co, wrote to HMRC on 30th January 2015 giving some further explanation as to why the appeal was late, citing, without giving detail, various personal difficulties including the illness and death of both sisters' husbands, the Appellant's development of diabetes, and significant time spent caring for the sisters' elderly mother.

6. HMRC responded on 11th March 2015 requesting full details of each reason provided for the delay.

7. On 16th April 2015 Channon & Co replied on behalf of the Appellant, giving three reasons for the delay: personal tragedy/difficulties (the death of the Appellant's spouse and father and her mother's illness), illness (self-diagnosed clinical anxiety and depression) and professional reasons (records retained by HMRC and having to reconstruct records from bank statements).

8. On 15th May 2015 HMRC responded stating that whilst being sympathetic to the Appellant's situation, no dates or further details had been provided as to the death of the Appellant's husband or the period of illness of the Appellant or her mother, so as to explain the Appellant's inability to appeal any sooner than she did. HMRC also confirmed which records it held, namely the Appellant's previous accountant's workings in respect to VAT returns and bank statements. HMRC concluded that in the absence of further detail, and with professional representation covering the period, there was no reasonable excuse not to have lodged the appeal sooner and, accordingly, refused to accept the late appeal and advised the Appellant of her right to appeal directly to the Tribunal.

9. On 12th June 2015 the Appellant appealed to the Tribunal.

Relevant law and authorities

10. Under section 31A Taxes Management Act 1970 notice of an appeal against an amendment or assessment must be given in writing within 30 days of the notice of amendment or assessment being issued.

11. Under section 49 Taxes Management Act 1970 notice of an appeal may be given late if HMRC agree or, where HMRC do not agree, if the tribunal gives permission. HMRC shall agree to late notice of an appeal if the appellant has made a request to HMRC in writing, HMRC is satisfied that there was a reasonable excuse for not giving notice earlier and HMRC are satisfied that the request was made without delay after the reasonable excuse ceased.

12. Under Rule 3.9 of the Civil Procedure Rules "on an application for relief from any sanction imposed for a failure to comply with any rule...the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules...".

Data Select Ltd v HMRC [2012] UKUT 187 (TCC)

13. This case was an appeal to the Upper Tribunal of a First tier Tribunal decision refusing a late appeal. Morgan J set out the questions which, as a general rule, a court should ask itself when considering whether to extend a time limit as follows:

“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?

5. What will be the consequences for the parties of a refusal to extend time?”

14. He also said that in his judgment “the approach for considering the overriding objective and all the circumstances of the case, including the matters set out in CPR rule 3.9 is the correct approach”.

Norman Archer v HMRC [2014] UKFTT 423 (TC)

5 15. This case concerned an application to make late appeals against closure notices and discovery assessments. It confirmed the approach in *Data Select* but questioned whether the application of CPR rule 3.9 should be reconsidered in light of its amendment since that decision, concluding that “the Tribunal should continue to
10 weight given to the need to comply with the rules and regulations, including time limits contained within the statute, than was the case before new CPR 3.9 was introduced”. However, Judge Redston made clear that the decision did not in fact turn on new CPR3.9 and would have been the same whether it was taken into account or not.

15 ***Leeds City Council v HMRC [2014] UKUT 0350 (TCC)***

16. This case involved a late application for a costs direction by HMRC. Judge Bishopp confirmed that the correct approach was to follow that set out by Judge Morgan in *Data Select*. He also described the reason for a time limit as follows “the
20 aim of the rule, like any other imposing a time limit, is to require a party asserting a right to do so promptly, and to afford to his opponent the assurance that, after the limit has expired, no claim will be made.”

Romasave (Property Services) Limited v HMRC [2015] UKUT 0254 (TCC)

17. This was an appeal against a decision of the First tier Tribunal refusing permission to make a late appeal. As well as confirming the approach set out in *Data
25 Select*, the case of *Denton* was cited and in particular a three stage approach, which the judge found to be helpful and in line with *Data Select*:

30 “the first stage is to identify and assess the seriousness and significance of the ‘failure to comply with any rule...’...the second stage is to consider why the default occurred. The third stage is to evaluate ‘all the circumstances of the case, so as to enable [the court] to deal justly with the application”.

18. Judge Berner found that in the context of a 30 day time limit, “a delay of more than three months could not be described as anything but serious and significant” and concluded that “in the circumstances of a delay of such significance and seriousness in making an appeal to the FTT with no good reason it would not be in the interests of
35 justice to permit the appeal”.

Appellant’s Submissions

The Appellant has cited the following reasons for the delay in lodging an appeal:

(1) Former representative Mr Harmey failed to challenge the assessment in a timely manner, though the Appellant states that her case is not based on neglect by Mr Harmey;

5 (2) Her spouse passed away and this, together with the pressure of HMRC's enquiry led to her being quite poorly, suffering clinical anxiety, depression and diabetes as a direct result of the enquiry;

(3) She cares for her elderly mother who suffers from increasing health problems;

10 (4) The retention of records by HMRC prevented the Appellant from lodging an appeal.

19. Ms Brown noted that whilst HMRC is constrained in only being able to permit a late appeal where there is reasonable excuse, the tribunal is not so constrained and may permit a late appeal in accordance with the overriding objective. The approach adopted by the Tribunal in considering appeals out of time includes considering:

15 (1) The purpose of the time limit;

(2) The length of the delay;

(3) The explanation of the delay;

(4) The consequences for the parties of extending the time limit; and

(5) The consequences for the parties of refusing to extend the time limit.

20 20. In considering applications, the Tribunal should have in mind the overriding objective to determine cases justly and fairly, including taking into account the factors specifically set out in CPR 3.9, namely the need for litigation to be conducted proportionately and for compliance with rules to be encouraged.

25 21. Ms Brown stated that the purpose of the time limit is to allow HMRC to proceed promptly and with certainty where an assessment has been made. It allows challenges to be dealt with by the same personnel who made the assessment and ensures all original information remains available to HMRC. In this case the personnel (Alison Pelling) and all records remain available to HMRC notwithstanding the delay. Ms Brown argued that whilst the time limit also allows HMRC to proceed to collect tax and take enforcement measures, in this case all debts had been paid and if the appeal were permitted to proceed HMRC would not be kept out of funds properly due but would only possibly be required to repay tax overpaid.

22. Ms Brown acknowledged that the period of delay was both serious and significant.

35 23. Ms Brown explained that there was no single cause for the delay, rather a combination of factors acted together to prevent the Appellant from lodging an appeal sooner, including personal problems (depression and anxiety caused by the deaths of her husband, brother-in-law and father, her mother's illness and need for increasing levels of care) and professional problems, including being let down by her previous
40 accountant, who she believed was dealing with and had ultimately resolved the issues

with HMRC, and the unavailability of original records (it is still unclear what has happened to them between HMRC and Mr Harmey). Finally, given the lengthy delay, the Appellant and her advisors believed that any appeal would need to be supported by adequate evidence that the original determinations were wrong and this could only
5 be achieved by a lengthy and detailed analysis and reconstruction of the accounting records.

Respondent's submissions

24. Mr Goulding said that the amendments and assessments issued in 2009 clearly showed that the Appellant had 30 days to appeal.
- 10 25. He maintained that no reasonable excuse had been given by the Appellant as to why the appeal was not made until 26th August 2014. The reasons provided for the delay, whilst no doubt very difficult for the Appellant, have not prevented her from running a business during the period and should not have prevented her or her advisor from lodging an appeal sooner. The Appellant had to date not provided detailed
15 information explaining how the reasons given prevented her from lodging the appeal throughout the whole five year period.
26. Mr Goulding argued that the fact that the Appellant did not have certain records (which had been retained by HMRC) should not have prevented her from lodging an appeal earlier. Her position as owner manager enabled her to have a true
20 understanding of the business turnover and any significantly "excessive" deviation from the norm would not require a review of records for an objection or appeal to be lodged against it. It was not necessary to provide detailed evidence or workings at the time of lodging an appeal. Rather the process of the appeal would have allowed sufficient time to submit all workings.
- 25 27. Mr Goulding said the Appellant's previous adviser was explicitly advised of the need of a late appeal should he require one.

Discussion and conclusions

28. The application for a late appeal is not confined to consideration of reasonable excuse and under Rule 2(1) of the Tribunal Procedure Rules 2009 the overriding
30 objective is to deal with cases fairly and justly.
29. The time limits set out in section 31A TMA 1970 are there to be observed and can only be extended for exceptional reasons. This view is supported by the case of Norman Archer where Judge Redston said "its purpose is to give finality, so that HMRC – the other party in the possible litigation will know within that time limit
35 whether or not they need to prepare for an appeal against their decisions. The time limit is a "rule" to ensure litigation "is conducted efficiently and at proportionate cost". It therefore comes within both (a) and (b) of the new CPR 3.9".
30. *Romasave* also supports this view:

“Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant”.

5 31. In the *Leeds City Council* case Judge Bishopp stated:

“in my judgment therefore the proper course in this tribunal, until changes to the rules are made, is to follow the practice which has applied hitherto, as it was described by Morgan J in *Data Select*”. In that case, Judge Morgan stated: “as a
10 general rule, when a court or tribunal is asked to extend the 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?”.

15 32. The parties agree that the Appellant failed to adhere to the deadlines set out in section 31A TMA 19700.

33. Applying the test set out in *Data Select*, the Tribunal found that:

(1) The purpose of the time limit is to give finality and ensure that
20 litigation is conducted efficiently and at proportionate cost. The time limit, being set out by statute, should generally be enforced.

(2) In this case the delay was significant and extremely serious. A delay of three months was described as serious and significant in *Romasave* and that in the present case was more than 20 times as long.

(3) No reasonable excuse had been given covering the whole period of the
25 delay. It was unfortunate that the Appellant was not present to give further evidence on this, but she had had opportunity to attend or to provide submit a witness statement. Based on the evidence before us, we found that an appeal could have been lodged before the conclusion of the analysis and reconstruction of accounting records.

(4) The consequences of refusing the application would be to prevent the
30 Appellant from seeking to show that she had overpaid tax and to recover the same. The Tribunal acknowledges that this is potentially of serious detriment to the Appellant. However, given the extreme length of the delay (more than 46 times the length of the time limit itself) and the lack
35 of detailed explanation for it, we concluded that in this case the interests of justice were best served by refusing the application.

34. The application for permission to make a late appeal was refused.

35. This document contains full findings of fact and reasons for the decision. Any
40 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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**RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE**

RELEASE DATE: 19 FEBRUARY 2016

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