



TC04972

Appeal number: TC/2015/00657

PROCEDURE – direct tax – appeal not notified to HMRC before notice of appeal given to Tribunal – whether an appealable matter – no – to extent that partial notice may have been given, Tribunal not satisfied that permission to give late notification to HMRC should be granted – conduct of proceedings taken into account – in absence of notification to HMRC, no jurisdiction for Tribunal to consider appeal – appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KANAGASABAL THUISHYANTHAN

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOHN CLARK

**Sitting in public at Fox Court, 30 Brooke Street, London EC1 7RS on 3
February 2016**

Doraisingham Visakaratnam of DVL & Co, Accountants, for the Appellant

**Matthew Mason, Appeals and Reviews Higher Officer, HM Revenue and
Customs, for the Respondents**

DECISION

1. The Appellant had given Notice of Appeal to the Tribunal dated 22 December
5 2014. I set out the circumstances below. At a preliminary hearing on 3 February 2016
I determined that there was no appealable matter, and informed the parties that I
would strike out the appeal. Although the parties agreed that no written decision was
required setting out the reasons for my decision to strike out the appeal, the
Appellant's agents DVL Accountants have sent in a document which appears to be
10 seeking permission to appeal against my decision, as well as raising matters
concerning the substance of the original appeal. As it is a precondition of seeking
permission to appeal that a full reasoned decision has been produced before any such
application is made, the duty Judge has required me to produce this full decision.

History of the matter

15 2. The Appellant's Notice of Appeal gave the date of the decision by the
Respondents ("HMRC") as 21 October 2014, and stated that the amount of penalty or
surcharge was £5,498.31. It stated that there had been no review by HMRC. It then
referred to the date of conclusion of HMRC's review as 21 October 2014, and also
gave the same date in the following box next to the wording:

20 "If HMRC offered a Review, but this was not accepted, date of offer of
Review".

3. The letter dated 21 October 2014 was to DVL Accountants from Mr AJ
Thomas, Inspector of Taxes, and included the following paragraphs:

25 "I have received a copy of your letter dated 28 July 2014 from my
colleague Mrs Jean West in our Quality Assurance and Complaints
Team.

30 As I have explained to you on many occasions, the assessments raised
are final and conclusive. I did not receive an appeal within the statutory
time limits and as such, if your client wants to take this matter further
he should make application to the Tribunals Service for permission to
make a late appeal.

As stated above I have explained this to you on several occasions and I
enclose copies of my letters dated 30 April 2014, 28 May 2014 and 24
July 2014."

35 4. Thus the letter was not a review decision, nor did it set out matters in respect of
which an appeal could be made.

5. The further attachments to the Notice of Appeal were copies of a letter dated 12
November 2013 from Mrs Jean West, a Complaints Officer for HMRC, a Self
Assessment Statement dated December 2014 showing a balance brought forward from
40 the previous statement of £5,598.07 plus interest of £33.64, totalling £5,631.71, a
letter from DVL & Co to Mrs West dated 28 July 2014, a Form P60 for the year

2008-09 for the Appellant, a Barclays loan account statement dated 12 June 2012, and a copy of the Appellant's short self-employment return for the tax year 2008-09.

6. Despite repeated requests to the Appellant and his advisers by HM Courts & Tribunals Service ("HMCTS"), it has remained unclear precisely what decisions of HMRC the Appellant wishes to appeal against.

7. Lengthy correspondence continued, involving HMCTS, HMRC, and DVL & Co. On 20 August 2015, Mr Mason of HMRC wrote to DVL & Co, with a copy to the Appellant, explaining that he had carried out a thorough review of the papers. He continued:

10 " . . . I must advise you that no appeal has been made to HMRC in respect of the 2008/09, 2009/10 enquiries or the 2010/11 penalties for late filing.

15 The closure notices of the 2008/09 and 2009/10 enquiries were issued on 10 January 2014 and the late filing penalty notice 7 August 2014. Any appeal against these notices should have been made to HMRC within 30 days of the date of the notices, i.e. 9 February 2014 and 6 September 2014 respectively."

He referred to s 49 of the Taxes Management Act 1970 ("TMA 1970") concerning late appeals and s 49D(1) TMA 1970 (both cited below). He continued:

20 "Where an appeal is made directly to the Tribunals Service it may be possible to treat the appeal as though it was an appeal to HMRC. However, before such an agreement is made, I require clarification as to what decisions and/or notices your client is appealing."

8. He referred to the papers accompanying the Appellant's Notice of Appeal. He asked DVL & Co to confirm what decisions/penalties the Appellant wished to appeal against, and to provide copies of the HMRC decision letters under which the assessments and penalty had been raised. He also asked DVL & Co to confirm the reasons as to why the appeals had been made late, ie outside the 30 day time limit.

9. On 5 October 2015 Mr Mason wrote to HMCTS stating that no response had been received by HMRC to the letter dated 20 August 2015. On 25 August 2015 HMCTS had sent a copy of that letter to DVL & Co and asked for written representations to be made to HMCTS within 21 days. HMRC had telephoned HMCTS on 5 October 2015 and HMCTS had confirmed that DVL & Co had provided a written response to them, but HMRC had not yet been provided with a copy of that response. Mr Mason noted that HMRC were due to submit their Statement of Case by 17 October 2015; however, due to the failure of the Appellant and DVL & Co to provide full clarification of the matters to be appealed and the grounds of appeal, HMRC were disadvantaged in the proceedings. Mr Mason therefore requested a stay in proceedings until such time as the Appellant and/or DVL & Co provided full details as to the matters that they wished to appeal and reasons as to why any appeals had been made late.

10. On 19 October 2015 HMCTS wrote to HMRC enclosing correspondence received from DVL & Co dated 28 September 2015. HMCTS requested HMRC to provide a Statement of Case no later than 30 October 2015.
- 5 11. On 20 October 2015 Mr Mason wrote to HMCTS; this letter repeated the substance of his letter to DVL & Co and the Appellant dated 20 August 2015, of which he enclosed a copy. He submitted that an appellant could only apply to HMCTS for permission to make a late appeal under s 49D TMA 1970 after HMRC had rejected the late request; he referred also to s 49D(1) TMA 1970. As the
10 Appellant and DVL & Co had failed to clarify fully the matters that they wished to appeal and provide a reasonable excuse to HMRC as to why the appeals had been made late, HMRC requested a strike-out of the proceedings under Rule 8(2)(a) of the Tribunal Rules on the basis that s 49D(1) TMA 1970 did not apply and as such the Tribunal had no jurisdiction in this matter.
- 15 12. Mr Mason wrote to HMCTS on 28 October 2015 to indicate that HMRC would not be submitting a Statement of Case at that time; this followed their request for the appeal to be struck out as there was no appealable matter to be put before the s behalf
13. On 24 November 2015 HMCTS wrote to HMRC enclosing correspondence from the Appellant dated 27 October 2015, and asked whether this clarified matters sufficiently or whether HMRC wished to proceed with the strike out application.
- 20 14. Mr Mason wrote to HMCTS on 1 December 2015, referring to the 24 November 2015 letter and enclosures. He stated that having read all the papers, these appeared to suggest that the Appellant wished to appeal the decisions and penalties set out in a table. He made various comments on the documentation sent in on the Appellant's behalf. He indicated that HMRC were willing to consider the Notice of
25 Appeal to HMCTS as though it was a late appeal to HMRC in the first instance; as such, HMRC withdrew their request to have the appeal struck out. However, HMRC again asked the Appellant or his representative to confirm the reasons as to why the appeals were made late, outside the 30 day time limit.
- 30 15. Given the above and the Appellant's agent's apparent misunderstanding of the appeals procedures and Tribunal procedures, HMRC respectfully suggested that a preliminary hearing should be arranged to discuss the matter of the late appeals and whether or not the Appellant had a reasonable excuse to justify HMRC accepting the notification of late appeals and/or to allow the Tribunal to give that permission for the Appellant to make or notify a late appeal to HMRC.
- 35 16. On 14 December 2015, Judge Poole gave Directions for a case management hearing. On the same date, HMCTS sent HMRC a copy of a letter dated 7 December 2015 from DVL & Co.
17. The hearing was subsequently fixed for 3 February 2016.

Arguments for HMRC

18. It was agreed that Mr Mason would set out HMRC's position before Mr Visakaratnam responded for the Appellant.

19. Mr Mason emphasised that the hearing did not concern other matters relating to notices under Schedule 36 to the Finance Act 2008 or Schedule 24 to the Finance Act 2007. The matters which appeared to be in question were closure notices for 2008-09 and 2009-10, and penalties under Schedule 55 to the Finance Act 2009, being a late filing penalty, daily penalties, a six month late filing penalty and a 12 month late filing penalty.

20. He considered that the matter before the Tribunal was an application for permission to make a late appeal to HMRC. The question was whether the Appellant had a reasonable excuse for the late appeal.

21. Both HMCTS and HMRC had attempted to obtain copies of the decisions which the Appellant wished to appeal against. He referred to Rule 22(3) of the Tribunal Rules. Certain notices had been provided by the Appellant, namely the closure notices for 2009-10, the notices of daily penalties for 2010-11, and the six month late filing penalty for 2010-11.

22. He indicated that HMRC were willing to proceed on the basis that their own copies of all the notices in question would be used in order to progress the case.

Arguments for the Appellant

23. Mr Visakaratnam explained that he did not think that there was an excuse for the late appeals. He referred to the history of the substantive dispute; I do not consider that it would assist to set out these details in this decision, which relates only to the procedural issue. He described the reasonable excuse as a timing difference.

My consideration of the issues

24. Since 2009, the legislation relating to direct tax appeals has required appeals to be made to HMRC in the first instance. This enables HMRC to offer a review to the person seeking to make an appeal. That person may decide not to take up the offer of a review; in that case, the person involved may choose to notify an appeal to the Tribunal by giving Notice of Appeal to HMCTS.

25. If the offer of a review is accepted, the person must await the outcome of the review, and is precluded from giving Notice of Appeal to HMCTS pending receipt of the review decision.

26. If a taxpayer does not notify HMRC that he wishes to make an appeal, this prevents the system from operating in the manner intended by the legislation. Thus the making of an appeal to HMRC is an essential first step in the process.

27. It may help to set out the relevant legislation. Section 49 TMA 1970 deals with cases where notice of appeal has not been given to HMRC within the time limit specified by the applicable legislation:

“49 Late notice of appeal

- 5 (1) This section applies in a case where—
- (a) notice of appeal may be given to HMRC, but
 - (b) no notice is given before the relevant time limit.
- (2) Notice may be given after the relevant time limit if—
- (a) HMRC agree, or
 - 10 (b) where HMRC do not agree, the tribunal gives permission.
- (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
- (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
- 15 (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
- (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
- 20 (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
- (8) In this section “relevant time limit”, in relation to notice of appeal, means the time before which the notice is to be given (but for this section).”
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28. Section 49D(1) TMA 1970 is as follows:

“49D Notifying appeal to the tribunal

- (1) This section applies if notice of appeal has been given to HMRC.
- (2) The appellant may notify the appeal to the tribunal.
- 30 (3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.
- ...”

29. Putting aside for the present one question concerning a copy of an appeal form produced at a much later stage, I am satisfied, on the basis of the documents provided to me and the parties’ explanations at the hearing, that no notice of appeal has been given by the Appellant or on his behalf to HMRC at any point up to the date of the preliminary hearing.

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30. This means that the precondition in s 49D(1) TMA 1970 has not been fulfilled. As a result, a notification to the Tribunal pursuant to s 49D(2) is not permitted. There is no residual discretion or power afforded to the Tribunal to enable a notified appeal to be entertained where no notice of appeal has previously been given to HMRC.

5 31. In that respect, my view is that the letter from Mr AJ Thomas of HMRC quoted above was misleading in its indication that an application should be made to HMCTS for permission to make a late appeal; it does not appear to be consistent with the legislation. Further, the letter dated 28 July 2014 from DVL & Co to Mrs West contains nothing to suggest that an appeal is being notified, and it is clear from her
10 address that her role as an officer of HMRC is to deal with matters concerning quality assurance and complaints.

32. The consequence of the absence of an appeal notified to HMRC is that, as far as the Tribunal is concerned, there is no appealable matter.

15 33. Is the position affected by s 49(2)(b) TMA 1970? The effect of s 49(2) might be interpreted as being that a person who has given no notice of appeal to HMRC may go direct to the Tribunal to seek permission to appeal. I do not consider that this is a permissible way of construing the legislation. The opening words of s 49(2) presuppose that the person seeking to appeal has given notice of appeal to HMRC, but has done so after the expiry of the relevant time limit. The only circumstance in which
20 the Tribunal may become involved is where the person in question has given HMRC a late notice of appeal and HMRC has refused to accept it.

34. That construction of s 49(2) TMA 1970 is consistent with s 49D TMA 1970; the appeal has first to be notified to HMRC, and if that notification is late and HMRC do not accept the late appeal, the Tribunal can decide to permit the late appeal. The effect
25 of s 49D TMA 1970 is that if it does so, it is only then that the person seeking to appeal may give Notice of Appeal to the Tribunal by filing the relevant form with HMCTS together with details of the documents on the basis of which the appeal is being made.

35. I do not consider that in the Appellant's circumstances, in the absence of any
30 notification of the appeal to HMRC, the position could have been "cured" as Mr Mason had suggested by treating the (purported) notification of the appeal to HMCTS as though it were an appeal to HMRC. Given the language of s 49D TMA 1970, which requires notice to have been previously given to HMRC, the suggested procedure would amount to "putting the cart before the horse".

35 36. On the basis that no notice of appeal was given to HMRC, the question whether the Appellant did or did not have a reasonable excuse for the late notification of his appeal does not arise. However, that is subject to the question of the appeal form, which I now address.

37. One of the enclosures to the letter from DVL & Co to HMCTS dated 25
40 October 2015, copied to HMRC, was a copy of a form SA370 ("Self Assessment: Appeal against penalties for late filing and late payment") showing the date 23 July

2014. This document relates to the tax year ended 5 April 2011, and refers to three late filing penalties, namely a three month penalty of £300, a six month penalty of £300 and a 12 month penalty of £300. In the space under the heading “Your reason for making an appeal”, references are made to tax liabilities for the years to 5 April 2009 and to 5 April 2010; there are also comments about confusion of the enquiry for these years as a result of the involvement of three different Inspectors; and there is also a reference to relief not being given for a self employment loss carried forward from 5 April 2008.

38. In his letter to HMCTS dated 1 December 2015, Mr Mason stated:

10 “HMRC would advise Tribunal that, prior to the copy being forwarded by Tribunals Service on 24 November 2015, HMRC have no record of the full and complete form SA370 as being received by HMRC.”

39. There is thus a conflict of evidence; Mr Visakaratnam maintains that the form SA370 was sent to HMRC at the time, and HMRC do not accept that they had sight of that form until they received the HMCTS letter dated 24 November 2015.

40. It is not clear to which address the form was sent, nor on the face of the form whether this was done by DVL & Co or by the Appellant personally. The inclusion in the space referred to above of the words “Dear Mrs Jean West” suggests that the form may have been sent to her. However, the letter from DVL & Co to Mrs West dated 24 July 2014 makes no mention of any form; it refers to “the following documents” being “enclosed herewith”, but does not specify any documents.

41. At the hearing, Mr Mason provided a copy of an email forwarding a copy of a message dated 2 September 2014 from Mrs West, who said:

25 “I am sending you a letter for this case [ie the letter to Mrs West from DVL & Co dated 28 July 2014] which although having my name on it did not have my office address. Consequently it has done the rounds and until reaching me on 13 August.

30 Since then there has been a series of problems with our fax, scanner, leave and bank holiday. I have looked at the previous complaint I dealt with and I have no further involvement with the case. I have no record of anyone taking a phonecall [*sic*] on our team, which is referred to in the letter, and I certainly have not spoken to the accountant.”

42. The attachments to that letter did not include the form SA370. This is verified by a covering note referring to 13 pages to be sent by fax; the documents including the letter total 14 pages, so it is clear that Mrs West did not have the form in addition to those documents.

43. I am not satisfied that the form was sent to HMRC in July 2014. If it was not, then it can have made no difference to the question whether any notification of appeal was given to HMRC.

40 44. Without additional evidence from both parties, which in the circumstances it would be impractical to seek, I am reluctant to assume against the Appellant that the

form did not reach HMRC. I therefore consider the position on the hypothesis that the form was received by HMRC, to establish whether it affects the conclusion set out above that no notification of appeal was given to HMRC.

5 45. As mentioned, the form referred to the year ended 5 April 2011. As a result, I do not consider that HMRC could reasonably be expected to treat it as a notification of appeal in respect of the matters mentioned in the space headed “Your reason for making an appeal.” These concerned questions which were not relevant to the 2010-11 tax year. The title of the form is “Appeal against penalties for late filing and late payment”; thus it is not intended as a form to deal with other disputed matters. It is clearly designed for use only in respect of penalties for a specific tax year, to be specified in response to the first question on the form.

46. I do not consider that the form can be regarded as a notification to HMRC of an appeal in respect of any matters other than the penalties referred to under the first heading “Penalties for filing your tax return late”.

15 47. At most, therefore, the form relates to the three penalties listed above.

48. To continue with the hypothesis, the date of the penalty notice for the first penalty was 13 September 2012, as was that for the second, six month penalty. The date of the penalty notice for the 12 month penalty was 28 March 2013.

20 49. The date on the form SA370 was 23 July 2014, long after the dates of the respective penalty notices, and clearly well outside the period for giving notice of appeal in each case.

25 50. As I have already mentioned, Mr Visakaratnam did not think that there was any reasonable excuse for the late notification of the appeal. That statement may have been made in the context of the giving of Notice of Appeal to HMCTS, but in my view it is equally applicable to the submission of the form SA370. As the conditions set out in s 49 TMA 1970 for HMRC to accept late notice have not been fulfilled, it is for the Tribunal under s 49(2)(b) TMA 1970 to decide whether to give permission for the late appeal to HMRC.

30 51. Clearly, there are no grounds to do so on the basis of reasonable excuse, given the acceptance on the Appellant’s behalf that there was no reasonable excuse. However, in contrast to the rest of s 49 TMA 1970, s 49(2)(b) does not limit the factors to be considered. Thus if factors other than the absence of reasonable excuse indicate that it would be appropriate for the Tribunal to give permission, it may use its discretion to do so.

35 52. I have considered the history of this appeal as shown by the documents in the hearing bundle and the copy extracts from the Tribunal file. I need only set out an extract from the comments of Judge Poole in making the Directions for the case management hearing:

40 “It is apparent that the Appellant’s representative is not treating this appeal with the care and attention that it deserves. Despite numerous

5 requests for clarification of the position, it is still not clear precisely what decisions of HMRC the Appellant wishes to appeal against, and therefore it is not clear precisely what further documents the Appellant needs to provide in support of his appeal. In addition, it appears that some or all of the appeals that the Appellant wishes to make are being made outside the statutory time limit and have not been notified to HMRC before being notified to the Tribunal.

10 It is apparent to me that due to the uncertainties caused by the Appellant's representative's poor handling of the appeal, the only way in which matters can be clarified sufficiently will be through a case management hearing, at which the representative will need to attend with all relevant papers and provide appropriate explanations in response to questions from HMRC and the Tribunal. . . .”

15 53. At the hearing, I was not provided with satisfactory responses in respect of the matters mentioned by Judge Poole, and I took the view that the position was unlikely to be clarified in a way which would enable the appeal to proceed in a proper manner.

20 54. In the light of that background and the absence of reasonable excuse for late notification to HMRC of the appeal in respect of the three late filing penalties, my view was that – to the extent that it was appropriate to consider giving permission to give such notice after the expiry of the relevant time limit – such permission should not be given to the Appellant.

25 55. In the absence of permission to give late notice of appeal to HMRC, the precondition in s 49D(1) TMA 1970 to its application is not fulfilled. As a result, it is not open to the Appellant to appeal to the Tribunal. It follows that there is no appealable matter.

30 56. Thus, whether on the basis of the hypothesis that the form SA 370 notifying HMRC of the appeal in respect of the late filing penalties was served on HMRC or on the alternative conclusion on the evidence that the form was not so served, the result is the same; there is no appealable matter. As I do not need to make a finding as to which version of events should be accepted as the correct reflection of what did or did not happen, I decline to do so.

My conclusions

57. For the above reasons, I am satisfied that there are no appealable matters. As a result, I am required by Rule 8(2)(a) of the Tribunal Rules to strike out the appeal:

35 “8(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them . . .”

58. My Direction striking out the appeal was issued shortly after the hearing.

Right to apply for permission to appeal

59. 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 CLARK
TRIBUNAL JUDGE**

RELEASE DATE: 16 MARCH 2016

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