[2016] UKFTT 0469 (TC)

TC05221

Appeal number: TC/2015/04567

INCOME TAX – application for an extension of time of over 3 years for notifying an appeal to the Tribunal – permission to notify the appeal refused on the basis that it would not be fair or just to grant it – s.49H(3) TMA –* BPP Holdings Ltd v HMRC [2016] EWCA Civ 121 *noted

FIRST-TIER TRIBUNAL
TAX CHAMBER

A STEWART MARTIN **Applicant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC

Sitting in public at Birmingham on 4 February 2016

Tim Scott, Tim Scott Accountants, for the Appellant

Philip Oborne, HMRC, for the Respondents

DECISION

1. This was an application for an extension of time to serve a notice of appeal initiating an appeal in this Tribunal by the intended Appellant, Mr Martin.

2. The decision against which Mr Martin wishes to appeal is contained in a closure notice issued under section 28A(1) and (2), Taxes Management Act 1970 ("TMA"), by HMRC in a letter to Mr Martin dated 27 January 2010. The closure notice amends Mr Martin's self-assessment for the tax year 2006/2007 by increasing the tax due by £5,953.20.

3. The letter, which Mr Martin does not say he did not receive (and which I find he did receive) has, under the heading "**What to do if you disagree**", advice that "you or your adviser can appeal" and that "you need to write to us within 30 days of the date on this letter, telling us why you think our decision was wrong". It also mentions the possibility of a review "by someone who has not previously been involved" – which is a review within HMRC – and also Mr Martin's "right to go to an independent tribunal".

4. However, no intention to lodge an appeal was indicated by or on behalf of Mr Martin until a letter dated 3 October 2012 was sent by his accountant, Mr Scott, to HMRC. That letter indicated that Mr Scott wished to submit a late appeal on behalf of Mr Martin 'on the grounds that HMRC were corresponding with the wrong agent'. The letter went on to explain that 'somewhere along the line HMRC started corresponding with CFW & Co regarding Mr Martin's compliance check. We [Mr Scott] thought, mistakenly, that with the lack of correspondence the case had been settled without addition to the profits'.

5. The notice of closure terminated an enquiry that had been opened by HMRC (Officer John Rodgers) under section 9A TMA on 21 January 2009. In the enquiry, Officer Rodgers asked for an analysis of the deduction for general administrative expenses made in the self-assessment and asked for the production of records. By a letter dated 31 July 2009 to Mr Scott, Officer Rodgers asked specifically to be provided with the underlying records for the items categorised as computer consumables, sundry expenses and recruitment fees. He asked for these to be provided by 28 August 2009.

6. Mr Scott apparently did not respond to this request until Officer Rodgers telephoned him on 3 December 2009. In that telephone call, Mr Scott told Officer Rodgers that 'he would dig out and ring me back next week'. Mr Martin had himself written to Officer Rodgers on 23 November 2009 and in that letter had said that he '[trusted his] agent has now complied with your request for further information as stated in your correspondence to Mr Scott of [31 July 2009]'. Officer Rodgers also telephoned Mr Martin on 3 December 2009 to inform him that Mr Scott had not provided the records but had said that he had told him (Officer Rodgers) that Mr Martin had the records and that Mr Scott had promised their production 'next week' when he (Mr Scott) would be seeing Mr Martin.

7. The records were not, however, produced until Mr Scott wrote to HMRC on 3 January 2013 asking for a reconsideration of an application for a late appeal (made the letter dated 3 October 2012 referred to above) and enclosing copies of 'the records of prime entry together with supporting invoices for computer consumables, recruitment fees and sundry expenses'. Officer Rodgers wrote to Mr Scott on 15 March 2013 acknowledging the letter dated 3 January 2013 with its enclosures, but declining to accept a late appeal because he did not consider that Mr Martin had a reasonable excuse for the delay in submitting the appeal, and also stating that he had not examined the copy documentation submitted.

8. Mr Scott submitted that the reason for the delay in bringing the appeal and the non-compliance with the request for the production of records was that CFW & Co had 'intermeddled' with the case. He explained that, in connection with a business arrangement made by Mr Martin, CFW & Co had been retained as accountants to the architectural practice to which Mr Martin belonged, but had not been given responsibility for Mr Martin's personal tax affairs.

9. He referred me to a letter dated 26 January 2010 from Officer Rodgers to Mr Martin in which the Officer had said that he had still not received the outstanding information requested in his letter dated 31 July 2009 'to your *former* adviser Tim Scott' (emphasis added).

10. That letter (of 26 January 2010) warned Mr Martin that Officer Rodgers did not intend that the enquiry should continue for much longer and that in the absence of supporting evidence for the expenses in issue, he did not consider them to be deductible and was making arrangements for the enquiry to be closed and an amendment made to Mr Martin's self-assessment. A copy of this letter was being sent to 'your adviser CFW &Co'. As noted above, the closure notice was issued the next day (27 January 2010). I saw a copy of a letter dated 26 January 2010 sent by Officer Rodgers to CFW & Co in which the Officer said that he noted that CFW & Co were now acting as adviser to Mr Martin and enclosing a copy of his letter to him of 26 January 2010. A copy of the closure notice letter of 27 January 2010 was also sent to CFW & Co on 27 January 2010.

11. There was with my papers a copy of a Notice of Appeal submitted to the Tribunal by Mr Scott on behalf of Mr Martin and dated 22 March 2013. There is also a letter from the Tribunal Service dated 25 August 2015 addressed to Mr Martin which states that the Tribunal Service, having checked their system, could find no record that it had received any appeal from Mr Martin. Mr Martin, understandably frustrated, re-submitted the Notice of Appeal on 16 September 2015.

12. Section 49 TMA deals with late notice of appeal. By that section HMRC may agree to a late notice of appeal being given to them – not to the Tribunal. That agreement can only be given by HMRC if they are satisfied that there was a reasonable excuse for not giving the notice of appeal in time. Where HMRC do not agree, the Tribunal may give permission.

13. As noted above, HMRC's letter dated 27 January 2010, which was the closure notice, offered to review the amendment to Mr Martin's self-assessment made by the closure notice. That offer was not accepted. In those circumstances, section 49H TMA provides that an appellant may notify an appeal to the tribunal within what is called 'the acceptance period'. That is the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question. In this case, 'the acceptance period' expired on 26 February 2010. A late appeal can, in these circumstances, only be made if the Tribunal gives permission (section 49H(3) TMA).

14. The Tribunal deals with the question of considering whether to give permission in such cases – as it deals with all other procedural questions – by seeking to give effect to the overriding objective of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"), which is to deal with cases fairly and justly. It may be useful to point out that fairness and justice in the application of the Rules is something which both parties (HMRC as well as an intending appellant) are entitled to expect from the Tribunal.

15. I will assume in Mr Martin's favour that he is not responsible for any delay after 22 March 2013 in notifying the appeal to the Tribunal. Nevertheless the delay in question is very substantial. It runs from 26 February 2010 to 22 March 2013 – over 3 years.

16. The Court of Appeal has recently held – in *BPP Holdings Ltd. v HMRC* [2016] EWCA Civ 121 – that the stricter approach to compliance with rules and directions made under the Civil Procedure Rules which was set out in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd.* [2014] 1 WLR 3926 applies equally to cases in the tax tribunals.

17. That is a warning against laxness which is binding on me. However, even without such a warning I would not have regarded a fair and just approach to the issue of an extension of time for appealing in this case as entitling me to grant Mr Martin's application.

18. Mr Martin himself received the letter constituting the closure notice dated 27 January 2010. It should have been plain from that letter that a timely response was required. Mr Martin himself is, in my judgment, responsible for the fact that such a response was not made. The facts relating to the enquiry which occurred before 27 January 2010, and which I have set out above, make it impossible for me to find that there were any extenuating circumstances which would make it fair or just to allow any significant extension of time for initiating an appeal to this Tribunal – let alone an extension of over 3 years.

19. Mr Martin is responsible for his dealings with Mr Scott and with CFW & Co. It would not be either fair or just to require HMRC to deal with a very stale appeal because Mr Martin has not dealt with those advisers effectively to ensure that the applicable time limit for an appeal to this Tribunal was observed.

20. After considering all the relevant circumstances, I refuse Mr Martin's application for an extension of time to serve a notice of 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 5 JULY 2016