



**TC05305**

**Appeal number: TC/2016/01687**

*CGT assessment – application for permission to appeal out of time - Data Select Ltd v HMRC criteria applied – BPP v HMRC considered – application granted*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CHRISTINE ROWLEDGE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE THOMAS SCOTT**

**Sitting in public at Fox Court, London EC1 on 25 July 2016**

**Ms Sally Hutchings of Morrisons Solicitors LLP for the Appellant**

**Ms Beverley Levy, HM Revenue and Customs Solicitor's Office, for the Respondents**

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## DECISION

1. The Appellant, Ms Rowledge, applied to the Tribunal for permission to make a late appeal in relation to an assessment to capital gains tax for 2007/08. HMRC objected to the application.
2. The only issue was whether leave should be granted for an appeal out of time. The substantive issues relating to the assessment would be considered if leave to appeal was granted.

### *Evidence and submissions*

3. Ms Rowledge gave evidence as a witness and was cross-examined by Ms Levy for HMRC. I was provided with various documents relevant to the background to both the assessment and the reasons for seeking a late appeal.

### *Background and agreed facts*

4. In December 2005 Ms Rowledge purchased a property for £215,000 (“the Property”). The Property was purchased by Ms Rowledge so that her brother, Peter Rowledge, could occupy it as his home.
5. In February 2008 Peter Rowledge purchased the Property from Ms Rowledge for £330,000.
6. On 11 February 2013 HMRC wrote to Ms Rowledge notifying her that they were carrying out a check of her tax position in relation to the sale of the Property.
7. On 19 March 2013 HMRC issued an information notice to Ms Rowledge under paragraph 1 of Schedule 36 to the Finance Act 2008. Ms Rowledge says that she did not receive this notice.
8. On 7 May 2013 HMRC issued a penalty notice under Schedule 36. Ms Rowledge says that she did not receive this notice.
9. On 8 July 2013 HMRC issued a notice of assessment to CGT for the year ended 5 April 2008 under section 29 of the Taxes Management Act 1970 (“TMA”) and a penalty determination under section 7(8) TMA (the “Assessment”).
10. On 15 November 2014 Ms Rowledge wrote to HMRC asking them to “review the situation as the property sale to Peter did not generate a profit and in turn I believe that capital gains tax is not due on this transfer of legal title of the property. In any event the property is/was a principal residence”.
11. On 12 January 2015 HMRC replied stating that their enquiry had been closed on 8 August 2013 and that the time limit for appealing against the Assessment had expired 30 days after it was sent (on 8 July 2013). The letter stated that since

Ms Rowledge had not given any reasonable excuse, a late appeal could not be considered.

12. Following other correspondence and telephone calls, on 29 June 2015 Ms Rowledge wrote to HMRC, broadly repeating the arguments in her letter of 15 November 2014 as to why no CGT was due.
13. On 21 March 2016, WSM Partners LLP, as agents for Ms Rowledge, filed a notice of appeal against the Assessment with the Tribunal.

### *Discussion*

14. The only issue before me was whether to give permission to Ms Rowledge to bring a late appeal against the Assessment.
15. This decision is a balancing exercise. In reaching a conclusion I am guided by the overriding objective of the Tribunal Rules to deal with cases “fairly and justly”, including “avoiding delay”.
16. My starting point is the approach set out by Morgan J in *Data Select Ltd v HMRC* [2012] UKUT 187(TCC), at [34]:

“Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a 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? The court or tribunal then makes its decision in the light of the answers to those questions”.
17. In adopting Morgan J’s approach, I also take into account the comments of the Senior President of Tribunals in *BPP Holdings v HMRC* [2016] EWCA Civ 121. In observing that a tax tribunal’s orders, rules and practice directions “are to be complied with in like manner to a court’s”, it was stated (at [38]) that:

“A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is a good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party”.
18. While *BPP* was dealing with time limits imposed by tribunal rules, and not, as in this case, by primary tax legislation, the decision emphasises the weight which should generally be given to such limits.

19. This is consistent with the language used by the Upper Tribunal in *O’Flaherty v HMRC* [2013] UKUT 0161 (TCC) in relation to the tribunal’s discretion to allow an appeal out of time (at [37]):

“The exercise of such a discretion is a very material one, as it gives to the Tribunal a jurisdiction that it otherwise would not have. Time limits are prescribed by law, and as such should as a rule be respected”.
20. However, all relevant factors must be taken into account. As stated in *O’Flaherty* (at [26]):

“There is a considerable authority that, on an application of this nature, the FTT’s discretion is at large. The FTT must consider all material factors, including the reasons for the delay, whether there would be prejudice to HMRC if the taxpayer were to be permitted to appeal out of time, and whether there would be demonstrable injustice to the taxpayer if permission were not to be given”.
21. Dealing first with the purpose of the statutory time limit, being 30 days from the issue by HMRC of the Assessment by virtue of section 31A TMA, as Judge Bishopp said in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC), at [24], the purpose of the time limit:

“... is to require a party asserting a right to do so promptly, and to afford his opponent the assurance that, after the limit has expired, no claim will be made”.
22. As stated by Judge Redston in *Norman Archer v HMRC* [2014] UKFTT 423 (TC), at [85]:

“Parliament has set a 30 day time limit within which taxpayers can appeal discovery assessments or amendments to their self-assessment. Its purpose is to give finality, so that HMRC – the other party in the possible litigation – will know within that time limit 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”.”
23. Dealing next with the length of the delay, this was significant. The appeal should have been made to HMRC by 8 August 2013. The first indication which HMRC had that Ms Rowledge wished to appeal was her letter of 15 November 2014, some 459 days after the appeal deadline.
24. Ms Rowledge claimed that her brother Peter wrote to HMRC contesting the claimed tax on 27 February 2013. HMRC said they had no record of receiving the letter. In any event, since no assessment was raised until July 2013, any letter sent 5 months earlier could not have been an appeal.
25. The third question identified in *Data Select* is whether there is a “good explanation” for the delay.
26. It is not particularly surprising that in January 2015 HMRC refused a late appeal under section 49 TMA. The reasons given by Ms Rowledge to HMRC at that stage for the lateness of the appeal did not include various reasons presented subsequently.

27. The possible reasons for the delay can be discerned from the notice of appeal to the Tribunal dated 21 March 2016; the correspondence and telephone calls between Ms Rowledge and HMRC in late 2015 and throughout 2016; written evidence from Peter Rowledge, and the explanations set out in Ms Hutchings' skeleton argument. From those materials and from Ms Rowledge's written and oral evidence, I find that the following facts contributed to the delay:
- a) Ms Rowledge had purchased the Property for her brother Peter because of his poor credit rating and inability at the time to obtain a mortgage. The understanding between Ms Rowledge and her brother was that he would deal with any tax enquiries relating to the Property. However, during the period when the Assessment was raised, he was suffering severe depression and was admitted to hospital for panic attacks. He attempted suicide, and was for a period sectioned by the police on the basis of his instability.
  - b) Ms Rowledge had mistakenly understood that she was appealing the Assessment by virtue of the many telephone calls she made to HMRC during the period 2013 to 2016, as well as several letters she had written. While the explanations and information provided by Ms Rowledge during this period were somewhat piecemeal and unfocussed, and while HMRC say that they have no record of some of the information which Ms Rowledge says she supplied, I find that Ms Rowledge did consistently make clear her objection to the Assessment.
  - c) During 2013, Ms Rowledge had been hospitalised, and was subsequently immobile and on painkillers, following an accident. She was also during that period the main carer for her mother who had herself been hospitalised.
28. The final questions raised in *Data Select* are the consequences for the parties of either an extension of time or a refusal to extend time.
29. HMRC argued that an extension of time would cause them prejudice. They had closed their files on this Assessment, and moved on to discharge their responsibilities in relation to other taxpayers. As they stated in their skeleton argument:
- “HMRC submit that if the extension of time is allowed and leave given to the appellant to appeal out of time, this would be of prejudice to HMRC and it would be unfair to other taxpayers who do adhere to the legislation by appealing within the 30 day time limit set by Parliament.
- HMRC say that if the appeal is accepted out of time they will be expected to revisit an enquiry which they considered was closed in August 2013”.
30. For the Appellant, Ms Hutchings acknowledged HMRC's argument, but emphasised that, if an extension were granted, it should be possible in practice to settle the appeal without the need for any tribunal hearing. That was because the issues between the parties related solely to written evidence and records, and did not require any witness evidence.

31. I have also considered the consequences of a refusal to extend time. For HMRC, the consequences are positive. For Ms Rowledge, however, the consequences of a refusal to extend time would be highly prejudicial.
32. The appeal which Ms Rowledge seeks to make out of time effectively raises only one issue. The CGT arising on the sale of the Property by Ms Rowledge to Peter Rowledge in 2008 is, according to HMRC's estimate in the Assessment, £34,377. The associated failure to notify penalty is £10,313. However, the CGT calculation takes no account of the substantial repair and renovation work undertaken following the purchase of the property, and assumes that none of the associated expenditure could add to the base cost and thereby reduce the gain.
33. Ms Rowledge engaged a professional firm to calculate what she maintains should have been the CGT due in view of the alleged allowable expenditure of approximately £80,000. The calculation showed CGT of £3,573, with an associated penalty of £1,072.
34. In considering whether to grant Ms Rowledge's application, I have not given any detailed consideration to the merits of the substantial appeal. As More-Bick LJ said in the Court of Appeal decision in *R (Dinjan Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 (at [46]):

“If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered...”
35. However, while not permitting or engaging in what has been termed a “mini-trial” of the merits, I have considered whether a refusal to extend time would be likely to cause what Judge Berner in *O’Flaherty* called “demonstrable injustice”. While the agreement of allowable expenditure between the parties might result in some claimed expenditure not being allowable, or not being evidenced to the satisfaction of HMRC, a refusal would result in Ms Rowledge having a tax liability some £40,000 greater than that which she contends is properly due.
36. Ms Rowledge gave evidence, which HMRC did not challenge, that she had been told on the telephone by HMRC's debt recovery unit that HMRC would take all necessary steps to recover the CGT and penalty assessed, even if bankruptcy ensued.
37. So, applying *Data Select*, and taking into account *BPP*, I have duly considered the various factors and all the relevant circumstances. The failure to comply with the statutory time limit, given its clear purpose, and the length of the delay weigh heavily in favour of refusing to extend time. However, the reasons for the delay, particularly the ongoing effect of the various health-related issues, do in my judgment amount to a “good explanation”, taking into account the

continuing efforts of Ms Rowledge to communicate with HMRC and object to the Assessment. In terms of the consequences for the parties, while an extension of time would prejudice HMRC in having to re-open a closed file, a refusal to extend time would cause very serious consequences indeed for Ms Rowledge.

***Decision***

38. Balancing all these factors, and being guided by the overriding objective, on the particular facts of this case permission to make a late appeal is granted.

***Right to apply for permission to appeal***

39. 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.

**THOMAS SCOTT  
TRIBUNAL JUDGE**

**RELEASE DATE: 05 AUGUST 2016**