[2017] UKFTT 0154 (TC)

TC05647

Appeal number: TC/2016/01318

INCOME TAX – UNDECLARED INCOME - WHETHER NOTIFICATION PRIOR TO ASSESSMENT IS A VALID NOTICE OF APPEAL – NO – APPLICATION FOR PERMISSION TO APPEAL OUT OF TIME – SECTION 49 TAXES MANAGEMENT ACT 1970 – APPLICATION REFUSED

FIRST-TIER TRIBUNAL
TAX CHAMBER

AMANDEEP SINGH **Appellant**

- and -

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

TRIBUNAL: JUDGE IAN HYDE

Sitting in public in Birmingham on 8 November 2016

Paresh Kotecha, for the Appellant

Stephanie Skipper, of HM Revenue and Customs, for the Respondents

DECISION

1. HMRC enquired into income that had not been declared by the appellant. In the course of correspondence between the parties the appellant purported to appeal against any tax and penalties due. On 18 July 2014 HMRC issued notices of assessment for under-declared income and associated penalty determinations. By a notice of appeal dated 2 December 2015 the appellant appealed the assessments and determinations. HMRC argues that the appellant has appealed out of time and the appellant argues that his notices to HMRC prior to the notices of assessment constitutes a notice of appeal or, if it does not, he should be allowed to appeal late.

2. In this application the Tribunal is not concerned with the merits of the appeal but whether the appellant has appealed in time against the notices of assessment for under declared income and associated penalty determinations or, if he has not, whether he should be allowed to appeal out of time.

Facts

3. There were no witnesses in this appeal although Mr Katecha, representing the appellant and being his accountant was able to make some observations about the history of the matter which were not challenged by HMRC.

4. I find the facts to be as follows.

5. On 16 March 2012 HMRC wrote to the appellant notifying him that they had obtained information that the appellant had received £26,528.76 income as a delivery driver for the year ended 5 April 2008 and that this income had not been declared. HMRC asked the appellant to provide information on income received and relevant expenses.

6. On 23 August 2013 and following correspondence and discussions between the parties the appellant sent relevant documents to HMRC.

7. On 13 February 2014, HMRC having reviewed available information sent calculations of assessable profits, tax and interest and penalties to the appellant totalling £27,367.47 and suggested that the preferred method of settling the outstanding amounts would be for the appellant to make an offer which would then be accepted by HMRC and the appellant would settle within 30 days.

8. On 21 February 2014 PRK accountants ("PRK") acting for the appellant wrote to HMRC at Local Compliance, Northampton in respect of the calculations asking for four weeks to check the calculations, telling HMRC the expenses appeared to be wrong and asking for a more detailed breakdown of the income and expenditure. PRK concluded the letter by saying;

> "Please accept this letter as our formal appeal to vacate the Penalty Notice".

9. On 12 March 2014 PRK wrote to HMRC at Local Compliance in Bootle enclosing their letter of 21 February saying;

> 'We enclose a copy of our letter of 21 February 2014 to appeal the tax calculations as detailed in Mrs. Pettit's letter…
>
> Please accept this letter as our formal appeal to vacate the Penalty Notice"

10. On 2 April 2014 HMRC wrote to PRK, copied to the appellant, notifying PRK that, as there had been no decision which could be appealed, there was as yet no formal right of appeal;

> "In your letter you state that you "appeal the tax calculations" and "[formally] appeal to vacate the Penalty Notice". I need to make to aware that, as yet, a formal right of appeal does not exist: if indeed your appeal is in response to my informal Contract Settlement proposal of 13 February 2014 A formal Righ of Appeal will become relevant if/when formal action is taken against your client. As such the grounds of your appeal appear to be invalid and I intend to take no further action regarding this at this stage…"

11. On 30 April 2014 a meeting took place and on the same day HMRC wrote to the appellant with revised income, interest and penalty calculations for the relevant tax years being in total £31,120.63. the document explaining the penalty explanation calculation stated;

> "…you **cannot** appeal against or request a review of anything to do with the penalty at this time. If we send you a penalty assessment notice, you will be able to appeal or ask for a review then"…

12. On 15 May 2014 PRK wrote to HMRC, being Mrs Pettit at HMRC in Bootle, enclosing their calculations and saying the income was grossly overstated and stating that the penalties were severe and concluded;

> "Please accept this letter as our formal appeal to vacate the assessments"

13. HMRC's evidence was that they never received the letter. Mr Katecha, giving evidence, said that he was a sole practitioner and he believed that he posted the letter. HMRC did not challenge that the letter had been sent but denied receiving it.

14. On 18 July 2014 HMRC issued notices of assessment and penalty determinations ('the Assessments") in the same amount as the calculations sent to the appellant on 30 April 2014. In the covering letter HMRC told the appellant he had a right of appeal and referred to the assessments and determinations for further information. The notice of assessment included the following;

> "If you disagree with this assessment you can appeal. To do this you need to write to us within 30 days of the date of the assessment, telling us why you think our decision is wrong"

15. The notice of determination of penalties included materially identical wording.

16. On 2 December 2015 PRK wrote to HMRC submitting amended tax returns and said that they had already appealed to vacate the assessments of April 2014. They had sent the appeals but had not received a reply. The letter referred to advice from HMRC officers to the appellant that as they had not received the April 2014 appeal, the appellant should file a late appeal. Finally PDK said

> "please accept this letter as our formal late appeal to vacate [the Assessments]"

17. On 15 January 2016 HMRC wrote to PRK and acknowledged receipt of the letter of 2 December enclosing a late appeal but pointed out that, as explained in the letter of 2 April 2014, there was no formal right of appeal at that point. Further, following the Assessments, the appellant did not submit a valid appeal by the deadline of 18 August 2014. The appellant's appeal was therefore late and HMRC did not accept that the appellant has a reasonable excuse. HMRC also noted a penalty had been incorrectly charged, reducing the amount payable by £2775.84.

18. On 1 February 2016 PRK wrote to HMRC explaining how throughout the enquiry the appellant had challenged the numbers produced by HMRC, telling HMRC that they had sent the letter of 15 May 2014 via Royal Mail and enclosing a notice of appeal to this Tribunal.

Relevant Legislation and Case Law

19. Section 31(1)Taxes Management Act 1970 ("TMA") provides;

> (1) An appeal may be brought against-
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) any assessment to tax which is not a self-assessment"

20. Section 31A TMA provides;

> "(1) Notice of an appeal under Section 31 of this Act must be given-
>
> (a) in writing,
>
> (b) within 30 days after the specified date,
>
> (c) to the relevant officer of the Board
>
> (2) …
>
> (3) …
>
> (4) In relation to an appeal under section 31(1)(d) of this Act-

(a) the specified date is the date on which the notice of assessment was issued, and

(b) the relevant officer of the Board is the officer by whom the notice of assessment was given.

(5) The notice of appeal must specify the grounds of appeal"

21. Section 49 TMA provides;

"(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

(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

(5) Condition B is that HMRC are satisfied that there was a 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

(7) …

(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)

Submissions as to whether the appellant has appealed

22. The appellant's first argument is that it has appealed by virtue of the letters of 21 February 2014, 12 March 2014 and 15 May 2014. The fact that these predated the Assessments is irrelevant because HMRC knew the appellant was disputing the tax liability and the penalties. The letter of 15 May 2014 was posted to Mrs Pettit at HMRC in Bootle, the correct addressee.

23. HMRC argued that the letters of 21 February 2014, 12 March 2014 and 15 May 2014 predated the Assessments and so do not constitute valid appeals. Section 31(1) required an appeal to be in respect of an assessment and, there being no assessment at the time of those letters, they did not constitute valid appeals. HMRC made clear in its letters that it was not possible for the appellant to appeal prior to an assessment being

made. Further, the letter of 15 May 2014 whilst not a work of fiction, was never received by HMRC until it was served in the bundle in advance of this application. HMRC did not challenge whether it had been sent to the right officer and address.

24. On the question as to whether the letter of 15 May 2014 complied with the requirement in Section 31A(1)(c) TMA that the appeal be sent to the relevant officer, HMRC referred the Tribunal to the decision in *Romasave (Property Services)Limited v HMRC* [2015] UKUT254. *Romaserve* was a VAT decision as to whether HMRC had satisfied the requirement to "notify it" to the taxpayer as required by section 73(2) Value Added Tax Act 1994. HMRC highlighted the reference by the Upper Tribunal at paragraph 19 to section 7 of the Interpretation Act 1978;

> "where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effective by properly addressing , pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post"

Submissions as to whether the appellant should be allowed to appeal out of time

25. In the event the appellant is not successful in his first argument he asks that his appeal of 2 December 2015 be accepted as a valid appeal to HMRC notwithstanding that it is late on the grounds that PRK's earlier letters made it clear the appellant disputed the tax and penalties due. From the meeting of 30 April 2014 HMRC were aware of the appellant's challenges to HMRC's position, including the double counting on movement between bank accounts. The appellant relied on the letters of 21 February 2014, 12 March 2014, and in particular the letter of 15 May 2014 enclosing tax calculations for each relevant year, all of which notified HMRC that the appellant was appealing. Even if the appellant was wrong about whether he had validly appealed, he nevertheless believed he had appealed and so there was no need to appeal again. In those circumstances the lateness of his eventual appeal should be excused.

26. Mr Kotecha claimed that there was further correspondence with HMRC which had not been brought before the Tribunal but accepted that the appellant should have chased HMRC earlier about the state of the appeal process. As to the consequences of being refused permission, Mr Kotecha pointed out that a tax liability of the amount assessed would mean the appellant would have to sell his house.

27. As to whether the appellant should be allowed to appeal out of time, HMRC referred the Tribunal to the decisions in *Romasave* and the Court of Appeal in *BPP Holdings Ltd v HMRC* [2016] 1 WLR 1915.

28. HMRC stressed the recent guidance in *BPP*, where it was said by the Senior President of Tribunals at paragraph 38;

> "the correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal"

29. Here, according to HMRC, there is no excuse that has been offered by the appellant to justify the 473 days of delay. In particular HMRC in its letter of 2 April 2014 made clear that the appellant could not appeal before assessments had been issued. Further, it was clear from HMRC's letter of 18 July 2014 enclosing the Assessments that the earlier letters were not valid appeals. The appellant was not therefore misled, could not have been under the misapprehension that they had appealed and so there was no need to appeal. There was therefore no reasonable excuse for the appeal being late.

30. HMRC referred the Tribunal specifically to paragraph 96 of the Upper Tribunal's decision in *Romaserve*;

> "... The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the Tribunal a jurisdiction it would not otherwise have. 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."

31. Both parties are in agreement that, in the event the appellant is successful on either ground, I should direct that the appeal is stayed for one month to enable the parties to seek to reach agreement on the tax and penalties due.

Decision as to whether there is a prior appeal

32. The first issue is whether one or more of PRK's letters of 21 February 2014, 12 March 2014 and 15 May 2014 amounted to a valid notice of appeal.

33. Sections 31 and 31A TMA set out a number of conditions for a notice of appeal to be validly served on HMRC being;

> (1) Section 31(1)(d) requires that the appeal is against "any assessment to tax…"
>
> (2) Section 31A(1) (a) and (c) require a notice of appeal to be given in writing to the relevant officer, being (in accordance with section 31A(4)(b)) the officer by whom the notice of assessment was given.
>
> (3) Section 31A(1)(b) calculates the time to appeal from the prescribed date, defined in section 31A(4)(b) as being "the date on which the notice of assessment was issued".
>
> (4) Section 31A(5) requires the appeal to specify the grounds of appeal.

34. It is clear that the drafting in sections 31(1)(d) and 31A(4)(b) require an assessment to be in existence at the time the appeal is made.

35. The letters of 21 February 2014 and 12 March 2014 only make reference to the penalties not the tax position. Further, to the extent they purport to appeal the penalty position, they do not amount to valid notices of appeal because they were given before the Assessments were issued and do not contain grounds of appeal.

36. The letter of 15 May 2015 was also given before the Assessments were issued and so does not amount to valid notices of appeal. As regards the requirement that the notice must be "given …to the relevant officer", HMRC's position was that the letter of 15 May 2014 was never received. Mr Katecha gave evidence that as the appellant's counsel he posted the letter addressed to Mrs Pettit at HMRC in Bootle. Neither HMRC's position not Mr Katetcha's evidence was challenged by the other side. I therefore accept the evidence of Mr Katetcha and find as a fact that he did send the letter of 15 May 2014 and also accept that HMRC, or at least the relevant officers, did not receive it. Having made those findings of fact I therefore, find that Section 31A(1)(c) TMA has been satisfied, the appellant's letter having been "given…to the relevant officer of the Board".

37. For completeness the letter of 15 May 2014 does in my view contain grounds sufficient to satisfy section 31A(5). Whether those grounds are all the grounds the appellant wishes to rely on is another matter which is not relevant to this application.

38. For these reasons I dismiss the appellant's first ground of appeal.

Decision as to whether to allow a late appeal

39. If there has been no prior valid appeal, HMRC having not agreed to a late appeal under section 49(2)(a) TMA, this Tribunal must determine whether to give permission in accordance with section 49(2)(b) TMA.

40. Prior to *BPP,* guidance on the enforcement of time limits was provided by Judge Bishopp in the Upper Tribunal in *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 350, applying the principles set out by Morgan J in the Upper Tribunal in *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187.

41. These decisions require the Tribunal to adopt a flexible approach to time limits. Whilst the Civil Procedure Rules of the High Court ("CPR") are a guide, the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Tribunal Rules") have been couched in more flexible terms and the Tribunal should bear in mind, not only the overriding objective in Rule 2(1) to deal with cases fairly and justly but also the requirement under Rule 2(2)(b) to avoid unnecessary formality and to seek flexibility.

42. Bearing in mind these general principles, the principles set out in *Data Select* require the Tribunal to ask itself the following questions;

(1) What is the purpose of the time limit?

(2) How long was the delay?

(3) Is there any 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?

43. The Upper Tribunal in *Romasave* considered and endorsed the approach in *Data Selec*t:

> " 89. It is not necessary for us to describe the history of this debate. The outcome, in our view, is that in this tribunal, and in the FTT, the factors identified by the courts in the revised form of CPR r 3.9 as having particular weight or importance, that is to say the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, are relevant factors, but have no special weight or importance. The weight or significance to be afforded to those factors, along with all other relevant factors, in applying the overriding objective to deal with cases fairly and justly, will be a matter for the tribunal in the particular circumstances of a given case."

44. In *BPP* the Court of Appeal reinforced the need to comply with the principles in CPR 3.9 being the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders;

> "37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
>
> 38. 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 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."

45. The Court of Appeal expressly did not consider the principles in *Data Select* but the Senior President of Tribunal said at paragraph 44:

"Morgan J applied CPR 3.9 by analogy...in just the manner I have suggested is appropriate".

46. In summary the Tribunal must apply the principles in *Data Select*, conscious of the recent guidance from the Court of Appeal in *BPP* highlighting the need for parties to comply with the principles in CPR 3.9 being the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

What is the purpose of the time limit?

47. The purpose of the time limit is to provide certainty in tax compliance and ensure disputes cannot be raised long after the relevant matters occurred.

How long was the delay?

48. The appellant was 473 days late in appealing to HMRC being required to appeal 30 days after 18 July 2014 but only appealing on 2 December 2015

49. This is a very long period of time, set against the comments of the Upper Tribunal in *Romaserve* at paragraph 96 that in the context of a 30 day time limit "a delay of more than three months cannot be described as anything but serious and significant". The delay here must therefore be seen as very serious and significant.

Is there any good explanation for the delay?

50. The appellant's argument is that he believed he had already appealed and so took no action. However, after the first two attempts to appeal, being 21 February 2014, and 12 March 2014, HMRC notified the appellant in its letter of 2 April 2014 that it was not possible to appeal until an assessment had been served. No such reminder was sent in respect of the 15 May 2014 letter, necessarily because, as I have found above, HMRC never received the letter.

51. Further, no evidence was produced to the Tribunal that the appellant chased HMRC for a clarification of the position. The appellant had been told twice in writing that an appeal had to be made after an assessment and so might reasonably be aware of that requirement. Even if the letter of 15 May 2014 had been received, it still predated the Assessments. The appellant was not therefore misled by HMRC and knew that an appeal had to be served after the assessments had been issued.

52. On that basis I find that the appellant ought reasonably to have known that his prior attempts to appeal were not valid and so I find no good explanation for the delay.

What will be the consequences for the parties of an extension of time?

53. If the appellant is granted an extension of time he will be allowed to continue his appeal. Mr Kotecha accepted that there was a tax liability but not as much as set out in the Assessments. For HMRC, an extension of time would require HMRC to reengage

with the appellants in the dispute which they might ordinarily have expected to have been concluded. However, no specific prejudice was identified by HMRC.

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

54. The appellant would be denied the ability to challenge the Assessments were he not granted an extension of time. This would have serious financial consequences for him.

55. For HMRC, whilst the argument was made that HMRC are entitled to finality, no argument was made that HMRC would be particularly prejudiced.

Generally

56. The Court of Appeal in *BPP* took compliance as its starting point, requiring there to be a good reason for non compliance. In this appeal, I do not find a good reason for delay and weighing the factors as set out by Morgan J in *Data Select* in the round, conscious in particular of the prejudice that would be suffered by the appellant, it is my decision that the appellant should not be granted leave to appeal out of time.

57. In conclusion I dismiss the appellant's application on the grounds that the letters prior to the Assessments did not amount to appeals to HMRC and, further, that the appellant's application for permission to appeal late to HMRC be refused.

58. 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.

IAN HYDE

TRIBUNAL JUDGE
RELEASE DATE: 3 FEBRUARY 2017