TC05762

Appeal number: TC/2016/04855

Stamp Duty Land Tax – avoidance scheme – late appeal – application for permission to notify a late appeal to the Tribunal - permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMES EDWARDS **Appellants**
AVRIL EDWARDS

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**

Sitting in Chambers on 4 April 2017

Sam Warren of Goldstone Tax for the Appellant

Peter Kane, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is a decision on an application from the appellants for permission to notify a late appeal to the Tribunal. The parties consented to the application being determined without a hearing.

The facts

2. The underlying appeal concerns the use by the appellants in July 2009 of a Stamp Duty Land Tax ("SDLT") saving scheme promoted by Premier Strategies Limited (a company which went into administration in 2013 and was ultimately dissolved on 11 March 2016). The appellants were purchasing a property in London for £1 million.

3. No SDLT return could be traced by HMRC in relation to the purchase. HMRC discovered the transaction through research on Land Registry and Companies House records and on 2 March 2012 they issued a determination to the appellants under paragraph 25, Schedule 10, Finance Act 2003 in the sum of £40,000 plus interest.

4. Premier Stategies Limited ("PS") responded on behalf of the appellants by letter dated 30 March 2012, appealing against the determination and applying for postponement of the disputed tax. They also asserted that an SDLT return had been delivered in form SDLT 1 in respect of the transaction. It transpired that an SDLT return had been submitted by Edcom Properties, the intermediate company involved in the scheme, but no return had been submitted by the appellants.

5. Matters were left in abeyance by HMRC pending the release of the decision in *Vardy Properties and another v HMRC*, which was issued on 6 September 2012. There then followed "a series of contacts between the parties by which the Respondents sought to settle the case" based on the *Vardy* decision. A "resolution opportunity" was offered to users of such schemes, which came to an end on 31 December 2014. The appellants did not take up that opportunity.

6. On 25 February 2015 HMRC wrote to the appellants, giving them a final chance to pay what HMRC considered to be the outstanding tax and interest within 30 days, and setting out a detailed analysis of the facts as they understood them and their view of the legal consequences.

7. On 23 March 2015, the first appellant wrote to HMRC in reply. He said he had been unable to find any previous correspondence from HMRC in relation to the scheme they referred to, and was not aware of the scheme or of any preferential offer to settle. He sought further information.

8. On 27 March 2015 HMRC issued a formal decision on the appellants' earlier appeal, sending a copy of their previous analysis and of the original determination.

They offered a statutory review of their decision or alternatively invited the appellants to appeal to the Tribunal within 30 days.

9. On 31 March 2015, HMRC responded to the first appellant's letter dated 23 March 2015. After summarising the then state of affairs, the letter went on to say this:

> "On 27 March 2015 we issued a decision letter to you. **As stated on the letter you now have 30 days from the date of the letter to pay the outstanding tax and interest or appeal to the tribunal.**" *[Emphasis included in original letter]*

10. On 6 May 2015, having received no response, HMRC issued a further letter advising that the appeal was now regarded as settled by agreement under paragraph 37 of Schedule 10 Finance Act 2003.

11. The following day, HMRC received a letter dated 25 April 2015 (which actually reached the relevant department within HMRC on 13 May 2015) from the first appellant, seeking contact with the debt management team within HMRC with a view to discussing a "time to pay" arrangement. This was referred internally within HMRC and the Debt Management Team wrote to the appellants on 2 June 2015, asking them to get in touch by 15 June 2015 to discuss the appellants' proposal.

12. In the absence of any response, the Debt Management Team wrote to the appellants on 6 October 2015, warning of impending enforcement action. On 12 October 2015 a Mr Douglas Shanks of DSC Metropolitan LLP Chartered Accountants called HMRC to say he had been instructed and was looking into matters. HMRC said that in the absence of proper written authority, they could not discuss the matter with him, but they would defer enforcement until 2 November 2015 to give him time to "provide information and payment".

13. On 2 November 2015 HMRC received a further telephone call from Mr Shanks, seeking an extension of time to the end of the month to resolve matters. He told HMRC he was advising the appellants to pay the determination in full.

14. On 8 January 2016, HMRC referred the matter internally to enforcement officers for action.

15. By letter dated 18 January 2016, DSC Metropolitan LLP Chartered Accountants wrote to HMRC, enclosing a form of authority from the appellants in their favour.

16. On 26 January 2016, HMRC enforcement officers attended at the appellants' property. The first appellant referred the officers to Mr Shanks, who had supposedly sent a letter regarding an appeal. The first appellant would answer no further questions and said that all contact should be through Mr Shanks. The officer managed to speak to Mr Shanks by telephone, to be told that some correspondence had been sent to HMRC in relation to an appeal, and all further communication should be through him.

17. There appears to have been further correspondence about possible payment, no copy of which was included in the papers before me. Finally on 17 June 2016 there was a telephone conversation between Mr Shanks and HMRC's Debt Management Unit, in which they were informed that the appellants had "begun the appeals process with Corner Stone".

18. On 6 July 2016 HMRC's Debt Management Unit spoke to the second appellant by telephone, to be told that Cornerstone had been instructed, and she would call back with their contact details.

19. On 12 July 2016, HMRC's Debt Management Unit received a telephone call from someone called "Beatrice" at Cornerstone Tax Advisers. As no authority was held to talk to her, she was given details of the fax number to send authority to. A fax authority was received and then a further conversation took place on 14 July 2016. The appellants were said to be "confused about the SDLT" and thought they were still in the appeals process (rather than being chased for payment) and had asked Cornerstone to contact HMRC. It was explained that HMRC considered the SDLT due for payment unless some documentation could be provided that showed otherwise. Cornerstone said they would call back "early next week".

20. On 27 July 2016, "Beatrice" called HMRC again, apologised for the delay but said she had only been able to speak to the appellants the day before. A late appeal was going to be submitted "next week".

21. On 10 August 2016, HMRC called Cornerstone again, to be told that "Beatrice" was out of the office until the following Monday, 15 August. After some further exchanges of missed calls, a further conversation ensued on 16 August, when HMRC were informed that Cornerstone had "received the Tribunal appeal documents" on 9 August and would be "submitting docs to the court next week".

22. On 12 September 2016, the Tribunal received a notice of appeal by email from Cornerstone on behalf of the appellants. They had not been properly authorised and it took until 18 October 2016 for an appropriate form of authority to be supplied to the Tribunal.

23. The appeal was notified by the Tribunal to HMRC on 27 October 2016 and on 30 November 2016 HMRC responded, objecting to the late appeal.

24. The appellants gave the following reasons in their notice of appeal for the lateness of the appeal:

> "Mr & Mrs Edwards' SDLT dispute was originally being dealt with by their agents at the time, Premier Strategies Ltd ("the Agent"). The Agent was taken into administration in 2013 and Mr & Mrs Edwards were left to correspond with HMRC themselves in relation to their SDLT dispute. On receipt of HMRC's decision letter on 27 March 2015 ("the Decision Letter"), they enlisted the help of DSC Metropolitan LLP Chartered Accountants ("DSC"), as an interim measure. DSC do not normally deal with appeals to the Tax Tribunal.

Mr Douglas Shanks of DSC was in regular correspondence with HMRC and informed them that Mr & Mrs Edwards intended to appeal the Decision Letter, but that they were still trying to find appropriate representation to enable them to progress their appeal.

Mr Shanks subsequently wrote to HMRC on 18 January 2016 informing HMRC that he had been instructed to perform an independent review and requested documentation to assist him in this. Furthermore, on 26 January 2016 Mr Shanks had a telephone conversation with HMRC informing them that he was arranging for his clients to be represented by advisers who were experienced in tax litigation to deal with their tax appeal in relation to the SDLT.

Cornerstone Tax Advisers ("Cornerstone") were approached in June 2015[1] to assist Mr & Mrs Edwards. Cornerstone were under the impression that Mr & Mrs Edwards had a live appeal in place. Cornerstone, however, only discovered that there was no appeal in place when they were appointed as agent to correspond with HMRC regarding calls Mr & Mrs Edwards were receiving from HMRC's Debt Management Unit in July 2016.

Cornerstone have since acted quickly and efficiently to clarify the position and have been in contact with both HMRC Counter-Avoidance and Debt Management. Mr & Mrs Edwards should not be punished for an oversight which was not of their making and they request that this late appeal be allowed so that they may pursue their appeal and establish that they do not owe HMRC the SDLT which it claims is due from them."

The law

25. The relevant statutory provisions are in paragraphs 36A, 36C and 36H of Schedule 10 Finance Act 2003, which provide (in relevant part) as follows:

"**Appeal: HMRC review or determination by tribunal**

36A –

(1) This paragraph applies if notice of appeal has been given to HMRC.

(2) In such a case –

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see paragraph 36B),

(b) HMRC may notify the appellant of an offer to review the matter in question (see paragraph 36C), or

(c) the appellant may notify the appeal to the tribunal (see paragraph 36D).

[1] Presumably intended to refer to 2016

(3) See paragraphs 36G and 36H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.

(4) This paragraph does not prevent the matter in question from being dealt with in accordance with paragraph 37(1) (settling of appeals by agreement).

…

HMRC offer review

36C –

(1) Sub-paragraphs (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.

(2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC's view of the matter in question.

(3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with paragraph 36E.

(4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under paragraph 37(1) for the settlement of that matter.

(5) The appellant may not give notice under paragraph 37(2) (desire to withdraw from agreement) in a case where sub-paragraph (4) applies.

(6) Sub-paragraph (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under paragraph 36H.

(7) HMRC may not notify the appellant of an offer to review the matter in question (and, accordingly, HMRC shall not be required to conduct a review) if –

(a) HMRC have already given a notification under this paragraph in relation to the matter in question,

(b) the appellant has given a notification under paragraph 36B in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal under paragraph 36D.

(8) In this paragraph "acceptance period" means 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.

…

Notifying appeal to tribunal after review offered but not accepted

36H –

(1) This paragraph applies if –

(a) HMRC have offered to review the matter in question (see paragraph 36C), and

(b) the appellant has not accepted the offer.

(2) The appellant may notify the appeal to the tribunal within the acceptance period.

(3) But if the acceptance period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this paragraph 'acceptance period' has the same meaning as in paragraph 36C."

26. The Tribunal therefore has a discretion, under paragraph 36H(4), to give permission for late notification of the appeal, and there are no statutory provisions which state how that discretion is to be exercised.

27. Paragraph 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides as follows:

"(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal—

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

28. The judgment of Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 included a useful analysis of the way in which the judicial discretion to permit the making of late tax appeals ought to be exercised (that case was concerned with section 49 Taxes Management Act 1970, a provision which is closely mirrored by paragraph 36H(3)):

"[22] Section 49 is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as

other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.

[23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s 49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s 33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late.

[24] Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed, in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one another, for

> example in a case where there is a reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies."

Discussion and decision

29. In the present case, HMRC made an offer of review in their letter dated 27 March 2015. The appellants did not notify HMRC of their acceptance of that offer and accordingly, under paragraph 36C(4), after the expiry of the 30 day period for acceptance, HMRC's view of the matter as stated in their letter dated 27 March 2015 "is to be treated as if it were contained in an agreement in writing under paragraph 37(1) for the settlement of that matter."

30. Thus the matter was treated immediately following 26 April 2015 as settled by agreement on the basis of HMRC's view as expressed in their letter dated 27 March 2015.

31. The appeal was actually notified to the Tribunal on 12 September 2016, over 16 months late. In the intervening period, the bulk of the communication received by HMRC indicated that the appellants were seeking to settle their liabilities and agree time to pay them.

32. I find the reasons for the lateness, as summarised in the appellants' notice of appeal, to be wholly inadequate. Essentially, in spite of being informed quite clearly (once in HMRC's formal letter offering a review dated 27 March 2015 and again in HMRC's explanatory letter dated 31 March 2015) that they needed to appeal within 30 days, the appellants took some months to appoint an adviser who did not have the necessary expertise to represent them in an appeal of this type, then let matters drift for several further months before appointing an adviser who was capable of acting for them. Finally, that adviser did not (for whatever reason) actually submit an appeal to the Tribunal for a further two months.

33. In a "normal" appeal, such conduct would display an unacceptably lax approach to the statutory time limits. In an appeal such as this, I cannot see how a delay of this nature and magnitude can possibly be "excused" by permitting the late appeal to proceed. Where taxpayers embark on a course of action which involves careful reliance on detailed technical provisions to avoid tax, they cannot reasonably expect an indulgent attitude to be shown to them when they fail so spectacularly to observe basic time limits in seeking to exercise their rights of appeal when HMRC challenge the effectiveness of the scheme.

34. By reference to the various factors mentioned in *Aberdeen City*, I see nothing in the history of this case to displace the starting assumption that "the normal case is covered by the time limit". I see no reasonable excuse for the delay in notifying the appeal. There was nothing confusing or misleading about the communications which HMRC sent to the appellants, and the appellants have failed to act with any

expedition even once it was clear to them that an appeal to the Tribunal was both necessary and late.

35. Permission to notify this appeal to the Tribunal after the relevant statutory time limit is therefore REFUSED. As such, the Tribunal has no jurisdiction to consider the appeal itself, which is therefore STRUCK OUT.

36. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2017