



TC05793

Appeal number: TC/2016/04041

Income tax – expense claims – late appeal – non –receipt of HMRC assessments and penalty notice–last known address –onus on taxpayer – Tinkler applied – application refused.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR BABA MUSAH

Appellant

- and -

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

**TRIBUNAL: JUDGE Rachel Short
Michael Bell ACA CTA Member**

**Sitting in public at the Royal Courts of Justice, the Strand, London on 15 March
2017**

Mr Michael Danso of Anthony Michael Associates, accountants for the Appellant

**Martin Foster, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

1. The Appellant, Mr Musah, appealed on 25 July 2017 to this Tribunal against
5 HMRC's closure notice in respect of his self-assessment for the 2011-12 tax year,
discovery assessments in respect of his self-assessment returns for the 2010-11 and
2009-10 tax years and a penalty notice all of which were served on Mr Musah on 13
November 2013. The total amount of tax (£8,168.47) and penalties (£5,717.92)
10 imposed by HMRC is £13,886.39. Mr Musah's appeal notice refers to an amount in
dispute of £6,500, taking account of his acceptance of a reduction in the amount of
expenses claimed as a deduction for the years in question.

2. Mr Musah's appeal against the assessments and the penalties was made late.
The date when he should have appealed to this Tribunal against those assessments and
penalties was 13 December 2013. HMRC notified Mr Musah that they did not accept
15 his late appeal on 8 December 2015 and again on 25 May 2016. Mr Musah appealed
to this Tribunal on 25 July 2016, nearly three years late.

3. The Tribunal first considered whether it should exercise its discretion to extend
the deadline for Mr Musah to make his appeal under Rule 5 of the Tribunal Procedure
(First-tier Tribunal)(Tax Chamber) Rules 2009 and made clear that it would proceed
20 to consider the substantive issues under appeal in detail only when it had come to a
decision about whether the late appeal should be allowed.

Background facts

4. Mr Musah is a builder. He submitted his self-assessment return for 2009-10 on
4 May 2010. That included a total of £8,687.00 of deductions for expenses of his
25 business. Mr Musah's self-assessment for 2010-11 was submitted on 28 April 2011
and included a total of £11,905.00 of deductions for expenses of his business. Mr
Musah's self-assessment for 2011-12 was submitted on 21 May 2012 and included
£15,234 of deductions for expenses of his business.

5. HMRC opened an enquiry into Mr Musah's tax return for the 2011-12 tax year
30 on 26 April 2013 and wrote to Mr Musah and his then current accountants, T T
Accountancy Services. That letter was issued to Mr Musah at Flat 10 Fenning Court,
London Road Mitcham (the "Croydon Address"). HMRC issued a Schedule 36 Notice
on Mr Musah on 28 May 2013, addressed to his Croydon Address and copied to his
accountants.

35 6. On 11 July 2013 TT Accountancy Services responded to HMRC's letter of 28
May 2013 indicating that they would respond to HMRC as soon as possible.

7. HMRC wrote to Mr Musah at his Croydon Address on 3 July 2013 and 9
August 2013 imposing penalties for non-compliance with the Schedule 36 Notice.
40 Those letters were copied to Mr Musah's current accountants.

5 8. T T Accountancy services wrote further to HMRC about Mr Musah's 2011-12 self-assessment return on 1 August 2013, providing certain information relating to turnover in the year ended 5 April 2012 (supported by evidence from Mr Musah's contractor, Stanmore Limited), but specifically referring to Mr Baba Musah and his Croydon Address.

10 9. HMRC wrote to Mr Musah on 9 August 2013 but did not receive a response. HMRC correspondence to Mr Musah, dated 2 September 2013, indicates that Mr Musah appointed a new agent, Ayeh & Co, on 9 July 2013. However, that letter of 2 September 2013 addressed to Mr Musah was returned to HMRC's Returned Post Handling Service marked 'Return' on 20 September 2013

10. HMRC wrote again to Mr Musah and his advisers, Ayeh & Co, on 10 October 2013, setting out their decision on the level of expenses which they considered to be allowable for each of the 2009-10, 2010-11 and 2011-12 tax years. HMRC did not receive a reply to this letter either.

15 11. HMRC raised discovery assessments on Mr Musah for the 2010-11 and 2009-10 tax periods and issued a closure notice in respect of the 2011-12 tax year on 13 November 2013, which were sent to Mr Musah at his Croydon Address. A penalty notice was also served on Mr Musah on 13 November 2013 relating to inaccuracies in his 2010-11 and 2009-10 self-assessment returns. Copies of those letters were sent to
20 Mr Musah's current advisers, Ayeh & Co.

12. HMRC wrote to Mr Musah at his Croydon Address and his current advisers on 3 June 2014 to notify Mr Musah that he was being monitored under the Serious Defaulters regime.

25 13. HMRC's records state that they were notified by Mr Musah that he had changed to a new address in Wimbledon on 8 August 2014.

14. Mr Musah notified HMRC that he had appointed new accountants, Anthony Michael and Associates on 22 November 2014.

30 15. The next record which HMRC have of Mr Musah contacting them is by letter of 3 July 2015 from his current accountants, Anthony Michael and Associates, requesting a review of HMRC's decision. HMRC responded to this request, (after a delay caused by internal personnel changes), on 8 December 2015, refusing to accept a late appeal. A further late appeal request was received by HMRC from Mr Musah's accountants on 25 May 2016, which HMRC also refused.

16. An appeal was made by Mr Musah to the Tribunal on 25 July 2016.

35 **Evidence**

17. Mr Musah told us that he had not received any of the letters from HMRC until August 2014. His previous accountant had not been communicating with him and had been sick. Mr Musah was not aware that he had debts outstanding with HMRC until, after three visits, he finally obtained information from his accountants. In July 2013

he appointed Ayeh & Co to act as his agent. He then, in October 2014, appointed a new firm of accountants, Anthony Michael and Associates, who started to sort the issues out.

5 18. Mr Musah told us that he had lived at three different addresses in London since mid-2013. He could not recall exactly when he moved, but said had lived at his Croydon Address until June 2013. He then had a temporary (two month) address in Wimbledon, (25, Southview) until he moved to a new permanent address in East Ham in September 2013. He told us that he had written to HMRC, at their Bootle address, to notify them of both of those changes of address, but he did not have copies of the
10 letters which he had sent.

19. HMRC provided a copy of their internal computer records showing the addresses which they had listed for Mr Musah.

15 20. We also saw a copy of two letters sent to Mr Musah's address in Croydon, one dated 2 September 2010, which was returned to HMRC on 20 September 2013 and another dated 10 October 2013 which was addressed to the same address and was returned, but the returns handling slip was not dated.

20 21. HMRC also provided copies of correspondence with Stanmore Limited, Mr Musah's main contractor, who confirmed on 21 November 2013 that that the address they held as Mr Musah's current address was Flat 10 Fenning Court, London Road, Mitcham, Mr Musah's Croydon Address.

22. HMRC also provided a copy of a note of a telephone conversation between HMRC and Mr Musah's accountants Ayeh & Co on 21 November 2013 when Ayeh & Co confirmed that his current address was Flat 10, Fenning Court, Mr Musah's Croydon Address.

25 23. We also saw copies of Mr Musah's tax returns for each of the 2009-10, 2010-11, 2011-12 and 2012-13 years. Mr Musah told us that he did his returns on line through his accountants and the time when the returns were submitted depended how busy he was.

30 24. Mr Musah's tax return for 2012-13, submitted on 12 August 2013 referred to his address as his Croydon Address.

25. Mr Danso told us that he had spoken to HMRC about how to update Mr Musah's address on HMRC's system. He had thought that it would be updated automatically because of the letters sent by Mr Musah. He had found it difficult to update Mr Musah's address on HMRC's tax return software.

35 26. We saw copies of the letters sent from Mr Danso to HMRC between July 2015 and July 2016 concerning Mr Musah's appeal.

Mr Musah's arguments

27. On behalf of Mr Musah, Mr Danso said that Mr Musah had not seen any of the correspondence from HMRC until he was given his files by his former accountant in August 2014. By that time it was too late for Mr Musah to make an appeal against the assessments and penalties.

28. When Mr Danso had taken over the case he had made contact with HMRC but had been told in January 2015 that the £6,000 debt was no longer outstanding, the debt had been written off because Mr Musah could not be traced. However, the debt had re-appeared on Mr Musah's tax account a few months later. Mr Danso had tried to persuade HMRC to reopen the appeal, but they had refused.

29. It was unfair that his client was being denied the right to make an appeal because HMRC had been sending letters to an incorrect address. Mr Musah should not be penalised for not making an appeal during the period while he, Mr Danso was trying to come to a settlement with HMRC. Mr Danso believed that it was always better to try to agree a dispute than to take a dispute to court.

30. The expenses claimed by Mr Musah were in line with the 18% allowance for expenses which HMRC's own fact sheet stated was permissible. Mr Danso had written to HMRC to ask them to accept expenses at 15% as a compromise but HMRC had reiterated that Mr Musah's case was closed.

HMRC's arguments

31. Mr Foster starting by explaining how he understood the conversation which Mr Danso had with HMRC about Mr Musah's tax debts having been cancelled. He told us that HMRC regularly cancel the collection of a tax debt when a taxpayer cannot be found, but that this does not cancel the tax liability on HMRC's books. Mr Foster agreed that it was incorrect for HMRC to have told Mr Danso that the debt had been cancelled and there was no need for Mr Musah to make an appeal.

32. Mr Foster said that HMRC had no record of receiving any correspondence from Mr Musah at Bootle giving information about his changes of address.

33. Mr Foster told us that he thought that Mr Danso's reference to HMRC's guidance about an 18% level for expense deductions was actually a reference to income tax which was allowed as a CIS deduction, and was no longer current. He pointed out that it would be unlikely that HMRC would publish specific guidance on a level of deductions which they would treat as acceptable. Mr Foster did say that HMRC would usually accept deductions of up to 10% of turnover, but there was no published HMRC guidance on this.

34. In considering whether Mr Musah's late appeal should be allowed, Mr Foster referred to the criteria suggested in the *Data Select* case (*Data Select Ltd v Revenue & Customs Commissioners* [2012] UKUT 187 (TC)) in support of his submission that this late appeal should not be allowed; (i) the purpose of the time limit; (ii) the length of the delay; (iii) whether there was a good explanation for the delay (iv) the

consequences of extending the time limit (v) the consequences of refusing to extend the time limit.

35. It was important to bear in mind that the purpose of the time limits for making an appeal was to provide certainty and finality for both parties. This matter was now
5 old and HMRC's original decision maker had retired. The delay in this case had already had negative repercussions for HMRC.

36. The length of the delay in this case had been significant; Mr Musah should have made an appeal by 13 December 2013 and no appeal was made until 26 July 2016. Mr Foster accepted that there had been some confusion after Mr Danso had been told that
10 the debt had been written off in January 2015, but HMRC had made clear to him in December 2015 and in correspondence in January 2016 that the only option was to appeal to the tax tribunal. Nevertheless no appeal had been made until July 2016. Mr Foster said that there had been a "serious delay" in this case, which should persuade the Tribunal not to extend the time limits as was suggested in the *Romasave* decision.
15 (*Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2015] UKUT 254)

37. Mr Foster pointed out that, on the basis of Mr Musah's evidence, he was still at his address in Croydon in April 2013 when HMRC's first enquiry letter was sent. He, and his advisers were at least aware that HMRC were investigating his tax position at
20 this stage. His advisers (T T Accountancy) had responded to HMRC's request for information on 1 August 2013.

38. HMRC have a right, in reliance on the decision in *Tinkler*, (*William Andrew Tinkler v HMRC* [2016] UKFTT 170 (TC)) to assume that letters are being sent to a taxpayer's correct address and they will be treated as correctly served under s 115
25 Taxes Management Act 1970 if they are sent to the taxpayer's usual or last known address. That last known address for Mr Musah was his Croydon Address. HMRC's letter of 26 April 2013 and the closure notices and assessments of 13 November 2013 were all sent to Mr Musah's last known address. No alternative address had been provided by Mr Musah until August 2014.

30 39. Mr Foster accepted that HMRC had received a return letter from the Post Office on 20 September 2013 and again in October 2013, but in response to that they had spoken to Mr Musah's accountants and his contractor, Stanmore Limited, who had confirmed that he was still at the Croydon Address, in November 2013.

35 40. Mr Foster stressed that even if Mr Musah did not receive HMRC's letters, they had been copied to his accountants (two different firms of accountants) and it was unlikely that both they and Mr Musah had all failed to receive HMRC's correspondence or that neither firm of accountants had told Mr Musah about correspondence with HMRC.

40 41. Mr Foster did not consider that Mr Musah had a good explanation for the delay in making his appeal.

Decision

Findings of fact

42. On the basis of the evidence provided we make the following findings of fact:

5 (1) Mr Musah was resident at Flat 10, Fenning Court, London Road, Mitcham (his Croydon Address) until at least June 2013.

(2) Mr Musah's tax return for 2012-13 filed on 12 August 2013 stated that he was resident at his Croydon Address.

10 (3) HMRC received two indications that Mr Musah might not be resident at his Croydon Address in the autumn of 2013; their letters dated 2 September 2013 and 10 October 2013 were sent to Mr Musah's Croydon Address, and both of them were returned by the Post Office.

(4) Mr Musah's accountants, Ayeh and Co, told HMRC that Mr Musah was resident at his Croydon Address on 21 November 2013.

15 (5) Mr Musah's main contractor Stanmore Limited told HMRC that Mr Musah was resident at his Croydon Address on 21 November 2013.

(6) HMRC undertook reasonable due diligence and it was reasonable for them to conclude that Mr Musah was resident at his Croydon Address in November 2013.

20 (7) All HMRC's correspondence to Mr Musah was also copied to his current accountants.

Criteria for considering late appeal

43. Recent authorities suggest that time limits in this Tribunal as in the courts should be generally respected, with extensions of time being given as an exception and by reference to specific criteria. These are set out in the *BPP Holdings* decision which HMRC referred to. (*Revenue and Customs Commissioners v BPP Holdings Limited* [2016] EWCA Civ 121). We also recognise that in considering any exercise of our discretion to extend these time limits for Mr Musah, we need to consider the Tribunal's overriding objective to deal with cases fairly and justly.

Extent of the delay

44. Our starting point in this case is that the delay on the part of Mr Musah was significant; on any analysis a delay of 31 months in respect of a deadline which is intended to be a month after HMRC's decision is issued must be treated as a serious delay.

35 45. We have taken account of the point made by Mr Danso, and accepted by Mr Foster, that HMRC's incorrect suggestion in January 2015 that there was no need to make an appeal because Mr Musah's debts had been written off by HMRC, contributed to the delay in making this appeal. However, even if we remove the

period during which Mr Danso believed that the debt had been written off until he realised that it had reappeared in Mr Musah's tax account (from January 2015 until March 2015), the period of delay still amounts to well over two years.

Explanation for the delay

5 46. Mr Musah, and Mr Danso on his behalf, was adamant that the real reason for this significant delay was because he was not aware of the assessments which HMRC had raised because they had not been sent to his correct address. Mr Musah suggests that the delay is due to HMRC's error in sending mail to the wrong address and that he should not be denied the right to an appeal because of HMRC's error.

10 47. In our view the situation is not quite as straightforward as that:

48. Firstly, Mr Musah accepts that he was at his Croydon Address until June 2013. By that date HMRC had already sent him an enquiry letter (26 April 2013) and a Schedule 36 Notice (28 May 2013) to his correct current address. Therefore we can conclude that even before he left his Croydon Address in June 2013 Mr Musah was
15 aware that HMRC were making enquiries into his tax return.

49. Secondly, as the *Tinkler* case makes clear, some responsibility falls on the taxpayer for ensuring that HMRC have a correct up to date address to which to send correspondence. Mr Musah told us that he notified HMRC of both of his new addresses when he left his Croydon Address in mid-2013, but Mr Musah could not
20 provide a copy of these letters of notification and HMRC said that they had no evidence of this. Their only notification from Mr Musah was of a change of address in August 2014.

50. *Tinkler* makes clear that HMRC can be treated as having served information on the taxpayer if it can be shown that letters have been sent to the taxpayer's last known
25 address. It is correct that HMRC received some indication, in the form of two returned letters, that Mr Musah was not receiving mail at his Croydon Address in autumn 2013, but HMRC did take steps to confirm Mr Musah's correct address subsequently including from Mr Musah's authorised agents and, correctly in our view, relied on that information.

30 51. In fact Mr Musah's tax return of August 2013 referred to his Croydon Address and neither his accountant nor his main contractor seemed to be aware of a change of address when HMRC approached them for information in November 2013. At best Mr Musah provided confused information about what his correct address was at this time.

35 52. Thirdly, in our view it is relevant that not only had HMRC attempted to contact Mr Musah, but they had also copied their correspondence to Mr Musah's accountants. Mr Musah told us that there were communication issues between him and his accountants. If Mr Musah's accountants failed to pass on the relevant information to him about the correspondence which they had received, that is an issue for Mr Musah
40 to take up with them, and not something for which HMRC can be criticised or which can, in circumstances in which Mr Musah was aware that enquiries were being raised

and was independently notified of the assessments and penalties, exonerate Mr Musah for failing to deal with these issues in a timely fashion.

53. For these reasons we do not consider that Mr Musah's argument that a late appeal should be allowed because of his lack of knowledge of HMRC's assessments until Mr Danso took over the appeal in August 2014 can be treated as a sufficiently good explanation for the delay in dealing with this appeal to support a very significant extension of time for the making this appeal.

54. We have also considered the situation after Mr Danso took over Mr Musah's appeal, when he (and Mr Musah) did have the information which they needed to deal with Mr Musah's appeal. Excluding the period from January to March 2015 when Mr Danso thought the debts had been written off, there is still a period of more than eighteen months from when Mr Danso took over the case until an appeal was made to the Tribunal in July 2016.

55. Mr Danso explained this delay by saying that he was negotiating with HMRC during this period and his priority was to settle this case rather than come to the Tribunal. We accept that it might not have been made as clear as it could have been to Mr Danso that he should have appealed to the Tribunal at the same time as attempting to come to a negotiated settlement with HMRC, but nevertheless Mr Danso was aware of the deadlines for making an appeal (HMRC set this out in their letter of 8 December 2015) and while HMRC might have contributed to some lack of clarity, and themselves were slow to respond to Mr Danso's letter of 3 July 2015, we do not consider that this is sufficient to completely exonerate Mr Danso for the delay in making an appeal application.

56. For all of these reasons we do not accept that there is a sufficiently strong explanation for the delay in making this appeal to support what would be a very significant extension in the time allowed to make this appeal.

57. We have also considered the other relevant criteria to determine whether this time extension should be allowed.

Consequences of extending the time limit

58. Although we did not consider Mr Musah's grounds of appeal in detail, we were told that the level of his expense claims was based on the misapplication of an out of date HMRC guidance note about the allowable level of expenses and noted that despite requests from HMRC, Mr Musah had not provided any evidence to substantiate the level of expenses which he had claimed, which in the case of 2011-12 and 2011-10 exceeded 50% of turnover. Mr Danso had asked HMRC to accept expenses at a level of 15% rather than a level of 10% used by HMRC in the closure notice and the discovery assessments. On the basis of this information, we do not consider that Mr Musah's appeal has a good prospect of success or that in refusing this application we have closed off an appeal which has obvious merit.

Purpose of the time limit

59. It is correct that in refusing to extend the time limits for making this appeal we have closed off any possibility of Mr Musah making this appeal, but this needs to be weighed against the need for finality, and the practical issues for HMRC in dealing with this appeal after such a significant period of delay.

60. Taking all of these criteria into account we have concluded that Mr Musah should not be granted an extension to the time for making his appeal and his application for a late appeal is refused.

Penalties

61. We did not therefore consider the substantive appeal made by Mr Musah. After we had given our decision to Mr Musah, Mr Danso made a specific plea in respect of the penalties which had been charged on Mr Musah, he felt particularly strongly that it was unfair that Mr Musah was being denied the opportunity to appeal against these penalties. We expressed some sympathy for this position, but confirmed that, having rejected Mr Musah's application to make a late appeal, we could not deal with the related penalties.

62. 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.

**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 19 APRIL 2017