



TC05853

Appeal number:TC/2015/06296

INCOME TAX – permission to appeal out of time - “best judgement” assessments - penalties for late submission of returns - penalties for inaccurate returns - deemed agreement to settle liability - whether reasonable excuse for delay

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NIRMAL SINGH KUDHAIL

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY’S Respondents

REVENUE & CUSTOMS

TRIBUNAL: JUDGE MARILYN MCKEEVER

MR TOBY SIMON

Sitting in public at Fox Court, 30 Brooke Street, London, EC1N 7RS on 7 April 2017

The Appellant did not attend and was not represented

Mrs Kate Murphy, Presenting Officer, for the Respondents

DECISION

Preliminary

1. The Appellant's agent applied for a postponement of the hearing on grounds of the Appellant's ill health. The postponement application was put before a judge and the agent was notified on 28 March 2017 that the application had been refused and the hearing would go ahead.
2. The agent renewed the application on 31 March, providing medical evidence. He asked for confirmation of the position by email dated 4 April. The application was again refused on 5 April. The agent sent an email dated 5 April to the Tribunal stating "Please do note that this firm is not instructed to attend the forthcoming trial...Please do place this e-mail message for the urgent attention of the kind Judge". It is not clear whether this was sent before or after receipt of the refusal, although the implication is that it was sent afterwards.
3. The medical evidence was in the form of a "fit note" for national insurance purposes. We had regard to the guidance issued by the Justices Clerks Society and the Chief Magistrate on dealing with cases in absence in the magistrates' court (July 2016 version) which notes that medical certificates should specifically address fitness to attend court. While not directly applicable to our Tribunal, we considered it gave helpful advice on the considerations to be taken into account.
4. We saw no reason to disagree with the view taken by judges on 28 March and 5 April.
5. The Appellant did not attend the hearing. Attempts were made to contact the Appellant and his agent. The only response was from his business phone number where someone stated that the Appellant was "off sick". We also contacted the Tribunal administration which confirmed that the postponement refusal letter had, in accordance with normal procedure, been emailed to the agent on 5 April.
6. We were satisfied that reasonable steps had been taken to notify the Appellant of the hearing and that it was in the interests of justice to proceed with the hearing. Accordingly, we decided to proceed with the hearing in accordance with Rule 33 of The Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009.

Introduction

7. This is an application for permission to appeal out of time against various assessments and penalties relating to the tax years 2006-7 to 2009-10.
8. The assessments arose from closure notices issued on 23 May 2013 in respect of the tax year 2006-7 and 2008-9 and an assessment in respect of the year ended 5 April 2010 also issued on 23 May 2013.
9. The Appellant has also been charged penalties for the late submission of tax returns under schedule 55 Finance Act 2009, and penalties for incorrect tax returns under section 95 Taxes Management Act 1970 and its successor provisions, schedule 24 Finance Act 2007.
10. The various assessments and penalties have also attracted interest resulting in a total liability of £95,062.38 (calculated as at 21 September 2015).
11. The Appellant denies that any additional income tax is due and accordingly, asserts that no tax geared penalties can be charged.

12. Although the Appellant did not attend the hearing, we had before us a substantial bundle of documents including letters to and from the Appellant, notes of HMRC's telephone conversations and the Appellant's grounds of appeal which had been professionally drafted.

The Facts

13. On 23 May 2011 HMRC commenced an enquiry into Mr Kudhail's tax returns for the years ended 5 April 2007 and 2009 following the late receipt of the returns on 24 March 2011. They suspected that he was in receipt of undeclared income from his company Foundation Estate Agents Ltd. (which was shown as dormant at Companies House although it had submitted an Employer's Annual Return showing Mr Kudhail as a director) and that he was receiving undeclared rental income from various properties.
14. The letter was sent to an address in Aberdour Road, Ilford (Aberdour Road) and was returned undelivered. HMRC contacted the Appellant's agent and on their suggestion subsequently wrote to the Appellant at an address in Manor Road, Chigwell (Manor Road) and at his business address in Beehive Lane Ilford (Beehive Lane) The letters were returned undelivered.
15. HMRC subsequently resent the letters in plain envelopes to Manor Road and Beehive Lane and these letters were not returned. Further letters were sent in plain envelopes to all of Manor Road, Aberdour Road and Beehive Lane and were not returned. The correspondence included information notices requiring the Appellant to provide information relating to his employment income and directorships and copies of bank accounts and mortgage statements. Those information notices were never complied with. Indeed, no response was received to any of the letters.
16. HMRC also attempted to make contact with the Appellant by telephone, calling him on his home, mobile and business numbers. On those occasions, when the telephone was answered, HMRC were variously informed that they had the wrong number, that Mr Kudhail was not in the office and that he was not connected to the business and did not work there.
17. HMRC sent letters to all three addresses on 16 October 2012 expressing disappointment that the Appellant had not responded to any communication he had been sent and stating that the decision maker proposed to issue Closure Notices including income from property and other business income. The Closure Notices would estimate income on the basis of the decision maker's best judgement to cover the Appellant's mortgage commitments, utilities and day to day living expenditure. It was proposed to assess total income for each year of £60,000, to consider discovery assessments for other years and to issue tax geared penalties for the submission of incorrect Self Assessment Tax Returns.
18. This elicited a telephone call from Mr Kudhail's son on 22 October 2012. He said that Mr Kudhail was out of the country with his wife who was suffering from cancer. They would be back at the end of November. The son stated that Mr Kudhail's private address was Aberdour Road.
19. We note that subsequent letters from the Appellant were written from both the Aberdour Road and Manor Road addresses. The notice of appeal showed the Manor Road address.
20. HMRC wrote to Aberdour Road and Manor Road on 26 November 2012 requesting a meeting. Mr Kudhail's son telephoned on 6 December 2012 saying the

- Appellant had taken his wife to India for treatment and would not return until the end of December.
21. HMRC again wrote to Aberdour Road and Manor Road on 12 December 2012 setting out the history of the enquiry. The writer recognised the Appellant's difficult personal circumstances but, in the light of the total lack of communication since the opening of the enquiry and the writer's view that Mr Kudhail had had ample time to respond to the enquiry and requests for information, the letter stated that Closure Notices and assessments would be issued as set out in the October letter. The decision maker pointed out that Mr Kudhail would have the option to appeal and could make representations and also offered a meeting to discuss matters.
 22. HMRC spoke to the Appellant on 4 January 2013 and were told that he and his wife had returned from India on 2 January, his wife was seriously ill and that contact would be made the following week to set up a meeting. Mr Kudhail confirmed his private address was Aberdour Road. There was a further telephone conversation on 23 January 2013 when Mr Kudhail said he was taking his wife to the USA for treatment and would be returning in two weeks. He confirmed Beehive Lane was his office address and Foundations estate agency was his business. It was agreed that a meeting would be arranged on his return from the USA.
 23. HMRC wrote to Aberdour Road on 8 March 2013 to arrange a meeting on 21 March and spoke to Mr Kudhail on the same day (after making a number of unanswered calls). The Appellant telephoned on 14 March to rearrange the meeting for 28 March. He then rang on 26 March to cancel the meeting.
 24. There was no further contact from the Appellant and on 23 May 2013 HMRC wrote to Manor Road with Closure Notices for the years ended 5 April 2007 and 2009 and an assessment for the tax year 2009-10. The assessment stated that penalties would also be assessed and all the letters stated the Appellant's right to appeal within 30 days, that is by 23 June.
 25. On 20 June, Mr Kudhail telephoned HMRC to say he had had a "penalty notice for failing to comply with an information notice" and the last day for appeal was 23 June. He said he had been in the USA with his wife and that she was now much better. He was advised that he needed to set out his grounds of appeal and supply the relevant information. He rang again on 21 June and was advised to send in a letter if he thought he had grounds of appeal and provide all the information in support of the appeal. The Appellant said he would send a letter by first class post.
 26. On 21 June 2013 Mr Kudhail wrote to HMRC (from the Aberdour Road address) stating that he had received HMRC's letter of 23 May 2013 but had not been able to reply as he had been out of the country in connection with his wife's cancer treatment. He said that he had requested his bank statements for the period and that he was trying his best and requested that the assessments be put on hold.
 27. HMRC wrote to the Appellant (at Aberdour Road) on 5 July stating that they were treating his 21 June letter as a formal appeal against the Closure Notices and Assessments issued on 23 May 2013. It requested the Appellant to state the reasons for his appeal, provide the information requested and suggesting a meeting to settle matters. Attempts were made to telephone Mr Kudhail on his mobile and at Beehive Lane. The person who answered the telephone at Beehive Lane said they had never heard of Mr Kudhail.
 28. Having heard nothing further, HMRC issued a "view of the matter" letter on 17 July 2013 stating that the additional liabilities charged by the Closure Notices and Assessments should stand as assessed. The letter stated the Appellant's right to request a review or to appeal to the Tribunal within 30 days. This was sent to Aberdour Road with a copy to Manor Road.

29. A penalty determination was issued on 5 August 2013.
30. No response was received from the Appellant and on 20 August 2013, HMRC wrote to the Appellant stating that the appeal would be treated as settled by agreement under section 54(1) Taxes Management Act 1970 (TMA).
31. Nothing further happened until the Appellant's agent submitted tax returns for the years ended 5 April 2006, 2007, 2008 and 2009 with a letter dated 5 August 2014. HMRC replied on 11 September 2014 to say that the returns were out of time and the position for the years ended 5 April 2007, 2009 and 2010 was final and conclusive as a result of the deemed settlement under section 54(1) TMA. The agent wrote again on 2 March 2015 asking why the returns had not replaced the assessments and was informed that the position remained as set out in the 11 September 2014 letter.
32. We were informed that the Appellant wrote to HMRC on 6 May 2015 asking HMRC to accept a late appeal in respect of the years to 2007, 2009 and 2010, stating that he had no knowledge of the assessments and Closure Notices because of his bad health and stress. This letter was not in our bundles. We note that the Appellant acknowledged receipt of the assessments and Closure Notices in his letter of 21 June 2013 following two telephone calls about appealing them.
33. It appears from the grounds of appeal that Mr Kudhail became ill with a heart condition in January 2014 and has had several operations. We also noted that the case had previously been postponed on the grounds that the Appellant was suffering from stress and we saw a doctor's note confirming that he was not fit for work. We also saw a letter from Barts Health NHS Trust in connection with the application to postpone this hearing relating to an appointment at the cardiology department.
34. HMRC responded on 13 May 2015 setting out the history of the matter and the deemed agreement. On this basis, they considered that the Appellant cannot now appeal because he had already made an in time appeal by his letter of 21 June 2013 and that appeal had been deemed to be settled following due and proper process. Accordingly, the tax assessed together with penalties and interest were due and payable.
35. The Appellant wrote to HMRC on 21 May 2015. He noted HMRC's statement that the Closure Notices and assessments had been sent to Manor Road, Aberdour Road and Beehive Lane and stated "Please understand that I do not reside over these three properties" (despite the letter having been written from Manor Road). He further stated that he had been unable to deal with matters owing to his wife's and his own serious ill health. He denied that his letter of 21 June 2013 was intended to be an appeal and in any event he did not see that it was possible to settle the matter unilaterally by "agreement" and he had not participated in any agreement. He further denied that he owed any tax.
36. There was further correspondence in which the Appellant expressed his dissatisfaction and on 12 October 2015 the Appellant's representative submitted a notice of appeal to the Tribunal including Grounds of Appeal, and an Application for Disclosure and an Extension of Time. Amended Grounds of Appeal, including an Application for Disclosure and an Extension of Time was submitted on 27 October 2015. The information requested in the Application for Disclosure was sent by HMRC on 12 November 2015.

The Law

37. We find that the Appellant's letter of 21 June 2013 did constitute an appeal against the assessments and Closure Notices contained in the letter of 23 May 2013 and that HMRC's letter of 17 July 2013 set out their view of the matter and informed the Appellant of his right to request a review or appeal to the Tribunal.

38. Accordingly, this falls within section 49C TMA which provides:

“49C (1) Subsections (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 section 49E.

(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 section 54(1) for the settlement of the matter.

(5) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (4) applies.

(6) Subsection (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49H.

(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 section in relation to the matter in question,

(b) the appellant has given a notification under section 49B in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal under section 49D.

(8) In this section “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.”

39. Section 49C (4) provides that if the Appellant does not either request a review or appeal within the 30 day period allowed, HMRC's view of the matter is to be regarded as if were contained in a settlement agreement under section 54(1) TMA.

40. Section 54 TMA provides as follows:

“54 Settling of appeals by agreement

(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the [tribunal], the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the [tribunal] had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

(2) Subsection (1) of this section shall not apply where, within thirty days from the date when the agreement was come to, the appellant gives notice in writing to the inspector or other proper officer of the Crown that he desires to repudiate or resile from the agreement.

- (3) *Where an agreement is not in writing—*
- (a) *the preceding provisions of this section shall not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the inspector or other proper officer of the Crown to the appellant or by the appellant to the inspector or other proper officer; and*
- (b) *the references in the said preceding provisions to the time when the agreement was come to shall be construed as references to the time of the giving of the said notice of confirmation.*
- (4) *Where—*
- (a) *a person who has given a notice of appeal notifies the inspector or other proper officer of the Crown, whether orally or in writing, that he desires not to proceed with the appeal; and*
- (b) *thirty days have elapsed since the giving of the notification without the inspector or other proper officer giving to the appellant notice in writing indicating that he is unwilling that the appeal should be treated as withdrawn,*
the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and the inspector or other proper officer had come to an agreement, orally or in writing, as the case may be, that the assessment or decision under appeal should be upheld without variation.
- (5) *The references in this section to an agreement being come to with an appellant and the giving of notice or notification to or by an appellant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the appellant in relation to the appeal.”*

41. Section 49C(6) provides that there is no deemed agreement under sub-section

(4) if the Appellant notifies the appeal to the Tribunal under section 49H TMA.

42. Section 49H provides:

“[49H Notifying appeal to tribunal after review offered but not accepted]

[(1) This section applies if—

(a) HMRC have offered to review the matter in question (see section 49C), 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 section “acceptance period” has the same meaning as in section 49C.]”

43. In other words, where there has been a deemed agreement within section 54(1) by virtue of section 49C(4), that agreement will be negated and the Appellant may still appeal if the tribunal gives permission.

44. The Appellant is applying for permission to appeal out of time under section 49H.

The Appellant’s submissions

45. Until 2015 the Appellant had been without legal representation.

46. The Appellant had spent a great deal of his time caring for his wife who has been suffering from cancer since before 2013 and as a result the Appellant was un-

able to give much attention to his tax affairs and overlooked important correspondence until it was too late.

47. From January 2014, the Appellant himself experienced ill health and has had several operations.
48. The Appellant denies receiving all of the relevant correspondence.
49. The Appellant was confused by HMRC's letters in 2014 and 2015 asserting that the appeal had been settled without it being explained that he still had the option to bring an out of time appeal.
50. The Appellant asserts that he does not owe any further income tax for the period 2006 to 2012 and a refusal to admit his appeal will mean he must pay nearly £100,000 arising from tax he says was never really owing. As well as being a factor in favour of allowing an out of time appeal, this also engages the Appellant's right to the peaceful enjoyment of his possessions under Protocol 1, Article 1 of the European Convention on Human Rights (ECHR) and the Tribunal has a duty to apply its own rules and exercise its discretion so as not to interfere disproportionately with that right.

The Respondent's submissions

51. Initially, the Respondents sought to rely on the deemed agreement under section 54(1) as preventing a further appeal on the basis that the appeal notified on 21 June 2013 had been settled by agreement.
52. They subsequently acknowledged that the Appellant could still seek permission to appeal by virtue of section 49H TMA and sought to rely on the criteria set out in the Upper Tribunal case of *Data Select Ltd v Revenue and Customs Commissioners* [2012] STC 2195 (Data Select) as supporting their case that permission for a late appeal should be refused.

Discussion

53. Data Select related to a VAT appeal but subsequent cases have recognised that the same principles apply to appeals relating to other taxes.
54. The Upper Tribunal in *Data Select* endorsed the approach of the First Tier Tribunal in earlier cases of considering the overriding objective (of dealing with cases fairly and justly) and all the circumstances of the case, including the matters listed in CPR r3.9.
55. The tribunal said:

“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.”

56. The judge went on to say:

“In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA. The general comments in the above cases will also be found helpful in many

other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. None the less, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision.”

57. We must now apply these principles to the facts set out above.
58. The purpose of the time limit for submitting an appeal, in tax matters as in litigation, is to achieve finality. As was pointed out in *Data Select*, it is undesirable for matters to be reopened after a lengthy interval and it does not matter whether both parties or only one had assumed that matters had been finally fixed and settled.
59. The present case relates to years of assessment which ended between ten and seven years ago. The enquiry began six years ago and HMRC considered that matters had been finalised for nearly two years before the Appellant intimated that he wished to appeal out of time.
60. The original decision maker no longer works for HMRC and after this length of time the Appellant’s recollection of events as it appears from the correspondence and the Grounds of Appeal is, unsurprisingly, poor. The Appellant has not provided any of the information originally requested by HMRC in support of his case and it may now not be possible, and will at least be difficult, to obtain it. All this would prejudice a fair hearing of the substantive issues if we were to allow the Appellant to proceed with the appeal.
61. The delay in bringing the appeal was more than two years which by any measure is a substantial and serious delay.
62. It is not clear when the Appellant’s wife was first diagnosed with cancer and we have seen no medical evidence. We do not, however, doubt that she was seriously ill for a significant part of the relevant period and we recognise that the Appellant must have been put under severe strain as a result of his wife’s illness. This is clearly capable of being a good reason for the Appellant’s failure to pursue his appeal.
63. The Appellant’s own ill health appears not to have begun until early 2014, which was several months after the assessments and Notices of Closure had been issued and deemed settled, so we do not consider that this constitutes a good reason for the delay.
64. Although his wife’s illness and its impact on the Appellant is *capable* of being a reason justifying the delay, there are a number of other considerations. We note that the Appellant and his wife were able to travel long distances to obtain treatment. The Appellant said his wife was much better following the treatment in the USA in June 2013, just before he put in his appeal letter. He failed to follow up that appeal with evidence in support as requested by HMRC and did not respond to HMRC’s “view of the matter” letter in July 2013. The tax returns submitted for the period show employment and business income indicating that the Appellant was still able to work and carry on a business. We also take account of the history of the enquiry which shows that the Appellant made no effort whatsoever to engage with HMRC, and indeed, could be described as obstructive. From the outset of the enquiry in 2011 he simply ignored correspondence, avoided taking telephone calls

- and failed to supply any of the information required under the formal information notices.
65. The Appellant only responded when he received assessments for substantial sums of money and it appears he only sought to pursue his appeal when HMRC commenced enforcement proceedings in the County Court.
66. Without underestimating in any way the difficult time the Appellant and his wife were going through, we infer from looking at all the surrounding circumstances that the Appellant did remain capable of dealing with his tax affairs. HMRC took account of the Appellant's personal situation and allowed him extended periods of time to provide information and deal with the matters raised in the enquiry. This he made no attempt to do.
67. We therefore consider that the Appellant did not have a sufficient reason to justify such a lengthy delay in bringing the appeal. We do not accept that the Appellant did not receive the relevant correspondence and the factors mentioned at paragraphs 44 and 46 above arose some time after the expiry of the period for appealing the assessments.
68. We now turn to the consequences of allowing or not allowing the appeal to proceed.
69. For the reasons mentioned in paragraphs 56 and 57, a fair hearing of the substantive matter would be difficult after such a long delay and we are mindful of the undesirability of reopening a matter which appeared to have been settled a long time ago.
70. Against that, there would be a serious prejudice to the Appellant if, as he asserts, he does not owe the additional income tax sought and we refuse permission to appeal out of time. In this context, we note that the enquiry began in 2011 which appears to be before the Appellant's problems began, and that at no time since then has he provided any evidence or information which might help to establish what his correct tax liability is. He has had ample opportunity to provide that information. Having failed to do so, he was repeatedly warned that HMRC would make assessments based on what they believed his liability to be. When they ultimately did so, he appealed, but did nothing further. When HMRC issued their "view of the matter" letter, after allowing him further time to provide information about his tax position, he was properly informed of his appeal rights and he failed to exercise them. When he was informed that the matter was treated as settled he took no further action for nearly two years. In brief, the Appellant has made no attempt to demonstrate what the correct amount of tax is. In these circumstances, we do not consider that a refusal of permission to appeal would be a disproportionate interference with the Appellant's right to quiet enjoyment of his possessions under the ECHR.
71. Having weighed these issues we consider that the balance of prejudice is in favour of not allowing the application.

Decision

72. For the reasons set out above we refuse the application for permission to appeal out of time.
73. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 4 MAY 2017