



TC05958

Appeal number: TC/2016/04663

*Income tax – application to extend time for appeal – whether reasonable
excuse – no - refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DARREN DAVIDSON

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at Eagle Building, Glasgow on Wednesday 14 June 2017

Darren Davidson, in person

Gregory Morran, Officer of HMRC, for the Respondents

DECISION

Background

1. On 31 August 2016, the appellant lodged an appeal with the Tribunal referring
5 to a decision dated 24 August 2016 and quoting the "... amount of tax or penalty or surcharge ..." as being £15,000.

2. The said letter from the respondents ("HMRC") was in response to a complaint
dated 4 August 2016 from the appellant. That letter explained that the self-
assessments for 2006/07 to 2008/09 inclusive were based on the information provided
10 in his tax returns. The additions for interest, surcharges and penalties were applied
because the appellant had not filed the returns or paid the tax due by the due dates.
The letter went on to state that if he did not agree that his appeal against the penalties
imposed for those years was too late then he could apply to the Tribunal.

3. The figure of £15,000 appears to relate to an Earnings Arrestment Schedule
15 showing a debt due to HMRC in 2013 as being £14,653.58. A copy of that was
submitted with the Notice of Appeal.

4. The grounds of appeal indicate that the appellant is challenging the amount of
tax that he has paid and, of course, the penalties and surcharges. He also talks about
tax returns issued three years after he ceased self-employment in 2010. I cannot look
20 at the tax that has been paid or why it has been assessed.

Preliminary issue - jurisdiction

5. I explained to the appellant that the Tribunal have no jurisdiction to look at the
various tax demands that the appellant had received, and paid, over the years as they
had not been appealed to the Tribunal.

25 6. The only matter that is within my jurisdiction in this appeal are the penalties and
surcharges which are as undernoted:

Year	Type of Penalty	Amount	Date penalty notice issued	Appeal due date	Date appeal received	Number of days late
2006-07	First Surcharge	£162.14	11/05/2009	10/06/2009	21/03/2016	2477
2006-07	2 nd Surcharge	£161.82	11/05/2009	10/06/2009	21/03/2016	2477
2006-07	First Fixed Penalty	£100	19/02/2008	20/03/2008	21/03/2016	2923
2006-07	2 nd Fixed Penalty	£100	05/08/2008	04/09/2008	21/03/2016	2755
2007-08	First Surcharge	£248	30/11/2010	30/12/2010	21/03/2016	1908
2007-08	2 nd Surcharge	£248	30/11/2010	30/12/2010	21/03/2016	1908

2007-08	First Fixed Penalty	£100	17/02/2009	19/03/2009	21/03/2016	2559
2007-08	2 nd Fixed Penalty	£100	04/08/2009	03/09/2009	21/03/2016	2391
2008-09	First Surcharge	£371	30/11/2010	30/12/2010	21/03/2016	1908
2008-09	2 nd Surcharge	£371	30/11/2010	30/12/2010	21/03/2016	1908
2008-09	First Fixed Penalty	£100	16/02/2010	18/03/2010	21/03/2016	2195
2008-09	2 nd Fixed Penalty	£100	03/08/2010	02/09/2010	21/03/2016	2027

The Facts

7. The appellant had been self-employed as a taxi driver and plumber. The tax returns for each of the years ending 5 April 2007, 2008 and 2009 were issued on 6 April in those years. The returns were due to be filed by no later than 31 January in the following year.

8. On 6 May 2009, the appellant had told HMRC that the returns for 2006/07 and 2007/08 would be submitted by post by 3 June 2009. He was warned of the consequences of the late submission of income tax returns. Those returns were not lodged. On 4 March 2010, the appellant indicated that he needed assistance to complete the outstanding returns and an appointment was made for the following day and then rearranged for 8 March 2010. The appellant did not attend. On 23 March 2010 a further appointment was made and on 24 March 2010 the appellant said that he would hand in the completed 2006/07 and 2008/09 returns within seven days. He did not.

9. On 28 November 2011, the appellant said that he would submit the returns "shortly". The returns were duly submitted on 2 December 2011 but the 2007/08 tax return was returned to the appellant as it had not been signed. It was finally lodged on 9 January 2012.

10. Subsequent tax returns were not filed on time.

11. Revenue determinations were raised for the years 2006/07 and 2007/08 because the tax returns were late. However, those determinations were displaced when he submitted the tax returns. The self-assessment tax due for each year was therefore based on the actual figures supplied on the tax returns and not on HMRC estimates.

12. Determinations were not raised for the years 2008/09 to 2010/11 because the tax due for those years was based on the information provided in the tax returns. HMRC have confirmed that the VAT and PAYE debts to which the appellant has referred in his various letters did not include estimates.

Application for admission of a late appeal

The Law

13. The Tribunal's power to admit a late appeal is contained in Section 49 Taxes Management Act 1970 which reads as follows:-

- 5 “49 **Late notice of appeal**
- (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—
- 10 (a) HMRC agree, or
- (b) where HMRC do not agree the tribunal gives permission.”

14. The general approach to such discretionary decisions is set out by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City*¹ (“Aberdeen”) and in particular at paragraphs 22-24. Those read as follows:-

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 “[22] Section 49 [of the Taxes Management Act] 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.

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 [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 s49, 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

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¹ 2006 STC 1218

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 s33(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 and 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.”

15. HMRC referred me to, and relied on Judge Berner at paragraph 36 in *O’Flaherty v HMRC*² and that reads:-

“I was referred to ... where Sir Stephen Oliver refused permission to appeal out of time. In the course of his decision, Sir Stephen made the point that permission to appeal out of time will only be granted exceptionally. It is in my view important that this comment should not be thought to provide a qualitative test for the circumstances the FTT is required to take into account. It should properly be understood as saying nothing more than that permission should not routinely be given; what is needed is the proper judicial exercise of a discretion, taking account all relevant factors and circumstances.”

16. He goes on to record at paragraph 37 that:-

“Time limits are prescribed by law, and as such should as a rule be respected”.

I agree entirely.

17. Paragraph 38 reads:-

“These references to permission being granted exceptionally should not be elevated into a requirement that exceptional circumstances are needed before permission to appeal out of time may be granted. That is not what was said in *Ogedegbe* nor in *Aston Markland*, and it is not the case. The matter is entirely in the discretion of the FTT, which must take account of all relevant circumstances. There is no requirement that the circumstances must be exceptional.”

That is the approach which I adopt.

18. I have considered, and weighed in the balance, all of the relevant circumstances including, but not restricted to, the circumstances identified in *Aberdeen*. In so doing,

² 2013 UKUT 01619 (TCC)

I have concurrently applied the three stage process set out by the Court of Appeal in *Denton & Others v T H Whyte & Another; Decadent Vapours Ltd v Bevan & Others* and *Utilise TDS Ltd v Davies & Others* (“Denton”)³. The first of those is to identify the seriousness and significance of the failure to lodge an appeal in relation to which the relief sought. The second is to consider why the default occurred and the third is to evaluate all the circumstances of the case so as to deal justly with the application of the factors.

19. I was not referred to *Romasave (Property Services) Ltd v HMRC* (“Romasave”)⁴ where Judges Berner and Falk at paragraph 96 stated:-

10 “... 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.”

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I am bound by that and agree.

20. Lastly, at all times I have had in mind Rule 2 of the Rules which reads:-

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“2.—Overriding objective and parties’ obligations to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

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(2) Dealing with a case fairly and justly includes—

- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- (d) using any special expertise of the Tribunal effectively; and
- (e) avoiding delay, so far as compatible with proper consideration of the issues.

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(3) The Tribunal must seek to give effect to the overriding objective when it—

- (a) exercises any power under these Rules; or
- (b) interprets any rule or practice direction.

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(4) Parties must—

- (a) help the Tribunal to further the overriding objective; and
- (b) co-operate with the Tribunal generally.”

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³ 2014 EWCA Civ 906

⁴ 2015 UKUT 254

Discussion

Is there a reasonable excuse for not observing the time limit?

5 21. The appellant has never explained why he did not appeal the numerous penalty and surcharge notices, each of which indicated a 30 day time limit for appeal.

22. It would appear that he did appeal the 2010/11 penalties and, for whatever reason, HMRC did accept that appeal on 21 April 2016. In that letter they also explained to him the history of the 2006/07 to 2008/09 tax returns and pointed out that the time
10 limit for appealing those penalties had passed.

23. In his letter of reply dated 13 May 2016 the appellant argued that these penalties should also be cancelled because that would be “the fair and honest thing to do”. He advanced various arguments about the tax that had been paid and suggested that he had contacted HMRC and had had no responses.

15 24. HMRC have produced the SA notes recording every contact made from 5 January 2005 to 25 August 2016. That tells a very different story, as narrated above. I note in particular that on 30 January 2016 he told HMRC that he would write in to appeal penalties. The next contact was on 23 March 2016 when he sent in an appeal in
20 relation to all of the monies he had paid HMRC in respect of various taxes. HMRC treated that as an appeal of the penalties and it was that letter which triggered their letter to him of 21 April 2016 explaining that, in fact, the tax had been correctly assessed based on the information in his returns. That letter enclosed other letters relating only to the penalties and surcharges and indicated that he should appeal to the Tribunal; he did not do so until 31 August 2016.

25 25. This is all in the context that HMRC had raised sequestration proceedings in 2013 or 2014.

26. In all these circumstances I find that at no stage has the appellant had any excuse, let alone a reasonable excuse, for failure to observe the time limit to raise an appeal in respect of any penalty or surcharge.

30 *Is there prejudice to one or other party if a late appeal is allowed to proceed?*

27. Clearly there is prejudice to the appellant if the appeal is not permitted to proceed. However, there is very substantial prejudice to HMRC if the appeal were allowed to proceed. There would then be litigation which would be at considerable cost to the public purse. The appellant’s history is one of an almost total failure to
35 observe time limits.

28. In any event, even if the appellant were able to litigate, on the basis of the information before me, the prospects of success seem remote since he conceded orally that he could not recall why the tax returns were late or why tax was paid late.

29. I have weighed all the relevant factors in the balance. Crucially there was a very
40 long period of delay which, as well as being an important factor in its own right,

heightens the need for an explanation for the whole of the period of delay and that has been sadly lacking. Effectively there were two periods of delay, namely, the delay before HMRC's letter of 21 April 2016 and then the further delay before an appeal was lodged. The absence of a good explanation for either period of delay is particularly stark given the need to conduct litigation effectively.

30. In all these circumstances I do not grant the application for leave to extend the time for lodging an appeal.

31. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 19 JUNE 2017