[2018] UKFTT 0008 (TC)

TC06287

Appeal number: TC/2016/04724

CAPITAL GAINS TAX – application to appeal out of time – relief sought for loss of earlier year – application refused – loss in any event not claimed in time and unallowable

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT KITSON **Appellant**

- and -

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

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC

Sitting in public at the Royal Courts of Justice, the Strand, London WC2 on 24 February 2017

The Appellant did not appear and was not represented

Miss Lucy Lawrence, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. On 3 September 2016 Mr Kitson applied to the Tribunal to appeal out of time against an assessment for capital gains tax for the year 2010/11 in the amount of £8,113.40 in respect of the sale of shares valued at £70,000 on 1 November 2010. The date of the decision against which the appeal is made is stated to be 31 May 2013.

2. From the attached correspondence, it appears that Mr Kitson first appealed that decision on 17 June 2016. On 26 July 2016 the Respondents responded to Mr Kitson's appeal and refused to accept his late appeal. The Respondents' letter was evidently sent to Mr Kitson in Spain (where he now resides) with only UK second class postage and as a result took some time to reach him. The question that I have to decide, however, is whether the circumstances leading to his notice of appeal being given to the Respondents some three years after their original decision are such that I should allow him to pursue his appeal. On 20 October 2016 the Respondents wrote to the Tribunal supporting their refusal to allow his appeal out of time and objecting to his application to the Tribunal for his appeal to proceed.

3. At the hearing of his application, neither Mr Kitson nor any representative of his was present. On 31 January 2017 Mr Kitson had e-mailed the Tribunal to say that he would be unable to attend the hearing on 24 February but that he was happy for the hearing to take place. Accordingly, I concluded that I should proceed with the hearing in the Appellant's absence as permitted by Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules").

The Facts

4. On 17 April 2012, the Respondents commenced a compliance check in relation to Mr Kitson's tax affairs for 2010/11. Mr Kitson had not submitted a self-assessment return for 2010/11 or notified any liability and the Respondents indicated that they had information to suggest that he had undeclared income or gains for that year. They requested information about his income and gains. They wrote to Mr Kitson at an address in Tenterden. They received no reply.

5. On 21 June 2012, the Respondents issued a formal information request to the same address in Tenterden. They received no reply. On 29 August 2012, they issued a penalty warning in respect of Mr Kitson's failure to comply with their request. Eventually, on 4 October 2012, they attempted to contact Mr Kitson by telephone. The Respondents' officer called the number said to be linked to the address to which they had been writing and spoke to an individual who said he was Mr Kitson's son-in-law. It transpired that the telephone number was now linked to a different address in Tenterden but Mr Kitson's son-in-law was able to inform the Respondents' officer that Mr Kitson had sold his house in Tenterden and had moved to Spain.

6. Mr Kitson's son-in-law was unable to give the Respondents' officer an address in Spain but volunteered a Spanish telephone number and said that his wife, Mr Kitson's daughter, had the address. The Respondents' officer requested that she call him but there is no record that she did. Subsequently, on 27 December 2012 and 22 February 2013, the Respondents' Officer recorded further attempts to contact Mr Kitson's son-in-law or his wife, without success but on the second occasion leaving a message on an answer machine. There is no record of whether the Respondents' Officer attempted to call the Spanish telephone number with which he had been supplied.

7. Accordingly, on 27 March 2013 the Respondents wrote again to Mr Kitson's former address in Tenterden (notwithstanding the information that it had been sold), indicating that they had information suggesting that on 1 November 2010 Mr Kitson had sold 10,000 £1 shares in Optical Surfaces Ltd back to the company. The Respondents indicated that they would issue an assessment in respect of the gain unless they heard from him within 30 days. They heard nothing.

8. Accordingly, on 31 May 2013 the Respondents issued an assessment in the amount of £8,113.40. The covering letter and notice of assessment drew Mr Kitson's attention to the need to appeal within 30 days. Both were sent to Mr Kitson's former address in Tenterden. Nothing was heard from Mr Kitson.

9. There is no record of any of the above correspondence being returned to the Respondents as undelivered.

10. In early October 2014 Mr Kitson telephoned the Respondents' Wrexham Enquiry Centre concerning an assessment that the Respondents' Officer had issued. Mr Kitson evidently said that he had never received the assessment. If that is correct it is unclear how Mr Kitson knew that an assessment had been issued or was able to provide the Wrexham Enquiry Centre with the name of the Officer who had issued it (if in fact he did). Someone must have communicated this information to Mr Kitson or it may be that the Wrexham Enquiry Centre had itself been able to link the assessment with the issuing Officer. The person concerned at the Wrexham Enquiry Centre said that she would write to Mr Kitson following his call but if she did so, I did not see her letter.

11. Eventually, on 5 December 2014, the Respondents' Officer who had issued the assessment wrote again to Mr Kitson enclosing a copy of the assessment. This letter was sent to an address in Tenterden, but a different address to that of Mr Kitson's previous residence there and different also to the address that Mr Kitson's son-in-law had given when the Officer had first spoken to him (see paragraph 5 above). This new address was presumably one that Mr Kitson had supplied to the Wrexham Enquiry Centre when he called. Nothing was heard from Mr Kitson.

12. On 17 June 2016, Mr Kitson wrote to the Respondents from an address in Spain. He claimed that he had telephoned dozens of times since 2014 but had only recently got through to the Respondents. Whether or not that is true, he plainly had spoken to Respondents in October 2014. He now said that he wished to appeal the

assessment on the basis that he had a prior loss in an earlier year that would eliminate the gain for 2010/11. As regards the share sale that had been assessed to tax, Mr Kitson said that he had agreed to sell the shares on the basis that they would be bought in instalments over seven years, ensuring that the gain in each year fell within his annual exemption. This plan had, however, evidently changed, "to enable the company to pay dividends instead of bonus to save NI contributions". For that reason Mr Kitson had not thought his prior capital loss was available for offset. This may possibly refer to the fact that the disposal in question appears to have been a purchase of own shares by the Optical Surfaces Ltd. Be that as it may, the assessment in question is for capital gains tax and Mr Kitson accordingly is now seeking to reduce the gain by the amount of his earlier loss. He enclosed some papers relating to that previous transaction and provided a brief explanation of the transaction in his letter.

13. Mr Kitson's letter was not addressed directly to the Respondents' Officer who had been attempting to contact Mr Kitson but eventually his letter founds its way to that Officer. He replied to Mr Kitson on 26 July 2016 to his address in Spain (albeit with only UK second class postage). He refused to accept Mr Kitson's appeal as it was out of time and offered no reasonable excuse for his failure to appeal in time.

14. Accordingly, on 3 September 2016 Mr Kitson applied to this Tribunal for leave to appeal out of time. In his grounds he acknowledges that the assessment was sent to his former address in the UK but states that he did not know about the assessment until December 2014. That statement is wrong because he knew of the assessment by October 2014 but it may reflect the fact that he was sent a copy of the assessment on 5 December 2014. He claims that he had suffered a loss on a transaction in an earlier year but that the paperwork had been stored in his daughter's garage. It had been disposed of after suffering rain damage. On a return trip to England in May 2016, however, he had found evidence to prove the loss. He claims that he telephoned the Respondents for weeks before finding someone to talk to and then sent his appeal.

HMRC's submissions

15. HMRC object to Mr Kitson's application on the basis that the assessment was sent to his latest address sent on record on 31 May 2013 and a further copy sent to him on 5 December 2014. He nevertheless failed to submit an appeal until June 2016. Even if (as his grounds suggest) he did not know about the assessment until December 2014, he had still taken a further 18 months to appeal. The reason then offered for the delay did not relate to the disposal giving rise to the gain but to previous losses. The loss of paperwork relating to that earlier loss was not something that would have prevented his appealing earlier. Even though the Tribunal had a wider discretion to allow an appeal to be made out of time, this was not a case in which the Tribunal should exercise its discretion in the taxpayer's favour.

16. Miss Lawrence for the Respondents referred me to a number of cases on the general approach to an application for extension of time, including *Data Select Ltd v HMRC* [2012] STC2195, *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC), *Denton and Others v TH White Ltd and Another* [2014] EWCA Civ 906 and *Olusegun Odunlami v HMRC* (TC04786) [2015] UKFTT 668 (TC).

17. In *Data Select*, Mr Justice Morgan said at §34:

> "Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court of 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."

18. As regards the purpose of the time limit, the Tribunal had this to say in *Olusegun Odunlami*:

> "41 It seems to us that the time limit of 30 days for a taxpayer to make an appeal is to provide taxpayers, as those liable to tax and, HMRC, as the enforcer of the payment of taxes, with certainty as to the "cut off" point when the amount of tax or penalties asserted by HMRC to be due as regards a particular matter or period becomes certain and final. In specifying a period of 30 days Parliament has set down what it regards as sufficient time fort a taxpayer to consider whether he wishes to dispute a tax assessment or penalty determination and if so make an appeal. The taxpayer is required to act promptly if he wishes to make an appeal thereby providing efficiency in the conduct of the dispute (should there be an appeal) or finality should there be no appeal.
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> 42. On that basis we would not regard it as a matter of routine for the tribunal to allow an appeal to be made outside the normal time limits. The starting point must be that the 30 day time should usually be adhered to. Otherwise the purpose of the provision of the time limit would be undermined. There would be little incentive for taxpayers to comply with the time limit and the lack of certainty and finality would potentially cause difficulties with the conduct of resulting disputes and burdensome administrative and enforcement issues fort HMRC. Therefore, the tribunal can permit a late appeal only, as set out in *Data Select*. If it is satisfied that on balancing all relevant factors (the length of the delay, the reason for the delay and the effects on the parties of granting or not granting the application for the late appeal), it would be unjust and unfair not to do so."

My Decision

19. It is for Mr Kitson to persuade me that I should allow his appeal to proceed. The fact that he chose not to appear or be represented at the hearing has not, however, played any part in my decision, save that my decision can only be based on the material that I have before me.

20. The circumstance that Mr Kitson had sold his house in Tenterden and moved to Spain, such that he never received the Respondents' correspondence raising enquiries into his share disposal, provides an obvious basis for extending the time allowed to

appeal. Even if the assessment issued on 31 May 2013 was sent to Mr Kitson's last known address, by that time the Respondents were aware that he was no longer resident there, that he had sold the property and that he had moved to Spain. They were, furthermore, in possession of another address in Tenterden where they had communicated with members of Mr Kitson's family. In the eight months between 4 October 2012, when this information became available to the Respondents, and the issue of the assessment on 31 May 2013, the Respondents' attempts to pursue their enquiries and established contact with Mr Kitson might be thought to have been half-hearted: two or possibly three telephone calls and one letter to an address where Mr Kitson was known to be no longer living.

21. That is, of course, to put all the onus on the Respondents to track Mr Kitson down. Mr Kitson had his own obligation in relation to the disposal of shares that he had not reported to the Respondents. Furthermore, on the assumption that either the correspondence (or some of it) eventually reached him or his family reported to him the Respondents' attempts at communicating with him, it fell to him to respond in some way to the correspondence or attempted communications. The fact that, eventually, Mr Kitson was aware of the assessment (even if he had not seen it at that stage) is evidenced by his contacting the Wrexham Enquiry Centre in early October 2014. He may, as he evidently claimed when he called the Centre, never have received the Assessment but he was certainly aware of its existence. Nevertheless, it took a further 20 months for him to write to the Respondents seeking to appeal the assessment.

22. Taking my starting point as October 2014, and having regard to the questions posed by Mr Justice Morgan in Data Select,

(1) The purpose of the time limit appears from the extract I have set it out from *Olusegun Odunlami* in paragraph 18 above;

(2) The delay was some 20 months from October 2014 to June 2016. The delay was still 18 months even if it is calculated from when he was sent the copy of the assessment on 5 December 2014;

(3) The only explanation offered for the delay is that papers relating to a previous transaction giving rise to a loss had been thrown away and further papers relating to that transaction were only located in May 2016;

(4) An extension of time will deny the Respondents the finality that they had assumed existed for the year in question and would require them to investigate a transaction in an earlier year of assessment (but as to which see further below); and

(5) A refusal to extend time will deny Mr Kitson relief for whatever losses he can establish as arising in that earlier year and are available to carry forward to a later year (but as to which see further below).

23. In reaching my decision on whether to extend time and to permit Mr Kitson to appeal the assessment, I shall assume that there was a transaction in an earlier year which, if shown to have given rise to a loss for capital gains tax purposes, would provide a basis for Mr Kitson to contend on appeal that the assessment should be

reduced to take account of that loss. Nevertheless, I am still satisfied that I should refuse to extend Mr Kitson's time for appealing. The delay is too long; the explanation for it is weak; Mr Kitson would always have known of his earlier loss whether or not he had retained the papers and could have pursued the matter well before he did; finally, the imposition it would place on the Respondents is unfair in the circumstances. All these combine to make it manifestly unjust to extend time and allow Mr Kitson's appeal to proceed, notwithstanding the denial that entails for any claim that Mr Kitson might make to offset an earlier loss.

24. It appears from his e-mail of 31 January 2017 that Mr Kitson may have thought that the hearing would consider his substantive appeal. I will therefore deal briefly with the further point raised by Miss Lawrence. In his grounds Mr Kitson suggests that he never had a capital gain, that the Respondents know that and the problems of time and paperwork do not alter those facts. Plainly, however, that is wrong. Mr Kitson admits in his appeal letter that he disposed of his shares in Optical Surfaces Ltd and, furthermore, indicates that he was aware that each tax year must be taken separately (given the original plan to dispose of the shares over seven years to benefit from the annual exemption). The basis of his appeal does not relate in any way to the gain assessed on the disposal of those shares in the year in question but relates to a loss said to arise on another disposal in an earlier year.

25. However, as the Respondents point out, section 16(2A) Taxation of Chargeable Gains Act 1992 requires that a loss arising in a year of assessment is not an allowable loss unless, in relation to that year, the taxpayer gives notice to the Respondents quantifying the amount of that loss. For these purposes the provisions of the Taxes Management Act 1970 apply to that notice as if it were a claim for relief. In this respect the Respondents say that Mr Kitson gave no notice quantifying the loss as required by section 16(2A) and nothing in Mr Kitson's application, appeal letter or appended documents suggests otherwise. He is now out of time to give such a notice for the year in question (2009/10) and the loss, even if suffered, is therefore not an allowable loss. Even if I allowed his appeal to proceed (which I am not prepared to do for the reasons I have given), it is likely that the Respondents would apply to have it struck out as raising an issue on which Mr Kitson has no reasonable prospect of success.

26. Under Rule 38 of the Tribunal Rules, the Tribunal may set aside a decision which disposes of proceedings and remake the decision if the Tribunal considers it in the interests of justice to do so and one of more of the conditions in paragraph (2) is satisfied. Those conditions include a case in which the party or a party's representative was not present at a hearing related to the proceedings. A party who wishes to apply for a decision to be set aside must apply in writing to the Tribunal so that the application is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

27. Subject to the previous paragraph, this document contains full findings of fact and reasons for the decision on the registration issue. 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 for permission to appeal 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.

MALCOLM GAMMIE
TRIBUNAL JUDGE

RELEASE DATE: 4 JANUARY 2018