



TC06840

Appeal number: TC/2018/03684 & 00871

INCOME TAX – application to make a late appeal – consideration of the length of delay and the reasons therefor – consideration of the prejudice to both parties – consideration of the merits of the appeal – permission given for late notification

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARK BOOTH

Appellant

- and -

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

**TRIBUNAL: JUDGE PHILIP GILLETT
LESLIE HOWARD**

Sitting in public at Tribunal Centre, City Exchange, Leeds on 20 November 2018

Liban Ahmed, of CTM Tax Litigation Ltd, for the Appellant

Vickianne Wood, officer of HMRC, for the Respondents

DECISION

1. This was an application to make a late notification of an appeal against assessments to income tax and associated penalties raised by HMRC in respect of the tax years 2005 to 2013. A separate application for permission to make a late appeal in respect of late filing penalties, under reference TC/2018/00871, was withdrawn by the appellant.

The Facts

2. We received a bundle of documents and heard evidence from Mr Booth. We find the following as matters of fact.

3. Mr Booth has been operating a car repair business since 2005 but had made no tax returns in respect of this business. He stated that he had never taken more than £150 to £180 per week out of the business and he therefore believed that he was below the threshold for paying income tax.

4. On 24 September 2014 he was visited by officers from HMRC who were making enquiries about his business.

5. Mr Booth was unable to provide any records about his business at the time of the visit and undertook to engage a book-keeper to produce some accounts from the underlying records. At that time he had no records at all relating to the business prior to 2011 when he had moved to his current premises.

6. Correspondence continued between HMRC and Mr Booth for some time but no accounts or other information was forthcoming. Mr Booth frequently promised that accounts would be produced and at one time even said they were in the post, which was not correct. HMRC also served an information notice on Mr Booth but again this produced nothing, and HMRC have raised a penalty in respect of that failure.

7. Eventually, on 19 March 2015, HMRC wrote to Mr Booth setting out estimated profits for his business based on the average for car repair businesses in West Yorkshire and that unless he objected to those figures they would raise assessments in those amounts.

8. No response was received from Mr Booth and, on 4 June 2015, HMRC duly raised assessments for income tax, NI and penalties based on the figures in the letter of 19 March 2015.

9. Strangely, instead of challenging the HMRC figures, Mr Booth seems to have accepted that they were correct and commenced paying the amounts demanded. He simply did not understand that he needed to obtain professional advice. He telephoned HMRC on a number of occasions to request a time to pay agreement. At the time of the hearing Mr Booth had paid approximately £12,000 to HMRC but the amount outstanding, including interest and penalties, was still in excess of £18,800.

10. Mr Ahmed informed us that HMRC had instructed bailiffs, who were on standby should this application be refused, to seize all the assets of Mr Booth's business in part payment of the debt. This would not however extinguish the debt fully and Mr Booth would therefore be made bankrupt.

5 11. Mr Booth provided what were described as Cash Book totals for 2011-12 and 2012-13 immediately prior to the hearing. These showed net profits for 2012-13 as being £4,587.39 and a net loss for 2011-12 of £924.29. We note that Mr Booth had been seriously ill for around 10 months from October 2010 which had therefore led to lower than normal trading results for 2011-12.

10 12. Mr Booth had submitted tax returns for the years 2013-14 to 2016-17 and these showed dramatically lower profits than those estimated by HMRC for the earlier years, as shown in the table below. We note however that the figures in these tables do not fully reflect the numbers shown in the cash book spreadsheets.

Year end	HMRC Assessments	Mr Booth's Position	Tax in Dispute	Interest Charged	Interest in dispute
2005	2,984.10	0.00	2,984.10	1,289.44	1,289.44
2006	2,930.70	0.00	2,930.70	1,295.81	1,295.81
2007	2,281.50	0.00	2,281.50	885.65	885.65
2008	2,214.90	0.00	2,214.90	701.64	701.64
2009	1,998.20	0.00	1,998.20	519.37	519.37
2010	1,887.80	0.00	1,887.80	438.58	438.58
2011	2,027.80	0.00	2,027.80	400.37	400.37
2012	1,044.75	0.00	1,044.75	180.04	180.04
2013	1,029.55	966.04	1,029.55	146.52	9.09
2014	191.09	191.09	0.00	112.78	0.00
2015	748.88	748.88	0.00	99.67	0.00
2016	274.30	274.39	0.00	22.27	0.00
2017	227.88	227.88	0.00	0.00	0.00
Total	19,841.54	2,408.28	17,433.26	6,092.14	5,719.99

13. HMRC had no opportunity to examine the cash book schedules before the hearing but did challenge them. It was clear from Mrs Wood’s questioning that the spreadsheets were not totally consistent with statements made by Mr Booth in the past. In particular, the spreadsheets showed almost no cash income but Mr Booth had
5 said previously that he paid the whole of the rental on his garage in cash and the spreadsheets did not show sufficient cash receipts with which he could have settled the rental payments.

14. As regards the reasons for the late submission of his appeal, Mr Booth initially seems to have accepted that the HMRC figures were correct. He believed that a tax
10 liability had arisen over the years but, in 2017, was faced with bailiffs and bankruptcy because his payments were not keeping up with the claimed liability. He therefore sought advice from a firm of accountants who quantified the debt and came to the conclusion that the figures for the earlier years were incorrect.

15. That firm of accountants did not consider themselves sufficiently experienced in tax investigation work and therefore referred Mr Booth to a specialist firm, CTM, to
15 seek advice about making an appeal.

16. CTM initially asked HMRC to carry out an internal appeal but this request was rejected. An appeal was then lodged with the tribunal in January 2018.

The Law

20 17. This tribunal may give permission for an appellant to make a late appeal under s49H(3) Taxes Management Act 1970 in cases where an internal review has been offered but not taken up, such as in this case.

18. The approach which should be taken by the First-tier Tribunal in deciding whether or not to grant permission for a late appeal was set out by the Upper Tribunal
25 in the case of *William Martland v HMRC* [2018] UKUT 178 (TCC), at [44] to [46] as below:

“44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission
30 should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being
35 “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

5 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data*
10 *Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT’s deliberations artificially by reference to those factors. The FTT’s role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

15 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant’s case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:

20 “If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties’ incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see
25 without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to
30 them.”

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time –
35 permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant’s appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT’s time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some
40 merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents’ reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an
45 applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the

respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

5 **Discussion**

19. We will therefore examine the three stage process as set out above.

The Delay

20. In this case the delay was very lengthy. A delay of three months has been described as being both significant and serious. In this case the delay was 30 months.
10 We must therefore consider with some care the reasons for that delay and the matter of prejudice to both parties.

The Reasons for the Delay

21. Mr Booth is someone with almost no knowledge of tax systems and procedures and we must therefore judge his actions by reference to that.

15 22. He believed that because he took out less than £180 per week throughout the period then he was not liable to pay tax and did not need to file a tax return or inform HMRC that he was trading. This was a genuine belief but he was wrong in that belief. We can make no finding as to whether it was reasonable for him to hold that belief. He did not say that he had been advised of this by anyone competent to advise
20 on such matters, but he had a very limited understanding of tax matters and this was his genuine belief.

23. When HMRC visited his premises and subsequently produced some estimates of his tax liability his first assumption was that they must be correct, and he therefore started paying off this debt, even borrowing money to do so. It was only when he
25 realised that he could not afford to pay any more and when he was therefore threatened with the prospect of bailiffs and bankruptcy that he sought professional advice.

24. The first accountants he approached were able to identify that there was a problem with the assessments but were unable to help further. They therefore referred
30 Mr Booth to a specialist firm, CTM, who first requested an internal review and then lodged an appeal with the tribunal.

25. Mr Ahmed, for Mr Booth, argued that an appeal was lodged as soon as Mr Booth knew that there were any grounds for an appeal. It is hard for us to understand that Mr Booth did not see the need to seek professional advice earlier but it is clear
35 that he simply believed that HMRC knew what they were doing and that their figures would be right. He tried for some time to pay off the tax he thought was owing and tried to put together some figures from his records, but clearly his records were not in good order and the book-keeper he engaged struggled to produce any figures. He also

made the mistake of not replying to any HMRC letters. He did not have anything to say, so he said nothing, but this was a mistake.

26. As we have said, it is difficult to understand Mr Booth's actions but, as have also said, Mr Booth was someone with almost no knowledge or understanding of the tax system and its processes. He seems to have believed that HMRC thought that he owed them money and that was good enough for him, until he was unable to make the required payments, at which time he eventually sought professional advice.

27. This explanation for the delay is therefore weak but plausible given Mr Booth's very limited understanding of tax matters.

10 *Prejudice to both Parties*

28. Finally, we must examine the prejudice to both parties of granting or not granting permission to notify a late appeal.

29. The prejudice to Mr Booth is clearly extreme. Mr Ahmed said, and Mrs Wood did not disagree, that HMRC had already instructed bailiffs to enter Mr Booth's business premises and seize the tools of his trade should this request for permission to make a late appeal be refused. Mr Ahmed also said that Mr Booth's bankruptcy would follow shortly thereafter. The consequences for Mr Booth of not granting permission to make a late appeal would therefore be dire in the extreme.

30. For HMRC, this is an appeal which they had every right to believe had been settled three years ago. They do however still appear to have all the records necessary for them to deal with the appeal and they do not seem to have suffered any prejudice in that regard.

Merits of the Appeal

31. As part of our consideration of the prejudice to both parties we are also required to consider the merits of the case, but without carrying out a full hearing.

32. Mr Booth presented the tribunal with two spreadsheets purporting to show a summary of the cash book for 2011-12 and 2012-13. Neither of these spreadsheets showed significant amounts of cash sales, which we find very hard to accept, especially as Mr Booth had earlier stated that he paid his rental in cash and these spreadsheets did not show sufficient cash receipts to enable him to do that. These spreadsheets would therefore appear to be incomplete.

33. Nevertheless, Mr Booth has prepared and filed tax returns for 2013-14, 2014-15, 2015-16 and 2016-17, which HMRC appear to have accepted. These show levels of earnings for those years substantially below the estimated profits used in HMRC's assessment and penalty calculations for the early years.

34. Mr Booth's records for the early years are very limited, and comprise only bank statements, although we were not told how complete these records might be. His figures for 2011-12 and 2012-13 appear, from only a limited review, to be incomplete,

but they do present a very different picture from the estimates prepared by HMRC. The tax returns for the subsequent years also show a very different picture from HMRC's estimates.

5 35. If this appeal were to proceed to a full hearing then the burden of proof would rest with Mr Booth to disprove HMRC's estimates. This is not an insignificant task on the basis of his limited records. There is a strong implication from the figures for the most recent years, for which Mr Booth has filed returns, that the estimates for the early years are significantly over-stated but a tribunal may require more than mere implications to find in Mr Booth's favour.

10 36. Thus far, Mr Booth's use of professional advice has been patchy, apparently due to a lack of funds to pay their fees. If this case were to proceed to a full tribunal hearing then he would clearly need consistent professional advice to take things forward.

Decision

15 37. Having carried out the required balancing exercise and having considered in particular:

(1) The extreme prejudice to Mr Booth of refusing permission to make a late appeal, and

(2) The likelihood that HMRC's estimates for the early years are over-stated,

20 we have decided that we should GRANT permission for Mr Booth to make a late notification of his appeal to the tribunal in accordance with the provisions of s49H(3) Taxes Management Act 1970.

25 38. 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.

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**PHILIP GILLETT
TRIBUNAL JUDGE**

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