TC05669

Appeal number: TC/2016/05010

Stamp duty land tax – procedure – late notification of appeal to the Tribunal – whether the Tribunal, by registering appeal, allocating it to standard category, issuing a general stay and forwarding the appeal to HMRC had implicitly given permission for late notification of the appeal – held no – whether permission for late notification should be granted in the circumstances – held no – appeal struck out for lack of jurisdiction

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD ANCELL **Appellants**
SUSAN ANCELL

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**

Sitting in Chambers on 10 February 2017

Determined, by consent, without a hearing and on the basis of written submissions received from the parties

Patrick Cannon of counsel, instructed by Members Executive Office Limited for the Appellants

Peter Kane of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns the appellants' application for permission to make a late appeal against a decision of HMRC (following a statutory review) to uphold their original decision that the appellants were liable to pay stamp duty land tax notwithstanding their use of a scheme intended to avoid such liability.

2. The distinguishing feature of this application is that the appellant seeks to argue that the Tribunal, by allocating the appeal to the standard category, issuing a general stay of proceedings and forwarding the appeal to HMRC, had effectively already given permission for the appeal to be notified to the Tribunal out of time.

The facts

3. The appellants acquired a property in October 2008 (or possibly October 2010, the evidence before me is currently unclear, though nothing hangs on the point) at a cost which is alleged to be £1,010,000. In doing so, they used the services of a company called Premier Strategies Limited ("PSL"), using a scheme promoted by them the intended effect of which was to avoid liability to stamp duty land tax on the purchase of the property.

4. On 24 February 2012, HMRC issued a determination under paragraph 25 of Schedule 10 Finance Act 2003 addressed to the appellants, notifying them of a liability to SDLT of £40,400 in respect of the transaction.

5. By letter dated 14 March 2012, PSL notified an appeal to HMRC on behalf of the appellants in respect of the determination dated 24 February 2012. They also applied for postponement of the full amount of the disputed SDLT liability under paragraph 39(1)(a) of Schedule 10 Finance Act 2003. They also invited HMRC to withdraw the determination, arguing that an SDLT1 return had in fact been submitted for the transaction in question and accordingly no power to issue a determination arose.

6. After further correspondence, HMRC (Officer J Mooney) finally issued two letters (one to each appellant) dated 27 March 2015, in which they gave their formal decision rejecting the appellants' appeals. The letters went on to offer the appellants independent reviews of the decisions, an offer which the appellants took up by a joint letter in reply dated 21 April 2015.

7. On 9 July 2015, HMRC (Officer J R Spong) issued their formal review decision, upholding the previous decision. At the end of that letter, the following text appeared:

"**Next steps**

If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. If you want to notify the appeal to the tribunal, you must write to the tribunal within 30 days of the date of this letter. You can find out how to do this on the GOV.UK website www.gov.uk/tax-tribunal/appeal-to-tribunal or you can phone them on 0300 123 1024.

If you do not notify the appeal to the tribunal within 30 days of the date of this letter, the appeal will be determined in accordance with my conclusion, by virtue of Paragraph 36F Schedule 10 Finance Act 2003.

If you notify the appeal to the tribunal any postponement of tax will continue until the tribunal has decided the matter.

I would remind you that interest is charged on outstanding tax. You may wish to pay the tax now even if you are proceeding with your appeal. If you pay it and your appeal succeeds, HMRC will repay the tax and pay you interest for the period from when you paid it until the repayment.

You can find further information about appeals and reviews on the GOV.UK website www.gov.uk/tax-appeals/decision."

8. The appellants responded to this letter by a letter to Officer Spong dated 31 July 2015, in which they said "We are currently waiting for information to allow us to respond to your letter. We would hope to be able to get a response to you within the next 30 days." In view of their earlier correspondence with Officer Mooney, they also wrote to her in similar terms on 10 August 2015.

9. Officer Mooney did not receive that letter until 17 August 2015. In the absence of any further contact from them, she had written to the appellants on 11 August 2015. That letter started as follows:

"We have had no response to our decision letter dated 9 July 2015, I therefore consider this matter to be settled by agreement under Paragraph 37 Schedule 10 of the Finance Act 2003."

The letter then went on to specify the amount to pay, and gave various logistical details for paying it.

10. There were clearly some crossed wires within HMRC, because on the same date (11 August 2015), Officer Spong wrote to the appellants in response to their letter to him dated 31 July 2015. His letter contained the following text:

"I note that you intend to respond to my review conclusion letter of 9 July 2015. However I should mention that as the review has concluded there is no provision for its conclusions to be amended. I would also remind you of the position as set out in the "Next Steps" section of my conclusion letter, in particular the following:

> If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. If you want to notify the appeal to the tribunal, you must write to the tribunal within 30 days of the date of this letter. You can find out how to do this on the GOV.UK website www.gov.uk/tax-tribunal/appeal-to-tribunal or you can phone them on 0300 123 1024.
>
> *If you do not notify the appeal to the tribunal within 30 days of the date of this letter, the appeal will be determined in accordance with my conclusion, by virtue of Paragraph 36F Schedule 10 Finance Act 2003.*
>
> If you wish to keep the appeal open you must notify it to the tribunal. The Tribunals Service does have the discretion to accept a late notification, but this is entirely a matter for the Tribunals Service and not for HMRC."

11. When she received the appellants' letter dated 10 August 2015, Officer Mooney wrote to them again on 18 August 2015, saying this:

> "I acknowledge receipt of your letter of 10 August 2015 and a wait *[sic]* your response as to how you wish to proceed.
>
> In the interim HMRC will be taking action to restore the unlimited Company Brodick Real Estate to Companies House Register. We will notify you one *[sic]* we have made a submission to the Tribunal."

12. There was no further contact from the appellants and in December 2015 HMRC released the outstanding tax for collection. It appears that prompted the appellants into action, as HMRC received an email on 27 January 2016 from Members Executive Office Limited ("ME") stating they had been asked by the appellants to "deal with their SDLT case with you on their behalf". This was followed up by a letter dated 22 February 2016, in which ME sought to "make a late appeal against the Revenue determination". It was acknowledged that the appeal was late, the reason being:

> "due to the Administration of Premier Strategies Limited, Mr & Mrs Ancell received no professional representation and were, therefore, uncertain as to how to proceed. This uncertainty was exacerbated by the fact that HMRC letters referred to the fact they were in continued discussions with Premier Strategies Limited in respect of the scheme and indeed, were still deciding themselves on a strategy of how to take things forward."

13. HMRC did not respond to this letter until 23 August 2016, saying:

> "this was an oversight on our behalf as we were assuming the late appeal was in response to the decision of the independent review officer sent to your client on 9 July 2015 and would be notified to the tribunal.

> On further review following your letter dated 21 July 2016 and as we have not to date received notification from the tribunal of an appeal this assumption appears to have been incorrect?"

14. After summarising the history, this letter then went on to say:

> "As you will see from my summary above, an appeal has already been received and considered in respect of the Revenue Determination, HMRCs decision was clearly set out in our letter of 27 March 2015 and the Independent Review Officer confirmed this decision in their conclusion letter issued on 11 August 2015…
>
> In view of this I am unable to accept your letter dated 22 February 2016 as a late appeal against the Revenue Determination.
>
> As already explained to your clients any appeal in respect of HMRCs decision following conclusion of the Statutory review should have been submitted directly to the Tribunal."

15. On 20 September 2016, the Tribunal received the appellants' notice of appeal. As it was submitted on their behalf by ME, the Tribunal considered whether ME appeared to be a "legal representative" within the meaning of the Tribunal's procedure rules, decided it did not and sent an email on 7 October 2016 to the appellants' email address identified on the notice of appeal form, requiring them to provide an appropriate signed authority to the Tribunal if they did indeed wish to authorise ME to act on their behalf. That signed authority was returned by the appellants by email on 11 October 2016.

16. The notice of appeal contained an acknowledgement that the appeal had been notified late, and gave the following reasons:

> " – The appeal has been notified late to the Tribunal because confusion had arisen on both the part of Mr & Mrs Ancell and HMRC. This is accepted by HMRC in their letter of 23 August 2016 where correspondence had crossed in the post (see attached copy letters).
>
> – Due to the provider of the planning (Premier Strategies Limited) entering into administration, Mr & Mrs Ancell were not represented and were not sure how to proceed.
>
> – Mr & Mrs Ancell responded to HMRC within the 30 day time limit on 31.7.15 stating they were awaiting information to allow them to respond & also again on 11.8.15.
>
> – Now that Mr & Mrs Ancell are being represented by ME Office Limited they wish to make a late appeal to the Tribunal."

17. On 12 October 2016, a Direction was issued under my authority in the following terms:

"IT IS DIRECTED that

1. All proceedings in the above appeal are hereby STAYED and all time limits generally EXTENDED until further order, pending the selection and subsequent progression of appropriate lead appeals in the large group of appeals addressing the same or similar issues to those arising in this appeal.

2. Accordingly HMRC need not deliver their statement of case until further order.

3. Either party can apply at any time for these Directions to be amended, suspended or set aside."

18. On the same day, the appeal (with the accompanying stay Direction) was notified by the Tribunal to HMRC. On 15 November 2016 HMRC responded by submitting to the Tribunal an application to the effect that the Tribunal should refuse permission for this appeal to be notified late.

The law

19. The relevant statutory provision is paragraph 36G of Schedule 10 Finance Act 2003, which provides as follows:

"**Notifying appeal to tribunal after review concluded**

36G –

(1) This paragraph applies if –

(a) HMRC have given notice of the conclusions of a review in accordance with paragraph 36Em ir

(b) the period specified in paragraph 36E has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

(3) If the post-review 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 paragraph 'post-review period' means –

(a) in a case falling within sub-paragraph (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with paragraph 36E(6), or

> (b) in a case falling within sub-paragraph (1)(b), the period that–
>
> > (i) begins with the day following the last day of the period specified in paragraph 36E(6), and
> >
> > (ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with paragraph 36E(9)."

20. In the present case, therefore, it is common ground that the time limit for notifying the appeal to the Tribunal ended on 8 August 2015. The appeal was therefore notified well over a year late.

21. The Tribunal has the discretion, under paragraph 36G(3), to give permission for late notification of the appeal, and there are no statutory provisions which state how that discretion is to be exercised.

22. Paragraph 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides as follows:

> "(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal—
>
> > (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
> >
> > (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

The issues

23. On behalf of HMRC, Mr Kane argued that:

(1) The appeal had clearly been notified to the Tribunal over a year late, and there was no good reason for this. The argument that the appellants were uncertain as to how to proceed because of the administration of Premier Strategies and their lack of professional representation was entirely without merit; the appellants had engaged confidently with HMRC's correspondence and the time limit for appealing to the Tribunal had been made quite clear to them.

(2) The criteria outlined in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 by Lord Drummond Young in the following passage were not satisfied:

"[22] Section 49[1] 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.

[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 s 49, 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 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 s 33(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.

[1] The reference was to section 49 Taxes Management Act 1970, containing provisions which mirror quite closely those with which this application is concerned

> [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 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."

(3) In particular, there was no evidence that the appellants had a reasonable excuse for the appeal being notified late. A need to seek professional advice could not amount to such an excuse; here there was a very clear statement in Officer Spong's review decision letter dated 9 July 2015 of the need to notify any appeal to the Tribunal within 30 days. Based on the comment of Sir Stephen Oliver in *Ogedegbe v HMRC* [2009] UKFTT 364 (TC) at [7] that an extension of time for making an appeal would "only be granted exceptionally", he submitted there would need to be a "compelling and demonstrable reasonable excuse that prohibited the appellants from making an appeal in time" and there was no such excuse.

(4) Further, matters had not "proceeded with reasonable expedition", either before or after the appointment of ME Office Limited. There had been a delay of five months in any contact from the appellants between 11 August 2015 and 27 January 2016; and it was a further 8 months or so before any appeal was lodged with the Tribunal.

(5) On the matter of prejudice, Mr Kane said that HMRC had started work on restoring Brodick Real Estate to the register within the six year time limit from its date of dissolution (13 April 2010), but when no further response was received from the appellants between August and December 2015, they had discontinued that process and it was now too late to reactivate it. Thus if the appellants adduced evidence to show that the return of capital from Brodick Real Estate had been carried out *ultra vires*, HMRC would have lost the opportunity of obtaining a judgment against the company, thus precluding them from recovering the tax from the appellants in their capacity as shareholders in it.

(6) Finally, he submitted that to the extent they were relevant to the present appeal, all the "public policy" matters referred to by Lord Drummond Young pointed to permission being refused in this case.

24. On behalf of the appellants, Mr Cannon put forward the following arguments:

(1) By acknowledging the appeal, allocating it to the standard category and issuing Directions staying it, the Tribunal had "by word and action" already

given its permission for the late notification of the appeal and made a decision under Procedure Rule 20(4) to accept it, even before HMRC had made their objection to the late appeal known – and indeed, HMRC had no right to make any representations on the matter, it being a matter to be determined by the Tribunal on the basis of the submissions made by the appellants alone (this being analogous to the procedure under which the Tribunal determined applications for permission to appeal without seeking or considering any representations from the other party on such application).

(2) In any event, HMRC's "unqualified statement" in their letter of 18 August 2015 that they would wait to hear how the appellants wished to proceed with their appeal amounted to a "clear waiver" of any right HMRC might have had to object to a late notification of the appeal "unless and until they had given reasonable notice to the appellants of their intention to resile from this position".

(3) Further, on the basis of the same statement by HMRC, it was reasonable for the appellants to have believed that time had been extended for them to notify their appeal to the Tribunal.

(4) Further, even after the appellants had instructed advisers to represent them, it took HMRC over six months to respond to the representative's letter dated 22 February 2016, informing them that the appeal should have been submitted to the Tribunal (which was what subsequently happened).

(5) In response to HMRC's argument that they would now be prejudiced if the appeal was admitted late, because they had allowed the deadline for restoration of Brodick Real Estate to pass on the basis that the appellants were not appealing the decision against them, he submitted this was a matter for HMRC and not a good reason to deny the appellants their right to appeal; he pointed to the fact that HMRC had said in their letter dated 18 August 2015 that they were going to apply for restoration of the company anyway (which he said undermined HMRC's submission) and in any event the likelihood of the company having acted unlawfully by making an unauthorised distribution (as was the case in *Vardy*) was small because this case did not involve a dividend – accordingly there was unlikely to be any prejudice to HMRC in any event.

Discussion and decision

Has permission to make a late appeal already been implicitly granted and should HMRC be invited to make submissions on the issue before a decision is reached?

25. These two points are clearly interrelated and I propose to consider them together.

26. The crucial provision is that contained in paragraph 36G(3) of Schedule 10 to Finance Act 2003. This provides that "the appellant may notify the appeal to the tribunal only if the tribunal gives permission".

27. One possible interpretation of this provision would require a "late" appellant to make a preliminary standalone application to the Tribunal for permission to notify a late appeal, with the substantial appeal itself only being notified if the Tribunal granted the application. This would obviously be procedurally inefficient and cumbersome, not to say somewhat confusing to the lay appellant. If paragraph 36G(3) contained the words "only if the tribunal has given permission", then it might arguably be a correct interpretation; however it seems to me that the draftsman has chosen the existing wording carefully, in order to leave open the question of whether the permission should be given before or after the appellant seeks to notify the substantive appeal itself to the Tribunal.

28. Thus it is inherent in the structure of paragraph 36G(3) that an application for permission to notify a late appeal may be submitted before, with or after the notification of the substantive appeal itself. Obviously as a matter of administrative convenience and efficiency, it is preferable for the application to be submitted as part of the notice of appeal itself, and this is how the Tribunal's notice of appeal form is structured.

29. If Mr Cannon's submission is correct, then its logical consequence would be that every single notice of appeal received by the Tribunal would need to be judicially considered in detail before it was accepted for administrative processing, in order to ascertain whether the appeal was in fact being submitted late and (if it was) to decide whether permission to notify the appeal out of time should be granted. It is quite common for appellants simply to ignore the question of whether the appeal is late or not (and indeed, the structure of the appeals and reviews legislation is sufficiently complex that it may not always be immediately apparent whether an appeal is being notified late or not) and accordingly this process would in many cases be extremely difficult or quite simply impossible to carry out properly, if based purely on the information (if any) provided by the appellant. Also, of course, appellants may simply give false information in their application. It would be odd indeed if the legislation were to be interpreted so as to allow an appellant to circumvent the statutory time limit simply by being selective or downright disingenuous about the information provided in support of his application for permission to notify a late appeal.

30. Mr Cannon argued that the Tribunal's allocation of the appeal to the standard category and the making of what he referred to as "detailed directions for a stay" should also be taken into account, presumably on the basis that this further activity clearly implied that a considered decision had been taken to give permission for late notification of the appeal. Again, this fails to take into account the fact that no judicial consideration whatever had been given to the late appeal application, on the basis that the Tribunal's administrative procedures do not require it unless and until it becomes apparent as a point of dispute between the parties. There would appear to be very little point in any of the guidance given by (amongst others) Lord Drummond Young as to how to approach the exercise of the judicial discretion to accept a late appeal if Mr Cannon's argument were correct.

31. This leads on to the further point that a consideration of the various issues said by Lord Drummond Young to be relevant cannot be properly undertaken (except perhaps in a very rare extreme case) without hearing "both sides of the argument" first; the rules of natural justice require it. There may be cases in which the application made by an appellant for permission is so weak that a judge takes the view it should be refused without even needing to hear submissions in response from HMRC; in any other case (and that will be the vast majority of cases) it will be impossible for a judge to exercise his discretion "judicially" without hearing the arguments of both sides. That is when Lord Drummond Young's guidance can be judicially applied, and if Mr Cannon's argument is correct, that point would never be reached unless the Tribunal instituted a whole new preliminary process for all appeals, requiring individual scrutiny by a judge before the appeal could even be processed by the Tribunal. That would cause an immense amount of wasted judicial time for no practical benefit, and that cannot sensibly be considered as a result which Parliament would have intended.

32. Finally, it is worth observing that the Tribunal's administrative procedures do call for the clerk who processes any incoming appeal to consider whether there is an obvious "late appeal" issue which has not been addressed in the notice of appeal, and to raise the matter with the appellant (or representative) if the point is picked up. But this is little more than an attempt to forestall obvious problems at an administrative level, and involves no judicial consideration at all.

33. For all the above reasons, I find that the Tribunal has not given permission for this appeal to be notified late, and it was appropriate for HMRC's representations on that application to be sought before any judicial decision on the point was made.

Should permission be given in this case?

34. In the light of the facts summarised above, I must therefore consider whether to exercise my discretion to permit the late notification of this appeal.

35. I do not consider the very slight confusion that may have been caused by two HMRC officers writing to the appellants (whilst unfortunate) can in any way justify the lengthy delay on the part of the appellants in following the clear instructions that were given to them as to the time limit for appealing. The fact that they did not receive the anticipated support from the company that had "sold" the avoidance scheme to them does nothing to justify the delay. The appellants appear to have done nothing in relation to this matter after sending their letter dated 10 August 2015 (when they said they would "hope to be able to get a response to you within the next 30 days") until HMRC's debt management unit started pursuing them for payment in December 2015.

36. I consider the application to be entirely without merit and permission to notify a late appeal to the Tribunal is therefore REFUSED. The Tribunal accordingly has no jurisdiction to consider the appeal, which is therefore STRUCK OUT pursuant to Rule 8(2)(a) of the Tribunal's Procedure Rules.

37. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 15 FEBRUARY 2017