



TC06149

Appeal number: TC/2016/04923

***PENALTIES – personal penalty notices- application for appeal out of time
-permission granted***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MUHAMMED HAFEEZ KATIB

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE GETHING

**Sitting in public at Birmingham Employment Tribunal, Tax Centre City Tower,
5-7 Hill Street, Birmingham, West Midlands B5 4UU on Monday 25 September
2017 at 10.00**

Oliver Conolly, counsel for the Appellant

**Howard Watkinson, counsel instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

1. This case concerns an application by the Appellant to appeal a personal penalty notice after the 30 day time limit. The parties accept that the Tribunal has discretion to permit an appeal out of time. The issue is whether the Tribunal may exercise that discretion where the delay is serious and in the circumstances where the Appellant is totally dependent on his representative and the representative has failed to take any or any necessary steps.

2. The application before the Tribunal is not an appeal on behalf of MDM.

The evidence

3. I had the benefit of two witness statements of the Appellant who was cross examined by counsel for the Respondents. I found the Appellant to be an honest witness.

The facts

4. The Appellant had been a director of a company (MDM Global Limited "MDM") which traded in metal. It commenced business in early 2013 when it registered for VAT. Its first trade was in February 2014. MDM filed returns. HMRC disallowed input tax claims and raised assessments based on gross turnover. As a result of MDM's failure to pay the VAT assessed, penalty assessments were notified to MDM and, as MDM had become insolvent, personal penalty notices were served on the Appellant.

5. The personal penalty notices issued were as follows:

Dates of penalty notices	Amount of penalty
5 December 2014	£145,275.45
22 December 2014	£102,313.51
29 January 2015	£92,565.60
17 March 2015	£78,203.19
30 th April 2015	£63,407.60
29 June 2015	£8,735.89
TOTAL	£490,501.24

6. VAT assessments and penalty notices were received by MDM on 5 December 2014 and on the same day a personal penalty notice was received by the Appellant as indicated in the table above. On that day the Appellant changed advisers. Mr Bridger of Sovereign Associates was appointed. Mr Bridger continued to represent the Appellant from 5 December 2014 to July 2016 when Bond Adams was appointed to represent both MDM in provisional liquidation and the Appellant. During the period when Mr Bridger was engaged the Appellant paid Mr Bridger £500 per month to represent him and MDM.

7. The Appellant did not recall receiving the personal penalty notices but recalled receiving a lot of documents in respect of MDM and himself and as he did not understand them he sent them to Mr Bridger to deal with on his and MDM's behalf. There were emails showing some documents were sent to Mr Bridger. The Appellant always sent him the original documents by registered post. The emails provided to HMRC did not include the attachments, but as the attachments were notices and letters from HMRC I cannot see that the omission was significant. There were some extraordinary communications from Mr Bridger which I will detail below which show Mr Bridger operated in an unusual way. Counsel for HMRC alleged that the Appellant had cherry-picked the correspondence that had been supplied. Counsel also invited the Tribunal to draw adverse inferences from the apparent failure of the Appellant to obtain copies of documents from Mr Bridger which correspondence counsel for the Respondents understood to be privileged being covered by litigation privilege. HMRC had not issued an information notice to Mr Bridger or the Appellant. I consider that the Appellant had made adequate disclosure to HMRC. I do not think it likely that the Appellant was cherry-picking judging from the correspondence and I do not draw an adverse inference from the Appellant not seeking documents from Mr Bridger.

8. During the course of MDM's business the Appellant had been advised to open an offshore bank account which he did in Hungary. The Appellant had given HMRC the details of the bank account. MDM had however ceased trading and as the account had been closed the Appellant had been unable to obtain copies of bank statements to show payments for goods. HMRC had not exercised powers under Treaties to obtain information and obtain copies of the bank statements.

9. Mr Bridger had assured the Appellant on numerous occasions that he was experienced in handling tax matters of this nature, had secured excellent outcomes for clients and that everything was in hand. Mr Bridger had declined to give the Appellant copies of his correspondence with HMRC on the ground of confidentiality. As the Appellant had no experience of such matters he was totally reliant on Mr Bridger and was unable to judge whether Mr Bridger was not competent. Mr Bridger failed to appeal on the appellant's behalf against any of the notices of assessment of VAT or penalties against MDM or the personal penalty notices served on the Appellant. The Appellant became aware of the dire situation when he received a letter from the official receiver and there was a threat of bailiffs attending his home.

10. The Appellant is married and has two adopted children. The family live in a modest home with a value of £220,000 and a mortgage of £120,000. The Appellant was deeply concerned about the effect that these insolvency proceedings would have on his wife and children and did not wish to have meetings with any party at his home.

11. Mr Bridger's advice included that the Appellant should cease to be a man by making a declaration to that effect to enable Mr Bridger to communicate to the world that the Appellant was dead, that there was plenty of time to deal with an enforcement notice as the Bills of Exchange Act governed the counting of the time limit to do so, that the Appellant erect a poster in his home denying access to all persons which was intended to prevent access by officials/bailiffs to avoid loss of personal assets. Mr Bridger refers to himself as "Master Bridger".

12. In my view, Mr Bridger's advice to the Appellant in the spring of 2016 justifies the "fabulist" label which Mr Connolly for the Appellant gave to Mr Bridger.

13. Bond Adams, a firm of solicitors, was engaged by the Appellant from July 2016. They immediately addressed the urgent issue of suspending the enforcement action that HMRC were taking to collect the VAT and penalties assessed on MDM and the Appellant. They then filed notices of appeal dated 9 September against the personal penalty notices with the tribunal. They were filed first on 15 September 2016. The Tribunal noticed the notices of appeal did not have attached to them the decisions against which the appeals were being made. The notices of appeal were re-filed for a second time on 10 March 2017.

14. The Appellant admits that the delay in appealing against the personal penalty notices is serious.

15. The Appellant had no competence to deal with the various notices issued by HMRC to MDM and himself and he was totally dependent on his advisers.

16. I find that Mr Bridger misled the Appellant as to what steps were being taken and needed to be taken to challenge the personal penalty notices.

17. I find that the delay between December 2014 and July 2016 in making appeals against the assessments and notices was caused by Mr Bridger's inactivity and misleading information he gave to the Appellant on whom the Appellant had relied.

18. I find that Bond Adams proceeded as quickly as possible upon being appointed by the Appellant and naturally prioritised the steps to set aside the statutory demand for payment. The appeals were made in September and I accept they were made as expeditiously as possible following Bond Adams appointment.

The legislation

(References to VATA are to the Value Added Tax Act 1983)

19. Section 83G(1) VATA provides that an appeal "*is to be made*" within 30 days of "*the date of the document notifying the decision to which the appeal relates*"

20. Section 83(G)(6) provides that an appeal may be made after that period "*if the tribunal gives permission to do so*".

5 The issue in contention is in what circumstances may the First-tier Tribunal exercise that discretion to permit an appeal out of time.

The authorities

21. I was taken to the following cases:

- (1) *BPP Holdings Limited v HMRC* 2017 UKSC 55 (*BPP Holdings*)
- 10 (2) *McCarthy & Stone (Developments) Ltd v HMRC* 2014 UKUT 196 (*McCarthy & Stone*)
- (3) *Denton v TH White Ltd* 2014 EWCA Civ 906 (*Denton*)
- (4) *B Fairall (in Liquidation) v HMRC* 2010 UKFTT 3015 (*Fairall*)
- (5) *Rowledge v HMRC* 2016 UKFTT 0556 (*Rowledge*)
- 15 (6) *Data Select Ltd v HMRC* 2012 STC 2195 (*Data Select*)
- (7) *Mitchell v News Group Newspapers Ltd* 2013 EWCA Civ 1537 (*Mitchell*)
- (8) *Obhloise Benjamin Ogedegbe v HMRC* 2009 UKFTT 364 (*Ogedegbe*)
- (9) *Leeds City Council v HMRC* 2014 UKUT 350 (*Leeds City Council*)
- (10) *Romansave Property Services v HMRC* 2015 UKUT 254 (*Romansave*)
- 20 (11) *R (oao Dinjan Hysaj) v SSHD* 2014 EWCA Civ 1633
- (12) *Hytech v Coventry City Council* 1997 EWCA Civ 1673 (*Coventry City Council*)

The Appellant's submissions on the law

22. Counsel for the Appellant noted that the Supreme Court in *BPP Holdings*
25 endorsed guidance given by the Upper Tribunal in *McCarthy & Stone* when Judge
Sinfield was not inclined to admit that different practices should apply in the Upper
Tribunal (from the High Court) for failure to adhere to court orders, practices etc
given that the overriding objectives of both the Upper Tribunal and the High Court are
expressed in the same terms. Further the Upper Tribunal in *McCarthy & Stone* relied
30 on *Mitchell* which has been clarified subsequently in the Court of Appeal in *Denton* in
which the following threefold test was identified:

'A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which

engages Rule 3.9(1) CPR. If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all of the circumstances of the case, so as to enable [the court] to deal justly with the application including factors (a) and (b) per Vos LJ at [24]).'

Factors (a) and (b) are:

'(a) for litigation to be conducted efficiently and at proportionate cost: and (b) to enforce compliance with rules, practice directions and orders'[I]

In relation to the third limb of the test in *Denton*, it was noted that *McCarthy & Stone* had accepted the criteria laid down in *Data Select* which are:

- (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 consequence for the parties of an extension of time?
- (5) What will be the consequences for the parties of a refusal to extend time?

23. Counsel for the Appellant applied the five factors to the facts of this case as follows:

(1) *Purpose of the time limit.* Counsel accepted that the purpose of the time limits is to require a party asserting a right of appeal to do so promptly and to assure the opponent that after the time limit has expired, no claim will be made, per *Leeds City Council* which principle was endorsed in *Rowledge*.

(2) *How long was the delay.* Counsel for the Appellant accepted that the delay was serious. The notices were received between 5 December 2014 and 29 June 2015. The notice of appeal is dated 9 September 2016 which is between 20 months and 13.5 months late. He noted that permission to appeal out of time was granted in FTT case of *Fairall* where the delay was 33 months.

(3) *Was there a good explanation for the delay?* Counsel said there was a good explanation for the delay. Counsel for the Appellant placed the blame at the door of Mr Bridger, the Appellant's representative during the period December 2014 to July 2016. The Appellant was totally reliant on Mr Bridger. Mr Bridger misled the Appellant into believing his affairs were being handled professionally. Mr Bridger sought to reassure the Appellant that there was no reason to be concerned by communications received from HMRC. He boasted about success in other cases, he reassured the Appellant that he was taking all relevant steps to protect the Appellant's position. The principle in the *Coventry City Council* case ought not to apply in a case where the Appellant has been systematically misled by the adviser. This is a factor which should be taken into account as not to do so would be draconian indeed. The Tribunal has the ability

to consider all the circumstances and this is an extreme case. A decision in favour of the Appellant in this case would not open the floodgate of requests for permission to appeal out of time on account of actions of a legal adviser. When the Appellant instructed his current advisers there was no unavoidable delay. A 700 page witness statement was produced to set aside the statutory demand for payment. Once that was done the application for permission to appeal out of time was undertaken.

(4) *What will be the consequences for the parties of an extension of time?* The burden of proof will be on the Appellant to prove that the input tax claimed by MDM is deductible. Loss of evidence and delay will prejudice the Appellant but no real prejudice will fall on the Respondents although it is noted there has been a change of personnel handling the enquiry.

(5) *What will be the consequences for the parties of a refusal to extend time?* There will be demonstrable injustice if the case is not heard. The Appellant's net assets are insufficient to meet the amount of the penalty. His only asset is a family home where he lives with his wife and two children. The home has a value of £220,000 with a mortgage of £120,000.

In view of the above in all of the circumstances of the case Counsel submitted that permission to appeal out of time ought to be granted.

Counsel for the Appellant indicated that the prima facie merits of underlying appeal were considered not relevant in *Rowledge*. He addressed the Tribunal on the point but as HMRC and I also consider the prima facie merits are irrelevant I do not consider them in this decision.

The Respondent's submissions

24. Counsel for the Respondents indicated the correct approach to be adopted by the Tribunal in considering the Appellant's application to make an appeal out of time is:

(1) To consider the overriding objective "*to deal with cases fairly and justly*" and all of the circumstances of the case guided by the 5 factors set out in *Data Select* (as set out above).

(2) To have regard in doing so to the provisions of CPR 3.9 as interpreted in *Mitchell* and *Denton* (as set out above), and applied to the tribunal system in BPP, including the need for both the litigation to be conducted efficiently and at proportionate cost and the general need to enforce compliance with time limits when considering all the circumstances of the case.

(3) To avoid investigating the merits of the case.

25. Counsel for the Respondents also referred to the Court of Appeal case of *Coventry City Council* which involved a dispute pertaining to a computer software system where the Coventry City Council's legal team had failed their client by preparing inadequate documentation, senior counsel failed to attend a hearing at which a pupil attended on behalf of the client. The Court held that the client had to

pay the penalty of the failure of its legal team. The Court considered the attitude was contumacious and showed a wilful lack of respect and regard.

26. Applying the five factors in *Denton* in the following manner counsel for the Respondents considered the application for permission to apply ought to be dismissed

5 (1) The purpose of the time limit was to provide finality to HMRC so they may close their files and deal with other cases. There was a strong public interest in this and the decision in *BPP Holdings Limited* reinforced the need for finality.

(2) The delay was between 26 months and 20 months and was serious.

10 (3) There was no good reason for the delay. Counsel challenged the Appellant's inability to recall receipt of the documents, and his compliance with requests for documents including in particular the Hungarian bank account. Counsel also challenged the Appellant's lack of consent to Mr Bridger representing to the Official Receiver that he was dead. Counsel invited the
15 Court to draw adverse inferences from the Appellant's failure to request his former adviser to produce his files. Counsel suggested that even if the account of Mr Bridger's conduct is true, the Appellant was deceived by Mr Bridger into believing there was no reason to be concerned about the documents being received from HMRC and all was in order, the decision in *Coventry City Council* case should be followed. Counsel suggested that the actions of the
20 adviser should fall upon the head of the client. Further even if the Appellant's story about the conduct of Mr Bridger between December 2014 to July 2016 is to be believed there is no excuse for the three month delay in Bond Adams being instructed in July 2016 and filing the appeal in September 2016 without copies of the underlying decisions being appealed.
25

(4) If the permission is granted the Respondents are denied finality and will suffer prejudice in the Appellant being allowed to bring an appeal since the officer previously involved in the case has left the service.

30 (5) Finality will be achieved if permission is refused. There will be prejudice to the Appellant but he brought it upon his own head.

Discussion

27. The parties were in agreement as to the proper test to be applied, viz the 5 factors set out in *Data Select* which I deal with below.

(1) *What is the purpose of the time limit?*

35 Both parties accepted that the purpose was to produce finality at the earliest possible time in line with the overriding objective. Counsel for the Respondents urged me to follow *BPP Holdings* and insist the time limits be strictly adhered to. I do not consider *BPP* is helpful and certainly not decisive because in that case a direction had been made by the First-Tier tribunal (F-tT) and the F-tT had
40 indicated that HMRC would be barred from participating in proceedings if the

direction was not adhered to. The facts in this are very different: there had been no analogue of the F-tT's direction in *BPP* and no other "warning shot" over "the Respondent's bows". Nor was there in *BPP* an analogue of Mr Bridger's unusual behaviour in this case.

5 (2) *How long was the delay?*

The parties agreed the delay was serious. The Appellant indicated that the delay was between 13.5 and 20 months but there had been other cases in the tribunal where a delay of 33 months had occurred where there had been a mistaken belief that an appeal had been made orally. The Respondents considered the
10 delay should be regarded as between 24 and 20 months. I do not think the difference between the parties on the length of the delay is material in this case.

(3) *Is there a good explanation for the delay?*

The Appellant considered there was good reason for the delay which was due to Mr Bridger's failure to properly represent the Appellant. Mr Bridger failed to
15 give the Appellant legal advice in relation to the personal penalty notices, failed to take steps to appeal the notices. On the contrary he habitually assured the appellant that matters were in hand, that there was no need for the appellant to be concerned, that he had the expertise to deal with the issue. Mr Bridger deliberately misled the Appellant and the appellant had relied upon Mr Bridger.

20 The Respondents invited me to conclude that the principle in *Coventry City Council* should apply, that the conduct of a legal representative should be visited upon the head of the client. As there was no good reason for Mr Bridger's delay so there should be no good reason for the appellant's delay.

I do not consider the *Coventry City Council* principle should apply in cases such
25 as this where, to use an analogy from employment law, the so-called representative is on a frolic of his own acting outside the scope of any possible brief that the Appellant could have given. As mentioned above there was no analogue of the F-tT's direction in *BPP Holdings* and no other "warning shot" over "the Respondent's bows". Nor was there in *BPP Holdings* an analogue of
30 Mr Bridger's unusual behaviour in this case.

In relation to the modest delay from Bond Adam's appointment in July 2016 to the making of the appeals in September 2016 I find that that delay is explicable as Bond Adams had first to deal with the more pressing issue of the enforcement proceedings.

35 (4) *What will be the consequence for the parties of an extension of time?*

If permission is granted the Appellant will be able to bring his appeal against the personal penalty notices and as the burden of proof is on the Appellant, the delay may be a barrier to him being able to do so effectively as evidence may not be available to him now that may have been available to him 20 months ago.
40 HMRC considered that they would be prejudiced if the permission is granted as there had been a change in personnel at HMRC. The officer dealing with the enquiry is no longer with HMRC. As HMRC is a professional organisation, its

files and records should be in such good order to enable another officer to pick up the case quickly in consequence there will, in my opinion, be prejudice to the Appellant but no real prejudice to HMRC if permission is refused.

(5) *What will be the consequences for the parties of a refusal to extend time?*

5 I accept Counsel for the Appellant's assertion that there would be demonstrable
injustice if permission is not granted. The Appellant's only asset is his home, a
modest dwelling with a value of £210,000 subject to a mortgage of £120,000,
which he shares with his wife and two adopted children. The aggregate value of
10 the penalties is £490,000. It will be inevitable that the Appellant will lose his
home. The Respondents accepted there would be prejudice to the Appellant but
that he had brought the injustice on his own head. I do not accept that he did do
so. The Appellant appointed Mr Bridger to represent him. Mr Bridger did not do
so effectively. On the contrary Mr Bridger's actions or inactions were so
15 extraordinary, so out of the scope of any brief that could have been delivered to
any putative representative, that those actions cannot in all conscience be visited
upon the Appellant. I note that if permission is granted the Respondents will be
able to defend the appeals in exercise of their statutory duty to administer the
tax system and collect the correct amount of tax.

20 Counsel for the Respondents invited me to have regard to all of these factors in
light of CPR 39 and through the lens of efficient litigation, to follow *BPP
Holdings* and refuse permission which had been followed in a number of
tribunal cases such as *Odegebe* and *Romaserve*. In *BPP Holdings* HMRC had
failed to comply with a series of directions (accompanied by a warning of the
25 consequences of non-compliance) and had provided no reasonable excuse other
than lack of resources. The Supreme Court did not interfere with the decision of
Judge Mosedale debaring HMRC from further participation in the proceedings.
Lord Neuberger comments on the guidance given by the Upper Tribunal:

30 *"to secure a degree of consistency of approach among the Ff-T judges. In
the context of court decisions, this was plainly in the mind of the court of
appeal in Mitchell and Denton. There must be a limit to the permissible
harshness (or indeed the permissible generosity) of a decision relating to
the imposition or confirmation (or discharge) of a debaring order. It may
35 be this case is not far from that limit..... However I do not consider that it
was the wrong side of the line, given the combination of the nature and
extent of HMRC's failure to reply to BPP's request, the length of the delay
in rectifying the failure and the length of the consequential delay to the
proceedings, the absence of any remedy to compensate BPP for the delay,
and the absence of any explanation or excuse for the failure coupled with
the existence of other failures by HMRC to comply with directions."* [34]

40 Lord Neuberger recognised the judge faced "a binary question involving
two unpalatable choices. Making the debaring order which she regarded
as draconian, or not making the order, which, to use the vernacular,

would have meant that HMRC effectively would have got away with it."[35]

5 The decision of Judge Mosedale in BPP Holdings was a balance of all of the facts. The Supreme Court accepted the balance that she struck but acknowledged the decision was very much at the limit of permissible harshness. The facts of this case are very far away from those in BPP. They are extraordinary and in weighing all of the circumstances in this case I am unable to accept the invitation to follow BPP for to do so in this case would be too extreme and fail to have regard to the overriding objective.

10 *Decision*

28. I give permission for the appeal to be made out of time.

29. 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.

20

**HEATHER GETHING
TRIBUNAL JUDGE**

25

RELEASE DATE: 04 OCTOBER 2017