Neutral Citation: [2023] UKFTT 00373 (TC)

Case Number: TC08794

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/11143

LATE APPEAL – employment taxes – serious and significant delay – no good reason – balance of prejudice in favour of HMRC – application REFUSED

Heard on: 21 March 2023
Judgment date: 18 April 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

CRANHAM SPORTS LLP

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Simon Browne of Counsel

For the Respondents: Ms Marianne Tutin of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) using HMCTS video hearing system. The documents to which I was referred are contained in an electronic documents bundle of 177 pages, and authorities bundle of 382 pages. Cranham Sports LLP ("**Applicant"**) filed a skeleton argument of 7 pages and HM Revenue & Customs ("**HMRC**") skeleton was 10 pages.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND FACTS

3. The hearing was to consider the Applicant's application for permission to bring their appeal in respect of determinations made under regulation 80 of the Income Tax (Pay as You Earn) Regulations 2023 ("**Determinations**") and notices under section 8 of Social Security and Contributions (Transfer of Functions) Act 1999 ("**Notices**") for tax years ended 5 April 2014 to 5 April 2019 ("**Relevant Tax Years**").

4. The Applicant is a partnership intermediary, incorporated on 24 August 2009, of which Mr Barry Cowan is a member. Mr Cowan performed services as a tennis commentator in relation to matches broadcast by Sky UK Limited ("**Sky**") during the Relevant Tax Years. By the Notices and Determinations HMRC assert that during the Relevant Tax Years the arrangements between the Applicant and Sky are such that had they take the form of a contract between Mr Cowan and Sky, Mr Cowan would be regarded as employed by Sky such that additional income tax and class 1 national insurance contributions are due.

5. The Determinations and Notices for the Relevant Tax Years were issued to the Applicant at the end of what appears from the documents before me to have been an enquiry with which the Applicant's representatives became increasingly frustrated.

6. During the course of the enquiry, on 17 June 2021, HMRC issued an opinion (the opinion itself was dated 18 June 2021). That opinion stated that it had considered communications between HMRC and both the Applicant's representative and Sky. By reference to the relevant test for determination of whether an individual is subject to a contract of or for services, HMRC reached the view that, under a notional contract between Barry Cowan and Sky, the relationship was one of service (i.e. that Mr Cowan should be treated as employed by Sky). The letter notes:

> "… my opinion assumes that the information you have supplied accurately reflects the basis on which services are provided and only applies to the contract that has been supplied by you. If the contract is not fully acted upon in practice or there are other oral or implied conditions which have not been presented to me, my opinion may be modified.
>
> …
>
> If I have misunderstood or misinterpreted anything within the information supplied to me, please let me know. I will of course readdress any consequent issues and advise you accordingly. If you disagree with the contents of this letter you should tell me by the date mentioned below why you think it is wrong and provide any further information and/or documentation that you think is relevant. I will consider what you tell me and advise you accordingly. If I do not hear from you by 19 July 2021, I will assume your agreement …"

7. By email response to the opinion, on 9 July 2021, the Applicant's representative raised a list of 23 points of dispute/disagreement with the analysis set out in the opinion and stated that the list was not exhaustive but that the decision was unsafe and completely incorrect.

8. The Determinations for years ended 5 April 2018 and 2019 and the Notices for tax years ended 5 April 2015 – 19 were issued on 17 November 2021and the Applicant duly notified HMRC of an appeal in respect of them within the required period of 30 days also raising a complaint with how the enquiry had been managed. The appeal notification identifies that no response was received by them to the email of 9 July 2021.

9. I was told in the hearing that the Applicant also challenged HMRC's use of communications between HMRC and Sky to which the Applicant was not privy and requested copies of the documents. Mr Browne said that there had been considerable delay in obtaining disclosure and that the disclose was not made until July 2022. Limited correspondence regarding this was available to me in the bundle of documents (i.e. the correspondence requesting the documents was not included though there is reference in latter correspondence to the request having been made). Ms Tutin did not deny that there had been a request for the Sky documents or that the request had been made before the view of the matter letter. She also did not contend that the documents were provided before July 2022, but she claimed that the delay in producing them had been caused by the need to obtain consent from Sky.

10. On 8 December 2021, and in response to the appeals, HMRC issued what is known as their view of the matter letter (the letter was dated 9 December 2021 but sent under cover of an email on 8 December 2021). The letter stated:

> "Having reviewed the relationship between [Sky] and [the Applicant] … our view remains the same as set out in our opinion letter … that had there been a contract between Barry Cowan personally and [Sky] it would be considered a contract of service i.e. employment. As such, the engagement is subject to the "Intermediaries" Legislation (IR35).
>
> …
>
> To settle the appeal, you have the option to either accept HMRC's current view regarding the status, take up our offer of an internal review by an HMRC officer who has had no previous dealings with the case or refer the appeal to the Tribunal Service. If you take up the offer of an internal review you will have the opportunity to provide any further information or reasons in support of your case. The review officer will write and tell you the outcome of their review. If you opt for a review you can still appeal to the tribunal after the review has finished.
>
> If you disagree with HMRC's position, you have 30 days from the date of this letter within which to either accept my offer of an internal review by replying to this letter or notify the appeal to tribunal.
>
> If you neither accept the offer of a review nor notify the appeal to the tribunal, the appeal will be treated as settled by agreement under section 54(1) of the Taxes Management Act 1970 on the basis of my view of the matter as set out above."

11. Within 23 minutes of receipt of the email containing that letter the Applicant's representative responded as follows:

> "You say your view has not changed but you have failed to respond at all to any of the points we have raised in our email dated 9/7/21.
>
> So is this how you intend matters to progress, that is, you simply ignore the points we have raised and carry on regardless?

> No wonder we have raised a complaint in this case and if this is the best you can do, we are raising another complaint as this response is completely unacceptable.
>
> … please reply by 22 January 2022. If you can't reply by this date, then let us know."

12. I was told that on 17 January 2022, HMRC made a without prejudice approach to the Applicant to settle the dispute. I was not provided with a copy of the communication. HMRC informed me that the letter was a standard letter sent by the officer responsible for the enquiry and that it did not purport to extend the period in which the Applicant was required to request a review or notify and appeal.

13. On 26 January 2022 HMRC wrote to the Applicant stating that as no request for review had been received and not notification of an appeal to the Tribunal been made the dispute was treated as settled in accordance with the relevant provisions of the Taxes Management Act 1970 ("**TMA**") and as explained in the view of the matter letter.

14. The Applicant's response to this letter stated:

> "There is no way the matter is going to be settled in this way.
>
> Your 'opinion' dated 18/6/21 was full of holes and errors, plus it also seemed to rely on information that you purport to have come from Sky, however ,as explained, we have not seen this correspondence.
>
> You are well aware of our position and I sent you a very long e-mail on 8/7/21, so am still awaiting your detailed response, rather than your very short letter dated 9/12/21 which I received by e-mail on 8/12/21 and to which I responded the same day, but have received nothing further from you until today."

15. Correspondence ensued. On 2 February 2022 HMRC confirmed that as there had been no request for review or notification of appeal the provisions of s54(1) TMA bought the matter to a close. By an email response the same day the Applicant continued to argue that the dispute would or should remain open until HMRC had fully responded to the points raised in the email of 9 July 2021 and pending disclosure of the Sky correspondence and documentation. It was also contended that December and January are busy months for the representative. At this point a request was made for a review.

16. The late request for review was refused by letter dated 17 February 2022 (such letter again being send by email a day prior to the date of the letter). In the email response to that letter the Applicant's representative communicated his understanding that the dispute had, in fact, been referred for an internal review. However, he continued to contend that prior to such a review it was necessary for HMRC to provide a response to the points raised in his email of 9 July 2021 and for disclosure of the Sky documentation. Further reference was made to the without prejudice offer to settle. HMRC responded confirming that no internal review had been accepted and indicating that the reasons provided for failure to request an in time review did not represent a reasonable basis for granting a late review.

17. There was further correspondence between the parties in which each reiterated their position. Finally, on 10 March 2022 an appeal was notified to the Tribunal. The Notice of Appeal was dated 18 February 2022 but the Applicant accepted that it was not sent to the Tribunal until 9 March 2022 and was received one day later.

FINDINGS OF FACT

18. The only evidence before me was contained in the correspondence in the bundle the contents of which are outlined above. From these documents I made the following findings of fact:

(1) HMRC's opinion as to the deemed employment status of the Applicant was reached using material available provided to them by Sky which was not made available to the Applicant. That material was not provided to the Applicant until July 2022.

(2) The Applicant requested the Sky documentation and considered it important and relevant to the basis on which it intended to challenge HMRC's decision.

(3) HMRC clearly and unambiguously notified the Applicant of his statutory rights to continue the dispute following the view of the matter letter.

(4) Immediately upon receipt of the view of the matter letter the Applicant's representative took issue with HMRC's conclusion as stated but did not request a review of that decision.

(5) HMRC sent a without prejudice offer to settle. That letter appears to have been a case of the right hand not knowing what the left hand was doing and may have been sent by mistake, but it was nevertheless sent and received.

(6) The appeal was not notified until 10 March 2022 and was therefore 60 days late.

THE LAW

19. Pursuant to section 49A TMA following an appeal being made to HMRC in respect of a decision of theirs HMRC may notify the appellant of an offer to review the matter in question. Where they do so, pursuant to section 49C TMA they must offer their view of the matter. Section 49C TMA also provides that when offered a review the taxpayer must either 1) require HMRC to undertake the review or 2) notify and appeal to the Tribunal, in both cases within 30 days of the view of the matter letter. In the absence of a request for review or notification of the appeal section 49C(4) TMA provides that the dispute shall be treated as settled on the basis set out in the view of the matter letter.

20. Where the statutory period of 30 days has expired without the taxpayer requesting a review or notifying the appeal section 49H TMA provides that notification of the appeal may be given only with the Tribunal's permission.

21. The test to be applied by the Tribunal when exercising its statutory power to permit the late notification of the appeal is as provided by the Upper Tribunal ("**UT**") in the case of *Martland v HM Revenue and Customs* [2018] UKUT 178 (TCC) ("**Martland**").

22. The UT considered the relevant authorities of the Court of Appeal and Supreme Court in the context of relief from sanctions under the Civil Procedure Rules to determine the appropriate test when considering a breach of the FTT Rules. The UT summarised the approach taken in the authorities:

> "[40] In *Denton*, the Court of Appeal was considering the application of the later version of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [24]):
>
> > "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' ... 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 the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b) in Rule 3.9(1)]"

> [41] In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered.
>
> [42] The Supreme Court in BPP implicitly endorsed the approach set out in Denton. That case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FTT
>
> [43] … The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". …"

23. The UT then concluded that a similar approach should apply to the Tribunal.

24. When applying the *Martland* test it is clear, following the guidance provided by the UT in *Muhammed Hafeez Kantib v HMRC* [2019] UKUT 189 (TCC), that the acts and failures of a representative are to be assimilated to those of the appellant save in exceptional circumstances and/or where the failure of the representative can be reasonably excused.

PARTIES SUBMISSIONS

25. The parties were agreed that I was to apply the principles in *Martland* when determined whether to grant this application.

Applicant's submissions

26. Somewhat curiously, in my view, the Applicant did not seek to contend that the email of 8 December 2021 was, in substance, a request for internal review. The Applicant accepted that no internal review was requested at any time prior to 2 February 2022. The Applicant accepted that to have not requested a review was an oversight or mistake but one rooted in a view that until HMRC had responded to the detailed points raised in the email of 9 July 2021 or provided the Sky documentation there had been no effective view of the matter communicated.

27. The Applicant sought to contend that the delay in notifying the appeal was neither serious nor significant in the context of HMRC being fully aware that the Applicant disputed their view of the matter. It was claimed that HMRC's conduct of the enquiry and engagement throughout, including in the period from 8 December 2021 to 10 March 2022 and beyond, contributed to the delay in notifying the appeal.

28. The substance of the Applicants submission was that when considering all the circumstances the balance of prejudice lay with the Applicant because HMRC had failed to adequately address the points of disagreement raised and failed to provide documents considered on review but not disclosed to the Applicant. It was asserted that, at least in the circumstances of the present case, HMRC should have promoted the Applicant within the 30 days to formally request a review or notify the appeal.

29. The Applicant contended that, to the extent it was relevant, in the balancing exercise to be undertaken, the Applicant's prospect of success in the appeal favoured the case being heard as this was not a case where HMRC were clearly going to succeed and, in the event that permission to appeal out of time were to be refused HMRC would benefit from a windfall of tax not properly due to them.

HMRC's submissions

30. Ms Tutin emphasised that the courts and Tribunals had consistently directed that particular weight is to be given by the need to enforce statutory time limits. In the context of

a 30-day time limit the delay of 60 days was, in HMRC's submission, both serious and significant.

31. HMRC contended that no real or substantive explanation had been given for the delay other than that the Applicant's advisor had made a mistake. By reference to the judgment in *Katib* the advisors' failings were to be assimilated to those of the Applicant.

32. A very close parallel was drawn facts in *MPTL Ltd v HMRC* [2022] UKFTT 472 ("**MPTL**") which led Judge Aleksander to refuse to permit an out of time appeal.

33. HMRC contend that the prejudice of not being able to bring an appeal which might otherwise have been prosecuted and the associated "windfall" is an inherent feature of the failure to act within time and should be given little or no weight. In any event, it was asserted that this was a matter in which the majority of cases (particularly those concerning individuals working with/for Sky) have gone against the taxpayer thereby justifying a decision that permission be refused saving all parties the cost and time associated with a substantive appeal.

APPLYING MARTLAND

34. As indicated the delay in this appeal was 60 days in the context of a 30 day statutory time limit. Judge Aleksander noted in *MPTL* of a delay of the same length, "whilst it does not rank amongst some of the longest delays that this Tribunal has had to consider it is long enough to be considered serious requiring time to be spent addressing the second and third stages of the *Martland* test."

35. I respectfully agree.

36. The second stage requires consideration of the reason for the delay. In short the Applicant concedes that the delay had no reason other than the representative made a mistake and essentially did not realise or believe, in light of the email of 8 December 2021, that time was running against the Applicant. The Applicant accepts that no request for review was made by the email but nevertheless asserts that there is adequate reason for the delay.

37. The reason advanced in *MPTL* was the same as here. Judge Alekander records the reason in that case as "bone fide mistake". As here, MPTL were given instructions on how to file an appeal or request a review and were notified of the consequences of doing neither. Judge Aleksander confirmed his view in that case that HMRC were under no duty to tell a taxpayer, particularly a professionally represented one, that they needed to act within 30 days, but noted that in any event the view of the matter letter did make it clear what needed to be done by when.

38. It is my view that consistently with the requirements of section 49C TMA where HMRC notify a taxpayer of an offer of a review they must communicate the time limit in which to accept the offer. Whilst it might be debateable whether they must then inform a taxpayer of the alternative of notifying an appeal and the consequences of failing to do either, it is clearly good administration to do so. However, that point is entirely moot where standard procedure, which was followed in the present case, is for a full recitation of the taxpayers statutory rights to be included in the view of the matter letter.

39. In *MPTL* no explanation for the mistake was provided. Here there was no direct or oral evidence given by the representatives as to how the mistake arose. Mr Browne for the Applicant contended that the correspondence spoke for itself and that it was plain that pending a full and proper response to the details points of dispute provided on 9 July 2021 and without disclosure of the Sky documentation the dispute was live.

40. The representatives in this case were chartered accountants acting for the Applicant in connection with its tax affairs and should have been, and were in any event, were made aware of the statutory time limit in which to request a review or notify an appeal. As such there is no

sensible basis to contend that they were unaware that it was running from the letter dated 9 December 2021. Acting prudently, a competent professional could have been expected to have protected the Applicant's position by formally asking for an internal review even were the view held that the view of the matter was inadequate. For this reason I find that no adequate reason for the delay has been provided with the consequences that I must proceed to the third stage of the *Martland* test.

In all of the circumstances …?

41. At this stage I must consider all of the circumstances and determine the "just" outcome.

42. HMRC submitted that in a case of the exercise of a statutory discretion (as distinct from a case management decision) the provisions of rule 2 (the overriding objective to deal with a case justly and fairly by refence to the particular issues identified in the rule) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**FTT Rules**") did not apply. I do not accept that submission. Firstly, the judgment in *Denton,* as endorsed in *Martland,* confirms that the application is to be justly determined. Secondly, there is no limit on when and how the overriding objective is to be determined merely that the overriding objective of the Rules is to enable me to deal with cases fairly and justly. In particular rule 20(4) envisages that the Rules are to apply where an enactment providing for an appeal also provides for the Tribunal to accept a late appeal with the permission of the Tribunal.

43. When undertaking the balancing exercise particular importance should be given to the requirement to enforce compliance with statutory time limits and for litigation to be conducted efficiently.

44. I note that the letter of 8 December 2021 notified the need to act within 30 days but also requested a response by 22 January 2022 with an indication that if that deadline could not be complied with then to contact HMRC. The Applicant did immediately communicate dissatisfaction with the decision and invited a full response to the points of dispute raised in July 2021. Following that email, and prior to 22 January 2022 (but after the 30 days from 9 December 2021 had passed) HMRC sent a communication inviting without prejudice settlement discussions. Albeit that the invitation was firmly rejected on behalf of the Applicant I consider that a reasonable conclusion to have drawn at that time was that the dispute remained live and that HMRC had, in some way, treated the email of 8 December 2021 as keeping the appeal alive. Certainly, I consider that until 25 January 2022 a failure to notify the appeal was not unreasonable conduct.

45. The reasonableness of a continued delay post 25 January 2022 diminishes. The Applicant did not immediately, upon receipt of that letter, request a review, it took a further week and when the request for review was rejected on 17 February 2022 it took a further 3 weeks to notify the appeal. In the period from 25 January 2022 the Applicant's representative simply expressed increased frustration and indignation at HMRC's conduct without considering what course of conduct would represent his client's best interests.

46. The representative's failure to appreciate and act in the circumstances is not a factor which militates in the Applicant's favour because, as submitted by HMRC, there is authority which is binding on me that the advisor's failures are to be treated as those of the Applicant (see *Katib* which references *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666).

47. The sum at stake and the loss of opportunity to challenge it is plainly a factor to be taken into account but is not one which carries significant weight.

48. In *Martland* the UT considered that the Tribunal could have regard to any obvious strength or weakness of the applicant's case in the context of the balance of prejudice with

there being obviously greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. However the Upper Tribunal noted a word of caution that the Tribunal should not "descend into a detailed analysis of the underlying merits of the appeal". Quoting from the judgment of Moore-Bick LJ in *R (oao Hysaj) v Secretary of State for the Home Department* 2014] EWCA Civ 1633 the UT notes that in the majority of cases the merits of the appeal have little to do with whether it is appropriate to grant an extension of time and firmly discouraged any investigation into anything other than the identification of an obviously strong or weak case.

49. I note that Judge Aleksander did consider the merits of the appeal in *MPTL* concluding that they were "not good". HMRC invited me to conclude the same and give more weight to this factor as justifying refusal of the application. With respect to Judge Aleksander I consider it inappropriate in an IR35 case to conclude other than success is likely to be arguable. The cases are highly fact specific requiring a multifactual evaluation of the relationships between the parties. That there are cases which fall on both sides of the line (even for those contacting to provide services to Sky) would indicate that I should be discouraged from consideration of the merits. For that reason I have not considered them and express no view.

50. HMRC, in essence, contend that they will be put to the inconvenience and expense of defending an appeal which they were entitled to conclude was settled as at 9 January 2022. They indicate that the representatives' failure to act within the 30 days is a matter which, if it is to be remedied at all, is not to be so remedied through this Tribunal but by way of action against the representative.

51. Having weighed all of these factors I have concluded that I am, in the end, not persuaded to grant permission. I consider that had the appeal been notified within a reasonable period after 25 January 2022 I would have granted permission firstly because the period of delay would have been short and secondly because I consider that the conflict in the letter as to dates and the without prejudice correspondence could have created an impression to the representative and his client that the time limit was not running. However, by 25 January 2022 it was clear that HMRC considered the time limit to have expired. Rather than seek to remediate the position as soon as possible the representative continued to lock horns with what he considered to be the outrageous conduct of HMRC. He did not appeal but continued to make complaint to HMRC.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

52. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 18th APRIL 2023