Neutral Citation: [2023] UKFTT 00374 (TC)

Case Number: TC08795

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2022/13097

LATE APPEAL – SDLT appeal – 42 days late – Martland applied – serious and significant delay – no good reason – balance of prejudice against the Appellant – application ALLOWED

Heard on: 13 April 2023
Judgment date: 17 April 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

MARIE GUERLAIN-DESAI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Patick Cannon of counsel instructed by Cornerstone Tax 2020 Limited

For the Respondents: Ms Maria Serdari litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) using HMCTS video hearing system. 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.

2. The hearing concerns the application by Marie Guerlain-Desai ("**Applicant"**) for permission to bring an appeal outside the statutory time limit prescribed in paragraph 36G Schedule 10 Finance Act 2003 ("**Sch 10 FA 03**"), namely 30 days after receipt of the decision of HM Revenue & Customs ("**HMRC**") upholding a closure notice issued pursuant to paragraph 12 Sch 10 FA 03 amending Applicant's amended stamp duty land tax ("**SDLT**") return. HMRC object to the Applicant's application to bring the appeal outside such time limit.

3. The documents to which I was referred are contained in an electronic documents bundle of 299 pages prepared by HMRC including their authorities. The Applicant provided a response to HMRC's objection and an additional authorities bundle of 108 pages.

4. I gave an extempore judgment allowing the application. HMRC indicated that they were content that I issue a short decision which would not have been published. Mr Cannon, on behalf of the Applicant and Cornerstone, requested a fully reasoned and published judgment. As the decision on this application was not one which finally disposes of all issues in the proceedings there is no rule requiring me to produce a fully reasoned or published decision, I have nevertheless produced this judgment which may be of interest to other parties.

FACTUAL FINDINGS

5. On 15 January 2021 the Applicant purchased a property in Petersfield, Hampshire paying £3,160,000. The property was described in the sales particulars as "a substantial county property built in 1928, set within the private estate of Durford Wood in a secluded position with wonderful parklike gardens and woodland."

6. At the time of purchase SDLT was paid on the basis that the full consideration paid was for a residential property. Subsequently, it appears that Cornerstone Tax ("**Cornerstone**") "analysed the tax return data" and reviewed the transaction, concluding that the property had been misclassified. Following that conclusion, on behalf of the Applicant, an amended SDLT return was rendered pursuant to which it was claimed that the part of the price attributable to 12 acres of mature woodland should have been reclassified as non-residential property for SDLT purpsoes. The amended return was submitted on 1 April 2021.

7. HMRC opened an enquiry into the return on 13 December 2021 and, following correspondence with the Applicant and Cornerstone, closed the enquiry on 25 February 2022 amending the amended return such that £225,250 additional SDLT became payable.

8. Within the required 30 days the Applicant appealed to HMRC. HMRC offered a review of the decision on 30 March 2022 which was accepted by the Applicant on 22 April 2022. The statutory review conclusion was notified on 8 June 2022. That letter notified the Applicant that if she disagreed with the conclusion stated she was required to notify her appeal to the Tribunal within 30 days. The letter went on to clearly state that if the appeal was not notified within 30 days the conclusion stated in the letter would be treated as if there were an agreement in writing under paragraph 37 Sch 10 FA 03, the effect of those provisions is that the decision would become final.

9. No appeal was notified by the deadline which expired on 8 July 2022. However, on 19 August 2022, a notice of appeal was lodged seeking to bring an out of time appeal. The stated grounds were that there had been an administrative error on the part of Cornerstone. An individual had left their employment having failed to notify the appeal which had only subsequently been noticed by the practice.

THE LAW

10. Section 36G Sch 10 FA 03 provides for this Tribunal to admit an appeal notified outside the prescribed time limit. These provisions allow for the exercise of my discretion as to whether to accept jurisdiction of an appeal made out of time.

11. The circumstances and manner in which I should exercise that discretion have been prescribed by the Upper Tribunal ("**UT**") in the case of *William Martland v HMRC* [2018] UKUT 0178 (TCC) ("**Martland**"). The Court directed as follows:

> "[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". …"

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

13. Other cases, which both predate and follow *Martland*, provide additional guidance on to the approach to be followed.

14. In *Romasave (Property Services) Ltd b HMRC* [2015] UKUT 254 the UT emphasised that as accepting an out of time appeal gives the Tribunal jurisdiction it would not otherwise have the exercise of the discretion is a matter of "material import". It noted that when considering the first limb of what is identified above in *Martland*/*Denton* test, the Tribunal should consider the length of the delay by reference to the relevant time limit. The UT noting that a 3-month delay as compared to a 30-day time limit was both serious and significant.

15. However, it is important to note that the UT also referenced the judgment of the Court of appeal in *Secretary of State for the Home Department v SS (Congo) and others* [2015]. In that case at paragraph [105], the Court expressed the view that to exceed a time limit of 28 days by 24 days was at least a significant breach and that "a party who delays by several weeks or months in applying to the court for permission to appeal can generally expect to have the delay treated as significant or serious" going on to emphasise that one reason for limiting the time for filing of a notice of appeal is to promote finality in litigation.

16. When going on to the second stage the UT in *HMRC v Katib* [2019] UKUT 189 (TCC) determined 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.

17. In connection with the third stage and considering all of the circumstances, it is clear from *Martland* itself that 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;

18. It is also clear from *R (ono Hysaj) v Secretary of State for the Home Department* [2015] EWCA Civ 1195 that the merits of the appeal are only relevant to the question of whether permission is to be granted where, without much investigation the court can see that the grounds of appeal are either very strong or very weak.

PARTIES SUBMISSIONS

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

Applicant's submissions

20. On behalf of the Applicant, Mr Cannon submitted that a delay of 42 days was not serious and significant, he emphasised that even HMRC's case was not predicated on the delay being both serious and significant. He contended that, by their objection, HMRC were seeking to "hollow out" or "undermine the benchmark" to be derived from *Romasave* that a delay of less than 3 months did not meet the first stage of the *Martland* test. In his submission the Applicant succeeded at the first stage.

21. Nevertheless he went on to address the second and third stages. As regards the reason for the delay, Mr Cannon accepted that Cornerstone's failure was to be imputed to the Applicant but that, as a consequence, the skills and attributes attributed to Cornerstone as a competent tax advisor with significant tax litigation experience could not necessarily be ascribed to the Applicant. Mr Cannon was careful to avoid any statement as to the competence of the Applicant and did not call her to give evidence as to her understanding of the terms of the review conclusion letter and the requirement to bring an appeal.

22. It was implicit that Mr Cannon recognised that the reason provided was not a "good" reason that excused the default, and it was explained by reference to the human condition and that mistakes will always happen.

23. Mr Cannon reiterated that he did not consider that the third stage was required but considered that the balance of prejudice was firmly in the Applicant's favour. He submitted that HMRC could not realistically claim that they were prejudiced by having to defend an appeal in respect of which they had invested so much time and effort in brining the objection to the out of time application.

24. He emphasised that his client stood to suffer £225,250 additional SDLT if she were precluded from brining her appeal.

25. He contended by reference to two recent decisions of this Tribunal (*Gary Withers v HMRC* [2022] UKFTT 00433 (TC) and *Robert and Maxine Sloss v Revenue Scotland* [2021] FTSTC 1) that the Applicants appeal was not a very weak appeal and accordingly the merits of the appeal were sufficient for them to not be a matter that I should take into account when assessing all the circumstances.

26. He did not address me at all on the issues of ensuring compliance, finality of litigation and the requirement to conduct litigation efficiently and at proportionate cost.

HMRC's submissions

27. The focus of Ms Serdari's submissions was that the delay was not an insignificant one in the context of a 30-day appeal deadline and that in light of the explanation given for the delay in bringing the appeal the decision on whether to grant permission would come down to an assessment of all the circumstances and the balance of prejudice. Quite rightly, emphasis was put on the failure to bring the appeal promptly and within the time limit such that the question as to the correct SDLT treatment of the purchase could not be litigated effectively. She contended that HMRC were entitled to rely on the finality of litigation and should not now be required to litigate a matter which, by reference to statute, was finalised.

28. In addition, however, Ms Serdari sought to assert that the merits of the appeal were very weak. I was taken to the property sales particulars and some of the other documents in some detail to evidence that the woodland was an essential feature of the character of the property and should properly be treated as residential property and not non-residential property. She indicated that the weight of cases on this issue have gone against the taxpayer litigants and that in granting permission I would simply be putting off the inevitable outcome on any substantive appeal.

APPLYING MARTLAND

29. In my extempore judgment I indicated that I was not persuaded that a 42-day delay could be said to mean that I need go no further than he first stage of the *Martland* test. I remain firmly of that conclusion. It is plain from the relevant authorities set out above that a 42-day delay could be both serious and significant in context of a 30-day appeal time limit and, perhaps more particularly, in the context of a review conclusion letter which specifically sets out both the time limit for appeal and the consequences of not meeting it.

30. The review conclusion letter in this case was not as explicit as some I have seen in respect of view of the matter letters issued in other disputes for other taxes. In the present case the letter was clear that failure to appeal represented an agreement in writing under paragraph 37 Sch 10 FA 03. That provision dictates finality, but the letter whilst implying it does not state it in entirely accessible terms.

31. However, I entirely and fundamentally disagree with Mr Cannon that HMRC's decision to object to this application represents a failure to respect or adhere to what he described as the principles determined in *Romasave*. *Romasave* does not say that a period of less than 3 months will not meet the first stage, on my view it very much leaves that an open question.

32. In the circumstances of this case I consider that in view of the precise terms of the review conclusion letter it cannot be said that 42 days is not both serious and significant thus requiring consideration of the second and third stages.

33. The explanation for the delay was honest but does not represent a good reason for the delay. It is true that human error and oversight will occur but sometimes we have to live with the consequences of the error. Not realising the time and missing the train does not mean the train should have waited for me – I have missed the train and must accept the consequences of that.

34. The Applicant had entrusted Cornerstone with the task of amending her SDLT return and the effective management of the enquiry and ensuing dispute with HMRC. She cannot absolve herself of their failure though, of course, had I refused the application, may have considered whether, like Mr Katib (see paragraph 59 of that judgment), her recourse was against Cornerstone for their failure to act diligently on her behalf.

35. As such there is no good reason for the failure to bring the appeal and I must proceed to stage 3 and consider all of the circumstances.

36. In every case where permission to bring a late appeal is not granted there will be the inevitable consequence that the Applicant does not have the opportunity to test whether their position on the tax is correct. Similarly, HMRC will, if permission is granted, be put to the effort and cost of defending an appeal in which they were, by operation of law, entitled to consider was not being brought.

37. I must balance the prejudice of those inevitable outcomes having particular regard to the requirement to enforce time limits and ensure efficient litigation..

38. I am not required to undertake a detailed assessment of the merits of the appeal; however I am broadly familiar with the issues in the appeal and form the view that the case is an arguable one. The case law in this area, to date, evidences that there are cases on either side of the line, even in the case of woodland. The outcome of this case will require a detailed consideration of not only the basis on which the property was sold but also the precise terms of on which the woodland of the entire Durford Wood estate (which is consists of 300 acres of woodland in total of which the Applicants 12 acres is just part) is managed and used. Contrary to HMRC's submission therefore, I do not see that this is a case which is very weak, and which therefore strongly influences the balancing exercise to be undertaken in their favour. Neither however, is it so strong that its strength is an influencing factor in the Applicant's favour – in essence the merits are not a relevant factor in the balancing exercise.

39. As such the relevant circumstances I must balance are that:

(1) the delay was 42 days and not any longer;

(2) the appeal was said to have been bought as soon as the error was identified and HMRC did not contest that assertion;

(3) whilst the reason for the delay is not a good one, it must readily be expected that mistakes do happen, there was a sufficient process in place that it was picked up relatively quickly;

(4) the susceptibility to making mistakes applies to taxpayers and HMRC equally, there is no higher standard that should be applied to either litigant and a hard and fast rule as to length of delay where a mistake arises would be inappropriate and not necessarily permit a just outcome;

(5) the sum at stake, and which would be payable if permission is granted, is not insignificant for an individual;

(6) HMRC will have to defend the appeal but are tasked with ensuring that the right amount of tax is collected.

40. Considering all of these factors I concluded and communicated that, on balance, in the circumstances I was prepared to exercise my discretion to permit the appeal to be bought out of time.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

41. 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: 17th APRIL 2023