Neutral Citation: [2024] UKFTT 00946 (TC)

Case Number: TC09327

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2023/09299

PROCEDURE – application to admit late appeal – application for strike out – appeal admitted – strike out stayed

Heard on: 8 October 2024
Judgment date: 22 October 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

DAWN FIDLER AS THE EXECUTOR OF THE ESTATE OF KEVIN FIDLER (DECEASED)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Avient instructed by Balance Accountants

For the Respondents: Joel Murray litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was a video hearing using Microsoft Teams. A face-to-face hearing was not held because it was expedient not to do so The documents to which I was were referred were: 1) a skeleton argument for each side; 2) a bundle of documents of 488 pages, 3) a supplementary bundle including authorities of 399 pages and 4) and Appellant's authorities bundle.

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.

3. The context of the appeal is Mr Fidler's use of a tax avoidance scheme known as "Excalibur". In very brief summary, the scheme involved the generation of capital losses which were then set against income in the year in which the losses were generated and/or the previous year. In Mr Fidler's case a loss of £1,744, 596 was generated in the tax year to 5 April 2007. By his tax return for the tax year ended 5 April 2006 he sought to set £1,514,845 of the loss against his income for that year reducing the tax payable in that year and generating a credit.

4. The steps in the scheme have been definitively determined as ineffective in achieving the tax advantage sought and this is accepted by Mrs Fidler (acting as executory for her husband Kevin Fidler's estate) (**Appellant**).

5. On 3 July 2019 HM Revenue & Customs (**HMRC**) issued (or, the Appellant contends, purported to issue) two closure notices (for the purposes of this judgment I refer to both documents as closure notices):

> (1) pursuant to section 28A Taxes Management Act 1970 (**TMA**) in respect of the losses claimed in respect of the tax year ended 5 April 2007, only part of which was used in that tax year; and
>
> (2) pursuant to paragraph 7 Schedule 1A TMA in respect of a claim to carry back part to the tax year ended 5 April 2006.

6. The Appellant appealed both closure notices but has subsequently withdrawn her appeal in respect of the section 9A TMA closure notice.

7. The hearing was therefore listed to consider two applications made by the Appellant:

> (1) to bring a late appeal in respect of the 2005/6 tax; and
>
> (2) to strike out that appeal pursuant to rule 8(2) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**Tribunal Rules**) on the grounds that there was valid closure notice with the consequence that the Tribunal has no jurisdiction to consider the appeal.

8. The parties disputed the order in which I was to consider the two applications. HMRC contended that I must determine the out of time application as until an appeal was admitted I was seized of no jurisdiction at all. The Appellant originally contended that I must determine the question of the validity of the closure notice before determining whether to admit the appeal as there was, and could be, no appeal to admit if there was no valid closure notice issued against which the appeal was said to be made. By the time of the hearing the Appellant had nuanced that submission contending that what was submitted to be the obvious invalidity of the closure notice was a highly relevant and almost determining factor driving a decision to admit the appeal in order that I might then strike it out.

9. My only power to consider and determine a dispute between HMRC and a taxpayer is carefully scoped in statute (Tribunal Courts and Enforcement Act 2007 and various taxing statutes). Thus any dispute must be against a decision which is, or at least purports to be, one listed in one of the taxing statutes. The taxpayer relevantly affected by the decision may bring an appeal by serving a notice of appeal meeting the requirements of rule 20 Tribunal Rules which should be received within 30 days of the relevant decision (which may be a review decision). Only once the appeal is received and admitted by the Tribunal may I consider the validity of the decision and/or my jurisdiction in respect of the appeal pursuant to rule 8 Tribunal Rules.

10. I therefore determined to consider the question of the late appeal before moving on to consider the strike out application.

LATE APPEAL

Relevant chronology

11. Within 30 days of the issue of the closure notices the Appellant's representatives wrote to HMRC challenging the closure notices. HMRC accepted the challenge as a valid appeal made to them pursuant to section 31A TMA. HMRC did not formally respond to the appeal (though there was correspondence between the parties) until a view of the matter letter was issued on 20 September 2022 (though an earlier letter of 27 June 2022 also stated that it represented HMRC's view of the matter). Following a review the conclusions and amendments made in the closure notices were confirmed by letter dated 31 October 2022.

12. On 28 November 2022, the Appellant's representatives wrote to the Tribunal stating that they acted on behalf of the Appellant who wished to appeal both closure notices as confirmed in the review conclusion letter. The letter set out brief grounds on which the appeal was said to be based. The Appellant also wrote to HMRC on the same day enclosing a copy of the appeal letter. The Tribunal received the appeal on 2 December 2022. There had been a postal strike on 24, 25, 30 November and 1 December 2022.

13. For reasons now unknown the letter was not processed by the Tribunal administration centre as an appeal. However, on 2 February 2023 the Tribunal wrote to the Appellant notifying her "If you wish to make an appeal to the first-Tier Tax Tribunal, I have enclosed the relevant forms and guidance." A copy of the Tribunal Notice of Appeal form T240 was enclosed.

14. The Appellant subsequently completed the T240 serving it on 13 July 2023. In that form the Appellant indicated that she considered the appeal to be in time. The covering letter referenced the letter sent to the Tribunal on 28 November 2022 and apologised for the delay in submitting the appeal form T240, explaining that the appointment of new advisors had principally led to the delay in its submission. Without consideration of the letter of 28 November 2022 the Tribunal treated the covering letter as an application to bring a late appeal and invited HMRC's submission on that application.

15. HMRC objected to the lateness of the appeal.

Date of appeal

16. When I reviewed the papers before the hearing, I considered in detail the letter of 28 November 2022 by reference to the requirements of rule 20 Tribunal Rules which sets out the requirements for a valid notice of appeal. There is no requirement under the Tribunal Rules that an appeal be made using any particular form provided that it meets the requirements of rule 20 (or that any deficiency in it is waived by the Tribunal pursuant to rule 7 Tribunal Rules). From the letter and the attached review conclusion letter the Tribunal was made aware of the Appellant's name and address, the name and correspondence address for her appointed

representative, that the appeal concerned closure notices, the grounds on which the closure notices were challenged, and the outcome sought. It was therefore right to conclude that the letter and enclosures sent to the Tribunal on 28 November 2022 met the requirements of rule 20 Tribunal Rules and should have been processed as an appeal.

17. I checked with the administration office of the Tribunal why it had not been so processed but was unable to discern a reason.

18. The appeal was received on 2 December 2022. The statutory time limit in which to notify the appeal expired on 30 November 2022. Accordingly, the appeal was received late, strictly necessitating me to consider whether to admit the appeal despite that delay. However, the delay was not to the submission of the T240 on 13 July 2023.

Test to be applied when considering whether to admit a late appeal

19. The test to be applied by the Tribunal is as explained by the Upper Tribunal in the case of *Martland v HM Revenue and Customs* [2018] UKUT 178 (TCC) ("***Martland***").

20. The UT considered the relevant authorities of the Court of Appeal and Supreme Court and the appropriate test when considering a failure to make an in-time appeal. 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.

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

Discussion

22. HMRC's objection to the late appeal was premised on an assumption that the appeal had been received more than 7 months out of time. In this regard they contended that the delay was serious and significant and without good reason. When all the circumstances were considered and giving particular weight to the importance of respecting statutory time limits and the need to conducting litigation effectively, they submitted that the balance weighed against admitting the appeal

23. Having indicated that it was right to consider the application of the *Martland* principles to an appeal which was 2 days late I invited HMRC to confirm whether they maintained their objection to the late appeal and the basis for any continued objection. HMRC withdrew their objection.

24. The Appellant accepted that any delay was serious in the context of missing a statutory time limit. However, it was contended that the delay was not one which was significant. Mr Avient contended, by reference to the letter to the Tribunal, which was also copied to HMRC, that there had been an intention and endeavour to comply with the requirement to notify an appeal within 30 days. He referred to the provisions of the Civil Procedure Rules which, though not directly applicable in the Tribunal, provided useful guidance that the Appellant was entitled to assume that the appeal, assuming it was posted first class, would be received the next working day which would have been in time. It was therefore to be concluded that the delay was not as a result of the conduct of the Appellant (or her representatives). As such, when considering the final stage of the *Martland* test, even giving particular weight to the need to comply with statutory deadlines and the need for effective litigation, there was an overwhelming prejudice which would arise to the Appellant if denied the right to bring the appeal when no prejudice would be suffered by HMRC if the appeal were admitted because at no point had HMRC been unaware of the appeal.

25. This was said to be so particularly in the context of the strength of the Appellant's case that there was no valid closure notice denying the claim to use the carried back losses. This strength was said to be found in the recent determination of the Tribunal in the matter of *Roger Murphy v HMRC* [2024] UKFTT 537 (TC) in which the Tribunal had determined, on materially identical facts, that the relevant provision through which to have enquired into the carried back losses utilised in tax year ended 5 April 2006 was section 9A and not paragraph 5 Schedule 1A TMA.

26. A lack of objection from HMRC is not sufficient on its own for the appeal to be admitted out of time; the Tribunal is still required to determine whether to exercise its discretion.

27. At stage 1 it is plain that a delay of 2 days is very short. Accordingly, and by reference to the excerpt from *Denton* quoted above I need not spend too much time on stages 2 and 3.

28. As regards stage 2 it, appears, and HMRC do not factually challenge, that the appeal letter was sent on 28 November 2022. It was therefore sent within a time frame that the CPR would permit an assumption that it would have been received on 29 November 2022 (the next working day after 28 November 2022). In fact, there were postal strikes on 24, 25 and 30 November and 1 December 2022. I therefore infer that despite the letter being posted on a Monday in a window when the strikes were not operational, there was a postal delay which caused it to be delivered after the expiry of the 30-day time limit. In my view that is a reasonable explanation for the delay.

29. It therefore hardly requires me to consider the third stage. However, I note the following circumstances:

> (1) There is a particular importance in meeting statutory deadlines, here I infer that the Appellant was aware of the deadline and used reasonable endeavours to ensure compliance, posting it in a window of strikes which might be expected to ensure it was delivered.
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> (2) The need for effective litigation. In this regard I note that the Appellant has, generally, been responsive and compliant. The appeal to HMRC as required by section 31A TMA was made comfortably within the required 30-day period. The letter notifying the appeal to the Tribunal was sent on 28 November 2022 and copied in HMRC. Following the communication from the Tribunal indicating that a T240 was required the representatives communicated with HMRC in order to obtain the confirmation that the tax had been postponed which they considered necessary in order to bring the appeal and seeking copies of the original closure notices. These were provided on 30 May 2023, but

HMRC then indicated that a new authority to communicate with the representative was required. The T240 was finally served on the Tribunal on 13 July 2023.

(3) HMRC were aware that the Appellant contested the closure notice throughout the period from the original appeal through to the final submission of the T240 and the grounds on which it was contested. It is not therefore reasonable for them to assert (as they did in correspondence) that they considered the matter to be settled.

(4) The tax at stake is significant and an inability to challenge the validity of the closure notice will prejudice the Appellant.

(5) The delay is very short and there is a reasonable explanation for the delay.

30. Weighing those factors together I consider that the appeal should be admitted out of time. I have explicitly not considered the asserted strength of the Appellant's case that the closure notice is invalid because HMRC opened an enquiry into the loss under paragraph 5 Schedule 1A TMA rather than section 9A TMA. Firstly, in *Martland* at paragraph 46, the Upper Tribunal stated that when undertaking the balancing exercise the Tribunal can have regard to "any obvious strength or weakness in the applicant's case" as it goes to the question of prejudice. However, the Upper Tribunal notes that "it is important … that this should not descend into a detailed analysis of the underlying merits of the appeal."

31. The Appellant sought to draw a close parallel to the facts of her case and the facts and analysis in *Murphy* which led to the Tribunal's conclusion (as set out in paragraph 74 of the judgment) that as Mr Murphy had made his claim to loss relief "in" his 2005/6 tax return (despite as per paragraph 62 having no statutory entitlement to do so) there could be no valid enquiry under paragraph 5 Schedule 1A TMA and thereby no valid closure notice.

32. However, I note that at paragraph 73 Judge Greenbank reaches that conclusion by reference to the judgment of the Court of Appeal in *R (oao Derry) v HMRC* [2017] EWCA Civ 435 which he concluded remained binding despite reservations expressed by the Supreme Court. Further, The Tribunal concluded that the closure notice issued by HMRC to Mr Murphy in respect of the tax year 2006/7 which had denied the loss claim and referenced that the carry back was effective to deny the carried back losses.

33. Whilst I acknowledge that the Appellant has withdrawn her appeal in respect of the 2006/7 closure notice which would preclude this Tribunal from considering whether the conclusion in *Murphy* in respect of the 2006/7 closure notice were to be read across I cannot be satisfied that the conclusion which denied Mr Murphy's 2005/6 carry back losses has no read across to the Appellant's case.

34. Having carefully considered the full judgment I do not consider that the Appellant's case that the closure notice for 2005/6 is exceptionally or obviously strong. Whilst it may be arguable in light of *Murphy* the Upper Tribunal register of appeals confirms that there is an extant appeal to the Upper Tribunal in the *Murphy* case which further removes the argument from a conclusion that it is obviously strong.

STRIKE OUT APPLICATION

35. By her application, the Appellant seeks for her own appeal to be struck out. When the application was received, I indicated it to be a very strange application and reinforced that view in the hearing. The usual effect of an appeal being struck out is that there is no effective appeal through which the amount of tax shown on the closure notice may be challenged. As a consequence, the any amended amounts which have been postponed will become due and payable pursuant to section 55(9) TMA on a date on which HMRC issue in a notice to the taxpayer. In my view striking out the appeal at least carries the risk that the amounts the Appellant seeks to challenge would become enforceable.

36. In the hearing I also I expressed the view that the application to strike out was inconsistent with the overriding objective as the Appellant should not bring an appeal in respect of which it knew the Tribunal had no jurisdiction.

37. It appears to me that what the Appellant in fact seeks is a substantive determination as to the invalidity of the 2005/6 closure notice and that any amendment purportedly made in it is thereby also unenforceable against her husband's estate. As in the case of *Murphy*, the forum to bring that challenge is to proceed with the case in the normal way. However, and at present, given the similarities with *Murphy* it is appropriate to understand the nature and scope of the appeal in *Murphy* and the position adopted by HMRC in that appeal vis a vis the Tribunal's conclusions on the 2005/6 closure notice.

38. In light of my reservations the Appellant invited me to stay the strike out application pending confirmation of HMRC's position in the *Murphy* appeal. HMRC agreed that a stay was appropriate.

39. On the basis that, at present, it makes little difference whether the strike out application or the appeal generally is stayed I granted the application for a short stay during which HMRC are directed, in accordance with the attached directions (not to be released with the published judgment) to confirm whether they are challenging the Tribunal's decision in Murphy vis a vis the 2005/6 closure notice and the basis on which any such challenge is pertinent to the Appellant's application and/or appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

40. 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: 22nd OCTOBER 2024