The sound of silence

Management of taxes

01 June 2019

Keith Gordon looks at a case where a taxpayer sought to notify an appeal to the Tribunal long after HMRC had closed their files

Key Points

What is the issue?

Ms Kaura had been issued with a series of discovery assessments covering nine tax years on 5 December 2014. On the same day she was issued with penalty

determinations for some of those years and (reflecting the change of rules for penalties) further penalty assessments for the remaining years in January 2015.

What does it mean to me?

As the Tribunal had noted, HMRC had behaved in an exemplary fashion so far as being accommodating to a taxpayer who was suffering from ill-health and whose advisers seemed to be letting her down.

What can I take away?

The case might be of particular relevance in cases where a new client has come along seeking to give life to an appeal that looks as if it was long abandoned. In such cases, it is worth establishing how the correspondence concluded: was there an actual agreement between the parties? If not, were the internal review provisions properly engaged? If the answer to both is no, then it might be that the appeal is not in fact dead, but merely resting.

The First-tier Tribunal (Tax Chamber) is a most valuable resource which provides a forum for litigating most disputes between HMRC and taxpayers. It is indeed my firm view that the right of access to an independent tribunal to challenge HMRC decisions is a necessary protection for taxpayers which should be paid for out of central funds. I truly hope that previous threats to impose ‘user fees’ have gone away for good.

On the other hand, there must be some limits. For example, I do not think that taxpayers should automatically be permitted to resurrect an old dispute when there is a risk that HMRC might have disposed of their files on the case. Accordingly, I am content with the general rule that time limits govern when a taxpayer may notify a case to the Tribunal, subject to the Tribunal retaining the right to admit any case outside those time limits if it considers it just to do so.

This was the background of the case of *Kaura v HMRC* [2019] UKFTT 182 (TC).

The facts of the case

Ms Kaura had been issued with a series of discovery assessments covering nine tax years on 5 December 2014. On the same day she was issued with penalty determinations for some of those years and (reflecting the change of rules for

penalties) further penalty assessments for the remaining years in January 2015.

Ms Kaura appealed against these assessments and throughout 2015 there was some dialogue between her and HMRC, although little progress was made in the case because of a lack of information being provided by Ms Kaura. On 6 January 2016, the HMRC officer stated his revised view as to the amounts that should be assessed and required Ms Kaura to respond by no later than 8 February. In the absence of any response, the officer 'proposed simply to settle the appeals'.

Ms Kaura then appointed an accountant although there appeared to be some difficulties in getting the accountant fully instructed. Accordingly, the officer repeated his position that if he did not hear within 14 days (now of 17 March 2016), he would proceed as previously outlined and settle the appeals.

On 29 March 2016, the officer received an e-mail from a different firm of accountants saying that they had taken over the case. However, still no information was provided to HMRC and on 26 May 2016 the officer, once again, tried to bring things to a close stating that unless he heard from Ms Kaura by 22 June 2016, 'it is intended to assume that the proposals for settlement as outlined in [his] letter of 6 January 2016 are acceptable to you and your agent and finalise the appeals in those figures'.

There was no meaningful contact in the meantime. Accordingly, on 28 July 2016 a different HMRC officer wrote to Ms Kaura to say that he was 'treating [her] lack of response as a deemed agreement to the proposals and wish[ed] to notify [her] that [her] appeal is now settled under s 54(1) Taxes Management Act 1970'.

The Tribunal's decision notice gives the impression that nothing happened for 23 months, although I infer that the matter was then transferred to HMRC's Debt Management team who then commenced enforcement proceedings in the County Court.

Picking up the narrative from the decision notice, a new firm of advisers notified Ms Kaura's appeal to the Tribunal on 28 June 2018. Given that the normal time limit is 30 days, this is late by some considerable margin. Due to a procedural omission, the notice was initially rejected by the Tribunal on 12 July 2018 but the matter was rectified very quickly on 19 July 2018. The notice of appeal included a request that the appeal be admitted (two years) late citing, as reasons for the delay, Ms Kaura's ill-health and the failures by her advisers to deal with her affairs properly.

The Tribunal’s decision

The case came before Judge Tony Beare.

In relation to the application for the admission of the late notice of appeal, the Judge followed what has now become an established three-part test as set out by the Upper Tribunal in the case of *Martland v HMRC* [2018] UKUT 178 (TCC).

The first point is to establish the length of delay – if it is very short then the Tribunal is unlikely to need to spend very long on the remaining two stages, although it does not mean that those stages should be routinely ignored even in cases involving short delays. (As a guide, it should be noted that delays of more than three months have routinely been categorised as ‘serious and significant’.)

The second stage is to identify the reason for the delay.

The final stage is to evaluate all the circumstances of the case, weighing up the length of the delay, the reasons and the potential detriment to the respective parties of (for the taxpayer) refusing permission and (for HMRC) admitting the case.

In the evaluation exercise, it has been held that the Tribunal can have regard to any obvious weakness or strength in the taxpayer’s case, but the Upper Tribunal has cautioned against conducting a mini-trial. Furthermore, the Tribunal should generally not be swayed by a taxpayer’s claims to be short of funds and therefore unable to appoint a professional adviser. This is because, the process is (theoretically at least) one that can be initiated by an unrepresented taxpayer.

In evaluating the case, the Judge inevitably considered that a two-year delay was considerable. He also noted how patient HMRC had been during the previous 18-month period. Although the Judge acknowledged that Ms Kaura had been let down by her advisers and was suffering from ill-health, he held ‘there is a limit on how far she can rely on those factors to justify a delay of this magnitude’. In the circumstances, the Judge was not prepared to admit the appeal after two years.

That would ordinarily have meant the end of the case. However, the Judge identified a flaw in HMRC’s processes. He identified the issue at the heart of the case being the ‘late’ notification of the appeals to the Tribunal. However, as the Judge noted, there is no ‘provision in the legislation which imposes any time limit at all on the notice of appeal to the First-tier Tribunal in this case’.

As the Judge recognised, and this has been the case ever since the First-tier took over responsibility for tax cases in April 2009, the only way HMRC can bring finality to an ongoing appeal is by offering the taxpayer an internal review under section 49C of the Taxes Management Act 1970 ('TMA') (or the equivalent provisions elsewhere). Such an offer triggers a 30-day period during which time the taxpayer must either accept the offer or notify the matter direct to the Tribunal. Failure to do either will deem there to be an agreement under section 54. However, in this case, HMRC failed to offer an internal review and merely sought to infer an agreement under section 54. In the absence of an offer of any internal review, there was no operative time limit. As a result, the notification of the appeal to the Tribunal was not late and the appeal was allowed to proceed.

Commentary

There are a number of lessons to be taken from the case. As the Tribunal had noted, HMRC had behaved in an exemplary fashion so far as being accommodating to a taxpayer who was suffering from ill-health and whose advisers seemed to be letting her down. I have little doubt that the professionalism showed by HMRC before July 2016 had a subconscious bearing on the Judge's approach to the balancing exercise he was required to undertake in relation to the two-year period of inactivity that followed. It would be interesting to see how a Judge would have viewed a case where HMRC had behaved in a less professional fashion.

Of course, HMRC's officers' views as to the procedures seriously let them down. Given that, historically, HMRC officers received considerable training about the procedures in the TMA, I think that this is a real shame. Indeed, I have on occasions attended a County Court where a Judge might have been expected to rubber-stamp a request by HMRC for a judgment debt (there is a fast-track process for tax debts) only for me to explain that the perceived section 54 agreement is ineffective.

It is my view that the Judge's approach to the case was more or less flawless. There is, however, one angle that might have been overlooked in his analysis. The Judge was of course right that there was no deemed section 54 agreement because there had been no offer of internal review. However, could it be said that there was an actual section 54 agreement which would have given the taxpayer a 30-day 'cooling off' period (but no longer)? In my view, the answer is no because it is an established principle of contract law that an agreement cannot generally be inferred by the silence of one party. However, there is always the possibility that someone could

argue that this case falls within one of the exceptions to the rule.

What to do next

I suspect that few readers (if any) would allow their clients to get into the situation that Ms Kaura found herself in. As this case shows, a Tribunal is unlikely to have much sympathy if an appeal is notified two years late (although case law does demonstrate that each case will be considered on its own merits).

However, the case might be of particular relevance in cases where a new client has come along seeking to give life to an appeal that looks as if it was long abandoned. In such cases, it is worth establishing how the correspondence concluded: was there an actual agreement between the parties? If not, were the internal review provisions properly engaged? If the answer to both is no, then it might be that the appeal is not in fact dead, but merely resting.