Appeal number: TC/2017/06156

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAZHARULLAH AWAN **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 12 February 2018

Ben Elliott, Counsel. for the Appellant

Helen Davies, Officer of HMRC, for the Respondents

DECISION

1. This is an application by the appellant, Mr Awan, for permission to make a late appeal under s 49(2)(b) Taxes Management Act 1970 ("TMA"). Although the notice of appeal appeared to extend to some additional matters, it was clarified at the hearing that permission was being sought in respect of:

(1) a penalty for inaccuracy under Schedule 24 Finance Act 2007 ("Schedule 24") in the amount of £1,482.84 for the 2008-09 tax year; and

(2) penalties totalling £23,980.76 imposed under Schedule 41 to the Finance Act 2008 ("Schedule 41") for failure to notify HMRC of liability to pay tax, as follows:

Tax year	**Penalty amount (£)**
2009-10	3,068.03
2010-11	2,593.26
2011-12	7,614.14
2012-13	7,211.48
2013-14	3,493.85

2. HMRC's case is that these penalties, totalling £25,463.60, were assessed by a letter dated 6 September 2016. There is some dispute about whether this assessment was received by Mr Awan (or by his accountant) but if it was it is accepted that the appeal was late. Mr Awan formally appealed both to HMRC and to the Tribunal on 11 August 2017, around 10 months – or on HMRC's calculation 310 days – late. HMRC objected to Mr Awan's application to lodge an appeal out of time.

3. I explained at the hearing that I had decided to grant Mr Awan's application. This written decision summarises the facts on the basis of which that decision was reached, and the reasoning.

4. There are two unusual features of this appeal which are worth mentioning now. First, the bulk of the penalties assessed by HMRC, namely those charged under Schedule 41, relate to an alleged failure by Mr Awan to notify his chargeability to income tax under s 7 TMA in respect of the relevant periods, even though he had been within self assessment for many years and had at no stage notified HMRC that he was no longer chargeable to tax. Secondly, Mr Awan's appeal is not primarily motivated by a wish to avoid the monetary penalties. His appeal was prompted by a letter sent by HMRC on 14 July 2017 explaining that HMRC were proposing to publish his details as a deliberate tax defaulter, under s 94 Finance Act 2009 ("FA 2009"), a provision which came into force on 1 April 2010. There is no direct right of appeal in respect of action taken under that provision.

5. Mr Awan provided a witness statement and gave oral evidence. He was cross-examined by HMRC.

The facts

Background

6. Mr Awan is 78 years old. He came to the UK from Uganda in 1972 with his wife and young family. He works as an automotive technician. In 1981 he started his own garage business with his wife, which he still runs as a sole trader. He currently employs two of his children plus two other mechanics, and still works six days a week in the garage. He was awarded an MBE in 2000 for services to the motor repair industry, following nomination by a customer.

7. In 2001 Mr Awan obtained a loan from RBS to fund the building of new workshops, secured by a mortgage on the property. The builder turned out to be insolvent and the family ended up doing much of the work itself. Problems with RBS started in 2006 when Mr Awan approached RBS to explain that he wanted to start making capital repayments (the mortgage had been granted on an interest only basis). RBS claimed that they could not find the loan agreement and because there was an overdraft facility said that they thought that the business might need restructuring. A succession of different individuals at RBS continued to claim that they could not find the loan agreement, despite being shown Mr Awan's own copy, and RBS continued to take only interest payments and then threatened to withdraw the overdraft facility until Mr Awan agreed a higher interest rate. In 2008 Mr Awan was told again that RBS could not find the loan agreement and that he would have to sign a new loan at double the interest rate and for an upfront fee. When Mr Awan refused the overdraft facility was withdrawn and the bank account was closed in 2010. He managed to open another account with HSBC but lost the ability to accept debit and credit cards for around five months, losing a considerable amount of business as a result.

8. RBS then commenced legal proceedings to try to foreclose on the mortgage (securing the loan that they had said they had no documentation for). An out-of-court settlement was reached at the end of 2013 and a complaint to the ombudsman was determined in Mr Awan's favour in early 2014.

9. During the same period Mr Awan was also involved in a legal dispute with Abbey Life who were trying substantially to reduce the original guaranteed value of his life insurance cover. Trading conditions also became tough during the recession following the financial crisis and key staff were lost. Mr Awan's health was affected by the pressure and stress, and his son also became seriously ill in May 2014.

Mr Awan's tax affairs

10. Mr Awan has been filing tax returns since he set up his business in the 1980s. HMRC's own systems show that he was registered for self-assessment with effect from 13 October 1996. (Self-assessment was first introduced for the tax year 1996-97.) He was also registered for VAT and operated the PAYE system in respect of his employees, including his children.

11. Mr Awan gave unchallenged evidence that he was an entirely compliant taxpayer up to 2007, and that since that time he has continued to keep up-to-date with

PAYE and VAT liabilities in full. However, a combination of the problems with RBS, Abbey Life, the recession and the physical demands of the workshop took its toll and Mr Awan fell behind with his self assessment returns. Returns for the tax year 2005-06 onwards were not filed.

12. HMRC's records indicate that tax returns were issued to Mr Awan in respect of tax years up to and including 2008-09. However, whilst he appeared to have remained within the self-assessment system it seems that no tax returns were generated for the years 2009-10 to 2013-14 inclusive. Printouts of the "tax year summary" for these years simply state "not issued". Ms Davies for HMRC was unable to provide an explanation at the hearing, but I infer that the system was probably programmed to stop issuing tax returns once returns had not been filed for some time. This is important because it is the tax return that contains the notice to file, within s 8(1) TMA. This is discussed further below.

13. On 17 October 2011 HMRC wrote to Mr Awan stating that their records "show that you have not filed your self assessment tax returns for the 2007-8, 2008-9 and 2009-10 tax years", and stating that he must file the overdue returns. Mr Awan responded on 25 November 2011 stating that he was taking steps to complete the returns, that he took the matter very seriously and had appointed a new accountant to help. HMRC wrote again on 7 December referring to overdue tax returns for those three years, and repeating that he must file his overdue returns. Mr Awan replied on 20 December referring to his earlier response, stating again that he considered it a priority and referring HMRC to his new accountants. HMRC wrote a further time on 5 January 2012 chasing for the outstanding returns and threatening to estimate the tax due. Mr Awan's son spoke to HMRC on 17 January 2012 to explain the position and offered to make a £5,000 payment on account, which was accepted. The follow-up email to Mr Awan's accountant which records what was said in the conversation referred to the HMRC officer saying that five returns were outstanding at this point. The return for 2005-06 was subsequently sent, on 6 April 2012. HMRC chased again for "outstanding self assessment returns" by a letter dated 21 June 2012.

14. It is clear from the evidence, and was not challenged by HMRC in cross examination, that Mr Awan was well aware that he needed to file a self assessment return for each tax year. It is also clear that he understood that HMRC knew this as well. The correspondence referred to above from HMRC makes specific reference to 2007-08, 2008-09 and 2009-10. The notes of conversation referred to five outstanding returns, covering (it appears) 2010-11 as well as 2005-06. No distinction was drawn by HMRC between the different years. Mr Awan had no idea that, based on HMRC's subsequent penalty assessment, he was supposed to write to HMRC informing them that he had to file a return. He also continued to file VAT returns and make payments under the PAYE system throughout the relevant period, so he was clearly not trying to hide the fact that he was carrying on a taxable business.

15. In September 2014 Mr Awan was contacted by an HMRC officer, Mark Hunt, to explain that HMRC wanted to attend his business to check his records. Mr Hunt wrote to him at his business address and Mr Awan understood that the check was about PAYE and VAT. Mr Hunt and a VAT colleague visited the business. Mr Awan's accountant, Mahmood Din, was also present. Mr Din informed Mr Hunt at the meeting that Mr Awan was behind with his self assessment returns and that Mr Din had become involved to get them up-to-date. Mr Awan's understanding was that Mr Hunt had not been aware of this prior to the meeting.

16. Following the meeting Mr Din agreed a further payment on account of income tax of £18,000 on behalf of Mr Awan, which was sent in December 2014. All the outstanding self assessment returns (eight in total, from 2006-07 to 2013-14 inclusive) were submitted in February 2015. Some documents were missing and RBS had also been uncooperative, so the returns were made to the best of Mr Awan's knowledge. A further payment on account of £15,000 was made in June 2015.

17. Mr Hunt undertook further enquiries, including opening an enquiry into the year 2013-14. He identified a pension of which Mr Awan had been unaware, which was being paid into an otherwise dormant bank account. The amount was relatively small. More significantly, Mr Hunt subsequently asked for a significant amount of additional business and personal information to conduct further checks. Based on his enquiries he reached the conclusion that invoices were not always issued for MOTs done. Mr Awan accepted that some invoices were missing due to clerical error but his evidence was that this was not deliberate, and he did not consider that it altered his turnover as the business bank account reflected all the income used to calculate business profits (whether or not there was a corresponding invoice). However, in order to speed the conclusion of the investigation he agreed, specifically on a without prejudice basis, that the business turnover could be increased by Mr Hunt.

18. There was a further meeting with Mr Hunt and his senior officer in March (or possibly June) 2016. The MOT related calculations that Mr Hunt had performed on a sampling basis were extrapolated to other years. Mr Awan agreed to the adjustments, again on a without prejudice basis. The fact that this agreement was without prejudice is specifically recorded in correspondence from HMRC.

19. During August and September 2016 HMRC sent a number of letters to Mr Awan. The first, dated 16 August, is a detailed letter covering the effect of the "without prejudice" agreement to increase turnover for each of the years 2006-07 to 2013-14, the add-back of the pension amount and the resulting effect on tax and interest payable. The letter goes on to describe penalties which Mr Hunt said were chargeable under s 93(5) TMA for late filing of the returns for 2006-07, 2007-08 and 2009-10, under s 95 TMA for negligent or fraudulent filing of incorrect returns for 2006-07 and 2007-08, and under Schedule 24 and Schedule 41 as referred to above. The details "penalty explanation" documentation attached to this in respect of the Schedule 24 and Schedule 41 penalties explains among other things HMRC's view that the behaviour was deliberate.

20. Formal assessments were issued in respect of years 2006-07 to 2012-13 on 30 August 2016, and a closure notice for the year 2013-14 on 1 September 2016. Penalty determinations were issued on 5 September 2016 in respect of the penalties HMRC claimed under ss 93 and 95 TMA. The notice assessing penalties under Schedule 24 and Schedule 41 was dated 6 September 2016, although confusingly it appears to have been accompanied by a penalty calculation summary dated 5 September 2016 which states that it was not a penalty assessment or notice to pay, and contemplates further correspondence before anything became final. (It is clear that the latter document is written in a form designed to be issued at an earlier stage, and not with the notice of penalty assessment.) The penalty calculation summary also includes reference to HMRC's view that the behaviour was deliberate.

21. On 22 September 2016 Mr Awan wrote to Mr Hunt referring by their dates to a number of letters received, namely a letter dated 16 August 2016, seven letters dated

30 August 2016, a letter dated 1 September 2016, two letters dated 5 September 2016 and two letters dated 6 September 2016. The letter from Mr Awan states that he was writing to inform Mr Hunt that he did not fully understand the contents of these letters and would require Mr Din to explain them to him. The letter also notes that, as Mr Hunt was aware, Mr Din had not been well, but Mr Awan had asked him to assist as soon as he could. Mr Awan has not since been able to locate the correspondence referred to in his 22 September letter and cannot recall the specific contents. However, despite it being subsequently alleged in his grounds of appeal that Mr Awan had not received the 6 September assessment imposing penalties under Schedule 24 and Schedule 41, I consider it more likely than not that that this was among the letters referred to in his letter of 22 September.

22. It is clear from the HMRC correspondence that from 3 October 2016 Mr Din was in contact with Mr Hunt. It appears that Mr Din did query the level of the penalties but did not formally appeal against them, simply asking Mr Hunt whether there was any scope for reducing them. Mr Hunt advised that there was not. Correspondence continued but this focused only on whether the payments on account had been allocated in the most advantageous way in order to minimise interest charges, and what Mr Awan still had to pay. Mr Awan continued to make payments to HMRC, obtaining a personal loan in order to do so.

23. On 14 July 2017 HMRC wrote to Mr Awan stating that he had incurred penalties for deliberately failing to notify liability to income tax, and that fact sheets issued to him in December 2014 and on 16 August 2016 had advised that HMRC may publish details of those who evade tax. The letter referred to penalties imposed in respect of the tax years 2010-11, 2011-12, 2012-13 and 2013-14 in the amounts referred to at [1] above for those years (in other words, most of the penalties levied under Schedule 41). The letter stated that HMRC aimed to publish a person's details where the relevant criteria were met in the absence of exceptional circumstances. The letter stated that HMRC considered that the criteria were met but invited representations as to why details should not be published.

24. Following receipt of this letter Mr Din continued to correspond with Mr Hunt about allocation of payments and what was outstanding, although in an email dated 4 August 2017 he also queried the proposed publication on the basis that Mr Awan felt that it would have a very negative impact at what was already a difficult time for the business, and stated that he hoped that Mr Hunt agreed that the errors were not deliberate and that there was full co-operation.

25. On 11 August 2017, after taking legal advice, Mr Awan wrote to Mr Hunt formally appealing against the penalties. He lodged his appeal to the Tribunal on the same day. Both appeals stated that neither Mr Awan nor his agent had received the assessments and had only been informed about them by a letter dated 14 July 2017.

26. Mr Awan's evidence, which I accept, is that if he had understood that the penalties had been assessed on the basis of deliberate behaviour he would have appealed against them immediately. He had never accepted that any mistakes were deliberate or dishonest. He did not understand the basis on which the penalties had been charged until he obtained legal advice shortly before lodging his appeal on 11 August 2017.

Principles to apply

27. Guidance has been provided in a number of cases as to the approach the Tribunal should take in determining questions of this kind. Most recently, important guidance has been provided by the Supreme Court in *BPP Holdings Limited and others v HMRC* [2017] UKSC 55. It is clear from the Supreme Court decision that we must take all relevant factors into account, but that close regard should also be paid to the approach now taken by the courts, under which importance must be attached to observing rules. The approach taken in the CPR (the Civil Procedure Rules) should generally be followed. Lord Neuberger referred in particular to the guidance given by Judge Sinfield in *McCarthy & Stone (Developments) Ltd v HMRC* [2014] UKUT 196 (TCC), [2015] STC 973 as being appropriate. Addressing the question of whether to permit an extension of time under the Upper Tribunal rules, Judge Sinfield referred to the Court of Appeal decision in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 as providing useful guidance. *Mitchell* made it clear that, whilst all the circumstances should be taken into account, particular weight should be given to the references in the CPR to the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions and orders. The Court of Appeal considered the issue again in *Denton v TH White* [2014] EWCA Civ 906 and provided some clarifications which were considered by the Upper Tribunal in *Romasave (Property Services) Ltd v HMRC* [2016] STC 1, which also considered the useful guidance provided by Morgan J in *Data Select Ltd v HMRC* [2012] STC 2195.

28. The guidance in *Data Select* suggests that the Tribunal should ask itself the following questions: what is the purpose of the time limit, how long was the delay, was there a good explanation for it, and what are the consequences for the parties of an extension or a refusal. The guidance in *Denton*, discussed and applied in *Romasave*, refers to a three-stage process, the first being to identify and assess the seriousness and significance of the failure, the second to consider why it occurred and the third to evaluate all the circumstances of the case, including those emphasised by the CPR rules.

Discussion

29. As I explained at the hearing, I have no doubt that the correct approach in this case is to permit a late appeal pursuant to s 49(2)(b) TMA. In doing so I have proceeded on the basis that the 6 September 2016 penalty assessment was received by Mr Awan, which I have concluded is more likely than not to have occurred. I have taken account of the fact that, at around 10 months, there is no doubt that the extent of the delay was "serious and significant" as referred to in *Denton*. I have also taken account of the fact that the purpose of the time limit is to achieve finality for both sides (in the absence of a timely appeal) and that there is a clear public interest in the observance of time limits. However, these important points are outweighed by the strong reasons in favour of admitting the appeal in this case.

30. My reasons for allowing the application, notwithstanding the extent of the delay and the purpose of the time limit, are as follows:

(1) It is quite clear to me that until July 2017 Mr Awan did not understand the basis on which the Schedule 24 and Schedule 41 penalties had been assessed. He had never accepted that he was a deliberate defaulter or that he was

dishonest in any way, and there is no evidence that any allegation of that nature had been put to him during HMRC's investigation. On the contrary, the adjustments to turnover were specifically agreed on a without prejudice basis. The first mention of deliberate behaviour was in the 16 August 2016 letter from HMRC. Mr Awan did not understand this or the subsequent correspondence and, whilst he did take advice as soon as his adviser was available, he did not appreciate that he was not being well advised. Although HMRC pointed to the fact sheets sent in 2014 and 2016 referring to the possibility of publication, it was also clear that Mr Awan had not appreciated that he was at risk of this. It is relevant to take account of Mr Awan's age, attributes and circumstances and, against that background, his lack of understanding was real and was not culpable.

(2) An assessment to penalties under Schedule 41 for failure to notify a liability to income tax against someone who is a VAT registered sole trader, regularly filing VAT returns, and who has been within the self assessment system for many years, is in my view quite exceptional and, frankly, highly questionable. The only reason it has occurred is that, for reasons presumably understood somewhere within HMRC but not explained to me, HMRC's computer system simply stopped issuing tax returns (containing notices to file) after the notice issued on 6 April 2009 in respect of 2008-09. For any tax year in respect of which a notice to file is issued (under s 8(1) TMA) the obligation to notify liability to income tax falls away: see s 7(1), (1A) and (1B) TMA. That is why no one already within the self assessment system normally has to write to HMRC to say that they are liable to income tax. In the light of this Mr Awan's assumption that he did not need to notify HMRC is hardly surprising. It is entirely understandable that someone who has been within the self assessment system for years, is regularly filing VAT returns in respect of his business, and is also accounting for PAYE, should not spot that HMRC has suddenly stopped sending him paper tax returns and therefore that he better tell them that he has a liability to tax. HMRC did not at any stage alert Mr Awan to the fact that he was no longer going to receive tax returns, and certainly made no attempt to make any check within their own systems to determine whether it was right to stop issuing returns. Even a cursory check would have made it clear that he was still carrying on his business.

(3) The fact that Schedule 41 is engaged at all is pretty remarkable, but it is even more remarkable that penalties have been assessed on the basis that Mr Awan's behaviour was deliberate. It is quite clear that he was not aware that (on HMRC's view) he was supposed to write to them to explain what in reality both he and HMRC already knew, namely that Mr Awan was carrying on a business and had a liability to income tax. Ms Davies explained that HMRC's view was that there was a deliberate failure to comply with s 7 TMA in any case where a taxpayer is aware that he is chargeable to tax and has failed to notify that to HMRC, subject to the question of reasonable excuse. In my view this is a point that deserves to be tested: contrast the comments in the Upper Tribunal decision of *HMRC v Tooth* [2018] UKUT 38 (TCC) at [63] that an allegation (in that case) of deliberately bringing about a tax loss was "a serious one, tantamount to an allegation of fraud." And even if there was a deliberate failure to notify, there must at least be an arguable case that there was a reasonable excuse.

(4) In addition, HMRC appears to have taken no account of the correspondence in 2011 and 2012 referred to at [13] above. As Mr Elliott

submitted, there is no prescribed form for notification of chargeability to tax and it is at least arguable that notification was made during this correspondence, which would be relevant to at least some of the years in dispute. Again, this would be relevant to whether the penalties were properly chargeable and, potentially, to the question of reasonable excuse (and the duration of any excuse).

(5) HMRC behaviour throughout the enquiry was not consistent with any allegation that Mr Awan had failed in a duty to notify chargeability under s 7 TMA. On the contrary, the correspondence referred to at [13] above assumes that notices to file were issued in respect of at least some of the years. Furthermore, it seems that HMRC opened (and closed) an enquiry into the year 2013-14. Technically they would not be able to do so if a notice to file had not been issued. The power to open an enquiry under s 9A TMA assumes that a return has been made under s 8 TMA. That will only be the case where a notice to file has been given under s 8(1). But HMRC's case is that no such notice to file was issued (because if it had been then there would have been no default under s 7 TMA giving rise to a penalty under Schedule 41).

(6) This is not a case where the assessment in question was followed by silence from the taxpayer. Mr Awan wrote promptly to say that he did not understand the letter and needed to involve his agent. Unfortunately, Mr Awan did not appreciate that he was being poorly advised and that his agent would do no more than accept Mr Hunt's confirmation that nothing could be done about the level of the penalties. It is quite clear that Mr Din would have been able to appeal the penalties in time but did not do so (he had contacted HMRC to query the penalties by 3 October 2016, within the normal 30 day deadline). Mr Din did however continue to communicate with Mr Hunt throughout the period. This was not a case where HMRC could reasonably conclude that full finality had been achieved. Whilst a written appeal complying with the requirements of s 31A TMA had not been received, HMRC were aware that an objection to the penalties had been raised. Furthermore, the consequences of the penalties were still being played out from HMRC's perspective, since it only issued a letter warning of its intention to publish Mr Awan's details on 14 July 2017, less than a month before the appeal was lodged.

(7) I do not think that permitting a late appeal would result in any prejudice to HMRC, beyond the general prejudice that lack of finality always brings. There is no indication, for example, that the quality of any evidence will be adversely affected. On the contrary, the prejudice to Mr Awan of not granting permission is very marked. He has no right of appeal against HMRC's decision to publish his details, effectively as a dishonest tax evader. Publication could quite clearly have a material adverse effect on him as an individual, his business and family. His only avenue is to appeal against the penalties. This is a relevant consideration to take into account.

(8) Ms Davies submitted that permitting a late appeal would risk undermining the legislation allowing HMRC to publish details of defaulters. I do not agree. If the appeal is permitted but ultimately fails then HMRC would not have lost its ability to publish details. It can do so at any point within 12 months of the appeal becoming final: s 94(8) and (11) FA 2009. A timely appeal would also have delayed the publication date, the only difference being the extent of the delay. It is also worth noting here that it took HMRC 10 months after the penalties were assessed to write to Mr Awan to explain their proposal to

publish. This not only effectively accounts for the timing of Mr Awan's appeal but also rather suggest that speedy publication was not regarded as a significant priority.

31. By way of additional observation, I made it clear to the parties at the hearing that I hope that this matter will not need to come back to the Tribunal. It ought to be capable of being settled through correspondence. In particular, I would urge HMRC to take a careful look at the facts found in this decision, and my reasons for permitting the application.

Disposition

32. Mr Awan's application for permission to make a late appeal is granted.

33. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 23 FEBRUARY 2018