

THE SPECIAL COMMISSIONERS

CONSULTANTS LIMITED Applicant

- and -

HM INSPECTOR OF TAXES Respondent

Special Commissioner: JOHN F AVERY JONES CBE

Sitting in private in London on 19 February 2002

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ANONYMISED DECISION

1. Consultants Limited applies to appeal out of time against a Determination made on 7 October 1997 determining losses at £63,511 for the accounting period ended 31 December 1995. Mr O appeared for the Applicant and Mr W for the Inspector.
2. The circumstances are that at the time of the Determination the Applicant was involved in litigation over unpaid fees on a substantial job and Mr O, the Principal of their Accountants, Messrs N, had been told not to run up any bills for tax work. He did however accept that he would do anything essential and continued to make PAYE returns for the Applicant.
3. Both Mr O and Mr W provided me with skeleton arguments. Mr O answered questions from Mr W who called as witnesses two Inspectors concerned with the case at different times, Mr C and Mrs B, who were cross-examined by Mr O.
4. The Notice of Determination dated 7 October 1997 was addressed to the Applicant at the correct address, but the postcode was wrong (the post code stated was that of a block of 8 flats in the same road to which there is no access other than for residents). A copy was correctly addressed to Messrs N but Mr O told me that he had not received it. Neither copy was returned by the Post Office. The following day, 8 October 1997, Mr C, HM Inspector of Taxes at W District, wrote to Messrs N saying "I am now sending a formal loss determination under Section 41A TMA 1970 adding back items I have queried. Any appeal should be supported by full replies to all outstanding points." Mr C said that it would have been his practice to enclose the agent's copy of the Notice of Determination with the letter. No appeal against the Determination was made until 5 April 2001 when Messrs N, having been instructed to act again following the resolution of its financial difficulties, wrote "...we should be glad if you would accept this letter as formal notice of a late appeal in respect of that determination and we give the answers to the points raised in the letter of 4th September 1997 below."
5. Mr O first contended that the Inspector could have amended the Determination in accordance with section 41A of the Taxes Management Act 1970 in the light of the further information provided. Mr W contended that a loss determination could not be increased in this way. It seems to me that this question does not arise for decision by me as the question before me is an application to appeal out of time and not a substantive issue of the amount of the Determination.
6. Section 49(1) of the Taxes Management Act 1970 provides:
"An appeal may be brought out of time if on an application for the purpose an inspector or the Board is satisfied that there was a reasonable excuse for not bringing the appeal within the time limited and that the application was made thereafter without unreasonable delay, and gives consent in writing; and the

inspector or the Board, if not satisfied, shall refer the application for determination by the Commissioners."

7. The first question is whether the letter of 5 April 2001 is an "application for the purpose" of section 49. Gibson LJ said in *R v Special Commissioners ex p Magill* 53 TC 135, 140D, "Some meaning must be given to the phrase 'on an application for the purpose' in the context of an appeal out of time and I can only do that if either in the body of the notice of appeal or separately an application is made to the Inspector 'for the purpose' of securing relief from the normal consequences of the delay." Mr W submitted that no such application until the hearing as no excuse had been put forward by the Applicant until then.

8. It seems to me that the letter of 5 April 2001 is a sufficient application for the purpose of the section. It makes clear that the Applicant is seeking leave to appeal out of time. It is, however, unhelpful in not giving any excuse, with the result that the Inspector was bound to refuse it, resulting in a reference to the Commissioners. Nor was it helpful that Messrs N did not respond to the Inspector's letter of 12 June 2001 again offering to consider the reasonable excuse and no unreasonable delay aspects, so that the Inspector never had the opportunity of considering these before they were put forward to me at the hearing.

9. The second question is whether the Applicant has a reasonable excuse for not bringing the appeal within the time limit. Mr O puts forward the Applicant's financial difficulties and the wrong postcode on the Notice addressed to the Applicant as a reasonable excuse. Mr W contended that if the Applicant chose to instruct its accountants not to take any action it had to take the consequences. He also contended that the Applicant was deemed to have received the Determination in accordance with section 115 of the Taxes Management Act 1970 and section 7 of the Interpretation Act 1978 unless it showed that it had not been received, and there was no evidence from the Applicant that it had not.

10. Since the Determination was not correctly addressed to the Applicant I do not find that it was necessarily received. If it had been received at Messrs N's office, which is also the registered office of the Applicant, I assume that Mr O would have dealt with it. However, the copy addressed to Messrs N, was correctly addressed and is deemed to have been received by them as the Applicant's agents unless proved otherwise. I consider that on the balance of probabilities it was enclosed with the Inspector's letter of 8 October 1997, which was certainly received by Messrs N. The wording that "I am now sending a formal loss determination" suggests that it was an enclosure, and Mr C stated that this was his practice. If, for example, the Determination was enclosed with the letter but left in the envelope by mistake and thrown away, the letter made it clear that a Determination was being made and referred to the possibility of an appeal against it. Mr O, as an experienced accountant, should have appreciated the need to do something within time limits and should have queried the fact that he had not received the Determination.

11. The Applicant's financial difficulties did not prevent them from instructing Messrs N to take necessary action in dealing with its tax affairs. Mr O was doing essential tax work such as PAYE. He accepted that making an appeal was part of the essential work. There is nothing in the Applicant's circumstances that would have prevented this from happening. I appreciate that the 8 October 1997 letter stated that any appeal should be supported by full replies to all outstanding points but an appeal could have been made without dealing with the outstanding points at the same time. Mr C's letter went on to say: "Given that the appeal against the assessment was itself listed 5 times before the Commissioners, any appeal against the loss determination will be immediately laid before them where it will be my intention to seek determination at the first opportunity." That would have put the Applicant into difficulties but it is still not a reason for not starting the appeal process within the time limits. I do not consider the Applicant's financial difficulties to constitute a reasonable excuse.

12. Thirdly, was the application made without reasonable delay? Mr O contends that there was delay only between 2 February 2001 (the date of the General Commissioners' meeting at which he agreed to produce accounts, having been re-instructed by the Applicant) and 5 April 2001 when he appealed, which is not unreasonable.

13. I do not accept the 2 February 2001 starting date. The Determination was made on 7 October 1997 and since then the delay was 1246 days, or over three and a half years. On any basis the delay cannot be reasonable. There was nothing that would have prevented the Applicant through Mr O from writing a simple letter appealing against the Determination at any time during this period.

14. Accordingly I dismiss the application.

JOHN F AVERY JONES
SPECIAL COMMISSIONER

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