TC03268

Appeal numbers: TC/2012/8649 & TC/2012/8646

POSTPONEMENT OF TAX APPLICATIONS –whether third appellant's application should be adjourned until further evidence obtained –no- whether tribunal had jurisdiction to entertain either application as lodged more than 30 days after letter treated as SOCA's determination – yes – because that letter was not a determination under s 55(3)(a) but a later letter from SOCA was such a determination & applications were made within 30 days of this later letter -postponement application of second appellant refused as no reasonable grounds for belief in overcharge to tax – postponement application of third appellant allowed as reasonable grounds for belief in overcharge to tax

FIRST-TIER TRIBUNAL
TAX CHAMBER

GUI HUI DONG	**Second Appellant**
-and-	
HONG FANG	**Third Appellant**
- and -	
NATIONAL CRIME AGENCY	**Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 20 December 2013 and 7 January 2014

Mr O Connolly, counsel, instructed by Cavendish Legal Group, for Mr Dong

Ms H Brown, counsel, instructed by ALH Solicitors, for Ms Fang

Mr C Stone, counsel, instructed by the National Crime Agency

DECISION

Background

1. On 21 May 2012 SOCA (now NCA) raised various assessments on Mr Dong and Ms Fang. Mr Dong and Ms Fang applied for postponement of the tax assessed and appealed the assessments to the Tribunal.

2. At the same time, other assessments were raised on, and appealed by, Credit Lucky Limited. Mr Dong was director and sole shareholder of Credit Lucky Limited. Ms Fang was his wife at the time at issue in this appeal but they have since parted. Credit Lucky Limited ("Credit Lucky") is therefore the first appellant in these joined appeals but its appeal and application for postponement of tax are currently stayed pending certain proceedings in the court concerning its liquidation. Mr Dong and Ms Fang's appeals and applications are for the time being progressing independently of Credit Lucky's.

3. At the hearing, Mr Dong and Ms Fang were separately represented by counsel. Ms Brown's approach, which was to adopt Mr Connolly's submissions and add some of her own, clearly saved repetition. In the below decision I do not necessarily always distinguish between which counsel for each of the appellants made which submission as I see no need to do so when the submission supported the position of both appellants.

4. This hearing was called to consider Mr Dong and Ms Fang's applications for postponement of payment of the tax assessed on them by the 21 May 2012 assessments. The application was made under s 55 Taxes Management Act 1970 ("TMA").

Adjournment

5. Originally both appellants applied for an adjournment of the hearing of their application for postponement of the tax. At the hearing, Mr Connolly on behalf of Mr Dong withdrew the application for adjournment, but Ms Brown maintained Ms Fang's. I decided that there would be no adjournment, for the reasons below, and the hearing proceeded.

Facts relevant to the adjournment

6. Credit Lucky is in liquidation and has been investigated by the police. The police hold Credit Lucky's client files and copies of these are due to made available to the second and third appellants (under a Magistrates' order) at the end of January 2014.

7. Other business records, such as data relating to transactions, are in the possession of Credit Lucky's liquidator. There is a dispute over what the liquidator possesses, to what extent the appellants have already been given access to it, and

whether the liquidator is bound to give further access and on what terms. The second appellant had lodged a third party disclosure order application with the Tribunal against the liquidator but this is not due for hearing until the end of February. The hearing might be delayed as the liquidator has sought an adjournment on the grounds that the second appellant had applied for rescission of the liquidation of Credit Lucky and the High Court decision on that is yet to be handed down.

8. The third appellant's case was that the information contained in Credit Lucky's files would verify that the money in her accounts (with the exception of rental income) all belonged to Credit Lucky or its clients and that it did not form part of her income. However, neither Ms Fang nor her accountant adviser (Mr George Georgiou) had ever seen these files and this belief could be based on nothing more than what Mr Dong had said.

9. The third appellant sought an adjournment until at least February when, if nothing else, they would be in possession of the client files.

The law on postponement

10. I find that the scheme of s 55 TMA is that it is obvious that NCA's and (if required) the Tribunal's determination on how much tax should be postponed pending the hearing of the appeal should be made at the outset of the appeal process. There is no time scale in which NCA or the Tribunal must make their determinations under s 55(3)(a) and (b) respectively, but it was inherent in the nature of s 55 that postponement determinations would be made speedily because otherwise that would defeat the object of the provision.

11. The appellant's case amounted to saying that the determination of the tax to be postponed should not happen until the appeal was ready for trial and in particular that the appellant had gathered all the evidence on which she would rely. If that was so, s 55 would be a pointless provision. The parties might as well get on with the substantive hearing.

12. On the contrary, it is clear that s 55(3) determinations were meant to be made at the outset of the appeal process on the basis of the grounds that the appellant put forward at that time. Section 55(4) contemplated the possibility of a revision of the determination in the event of a "change in circumstances". So if the appellant's grounds of appeal improved, perhaps when new evidence was obtained, the appellant could apply to NCA for repayment of some of the tax that had not been postponed.

13. These appeals and applications were lodged nearly 18 months ago. The applications for postponement should really have come on for hearing before now and the fault for that may lie in part in the Tribunal's administrative processes. I saw no reason to adjourn the appellant's application, particularly when the second appellant's application was proceeding, as it would always be open to the appellant to make a new application if there was a change in circumstances as a result of new evidence becoming available.

Jurisdiction

14. NCA's position was that this Tribunal had no jurisdiction to consider the appellants' postponement applications because (they said) they were made out of time. As this was a point on jurisdiction, Mr Stone asked the Tribunal to decide it as a preliminary point.

15. Although NCA's statement of case mentioned that the applications were (in their opinion) made out of time, the challenge to the Tribunal's jurisdiction was only made explicit in Mr Stone's skeleton argument. This was received by the appellants' advisers only shortly before the hearing and they did not feel prepared to deal with it.

16. I mention in passing that Mr Stone cannot be criticised for the late delivery of his skeleton argument as the directions were for the skeletons to be sequential and Mr Connolly's was delivered late. Ms Brown was only instructed the day before the hearing so hers was necessarily too late for a response.

17. Further, I wanted all counsel to address me on the potential relevance of s 118 Taxes Management Act 1970 ("TMA") and none of them had considered it. So I refused Mr Stone's application to deal with the jurisdiction point as a preliminary issue in order for the representatives to prepare reasoned submissions. It was already obvious that the hearing would take more than the one day for which it was listed. So in the December hearing I started to hear the postponement application itself and in the reconvened hearing in January, I heard submissions on the jurisdiction point as well as the remaining submissions on the application itself.

The law

18. Subsection (2) of s 55 TMA provides:

> "(2) Except as otherwise provided by the following provisions of this section, the tax charged -
>
> (a) by the ..assessment...
>
> shall be due and payable as if there had been no appeal."

19. In other words, making an appeal against a tax assessment does not put off the liability to pay the tax pending the determination of that appeal. There is an exception to this. Indeed, most cases in the tax tribunal benefit from sub-sub-section (a) of the exception. The exception is in s 55(3):

> "If the appellant has grounds for believing that the ...assessment overcharges the appellant to tax....,the appellant may -
>
> (a) first apply by notice in writing to HMRC within 30 days of the specified date for determination by them of the amount of tax the payment of which should be postponed pending the determination of the appeal;

> (b) where such a determination is not agreed, refer the application for postponement to the tribunal within 30 days from the date of the document notifying HMRC's decision on the amount to be postponed.
>
> An application under paragraph (a) must state the amount believed to be overcharged to tax and the grounds for that belief"

20. The 'specified date' is the date of issue of the assessment: s 55(10A)(a).

21. All parties accepted that applications had been made by both Mr Dong and Ms Fang to NCA under s 55(3)(a) on 16 June 2013, at the same time as they lodged their appeals with NCA. Mr Dong requested postponement of 90% of the tax and Ms Fang requested postponement of 100% of the tax assessed.

22. NCA's case was that it had issued a 'determination' as referred to in s 55(3)(b) refusing the applications by a letter dated 11 July 2012. I will refer to this as the Letter.

Was there a decision on postponement?

23. It was accepted by all that the application to the Tribunal for postponement was made at the same time and in the same notices of appeal against the assessments. Mr Dong's notice of appeal to the Tribunal was dated 16 August 2012 and Ms Fang's notice of appeal was dated the same date.

24. It was the appellants' position that this was not out of time because the Letter, which NCA considered to be a 'determination' within s 55(3)(b), was not such a determination.

25. However, the appellants did not suggest that any other letter from NCA amounted to a 'determination', so this submission overlooked the problem that, if they were right, this Tribunal had no jurisdiction to hear the postponement application. S 55(3)(b) only permits a referral to the tribunal *after* NCA has made a determination. Of course, if there had been no determination, that would mean the appellants would be in the position of having made an application to NCA which had not yet been determined so that (under s 55(6)(b)) they would not currently be liable to pay the assessments.

Was the Letter a determination?

26. Was the Letter a determination within s 55(3)(a)? The letter runs to some one and a half pages and I do not reproduce the whole of it. It said:

> "…..
>
> I am not however in a position to accept the proposed postponement applications which suggest as sum payable against each of the assessments equivalent to 10% of the tax….

> In the circumstances as you have so far failed to provide me with any *meaningful information* to displace the assessment figures…*I am not currently in a position to accept anything less than 100% of the duties charged*, and reject in their entirety your postponement applications." (my emphasis)

27. Up to this point a reader of the Letter could be in no doubt that the appellants' application for postponement had been refused by SOCA. However, the last substantive paragraph read as follows:

> "If you accept my suggested figure in line with that originally assessed please confirm this in writing. If however you do not accept my proposal, please let me either have your counter proposals, duty supported as indicated above, or let me know and write to the tax tribunal within the next 30 days of this notification to ask it to decide the amount of tax to be postponed."

28. Here the SOCA officer writing the letter gave the appellants three alternative options:

(a) pay the full tax assessed;

(b) make a new application, supported by "meaningful information", proposing a different (and impliedly) lesser amount to be postponed; or

(c) apply to the Tribunal within 30 days to challenge SOCA's decision to refuse the application.

29. The appellants' case is that the letter was confusing. As there was a dispute over whether s 118 TMA would apply to s 55(3)(b) and if it did, whether the appellants had a reasonable excuse for the late application, I do not consider at this point whether such confusion was reasonable. But I do find as a fact that the letter did refuse the appellants' current proposals for postponement. While the letter did invite revised proposals, the postponement of tax applied for by the appellants had been refused.

30. Nevertheless, s 55(3)(b) gave a 30 day time limit to apply to the tribunal only where there was a document which notified "HMRC's decision on the amount to be postponed". The Letter invited the appellant to make new proposals, so was there a final decision on the amount to be postponed? While SOCA had clearly decided that the amount currently proposed by the appellants was not the amount to be postponed, they had, in the last paragraph, left the door open to a different amount being postponed.

31. I consider that the scheme of s 55(3) is such that it envisages the appellant making a proposal of the amount to be postponed, and HMRC then determining the amount to be postponed: the sub-section envisages the amounts might be different. For instance, the appellant might propose 100% should be postponed but HMRC

determine (under s 55(3)(a)) that only 50% should be postponed. S55(3)(b) then says "where such a determination is not agreed..." making it obvious that it contemplates that HMRC's determination may not be in the figure proposed by the appellant.

32. Moreover, s 55(3) clearly contemplated that HMRC would make a determination of the amount of tax to be postponed. It did not contemplate that HMRC would merely refuse the appellant's proposals. There is a world of difference between HMRC saying 'your application for postponement of 90% of the tax is refused' and HMRC saying 'we determine that the amount to be postponed is X%' even if that X% is 0%.

33. Did the Letter include a determination? The phrase *"I am not currently in a position to accept anything less than 100% of the duties charged"* does make it clear that the writer thinks that 0% should be postponed, but it does not use the word "determined" and is perhaps ambiguous on whether it is the writer's final position as it says "I am not currently in a position…." More importantly, it cannot be read in isolation. This phrase also has to be seen in its context and its context included the final paragraph of the letter which said, as mentioned above:

> "…. If however you do not accept my proposal, please let me either have your counter proposals, duty supported as indicated above, or let me know and write to the tax tribunal within the next 30 days of this notification to ask it to decide the amount of tax to be postponed."

34. The writer's "proposal" was clearly that 0% of the tax be postponed. Yet s 55(3)(a) required a determination, not a proposal. While the word "determination" would not necessarily have to be used, it is quite clear that a "proposal", especially one which invites counter-proposals, is not a determination. It is an invitation to treat and not a decision. In conclusion I find that the Letter was not a determination within s 55(3)(a) of the amount to be postponed.

35. If the matter had been left there all I could do was refuse jurisdiction on the grounds there was no determination within s 55(5)(a). However, this letter of 11 July triggered a response to SOCA from the appellants' joint representative at the time (Mr Georgiou). His letter was dated 7 August 2012 and explained that the appellants considered themselves handicapped in making further proposals because all the records were with the company's liquidator or the police.

36. SOCA replied on 9 August ("the August Letter"). This letter correctly referred to the Letter as rejecting the postponement applications. The August Letter goes on to say:

> "….As you are not prepared to put forward further proposals for consideration, the assessed liabilities remain due and payable."

37. I find that this is a determination that 0% of the tax will be postponed. While it does not use the word "determined", when read together with the Letter, it is clear that SOCA's decision was final, as the appellants had not responded to the invitation to

make counter- proposals, and that that decision was that 0% of tax would be postponed. The August letter did not describe this view as a "proposal" and nor did it invite any further counter proposals.

38. The applications to the Tribunal for postponement were dated 16 August and were therefore well within the 30 days of the August Letter as required by s 55(3)(b). They were not out of time. I find that therefore this Tribunal does have jurisdiction.

39. This decision means that I do not have to go on and consider the many arguments addressed to me by all three counsel on whether s 118 TMA applies to applications to the tribunal under s 55(3)(b) and, if relevant, whether the appellants had a reasonable excuse for the late application to the Tribunal. Instead I move on to determine the amount to be postponed pending the hearing of the appeals.

Postponement application

The law

Legal test for postponement application

40. The legal test for determining how much should be postponed pending the hearing of the tax appeal is set out in s 55(6) as:

> "(6) …the amount (if any) in which it appears, that there are reasonable grounds for believing that the appellant is overcharged to tax…."

This is perhaps a deceptively simple statement. What does it mean? Special Commissioner Dr Brice in *Sparrow Ltd* [2001] STC (SCD) 2016 said that the s 55(6) test was as follows:

> "[70]…the taxpayer company at this stage does not have to prove all the facts or succeed in all the legal arguments which will have to be proved or established at the hearing of the substantive appeal….However, s 55(6) does require me to have some firm basis for believing that the taxpayer company has been overcharged by the assessment and here I must have regard to the evidence adduced."

She also referred to two Australian authorities on what "reasonable grounds" meant and they were as follows.

> "To be 'reasonable', it is requisite only that they be not fanciful, imaginary or contrived, but rather that they be reasonable; that is to say based on reason, namely agreeable to reason, not irrational, absurd or ridiculous" (*Re Porter and Dept of Community Services and Health (1988) 8 AAR 335 at 337)*
>
> and
>
> "when a statute prescribes that there must be 'reasonable grounds' for a state of mind …it requires the existence of facts which are sufficient to

> induce that state of mind in a reasonable person." (*George v Rockett (1990) 170 CLR 104 at 112.)*

41. *Sparrow* (as *Pumahaven)* went on appeal to the High Court [2002] EWHC 2237 (Ch) and then the Court of Appeal [2003] EWCA Civ 700 which at §6 specifically approved §70 above of Dr Brice's decision. In the High Court, Mr Justice Park said:

> [17] "the commissioner's role…[was] to consider whether there were real and not fanciful grounds for appeal. That formulation does not reproduce the words of the statute, but I would broadly agree that it adequately indicates the effect…."

42. Breaking up the test into its constituent parts is perhaps helpful:

"Grounds"

43. These are appeals which will turn largely on the facts. I do not understand the parties to have any significant dispute over the applicable law (save on the presumption of continuity (§§117-122) and a minor matter mentioned in §85). The appellants says that I should not test the evidence as part of a postponement application and to an extent that is true: I am not to form a view on whether the evidence is true or false and for that reason there was no cross examination of witnesses (most of whom did not attend) and each party has reserved the ability to challenge the witnesses' evidence in the main hearing.

44. But "reasonable grounds" refers quite clearly to the appellant's case both on the law and the facts. If their case is nonsense on the law, they will lose the postponement application. Or if it is nonsense on the facts, they will lose the postponement application.

45. In *Pumahaven,* Park J said:

> "[10] … [s55(6)] does not require [the tribunal] to conduct a mini-trial of what will be the main appeal.
>
> [11]…the commissioners do not have to decide, or form a view on the balance of probabilities, whether the taxpayer has been overcharged. They have to form a view on whether the taxpayer has reasonable grounds for arguing that he …has been overcharged….if and to the extent that their view is that the taxpayer's arguments are reasonable, then, even if the commissioners can see the possibility that on a full hearing of the appeal the arguments may not succeed, the commissioners should make an order for postponement."

46. So I have to consider the evidence but without reaching a concluded view on it (and indeed, having not heard the witnesses, I am not in a position to reach a concluded view on it).

47. But while I will not decide whether any of the evidence is true or false, neither will I make my decision on the assumption that what any witness says is true (indeed that would be impossible as some evidence by witnesses contradicts evidence by other witnesses). I will look at the appellant's evidence as a whole in order to consider whether it amounts to reasonable factual grounds for believing that the appellants were overcharged.

48. If the evidence which the appellants rely on, together with any evidence of the other side which the appellants accept, if found to be true by the Tribunal hearing the case, would not be an answer to the assessment, then clearly the appellants would not have reasonable grounds for believing they are overcharged to tax.

49. Similarly, if factual case that the appellants put forward (comprising the evidence which the appellants rely on, together with any evidence of NCA which is accepted by them and will not be challenged at the hearing) is internally inconsistent and/or contradictory in a material matter then they will not have reasonable grounds for believing that they are overcharged to tax.

50. For instance, Dr Brice in *Sparrow Ltd* (which was *Pumahaven* at first instance) held that the tax should not be postponed. Dr Brice considered that the success of the taxpayer's appeal would depend on the taxpayer being able to prove that an overseas bank had made a loan to it of £1.65 billion. So far the taxpayer had produced no documents to evidence it. Dr Brice ruled:

> "[81] …But the lack of complete documentation for a loan of £1.65bn must give rise to real doubts about the loan relationship….
>
> [82] Having regard to the representations made and the evidence adduced I do not consider that there are reasonable grounds for believing that there was a loan relationship between the taxpayer company and the overseas bank. There are not sufficient facts to induce that state of mind in a reasonable person."

51. My reading of this is that the appellant's case was that a bank had loaned it an extremely large sum of money without documentation. That was internally inconsistent evidence because it was inherently unlikely that a bank would make such a large loan without documentation. Because the appellant did not provide a reasonable or indeed any explanation for such unlikely conduct, its story did not amount to a reasonable case on the facts.

52. On appeal, Park J remitted the case back to the Tribunal because the taxpayer had put forward a ground in his appeal which the Special Commissioner had not considered in her decision: she had not considered whether this other ground amounted to "reasonable grounds for believing that the appellant is overcharged to tax." See §32-33 of Park J's decision. It was not remitted because of her decision at §81-82.

53. The Court of Appeal dismissed the appeal on the grounds that Park J had been right to remit the case as the court's appellate jurisdiction was supervisory in the sense it was only for the Special Commissioners to make the decision in s 55(3)(b) and the

High Court could only re-make the decision if there was only one conclusion reasonable commissioners could have reached. (Now the provisions have been amended so that there is no right of appeal against the Tribunal's decision, so the only challenge to a decision made under s 55(3)(b) is now by judicial review. As the court's jurisdiction was effectively supervisory only, the distinction may be illusory rather than real).

Belief

54. What does the legislation mean when it uses the word 'believing'? Mr Connolly's point is that belief is less than proof but more than suspicion and for that he relied on the Australian case of *George v Rockett* (1990) 170 CLR 104 at 116*:*

> "…the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

55. I agree that "belief" is an easier test for the appellant to meet than, say, if the legislation had required the Tribunal to only allow postponement where there are reasonable grounds "for finding" an overcharge. Belief is not the same as proof.

56. Moreover, the test is whether there are reasonable grounds for such a belief: it does not require this Tribunal to actually hold that belief.

Overcharged to tax

57. The test is of a belief that the appellant is "overcharged to tax". The legislation does not refer to a belief that the appellant's appeal would be allowed in whole or in part. Is there in any significance in this or is "overcharged to tax" synonymous with the appeal being allowed in whole or part? This may not just be semantics because (it might be said) an assessment may charge the appellant more in tax than his tax return would have shown if properly completed, but the assessment nevertheless be upheld because the appellant fails to successfully challenge it. In this case for instance, NCA's position is that their assessment is necessarily an estimate. Therefore, by implication, the assessment is necessarily either more or less than the exact amount that ought to have been declared in the appellants' tax returns.

58. My view is that, by section 55(2), assessed tax is treated as tax due and payable. So, whatever "true" tax liability would have been shown had the tax return been completed properly at the right time, tax charged by an assessment is only overcharged if the appellants can successfully challenge the assessment in whole or in part on an appeal.

59. In other words, the appellants are only overcharged to tax if they are able to successfully challenge the assessments in whole or part. And to challenge the assessments the appellants will need to demonstrate what their income was and in

particular that it was a figure lower than the figure on which the assessment was based: *T Haythornthwaite & Sons v Kelly* CA 1927 11 TC 657. NCA are not required to prove that their assessment was right.

60. So in looking at whether the appellants have reasonable grounds for believing they are overcharged, I need to consider their case for saying that their income was in a figure lower than assessed. It is not really a question of whether the assessment was wrong, but whether the appellants can show reasonable grounds for believing their income was lower than assessed.

Same as test for striking out and summary judgment?

61. Mr Connolly's position is that, as a whole, the s 55(6) test was the same test as for striking out or summary judgment. He referred me to many authorities on striking out and summary judgment.

62. The test for summary judgment in the courts is whether the defendant "has no real prospect of successfully defending the claim". I would expect it to be the mirror of the test for striking out as summary judgment disposes of the defence without trial and striking out disposes of the claim without trial. And indeed the test for striking out is that the statement of case "discloses no reasonable grounds for bringing or defending the claim" (Rule 3.4(2)(a) CPR).

63. In *Apvodedo NV v T Collins* [2008] EWHC 775 (Ch) Mr Justice Henderson ruled that:

> [32] It is well established that in order to defeat an application for summary judgment it is enough for the defendant to show a prospect of success which is real in the sense of not being false, fanciful or imaginary….the object of the rule is to deal with cases that are not fit for trial at all."

The last part of that formulation was in reliance on the House of Lord's decision in *Three Rivers DC v Bank of England (no 3)* [2001] UKHL 16. In so far as summary judgment was sought in cases turning on their facts, Lord Hope said:

> [95]…it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view…."

(By that last phrase, it is clear that Lord Hope merely meant it would be easier to decide in simple cases whether or not the case was without substance: he obviously did not mean that simpler cases were more likely to be without substance.) The question of complex cases and summary judgment was considered by the High Court in *De Molestina v Ponton* [2002] 1 Lloyds LR 280 where Colman J said that where strike out was sought the judge would have to:

> [3.4]….conduct a careful investigation of the evidence to ascertain whether, in spite of the intrinsic complexity, there is obviously no substance in the claim…..Where, in a complex case, as may often be the situation, the frontier between what is merely improbable and what is clearly fanciful is blurred, the case or issue should be left to trial."

In *Berezovsky v Abramovich* [2010] EWHC 647 (Comm) Colman J said:

> [146] …For the court to be satisfied that the claim has no real prospect of success it must entertain such a high degree of confidence that the claim will fail at trial as to amount to substantial certainty….That high degree of confidence is required in order to deal with each case justly and consistently with Art 6.1 of the European Convention on Human Rights…"

64. These cases show that for summary judgment or striking out the court has to have substantial certainty that the claim or defence will fail and by preventing the case from proceeding the court is thereby saving everybody wasted costs without denying justice.

65. Mr Connolly's proposition is that the s 55(6) test is the same test as for summary judgment or striking out. But as a matter of Parliamentary intent, this makes little sense. If the postponement of tax test was the same as the striking out test, it would make the provisions on postponement of tax otiose. NCA would not need to refuse postponement of the tax pending the appeal: they would be able to have the appeal struck out instead. Logically, Parliament must have intended the s 55(6) test to require upfront payment of tax by taxpayers with an intermediate category of case, cases which have better grounds than cases ripe for being struck out, but not such good grounds that they should be permitted to postpone the payment of tax pending the hearing of the appeal. Another way of looking at this is that Parliament cannot have intended NCA to spend money defending, all the way to a hearing, cases which could have been struck out earlier, merely because the taxpayer paid the money in dispute.

66. Mr Connolly's reply to this point of construction was that a refusal of postponement would have the same effect as striking out if the taxpayer could not afford to pay the tax pending the appeal. However, as Mr Stone pointed out, this is not right. Unlike the indirect provisions contained in s84(3) Value Added Tax Act 1994, there is no provision in the TMA which requires, in order for Tribunal to have jurisdiction to hear appeal, the taxpayer to have paid the tax pending the hearing of the appeal.

67. Obviously, if the application for postponement is refused, NCA can initiate enforcement proceedings in the courts, but appeal proceedings in the Tribunal are unaffected. Indeed, Mr Dong and Ms Fang's appeals are proceeding, directions have been issued, and jurisdiction in those appeals does not depend on the outcome of this application.

68. Of course, the outcome of any such hypothetical enforcement proceedings might be the insolvency of the taxpayer, and the hypothetical insolvency practitioner might be less enthusiastic than the hypothetical taxpayer in pursuing the hypothetical appeal, but it is hard to see how a refusal to postpone would necessarily stifle such an appeal when the insolvency practitioner might agree to the taxpayer pursuing the tax appeal at its own expense.

69. In conclusion, there seems every reason to think that Parliament must have intended the test for striking out and for postponement to be different. There should be cases where it is right to deny postponement but where it would not be appropriate to strike them out.

70. Nevertheless, I accept that the line between having reasonable grounds for a belief that an appeal against an assessment will be successful (in whole or part) and between having no real prospect that such an appeal will be successful (in whole or part) may be a thin one.

Are "reasonable grounds" the same as grounds which are "not absurd"?

71. Mr Connolly also suggested that "reasonable grounds" were any grounds which were not fanciful or absurd, relying on *Sparrow*, and in many ways this was the same submission as above (ie that the s 55(6) test was the same as for striking out).

72. Mr Connolly disagreed with what I said in *Blunts Farm Estate Limited* [2010] UKFTT 469 (TC) in response to the same submission by Mr Connolly in that case. There I said that there was a middle ground in that something might not be absurd but that did not necessarily make it reasonable: see §8-10 of my decision in that case. In saying that, I followed the view expressed by Park J in *Pumahaven* at §39:

> "[39]…There is scope for an argument not to be palpable nonsense but still to stop short of affording reasonable grounds for believing that the taxpayer may have been overcharged."

73. Mr Connolly pointed out that what Park J said at §39 was not perhaps entirely consistent with what he said at §17 (see §41 above) which might be taken as saying "real" was the opposite of "not fanciful" and there was no middle ground of unreal but not fanciful grounds. However, §17 does not expressly say this and I prefer to apply Park J's clear statement at §39 as it seems to me that 'not zabsurd' is a very low test and a lower test than intended by the word "reasonable". As I have already said, the test for postponement cannot have been intended by Parliament to be entirely co-extensive with the test for striking out.

74. Therefore I will consider whether the appellants have reasonable grounds for a belief that they are overcharged to tax. The test is not whether their grounds for such a belief are "not absurd" although the line between the two might be narrow.

The basis of the assessments

75. I had witness statements from one SOCA and one NCA officer (the former has retired); I also had witness statements from Mr Dong, Mr George Georgiou, an accountant, and a Mr Xing (Mr Dong says he is a business associate and NCA say he is Mr Dong's brother).

76. The appellants accept that the business of Mr Dong's company, Credit Lucky, was to accept sterling deposits from its clients in this country and make the equivalent amount of money converted into Chinese currency available to its clients in China. Its business model enabled its clients to access their funds in China within 24 hours of a deposit in the UK. But as it actually took longer for the funds to clear through banks than 24 hours, Credit Lucky would borrow funds from persons in China to enable it to bridge the time delay in the transfer of funds.

77. SOCA (now NCA) alleged that at least some of these funds transferred to China on behalf of Credit Lucky's clients were the proceeds of crimes committed by Credit Lucky 's clients in the UK. SOCA considered that Credit Lucky was engaged in money laundering. That is not really relevant at this point. The important point is that it is accepted by all parties that Credit Lucky performed a service for its clients for which it was remunerated and that Mr Dong personally received income from Credit Lucky.

78. SOCA alleged some £592 million passed through Credit Lucky's hands in the five years covered by the assessments in issue (2004-2009). Mr Georgiou, for the appellant, says the figure was even higher at £687 million. Both parties agree that some £65 million passed through the personal accounts of Mr Dong and Ms Fang in these five years.

79. NCA accepted (at this hearing at least) that about 97% of the £65 million which passed through the appellants' personal accounts was money belonging to Credit Lucky or its clients. The parties differ on the reasons why this money was put through the second and third appellants' personal accounts. The appellants' case is that it was because of restrictions on the amount of money which could be put through Credit Lucky's business bank accounts; NCA say it was to confuse the trail. The reason does not matter for the purpose of the applications. At issue is the 3% which NCA does not accept was used for Credit Lucky business: they have assessed it on the basis it was the appellants' income from the business.

80. The assessments were calculated by identifying the money which passed through Mr Dong's and Ms Fang's accounts which was used in Credit Lucky's business. Where the destination of money could not be identified or was identified as personal expenditure, it was assessed on Mr Dong and Ms Fang. This led to the following assessments to tax:

Assessments to tax	Mr Dong	Ms Fang
04/05	£233,767.60	£22,327.60

05/06	£68,334.20	£34,159.20
06/07	£70,839.57	£36,134.00
07/08	£77,504.80	£37,374.40
08/09	£216,601.57	£1,393.00

81. Mr Dong and Ms Fang accept that Mr Dong did have income from Credit Lucky's business during those five years, but at a much lower figure than SOCA assessed. They do not accept that Ms Fang had any income from it.

82. But both appellants accept that their income was higher than they declared on tax returns. I will refer to Ms Fang's case below. Mr Dong accepted that all items which NCA had shown to be personal expenditure out of his accounts during the five years represented income assessable on him. He also considered any personal expenditure out of Ms Fang's accounts during that period was income assessable on him. He did not accept that any of the other money in his or Ms Fang's accounts during that period was assessable on him as income: he considered it represented client money or money belonging to Credit Lucky.

83. The following table sets out the liability to tax which Mr Dong accepts on this basis. This table cannot be compared directly to the previous one as this table is a statement of <u>income</u> and not of <u>tax liability</u> arising on that income. For instance, for 08/09 SOCA considered Mr Dong's income to be £569,823 (tax of £216,601) whereas Mr Dong considers that his income was only £4,924 (ie below the threshold for paying tax).

Appellants' statement of income	Mr Dong	Ms Fang
04/05	£21,546	£8,570
05/06	£45,402	£10,826
06/07	£24,807	£9,966
07/08	£32,157	£11,332
08/09	£4,924	£13,240
TOTALS	£128,836	£53,934

84. The year 05/06 was for rather higher an amount than the other years: this was because Mr Dong accepted that the purchase of a Mercedes car on 27 June 2005 for £18,500 was additional personal expenditure, added to the other personal expenditure out of his and Ms Fang's personal accounts. In that year, there was also expenditure on the purchase by Mr Dong of the business of a noodle shop for £35,582. Mr Georgiou (on Mr Dong's behalf) did not accept that this was personal expenditure on the grounds that the business proved to be unsuccessful. The figure of £35,582 is therefore not included in the figure for 05/06 of £45,402.

85. I note that Mr Georgiou's case on the purchase of the noodle shop is obviously wrong in law. Having accepted that the purchase was made on Mr Dong's behalf, it was clearly made from income from Credit Lucky received by Mr Dong and therefore assessable on him as his income. It is irrelevant whether the investment Mr Dong chose to make with his money was a good one or bad one. There are, I find, no reasonable grounds for believing Mr Dong overcharged to tax in respect of any of the income in the above table in §83 (as Mr Dong accepts this income) nor in respect of the £35,582 where the appellant's argument is obviously wrong in law.

86. I move on to consider the major part of the assessments.

Reasonable grounds for believing Mr Dong is overcharged to tax?

87. Challenge on lack of evidence: As I have said, it is Mr Dong's case was that (as NCA accept) most of the money passing through his personal accounts was money belonging to Credit Lucky or its clients. His case is that *only* the money which was clearly identifiable as having been used for personal expenditure was so used: any other money the destination of which could not be identified would have been money belonging to Credit Lucky or its clients and not money belonging to Mr Dong or Ms Fang.

88. In other words, it is Mr Dong's case that all cheque payments and money transfers with unidentified destinations, and all payments to other, unidentified accounts were payments on behalf of Credit Lucky and not income of Mr Dong.

89. Mr Georgiou was not appointed until after the event, in 2012 and after Mr Dong had left for China. He had no first hand knowledge of what happened. So far he is unable to provide evidence to corroborate what Mr Dong says. He has (or intends to) institute forward traces on the payments and cheques, and he wishes to examine Credit Lucky's client files (shortly to be disclosed by the police) and (as I have said) is seeking an order against the liquidator to disclose transaction records. It is his opinion, on the basis of what his clients have instructed him, that these will support his clients' contentions.

90. I find that at the moment, which is what matters for the purpose of this application, the only evidence that these payments with an unidentified destination relate to Credit Lucky's business is Mr Dong's statement which is based (he says) on personal recollection. Yet he cannot identify where the payments actually went, he says, without the client files and transaction files. I agree with Mr Stone that it is inherently improbable that Mr Dong can remember after all this time and without any records that all unidentified payments belonged to Credit Lucky or its clients. In this his evidence is internally inconsistent as there is no explanation (reasonable or otherwise) for this feat of memory.

91. Challenge on life-style: NCA's next point was that in their opinion the appellants' life style seemed inconsistent with the income Mr Dong accepts he received (see table in §83). Mr Dong purchased the Mercedes car in 2005 and bought a house in September 2008 for just over £500,000.

92. So far as the car is concerned, Mr Dong accepts that its purchase was with money he received from Credit Lucky and that the purchase price should therefore comprise part of his income. The ownership of the car is therefore not inconsistent with his income: he has accepted it as part of his income.

93. So far as the house was concerned, although this was purchased with the assistance of a mortgage, this was paid off after a few months. Expensive refurbishment works were carried out to the property in 2010 but that is after the period with which I am concerned. So from where did the £500,000 come?

94. Mr Dong's and Mr Xing's evidence is that the purchase of the house was financed by Mr Xing and two business associates based in China originally as an investment property with a view to sale for a profit. Mr Xing's evidence is that he has now bought out the other two investors with a view to himself and/or members of his family coming to the UK to live in it.

95. Mr Xing's evidence is that Mr Dong, Ms Fang and their four children were permitted to live in the property in order to look after it. Ms Fang and the children are still living there on the same basis. Rent is not paid.

96. NCA have some evidence (a file note from the conveyancing solicitor) which suggests that the property was Mr Dong's in equity, but this is irrelevant for present purposes as the question is whether Mr Dong's case is internally consistent and Mr Dong does not accept the evidence of the solicitor's file note.

97. I agree with NCA that expenditure by Mr Dong of £500,000 in 2008 would be inconsistent with Mr Dong's accepted income as set out in the table in §83. However, Mr Dong does not accept that the £500,000 was his expenditure and he has proffered the explanation as above. Is that explanation internally consistent? The odd thing about the explanation is why Mr Xing would buy an investment property and allow Mr Dong and his family to live in it rent free pending a sale or personal use of it by Mr Xing. However, it is Mr Dong's case that Mr Xing is a friend: it is NCA's case that Mr Xing is Mr Dong's brother. Family or friendship could be a rational explanation of the lack of commerciality in Mr Xing's failure to charge rent.

98. Therefore, I do not consider that this part of Mr Dong's case is internally inconsistent. I take no view, of course, on whether it is true.

99. In so far as NCA rely on evidence which shows an expensive lifestyle in years after those years at issue in this application, I do not consider this relevant as the assessments related to income in earlier years. His income in later years is not in issue in this application.

100. <u>Low income compared to turnover:</u> The main part of NCA's case was simply that the income which Mr Dong agrees he received from his employment/directorship of Credit Lucky appears inconsistent with the money which Mr Dong accepted was processed on behalf of Credit Lucky's clients. Mr Dong accepts Credit Lucky, a company of which he was sole director and sole shareholder, processed over half a billion pounds in 5 years and that some £65 million of this passed through his and his

wife's bank accounts. Mr Dong's case, in a nutshell, is that he gave his company's clients a valuable money transfer service, which involved Credit Lucky in borrowing large sums of money in China, but in return for doing this, nevertheless received in personal income and lived in a five year period on £128,836, which was an average income of only about £25,000 per year.

101. I consider that this evidence is internally inconsistent and calls for a reasonable explanation in order to amount to reasonable grounds for believing in an overcharge to tax. I would not need to decide whether the explanation was true: I would just need there to be a reasonable explanation such that it could amount to reasonable grounds for believing there was an overcharge.

102. Mr Connolly said the explanation was that Mr Dong chose to charge very small fees for his company's services to drive out competition with a view to increasing its charges in the future. No explanation, however, was given by Mr Dong in his witness statement for why his income was so comparatively low. By itself this would be grounds for rejecting this explanation: it is not in the evidence.

103. Even if I overlooked its absence from the evidence, I consider a bare statement to that effect would be insufficient because it raises more questions than it answers. Why charge so little for so long? Was business so cut-throat that he had to keep his earnings to only about double the minimum wage? Why not seek better paid employment? Was the strategy successful? If so, which competitors were driven out of business? If not, why persist with it? It also fails to explain why he earned about £80,000 in 05/06 but only about £5,000 in 08/09 (see §§83 and 85) if margins were so critical. But there is no evidence which takes what appears to be an unlikely story and turns it into a reasonably believable story.

104. Mr Connolly, relying perhaps on what was said in *De Molestina* (see §63), said this was a case of great factual complexity where I should be slow to reach the conclusion that there are insufficient grounds to grant postponement. I agree that a great many witness statements of long length accompanied by a large number of exhibits have so far been exchanged in this appeal. Nevertheless the case at root is very straightforward. Mr Dong's case is that he solely owned and operated a company whose business offered its clients a valuable service and was entrusted (over a five year period) with over half a billion pounds, about sixty five million of which passed through his and his wife's personal accounts, yet he was content to earn (on his case) an average of only twenty five thousand pounds per year. I consider this internally inconsistent and no reasonable explanation has been given for it.

105. I would not go so far as to say it is an absurd case, but as it stands it is not internally consistent and does not amount to reasonable grounds for a belief Mr Dong is overcharged to tax.

106. I find that there are two incredible elements to Mr Dong's case which are not supported by anything more than Mr Dong's say so and in particular were not given a credible explanation or supported by documentary or other evidence. Those are (a) that he earned so little in comparison to the turnover of his wholly owned company

and (b) that without consulting records he knows that all the untraced funds over a five year period from his personal accounts were not personal income. Therefore, on Mr Dong's case as it stands, I do not consider that there are reasonable grounds for believing that he will successfully challenge the assessment in whole or in part.

107. I refuse Mr Dong's application for postponement. I determine that the case put forward by Mr Dong does not amount to reasonable grounds for believing that any part of the assessment overcharges him to tax. None of it should be postponed.

108. I do not need to reach a conclusion on whether the striking out test is met. I have said that I consider it to be harder for appellants to demonstrate that tax should be postponed than to defend an application for striking out. And irrespective of the question of whether or not there is a real prospect of success, Mr Dong's case is obviously not suitable for striking out at the moment as the appellants still await disclosure of further evidence which may strengthen their case. And if this further evidence does lead to a change in circumstances, then Mr Dong can of course make another application for postponement to NCA under s 55(3).

Reasonable grounds for believing Ms Fang is overcharged to tax?

109. Ms Fang has given no evidence so far. She relies on Mr Georgiou's evidence. His evidence is little more than hearsay but despite Mr Stone's objections, I do not think that matters for the purpose of this hearing. The question is whether the case put forward on behalf of Ms Fang is consistent with what Ms Fang, via her advisers, accept are the facts.

110. As with Mr Dong, she was assessed on the value of the funds in her account the destination of which had not been traced to Credit Lucky or Credit Lucky's clients. NCA was making the assumption that these untraced funds were income paid to Ms Fang from the business.

111. Mr Georgiou on her behalf denies this. It is her case that the funds did not belong to her because Mr Dong controlled her bank accounts and she understood from him that all the untraced funds would have been used for Credit Lucky business.

112. She was also assessed on the total of expenditure from her accounts which were shown to be personal expenditure. Mr Dong accepted that in respect of his accounts but Ms Fang denied it in respect of her accounts. It was both Mr Dong's and Ms Fang's case that Mr Dong controlled her accounts and any personal expenditure from those accounts was attributable to him. He accepted personal expenditure from Ms Fang's accounts as his income and the figures in the table at §83 take this income into account.

113. Ms Fang's case is therefore quite different to Mr Dong's. Her case is that it was her husband's business and she permitted him to use her personal accounts in order to help run that business, but none of the money in the accounts belonged to her with the exception I mention below. Mr Dong agrees with his ex-wife on this.

114. While I take no view on whether Ms Fang's case is true or not, I consider it internally consistent. She was not a director nor shareholder of the company. Mr Dong was its sole director and shareholder. Her case in effect is that she received no wage from the company, Mr Dong was the family's breadwinner and he gave her an allowance from his income to pay expenses.

115. Mr Georgiou on behalf of Ms Fang does accept that she had undeclared rental income during the five years at issue, earned on properties purchased before 2004. This income is the income shown in the table at §83 above.

116. In conclusion, for these reasons, I consider that there are reasonable grounds for a belief that Ms Fang was overcharged to tax by NCA except in relation to the accepted rental income. Payment of the tax assessed should be postponed save in respect of the accepted rental income as set out above.

Note - Continuity presumption

117. Ms Brown challenged NCA's assessments in so far as they were based on the presumption of continuity. Having allowed her client's postponement application on a different basis I do not really need to consider this. Nevertheless, my views in brief are as follows.

118. The assessments were based on estimates of the appellants' income in that they do not know what the appellant's income was. The assessments were estimates based on money passing through Mr Dong's and Ms Fang's accounts which could not be identified as Credit Lucky or client money. But Mr Dong's and Ms Fang's accounts were no longer used for the business after 05/06 and the NCA therefore applied the presumption of continuity for the next two years. They presumed Mr Dong and Ms Fang would have had income in similar amount to the two preceding years. The assessment for the last year (08/09) was based on payments into Mr Dong's personal accounts again.

119. Ms Brown's argument was that NCA were wrong to assess on the basis of the presumption of continuity because *Jones v Bamford* [1973] STC 519 was only authority for estimating later years on the basis of earlier years where evidence for the later years was entirely lacking. Here, she says, the appellants gave evidence for the later years.

120. I cannot agree. While *Jones v Bamford* might have been a case where there was no evidence for later years, the principle in that case is clearly not limited to such cases. Indeed, as the Judge said,

> "once the inspector comes to the conclusion that, on the facts which he has discovered, the taxpayer has additional income beyond that which he has so far declared to the inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer."

121. Ms Brown's case was that her client's evidence was that they closed the bank accounts used for Credit Lucky's business after 05/06. Be that as it may, SOCA's assessment was on the basis that the appellants had undeclared income. Closing bank accounts, even if proved that no others were opened instead, does not prove that there was no undeclared income. The money could have been put somewhere else.

122. In any event, Ms Brown's case was predicated on the basis that it was the appellants's case that no other bank accounts were opened to replace those that NCA accept were closed. However, this is not their case as Mr Georgiou on their behalf did accept in his witness statements that there would have been other bank accounts.

123. For both these reasons, I reject Ms Brown's case on this.

124. This document contains full findings of fact and reasons for the decision.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 27 January 2014