TC03395

Appeal numbers: TC/2013/3302 & TC/2013/3304

APPLICATION FOR PERMISSION TO MAKE A LATE APPEAL – deliberate inaccuracy penalty – penalty paid and matter settled by agreement– taxpayer had uncommunicated reservation that his name would not be published as a deliberate defaulter – applied to appeal penalty when HMRC notified him his name was likely to published - permission refused;

APPLICATION FOR ANONYMISATION OF DECISION – wrong for tribunal to grant anonymisation in order to preserve reputation or to prevent taxpayer's professional body discovering the imposition of penalty – position might be different where the hearing was merely interim – as permission refused hearing was final- in principle anonymisation should not be granted – anonymisation nevertheless granted pending any appeal – names to be published when appeal process exhausted

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD CHAN AND GERALDINE CHAN **Appellants**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 7 February 2014

J Woolfe, Counsel, instructed for the Appellants

S Pritchard, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Note: this decision was originally published under the name of "Mr & Mrs B" in accordance with §94. It was republished without anonymity for the appellants after the time to make an oral application for permission to appeal this decision to the Upper Tribunal expired without such an application being made.

Findings of fact

1. The appellants are married. In 2010 they jointly purchased a property. It cost them £763,750. On the Stamp Duty Land Tax ("SDLT") return the purchase price declared was £100,000. No SDLT was paid: SDLT of £30,550 was due.

2. HMRC discovered this in 2011 when they opened an enquiry. The appellants, on the matter being brought to their attention, paid the outstanding SDLT of £30,550.

3. In letters dated 13 April 2011 HMRC asked for information and warned the appellants (& the appellants' adviser) that HMRC was considering imposing a penalty. The letters to the appellants included two sets of guidance notes. The first was "Compliance checks – general information" and the second was "Compliance checks – penalties for errors in returns or documents." The first said, amongst other things:

> "what to do if you disagree
>
> If you disagree with anything during the check please tell the officer dealing with the check what you disagree with and why.
>
> You can appeal against most of the decisions that we make. We will write and tell you when we make a decision that you can appeal against. We will also explain the decision and tell you what to do if you disagree....."

4. The second of the guidance notes explained when HMRC would impose a penalty and how it would be calculated. It included a similar "what to do if you disagree" paragraph. The penultimate section of the guidance was as follows:

> **When we may publish details about you**
>
> We may publish the name, address, and other information about those who deliberately evade tax. We may be able to publish information about you if:
>
> -we charge you a penalty for a deliberate, or a deliberate and concealed, inaccuracy, and
>
> -the tax on which the penalty … is based is more than £25,000...."

5. HMRC then informed the appellants of the amount of penalty which they considered appropriate (£16, 038.75) and this led to some correspondence. By letter dated 21 March HMRC informed the appellants that HMRC were not prepared to agree that a lower penalty figure was appropriate. It enclosed another guidance note

"Compliance checks – publishing details of deliberate defaulters" and informed the appellants that the writer's view was that the answer to the 5 questions which had to be answered affirmatively before publication took place would be "yes" but went on to say:

> "I cannot advise you whether HMRC will publish your details as this is decided by a specialist team."

6. The writer (Mr S Goodall) said that this was the appellants' last chance to settle the matter by contract settlement.

7. The enclosed guidance note explained HMRC's view of the law contained in s 94 Finance Act 2009 ("FA 9"). On the third page it said, after setting out the five publication questions:

> "If the answer to all five publication questions is 'yes' we may publish your details.
>
> The officer carrying out the compliance check will tell you as soon as possible as (sic) they think that the answer to all of the five publication questions is 'yes'. They will not be able to tell you whether we will publish your details....
>
> At the end of the check, the officer will ...tell you the amount of any penalties that are due – including penalties for what you deliberately did wrong.
>
> If you do not agree with the tax or penalty, you may be able to appeal against these decisions....
>
> Any penalties will become final when either you agree them, you decide to take no further action or a tribunal makes a decision about them.
>
> As soon as the penalties become final, the officer will refer your case to the specialist team that is responsible for publishing details of deliberate defaulters. The team will not have been involved in your compliance check.
>
> A senior civil servant in the team will decide whether we can publish your details...
>
> To be fair and consistent, we aim to publish the details of every person, company, or other kind of organisation where the answer to all of the five publication questions is 'yes'. We will only decide not to publish in exceptional circumstances."

8. In response to this letter, the appellants wrote back on 16 April 2012 signing the agreement form to settle the case at the figure HMRC proposed. The letter said they did this "under protest" and went on to say:

> "Now that this matter has been finalised by agreement, I assume that you will no (sic) recommend that details be published."

9. The letter went on to say that they did not consider they had deliberately evaded tax.

10. Mr Goodall's response was dated 31 May 2012. It said, amongst other things:

> "As previously stated, I have no influence over whether your details are published as this is decided by a specialist team...."

He asked the appellants whether in these circumstances they still wished to proceed to settlement.

11. The appellants' reply was dated 12 June 2012 and was so far as relevant:

> "It is of great concern to us that we are being expected to compromise the claim when the threat of publication remains a live issue. To this end, we would ask that that you refer the case to the specialist team at this stage for a decision so we can make an informed decision about compromising the claim."

12. Mr Goodall's reply was dated 15 June 2012 and stated, so far as relevant:

> "...I am unable to refer the matter to the specialist team dealing with the publication of details. A decision cannot be made until the penalty has become final....."

13. He went on to say that, as they were unable to agree a settlement, he would issue formal assessments. The assessments for SDLT of £30,550 plus interest were issued on 29 June 2012. These showed that the SDLT, although not the interest, had already been paid. The penalty assessments were issued on 6 July 2012 for £16,038.75.

14. A letter from the appellants dated 25 July 2012 told Mr Goodall that the appellants had not received the promised penalty assessments. It went on to explain the appellants' view of why they were not liable to a penalty for deliberate inaccuracy and that the penalty was excessive and concluded:

> "Furthermore, there is the threat of publication of details. Mr [Chan] is a solicitor and notwithstanding that he maintains that publication is totally unjustified in this case it would wrongly impact on his reputation...."

15. Further copies of the penalty assessments were despatched and Mr Goodall extended the 30 day time limit for appealing to run from 31 July 2012. The appellants' reply on 24 August was that their letter of 25 July should have been treated as a notice of appeal.

16. Mr Goodall's letter of 6 September acknowledged the appellants' letter and said that he had now referred the matter for an independent review. The review was carried out by a Mr Taylor. The review letter was dated 3 October 2012. The review letter was relatively short but included an appendix explaining the review officer's conclusions in detail. Both the letter and its appendix dealt only with the appeal against the penalty and in particular explained the officer's view that the inaccuracy was deliberate and why he agreed the penalty was correctly calculated. At no point was there any mention of the issue of publication and it was clear that this was not addressed.

17. The appellants' reply to Mr Taylor was dated 25 October 2012 and said as follows:

> "Whilst we do not agree with your findings strictly on a commercial basis we have now paid £16,038.75 by BACS to you to settle this matter in full and final. If you are not prepared to accept the payment on this basis please return the payment to me immediately."

18. Mr Goodall's evidence, which we accept, was that Mr Taylor received this letter but passed it to Mr Goodall to deal with. Mr Goodall wrote to the appellants on 31 October 2012 to say:

> "thank you for your letter of 25 October 2012, the contents of which have been noted. The appeal in this matter is now settled under Section 54(1) Taxes Management Act 1970..."

As was noted in the hearing, s 54 TMA does not apply to SDLT penalties (see §26) but Mr Goodall was obviously unaware of this.

19. There was no more correspondence between the parties until 12 March 2013 when a Mr A Carlyle of HMRC's Central Policy unit wrote to the appellants to notify them that HMRC were considering the publication of their names and they should reply within 30 days with representations if they did not think that this should happen.

20. The appellants reply was dated 10 April and was very long. It was made after consultation with tax counsel. It stated they would not have settled the penalty appeal if they had appreciated that there was no right of appeal against the decision to publish. The letter also stated that Mr Chan was a solicitor:

> "As such, he takes great pride in his integrity. The publication might result in his professional body taking steps to strike him off. This could obviously have serious consequences for him and his family not to mention the 50 or so members of staff which Mr Chan employs in his business…."

21. The letter notified HMRC that the appellants were applying to this Tribunal for permission to make a late appeal against the penalties.

22. The application for permission to make a late appeal was lodged with this Tribunal on 10 April 2013, the same day.

Does the Tribunal have jurisdiction?

23. At the hearing I raised the question whether the Tribunal even had jurisdiction to consider the appellants' application for permission to lodge their appeal against the penalty out of time. Paragraph 37(1) of Schedule 10 of the Finance Act 2003 provides, in respect of SDLT, identically to the better-known s 54 Taxes Management Act 1970, that appeals settled by agreement are to be treated as if the Tribunal had determined the appeal.

24. My view is that the effect of s 54 TMA or paragraph 37(1) (if they were applicable) was that if there was a contract settlement the Tribunal would have no jurisdiction. This is because those provisions state that:

> "the same consequences shall follow, for all purposes, as would have followed if, at the time the agreement was come to, the tribunal had determined the appeal ….."

25. Mr Woolfe was of the view that this was not right because paragraph 37F(2) (or section 49F TMA) treat HMRC's review letter as a deemed contract settlement, which the appellant can only set aside by appealing (whether on time or late). His view was that there could not be a deemed settlement and an actual settlement at the same time.

26. I do not agree with this, but it does not really matter for the purposes of this appeal. While the hearing proceeded on the basis that paragraph 37(1) applied to SDLT penalties, it now appears to me that it does not. Penalties for SDLT are assessed under Schedule 14 of the FA 2003. While paragraph 5(5) of Sch 14 brings in paragraphs 36A-36I of Schedule 10 (which are the provisions equivalent to s 49A-I of TMA for SDLT assessments), no provision of Sch 14 brings in paragraph 37. Rather oddly, therefore, there seems there is nothing that enables HMRC and a taxpayer to settle an SDLT penalty appeal by agreement. Section 54 itself does not apply as it applies only to appeals under the Taxes Acts (see s 48). The Taxes Acts (see s 118(1) TMA and Sch 1 Interpretation Act 1978) do not include the FA 2003 provisions relating to SDLT as it is not an income tax.

27. Nevertheless, as a matter of general law courts recognise the binding nature of contracts, so it is difficult to see how the Tribunal could have been intended by Parliament to have jurisdiction in a case where the parties have settled the matter by a binding and lawful contract. The contract itself would oust jurisdiction or, alternatively, permission to appeal simply should not be granted as to do so would be to fail to recognise the binding nature of contracts in English law.

28. Therefore, if I am right on this, the only question before me is whether the parties actually entered into a contract to settle the matter. The appellants' case is that there was no such contract (or if there was, that it included non-publication as one of its terms). I consider this below. And in case I am wrong in what I say in §27, I go on to deal with whether I would exercise my discretion under paragraph 36G(3) of Schedule 10 FA 03 to permit the appellants to notify an appeal to the Tribunal after the post-review period has ended.

Is there a binding contract?

29. Mr Woolfe's view was that there was no settlement (and, it follows, no contract) as the parties were not 'ad idem': he meant that the two sides to the contract had agreed to different things. Alternatively, he suggested, they had agreed to the same thing and that was an agreement to settle and not to publish, an agreement he said that HMRC were now seeking to resile upon.

30. It is well understood that for there to be a contract there must be offer and acceptance. If there was a contract, there are two options for how it was formed. Either, the review letter of 3 October 2012 (§16) was the offer and the appellants' letter of 25 October 2012 was acceptance. Alternatively, the appellants' letter of 25 October 2012 (§17) was the offer and HMRC's letter of 31 October 2012 (§18) was the acceptance. Is either of these right?

31. Both parties were agreed that whether there was an offer must be assessed objectively. What matters is what was said rather than what was meant.

32. The review letter said nothing about publication (see §16). If it was an offer, it clearly did not include within its terms an agreement not to publish.

33. I find from the evidence that, subjectively, the appellants did not intend to be bound by their letter of 25 October 2012 unless HMRC were bound not to publish. This was the tenor of Mr Chan's oral evidence. He said the matter of publication was at the "forefront" of his mind when writing his letter of acceptance of 25 October. I accept this: it is bourn out by the earlier evidence which shows that he was intent on settling the matter on terms that HMRC would not publish his name: see §§8, 11 & 14. I also note that the appellants had settled a different and smaller SDLT penalty at around this time, where there was no question of publication, and Mr Chan's acceptance letter did not use the words "full and final" or refer to the payment being returned if HMRC did not accept the terms. Mr Chan did mean these terms to include publication within the settlement.

34. I also find that, objectively, the appellants' letter of 25 October 2012 did not communicate this reservation to HMRC. The appellants' case was that the use of the additional words referred to above ("full and final" and returning the money) should have put HMRC on notice that there was this reservation, particularly in view of the previous correspondence. I do not agree. Objectively, there was no express reference to the issue of publication in the letter of 25 October and no reference to the issue of publication in the review letter of 3 October 2012 to which it was a reply and to which it referred. There was no duty on Mr Taylor or Mr Goodall to notice the difference in wording with a previous settlement a few weeks earlier and query if there was any reason for this.

35. A natural interpretation of the words used by the appellants "full and final" and returning the money if HMRC were not prepared to accept payment on "this basis" would be that the appellants were referring back to the review letter and its calculation of the penalty at a lesser amount than the maximum of 70%. It would not, objectively, be taken as a reference back to the issue of publication raised in earlier correspondence with a different officer and to which no express reference was made. This is particularly so in the circumstances when a natural reading of that earlier correspondence was that so far as HMRC was concerned the question of publication was closed as Mr Goodall's letters (of 21 March (§5), 31 March (§10) and 15 June 2012 (§12)) were clear that HMRC could not make a decision on publication until the penalty was final, and that was the very reason the matter had reached the formal stage of an appeal to HMRC and a review being carried out (§13).

36. It is the objective and not subjective position which matters for contract law. Nevertheless, I find that, even if it was relevant, subjectively Mr Goodall was unaware of the appellants' reservations. I find this based on his oral evidence and because, when earlier faced with a reservation, he responded to it and refused to accept an agreement on that basis (see §13). I find he would have done so again had he been aware of the reservation. I also find this because the appellants' letter of 25 October 2012 made no express or even implied reference to publication.

37. As a matter of law, I find that the appellants' letter of 25 October 2012 was therefore acceptance of HMRC's offer contained in the review letter and treated as such by Mr Goodall in his letter of 31 October 2012. It amounted to a contract for settlement on the terms that the appellants would pay the penalty in the assessed amount. It did not include any stipulation about non-publication as deliberate defaulters. In other words, the appellants' subjective reservation was uncommunicated to the offeror and therefore formed no part of the contract; moreover having a subjective but uncommunicated reservation did not prevent the formation of a valid contract on the terms as offered.

38. The same result is arrived at even if the appellants' letter of 25 October 2012 is seen as the offer, and HMRC's letter of 31 October 2012 as the potential acceptance. Again it is the objective position which matters and for the reasons given above, objectively it was an offer to settle on terms of the review letter and without any reference to the issue of publication. HMRC, acting by Mr Goodall, who was actually and reasonably unaware of the appellants' reservation, accepted the offer in his letter of 31 October 2012. As a matter of contract law, a valid contract on the objective terms set out in the review letter was reached, despite the appellants' uncommunicated reservation.

39. I entirely reject the appellants' case that if there was a settlement it was on terms which included the issue of publication. It would be impossible for this to be so. There was no express reference to publication in the review letter, the appellants' reply nor HMRC's reply to that. While the appellants had a subjective reservation, they entirely failed to communicate this. HMRC were objectively and subjectively unaware of it. (In any event, I consider that it would have been unlawful for HMRC to have reached such an agreement as it would be tantamount to blackmail as it would amount to agreeing that a taxpayer pay a higher penalty in return for not making their behaviour known.)

40. As a matter of contract law, therefore, I find that the appellants and HMRC have settled the matter. That ousts the jurisdiction of this Tribunal.

Should time be extended?

41. As I said above, I would consider the exercise of my discretion in case I was wrong on my conclusion either that there was a contract to settle or that that contract meant the Tribunal had no jurisdiction to entertain the appellants' application. So ignoring §40, I would approach the appellants' application as follows.

The law

42. There is no guidance in the statute on how the Tribunal should exercise its discretion. And both parties considered that any previous decisions on this issue were in effect superseded by the recent Upper Tribunal decision in *McCarthy & Stone (Developments) Limited and others* (PTA/345/2013) applying the Court of Appeal decision in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537.

43. The case concerned an application for permission to appeal to the Upper tribunal an FTT decision out of time. The Upper Tribunal referred to the new CPR 3.9 which provides:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

44. The Upper Tribunal said, as have previous cases, that while the White Book does not govern proceedings in this Tribunal, nor in the Upper Tribunal, its principles are clearly to be respected.

> "[45] The overriding objective does not require the time limits in those rules to be treated as flexible. I can see no reason why time limits in the UT Rules should be enforced any less rigidly than time limits in the CPR. In my view, the reasons given by the Court of Appeal in Mitchell for a stricter approach to time limits are as applicable to proceedings in the UT as to proceedings in courts subject to the CPR. I consider that the comments of the Court of Appeal in Mitchell on how the courts should apply the new approach to CPR 3.9 in practice are also useful guidance when deciding whether to grant an extension of time to a party who has failed to comply with a time limit in the UT Rules.
>
> [46] The new CPR 3.9 does not contain a long list of factors to be considered as the old one did. The new version now provides that the court will consider all the circumstances of the case to enable it to deal justly with the application including the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.
>
> [47] As the Court of Appeal recognised in Mitchell at [49], regard must still be had to all the circumstances of the case but the other circumstances should be given less weight than the two considerations which are specifically mentioned. In this case, applying the principles of the new CPR 3.9, as explained in Mitchell and Durrant, means that, in considering whether to grant relief from a sanction, I should take account of all the circumstances, including those listed in the old CPR 3.9, but I should give greater weight to the need for litigation to be conducted efficiently and the need to enforce compliance with the UT Rules, directions and orders."

45. However, CPR 3.9 and the decision in *McCarthy & Stone* relates to breaches of court (or tribunal) rules. Here, there has been no breach of the Tribunal's rules. The appellants have merely failed to bring their appeal within the statutory time limit and the Tribunal has discretion granted by statute to permit a late appeal. The legislation expressly contemplates the possibility that the time limit for appealing could be extended, although that is also true of the Tribunal's rules. The question here is not whether the litigation is being conducted efficiently but whether the appellants are entitled to litigate at all.

46. However, these distinctions may be more apparent than real. Time limits, whether statutory or under court rules, are there for a reason. Extending time should be the exception rather than the norm.

47. So I accept that the need for time limits to be adhered to should be given significant weight. Other considerations remain relevant, however, as recognised in *McCarthy & Stone* (§46 and §47) and as stated by the Upper Tribunal in *Data Select Ltd* [2012] UKUT 187 (TCC). In that case the Judge said:

> "[34] …..Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.
>
> [37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time …."

The purpose of the time limit

48. The purpose of the 30 day time limit in which to bring an appeal was clearly to bring about finality in a person's tax affairs. HMRC are entitled to know within a relatively short period whether the decision they have made is under challenge or is final. This is a very important concern and one which (by analogy with the new CPR) must carry a great deal of weight.

How long was the delay?

49. From the date of the issue of the review letter to the date of the purported appeal was slightly over six months.

Explanation for the delay?

50. In paragraphs §§29-40 above I dealt with the question of whether there was a contract settlement between the appellants and HMRC. I found at paragraph 33 that subjectively the appellants had intended, by inclusion of the words "full and final" to include the issue of publication in the settlement terms. At §§34-35 I also found that they entirely failed to communicate this stipulation to HMRC.

51. It was not put to Mr Chan that the omission was deliberate so I proceed on the basis that the omission was merely inadvertent. Even so, it was clearly the appellants' fault that their letter of 25 October 2012 failed to communicate that their acceptance was conditional on non-publication. The omission is difficult to understand bearing in mind how important the issue was to Mr Chan and because I find Mr Chan was well aware that HMRC would not agree to settle the question of publication, because he had been told this a number of times (§§4, 5, 7, 10, & 12) and had tried unsuccessfully to settle on this basis before (§§8-13).

52. Therefore, his belief that the settlement included a non-publication condition was entirely unreasonable: he knew he had not expressly made such a reservation and he had been told and should have known that HMRC would not agree to it.

53. Consideration of all parties' reasonable expectations militates against giving permission to appeal out of time as it would negate HMRC's *reasonable* expectations that the matter was final on the basis of the appellants' *unreasonable* expectations that the settlement included a non-publication condition.

Consequences of extending time?

54. The appellants have always maintained that their conduct in under-declaring their liability to tax was inadvertent rather than deliberate. They seek permission to appeal in order to have the opportunity to prove this.

55. Nevertheless, it is clear from the correspondence that the appellants were prepared to admit to deliberate misdeclaration as long as their names were not published. I think it fair to say that the main reason they want the opportunity of proving that the misdeclaration was inadvertent is in order to prevent publication of their names as deliberate defaulters.

56. HMRC's position is that this is an abuse of the appeals process. HMRC's position is that the appellants were prepared to admit to tax evasion as long as no one found out. Mr Chan's particular concern was that the Solicitors Regulatory Authority should not find out. The SRA would only find out if his name was published by HMRC as his evidence was that he did not consider that he had any obligation to tell the SRA of matters which the SRA might consider affected his fitness as a solicitor. (This Tribunal does not have any function to consider disciplinary matters but I note that Mr Chan may find this view of the rules of professional conduct which govern solicitors ill-informed).

57. Mr Chan's own evidence did not show him to be a person of high ethical standards. He considered that the SRA would be concerned if he, as a solicitor, was liable to a deliberate inaccuracy penalty, but he was prepared to accept liability to one as long as no one, including the SRA, found out. He has not informed the SRA about the penalty and does not intend to inform the SRA about it. Should this lack of ethics on Mr Chan's part affect my decision?

58. I do not think so. If the appeal had been lodged in time, the appellants' underlying motivation in bringing it would have been irrelevant. I think it is irrelevant in this application: as long as the appellants have an arguable case that their misdeclaration was only inadvertent, I do not see why a desire to avoid publication rather than the (perhaps) more normal motivation of wishing to minimise financial penalties, would by itself count against them.

59. The SRA may well have concerns with Mr Chan's behaviour but this is not the forum for dealing with them.

60. My conclusion is that liability to a civil evasion penalty, which is what this amounts to, is a very serious matter for Mr Chan. Potentially it could affect his livelihood, as the SRA has the power to strike solicitors off and might do so where there has been an admission of what might be considered dishonesty. It may be less serious for Mrs Chan, who, it appears, is not a member of a professional body. Nevertheless, the very serious nature of the matter for at least one of the two appellants is a definite factor in favour of giving permission out of time.

61. For HMRC, the consequences are (assuming the appeal would be unsuccessful) delay in finally dealing with this matter. On the other hand, assuming the appeal is successful, I must presume as a government body committed to collecting the right amount of tax, avoiding a miscarriage of justice would be preferable to HMRC than publishing the name of someone who would have shown they were not actually a wilful defaulter.

Do the appellants have an arguable case?

62. Part of looking at the consequences of extending time is to consider the likely success of the appeal. There is no point in extending time if all it does is delay (at great cost) the inevitable.

63. The appellants' case on appeal (if admitted) will be factual rather than legal. They explain that the wrong figure was entered on the blank SDLT return because the price wasn't known at the time the form was printed. Inadvertently, they say, the error was not noticed or corrected later.

64. In a preliminary hearing, it would be wrong of me to take a view on whether or not I accept this evidence as credible. Indeed, I have not heard the evidence and am not in a position to take a view on it. All I can consider is whether the evidence could be believed if the Tribunal were inclined to consider the appellants credible witnesses. Is their story possible? I conclude that there is nothing so obviously contradictory or

improbable with their story that, had the appeal been lodged in time, it could have been struck out for not having a reasonable prospect of success. So for the purpose of this application I conclude that the appellants have an arguable case.

Other relevant matters?

65. While those are the issues identified in *Data Select Ltd*, it is clear I must consider all relevant matters and in this case a further relevant matter is there was an attempt to settle the matter (ignoring my findings at §40 that the attempt was successful). This indicates permission should not be given for the reasons at §27.

66. Another matter to which the appellants refer is that they have no right of appeal against a decision to publish. They suggest that they did not understand at the time they settled the penalty that they would have no right to appeal a decision about publication. I find, on the contrary, that they had received a great deal of guidance from HMRC (see §§3, 4, & 7). They ought to have understood that once a deliberate inaccuracy penalty was imposed, as the tax exceeded £25,000, publication would follow save in exceptional circumstances. They ought to have understood, and I consider they did understand, that challenging the penalty was the only way of challenging the finding of 'deliberate inaccuracy'.

67. As a matter of fact I find that they settled the matter, not because they believed that they could appeal a publication decision, but because they were content to admit to liability to deliberate inaccuracy as long as their names weren't published.

68. Mr Woolfe also suggested that a failure to allow the appellants to appeal the penalty would be a breach of their human rights and in particular their right to privacy. This is because it was his case that only the Tribunal would consider whether the appellants had actually made the inaccuracy deliberately: the only way to challenge a decision to publish would be by way of judicial review and on judicial review the administrative court would not consider the facts.

69. Mr Pritchard did not agree that judicial review failed to provide an adequate safeguard to the appellants' right to privacy.

70. My view is that it is for the administrative court to determine whether it can provide an adequate safeguard to the appellants' right to privacy. It would be wrong for this Tribunal to take into account in exercising its discretion whether to permit an out of time appeal against a penalty the appellant's case that judicial review is an inadequate remedy to challenge publication. This Tribunal it is no position to take a view on whether the administrative court would provide an adequate remedy on a challenge to a decision which HMRC has not yet made and, when and if made, will be on a matter over which this tribunal has no jurisdiction.

71. Indeed, the appellants' case presupposes that HMRC will make a decision to publish their names and that the appellants' grounds of challenge to that decision will be the same as they would raise in defence to penalty proceedings in this tribunal: in other words, they intend to challenge it on the basis that, they say, the inaccuracy was

not deliberate. Yet it seems to me that their problem is more fundamental than whether judicial review is an adequate remedy. It will simply be too late to challenge whether the penalty was properly imposed by challenging a decision to publish their names as deliberate defaulters. If the appellants want to challenge the validity of the penalty they must get permission to appeal from this Tribunal.

72. Therefore, this ground amounts simply to a reiteration of what I said at §60-61. If I refuse permission to appeal, it will be a very serious matter for Mr Chan as he will be unable to challenge whether the penalty was correctly imposed. That is most definitively a matter which I must consider when exercising my discretion.

Conclusions

73. My starting point is that the time limit should be respected unless there are very good reasons not to: time limits are there for a reason. Parties, including HMRC, are entitled to finality.

74. While I note the delay was of six months, I consider the other matters of much greater importance.

75. The potential for damage to Mr Chan's reputation and the very serious nature of any possible disciplinary proceedings which could be taken against Mr Chan by the SRA if the 'deliberate inaccuracy' penalty stands are the main factors in favour of giving permission to appeal out of time. If I do not grant permission to appeal the appellants will be unable to challenge the penalty. Against that, however, I find that the appellants are the authors of the situation in which they find themselves. Mr Chan failed to communicate their reservation about publication to HMRC: had he done so the appeal would not have been treated as settled and they could have made a timely appeal rather than now seek permission to appeal out of time. The failure by Mr Chan to mention his reservation in his letter of 25 October is very hard to understand or excuse bearing in mind it is clear that the matter of non-publication was critical to him and he knew HMRC had earlier refused to settle on terms which included non-publication and further that they had told him that they would not able to settle on such terms. Another matter which counts against giving permission is that the appellants were prepared to accept they were guilty of deliberate inaccuracy in their return: they only seek to resile on this because of the threat of publication.

76. Overall, and irrespective of the question of the contract settlement, I find in any event that consideration of all the other factors point more strongly to permission to appeal late not being granted. Time limits should ordinarily be adhered to. HMRC's *reasonable* expectation that the matter was settled should be given effect to rather than the appellants' *unreasonable* expectation that the settlement encompassed non-publication. I therefore refuse permission to appeal late.

77. Further, if I am right and the Tribunal has no jurisdiction to go behind the contract, then there would be no point in granting permission to appeal in any event. The matter is settled by contract.

78. The appellants' application is refused.

Application for anonymity

79. At the end of the hearing the appellants indicated that they intended to apply for my decision to be anonymised and they then made that application a few days later. Both parties made submissions on this and agreed that my decision should be on the papers without an oral hearing.

80. The factors which I consider as part of my decision are as follows:

81. Public hearing: The hearing of the application for permission to make a late appeal was heard in public. In *HMRC v Banerjee* [2009] EWHC the Judge noted that there was no absolute bar on anonymising a decision after a public hearing (see §16), although it may make it less likely (see §29 and §38). In this case, the hearing might as well have been in private, in the sense that, so far as I recall, only the parties and their advisers were present and a transcript is not available. Nevertheless, the hearing was in public and it is possible that the papers referred to in the hearing (such as the statement of case and skeletons) could be applied for under the principle of open justice or even be the subject of a successful application under the Freedom of Information Act. So I have to bear in mind that the hearing was in public which may mean anonymisation of the decision to protect the identity of the appellants would be ineffective.

82. Mrs Chan's position: In this application I only consider Mr Chan's position. It was not suggested that Mrs Chan's identity required protection. Both parties rightly assume that if Mr Chan is entitled to anonymisation, then Mrs Chan's name must also be anonymised in order to protect Mr Chan's identity.

83. Akin to libel? One part of the appellants' case was that I should see publication of my decision as akin to libel proceedings: in other words, HMRC allege that the appellants are in effect guilty of dishonesty. Publishing that, as I understand the appellants' point to be, is akin to libel. As a matter of law, it is not akin to libel. Nothing a Tribunal says can in law be libellous. Nor can HMRC be accused of libel when they have done nothing to publish it (and publication under statutory power cannot be libellous). Really this point is just another way of putting Mr Chan's main point which is that his name should not be published unless and until a tribunal has ruled on whether the appellants did deliberately file an inaccurate return.

84. Exceptional circumstance? As a matter of law, the principle of open and public justice would require all cases to be published without protecting anyone's identity, but it is recognised that in some exceptional circumstances justice would not be served if identities were not protected. In *Banerjee* the High Court said determining whether anonymity should be ordered, the court must have regard to protection of confidential material and a person's right to private life (§26). The Tribunal should also has regard to the fact that a person's tax affairs are particularly sensitive, while at the same time that tax matters are of general public interest (§35).

85. In that case the court found no exceptional circumstances to justify a doctor's desire for anonymity because of the risk her patients might find out about her dispute with HMRC over expenses.

86. In *Mr A* [2012] UKFTT 541 (TC), a well-known broadcaster was refused anonymity in his tax appeal concerning an alleged tax avoidance scheme. Mr A was concerned that being alleged to be involved in tax avoidance was very likely to bring about adverse publicity which might affect his reputation and future career. He was refused anonymity. Indeed, so far from amounting to an exceptional circumstance to justify anonymity, the judge said that hearing Mr A's appeal in private would be inimical to justice as giving "rise to the suspicion…that riches or fame can buy anonymity".

87. The appellants' case is that, unlike the *Banerjee* case, the exceptional circumstance is Mr Chan's reputation. From having heard seen and heard the evidence at the hearing, I take this as a reference to the fact that his professional qualification might be affected if the SRA knew about the penalty. It may also include a desire for clients and potential clients to be kept in ignorance about the matter.

88. My conclusion is that this case, similarly to that in *Mr A*, concerns a taxpayer in an exceptional position, but that exceptional position, so far from justifying anonymity, positively favours full publication. Mr Chan wishes to hide alleged misdemeanours from the SRA, his clients and his potential clients. The Tribunal is here to administer justice: it is inimical to justice for the Tribunal to help Mr Chan keep from his professional body and his clients matters which even he thinks the SRA would consider relevant to his practice as a solicitor.

89. <u>Interlocutory Hearing:</u> Mr Chan suggests that judges should be more willing to hear in private, and/or anonymise decisions following, interlocutory applications. He points to the decision of the High Court in *R (oao Chaudhari) v Royal Pharmaceutical Society of Great Britain* [2008] EWHC 3190 (Admin) in which the judge appeared to indicate (at §10) that the need for open justice did not necessarily apply to preliminary hearings. However, that is only one possible reading of the case. I read the case as being one of judicial review where the finding was that the decision (to anonymise) which was under review was one which was not Wednesbury unreasonable particularly where the chairman who made the decision reasonably considered the publication of the preliminary hearing might prejudice the substantive hearing. However, I do think it is relevant that in a preliminary hearing that there are (normally) only allegations and no findings of fact. That might justify anonymity of an interlocutory matter where anonymisation of the final hearing may not be justified.

90. I note that Mr Chan also relied on *Mr A* for the proposition judges should be more ready to anonymise decisions on interlocutory matters. He believes that there was a decision in that case that the written decision on the application for anonymisation would be anonymised while the final decision in the appeal would not be anonymised. He is mistaken. The only decision reported at [2012] UKFTT 541 (TC) was that substantive decision would not be anonymised: the preliminary

decision itself was merely anonymised pending the possibility of a successful appeal against the decision on anonymisation (see §2). As there was no such appeal, there was no decision that the preliminary decision should be anonymised and it is merely oversight that the decision has not been altered retrospectively to refer to "Mr A" by his name.

91. I recognise that the general public may be less legalistic than a tribunal or disciplinary body in making make the legal distinction between what is proved (or accepted) and what is merely alleged. For this reason, it might be right to keep decisions in *preliminary* hearings in what is in effect an alleged dishonesty case anonymised where there is risk to reputation.

92. However, even if that is right in principle, which I do not need to decide, I would not apply it here: my decision was not in effect a "preliminary" decision. I have refused permission to appeal late so, in so far as the FTT is concerned, I have finally disposed of the appeal. I might have granted anonymity on the decision on the application for permission to appeal late if my conclusion had been to grant permission. (And that anonymity, even if granted, would not have extended to the final decision.)

93. In conclusion, I have considered all the above factors and in my view:

- The reference to libel is unfounded for the reasons given;
- The fact the hearing was in public points (albeit far from decisively) towards no anonymity;
- It may be appropriate, in order to prevent mere allegations being treated as fact by the public at large, for anonymity to be more readily granted in interlocutory and preliminary matters. However, because I refused permission to appeal, my decision must be compared to a final decision rather than an interim decision.
- While a solicitor's good reputation is important to the solicitor, that that reputation is deserved is an important matter to the public and his professional body. The public has an interest in knowing if a solicitor has been found liable to a deliberate inaccuracy penalty and his professional body has the right to consider whether disciplinary proceedings are appropriate. In these circumstances, it would be inimical to justice for the Tribunal to protect the solicitor's identity and for that reason, a final decision that has the effect (as mine does) that the solicitor is liable to a deliberate inaccuracy penalty *should* be published without anonymity.

94. Nevertheless, I recognise that my decision on anonymity and/or my decision on the application for permission could be appealed, and in that sense they are not final. As the decision on anonymity is based on the *refusal* of permission to appeal, I will not prejudge any appeal and will anonymise this decision until the appeal process on both aspects of my decision is exhausted.

95. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE

TRIBUNAL JUDGE

RELEASE DATE: as release date for anonymised decision (13 March 2014)