TC04078

Appeal number: TC/2014/00723

VAT – application for an extension of time to bring an appeal – nature of decisions under appeal – whether assessments – time limit for appealing – balancing exercise – application refused – appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

FORGE ALLIANCE **Appellant**
(a partnership)

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Belfast on 6 May 2014 and 8 August 2014

Mr David Haslett, representative appeared for the Appellant

Ms Sharon Spence of HM Revenue & Customs appeared for the Respondents

REASONS

Background

1. The Appellant is a partnership which was in business in Northern Ireland buying and selling soft drinks on a wholesale basis. The partners were Mr Ghulam Mustafa Lateef and Mr Siddique Zafar Imam.

2. On 12 August 2004, following an enquiry into the Appellant's VAT returns, HM Customs & Excise as it then was sent three decision letters to the Appellant in respect of VAT accounting periods 09/03, 12/03 and 03/04 ("the Decision Letters"). The Decision Letters referred to the returns and stated as follows:

> "*As you have been notified, the Commissioners consider that the amounts shown should properly be amended as follows: …*"

3. The letters then set out various amendments to boxes on the Appellant's returns for the relevant periods. Those amendments were made principally to reflect increases to the output tax shown as due by the Appellant. In particular the Respondents considered that there was insufficient evidence that certain sales which had been zero rated had been dispatched from the UK.

4. I shall set out below the dealings between the Appellant and its advisers on the one hand and HMRC as I shall refer to them for convenience on the other hand. Those dealings cover the period from 12 August 2004 when the Decision Letters were issued to 17 January 2014 when a notice of appeal was lodged with the tribunal.

5. In its notice of appeal the Appellant identified the latest time for appealing the decisions as 11 September 2004, that is 30 days after the Decision Letters and gave reasons as to why the appeal was late. The Respondents opposed any extension of time to make the appeal and applied to strike out the appeal on the basis that it was out of time.

6. The application to make a late appeal was listed to be heard on 6 May 2014. At the outset of his submissions Mr Haslett on behalf of the Appellant made a submission that the decisions were not in fact assessments and there was no time limit to appeal against the decisions.

7. For the purposes of this application it is therefore necessary for me to deal with the following issues:

(1) What is the nature of the decisions which the Appellant seeks to appeal?

(2) What is the time limit for appealing those decisions?

(3) In so far as the Appellant is out of time, should I extend the time for the Appellant to give notice of appeal?

8. I shall deal with the law and facts in relation to those issues separately.

What is the Nature of the Decisions?

9. The Appellant's VAT return for period 09/03 gave rise to a repayment claim of £26,416. Following submission of that return a VAT audit visit took place on 20 January 2004. Further visits took place culminating in a visit on 11 August 2004. During that period the Appellant had made further returns for periods 12/03 and 03/04. There was also a return for period 06/04 which is not the subject of this appeal but which is relevant as appears below.

10. Following the enquiry the Appellant's returns were adjusted by HMRC in the Decision Letters as follows:

	09/03	**12/03**	**03/04**	**Total**
	£	**£**	**£**	**£**
Net Repayment Originally Claimed	(26,416)	(54,533)	(36,150)	(117,099)
Adjustments Made	97,182	32,840	42,252	172,275
Adjusted Tax Payable / (Repayable)	70,766	(21,693)	6,102	55,175

11. The total repayments claimed by the Appellant in its returns amounted to £117,099. Following the adjustments made by HMRC there was a total sum payable of £55,175. Some time later there were further small adjustments by HMRC which I refer to below.

12. The Decision Letters were in exactly the same format and contained amendments to boxes on the returns which for period 09/03 were as follows:

"*Box (1) increased to £155459.23*

Box(3) increased to £216333.74

Box (4) decreased to £145568.46

Box (5) increased to £70,765.28

This arises for the following reason(s): Box 1. Satisfactory evidence for despatch of goods not produced. Box 4. Duplication of input tax."

13. On a VAT return, Box 1 is the VAT due on sales (output tax), Box 3 is the total VAT due including VAT due on acquisitions, Box 4 is the VAT reclaimed on purchases and Box 5 is the net VAT to be paid or repaid by HMRC.

14. I was told that the amendments to Box 4 related to small input tax adjustments in periods 09/03 and 12/03. In 09/03 the input tax claim was reduced by £8,522 to reflect a duplication of input tax reclaimed. In 12/03 the input tax was actually increased by £3,978 to reflect input tax which had not been claimed. Apart from these adjustments, the amendments to all the returns increased the amount of output tax due on sales where there was no proof of removal of the goods from the UK. I should note that the Appellant contends, as I understand it, that at least some of the goods in question were never in the UK but remained in the Republic of Ireland. As such it is the Appellant's case that no output tax was due on those supplies. As for the balance the Appellant contends that it has sufficient evidence of dispatch.

15. The parties' submissions as to the nature of the decisions under appeal were made without reference to any authorities.

16. Mr Haslett submitted that the Decision Letters did not constitute assessments and that therefore the tribunal did not have jurisdiction. There was no right of appeal against a decision amending a VAT return. That is a curious submission, because of course it is the Appellant that is seeking to appeal the Decision Letters to the tribunal.

17. Mr Haslett further submitted that the reason HMRC had chosen to amend the return rather than to make assessments was to deny the Appellant a right of appeal. He invited me to strike out the Respondents' case pursuant to Tribunal Rule 8. I took that to be an application to debar the Respondents from taking further part in the proceedings.

18. The relief sought by Mr Haslett exposes the difficulty in his argument. If he is right that the Tribunal has no jurisdiction then rather than debarring the Respondents from defending the appeal I should strike out the appeal itself.

19. Mr Haslett submitted that it was not the normal practice of HMRC to amend a VAT return. Any adjustment to the VAT account must be done through an assessment notified to the trader and against which he would have a right of appeal.

20. Ms Spence for HMRC submitted that the returns for 09/03, 12/03 and 03/03 had not yet been processed by HMRC at the date of the Decision Letters. They were all repayment returns which HMRC was seeking to verify in the course of its enquiries. The practice of HMRC where a return has not been processed and the repayment claimed appears excessive is to amend the return prior to processing.

21. Ms Spence submitted that the decision to amend the returns in question was a decision to refuse repayment of a VAT credit pursuant to section 25(3) Value Added Tax Act 1994 ("VATA 1994"). In so far as the decisions gave rise to VAT falling due to HMRC in periods 09/03 and 03/04 the letters amounted to an assessment under section 73(1) VATA 1994.

22. Section 25 VATA 1994 provides for a taxable person to account for output tax (section 25(1)) and claim credit for input tax (section 25(2)) by reference to accounting periods. Section 25(3) then provides as follows:

> " *(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a 'VAT credit'*."

23. Section 25(6) then provides:

> " *(6) A deduction under subsection (2) above and payment of a VAT credit shall not be made or paid except on a claim made in such manner and at such time as may be determined by or under regulations;…*"

24. Regulation 29 VAT Regulations 1995 provides that a claim to deduct input tax from output tax under section 25(2) must be made on a VAT return. There are no regulations as far as I am aware that provide for the manner in which a VAT credit is to be paid, although there are provisions in section 79 for repayment supplement to be paid in certain circumstances where a VAT credit is not repaid within a certain period.

25. In relation to the correction of returns I should also note Regulations 34 and 35 VAT Regulations 1995. Regulation 34 sets out the circumstances in which a trader can correct a return it has previously submitted. Regulation 35 provides:

> "*Where a taxable person has made an error –*
>
> *a) in accounting for VAT, or*
>
> *b) in any return made by him,*
>
> *then, unless he corrects that error in accordance with regulation 34, he shall correct it in such manner and within such time as the Commissioners may require.*"

26. Under Regulation 35 it is still the trader who must make the correction, albeit acting on directions from HMRC.

27. In so far as the returns showed an excess of input tax over output tax they gave rise to a VAT credit. It is clear from section 25(3) that HMRC must pay the VAT credit to the taxable person. However neither VATA 1994 nor regulations made under that Act specify a time for payment. HMRC is plainly entitled to make reasonable enquiries into whether a return is correct. That will include enquiries as to whether input tax is properly claimed and output tax is properly accounted for.

28. It is important to note that the substantive issue on this appeal does not relate to the denial of an input tax credit. The reason HMRC have refused to make repayment

of the VAT credit claimed by the Appellant on its returns is because they consider the output tax due has been understated.

29. Denial of an input tax credit does not itself require an assessment. Claims to a credit must be made in a return, and the return can be amended to reflect a denial of such a claim so as to give the true VAT credit. That is a decision which is appealable by virtue of section 83(1)(c) VATA 1995.

30. Denial of an input tax credit may mean that the output tax exceeds the input tax in which case the trader must account for the excess pursuant to section 25(2) and (3).

31. The position is different where HMRC assert that the trader has failed to account for output tax. Before I consider the position in those circumstances it is helpful to consider what amounts to an assessment and when an assessment is required.

32. There is a large body of case law as to what constitutes an assessment for the purposes of the VATA 1994. In *Courts plc v Customs & Excise Commissioners [2004] EWCA Civ 1527* Jonathan Parker LJ (with whom Hooper and Pill LLJ agreed) stated as follows at [107]:

> " *In my judgment, given that the making of an assessment is an internal matter for the Commissioners, in respect of which there is no prescribed statutory procedure, it is simply not possible to arrive at a formula which will determine in every case whether or not an assessment has been made. The Commissioners may, for example, decide to treat certain cases as special or exceptional cases, to which their normal internal processes should not apply… In my judgment the position in this respect is correctly reflected in the internal guidance issued in October 1997 (quoted in paragraph 13 above).*"

33. The internal guidance which was endorsed by the Court of Appeal included the following:

> "*An assessment is 'made' when you have finished calculating the amount upon which the assessment is to be based and a final decision to assess that amount has been taken. This will be when the amount has been quantified, documented, checked, signed and dated. As a general rule then, the 'made' date is when the VAT641 computer input document has been completed…*
>
> *The officer has completed his action calculating the assessed amount and made a final decision to assess that amount. In such cases the assessment was made at the time the action was completed with respect to the schedule and not the VAT641.*"

34. In *BUPA Purchasing Limited v Customs & Excise Commissioners (No 2) [2007] EWCA Civ 542* Arden LJ giving judgment of the Court of Appeal concluded that as a matter of interpretation, it is an essential part of an assessment for the purposes of section 73(1) that it determines the net amount due by way of VAT. As to what comprises an assessment she stated at [37] and [38]:

"*37. There is no statutory definition of "assessment". It is in general a legal act on the part of the Commissioners constituting their determination of the amount of VAT, interest, penalty or surcharge that is due (see generally, Courts plc v Customs & Excise Commissioners plc [2004] STC 27).*

38. … Thus there cannot be an appeal against an assessment under s 73(1) unless it assesses that there is a net amount of VAT due. If the taxpayer contends that he is entitled to a repayment of VAT, he will have to appeal on some other ground, such as against the amount of input tax allowed, and VATA makes express provision for this in s 83."

35. Computation of output tax and input tax in an assessment are not separate assessments for the purposes of section 73(1). There is one assessment of the net amount of tax due. Arden LJ also accepted that HMRC have an implicit power to amend the input tax and output tax used to calculate the net tax due. At [58] she stated:

"*It is true that there is no express power for the Commissioners to amend the input and output tax elements of the computation where no alteration is made to the overall amount of VAT due. However, such a power, and likewise a power to take into account by deduction offsets of overclaimed input tax or underdeclared output tax (as the case may be), must in my judgment follow from and be implicit in the best judgment requirement. Those powers are reasonably necessary for carrying out the assessment process.*"

36. More recently, the Upper Tribunal in *Benridge Care Homes Ltd v Revenue & Customs Commissioners [2012] UKUT 132 (TCC)* considered what amounts to an assessment and importantly for present purposes whether an assessment is required. The means of assessment in that case bear similarities to the present case. The trader made returns showing net tax due to the trader. Following an inspection HMRC wrote to the trader reducing the repayments to nil because the returns did not correctly record the output tax due. It did so by reducing the input tax figure to nil. The trader contended that HMRC were not entitled to do so. If HMRC considered that the output tax was understated in a return it was contended that HMRC had to either make an assessment under section 73(1) or require the trader to correct it pursuant to regulation 35 VAT Regulations 1995.

37. In Benridge the trader contended that the decision letters amounted to assessments and that there was no basis for HMRC to reduce the input tax figure. HMRC contended that the decision letters were not assessments, but were decisions refusing claims to input tax.

38. The Upper Tribunal referred to the process of amending a return by letter at [21] as follows:

"*In this respect HMRC do not have a general power to revise or adjust VAT returns. The most that they can do is to require the taxpayer to do so under regulation 35.*"

39. The Upper Tribunal went on to consider whether HMRC could reduce the input tax claimed otherwise than by way of assessment. The facts of the case were unusual in that it was not concerned with a decision of HMRC denying the right to deduct input tax. Nor was there any issue as to the amount of output tax chargeable. Rather the issue was as to the way in which HMRC had calculated that no repayment was due by adjusting the input tax figure instead of the output tax figure. In those circumstances the Upper Tribunal held that the decision letters amounted to a decision that no repayment was due, which was appealable under section 83(1)(b) VATA 1994. It was not necessary for there to be an assessment. At [35] it stated:

> "*That is a decision which is "with respect to … the VAT chargeable on [supplies] of services" within section 83(1)(b). An appeal lies against that decision to the Tribunal. It is not an assessment of a net amount due under section 73, but a decision about the VAT chargeable on supplies. In some cases such a decision could form part of the reasoning for an assessment, but the headings in section 83 are not mutually exclusive.*"

40. The Upper Tribunal has therefore recognised that a decision amending the input tax claimed in a return in order to achieve a figure for the net tax payable, in that case nil, was within the power of HMRC. It was susceptible to appeal under section 83(1)(b).

41. In Benridge the Upper Tribunal went on to consider whether the decision letters were assessments for the purposes of section 73(1). It found that they were not because no net amount of VAT was being sought from the trader. At [38] and [39] it stated as follows:

> "*38. In the present case the letters did not purport to be assessments and Mr Chapman did not seek to establish the Respondents' case on the basis that they were. We do not think that they were assessments: they reflect a conclusion that no assessment is required or should be made because no net amount of VAT is sought. Even allowing for Arden LJ's comments in BUPA, as an administrative act we consider that the Commissioners, as the assessing body, must believe that they are making an assessment. We do not think that they can assess, so as to speak, "by accident". In this respect we think that the First-tier Tribunal was in error if and to the extent that it arrived at its decision on the basis that the letters constituted assessments.*
>
> *39. There is no need, however, to assess where no amount of tax is due. The statutory mechanism does not need such an assessment to be made. It would be particularly incongruous if there were to be implied a power for the Commissioners to adjust input tax and output tax figures in a case in which an assessment has been made but for there to be no such power to do so in arriving at the conclusion that no amount of tax is due so that no assessment need be made.*"

42. The reasoning of the Upper Tribunal applies directly to the facts of this case in relation to period 12/03. The effect of the amendment for that period is to reduce the amount repayable but not giving rise to any tax due to HMRC. The decision of the Upper Tribunal is binding on me in this appeal. I am satisfied that in the present case HMRC was entitled to amend that return by way of a decision letter and the decision was appealable under section 83(1)(b).

43. In relation to periods 09/03 and 03/04 the effect of the amendments was to identify amounts due from the Appellant to HMRC. The Upper Tribunal decision is not authority for the proposition that HMRC are entitled to make amendments by way of letter where the result is to charge an amount of tax on a trader. However Ms Spence did not suggest that HMRC could effectively claim an amount due from a trader without making an assessment.

44. The question which then arises is whether the Decision Letters in relation to periods 09/03 and 03/04 were assessments. In light of the authorities referred to above I am completely satisfied that those Decision Letters were assessments. They clearly determined an amount of VAT which was due from the Appellant. The officer writing the letters had calculated the amount of VAT she considered to be due from the Appellant and had clearly taken a decision to assess that amount. Objectively, that was the whole purpose of the Decision Letters.

45. On the basis that the Decision Letters were assessments, the Appellant was entitled to appeal under section 83(1)(p) VATA 1994.

46. I am satisfied therefore that the Decision Letters give rise to appealable decisions.

What is the Time Limit for Appealing?

47. Mr Haslett accepted that the time limit for appealing an assessment was 30 days from the date of the assessment. In relation to the assessments for periods 09/03 and 03/04 therefore the time limit for appealing was 11 September 2004.

48. The time limit in 2004 derived from the VAT Tribunal Rules 1986. Rule 4(1) provided as follows:

> "*… a notice of appeal shall be served at the appropriate tribunal centre before the expiration of 30 days after the date of the document containing the disputed decision of the Commissioners.*"

49. Mr Haslett submitted that because the Decision Letters did not constitute assessments there was no time limit for the bringing of an appeal. That is plainly wrong. Rule 4(1) is not confined to assessments. The decision in relation to period 12/03 was contained in a letter dated 12 August 2004 and the time limit for appealing that decision also expired on 11 September 2004.

Extension of Time for Appealing

50. The correct approach to applications to extend time was considered by the Upper Tribunal in *Data Select Ltd v HMRC [2012] UKUT 187 (TCC),* where Morgan J said at [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.*"

51. Morgan J also said at [37] that the Tribunal should have regard to the overriding objective of dealing with cases fairly and justly and the factors set out in the Civil Procedure Rules at 3.9. In *Leeds City Council v HMRC [2014] UKUT 0350 (TCC)* the Upper Tribunal recently endorsed the approach in Data Select Ltd. It also held that the amendments to CPR 3.9 reflecting a stricter approach to compliance described by the Court of Appeal in *Mitchell v Associated Newspapers Ltd [2013] EWCA Civ 1537* have not been incorporated into the rules of the F-tT (See also the decision of the Chamber President to the same effect in *Kumon Educational UK Co Ltd v HMRC [2014] UKFTT 772 (TC)*).

52. In assessing the consequences of an extension of time or a refusal to extend time I should also have regard to the merits of the appeal – See *O'Flaherty v HMRC [2013] UKUT 01619 TCC* per Judge Berner at [34] and [63].

53. Before considering these factors I must make relevant findings of fact as to the reasons the Appellant is out of time for appealing. I make the following findings from the documentary evidence before me and taking into account the parties' submissions. I should say that the documentary evidence before me was not complete, and the likely explanation for that is the passage of time since August 2004. I have therefore had to draw inferences in relation to certain aspects of the evidence.

54. As indentified above, the decision to amend the returns and issue the Decision Letters was made following various visits to the Appellant. During the course of those visits evidence and information was sought and the returns, records and explanations of the Appellant were considered. Information and records were also sought in correspondence.

55. At a visit on 11 August 2004 the visiting officer, Heather Arnold, records the following which was not disputed by the Appellant:

> "*I explained [Mr Lateef] would be receiving letters reducing the repayment returns. S8-17C letters issued. I told Mr Lateef that if evidence of despatch was obtained or he was unhappy with my decision he could ask for the assessment to*

be reviewed. I explained that someone I (sic) would review the assessment if a review was requested and if he was still unhappy he could go to a VAT tribunal. "

56. In late 2004 and early 2005 there was another enquiry into the Appellant's returns for periods 06/04 and 09/04. That enquiry resulted in an assessment for those periods. The assessment notes included references to the right of appeal. Whilst the assessment was dated 2 February 2005 details of the intended assessment were provided to the Appellant prior to that date. On 19 January 2005 the Appellant's accountants, messrs Higgins Graham, wrote appealing that assessment. On 1 February 2005 HMRC wrote to the Appellant acknowledging the letter from Higgins Graham and treating it as a request for reconsideration. HMRC stated in that letter:

"*If the assessment is upheld a further letter will be sent giving a date from which you will have 21 days in which to appeal to an independent VAT and Duties Tribunal.*"

57. It seems likely that some of the correspondence at this time, whilst mainly referring to a review of the February assessment, also referred to a review of the Decision Letters. For example a letter dated 25 April 2005 from Higgins Graham asks Mr Stockman to contact them "*to review the information we have in relation to the re assessed sales*". Mr Haslett suggested that this related to the Decision Letters and I consider that he is probably right.

58. A meeting followed between the review officer, Mr Stockman, and Higgins Graham. There was also further correspondence in relation to the February assessment. On 19 August 2005 Mr Stockman wrote to Higgins Graham upholding that assessment in full. He also stated as follows:

"*You may of course request a fresh local reconsideration at any stage in the future, provided it is based on new or previously unseen material.*

In the meantime, your client has 21 days from the date on this letter in which to lodge an appeal with the independent VAT and Duties Tribunal."

59. Mr Stockman's letter crossed in the post with a letter from Higgins Graham dated 18 August 2005 which stated that due to information being mislaid they had been unable to complete their own review of the matter and suggesting a further meeting. By 24 August 2005 the Appellant had ceased trading.

60. On 7 November 2005 Higgins Graham sent a letter to HMRC setting out details of sales in relation to VAT periods 09/03, 12/03 and 03/04. These periods related to the Decision Letters rather than the February assessment.

61. Mr Stockman, although it appears he was reviewing an assessment for different periods, requested documentation in relation to the details provided by Higgins Graham. I infer therefore that he was also at this stage reviewing issues arising out of the Decision Letters.

62. There is no record of any response by Mr Stockman in relation issues arising from the Decision Letters. However some considerable time later, on 4 October 2006, Mr Stockman issued a "notice of assessment" which identified various amounts due from HMRC to the Appellant. The amounts were £2,900 for period 09/03, £1,311 for period 12/03 and £2,268 for period 03/04. These are the small adjustments I referred to above and they relate to the Decision Letters and in particular to supplies made to a customer called Hughes. Mr Stockman accepted that those supplies had been properly zero rated. The notes to the assessment again set out rights of appeal.

63. At or about the same time HMRC issued a statement of account showing a sum due from the Appellant of £96,142.60.

64. On 11 October 2006 Higgins Graham wrote to Mr Stockman referring to a letter from Mr Stockman dated 27 September 2006. No copy of Mr Stockman's letter is available either from HMRC or from the Appellant. I infer that this is probably because of the passage of time since 2006. The letter from Mr Stockman was likely to have been his conclusion of the review and an explanation of the adjustments he was intending to make for periods 09/03, 12/03 and 03/04. In any event Higgins Graham asked for a review of that decision in relation to one customer, ASAS Enterprises Limited. Mr Stockman indicated that he was happy to meet with Higgins Graham to discuss any matters arising from his decision.

65. There appears to have been further correspondence and on 28 November 2006 Higgins Graham told Mr Stockman that the Appellant believed HMRC retained a lever arch file of documents previously provided by the Appellants. Mr Stockman checked his records and identified that he had received 3 case files in December 2005 which had been returned to Higgins Graham.

66. There is no record of any correspondence between 11 December 2006 and 7 October 2008 when HMRC wrote to the Appellant in connection with its continuing registration for VAT. HMRC intended to de-register the Appellant with effect from 17 October 2008. On 14 November 2008 the Appellant lodged the answers to an HMRC questionnaire in relation to business assets and stock at the date of deregistration. There was no correspondence at this time in relation to the Decision Letters or any liability of the Appellant.

67. On 1 December 2009 Mr Ogunnubi of HMRC demanded payment of the sum of £103,797 said to be due from the Appellant. I understand that Mr Ogunnubi was in an HMRC department concerned with debt recovery. There was a further demand on 18 January 2010. It appears that Mr Haslett became involved at this stage on behalf of the Appellant. On 8 December 2009 Mr Haslett had written to HMRC requesting a breakdown of the debt and justification for the claims. On 1 February 2010 a breakdown was sent.

68. There was no further contact until HMRC made yet another demand for payment on 16 May 2011. Mr Haslett responded on 25 July 2011. Mr Haslett states in that letter, although there is no supporting documentation, that a Ms Martin had agreed on 27 January 2010 to suspend all action. Further, that requests for the return

of documents had been made to Mr Ogunnubi and Ms Martin in February 2010 but without response.

69. There is no record of any response from HMRC, although Ms Spence told me that there was no record that HMRC received any letters from Mr Haslett. I have no reason to think that Mr Haslett did not send those letters. Indeed there was a reply by HMRC to Mr Haslett's letter dated 8 December 2010. I find that Mr Haslett did send those letters.

70. Mr Haslett told me in his closing submissions that in 2011 Mr Lateef was the subject of bankruptcy proceedings by HMRC. I had no evidence in relation to any such proceedings and I make no findings of fact in relation thereto.

71. On 19 August 2013 Mr Haslett wrote, apparently unprompted, stating it had been some time since he had last written, without response from HMRC, and seeking confirmation that HMRC was no longer interested in the Appellant and that "*the assessed amount … is withdrawn*". There was no response and Mr Haslett repeated his request for confirmation on 3 September 2013 and 17 September 2013. In the latter request Mr Haslett stated "*The assessment in question was challenged but again no action to conclude the affair was ever taken*".

72. There was then further correspondence between Mr Haslett and HMRC. There was also direct communication between Mr Lateef and Mr Ogunnubi both in relation to the VAT position and the file of documents said to be missing. The notice of appeal was lodged with the Tribunal on 17 January 2014. It gave the following reasons for appealing late:

> (1) Mr Lateef was for many years under the impression that the enquiry had not been finalised;
>
> (2) The Appellant was not advised of the right to appeal or the time limits for appealing;
>
> (3) There was no formal notice given other than the Decision Letters.

73. On 17 February 2014 Mr Ogunnubi wrote to Mr Haslett stating that the case had been forwarded to HMRC's review team. It is clear that this could not be a statutory review pursuant to section 83A VATA 1994 because there was already an appeal to the tribunal (see section 83C(4) VATA 1994).

Decision on Extension of Time

74. Against that factual background I now turn to the question of whether I should extend the time for appealing.

75. The purpose of the time limit is plainly to achieve finality. It is not desirable that decisions and assessments of HMRC should be subject to challenge indefinitely. There is a public interest in the finality of such decisions and assessments. The time limit chosen by Parliament is 30 days, subject to the possibility of a tribunal in an appropriate case extending the time limit. The time limit no doubt reflects the fact that

decisions generally follow a period of enquiry and discussion with the trader as in this case.

76. The notice of appeal in this case was significantly out of time. It ought to have been served on or before 11 September 2004. It was not served until 17 January 2014. It was almost 10 years out of time.

77. I must ask whether there is any good reason for the notice of appeal being lodged so far out of time.

78. I take into account that the Decision Letters did not identify the Appellant's appeal rights or the time within which an appeal was required to be lodged with the VAT and Duties Tribunal. It is unfortunate that the Decision Letters did not identify the right of appeal or the time limits. They did however identify the possibility of reconsideration. Further, Mr Lateef was personally told by the officer about the right of appeal at the visit on 11 August 2004.

79. Mr Haslett submitted that HMRC's intention in sending out letters rather than formal assessments and in failing to identify the appeal procedure was to frustrate the Appellant's ability to appeal. He submitted that there had been an extreme abuse of power. There is no cogent evidence to support those submissions and I reject them.

80. It is not clear whether the Appellant had any accountant or other professional acting in 2004. By 2005 however he was professionally represented by Higgins Graham. They were plainly aware of the Decision Letters and there is no reason to suppose that they were not aware of both the right of appeal and the time limit for appealing.

81. It may have been that in 2005 there was a more relaxed attitude to extensions of time in the VAT Tribunal. Indeed Mr Stockman wrote on 19 August 2005 that a further local reconsideration could be carried out at any time based on new or previously unseen material. Mr Haslett did not suggest that the present appeal to the tribunal is based on new or previously unseen material. In any event, by November 2005 Higgins Graham were acting in relation to the Decision Letters and challenging the decisions by way of review. The evidence before me shed no light on what was happening during 2006. However by November 2006 small adjustments had been made and there had been inconclusive discussions as to the whereabouts of a file of documents. By that time Mr Stockman's review was clearly concluded. I do not accept that Mr Lateef was under the impression that the enquiry had not been finalised. There was further reference to the appeal procedure in the notes to Mr Stockman's assessment.

82. I have no explanation whatsoever for the period of time between December 2006 and December 2009. There is no explanation as to whether or when Higgins Graham ceased to act or what advice they had given in relation to the Decision Letters. The evidence I do have suggests that the Appellant simply ignored his liability to VAT arising from the Decision Letters until HMRC sought to enforce the debt in December 2009. Even if HMRC had delayed enforcement during this period,

and there is no evidence as to what steps if any they were taking, the Appellant should still have confirmed the position in relation to the enquiry (if he had thought it still ongoing) and if necessary appealed the Decision Letters.

83. Mr Haslett suggested in closing submissions that during this period Mr Lateef had set up a business called New Forge Enterprises which had been accused by HMRC of involvement in missing trader fraud. Assessments were made by HMRC but eventually withdrawn. The position of the Appellant in relation to the Decision Letters took a back seat during this period.

84. I had no evidence in relation to New Forge Enterprises, but in any event I do not consider that would provide a good reason for failing to act in relation to the Decision Letters addressed to the Appellant.

85. I am prepared to accept that for the period after February 2010 Mr Haslett had been told that all action on the debt would be suspended and HMRC had failed to respond to Mr Haslett's request for documents. However that should not have prevented the Appellant from seeking to clarify the position in relation to the Decision Letters and if necessary lodging a notice of appeal.

86. In my view there was no good reason for the Appellant not lodging a notice of appeal, either in the period from December 2006 to December 2009 or in the period from February 2010 to August 2013. Thereafter I am prepared to accept that active steps were being taken by the Appellant in relation to the Decision Letters. However that does not excuse the previous inactivity, especially between 2006 and 2009.

87. Mr Haslett submitted that Mr Lateef believed there was no right of appeal. Mr Lateef did not give evidence. Even if he did believe there was no right of appeal I do not accept that he could reasonably have held such a belief in light of the facts I have found. He was professionally advised and the Decision Letters were the subject of a reconsideration. There were various references to rights of appeal during that process, including the small adjustments made in October 2006. The reasonable inference from those references is that if the Appellant disagreed with the small adjustments and felt they should have been larger then he had a right of appeal.

88. I am satisfied that HMRC would suffer prejudice if the time for appealing is extended. The accounting periods in issue are now more than 10 years old. Memories will not be reliable and in the intervening years at least some correspondence and possibly other documentation has been lost.

89. I must also take into account the merits of the appeal and prejudice to the Appellant if time is not extended. At one stage in submissions Mr Haslett suggested that the missing file contained documentation which was necessary for the Appellant to make good its appeal. He later withdrew that submission and said that he was not in a position to help me as to the substantive merits of the Appellant's case. Notwithstanding Mr Haslett's approach I am prepared to accept that the Appellant would have at least an arguable case on the appeal. It will therefore suffer prejudice if the time for appealing is not extended. The partners will have a liability to tax for the

three periods of approximately £55,000 and will have been denied repayments of tax of approximately £117,000. I accept that is a significant prejudice.

90. I must weigh all these circumstances and factors in the balance. In my view the balance is overwhelmingly in favour of not permitting a late appeal. I therefore refuse the Appellant's application to extend time. In the circumstances I must strike out the appeal. For completeness I should add that the Appellant made out no case for HMRC to be barred from taking further part in these proceedings.

91. By way of postscript I should record that at the hearing on 8 August 2014 Ms Spence for HMRC told me that HMRC had written off the Appellant's debt of £103,000 in January 2012. They had not sought to enforce it since then and it was unlikely they would do so in future. I have not taken those matters into account in reaching this decision.

92. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 16 October 2014