[2017] UKFTT 731 (TC)

TC06145

Appeal number: TC/2016/05063

PROCEDURE – application to make a late appeal – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR KOYSAR KHAN **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN

Sitting in public at the Royal Courts of Justice, the Strand, London on 6 June 2017

Mr Razaq-Sidiq for the Appellant

Ms Esther Hickey, an officer of HM Revenue and Customs, for the Respondents ("HMRC")

DECISION

1. The hearing was to consider whether the appellant made an appeal against a number of determinations and assessments to income tax, VAT and penalties and surcharges within the applicable statutory time limits and, if not, whether the appellant may be permitted to bring an appeal outside those time limits.

2. The appellant submitted a notice of appeal to the tribunal on 23 September 2016. In the notice it was stated that the total amount of tax, penalties and surcharges appealed against was £56,167.67. The appellant did not send the tribunal the particular determinations and assessments to which the specified amount related. In response to the tribunal's request for clarification as to the precise decisions the appellant wished to appeal against, on 5 December 2016, the appellant submitted details of a statutory demand from HMRC for payment of £56,167.67 and a "statement of liabilities" that HMRC prepared as at 19 February 2016.

3. Following further requests for clarification from the tribunal, in a letter to the tribunal of 14 March 2017, HMRC set out details of their various decisions against which the appellant had a right of appeal. In summary, these comprised the following:

(1) For direct tax purposes:

(a) Assessments to income tax for the tax years 2007/08 to 2010/11 for a total of £18,562.24 in each case issued on 10 September 2012 (under s 29 of the Taxes Management Act 1970 ("**TMA**") and s 9A and s 28A TMA).

(b) A penalty for the tax year 2007/08 of £588 issued on 29 August 2012 (under s 95(1)(a) TMA).

(c) Penalties for the tax years 2008/09 to 2010/11 of a total of £3,306 issued on 28 August 2012 (under schedule 24 of the Finance Act 2007).

(d) Late payment penalties for the tax year 2010/11 of £681 issued on 20 November 2012, 23 April 2013 and 22 October 2013 (under schedule 56 of the Finance Act 2009).

(e) Surcharges for late payment of tax due for the tax years 2007/08 to 2009/10 of a total of £1,400.48 issued on 29 November 2012 and 10 May 2013 (under s 59C TMA).

(2) For VAT purposes:

(a) Assessments for VAT due in respect of VAT accounting periods from 08/09 to 08/11 of £18,234 issued on 15 February 2012.

(b) VAT default surcharges of £573.65 in respect of the VAT accounting periods ending 08/08, 05/09, 08/09, 08/10 and 02/12.

I refer to all of the above together as "assessments".

4. In outline, the direct tax assessments were for income tax on additional income from the appellant carrying on a business in respect of the Archer public house and a cash and carry business. These were raised on the conclusion of an enquiry into the appellant's tax position for the tax year 2008/09. The penalties of £588 and £3,306 were for negligent or careless conduct in failing to declare the relevant income. It appears from the correspondence set out below that HMRC made these assessments on the basis that the appellant's overall expenditure exceeded his income from the two businesses, such that he must have had additional undeclared income from these businesses.

5. As set out in a letter from HMRC to the appellant dated 15 February 2012, the VAT assessments were made on the basis that the appellant had not been declaring VAT on the income from the pub business since the VAT quarterly accounting period 08/09 onwards. HMRC understood that the appellant was still the official licensee for the pub and therefore income from running it should have been declared on his VAT returns under his VAT registration number 796 2103 19. The assessment was based on an average of the net VAT declared over the three years before the appellant stopped declaring income less VAT actually declared on the return for each relevant quarterly period. It appears the appellant was also using that VAT registration number to declare income from the separate cash and carry business as set out below.

Law – time limits for appeals

6. The tribunal accepts that the appeal is potentially made in respect of the assessments and determinations as set out in [3] above. However, the appellant can make an appeal only if an appeal was made within the applicable statutory time limits or the tribunal decides to allow an appeal to be made outside those limits.

Direct tax – time limits for appeal

7. The appellant has a right of appeal against the direct tax assessments and related penalties listed in [3(1)(a) to (e)] above under s 31 TMA, s 100B TMA, s 15 and 16 of schedule 24, schedule 56 of the Finance Act 2009 and s 59C TMA respectively.

8. The time limits and procedure for bringing an appeal is in each case governed by s 31A TMA. This provides that an appeal is required to be made to the relevant officer of HMRC who issued the closure notice or assessment or penalty determination within 30 days of the date on which the particular notice of assessment, determination or closure notice was issued.

9. An appeal can be made to the tribunal only if an appeal is first made to HRMC. An appeal to the tribunal also has to be made within the initial 30 day period or, where HMRC are required or requested to undertake a review of the relevant decision, broadly, within 30 days of the conclusion of the review.

10. Where a notice of appeal is given late, after the specified 30 day period, HMRC may agree to the appeal being made late or the tribunal may give permission for the appeal to be made late under s 49 TMA. This provides that where notice of appeal may be given to HMRC, but no notice is given before the relevant time limit (under s 49(1)), notice may be given after the relevant time limit if (a) HMRC agree, or (b) where HMRC do not agree, the tribunal gives permission (s 49(2)).

11. It is further provided that HMRC shall agree to notice being given after the deadline where (a) the appellant has requested HMRC in writing to agree, (b) HMRC consider that there is a reasonable excuse for not giving the notice before the time limit and (c) HMRC are satisfied that the request was made without unreasonable delay after the reasonable excuse ceased (s 49(3) to (6) TMA).

12. If the appeal is made late and HMRC do not agree to the appeal being made late but the tribunal decides it can be made to HMRC late, the appellant may then appeal to the tribunal (under s 49A) (subject to the outcome of any review by HMRC of their decision).

13. In this case HMRC do not agree to the appeal being made late.

VAT – time limits for appeal

14. As regards the VAT assessments and default surcharges, the appellant has a right of appeal to the tribunal under s 83 VATA.

> (1) An appeal under that section must be made to the tribunal again within a 30 day period. The period is usually 30 days beginning with the date of the document in which HMRC notifies the decision to the taxpayer (s 83G VATA).
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> (2) That is subject to cases where HMRC are required or requested to undertake a review of the relevant decision, in which case, broadly, the appeal has to be made within 30 days of the conclusion of the review. The taxpayer usually has to request or accept such a review when offered within a 30 day time limit also.
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> (3) If a request for a review or acceptance of an offer of a review is not made to HMRC within the applicable 30 day time limit, HMRC must nevertheless review their decision if (a) the taxpayer applies for a late review in writing, (b) HMRC are satisfied that the person had a reasonable excuse for not accepting an offer of a review or requesting a review within the time limit and (c) HMRC are satisfied that the person made the late request without unreasonable delay after the excuse had ceased to apply (s 83E VATA). That is the case unless the person has appealed to the tribunal in respect of the decision.
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> (4) An appeal to the tribunal may be made after the end of the relevant 30 day period if the tribunal gives permission to do so (s 83G(6) VATA).

15. In this case it appears that the appellant did not request a review of any of the VAT decisions or accept any offer of such a review within the applicable 30 day time limit.

16. An appeal against a VAT assessment of this kind and default surcharges can be brought only if the amount which HMRC have determined or assessed to be payable as VAT has been paid or deposited with them (under ss 84(3) and 84(3A) VATA). However, where that is not the case an appeal "shall be entertained if – (a) HMRC are satisfied (on the application of the appellant), or (b) the tribunal decides (HMRC not being so satisfied and on the application of the appellant), that the requirement to pay

or deposit the amount determined would cause the appellant to suffer hardship" (under s 84(3B) VATA).

Hardship condition

17. In this case the appellant had not paid the relevant VAT and, as explained below, in my view had not made an application to HMRC that he should not be required to pay the VAT on the grounds that doing so would cause him hardship.

18. The appellant asserted that a hardship application had in fact been made to HMRC. In support of this, the appellant produced letters from his accountant, ABC Bookkeeping and Accountancy ("**ABC**"), to the HMRC local compliance team for small and medium enterprises. However, these relate to a request for time to pay the total tax debt HMRC assert is owed to them and were not addressed to the team at HMRC dealing with any appeal against the relevant assessments. In the first letter of 30 April 2017, ABC stated that it was not possible for the appellant to pay all the liability of £56,134.39 in one go. They said he could pay £150 per month and attached a schedule of his monthly income and expenses (but with no supporting documentation). This showed his total monthly income as £1,933.15 and monthly outgoings as £1769.17. They stated the appellant was willing to pay the full amount but needed to agree a payment plan to get some extra time. In a letter of 10 May 2017 to the same HMRC team, ABC said that the appellant had paid £6,000 that day but he was otherwise expecting confirmation as regards a payment plan. It was noted that the appellant was due to have a hearing in the High Court as regards a bankruptcy petition on 23 May 2017 and a hearing in the tax tribunal on 6 June 2017.

19. Ms Hickey confirmed that she was not aware of these letters and they would not be accepted by HMRC as a hardship application. I do not regard the letters as sufficient to indicate to HMRC that the appellant was thereby intending to make a hardship application in respect of the relevant VAT assessments and default surcharges. A set out, the accountants were seeking to agree a payment plan with HMRC as regards the total amount of tax and VAT HMRC assessed to be due. Moreover the information given (with no supporting documents) is insufficient for an assessment to be made as to whether the appellant would suffer hardship if required to pay the relevant VAT.

20. It is clear from the wording of s 84 VATA, that the tribunal can consider a hardship application only if an application has first been submitted to HMRC as regards which HMRC are not satisfied that the requirement to pay or deposit the relevant amount would cause the person hardship. In other words the tribunal can only decide a hardship application if such an application has first been made to HMRC and refused by them. As that was not the case (as the appellant had merely requested extra time to pay the debt), the tribunal was not able to deal with this issue at the hearing.

21. I have nevertheless considered whether, if the appellant was able to make a successful hardship application (or paid or deposited the relevant tax), he is able to bring an appeal as set out below.

Background – grounds of appeal

22. The appellant set out the following in the grounds of appeal submitted with the notice of appeal, as supplemented by a further document sent to the tribunal on 5 December 2016:

(1) The appellant was the sole proprietor of two businesses; the Zaman Brothers cash and carry business and the Archers public house. He originally had two separate VAT registration numbers for those businesses.

(2) HMRC proposed on 8 December 2005 to close one of the VAT registration numbers and suggested that the appellant used the other one for both businesses.

(3) The appellant ceased carrying on the pub business on 31 May 2009.

(4) The appellant sent the closing bank statements of the business account to HMRC on various occasions to illustrate that there was no "S/line transaction". He asserted he was no longer trading and no trading income was received from the business since May 2009.

(5) The appellant said he submitted proof to HMRC that he was not the business rate payer for the pub business. In his view HMRC were wrongfully urging him to pay VAT for the closed pub business.

(6) He said that after the cessation of the pub business, neither the appellant nor anyone on his behalf has tried to run the pub business. The position on that "was cleared by the appellant at the meeting with HMRC held on 10 June 2010. On this grounds the appellant vehemently denies any contradictory assumptions put forward by HM Inspector Mr K Crisp on 23 February 2016".

(7) The appellant stopped operating the cash and carry business on 5 April 2012 and informed HMRC of that on 12 May 2012. HMRC confirmed they received this is in a letter of 14 May 2014.

(8) The appellant submitted a joint VAT return for both businesses until 2009. He claimed VAT repayments in respect of the cash and carry business but had to make VAT payments in relation to the pub business. In the appellant's view, HMRC are liable to repay VAT in respect of the cash and carry business until April 2012 but they stopped the payments and, therefore, owe £18,000 as repayments to the appellant.

(9) The appellant said that HMRC concluded the appellant's income tax and VAT affairs in 2012. The appellant instructed his previous accountant to appeal against the decision of HMRC which was misunderstood by the accountant and, therefore, only a partial appeal was made against a penalty determination. It is only logical that if one is contending the penalty, the same would be done by challenging all the grounds and allegations made by HMRC. The appellant stated that he "failed to appeal against the whole decision" which was "a genuine misunderstanding which the HMRC failed to recognise and carried on with their claim based on wrong calculation".

(10) The appellant said he inadvertently believed that his tax affairs were sorted in totality following the appeal and therefore never submitted any VAT returns after 31 May 2012. It was only after receiving a statement of liabilities dated 7 November 2014 that he was notified of the situation. The appellant along with his newly appointed accountant firm (ABC) had various communications with HMRC to settle the dispute amicably but they were unsuccessful as HMRC relied wrongfully on the VAT1 registration form of 2002 which the appellant filed as sole proprietor of the two businesses.

(11) He asserted that, as HMRC have failed to consider the change in the situation in 2009 and 2012, namely, that the appellant is no longer running any business in the UK, they came to an erroneous decision based on the wrong facts and calculations.

(12) The decision relating to the 2012 year was notified to the appellant with appeal rights on 11 February 2016. The appellant then applied for a review but never received an outcome.

(13) The appellant appealed against the VAT assessment and penalty determination on 2 March 2016 as the tax levied on him was unfair and miscalculated. ABC contacted HMRC numerous times with no effective outcome received.

(14) On 6 September 2016, ABC contacted HMRC on the telephone to which HMRC responded by upholding their decision and no determination was made in relation to the appeal filed by the appellant against their unlawful decision which HMRC further confirmed by fax on the same day.

(15) HMRC unjustifiably filed a bankruptcy petition against the appellant for £56,167.67 of which the appellant became aware on 9 August 2016 by a letter from the court sent whilst the appellant was in communication with HMRC to resolve the issues amicably. HMRC has taken the matter to the insolvency court without any prior warning to the appellant. The appeal against that decision was made on 2 March 2016, as noted above, on which no decision by HMRC has yet been received. HMRC filed the petition "on the basis of a mistaken belief that the appellant never appealed against the determination dated 11 February 2016. In fact the appellant submitted his appeal on 2 March 2106. So the HMRC's position in respect of the appellant is wrong hence their decision is not in accordance with the law".

(16) The appellant stated "the witness statement of HMRC in relation Bankruptcy matter and on paragraph No. 28 clearly states that "on March 2016, the accountant wrote to my office appealing against the assessment and claiming that the Debtor was not aware of the liability and was not notified that he needs to appeal against this if the assessment is wrong".

(17) The appellant said he was not bringing this appeal to subvert HMRC's bankruptcy petition but because of the fact that HMRC filed it

whilst the appellant was in negotiation with them and hoped to resolve the issues in a friendly and reasonable manner.

(18) In his view, since there is no final decision as regards the appeal of 2 March 2016, the tribunal should dismiss all of the tax claims and reopen the matter to make a fair calculation of the tax and VAT liabilities and for the costs in the appeal.

(19) He also asserted that "the decision to claim an unreasonable and unfounded amount of money would be considered unnecessary interference with Appellant's private and family life under Article 8 of ECHR".

23. As regards the application to make the appeal outside the applicable time limits, the appellant stated the following when he submitted the notice of appeal.

(1) The appellant did not hear from his previous accountants who were representing him at the time and assumed the matter was resolved.

(2) He came to know about the issue once HMRC filed their bankruptcy petition.

(3) The appellant's new accountant was in negotiation with HMRC prior to that which was still on-going (and he referred to the correspondence described below).

(4) The appellant appealed against the decision and no decision has been made on that by HMRC.

(5) Without reaching a conclusion on the appeal, HMRC filed the bankruptcy petition.

(6) The appellant's accountant received a faxed letter from HMRC dated 6 September 2016 in which they confirmed that they have concluded the matter while yet they said nothing about the pending appeal.

(7) The appellant is in time to bring this appeal should HMRC's last letter dated 6 September 2016 be considered their last and final decision.

(8) But HMRC might raise the issue that the appeal is out of time as the matter was on-going since 2012.

(9) HMRC's decision is based on a wrong and erroneous calculation which is arguable and it would be an injustice on the appellant should the matter not be resolved in open court as there are complex and complicated legal issues involved.

(10) Based on the grounds and attached documents, the appellant contends that this is an in time appeal but, if the tribunal considers otherwise, the tribunal is requested to extend the time of the appeal.

24. On 5 December 2016, the appellant also sent the tribunal a witness statement from the appellant confirming the facts were as set out in the grounds of appeal and the following correspondence.

(1) A letter dated 13 April 2012 from the appellant to HMRC in which he notified HMRC as regards VAT registration number 796 2103 19 that "Business ceased on 05/04/2012" and requested that HRMC deregister his VAT registration immediately. The letter bore a HMRC stamp showing it was received by them on 17 April 2012.

(2) A bank statement for the appellant in respect of the pub business for the period from 18 November to 10 December 2009.

(3) A letter dated 14 May 2014 from HMRC to the appellant referring to a phone conversation with him that day and enclosing the VAT registration form which they said the appellant submitted to HMRC on 18 July 2002. HMRC noted that that the appellant had ticked the box in the form stating he was the sole proprietor which they said meant that he was running the business on his own as a sole trader. HMRC also enclosed copies of all relevant correspondence from 18 July 2002 to 17 April 2012 when HMRC received the appellant's letter dated 12 April 2012 advising the business had ceased trading on 5 April 2012. It was stated that, from an HMRC point of view, VAT was required to be accounted for under the VAT registration number 796 2103 19 for the two businesses the appellant ran "as sole trader – Zaman Brothers and The Archers Public House". There was then an explanation of the VAT due of £20,467.01 as comprising an assessment for £18,908.19 and further interest. It was stated that enforcement action would be taken unless HMRC received payment or proposals for payment by 30 May 2014.

(4) A letter dated 12 November 2014 from ABC to the debt resolution team at HMRC. They noted that they were writing in relation to HMRC's recent warning of bankruptcy action against the appellant. They said that the appellant had approached them to resolve the VAT issues and that they had also received a statement of liabilities dated 7 November 2014 for £25,762.74. They said the appellant had ceased business on 31 May 2009 and that he did not submit any VAT returns after that date and they understood that he did not apply for cancellation at cessation and the VAT officer had continued with assessments. They asked HMRC not to pursue bankruptcy action and allow one month to resolve the issue.

(5) A letter dated 10 November 2015 from ABC to the debt resolution team at HMRC making the same representations as set out in the earlier letter.

(6) A letter dated 10 February 2016 from ABC to the local compliance team for small and medium enterprises at HMRC. They stated that following the receipt of further information from the appellant and verification from the local authority and business bank, they now thought that the assessment raised by HMRC was significantly wrong. They now understood that the client notified HMRC on 13 April 2012 about the closure of his cash and carry business on 5 April 2012. They noted that the appellant also had the pub business and they assumed he was submitting a joint VAT return for the two businesses. They said that for

the cash and carry business there were VAT repayments on the returns and for the pub there were payments due. He ceased the pub business in May 2009. They enclosed a bank statement and said they had also verified with the local authority that the rate payer for the pub was changed in July 2009 although the new rate payer details were not disclosed for security reasons. They said that the business bank account was finally closed on 10 December 2009. They asked HMRC to reconsider the assessments.

(7) Email correspondence on 11 February 2016 between a caseworker at the local compliance unit at HMRC and ABC who it appears was carrying out an enquiry into the appellant's tax position for the 2011/12 tax year. The case worker sought to explain that the position was closed as regards the prior years and he would be issuing a closure notice as regards the enquiry into the appellant's tax position in the 2011/12 tax year shortly.

(8) A letter dated 11 February 2016 from the caseworker at HMRC to the appellant in which he stated that HMRC had then concluded the enquiry into the appellant's tax return for the tax year 2011/12. The letter was stated to be a closure notice in respect of that year under s 28A TMA. It was noted that the amount of loss available in that year to set off against earlier years had been reduced to nil but, whilst there was no change to the tax liability for the 2011/12 tax year, the liabilities identified as part of the previous enquiry remained due and payable. There was a section in the letter setting out the appellant's appeal rights.

(9) An email dated 16 February 2016 from the caseworker at HMRC to ABC setting out the basis on which the appellant could make a late appeal to HMRC and/or the tribunal as regards the assessments and determinations for the earlier years, before the tax year 2011/12.

(10) A letter dated 19 February 2016 from the debt enforcement section at HMRC to ABC in relation to HMRC's demand for payment of the debt they said the appellant owed them of £56,167.67. This enclosed a statement of liabilities owed to HRMC as at that date and stated the following:

> (a) The officer had reviewed the records and noted that the appellant had not appealed against any of the relevant assessments to which the debt related which should have been done within 30 days of receiving each one.
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> (b) If "you have missed the deadline for your appeal it may still be accepted if you have a reasonable excuse why the appeal was late. You will need to give HMRC an explanation of why your appeal has been sent in after the 30 day appeal period and show that you appealed as soon as you could."
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> (c) "What you need to do before 31 March 2016 (as no further warning or time will be given beyond 31 March 2016); I have put your case on hold until 31 March 2016 to allow time for you to make an appeal".

(d) There was then set out the action which the appellant would need to take to appeal against the relevant assessments and it was set out that he would need to proceed to pay the full debt owed.

(e) It was stated that if no reply was received or payment made by 31 March 2016 arrangements would be made for HMRC to file for a bankruptcy petition in the High Court against the appellant with no further warning.

(11) A letter of 23 February 2016 from Mr Crisp at the compliance unit at HMRC to ABC which set out the following:

(a) He explained he was the officer who carried out the enquiry into the appellant's 2008/09 tax return, that he noted ABC's comments in their previous correspondence but "they do not take account of all the relevant information held at the time of the check into your client's case".

(b) He said that at a meeting of 10 June 2010, the appellant said that he had a manager in the public house and allowed him to run it for him from 31 May 2009 but he was still the registered tenant/leaseholder with Enterprise Inns and the licensee of the premises. There was no written agreement of the arrangement and he was informed that he was still responsible for the VAT of the public house business unless he provided any documentary evidence to the contrary.

(c) As regards income tax it was established that the appellant had spent more money than was available to him and in the absence of any reasonable explanation to the contrary, this money would have been drawn from the two businesses.

(d) In addition the appellant had let his brother and family along with a manager reside in the premises above the public house, which was private use and an appropriate adjustment was made.

(e) The check into the appellant's income tax and VAT position concluded in 2012 and an amendment, assessments and penalty determination were issued. At that time the appellant had the statutory 30 days to appeal against the various decisions. He only lodged an appeal against the penalty which was settled following the issue of a view of the matter letter when he did not opt for an independent review or to take the appeal to the tribunal. He did not lodge any appeal against the quantum of the income tax or VAT amendment and assessments.

(f) It appeared to Mr Crisp that the appellant had only now approached the accountants as his colleagues were actively pursuing the debt he owed. "It is my view that there is no

known reason why any late appeal… should be allowed and Mr Khan should now make arrangements to settle the debt. If he does not agree with this then his only recourse would be to make a late application to the Tribunal Services to see if they would accept a late appeal in this matter, which must set out the full reason why the appeal is late and the grounds for the appeal."

(12) A letter dated 2 March 2016 from ABC to the debt management team at HMRC stating the following:

(a) The appellant considered that there was no VAT due.

(b) However, he was not aware until he received the demand from debt management in 2015. He then acted promptly and sought the accountant's assistance to resolve the matter.

(c) As he was a new client the accountants had to request explanations and documents from HMRC which they did in June 2015 but they did not receive a response. They wrote to HMRC again in November 2015, had to call for an update and then received the details in a fax. At that stage they realised there was some obvious error in the VAT assessment and hence in the self-assessment.

(d) As the client was not aware about this liability and was not notified that he needed to appeal against it, he took no action.

(e) They enclosed copies of VAT return, bank confirmation of the business account closure, a copy of bank statement showing no "S/line" transaction and hence no trading income.

(f) As further evidence they had contacted the local authority to establish the business rate payer for the premises. It was confirmed by the local authority that the appellant's account was open until July 2009 and was then transferred to a new account holder.

(g) They urged HMRC to consider the appeal.

(13) A letter dated 6 September 2016 from the compliance unit at HMRC to ABC stating that they enclosed (a) a copy of a letter dated 23 February 2016 from Mr Crisp of HMRC who dealt with the original income tax and VAT enquiry, (b) a copy of an email dated 16 February explaining the position regarding any late appeal and the information required and (c) a copy of the 2011/12 closure notice sent to the appellant (as set out above).

Submissions

25. The appellant submitted that in fact an appeal was made against the assessments within the applicable time limits (as set out above and in [27] to [36] below). If that is not accepted, it is in the interests of justice and fairness for the appellant to be permitted to appeal outside the applicable time limits as he had mistakenly thought

that an appeal was made (as set out above) and due to the substantial amounts involved and potential consequences for the appellant in not being able to appeal.

26. HMRC considered it clear that the appeal was not made within the applicable time limits. They said that under the approach set out in the cases, looking at all the circumstances, it was not in the interests of justice and fairness for the appellant to be permitted to appeal at this very late stage. HMRC referred in particular to the cases of *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC), *Romasave (Property Services) Ltd v Revenue And Customs [2015] UKUT 254 (TCC)* and *Denton v T H White Ltd [*2014] 1 WLR 3926. HMRC emphasised, in particular, the very substantial delay, for which they said there was no reasonable excuse, the potential prejudice to HMRC in having to deal with an appeal many years after the year in question (noting that they only kept records for six years after the end of the relevant year) and the need for finality in litigation.

Was the appeal made late?

27. As set out above, under the statutory time limits, to be able to make an appeal, a taxpayer usually has to notify HMRC or the tribunal that he wishes to appeal (or request or accept an offer of a review) within 30 days of the issue of the relevant assessment. The time limit applies to each individual assessment issued. So, for an income tax assessment issued on 10 September 2012, the time limit expires 30 days after that date, on 10 October 2012. For a VAT assessment issued on 15 February 2012, the time limit expires 30 days after that date, on 17 March 2012. Each of the relevant assessments and determinations set out the appellant's appeal rights and the applicable time limit.

28. If the taxpayer fails to take action within that 30 day period, the taxpayer has to apply to HMRC or the tribunal for permission to make an appeal outside the normal time limits. In this case, HMRC does not agree to a late appeal against any of the assessments.

29. There is no evidence that the appellant notified HMRC, within the applicable time limits, that he wished to appeal against or required a review of any of the relevant matters except as regards the penalties of £588 and £3,306.

30. In the bundle there was a letter dated 25 September 2012 from the appellant's former accountants to HMRC in which they stated: "I refer to your letter dated 29/08/12. Our client asked us to appeal against the penalties reason being he was regular and submitted all his tax return on time. Moreover, he has co-operated with all queries 100% hence he believes you will reconsider and cancel the penalties altogether considering the unprecedented economic crisis".

31. HMRC replied in a letter of 15 October 2012 upholding their penalty determination of £588. We note that HMRC treated this as an appeal only against the penalty of £588 notwithstanding that additional penalties of £3,306 had also been issued. We assume this was because the appellant's former accountants had only referred to HMRC's letter of 29 August 2012 in which notice was given of the penalty of £588 and not their letter of 28 August 2012 in which notice was given of the other penalties. However, it seems clear from the reference to "penalties" that the appellant intended to appeal against all of these amounts. We do not accept, however, as the

appellant set out in his grounds of appeal, that this was intended to relate also to the other assessments given the wording of the letter.

32. In any event, the appellant took no further action as regards the appeal against the penalties. HMRC set out clearly in their letter of 15 October 2012 that the appellant could ask for the decision to be reviewed or could notify an appeal to the tribunal within 30 days. The appellant did not take either course of action.

33. The appellant's representative argued at the hearing that the appellant had in fact made an appeal against all the assessments within the applicable time limits. He referred to the letter from HMRC of 11 February 2016 (see [24(8)] above). In this there was a statement that there was a 30 day time limit for an appeal. The appellant asserted that the appeal was then made in response to that letter, on 2 March 2016, by ABC (see [24(12)] above).

34. The tribunal noted that in fact the letter of 11 February 2016 related only to the appellant's tax position in respect of the tax year 2011/12. The tax position in that year is not the subject of these appeal proceedings. It is clear that HMRC were notifying the appellant that he could appeal against the decision for that year, the tax year 2011/12, within a 30 day period. That statement did not relate to the tax position in the earlier years which are the subject of this appeal.

35. The appellant's representative then pointed to the letter from the debt enforcement unit at HMRC dated 19 February 2016 in which they, so the representative argued, seemed to indicate that the appellant was in time to make an appeal so long as this was done by 31 March 2016. The tribunal noted that reading the comments in the letter the representative pointed to in context of the whole letter, HMRC were clearly saying that the appellant could seek to make an application for permission to make a late appeal. They were not stating that the appeal was in time or that such a late appeal would necessarily be accepted.

36. I have concluded, therefore, that as regards all assessments no appeal has been made within the applicable statutory time limits. On that basis, as regards each assessment, an appeal can be made only if the tribunal gives permission for it to be made late.

Permission for a late appeal

37. There is no guidance or restriction in the statute as to when the tribunal may give permission for a taxpayer to make a late appeal. However, there have been a number of cases on the correct approach to be adopted. (Some of the cases relate to applications for extension of time limits rather than an appeal made out of time but the same principles have been held to apply.) From the cases it is established that in exercising this discretionary power (as with all such powers) the tribunal should have regard to the overriding objective of the rules governing the tribunal of dealing with matters fairly and justly.

38. More specific guidance was given by the Upper Tribunal in *Data Select*. In that case, Mr Justice Morgan set out (at [34]) five questions which the tribunal should ask itself in deciding whether an extension of time is permitted:

> "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."

39. Mr Justice Morgan went on to note (at [35]) that the Court of Appeal had held that in such cases it will usually be useful to consider the overriding objective and the checklist of matters set out in rule 3.9 of the Civil Procedure Rules ("**CPR**") governing court procedure. That was the case notwithstanding that the CPR do not strictly apply to tribunal proceedings (as the tribunal is governed by its own rules). He also noted (at [36]) that he was shown a number of decisions of the tribunal which had adopted that approach and he concluded (at [37]):

> "In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR 3.9, is the correct approach to adopt in relation to an application to extend time....."

40. In the same passage he also noted that some of the cases he had referred to stress the importance of finality in litigation. He said that, whilst those comments were not directly applicable to an application relating to an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position:

> "Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

41. Following the decision in *Data Select*, changes were made to the CPR. Under the new version of rule 3.9, rather than requiring the court to consider a list of factors as in the version in place when *Data Select* was decided, only two factors were specifically referred to as follows:

> "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.*" (emphasis added)

42. The question then arose of what effect the new CPR rules had on an application for extension of time or to make a late appeal and whether this altered the approach to be adopted by the tribunal. There have been two conflicting decisions on this in the Upper Tribunal.

43. In the Upper Tribunal decision in the case of *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC) Judge Sinfield concluded that the new CPR 3.9 and comments made by the Court of Appeal on its application showed that the courts must be tougher and more robust

than they had been previously in dealing with whether to extend time limits. He referred in particular to the Court of Appeal decisions in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624. He rejected the argument that differences in the wording of the overriding objectives of the Upper Tribunal rules and the CPR meant that the tribunal should adopt a different approach to that taken in those cases. He thought the tribunal should apply the same approach as in the *Mitchell* case that, although consideration should be given to all the circumstances of the case, other circumstances should be given less weight than the two conditions specifically mentioned in rule 3.9. In the case of *Leeds City Council v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT 596 (TCC) Judge Bishopp rejected the approach taken by Judge Sinfield.

44. Subsequently the approach taken in *McCarthy v Stone* has now been endorsed by the Court of Appeal and the Supreme Court in the case of *BPP Holdings Limited and Others v HMRC* ([2016] STC 841, [2017] UKSC 55) in the context of whether this tribunal was correct to bar HMRC from proceedings for non-compliance.

45. The Court of Appeal noted, at [15] of the *BBP* decision, the two conflicting decisions in the Upper Tribunal which they described as concerning "whether the stricter approach made under the CPR as set out in *Mitchell* and *Denton* applies in relation to cases in the tax tribunal". Lord Justice Ryder, who set out the decision, stated at [17] that "I am of the firm view that the stricter approach is the right approach". At [37] he continued that:

> "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals … to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton* [*Denton v T H White Ltd* [2014] 1 WLR 3926]. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunal and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's."

46. At [38] and [39] he continued to warn against a more relaxed approach:

> "A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation.

> Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.
>
> …… I remind HMRC that even in the tribunals where the flexibility of process is a hallmark of the delivery of specialist justice, a litigant in person is expected to comply with rules and orders and a State party should neither expect to nor work on the basis that it has some preferred status – it does not."

47. At [44] he noted that reference had been made to *Data Select* but he thought this was not an appropriate case to analyse that decision. He noted that the question in that case was the principle to be applied to an application to extend time where there has been no history of non-compliance. In *BPP*, HMRC neither acknowledged that they had breached a time limit nor made an application for an extension of the same. In his judgement, therefore, the question in *BPP* turned on an antecedent principle of compliance. He said had he been minded to analyse *Data Select*, "that would have created a further difficulty for HMRC. He noted that "Morgan J applied CPR 3.9 by analogy without waiting for the TPC to amend the UT Rules in just the manner I have suggested is appropriate."

48. In the Supreme Court, the court endorsed the approach taken by the Court of Appeal and that of Judge Sinfield in *McCarthy & Stone*. The court noted, at [24], that, when considering the proper approach to the making of a debarring order in the tribunal, the lower courts and counsel concentrated on recent English cases, particularly *Mitchell* and *Denton*, but also *Durrant v Chief Constable of Avon and Somerset Constabulary*. They described those cases as providing "a salutary reminder as to the importance that is now attached in all courts and tribunals throughout the UK to observing rules in contentious proceedings generally". They noted, however, that they are directed to, and only strictly applicable to, the courts of England and Wales, save to the extent that the approach in those cases is adopted by the Upper Tribunal, or, even more, by the Court of Appeal when giving guidance to the tribunal.

49. At [25], they noted that such guidance to tribunals on tax cases was given by Judge Sinfield in the UT in *McCarthy & Stone* referring to his comments that he did not accept that the UT should adopt a different, ie more relaxed, approach to compliance with rules, directions and orders than the courts that are subject to the CPR. They noted that the same view was expressed by Ryder LJ in the Court of Appeal in *BPP*, at [37] and [38] citing his comments that: "I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals", and "[i]t should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's" (see [43] and [44] above).

50. They concluded on this point, at [26], that "it is not for this Court to interfere with the guidance given by the UT and the Court of Appeal as to the proper approach to be adopted by the [tribunal] in relation to the lifting or imposing of sanctions for failure to comply with time limits (save in the very unlikely event of such guidance being wrong in law)". They said that the guidance given by Judge Sinfield in *McCarthy & Stone* was "appropriate": as counsel for BPP pointed out, it is "an important function" of the [Upper Tribunal] to develop guidance so as to achieve consistency in the

tribunal and by confirming that guidance in this case, the Court of Appeal has very substantially reinforced its authority:

> "In a nutshell, the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach."

51. In the *Denton* case to which the Court of Appeal in *BPP* referred, the court considered (at [24]) that judges should adopt a 3 stage approach when considering whether to grant relief from sanctions for failure to comply with any rule or direction of the relevant court:

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court 15 order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b) in CPR 3.9]."

52. As regards the third stage the court said that all the circumstances of the case must be considered but (at [37]) the two factors set out in rule 3.9 of the CPR, being the need for litigation to be conducted efficiently and at proportionate cost and to ensure compliance with rules and directions, are of particular importance and should be given particular weight.

53. We take from the above case law, that in deciding whether to extend the time limit for an appeal, the tribunal must have in mind the general guidance set out in *Denton*, namely, that all circumstances must be considered but that particular weight should be given to the two factors set out in CPR 3.9. In looking at all the circumstances, approaching the matter by looking at the questions posed in *Data Select* remains a useful way of assessing this. I have considered, therefore, each of the questions posed in the *Data Select* case.

What is the purpose of the time limit?

54. It seems to me that the time limit of 30 days for a taxpayer to make an appeal is to provide taxpayers, as those liable to tax and, HMRC, as the enforcer of the payment of taxes, with certainty as to the "cut off" point when the amount of tax or penalties asserted by HMRC to be due as regards a particular matter or period becomes certain and final. In specifying a period of 30 days Parliament has set down what it regards as sufficient time for a taxpayer to consider whether he wishes to dispute a tax assessment or penalty determination and, if so, to make an appeal. The taxpayer is required to act promptly if he wishes to make an appeal thereby providing efficiency in the conduct of the dispute (should there be an appeal) or finality (should there be no appeal).

55. On that basis I would not regard it as a matter of routine for the tribunal to allow an appeal to be made outside of the normal time limits. The starting point must be that the 30 day limit should usually be adhered to. Otherwise the purpose of the time limit would be undermined. There would be little incentive for taxpayers to comply

with the time limit and the lack of certainty and finality would potentially cause difficulties with the conduct of resulting disputes and burdensome administrative and enforcement issues for HMRC. Therefore, the tribunal can permit a late appeal only, as set out in *Data Select*, if it is satisfied that on balancing all relevant factors (the length of the delay, the reason for the delay and the effects on the parties of granting or not granting the application for the late appeal), it would be unjust and unfair not to do so.

How long was the delay?

56. The VAT assessments and direct tax assessments were made in February and September 2012 respectively. The penalties and surcharges were raised from August 2012 and the latest one on August 2013. We do not have the precise dates on which the default surcharges were raised but it is likely they were raised shortly after the periods in question. It appears the appellant made no contact with HMRC from the time the appeal was submitted against the penalties in September 2012 and sometime in 2014 when the appellant engaged ABC on receiving notice that HMRC proposed to take steps to recover the amount they regarded was due. There is reference in the correspondence to a call by the appellant to HMRC in May 2014 and ABC then became involved in correspondence with HMRC in November 2014. The notice of appeal was not submitted to the tribunal until September 2016. The delay has, therefore, been substantial. I regard a delay of such a length as significant and serious having regard to the purpose of the time limit as set out above.

Is there a good explanation for the delay?

57. I am unable to conclude that there was a good explanation for the delay. The appellant did not argue that he had not received the assessments. He was, therefore, notified of the time limits for bringing an appeal from the information set out in the assessments. He said in the notice of appeal that he thought his former accountants had dealt with appeals against the assessments. He said that they were mistaken in only submitting an appeal against the penalties; they should have submitted appeals against all matters.

58. However, the wording of the letter from the appellant's former accountants to HMRC as regards the penalties is clear; the appeal was made only in respect of penalties. Even if the appellant mistakenly thought that his accountants had submitted an appeal against all assessments, it appears he did not take any action at all to follow up with them as regards what was happening with any such appeal. It lacks credibility that, in particular, given the large amounts of tax in issue, the appellant would not take any action to check with his accountant precisely what had been appealed and the outcome of that appeal.

What will be the consequences for the parties of an extension of time or a refusal to extend the time?

59. The parties did not make any detailed submissions on the merits or otherwise of the appeal. HMRC merely asserted that the amounts are lawfully due and the appellant that it is in the interests of justice for the appeal to be heard. I assume, therefore, that the appeal is not without at least some prospect of success such that there is potentially a substantial detriment to the appellant in not being able to bring it. If the time limit were to be extended, on the other hand, HMRC would face the

prospect of dealing with a matter which they would have regarded as closed, as regards the most substantives assessments to income tax and VAT and the majority of the other penalties/surcharges by at the latest towards the end of 2012. I note that in the *Data Select* case Morgan J commented on the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled. It could be said that HMRC have been on notice that the appellant may seek to make an appeal since the time when the appellant contacted them in May 2014 or at least when ABC became involved in November 2014. However, that contact was a long time after the assessments were issued and there was further delay in that the appeal to the tribunal was not made until September 2016.

60. In conclusion, taking into account all the circumstances and bearing in mind the need (a) for litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules, I do not consider that it is fair and just to permit the appellant to make a late appeal against the assessments (to the extent he is entitled to do so). In all the circumstances, the serious and significant delay by the appellant in making an appeal, the absence of any credible reason for the delay, the potential difficulties in the conduct of the case for HMRC given the delay, the need for finality and efficient conduct of litigation and for compliance with time limits (bearing in mind the purpose of the limit), outweighs the detriment to the appellant in not being able to bring the appeal.

Conclusion

61. For all the reasons set out above, I have concluded that the appellant did not appeal against the assessments within the applicable statutory time limits and the appellant's application to bring an appeal against the assessments (to the extent he has a right of appeal) outside the applicable time limits is refused.

62. 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.

HARRIET MORGAN

TRIBUNAL JUDGE

RELEASE DATE: 3 October 2017