[2017] UKFTT 831 (TC)

TC06226

Appeal number: TC/2016/05720

Income Tax - VAT registration – VAT Penalties – late appeal - application for permission to appeal out of time – Data Select criteria – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ADAM AKHTAR **Appellant**

- and -

COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE RUPERT JONES
SUSAN LOUSADA

Sitting in public at Nottingham Justice Centre on 3 October 2017

Mr Mandar Patel, Accountant and representative for the Appellant

Colin Smithson and Philip Oborne, Presenting Officers of HMRC for the Respondents

DECISION

1. Adam Akhtar ("the appellant") applies for permission to admit a late appeal under Rule 20(4)(b) of the Tribunal Rules. His appeal, together with this application, was notified to the Tribunal in a notice of appeal dated 16 October 2016.

2. The appeal is against the following decisions of HMRC against the appellant:

a) Four Notices of Assessment to Income Tax and National Insurance (as a self-employed car dealer) dated 14 September 2015 for the years ending 5 April 2011, 2012, 2013 & 2014 in the sums of £200, £5,037.29, £4,391.98 and £350 respectively. These Notices were also copied to the appellant's accountant and adviser, Mr Patel. The deadline for appeal to the Tribunal therefore expired on or around 14 October 2015, depending on the date the notices were given or issued to the appellant.

b) A letter dated 23 September 2015 notifying the appellant of requirement to register for liability to be registered for Value Added Tax (VAT) for the period from 01/06/2011 to 31/07/2013 and assessment of VAT tax payable in the sum of £63,897.19. The decision to require registration for VAT was upheld as set out in a review decision letter dated 26 November 2015. The letter was also copied to the appellant's accountant and adviser, Mr Patel. The deadline for appeal to the Tribunal therefore expired on or around 26 December 2015.

c) A notice of VAT penalty assessment in the sum of £18,530.18 dated 10 December 2015 for the appellant's failure to notify his obligation to register for VAT on or before the appropriate date. The deadline for appeal to the Tribunal therefore expired on or around 9 January 2016.

3. In the bundle of papers the Tribunal received from the Tribunal Service in advance of the hearing, there was also a letter dated 7 October 2015 from HMRC. This was a Penalty Explanation notice explaining the penalties intended to be charged totalling £22,012.97. These were made up of the VAT penalty of £18,530.18 which was later issued on 10 December 2015 and two penalties for failure to notify self-employment income as a car dealer for the years ending 5 April 2011 and 2012 in the sums of £133 and £3,349.79.

4. The Tribunal therefore infers that HMRC also went on to issue Penalties against the appellant in respect of Income tax and Class 4 National Insurance Contributions totalling £3,482.79 on 10 December 2015. However, no penalty notices were included within our papers and the appellant's appeal does not make reference to these penalties as being subject to appeal.

5. The statutory deadline for appeals to the Tribunal against each of the decisions is 30 days following the giving of the notice or issuing of the decision. This appeal right and 30-day deadline were set out in clear terms within the notices at paragraph 2 a) and c) which were sent to the appellant.

6. The review and appeal rights communicated to the appellant and his accountant in respect of decision b) are more complex. They are dealt with below.

7. The application and appeal was made just over nine months out of time for the most recent decision under appeal and around one year out of time for the oldest decision.

Summary of the facts

8. The Tribunal received a bundle of documents consisting of the appeal notice, HMRC's grounds of objection and correspondence beginning in 2015. The appellant did not attend nor provide any written evidence but representations were made on his behalf by Mr Patel.

9. We find the following facts.

10. On 14 September 2015 HMRC issued the appellant with four Notices of Assessment to Income Tax and National Insurance (as a self-employed car dealer). These were for the years ending 5 April 2011 to 2014 inclusive, in the sums of £200, £5,037.29, £4,391.98 and £350 respectively. These Notices were also copied to the appellant's accountant and adviser, Mr Patel. The right of appeal to the Tribunal and 30-day deadline were set out in clear terms within the notices.

11. The appellant, nor Mr Patel acting on his behalf, did not appeal to the Tribunal against the assessment decision within the 30-day period for appeal, which deadline expired on or around 14 October 2015.

12. On 23 September 2015 Rachael Blowers of HMRC wrote to the appellant informing him that he had been required to register for liability to be registered for Value Added Tax (VAT) for the period from 01/06/2011 to 31/07/2013. Pursuant to section 73 of the VAT Act 1994 he was assessed to payable VAT in the sum of £63,897.19 in respect of the whole period. The letter explained the review / appeal rights to the appellant. It gave him the option of applying to HMRC to review the decision within 30 days and / or appealing to the Tribunal within 30 days of the date of the letter.

13. What the letter did not explain is that only the decision to register him for VAT was an appealable decision itself for the purposes of the VAT Act 1994 – the assessment to pay the amount of VAT could not itself be appealed under the Act.

14. On 7 October 2015 Mr Patel, the appellant's accountant at Accountancy Solutions, wrote to Mr Richardson of HMRC stating 'Further to our recent telephone conversation. Mr Akhtar wishes to lodge an appeal against your assessment on the following grounds'. The letter concluded the following 'Mr Akthar admits to the selling of some vehicles and the failure to register for Self-Assessment. He believes the VAT debt would not be relevant as he is / would have been under the VAT threshold.'

15. It can be seen that there is some ambiguity in the wording of Mr Patel's letter as to whether Mr Akhtar was seeking a review of the decision by HMRC or an appeal to the Tribunal.

16. On 16 October 2015 HMRC have recorded a note of a conversation which took place between Mr Patel and an officer. While Mr Patel does not dispute that a conversation took place, he cannot recall it. We are satisfied that it took place as

recorded. The officer of HMRC explained to Mr Patel the available and alternative routes to challenge a decision by way of appeal and review. During this conversation Mr Akhtar confirmed that he would like to proceed by way of a review of the decision by an independent officer of HMRC.

17. On 26 November 2015 HMRC wrote to the appellant informing him of the outcome of the review of the decision to register him for VAT from 1 June 2011 to 31 July 2013. The letter provided reasons for upholding the original decision on conclusion of the review. It also explained 'the remit of the review only falls to whether you were liable to be registered, section 83(1)(a) of the VAT Act 1994, the only appealable decision is the liability to be registered for VAT.' The letter also states that a copy of this review decision would be sent to his representative, Mr Patel.

18. What HMRC's letter does not do is explain the rights of challenge to the review decision – namely to appeal to the Tribunal within 30 days and that no further re-review would be conducted by HMRC unless new information was presented. The letter simply refers the recipient to further information about appeals and reviews on HMRC's website. This was not as helpful as HMRC might reasonably have been, albeit that the original decision of 23 September 2015 contained more helpful guidance on the rights of appeal and review.

19. The appellant, or Mr Patel acting on his behalf, did not appeal to the Tribunal against the review decision within the 30-day period deadline for appeal which expired on or around 26 December 2015.

20. On 10 December 2015 HMRC issued the appellant with a notice of VAT penalty assessment in the sum of £18,530.18 for the appellant's failure to notify his obligation to register for VAT on or before the appropriate date. The right of appeal to the Tribunal and 30-day deadline were set out in clear terms within the notice.

21. The appellant, or Mr Patel acting on his behalf, did not appeal to the Tribunal against the penalty decision within the 30-day period deadline for appeal which expired on or around 9 January 2016.

22. In the bundle of papers we received from the Tribunal Service in advance of the hearing there was also a letter dated 7 October 2015 which was a Penalty Explanation explaining the penalties intended to be charged totalling £22,012.97. These are made up of two schedules: a) the VAT penalty of £18,530.18 which was issued on 10 December 2015 and b) two penalties for failure to notify self-employment income as a car dealer for the years ending 5 April 2011 and 2012 in the sums of £133 and £3,349.79. We therefore infer on the balance of probabilities that there were likely to have been direct tax penalties totalling £3,482.79 also issued on 10 December 2015. In any event, these are not subject to appeal.

23. On 8 February 2016 Mr Patel wrote to HMRC stating that the appellant did not agree with the review findings as to his registration for VAT and VAT assessment raised. The letter raised further issues as to the nature of his trade in second hand cars. It concluded 'To avoid a tribunal we would like to be informed if any of the above would help reaching a reasonable settlement to this matter.'

24. During the hearing Mr Patel explained that the reason for the delay between the review decision of 26 November 2015 and 8 February 2016 was that he was seeking the information from the appellant which was relied on within the letter and that the appellant had needed to obtain this. In addition, the 31 January deadline for filing tax returns and making payments had intervened and occupied Mr Patel.

25. On 10 March 2016, Mr Richardson of HMRC replied to Mr Patel stating that he had obtained advice regarding his query and had reviewed his letter and the points he had made. The letter concluded:

'You may, if you wish send in the 6 years' worth of Mr Akhtar's bank statements, but the car sales takings could have gone into a different account and so this would have no bearing on the original decision made.

I do not consider that any new evidence has been provided that would change HMRC's decision. Therefore we cannot re-review the case and you will need to apply to the tribunal…..If you write you need to use the address shown above. If you send documents you must tell us if you want them returned as we may securely destroy them after 90 days.'

26. What HMRC's letter of 10 March 2016 did not state, was that the 30-day deadline for appeal had expired on or around 26 December 2015 and that it was therefore late. In any appeal to the tribunal, an application would have to be made for permission to admit a late appeal on the basis of a good reason for the delay. To include this would have been helpful.

27. By continuing to correspond with Mr Patel regarding further information subsequent to the review decision of 26 November 2015, HMRC were demonstrating reasonableness and cooperation. They were considering whether the further information submitted new information for the purposes of conducting a re-review.

28. Nonetheless, without inserting the warning as to the lateness of any appeal to the Tribunal there was a danger that it might be relied upon by Mr Patel or the appellant in believing that the correspondence automatically extended the time in which to bring the appeal. In effect, the absence of warning might be used as a basis to believe that the 'clock had stopped' and that they would be entitled to continue corresponding with HMRC without risking their ability to bring an appeal to the Tribunal.

29. In an email dated 15 July 2016 (sic), forwarded to HMRC on 14 July and then 17 July 2006, Mr Patel wrote to Mr Richardson by email. Mr Patel stated he had been approached by the appellant with regard to the above case as a debt collector from HMRC had visited his family home to assess the appellant's assets. He stated that the appellant had been in touch with BCA (the administrator) and requested information with regard to all the vehicles sold on his card. An email had been received from Joanne Williams from BCA with the required information. This had been forwarded to Mr Richardson of HMRC. Ms Joanne Williams had also forwarded details of how the cars in the appellants name were paid for. Mr Patel did not believe that he or the appellant had the authority to ask for the details of the card payments however Mr Patel suggested HMRC might have this authority. He asked HMRC to contact Ms Williams at BCA.

30. Mr Patel concluded 'I am now prepared to take this matter to hearing and will be making the application for a tribunal. Mr Akhtar is prepared to standby his earlier offer to pay any penalties or fines and tax due on the cards sold he states that he bought. I should be grateful if you could reply to this email as soon as possible.'

31. On 18 July 2016 Officer Richardson replied by email to Mr Patel. The email began 'Thank you for your emails and I look forward to receiving your invoices.' The email concluded 'I do not consider that any new evidence has been provided that would change HMRC's decision. Therefore, if you still wish to do so, you will need to apply to the tribunal.'

32. The email did not state, just as the earlier letter had omitted, that the 30 deadline for appeal to the Tribunal had expired on 26 December 2015. It would have been helpful to state this and that in any appeal to the tribunal, an application would have to be made for permission to admit a late appeal on the basis of a good explanation for the delay. The email did not state the position in law - that the making of representations regarding a re-review would not 'stop the clock' for the purposes of bringing an appeal to the Tribunal.

33. On 16 October 2016 Mr Patel lodged a notice of appeal at the Tribunal on behalf of the appellant against the three decisions set out paragraph 2 above. The notice also included an application for permission to appeal outside the relevant time limits.

34. The reasons given for why the appeal was late were as follows: 'We have been corresponding with HMRC to try to resolve matters with both party's (sic) agreement. We are now in a stalemate position where HMRC appear to be making mistakes and ignoring previous decisions made by other parties in HMRC's position. My client also believes that to some extent it is an issue where the people we have dealt with at HMRC have a lack of understanding of his community and this has been reflected in their actions along with poor handling of events by HMRC's debt collectors infringing on people's Human Rights under section 149(a) of the Equality Act.'

35. In subsequent correspondence received on 13 June 2017 Mr Patel also stated 'On 18 July 2016 Mr Richardson responds to my email stating that he looks forward to receiving the invoices. In the same email he indicates that he does not consider that new evidence has been provided although earlier it the email he states he was looking forward to receiving the invoices. There was never any response to the invoices sent to Mr Richardson and after a few months of waiting (much less than 1 year) tribunal papers were filed.'

Summary of Appellant's submissions

36. Mr Patel, on behalf of the appellant, submitted in summary that the reason that the appeal was late is as follows. They were trying to avoid making an appeal to the Tribunal if necessary but resolve the matter outside the Tribunal process. There was a protracted background to the matter as HMRC's enquiry had originally been opened, closed and reopened during the course of 2012 and 2013.

37. Mr Patel considered: a) the direct tax assessments of 14 September 2015; b) the VAT registration review decision of 26 November 2015; and c) VAT penalties decision of 10 December 2015, were all to be treated as part of the same issue

concerning the liability to taxes and extent of the appellant's trade in second hand cars. Therefore, he considered only one appeal was required.

38. Between the review decision on 26 November 2015 and the letter of 8 February 2016 Mr Patel was seeking further information from his client, the appellant. Following HMRC's letter of 10 March 2016, they decided not to appeal to the Tribunal at that stage but seek a re-review in light of further information that they had obtained from the administrator for BCA.

39. Following the receipt of HMRC's email of 18 July 2016 Mr Patel sent the further invoices as suggested in HMRC's email of 17 July 2016. Thereafter they expected to hear further from HMRC. It was only after a further 90 days without any further response from HMRC that they appealed to the Tribunal as they had received no reply. The delay in the appeal to the Tribunal was at most two months from the email of 17 July 2016, if the 30-day allowable appeal period is taken into account.

40. Mr Patel also submitted that the consequences of not giving permission to admit the late appeal would be that the appellant would become liable for a very large amount of tax and penalties to HMRC. The appellant disputed he was liable for these sums as he had not bought and sold the number of cars alleged – around 193. If time was not extended, the merits of the appeal would not be heard. He submitted the merits ought to be heard. Mr Patel submitted that the appellant would not be able to afford the sums for which HMRC stated he was liable. The appellant was said to be a student with a full time job for the Highways agency but lives at his father's address and does not have any assets. The appellant was willing to pay the tax (both income tax and any VAT) due on the 31 cars which he accepted he had sold.

Law

41. The statutory deadline for an appeal against assessments to pay Income Tax for self-employed persons under self-assessment, and the registration for VAT is 30 days following the date of the notice of issue of the decisions pursuant to section 31A, 49D & 49G of the Taxes Management Act 1970 and section 83G VAT Act 1994. The 30-day deadline also applies to the appeal against penalties for failures to make returns or payments of VAT and Income Tax pursuant to schedules 55 & 56 of the Finance Act 2009.

42. The Tribunal has the power to give permission to admit an appeal under Rule 20(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('Tribunal Rules') if it is provided after the end of any period specified in an enactment. It may also extend time for the notice of appeal under Rule 5(3)(a) of the Tribunal Rules.

43. The Tribunal must also apply the overriding objective under Rule 2(1) of the Tribunal Rules to deal with cases fairly and justly. This is supplemented by Rule 2(2) which provides:

(2) Dealing with a case fairly and justly includes— (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; and (e) avoiding delay, so far as compatible with proper consideration of the issues.

44. The Tribunal notes the useful summary provided by the First-Tier Tribunal (Tax Chamber) at paragraph 4 of its decision in *Assaf Ali Butt v The Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 95 (TC) on applications to appeal out of time:

'In terms of the tests and general approach that we must adopt in dealing with applications to appeal out of time we have considered the recent decisions of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2103] EWCA Civ 1537 and *Denton v T H White Ltd* [2014] EWCA Civ 906, and those of the Upper Tribunal in *McCarthy & Stone (Developments) Limited* [2014] UKUT 196 (TCC), *Data Select Limited* [2012] UKUT 187 (TCC) and *Leeds City Council* [2014] UKUT 350 (TCC). Taking together all those decisions, we concur with the conclusion reached by this Tribunal in the recent case of *Aeron Mathers* [2014] UKFTT 893 (TC) (at [25]):

> "… briefly, we consider the main points to be that:
>
> - even if Tribunals are not required to follow the full requirements of the latest guidance given to the higher courts in terms of seeking to ensure much stricter adherence to time limits and other directions, in order to ensure the efficient and most cost-effective conduct of litigation, we must certainly pay some regard to that intended stricter adherence to such matters;
> - as Tribunals, we are entitled to approach matters slightly more flexibly than the higher courts are now encouraged and directed to do;
> - we must certainly not, however, allow litigation to be side-tracked by other parties in litigation seeking to rely on, and exploit, trivial procedural steps that their opponents may have failed to address; and
> - in considering generally how to deal with late applications (for instance to bring an appeal, as in this case) we should still address the list of points summarised by Mr. Justice Morgan in *Data Select*. Those points are that we should address the 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 a refusal to extend time or the grant of such an extension?
>
> - We also consider it appropriate in this case to pay some regard to whether we consider that the Applicant was likely to have been able to raise valid and compelling points, should an appeal proceed, particularly because it seemed that the tax and penalties being imposed would be a serious matter for the particular appellant; and
> - It is also relevant to pay some regard to the whole conduct of the enquiries, and to the issue of whether there have been repeated delays, non-cooperation and failures to advance points, arguments and explanations at many earlier times."'

45. Subsequent to this decision, the Court of Appeal handed down judgment in *BPP Holdings v HMRC* [2016] 1 WLR 1915 in which the Senior President of Tribunals stated at paragraph 15-16 and 37-38 of his judgment:

> 15.There are two conflicting decisions of the UT about the principles that are to be applied when non-compliance with rules and directions falls to be considered by a tax tribunal. The first in time is the decision of Judge Sinfield in *McCarthy & Stone (Developments) Ltd v HMRC* [2014] UKUT 197 (TCC), [2014] STC 973 and the second is the decision of Judge Bishopp in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC) where he declined to follow Judge Sinfield's approach. The *Leeds* decision was promulgated after Judge Mosedale's determination in this case and accordingly she could not have known of it. Judge Bishopp followed his earlier reasoning in *Leeds* in coming to the conclusion that the FtT in this case had erred in law.
>
> 16.The key question underlying the two decisions can be characterised in the following way: whether the stricter approach to compliance with rules and directions made under the CPR as set out in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3926 applies to cases in the tax tribunals. The two conflicting decisions of the UT on the point came to different conclusions. For the reasons I shall explain, I am of the firm view that the stricter approach is the right approach.

……..

> 37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT 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*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals 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. If it needs to be said, I have now said it.
>
> 38. 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.

46. The Supreme Court approved this approach in its recent judgment, *BPP Holdings Ltd v HMRC* [2017] UKSC 55 at paragraphs 24 to 27:

> 24. In this case, when considering the proper approach to the making of a debarring order in the Ft-T, the Ft-T, and indeed the UT, the Court of Appeal, and counsel before us, concentrated on recent English cases, particularly Mitchell and Denton, but also Durrant v Chief Constable of Avon and Somerset Constabulary (Practice Note) [2014] 1 WLR 4313. These cases provide 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, but 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 UT, or, even more, by the Court of Appeal when giving guidance to the Ft-T.

25. Such guidance to tribunals on tax cases was given by Judge Sinfield in the UT in McCarthy & Stone. In para 43, after referring to differences and similarities between the CPR and the tribunal rules, in that case the Tribunals Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), he accepted that "the CPR do not apply to tribunals" but added 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". The same view was expressed by Ryder LJ in paras 37 and 38 in the Court of Appeal in this case, including this: "I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals", and added that "[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".

26. 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 Ft-T 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). We have twice recently affirmed a similar proposition in relation to the Court of Appeal's role in relation to the proper approach to be taken in such cases by first instance judges - see Global Torch Ltd v Apex Global Management Ltd (No 2) [2014] 1 WLR 4495 and Thevarajah v Riordan [2016] 1 WLR 76. The guidance given by Judge Sinfield in McCarthy & Stone was appropriate: as Mr Grodzinski QC, who appeared for BPP pointed out, it is "an important function" of the UT to develop guidance so as to achieve consistency in the Ft-T: see R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] 2 AC 48, para 41, per Lord Carnwath. And, by confirming that guidance in this case, the Senior President, with the support of Moore-Bick V-P and Richards LJ, 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.

27. Such an approach was adopted by Judge Mosedale, as demonstrated by the passages in her judgment cited in paras 15 and 20 above. As Ryder LJ rightly said at para 32 of his judgment: "Judge Mosedale did not directly apply the CPR or the subsequent authorities that give guidance on CPR 3.9. She was careful to make it clear that her consideration of the same was limited to whether the guidance contained in them was relevant by analogy to the application of the overriding objective in the tax tribunal rules … Most importantly, she distinguished the guidance before applying a nuanced version of it to the overriding objective in the tax tribunal rules."

47. Mr Justice Morgan referred to Rule 3.9 of the Civil Procedure Rules ("CPR") at [37] of his judgment in *Data Select*. Rule 3.9 has since been amended and now reads:

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

29. In *R (oao Dinjan Hysaj) v SSHD* [2014] EWCA Civ 1633 ("*Hysaj*"), Moore-Bick LJ, giving the judgment of the Court of Appeal, gave guidance on whether the merits of a substantive appeal should be considered in applications for extension of time. His Lordship stated at [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases."

30. In *Raymond Harvey v HMRC* [2016] UKFTT 597 (TC) the First-Tier Tribunal in considering an application for permission to appeal out of time adopted the approach of using the structure and the criteria set down by Mr Justice Morgan in *Data Select* at paragraph 34 of that decision:

> 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.

Summary of Discussion and Decision

48. The Tribunal adopts the approach of considering the *Data Select* questions in the context of the approach approved by the Supreme Court in *BPP Holdings*.

Purpose of the time limit

49. The purpose of the time limit in which to bring an appeal is in pursuit of a clear public interest in the finality of the decisions of HMRC. Time limits enshrine the need to bring the conduct or prospect of litigation to a speedy conclusion. As time limits, whether imposed by statute, tribunal rule or tribunal directions, serve the public interest, compliance is normally to be expected.

50. In *John O'Gaunt v HMRC* TC/2014/04510, the Tribunal explained the purpose of such time limits at paragraph 21 of its decision: '*It is designed to provide certainty and it is not in the interest of justice to permit appeals after long periods of delay. There is a public interest in the finality of decisions of the commissioners*.' In *North Berwick Golf Club* [2015] UKFTT 0082 (TC) at [33] the Tribunal stated '*time bar provisions are created for a reason and that is that they provide finality and certainty and that is not a matter that should be lightly disregarded*'.

51. Rule 2(2)(e) of the Tribunal Rules, part of the overriding objective, requires the tribunal to avoid delay so far as compatible with proper consideration of the issues.

52. In applying the law to the facts of this case, the purpose of the time limit in which to bring an appeal, is in pursuit of a clear public interest in the finality of decisions of HMRC. Time limits enshrine the need to bring the conduct or prospect of litigation to a speedy conclusion.

Length of the delay

53. The length of the delay in this case before a notice of appeal was lodged by the appellant at the Tribunal on 16 October 2016, was lengthy on any analysis.

54. We have found the length of delay to be between ten and thirteen months from the decisions so that the appeals are between nine and twelve months late.

55. The Tribunal notes that the Upper Tribunal in *Romasave (Property Services) Limited v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC) at paragraph 96 stated that 'a delay of more than three months cannot be described as anything but serious and significant.' It also notes that the Upper Tribunal in *O'Flaherty v Revenue and Customs Commissioners [2013]* UKUT 0161 (TCC) stated that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely.

Reasons for the delay - Good Explanation?

56. The principal reasons that the appellant and his agent rely upon for the delay in lodging an appeal are that: they were trying to avoid taking an appeal to the Tribunal; they sought to provide fresh information to HMRC in February and July 2016 following the reviews on 26 November 2015 and March 2016; and they waited for a reasonable period of time after July 2016 without any further reply from HMRC before lodging the appeal at the Tribunal. They had been expecting a reply from HMRC but none had been forthcoming.

57. We do not consider this to be a good explanation for the delays for the following reasons.

58. The appellant's explanation does not give any good reason for the failure to appeal against the direct tax assessments issued on 14 September 2015 within a reasonable time. The first time these were appealed was on 16 October 2016, some twelve months late. No reference was made to them within any of the intervening correspondence and no request for HMRC review or appeal was made. The timescales and routes of appeal were made clear to the appellant at the time of the issuing of the assessments. There was no ambiguity in the course of action that should be taken and deadline for doing so. There is no explanation for the lack of appeal within a reasonable time following the issuing of the assessments.

59. Likewise, the appellant's explanation does not give any good reason for the failure to appeal against the VAT penalty issued on 10 December 2015 within a reasonable time. The first time this was appealed was on 16 October 2016, some nine months late. No reference was made to it within any of the intervening correspondence and no request for HMRC review or appeal was made. The timescales and routes of appeal were made clear to the appellant at the time of the issuing of the penalty. There was no ambiguity in the course of action that should be

taken and deadline for doing so. There is no explanation for the lack of appeal within a reasonable time following the issuing of the penalty.

60. In relation to the appeal against the review decision upholding the appellant's registration for VAT, the VAT assessment itself not being appealable, the Tribunal has found that some of the correspondence from HMRC was not as helpful as it might have been.

61. While HMRC's original decision of 23 September 2015 set out the route of appeal to the Tribunal and deadline for doing so, the review letter of 26 November 2015 did not do so but only referred to guidance. However, it is clear from the correspondence itself and Mr Patel's submissions that he, and the appellant by implication, were aware of the route of appeal to the Tribunal. Indeed, they were seeking to avoid using this route if possible. In any event, the burden would be on the appellant to inform himself of the law on how to make an appeal and the applicable deadlines. This is all contained within HMRC's published guidance. It was also contained within the original letter of 23 September 2015 and explained in the telephone call with Mr Patel on 16 October 2015.

62. The letter and email of HMRC Officer Richardson of 10 March 2016 and 18 July 2016 declined to conduct a re-review based upon the information provided. The correspondence advised Mr Patel to proceed with an appeal to the Tribunal. The communications were, to some extent, capable of confusing the appellant and Mr Patel as to the automatic availability of an appeal to the Tribunal. Both the letter and email made it clear that the original review decision was upheld, the new information had been considered and rejected and the proper course to challenge these decisions was to appeal to the Tribunal. However, in not stating that the deadline for appeal had already passed and that any application for appeal to the Tribunal would be out of time and require permission to proceed, they were capable of giving false comfort to Mr Patel and appellant that an appeal would automatically be accepted by the Tribunal.

63. However, most importantly, Mr Patel did not rely on any misapprehension or seek to suggest he was misled by the letter and email of Officer Richardson that the appellant was within time to make the appeals. There was no evidence from the appellant on this point or any other. Officer Richardson had at least made it clear that the proper course was to appeal to the Tribunal if his decisions were not accepted. Reading all the correspondence from HMRC as a whole from 23 September 2015 there could be no doubt about this.

64. We are then left to consider whether Mr Patel's explanation, on behalf of the appellant, for the delays between 26 November 2015 and 8 February 2016; 10 March and 14 July 2016; & 18 July and 16 October 2016 were reasonable. Are they such that, taken individually and collectively, there is a good explanation for the delay?

65. The delay between 26 November 2015 and 8 February 2016 was over two months. It is said that during this time the appellant provided further information to Mr Patel on which he sought to challenge the review decision. This is a fairly long passage of time, albeit, on its own it might not be considered to be unreasonable if it were the only delay in the case. However, the review letter of 26 November 2015 did make clear that the review had concluded. Therefore, the appellant and his adviser should reasonably have been aware, based on guidance, that if seeking to provide

fresh information to HMRC in support of a re-review, this should be done as quickly as possible thereafter.

66. The delay between HMRC's letter of 10 March 2016 and 15 July 2016 is over four months. It is said that during this time Mr Patel and the appellant provided further information based on enquiries with Joanne Williams of BCA which supported the merits of this case. This could not be considered to be a reasonable period of time to wait for further information in the circumstances. Given the clear terms of the letter of 10 March 2016 that there would be no re-review and the matter could be appealed to the Tribunal, the appellant and Mr Patel should reasonably have either sought to have appealed to the tribunal on an urgent interim basis whilst waiting for this information or expedited their enquiries with Ms Williams or both.

67. The delay between 18 July and 16 October 2016 is around three months. We do not consider this to be reasonable. Although the first line of Mr Richardson's email of 17 July 2016 states that he awaits the invoices, the last lines of the email also make clear that the matter is concluded and a Tribunal appeal should be utilised. There was minimal ambiguity within the email when read as a whole.

68. Furthermore, the delay, in waiting a further three months following receipt of this email to appeal was unreasonably long. It has to be considered in the context of correspondence that had been conducted at least since September 2015 and in which a Tribunal appeal had been repeatedly advised. We did not receive any evidence concerning the date and manner in which the further invoices were sent to officer Richardson by Mr Patel or others in order to be considered. Nonetheless, assuming they were sent at around the same time as the email of 17 July 2016, it would not be reasonable to wait a further three months without either chasing the officer for a reply or lodging an appeal. One would expect such a course of action to be taken within 28 days at the latest.

69. Looking at the delay as a whole, there was not a good explanation for the period of around 9 or 10 months between 26 November 2015 and 16 October 2016 in lodging the appeals against the VAT registration review decision.

Consequences of extending time or refusing to extend time

70. If the Tribunal were to grant the appellant's application and give permission to admit the late appeal, the consequence is that the substantive merits of his appeal would be heard. The Tribunal has not considered the merits of his appeal in determining the application.

71. The consequence for HMRC of giving permission and admitting the appeal is that HMRC will have to devote resources to defending the appeal following what has been a long and historical process.

72. The consequence of dismissing the application and refusing permission to extend time to admit the appeal would be serious for the appellant. He will be liable to pay an outstanding sum in taxes and penalties that is currently estimated to be at least £94,000. HMRC enforcement action began in July 2016 and a debt collection agency was employed. It is said that he has no assets and is likely to be rendered bankrupt although no evidence has been received from the appellant on this point.

73. The consequence for HMRC of refusing permission will be that the outstanding liabilities will become due from the appellant.

Conclusion

74. The Tribunal having weighed up all the factors, has decided to dismiss the application and declines to admit the appeal. It considers this to be in accordance with the interests of justice and overriding objective to be just and fair to all parties.

75. The length of the delay was significant, and the appellant and his agent did not provide a good explanation for the delay in appealing the three decisions between October 2015 and October 2016. The Tribunal considers that there were various types of liabilities demanded by HMRC and the appeal against which is late. It should reasonably have been pursued to the Tribunal at an earlier stage. While the consequences of not admitting the appeal may be serious for the appellant this does not outweigh the other factors in the case. The purpose of the deadline for the appeal is to ensure finality of HMRC's decisions within a reasonable period and certainty for all taxpayers. The routes of appeal and timescale in which they should be made were communicated to the appellant.

76. Therefore, the Tribunal dismisses the application for permission to admit the appellant's late appeal.

77. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 20 NOVEMBER 2017