[2018] UKFTT 110 (TC)

TC06367

Appeal number: TC/2016/01555

PROCEDURE – application to make appeal out of time – red diesel found in commercial vehicle – assessment to excise duty and wrongdoing penalty – overarching issue of approach – whether right of appeal distinguishable – whether* BPP Holdings *directly applicable – procedural jurisprudence since amendments to CPR 3.9 effective from 1 April 2013 – consideration of "the two principal matters" in relation to "all the circumstances of the case" – whether merits of an appeal relevant – guidance in* McCarthy & Stone *followed – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PATRICK MACKIN **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at the Royal Courts of Justice, Belfast on 27 April 2017, with post-hearing submissions by the Respondents dated 15 May 2017, and the response thereto by the Appellant's representative dated 22 May 2017.

Mr Danny McNamee, of McNamee McDonnell Solicitors, instructed by McKeague Morgan & Co, for the Appellant

Mrs Sharon Spence, of General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. By Notice of Appeal dated 6 September 2016, Mr Mackin appealed against the following determinations by HMRC:

(1) A notice of assessment to excise duty dated 31 August 2012 under s 13 (1A) of the Hydrocarbon Oil Duties Act 1979 ("HODA") in the sum of £161,893, (revised to £144,730 on 21 November 2016); and

(2) A notice of assessment to wrongdoing penalty dated 30 January 2013 under Schedule 41 to the Finance Act 2008 ("Sch 41 FA 2008") in the sum of £35,003, (revised to £32,370.08 on 21 November 2016).

2. The Notice of Appeal was lodged by McKeague Morgan & Co as Mr Mackin's representative, and included an application to make a late appeal. HMRC opposed the application by notice to the Tribunal dated 28 November 2016.

3. The interlocutory hearing was set down for the sole purpose of considering whether the application to make a late appeal should be granted.

4. Mr Mackin did not attend the hearing, and was represented by Mr McNamee on the instruction of McKeague Morgan & Co. No evidence was led by either party.

Post-hearing submissions

5. At the conclusion of the hearing, I gave directions orally for HMRC to provide to the Tribunal and the appellant the reasons for the reduction of the hydrocarbon duty assessment from the original amount under appeal of £161,893 to £144,730, which in turn reduced the wrongdoing penalty from £35,000 to £32,370. The principal purpose of the directions is to ascertain the reasons for the reduction in the quantum of the duty assessment, and the reasons for the directions are two-fold.

6. First, the reduction in the quantum of the assessment was by letter dated 21 November 2016, following an internal review by HMRC which took place after the lodgement of the Notice of Appeal. The letter of 21 November 2016 gave no reasons for the reduction, and it is the Appellant's case that the merits of his appeal hinge on the quantification of the duty assessment. The Tribunal considers the reasons for reducing the quantum of assessment in November 2016, arguably, may disclose a relevant factor for consideration in determining the outcome of this application.

7. Secondly, the issue concerning the merits of the appeal is central in the appellant's submissions against the respondents' objections. For the appellant, it was averred that the evidence on which the Appellant would seek to rely is of a kind where the credibility or quality of the evidence would not be compromised by the passage of time. To various extents, the revision of the duty assessment by reduction has been argued as supporting the appellant's contentions against the quantification of the duty assessment.

8. Notwithstanding the fact that the issue of merit is central to the appellant's case, it was emphasised at the hearing that the respondents are not obliged to address the merits of the substantive appeal. If the respondents should choose to address the issue of merit, then the appellant would be given the opportunity to respond to HMRC's submissions in writing.

9. At the hearing, I asked Mrs Spence if oral directions would suffice, or whether they should be followed by written directions. Mrs Spence had confirmed that oral directions on this occasion would be sufficient, and it was agreed that the date for production of the requested information would be Monday 15 May 2017.

10. The Tribunal therefore had not anticipated an application for written directions, which was submitted by Mr Harry Williamson by email on 2 May 2017 at 16:16 on the respondents' behalf. For whatever reasons, Mr Williamson's application was forwarded to me only on 11 May 2017. Meanwhile, my interim instruction to grant the application was crossed with the respondents' written submissions of 15 May, which was forwarded to me on 18 May, along with Mr Williamson's follow-up email to his application of 12 May 2017.

11. Having considered the written submissions from the Respondents, I can confirm that their submissions accord to the directions given at the hearing. The appellant's response thereto was received on 22 May by the Tribunals Service.

The applicable law

12. When the Tribunal grants permission for a late appeal, it is exercising its case management powers by extending the time limit under Rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("the Tribunal Rules"). Rule 20(4) clearly states that unless the Tribunal gives such permission, the Tribunal must not admit a late appeal.

13. The two specific procedural rules in relation to the admission of a late appeal are to be applied in the context of the overriding objective under Rule 2: "to deal with cases fairly and justly", which 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."

14. The duty assessment was raised under s 13(1A) of the HODA 1979, which deals with the use of rebated oil in vehicles, and provides that:

> "Where oil is used or is taken into a road vehicle in contravention of section 12(2) above the commissioners may –
>
> (a) assess an amount equal to the rebate on like oil at the rate in force at the time the contravention as being excise duty from any person who sued the oil or was liable for the oil being taken into the road vehicle; and
>
> (b) notify him or his representative accordingly."

15. Under s 15C(1) of the Finance Act 1994 ("FA 1994"), a person who has been notified of an assessment to excise duty may accept HMRC's offer to review that decision "within 30 days of the date of the document containing the notification of the offer of the review".

16. Section 16(B) of FA 1994 provides that a person "P" wishing to appeal against an assessment raised under s 13(1A) of HAD is to do so within 30 days of "the date of the document notifying P of the decision to which the appeal relates".

17. After the review of the decision, if P wishes to appeal against HMRC's review conclusion, an appeal may be made to the Tribunal under s 16(1) of FA 1994 "within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates".

18. Where a review request has been made, and HMRC fail to give notice of the outcome of the review within 45 days from the date of request, then the assessment is deemed to have been upheld on review. Under s 16(1A) of FA 1994, the person can appeal to the Tribunal, and the time limit for making an appeal in such a situation is within 75 days of the date on which a review was requested.

19. Section 16(1F) of FA 1994 allows an appeal to be made out of the applicable time limit if the Tribunal grants permission.

20. As regards the appeal against the wrongdoing penalty, para 18(1) of Sch 41 to FA 2008 provides that an appeal against a decision that a penalty is payable by P "shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or the Upper Tribunal)."

21. Case law authorities that are referred to in this decision are listed in their alphabetical order as follows:

> (1) *Advocate General for Scotland v General Comrs for Aberdeen City* [2006] STC 1218; ("*Aberdeen City*")
>
> (2) *BPP Holdings v Revenue and Customs Comr*s [2016] EWCA Civ 121; and [2017] UKSC 55; ("*BPP Holdings*")
>
> (3) *Data Select Limited v Revenue and Customs Comrs* [2012] UKUT 187 (TCC); ("*Data Select*")

(4) *Denton v T H White Ltd* [2014] EWCA Civ 906; (*"Denton*")

(5) *Durrant v Chief Constable of Avon and Somerset Constabulary and Another* [2015] EWCA Civ 1633; ("*Durrant*")

(6) *Leeds City Council v Revenue and Customs Comrs* [2014] UKUT 0350 (TC); ("*Leeds City Council*")

(7) *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1573; ("*Mitchell*")

(8) *R (on the application of Dinjan Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633; ("*R (Hysai*)")

(9) *Revenue and Customs Comrs v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC); ("*McCarthy & Stone*")

(10) *Richard Chan and Geraldine Chan v Revenue and Customs Comrs* [2014] UKFTT 256 (TC); ("*Richard Chan*")

(11) *Romasave (Property Services) Ltd v Revenue and Customs Comrs* [2015] UKUT 254 (TCC); ("*Romasave*")

(12) *Thomas Corneill & Co Ltd v Revenue and Customs Comrs* [2007] EWHC 715 (Ch); ("*Thomas Corneill*")

Factual background

22. The appellant worked as a mechanic in Scotland, building runways linked with the oil trade. He then purchased his own lorry and built up a haulage business with a fleet of lorries. That business was "wound up in 2001 due to legal and tax problems", (per one of the medical reports). The appellant started again with a smaller fleet, and at the material times, he was trading as "P Mackin Transport" in Northern Ireland.

Vehicle seizure, restoration and fuel audit

23. On 1 December 2011, one of the appellant's business vehicles was tested as containing red diesel in the fuel tank. The appellant was interviewed under caution and claimed that the fuel in the tank was contaminated by the hose used to fuel the vehicle which had been previously used for red diesel. The vehicle was restored.

24. On 27 January 2012, HMRC notified the appellant of their intention to carry out a road fuel audit of the appellant's business and requested the relevant records: (1) Details of all diesel vehicles and for each: date of purchase/disposal; V5 registration document; average weekly mileage; average MPG; fuel tank size; date any additional tanks fitted; service records; periods when vehicle was off the road; MOT/PSV certificates; current mileage records; tachographs (if appropriate); (2) fuel purchase invoices; (3) fuel card suppliers; (4) on site fuel storage capacity; (5) details of vehicles / machinery with legitimate rebated fuel use.

25. As a way of supplying the requested information, Mr Mackin annotated the front page of HMRC's 27 January 2012 letter with the following details:

(a) Average weekly mileage – "1200 to 1500 Each"

(b) Vehicle fuel tank sizes – "1300 to 1500"

(c) Any additional tanks fitted – "No"

(d) Tachographs – "1 Year"

(e) On site fuel storage capacity – "6,000"

(f) Vehicles/ machinery with legitimate rebated fuel use – "2,500 – 3 Fork Lifts, 1 Tractor, 1 Digger"

26. Other documents provided, such as MOT certificates, current mileage readings, were marked with a tick on the annotated copy of the letter. The documents were to be provided to Custom House in Belfast by 8 February 2012.

The duty assessment under s 13(1A) HODA

27. On 31 August 2012, HMRC completed the fuel audit and notified the appellant of an assessment to excise duty of £161,893 for the period from 1 September 2008 to 30 November 2011, a duration of three years and three months.

28. The letter to the duty assessment notice includes a reminder that for offences committed on or after 1 April 2010, HMRC will apply new wrongdoing penalties where a person uses a product for a purpose that attracts a higher duty rate or for handling excise goods on which there is unpaid excise duty.

29. The letter continues by informing the appellant of the actions he could take as respects the duty assessment notice:

> "If you have any further information that you want me to consider, please send it to me now.
>
> If you do not agree with my decision, you can ask for my decision to be reviewed by an HMRC officer not previously involved in the matter, or appeal to an independent tribunal.
>
> If you opt for a review you can still appeal to the tribunal after the review has finished.
>
> If you want a review you should write to me at the above address within 30 days of the date of this letter, giving your reasons why you do not agree with my decision. We will not take any action to collect the disputed tax while the review of the decision is begin carried out.
>
> If you want to appeal to the tribunal you should send them your appeal within 30 days of the date of this letter."

30. The notice concludes by giving the website references for further information about appeals and reviews, and of the telephone number to contact and the case reference to cite.

31. The fuel duty calculations are set out in supplementary pages to the duty assessment. The calculations cover eight vehicles as in use for various durations in the

39-month period being audited. For each vehicle, the registration number, the make and the model, and the period in use are stated.

32. The fuel consumption for each vehicle is assessed by standard formulae with the following components:

(1) Number of weeks is multiplied by the industry average usage per week (uniformly applied as 1100 miles per week with one exception).

(2) The total mileage in the audit period is divided by the fuel consumption indicator for that particular model of vehicle, with 7 vehicles assessed at 7.9 miles per gallon ("mpg"), and one at 6.4 mpg; (the higher the mpg, the lower the fuel consumption).

(3) The mpg is then multiplied by the standard factor of 4.5461 to convert the fuel consumption from gallon to litre in unit.

33. The total shortfall in "legitimate" fuel purchase is calculated as follows:

(1) The figure for fuel consumption in litre for each vehicle is added together to arrive at the combined total of fuel required by the business during the audit period of 465,057.93 litres.

(2) Fuel purchase that had been vouched as legitimate in the audit totalled 106,966.6 litres.

(3) The difference of the two figures is the shortfall in legitimate fuel purchased, being 358,091.33.

(4) The total shortfall is divided by the combined total of weeks assessed on each vehicle to arrive at the "shortfall per week" figure of 2,118 litres.

34. The final stage of the assessment is to apply the shortfall in the duty rate for legitimate diesel and red diesel to the shortfall per week figure. The audit period was subdivided into eight different duty periods to reflect the duty rate increases that had taken place. For each duty period, the "shortfall per week" figure in fuel consumption is multiplied by the duty rate difference to arrive at the duty owing. The combined total of the eight different duty periods gives the figure for the duty assessment at £161,893.50.

The wrongdoing penalty assessment under Sch 41 FA 2008

35. On 30 January 2013, HMRC notified the appellant of an assessment to a wrongdoing penalty in the amount of £35,003.12.

36. On page two of the notice is a section headed "**Appeals**" (in bold) as follows:

> "If you disagree with this assessment, you need to write to us within 30 days of the date of this notice, telling us why you think our decision was wrong and we will look at it again. If you prefer, we will arrange for a review by an officer not previously involved in the matter. You will then have the right to appeal to an independent tax tribunal.

> Alternatively you can appeal direct to the tribunal within 30 days of this notice."

37. The notice concludes with the website reference and of the phone number to contact HMRC to locate further information on review and appeal.

38. The penalty assessment notice was accompanied by a penalty explanation schedule, which categorised the behaviour as "deliberate but not concealed" with a penalty range of 35% to 70%. The explanation given in this respect is as follows:

> "Mr Mackin fuelled his vehicle with red diesel. Although Mr Mackin stated under caution that he had used the same hose to fuel his forklifts he did provide false fuel receipts that he claimed the input tax on.
>
> The disclosure was prompted because you did not tell us about the wrongdoing before you had reason to believe we had discovered it, or were about to discover it."

39. Against the penalty range, an overall reduction of 80% was given by HMRC for the following reasons:

> "**Telling**: 20% reduction given for the information provided by Mr Mackin during cautioned interview.
>
> **Helping**: 30% reduction given for the reason as to how the red diesel ended up in the running tank of his vehicle. However Mr Mackin provided false fuel invoices that he had claimed the input tax on.
>
> **Giving**: Full reduction given for the access provided by Mr Mackin to his records."

Appeals against the wrongdoing penalty and VAT arrears

1. On 17 April 2013, the appellant's solicitor, Gillen & Co wrote to HMRC Debt Management in respect of the VAT arrears due by the business of £18,820.73 on being de-registered from VAT.

2. On 20 May 2013, in almost identical wording to that of 17 April 2013, Gillen & Co wrote to HMRC Debt to appeal against the wrongdoing penalty as follows:

> "We act on behalf of Mr Patrick Mackin who has consulted us in relation to your letter dated 19 April 2013 seeking payment of the sum of £35,003.12.
>
> Please note that our client does not accept that this amount is due and wishes to appeal this assessment.
>
> We would be obliged if you would kindly confirm whether a formal assessment has been raised in respect of this amount so that we can move to the appeal procedure."

Publishing details of deliberate tax defaulters

3. On 25 September 2013, HMRC Central Policy in Stockport wrote to advise Mr Mackin that HMRC intended to publish his details in accordance with their policy in

"Publishing details of deliberate tax defaulters". (A matter that was intimated to Mr Mackin back in January 2012.)

4. On 1 October 2013, Gillen & Co wrote on behalf of Mr Mackin to raise objection to the publication of his details as a tax defaulter. The letter is not included in the bundle but was referred to by Central Policy's reply to Gillen & Co, which states in the absence of a signed authority from Mr Mackin, HMRC could not discuss the matter with Gillen & Co.

5. On 22 October 2013, Officer Harris from HMRC Central Policy wrote to Mr Mackin, advising the following:

> "We are not able to discuss these matters with Gillen & Co without a written letter of authority from you.
>
> I can however confirm that I can find no record of any appeal against the penalty in respect of which HMRC are considering publishing your details."

The signed authority in the context of Central Policy correspondence

6. A hand-written authority signed by Mr Mackin dated 28 October 2013 is included in the bundle, which states: "I authorise HM Revenue and Customs to correspond with my solicitors Gillen & Co, [address] regarding my tax affairs".

7. The signed authority was forwarded by Gillen & Co to Central Policy at Stockport with a covering letter dated 29 October 2013. In turn, Central Policy forwarded the authority to HMRC "PAYE and Self Assessment" at Newcastle Upon Tyne to update the tax records of Mr Mackin by registering Gillen & Co as his agent.

Correspondence in 2014 between HMRC and the appellant

8. During the course of 2014, no correspondence would appear to have passed between the parties on the duty and penalty assessments.

9. The hearing bundle contains two documents served in 2014 by HMRC. Both documents are surcharge notices, dated 4 March 2014 and 11 June 2014, in relation to Mr Mackin's outstanding income tax liability for the year ended 5 April 2008.

Correspondence in 2015 between HMRC and the appellant

10. On 15 January 2015, Gillen & Co wrote to Debt Management Field Force ("DM Field Force") in Liverpool. The short letter states as follows:

> "We refer to your letter to our above named client dated 22nd October 2014.
>
> Please note that the liability claim by HM Revenue & Customs in relation to Oil duty is under appeal by our client. His appeal has not yet been heard and therefore this liability is still in dispute.
>
> We would be obliged if you would kindly confirm by return the present position in relation to our clients appeal."

11. On 29 January 2015, Officer McMaster of DM Field Force replied as follows:

> "I have checked with the Oils debt issuing officer (Ms P Connell) who has advised that she has not received an appeal regarding the Oils debt. She did advise that there is an ongoing appeal regarding Mr Mackin's VAT arrears."

12. HMRC's 29 January 2015 letter concluded by asking that a copy of the appeal to be submitted as there was no record of any appeal having been made previously.

13. There was no follow-up of the matter by Gillen & Co by forwarding the appeal claimed to have been made. There was a gap in the correspondence in the ensuing 5 months, and the next letter from Gillen & Co on 24 June 2015 would seem to have been prompted by the actions of "Debt Management Enforcement and Insolvency" ("DM Insolvency").

Bankruptcy petition by Debt Management

14. On 23 January 2015, DM Insolvency wrote to Mr Mackin to advise that proceedings would commence against him at the High Court unless payment of tax in arrears was received by 12 noon on 6 February 2015. The letter stated that the action at the High Court would mean HMRC could petition for the appellant's bankruptcy, which would result in the appointment by the Court of a Trustee to sell his property and any other assets to settle the debts.

15. A statement of liabilities was attached to the 23 January 2015 letter. The total liabilities pursued by DM Insolvency stood at £222,246.42, and included the £161,893 oil duty assessment, and the wrongdoing penalty assessment of £35,003 as originally assessed. The balance of £25,350 was made up of income tax arrears under self-assessment and relating surcharges, sundry PAYE/NIC deductions and late filing penalties for the Employer's annual return P35.

16. On 22 June 2015, DM Field Force sent Mr Mackin a letter (not in the bundle). On 24 June 2015, Gillen & Co wrote to DM Field Force as follows:

> "We act on behalf of Mr Patrick Mackin who has consulted us in relation to a letter dated 22nd June 2015 delivered to his premises.
>
> Please note that the debt in this matter is still under appeal and under dispute by our client. We enclose herewith a copy of our letter dated 15th January 2015 to HM Revenue & Customs Debt Management. We have not received a response to that letter and would now be obliged to hear from you by return."

17. On 27 July 2015, DM Insolvency wrote to Mr Mackin in relation to the Statutory Demand served on 25 June 2015. A Statement of Liabilities was enclosed. The letter also referred to a phone call from Mr Mackin of 17 July 2015, in which Mr Mackin said that the VAT and the "Oil duty tax" were under appeal. DM Insolvency confirmed that the VAT arrears were under appeal and not included in the Statement of Liabilities, but the Oil duty assessment was not under appeal and therefore due for payment.

Letter from Michael Purdy & Co alleged to have been sent

18. By fax on 3 August 2015, Gillen & Co replied to DM Insolvency regarding the letter of 27 July 2015.

19. For the first time in the history of correspondence between HMRC and Gillen & Co, the name of Michael Purdy & Co appeared in the following manner:

> "It is clear from our instructions that the Oil duty tax has been under appeal since 1st October 2012. The appeal was submitted by our clients [sic] accountant Michael Purdy & Co and we enclose herewith a copy of their letter of appeal."

20. The letter concluded by saying: "This appeal has not been dealt with and remains pending. In the circumstances please confirm that any action in relation to the oil duty tax will be halted."

21. Transmitted also by fax was the letter allegedly sent by Michael Purdy & Co to HMRC at Custom House Square, and states the following:

> "We refer to the assessment raised on our client for the alleged use of illegal fuel.
>
> We are appealing against this assessment for the following reasons:
>
> 1. The Lory in question DCZ 777 was not found to contain illegal fuel, only contaminated fuel. ...
> 2. No other lorry, despite having been stopped and tested on numerous occasions, was found to be operating on illegal fuel.
> 3. The assessment has been based on calculating fuel consumption on lorries that were not in service."

22. On 25 August 2015, Officer Connell, who carried out the fuel audit and raised the duty assessment, replied to Mr Mackin in relation to the letter of 1 October 2012 received by fax, and advised that:

> (1) HMRC do not hold any authority from you to deal with a third party;
>
> (2) There is no evidence or record of this letter or any appeal ever having been received by HMRC against the original assessment.
>
> (3) The assessment was raised as there was a shortfall of legitimate road fuel due to the fact that invoices from MV Tapper and Morgan Fuels were disallowed as they were false.
>
> (4) No new evidence has been presented in the faxed letter to challenge this assessment.

23. On 3 September 2015, Gillen & Co replied to Officer Connell, stating that a signed authority was sent to HMRC on 29 October 2013, (attaching a copy of the authority originally sent to Central Policy), and reiterating that a letter of appeal was sent by the accountant in respect of the oil duty assessment on 1 October 2012.

24. The 3 September letter concluded by requesting HMRC to acknowledge that Mr Mackin "has a valid appeal in relation to the oil duty which was lodged by our clients [sic] accountant on the 1st October 2012 and proceeded to list the matter for appeal as soon as possible".

25. On 13 September 2015, Officer Connell replied as follows:

> "As you have provided no additional information for me to reconsider I am unable to alter my original decision dated 31 August 2012."

It was advised that if a late appeal was to be lodged for Mr Mackin, it must be lodged with the Tribunals Service.

26. On 23 November 2015, Gillen & Co replied to Officer Connell, advising that the matter had been passed to Michael Purdy. The letter concluded by asking:

> "Please confirm that it is now accepted that there is an appeal lodged in this matter and that it will be listed. Please confirm that the proposed bankruptcy proceedings will be stayed in the meantime."

The second letter from Michael Purdy

27. On 20 November 2015, Michael Purdy & Co wrote to HMRC, but at the address of the First-tier Tribunals Service in Birmingham. The full contents of the letter are as follows:

> "We forwarded an appeal on **1st December 2012** against an oil duty assessment raised against our client. HMRC has not acknowledged receipt of said appeal and are trying to serve statutory demand on our client.
>
> We wish to lodge a further appeal against this assessment with the Tribunals Service.
>
> Please advise as to when the appeal can be heard." (emphasis added)

The Notice of Appeal, the bankruptcy proceedings and the voluntary arrangement

28. McKeague Morgan & Co was instructed to deal with the bankruptcy petition by HMRC Debt Management. On 23 and 24 August 2016, Nicky McKeague of the firm wrote to Officer Connell in relation to the alleged appeal lodged against the duty assessment and wrongdoing penalty.

29. On 6 September 2016, McKeague Morgan filed the Notice of Appeal with the Tribunals Service.

30. On 22 September 2016, the appellant was made bankrupt following a hearing at the High Court of Justice in Northern Ireland. It would appear that Mr Mackin attended the High Court hearing and disputed that the excise duty and wrongdoing penalty debts were due.

31. On 11 October 2016, the appellant entered into an individual voluntary arrangement in respect of the debts to HMRC; the bankruptcy was annulled.

Records of appeal with the Tribunal and HMRC's internal review

32. On 20 April 2016, HMRC solicitor's office confirmed with the Tribunals Service of any appeals that have ever been submitted by the appellant. There were two appeals on record. The first appeal was submitted in 2012 (TC/2012/06548) and was against a decision dated 23 April 2012 in the sum of £100,518. This appeal was withdrawn by the appellant in 2015.

33. The second appeal on record at the time was the present appeal under the reference TC/2016/01555, which was initially filed in March 2016, but was returned to the appellant's representative as incomplete. The appeal was then re-submitted in September 2016 by McKeague Morgan.

34. On 21 November 2016, HMRC carried out a review of the duty assessment in response to the appeal lodged in September 2016. The review concluded that the assessment was correct in principle, but noted some inaccuracies in the calculations of the duty assessment issued in 2012. The adjustments to the calculations reduced the excise duty from £161,893 to £144,730, and the penalty from £35,003 to £32,370.08.

Appellant's case

In respect of the application for making an appeal out of time

35. On the Notice of Appeal dated 6 September 2016, the reasons given in support of the application for a late appeal are as follows:

> "Mr Mackin's accountants state that they submitted an appeal on 1 October 2012. HMRC state that they have a record of an appeal against a VAT assessment but no record of an appeal against the HODA assessment.
>
> Mr Mackin's poor health has resulted in delays in the matter being dealt with."

36. A two-page summary of Mr Mackin's medical conditions and medication, two medical reports, one by a consultant psychiatrist (7 pages), and one by a consultant in pain management (5 pages) have been lodged with the Notice of Appeal. Both medical reports were carried out in connection with the injuries sustained by Mr Mackin in a road accident on 10 September 2010. The psychiatrist's report was dated 4 April 2011 after an interview with Mr Mackin on 23 March 2011, and the pain management report was made following an examination on 24 March 2011.

The grounds in relation to the substantive appeal

37. The appellant contends that the calculation of the excise duty unpaid is overstated for the following reasons:

> "A) Incorrect calculation of mileage on vehicle reg IEZ 1355.
>
> B) SORNs insurance evidence and DVA correspondence confirming that vehicles assessed by HMRC as being in use during the audit period, were not in use (laid up) at the time.

C) HMRC audit calculation assumes vehicles worked 52 weeks per annum. No allowance has been given for downtime in respect of driver holidays, MOT preparation, servicing and periods when containers would have been available for collection (continental holidays). Downtime and holidays are estimated at 8 weeks per vehicle per annum.

D) HMRC calculation estimates each vehicle at 1100 miles per week and works on the assumption that all vehicles are on the road at the same time. Mr Mackin estimates a more accurate reflection of mileage as being 880 miles per week.

The attached schedule take the above factors into account and recalculates the liability for excise duty at £18,231."

38. The documents enclosed in support of the substantive appeal are:

(1) One Statutory Off Road Notification ("SORN") from Driver and Vehicle Agency ("DVA") – acknowledgement letter for TLZ 2248 dated 8 September 2009;

(2) A SORN notification for TLZ 2249 (but not DVA letter);

(3) A "Confirmed Vehicle Schedule at Renewal" at 26 October 2008 showing DLZ 6369, DLZ 6370 and TLZ 2248 as for "laid up fire and theft cover" only;

(4) A letter from "Find Insurance NI" dated 31 March 2016 (following a request from Mr Mackin) to confirm 10 vehicles owned by P Mackin Transport being insured with the company; the list includes DLZ 6370 (for laid up cover from 26 October 2009 to 9 December 2010) and TLZ 2248 (effective 26 October 2009 to 26 October 2010, and reinsured 5 January 2011 to 6 May 2011).

(5) DVA letter regarding N611 CUV dated 30 August 2012 to say that no record was held for this vehicle.

Oral and written submissions

39. Mr McNamee's submissions can be summarised as follows:

(1) That the appellant has suffered from long standing and continuous physical and mental health problems; that the attempts to make an appeal by his previous financial advisers were apparently unsuccessful though it is not clear for what reason they were unsuccessful.

(2) That the respondents are not prejudiced by this late appeal due to the deeming provisions at para 5 of Sch 3 to the Customs and Excise Management Act 1979 whereby "the non-duty paid nature of the fuel cannot be in issue before the First-tier Tax Tribunal".

(3) The "strength" of the appellant's case in this matter is "a highly material consideration" in the Tribunal's exercise of its overriding objective. That the respondents appear to accept that "there may be some evidential value in relation to the insurance schedules and documents";

that "there appears to be strong prima facie evidence in relation to the vehicles dealt with" in the respondents' post-hearing submissions.

(4) An application to appeal out of time is provided for within the legislation. There is therefore "no correlation between an appellant making an appeal out of time and an appellant seeking to set aside a Strike Out due to non-compliance with Directions".

(5) That "nowhere in the Respondent's submission does it indicate where and by what means the Respondent would be prejudiced by allowing the late appeal"; that there are "no grounds for the Respondent to resist this late appeal" and that "the late appeal should be allowed".

(6) That "the principle of proportionality as regards the exercise by the Tribunal of its overriding duties in dealing with the matter fairly and justly" means that the Tribunal should not be "blind to [sic] contents and import of these documents [attached to the Notice of Appeal]" as HMRC "apparently invites the Tribunal to in like manner deal with this matter blind to contents and import of these documents".

HMRC's case

Submissions at the hearing

40. The Notice of Appeal asserts that the appellant's accountant, Purdy & Co "appealed the assessment by letter to HMRC dated 1 October 2012". HMRC have no record of ever receiving any copy of that letter until 3 August 2015, when a copy of the said letter was faxed to HMRC by Gillen & Co. HMRC submit that there was no evidence that such an appeal letter had been received either by HMRC nor the Tribunals Service to that effect.

41. Even if HMRC had received the letter at the time when the appellant alleges that it was sent, it could not constitute a notification of an appeal to the Tribunal since it was addressed to HMRC. If it was intended to constitute a request for a review of the decision by the respondents, to which the Respondents did not respond, the time limit for filing a Notice of Appeal with the Tribunal was 75 days after 31 August 2012 (s 16(1A) FA 1994), so the Notice of Appeal was still served over 3 years 9 months out of time.

42. As to the assertion that the appellant's accountant sent a "second appeal" to the First-tier Tribunal Birmingham on 20 November 2015, saying that "the appeal was not acknowledged", HMRC submit that the letter, if ever received by the Tribunals Service, does not in any event meet the requirements for a valid Notice of Appeal set out at Rule 20 of the Tribunal Procedure Rules.

43. In relation to the medical reports dated 24 March 2011 and 4 April 2011, these were more than a year prior to the decisions at issue, and gave no opinion as to the appellant's fitness in involving himself in his own tax affairs between August 2012 and September 2016. Furthermore, it is specious for the appellant to invite the

respondents to adduce expert evidence to rebut the appellant's assertions when he himself has not provided any expert evidence in support thereof.

44. HMRC would suffer significant prejudice on the specific facts of this case. In accordance with their usual procedures, the respondents have destroyed the sample of red diesel taken from the appellant's vehicle, when no appeal was received. The fuel was not, prior to its disposal, sent away for detailed testing by the Government Chemist. If the appellant were to contend that red diesel was found in his tank due to cross-contamination of a refuelling hose, as he did during the interview under caution in 2011, or that the respondents ought not to have embarked on the road fuel audit in the absence of a chemical analysis of the fuel, the respondents would not be able to rely on chemical analysis of the sample to disprove this.

Post-hearing written submissions

45. The first matter for submission concerns the reasons for the reduction in the quantum of the duty assessment in November 2016, following an internal review conducted by HMRC on being notified that an appeal was lodged against the assessment in September 2016.

46. Three arithmetic errors were discovered on review, two of which resulted in an over-assessment and were the reasons for the reduction to the assessment. The first error reveals that the total diesel consumption in litres for one of the vehicles should have been 87,987 when it was over-stated by 2,000 litres as 89,987. The second error concerns a different vehicle and the period it was on the road, which should have been 109 weeks instead of the 169 weeks assessed.

47. On the matter of merits of the substantive appeal, HMRC submit that this is not a case where the merits of the claim "were so strong that there was no real answer to them, in other words, in cases where an application for summary judgment could be expected to succeed" (*HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* [2014] UKSC 64 at [30]).

48. The following evidential aspects relating to the appeal are highlighted:

(1) HMRC's enquiries revealed that many of the invoices provided by the appellant in support of the purchase of sufficient white diesel to meet the needs of the business vehicle was not genuine; for example:

(a) Numerous invoices purported to be from Morgan Fuels Ltd were confirmed by Morgan Fuels as not genuine;

(b) Numerous invoices purported to be from MV Tapper bore no VAT registration number even though there was a VAT amount; the appellant's daughter then provided HMRC with a document purporting to show MV Trapper's VAT registration number, and the number was traced to a plumber registered in England;

(c) Whilst copy cheques were provided as proof of purchase of diesel, no copy cheques were provided as made out to either Morgan Fuels Ltd or MV Tapper.

(2) The weekly mileage estimate used by HMRC was 1,100 miles per week for all but one vehicle, which was estimated at 600 miles per week. The appellant contends the weekly mileage estimates should be 20% lower at 880 and 480. HMRC then requested the appellant's business records in 2012, which showed a fair estimate for each vehicle to be 1,200 to 1,500 per week. On this basis, the appellant's contention that the weekly mileage estimates should be at 880 and 480 are not credible in the absence of any substantive evidence.

(3) The lower estimates used in HMRC's mileage calculation for the appellant's vehicles are in line with HMRC's policy, and reductions for holidays and downtime have already been factored into these figures. The appellant contends that holidays and downtime should be given to HMRC's estimates, which would mean discounting holidays and downtime twice over.

(4) The appellant provided two documents purportedly showing some of his vehicles were either insured with laid up cover only, or uninsured during the assessment period.

(a) The first document is a schedule compiled on 21 October 2008, showing details of the appellant's vehicles insured at that date apparently for the purpose of renewal of the appellant's insurance on 26 October 2008, and that two vehicles (one being DLZ 6370) were shown to be laid up from 26 October 2008 to 25 October 2010. However, the schedule itself was not sufficient proof that the insurance for those vehicles was in fact renewed on those terms as laid up, and actual insurance documents or alternative validation to that effect would have to be provided.

(b) The second document is a letter from "Find Insurance NI" dated 31 March 2016, which appears to show that DLZ 6370 was insured as laid up from 26 October 2009 to 8 June 2012, it also shows another commercial vehicle (P124 PKH) which was not disclosed to HMRC in 2012 and was not included in the assessment.

(5) Attached to the Notice of Appeal are documents purportedly to demonstrate that three of the appellant's vehicles were the subject of a Statutory Off Road Notification ("SORN") for road tax purposes for various durations during the audit period.

(a) The first SORN would appear to be valid evidence which HMRC would accept;

(b) The second, however, was a notification to DVA but not a SORN acknowledgement from DVA; and

(c) The third was a claim of a SORN for a vehicle whose registration number does not match exactly that on the insurance document, and which DVA stated that it has no record of the vehicle with that supposed registration number;

(d) The SORN duration claimed for each vehicle was only around 12 to 13 months of the 39-month audit period.

Discussion

The overarching issue of approach

49. The overarching issue of the correct approach the Tribunal should adopt in determining the application is, of itself, a matter of contention between the parties.

50. For HMRC, Mrs Spence highlighted that the development in this area of law has been at some pace in recent years, with "conflicting" judicial decisions on the relevant approach being delivered. She submits that for the present application, "it is appropriate to consider the *Data Select* questions in the context of the stricter approach in *BPP Holdings*".

51. The focus of the parties' contention as regards the approach the Tribunal should adopt concerns the relevance of Lord Justice Ryder's decision (Court of Appeal) on *BPP Holdings* delivered on 1 March 2016. Relying on *BPP Holdings*, HMRC submit that a stricter and tougher approach in the enforcement of time limits should be adopted, and that includes an extension of time to make an appeal.

52. Mr McNamee, on the other hand, seeks to distinguish the right of appeal from an obligation to comply with rules and directions. He avers that Mr Mackin's right of appeal is a statutory right for him to exercise, and there is "no correlation" between the exercise of a statutory right and the obligation to comply with rules and directions to render the authority of *BPP Holdings* applicable in this case.

53. Instead of considering the *Data Select* questions, Mr McNamee urges on the Tribunal to consider the merits of Mr Mackin's appeal as central to his case, and that to deny Mr Mackin's right of appeal is contrary to "the principle of proportionality" and incompatible with the exercise of the Tribunal's discretion with regard to its overriding objective.

Any real distinctions as respects an application to appeal out of time

54. The central tenor of Mr McNamee's submission is that the matter in front of me is somewhat different from that in *BPP Holdings*; that the authority is only applicable to considering an application for a strike-out or a debarring order, and is not relevant to considering whether the exercise of Mr Mackin's statutory right of appeal should be allowed out of time.

55. As I understand it, Mr McNamee is urging on me to consider the question as formulated by Judge Mosedale in *Richard Chan* at [45]: "The question here is not

whether the litigation is being conducted efficiently but whether the appellants are entitled to litigate at all." However, after stating the question that seemingly distinguishes the two matters, Judge Mosedale observed at [46] that "these distinctions may be more apparent than real", and for the following reasons, I agree.

56. First, a breach of rules or directions and a failure to exercise a statutory right timeously are both the result of non-compliance with a time limit by the defaulting party. In terms of the origin of the default, there is no real distinction between them.

57. Secondly, where a breach receives the sanction of a debarring order or a strike out, the effect is to remove the entitlement of the defaulting party to have a fair hearing on the merits of its case. In terms of consequences, there is no real distinction either between the imposition of such sanctions and a refusal to grant permission to appeal out of time.

58. Thirdly, the judicial consideration in either case is essentially to reach a decision on the same matter, namely, whether to allow "an extension of time" to comply with a rule or a direction, or as the case may be, to make an appeal out of time. To that extent, there is no intrinsic difference in the consideration between whether to impose a sanction, or to admit a late appeal; the underlying matter is identical.

59. Fourthly, Mr McNamee seems to suggest that to pay heed to the overriding objective means that the Tribunal should distinguish a late appeal application from an application for the imposition of a sanction. I am not at all persuaded that this is right.

60. The essential matter is whether to grant an extension of time, and the consequence of that decision may mean the imposition of a sanction, or a refusal of a late appeal. In my view, to bifurcate the approach in determining the essential matter of extension of time will be contrary to the overriding objective, which is to deal with cases fairly and justly. It is not arguable that to introduce nuanced differences in the approach in dealing with cases where the essential matter is the same will be in the interests of fairness and justice. Any nuanced distinctions, once admitted, will run the risk of multiplying. Contrary to what Mr McNamee submits, a consistent and uniform approach is desirable to the promotion of fairness and justice, and *that* must be in line with the overriding objective.

61. Fifthly, the guidance in *McCarthy & Stone* has emphasised that "the overriding objective does not require the time limits in those rules to be treated as flexible" (at [45]). Seeking flexibility by developing nuanced differences in the approach in enforcing time limits is definitely not a requirement under the overriding objective.

62. Finally, the Supreme Court judgment by Lord Neuberger in *BPP Holdings* has emphasised that "it is highly desirable, particularly in a field where the law is the same throughout the United Kingdom (as in tax), that tribunals, or at any rate tribunals in the same field, apply the same, or (at least in some cases) even similar, rules in the same way throughout the UK" (at [22]).

63. For all these reasons, I am not persuaded that there should be any difference, however nuanced, in the approach when considering whether a sanction should be

imposed due to a breach, or whether permission should be granted for a late appeal. The authority of *BPP Holdings* is therefore applicable to this application.

64. For completeness, it should be mentioned that Lord Neuberger has cautioned that "all tribunals and appellate courts above the level of the UT should be wary of applying or relying on the procedural jurisprudence of the English and Welsh courts without also taking into account that of the Scottish and Northern Irish courts".

65. The application in front of me was heard in Northern Ireland; the CPR governs the proceedings in English and Welsh courts, and does not apply directly to the tax tribunals (FTT and UT). However, I am clear that it is not required of me to take into account the procedural jurisprudence of the Norther Irish courts for the purpose of this application, since the application is being considered at first instance, and the jurisdiction of the FTT on tax matters which are not devolved applies throughout the United Kingdom.

Procedural jurisprudence for this tribunal as it now stands

66. The Civil Procedure Rules ("the CPR") as amended with effect from 1 April 2013 has led to the development in case law on the interpretation of the new procedural code, especially in respect of CPR 3.9.

67. The new CPR 3.9 reads 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;
>
> (b) to enforce compliance with rules, practice directions and orders."

68. The relevance of the new CPR 3.9 to tribunal proceedings has been the subject matter of two Upper Tribunal decisions, which were probably what Mrs Spence was referred to as "conflicting decisions" in case law development. These two decisions were delivered in 2014 by Judge Sinfield in *McCarthy & Stone*, followed by Judge Bishopp in *Leeds City Council*.

69. In line with his reasoning in *Leeds City Council*, Judge Bishopp had reversed the FTT decision by Judge Mosedale to debar HMRC from taking part in the proceedings in *BPP Holdings*. In his Court of Appeal judgment in *BPP Holdings*, Lord Justice Ryder referred to the "two conflicting decisions of the UT about the principles that were to be applied with rules and directions fell to be considered by a tax tribunal" (at [15]). Affirming the approach developed in *McCarthy & Stone*, the UT decision by Judge Bishopp was reversed by the Court of Appeal, and the debarring order against HMRC was reinstated.

70. With the benefit of the Supreme Court judgment in *BPP Holdings*, it is opportune to summarise where the jurisprudence now stands as regards the approach to be taken by first instance judges in exercising its discretionary powers in case

management as respects an extension of time, and whether the approach developed in *Data Select* continues to be applicable in its full extent.

71. In so doing, it should be noted that in relation to the Court of Appeal judgment in *BPP Holdings*, Lord Neuberger in his Supreme Court judgment has clearly pointed out at [9] that while "we agree with the conclusion reached by the Court of Appeal, we should not be taken as approving all its reasoning".

72. It is the UT decision of *McCarthy & Stone* which received express endorsement from Lord Neuberger at [26]: "The guidance given by Judge Sinfield in *McCarthy & Stone* was appropriate", in the context of it being "an important function" of the UT "to develop guidance so as to achieve consistency" in the FTT, and that:

> "… confirming that guidance in this case, ... 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."

73. On that basis, the guidance developed in *McCarthy & Stone* should be the approach this tribunal adopts, whereby following the introduction of the new CPR 3.9, "courts must be tougher and more robust than they have been hitherto when dealing with applications for relief from sanctions for failure to comply with any rule, direction or order" (at [42]).

74. In respect of the overriding objective in the UT Rules, Judge Sinfield states at [43] that while "the CPR do not apply to tribunals", he does not "accept that the differences in the wording of the overriding objectives in the CPR and UT Rules mean 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."

75. Given Mr McNamee's emphasis on the overriding objective, the guidance in *McCarthy & Stone* on how to balance the various factors that come under the overriding objective is of particular relevance, and is as follows:

> "[44] An informal and flexible approach may mean that a self-represented litigant is granted relief from a failure to comply with the rules, including time limits, in circumstances where a more experienced and better resourced party is not. … Such factors will, however, carry less weight than the two principal matters which must be considered in the new CPR 3.9.
>
> [45] The overriding objective does not require the time limits in those rules to be treated as flexible. I can see no reason why time limits in the UT Rules should be enforced any less rigidly than time limits in the CPR. …"

76. The guidance in *McCarthy &* Stone, while referring to Rule 2 of the Upper Tribunal Procedure Rules, can be applied directly to the First-tier Tribunal Procedure Rules: the wording for the overriding objective under Rule 2 of the respective Tribunal is effectively identical.

The primacy of the two principal matters

77. The two principal matters in the new CPR 3.9 referred to at [44] of *McCarthy & Stone* are: (a) for litigation to be conducted efficiently and at proportionate cost; (b) to enforce compliance with rules, practice directions, and orders.

78. The relevance of the CPR to the tribunal proceedings, as clarified by the Supreme Court in *BPP Holdings* at [26] is: *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*.

79. In accordance with the decision of *Durrant* at [41], the two principal matters must be considered *first* because they "are the most important considerations". For failing to do so, the Court of Appeal in *Durrant* concluded that the judge at first instance had erred because he "went through the old checklist of factors in the superseded version of CPR 3.9 before coming to the two considerations specifically mentioned in the new CPR 3.9", and then returning to consider further "all the circumstances of the case". The court further observed that the first instance judge:

> "… did not appreciate that the two considerations specially mentioned in the new rule are the most important considerations and should be given greater weight than other factors… Nor did he appreciate how much less tolerant an approach towards non-compliance with rules, practice directions and orders is required by the new rule."

80. Furthermore, the primacy of the two principal matters under the new CPR 3.9 means that they should be accorded greater weight than: (1) those factors under the overriding objective, and (2) those criteria in the *Data Select* approach developed by Morgan J, which incorporated the factors under the old CPR 3.9. Accordingly, Judge Sinfield's guidance on the *Data Select* approach is as follows:

> "[55]… that approach [in *Data Select*] can no longer be regarded as correct in the light of the guidance given by the Court of Appeal in *Mitchell*. That is not to say that the factors in the old CPR 3.9 are irrelevant. Those factors may, depending on the case, be part of 'all the circumstances of the case' which it is appropriate to consider. The matters listed in the old CPR 3.9 are a useful aid to ensure that all relevant other issues have been taken into account. In my view, it is no longer necessary, however, to treat the matters in the old CPR 3.9 as a checklist of issues that must be set out in full and considered in every decision."

The matters for consideration in determining this application

81. In the light of the aforesaid, the approach I adopt in determining this application is by considering the hierarchy of relevant matters in the following order:

> (1) The need for litigation to be conducted efficiently, being the first principal matter;
>
> (2) The need to enforce compliance with the Tribunal Procedure Rules, being the second principal matter;

(3) Whether there is a good explanation for the failure, in relation to the submission on Mr Mackin's medical history;

(4) The merits of the appeal, in relation to the predominant factor singled out by Mr McNamee in support of this application.

82. As made clear in *Durrant*, not only is the hierarchy of matters to be considered re-ordered under the new CPR, but the relative weighting to each matter has also been re-aligned. The factors in the checklist of issues in the old CPR 3.9, while forming part of the consideration of all the circumstances of the case, now "carry less weight than the two principal matters which *must* be considered in the new CPR 3.9" (emphasis added, *McCarthy & Stone* at [44]).

83. Furthermore, in considering "all the circumstances of the case", it is no longer necessary to consider every factor in the checklist of the issues listed in the *Data Select* approach. In the present case, my consideration of all the circumstances of the case is confined to matters that the appellant has relied on in support of his application for an extension of time.

First matter: The need for litigation to be conducted efficiently

Whether there was an appeal in October 2012

84. On this matter, there is uncertainty as regards when a valid appeal was made. No witnesses were called, nor any witness statements provided by Mr Mackin or his agents Gillen & Co and Michael Purdy & Co. I was taken through the history of correspondence between the parties in considerable detail during the hearing. A finding of fact is required to establish the timing when a valid appeal was lodged.

85. First, I will consider the letter that was allegedly sent by Michael Purdy & Co and dated, on the face of it, 1 October 2012, for the purpose of making an appeal against the duty assessment. For the following reasons, I am unable to make a finding of fact that the letter was contemporaneous with the date shown thereon:

(1) The first letter on record from Gillen & Co to HMRC in relation to the penalty assessment was dated 20 May 2013 and no mention was made of the duty assessment nor an appeal supposed to have been made in 2012.

(2) By fax on 3 August 2015, the name Michael Purdy & Co was first mentioned, and Gillen & Co claimed: "It is clear from our instructions that the Oil duty tax has been under appeal since 1st October 2012 … by our clients [sic] accountant Michael Purdy & Co."

(3) From 20 May 2013 to 3 August 2015, there had been correspondence between Gillen & Co and various departments of HMRC, but at no time was the letter of 1 October 2012 from Michael Purdy mentioned, until the late stage of 3 August 2015.

(4) Presumably, Gillen & Co received their instructions in April 2013 when they were asked to appeal against the VAT arrears and then May 2013, the penalty assessment. If it was indeed as "clear from our

instructions" as Gillen & Co stated, it seems to me extremely peculiar that the important "appeal" letter (against the duty assessment) and of its date, was only *first* mentioned some 26 months after Gillen & Co wrote to appeal against the penalty assessment.

(5) The significance of the date for complying with the time limit for making an appeal could not have been missed by the agents, whether it was Gillen & Co or Michael Purdy & Co. It is incredible that the significant date of 1 October 2012 was first mentioned on 3 August 2015, after more than two years of protracted correspondence regarding the making of an appeal against the duty assessment.

(6) When Michael Purdy wrote the second letter of appeal dated 20 November 2015, the date of the first (alleged) letter would have been vested with great significance by that time. It was curious that a date of such significance should be wrongly stated as 1 December 2012 in this second letter. The inconsistency in the date of the alleged letter, given the signification vested on the date of 1 October 2012, further distracts from the cogency of the representations made by Gillen & Co in their fax to HMRC of 3 August 2015.

(7) The corroborative evidence from HMRC is that they have no record of receiving the letter of 1 October 2012 alleged to have been sent, while it is noted that no other letters in the course of correspondence between the parties appear to have gone missing.

86. In these circumstances, where I have no conclusive evidence to enable me to find as a fact that the letter of 1 October 2012 was contemporaneous with the date shown thereon, the date of the letter remains in doubt. The timing of the first mention of the letter in the long course of correspondence, the lack of any follow-up action in such a time-sensitive matter, and the silence in the intervening period over this alleged letter all speak eloquently against its contemporaneity. On the balance of probability, I find that the letter was not contemporaneous with the date shown thereon.

87. Even if a contemporaneous document had been drafted on 1 October 2012, the onus is on the appellant under s 7 of the Interpretation Act 1978 to prove to the required standard that the service of the document could have been "deemed to be effected by properly addressing, pre-paying and posting … at the time at which the letter would be delivered in the ordinary course of post". There is no supporting evidence to enable me to make a finding of fact that effective service of the said document at the time could be deemed. In other words, the burden of proof to the required standard is not met here for part one of section 7 to be engaged.

The date of a valid appeal

88. In the second letter from Michael Purdy & Co dated 20 November 2015, HMRC was the addressee but the letter was sent to the Tribunals Service in Birmingham. The contents of the letter referred to "an appeal on 1st December 2012 against an oil duty assessment"; that "HMRC has not acknowledged receipt of the

said appeal", and that they wished "to lodge a further appeal against this assessment with the tribunals service".

89. I conclude the letter of 20 November 2015, while expressing the intention to make a further appeal to the Tribunals Service, did not constitute the instrument to effect a valid appeal.

90. In March 2016, there was an attempt to lodge an appeal with the Tribunals Service. However, that lodgement was returned by the Tribunals Service, as the requisite information had not been provided to process the appeal.

91. It was the Notice of Appeal dated 6 September 2016 that constituted a valid appeal against the duty assessment.

92. For that matter, it was also the Notice of Appeal dated 6 September 2016 that constituted a valid appeal against the wrongdoing penalty. I conclude that the letter of 20 May 2013 from Gillen & Co was at most a notification of the intention to appeal; it was addressed to Debt Management (not to the Tribunals Service); it contained no substantive information as respects the grounds and evidence related to the pleadings.

The length of delay

93. The date of the duty assessment was 31 August 2012, and on page two of the assessment notice, it was clearly stated that Mr Mackin could opt to accept the offer of review within 30 days of the date of the assessment. That offer was in line with the statutory provision under s 15C (1) of the FA 1994, which means that an acceptance was to be notified to HMRC by 30 September 2012.

94. The alternative of making an appeal to the Tribunal within 30 days of the date of the assessment was also stated on page two of the notice. This is the statutory right of appeal under s 16(B) of FA 1994, which clearly provides the time limit for making an appeal against an assessment raised under s 13(1A) of HAD to be within 30 days of "the date of the document notifying P of the decision to which the appeal relates".

95. Mr McNamee submits that Mr Mackin's statutory right of appeal is at issue here, and that is not in dispute. However, this statutory right is well defined as exercisable within a time limit; the statute only provides the right within the time span of 30 days from the date of the notification of the liability.

96. The Tribunal has the discretionary powers to extend this time span, but that discretion has to take into account the length of delay. The Upper Tribunal decision of *Romasave* gives clear guidance at [96] on the exercise of such discretion:

> "The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the Tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

97. As a matter of fact, the valid appeal to the Tribunal against the duty assessment was made on 6 September 2016, while the time limit for making the appeal was 30 September 2012.

98. As regards the penalty assessment dated 30 January 2013, the time limit for making an appeal expired on 1 March 2013. The appeal was made on 6 September 2016 to the Tribunal.

99. The length of delay in the present case is three years and eleven months for the duty assessment, and three years six months for the penalty assessment, when more than three months is to be considered as "serious and significant".

100. Even if I were to find that there had been a contemporaneous letter served on 1 October 2012 as alleged, that letter at the very most, could only be considered as a request for a review. The letter was addressed to HMRC at Customs House Square in Belfast, and it listed three reasons for the appeal (but without giving any supporting documents). The appellant clearly did not receive any reply from HMRC related to this letter alleged to have been sent in October 2012.

101. Where a review request has been made, and HMRC fail to give notice of the outcome of the review within 45 days from the date of request, the assessment is deemed to have been upheld on review. The absence of a reply from HMRC means that the appellant could have taken the assessment as upheld, and pursued the appeal under s 16(1A) of FA 1994, and the time limit for making an appeal in such a situation is within 75 days of the date on which a review was requested.

102. Even if I were to reckon the breach of the time limit under s 16(1A) of FA 1994 (on the assumption that there had been a letter sent to HMRC in October 2012), the eventual appeal when it was lodged with the Tribunal in September 2016 would still be significantly out of time.

103. There can be no basis for the Tribunal to exercise its discretionary power to such an extent as to admit an appeal that is so seriously and significantly out of time. On the factual basis alone, the application must be refused. This would be so even under the old procedural regime, let alone in the current regime where "courts must be tougher and more robust than they have been hitherto", as the guidance from *McCarthy & Stone* has directed.

Second matter: the need to enforce Tribunal Rules

104. The overriding objective, on which Mr McNamee has heavily relied, does not require the time limits in those rules to be treated as flexible. As the guidance in *McCarthy & Stone* states: there is no reason why time limits in the FTT Rules should be enforced any less rigidly than time limits in the new CPR.

105. The aim of the Tribunal Rules is to do justice, as Judge Bishopp observes in *Leeds City Council* at [24]:

> "The aim of the rule, like any other imposing a time limit, is to require a party asserting a right to do so promptly, and to afford to his opponent the assurance that, after the limit has expired, no claim will be made."

106. Other factors under the overriding objective, such as consideration for "anticipated costs and resources of the parties", "avoiding delay", are an aid to doing justice, not just to Mr Mackin, but also to HMRC, as a party to potential litigation. As a public body, the resources available to HMRC has a public interest dimension. This is succinctly put by Lord Drummond Young in *Aberdeen City* at [23] as follows:

> "The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened."

107. Here, the application concerns an intended appeal against a determination against HMRC, and no judicial decision has been made on that determination to make the comments on "finality in litigation" directly applicable. Nevertheless, as Morgan J in *Data Select* has noted at [37]:

> "… 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."

108. While Mr McNamee has emphasised the appellant's right of appeal as statutory, his failure to exercise his right of appeal within the time limit has legal consequences. One consequence is that HMRC are entitled to assume that matters had been "finally fixed and settled", and the wider public interest consideration weighs heavily against the deployment of HMRC's resources to defend against a stale claim, and indeed the resources of the courts to deal with a matter that is so significantly out of time.

Third issue: whether there was a good explanation for the delay

109. The validity of the medical reports in March 2011 is not in dispute, nor is the fact that the appellant was involved in a serious road accident on 10 September 2010.

110. The Tribunal has no expertise to comment on the medical reports, nor is it necessary to do so for the purpose of determining this application. The weighting to be accorded to these reports as offering a good explanation for the delay is, to a significant extent, relegated to "all the circumstances" consideration.

111. In terms of timing, the seizure of the vehicle containing red diesel on 1 December 2011 took place just under 14 months after the road accident, or 8 months after the medical reports. It would seem that the appellant was able to be involved in his business by the time of the vehicle seizure, and that he was able to deal with the provision of documents requested for the fuel audit by 8 February 2012.

112. In any event, even if the appellant was incapacitated, he had the service of his professional agents to act on his behalf. While it is not open to me to find when the appellant actually engaged the service of Michael Purdy & Co, or Gillen & Co to deal with the duty assessment, these agents would seem to be part of the appellant's business connections at the material times.

113. Furthermore, the appellant is not new to tax assessments or appeals; he has been in the haulage business for at least around 20 years; he had a former haulage business that was wound up in 2001 "due to legal and tax problems" (per medical report); he had the previous experience of making an appeal with the Tribunal against HMRC's decision (dated 23 April 2012 for £100,518 and withdrawn in 2015); he had other assessments raised against him at the material times: VAT arrears, Employer's PAYE and NIC, Income tax surcharges; and the VAT arrears are under appeal if not all the other outstanding liabilities.

114. Whatever the appellant's medical conditions might have been, they cannot explain the delay of nearly 4 years in bringing an appeal, especially in the context of the availability of his professional advisers, and of his extensive experience as a taxpayer over the decades of being in business.

Fourth matter: the merits of the appeal

115. The bankruptcy petition for the overall debts of £222,246 pursued by HMRC had, as its main elements, the oil duty assessment of £161,893 and the wrongdoing penalty of £35,003 (before their respective reduction adjustments), which together represented 88% of the overall debts.

116. Whilst the bankruptcy was annulled by the voluntary arrangement, the Tribunal is keenly aware of the consequence to Mr Mackin if his application is refused: the duty and penalty assessments will stand as the quantum of his liabilities.

117. In respect of the merits of the appeal, Mr McNamee has made two main submissions. First, he contends that the reduction of the duty assessment by HMRC on their own initiative when the matter was reviewed in preparation for these proceedings is indicative of some fundamental errors in HMRC's calculations.

118. Secondly, Mr McNamee submits that the evidence available to support the appellant's contention that the quantum of the duty assessment should only be £18,231 is, as I understand from his various descriptions, incontrovertible.

119. With these submissions being advanced, I requested HMRC to clarify the basis for reducing the duty assessment, (the penalty reduction follows on from there). I made clear that HMRC are not obliged to address the matter of merits.

120. I am grateful for Mr Williamson's detailed yet concise post-hearing submissions on behalf of HMRC, not only on the reasons for the reduction, but also on the quality of evidence which Mr McNamee avers to be incontrovertible.

121. The interlocutory nature of the matter in front of me means that the merits of the appeal can only be considered as part of all the circumstances of the case, as More-Bick LJ, giving the judgment of the Court of Appeal in *R (Hysaj)* states 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."

122. In other words, the relevance of merits in balancing the various factors has to be limited *only* "to those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak".

123. Based on the five documents accompanying the Notice of Appeal in support of the substantive appeal, and on HMRC's response thereto, I note as follows:

(1) The fuel audit has identified invoices from two major fuel suppliers to be false; this fact is not in dispute by the parties.

(2) At the time of submitting information for the fuel audit, the average weekly mileage for each vehicle was stated as: "1200-1500 Each" (per the annotated copy of HMRC's letter of 27 January 2012). HMRC applied the industrial average usage of 1100 miles per week in the calculations. The figure of 880 miles per week underpinning the quantum of the appellant's duty calculations of £18,231 is unsubstantiated by any evidence, and does not appear to be incontrovertible. On the contrary, the business records of the appellant in 2012 showed a fair estimate to be 1200-1500 miles per week, which accorded with the annotated answer.

(3) HMRC's duty assessment was made on eight vehicles in the audit period, and weeks of non-usage had been taken into account in the calculations. One of the three vehicles (DLZ6369) in the Schedule at Renewal as "laid up" was not included anyway. While the other two vehicles were included, HMRC also pointed out there was another commercial vehicle not disclosed to HMRC in 2012.

124. It is unnecessary to go into any further detail. The uppermost observation of the quality of evidence is the false invoices, (on which input VAT had been falsely claimed). In that regard, I share the comment of the judge at [41] in *Thomas Corneill*, where the appellant produced a series of demonstrably false invoices: "The tribunal was obviously very unimpressed with the quality of evidence from Thomas Corneill."

125. The claim that the evidence exists to support the quantum of the assessment to £18,231 is unmeritorious. In actual fact, the quality of the submitted evidence is weak, scant, and piecemeal; it raises questions on the completeness of disclosure; it confirms the duty assessment raised by HMRC as judicious and reasonable.

126. Besides, the time to raise the quantum issue was when the assessment was first raised in August 2012. HMRC cannot be criticised for not taking into account the SORN certificate which has been conceded to be valid, if the appellant has chosen to produce it only at this late stage (in September 2016 when lodging the appeal).

127. The late production of the five documents is characteristic of how the appeal has been conducted. There is a consistent failure to pursue the appeal with any diligence, whether on the part of Mr Mackin or his advisers. The letters starting with Gillen & Co's on 20 May 2013 against the penalty assessment and all subsequent letters would seem to have been prompted by actions from Debt Management or Central Policy. Each letter was perfunctory and sought to do no more than to hold off the actions from these branches of HMRC.

128. These letters were wrongly addressed to branches of HMRC which dealt with matters such as the collection of the debts or publication of tax defaulters' details, and not with the substantive matters underpinning the appeal. The fact that these actions were brought by HMRC should have alerted any competent and professional lawyers to the true state of affairs as regards the status of the intended appeal, namely, that there was no valid appeal in place. There was a gap in 2014 when no correspondence was exchanged over this matter. When HMRC did not act, the advisers took no action, (or perhaps more accurately, Mr Mackin gave no instructions for any actions). The pattern of response was one of passivity, of minimal input, of reversing onus by asking HMRC to acknowledge the appeal, when in substance and form, no serious attempts had ever been made to lodge a cogent appeal supported by credible evidence.

Decision

129. The application for permission to make the appeal out of time is refused.

130. 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.

DR HEIDI POON

TRIBUNAL JUDGE
RELEASE DATE: 7 MARCH 2018

This decision is re-published after amendments to correct accidental typographical slips under Rule 37 of the Tribunal Rules.