[2018] UKFTT 275 (TC)

TC06505

Appeal numbers: TC/2017/00246
TC/2016/03773

PROCEDURE – applications to notify appeals out of time – section 49H of TMA 1970 – failure in accepting an offer of review within the statutory time limit – Discovery assessment – tax-geared penalty determinations – appeal against refusal for postponement of tax –* BPP Holdings *and* McCarthy & Stone *considered – 'all the circumstances of the case' considerations – applications allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BIFFIN LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at the Tribunals Service at George House, 126 George Street, Edinburgh on 13 November 2017

Mr David Yates, Counsel, instructed by Dentons UKMEA LLP, for the Appellant

Philip Simpson QC, instructed by the Office of the Advocate General, for the Respondents

DECISION

The substantive appeals

1. The appellant, Biffin Limited ('Biffin'), appeals against the following decisions by the Respondents ('HMRC'):

(1) A discovery assessment to Corporation Tax for the accounting year ended 31 December 2010;

(2) Penalty determinations in relation to the late filing of returns for the accounting years ended 31 December 2010, 2011, 2012, and 2013; and

(3) HMRC's decision to refuse the postponement of the disputed tax in relation to the discovery assessment for the period to 31 December 2010.

2. The corporation tax assessment and penalty determinations are grouped together under the appeal reference TC/2017/00246; (henceforth also as appeal 1.A) and the refusal decision on the postponement of tax is under TC/2017/03773; (appeal 1.B).

3. The disputed sums of tax and penalties in relation to these appeals notified late to the tribunal are as follows:

(1) The discovery assessment is for a total of £161,470 for the period ending 31 December 2010.

(2) Late filing penalties of £32,794, £24,209, £22,519, and £21,365 respective to the periods ended 31 December 2010, 2011, 2012, and 2013.

(3) The postponement application in relation to the 2010 discovery assessment is for the sum of £52,132 out of the total of £161,470 charged.

The issue for determination

4. The appeals were lodged by PricewaterhouseCoopers LLP ('PwC'), accountants for Biffin. There is no dispute that the appellant was late in notifying the above appeals to the Tribunal.

5. The issue for decision at this hearing is whether the appellant's applications for an extension of time to notify appeals 1.A and 1.B to the Tribunal should be granted. HMRC oppose the applications.

Evidence

6. Mr Preshaw gave evidence on behalf of the appellant. Mr Preshaw was one of the principal staff members at PwC with responsibility for the appellant's tax affairs.

7. There was no issue as to the credibility of the witness. I accept Mr Preshaw's evidence as to matters of fact in relation to the circumstances that led to the appeals being notified out of time.

8. Mr Preshaw's witness statement contains comments which pertain to matters of opinion or of understanding. It is not necessary to address them here, as these statements are not directly relevant to the matters in front of me, and are consequently disregarded in my consideration.

Linked appeals and proceedings

9. Separately, there are five in-time appeals by Biffin (as the First Appellant), which are conjoined with six other appeals brought by its two directors, Robert MacFarlane (as the Second Appellant) and Eric Taylor (as the Third Appellant). These conjoined appeals relate to substantive matters concerning Biffin's tax affairs, which in turn have implications on the tax position of its directors.

10. In relation to these related substantive appeals, the three appellants' applications to postpone the disputed sums of tax had been variously refused by HMRC. These refusal decisions were appealed in time, giving rise to another set of proceedings to be determined as preliminary matters.

11. By case management directions issued in August 2017, the Tribunal directed that the applications to admit the late appeals (Part I of the hearing) and the appeals in relation to the postponement of tax for the in-time linked appeals (Part II of the hearing) were to be heard on the same day. In the end, only Part I of the hearing was concluded on 13 November 2017, and Part II was re-listed for 5 March 2018.

12. The hearing listed for 5 March 2018 was further postponed to 13 April 2018. In the interim, the parties had entered negotiation over the postponement of tax in relation to the in-time appeals. At the hearing on 13 April 2018, the parties informed the Tribunal that they were close to the point of a contract settlement. The hearing on 13 April was adjourned for the parties to formalise the settlement agreement.

The relevant legislation

13. The Tribunal's power to admit a late appeal is contained in section 49 of the Taxes Management Act 1970 ('TMA'), and the relevant subsections are:

> '49 **Late notice of appeal**
>
> (1) This section applies in a case where –
>
> (a)notice of appeal may be given to HMRC, but
>
> (b) no notice is given before the relevant time limit.
>
> (2) Notice may be given after the relevant time limit if –
>
> (a) HMRC agree, or
>
> (b) where HMRC do not agree the tribunal gives permission.'

14. The present application is made with reference to s 49C TMA, which reads:

> '49C **HMRC offer review**

(1) Subsections (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.

(2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC's view of the matter in question.

(3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with section 49E.

(4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under section 54(1) for the settlement of the matter.

(5) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (4) applies.

(6) Subsection (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49H.'

15. Where a review offer has not been accepted, the powers of the tribunal on an appeal so notified are governed by s 49H TMA:

'49H **Notifying appeal to tribunal after review offered but not accepted**

(1) This section applies if –

(a) HMRC have offered to review the matter in question (see section 49C), and

(b) the appellant has not accepted the offer.

(2) The appellant may notify the appeal to the tribunal within the acceptance period.

(3) But if the acceptance period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this section "acceptance period" has the same meaning as in section 49C.'

Factual background

16. The business of Biffin is in the development of contaminated land. The company was incorporated in February 2003, and registered in Jersey.

17. At the material times, Biffin was legally owned by discretionary trusts, and Mr McFarlane and Mr Taylor were the named discretionary beneficiaries. In July 2006, Mr Taylor became the named director of Biffin, while Mr McFarlane was appointed as a director in September 2006.

18. The 2010 Discovery assessment and the penalty determinations to which these applications relate, together with the linked appeals that are in-time, are the culmination of HMRC's enquiries into Biffin that originated in November 2011.

19. Protracted correspondence between PwC and HMRC charts the course of the enquiries and the narrowing down of issues and of the disputed sums involved. For the purposes of the present applications, it was the correspondence from HMRC to Biffin and its directors dated 24 August 2016 that is of direct relevance.

HMRC's letter of 24 August 2016 offering internal review

20. On 24 August 2016, HMRC Officer Mason wrote 'in response to [PwC's] letters of 25 and 28 July requesting internal reviews in respect of the following assessments, amendments and determinations'.

21. The letter sets out its purpose with the subject heading on the front page, namely 'Internal Review request – View of the Matters'. The contents of the letter correspond to the subject heading, and are in the main the review conclusions on those matters covered by the in-time linked appeals.

22. The main letter was addressed to Biffin at the Trustees' address in Jersey. The letter was also sent in duplicate to Biffin at PwC's office in Glasgow. The duplicate letter was accompanied by a covering letter, which bears the same (and only) subject heading as relating to 'Internal Review request – View of the Matters'.

23. After the introductory sentences, the letter continues by itemising the list of matters covered by the internal review request, and for each category of matters, HMRC's views are set out under the following sub-headings in the body of the letter:

(1) Jeopardy Amendments 2008 and 2009 (page 2);

(2) 2011, 2012, 2013 Discovery Assessments (pages 2 to 6);

(3) 2006 and 2007 Discovery Assessments (pages 6 to 10);

(4) Tax Related Penalty Determinations for the periods ended 31 December 2007, 2008 and 2009 (pages 10 to 11);

(5) NIC Decisions for the five tax years ended 5 April 2006 to 2010 (pages 12 to 13).

24. Interspersed between the headings for category 4 and 5 matters are two separate sub-headings to cover additional matters not included in the itemised list. These matters are 'additional' in the sense of not being matters raised in PwC's letters of 25 and 28 July, and fall under the following sub-headings:

(1) 2011, 2012 & 2013 Penalty Determinations and 2010 Assessment (page 11);

(2) PAYE Determinations for income tax for the tax years ended 5 April 2006 and 2007 (page 12).

25. For the purposes of the present application, it is the substance under the first additional sub-heading that is of significance, which reads as follows:

> 'Linked to or of a similar nature to the 2011, 2012 and 2013 tax assessments, are the penalty determinations for those years and the tax assessment for the year ended 31 December 2010.
>
> The company has appealed against the fixed rate and tax geared penalties for 2011, 2012 and 2013 but has not requested an internal review of these at present. *In addition, the company has not requested an internal review of the Discovery assessment for 2010*.
>
> I understand the basis of the appeals against the penalties and 2010 assessment is similar in nature to that of loss relief claim for 2011 to 2013, in that the company believed it had an agreement with HMRC to delay the submission of the returns for each year. I disagree and am unaware of any reasonable excuse for the late submissions of the returns for 2010 to 2013.
>
> My view of the matter in respect of the penalties and 2010 assessment is the same as above for the loss relief claims, in that there was no such agreement with HMRC nor grounds for accepting late claims. Even if there was a prior agreement, this had clearly ceased following the failure to submit the outstanding returns by 7 December 2015. *Should you wish internal reviews into the penalty determinations for 2010 to 2013, or 2010 assessment, please let me know within the next 30 days*.' (emphasis added)

It is noted that the sub-heading to these additional matters for which a review offer was made does not include the penalty determination for the year 2010, but that in the body of text as italised the offer of review did cover 'the penalty determinations for 2010 to 2013'.

Other letters from HMRC dated 24 August 2016

26. The above letter of 24 August 2016 is one of the five letters from Officer Mason bearing the same date. The four other letters cover the following matters:

> (1) A letter to PwC confirming that HMRC would not give assurance not to proceed with the collection of the amounts where no postponement had been agreed.
>
> (2) A letter to Mr McFarlane advising that an internal review would take place in relation to the jeopardy amendments and discovery assessments as respects the years 2004-05 through to 2009-10.
>
> (3) A letter to Mr Taylor advising that an internal review would take place as respects the same matters as those for Mr McFarlane.
>
> (4) A letter to Biffin agreeing to PwC's request that no enforcement action would take place to collect penalties on the basis that they are not subject to the s 55 TMA provisions.

Appellant's subsequent actions

27. By letter dated 18 November 2016, PwC requested an internal review of the 2010 assessment under s 49B TMA. The letter, however, did not request a review of the late filing penalties.

28. By letter dated 16 December 2016, the Respondents refused the request as 'incompetent', on the ground that the acceptance period for the offer of internal review had expired.

29. On 20 December 2016, the appellant notified its appeal (Appeal 1.A) in relation to 2010 Discovery assessment and the penalty determinations for 2010 to 2013.

Applications for judicial review claim

30. By letters dated 13 and 14 September 2016, HMRC served on Mr McFarlane and Mr Taylor respective demands for payment in the sums of circa £4.5m each, with action by way of summary warrant if the sums were not paid in full. Attempts to discuss the payment demands were made by PwC on behalf of the two directors in the course of September 2016. On consulting with counsel, it was decided that the best course of action was to apply for judicial review at the High Court and for interim relief; the application was filed on 23 September 2016.

31. At the first hearing, which was *ex parte*, Mr Justice Jay granted interim relief but made the following observations:

> 'It is not satisfactory to file papers in a case of this nature and complexity seeking interim relief on an urgent basis shortly before 4.30pm on a Friday afternoon. Further, the relief sought is without notice to the Defendant (the latter has had no opportunity to participate), and it is arguable that in this sort of case proper notice should have been given.
>
> That said, and having considered the Grounds, I am just persuaded that I should grant interim relief, but for a limited period.
>
> If the Claimants wish to extend this order, they will have to apply on notice to the Defendant in good time before 4pm on 5/10/16.'

32. By notice filed and served on 29 September 2016, Biffin, Mr McFarlane and Mr Taylor were joined Claimants in an application for interim relief. The application was heard on 5 October 2016, which resulted in an injunction order being made and issued on 14 October 2016. By that order, HMRC as the Defendants in the judicial review application were 'prohibited from taking any steps to enforce or seek payment of any of the alleged tax liabilities that are the subject of appeal and any interest thereon'. A costs order was also made against HMRC in the sum of £19,800.

33. On 6 February 2017, Mr Justice Cranston's decision on the judicial review application was issued, whereby: (1) permission for the application is refused; (2) the interim relief orders of 23 September 2016 and 5 October 2016 are dissolved; (3) no order as to costs.

34. Judicial review proceedings were also raised by Biffin, McFarlane and Taylor in the Court of Session around the same time, which were dismissed with expenses being awarded in favour of HMRC.

The request for postponement of tax

35. The matter under Appeal 1.B is in respect of the postponement of tax charged by the 2010 Discovery assessment. By letter dated 5 January 2016, PwC wrote to HMRC to apply for postponement in the following terms:

> 'We refer to your letter of 16 December 2015 enclosing a corporation tax assessment for Biffin Ltd for the year ended 31 December 2010. Our clients wish to formally appeal the assessment on the following grounds:
>
> - The income figure of £630,992 is estimated.
> - There appears to have been no consideration of allowable expenses in calculating the taxable profit.
> - There has been a denial of loss relief for trading losses brought forward.
>
> We would also request postponement of the tax of £161,470.12 until such times as the matters currently under enquiry are resolved.'

36. On 15 January 2016, a CTSA return for the year ended 31 December 2010 was filed, followed by a letter dated 1 February 2016 from PwC which identified the figure of £52,132 as the sum for postponement, having accepted the balance of the tax liability sought by the 2010 Discovery Assessment was in fact due.

Appellant's grounds of application

37. For the appellant, Mr Yates submitted that the appellant had appealed all matters in time to HMRC; that the matter for this tribunal was therefore whether it should allow Biffin to 'notify' its (timeous) appeals out of time under s 49H(3), in a case where the notification was late.

38. Secondly, the appeal was notified late due to PwC's oversight in realising that HMRC had offered a review in the letter of 24 August 2016; that PwC's oversight was 'readily understandable', and 'should be excused by the Tribunal' for the following reasons:

> (1) the letter does not in the introduction refer to an offer of review at all; that 'there are no other warnings or indications at the beginning of the letter that this is occurring'; and that it is 'only on pages 11-12 where HMRC offer a review';
>
> (2) the letter was received against a background of multiple appealable decisions and at a time when PwC were assisting the appellant and its directors in preparing for urgent proceedings against HMRC;

(3) that HMRC 'were found to be acting unlawfully in attempting to enforce tax debts prior to the Tribunal determining the postponement applications';

(4) Mr Preshaw's letter of 18 November 2016 requesting a review was indicative that PwC did not realise that a review had been offered;

(5) PwC acted promptly without delay when their error was pointed out by HMRC on 16 December 2016 by making an application to the Tribunal.

39. Thirdly, 'no prejudice has arisen to HMRC in particular given that the late appeal forms part of a much larger cohort of appeals'. The grounds of appeal as stated on the Notice of Appeal for the 2010 Discovery Assessment are the same or similar to those for the in-time appeals, namely:

> 'The assessment (16 Dec 15) was made based on estimated income and on the basis no relief against non-trading income was available for trading losses arising in the period ...'

40. Fourthly, at the hearing Mr Yates advanced a further ground that the appellant's Article 6 rights are infringed in relation to the tax-geared penalties if the appellant were to be denied to the opportunity to defend itself against the penalty determinations.

41. Fifthly, it is submitted that 'to any reasonable reader', there was an 'express request' for postponement by letter dated 5 January 2016, and the relevant figure to be postponed was identified, and revised to £52,132 by letter dated 1 February 2016.

Respondents' case of objection

42. For the respondents, Mr Simpson submitted that:

(1) The appellant neither applied for review nor lodged a notice of appeal by the time limit, and that the responsibility for this failure must be borne by the appellant and its advisers.

(2) Whilst it is possible for the late appeal to be admitted under s 49H(3), this is by way of exception and 'particular reasons must be shown for disregarding [the] limit' per Lord Drummond Young at [22] of *Commissioners of Inland Revenue, Petitioners* [2006] STC 1218.

(3) The only evidence being put forward is that of Mr Preshaw. Neither the Second nor the Third Appellant, each of whom was a director of the First Appellant at the material time, is offering any evidence.

(4) Mr Preshaw's explanation for the failure is to assert that the relevant part of the letter dated 24 August 2016 was overlooked due to the complexity of the case, while 'he is at pains to explain that his background is in complex tax investigations'; that it behoves a professional adviser to pay heed to every detail in an official communication; that HMRC should not have to bear the burden of such an oversight by a well-remunerated agent, and that remedy is available to the appellant against PwC.

(5) The appellant asserts that the issues are the same as those that arise in relation to the linked appeals. This is not correct in respect of the late filing penalties. The appellant has made no reference to prospects of success; it is submitted that these are low, and the application should be refused.

Discussion

43. Mr Yates referred to the Supreme Court judgment in *BPP Holdings v Revenue and Customs Comr*s [2017] UKSC 55 ('*BPP Holdings*') in his submissions, but he did not explicate how the Supreme Court judgment would have assisted the appellant's applications.

44. The procedural jurisprudence relevant to this tribunal as it now stands after *BPP Holdings*, is stated by Lord Neuberger at [26]:

> '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.'

45. In *BPP Holdings* (at [26]), Lord Neuberger expressly endorsed the guidance to the First-tier Tribunal as given by Judge Sinfield in the Upper Tribunal decision in *Revenue and Customs Comrs v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC) ('*McCarthy & Stone*'). It is therefore worth highlighting the view stated in *McCarthy &* Stone as respects the new CPR 3.9, as ushering in a new regime whereby '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]).

46. The new CPR 3.9 took effect from 1 April 2013 and 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.'

47. The two principal matters in the new CPR 3.9 are specifically referred to in *McCarthy & Stone* when discussing the implications of *Durrant v Chief Constable of Avon and Somerset Constabulary and Another* [2015] EWCA Civ 1633 ('*Durrant*'). In *Durrant*, it is made clear that 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' (at [44] of *McCarthy & Stone*).

48. Accordingly, Judge Sinfield's guidance (at [55]) on the approach developed by Morgan J in *Data Select Limited v Revenue and Customs Comrs* [2012] UKUT 187 (TCC) ('*Data Select*') is:

> '… 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.'

49. In respect of the overriding objective in the Upper Tribunal 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.' The same reasoning applies to the overriding objective in the FTT Rules, given that the wording of the overriding objective of the First-tier Tribunal Rules is effectively identical to that for the Upper Tribunal.

The length of delay

50. The procedural jurisprudence after *BPP* is clear, that 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, and that applies to the Tribunal's discretion in allowing an extension of time.

51. Furthermore, the exercise of the discretion to extend time must take into account the length of delay. The guidance in this respect from the Upper Tribunal in *Romasave (Property Services) Ltd v Revenue and Customs Comrs* [2015] UKUT 254 (TCC) is at [96] and states as follows:

> '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.'

52. Biffin was entitled to accept the offer of internal review under s 49C of TMA, or to notify the appeal to the Tribunal under s 49H TMA (if the offer for review is not accepted). The time limit for either course of action is the same, being 30 days after the date of the letter of review offer as prescribed by s 49C(8) TMA.

53. The date of the offer of review was 24 August 2016. If the appellant were to take up the offer of review, the time limit for accepting the offer was 23 September

2016. The appellant failed to register that the letter of 24 August 2016 contained an offer of review in relation to the 2010 Discovery Assessment and the Penalty Determinations for the relevant years. In the absence of an acceptance of the offer of review, the appeals were notified to the Tribunal, and the time limit for such notification was also by 23 September 2016.

54. The Notice of Appeal to the Tribunal was dated 20 December 2016, which means the length of delay is just under three months after the expiry of the time limit.

55. On these facts alone, and applying the latest case law authorities, the applications should be refused. As Mr Simpson submitted by citing Lord Drummond Young, 'particular reasons must be shown for disregarding [the] limit'. In considering whether there had been particular reasons, I have regard to 'all the circumstances of the case' which had led to the delay. The *Data Select* approach remains relevant when considering all the circumstances of the case, albeit that the importance of those factors is to be weighed against the principal matters which are now primary.

All the circumstances of the case

(a) The 2010 Discovery assessment

56. The appeals that have been notified late are linked to the in-time appeals that have been related earlier in this decision. From the ongoing course of correspondence between the parties over the cohort of appealable decisions, it is clear that PwC's failure to register that HMRC's letter of 24 August 2016 contained the review offers of the relevant matters was the cause for the delay.

57. This procedural slip was due to an oversight on the part of PwC, which was readily admitted by Mr Preshaw. In evidence, he explained how the manner in which the contents of 24 August 2016 were introduced had led to this oversight. While accepting the respondents' submission that this was an oversight by a professional adviser paid to deal with complex tax investigations, I nevertheless have regard to the contexts in which the oversight arose.

58. Firstly, within the immediate context of the review conclusion letter, the covering letter accompanying the duplicate copy sent to PwC's office set out the purpose of the letter as 'Internal Review request – View of the Matters'. The main letter itself reiterated the same subject heading; the contents of the letter corresponded to its main purpose; 12 out of the 13 pages were devoted to stating the review conclusions on matters listed by the bullet points on the front page of the letter; the relevant four paragraphs containing the review offers started at the lower one-third of page 11 with the last paragraph on page 12; the 'additional' matters were not introduced at the end of the letter after all the listed matters were dealt with, but were embedded in the body of the letter, and interspersed between matters that fall firmly within the review conclusions.

59. Secondly, the review conclusion letter of 24 August 2016 containing the review offers was issued in the context of a cohort of letters from HMRC issued on the same

day, all of which were of some length and substance. Although not all of these five letters were in relation to Biffin, the appealable decisions in relation to its directors are inextricably linked with those in relation to Biffin.

60. Thirdly, the wider context in which subsequent events unfolded culminating in the judicial review proceedings is of relevance. It is not necessary to comment on whether the actions of Debt Management to seek payment of some £4.5 million from each director was 'unlawful' as described by Mr Yates. However, the quantum of the payment demands, the observations from Mr Justice Jay in granting interim relief, and the timing of the applications for interim relief and the judicial review claims, all spoke for the urgency of those proceedings and the preoccupation of the appellant's advisers during the acceptance period of the review offers.

61. Viewed in the round, the prejudice to the appellant by a refusal to extend time outweighs that to the respondents. This is not a case that HMRC were unaware of the appeal until a late stage. The respondents had been aware of the appellant's position that it did not agree with the 2010 Discovery assessment by its appeal to HMRC against the assessment. It was the offer of a review that triggered the running of a time limit, and in a sense, 'dislodged' the appeal already made to HMRC. In contrast, the prejudice to the appellant, if extension of time were refused, would mean that the disputed sum of tax would become the settled liability, which in turn would fix the tax-geared element in the late filing penalty for the CTSA return for 2010, and to whatever extent, might also impinge on the tax liabilities of its directors.

62. In view of the overriding objective, to deal with matters fairly and justly is to afford the appellant the opportunity to have the substantive issues in relation to the 2010 Discovery assessment properly determined in conjunction with the other in-time appeals. To this end, the respondents are not unduly burdened by the 2010 Discovery assessment being included in the cohort of Biffin's substantive appeals, since the grounds of appeal for the other years seem to concern the same or similar issues. On balance, it is appropriate to admit the substantive appeal against the 2010 Discovery assessment that was notified late under s 49H(3) of TMA.

(b) The penalty determinations

63. As regards the penalty determinations, the tax-geared element in the imposition of these penalties means that the fairness of the quantum of the penalty is pitched to the fairness of the tax liability for the respective years.

64. On the basis of my decision to admit the 2010 Discovery assessment, there now exist appeals in relation to the appellant's tax liabilities for the periods from 2010 to 2013. Given the tax-geared element in the penalty determinations, I consider that the late appeal against the penalties for the four years should also be admitted, so that the quantum of these penalties can be fairly determined in accordance with the tax liabilities for the said years as determined under the relevant substantive appeals.

65. Aside the issue of quantum, I note the respondents' contention that the grounds of appeal against the penalty determinations are different from those in the substantive appeals against the tax liabilities. This point was made as a rebuttal to Mr Yates' submission that HMRC were not prejudiced if the penalty appeals were admitted. While I accept the validity of the respondents' contention, I consider that the prejudice against the appellant, if deprived of the right of reply in a case of penalty imposition, far outweighs the prejudice that may be posed to HMRC.

66. Accordingly, I give permission for the late appeal against the penalty determinations for the periods 2010 to 2013 to be admitted.

(c) The postponement of tax against 2010 assessment

67. The postponement of tax under appeal 1.B is in relation to the Discovery assessment for the period to 31 December 2010, and was a matter that HMRC had been aware of since 5 January 2016. Given that the substantive appeal against the 2010 Discovery assessment has been given extension of time, it is reasonable to admit the late appeal against HMRC's decision refusing postponement of the disputed tax. In any event, the matter of postponement of tax in relation to 2010 is most likely to be covered in the parties' contract agreement to dispose of the linked in-time appeals concerning postponement of tax which were originally scheduled to be heard as Part II of these proceedings.

Decision

68. The Tribunal gives extension of time and allow all matters under the appeal references TC/2017/00246 and TC/2016/03773 to be admitted.

69. Directions are issued for these matters to join the proceedings in relation to the linked appeals.

70. 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: 22 MAY 2018