[2018] UKFTT 497 (TC)

# TC06675

**Appeal number: TC/2016/00217**
**TC/2017/03105**

***PROCEDURE – withdrawal of appeals against VAT and excise duty assessments, associated penalties and refusal of AWRS approval – late applications for reinstatement – whether power to reinstate under rule 17 FTT rules was precluded by s 85(4) VATA – yes – whether (if power existed) extension of time should be permitted – yes – whether appeals should be reinstated on the facts – no***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**OWD LIMITED** **Appellant**
**T/A BIRMINGHAM CASH & CARRY**
**(IN LIQUIDATION)**

**- and -**

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

**TRIBUNAL: JUDGE SARAH FALK**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 5 June 2018**

**David Bedenham, instructed by Rainer Hughes, for the Appellant**

**Howard Watkinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. The appellant OWD Limited ("OWD"), a company now in insolvent liquidation, made numerous appeals to the Tribunal during 2016 and 2017. Ten of the appeals were subsequently consolidated under appeal reference TC/2016/00217, and HMRC produced a detailed consolidated Statement of Case in respect of those appeals. Appeal reference TC/2017/03105 covers a single further appeal. This decision relates to the withdrawal of the appeals by OWD's liquidator following his appointment and a subsequent late application to reinstate the appeals under rule 17 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). HMRC challenged the reinstatement of the appeals on the basis that a reinstatement was statute barred by s 85 Value Added Tax Act 1994 ("VATA"), or alternatively the reinstatement was an abuse of process, and in any event an extension of time should not be permitted. Even if an extension was allowed, HMRC's case was that reinstatement should in any event not be permitted on the facts.

2. In summary, the appeals related to the following:

> (1) three excise duty assessments in the amounts of approximately £660,000, £627,000 and £479,000 respectively, raised on the grounds that OWD was holding alcohol products on which excise duty had not been paid;
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> (2) three penalty assessments arising out of the excise duty assessments and made under Schedule 41 Finance Act 2008 ("FA 2008"), of around £138,000, £132,000 and £168,000 respectively (the third of the penalties being levied on the grounds of deliberate behaviour);
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> (3) four VAT assessment appeals, the first in respect of two assessments totalling around £152,000 and relating to disallowance of input tax recovery on property rents, the second in respect of an assessment of around £10,000 relating to the same subject matter, the third for about £320,000 of under declared output tax (essentially, suppression of sales), and the fourth being the appeal under reference TC/2017/03105 and relating to an assessment of around £38,000 issued to recover input tax; and
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> (4) HMRC's refusal of OWD's application for approval to carry on the wholesale of alcohol under the Alcohol Wholesaler Registration Scheme ("AWRS"), pursuant to s 88C Alcohol Liquor Duties Act 1979.

3. In addition, OWD has another appeal before the Tribunal relating to the denial of input tax recovery under the *Kittel*[1] principle. This appeal is ongoing and is not affected by this decision. Finally, OWD is a party to High Court proceedings relating to the refusal of AWRS approval. The current status of these proceedings is that the Court of Appeal have granted temporary relief, in the form of temporary approval

[1] *Axel Kittel v Belgium; Belgium v Recolta Recycling* (C-439/04 and C-440/04) [2006] ECR 1-6161.

under the scheme pending the outcome of Tribunal proceedings challenging the refusal, but permission to appeal that decision to the Supreme Court has been obtained.

## Evidence

4. A witness statement was provided on behalf of OWD by Sanjay Panesar, the senior partner of Rainer Hughes. Mr Panesar was not called to give oral evidence. I agree with HMRC that, overall, the witness statement is of limited assistance. Mr Panesar was not authorised to waive legal privilege and therefore provided little information about the position of the liquidator and the background to the decision to withdraw the appeals and the subsequent application to reinstate them. However, the statement does exhibit some relevant correspondence.

5. Documentary evidence primarily comprised details of the appeals, Mr Panesar's witness statement and exhibits, and correspondence relating to the withdrawal and application to reinstate.

## Section 85 VATA and rule 17

6. So far as relevant, s 85 VATA provides as follows:

> "**85. Settling appeals by agreement**
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> (1) Subject to the provisions of this section, where a person gives notice of appeal under section 83 and, before the appeal is determined by a tribunal, HMRC and the appellant come to an agreement (whether in writing or otherwise) under the terms of which the decision under appeal is to be treated—
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> (a) as upheld without variation, or
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> (b) as varied in a particular manner, or
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> (c) as discharged or cancelled,
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> the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement.
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> (2) Subsection (1) above shall not apply where, within 30 days from the date when the agreement was come to, the appellant gives notice in writing to HMRC that he desires to repudiate or resile for the agreement.
>
> …
>
> (4) Where—
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> (a) a person who has given a notice of appeal notifies HMRC, whether orally or in writing, that he desires not to proceed with the appeal; and

(b) 30 days have elapsed since the giving of the notification without HMRC giving to the appellant notice in writing indicating that they are unwilling that the appeal should be treated as withdrawn,

the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and HMRC had come to an agreement, orally or in writing, as the case may be, that the decision under appeal should be upheld without variation.

(5) References in this section to an agreement being come to with an appellant and the giving of notice or notification to or by an appellant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the appellant in relation to the appeal."

7. Rule 17 of the Tribunal Rules provides:

"**17. Withdrawal**

(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case—

(a) by sending or delivering to the Tribunal a written notice of withdrawal; or

(b) orally at a hearing.

(2) The Tribunal must notify each party in writing of its receipt of a withdrawal under this rule.

(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

(4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—

(a) the date that the Tribunal received the notice under paragraph (1)(a); or

(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

Rule 5(3)(a) of the Tribunal Rules also permits the Tribunal to "extend or shorten the time for complying with any rule…, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit".

## The relevant facts

8. OWD Limited's sole director and shareholder is Mrs Kuldip Bachra. On 15 August 2017 OWD passed a resolution to enter Creditors' Voluntary Liquidation. Mr Tauseef Rashid of Kingsland Business Recovery was appointed as liquidator. The statement of affairs produced as at that date and filed at Companies House shows the only assets as being cash at bank of £5,600. Total creditors are estimated at nearly £3.2 million, of which HMRC is shown as owed around £2.6 million and Mrs Bachra

is shown as owed around £274,000, with the balance being made up of what appear to be trade creditors.

9. OWD did not immediately inform HMRC or the Tribunal, or its solicitors Rainer Hughes, that it had entered liquidation. HMRC became aware and emailed the Tribunal and Rainer Hughes on 22 August to advise them of the fact. On the same day Rainer Hughes spoke to Mr Rashid to ask for instructions about the appeals, and were told that he would consider the matter and speak with his legal advisers.

*Withdrawal of consolidated appeals TC/2016/00217*

10. On 30 August the Tribunal contacted Mr Rashid by email attaching a letter requesting confirmation of whether the appeals consolidated under TC/2016/00217 would be continued or withdrawn. A copy was sent to Rainer Hughes under cover of a further letter. Mr Rashid replied to the Tribunal by email on the same day, under reference TC/2016/00217. Mr Rashid's email stated that, by virtue of its insolvency, OWD was no longer in a position to be represented in the proceedings and, consequently, the liquidator did not intend to continue with them. On the following day, 31 August, Mr Rashid forwarded this email to the relevant contact at HMRC's Solicitor's Office, Jessica Patrick, simply saying "FYI". He also sent a copy to Rainer Hughes.

11. Mr Panesar's evidence was that Mr Rashid did not obtain advice from Rainer Hughes about how to respond to the Tribunal's enquiry of 30 August, but instead took independent legal advice. I accept this. I also accept Mr Panesar's evidence that he spoke to Mr Rashid after finding out that he had withdrawn the appeals. Mr Panesar's evidence was that Mr Rashid said he had withdrawn the appeals because he thought that the result of doing so would be that the assessments would stand and would simply be taken into account in the liquidation, but that he "did not…appreciate that there is a risk that the assessments could lead to an attempt by HMRC to hold the former Directors personally liable, and accordingly it might have been appropriate to discuss the appeals with the directors before withdrawing them". This evidence is discussed further below.

12. On 6 September Rainer Hughes responded by email to the Tribunal's letter dated 30 August. This email stated that they were taking instructions, would not be in a position to reply by today (the Tribunal had given the liquidator seven days for a reply), and that they would revert shortly. This email was not sent to HMRC.

13. On 7 September the Tribunal wrote to HMRC in respect of appeals TC/2016/00217, copying the liquidator and Rainer Hughes. The letter stated that the liquidator had informed the Tribunal that it had withdrawn its appeals, and that any further application needed to be made within 28 days or the file would be closed. (In fact, the 28 days under rule 17 of the Tribunal Rules strictly ran from receipt by the Tribunal of the notice of withdrawal.)

14. On 5 October Rainer Hughes emailed the Tribunal again to advise that the directors and liquidator were discussing the continuation of the appeals and that

neither OWD nor the liquidator would be able to respond within 28 days of the Tribunal letter dated 7 September. An extension was sought to 13 October.

*Withdrawal of appeal TC/2017/03105*

15. In the meantime, on 31 August Ms Patrick of HMRC sent an email to the Tribunal and to Rainer Hughes, referring to OWD's liquidation and asking the liquidator to confirm whether other appeals listed in the heading to the email, which included TC/2017/03105, were being withdrawn. Ms Patrick also forwarded this email to Mr Rashid and asked him to confirm the position to the Tribunal and to her. Mr Rashid replied on 4 September, copying the Tribunal but not Rainer Hughes. The reply reads:

> "Dear Jessica
>
> I confirm that the attached appeals and all the appeals related to this matter are withdrawn. By virtue of its Insolvenct [sic], the Company is no longer in a position to represent itself at these proceedings. The Liquidator therefore has no intention to progress with these appeals."

*Attempts to reinstate*

16. On 6 October the liquidator sent a letter to Rainer Hughes consenting to the consolidated appeals under reference TC/2016/00217 being reinstated. Rainer Hughes forwarded this letter by email to the Tribunal, with a copy to HMRC, on the same day requesting that the appeals be reinstated, but not giving any reasons beyond referring to the liquidator's consent. Mr Panesar's explanation for the delay, which is discussed below, was that it arose as a result of his firm having to explain the issues surrounding each of the 11 appeals and the liquidator needing to take independent legal advice.

17. On 12 October HMRC requested written reasons to be provided in support of the reinstatement request, referring to the requirement under rule 6(3) of the Tribunal Rules that an application for a direction must include reasons, and also sought clarification in relation to appeal TC/2017/03105. Rainer Hughes had not previously been aware that the liquidator had withdrawn the appeal under that reference and they sought instructions from the liquidator.

18. Rainer Hughes emailed the Tribunal, copying HMRC, on 16 October in response to HMRC's request for reasons, stating that they relied on the letter from the liquidator consenting to reinstatement, confirming (in response to another query from HMRC) that there had been no assignment of the appeals to the former directors and saying that when the liquidator requested that the appeals be withdrawn he had not appreciated the position. Although the heading of this email refers only to appeal TC/2016/00217, there is a statement in the email that the reinstatement should be for all appeals in the name of OWD. HMRC attempted to clarify this further, being told in response that they were seeking confidential information which Rainer Hughes could not provide, and on 20 October HMRC sought an unless order seeking dismissal of the application to reinstate in the absence of receipt of a properly particularised application. Both appeals TC/2016/00217 and TC/2017/03105 are referred to in this letter.

19. On 8 November Mr Rashid wrote a further letter consenting to appeal TC/2017/03105 being reinstated. A formal application notice was filed on 8 November, seeking an extension of time to apply for reinstatement of both that appeal and the consolidated appeals and applying for the appeals to be reinstated. The application attached Mr Panesar's witness statement and maintained that the delay was due to the fact that it was necessary for the liquidator to understand the detail of the appeals and their significance and to take legal advice, that HMRC would not be prejudiced whereas there would be real prejudice to OWD if reinstatement was not permitted, including the risk of penalties against OWD or its directors and the risk of personal action against the directors.

*Personal liability notices*

20. Although I saw no evidence of this, both parties accepted that HMRC has issued personal liability notices to Mrs Bachra in respect of alleged defaults by OWD. The position was not made clear but I infer that these notices were issued under paragraph 22 of Schedule 41 FA 2008, in respect of one or more of the penalties assessed on OWD under that Schedule.

## Submissions

*Section 85(4) VATA*

21. HMRC's primary argument was that, by virtue of s 85(4) VATA, the Tribunal was *functus officio* and had no jurisdiction to grant a late application for reinstatement under rule 17 of the Tribunal Rules.[2] No case law was cited in support of this at the hearing, and if it was correct it would mean that the First-tier and Upper Tribunals appear to have proceeded on an incorrect basis in *Pierhead Purchasing Limited v HMRC* [2015] STC 331, where an extension of the time limit under rule 17(4) was considered in relation to an application to reinstate a VAT appeal, without reference to s 85 VATA and with no suggestion being made either before the FTT or Upper Tribunal that the FTT's discretion to reinstate was fettered by it. Mr Bedenham, for OWD, submitted that there was no basis to argue that s 85 cuts down the scope of the Tribunal's discretion under rules 5 and 17, and the issue was fairly before the Upper Tribunal in *Pierhead Purchasing*.

22. In view of the significance of HMRC's argument I sought written submissions on various matters, in particular the legislative history of s 85 VATA and its direct tax equivalent in s 54 Taxes Management Act 1970 ("TMA"), whether there is any relevant case law on s 85(4) or s 54(4) that was not identified at the hearing, an argument raised by HMRC that s 85(4) and rule 17 give an appellant a choice of using either provision, with rule 17 being engaged where an appellant communicates only with the Tribunal and not where it communicates its withdrawal to HMRC, and the

[2] Mr Watkinson did suggest that in theory it might be possible to apply to the Upper Tribunal to make a late appeal against the agreement under s 85(4), or conceivably that the FTT might be able to review that agreement as a "decision" of the FTT and grant permission. However, these points were not pursued and I have not considered them.

scope of the Tribunal's jurisdiction under rule 17 and the enabling legislation under which the Tribunal Rules were made, and any impact of that on the application of s 85(4).

23. Detailed written submissions were subsequently provided by Mr Watkinson for HMRC, for which I am very grateful. Resource constraints prevented further submissions on behalf of OWD. In summary, it is clear from HMRC's further submissions that s 85 VATA was intended to be modelled on s 54 TMA and to have a similar effect. The research had also unearthed some VAT and Duties Tribunal cases of some potential relevance, although the rules for that Tribunal included no express power to reinstate, together with some more recent cases, of which *Filit Tuncel v HMRC* [2014] UKFTT 171 (TC) and *HMRC v C M Utilities Ltd* [2017] UKUT 205 (TCC) were of most assistance. The submissions also confirmed that HMRC was not pursuing its submission that the appellant had a choice between s 85 VATA and rule 17, and argued that there was nothing in the enabling legislation for the Tribunal Rules that supported any suggestion that s 85(4) could be overridden.

*Other submissions for OWD*

24. Leaving s 85 VATA to one side, Mr Bedenham, for OWD, submitted that the application to reinstate was only made four days late. The delay was not serious and significant. There was a good explanation related to the liquidation, the need to explain the position to the liquidator and the liquidator's need to take advice on a variety of different appeals. The liquidator was newly appointed, there were large sums involved in the assessments and it was quite appropriate for liquidator to take advice to familiarise himself with the position, since otherwise he could be in breach of his duties as an office holder. HMRC's position was not prejudiced by the delay. In all the circumstances it was in the interests of justice to grant an extension.

25. It was also clearly in accordance with the overriding objective to grant the application to reinstate. There was no prejudice to HMRC and finality of litigation was not a trump card. HMRC had already produced a detailed Statement of Case in relation to 10 of the appeals. In contrast there would be significant prejudice if the appeals were not reinstated. There were significant sums involved. The excise duty assessments had merit because they raised the issue disputed in *B & M Retail Ltd v HMRC* [2016] UKUT 429 (TCC). The excise duty penalties suggested blame, one of the VAT assessments related to suppression of takings, and it was very clear that allegations of impropriety had being made by HMRC in refusing AWRS approval. Any challenge to the personal liability notices would not affect the blot on the name of the director left by the refusal of AWRS approval. The liquidator's withdrawal of the appeals had been off-the-cuff rather than considered, and should not prevent OWD from conducting the appeals.

*Other submissions for HMRC*

26. Mr Watkinson, for HMRC, submitted that the applications appeared to amount to nothing more than change of mind on the part of the liquidator.

27. If HMRC were wrong on s 85(4), then the application for an extension of time should still not be granted. The application was an application for a direction and therefore had to include reasons under rule 6(3). This requirement was only satisfied on 8 November so the delay was some six weeks. This was serious and significant. Both HMRC and the Tribunal were entitled to believe that the proceedings were at an end. Rainer Hughes' email of 6 September had not been copied to HMRC. There was no good explanation for the delay. The suggestion that a professional liquidator with a duty to the Court did not understand the consequences of withdrawing an appeal, in circumstances where it was clear that the liquidator had taken his own independent advice, was incredible. It could not be said that the liquidator withdrew the appeals by mistake. It was significant that the liquidator had not given evidence. The liquidator also owed no duty to the director in her capacity as director, and the effect of withdrawing the appeals on a director was irrelevant to the liquidator's decision. The implication was that the liquidator had been convinced into impermissibly delegating his decision-making function in relation to the litigation to OWD's former solicitors.

28. OWD was hopelessly insolvent whether or not the appeals proceeded. Furthermore, continuing to appeal the AWRS decision was pointless. The chances that a company in insolvent liquidation would end up with approval under that regime was vanishingly small. If an extension was granted HMRC would be denied finality and would have to conduct the appeals, with no real prospect of recovering its costs from OWD. Although OWD would also be unable to continue its appeals it had withdrawn them voluntarily and there was no prejudice.

29. If the Tribunal was minded to grant the application for an extension of time, then the application for reinstatement should still not be granted on the basis that it would not further the overriding objective.

## Discussion

*Section 85(4) VATA*

30. As a preliminary point, I agree with Mr Watkinson that s 85 VATA is potentially relevant to all the appeals, and not only the appeals against VAT assessments. Appeals against excise duty assessments are brought under s 16 Finance Act 1994 ("FA 1994"). Section 16(3B) makes clear that s 85 VATA applies for those purposes. Similarly in respect of the penalties, paragraph 18 of Schedule 41 FA 2008 provides that an appeal is treated in the same way as an appeal against assessment to the tax concerned, so again s 85 is in point. The appeal against the refusal of AWRS approval falls within paragraph 3 of Schedule 5 FA 1994, and as a result is a "relevant decision" within s 13A FA 1994, to which the appeals procedure in s 16 FA 1994 again applies.

31. Having considered the additional submissions, I have also reached the view that s 85(4) VATA applies on the facts, with the effect that the Tribunal has no power to reinstate the appeals after the 30 day "cooling off" period referred to in s 85(2). Since *Pierhead Purchasing* did not address this issue I do not consider that I am constrained by that decision in concluding that s 85(4) applies.

32. Section 85 is quite clear in its terms. If an appellant, or someone on its behalf, notifies HMRC that it desires not to proceed with an appeal and there is no objection from HMRC under s 85(4)(b), then the parties are deemed to have agreed that the appeal is upheld, with the same consequences as if the Tribunal had determined it. This is the effect of s 85(4), read with s 85(1.) The only caveat to this is where the appellant notifies HMRC within 30 days of the original notification (being the date of the deemed agreement) that it no longer wishes to withdraw. In that case the effect of s 85(2) is that the deemed Tribunal determination created by the withdrawal does not take effect. There is no power in s 85 for this 30 day time limit to be extended, and in my view rules 5 and 17 of the Tribunal Rules cannot supply such a power.

33. In *HMRC v C M Utilities Ltd* the Upper Tribunal made clear that rule 17 of the Tribunal Rules is expressly subject to "any provision in an enactment relating to withdrawal or settlement of particular proceedings" (rule 17(1)), and also that there is also nothing in rule 17 specifying the consequences of a withdrawal. It is essentially procedural in nature. Similarly, rule 5(3)(a) is expressly caveated so as not to permit a time period to be altered where that would conflict with another enactment that sets down a time limit. In contrast, s 85 VATA is both clear in its terms and does provide for the substantive consequences of a withdrawal. There is no indication that there was any intention that the operation of s 85 VATA should be affected by the replacement of the VAT and Duties Tribunal by the current Tribunal system and the inclusion in the Tribunal Rules of a power to reinstate. There is also nothing in the enabling legislation under which the Tribunal Rules were made (primarily s 22 of and Schedule 5 to the Tribunals, Courts and Enforcement Act 2007) suggesting that the Tribunal Rules were intended to be able to override the effect of primary legislation such as s 85 VATA, or its direct tax equivalent s 54 TMA[3].

34. *HMRC v C M Utilities Ltd* was a direct tax case where the appellant had notified the Tribunal of the withdrawal of an appeal, but HMRC did not wish to accept the withdrawal because they wished to increase the assessments under appeal. The Upper Tribunal, reversing the decision of the FTT, held that the purported withdrawal did not prevent the assessments being increased. The Upper Tribunal said the following about rule 17 of the Tribunal Rules at [20]:

> "Two features of Rule 17 are readily apparent. The first is that it provides for the withdrawal (and reinstatement) of a party's case, but it does not provide for the consequences of withdrawal. The second is that it is expressly subject to statutory provisions relating to both withdrawal and settlement. It is to those statutory consequences that we must look to determine the consequence of withdrawal."

35. The Upper Tribunal went on to consider the power to vary assessments under s 50(6) and (7) TMA, noting that the FTT had considered that the introduction of rule 17 on the transfer of functions to the FTT in 2009 meant that it was no longer the case that taxpayers were prevented from withdrawing from appeals. The Upper Tribunal disagreed, saying at [27] that "the consequences of withdrawal depend on the

[3] Part 4 of Schedule 5 does confer a power on the Lord Chancellor to amend primary legislation, but I understand that there has been no relevant exercise of that power.

statutory provisions which apply in the particular circumstances". In that case s 54(4) (the equivalent of s 85(4)) applied and HMRC had given notice within 30 days that they were unwilling for the appeal to be withdrawn. The effect was that there was no deemed agreement under s 54 and the FTT therefore retained jurisdiction to deal with the appeal, and if appropriate to increase the assessments. As to rule 17, the Upper Tribunal said the following at [36]:

> "Rule 17 is entirely compatible with that analysis. Not only is it expressly subject to statutory provisions relating to withdrawal or settlement (of which s 54 is plainly one), and says nothing itself about the consequences of withdrawal, it is also drafted in terms that it is the case of the party seeking to withdraw that is the subject of the withdrawal. Where it is the appellant who withdraws, that does not necessarily mean that the whole of the proceedings must be regarded as having come to an end. The proceedings remain to be determined, *whether as a matter of statute, as for example, where HMRC do not object, by a combination of s 54(4) and s 54(1)*, or by a decision by the tribunal, which in relevant circumstances will include consideration of whether the appellant has been undercharged and the assessment should be increased accordingly." (Emphasis supplied.)

36. In my view *HMRC v C M Utilities Ltd*, whilst not precisely in point, is supportive of HMRC's case. It makes it clear that rule 17 is subject to the statutory provisions relating to withdrawal, including any agreement deemed to arise by virtue of s 54(4) and s 54(1) TMA. In that case s 54 TMA was in point, but the Upper Tribunal noted at [37] that s 85(4) VATA is in the same terms.

37. *Filit Tuncel v HMRC* considered the possibility of reinstatement of an appeal where there had been an agreement under s 54 TMA. It adopts an approach which used the concept of abuse of process, but the point is essentially the same. Once 30 days have elapsed, the position is final. Judge Poole said the following at [33] and [34]:

> "33. Once agreement has been reached in writing (or has been confirmed in writing), then section 54 TMA is engaged and the only statutorily permissible means of cancelling that agreement is through the "cooling off" provisions of section 54(2) TMA. It is common ground that no notice was given within 30 days under that sub-section purporting to repudiate or resile from the agreement and accordingly we find that section 54(1) applies to this agreement. Thus, so far as the income tax and NIC amendment/assessments are concerned, "the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had... varied it..." in the manner agreed.
>
> 34. This means that, for the purposes of the Appellant's application to "reinstate" the part of his appeal that relates to the income tax and NIC amendment/assessments, we are required to assume that the Tribunal has already determined that part of the appeal on the basis agreed. In such a case, the doctrine of *res judicata* means that it would be an abuse of the Tribunal's process to permit the appeal to be re-opened, because the Tribunal would thereby be allowing the parties to re-

> litigate an appeal which had already been deemed by statute to have been determined on an agreed basis."

38. In contrast, in the earlier case of *Harleyford Golf Club Ltd v HMRC* [2011] UKFTT 634 (TC), the Tribunal effectively assumed that there was a discretion to reinstate a withdrawn VAT appeal, although the discretion was not exercised on the facts. The Tribunal noted that there could be no "statutory reinstatement" because the 30 day limit under s 85 VATA had been exceeded, but still assumed that the Tribunal had discretion under rule 17 (see paragraph [79]). Effectively this was the same approach as in *Pierhead Purchasing Limited v HMRC* and in my view it does not take proper account of the effect of s 85 VATA.

39. In this case Mr Rashid, acting on behalf of OWD, notified HMRC that OWD wished to withdraw the appeals. The notification in respect of the appeals consolidated under TC/2016/00217 was made on 31 August 2017, by forwarding the email sent to the Tribunal the day before. The notification in respect of appeal TC/2017/03105 was made by an email sent to HMRC on 4 September (an email that was copied to the Tribunal). The effect of s 85(4) is to treat each notification to HMRC as an agreement, reached on the date of the notification to HMRC, that the relevant decisions should be upheld without variation. Since no notice to the contrary was given to HMRC within 30 days, the effect is the same as if the appeals had been determined in HMRC's favour on the dates of the notifications.

40. This is sufficient to dismiss the applications to reinstate. However, since the questions of whether to extend time and whether to exercise the discretion to reinstate (if the Tribunal had power to do so) were fully argued before me I have set out my views on those issues below. For the purposes of this discussion it is assumed, contrary to the conclusion that I have reached, that s 85 does not prevent the Tribunal from permitting a late reinstatement.

*Whether extension of time should be permitted: the principles*

41. Guidance has been provided in a number of cases as to the approach the Tribunal should take in relation to failures to comply with time limits, including guidance by the Supreme Court in *BPP Holdings Limited and others v HMRC* [2017] UKSC 55. It is clear from the Supreme Court decision that I must take all relevant factors into account, but that close regard should also be paid to the approach now taken by the courts, under which importance must be attached to observing rules. The approach taken in the CPR (the Civil Procedure Rules) should generally be followed. Lord Neuberger referred in particular to the guidance given by Judge Sinfield in *McCarthy & Stone (Developments) Ltd v HMRC* [2015] STC 973 as being appropriate. Addressing the question of whether to permit an extension of time under the Upper Tribunal rules, Judge Sinfield referred to the Court of Appeal decision in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 as providing useful guidance. *Mitchell* made it clear that, whilst all the circumstances should be taken into account, particular weight should be given to the references in the CPR to the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions and orders. The Court of Appeal considered the issue again in *Denton v TH White* [2014] EWCA Civ 906 and

provided some clarifications which were considered by the Upper Tribunal in *Romasave (Property Services) Ltd v HMRC* [2016] STC 1, which also considered the guidance provided by Morgan J in *Data Select Ltd v HMRC* [2012] STC 2195.

42. Most recently, the Upper Tribunal has returned to the subject in *William Martland v HMRC* [2018] UKUT 178 (TCC) in the context of an application for permission to make a late appeal. At paragraph [44] the Upper Tribunal endorsed the three stage process referred to in *Denton* of (1) establishing the length of the delay and determining whether it was serious or significant, (2) determining the reason or reasons why the default occurred, and (3) evaluating all the circumstances of the case (the third element being a balancing exercise which will assess the merits of the reason(s) for the delay and the prejudice that would be caused to the parties). In doing so account must be taken of the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for time limits to be respected (paragraph [45]). The FTT can have regard to any obvious strength or weakness of the applicant's case, but should not descend into a detailed analysis of the merits (paragraph [46]).

43. *Martland* related to an application to make a late appeal, and the Upper Tribunal did recognise that there is a distinction between such cases and case management decisions relating to extensions of time, since permission to make a late appeal founds the jurisdiction of the FTT (paragraphs [18] and [46]). This meant that some outline consideration of the merits was appropriate in late appeal cases to gain a general impression of the strength or weakness of the appeal (paragraph [46]). However, as a general matter the same principles apply to late appeals and to case management decisions relating to extensions of time (see paragraph [56]).

*Whether extension of time should be permitted: application to the facts*

44. Under rule 17 of the Tribunal Rules, any application to reinstate should have been made within 28 days of the date of receipt by the Tribunal of the notice of withdrawal. Notice was received on 30 August 2018 in respect of TC/2016/00217 and 4 September 2017 in respect of TC/2017/03105. However, the position is confused in respect of TC/2016/00217 by the Tribunal's letter of 7 September giving 28 days from that date. There was no equivalent letter in the bundle in respect of the other appeal. I think the appropriate approach in the circumstances is to treat the 28 day period in respect of TC/2016/00217 as expiring at the time stated in the Tribunal's letter, which would have been on 5 October 2017. In respect of TC/2017/03105 the 28 day period permitted under rule 17 would have run out on 2 October 2017.

45. The first communication that might be regarded as an application to reinstate was on 6 October, in respect of TC/2016/00217. Rainer Hughes' email of 16 October confirmed that the reinstatement application related to all appeals, and is the first communication that might therefore be regarded as an application to reinstate TC/2017/03105. Based on these dates (and taking account of the Tribunal's letter of 7 September) the applications were respectively one day and 14 days late. By reference to the formal application notice filed on 8 November the applications were (on the same basis) 34 and 37 days late respectively.

46. In the absence of an express requirement about the form of an application to reinstate, I am not convinced that it is appropriate to regard the applications as over a month late in circumstances where it had been made clear at an earlier stage that there had been a change of mind about the withdrawal and that OWD wished the appeals to be reinstated. On that basis the one day delay in respect of TC/2016/00217 was not serious or significant, particularly taking account of the fact that Rainer Hughes had contacted the Tribunal on 5 October, within the 28 day the deadline Tribunal had set, to ask for an extension. The 14 day delay in respect of TC/2017/03105 is more significant.

47. Turning to the reasons for the delays, the longer delay in respect of TC/2017/03105 is explicable by reference to the fact that Rainer Hughes had not been informed that the liquidator had withdrawn the appeal on 4 September. However, I do not consider that this is a full excuse. My view of the correspondence overall is that insufficient care was taken by Rainer Hughes to clarify the position, particularly bearing in mind that Rainer Hughes had been copied Ms Patrick's email of 31 August specifically asking about appeal TC/2017/03105.

48. The principal reason for the delay relied on by OWD was the need to explain the issues surrounding each of the 11 appeals to the liquidator, and the liquidator needing to take independent advice. I am not persuaded of this. The liquidator did not give evidence and privilege was not waived, so it is not possible to determine exactly what went on. However, the liquidator took legal advice before withdrawing the appeals. I infer that he must have taken some steps to understand what the appeals involved in making that decision, and in choosing not to withdraw another appeal relating to the denial of input tax recovery under the *Kittel* principle (see [3] above). In consenting to reinstatement any further advice is in my view highly likely to have been restricted to whether reinstatement risked any adverse impact on the position of OWD and its other creditors, rather than understanding the appeals in detail. OWD's assets are so limited that it is very hard to see that other creditors could have a material interest in the success of the appeals, so I do not think that that can realistically have been a motivating factor.

49. Turning to the third stage of the process referred to in *Denton*, there is a strong public interest in complying with time limits, which are there for good reasons related to legal certainty and achieving finality of litigation. There is some prejudice to OWD in not being permitted to conduct the appeals. However, as a company in insolvent liquidation it does not really have any ongoing interests apart from those of its creditors. The very limited extent of its assets means that, even though the aggregate amount at stake in the appeals is very significant, the prejudice to creditors is extremely limited. In contrast, there is clear prejudice to HMRC in being required to conduct appeals with no apparent prospect of being able to make recovery of their costs (and in any event with no recovery of any tax). In addition, whilst I heard no argument on the merits of the appeals, I agree with Mr Watkinson that the chances of AWRS approval ultimately being obtained must be vanishingly small.

50. The real reason why reinstatement of the appeals is being sought clearly relates to the position of Mrs Bachra, and the risk that she could be held personally liable and/or

that her reputation will be affected. This point is discussed below in relation to the merits of the application to reinstate. However, it is potentially relevant as part of "all the circumstances" to be considered in deciding whether to allow an application out of time, and I have considered it in that context as well. The comments made at paragraphs 57 and 58 below apply equally here.

51. Overall and on balance, I consider that the fact that the delays were relatively short and that there are some reasons to explain them, mean that in principle I would not think it appropriate to refuse to grant the application for an extension of time. In my view these factors (just) outweigh the prejudice to HMRC and the other circumstances.

*Application to reinstate*

52. In determining whether to reinstate the appeals, the Tribunal must of course exercise its powers so as to seek to give effect to the overriding objective of the Tribunal Rules, namely to deal with cases fairly and justly (rule 2). The decision must take proper account of all relevant circumstances.

53. In this case, these circumstances include the prejudice to each party of the appeals either being reinstated or not being reinstated, and (so far as they are clear) the merits of the case. These factors are discussed at paragraph 49 above and do not point in favour of reinstatement.

54. Mr Bedenham relied on the fact that HMRC had already done a significant amount of work on the consolidated appeals, in the form of a Statement of Case. This was not a case where no work had been done at all. I agree that this is a relevant factor, but I do not consider it is a particularly material one. The nature of the appeals appears to me to be such that, if a full hearing was conducted on the merits, a very significant amount of additional work would be required by HMRC.

55. Mr Bedenham also relied on the liquidator having withdrawn the appeals at a time when he did not appreciate the real position. I have already indicated that I am not persuaded by this. The liquidator had taken his own advice and, from the perspective of OWD and its creditors, the decision to withdraw made sense.

56. The one substantive reason provided to reinstate the appeals relates to the personal position of the director, Mrs Bachra. The concern is that the withdrawal of the appeals will have an adverse effect on Mrs Bachra.

57. I do not accept that this is a sufficient reason to reinstate the appeals. It is clear, and HMRC accept, that Mrs Bachra will not be prevented from challenging the personal liability notices issued against her just by virtue of OWD's appeals being withdrawn: see *Lindsay Hackett v HMRC* [2016] UKFTT 781 (TC), in particular at paragraphs [44] and [45]. Assuming Mrs Bachra chooses (or has chosen) to challenge the notices then she will have an opportunity to defend them on the merits, without the assessments against OWD being deemed to be correct. She might have preferred OWD to take the lead (in the hope that a successful appeal by it would lead to the

notices against her falling away) but in my view that is not a proper reason to reinstate the appeals.

58. I also do not consider that any more general concern that Mrs Bachra may have about the impact of the withdrawal of the appeals on her reputation or her potential exposure to any other liability (none being specified) justifies the appeals being reinstated. This is so even though some aspects of the decisions and assessments appealed against relate to deliberate conduct or allegations about behaviour that could be attributed to Mrs Bachra in her role as director. These are not reasons related to OWD itself. No details were provided of the precise nature of any concerns. In these circumstances it is hard to see why, as with the personal liability notices, the appropriate response from Mrs Bachra to any reliance being placed as against her on HMRC's decisions not being successfully challenged by OWD, should not be that that resulted from the liquidator's decision to withdraw the appeals, and was not a dispute that was adjudicated on the merits.

59. Accordingly, even if I had power to do so I would not consider it appropriate to reinstate the appeals.

**Disposition**

60. The applications to reinstate the appeals are refused on the basis that the Tribunal has no jurisdiction.

61. 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 Rules. 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.

**SARAH FALK**
**TRIBUNAL JUDGE**

**RELEASE DATE: 22 AUGUST 2018**