[2019] UKFTT 182 (TC)

TC07032

Appeal number: TC/2018/04510

CAPITAL GAINS TAX – whether assessments have been determined by agreement – no – accordingly, application to strike out the appeal dismissed - whether permission to give late notice of appeal to the First-tier Tribunal is required – no – if such permission had been required, would it have been given – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

HARCHARAN KAURA **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 15 February 2019

Mr Imad Ilyas of Churchill Tax Advisers, for the Appellant

Mrs Paula O'Reilly, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to an appeal by the Appellant against:

(a) discovery assessments issued under Section 29 of the Taxes Management Act 1970 (the "TMA") on 5 December 2014 in respect of the tax year of assessment (a "tax year") ending 5 April 2005 through to the tax year ending 5 April 2013 (both inclusive), as amended on 27 July 2016 (in the case of the assessments in respect of the tax year ending 5 April 2005 through to the tax year ending 5 April 2011 (both inclusive)) and 28 July 2016 (in the case of the assessments in respect of the tax years ending 5 April 2012 and 5 April 2013);

(b) penalties assessed under Section 95(1)(a) of the TMA on 5 December 2014 in respect of the tax years ending 5 April 2005, 5 April 2006 and 5 April 2007, as amended on 27 July 2016 (in the case of the penalty in respect of the tax year ending 5 April 2005); and

(c) penalties assessed under Schedule 24 to the Finance Act 2007 ("Schedule 24") on 27 January 2015 in respect of the tax year ending 5 April 2009 through to the tax year ending 5 April 2013 (both inclusive), as amended on 30 August 2016 (in the case of the penalties in respect of the tax years ending 5 April 2012 and 5 April 2013).

2. In addition to the above, although they were not mentioned in the Respondents' skeleton argument for the hearing, the documents bundle suggests that there may well be other outstanding penalty assessments which are included in the appeal – for example, the penalties assessed on 27 June 2014 and 12 August 2014 for failing to comply with the information notice of 8 May 2014 (see pages 020 to 027 of the documents bundle) and the penalty assessed under Section 7(8) of the TMA on 5 December 2014 in respect of the tax year ending 5 April 2008 (see pages 080 to 083 of the documents bundle). In the exchanges which took place between the Appellant and Mr Neil Welsh of the Respondents in March 2015, it is clear that both parties understood that the Appellant had appealed against all of the outstanding assessments which had been issued to her, including the assessments to penalties. In his email of 24 March 2015, Mr Welsh made the point that not all of the penalties could be postponed, but he clearly accepted that all of the penalties were included in the appeal.

3. Be that as it may, this decision deals with two preliminary matters in relation to the appeal and not with the substantive issues to which the appeal gives rise. Those preliminary matters are:

(a) whether I should uphold the Respondents' application for the appeal to be struck out on the basis that there is no right of appeal against an agreement under Section 54 of the TMA which determines an appeal; and

(b) if not, whether I should give permission to the Appellant for the appeal to proceed despite the late notice of the appeal.

Background

4. The background to the appeal is as follows:

(a) the Respondents set up self-assessment records for the Appellant on 12 December 2003;

(b) the Appellant had not submitted tax returns for any of the tax years following the tax year ending 5 April 2007 and therefore Mr Welsh wrote to her on 4 February 2014 to request information in respect of property transactions effected in the tax year ending 5 April 2005 through to the tax year ending 5 April 2013 (both inclusive);

(c) in the absence of a response to that letter, Mr Welsh issued a formal notice under Schedule 36 of the Finance Act 2008 ("Schedule 36") on 8 May 2014 requesting the relevant information;

(d) in the absence of a response to that notice, Mr Welsh issued an initial penalty of £300 to the Appellant on 27 June 2014 under Schedule 36 and then daily penalties aggregating to £690 (for the period from 28 June 2014 to 12 August 2014) to the Appellant on 12 August 2014 under Schedule 36;

(e) in the absence of a response to those penalty notices, Mr Welsh wrote to the Appellant on 21 October 2014 to inform her that the Respondents intended to issue assessments for the tax year ending 5 April 2005 through to the tax year ending 5 April 2013 (both inclusive) and to assess the Appellant to penalties;

(f) in the absence of a response to his letter of 21 October 2014, Mr Welsh issued, on 5 December 2014, (i) assessments for the tax year ending 5 April 2005 through to the tax year ending 5 April 2013 (both inclusive); (ii) penalty determinations under Section 95(1)(a) of the TMA in respect of the tax years ending 5 April 2005 through to the tax year ending 5 April 2008 (both inclusive); and (iii) a penalty determination under Section 7(8) of the TMA in respect of the tax year ending 5 April 2008, and issued, on 27 January 2015, penalty determinations under Schedule 24 in respect of the tax year ending 5 April 2009 through to the tax year ending 5 April 2013 (both inclusive);

(g) on 13 March 2015, the Appellant telephoned Mr Welsh to say that she had submitted all of her outstanding tax returns apart from those in respect of the tax years ending 5 April 2013 and 5 April 2014. She was informed by Mr Welsh that these had not been received. By an email exchange of the same day, the Appellant promised Mr Welsh that she would submit her appeals against the outstanding assessments and penalties over the forthcoming weekend;

(h) on 21 March 2015, Mr Welsh received by email from the Appellant an appeal against the assessments and penalty determinations referred to in paragraph 4(f) above;

(i) on 24 March 2015, the Appellant telephoned Mr Welsh again to explain why her tax affairs were in arrears and to tell Mr Welsh that she was now gathering the information needed to enable her to submit her tax returns. In an email later on the same day, Mr Welsh wrote to the Appellant to say that her email of 21 March 2015 was being treated as an appeal against the assessments and penalty determinations and a postponement application in relation to the taxes and penalties set out in the assessments issued on 5 December 2014;

(j) on 27 March 2015, Mr Welsh formally acknowledged the Appellant's appeal and postponement application;

(k) on 5 May 2015, the Appellant wrote to Mr Welsh to say that she was halfway through preparing her outstanding tax returns and to ask him if he would prefer to have those tax returns which had already been completed sent to him immediately or to wait until all of the tax returns had been completed;

(l) on 19 May 2015, Mr Welsh responded to say that he wanted those tax returns which had been completed to be sent to him by no later than 10 June 2015;

(m) on 7 July 2015, Mr Welsh telephoned the Appellant to provide her with certain information about her employment income and to discuss certain issues in relation to the Appellant's tax affairs. During the conversation, the Appellant mentioned that she had received a letter from the Respondents saying that there no tax returns outstanding. Mr Welsh expressed some surprise at this and the Appellant said that she would send her tax returns to Mr Welsh by email, which she duly did, on 14 July 2015;

(n) on 13 August 2015, after the Appellant had chased Mr Welsh by email on 21 July 2015, Mr Welsh telephoned the Appellant to discuss the tax returns and certain information in relation to those tax returns. It was left that the Appellant would look into the questions which Mr Welsh had raised and would call again on the following Tuesday to provide some further information;

(o) on 19 August 2015, a further telephone conversation between Mr Welsh and the Appellant in relation to the Appellant's tax returns occurred. At the end of the call, the Appellant said that she would provide the outstanding information to Mr Welsh by email within a few days;

(p) on 22 August 2015, the Appellant emailed Mr Welsh to say that she needed to speak to him urgently. She had had some horrific news that might cause her to be unable to provide the outstanding information to Mr Welsh as she had promised;

(q) on 26 August 2015, Mr Welsh telephoned the Appellant in response to the email described in paragraph 4(p) above and she told him that she had just been diagnosed with cancer. Mr Welsh expressed his sympathy and said that he was happy to allow further time for the outstanding information to be provided;

(r) on 9 September 2015, Mr Welsh telephoned the Appellant to enquire as to progress in her gathering together the relevant information. The two of them discussed specific issues arising out of the tax returns and the Appellant said that she would do her best to provide the outstanding information;

(s) on 23 September 2015, the Appellant emailed Mr Welsh to provide certain information in relation to her tax affairs;

(t) on 27 October 2015, Mr Welsh responded by email to the various points which had been set out in the Appellant's email of 23 September 2015. He concluded by saying that he believed that the information which he had requested in the email "summarises the information required to bring matters to conclusion and I would be grateful if it were provided no later than 30 November 2015";

(u) on 8 December 2015, Mr Welsh emailed the Appellant again to say that he had been trying to contact the Appellant without success and wanted to make progress in relation to the contents of his email of 27 October 2015;

(v) there was no further communication between the parties until 6 January 2016, when Mr Welsh wrote to the Appellant to inform her as to how he intended to proceed in relation to determining her appeal. The letter concluded by enclosing calculations showing the revisions which would be required to the existing assessments in order to give effect to his proposal, by asking the Appellant to respond by no later than 8 February 2016 and to say that "[i]f there is no response by then it is proposed simply to settle the appeals";

(w) on 7 January 2016, the Appellant emailed Mr Welsh to apologise for her delay in replying but explaining that this was due to a deterioration in her health and further chemotherapy. She explained that she was having difficulties in obtaining the outstanding information at this point and concluded "what can I do to close this and move forward a fresh as the stress [is] taking a toll in my [health], I am happy to come to an arrangement for payment I am not sure what else to do at this point";

(x) also on 7 January 2016, Mr Welsh emailed the Appellant to express his sympathy with her predicament and to ask her to let him know a convenient time to call her when he was next back in the office on 20 or 21 January 2016. The Appellant responded by saying that 20 January 2016 should suit and added that "I need this to come to a conclusion I am very worried that I might [lose] my house or end up in prison as I am not in the position to pay the amount in whole";

(y) on 20 January 2016, Mr Welsh emailed the Appellant to say that he had been trying to contact her without success and asking her to call him so that the matter could be brought to a conclusion;

(z) also on 20 January 2016, in response to Mr Welsh's email, the Appellant emailed to say that she had instructed an accountant, Naylesh Patel, to deal with the enquiry because it was causing her great stress. Mr Welsh responded to the Appellant's email by asking her to request Mr Patel to call him the next day or to offer to call Mr Patel if the Appellant could provide him with Mr Patel's telephone number;

(aa) on 26 January 2016, the Appellant provided Mr Welsh with Mr Patel's telephone number and, on 28 January 2016, the Appellant emailed Mr Walsh to ask if he had managed to make contact with Mr Patel. Mr Welsh replied by email on 26 January 2016 to say that he had left a message for Mr Patel because Mr Patel was not available and would try again on the following Tuesday. However, he suggested that it would expedite matters if the Appellant could provide a form 64-8 for Mr Patel to submit to the Respondents;

(bb) on 2 February 2016, Mr Welsh and Mr Patel spoke briefly on the telephone. Mr Patel said that he would be meeting the Appellant the following day and would be arranging for a form 64-8 to be executed;

(cc) according to Mr Welsh's file notes, on each of 23 February 2016, 24 February 2016, 1 March 2016 and 2 March 2016 he spoke once again to Mr Patel. (The file note refers to a "Mr Popat" but, viewed in context, that must have been Mr Patel.) Mr Patel informed Mr Welsh that he would not be able to act for the Appellant until she had paid his retainer. Mr Welsh continued to press Mr Patel, calling again on 15 March 2016 and 16 March 2016;

(dd) on 17 March 2016, Mr Welsh emailed the Appellant to say that he had tried on several occasions to contact "Mr Popat" (ie Mr Patel) to ascertain whether Mr Patel's firm intended to act and that, in the continuing absence of progress, he needed the Appellant to let him know how he should proceed. He concluded by saying that, if he didn't hear from the Appellant within 14 days, he would assume that Mr Patel's firm would not be acting and that "[i]f there is no further information you can provide then I will proceed as outlined in my letter of 6 January 2016 to settle the appeals";

(ee) on 29 March 2016, Mr Welsh received from Doshi & Co ("Doshi") a letter explaining that Doshi had been appointed to deal with the Appellant's tax affairs and enclosing a form 64-8. Doshi asked Mr Welsh to send to them copies of all prior correspondence in relation to the Appellant's tax affairs;

(ff) on 5 April 2016, Mr Welsh called Doshi and informed them that this was now a matter of the utmost urgency. Mr Welsh would send to Doshi copies of all of the relevant correspondence and he wished to bring matters to a speedy conclusion. Doshi said that they would review the

correspondence once received and get back to Mr Welsh as quickly as possible;

(gg) also on 5 April 2016, Mr Welsh spoke to Mr Patel who confirmed that his retainer had now finally been paid and that a form 64-8 had been completed in respect of Mr Patel's firm and would be sent to Mr Welsh. The documents bundle contains no evidence that any such form was ever received by the Respondents from Mr Patel;

(hh) on 6 April 2016, Mr Welsh sent the correspondence to Doshi, highlighting in his covering letter that the critical document was the one of 6 January 2016 (which set out how Mr Welsh intended to proceed in the case) and requesting that Doshi respond by 26 April 2016 so that a timetable could be agreed for the submission of the outstanding information;

(ii) on 5 May 2016, Mr Welsh called Doshi to chase for a response to his letter of 6 April 2016 and left a message for the person at Doshi wo was responsible for the Appellant's case to call him back;

(jj) on 26 May 2016, Mr Welsh emailed the Appellant to say that Doshi were not responding to him and that therefore, unless he heard back from either the Appellant or Doshi by 22 June 2016, "it is intended to assume the proposals for settlement as outlined in my letter of 6 January 2016 are acceptable to you and your agent and finalise the appeals in those figures". Mr Welsh attached to his email copies of his letter of 6 January 2016 to the Appellant, his letter of 6 April 2016 to Doshi and his chasing letter to Doshi of the same day (although, oddly, the date set out on the chasing letter is 31 May 2016);

(kk) also on 26 May 2016 (although, as noted above, the letter is dated 31 May 2016), Mr Welsh sent a chasing letter to Doshi, copying to them his email of the same day to the Appellant;

(ll) also on 26 May 2016, the Appellant responded to say that she was sorry for the lack of response from Doshi and that she had forwarded Mr Welsh's email to Doshi and asked them to respond as soon as possible;

(mm) on 28 July 2016, Mr PA Davis, another Officer of the Respondents, wrote to the Appellant to inform her that he had taken over her appeal from Mr Welsh and that, in view of the absence of any response from both the Appellant and Doshi to Mr Welsh's email and letter of 26 May 2016, he was "treating your lack of response as a deemed agreement to the proposals and wish to notify you that your appeal is now settled under s 54(1) Taxes Management Act 1970". Mr Davis enclosed revised assessments and penalty determinations reflecting the terms of Mr Welsh's letter of 6 January 2016 and concluded by saying that, if the Appellant did not agree that the appeal is settled "you must tell me so within 30 days of the date of this letter"; and

(nn) on 28 June 2018, Churchill Tax Advisers ("Churchill") submitted a notice of appeal on behalf of the Appellant to the First-tier Tribunal along with a signed form of authority entitling Churchill to act for the Appellant.

> This notice was initially rejected by the First-tier Tribunal on 12 July 2018, on the grounds that certain required information had not been included with the notice, but it was resubmitted successfully by Churchill on 19 July 2018. The notice of appeal included a request for permission to notify the appeal late and cited, as reasons for the late notice the Appellant's ill-health, coupled with a failure by the Appellant's adviser to deal properly with her tax affairs despite assurances to the contrary.

5. I have set out the correspondence in some detail because it is highly relevant to both of the questions which I need to address in this decision.

The application to strike out the Appellant's appeal

6. The Respondents have applied for the Appellant's appeal to be struck out on the basis that the appeal has been determined by agreement under Section 54 of the TMA and that there is no right of appeal against an appeal which has been so determined.

7. The Respondents are quite right in saying that, if an appeal has been determined by agreement under Section 54 of the TMA, there is no right to appeal against that determination. In such a case, unless the relevant taxpayer asks to repudiate, or resile from, the agreement within thirty days of the agreement's being reached, the agreement is final and cannot be the subject of an appeal. This is because, in the absence of any such repudiation, the appeal is treated as if it had been determined by the First-tier Tribunal on the terms of the agreement – see Sections 54(1) and 54(2) of the TMA.

8. It follows that, if the Respondents are right in saying that the appeal in this case has been determined by way of agreement, then that is the end of the matter. The appeal has been finally determined.

9. However, as I intimated at the hearing, I consider that the appeal in this case has not been determined by agreement. In saying that, I wish to make it very clear at the outset that I do not in any way impugn the good faith or professionalism of either Mr Welsh or Mr Davis. Having read through the correspondence, I consider that they conducted themselves at all times during the period in question as one would wish Officers of the Respondents to behave, despite the fact that they were dealing with some trying circumstances. Their communications show that they were extremely sensitive and sympathetic to the position of the Appellant and bent over backwards to be as accommodating to her predicament as they could be.

10. However, I think that they fell into error when, in writing to the Appellant on 6 January 2016, Mr Welsh set out his proposal for dealing with the outstanding matters and concluded "[i]f there is no response…it is proposed simply to settle the appeals" and then, on 28 July 2016, Mr Davis said that he was "treating your lack of response as a deemed agreement to the proposals and wish to notify you that your appeal is now settled under s 54(1) Taxes Management Act 1970".

11. I say this because, in order for there to be an agreement, there needs to be an offer by one party and an acceptance of the offer by the other and, in this case, there was an offer (by Mr Welsh in his letter of 6 January 2016) but no subsequent

acceptance of that offer by the Appellant. Silence, or a failure to contradict the terms of an offer, cannot be deemed to amount to an acceptance of that offer. In just the same way that you cannot write to someone and say that, if you haven't heard from them by a particular date, they will be deemed to have agreed to sell to you a valuable asset for nothing, so you cannot write to someone and say that, unless you hear from them by a particular date, they will be deemed to have agreed to the assessments to tax and penalties which you have issued to them.

12. There are two important technical points which I need to make in this regard.

13. First, at the hearing, Mrs O' Reilly said that my conclusion on this point could not be correct in the tax context because, if it were to be correct, then the Respondents would have no means of determining an appeal which had been made by a taxpayer who, having lodged his appeal with the Respondents, then refused to engage with the Respondents after making the appeal. Mrs O'Reilly said that, in such a case, since the Respondents could not themselves give notice of the appeal to the First-tier Tribunal, the only way to determine the appeal would be by way of an agreement under Section 54 of the TMA and therefore one should infer from that that the Respondents must be capable of engineering an agreement with an unresponsive taxpayer in the manner applied in this case – that is to say, setting out the terms of the proposed agreement and saying that, in the absence of a response within a certain timeframe, the taxpayer would be deemed to have agreed to those terms.

14. However, in my view, that submission does not take into account the terms of Sections 49A et seq. of the TMA. Under Section 49A of the TMA, once an appeal to the Respondents has been made, the appellant can ask the Respondents to review the matter in question (in which case Section 49B of the TMA applies) or the Respondents can offer to review the matter in question (in which case, Section 49C of the TMA applies) or the appellant can notify his or her appeal to the First-tier Tribunal (in which case Section 49D of the TMA applies).

15. If the appellant notifies his or her appeal to the First-tier Tribunal, then the appeal can proceed before the First-tier Tribunal and the problem to which Mrs O'Reilly referred at the hearing will not arise.

16. If the appellant asks for a review, then the Respondents must provide the appellant with their view of the matter in question in accordance with Section 49B(2) of the TMA and then conduct that review and notify the appellant of their review conclusions in accordance with Section 49E of the TMA. In that event, unless the appellant then notifies an appeal to the First-tier Tribunal against the review conclusions, those conclusions fall to be treated "as if they were an agreement in writing under section 54(1) for the settlement of the matter in question" and the appellant cannot repudiate or resile from that deemed agreement (see Section 49F of the TMA). So, again, the Respondents are able to ensure that the problem to which Mrs O'Reilly referred at the hearing will not arise.

17. Finally, if the Respondents offer to review the matter in question, they must again provide the appellant with their view of the matter in question (this time under Section 49C(2) of the TMA and not Section 49B(2) of the TMA). If the appellant

accepts the offer of a review, then Sections 49E and 49F of the TMA apply in the same way as if the appellant had asked for the review and the procedure is as described in paragraph 16 above. On the other hand, if the appellant does not accept the offer of a review, then, unless the appellant then notifies an appeal to the First-tier Tribunal against the Respondents' view of the matter in question, that view "is to be treated as if it were contained in an agreement in writing under section 54(1) for the settlement of the matter" and the appellant cannot repudiate or resile from that deemed agreement (see Sections 49C(4), 49C(5) and 49C(6) of the TMA). It can be seen that, again, the Respondents are able to ensure that the problem to which Mrs O'Reilly referred at the hearing cannot arise.

18. The references in Sections 49C and 49F of the TMA to the fact that a specified course of conduct will lead to a deemed agreement under Section 54(1) of the TMA which cannot be repudiated by the appellant demonstrate that:

> (a) in all cases, the Respondents cannot be prevented by a recalcitrant appellant from having the appeal determined; and
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> (b) the draftsman has recognised that a failure to take a course of action cannot amount in and of itself to an acceptance giving rise to an agreement and therefore has to be deemed to give rise to such an agreement by the legislation.

19. In the present context, I consider that the proposal set out in Mr Welsh's letter of 6 January 2016 cannot properly be described as the Respondents' setting out their view of the matter in question because it was not preceded either by a request for a review or by an offer to review. As such, neither of Sections 49B and 49C were engaged at the time when it was provided.

20. The second point arises out of the fact that, in this case, the terms of the offer made by Mr Welsh were set out in writing, in the form of the proposal made in his letter of 6 January 2016 and those terms were again reflected in writing in the letter written by Mr Davis on 28 July 2016, together with its enclosures. It can be seen that Section 54 of the TMA contemplates two different types of agreement – an agreement in writing and an agreement "otherwise". In the latter case, the existence of the agreement, and the terms of the agreement, need to be confirmed in writing by one of the parties to the other and, in that case, the agreement is treated as having been entered into at the time when the confirmation is given (see Section 54(3) of the TMA).

21. The fact that the terms of the Respondents' proposal were set out in writing in both the letter of 6 January 2016 and the letter of 28 July 2016 does not mean that there has been a written confirmation for this purpose because Section 54(3) of the TMA is predicated on the existence of an agreement falling within Section 54(1) of the TMA in the first place – see the opening words in Section 54(3) of the TMA. In other words, the mere fact that the terms of the Respondents' proposal were twice set out in writing does not, in and of itself, mean that there was an agreement. In this case, the letter from Mr Welsh of 6 January 2016 contained an offer which the Appellant never accepted, whilst the letter from Mr Davis of 28 July 2016 merely

confirmed the terms of an agreement which did not in fact exist – because of the absence of any acceptance of the Respondents' offer by the Appellant.

22. Turning to the details of the correspondence which passed between the parties, there are two particular parts of that correspondence which I have considered in this context.

23. The first is the letter from Mr Welsh to the Appellant of 21 October 2014 in which, in the course of describing the process which would ensue once he issued the assessments and the penalties, Mr Welsh mentioned that the Appellant would, at that point, have an option to notify her appeal against the assessments and penalties to the First-tier Tribunal or ask the Respondents for a review. I consider that it is clear that, in writing on those terms, Mr Welsh was simply explaining to the Appellant what her options would be once the assessments and penalties were issued and noting that one of those options would be for the Appellant to ask for a review. He was not offering the Appellant a review on behalf of the Respondents. Indeed, he could not do so at that stage as the assessments and penalties had yet to be issued and the Appellant had yet to appeal so that Section 49A of the TMA had not yet been engaged. In effect, these words from Mr Welsh were no different from the language which appeared at the end of the assessments in this case which explained what the options would be once an appeal was made. They did not themselves amount to an offer of a review by the Respondents.

24. The second is the references in the Appellant's emails to Mr Welsh of 7 January 2016 in which she expresses her concerns about the current state of her tax affairs and her desire to settle those affairs before dire consequences ensued. I believe that it is clear from the context in which those statements were made that the Appellant was merely expressing in the most general of terms her desire to resolve her tax issues by coming to some payment arrangement with the Respondents. She was not in any way indicating her agreement to the precise terms of the proposal which was set out in Mr Welsh's letter of 6 January 2016. (In fact, there is no indication in the way that those emails were expressed that she had even received Mr Welsh's letter of 6 January 2016 at the point when the emails were sent and it seems most unlikely that she would have done.) The fact that Mr Welsh did not regard those emails as evidencing the Appellant's agreement to the terms of his proposal of 6 January 2016 can be seen in the way that he continued after that date to chase for a response to the terms of his proposal and to say that, in the absence of a response, he would have no choice but to settle the matter on the basis of those terms – see, by way of example, his emails of 20 January 2016, 17 March 2016 and 26 May 2016 - and can also be seen in the terms used by Mr Davis in his letter of 28 July 2016.

25. In short, there is no evidence that the Appellant ever agreed to the terms of the proposal which was made by Mr Welsh on behalf of the Respondents for settling the appeal by agreement and therefore the appeal remains on foot and has yet to be determined.

26. This means that each of the amended assessments of 27 July 2016 and 28 July 2016 which purports to be the result of an agreement between the parties under Section 54 of the TMA is of no effect. For completeness, I should note that, whilst

each of the amended assessments of those dates in respect of the tax year ending 5 April 2006 through to the tax year ending 5 April 2013 (both inclusive) does say that it is consequent upon the agreement of the parties under Section 54 of the TMA, the amended assessment of 27 July 2016 in respect of the tax year ending 5 April 2005 (at pages 179 and 180 of the document bundle) does not say that. Instead, it purports simply to be an amended assessment in respect of that tax year. I suspect that this was just an error but it does mean that that amended assessment continues to have effect for the purposes of the appeal, unlike the other assessments of 27 July 2016 and 28 July 2016.

Permission to give late notice of appeal to the First-tier Tribunal

27. I should start this section of the decision by observing that the assessments and penalties which are the subject of the appeal were mostly issued on 5 December 2015 – and, in the case of the penalties for failure to comply with the information notice, on 27 June 2014 and 12 August 2014 – whereas the Appellant did not make her appeal against the assessments and penalties to the Respondents until 21 March 2015. This was in each case outside the 30-day time limit within which the appeal to the Respondents should have been lodged. However, the Respondents have at no point sought to make an issue of that given the circumstances of the Appellant at the time. In fact, in his email to the Appellant of 13 March 2015, Mr Welsh expressly alluded to the fact that the time limit had expired and it is clear from his subsequent exchanges of emails with the Appellant of 21 March 2015 and 24 March 2015 that he was content to accept the appeal notwithstanding that the appeal was late, given the difficulties which the Appellant was experiencing.

28. However, the Respondents are objecting to the fact that the Appellant did not notify the appeal to the First-tier Tribunal until 19 July 2018. The Respondents refer to the date of the amended assessments of 27 July 2016 and 28 July 2016 and say that, as the notice of the appeal to the First-tier Tribunal was not submitted by Churchill until 19 July 2018, the notice of appeal was almost two years late.

29. I believe that that is incorrect for two reasons.

30. First, as I have noted in paragraphs 6 to 26 above, the assessments of 27 July 2016 and 28 July 2016 purported to follow from an agreement reached by the parties under Section 54 of the TMA and were therefore invalid as no such agreement had in fact been reached. As such, the dates of the assessments which are the subject of the appeal in fact go back to 5 December 2014 (and earlier, in the case of the information notice penalties).

31. However, in my view, none of that is relevant because I have been unable to discover any provision in the legislation which imposes any time limit at all on the notice of appeal to the First-tier Tribunal in this case.

32. There has been no offer of a review by the Respondents, so that Section 49C is not engaged. And there has been no request by the Appellant for the Respondents to conduct a review, so that Section 49B of the TMA is not engaged. It follows that neither of Sections 49G and 49H of the TMA – which apply in circumstances where a

review has been offered or requested – is engaged. It follows that the machinery pursuant to which a time limit would have arisen for notifying the appeal to the First-tier Tribunal is not in point. There is no time limit in Section 49D of the TMA – which is the provision which is in point in this context - and Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") simply refers to the time limit in the applicable enactment, which, in this case, is Section 49D of the TMA.

33. The reason why these somewhat unusual circumstances have arisen is that the Respondents have been proceeding since July 2016 on the basis of the mistaken apprehension that there was an agreement between the parties under Section 54 of the TMA. Before July 2016, the Respondents were seeking to settle the appeal by agreement and therefore they never offered the Appellant a review following the making of the appeal. Moreover, the Appellant never sought a review. Had either of those things occurred, then the relevant TMA provisions would have given rise to a time limit for notice of the appeal to the First-tier Tribunal to be given. But they did not.

34. I have therefore concluded that there is in fact no need for the Appellant in this case to apply for permission to proceed with her appeal. There is no time limit in place which requires the permission of the Respondents or the First-tier Tribunal before the appeal is heard.

35. I realise that this is a counter-intuitive answer because it means that, in theory, the Appellant could have deferred giving notice of the appeal for many years without suffering any prejudice. But it stems from the peculiar facts of this case and is therefore highly unlikely to be replicated.

36. Nevertheless, given that the answer I have reached as set out above is so unusual that it may be subject to an appeal, I have considered whether, if there had been an applicable time limit for the Appellant to notify the appeal to the First-tier Tribunal, I would have exercised my discretion to give permission for the appeal to proceed on the facts of this case.

37. In order to do that, I need briefly to summarise the events which have taken place in relation to this matter between July 2016 (when the amended assessments were issued) and the filing by Churchill of the notice of appeal to the First-tier Tribunal on 19 July 2018. The material facts are as follows:

> (a) the Appellant has continued to suffer from ill-health over that period. She has produced written evidence in the form of doctor's certificates to that effect;
>
> (b) the Appellant discovered that, despite their protestations to the contrary, Doshi were not progressing discussions with the Respondents. Accordingly, she instructed an alternative tax adviser, a Mr Derek Saunders of Catbrook Finance, in May 2017 to help her with the appeal but he also did not progress matters despite requests from the Appellant. Eventually, she appointed Churchill in June 2018 to deal with the appeal

and Churchill were responsible for filing the notice of appeal to the First-tier Tribunal in the following month;

(c) however, the Respondents' records show that the Appellant continued personally to deal with her tax affairs more generally over the two year period;

(d) on 8 August 2016, the Respondents commenced recovery proceedings in respect of the relevant assessments by issuing a Form IDMS99;

(e) on 26 August 2016, the Respondents' debt management team spoke to the Appellant on the telephone about the debts that the Appellant owed;

(f) on 28 October 2016, numerous notices of enforcement were issued by the Respondents' debt management team to the Appellant;

(g) on 9 November 2016, the Appellant telephoned the Respondents' debt management team in response to those notices. The Appellant told the debt management team that she was appealing against the assessments in question, that she expected her accountant to have dealt with the appeal by the end of the month and that collection should therefore be suspended;

(h) on 12 June 2017, the Respondents served a statutory demand on the Appellant;

(i) on 30 October 2017, the Respondents served a bankruptcy petition on the Appellant;

(j) also on 30 October 2017, the Appellant called the Respondents' debt management team. She told the Respondents that she thought her agent was dealing with the appeal. The Respondents suggested that she speak to the inspector about the status of the appeal before applying to the First-tier Tribunal;

(k) on 13 November 2017, the Appellant telephoned the Respondents' debt management team again. The Respondents' file notes that the Appellant "disputes amount due – says she had very poor advice from 2 different accountants. Has looked at going to Tribunal but has been advised she'd need to provide Bank Statements etc plus the solicitors she used re property sale have now closed";

(l) between 20 November 2017 and 21 May 2018, there was extensive correspondence between the Appellant and the Respondents' debt management team in relation to the bankruptcy proceedings and the collection of the outstanding debt; and

(m) on 20 August 2018, the bankruptcy petition was heard.

38. Turning then to the relevant principles that I would need to apply in determining whether or not to give permission for the late notice of appeal in this case (if such permission were to be required), those principles have been established by a number of decisions of the higher courts, one of which is the recent Upper Tribunal decision in *Martland v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 178 (TCC) ("*Martland*").

39. In their decision in that case, the Upper Tribunal referred to several earlier decisions – most notably, the judgment of Lord Drummond in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 and the judgment of Morgan J in *Data Select Limited v The Commissioners for Her Majesty's Revenue and Customs* [2012] STC 2195 – and concluded that those cases required the following questions to be addressed in each such case:

> (a) what is the purpose of the time limit?
>
> (b) how long was the delay?
>
> (c) is there a good explanation for the delay?
>
> (d) what will be the consequences for the parties of an extension of time? and
>
> (e) what will be the consequences for the parties of a refusal to extend time?

40. The Upper Tribunal in *Martland* made it clear that, in answering these questions, one needs to consider the overriding objective of the Tribunal Rules, as set out in Rule 2 of those rules - to the effect that the First-tier Tribunal should deal with cases fairly and justly - and the matters listed in Rule 3.9 of the Crown Procedure Rules (the "CPR") – that is to say, all of the relevant circumstances, including the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules.

41. The Upper Tribunal in *Martland* added that the reference to Rule 3.9 of the CPR shows that the case law in relation to an application for permission to give late notice of an appeal is really just part of the wider stream of case law on relief from sanctions and extensions of time in connection with the procedural rules of the courts and tribunals. In *Martland*, it was noted that the key cases in that stream of authority so far as an application for permission to give late notice of an appeal is concerned are the Court of Appeal decision in *Denton v TH White Limited* [2014] EWCA Civ 906, [2014] 1 WLR 3926 ("*Denton*") and the Supreme Court decision in *BPP Holdings Limited v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 55, [2017] 1 WLR 2945 ("*BPP*").

42. In *Denton*, the Court of Appeal was considering the application of the CPR to cases in which relief from sanctions for failures to comply with various rules of court was being sought. It said that, in any such case, the judge should address the application for relief from sanctions in three stages as follows:

> (a) identify and assess the seriousness and significance of the failure which has engaged Rule 3.9 of the CPR;
>
> (b) consider why the default occurred; and
>
> (c) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application and, for this purpose, giving particular weight to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules.

43. The Supreme Court in *BPP* implicitly endorsed the approach in Denton.

44. The Upper Tribunal in *Martland* concluded that, when the First-tier Tribunal is considering an application for permission to give late notice of an appeal, it needs to remember that permission should not be granted unless the First-tier Tribunal is satisfied on balance that it should be. The Upper Tribunal went on to say that, in considering that question, the First-tier Tribunal "can usefully follow the three-stage process set out in Denton", which is to say:

> (a) establish the length of the delay because, if it was very short, then the First-tier Tribunal "is unlikely to need to spend much time on the second and third stages" (see Denton at paragraph [28]), although the Upper Tribunal in *Martland* made it plain that this should not be taken to mean that permission may be granted in cases of very short delays without moving to a consideration of those latter two stages;
>
> (b) establish the reason for the delay; and
>
> (c) evaluate all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the extent of the detriment to the applicant in not giving permission and the extent of the detriment to the party other than the applicant of giving permission.

45. The Upper Tribunal in *Martland* reiterated that the evaluation at the stage mentioned in paragraph 44(c) above "should take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost, and for the statutory time limits to be respected".

46. The Upper Tribunal in *Martland* made two final points in relation to the exercise by the First-tier Tribunal of its discretion in deciding whether or not to permit late notice of an appeal.

47. First, the Upper Tribunal held that the First-tier Tribunal can have regard to any obvious strength or weakness in the applicant's case because that is highly relevant in weighing up the potential prejudice to the parties of the relevant decision. In other words, where the First-tier Tribunal refuses an application for permission to give late notice of an appeal, there is much greater prejudice to an applicant with a strong case than there is to an applicant with a weak case. The Upper Tribunal cautioned against such a process's descending into a detailed analysis of the underlying merits of the appeal but it did say that, if an applicant's case was hopeless, then it would not be in the interests of justice for permission to be granted because that would lead the time of the First-tier Tribunal to be wasted. However, in most circumstances, an appeal will have some merit and so, without conducting a detailed evaluation of the merits, the First-tier Tribunal should at least form a general impression of the merits of the appeal and allow the parties an opportunity to address that question in outline.

48. Secondly, the Upper Tribunal said that the shortage of funds and the consequent inability of the applicant to appoint a professional adviser should not, of itself, carry any weight in considering the reasonableness of the applicant's explanation of the delay. Nor should the fact that the applicant is self-represented. This is because the appealable decisions of the Respondents generally include a clear statement of the

relevant appeal rights and it is not a complicated process to notify an appeal to the First-tier Tribunal, even for a litigant in person.

49. Finally in this context, mention should be made of the statement in paragraph [96] of the Upper Tribunal decision in *Romasave (Property Services) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0254 (TCC) ("*Romasave*") to the effect that a delay of more than three months "cannot be described as anything but serious and significant".

50. At the hearing, Mr Ilyas urged me to give me permission for the late notice of appeal for the following reasons:

> (a) first, he said that the Appellant had been badly let down by her previous advisers, on whom she had, quite reasonably, relied to progress the appeal;
>
> (b) secondly, he pointed to the continuing ill-health of the Appellant throughout the relevant period;
>
> (c) thirdly, he said that it should have been clear to the Respondents from the telephone calls described in paragraph 37 above made by the Appellant to the Respondents' debt management team that the Appellant did not agree with the assessments and wished to appeal against them. He submitted that, so far as the Appellant was concerned, the Respondents Officers were all representatives of the Respondents as a whole and it was entirely understandable if the Appellant was unable to distinguish between her inspector and the debt management team;
>
> (d) fourthly, he submitted that the bankruptcy court was prepared to stay the bankruptcy proceedings pending the determination of the appeal and therefore the First-tier Tribunal, faced with the same evidence, should allow the Appellant to present her case in relation to the appeal; and
>
> (e) finally, he contended that the Appellant's case in the appeal is a strong one – as is evidenced by a clear and obvious error in Mr Welsh's letter of 6 January 2016 in relation to Flat 17, Bishops Court, 56 Folgate Street, where, having said that the sale price of the property was £249,999 and the purchase price of the property was £320,000, Mr Welsh concluded that the Appellant made a capital gain of £70,001, instead of a capital loss of that amount.

51. In considering these various arguments, I think it is necessary to bear in mind that the delay in this case has been considerable. In *Romasave*, a delay in excess of three months was regarded as being serious and significant. In this case, even if one starts from the date at the end July 2016 when the amended assessments were issued – and, technically, as I have already said, the relevant date is in fact much earlier than that - the delay has been almost two years. In addition, it is not as if the last two years should be considered in isolation – over the two years preceding that, the Respondents have shown considerable restraint and sympathy in allowing the Appellant time to sort out her tax affairs.

52. Against that background, I accept that the Appellant has been let down by her advisers in relation to the appeal and that she has been suffering from ill-health. But, in my view, there is a limit on how far she can rely on those factors to justify a delay of this magnitude. Neither factor absolves her of ultimate responsibility for ensuring that the appeal was progressed. The correspondence set out in paragraph 4 above, together with the telephone records mentioned in paragraph 37 above, show that the Appellant was both able to take the initiative in relation to her tax affairs and did so, frequently. I therefore do not think that she can simply rely on the ineptitude of her advisers or her ill-health to justify the exercise of my discretion in this case.

53. As far as Mr Ilyas's third argument is concerned, it is true that the average taxpayer cannot initially be expected to know that there is a difference between the various departments of the Respondents but, in this case, the Appellant should have known that her appeal needed to be progressed with Mr Davis, or his successor, as it was Mr Davis who had taken over from Mr Welsh and written her the letter of 28 July 2016 enclosing the amended assessments. Moreover, in the telephone note of the discussion between the Respondents debt management team and the Appellant of 30 October 2017, the Appellant was told that her adviser needed to contact the inspector – the note reads "Suggested that he speaks to inspector & provided contact details, before applying to Tribunal". Thus, even if the Appellant did not know before that date that she needed to progress the appeal with her inspector, she should have known that that was the case from that date.

54. I believe that there is nothing in Mr Ilyas's fourth point – as Mrs O'Reilly pointed out at the hearing, the bankruptcy court was bound to stay those proceedings pending the final determination of the appeal. Whether the appeal would be finally determined on its substantive merits or on the ground that the Appellant was out of time to give notice of the appeal to the First-tier Tribunal was neither here nor there to the bankruptcy court.

55. Finally, at the hearing, Mrs O'Reilly pointed out that the various outstanding tax issues had already been explored extensively by Mr Welsh in the lead-up to his proposal of 6 January 2016 and that, therefore, the prospects of the Appellant's succeeding in her appeal were not as strong as Mr Ilyas was suggesting. As regards the specific example which Mr Ilyas had provided, Mrs O'Reilly pointed me to Mr Welsh's email of 27 October 2015 from which it is clear that his letter of 6 January 2016 accidentally transposed the sale and purchase prices. On the basis of that email, it is clear that there was a gain of £70,001 in relation to that disposal, and not a loss, which is exactly what the letter of 6 January 2016 concluded.

56. In summary, applying the principles from *Martland* set out above, and recognising that there would inevitably be a detriment to the Appellant if she were to be precluded from proceeding with the appeal, I believe that the reasons which have been given for the delay would not justify the exercise of my discretion to give permission for the appeal to proceed. The Respondents have been very accommodating in relation to the Appellant and they were entitled to assume that, if the Appellant did wish to pursue the appeal before the First-tier Tribunal, she would have taken steps to do so sooner than she did. (In any event, the Respondents might reasonably have concluded from the substance of the conversation between their debt

management team and the Appellant of 13 November 2017 that the Appellant had given up on applying to the First-tier Tribunal because of an absence of bank statements and the fact that her solicitors were no longer in business.) I am not convinced that the prospects of success of the Appellant if the appeal were to proceed are so overwhelming that they should outweigh the above considerations. On the contrary, insofar as they should be taken into account in making a decision of this nature, those prospects do not appear to me to be compelling.

57. Having said all of that, given my conclusion in paragraph 34 above, the question of whether or not I should give my permission is entirely hypothetical as I consider that the appeal can proceed without my permission.

Conclusion

58. In conclusion:

(a) the assessments which are at issue in the appeal have not been determined by an agreement between the parties under Section 54 of the TMA; and

(b) the appeal can proceed without the need for the permission of the First-tier Tribunal; but

(c) if the conclusion set out in paragraph 58(b) above were to be incorrect, then I would not myself be prepared to give permission for late notice of the appeal to be given.

59. I therefore dismiss the Respondents' application to strike out the appeal and confirm that the appeal may proceed.

Right to appeal

60. 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.

TONY BEARE

TRIBUNAL JUDGE
RELEASE DATE 08 MARCH 2019