[2019] UKFTT 579 (TC)

# TC07373

*PROCEDURE – appeal had been struck out under terms of an Unless Order – new appeal made against same HMRC decision – treated as late application for reinstatement – whether to give permission to make a late application – no – whether to reinstate appeal – no – application dismissed*

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

**Appeal number: TC/2016/03549**
**TC/2019/01990**

**BETWEEN**

**SUBWAY LONDON LTD** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE JEANETTE ZAMAN**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 6 September 2019**

**Mr Phillip Webb, of Churchill Tax Advisers, for the Appellant**

**Mr Matthew Wilby, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents**

## DECISION

### INTRODUCTION

1. Subway London Ltd ("Subway") gave notice of appeal to the Tribunal on 26 March 2019, which was allocated reference TC/2019/01990 (the "2019 appeal"). The 2019 appeal states that it is a late appeal against VAT of £93,217.00 charged pursuant to HMRC decisions dated 29 April 2016 and 23 June 2016. Subway had appealed to the Tribunal on 28 June 2016 against those same decisions under the reference TC/2016/03549 (the "2016 appeal"). That appeal had been struck out pursuant to the terms of an unless order.

2. On 17 May 2019, Judge Mosedale notified both parties that a hearing would take place to determine the following matters:

(1) HMRC's application to strike out the 2019 appeal;

(2) Subway's application to admit the late 2019 appeal if it is not struck out;

(3) if the 2019 appeal is struck out, whether Subway should be given permission to make a late application to reinstate the 2016 appeal; and

(4) if so, whether the 2016 appeal should be reinstated.

### PRELIMINARY ISSUE

3. The notice of hearing dated 9 July 2019 directed the parties to provide to the Tribunal and each other, no later than seven days before the hearing, an outline of the arguments that they will put at the hearing. HMRC complied with this direction and submitted a skeleton argument (as well as its proposed index of documents to be included in the bundle).

4. Mr Webb sent Subway's grounds for its application (the "grounds") and a witness statement from Mr Khuram Shahzad, the director of Subway, to the Tribunal and HMRC on 5 September 2019, ie the day before the hearing. The grounds referred to, and a copy was included of, an additional Tribunal decision (which was not included in HMRC's proposed index of documents), namely that of Judge Mosedale in *Maltavini Limited v HMRC* [2016] UKFTT 267 (TC). HMRC objected to the late admission of these documents.

5. I heard representations from both parties. Mr Webb explained that he had not been aware of the Tribunal's direction to provide the outline no later than seven days before the hearing. Mr Wilby had emailed Churchill Tax Advisers ("CTA") on 15 August 2019 seeking to agree a joint bundle, but Mr Webb had been out of the office then and subsequently and neither he nor anyone else at CTA had replied to that email.

6. Mr Wilby objected to the lateness, pointing out that this was yet another example of Subway failing to comply with Tribunal directions. No reason had been given as to why CTA had not been aware of the requirement set out in the notice of hearing dated 9 July 2019. He had not received any response from CTA to his email of 15 August 2019, and that email should have alerted them to the fact that a deadline had been imposed by the Tribunal. The late exchange of Subway's grounds meant that he had little time to read the additional papers and to prepare HMRC's response thereto ahead of the hearing.

7. Having considered the representations from both parties, I informed the parties of my decision as follows. The notice of hearing had not required that parties provide witness statements in advance of the hearing, and, accordingly, the provision of Mr Shahzad's witness statement the day before the hearing could not be said to be late. I therefore concluded that this should be admitted.

8. Subway's grounds were, however, exchanged late in breach of the Tribunal's directions. I had regard to the overriding objective in Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") that I deal with matters fairly and justly, and in particular that I avoid unnecessary formality but also ensure that the parties are able to fully participate in the proceedings. I noted Subway's failure to comply with a straightforward timing requirement without any good reason for such non-compliance, but nevertheless decided to admit the document – it was fairly short (at just over three pages long) and, more importantly, it was in substance a development of the arguments which had been put by Subway as its grounds of appeal in the 2019 appeal and in correspondence with HMRC. As such, its contents were not a surprise to HMRC and in many respects the arguments made, in particular Mr Shahzad's reliance on his original adviser, had been predicted by Mr Wilby in HMRC's own skeleton argument.

**BACKGROUND**

9. I find the following facts based on the papers before me. (Additional findings of fact are made in the sections headed "Evidence of Mr Shahzad" and "Discussion".)

10. The 2016 appeal was lodged with Tribunal on 28 June 2016 against HMRC's decision to raise an assessment for VAT of £93,217. That appeal stated that Subway's representative was FTI Fox Consultants ("FTI"), it was an appeal against VAT of £93,217 and that the HMRC decision was dated 23 June 2016. The 2016 appeal states that it was made late (although this does not in fact appear to be correct) and:

> (1) in the grounds of appeal challenges the validity of the assessment of 23 June 2016, enclosing a note challenging the "best judgement" making of the assessment with reference to the absence of HMRC's invigilation notes or full information and explanation of the assessments; and
>
> (2) encloses a letter from HMRC to Mr Shahzad dated 23 June 2016 headed "Notice of VAT assessments" which sets out that the VAT due is £93,217.

11. On 26 May 2017 HMRC applied for a direction that Subway be required to provide certain information and documents by 30 June 2017 and requested a stay in proceedings until 31 July 2017.

12. On 13 June 2017 Judge Mosedale issued a direction for Subway to provide further and better particulars of its grounds of appeal by 27 June 2017. No response was received from Subway or FTI.

13. On 18 July 2017 Judge Mosedale issued an "unless order" directing that "…UNLESS the appellant notifies the Tribunal no later than 01 August 2017 that it intends to continue to defend this appeal, this appeal WILL BE STRUCK OUT and UNLESS by the same date the appellant serves further and better particulars of its grounds of appeal then this appeal MAY BE STRUCK OUT without further reference to the parties" (the "Unless Order").

14. No response was received from Subway or FTI and the appeal was struck out.

15. On 29 October 2018 Astute Accountants ("Astute") wrote to HMRC on behalf of Subway explaining that Subway's previous adviser had left the case without giving an update leaving Subway confused as to the current status and Subway had now received a demand for £98,748.55 of assessed VAT which they knew to have been suspended. That letter asked HMRC for a copy of all correspondence between HMRC and the previous adviser.

16. On 20 December 2018 Astute wrote to HMRC Debt Management, referring to the letter of 29 October 2018 to which they had yet to receive a reply, and asking that collection proceedings be halted until the matter had been concluded.

17. On 25 February 2019 HMRC wrote to Astute explaining that the case had been struck out on 18 July 2017. (I note that this is not correct, as the Unless Order was made on that date but the case was not struck out until 2 August 2017.)

18. On 26 March 2019, Subway made the 2019 appeal. As noted at [1] above, the 2019 appeal refers to HMRC decisions dated 29 April 2016 and 23 June 2016, includes a claim for hardship and includes:

(1) as reasons why the appeal is made late:

> "My last agent has gone silent and did not advise me he was not acting for me anymore. I only found out when HMRC wrote to me on 25th Feb 2019 to say that my First Tier Tribunal case had been struck out on the 18th July 2017 due to no reply from my then acting agent. Prior to this, I have tried to contact my previous agent on several occasions without any success. My previous advisor had originally applied for ADR but after that point disappeared.
>
> I then instructed Churchill Tax Advisers in March 2019 to act for me and submit the relevant appeal again to the Tribunal.
>
> In light of the circumstances explained above, I would be grateful, if I am given permission to file a late appeal."; and

(2) as grounds for appeal, that the assessments are excessive and unreasonable and HMRC have not explained the basis on which they were made. The revision proposed is not in line with Subway's business model or reality, and Subway intends to apply for ADR to seek to agree the actual duties based on actual figures, where possible.

19. On 18 April 2019, HMRC applied for the appeal to be struck out under Rule 8(2)(a) of the Tribunal Rules as there is no valid appeal, and/or if the 2019 appeal is to be treated as a late application for reinstatement of the 2016 appeal that this be refused.

**EVIDENCE OF MR SHAHZAD**

20. Mr Shahzad provided a witness statement on which he was cross-examined. I found him to be a credible witness. His evidence, which I accept, was that:

(1) He is one of two directors of Subway, and was responsible for appealing the decision letter from HMRC dated 23 June 2016.

(2) On the recommendation of the franchisor of the Subway-branded shops, he appointed Mr Mark Gordon of FTI to appeal the matter for him.

(3) Mr Gordon assured him that he would manage the appeal going forward, telling him that he had 50 other Subway franchisees that were in the same position. Mr Shahzad should therefore let Mr Gordon deal with all of the franchisees together – this would be cheaper and Mr Shahzad would not have to do anything.

(4) Mr Shahzad was told that all he would have to do was provide any information when asked to do so by Mr Gordon. Otherwise, he should wait to hear from him. Mr Shahzad believed that Mr Gordon knew what he was doing and that there was no need to worry.

(5) He paid Mr Gordon a retainer of £1,000 and agreed to pay him an additional fee of 10% of the amount assessed that Mr Gordon was able to save him.

(6) In January 2018 Mr Shahzad was concerned that he had not received a progress report. He phoned on many occasions, emailed more than once and then contacted other franchisees who had used Mr Gordon's services. None of them could contact him either.

(7) Mr Shahzad then contacted his regular accountant, Astute, who approached HMRC and discovered that the appeal had been struck out. It was about this time (February 2018) that HMRC started to seek to enforce the debt.

(8) At this same time Mr Shahzad also discovered that his brother had suffered from liver failure and was waiting for a transplant. He was very pre-occupied by this. In addition, the other director was going through a difficult divorce.

(9) If Subway is not able to pursue the appeal, the company will go into liquidation as the business is not able to pay the VAT assessment of £93,000.

21. In cross-examination, and in response to questions which I put to Mr Shahzad, he added the following information. I consider some of this further in the Discussion – at this stage I note that whilst my opinion was that Mr Shahzad was honest and helpful, he was somewhat vague in his recollection of dates and in particular was uncertain as to the events after February 2018 (see [21(7)] and [21(8)] below):

(1) Mr Shahzad had met Mr Gordon when he was preparing the 2016 appeal at Mr Gordon's offices in Golders Green.

(2) After the 2016 appeal had been filed, he generally received updates from Mr Gordon every six weeks to two months. Mr Shahzad would sometimes have to chase for these updates.

(3) Prior to the email referred to at [21(3)], Mr Gordon had not asked him for any detailed breakdown of sales or turnover of Subway's business. He had been expecting this would be asked of him when it was needed, and was ready to provide it.

(4) Mr Shahzad was asked to provide Mr Gordon with a completed form 64-8 and another form authorising him to act as representative before the Tribunal and the "Subway Manual" which is given by the franchisor to franchisees.

(5) The last contact he had with Mr Gordon was in September 2017 when Mr Gordon emailed him to ask him for certain sales information. Mr Shahzad provided this information to Mr Gordon, but he received a subsequent email from Mr Gordon explaining that the first email had been sent to him by mistake and had been intended for another franchisee. The last update he had received from Mr Gordon in respect of Subway's own appeal would have been around July 2017.

(6) When asked as to whether Mr Shahzad found it strange that he had not received requests for detailed information from Mr Gordon or full written updates of progress during this period from June 2016 to July 2017, Mr Shahzad explained that he hasn't known what to expect and was happy that matters were being dealt with by a competent and professional adviser. He was putting together a detailed file of information and expected that Mr Gordon would ask for this when it was needed and that he was simply dealing with the franchisees in turn.

(7) Having discovered in February 2018 that the appeal had been struck out, Mr Shahzad initially sought assistance from Astute as they were the accountants he generally used. However, they advised him to seek specialist advice from someone with litigation experience, and so he then instructed CTA. He thought he instructed CTA in August or September 2018.

(8) When asked to explain the reason for the delay between discovering the strike out in February 2018, Astute contacting HMRC for him on 29 October 2018 and then making the 2019 appeal with the assistance of CTA on 26 March 2019, Mr Shahzad explained that he thought there had been earlier attempts to contact HMRC (before October 2018) to which no response had been received, and that he had not known what to do. He had at this time also been struggling to deal with his brother's illness.

**RELEVANT LAW**

22. Rules 2, 5, 8 and 17 of Tribunal Rules 2009 are set out below:

> "**Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> 2(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly. Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.
>
> ...
>
> **Case management powers**
>
> 5(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;
>
> (b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

(e) deal with an issue in the proceedings as a preliminary issue;

(f) hold a hearing to consider any matter, including a case management hearing;

(g) decide the form of any hearing;

(h) adjourn or postpone a hearing;

(i) require a party to produce a bundle for a hearing;

(j) stay (or, in Scotland, sist) proceedings;

(k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started—

(i) the Tribunal no longer has jurisdiction in relation to the proceedings; or

(ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case;

(l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal, as the case may be, of an application for permission to appeal, a review or an appeal.

...

**Striking out a party's case**

8(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent.

…

**Withdrawal**

17(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) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or

(b) orally at a hearing.

(2) The Tribunal must notify each other party in writing 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).”

**APPELLANT’S SUBMISSIONS**

23. Subway’s grounds for applying for reinstatement stated that, having considered the case law to which HMRC had referred in its skeleton argument, they accepted that the Tribunal did not have jurisdiction to entertain the 2019 appeal as it had the same subject-matter as the 2016 appeal which had already been decided (by virtue of having been struck out). Subway was instead making a late application for the 2016 appeal to be reinstated.

24. Subway's position was (in summary) that the breaches which had led to the striking out of the 2016 appeal were due to the failures of its previous adviser, FTI, over which Subway had no control.

25. When Subway received HMRC's decision letter in June 2016, the franchisor of the Subway-branded shops had suggested that Subway use FTI in connection with its appeal as they were acting for other franchisees in respect of similar matters. Mr Shahzad instructed Mr Gordon of FTI and Mr Gordon had helped him complete the notice of appeal to the Tribunal for the 2016 appeal.

26. However, unknown to Mr Shahzad, Mr Gordon had then failed to pursue the appeal properly and failed to comply with Tribunal directions. Mr Shahzad did not know the appeal had been struck out until his accountant, Astute, contacted HMRC at the beginning of 2018 and HMRC commenced enforcement action in February 2018. Mr Shahzad has since tried to contact Mr Gordon and FTI but has not been able to do so. Having paid FTI to pursue the appeal on its behalf, it is not unreasonable for Subway to have assumed that the appeal was in safe hands and they would be informed when something was required from them. The two directors of Subway had no experience with the Tribunal, and relied on the professional they had appointed.

27. Subway accepts that the Tribunal may suggest that its remedy lies in taking action against FTI and seeking to recover under its professional indemnity insurance. However, this remedy is not available as no trace can be found of FTI.

28. Subway acknowledged the discussion in *Martland* around finality for HMRC and HMRC's right to legal certainty. However, when looking at the prejudice that might be suffered by the parties, if the late application were not permitted and the 2016 appeal were not then reinstated, Subway would cease to exist as it would be unable to pay the amount claimed by HMRC. Mr Shahzad had been completely misled by Mr Gordon who, even two months after the appeal had been struck out, did not tell him of this or give any indication that there was a problem.

29. In terms of the merits of the 2016 appeal, Subway's position is that HMRC's assessment was flawed in that HMRC identified items which were in fact zero rated as being standard rated and has not provided relevant information in support of these conclusions. If the 2016 appeal is reinstated, Subway would seek to resolve matters with HMRC through ADR.

30. The circumstances are clearly exceptional and the Tribunal is asked to exercise its discretion to permit the late application and then to reinstate the 2016 appeal.

#### HMRC'S SUBMISSIONS

31. HMRC's skeleton argument addressed all four matters identified as the subject-matter of the hearing. Whilst at the hearing Subway withdrew the argument that the 2019 appeal was a new appeal, HMRC's arguments are set out below as they explain my own comments on this issue.

### HMRC's application to strike out the 2019 appeal

32. The 2019 appeal is purportedly a new appeal but is in fact materially identical to the 2016 appeal, which was struck out as a result of a direction issued on 18 July 2017 due to Subway's serial non-compliance with earlier Tribunal directions concerning the same issues and the same disputed amount of tax. Subway confirmed as much in its notice of appeal at section 6, stating, "I then instructed Churchill Tax Advisers in March 2019 to act for me and submit the relevant appeal **again** [emphasis added] to the Tribunal."

33. The legal principle of cause of action estoppel applies in this instance, and Subway cannot appeal to the Tribunal against a matter which, by virtue of being struck out, has already been determined by the Tribunal - see *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313, which stated:

> "…where a given matter becomes the subject of litigation…the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

34. The Tribunal has no jurisdiction to entertain this appeal and must strike it out under Rule 8(2)(a).

35. Alternatively, the appeal should be struck out under Rule 8(3)(c) of the Tribunal Rules. It was confirmed in *Shiner & Anor v Revenue and Customs Commissioners* [2018] EWCA Civ 31 that Rule 8(3)(c) may be used to strike out an appeal due to an abuse of process:

> "19. The Upper Tribunal in its decision at [55] did not take Mr McDonnell to have submitted that there was no power to strike out for abuse of process but in any event, in my view, the power contained in rule 8(3)(c) is wide enough in its terms to include a strike out application based on those grounds. Such an application, if successful, would result in the First-tier Tribunal concluding that the relevant part of the appellant's case could not succeed."

36. Furthermore, Lord Bingham provided the following test in *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 regarding the issue of abuse of process:

> "…there should be finality in litigation … a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings … It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise the issue which could have been raised before … it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances."

37. There has been no new decision against which Subway could appeal, and indeed, from its notice of appeal it is clear that Subway seeks to appeal against the 2016 decision. Allowing the 2019 appeal to proceed would amount to re-litigation of the same matter (the 2016 appeal), which in turn would amount to an abuse of process.

**Subway's application to admit the late 2019 appeal if it is not struck out**

38. Section 83G VATA 1994 provides that an appeal must be made within 30 days of HMRC's decision. The decision against which Subway wishes to appeal is the decision notified on 23 June 2016. The 30-day time limit in which to bring an appeal ended on 23 July 2016. HMRC submitted that the Tribunal should not permit Subway to appeal late, referring to the approach taken by the Upper Tribunal in *Martland* and *TP Bell*.

**Whether Subway should be given permission to make a late application to reinstate the 2016 appeal**

39. Subway should not be allowed to make a late application for reinstatement. Following the three-stage approach outlined in *Martland*:

***Length of the delay***

40. Subway is required, by virtue of Rule 8(6) of the Tribunal Rules, to apply for reinstatement of an appeal within 28 days. Subway submitted the deemed application for reinstatement on 26 March 2019. HMRC understand that the appeal was struck out, effective from 2 August 2017 (the Appellant having had until 1 August 2017 to comply with the Unless Order). The application is therefore 717 days late (1 year, 11 months and 18 days), which is serious and significant and far exceeds the 28-day limit set by Tribunal.

***Reasons for the delay***

41. Subway places the blame for the delay on its previous representative, but Mr Shahzad should have been aware from the lack of information which was being requested from him that the appeal was not being pursued diligently. The information he had been asked for was not consistent with pursuing an appeal against an assessment of just under £100,000. In any event, it was Subway's responsibility to ensure that the appeal was pursued properly, and it is responsible for the failures of its adviser.

42. Furthermore, having become aware in January or February 2018 that the 2016 appeal had been struck out, there is then no good reason for the delay in appointing new advisers or making what has been deemed to be an application to the Tribunal for permission to apply late for reinstatement. HMRC had no record of Astute or CTA contacting HMRC before Astute's letter of 29 October 2018. This additional eight to nine month delay between the date on which Mr Shahzad says he found out about the strike out and contacting HMRC to seek to follow-up matters was itself serious and significant.

***Evaluating all the circumstances***

43. Subway has been an inactive participant and failed repeatedly to engage with the appeals process (including in relation to this hearing itself and the failure to provide an outline of its arguments by the date specified). This application is merely an attempt to re-litigate matters which were settled by the striking out of the 2016 appeal in an attempt to delay or nullify the collection action.

44. Subway indicates that it would have difficulty paying any amounts due. While there is little detail provided, HMRC submit that insufficiency of funds or potential financial hardship do not outweigh consideration of the seriousness and significance of the lateness in importance.

45. HMRC will be unfairly prejudiced by any attempt to unpick the finality of the striking out of the 2016 appeal. They would need to devote resources to an appeal which HMRC had considered closed some time ago.

**Whether the 2016 appeal should be reinstated**

46. If, however, the Tribunal should grant permission for a late application to be made, in considering whether the appeal should be reinstated HMRC are of the view that it is appropriate to follow the adapted *Martland* test set out by the Upper Tribunal in *Chappell*.

***Seriousness of the breach***

47. Subway submitted its notice of appeal for the 2016 appeal on 28 June 2016. On 13 June 2017, Judge Mosedale issued a direction for Subway to provide further and better particulars of its grounds of appeal. On 18 July 2017, as Subway had failed to comply with the original direction, an Unless Order was issued. Subway had therefore been given additional time to engage with the appeals process by virtue of the direction of 13 June 2017, and having failed to take advantage of this, had been granted a further opportunity for compliance, as a result of the Unless Order, of which again it did not avail itself.

48. The underlying breach was therefore the failure of Subway to respond to the direction for further and better particulars by 27 June 2017, leading to the requirement for the Unless Order of 18 July 2017. The Unless Order was required due to the serial noncompliance of Subway, which was already in breach of its obligations to Tribunal, and the failure to observe the directions can only be considered a serious and significant breach of its obligations as a party to the appeal.

***Reason for the breach***

49. Subway states in the 2019 appeal that its previous agent "…did not advise me that he was not acting for me anymore. I only found out when HMRC wrote to me on 25th Feb 2019 to say that my First Tier Tribunal case had been struck out on the 18th July 2017 due to no reply from my then acting agent."

50. HMRC submit that the alleged failure of the agent does not excuse the failure of Subway to engage with the appeal. It was solely the responsibility of Subway to take an interest in the appeal proceedings and remain informed. The facts of its repeated failure to comply with directions; to seek timely advice from either HMRC or the Tribunal; and its failure to appoint new representation in a timely manner, suggest that it has not approached the proceedings with the seriousness required and, irrespective of the alleged conduct of its former representative, the failure falls fully on Subway alone.

51. This being the case, HMRC submit that there is no merit to the reason for the breaches put forward by the Appellant.

***Evaluation of all the circumstances***

52. HMRC maintain that the breaches are serious and significant, and no good reason has been provided for the failure to comply. Their submissions on the third stage of the test in the context of the late application apply also to the application for reinstatement.

53. The merits of the substantive appeal are not relevant in this exercise.

54. As the Upper Tribunal case of *Katib* renders potential financial hardship insignificant as a consequence of denying a reinstatement or late appeal application (in comparison to the failure to comply with statutory time-limits), HMRC submit that the prejudice resultant from allowing reinstatement of the 2016 appeal would fall more greatly on HMRC, in having to revisit matters long considered to be settled. The fact that the Tribunal cannot rely on Subway to comply with any future directions if the reinstatement were to be permitted is illustrated by Subway's most recent breach ahead of this hearing.

**DISCUSSION**

55. The matters for me to decide were set out in the notice of hearing (see [2] above). I address them each in turn.

**Whether this Tribunal has jurisdiction to admit the 2019 appeal**

56. The grounds prepared by Mr Webb stated that "The Appellant now makes this application in realisation that the Tribunal WILL NOT have the jurisdiction to entertain the new appeal to proceed as outlined in *Henderson v Henderson* (1843)." The grounds did not advance any argument against HMRC's position, namely that as the HMRC decision which is the subject-matter of the 2019 appeal is the same as that of the 2016 appeal and the 2016 appeal was struck-out, the Tribunal did not have jurisdiction to hear that 2019 appeal as a new appeal.

57. At the hearing Mr Webb confirmed that Subway were withdrawing this part of its appeal. Whilst not having been convinced that the position set out in the grounds was sufficiently clear to be treated as a withdrawal under Rule 17(1)(a) of the Tribunal Rules, the position confirmed by Mr Webb at the hearing was completely clear and was an oral withdrawal under Rule 17(1)(b) of this part of Subway's appeal. If Subway had not withdrawn this part of its appeal, I would have struck it out for lack of jurisdiction under Rule 8(2)(a) as the matter which is the subject of the 2019 appeal has already been determined by this Tribunal under the 2016 appeal.

**Whether this Tribunal should give permission for the 2019 appeal to be made late**

58. With the 2019 appeal having been withdrawn, this is not relevant.

**Whether this Tribunal should give permission for a late application to be made for reinstatement of the 2016 appeal**

59. Both parties agreed that in considering this question I should follow the guidance given by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC), albeit that such guidance was given in the context of whether to allow the notification of a late appeal to the Tribunal. The Upper Tribunal said:

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton:
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
> (2) The reason (or reasons) why the default occurred should be established.
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in Aberdeen and Data Select will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference

> to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.
> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. ... It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.
> 47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore- Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

60. In addition, the Upper Tribunal in *HMRC v Katib* [2019] UKUT 0189 (TCC), which concerned an appeal by HMRC against a decision of the Tribunal to give permission for the taxpayer to make late appeals, emphasised the importance of adhering to statutory time limits at [17]:

> "We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion. We accept Mr Magee's point that the FTT referred to both *BPP Holdings* and *McCarthy & Stone* in the Decision. Paragraph 27(1) of the decision (cited above) shows that the FTT seemed to have the point in mind. However, instead of acknowledging the position, the tribunal went on to distinguish the *BPP Holdings* case on its facts. Differences in fact do not negate the principle, and it is not possible to detect that the tribunal thereafter gave proper weight to it in parts of the decision which followed."

61. Subway's application for reinstatement of the 2016 appeal was just under two years' late. That is clearly a significant and serious delay. I have carefully considered the reasons given for the delay and have had particular regard to the recent decision of the Upper Tribunal in *Katib* for this purpose, given that the taxpayer in that case also sought to explain the delay by reference to the failures of his adviser.

62. I have said previously that the conduct of the taxpayer's adviser in *Katib* was somewhat striking. The Tribunal described it as "extraordinary" and, having considered the findings of fact made by that Tribunal, I can only agree. An example of that conduct, referred to by the Upper Tribunal, was that Mr Bridger's advice included that Mr Katib should cease to be a man by making a declaration to that effect to enable Mr Bridger to communicate to the world that Mr Katib was dead. Nevertheless, having set aside the decision of the Tribunal on the basis that an error of law had been made, the Upper Tribunal re-made the decision as follows:

> "53. The first stage of the *Martland* examination can be addressed briefly. Mr Katib's delay in appealing against the PLNs was, at the very least, 13½ months. That was "serious and significant". The real question is how the second and third stages of the evaluation should be performed, having regard to the particular importance of statutory time limits being respected.
> 54. It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant. In *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666 , when considering the analogous question of whether a litigant's case should be struck out for breach of an "unless" order that was said to be the fault of counsel rather than the litigant itself, Ward LJ said, at 1675:
> Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. *The basis of the rule is that orders of the court must be observed* and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself. [emphasis added]
> 55. We do not accept Mr Magee's general argument that this approach simply involves attributing the actions of legal representatives to their clients and has no bearing on the question whether incorrect advice provided to a client can be a good reason for the client's default. Given the importance of adhering to statutory time limits, we see no reason why a litigant who says that a representative failed to file an appeal on time should necessarily be in a different position from a litigant who says that a representative failed to advise adequately of the time limits within which an appeal should be brought. In any event, it seems from [7] of the Decision that the FTT found that Mr Bridger had been instructed to appeal against the PLNs on Mr Katib's behalf but failed to do so and, therefore, Mr Katib is not simply complaining that Mr Bridger provided defective advice.
> 56. Nor do we accept Mr Magee's submission that the decision of the High Court in *Boreh v Republic of Djibouti and others* [2015] EWHC 769 establishes an "exception" to the principle where a representative misleads the client. Rather, we consider that the correct approach in this case is to start with the general rule that the failure of Mr Bridger to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by ***Martland*** . However, when considering the third stage of the evaluation required by ***Martland****, we should recognise that exceptions to the general rule are possible*

*and that, if Mr* Katib was misled by his advisers, that is a relevant consideration.

57. The FTT concluded at [27(3)] of the Decision that the general rule set out in *Coventry City Council* should not apply because Mr Bridger was "on a frolic of his own acting outside the scope of any possible brief that [Mr Katib] could have given". That conclusion, however, was reached without having regard to the particular importance of statutory time limits being respected and is thus vitiated by the error of law that has led to us setting aside the Decision. More significantly, we do not consider that the FTT's departure from the general principle is justified by that fact in this case (which we think is probably an additional error of law, though not one relied on in the grounds of appeal).

58. It is clear from the Decision that Mr Bridger did not provide competent advice to Mr Katib, misled him as to what steps were being taken, and needed to be taken, to appeal against the PLNs and failed to appeal against the PLNs on Mr Katib's behalf (see [7] and [16]). But extraordinary though some of Mr Bridger's correspondence was, the core of Mr Katib's complaint is that Mr Bridger was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise.

59. Mr Magee urged us to give particular weight to the FTT's finding, at [15], that Mr Katib did not have the expertise to deal with the dispute with HMRC himself, but that does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena. We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against Mr Bridger or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of Mr Bridger's failings and, if he wishes, pursue a claim in damages against him or Sovereign Associates for any loss he suffers as a result. This conclusion is fortified by the fact that the FTT's findings demonstrate that there were some warning signs that should have alerted Mr Katib to the fact that Mr Bridger was not equal to the task. Despite Mr Bridger assuring Mr Katib that his appeals were in hand, he was still receiving threats of enforcement action ([9]). Mr Bridger's advice to "cease to be a man by making a declaration to this effect" should have alerted Mr Katib to the warning signs. Mr Katib is not without responsibility in this story.

60. For the same reasons we do not consider that Mr Bridger's conduct has any real weight when considering the factors relevant to the final stage of the three-stage approach outlined in *Martland*. Turning to other factors relevant to that third stage, the FTT concluded that the financial consequences of Mr Katib not being able to appeal were very serious because his means were limited such that he would lose his home. That, the FTT concluded, was too unjust to be allowed to stand. We have considered this factor anxiously for ourselves. However, again, when properly analysed, we do not think that this factor is as weighty as the FTT said it was. The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties

> posed by the fact that the delays were very significant, and there was no good reason for them.
> 61. Therefore, we have concluded that, in all the circumstances of the case, Mr Katib has not given a sufficiently good reason for a serious and significant delay in appealing against the PLNs. HMRC's appeal is allowed and we remake the Decision so as to refuse Mr Katib permission to make late appeals."

63. I have included the lengthy extract from *Katib* above as it addresses the Upper Tribunal's approach to stages two and three set out in *Martland* (considering the reasons for the delay and evaluating 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 Subway which would be caused by my not giving permission and the extent of the detriment to HMRC which would be caused by my giving permission). I also note, as set out in the Upper Tribunal decision in *Martland*, that the starting point is that permission should not be granted unless this Tribunal is satisfied on balance that it should be. *Katib* emphasises that a taxpayer who is dealing with the consequences of an incompetent adviser faces a high hurdle.

64. I would summarise the reasoning of the Upper Tribunal in *Katib* as follows:

(1) failures by the taxpayer's adviser should generally be treated as failures by the taxpayer;

(2) the general rule that the failure of an adviser to advise the taxpayer of the deadlines for making appeals, or to submit timely appeals on his behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland*;

(3) when considering the third stage of the evaluation required by *Martland*, exceptions to the general rule are possible and, if a taxpayer was misled by his advisers, that is a relevant consideration;

(4) the core of the taxpayer's complaint is that the adviser was incompetent, did not give proper advice, failed to appeal on time and told the taxpayer that matters were in hand when they were not. That core complaint is not as uncommon as it should be. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal;

(5) the fact that the taxpayer did not have the expertise to deal with the dispute with HMRC himself does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena;

(6) given the particular importance of respecting statutory time limits, neither the taxpayer's complaints against his adviser nor his own lack of experience are sufficient to displace the general rule that a taxpayer should bear the consequences of his adviser's failings;

(7) this conclusion is fortified by the fact that there were some warning signs that should have alerted the taxpayer to the fact that the adviser was not equal to the task – the taxpayer was still receiving threats of enforcement action, and the advice to "cease to be a man by making a declaration to this effect" should have alerted the taxpayer to the warning signs;

(8) the adviser's conduct does not have any real weight when considering the factors relevant to the final stage of the three-stage approach outlined in *Martland*; and

(9) whilst the financial consequences of the taxpayer not being able to appeal were very serious because his means were limited such that he would lose his home, this factor was not as weighty as the Tribunal said it was. The core point is that the taxpayer would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that could be propounded by large numbers of taxpayers, and it does not have sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them.

65. In the light of the above, I now apply the second and third stages of the process as set out in *Martland*.

66. Mr Shahzad relied entirely on the agent he appointed, believing that he had chosen an appropriate adviser given that Mr Gordon was dealing with appeals by many other franchisees on similar issues, and that Mr Gordon would tell him when information was needed from him. If several weeks went by without receiving an update, then Mr Shahzad would contact Mr Gordon to check the position.

67. This reliance on an adviser was understandable. However, the reasoning in Katib which I have outlined at [64(1)] to [64(6)] above applies here. When assessing the reasons for Mr Shahzad's delay (at least up until January or February 2018), this falls squarely within the general rule that the failure of FTI to comply with directions on Subway's behalf is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland.* Contrary to Mr Webb's submission, I do not agree that the circumstances are "clearly exceptional".

68. Furthermore, whilst Subway's 2019 appeal states that Mr Shahzad only found out that the 2016 appeal had been struck out when HMRC wrote to him on 25 February 2019, Mr Shahzad confirmed in his witness statement and during cross-examination that he had become aware a year earlier, when he had asked Astute to contact HMRC and find out what was going on (given Mr Gordon's silence) and HMRC began enforcement action.

69. I am not satisfied that there was then a good reason for the delay until 26 March 2019 in seeking to take steps to reinstate the 2016 appeal. Mr Shahzad did say in cross-examination that, before the letter of 29 October 2018 Astute had written to HMRC but had not received a reply, but HMRC have no record of any earlier letters, that letter is the one which encloses the form 64-8 confirming Astute's appointment as Subway's representative and it does not refer to earlier unanswered letters. Furthermore, Astute's next letter of 20 December 2018 makes it clear that HMRC had not responded to the October letter. I therefore find that it is more likely that the letter of 29 October 2018 was the first letter from Astute to HMRC on Subway's behalf, contrary to Mr Shahzad's recollection, and that this was the letter to which no response was received.

70. When considering "all the circumstances" for the purposes of stage three, and balancing the merits of the reason for the delay and the prejudice that would be caused to the parties by granting or refusing permission, I start with acknowledging the importance of adhering to time limits. The Tribunal Rules prescribe the appropriate time limits for an application for reinstatement to be made and the starting point is that these should be respected and adhered to.

71. The other matters that are potentially relevant are whether Mr Shahzad was misled by the agent, and the unfairness to Subway of not being able to appeal against the penalties:

(1) We did not have any evidence from Mr Gordon (which is unsurprising in the circumstances) and I do not make any finding as to whether, in the period from June 2016

to July 2017, he was dishonest rather than simply incompetent in relation to his representation of Subway. However, I do find that, as Subway's properly appointed representative, he did receive the directions from the Tribunal dated 13 June 2017 and 18 July 2017. Accordingly, I find that Mr Shahzad, and thus Subway, was misled by Mr Gordon, as Mr Shahzad had not been informed that the Tribunal had directed that further and better information be provided, that this had not been complied with, that this resulted in the same information then being required under the terms of the Unless Order and that this had also been ignored. The mistaken email from Mr Gordon of September 2017 (which was not before the Tribunal but the existence of which was not challenged by HMRC) illustrates the poor treatment which Mr Shahzad received – by this time Subway's appeal had been struck out, Mr Gordon did not tell him, and appears to have been doing at least something to pursue appeals for other franchisees at that time.

(2) One of the "warning signs" that was identified in *Katib* is not evident here – the general updates do not appear (as described by Mr Shahzad) to have been striking. However, the updates were very vague, and Mr Shahzad confirmed that Mr Gordon had not asked him to provide detailed information as to Subway's sales in support of his appeal. Whilst Mr Shahzad is not experienced in tax litigation, he should have started to challenge why this was, particularly as a key ground of the appeal against the VAT assessment is the lack of information which HMRC have provided to support their assessment of certain supplies as standard-rated. Mr Shahzad says that he believed Mr Gordon knew what he was doing and was waiting to be asked for additional information. I believe him, but consider that this continued belief was becoming less reasonable throughout 2017 given the period of time which had passed since the appeal was made. I observe in any event that the Upper Tribunal in *Katib* were only "fortified" by the presence of warning signs: this is not to say that, without them, they would have reached a different conclusion. Indeed, the tenor of their approach is that they would not have done so.

(3) If permission to make a late application is refused, Subway will not be able to pursue its argument that the 2016 appeal should be reinstated, the reasons in support of which overlap largely with those which it advances in support of being given permission for a late application given that the reasons for the delay are the same as the reasons for the breaches (save that, as I conclude later, the merits of the underlying appeal are not a relevant factor in considering reinstatement). If it is not then able to have the 2016 appeal reinstated, Subway cannot challenge the assessments which were made by HMRC. Subway's contention is that the assessments were excessive/unreasonable and HMRC have not provided information as to their basis. There is still no information as to the basis of HMRC's assessment, and I quite simply have no way of knowing whether or not, in the event that Subway were to overcome the hurdles before it and proceed to a substantive appeal against the VAT assessment, or, as it wishes, proceed to ADR to seek to agree amounts based on actual figures where possible, this would result in the assessment being reduced. I do not therefore give any weight either way to the potential merits of the underlying appeal.

(4) Mr Shahzad has stated that needing to pay this VAT assessment will cause financial difficulties such that Subway would cease to exist, which I take to mean that the company would become insolvent. This would also be the case if I were to give permission for a late application and the application were refused, or if it were permitted and the appeal was then unsuccessful. This factor was present in *Katib*, where the amount at stake was

£490,000 and the taxpayer faced losing his home. That hardship did not sway the Upper Tribunal.

(5) Mr Webb has also drawn to my attention the fact that other Tribunals, when considering the consequences for the taxpayer of denying permission to make a late appeal in circumstances where the blame is being placed on a previous adviser, have stated that the remedy in such circumstances is for the taxpayer to pursue a claim against the advisers (who will be backed by professional indemnity insurance). This option is not available to Subway, as Mr Gordon and FTI have disappeared and no trace of them can be found. However, I need to consider whether it is appropriate that the consequences of their disappearance should be borne instead by HMRC rather than Subway. I am also conscious that such statements about taking action against the third party have been made as a matter or principle given where the blame lies, and not after having heard evidence as to whether such an option would offer an effective remedy in the particular circumstances.

72. Considering all of the above, I am not satisfied that the reasons given for the delay, the failures of FTI or the prejudice which would be caused to Subway of refusing permission outweigh the importance of adhering to time limits and thus ensuring finality in proceedings. Accordingly, I do not give permission for a late application to be made.

**If a late application is permitted, whether to give permission for the reinstatement of the 2016 appeal**

73. Having refused permission for a late application, it is not necessary for me to consider whether to give permission for the reinstatement of the 2016 appeal. However, I do so as I heard arguments from both parties on this question and my reasoning is closely based on the reasons explained above for the refusal of permission for a late application to be made.

74. The relevant principles have recently been considered by the Upper Tribunal in *Chappell v The Pensions Regulator* [2019] UKUT 209 (although I note that Mr Chappell's application for reinstatement had been made in time). Judge Herrington examined the recent authorities on time limits and sanctions, including the decisions of the Court of Appeal in *Denton and others v TH White Limited and others* [2014] 1 WLR 3926, the Supreme Court in *BPP Holdings Limited v HMRC* [2017] 1 WLR 2945 and the Upper Tribunal in *Martland*. He identified that these cases raise a question as to whether the merits of the proceedings are a relevant consideration on a reinstatement application in the tribunals. Attention had been focused on a statement by the Supreme Court in *Global Torch Ltd v Apex Global Management Ltd* [2014] 1 WLR 4495 where it said at [29] that "the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues...". Judge Herrington considered at [85] that there is a distinction between (1) a case involving a late appeal and where the tribunal had to consider whether it should assume a jurisdiction which it would not otherwise have had and (2) a case involving a case management decision to impose a sanction in relation to proceedings in respect of which the tribunal already had jurisdiction. He concluded that:

> "86. In my view when considering a reinstatement application which is made following the making of an unless order, the Upper Tribunal should, consistently with what was said by the Supreme Court in *Global Torch*, generally take no account of the strength of the applicant's case. It is helpful to set out in more detail what Lord Neuberger said [29] of the judgment in that case:

> 'In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues…'"

75. Judge Herrington considered (at [93]) that the exception is where the applicant's case identifies an unanswerable case in relation to an issue that would justify the making of a barring order against the respondent, going on to say:

> "...Examples of that might be where the Tribunal would have no jurisdiction because TPR's action was clearly time-barred or where as a matter of law it was clear that there was no basis for TPR's contentions that the outcome sought fell within the scope of the relevant legislation so that its case had no reasonable prospect of succeeding."

76. Judge Herrington went on to consider the following points as relevant:

> "99… in applying the overriding objective when considering the reinstatement application, I will follow the three stage approach set out at [44] of *Martland* … adapted so as to take account of the fact that this is a reinstatement application rather than an application to make a late appeal. In that regard, at stage one, I will consider the seriousness and significance of the breach of the Unless Order, taking account also of the previous breaches of the Rules that led to the making of the Unless Order.
>
> 100. In conducting the balancing exercise at the third stage of the process, I will give particular importance to the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.
>
> 101. I shall only consider the merits of Mr Chappell's reference to the extent that it appears that TPR's case has any feature such as those that I have described at [93] above."

77. With the benefit of this guidance, I therefore proceed to consider Subway's application for reinstatement of the 2016 appeal.

***Seriousness and significance of the breach***

78. In *Chappell* Judge Herrington stated:

> "95. As regards the assessment of the seriousness of a breach in respect of which a sanction has been imposed…where the breaches are of a requirement contained in an "unless" order it is necessary, when assessing the seriousness and significance of that breach, to consider the underlying breach and the failure to carry out the obligation which was imposed by the original order or rule and extended by the "unless" order.
>
> 96. In *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] 1 WLR 4530 the court explained that this was justified because an "unless" order does not stand on its own. It observed at [38] that the court usually only makes an "unless" order against a party which is already in breach. It went on to say at [38] and [39]:
>
> '38…the "unless" order gives that party additional time for compliance with the original obligation and specifies and automatic sanction in default of compliance. It is not possible to look at an "unless" order in isolation. A party who fails to comply with an "unless" order is normally in breach of an original order or rule as well as the "unless" order.
>
> 39. In order to assess the seriousness and significance of a breach of an "unless" order, it is necessary also to look at the underlying breach. The court

> must look at what X failed to do in the first place, when assessing X's failure to take advantage of the second chance which he was given.'"

79. Once the 2016 appeal had been made, there was a complete failure by Subway and its adviser to participate in the proceedings. Subway did not make any attempt to comply with the directions issued on 13 June 2017 or 18 July 2017. I have no doubt in concluding that this failure was serious and significant.

***Reasons for the breach***

80. The reasons for the breach given by Mr Shahzad are the same as those for the lateness of the application for reinstatement, namely his reliance on Mr Gordon to do what was necessary to pursue the appeal on Subway's behalf and request information from Mr Shahzad when required.

81. Whilst the decision in *Katib* was concerned with the exercise of a Tribunal's discretion to permit a late appeal, I conclude that the reasoning therein as to the failures of an adviser generally being treated as the failures of the taxpayer should apply to the exercise of discretion as to whether to reinstate an appeal. The fact that Mr Shahzad was relying on Mr Gordon to pursue the 2016 appeal properly, doing whatever was required for that purpose, and that Mr Gordon then (unknown to Mr Shahzad) failed to comply with the directions given by the Tribunal does not amount to a "good reason" for those same breaches.

***Evaluation of all the circumstances***

82. This third stage involves a balancing exercise which assesses the merits of the reasons given for the failure to comply with the Unless Order and the prejudice which would be caused to both parties by granting or refusing the reinstatement application.

83. As stated above, I have concluded that there was no good reason for the failure. That, as in *Chappell*, is a very strong factor in favour of refusing to reinstate the appeal.

84. Considering the prejudice to the parties, there would be clear prejudice to HMRC if the appeal is reinstated as they would have to devote resources to an appeal which they believed had been concluded in 2017. If I were to reinstate the appeal, HMRC would be taken back to the position where they were seeking further and better information on the grounds of Subway's appeal. Subway has now appointed new advisers, CTA, but, as HMRC noted, there has already been a breach of the Tribunal's directions ahead of the hearing of this application and accordingly HMRC can have little reassurance that further breaches would not occur, rendering defending the appeal even more onerous.

85. I do not doubt that there would be significant prejudice to Subway if the appeal were not reinstated. Mr Shahzad has stated that the company cannot afford to pay the VAT which has been assessed, and Mr Webb has pointed out that the circumstances of Mr Gordon and FTI's disappearance means that there is no recourse to the advisers. Refusing to reinstate the appeal means that Subway will not be able to challenge this assessment. This factor weighs in favour of reinstating the appeal.

86. I consider that the merits of the appeal are neutral, as there are no unanswerable points in Subway's appeal along the lines of those given as examples by Judge Herrington at [93] in *Chappell*.

87. Finally, I give particular weight to the importance of efficient litigation and compliance by the parties with rules and orders. There have been repeated failures to comply with Tribunal directions by Subway. This hinders the efficient progress of the appeal.

88. Considering all of the above, I am not satisfied that the reasons given for the breaches or the prejudice which would be caused to Subway of refusing to reinstate the appeal outweigh the prejudice to HMRC were the appeal to be reinstated and the importance of efficient litigation in compliance with rules and orders. Accordingly, even if I had decided to give permission for a late application to be made, I would then in any event have refused to reinstate the appeal.

**CONCLUSION**

89. Dealing with the four matters which are the subject-matter of this hearing, and for the reasons explained above:

(1) the 2019 appeal is withdrawn;

(2) accordingly, the question as to whether to give permission for the 2019 appeal to be made late does not arise;

(3) permission for a late application for reinstatement of the 2016 appeal is refused; and

(4) even if a late application had been permitted, the substantive application for reinstatement would be refused.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

90. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JEANETTE ZAMAN**
**TRIBUNAL JUDGE**

**RELEASE DATE: 13 SEPTEMBER 2019**