



[2019] UKFTT 652 (TC)

TC07427

*PROCEDURE – application for permission to notify appeal out of time – section 49G
Taxes Management Act 1970 – Martland applied – permission refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/01207

BETWEEN

SABIR ALI

Applicant

-and-

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

Respondents

**TRIBUNAL: JUDGE HEIDI POON
SONIA GABLE**

Sitting in public at Eagle Building, Glasgow on 2 October 2019

Phillip Webb, instructed by Churchill Tax Advisers, for the Applicant

Caitlin McDonald, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is a case-management decision in relation to Mr Ali's application for permission to make a late appeal. HMRC oppose the application on the basis that the appeal was made out of time, and applying case law principles to the facts in question, permission should be refused.
2. The appealable decision in question was issued by HMRC by letter dated 5 October 2018, and that the appeal to the Tribunal was by notice, which, although dated 8 February 2019, and was lodged by email attachment on 19 February 2019. The Notice of Appeal includes an application for permission to make a late appeal.
3. The substantive matters of the appeal to which this application relates concern HMRC's amendments to Mr Ali's self-assessment ('SA') returns for the tax years 2013-14, 2014-15 and 2015-16 pursuant to s 28A and s 29 of the Taxes Management Act 1970 ('TMA').

RELEVANT LEGISLATION

4. Paragraph 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Tribunal Rules') provides as follows:

'(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal –

- (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
- (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.'

5. The enactment in this case is the Taxes Management Act 1970, and the relevant time limits are provided under the following sections:

(1) Section 31 provides for the right of appeal against any amendment of a self-assessment by a closure notice under s 28A or s 28B, and any assessment to tax which is not a self-assessment such as a discovery assessment under s 29.

(2) Section 31A requires that notice of an appeal under s 31 '*must be given*' (a) in writing, (b) within 30 days after the specified date, and (c) to the relevant officer of the Board.

- (3) Where a notice of appeal is given late, s 49 provides as follows:

'49 Late notice of appeal

(1) This section applies in a case where –

- (a) notice of appeal may be given to HMRC, but
- (b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if –

- (a) HMRC agree, or
- (b) where HMRC do not agree, the tribunal gives permission.'

6. In the present case, a review conclusion was issued by HMRC, and the application to the Tribunal for permission to make a late appeal is brought under s 49G TMA, which provides:

‘49G Notifying appeal to tribunal after review concluded

- (1) This section applies if –
 - (a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or
 - (b) the period specified under section 49E (6) has ended and HMRC have not given notice of the conclusions of the review.
- (2) The appellant may notify the appeal to the tribunal within the post-review period.
- (3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.
- (4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.
- (5) In this section “post-review period” means—
 - (a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E (6), or
 - (b) in a case falling within subsection (1)(b), the period that—
 - (i) begins with the day following the last day of the period specified in section 49E (6), and
 - (ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E (9).’

THE FACTS

Background

7. Mr Alis works as an employee for Airways Travel and Tour Ltd (‘Airways’), a company fully owned by his daughter at the relevant times. He also receives rental income.
8. On 9 January 2015, an enquiry was opened into Mr Ali’s SA return for 2012-13, which resulted in a review conclusion decision being issued on 3 November 2017. The review was accepted by the agent, Yousaf & Co, and the matter was settled with a s 54(1) TMA agreement.
9. On 6 October 2015, HMRC opened an enquiry into Mr Ali’s 2013-14 return under s 9A TMA. The protracted enquiry took nearly 28 months to conclude on 22 January 2018, with the issue of a closure notice, which assessed Mr Ali to additional income tax £23,350.80 based on the information gathered in the course of the enquiry and the conclusions reached thereon.
10. During the course of the 2013-14 enquiry, Mr Ali changed his agent from Yousaf & Co to Professional Tax Solutions (‘PTS’) and a mandate of authority was submitted to HMRC by PTS on 18 July 2017. However, it was Mr Yousaf who continued to correspond with HMRC in the later course of the enquiry, all the way to making an appeal to HMRC against all assessments, and requesting a review. The chronology of the key events charting the course of the enquiry is under Annex 1.

The closure notice of 22 January 2018 for 2013-14

11. The SA return declared employment income after PAYE of £15,052, and rental income of £15,600, with a claim of relief for loan interest of £5,004. The closure notice assessed Mr Ali to additional tax of £23,350.80, based on the following conclusions reached.

- (1) The bank statements for the tax year showed that Mr Ali had lodgements into his bank account totalling £61,217.
- (2) No explanations had been offered to explain the source of income despite repeated requests. The sum fell to be treated as additional earnings under s 62 of the Income Tax (Earnings and Pensions) Act 2003.
- (3) The loan interest claimed of £5,004 was disallowed, as no documentary evidence was produced to support it.

Discovery assessments of 12 February 2018 to request for review

12. On 12 February 2018, and on the presumption of continuity based on the conclusions reached for 2013-14, HMRC raised discovery assessments under s 29 TMA for 2014-15 and 2015-16 in the sums of £22,102, and £21,013 respectively.

13. On 19 February 2018 and by registered post, Mr Ali himself wrote to Officer Hellings who issued the s 29 TMA assessments to appeal against all assessments as follows:

‘I wish to appeal against your decision for tax years 2013/14, 2014/15 & 2015/16 letters sent on 22nd January 2018 & 21st February 2018. We will carry out further research and put forward our arguments. In meantime (sic) can you please postpone all taxes payable until this matter is resolved.

This appeal letter should reach you before the appeal deadline.’

14. On 21 February 2018, Mr Yousaf (noting not PTS) wrote to HMRC on Mr Ali’s behalf to provide an explanation about the unexplained lodgements in Mr Ali’s account.

‘Please note unexplained and further deposit came from the customers to Mr S Ali to withdraw the English notes for them for exchange of Scottish notes.

Our client believes that the HIGHLIGHTED deposit or transfer were used to exchange the notes.’ (emphasis original)

15. Mr Yousaf’s letter of 21 February 2018 was accompanied by notices of appeal against the closure notice and discovery assessments on HMRC’s standards forms for making an appeal and postponement of tax application. The appeal was time-barred, and the grounds of appeal were that the unexplained lodgements were due to currency exchange.

16. On 14 March 2018, Officer Hellings replied to Mr Ali directly in a five-page long letter, giving the reasons for upholding all aspects of the assessments. The letter recorded:

- (1) The lodgements into Mr Ali’s bank account for 2013-14 total £76,817, of which £15,600 was declared as rental income in the SA return. (The sums of lodgements are listed as: £51,452 payers not identified; £17,465 from Airways, £600 from Khan Air Ticket, £700 from a Mr Mubarak, £6,600 deposited at a bank in Pollokshield in Glasgow.)
- (2) The balance of £61,217 represented unexplained lodgements.
- (3) Different explanations were given for the unexplained lodgements, which Officer Hellings referred to in her letter, giving the reasons why she rejected these explanations.

(a) On 20 June 2017, Mr Yousaf told HMRC that the transfers were from Airways of which Mr Ali was an employee; that due to difficulties with the bank, Mr Ali was transferring funds from Airways into his personal account to take out money in cash to pay business suppliers who were refusing to accept business cheques. (In spite of repeated requests for evidence to support such transactions to include invoices and receipts from suppliers, nothing was provided to Officer Hellings.)

(b) On 20 September 2017, Officer Hellings spoke to a Mr Slaven, an accountant engaged by Mr Ali to assist with the enquiry. Officer Hellings was told that there had been a miscommunication and the additional income was a dividend payable to Mr Ali as a shareholder of Airways. (Officer Hellings corrected Mr Slaven when he called in on 16 November 2017 that according to Companies House records, Mr Ali was not a shareholder of Airways and could not have been entitled to any dividend income.)

(c) On 17 October 2017, Mr Slaven wrote to advise that he met with Mr Ali on 11 October 2017 and highlighted that certain cash withdrawals on the bank statements were used to pay business suppliers, (but no evidence was provided to support those payments to the suppliers).

(d) On 8 December 2017, (and after several phone calls from Officer Hellings) Mr Slaven advised that Mr Yousaf would write to propose that the income should be treated as a company loan from Airways, to be paid back later. (No such letter was received.)

17. On 18 April 2018, Mr Yousaf wrote to HMRC disagreeing with the basis of assessment for 2014-15 and 2015-16 on the presumption of continuity based on 2013-14. In this letter, Mr Yousaf offered a fifth explanation for the lodgements, that they were 'exchange entries' of Scottish bank notes into English notes, as Scottish bank notes were not accepted in Parkistan.

18. On 22 May 2018, Mr Yousaf wrote to HMRC to notify that 'our client would like us to take this case for the review', and that Yousaf & Co had 'contacted alternative dispute resolution team to look into the case'.

Correspondence following request for review

19. The log of correspondence after the request of review is as follows.

(1) On 30 May 2018, HMRC wrote to Mr Ali to advise that the discovery assessments for 2014-15 and 2015-16 would be amended on a without prejudice basis in accordance with the amounts shown as having been deposited into the bank account, since the bank statements for the two years had been received for analysis.

(2) The 30 May 2018 letter also requested information by 30 June 2018 in relation to the disposal of two properties, which would appear to give rise to capital gains in the year 2014-15, but no entries for the disposals were included in the return.

(3) On 15 June 2018, HMRC wrote to Mr Ali and Mr Yousaf to advise that the application for Alternative Dispute Resolution ('ADR') had not been successful as it did not fit within the criteria for acceptance.

(4) On 10 July 2018, HMRC repeated the request for information on the capital disposals, to be provided by 10 August 2018.

(5) On 27 July 2018, the agent wrote to provide details to show that no capital gains arose from the property disposals. The letter stated again that relief should be given for

exchanging currency from Scottish to English notes, as Mr Ali is a travel agent and he does this as a favour to his clients.

The review conclusion decision of 5 October 2018

20. By letter dated 5 October 2018, the review conclusions were communicated to Mr Ali.

(1) The closure notice assessment for 2013-14 in the sum of £23,350.80 was upheld in full, HMRC having reviewed the explanations given at different stages of the enquiry.

(a) The explanation that this could have been a loan from the company was rejected for the reason that Mr Ali was not a director or a shareholder of Airways, and no documentary evidence had been produced.

(b) A second explanation put forward was that Mr Ali used his own personal account as suppliers would not accept cheques from the company account, but no evidence was provided to support this explanation.

(c) The third explanation was that the lodgements were for exchanging Scottish to English notes, but Mr Ali had been unable to supply evidence to support that the lodgements into his bank account arose from him exchanging Scottish notes for English notes for clients, presumably of Airways.

(2) Additional income had been established for years 2012-13 and 2013-14, which suggested a pattern of under-declaration, and discovery assessments were raised on this basis. The bank statements supplied for 2014-15 and 2015-16 further supported the pattern, albeit that the additional income was for lesser amounts than 2013-14.

(3) An examination of the bank statements for 2014-15 and 2015-16 showed 'the same pattern of unexplained lodgements but in lesser amounts to what was originally included in the further assessments'. The discovery assessments were consequently varied to reflect the lesser amounts.

(a) for the year 2014-15 from £22,102.20 to £9,168.20;

(b) for the year 2015-16 from £21,013 to £8,039.80.

(4) Addressing the time-bar issue, the officer referred to s 34 TMA, which provides for an assessment to be raised within 4 years after the end of the period to be assessed.

(a) The time limit for the 2014-15 assessment was 5 April 2019;

(b) The time limit for the 2015-16 assessment was 5 April 2020;

(c) The assessments for both years were issued on 22 January 2018, and within the normal time limit of 4 years provided under s 34 TMA.

(5) Under the heading of What Happens Next on the last page (4) of the letter, it states:

'If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. ...

If you want to appeal to the tribunal, you must write to the tribunal within 30 days of the date of this letter. [details of HMCTS' url, phone number and email].

If you do not appeal to the tribunal within 30 days of the date of this letter, the matter will be treated as settled by agreement under S.54(1) Taxes Management Act 1970.'

Telephone conference between agent and HMRC on 7 December 2018

21. Officer Hellings rang Churchill Tax Advisers ('CTA') as arranged. Two representatives from CTA (Ilyas and Raven) attended the telephone conference as CTA had been instructed to act on Mr Ali's behalf, following some seminars the firm had delivered to various businesses

in the Glasgow area. CTA were seeking clarification as to which years were in question. The results of the review conclusion decision were related to CTA.

22. According to the notes of the telephone conference taken by Officer Hellings, the following matters were discussed:

- (1) Regarding penalties, HMRC intended to impose penalties based on the inaccuracies being 'deliberate'.
- (2) Regarding penalty reduction for disclosure, the inconsistencies in the explanation given were highlighted by Officer Hellings, since Mr Yousaf had advised:
 - (a) Firstly, that the money deposited was to pay suppliers, but there were no invoices to support this assertion.
 - (b) Then he suggested that it was a loan from the company, but there was no loan agreement and nothing in the company accounts.
- (3) CTA queried whether Mr Ali's PAYE income had been considered as part of the unexplained lodgements. Officer Hellings advised that:
 - (a) There was no pattern to the deposits to suggest any regularity in receipts through PAYE income into the personal bank account.
 - (b) Mr Ali had already advised HMRC that he had paid himself in cash for his salary from Airways.
 - (c) HMRC had undertaken a means calculation based on the 'dubious amounts provided by Mr Yousaf and Mr Ali', and Officer Hellings 'had every reason to believe the PAYE income was being used to cover day to day living expenses which were not reflected in the bank accounts.
 - (d) There was no evidence of daily expenditure to cover grocery, travel, clothes or sundry items, or utility bills being debited from the bank account.
 - (e) Officer Hellings had questioned Mr Ali about how he met his living costs, and he said he paid everything with cash.
 - (f) HMRC reasoned that 'his PAYE income and the unexplained deposits were used to cover his hefty bank loans'.

23. During the telephone conference, CTA requested a copy of the breakdown of the means calculation. While agreeing to provide the same, Officer Hellings queried why this was being requested when the Review Officer's decision was issued 45 days ago, and that Mr Ali was out of time to make the appeal to the Tribunal. The notes recorded CTA's response to be:

'Agent disagreed. Said he had dealt with appeals and the likes for years and they had made a further appeal to take matter further.

When I queried the whereabouts of such an appeal as I had not received anything. Agent said they had applied to ADR.'

The applicant's witness evidence

24. Mr Ali lodged a witness statement. He was present at the hearing but did not give oral evidence, and his statement was accepted without cross-examination. In his statement, he stated that when HMRC's letter of 5 October 2018 was issued, he was 'undergoing extreme stress, which caused [him] to ignore the letter and the deadline to appeal', due to events which are summarised as follows:

(1) On 30 September 2018, Mr Ali moved home. When HMRC's letter arrived, he was no longer at the correspondence address. Mr Ali arranged to have his post forwarded and he received HMRC's letter sometime between 10 and 15 October 2018.

(2) When Mr Ali received the letter, he stated that he was 'very concerned about its contents' and forwarded the letter to his accountant (a Mr Yousaf) who arranged a meeting to discuss matters with Mr Ali.

(3) That Mr Ali now realised that for Mr Yousaf to see him in November 2018 was 'putting [him] past the deadline to appeal'.

(4) Mr Ali stated that he 'was distracted' and not 'concentrating on [his] own affairs' due to the 'chronic illness' of his wife, who was admitted to hospital in December 2016, and had been 'in hospital for nearly fifteen months off and on' until she was finally returned home in March 2018.

(5) Although Mrs Ali receives some help from social services, Mr Ali is her primary carer. When Mr Ali works, he has to make alternative arrangements for his wife. At the time of receipt of the review conclusion letter, Mr Ali stated that he 'was very concerned with settling [his] wife into her new home' due to her sight problems.

Documents produced at the hearing

25. In addition to the documents included in the hearing bundle, Mr Ali produced the following documents in support of his application.

(1) A letter from Mrs Ali's GP dated 28 May 2019 in relation to his wife's state of health;

(2) A letter dated 2 October 2018 from the local authority in relation to the council tax charge to evidence he had moved house.

26. For the respondents, Ms McDonald produced two documents as follows:

(1) The Annual Return of Airways filed on 19 May 2016 with Companies House covering the year to 31 March 2016, which stated Mr Ali's daughter to be the 100% shareholder of the company, and therefore Mr Ali could not have been in receipt of any dividend as he claimed to have been during the relevant tax years.

(2) The covering letter of 5 October 2018 addressed to Mr Yousaf at his office address, which accompanied the copy of the review conclusion letter sent to Mr Ali's agent.

The matter of the penalty assessment

27. A Notice of penalty assessment addressed to Mr Ali, and dated 17 January 2019 in the sum of £14,302.36 is included in the bundle, and was imposed pursuant to Schedule 24 to the Finance Act 2007 for inaccuracies in the SA return for 2013-14 as concluded by the closure notice issued. For the avoidance of doubt, the matter of penalty is not a matter included in the application for permission to make a late appeal.

28. Ms McDonald stated that the penalty was assessed for 'deliberate' inaccuracies and that the penalty assessment was issued on 2 March 2018. There is no document bearing that date included in the bundle to verify the date. We infer from Officer Hellings' note of telephone conference on 7 December 2018 that the penalty assessment would have been raised after the review conclusion letter issued in October 2018. In the conference call, CTA was recorded to have queried if any penalty would be raised, and Officer Hellings had replied that she was waiting for the review conclusion before progressing to the penalty stage. It appears to us that

the penalty assessment was therefore issued after that conference call, in January 2019, and not in March 2018 as noted by Ms McDonald in her submissions.

29. In any event, the matter of the penalty was not a matter that had been appealed. Ms McDonald confirmed that HMRC had not received an appeal against the penalty. Given the penalty was raised after the review conclusion decision, it was not included in the review conclusion. This application is in relation to the appealable decision which is the review conclusion letter. Consequently, the matter of the penalty is not covered by the application.

THE GROUNDS OF APPLICATION

30. On the Notice of Appeal, the grounds stated in support of the application are:

- (1) 'As the issues under investigation were of a very technical nature which my existing accountant was unable to deal with, I had to search for a specialist tax adviser and it took a long time to find the first tax specialist.'
- (2) 'At that stage, there was confusion as to whether HMRC had made a final decision which would prompt us to make an appeal to the tribunal as HMRC continued to correspond with us after they made their assessments.'
- (3) 'As I felt that I wasn't making much progress with my first tax adviser, I decided to look for another one and after another time consuming search, I came to Churchill Tax Advisers who have advised me the right steps.'

31. CTA is the named representative on the Notice of Appeal, and lodged the appeal on Mr Ali's behalf by email on 19 February 2019. While HMRC's reference for the case is correctly stated as CFS-1064448 on the notice, there are obvious errors on the form which include:

- (1) the date of decision *7 April 2016* (when it should have been 5 October 2018);
- (2) 'Type of Tax' is stated as 'VAT' (when it should have been income tax);
- (3) The amount of tax under appeal as £78,713 (when it should have been £40,558);
- (4) Has there been a review by HMRC? Stated as 'No' (when there had been a review).

Notwithstanding these errors which the Tribunal pointed out during the hearing, we accept the Notice of Appeal and its application signed by Mr Ali as pertaining to the appeal in relation to the documents and correspondence bearing HMRC's case reference.

32. Mr Webb submitted that Mr Ali understood the system to be 'not rigid', and that if he 'challenged the assessments by HMRC, they could be changed'. His failure to appeal must be seen in the context that Mr Ali thought he was engaged in the process which would work for him, and is a reflection of the other factors affecting his life at the time, namely:

- (1) He moved house at the end of September 2018, and that the review conclusion letter was sent to the wrong address, and that despite the forwarding arrangements for his post, it was between 10 and 15 October 2018 that he received the letter. Although the delay was 'not fatal' in meeting the 30-day time limit, Mr Ali's response time had been diminished and his scope for dealing effectively with the appeal within the time limit was compromised.
- (2) His arrangements to meet his accountant in mid-November already put Mr Ali outside the time limit. Further time was expended in finding alternative representation, which he did with Churchill Tax Advisers, a London-based firm.

(3) His wife’s serious illness which resulted in her being immobile, disabled and requiring care throughout the day, as detailed in Mr Ali’s witness statement.

33. At the hearing, Mr Webb related to the Tribunal that if the application were granted, then the evidence that Mr Ali intended to produce to support his grounds that the unexplained lodgements were due to changing Scottish notes into English notes would be in the form of personal testimonies from clients of Airways.

HMRC’S POSITION

34. The respondents opposed the application for the following reasons:

(1) Mr Ali was represented by an agent at all relevant times, who would be fully aware of the time limit for notifying an appeal to the Tribunal. It was submitted that filing an appeal with the Tribunal is ‘not an arduous process’.

(2) Either Mr Ali or his agent could have submitted an appeal to the Tribunal within the 30-day time limit prior to the meeting arranged in November 2018 to discuss the substantive matter of the appeal.

(3) In evaluating all the circumstances of the case, HMRC submit that the appeal has no reasonable prospect of success. Mr Ali had stated that he received his employment income in cash, therefore it could not have formed part of the lodgements.

(4) Numerous explanations for the unexplained lodgements had been offered, but no credible evidence has been produced to support the explanations.

DISCUSSION

35. The Upper Tribunal decision of *Martland v HMRC* [2018] UKUT 0178 (TCC) summarises the principles as developed in the well-known and wider stream of authority on relief from sanctions and extensions of time in connection with the procedural rules of the courts and tribunals. These principles are summarised at [43] of *Martland*:

‘The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for “litigation to be conducted efficiently and at proportionate cost”, and “to enforce compliance with rules, practice directions and orders”. We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to “consider all the circumstances of the case”.’

36. The three-stage approach in *Denton v TH White Ltd* [2014] EWCA Civ 906 is endorsed at [44] of *Martland* as guidance for FTT to follow:

‘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.’

Stage one: the length of delay

37. The relevant facts in relation to the length of delay are the following:

(1) On 5 October 2018, HMRC issued a review conclusion letter, which covers the matters in relation to a closure notice under s 28A TMA for the tax year 2013-14, and the discovery assessments under s 29 TMA for the years 2014-15 and 2015-16.

(2) The right of appeal against the review conclusion decision was to be exercised within 30 days from the date of the letter. The time limit to notify an appeal to the Tribunal was therefore 4 November 2018.

(3) The date on the Notice of Appeal was 8 February 2019; the length of delay if reckoned from that date would be 96 days.

(4) The email attaching the Notice of Appeal, the signed authority form, and the review conclusion decision from HMRC was sent by Imad Ilyas, Head of Compliance of Churchill Tax Advisers on 19 February 2019 at 11:56 hours.

(5) The length of delay should be properly reckoned from 19 February 2019, making the length of delay 107 days.

38. In assessing the length of delay, the Upper Tribunal in *Romasave (Property Services) Limited* [2015] UKUT 0254 (TCC) gives guidance at [96] as follows:

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

39. Given the length of delay was 107 days, we find the delay to be ‘serious and significant’. It is necessary for us to consider whether there were good reasons for the delay.

Stage two: the reasons for the delay

40. First of all, Mr Ali’s move of home was given as the reason why he was distracted during this period. However, Mr Ali was clear in stating that: (a) he did receive the review conclusion letter between 10 and 15 October 2018; (b) he was ‘very concerned about its contents’; and (c) he forwarded it to Mr Yousaf.

41. To that end, the house move and the care of his wife did not prevent Mr Ali from taking appropriate actions initially in dealing with the matter that he clearly understood to be time-sensitive. We have regard to the letter he wrote himself to HMRC dated 19 February 2019 to appeal against all the assessments, which clearly indicated that Mr Ali was very conscious of the importance of time limits as reflected by his statement: ‘This appeal letter should reach you [HMRC] before the appeal deadline.’

42. While there was a delay in the receipt of the review conclusion letter by Mr Ali, HMRC did send a copy of the review conclusion letter to Mr Yousaf who was still acting for Mr Ali. Even if Mr Ali did not receive the letter without a delay of 5 to 10 days, his agent would have received the letter without any initial delay.

43. Secondly, Mr Webb submitted that Mr Ali's failure to make an appeal on time should be viewed in the context that Mr Ali was mistaken in believing that he could have challenged HMRC again to amend the assessments after the review conclusion letter. We do not consider this a good explanation either, having regard to the fact that Mr Ali went through the process of review request and review conclusion in relation to the enquiry into 2012-13. No appeal was made against the review conclusion for 2012-13, and a s 54 TMA agreement followed.

44. The financial consequences of not appealing against the review conclusion letter for 2012-13 must have been explained and grasped by Mr Ali in one form or another, for the agent to accept the review conclusion. We therefore do not accept the submission that Mr Ali was somehow mistaken that he could have a further opportunity to negotiate the assessment with HMRC to be a good explanation for the delay in lodging an appeal with the Tribunal.

45. Thirdly, it is also submitted that by the time Mr Yousaf was able to meet with Mr Ali in November 2018, the time limit had already passed. We do not accept that the timing of the meeting should have dictated when the appeal notice could be filed, in that the filing of the appeal could have been done prior to the November 2018 meeting, either by Mr Ali or Mr Yousaf.

46. As a matter of fact, the Notice of Appeal to the tribunal asks factual questions which require factual answers. We do not accept that the completion of the Notice of Appeal is a technical matter that only a specialist can do. It is not clear to us who completed the Notice of Appeal that was eventually lodged, but as we pointed out, the Notice contains numerous errors, and those errors had not prevented the appeal from being accepted by the Tribunal for the late appeal application to be considered.

47. Fourthly, even if it is accepted that Mr Yousaf declined to act for Mr Ali, and that decision was communicated to Mr Ali in November 2018, Mr Ali did obtain alternative representation to enable a telephone conference to be arranged, which took place on 7 December 2018.

48. The new agent, CTA, informed HMRC that it was a firm of tax specialists based in London, which means it could be expected to know the procedural significance of complying with time limits in litigation. In addition, a firm of tax specialists should know that procedurally a review conclusion letter is final as far as HMRC are concerned, and that the next stage is to lodge an appeal with the Tribunal. During the conference call, HMRC pointed out that the review conclusion decision was issued 45 days previously, and yet in the agent's response, the matter of filing an appeal with the Tribunal did not appear to be a priority.

49. Instead, the professional efforts seem to have been diverted to applying for the ADR procedure, which would appear to be putting the cart before the horse, given that HMRC will not consider an ADR application unless and until there is a live appeal already lodged with the Tribunal. For whatever reasons, the filing of an appeal with the Tribunal was further delayed until 19 February 2019, and we can see no good explanation for the prolonged delay.

50. Finally, Mr Ali's witness statement focused on the condition of Mr Ali's wife, and that he needed to give her special attention after the house move. While we accept that could have been a reasonable explanation for an initial delay in filing a Notice of Appeal, we do not

consider that the ongoing situation can be a good explanation for the continued delay in filing an appeal, especially in view of the fact that Mr Ali was represented, and that filing a notice of appeal is not an onerous task, and as Mr Ali stated, a carer can be arranged for Mrs Ali when he needs to go to work.

Stage three: all the circumstances of the case

51. The Tribunal is conscious of the financial consequences for Mr Ali if his application for permission to make a late appeal is refused, which will mean the quantum of each of the three assessments to additional tax as upheld and varied in the Review Conclusion decision will be final. In considering the prejudice to Mr Ali if his application is refused, we address principally the prospect of his appeal succeeding.

52. We have considered the substantive issues in Mr Ali's appeal by setting out in some detail the background to the enquiry, and the basis upon which those back duty assessments have been raised. In our judgment, there is no reasonable prospect of Mr Ali's appeal succeeding for the following reasons.

(1) The year of enquiry was 2013-14 and upon the examination of the bank statements provided by Mr Ali, HMRC identified that there were substantial lodgements into his personal bank account far exceeding what had been declared as income in his SA return for the said year. The quantum of unexplained lodgements is £61,217, after allowing for £15,600 of rental income declared. (It had taken repeated requests from HMRC for the bank statements to be provided in July 2017, see Annex 1).

(2) Mr Ali did not dispute the quantum of the lodgements so identified, and he had also told HMRC that his employment income through PAYE was paid to him in cash, which therefore could not have accounted for any portion of the unexplained lodgements. HMRC's inference that the income received as cash would have been used to meet daily expenditure seems to us a reasonable conclusion to draw based on the fact there were no living expenses paid out of Mr Ali's bank account.

(3) The lodgements amounting to some £61,000 are substantial in the context of Mr Ali's income profile. It seems to us that as the recipient of such lodgements, Mr Ali must have some understanding of the source and nature of these lodgements. Yet, there were several explanations being proffered at different stages of the enquiry (see §16), each being replaced by a 'new' explanation on request of evidence to support the explanation previously advanced. It seems to us that each of these explanations had little credibility, and the fact that they were being retracted on demand of evidence to substantiate them calls into question their veracity.

(4) The latest and fifth version of explanation (see §17) is that the unexplained lodgements were due to the need to exchange Scottish bank notes into English bank notes. This explanation suffers the same defect as previous explanations. Not only was the explanation unsupported by any evidence, its substance does not accord to normal business practice. While we have not asked for any particulars of why such an exchange mechanism should be necessary, we wonder why it should have been encumbered upon Mr Ali to provide such a service, when the Airways customers could have made the exchange into English bank notes to put to whatever use as required. After all, the banks are there to perform such a function.

(5) From the opening of the enquiry in October 2015 to the issue of the closure notice in January 2018, Mr Ali was represented and was given numerous opportunities to provide information and offer explanations for the unexplained lodgements. It is also inexplicable why the latest explanation was first mooted only in April 2018, after the

closure notice and discovery assessments had been issued, and following the successive retraction of previous explanations.

(6) Quite apart from the fact that there was no evidence to support this explanation, its veracity is highly questionable, in that if it were the true explanation for such substantial deposits, why was it not offered as the explanation right from the beginning, and being consistently defended with credible evidence throughout the course of the protracted enquiry into 2013-14 (see Annex 1).

(7) The central issue in the substantive appeal concerns the nature of these unexplained lodgements. In our judgment, the evidence that Mr Ali has intimated he intends to produce, should his application for a late appeal be granted, would be in the form of personal testimonies from clients of Airways who had need for the exchange from Scottish to English notes. We are of the view that such testimonies could be accorded little to no weight in a trial, not to mention that it would have required testimonies from multiple individuals to explain lodgements amounting to £61,000. The probative value of these proposed testimonies cannot be accorded the weight of a robust piece of evidence in the form of a document of an institutional nature that can vouch for the authenticity of a transaction.

53. Master McCloud's dictum of what the overriding objective means after the *Jackson* reforms is at [59] in *Mitchell v News Group Newspapers Ltd* [2013] EWHC 2355 (QB) ('*Mitchell*'), and cited with approval by the Court of Appeal on appeal of the case in [2013] EWCA Civ 1537 at [17]:

'Judicial time is thinly spread, and the emphasis must, if I understand the *Jackson* reforms correctly, be upon allocating a fair share of time to all as far as possible and requiring strict compliance with rules and orders even if that means that justice can be done in the majority of cases but not all.'

54. In the light of all the circumstances of the case, we have given detailed and careful consideration to the prospect of success of Mr Ali's appeal. We have regard to the dictum as formulated by Master McCloud in relation to judicial time. Furthermore, the Tribunal's overriding objective is to deal with cases fairly and justly, not only Mr Ali's case, but also the respondents'. One aspect of fairness concerns the proportionate use of resources of the respondents as a party to litigation. The prejudice to HMRC would be to deploy resources to deal with cases that are quite properly considered as final and conclusive in law.

DISPOSITION

55. For the reasons stated, the application for permission to make a late appeal is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

DR HEIDI POON

**TRIBUNAL JUDGE
RELEASE DATE: 29 OCTOBER 2019**

Annex 1

The course of enquiry into 2013-14

1. The chronology of the key events for the enquiry into the SA return for 2013-14 up to the appointment of a new agent is as follows.

(1) On 6 October 2015, HMRC wrote to Mr Ali to open a s 9A enquiry into his 2013-14 SA return, notified his agent, Yousaf & Co. of their intention to extend the compliance check to include the 2013-14 SA return, and requested information on the rental income declared for 2013-14 to be provided by 6 November 2015.

(2) On 18 November 2015, as no information had been provided, HMRC issued an Information Notice to Mr Ali under Schedule 36 FA 2008. A copy of the notice was sent to the agent. On 19 November 2015, the Information Notice was re-issued to remove an error identified with the compliance date of 19 December 2015.

(3) On 26 November 2015, the agent provided information regarding three properties for which rental income was received in 2013-14.

(4) Between July and November 2016, there was much correspondence between HMRC and the agent regarding the source of capital to purchase the rental properties, a debt with the Bank of Scotland, and the sale and purchase of a number of properties.

(5) On 10 January 2017, HMRC, the agent and Mr Ali held a telephone conference, during which it was explained that Mr Ali had obtained a loan from his partner in the purchase. HMRC requested documentary evidence.

(6) On 30 January 2017, HMRC wrote to the agent to confirm the actions agreed in the conference call. In this letter, HMRC also provided their calculations of the figures for the 2013-14 tax return based on the information received, and requested further information to reconcile the figures declared on the SA return by 3 March 2017.

(7) On 1 March 2017, Mr Ali telephoned HMRC to ask for an extension of time to 8 March 2017 to comply with the information request since Mr Yousaf was on holiday. The extension was given but the requested information did not arrive on 8 March 2017.

(8) On 21 April 2017, HMRC wrote to request again the information that had been agreed to be provided by 5 May 2017.

(9) On 9 May 2017, HMRC issued a Schedule 36 notice for compliance by 8 June 2017. The items of information requested included:

(a) All bank statements for all accounts held and used for the day-to-day running of the letting income business and / or general household income/expenditure to include the debits for the mortgages, loan etc ... that exist and any account (if applicable) that are used to pay bills such as shopping, electric, gas and so on for the period from 6 April 2013 to 5 April 2014.

(b) A breakdown of the figures entered on the SA return of £5,004 for loan interest claimed.

(10) On 16 May 2017, the agent wrote to HMRC and proposed that the 2013-14 assessment be amended based on the profits for 2012-13, instead of starting a full enquiry into 2013-14. The agent also confirmed that the interest deduction claim had been over-estimated in the SA return for 2013-14 and provided revised figures.

(11) On 2 June 2017, HMRC wrote to the agent, copied to Mr Ali, that they were unable to accept the proposal to base the taxable profit for 2013-14 on 2012-13, and asked that the information requested by the Schedule 36 Notice to be provided by 8 June 2017, advising that a penalty of £300 would accrue in the event of failure.

(12) On 27 June 2017, the agent attached copies of Mr Ali's bank statements for 2013-14 by email correspondence, in which the agent also advised that due to difficulties with the bank, Mr Ali was transferring funds from Airways into his personal account and then taking the cash out to pay business suppliers as they were refusing to accept business cheques.

Engagement of a new agent to the issue of closure notice

2. The enquiry into 2013-14 SA return continued with a change in agency to Professional Tax Solutions ('PTS') as the new agent, although it would appear that Mr Yousaf was asked again to act for Mr Ali (in February 2018) after PTS was registered as the agent. The key events in this phase of the enquiry leading to the issue of the closure notice are as follows.

(1) On 18 July 2017, PTS notified HMRC that Mr Ali had authorised them to deal with the ongoing enquiry into his 2013-14 return, and enclosed a signed mandate. (This communication crossed with HMRC's reply to Yousaf & Co's letter of June 2017.)

(2) On 21 July 2017, HMRC wrote to Yousaf & Co acknowledging receipt of their letter of 27 June 2017 and the bank statements, noting their disappointment that it had taken a considerable time since the request by letter dated 30 January 2017. HMRC proposed a meeting or a conference call to progress with the enquiry as the bank statements gave rise to further questions concerning some of the entries.

(3) On 31 August 2017, HMRC replied to PTS, enclosing a copy of their letter of 21 July 2017 sent to Yousaf & Co and proposed a conference call with PTS.

(4) On 26 October 2017, HMRC wrote to PTS, noting that a meeting had been due to take place on 11 October 2017 between Mr Ali and Mr Yousaf, and requested an update on the outcome of that meeting by 3 November 2017.

(5) On 22 January 2018, HMRC issued Mr Ali a closure notice under s 28A for the 2013-14 tax year. A copy was issued to PTS.