TC07802

VALUE ADDED TAX – permission to make a late appeal – appeal made 7 days late after the provision of further information to the Respondents and a request to delay making the appeal until the further information was investigated – held that the delay in this case was neither serious nor significant and occurred for good reason and that, taking into account all the circumstances of the case, it was appropriate to give permission for the late appeal – application upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/04504

BETWEEN

SNAPCREST LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE TONY BEARE

The hearing took place on 31 July 2020 by way of a video hearing on the Tribunal Video Platform with the following people in attendance in addition to the two counsel specified below:

Mr Matthew Whyatt – ASW Solicitors;

Ms Amie Mason – the Respondents' solicitors office;

Mr Stephen Wishart – director of the Appellant; and

Mr Mike Holmes – observer from the HMCTS support team

A face to face hearing was not held because of the COVID 19 pandemic and because the matters at issue were considered appropriate to be dealt with by of a video hearing.

The documents to which I was referred comprised two bundles – a documents bundle (with associated index) of 59 pages, containing, inter alia, the review conclusion letter of 22 May 2019, the notice of appeal of 28 June 2019, the Respondents' objection to the late notice of appeal of 23 August 2019 and certain of the correspondence which has been exchanged between the parties and their representatives in the course of the appeal and

an authorities bundle (with associated index) of 170 pages, setting out the legislation and case law relevant to the hearing.

Mr Joshua Carey, counsel, instructed by ASW Solicitors, for the Appellant

Mr Lewis MacDonald, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

BACKGROUND

1. This decision relates to an application by the Appellant for permission to make a late appeal against a review conclusion letter of 22 May 2019. That letter confirmed a decision made by the Respondents on 13 March 2019 to deny the Appellant the right to recover value added tax ("VAT") input tax in the sum of £569,677 (and to issue assessments for the recovery of that VAT input tax) on the basis that the Appellant knew or should have known that the transactions to which the VAT input tax related were connected with the fraudulent evasion of VAT. The VAT input tax had been claimed in respect of the wholesale purchase of batteries, memory cards and fast-moving consumer goods from a supplier which the Respondents allege to have fraudulently defaulted on its VAT output tax obligations (the "fraudulent supplier").

2. The Respondents have objected to the application on the ground that the appeal was not made by the Appellant until 28 June 2019, 7 days after the expiry of the 30 day period within which, absent the permission of the First-tier Tribunal, the Appellant was entitled to make the appeal.

THE FACTS

3. At 1.00 pm on 21 June 2019, which, as noted above, was the final day of the 30 day period within which the Appellant was entitled to make its appeal, Haydn Clarke of the Appellant's solicitors sent an email to Jason Harris of the Respondents, marked as having high importance, with the heading "Re: Snapcrest Limited - Urgent". That email attached a copy of an email from Mr Stephen Wishart of the Appellant which contained the contact details of the fraudulent supplier, along with the name and contact details of the fraudulent supplier's director. The email from the Appellant's solicitors then said as follows:

"Given the importance of this information please confirm that HMRC will investigate the location for [the fraudulent supplier's director] as a matter of urgency. Please also confirm that HMRC will agree that the deadline for which our Client will need to appeal to the First Tier Tribunal will be extended until such time as HMRC have completed their investigation."

The email went on to say that, should the Respondents not agree to "this request", then the Appellant would bring that to the attention of the First-tier Tribunal in making its appeal and that the Appellant reserved its rights to seek costs as a result of having to have made its appeal. The email concluded:

"We look forward to hearing from you as a matter of urgency."

4. At 8.23 am on 26 June 2019, Mr Harris sent an email to Mr Clarke noting receipt of Mr Clarke's email of 21 June 2019 and the comments contained in both that email and its

attachment. It then reiterated the conclusion set out in the review conclusion letter and concluded as follows:

"Your client has the right of appeal to tribunal but should be aware that the 30 day appeal period ran from the review decision on 22 May. Any appeal will now be subject to their acceptance."

5. At 1.50 pm on the same day, Mr Clarke sent a further email to Mr Harris, with the same heading as in the email described in paragraph 3 above. In that email, Mr Clarke said that he was puzzled by the Respondents' "lack of response to our Client's letter and also to you not accepting our Client's proposal that all action against our Client should be stayed pending HMRC's investigation". The email went on to say that:

(1) the Appellant was now in the process of making its appeal and would do so within the next 7 days; and

(2) in the light of the delay to the Appellant's appeal occasioned by the Appellant's having provided the Respondents with the opportunity to investigate the matter further, Mr Clarke would be grateful for the Respondents' consent that they would not object to the Appellant's appeal being made late as long as the appeal was made within the timeframe mentioned in paragraph 5(1) above.

6. On 28 June 2019, which was two days after the emails mentioned in paragraphs 4 and 5 above, the Appellant made its appeal to the First-tier Tribunal. In its notice of appeal, the Appellant made an application for the First-tier Tribunal to accept the late appeal.

7. On 9 July 2019, the First-tier Tribunal acknowledged receipt of the appeal and wrote to the Respondents to inform them that the appeal had been made and asking them whether they objected to the late appeal.

8. On 23 August 2019, the Respondents lodged their notice of objection to the late appeal.

THE RELEVANT LEGISLATION

9. Section 83G of the Value Added Tax Act 1994 (the "VATA") sets out the rules governing an appeal against a review decision in relation to VAT. It provides that the relevant appeal must be made within 30 days of the date of the document notifying the taxpayer of the review conclusions but that an appeal may be made after that time with the permission of the First-tier Tribunal – see Sections 83G(3)(b), 83G(7) and 83G(6) of the VATA.

10. As outlined in paragraph [23] of the judgement of Chadwick LJ in the Court of Appeal decision in *Zoan v Rouamba* [2000] 1 WLR 1509, [2000] 2 All ER 620, where legislation sets out a period of time to run from a particular date, the date itself is not part of that period. So the first day of the 30 day period in this case was 23 May 2019, the day following the date of the Respondents' letter notifying the Appellant of their review conclusions. Thus, the 30 day period within which the appeal was required by Section 83G(3)(b) of the VATA to be made ended on 21 June 2019. As the appeal was not made until 7 days after that date – ie on 28 June 2019 – the appeal cannot proceed unless permission to that effect is given by the First-tier Tribunal.

11. Rule 20 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") provides that, if a notice of appeal is given after any time limit which is set out in the relevant enactment but the enactment makes provision for late notice of an appeal to be given with the permission of the First-tier Tribunal, then the notice of appeal must include

a request for such permission and the reason why the notice of appeal was not provided on time and, unless the First-tier Tribunal gives that permission, the First-tier Tribunal must not admit the appeal.

12. In this case, the Appellant has made an application for permission to make a late appeal and has set out those reasons in its notice of appeal. The reasons are set out below in the section of this decision in which I describe the arguments of the parties. Accordingly, I need to consider whether to give permission for the late appeal and, if I decline to give my permission, then I must not admit the appeal.

THE RELEVANT CASE LAW

13. There is no dispute between the parties as to the relevant principles that I should apply in determining whether or not to give permission for the late appeal in this case.

14. These principles have been established by a number of decisions of the higher courts, one of which is the Upper Tribunal decision in *Martland v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 178 (TCC) ("*Martland*").

15. In their decision in that case, the Upper Tribunal made the initial point that, in deciding whether or not to admit a late appeal, the First-tier Tribunal is not exercising a case management discretion but is rather "exercising a discretion specifically and directly conferred on it by statute to permit an appeal to come into existence at all" (see paragraph [18] in *Martland*). In other words, as the Upper Tribunal had noted in another case in this area of the law, *Romasave (Property Services) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0254 (TCC) ("*Romasave*"):

"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" (see paragraph [96] in *Romasave*).

16. The Upper Tribunal in *Martland* went on to note that it follows from this that Rule 2 of the Tribunal Rules – which sets out the principles which the First-tier Tribunal is required to adopt in dealing with cases once proceedings have been properly commenced before it – has no direct application to the exercise of the discretion in relation to whether or not to admit the appeal. Having said that, it went on, "the principle embodied in the overriding objective is a broad one, and one which applies just as much to the exercise of a judicial discretion of the type involved in this appeal as it does to the exercise of such a discretion in relation to more procedural matters" (see paragraph [19] in *Martland*).

17. The Upper Tribunal in *Martland* then turned to address what law should be applied by the First-tier Tribunal in deciding whether or not to exercise its discretion to admit a late appeal.

18. It noted that, whilst "the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal can be granted, …there is no requirement that the circumstances must be exceptional before the FTT can grant such permission" (see paragraph [29] in *Martland*). In other words, although permission to appeal out of time should be the exception rather than the rule – as noted by Sir Stephen Oliver at paragraph [7] in *Obhloise Benjamin Ogedegbe v The Commissioners for Her Majesty's Revenue and Customs* [2009] UKFTT 364 (TC) and approved by the Upper Tribunal at paragraph [96] in *Romasave* – that does not mean that the circumstances need to be exceptional before permission can be granted.

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

(1) what is the purpose of the time limit?

(2) how long was the delay?

(3) is there a good explanation for the delay?

(4) what will be the consequences for the parties of an extension of time? and

(5) what will be the consequences for the parties of a refusal to extend time?

20. The Upper Tribunal in *Martland* made it clear that, in answering these questions, notwithstanding the distinction which it had drawn between case management and the jurisdictional issue as noted in paragraph 15 above, the principle embodied in the overriding objective in Rule 2 of the Tribunal Rules - to the effect that the First-tier Tribunal should deal with cases fairly and justly – applied in these cases as well. In addition, the First-tier Tribunal needed to take into account the matters listed in Rule 3.9 of the Crown Procedure Rules (the "CPR") – that is to say, all of the relevant circumstances, including the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules. In saying this, the Upper Tribunal in *Martland* echoed the views of Morgan J at paragraph [37] in *Data Select* (although Rule 3.9 of the CPR had changed between the decision in *Data Select* and the decision in *Martland*).

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

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

(1) identify and assess the seriousness and significance of the failure which has engaged Rule 3.9 of the CPR;

(2) consider why the default occurred; and

(3) evaluate all the circumstances of the case, so as to enable the court to deal justly with the application and, for this purpose, giving particular weight to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules.

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

24. The Upper Tribunal in *Martland* concluded that, when the First-tier Tribunal is considering an application for permission to appeal out of time, it needs to remember that "the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be" (see paragraph [44] in *Martland*). The Upper Tribunal went on to say that, in considering that question, the First-tier Tribunal "can usefully follow the three-stage process set out in Denton", which is to say:

> (1) establish the length of the delay. If that delay is very short, then the First-tier Tribunal "is unlikely to need to spend much time on the second and third stages" (see *Denton* at paragraph [28]), although the Upper Tribunal in *Martland* made it plain that this should not be taken to mean that permission may be granted in cases of very short delays without moving to a consideration of those latter two stages;
>
> (2) establish the reason for the delay; and
>
> (3) evaluate all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the extent of the detriment to the applicant in not giving permission and the extent of the detriment to the party other than the applicant of giving permission.

25. The Upper Tribunal in *Martland* reiterated that the evaluation at the stage mentioned in paragraph 24(3) above "should take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost, and for the statutory time limits to be respected" (see paragraph [45] in *Martland*).

26. It went on to make two final points in relation to considering all the circumstances of the case at the final stage of the three-stage process in deciding whether or not to permit a late appeal.

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

28. Secondly, the Upper Tribunal said that the shortage of funds and the consequent inability of the applicant to appoint a professional adviser should not, of itself, carry any weight in considering the reasonableness of the applicant's explanation of the delay. Nor should the fact that the applicant is self-represented. This is because the appealable decisions of the Respondents generally include a clear statement of the relevant appeal rights and it is not a complicated process to notify an appeal to the First-tier Tribunal, even for a litigant in person. This second point is of no relevance in the present case.

DISCUSSION

29. It is common ground between the parties that the above description of the relevant law is correct and that my decision in this case depends on the application of the three-stage process set out in paragraphs 24 to 28 above to the facts in this case. Accordingly, I will address below each of the three stages, setting out, in turn, each party's submissions in relation to the relevant stage and then my own conclusions in relation to the relevant stage. In the course of setting out my views in relation to the third stage, I will set out my conclusion on whether or not I think it appropriate to give permission for the late appeal.

Was the delay "serious or significant"?

The parties' submissions on the length of the delay

30. Mr Carey, on behalf of the Appellant, submitted that it was not. He pointed out that the delay in this case was not very long – it was just 7 days. He pointed to the decision in *Darren Swann v The Commissioners for Her Majesty's Revenue and Customs* [2020] UKFTT 176 (TC), where the Respondents appeared not to have objected to a 5-day delay in filing an appeal and the First-tier Tribunal held that the relevant delay was neither serious nor significant. Similarly, in *Ayngaran International (UK) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKFTT 885 (TC), the First-tier Tribunal granted permission for an appeal which was 6 days late to proceed and the application was not opposed by the Respondents. Mr Carey said that, as the delay in this case was of a similar magnitude, a similar conclusion should be drawn here.

31. Mr MacDonald, on behalf of the Appellant, was somewhat ambivalent in his submissions on this point. He accepted that the delay was not "hugely serious" but then went on to make the point that it was not simply hours late and that a delay of 7 days in the context of a time limit for making an appeal of 30 days was "comfortably late". He added that, in addressing this question, it was important to bear in mind that:

(1) as noted in paragraph 18 above, permission to appeal out of time should be granted only exceptionally; and

(2) the seriousness of the delay needed to be examined by reference to the fact that this was not merely a case of failing to satisfy a time limit in the context of ongoing case management. Instead, the delay had occurred in the context of making the appeal in the first place and therefore it gave rise to the jurisdictional question noted in paragraph 15 above.

My conclusion on the length of the delay

32. I agree with Mr Carey that the delay of 7 days in this case was neither serious nor significant. It is certainly nowhere near the delay of 24 days by which the applicant for permission to appeal in *Secretary of State for the Home Department v SS (Congo) and others* [2015] EWCA Civ 387 exceeded the 28 day time limit for permission to appeal in that case - which the Court of Appeal in that case described as "significant" - or the delay of 3 months which the Court of Appeal in that case described as "serious" (see paragraph [96] in *Romasave*). The appeal in this case is clearly late but, even if I were to accept Mr MacDonald's description of the appeal as being "comfortably late", "comfortably late" is not a relevant description in this context. The terms actually used in *Martland* were "serious" and "significant" and I do not think that it is appropriate to describe a delay of 7 days in this case as being either "serious" or "significant".

33. The conclusion I have set out above does not mean that I can simply ignore the second and third stages of the three-stage process. It was common ground that those two stages still need to be addressed but that, as noted by the Upper Tribunal in *Martland*, where the relevant delay is neither serious nor significant, the second and third stages of the three-stage process become much less important.

Was there good reason for the default?

The parties' submissions on the reason for the default

34. Mr Carey submitted that there was a very good reason for the default – namely, that the delay had occurred because the Appellant had sought to assist the Respondents in locating the fraudulent trader. It was plain from the letter from the Appellant's solicitors of 21 June 2019 that the Appellant had sought to agree with the Respondents an extension to the deadline for making the appeal, while providing information which would assist the Respondents in locating the defaulting trader, in the hope of avoiding potentially costly litigation for both parties. This was an entirely reasonable position to have adopted. It was well-known that cases of this sort took a long time to resolve and involved extremely costly litigation. It was therefore eminently reasonable to seek to avoid embarking on that route if at all possible. Whilst it might be said with hindsight that the Appellant ought to have adopted the twin-track approach of making its appeal on time in addition to providing the Respondents with the information which it did, it could not be said that the approach adopted by the Appellant was unreasonable or not understandable.

35. In response, Mr MacDonald said that there was no good reason whatsoever why the Appellant had adopted the approach which it had. It was not reasonable for the Appellant to miss the deadline, particularly considering that it had instructed solicitors who were experienced in this area of the law. The Appellant had had since at least 13 March 2019, when it received the Respondents' original decision, to undertake the investigations into the fraudulent supplier. There was no reason why the Appellant needed to do that to the exclusion of its appeal.

36. Moreover, there was no good reason why, having provided the information which it had to the Respondents in the email from the Appellant's solicitors of 21 June 2019, the Appellant then did nothing about progressing its appeal until it received the Respondents' response on 26 June 2019.

My conclusion on the reason for the default

37. I find this question slightly more difficult to answer than the first question set out above, but only slightly.

38. The reason for my slight difficulty is that Mr MacDonald was quite right in his submission that there was nothing to prevent the Appellant from making its appeal on time while simultaneously pursuing its investigations into the fraudulent supplier. And I am sure that, with the benefit of hindsight, this is exactly what the Appellant and its solicitors wish that they had done.

39. However, in my opinion, despite the fact that that was a mistake on the part of the Appellant and its solicitors, it was an entirely reasonable and understandable mistake, founded as it was on their belief that the further investigations which they hoped that the Respondents would make in the light of the information which they had provided would preclude the need

for an appeal to be made in the first place. This was not a case where the Appellant simply adopted a cavalier attitude to the relevant time limit. Instead, the Appellant, acting in good faith, thought that it could avoid litigation which would be costly and time-consuming for both parties if it deferred making its appeal for a short time to enable the Respondents to pursue some further investigations.

40. Dealing with Mr MacDonald's specific submissions on this question in more detail, so far as the first submission is concerned – namely, that it was unreasonable for the Appellant and its solicitors to believe that the provision of the new information meant that it was fair to ask the Respondents to agree to an extension to the deadline for making the appeal – I do not agree that that approach was unreasonable. As it transpired, that belief was mistaken, but I do not think that every mistaken belief is by definition unreasonable. It is perfectly possible for a person to have a belief which, although mistaken, is nevertheless reasonable and honest, and I think the present facts fall within that case.

41. As far as Mr MacDonald's second submission is concerned – namely, that, in any event, it was unreasonable for the Appellant, having provided the Respondents with the information which it had done in the email from the Appellant's solicitors of 21 June 2019, to do nothing about progressing its appeal until it received the Respondents' response on 26 June 2019 – I do not agree with that proposition either. In this regard, I am particularly struck by two things – the terms of the email from the Appellant's solicitors of 21 June 2019 and the fact that it took 5 days for the Respondents to acknowledge that email and, even then, to deal somewhat obliquely with the Appellant's request. The email from the Appellant's solicitors asked the Respondents to signify their agreement to an extension of the deadline for making the appeal. It was sent to the officer within the Respondents who was responsible for the dispute and was clearly marked urgent and as having a high importance. For the relevant officer to do nothing about that email for 5 days and then to respond simply by reiterating that there was a 30-day deadline for making the appeal was unhelpful to say the least. In my view, having sent out the email of 21 June 2019, the Appellant was entitled to await the Respondents' reply before progressing with making the appeal. Moreover, when the Appellant's solicitors received the Respondents' reply on 26 June 2019, it responded to that reply on the same day to say that the Appellant would be making the appeal within the next 7 days and then proceeded to make the appeal within just 2 days.

42. I am therefore of the view not only that the delay in this case was neither significant nor serious but also that there was a perfectly reasonable explanation for the delay.

Evaluating all the circumstances

The parties' submissions on evaluating all the circumstances

43. The final leg of the three-stage process involves a consideration of the conclusions reached in relation to the first two stages of the three-stage process alongside all of the other circumstances.

44. As noted in paragraphs 24 to 28 above, those circumstances include the relative prejudice to the parties of my decision either way on this question and my general impression of the merits of the case.

45. In relation to the relative prejudice question, Mr Carey pointed out that the prejudice to the Appellant if its appeal were not to be allowed to proceed would be extreme. The amount of VAT input tax at stake was well in excess of £500,000, indeed close to £600,000, which was

a considerable sum for the Appellant to bear. Indeed, the Respondents themselves had recognised that fact by agreeing that, if this appeal were to proceed notwithstanding its being made late, the Appellant would be able to rely on hardship to avoid having to pay the VAT which was in issue to the Respondents. That was even before taking into account the knock-on consequences to the Appellant and its directors of losing the appeal – such as penalties and personal liability notices.

46. In contrast, Mr MacDonald pointed out that it was axiomatic that, if the appeal were allowed to be made out of time, the Respondents would be denied the finality of litigation to which it was entitled and would have to defend an appeal in which there was no likely prospect of recovering its costs.

47. In response to that, Mr Carey submitted that, on the contrary, the prejudice to the Respondents if I were to allow the appeal to proceed was minimal. Given the shortness of the delay and the fact that the Respondents were aware on the final day of the period within which the Appellant was entitled to make its appeal as of right – ie 21 June 2019 – that the Appellant intended to make an appeal in the event that the matter was not resolved by other means, this was clearly not a case where the Respondents could justifiably say that they had diverted their resources away from this appeal in the belief that the Appellant had decided to accept the review conclusions.

48. Moreover, as regards costs, the general position created by the Tribunal Rules was that, in a case allocated as a standard case, each party had to bear its own costs and could not recover its costs from the other party and, in a case allocated as a complex case, the successful party could recover its own costs from the other party unless the taxpayer had taken advantage of the rule which allowed it to opt out of the costs regime within 28 days of being notified that the case had been allocated as a complex case. Those rules applied to this case in the same way as any other case before the First-tier Tribunal. Accordingly, the inability on the part of the Respondents to recover its costs could not be the basis for claiming that it would suffer prejudice by reason of allowing the appeal to proceed.

49. As regards the significance of the merits of the case, both parties agreed that it was not appropriate to conduct a detailed examination of the merits of the case in the context of the present proceedings. On the other hand, in accordance with the guidance from the Upper Tribunal in *Martland* described in paragraph 27 above, it would be appropriate to consider any obvious strength or weakness in the Appellant's case and to form a general impression of the merits of the case because, if the Appellant's case was hopeless, then it would not be in the interests of justice for permission to be granted because that would lead the time of the First-tier Tribunal to be wasted.

50. Proceeding on that basis, Mr Carey submitted that cases such as the present one were extremely complex. The nature of the dispute was such that it would inevitably involve voluminous evidence and include lengthy witness statements. As such, there was no obvious "knock out" point for either party in terms of deciding the appeal and it was not a case where either party's case was obviously weak or could be described as hopeless. Applying the principles described in paragraph 27 above, the general impression was that this was not a case where the Appellant's case was hopeless and it would not be appropriate for me at this stage to conduct a detailed evaluation of the merits of the case.

51. In response, Mr MacDonald pointed out that, in accordance with the guidance set out in *Martland*, I was entitled to take into account any obvious strength or weakness in the Appellant's case. The VAT input tax which was the subject of the present dispute had been incurred in transactions pertaining to batteries, memory cards and fast-moving consumer goods, whereas the Appellant's business was of long-standing – some 35 years – and had historically related solely to wholesale sales of meat. Moreover, the size of the transactions was such that they had nearly doubled the Appellant's turnover.

52. Mr Carey pointed out that the Appellant's prior trade had not only involved wholesale sales of meat but had also involved packaging.

53. Finally, Mr Carey submitted that part of the circumstances which I was required to take into account involved the length of time which it had taken for the Respondents to indicate that they were objecting to the Appellant's application to make a late appeal. The Respondents had not notified the First-tier Tribunal or the Appellant of their intention to object to the Appellant's application until 23 August 2019, 45 days after the First-tier Tribunal had informed the Respondents that the Appellant had made its appeal and had asked the Respondents whether they objected to the late appeal (on 9 July 2019) and 58 days after the Appellant wrote to the Respondents to ask them if they would object to the late appeal if the appeal were to be made within 7 days of the email in question (on 26 June 2019). Mr Carey said that that conspicuous lack of meaningful engagement on the part of the Respondents was something which I should take into account in assessing the overall circumstances in which the application had been made.

54. Mr MacDonald responded by pointing out that the delay in the Respondents' expression of their objection to the application had not delayed the proceedings in any way. Over that period, the Appellant's hardship application had had to be addressed in order for the appeal to proceed.

My conclusion on evaluating all the circumstances

55. I should start this section of my decision with an extract from the joint judgment of Lord Dyson MR and Vos LJ in *Denton*, who said the following in paragraph [41] of their decision in that case:

"[41] We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new r 3.8(4)."

56. After considering the rival submissions of the parties to the application, and considering all the circumstances, I believe that the stance which the Respondents have taken in this case is not very far away from the approach described in paragraph [41] above, albeit that the above passage in *Denton* was describing an application for relief from sanctions and not an application to make a late appeal.

57. As I have indicated in the previous sections of this decision, it is my view that the failure on the part of the Appellant to make its appeal within the specified time limit in this

case was a minor infraction of the statutory time limit and was also entirely understandable. In my opinion, not only was the delay neither serious nor significant but also there was a good reason for the delay.

58. My conclusions in relation to the first two stages of the three-stage process therefore point firmly towards my exercising my discretion in favour of the Appellant. So, is there anything arising out of all the other circumstances of the case to suggest that that I should not do so?

59. When I turn to evaluate those other circumstances, I believe that the relative prejudice to the parties of my decision either way on this question points firmly in the same direction of my giving my permission for the late appeal.

60. After all, if this appeal were to be ruled out at the present stage, the prejudice to the Appellant would be significant. The amount of VAT input tax which is at stake is large and an inability to prosecute its appeal will clearly cause great financial hardship to the Appellant.

61. In contrast, the prejudice to the Respondents of my giving permission for the late appeal is relatively limited. Of course, the Respondents would suffer some prejudice because a case which would otherwise have been conclusively determined in their favour would still be at large. However, the Respondents would still have the opportunity to succeed in relation to the appeal when the substantive issues fell to be addressed in due course. Mr MacDonald's reliance on the "finality of litigation" argument sits somewhat uneasily with the actual facts in this case. The Appellant wrote within the statutory time limit to provide the Respondents with information which it thought the Respondents would want to investigate further and to signal its intention to delay its appeal until the investigation had been conducted. The Respondents took 5 days to respond to that email even though it was marked urgent and of a high importance. When the Respondents did get around to replying to the email, the Appellant's solicitors immediately indicated to the Respondents that the Appellant would be making its appeal and then the Appellant proceeded to do so within 2 days. As a result, there was never any time on or after the expiry of the statutory time limit when the Respondents might reasonably have thought that the Appellant had simply accepted the conclusion set out in their review letter and did not wish to dispute that conclusion. The Respondents always knew that this was very much a live issue which the Appellant was disputing. They therefore should not have been surprised to be notified on 9 July 2019 that the appeal had been made.

62. Similarly, I do not accord much weight to Mr MacDonald's arguments in relation to costs. The costs position in matters before the First-tier Tribunal depends on the category of case in question. However, once a case is allocated to a particular category, the rules in relation to costs apply to that case in precisely the same way as they do to all other cases in the same category. In a case such as this one, where almost all the factors point very strongly in the direction of granting permission for the late appeal, I do not think that the fact that the Tribunal Rules may not entitle the Respondents to recover their costs in the event that they succeed in relation to the substantive appeal should tip the balance the other way.

63. I am much more inclined to give weight to Mr MacDonald's arguments in relation to the merits of the Appellant's appeal. I agree with him that the size and subject matter of the transactions to which the appeal relates are a significant weakness in the Appellant's case. Mr MacDonald was therefore right to rely on that argument in support of his case. However, I do not think that that significant weakness in the Appellant's case is enough for me to be

able to conclude at this stage that the Appellant's appeal is hopeless and bound to fail. When the evidence is finally presented at the hearing in relation to the substantive issues, the Appellant may well be able to provide a cogent explanation for why the somewhat unusual nature of the relevant transactions did not alert it, and should not have alerted it, to the fact that the fraudulent supplier was fraudulent. Perhaps more significantly, as Mr Carey pointed out at the hearing, the question of whether the Appellant knew or should have known that the relevant transactions involved fraud is just one aspect of the appeal. It is also necessary for the Respondents to show that there has been a VAT loss occasioned by fraud and that the transactions in question were connected with that fraudulent VAT loss. As Mr Carey submitted, these issues give rise to complicated factual questions on which substantial evidence needs to be heard before it can be said that the Appellant's case is hopeless and bound to fail.

64. For the above reasons, I am firmly of the view that this is a case where the exercise of my discretion in favour of the Appellant is justified. That is not to say that I do not agree with Mr MacDonald that the Appellant made a mistake in not pursuing a twin-track approach of attempting to locate the fraudulent supplier while at the same time making its appeal. The Appellant could, and indeed should, have done that. But I believe that a refusal to allow the Appellant to continue with its appeal for that reason alone would be a draconian punishment for something which was no more than a mistake made in good faith and which did not lead the Respondents to think that the Appellant no longer wished to challenge the conclusions set out in the review letter.

65. There is one final point which I should make in relation to the evaluation of all the circumstances of the case. Mr Carey urged me to take into account, as one of those circumstances which pointed in favour of my giving permission for the late appeal, the lengthy delay which occurred between the Appellant's request for an indication of the Respondents' agreement to the application for its late appeal to be allowed (and the request from the First-tier Tribunal to the same effect) and the notification from the Respondents that they were objecting to the late appeal. I have not taken that delay into account in reaching my conclusion to exercise my discretion in this case in the Appellant's favour because I accept that the Respondents' dilatoriness may not have caused any delay to the overall conduct of the appeal and I can also see how the fact that it occurred after the Appellant was already in default in making its appeal in time means that, strictly speaking, it might be said to be irrelevant to the exercise of my discretion.

66. However, I will just say that, in my view, it ill behoves the Respondents to take issue with a 7 day delay in making the appeal - most of which period can fairly be ascribed to the failure on the part of the Respondents themselves to reply to the email of 21 June 2019 from the Appellant's solicitors until 26 June 2019 – and then to take 58 days from the Appellant's request and 45 days from the First-tier Tribunal's request to the same effect to state their objection to the late appeal. I accept that neither of those requests was expressed to be subject to a time limit. But it is hard to understand why it took as long as it did for the Respondents to inform the Appellant and the First-tier Tribunal that they wished to object to the late appeal.

67. For the reasons set out above, I hereby exercise my discretion to permit the late appeal in this case.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 5 AUGUST 2020