Neutral Citation: [2023] UKFTT 40 (TC)

Case Number: TC08695

FIRST-TIER TRIBUNAL
TAX CHAMBER

Decided on the papers

Appeal references: TC/2018/00535;
TC/2020/00206;TC/2021/17994

VAT – three Notices of Appeal on same issue – first appeal withdrawn – whether Tribunal had the jurisdiction to allow a late application for reinstatement of first appeal – the judgments in OWD and Albert House considered and applied – whether Tribunal should give permission for late appeal in relation to two other matters – Martland and Katib considered and applied – applications refused

Decided on the papers
Judgment date: 13 January 2023

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

MAQSOOD HUSSAIN
t/a NISA LOCAL

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The case was decided on the papers having considered the submissions of the Appellant and the Objection filed and served by Mrs Margaret Nkonde, Litigator of HM Revenue & Customs, on behalf of the Respondents

DECISION

INTRODUCTION AND SUMMARY

1. Mr Hussain has filed three Notices of Appeal ("NoA") at the Tribunal:

   (1) On 19 January 2018, under reference TC/2018/00535 ("the First Appeal"), Mr Hussain's agent, Ms Gemma Greene of Bohemian Accountants, sought to appeal against HMRC's refusal to accept an "error correction" of £35,100; she later reduced the quantum to £9,525.07. The First Appeal was withdrawn on 8 May 2019.

   (2) On 10 January 2020, under reference TC/2020/00206 ("the Second Appeal"), Ms Greene filed a second NoA. The issue in dispute was the same. The Tribunal wrote to Ms Greene saying that Mr Hussain could either make a late application for reinstatement, or explain why this NoA related to different matters from the First Appeal. No response was received, and on 31 October 2020 the Tribunal closed the file.

   (3) On 2 December 2021, under reference TC/2021/17994, Mr Hussain filed a third NoA ("the Third Appeal") in which he sought to reopen the First Appeal; he also made reference to two other matters not previously appealed, being penalties and a statutory review decision issued in January 2016 ("the January 2916 Decision").

2. On 24 May 2022, HM Revenue and Customs ("HMRC") objected to the Third Appeal proceeding ("the Objection"), on the basis that it was not a new appeal but an application to reinstate the First Appeal. Mrs Nkonde submitted that it was not in the interests of justice for that application to be allowed. I considered the Third Appeal and the Objection, and on 24 November 2022, issued a brief summary decision agreeing with HMRC that the Third Appeal was essentially the same as the First Appeal and was thus a reinstatement; I refused permission for it to proceed.

3. On 6 December 2022, Mr Hussain asked for a full decision, and this is that decision. It includes a detailed examination of the law in relation to late applications for reinstatement, and identifies provisions and related case law which were neither referred to by the parties nor considered in the summary decision. I accept that overlooking those provisions and the related case law was an error of law, and that this full decision therefore constitutes a review of that earlier summary decision under Rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules").

4. In relation to the application for reinstatement, I decided that the Tribunal had no jurisdiction, and even if that were wrong, the delay was extremely serious and significant without any good reason, and in all the circumstances of the case, it was not in the interests of justice to give permission.

5. In this decision I also set out, with reference to case law fully explained in the summary decision, why Mr Hussain does not have permission to appeal against the two other matters, namely the Penalties and the January 2916 Decision, to which he made reference in the Third Appeal. In a nutshell, this is because the delay was even longer, again with no good reason, and it was not in the interests of justice to give permission.

6. As a result of the foregoing, Mr Hussain's applications were refused.

THE FACTS

7. The facts are taken from the documents provided by the parties.

Mr Hussain's business and the January 2916 Decision

8. Mr Hussain operates a shop trading under the name "Nisa Local". Until at least January 2016, his accountants were a firm called Lindlay Adams Ltd ("LAL").

9. On 10 August 2015 and 24 September 2015, Officer Higham decided that input tax claimed for periods 05/14, 11/14 and 05/15 was not allowable, and he issued assessments under s 73 of the Value Added Taxes Act 1994 ("VATA") to collect the VAT. The 11/14 assessment related to the costs of shop fitting; the other two related to management charges made by a company called MH Investments Ltd, of which Mr Hussain was the director.

10. LAL asked for a statutory review of those decisions; this was carried out by Officer Hanrahan. Her review letter was issued to Mr Hussain on 29 January 2016 and a copy sent to LAL; this was the "January 2916 Decision".

11. Officer Hanrahan upheld Officer Higham's decision in relation to periods 05/14 and 05/15, but cancelled that relating to period 11/14. She informed Mr Hussain that if he did not agree with the review decision, he could refer the matter to the Tribunal within 30 days. He did not do so.

The Penalties

12. Mr Hussain was subsequently issued with penalties totalling £8,195 relating to periods 08/13 to 08/15 inclusive ("the Penalties"): these were included in a copy of Mr Hussain's "ledger" with HMRC which had been provided at his request on 12 May 2021 ("the Ledger"). The Penalties were entered in the Ledger on 14 April 2014, although HMRC's covering letter advised that the date on the Ledger may not be identical with the decision date. In an email dated 20 June 2017, Officer Higham confirmed the total of £8,195. No information was provided to the Tribunal as to the reason for the Penalties.

13. Mr Hussain annotated the email from Officer Higham with the words "penalties which should have been appealed in the first place". I find that no appeal was made against the Penalties within the statutory deadline.

The Notification of Errors letter

14. On 15 November 2016 HMRC received a Notification of Errors form (VAT 652) from Mr Hussain's new accountant, Ms Greene, for an alleged overpayment of £35,100 of output tax for periods 08/13 to 02/16. The explanation given by Ms Greene was as follows:

> "The error in VAT is £35,100. It occurred due to incorrect mark up on zero rated sales plus the sales were overstated as it included sales for services ie. paypoint and lottery which shouldn't have been there."

15. HMRC wrote to Ms Greene requesting further details about this alleged overpayment, but no information was provided.

16. On 16 June 2017 HMRC visited Ms Greene's offices to check the calculation of the alleged overpayment, but no analysis, detail or breakdown was provided at that visit. Correspondence ensued, and Ms Greene subsequently provided some recalculated figures.

However, these did not reconcile with the "error correction" which Ms Greene had previously submitted. When HMRC asked for an explanation, Ms Greene said she did not have a copy of "the initial error correction calculation". On 13 July 2017, HMRC issued Mr Hussain with a decision rejecting the error correction of £35,100.

The retail scheme changes

17. During the same visit on 16 June 2017, HMRC identified that the error correction had been calculated on the basis of the Direct Calculation retail scheme, whereas Mr Hussain's VAT returns had been submitted on the basis of Apportionment Scheme 1.

18. In their letter of 13 July 2017, HMRC explained that retrospective changes of retail schemes are not normally permitted, but that if Mr Hussain considered he should exceptionally be allowed to make such a change, he should write to HMRC "giving as much detail as possible".

19. On 31 July 2017, HMRC issued a further decision refusing a retrospective change of the retail scheme for periods 08/13 to 02/16, the same periods as had been included in the "error correction" submitted by Ms Greene. A statutory review of this new decision was requested by Ms Greene on 25 August 2017; a review letter was issued on 15 November 2017 upholding the decision.

The First Appeal

20. On 19 January 2018, Mr Hussain appealed to the Tribunal. The Tribunal clerk contacted Ms Greene to say that the document did not include the grounds of appeal. On 22 March 2018, Ms Greene put forward new calculations, which did not rely on assuming that the retail scheme had been retrospectively changed. On that new basis, the amount now in dispute was £9,525.07 rather than the original £35,100. I therefore infer that the First Appeal sought to challenge both the retail scheme decision and the error correction decision, but that Mr Hussain (via Ms Greene) subsequently abandoned the former.

21. HMRC applied to the Tribunal for a case management hearing so that further clarification could be provided as to Mr Hussain's position, and the Tribunal directed that this hearing be listed.

22. HMRC's file shows that on 29 May 2019 they were informed by the Tribunal that on 8 May 2019 Ms Greene had withdrawn the appeal by writing to the Tribunal. No reinstatement application was made within the 28 days following 8 May 2019, and the Tribunal closed the file.

23. In relation to the withdrawal of the First Appeal, Mr Hussain attached the following emails to the NoA for the Third Appeal:

(1) An email dated 4 June 2019 between Officer Higham and Ms Greene, saying "thank you for your email and attached letter. This has been forwarded to our Solicitor's office who are dealing with the appeal case".

(2) The header for an email from Ms Greene to Mr Hussain, dated 5 June 2019, but the text has been removed.

(3) On 4 July 2019, an email from Ms Greene to Officer Higham, saying "we still have not heard anything from the Solicitor's office yet, can you please give me their contact details so I can chase them".

(4) On 10 July 2019, an email from Officer Higham to Ms Greene, saying "I understand from the Solicitor's office that the appeal has been withdrawn re your letter dated 8 May 2019. In the circumstances I'm not sure what further communications are awaited and would be grateful if you would advise please".

(5) On 23 July 2019, an email from Ms Greene to Officer Higham, saying "this email had been opened when I was on holiday by a colleague who had not advised me. We have not received any notification from the solicitor's office regarding any withdrawal of the appeal. Have you received correspondence to this end. Please let me know."

(6) Officer Higham responded the same day, saying "I am sorry but we do not receive notifications. Could I suggest that you contact the solicitor's office direct and they should be able to help. Alternatively contact details for HMCTS are [contact details for the Tribunal office in Birmingham, including email and phone numbers]".

24. I find as facts that Ms Greene wrote to the Tribunal on 8 May 2019 withdrawing the appeal, and that the Tribunal informed HMRC of the withdrawal by letter on 29 May 2019. I come to those findings taking into account the following:

(1) Mr Hussain has not said in his NoA that the First Appeal was not withdrawn.

(2) The email correspondence with Ms Greene is incomplete, and in particular there is no information about what she was expecting from HMRC's Solicitor's office.

(3) Ms Greene did not write to the Tribunal or HMRC's Solicitor's office to say that the appeal had not been withdrawn.

(4) Ms Greene did not apply for the appeal to be reinstated.

The Second Appeal

25. On 10 January 2020 Ms Greene lodged a new appeal at the Tribunal on behalf of Mr Hussain. On 3 February 2020, the Tribunal wrote to Ms Greene noting that the Second Appeal concerned the same matters as the First Appeal, and that Mr Hussain had either to make an application for reinstatement or explain how the two Appeals differed. Neither Ms Greene nor Mr Hussain responded.

26. On 31 October 2020, the Tribunal wrote to Ms Greene saying that unless a response was received within 14 days, the Tribunal would close the file. No response was received and the Tribunal closed this second file.

The Third Appeal

27. On 27 November 2021, Mr Hussain completed the NoA for the Third Appeal by hand; this was posted and received by the Tribunal on 2 December 2021. The NoA said that Mr Hussain was appealing against £10,793 of VAT and £9,544.45 of penalties.

28. Under "grounds of appeal", Mr Hussain wrote (text as in original):

> "I am appealing because there were errors made in my case which I noticed after checking the paperwork myself. My accountant provided me with misinformation regarding the appeal, I noticed errors on behalf of HMRC as they have not given me the repayments which were due and therefore I feel that a complete review is required of the charges and VAT refunds and penalties as I believe errors were made by both HMRC and my accountants.
>
> I have never been given the choice to appeal. I made an appeal but do not [know] what happened as I have not be gave any information by my accountants who have been sacked by me of ill advise and poor service. Also there are many mistakes the VAT officer have made because I have had no refund from them. I must be given a chance to prove that errors was made by my accountant and the VAT officer, this is only fair to myself, thanks."

29. In answer to the question "why are you late" Mr Hussain wrote (again, text as in original):

> "I have been badly advised by my accountants and there have not kept myself in the picture. I feel that there are mistake made by my accountant and also VAT officer who have dealt with my VAT issues. I know that I can provide the relevant information which will prove that I should have bee given a refund of VAT, instead made to pay VAT which was never due."

30. At Part 21 of the NoA, appellants are instructed to "select the letter you are enclosing with your appeal", followed by two check boxes, one entitled "original notice letter or decision document" and the second entitled "review conclusion letter". Mr Hussain ticked neither. The next box is headed "list any other documents you have enclosed". Mr Hussain wrote:

> "I am enclosing the letter which HMRC sent regarding my appeal and the failure of my accountants to provide a response to the correspondence."

31. Attached to the NoA was the January 2916 Decision; a copy of the Ledger; the emails between Ms Greene and HMRC set out at §23; an email of 22 March 2018 from Ms Greene to Mr Hussain about changing the grounds of appeal; part of a letter from Ms Greene to HMRC dated 2 November 2015; the email from Officer Higham dated 20 June 2017, which confirmed that Mr Hussain owed the Penalties of £8,195 and other amounts, and an invoice dated 2014 from a supplier to Nisa Local. These attachments also include some brief hand-written annotations such as that referred to at §12.

32. On 24 May 2022, HMRC filed and served the Objection.

WHAT IS ENCOMPASSED IN THE NOA?

33. The main point in the NoA is that HMRC "have not given [Mr Hussain] the repayments which were due", and that he "should have been given a refund of VAT". I have taken this to be a reference to the "error correction" originally calculated as £35,100, but subsequently reduced to £9,525.07 after it was accepted that the retail scheme could not be changed retrospectively.

34. I agree with Mrs Nkonde that as both the First and Second Appeals related to that same issue, and that as the First Appeal had been withdrawn, the Third Appeal is a reinstatement application. I consider whether to allow or refuse the reinstatement application at §36ff below.

35. The NoA also refers to the January 2916 Decision and to penalties of £9,544.45. I consider these at §51ff below.

THE LATE REINSTATEMENT APPLICATION

36. I first set out the Tribunal Rules, followed by the law on late reinstatement applications; I then apply that law to Mr Hussain's case.

The Tribunal Rules

37. Rule 17 of the Tribunal Rules is headed "withdrawal" and it reads:

> "(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case—
>
> (a) by sending or delivering to the Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) The Tribunal must notify each party in writing of its receipt of a withdrawal under this rule.
>
> (3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.
>
> (4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—
>
> (a) the date that the Tribunal received the notice under paragraph (1)(a); or
>
> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

38. Rule 7(3) gives the Tribunal the power to "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".

39. Rule 7 thus gives the Tribunal the discretion to allow a late application to reinstate which is made after the 28 days set out in Rule 17(4), but only if that would not conflict with another statutory provision which prevents the Tribunal exercising such a discretion.

VATA s 85

40. VATA s 85 is headed "settling of appeals by agreement" and provides that:

> "(1) Subject to the provisions of this section, where a person gives notice of appeal under section 83 and, before the appeal is determined by a tribunal, HMRC and the appellant come to an agreement (whether in writing or otherwise) under the terms of which the decision under appeal is to be treated
>
> (a) as upheld without variation, or
>
> (b) as varied in a particular manner, or
>
> (c) as discharged or cancelled,

the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement.

(2) Subsection (1) above shall not apply where, within 30 days from the date when the agreement was come to, the appellant gives notice in writing to HMRC that he desires to repudiate or resile for the agreement.

(3) Where an agreement is not in writing

(a) the preceding provisions of this section shall not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by HMRC to the appellant or by the appellant to HMRC, and

(b) references in those provisions to the time when the agreement was come to shall be construed as references to the time of the giving of that notice of confirmation.

(4) Where

(a) a person who has given a notice of appeal notifies HMRC, whether orally or in writing, that he desires not to proceed with the appeal; and

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

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

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

41. Thus, VATA s 85 provides that:

(1) where a person has made an appeal to the Tribunal, but the parties settle the dispute before that appeal is determined by the Tribunal, that settlement is treated as if it were a decision of the Tribunal; and

(2) where the appellant notifies HMRC that it is withdrawing its appeal, the position is the same.

42. In *OWD v HMRC* [2018] UKFTT 0497 (TC), Judge Falk (as she then was) considered the interaction between the Tribunal Rules and VATA s 85. She held, rightly in my view, that where s 85 applies it is not possible for an appeal to be reinstated. That is because s 85 deems the agreement between the parties to have the same consequences as if the Tribunal had come to a decision in the same terms. It is not possible to reinstate an appeal after it has been decided by the Tribunal.

Does s 85 apply here?

43. Section 85 applies where:

> "a person who has given a notice of appeal notifies HMRC, whether orally or in writing, that he desires not to proceed with the appeal".

44. However, in Mr Hussain's case, Ms Greene did not notify HMRC. Instead, she gave notice to the Tribunal, and the Tribunal told HMRC the appeal was withdrawn. I considered whether that indirect notification was sufficient for s 85 to take effect.

45. A similar situation was considered in *Albert House v HMRC* [2020] UKUT 373 (TCC) in relation to Sch 10, para 37 of Finance Act 2003; that appeal concerned stamp duty land tax ("SDLT"), but the wording of the relevant provision is the same as that in VATA s 85.

46. In *Albert House,* the appellant had withdrawn its appeal, but HMRC objected to the withdrawal and wanted the case to proceed. VATA s 85(4) and the equivalent SDLT provision both state that if HMRC wish to prevent a withdrawal taking effect, they must give the appellant notice in writing to that effect. In *Albert House*, HMRC had not given notice to the appellant; instead, they had only written to the Tribunal, and the Tribunal had informed the appellant. The appellant's case was that this was insufficient to meet the statutory requirements, and that s 85 required the parties to notify each other directly, as summarised by the UT at [66]:

> "That statutory provision…contained a strict requirement that HMRC actually gave notice of its objection directly to an appellant and this requirement was not satisfied by using an unauthorised proxy (i.e. the FTT or the FTT's administration), even where the notice was then passed on to, and received by, the appellant in time."

47. The UT rejected that submission, holding at [74] that the purpose of the provision was that "an appellant who seeks to withdraw its appeal should know within 30 days whether HMRC are objecting to that withdrawal and should be told this in writing so that there is a record". It went on to hold at [88] (emphases in original):

> "The real question is whether HMRC *gave* notice *to* the Appellants. In our view, HMRC did indeed give notice to the Appellants. The Appellants clearly received, within the 30 day period, a written notice from which they were able to understand that HMRC were objecting to the withdrawal of the appeals. When the statute requires that HMRC must "give the appellant notice in writing" (paragraph 37(4)(b)), construed purposively, the word "give" looks at the position of an appellant (the intended recipient of the notice) and asks: has the intended recipient actually received the written notice?"

48. In my judgment, the position is the same here. Ms Greene wrote to the Tribunal on 8 May 2019 withdrawing the appeal, and the Tribunal informed HMRC of the withdrawal by letter on 29 May 2019. There was no doubt that HMRC had been told about the withdrawal; this was the purpose of the provision. Section 85 therefore applied; as a result, the First Appeal was deemed to have been decided by the Tribunal, and no reinstatement was possible.

Conclusion on the reinstatement

49. For the reasons explained above, Mr Hussain's application to reinstate the First Appeal is refused.

In the alternative

50. Even if that were to be wrong, I would not have granted Mr Hussain permission to make a late application to reinstate his appeal. That is for the same reasons as set out below in relation to the Penalties and the 2016 Decision. Although the delay in applying for reinstatement is less than the delay in relation to the Penalties and the 2016 Decision, it was still two and a half years between the withdrawal of the First Appeal and the filing of the Third Appeal. This is plainly very serious and significant, and all other factors are the same.

THE OTHER MATTERS

51. Mr Hussain referred to two other matters in his NoA. I first set out those matters, followed by the law on late appeals; I then apply that law to the facts.

The Penalties

52. As noted above, Mr Hussain said in the text of the NoA that he was appealing in part because (emphasis added) "a complete review is required of the charges and VAT refunds and penalties as I believe errors were made by both HMRC and my accountants".

53. Mr Hussain did not attach any HMRC penalty decision(s) to his NoA. However, he attached the Ledger and the email from Officer Higham dated 20 June 2017, which confirmed the total as being £8,195.

54. The amount of the penalties in the NoA for the Third Appeal was stated to be £9,544.45 rather than £8,195, but in the absence of any more information, I have assumed the difference to be interest.

55. I have therefore taken the Third Appeal to encompass an application for a late appeal against the Penalties of £8,195 charged on or before April 2014.

The 2016 Decision

56. As already set out at §10ff, on 29 January 2016 Officer Hanrahan upheld a decision made by Officer Higham to disallow input tax relating to management charges in 05/14 and 05/15. The First Appeal concerned only the "error notification" and the retrospective change to the retail scheme, both of which concerned output tax. It did not refer to Officer Hanrahan's decision or indeed anything to do with managing charges or input tax.

57. I therefore find that there has been no appeal to the Tribunal against the 2016 Decision, and that by attaching the review letter to the Third Appeal Mr Hussain was in terms applying to make a late appeal against that decision too.

Whether to give permission to make late appeals

58. I next considered whether to allow or refuse Mr Hussain's application to make late appeals in relation to the Penalties and the 2016 Decision.

The legislation

59. VATA s 83 provides that there is a right of appeal against assessments made under VATA s 73 and also against penalties.

60. VATA s 83G provides that the taxpayer can appeal directly to the Tribunal, but is required to do so within 30 days of the date of the assessment or decision. Alternatively, the

taxpayer can accept HMRC's offer of a statutory review within 30 days, and can then appeal the review decision to the Tribunal by 30 days after the date of that decision.

61. A person can only appeal to the Tribunal after those statutory deadlines if the Tribunal gives permission for a late appeal, see VATA s 83G(6).

The case law

62. The case of *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*") concerned an application to make a late appeal against excise duty and a related penalty, but the principles there set out have been applied and followed when deciding late appeal applications in relation to VAT and other taxes and duties, see for example *Websons v HMRC* [2020] UKUT 154 (TCC).

63. In *Martland* at [37] the UT set out Rule 3.9 of the Civil Procedure Rules ("CPR"), which reads:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

64. The UT then considered the authorities, in particular *Denton v TH White Limited* [2014] EWCA Civ 906 ("*Denton*") and *BPP v HMRC* [2017] UKSC 55 ("*BPP*"). The UT said:

> "[40] In *Denton*, the Court…took the opportunity to 'restate' the principles applicable to such applications as follows (at [24]):
>
> > 'A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]".'
>
> [41] In respect of the 'third stage' identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) 'are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered.'"

65. The UT noted at [42] that the Supreme Court in *BPP* had implicitly endorsed the approach set out in *Denton.* That Court also confirmed at [26] that "the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach". At [43] the UT said:

> "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'."

66. At [44] the UT set out the following three stage approach by way of guidance to this Tribunal:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason(s) why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to 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, and in doing so 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".

67. The UT also said at [46]:

> "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."

The length of the delay

68. The time limit for appealing the Penalties was no later than 30 days after 14 April 2014, the date they were entered in the Ledger. The Third Appeal was made on 2 December 2021, so more than seven years after the statutory time limit.

69. The time limit for appealing the 2016 letter was 30 days after 29 January 2016, when it was issued. The delay was thus almost six years.

70. In *Romasave v HMRC* [2015] UKUT 254 (TCC) ("*Romasave*"), the UT said at [96] that:

> "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."

71. The delays here are many times longer than the three months referred to in *Romasave*, and were plainly serious and significant.

Reason for delay

72. The only reason Mr Hussain gave for the delay was that his accountants gave him poor advice and poor service, and did not inform him about what was happening. In *Katib v HMRC* [2019] UKUT 189 (TCC) ("*Katib*"), where the UT said at [49] (their emphasis):

> "We accept HMRC's general point that, <u>in most cases</u>, when the FTT is considering an application for permission to make a late appeal, failings by a litigant's advisers should be regarded as failings of the litigant."

73. The UT returned to this issue at [54], saying:

> "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."

74. The UT then cited the Court of Appeal's judgment in *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666 ("*Hytec*"). Ward LJ, giving the leading judgment, said at p 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..."

75. In *Katib*, the UT continued at [56] by concluding that the correct approach was:

> "…to start with the general rule that the failure of Mr Bridger [Mr Katib's adviser] 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*."

76. This was followed at [58] by the following passage:

> "It is clear from the [FTT] 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 [personal liability notices] and failed to appeal against the PLNs on Mr Katib's behalf. But…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."

77. In deciding that little weight should be given to Mr Katib's reliance on his adviser, the UT also took into account that Mr Katib should have noticed "warning signs", including direct contact from HMRC in the form of enforcement action, which "should have alerted him". The UT therefore concluded Mr Katib was "not without responsibility in this story".

78. In accordance with *Katib* and *Hytec*, this Tribunal should therefore not normally find that reliance on an adviser provides a good reason for delay. There was nothing in Mr Hussain's case which took it outside that normal range. Moreover, Mr Hussain was sent the original 2016 Decision, which included the 30 day time limit for making an appeal, see §10. He was plainly aware of the Penalties because they were set out in the Ledger, and they would thus have been included in his Statements of Account; they were also referred to in the email from Officer Higham dated 20 June 2017 which he attached to the Third Appeal. I therefore find that reliance on his accountants does not provide Mr Hussain with a good reason for delay.

All the circumstances

79. The third step in the *Martland* approach is to consider all the circumstances, and then to carry out a balancing exercise.

80. Significant weight must be placed as a matter of principle on the need for statutory time limits to be respected. This was described as "a matter of particular importance" in *Katib*; the same point is made in Martland at [46]. The delay in relation to the 2016 Decision was more than seven years, while that in relation to the Penalties was almost six years, and there was no good reason for those delays.

81. As already noted, in *Katib* the UT found at [56] that reliance on advisers was unlikely to amount to a "good reason" for missing the statutory deadlines in the context of the second stage of the evaluation required by *Martland*. The UT continued in the same paragraph:

> "…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."

82. At [59] the UT considered the submission made on Mr Katib's behalf that "Mr Katib did not have the expertise to deal with the dispute with HMRC himself", but went on to say:

> "…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..."

83. I find that the Mr Hussain's reliance on his advisers is a factor to be weighed in the balance in favour of allowing a late appeal, but that relatively little weight is to be given to that factor as compared to the particular importance of respecting statutory time limits, for the reasons given in *Katib*. In addition, Mr Hussain was aware of the time limit applying to the 2016 Decision when it was issued, and was clearly copied on some of the correspondence with HMRC. I place little weight on Mr Hussain's reliance on advisers.

84. Although it is possible to take the merits of an appeal into account, see *Martland* cited earlier, there is no information as to the merits of Mr Hussain's appeal against either the Penalties or the 2016 Decision.

85. Mr Hussain will suffer prejudice if he is unable to appeal, but that is an inevitable consequence of losing the opportunity to challenge an HMRC decision. HMRC will suffer prejudice if the Tribunal were to give permission, because they will have to devote time and attention to defending these very old decisions. Granting permission also prejudices the position of other taxpayers, in that both HMRC and the Tribunal will divert resources from other cases.

86. It is clear from the above that the balancing exercise is overwhelmingly in favour of refusing permission to appeal.

Conclusion on the other matters

87. For the reasons explained above, the Tribunal refuses Mr Hussain permission to make late appeals against the 2016 Decision and/or the Penalties.

OVERALL CONCLUSION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

88. Mr Hussain's application to make a late reinstatement application is refused because the Tribunal has no jurisdiction; his application to make late appeals in relation to the 2016 Decision and the Penalties is also refused.

89. 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.

ANNE REDSTON
TRIBUNAL JUDGE

Release Date: 13th JANUARY 2023