



Neutral Citation: [2024] UKFTT 00013 (TC)

Case Number: TC09018

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Location: Decided on the papers

Appeal reference: TC/2022/12375

*PROCEDURE – application for reinstatement of appeal – appeal had been struck out for non-compliance with Unless Order requiring payment of duty or making of hardship application – application refused*

**Judgment date:** 04 January 2024

**Decided by:**

**TRIBUNAL JUDGE JEANETTE ZAMAN**

**Between**

**99P RECYCLING LTD**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

The Tribunal determined the appeal on 12 December 2023 without a hearing, with a copy of the Tribunal file (which included the Notice of Appeal, subsequent correspondence between the Tribunal and the parties, the Unless Order, directions striking out the appeal, the application for reinstatement and HMRC’s objections thereto).

## DECISION

### INTRODUCTION

1. HMRC had issued an assessment to 99P Recycling Ltd (“99P”) for customs duty in respect of the import of face masks. The initial assessment had been reduced by HMRC, and was reduced further following a review, and the final decision letter was issued on 27 November 2020 for £168,415.50. 99P appealed to the Tribunal. When the Tribunal acknowledged the appeal it informed 99P that it needed to pay or deposit the duty or make a hardship application to HMRC. The correspondence is considered in detail below, but in due course the Tribunal issued an unless order requiring the same and, following non-compliance by the specified date, the appeal was struck out by the Tribunal on 14 July 2023.

2. 99P then wrote to the Tribunal on 17 August 2023 saying it wanted to appeal this decision, and the Tribunal has treated that as an application for the appeal to be reinstated (the “Reinstatement Application”). HMRC have objected to that application (in “HMRC’s Response”). HMRC object on the following grounds:

- (1) The Reinstatement Application was made out of time.
- (2) 99P has taken no steps to rectify their breach of the Tribunal’s order which led to the striking-out.
- (3) The Reinstatement Application provides no reason for the failure to comply with the Unless Order.
- (4) The appeal had itself been made substantially out-of-time, and reinstating the appeal would cause substantial prejudice to HMRC.

3. The fact of the Reinstatement Application itself being made late needs to be addressed, as I need first to consider whether to admit such application before (if admitted) considering the substance thereof. I have set out the background, then address the timing of the Reinstatement Application and whether to grant such application.

4. Whilst no hearing bundle was directed to be produced, I had before me not only the Reinstatement Application and HMRC’s Response, but also a copy of the Tribunal’s file of correspondence.

5. I have decided, for the reasons set out below, to admit the Reinstatement Application but to refuse to reinstate the appeal. The appeal remains struck out.

### BACKGROUND

6. HMRC had issued an assessment to 99P on 27 November 2020 for customs duty of £168,415.50 on the import of face masks. In April 2022 99P provided to HMRC copies of various emails (from March 2022) which supported 99P’s explanation that the masks have been donated by 99P to, eg, a care home, nursing home, hospital and a hospice.

7. 99P submitted a Notice of Appeal to the Tribunal on 10 May 2022 (the “May 2022 Notice”). This was rejected by the Tribunal on 26 July 2022 as it did not include a copy of the decision letter. 99P obtained a copy of the decision letter from HMRC and submitted a second Notice of Appeal to the Tribunal on 18 August 2022 (the “August 2022 Notice”). This confirmed that the duty in dispute had not been paid, and that no hardship certificate had been provided by HMRC.

8. The Tribunal acknowledged the appeal on 9 November 2022, and set out that the duty needs to be paid or deposited with HMRC, or hardship agreed with HMRC or the Tribunal. That letter included a one page note headed “Guidance notes on applying for hardship”,

which includes HMRC's address for making hardship applications, the relevant HMRC webpage and the statement "All applications must be made FIRST to HMRC."

9. This requirement is based on the provisions of s16(3) Finance Act 1994 ("FA 1994") which provides that an appeal which relates to a "relevant decision" (which includes the decision to assess customs duty) "shall not be entertained" if the amount of duty which HMRC have determined to be payable has not been paid or deposited with HMRC unless (a) HMRC have, on the application of the appellant, issued a certificate stating either that such security as appears to them to be adequate has been given to them, or that, on the grounds of hardship that would otherwise be suffered by the appellant, they either do not require the giving of security or have accepted such lesser security as they consider appropriate; or (b) the Tribunal decides that HMRC should not have refused to issue such a certificate and are satisfied that such security (if any) as it would have been reasonable for HMRC to accept in the circumstances has been given to HMRC. This is referred to throughout as the requirement to make a hardship application.

10. That same day 99P provided to the Tribunal copies of the emails and attachments that had been sent to HMRC in April 2022 relating to the donation of masks to various bodies. In a separate email 99P confirmed to the Tribunal that they were preparing documents for a hardship application.

11. On 17 November 2022 99P wrote to the hardship team at HMRC, consenting to the use of email. That email did not include a hardship application. On 18 November 2022 HMRC replied asking for a hardship application to be submitted, saying they cannot process an application on the disclaimer email alone, and provided a copy of HMRC's guidance on how to submit such an application.

12. On 8 February 2023 HMRC wrote to 99P, reminding them about the requirements of s16(3) FA 1994. That email asked that they either pay the duty or submit a hardship application within 21 days, failing which HMRC would apply for the appeal to be struck out, and enclosed a further copy of HMRC's guidance.

13. There was then further correspondence between the parties (which was copied to the Tribunal):

(1) On 27 February 2023, 99P referred to previous emails sent to HMRC and a discussion "about how to solve out the issue", saying they had not heard anything back yet.

(2) HMRC replied, on 6 March 2023, referring back to previous correspondence 99P had had with different individuals at HMRC, and reiterated that:

(a) All correspondence needed to be sent to James Flux at HMRC, as he is the lawyer with conduct of the appeal. Debt management are unable to deal with enquiries whilst litigation is ongoing.

(b) HMRC will not consider the matter until the issues of hardship and the application to appeal out of time have been resolved. He referred to the previous correspondence on this point.

(c) HMRC extended the time by a further seven days before they would apply for strike out, setting a deadline, in bold, of 13 March 2023.

14. On 22 March 2023 99P wrote to the Tribunal as follows:

"Regarding the hardship application, our accountant said they are very busy and they will charge us a lot for them to prepare the documents for our application. Therefore, we think it is not worth applying hardship.

We just wondered if Tribunals still consider our appeal without hardship application? If the appeal may not proceed unless the tax in dispute is paid, would it be possible for us to pay monthly over the next 24 or 36 months due to our finance situation?

Looking forward to hearing from you soon.”

15. On 24 March 2023 HMRC applied to the Tribunal for the appeal to be dismissed on two bases, namely that no hardship application had been submitted with the result that the Tribunal does not have jurisdiction, and that the appeal was out of time and permission to appeal late should be refused (the “Strike Out Application”). The Strike Out Application includes a detailed “Background/Chronology”, detailing the correspondence between the parties (including the correspondence referred to above) and makes completely clear the requirement to apply for hardship (where an appellant has not paid or deposited the duty) and that no such application had been made by 99P.

16. The Tribunal wrote to the parties on 5 April 2023. That email refers to all the material which had been sent by 99P to the Tribunal in November 2022, and I infer that the Tribunal Case Worker who sent this email had not yet seen the Strike Out Application which had been made by HMRC. It does set out the following:

(1) Having checked the Tribunal’s file, they could not see confirmation from 99P that they had made a hardship application.

(2) The Tribunal has no jurisdiction to entertain the appeal until HMRC or the Tribunal approve hardship, or the amount of duty is paid or deposited with HMRC. “In the absence of such consent or payment the Tribunal will have no option and must strike the appeal on the grounds of lack of jurisdiction.”

(3) The Tribunal directed that within 14 days 99P make a hardship application to HMRC, provide the Tribunal with a copy of an application already made or pay/deposit the duty.

(4) In the event of non-compliance, the case will be referred to a judge to consider striking the appeal.

17. On 12 June 2023 the Tribunal issued an unless order (the “Unless Order”) as follows:

“The Tribunal DIRECTS that UNLESS the Appellant no later than 5pm on 23 June 2023 confirms in writing to the Tribunal that it intends to proceed with its appeal and delivers confirmation that it has:

(a) paid to (or deposited with) HMRC the tax under appeal; or

(b) made an application to HMRC for such payment or deposit to be dispensed with on the grounds that it would cause the Appellant to suffer hardship,

then the Appellant’s appeal MAY BE STRUCK OUT without further reference to the parties.”

18. There was then the following exchange of emails on 13 June 2023:

(1) 99P wrote to the Tribunal and HMRC confirming they would like to proceed with the appeal, they wished to pay the duty but were unable to do so due to cash flow issues and asked for the contact details at HMRC to arrange a payment plan.

(2) HMRC responded, re-iterating the terms of the Unless Order and stating that if 99P were unable to pay in full they would need to make a hardship application and enclosed HMRC’s guidance.

(3) There was a further email from 99P (to HMRC and the Tribunal) stating again that they could not pay in full and that the hardship application was not an option because of the cost.

(4) HMRC again responded, setting out that if 99P did not understand their legal obligations they should seek independent legal advice, referring back to statements already made that HMRC cannot accept payment by instalments whilst the appeal is ongoing and that should 99P intend to continue with the appeal, they must either pay the duty or make a hardship application.

19. On 27 June 2023 HMRC wrote to the Tribunal confirming that 99P had not complied with the Unless Order.

20. On 14 July 2023 the Tribunal issued directions confirming that the appeal had been struck out for non-compliance with the Unless Order “despite the explicit warning of the possible consequences of such failure, and in those circumstances it would not be fair and just to allow the proceedings to continue” (the “July 2023 Direction”). That direction then concludes:

“The Appellant has the right to apply to the Tribunal with reasons within 28 days after the date of issue of this Direction for the proceedings to be reinstated.”

21. On 17 August 2023 99P wrote to the Tribunal as follows:

“Thanks for your email. I was away for holidays. Sorry for late response.

We donated 3 million PPE to NHS, schools and local authority which costs us £1 million. We demonstrate our passion, care and social responsibility to our country and people. And now we have been asking to pay duty by HMRC which should be free because of our donation to eligible end user. We feel very sad. It will damage our motivation to do donation going forward. Why are we going to do that?

We are not happy for the decision. Can you please advise what we can do for appeal.”

22. The Tribunal sent a copy of the Reinstatement Application to HMRC on 10 October 2023, asking for representations to be made within 14 days. HMRC provided HMRC’s Response on 24 October 2023, which, as summarised above, objects to the reinstatement.

## **DISCUSSION**

23. Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Tribunal Rules”) deals with striking out and reinstatement of proceedings:

(1) Rule 8(2) provides that the Tribunal must strike out proceedings if the Tribunal does not have jurisdiction in relation to them.

(2) Rule 8(3)(a) provides that the Tribunal may strike out proceedings if the appellant has failed to comply with a direction which stated that failure to comply could lead to the striking out of the proceedings.

24. The correspondence since submission of the August 2022 Notice has focused on 99P’s failure to pay the duty or obtain a hardship certificate (which itself requires a hardship application to be made). In the absence of one of these occurring, the Tribunal does not have jurisdiction to hear the appeal (s16(3) FA 1994). Thus, whilst the July 2023 Direction is framed in terms of non-compliance with the Unless Order, ie non-compliance with Tribunal directions which had warned of striking out if there was a failure to comply, such non-

compliance also meant that the Tribunal would not appear to have jurisdiction to hear the appeal in any event.

25. Nevertheless, the appeal was struck out under Rule 8(3)(a). This is significant, as Rule 8(5) provides that if the proceedings, or part of them, have been struck out under Rule 8(1) or 8(3)(a), the appellant may apply for the proceedings to be reinstated. There is no equivalent provision in respect of a striking out under Rule 8(2) – instead, Rule 8(4) provides that the Tribunal may not strike out proceedings under Rule 8(2) without first giving the appellant an opportunity to make representations in relation to the proposed striking out. I considered that I should only deal with the possibility of striking out under Rule 8(2) and seeking representations in relation to this after I have dealt with the current application – this would only need to be addressed if I decide to reinstate the appeal.

26. Rule 8(6) provides that an application for reinstatement under Rule 8(5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

27. Here, the Tribunal sent notification of the striking out on 14 July 2023, yet the Reinstatement Application was not made by 99P until 17 August 2023, which is six days after the date required by Rule 8(6).

28. I therefore need to decide:

- (1) whether to admit that application late – if I refuse, then there is no application for reinstatement; and
- (2) if I admit the Reinstatement Application, whether to reinstate the appeal.

29. HMRC's Response is that the Tribunal should not admit the application late, but in any event that, if it is to be admitted, the Reinstatement Application should be refused for the reasons set out at [2.] above, which reasons themselves include reference to the underlying appeal itself having been made late to the Tribunal and requiring permission. Whilst HMRC have maintained their position throughout (not only in the Strike Out Application but also in the various correspondence) that the appeal should be dismissed as having been made out of time in any event, no representations have yet been sought from 99P on the question of whether to grant permission for a late appeal. The issue has not yet fallen for determination.

30. The issues before me both involve consideration of the exercise of judicial discretion, which must be exercised in accordance with the overriding objective in Rule 2 of the Tribunal Rules, namely to deal with cases fairly and justly. The approach to be taken when considering how to exercise discretion has been considered by the Upper Tribunal in several decisions in recent years.

31. The Upper Tribunal set out in *Martland v HMRC* [2018] UKUT 178 (TCC) at [44]-[45] that when the Tribunal is considering applications for permission to appeal out of time, the starting-point is that permission should not be granted, unless the Tribunal is satisfied on balance that it should be. In considering that question, the Tribunal can follow this three-stage process:

- (1) Establish the length of the delay – If it was very short, then the Tribunal is unlikely to need to spend much time on the second and third stages, but 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(s) for the default should be established.

(3) The Tribunal should evaluate all the circumstances of the case. This will involve a balancing exercise which will 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. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

32. In *HMRC v Breen* [2023] UKUT 252 (TCC) the Upper Tribunal summarised the test to be applied when considering an application for reinstatement (assuming that I decide to admit the Reinstatement Application):

“88. At FTT[9]-[12] the FTT applied the test provided for by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) (“*Martland*”) in considering Mr Breen’s application for reinstatement of his appeal. It was common ground before us that this was the correct test to apply. Essentially, *Martland* laid down a three stage test to be applied to the breaches of the Unless Order: (1) was the delay serious? (2) what were the reasons for the delay? and (3) a consideration of all the relevant circumstances. In considering the third stage of the *Martland* test particular importance was 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.

89. The FTT also referred, at FTT[13], to the decision of this Tribunal in *Chappell v The Pensions Regulator* [2019] UKUT 2009 (“*Chappell*”), which concerned an application to reinstate an appeal following a strike out. *Chappell* provides guidance in applying the usual *Martland* test when considering an application to reinstate an appeal struck out for non-compliance with an unless order. First, when considering the first stage of the *Martland* test it is necessary to take account of previous breaches in compliance which led to the granting of an unless order. In addition, the Tribunal should generally take no account of the merits of the underlying appeal where the appeal had been struck out for failure to comply with directions and orders, save in the limited situation where the appellant’s case is “unanswerable”, such that it would merit HMRC being debarred from resisting the appeal.”

33. I consider the two issues in turn, taking the required approach at each stage.

#### **Whether to admit the Reinstatement Application**

34. This involves applying the approach set out in *Martland*, without the modifications set out in *Chappell*.

35. Reflecting the requirements of Rule 8(6), the July 2023 Direction set out that any application for reinstatement must be made no more than 28 days after the issue of those directions, ie by 11 August 2023. The Reinstatement Application was sent to the Tribunal six days after this deadline.

36. In *Martland* the Upper Tribunal expressly stated that if a delay is very short, then the Tribunal is unlikely to need to spend much time on the second and third stages set out therein, but 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. In this case, however, HMRC submit that the delay of six days is “clearly serious and significant”, particularly when placed in the context of a 28 day deadline.

37. I am not persuaded that the delay of six days is necessarily serious and significant. I would characterise this as short. However, not only do I recognise the warning set out by the

Upper Tribunal in respect of delays that are “very short” (namely that this should not mean that the Tribunal fails to consider the second and third stage) but here I also take the view that the progression of the appeal to date must be taken into account when assessing all the circumstances and that the delay of six days should not be considered in isolation.

38. 99P has given only the barest of details in relation to the reasons for the delay, namely that Sky Li, the CEO, was on holiday. There are no further details, eg as to whether this was the case throughout the 28 days or only when the deadline approached. I accept that the CEO was on holiday for at least part of the 28 day period in which an application for reinstatement could have been submitted on time.

39. When evaluating all the circumstances, I place weight on the importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. Furthermore, I am not satisfied that the reason for the delay is a good reason – there has been no explanation as to why conduct was not handed over to another individual at 99P whilst the CEO was on holiday (particularly in circumstances where there had been exchanges of correspondence throughout 2023 and during June 2023, ie this was not a matter which arose without warning). The time limit was clearly set out in the terms of the Unless Order. The delay here, of six days, is also part of a pattern of delays, including the giving of notice of appeal to the Tribunal late and failing to comply with Tribunal directions and ultimately the terms of the Unless Order.

40. These matters weigh against allowing the Reinstatement Application to be admitted. However, I also recognise that the delay is short, and whilst any delay could potentially be said to prejudice the other party to the appeal, here I consider that prejudice to HMRC would be the consequence of either allowing the Reinstatement Application itself or, in due course, giving permission for a late appeal to be made. It is not the six days which is the cause of prejudice.

41. Whilst finely balanced, I have decided in the light of the above that the late Reinstatement Application should be admitted, placing particular weight on the delay being of six days rather than a matter of weeks, and that some explanation has been provided for the delay. This then leads to my needing to consider the substance of the Reinstatement Application.

#### **Whether to reinstate the appeal**

42. When considering whether to grant the Reinstatement Application I follow the approach set out in *Chappell* and *Breen*.

#### ***Establish the seriousness and significance of the failure***

43. The Unless Order required that, by 5pm on 23 June 2023, 99P confirm that it intends to proceed with its appeal and confirm that it has paid or deposited the duty or made a hardship application.

44. Whilst 99P did confirm (before this deadline) that it intended to pursue the appeal, it has not paid or deposited the duty, or made a hardship application. That remained the position even at the time of the Reinstatement Application and at the date of HMRC’s Response (in October 2023). The breach was therefore ongoing even four months after the date for compliance with the Unless Order. As to establishing the seriousness of this default, I do regard this default as very serious.

#### ***Reasons for the default***

45. The Reinstatement Application does not itself put forward reasons for the failure to comply with the Unless Order. However, I take account of all of the previous communications from 99P, which has maintained throughout that it does not have funds to



pay the duty due (and has been asking for time to pay, having suggested a 24 or 36 month payment plan), and that it would cost “a lot” to pay their accountant to submit a hardship application.

46. Whilst I do not lose sight of the fact that the burden is on 99P to establish that the Reinstatement Application should be granted, I do have regard to the fact that HMRC have not challenged 99P’s position on not being able to pay the duty in full. I accept that 99P did not have the funds to pay the tax in full by June 2023.

47. 99P have referred to the cost of instructing their accountant to submit a hardship application, but they have provided no information as to how much this was, particularly in proportion to the amount of the duty in question. Furthermore, having decided not to instruct an accountant to submit a hardship application on their behalf on the basis of cost, there is no evidence of 99P having made any attempt to follow HMRC’s guidance which had been repeatedly sent to them and make such an application themselves.

48. I have considered whether a reason for the failure to comply with the terms of the Unless Order was that 99P did not understand what they had to do. The correspondence prior to the issuing of the order does illustrate that there were instances where 99P had not fully understood the position:

(1) When they first received the acknowledgement of appeal from the Tribunal 99P said they would make a hardship application. This was in November 2022. 99P did send an email to HMRC on 17 November 2022. HMRC replied the following day, telling them they needed to make a hardship application. So even if 99P might have thought that they had done what was being required of them at that time, that misapprehension cannot have lasted beyond the following day.

(2) 99P emailed the Tribunal on 22 March 2023 saying they thought it “not worth” applying for hardship due to the cost of the application, asking if they could pay the tax over time. This email was sent even after HMRC had sent them information on, eg, 8 February 2023 about needing to pay the duty or making a hardship application.

49. I consider that the correspondence from both the Tribunal and HMRC was very clear as to what was required. Moreover, after 99P indicated that it somehow regarded paying the duty or making a hardship application as optional, the Strike Out Application (made by HMRC on 24 March 2023) is clear and detailed. The Tribunal also sent a detailed letter to the parties on 5 April 2023.

50. Against this background, it is then difficult to understand how 99P considered that the Tribunal would be able to consider the appeal if 99P were to pay monthly (as suggested in their email of 5 April 2023). I recognise that this stage of the *Martland* approach requires me to make findings as to the reasons for the default, rather than assess whether they were “good” reasons, and that something which might be objectively unreasonable could nevertheless be a genuine reason. However, the unreasonableness of a particular stated position might be a factor supporting a conclusion that it was not genuine.

51. In any event, these communications were before the date of the Unless Order, the requirements of which were clear and had a deadline of 5pm on 23 June 2023. 99P responded on 13 June 2023, ie the day after the Unless Order was released, but did not follow the instructions they had been given. Instead, they told the Tribunal that they wanted to proceed with the appeal (which was part of what they had been directed to do) and asked for direct contact details of HMRC about the payment arrangement. Having read all of the correspondence, I find it somewhat perplexing that 99P can have thought this was what was

being required at that stage, particularly given the terms of the Unless Order, which also made it clear that the appeal may be struck out if 99P failed to comply.

52. HMRC's litigator (James Flux) replied that same day, in a very clear email:

(1) He set out a summary of the Tribunal directions, summarising the requirements of the Unless Order, emphasising the deadline of 5pm on 23 June 2023.

(2) He attached the Strike Out Application which set out the relevant law, said that HMRC cannot make a separate arrangement for payment of duty whilst 99P intend to proceed to appeal, and that if they cannot afford to pay the duty in full they must submit a hardship application by 5pm on 23 June 2023.

(3) He enclosed HMRC's guidance on applying for a hardship certificate.

53. 99P's second email of 13 June 2023 again maintains they cannot pay in full, want to pay monthly and cannot afford to instruct an accountant to apply for hardship for them.

54. The communications from 99P do show that 99P considered they ought to be able to proceed differently, ie by agreeing a payment plan with HMRC for the payment of the duty and separately pursue their appeal to the Tribunal. But they were told repeatedly that this was not possible. I have decided that the default cannot be attributed to a failure to understand what they had to do to comply with the Unless Order. They did not want to take the required steps and wanted to pursue a different option (which they had been told was not available to them).

#### ***All the relevant circumstances***

55. When assessing all the circumstances, I take account of

(1) the particular importance of complying with Tribunal directions, both in substance and on time – here, not only did 99P fail to comply with the Unless Order, they had also failed to comply with earlier directions requiring them to pay the duty or make a hardship application, in particular those issued on 5 April 2023, by which time not only had the Tribunal previously set out the requirement (in November 2022) but there had been correspondence between 99P and HMRC about the need to make a hardship application if they were unable to pay the duty. Indeed, when reading the whole of the correspondence since the August 2022 Notice, the repeated statements from HMRC and the Tribunal that 99P needs to make a hardship application to enable it to pursue its appeal are striking, yet 99P has not done so;

(2) 99P's communications with the Tribunal – whilst 99P has not complied with the Tribunal directions, or the Unless Order, it has not ignored the correspondence from the Tribunal. It has emailed both the Tribunal and HMRC throughout the period from November 2022 to June 2023. I do not place much weight on this, but I do recognise that this is not a situation where a party has completely failed to respond to correspondence;

(3) prejudice to the parties – the prejudice to 99P if I refuse to reinstate its appeal is obvious, as it will not be able to pursue its appeal against HMRC's decision. If I do reinstate the appeal, then HMRC would be prejudiced as they would be faced with the need to allocate resources to defending an appeal which had been struck out, in circumstances where they had already devoted resources to trying to assist 99P with compliance with the Tribunal's directions; and

(4) merits of the reasons for the non-compliance – I have considered the reasons for the non-compliance above. I accept that 99P did not have the funds to pay the tax in full by June 2023. I am not satisfied that 99P were unable to submit a hardship

application (whether by instructing an accountant or by completing it themselves), and consider that 99P’s failure even to attempt to make a hardship application in the manner set out in the guidance is a significant factor against reinstatement. Even if 99P had initially misunderstood what they needed to do to progress the appeal, and even if they had thought that they could separately agree a payment plan with HMRC and still appeal to the Tribunal, the correct position had been set out to them several times even before the Unless Order, and the Unless Order clearly set out what they needed to do to avoid the risk of the appeal being struck out. That 99P thought they should have more options available to them is irrelevant. They were told they did not.

56. HMRC submit that I should also take account of the fact that the appeal to the Tribunal was made late (referring to the August 2022 Notice, but this would also apply if I were to have regard to the attempted May 2022 Notice) and requires permission (which HMRC submit should not be granted). I do not take account of this. It is clear from *Chappell* that the Tribunal should generally take no account of the strength of the applicant’s case at the third stage of the *Martland* test, with one possible exception being referred to, namely where a party has a case whose strength would entitle him to summary judgement. In *Breen* the Upper Tribunal decided that the burden of proof should not be taken into account, as this is one component of the strength of the taxpayer’s defence. I consider that the requirement for permission is analogous – it is a hurdle that 99P will need to overcome to pursue the appeal, and one of the relevant circumstances in determining whether to give permission would be consideration of the merits (albeit constrained by the guidance set out in *Martland*). Taking this into account here would involve some level of consideration of the merits becoming relevant to the decision on reinstatement, and the Upper Tribunal authority is clear that this would be an error of law.

57. Taking account of all of the relevant circumstances, I have decided to refuse the Reinstatement Application. In reaching this decision I am mindful that this prejudices 99P, but I consider that this is outweighed by the particular importance of the need to comply with Tribunal directions, and the prejudice to HMRC if the appeal is reinstated. This is in circumstances where 99P had been told repeatedly that it would need to pay the duty or make a hardship application, both by the Tribunal and HMRC, forewarned that failure to do so would result in HMRC applying for the Tribunal to strike out the appeal and ultimately required by the terms of the Unless Order.

#### **DECISION**

58. The Reinstatement Application is refused. The appeal remains struck out.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

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

**JEANETTE ZAMAN  
TRIBUNAL JUDGE**

**Release date: 04<sup>th</sup> JANAURY 2024**