Neutral Citation: [2024] UKFTT 00141 (TC)

Case Number: TC09076

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/00862

Keywords – application to make late appeal against APN penalties – Martland applied – application refused

Heard on: 18 January 2024
Judgment date: 25 January 2024

Before

TRIBUNAL: JUDGE DAVID HARKNESS
SIMON BIRD

Between

STEPHEN RAY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Ray appeared in person

For the Respondents: Ms Leigh Reynolds litigator of HM Revenue and Customs' Solicitor's Office

The hearing took place on 18 January 2024 using the Tribunal's own video hearing system. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

DECISION

SUMMARY

1. The matter before the Tribunal was an application (the "Application") for permission to notify late appeals to HMRC pursuant to s49 Taxes Management Act 1970 ("TMA 1970") against a series of notices of penalty assessment.

2. The details of the notices of penalty assessment are set out in the schedule to this judgment. For the sake of brevity, the word "penalties" is used in this judgment even though strictly some are surcharges charged under notices of surcharge; nothing turns on the distinction for the purposes of this judgment.

3. In summary, 26 notices of penalty assessment were issued to Mr Ray at various dates in 2016 and 2017. In respect of 7 of those, appeals were made to HMRC within the statutory time limits and the appeals in respect of those are proceeding separately to the Tribunal under case reference TC/2023/07471. Appeals were not made to HMRC within the statutory time limits in respect of the remaining 19 of those notices of penalty assessment and the Application to the Tribunal is in respect of those.

4. In deciding whether or not to allow the Application, we applied the three-stage test set out by the Upper Tribunal ("UT") in *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*"), which is as follows:

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

   (2) establish the reason or reasons 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".

5. Applying those tests, we found as follows:

   (1) the delays in making the appeals were all of over five years (and in some cases over six years). These delays were plainly very serious and significant.

   (2) they occurred because of Mr Ray's failure to make the appeals by the statutory time limits.

   (3) although the consequence of refusing permission is that Mr Ray cannot challenge the penalties at the Tribunal, the circumstances of the case were overwhelmingly in favour of refusing permission. This was essentially because:

      (a) significant weight must be given to the failure to respect statutory time limits;

      (b) there was no good reason for the long delays;

      (c) allowing cases to proceed when the appeal has been made out of time prejudices both HMRC and other taxpayers; and

      (d) the merits of Mr Ray's appeals appeared to be weak.

6. Accordingly, the Tribunal decided that the Application should be dismissed.

EVIDENCE

7. The documents to which we were referred were: HMRC's statement of case (23 pages) and skeleton argument (10 pages), Mr Ray's skeleton argument (3 pages), HMRC's main document bundle (454 pages) and two supplemental document bundles (27 pages and 41 pages).

FACTS

8. We found the following facts which were not disputed by Mr Ray:

(1) Mr Ray was issued with the Accelerated Payment Notices ("APN"s) detailed in the schedule to this judgment;

(2) The APNs were issued as a result of Mr Ray having entered into arrangements that were notified under the "DOTAS" regime in the Finance Act 2004 and to which HMRC had allocated a scheme reference number;

(3) On 7 September 2015, Mr Ray made representations under section 222 Finance Act 2014 in relation to one APN, attaching detailed evidence as to the calculation of the tax due. In consequence HMRC withdrew their original APN relating to 2010-11 and issued a replacement in a reduced amount on 27 November 2015;

(4) Mr Ray failed to pay the APNs within the time allowed and in consequence on 9 August 2016 he was issued with nine notices of penalty assessment as detailed in the schedule to this judgment. All of these notices gave details of how to appeal and of the 30 day appeal period;

(5) On 5 September 2016 Mr Ray wrote to HMRC. His letter was stated to be an appeal against those penalties arising on late payment of APNs for tax years 2011-12, 2012-13 and 2013-14. The letter was treated by HMRC as an in time appeal against seven of the nine notices of penalty assessment issued on 9 August 2016. The relevant notices are marked as such in the schedule to this judgment. Because it was stated to be an appeal against those penalties arising in respect of failure to pay APNs for tax years 2011-12, 2012-13 and 2013-14, HMRC – correctly in our view - did not treat the letter as appealing the penalties for failure to pay APNs for tax years 2009-10 or 2010-11. Accordingly, Mr Ray had done nothing to appeal against the two notices of penalty assessment issued on 9 August 2016 in respect of tax years 2009-10 and 2010-2011;

(6) On 7 September 2016, Mr Ray was issued with further notices of penalty assessment relating to the unpaid APNs, as detailed in the schedule to this judgment. All of these notices gave details of how to appeal and of the 30 day appeal period. Mr Ray did not appeal those notices within the 30 day period for appeal;

(7) On 27 September 2016, HMRC wrote to Mr Ray regarding the appeals he had made on 5 September 2016 against penalties, noting that he was a claimant in a judicial review relevant to the APNs and also noting that Mr Ray had given a witness statement in the course of that claim evidencing hardship. HMRC went on to state that they would not take steps (save in certain circumstances) to enforce the accelerated payments and related penalties which had been appealed until the judicial review proceedings had been determined or disposed of by the courts. HMRC also stated that the accelerated payments remained due and that penalties would apply if the accelerated payments were not paid in full and on time. We observe that HMRC did not point out that Mr Ray had not appealed against two of the penalty assessments which had been issued to him on 9 August 2016, although there was no obligation on HMRC to point that out;

(8) On 1 November 2016 HMRC issued further notices of penalty assessment (as detailed in the schedule to this judgment), accompanying the assessments with a short letter stating that the accelerated payments and penalties remained due and payable but that (save in certain circumstances) HMRC would not take steps to enforce the accelerated payments and late payment penalties until the judicial review claims had been determined or disposed of by the Courts. All of these notices gave details of how to appeal and of the 30 day appeal period. Mr Ray did not appeal those notices within the 30 day period for appeal;

(9) On 2 June 2017, HMRC issued further notices of penalty assessments (as detailed in the schedule to this judgment), again accompanying the assessments with a short letter stating that the accelerated payments and penalties remained due and payable but that (save in certain circumstances) HMRC would not take steps to enforce the accelerated payments and late payment penalties until the judicial review claims had been determined or disposed of by the Courts. All of these notices gave details of how to appeal and of the 30 day appeal period. Mr Ray did not appeal those notices within the 30 day period for appeal;

(10) In September 2020 Mr Ray reached a time to pay agreement with HMRC. The settlement agreement stated that penalties and surcharges for not paying APNs on time did not form part of the settlement agreement and accordingly were still payable;

(11) On 11 November 2022, HMRC wrote to Mr Ray advising that the judicial review proceedings of Marek Pudjak and others, which they understood Mr Ray to be a member of, had been discontinued. The letter contained a list of outstanding penalties and the late payment penalty interest then due. It was not entirely clear to us why that letter listed only some of the penalties, but we infer that was because the judicial review proceedings referred to related only to certain of the APNs to which Mr Ray was subject – but nothing turns on this. The letter stated that now that the judicial review proceedings had been discontinued, HMRC would be seeking to collect payment of the outstanding late payment penalties;

(12) On 20 January 2023, HMRC wrote a further letter to Mr Ray advising that the judicial review proceedings of Hilary Anne Duggan and Others, which they understood Mr Ray to be a member of, had also been discontinued. The letter listed outstanding penalties due and the late payment interest then due. Again that letter listed only some of the penalties, although when combined with the list in the 11 November 2022 letter, the list was complete. While not entirely clear to us, we infer that was because the judicial review proceedings referred to related only to certain of the APNs to which Mr Ray was subject – but again nothing turns on this. The letter stated that now that the judicial review proceedings had been discontinued, HMRC would be seeking to collect payment of the outstanding late payment penalties;

(13) In a letter dated 6 February 2023, received 9 February 2023, Mr Ray wrote to HMRC to appeal against the APN penalties detailed in HMRC's letters of 11 November 2022 and 20 January 2023;

(14) On 17 February 2023, HMRC wrote to Mr Ray setting out their view that the time limit to appeal against the late payment penalties was 30 days from the date the notices of penalty assessment were issued and therefore Mr Ray's appeal was out of time and that in their view the reasons given did not satisfy the requirements for a reasonable excuse for a late appeal;

(15) On 27 February 2023, the Appellant made the Application, seeking permission from the Tribunal to allow a late appeal to HMRC against the late payment penalties.

LEGISLATION AND CASE LAW

9. Section 31A(1) TMA 1970 provides that notice of an appeal against matters such as the penalty assessments which have been issued to Mr Ray must be given in writing to the relevant officer of HMRC within 30 days of the specified date, that date being the date the late payment penalty/surcharge notice was issued. Section 49(2) TMA 1970 provides that notice of appeal may be given after the relevant time limit if (a) HMRC agree, or (b) where HMRC do not agree, the Tribunal gives permission. Section 49(2) TMA 1970 gives a wide judicial discretion to the Tribunal, to be exercised in accordance with the guidance given by the applicable case law.

10. The case of *Martland* concerned an application to make a late appeal against excise duty and a related penalty, but the principles set out have been applied and followed when deciding late appeal applications in relation to other taxes. We considered that these principles apply to Mr Ray's Application.

11. In *Martland* at [38] 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."

12. 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.'"

13. The UT noted at [42] that the Supreme Court in BPP had implicitly endorsed the approach set out in Denton. 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'."

14. 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 or reasons 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".

15. 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."

APPLICATION OF THE LAW

16. We applied the three stage approach in *Martland* on the basis of the facts, taking into account the parties' submissions.

The length of the delay

17. The time limit for appealing the notices was 30 days from the date each was issued. The delay in notifying these appeals by Mr Ray was in each case more than 5 years and in

some more than 6 years after the expiration of the statutory time limit. 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."

18. The delay in relation to these appeals was therefore plainly serious and significant.

Reasons for the delay

19. We then considered the reasons why the delay occurred. Mr Ray's explanation for the delay (and his grounds for appeal) were not entirely clearly stated in his Notice of Appeal. Our summary of his grounds is as follows:

(1) he had been a member of a judicial review group for APNs;

(2) when he reached the time to pay agreement with HMRC in September 2020 it was because the risks of prolonging litigation were not viable. The settlement agreement was offered on terms that "could not be altered" and contained a clause that stated penalties and surcharges did not form part of the settlement agreement and accordingly were still payable;

(3) HMRC had taken over 2 years to wait after he had entered the settlement agreement before addressing APN penalties with him;

(4) he and other loan charge users had been hoping for better settlement terms;

(5) he had made an innocent mistake in using the loan charge schemes and had been fully transparent with HMRC;

(6) HMRC has stated they do not charge penalties for innocent mistakes (Mr Ray made reference to statements made by Jim Harra at the select committee hearing relating to Nadhim Zahawi);

(7) he considered the APNs and attendant penalties for non-payment should be withdrawn as a result of his time to pay settlement agreement with HMRC;

(8) the APN penalties did not match the totals in his settlement agreement;

(9) the situation was stressful.

20. At the hearing and in his skeleton argument and related papers Mr Ray advanced further points which we summarise as follows:

(1) at the time he received the APNs he was suffering from mental health problems;

(2) HMRC had themselves taken unreasonable time, for example in relation to the time between the first loans being made to Mr Ray under the tax avoidance schemes and the time HMRC first wrote to Mr Ray; the time between him reaching a civil settlement and the time HMRC wrote to him about the disputed penalties;

(3) HMRC were fraudulently claiming money that was not rightly due;

(4) the case of *Stephen Campbell v. The Information Commissioner and HM Treasury* [2023] UKFTT 00885 (GRC) was relevant because the document Mr Campbell was seeking was relevant to the legality of APNs and attendant penalties;

(5) the primary factor for the Tribunal to consider was not the lateness of the appeal but rather the legality of the APNs;

(6) Mr Ray was confident that HMRC were being draconian in the sums being demanded;

(7) Mr Ray had no means of paying the APNs or penalties.

21. We found it difficult to distil from these points the reasons Mr Ray was advancing as reasons for the delay in making the appeal.

22. Most of the points advanced seemed to us irrelevant to the question of the reasons explaining the delay in making the appeal. Going through them:

(1) a hope for better settlement terms would tend to emphasise the need for a timely appeal so that by contesting the matter, more advantageous terms would be accepted by HMRC;

(2) being a member of a judicial review group seems probably irrelevant, but to the extent relevant, is if anything an indication of a poor reason for the delay since it would tend to show a level of familiarity with judicial process and the need to comply with legal formalities (e.g. Mr Ray had given witness statements in connection with the judicial review proceedings in 2015 and 2016);

(3) the settlement agreement did not provide reasons for the delay. On its face the settlement agreement provided that penalties and surcharges for not paying APNs were still payable and referred to the penalty notices as providing details of how to pay. Hence a reader of that agreement would have appreciated the need to either pay the APN penalties, or, in order to dispute them, to look at the notices (which contained details of how and when an appeal could be made). Moreover since the settlement agreement was not reached until September 2020 it could provide no reason for the delay up to that point (the delay in appeals had started in 2016/2017 and so had been a delay of 3 or 4 years before the settlement agreement was reached);

(4) if Mr Ray considered he was "innocent", believed HMRC did not charge penalties for those in his circumstances, did not agree the amounts of the APNs/the attendant penalties, or considered HMRC were behaving fraudulently or had documents that would assist his challenge to the APNs and penalties, those would be reasons to make a timely appeal, not reasons explaining a delay to his appeal;

(5) the legality of the APNs is not relevant to the reason Mr Ray delayed in appealing the penalty assessments;

(6) lack of funds to pay the penalties is not a reason to delay appealing the penalties; lack of funds to pay e.g. for an adviser might be a reason perhaps but that is not what Mr Ray was claiming. We were also urged by HMRC to have regard to paragraph 16 schedule 56 Finance Act 2009, which provides lack of funds is not a reasonable excuse for failure to pay a penalty, although we did not think that was a relevant issue to the question of the reasons for Mr Ray's delay in making an appeal.

23. Accordingly only two points advanced by Mr Ray seemed to us potentially relevant to determining the reason for the delay:

(1) If Mr Ray considered HMRC had been dilatory in approaching Mr Ray, then we could perhaps see an argument that he interpreted that as an indication of HMRC generally being willing to take a relaxed view of time limits. However, we think such an argument is weak, both because we consider it well known that there are time periods for appeals and the penalty assessments stated on their face the need to make appeals within 30 days. Moreover Mr Ray did appeal certain of the assessments within the time limits so it seems reasonable to infer that he was aware of the need to appeal

within the 30 day period. Also, some of the dilatoriness of HMRC alleged by Mr Ray was in respect of periods after his settlement agreement was reached in 2020, so that cannot be a reason for his delay in making an appeal up to that point.

(2) Stress and mental health issues could in our view be reasons for a delay in making an appeal and we accepted that these might have been factors relevant to the delay in making an appeal by Mr Ray.

24. We very carefully considered the points Mr Ray made around mental health. In relation to this issue, he presented no medical evidence and, when pressed, admitted that he had not sought treatment because he was a resilient individual. We accept that receiving multiple APNs and penalty assessments all at once (7 notices of penalty assessment were sent to him on 1 November 2016 for example) would be extremely stressful and that mental health issues are capable of amounting to a reason for making an appeal late. However, we took into account that, in spite of the receipt of multiple APNs and penalty assessments, Mr Ray had appealed several of the late payment penalties within the permitted time period. Also, at the time he received the late payment penalties he was engaged in judicial review proceedings. We infer therefore a degree of familiarity with judicial processes and procedures and a level of mental health that permitted him to be involved in litigation. It seemed to us that in the round there was insufficient evidence that mental health issues were the reason Mr Ray had delayed in appealing the penalty assessments within the statutory time period.

25. One observation that seemed to us relevant in relation to the reason for the delay is that Mr Ray had at least some familiarity with the APN appeal process. For example in on 7 September 2015, Mr Ray made representations under section 222 Finance Act 2014 in relation to one APN notice. On 5 September 2016 he appealed APN penalties relating to tax years 2012, 2013 and 2014. It seemed to us noteworthy that, in spite of that familiarity, he failed in September 2016 to appeal against the APN penalties relating to 2010 and 2011 and then subsequently failed to appeal the remaining penalty assessment within the statutory time limit.

26. For the reasons set out above, based on the evidence presented to us, we found that there was no good reason for the failure to make the appeals within the statutory time limits.

All the circumstances

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

The need for time limits to be respected

28. Significant weight must be placed as a matter of principle on the need for statutory time limits to be respected - see *Martland* at [45].

29. In this case the delay was over five years. We found that there was no good reason for this delay, and this factor weighs heavily against the Mr Ray.

That Mr Ray is a Litigant in person

30. We took into account that Mr Ray is a litigant in person. However, we concluded that, especially for a litigant who was involved in other litigation and seemingly familiar with the appeal process, it was reasonable to expect compliance with time limits and certainly a failure to comply with a 30 day time limit for 5 or 6 years, seemed a significant failure. We also took into account the observations in *BPP* at [39] that "even in Tribunals where the flexibility

of process is a hallmark of the delivery of specialist justice, a litigant in person is expected to comply with rules and orders".

Background to the Application

31. We took into account that the background to Mr Ray's Application was that he had voluntarily entered into a series of tax avoidance schemes which had been given DOTAS numbers. While we did not think it was a strong factor, it seemed to us that this was at least potentially relevant. In our view, a reasonable and prudent taxpayer who had entered into tax avoidance arrangements would be aware that these were likely to be viewed with disfavour by HMRC. While the particular way in which the schemes Mr Ray had participated in were challenged would have come as a surprise (since the challenge was under retrospective legislation), the possibility of challenge would have been in the mind of a reasonable and prudent taxpayer. Such a taxpayer would therefore, in our view, have taken great care to comply with procedural formalities since the user of such a scheme might expect to be less likely than other taxpayers to be granted leniency by HMRC.

32. Mr Ray raised in his skeleton and in the hearing a number of matters relating to his views of the legality of the APN Penalties and the loan charge regime in general and in particular his view that the APNs which he had been issued should have been withdrawn. We understood the passion with which he held and advanced those points and were sympathetic to the stress and mental health issues that the users of loan charge schemes like Mr Ray have suffered. The review of the loan charge regime conducted by Sir Amyas Morse speaks to the unusual nature of the loan charge and the distress and hardship amongst those affected, including reports of people taking their own lives in cases linked to the loan charge, as well as wider impacts on mental health. However, we noted that the Morse review supported the essential purpose of the loan charge and we noted that recommendations of the review have been implemented in ways that presumably have benefited Mr Ray and others. In any event, it did not seem to us that the points Mr Ray made about the loan charge regime in general were of material relevance to the relatively narrow question with which we were presented. Wider questions of the legality of the loan charge and APN regime were, in our view, not particularly relevant to the question we had to decide.

33. On balance therefore, while we took these background factors into account, they did not weight materially in our consideration of all the circumstances.

The merits

34. The UT said in *Martland* that there is "much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one". The merits of the appeal may therefore be a relevant factor in the balancing exercise. However, the UT also said that the Tribunal should not " descend into a detailed analysis" of the merits of the appeal.

35. To the extent we could discern Mr Ray's substantive grounds for appeal they appeared to be a subset of the points made at [19.] and [20.] above, namely in summary:

(1) he had been a member of a judicial review group for APNs;

(2) when he reached the time to pay agreement with HMRC in September 2020 it was because the risks of prolonging litigation were not viable. The settlement agreement was offered on terms that "could not be altered" and contained a clause that stated penalties and surcharges did not form part of the settlement agreement and accordingly were still payable;

(3) he had made an innocent mistake in using the loan charge schemes and had been fully transparent with HMRC;

(4) HMRC has stated they do not charge penalties for innocent mistakes;

(5) he considered the APNs and attendant penalties for non-payment should be withdrawn as a result of his time to pay settlement agreement with HMRC;

(6) the APN penalties did not match the totals in his settlement agreement;

(7) HMRC were behaving fraudulently;

(8) the case of *Stephen Campbell v. The Information Commissioner and HM Treasury* [2023] UKFTT 00885 (GRC) ("*Campbell*") was relevant because the document Mr Campbell was seeking was relevant to the legality of APNs and attendant penalties.

36. We took the view that these grounds were weak:

(1) Several of them were not matters which would fall within the jurisdiction of the FTT considering an appeal against the penalties, e.g. the FTT does not have jurisdiction to comment on HMRC's conduct based on *Marks and Spencer plc v Customs and Excise Commissioners* [1999] STC 205 where Moses J stated at [247]:

> "…in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the Commissioners then it is clear the Tribunal had no jurisdiction. Its jurisdiction is limited to decisions of the Commissioners and it has no jurisdiction in relation to supervision of their conduct."

(2) Others are irrelevant to consideration of an appeal against penalties (e.g. that he had been a member of a judicial review group is not relevant to the consideration of an appeal of these APN penalties);

(3) Others seemed to us if anything to point away from allowing an appeal (e.g. the settlement agreement makes clear that penalties are not included and it would have been at the time of considering whether or not to enter into that settlement agreement that Mr Ray should have raised his concerns that the settlement agreement did not cover penalties if he had wanted to);

(4) Others, such as the relevance of *Campbell* were assertion unsupported by evidence.

37. It seemed to us there was very little here which would allow the Tribunal to put any great weight on Mr Ray's side of the scales in relation the merits of the appeal. Without descending into a detailed analysis of his case, to the extent we could discern it, his case appeared to be based on unsupported assertion, issues that were not relevant, and issues that are not within the Tribunal's jurisdiction. Accordingly, we decided that the merits did not favour Mr Ray's Application.

38. Other prejudice

39. Mr Ray will suffer prejudice if permission to make a late appeal is refused, because he will be unable to appeal against penalties. That is however an inevitable consequence of losing the opportunity to challenge an HMRC decision.

40. HMRC will suffer prejudice if the Tribunal gives permission, because they will have to devote time and attention to defending the notices of penalty assessment before the Tribunal. This is the inevitable consequence of granting permission. This point might carry more weight where, as here, there has been a significant delay. However, we did not consider

this point particularly important since the issues that would arise would be the same as those in the appeals Mr Ray is now bringing under reference TC2023/07471 in relation to those penalty assessments he did appeal in time. The marginal effort in contesting additional appeals by the same taxpayer about the same point seemed to us likely to be small.

41. Finally, granting permission also prejudices the position of other taxpayers, in that both HMRC and the Tribunal will divert resources away from other cases: as Davis LJ said in *Chartwell Estate Agents v Fergies Properties* [2014] EWCA Civ 506 at [28], the interests of justice include:

> "the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases..."

Balancing the factors

42. Once the circumstances have been identified, they must be balanced. The consistent message from *Denton, BPP* and *Martland* is that particular weight is to be given to the need to enforce compliance with statutory time limits.

43. The delays in relation to these appeals was many times longer than the three months referred to in *Romasave*. These delays were plainly serious and significant, and we found that there was no good reason for them. Those factors weigh heavily against Mr Ray. Added to that is the prejudice to HMRC and to appellants in other cases if permission were to be given and the apparent lack of merit in Mr Ray's substantive case.

44. On the other side of the scales is the prejudice to Mr Ray of losing the opportunity of appealing to the Tribunal. However, that factor does not carry significant weight for the reasons given above. The result of the balancing exercise is therefore that permission is refused.

OVERALL CONCLUSION

45. For the reasons set out above, we refused the Application for Mr Ray to make late appeals against the notices of penalty assessment.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

46. 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.

DAVID HARKNESS
TRIBUNAL JUDGE

Release date: 25th JANUARY 2024

Schedule – list of APNs and penalty assessments

Those penalty assessment in relation to which appeals were made within the 30 day time limit are marked "A"

Hamilton Trust scheme (23237378) – Tax year 2010

Accelerated Payment Notice			
Tax	Issue date	APN Amount	Legislation
Income Tax	16 November 2015	£4,897.00	Section 219(4)(b) Finance Act 2014

Late Payment Penalties			
Surcharge	Issue date	Amount	Legislation
First late payment surcharge	9 August 2016	£244.85	Section 59C(2) TMA 1970
Second late payment surcharge	7 September 2016	£244.85	Section 59C(3) TMA 1970

Hamilton Trust scheme (23237378) – Tax year 2011

Accelerated Payment Notice			
Tax	Issue date	APN Amount	Legislation
Income Tax	27 November 2015	£20,099.80	Section 219(4)(b) Finance Act 2014

Late Payment Penalties			
Penalty	Issue date	Amount	Legislation
First late payment penalty	9 August 2016	£1004.99	Paragraph 3(2) Schedule 56 FA09
Second late payment penalty	7 September 2016	£1004.99	Paragraph 3(3) Schedule 56 FA09
Third late payment penalty	1 March 2017	£1004.99	Paragraph 3(4) Schedule 56 FA09

Self Employed Contractor Rewards Strategy scheme (17668575) – Tax year 2012

Accelerated Payment Notice			
Tax	Issue date	Amount	Legislation
Late Payment Penalties (Income Tax)			
Penalty	Issue date	Amount	Legislation
Contributions			
First late payment penalty	**9 August 2016 A**	**£710.32 ***	**Section 226 (2) Finance Act 2014**
Second late payment penalty	1 November 2016	£710.32 *	Section 226 (3) Finance Act 2014
Third late payment penalty	2 June 2017	£710.32 *	Section 226 (4) Finance Act 2014

*These amounts were misstated in certain places in HMRC's statement of reasons, but nothing turns on the point.

Late Payment Penalties (National Insurance Contributions)			
Penalty	Issue date	Amount	Legislation
First late payment penalty	**9 August 2016 A**	**£35.51**	**Section 226 (2) Finance Act 2014**
Second late payment penalty	1 November 2016	£35.51	Section 226 (3) Finance Act 2014
Third late payment penalty	2 June 2017	£35.51	Section 226 (4) Finance Act 2014

The Grange Trust AKA Avenue Trust scheme (96665240) – Tax year 2012

Accelerated Payment Notice			
Tax	Issue date	Amount	Legislation
Income Tax	19 February 2016	£6,695.40	Section 219(4)(b) Finance Act 2014
National Insurance Contributions	19 February 2016	£2542.10	Section 219(4)(b) Finance Act 2014

Late Payment Penalties (Income Tax)			
Penalty	Issue date	Amount	Legislation
First late payment penalty	**9 August 2016 A**	**£334.77**	**Section 226 (2) Finance Act 2014**
Second late payment penalty	1 November 2016	£334.71 **	Section 226 (3) Finance Act 2014
Third late payment penalty	2 June 2017	£334.77	Section 226 (4) Finance Act 2014

** It seems likely this notice contains a typographical error and the intention was to impose a penalty of £334.77. Nothing turns on the point.

Late Payment Penalties (National Insurance Contributions)			
Penalty	Issue date	Amount	Legislation
First late payment penalty	**9 August 2016 A**	**£127.10**	**Section 226 (2) Finance Act 2014**
Second late payment penalty	1 November 2016	£127.10	Section 226 (3) Finance Act 2014
Third late payment penalty	2 June 2017	£127.10	Section 226 (4) Finance Act 2014

The Grange Trust AKA Avenue Trust scheme (96665240) – Tax year 2013

Accelerated Payment Notice			
Tax	Issue date	Amount	Legislation
Income Tax	19 February 2016	£25,044.20	Section 219(4)(b) Finance Act 2014
National Insurance Contributions	19 February 2016	£3,139.93	Section 219(4)(b) Finance Act 2014

Late Payment Penalties (Income Tax)			
Penalty	Issue date	Amount	Legislation
First late payment penalty	**9 August 2016 A**	**£1,252.21**	**Section 226 (2) Finance Act**
Second late payment penalty	1 November 2016	£1,252.21	Section 226 (3) Finance Act 2014
Third late payment penalty	2 June 2017	£1,252.21	Section 226 (4) Finance Act 2014

Late Payment Penalties (National Insurance Contributions)			
Penalty	Issue date	Amount	Legislation
First late payment penalty	**9 August 2016 A**	**£156.99**	**Section 226 (2) Finance Act 2014**
Second late payment penalty	1 November 2016	£156.99	Section 226 (3) Finance Act 2014
Third late payment penalty	2 June 2017	£156.99	Section 226 (4) Finance Act 2014

Grange Trust AKA Avenue Trust scheme (96665240) – Tax year 2014

Accelerated Payment Notice			
Tax	Issue date	Amount	Legislation
Income Tax	19 February 2016	£1,186.00	Section 219(4)(b) Finance Act 2014

Late Payment Penalties (Income Tax)			
Penalty	Issue date	Amount	Legislation
First late payment penalty	**9 August 2016 A**	**£59.30**	**Section 226 (2) Finance Act 2014**
Second late payment penalty	1 November 2016	£59.30	Section 226 (3) Finance Act 2014
Third late payment penalty	2 June 2017	£59.30	Section 226 (4) Finance Act 2014