Neutral Citation: [2024] UKFTT 950 (TC)

Case Number: TC09331

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London EC1

Appeal reference: TC/2023/00601

Personal liability notices under paragraph 19, Schedule 24, Finance Act 2007 – whether properly given in time – yes – whether appellant's ECHR rights infringed – no – whether permission should be given for a late appeal - no

Heard on: 12 March and 12 June 2024
Written submissions: 4 August 2024
Judgment date: 24 October 2024

Before

TRIBUNAL JUDGE MARK BALDWIN
MR JULIAN STAFFORD

Between

GHENADIE BEJAN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Andrew Young of counsel, instructed by Lexlaw Limited

For the Respondents: Laura Inglis of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. On 10 February 2023 the Appellant ("Mr Bejan") gave notice of his appeal against a personal liability notice (the "PLN") for £113,148 issued by the Respondents ("HMRC") and dated 11 May 2021.

2. The PLN was issued pursuant to paragraph 19 of Schedule 24 ("Schedule 24") to the Finance Act 2007. HMRC had imposed a penalty on Kronstadt Contractors Ltd ("Kronstadt") under paragraph 1 of Schedule 24 for a deliberate inaccuracy and sought to make Mr Bejan personally liable for that penalty on the basis that he was a director of Kronstadt and the deliberate inaccuracy was attributable to him.

3. As explained below, Mr Bejan has a right of appeal against the PLN, but such an appeal must be brought within 30 days of the date of the PLN. It can only be brought later if the Tribunal gives permission for this to be done.

4. Mr Bejan says that the PLN was not notified to him and so his time for appealing has not started to run. In the alternative, he says that, as he does not understand English, there can be no valid service until the PLN is notified in a form compliant with Article 6(3)(a) of the European Convention on Human Rights ("ECHR" or "the Convention"). Finally, Mr Bejan says that, if the Tribunal is not with him on either of these points, it should nevertheless exercise its discretion give him permission to bring his appeal out of time.

5. We are not concerned with the question whether Kronstadt is liable to a penalty for which Mr Bejan can be made personally liable. The only question we are concerned with is whether his appeal was brought out of time and, if it was, whether we should allow it to be entertained. As we will see, however, there is one issue which has a bearing on the answer to both these questions.

6. The hearing of this application has been rather protracted. Originally it was listed for half a day. Because of the need to translate proceedings for Mr Bejan's benefit, that was nowhere near enough time. We ended up taking evidence and brief submissions on 12 March and hearing longer submissions on 12 June. Finally, a point occurred to us as we began to write up our decision and we received written submissions on that (although only from HMRC) in early August.

THE FACTS IN OUTLINE

7. Before embarking on a detailed review of the facts and applicable law, it may be helpful to give a brief overview of the timeline of events. This was provided by HMRC but is not in dispute. The key events are as follows:

(1) Until July 2019 Mr Bejan loved at an address in Ilford ("Ilford") which was also Kronstadt's registered office.

(2) 2 July 2019: Mr Bejan and his wife purchased a property ("Gravesend") in Gravesend and moved there;

(3) 1 August 2019: HMRC opened their enquiries into Kronstadt's VAT affairs and wrote to Kronstadt at Ilford;

(4) 14 August 2019: HMRC wrote to Kronstadt at Ilford about a planned visit, which was later cancelled;

(5) 6 May 2020: HMRC wrote to Mr Bejan at Ilford advising of a VAT assessment on Kronstadt and highlighting a possible penalty;

(6) 6 June 2020: VAT assessment for period 01/20 was sent to Mr Bejan at Ilford;

(7) 13 October 2020: HMRC wrote to Mr Bejan at Gravesend enclosing copies of their letters of 6 May and 6 June 2020;

(8) 7 January 2021: HMRC write to Mr Bejan at Gravesend highlighting a prospective penalty for Kronstadt and PLN for Mr Bejan;

(9) 25 March 2021: HMRC letter enclosing penalty explanation sent to Mr Bejan at Ilford;

(10) 26 March 2021: HMRC letter enclosing penalty explanation sent to Mr Bejan at Gravesend;

(11) 11 May 2021: notice of penalty assessment on Kronstadt and PLN on Mr Bejan sent to Mr Bejan at Ilford;

(12) 13 May 2021: HMRC letter notifying penalty assessment and PLN (enclosing copies of correspondence sent to Kronstadt's registered office) sent to Mr Bejan at Gravesend;

(13) 16 March 2022: HMRC letter seeking payment of penalty sent to Mr Bejan at Gravesend;

(14) 30 March 2022 LL Accounting Services Ltd ("LL") emails HMRC, acknowledging letter of 16 March 2022 and asking to discuss;

(15) 31 March 2022: HMRC emails LL asking for their authority to act for Mr Bejan;

(16) 5 April 2022: HMRC emails LL requesting a response by 8 April 2022 and indicating that, in the absence of a response, the case would continue to progress;

(17) 11 April 2022: HMRC sent a bankruptcy warning letter and payment request letter to Mr Bejan at Gravesend ;

(18) 11 April 2022: LL email HMRC attaching authorisation form 64-8;

(19) 11 April 2022: HMRC email LL acknowledging form 64-8 and attaching correspondence sent to Mr Bejan on 11 April 2022. There is an issue around the effect of this email. In his Grounds of Appeal, Mr Bejan asserted that "The accountants engaged with HMRC and communicated with Officer Danny Saker. Officer Saker advised in an email dated 11 April 2022 to ignore previous correspondence and that fresh materials would be provided." In effect, it is said, Mr Saker was inviting Mr Bejan and his advisers to take no further action until they heard from him again, which (it is said) they did not. HMRC say that the email exhibited by Mr Bejan to support this position is not the same as the email Officer Saker sent, as some extra (and crucial for this point) words had been added. We discuss this issue at [73]-[74] below.

(20) 25 April 2022: HMRC emailed LL indicating that, in the absence of a response, the case will be forwarded to HMRC's insolvency department to start proceedings;

(21) 26 April 2022: LL emailed HMRC to say Mr Bejan is searching for necessary documents and asking for more time;

(22) 26 April 2022: HMRC emailed LL advising of the possibility of making a late appeal to the tribunal;

(23) May-December 2022: bankruptcy proceedings started and various (ultimately successful) attempts are made to serve a statutory demand and bankruptcy petition;

(24) 4 January 2023: call to HMRC from Mr Bejan's new agent;

(25) 6 January 2022: Officer Saker returned call to new agent and refers to possibility of late appeal to the tribunal;

(26) 10 February 2023: Mr Bejan filed his notice of appeal.

THE LAW

8. Schedule 24 contains a harmonised regime imposing penalties for different failings across a range of taxes. These penalties are normally visited on the taxpayer. However, paragraph 19 allows HMRC to make an officer of a company liable for all or part of a penalty imposed on a company. So far as relevant for us paragraph 19 provides as follows:

> "(1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.
>
> …
>
> (5) Where HMRC have specified a portion of a penalty in a notice given to an officer under sub-paragraph (1)—
>
> (a) paragraph 11 applies to the specified portion as to a penalty,
>
> (b) the officer must pay the specified portion before the end of the period of 30 days beginning with the day on which the notice is given,
>
> (c) paragraph 13(2), (3) and (5) apply as if the notice were an assessment of a penalty,
>
> (d) a further notice may be given in respect of a portion of any additional amount assessed in a supplementary assessment in respect of the penalty under paragraph 13(6),
>
> (e) paragraphs 15(1) and (2), 16 and 17(1) to (3) and (6) apply as if HMRC had decided that a penalty of the amount of the specified portion is payable by the officer, and
>
> (f) paragraph 21 applies as if the officer were liable to a penalty."

9. Paragraph 13 sets out the procedure for assessing and notifying penalties. The parts of paragraph 13 which apply for the purposes of paragraph 19 are as follows:

> "(2) An assessment—
>
> (a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),
>
> (b) may be enforced as if it were an assessment to tax, and
>
> (c) may be combined with an assessment to tax.
>
> (3) An assessment of a penalty under paragraph 1 must be made before the end of the period of 12 months beginning with—
>
> (a) the end of the appeal period for the decision correcting the inaccuracy, or
>
> (b) if there is no assessment to the tax concerned within paragraph (a), the date on which the inaccuracy is corrected.
>
> …
>
> (5) For the purpose of sub-paragraphs (3) and (4) a reference to an appeal period is a reference to the period during which— (a) an appeal could be brought, or (b) an appeal that has been brought has not been determined or withdrawn."

10. Interestingly, paragraph 13(1) does not apply for the purposes of paragraph 19. Paragraph 13(1) reads as follows:

> "(1) Where a person becomes liable for a penalty under paragraph 1, 1A or 2 HMRC shall—
>
> (a) assess the penalty,
>
> (b) notify the person, and
>
> (c) state in the notice a tax period in respect of which the penalty is assessed (subject to sub-paragraph (1ZB))."

As a general matter assessment and notification are distinct steps and "the process of making the assessment itself is an internal matter for the Commissioners"; see *Courts plc v Customs and Excise Comrs* [2004] EWCA Civ 1527, at [106] per Jonathan Parker LJ.

11. Paragraph 19 does not operate on the basis of that two-stage (assessment + notification) process. All that is required here is that HMRC "specify by written notice to the officer" how much of the company's penalty they are to be liable for. The reason for this is, presumably, that the penalty has already been assessed (on the company).

12. The combined effect of paragraphs 19(5)(c) and 13(3) is to impose a time limit on HMRC giving such a notice. Notice is required to be given before the end of the period of 12 months beginning at the end of the appeal period for the decision correcting the inaccuracy. A VAT assessment correcting the inaccuracy (Kronstadt's alleged failure to pay VAT) was issued on 6 May 2020 and so the appeal period (defined in paragraph 13(5) as the period during which an appeal could be brought) would end on 6 June 2020 and the time limit for assessing penalties and giving notice under paragraph 19 would in turn end on 6 June 2021.

13. Although Mr Young was very clear that this was no part of his argument, it seems to us that, if Mr Bejan was not properly notified of HMRC's decision to impose a personal liability on him by 6 June 2021, it would now be too late for HMRC to do so.

14. The effect of paragraphs 15(1) and (2) and (16) of Schedule 24 is to allow a company officer to appeal against a PLN by treating the PLN as a decision to impose a penalty. Paragraph 16 in turn provides that a penalty appeal "shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal)". As this penalty relates to VAT, this engages section 83 of VATA, which (inter alia) gives a right of appeal against VAT assessments. Section 83G of VATA provides (so far as relevant):

> "(1) An appeal under section 83 is to be made to the tribunal before—
>
> (a) the end of the period of 30 days beginning with—
>
> (i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or
>
> (ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision, or
>
> (b) if later, the end of the relevant period (within the meaning of section 83D).
>
> …
>
> (6) An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so."

15. Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FtT Rules") provides as follows:

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

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

16. Rule 2 of the FtT Rules provides as follows:

"(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction."

WITNESS EVIDENCE

17. We received evidence from four witnesses. Mr Bejan's two witnesses were Mr Bejan himself and Mr Akram (one of his legal representatives). They submitted witness statements and attended for cross-examination.

18. HMRC's two witnesses, Mr Pomroy and Mr Saker, submitted witness statements but did not attend for cross-examination. Mr Young objected to this. He said that it was the invariable practice of this Tribunal that witnesses should attend for cross-examination unless expressly released (because the other party did not wish to cross-examine them). When he referred to the invariable practice of this Tribunal, Mr Young was referring to the standard directions which this Tribunal commonly issues. These do require witnesses to attend and be ready for cross-examination unless told not to. However, no directions were issued in preparation for the March hearing.

19. On 19 February 2024, HMRC wrote to the Tribunal (copying in Mr Bejan's representatives) to confirm that they had served additional witness evidence (from Mr Pomroy) on Mr Bejan and that HMRC intended to rely on that. The email went on to say that "the Respondents do not intend for Officer Pomroy (or as previously advised, Officer Saker from whom the Respondents have previously served witness evidence) to attend the application hearing to provide oral evidence". On 11 March 2024, LexLaw wrote to the Tribunal indicating that "the parties have agreed that the second witness statement [that of Mr Pomroy] ought to be admitted by consent" and made no comment about the proposal that Mr Saker should not attend for cross-examination.

20. In the course of the hearing on 12 March Mr Young first raised the question of the non-attendance of HMRC's witnesses. The hearing on 12 March went part heard and on 22 May 2024 HMRC wrote to LexLaw repeating their view that it was unnecessary for Mr Saker to attend the hearing. However, they expressly asked LexLaw to confirm as soon as possible whether they proposed seeking an order for Mr Saker to attend for cross-examination. Mr Akram responded to that email, accusing HMRC of seeking to assert their own case management direction (which they were very much not seeking to do), but he did not at any time indicate to HRMC or the Tribunal that he wished Mr Saker to attend for cross-examination.

21. Officer Pomroy was present throughout the hearing, including the resumed hearing, and indicated that he was perfectly happy to be cross-examined. In the course of the June hearing, the Tribunal asked Mr Young whether he wanted to do that and he said no, because (by the time of the resumed hearing) the Tribunal had moved beyond the stage of hearing witness evidence. We told Mr Young that we were the masters of our own procedure, and, if he wanted to cross-examine Officer Pomroy, then (given that Officer Pomroy was quite happy for this) we would be perfectly content for him to do that. Mr Young did not take up that invitation.

22. Officer Saker's evidence was (as HMRC said to LexLaw) a relatively anodyne summary of what had happened, based largely on correspondence in HMRC's files, together with his evidence that the copy of the email of 11 April 2022 exhibited by Mr Bejan was not the same as the email he sent; he supported this by his exhibiting a copy of the email he sent. Ms Inglis was very clear that HMRC were not suggesting that Mr Bejan had altered the text of the email. As we shall see, if Officer Saker's email (as sent) was in the form exhibited by Mr Bejan, it can only justify a delay of two weeks in bringing proceedings. Although Mr Young made a great deal of Officer Saker's email, we do not consider that anything of substance turns on it.

23. As far as Officer Pomroy's evidence is concerned, all he does is explain how HMRC's central posting system works and exhibit copies of correspondence in this case as held in that system. We ae not sure what Mr Young would be hoping to achieve from cross-examining Officer Pomroy, who does not purport to give evidence of what happened in this case. In any event, there was an open offer to Mr Young to cross-examine Officer Pomroy and he did not take it up.

24. Bearing in mind the dealings between the parties and the Tribunal as regards witness evidence and the points we have just made about the nature of the evidence provided by HMRC's witnesses and the likely value/relevance of cross-examination, we did not think there was anything in Mr Young's objections and we admitted the witness statements of HMRC's witnesses. The more we reflected on the evidence in the course of writing this decision, the more convinced we became that this was the correct course to have adopted.

25. Finally, we should mention that LexLaw had asked for a witness summons in relation to Leontina Dumbliauskiene ("LD"), an employee of Mr Bejan's then advisers. The Tribunal (Judge Brooks) took the view that this is a "*Martland*" hearing and therefore unlikely to require much (if any) witness evidence, and decided that it was not appropriate to issue a witness summons at that stage. However, the Tribunal indicated that, if this was not the case and evidence from LD would be relevant to the application to admit the appeal out of time, LexLaw should write to the Tribunal explaining why LD's presence would be useful. The Tribunal's letter to LexLaw was not (as Mr Young suggested it was) an outright refusal to issue a witness summons. It very clearly left the door open to a witness summons if LexLaw felt one was necessary and wrote to the Tribunal to say why. LexLaw did not do that.

MR AKRAM'S EVIDENCE

26. Mr Akram is a solicitor with LexLaw (Mr Bejan's representatives). He was instructed by Mr Bejan in February 2023 in relation to HMRC's bankruptcy petition against him. He did not know Mr Bejan before then. He says that Mr Bejan has never spoken to Mr Akram or anybody else in his firm in English. All communications with him have been through an interpreter. It is Mr Akram's firm belief Mr Bejan does not speak or read English. He says this because sometimes, when things have been said either by Mr Akram or colleagues, Mr Bejan does not react until the words have been translated into a language of his understanding.

27. Mr Akram also says that, during his professional practice, he often receives post from HMRC that is dated several weeks earlier. He generally does not have this problem with other post, which suggests to Mr Akram that there is a problem with HMRC's postal system. Whenever possible, his firm tries to communicate with HMRC by email to avoid the problems associated with their centralised post system which can lead to long delays or issues of missing post.

28. Mr Akram also referred to various reports about shortcomings in the UK postal system more generally. He told us that Postwatch, the Consumer Council for Postal Services, used to report on the estimated level of missing post before it was disbanded in 2008. In 2004 it reported that about 14.4 million items of post are lost every year, with 60 per cent of these simply put through the wrong letterbox. Mr Akram says that, from his direct experience, there was a significant increase in postal problems during the COVID-19 pandemic and there were also a series of strikes and industrial disputes and, when postal services were operating, post would go missing often due to mis-delivery.

29. He says that in May 2023 OFCOM launched an investigation into Royal Mail's poor delivery performance record and failure to meet its delivery targets. Prior to that, in December 2022 in an OFCOM report titled 'Annual Monitoring Update for Postal Services Financial Year 2021-22' it reported: "The biggest rise in reported concerns were for 'lost mail' (18%) and 'damaged mail' (20%) (both up by three percentage points compared to the period July 2020 to June 2021), although 'misdelivered mail' remains the most highly reported concern by users of Royal Mail services (37%)".

30. Mr Akram says that, as a solicitor working in the field of tax litigation, he has personal knowledge of HMRC centralised IT postal system failures. He knows that mistakes are often made in these systems, which he understands have been supplied since 2004 by Fujitsu Global, which, he says, is the same unreliable IT provider that made a catalogue of mistakes in the 'Post Office Horizon Scandal'. He says that in that scandal faulty accounting systems provided by Fujitsu and known as Horizon created false shortfalls in the accounts of thousands of innocent sub postmasters. Given this scandal has been known about for over a decade, Mr Akram finds it surprising that HMRC use Fujitsu Global at all let alone for many of their centralised IT systems.

31. In cross-examination, Mr Akram accepted that he does not know whether the postal system used here was produced by Fujitsu and that he had no knowledge of post issues in this case. Nor does he say he is an expert on the UK postal service; he is just sharing his experience.

MR BEJAN'S EVIDENCE

32. Mr Bejan says that, apart from the odd word, he cannot speak English. Nor can he read or write in English. He moved to the UK in 2012 and from around 2016/17 until 2019 he ran a joinery company (Kronstadt). All his customer contacts were Eastern European, and they did not speak in English. He is fluent in Moldavian, Romanian, and Russian, which allowed him to communicate effectively with his customers. He found customers by personal

recommendation. He used sub-contractors from Romania or Russia, and he spoke to them in those languages.

33. Kronstadt's VAT and other tax returns and accounting records were looked after by Mr Bejan's friend, Sergiu Lungu, who is also Moldovian. It was Mr Lungu who recommended the accountants, LL UK Services Ltd ("LL") to him. Mr Bejan could "vaguely" understand Kronstadt's bank statements by looking at the figures. He did not pay Mr Lungu for helping.

34. After Kronstadt ceased trading, Mr Bejan went to work for Sbcom Ltd. He exhibited a letter from Boris Ursu, a director of Sbcom Ltd. This letter confirms that all instructions and communications with Mr Bejan are exclusively in Romanian because of his lack of proficiency in English. Mr Bejan also exhibited a letter from a past colleague, Ion Grigoriev, Project Manager at Gypcraft Drylining Limited, confirming his inability to communicate effectively in English.

35. Mr Bejan says that an interpreter is always present during his conferences with his legal representatives. The interpreter, Tina Vremere, is a friend, and Mr Bejan exhibited a statement from her confirming her attendance. He has always communicated with Lexlaw through an intermediary. His witness statement was read to him in a language he understood.

36. Mr Bejan accepted that the first time he told HMRC that he could not communicate in English was in his Grounds of Appeal. He says this is because no one asked him if he understood English before then.

37. Mr Bejan entirely rejects the suggestion that he added words into the email from Officer Saker. As he does not speak English, he had instructed LL, who were accountants, to act for him and deal with HMRC. In particular, he dealt with LD who spoke to him in Romanian.

38. Mr Bejan says that he is unable to read the email in question and relies on what he was told it says. A copy of the email was forwarded to him via WhatsApp by LD and she told him what the email said. She told him that the email was from HMRC. He had no reason to doubt this. He was told the email was originally from Officer Saker. Mr Bejan has never spoken directly to an officer of HMRC and he has never been interviewed by HMRC. Mr Bejan has been unable to contact LD. She stopped responding to his phone calls.

39. Ms Inglis showed Mr Bejan the two versions of the email of 11 April 2022. Mr Bejan agreed that the versions were not the same and said that he got the version in his witness statement from his accountants, who took care of correspondence with HMRC. In his insolvency witness statement Mr Bejan said that LL never received any further correspondence from HMRC. Ms Inglis asked Mr Bejan how he knew that, and he said that they should have told him if they had received any such correspondence.

40. Ms Inglis showed My Bejan a copy of an email from Mr Saker to LL dated 26 April 2022 in which Mr Saker that his group within HMRC had been set up to collect company penalties that have been assigned to directors personally. It said that "If you wish to appeal this decision, then you can apply to the tribunal via the following link for a late appeal against the decision". Mr Bejan said that he had not seen this email before.

41. Mr Bejan said that he had been told that HMRC relies on documents filed in the bankruptcy proceedings that HMRC brought against him to suggest that he can speak English. The documents suggest that he contacted HMRC and sent SMS text messages to Rebecca Wilkins, the individual attempting to serve documents on him. While it is true that a call was made and text messages were sent out, Mr Bejan says that they were facilitated by Mr Bejan's friends and the accountants he had instructed. The call was made on his behalf by the accountant at LL and his friend Natalie Ursu helped him send a text message to Rebecca Wilkins.

42. Mr Bejan believed that everything was in order when Kronstadt stopped trading and he says he had no reason to believe that HMRC had any concerns. He says that all taxes were paid and the company's records show this.

43. Mr Bejan moved to his current address in Gravesend on 19 July 2019. In cross-examination, he was shown invoices issued by Kronstadt after that date which gave his old address in Ilford. We were also shown a recent screenshot of Kronstadt's Companies House file, which shows Ilford as its registered office (up to the time it was dissolved in 2022) and Ilford as Mr Bejan's correspondence address. Mr Bejan accepts that he did not update details of Kronstadt's address or set up a post redirection arrangement. He did, however, update his address on his HMRC account.

44. Mr Bejan says that he did not receive HMRC's letters of 13 October 2020, 7 January 2021, 26 March 2021 or 13 May 2021, all of which were addressed to him at his new address in Gravesend.

45. Mr Bejan says that he was unable to read any correspondence from HMRC. He did not know that there were any decisions against him, let alone any penalty that could be appealed. He was unaware of any time limit for any appeal. The penalty notices he received from HMRC were in a language he did not understand. A letter dated 16 March 2022 was handed to him by his neighbour in Gravesend. He could not read the letter and so he could not understand it. The letter was ineffectively translated by an acquaintance of his, which is when he first came to know that he had issues with HMRC. This is when he decided to engage LL. He was shown all the documents sent to him by HMRC, after his legal representatives obtained them from HMRC. He did not receive any correspondence from HMRC until 16 March 2022 and all of the correspondence sent to Ilford was not received by him, as he had moved to his current address.

46. Ms Inglis took Mr Bejan to his witness statement in HMRC's bankruptcy proceedings against him. Again, Mr Bejan said that this was read to him in a language he understood before he signed it. Paragraph 9 of that witness statement reads:

> "After I received the letter dated 16 March 2022, I called Danny Saker, the HMRC officer mentioned on the letter, stating that I do not understand why do I have to pay the amount mentioned on the letter and how did HMRC came up with it. Danny Saker suggested that I should give authority to an accountant to act on my behalf."

Mr Bejan says that he did not call Mr Saker and the passage must have been mistranslated and he did not understand that the witness statement suggested that he had spoken to Mr Saker.

47. Paragraph 10 of that witness statement says that, after instructing LL, "they told me that they will sort this out, and that an appeal should be made." Mr Bejan does not remember whether LL said he should appeal.

48. The witness statement goes on to say that, after Mr Bejan received a letter from Rebecca Wilkins (of Excel Civil Enforcement), he sent a SMS text message in response. Mr Bejan says that he sent that message with help. He agrees that at first sight this passage suggests that he can read and understand English, but he says this is because it does not mention the help he received.

49. Mr Bejan received another letter from Excel Civil Enforcement. This letter explained that they wanted to serve a bankruptcy petition on him and would call him at a particular time. Mr Bejan's witness statement records that he sent another SMS text message asking for this call to be rearranged. Again, Mr Bejan agrees that at first sight this passage suggests that he can read and understand English, but he says this is because it does not mention the help he received.

50. Paragraph 14 of this witness statement says that "I filed quarterly VAT returns for the company myself". Mr Bejan says that he failed to mention that he was helped to do this by a friend. Again, Mr Bejan agrees that at first sight this passage suggests that he can read and understand English.

OFFICER SAKER'S EVIDENCE

51. Danny Saker is an HMRC officer. He was the case officer in charge of the recovery action on Mr Bejan's PLN. He submitted a witness statement but was not cross-examined.

52. The main point Mr Saker addressed was the email (referred to in Mr Bejan's Grounds of Appeal) he sent on 11 April 2022 to Mr Bejan's agent in which it is claimed he told the agent to ignore previous correspondence and that fresh materials would be provided. Mr Saker understands that this email has been exhibited by Mr Bejan to his witness statement in the associated bankruptcy proceedings.

53. Mr Saker's evidence is that, on 11 April 2022, he sent an email to LL which read:

> "Good morning,
>
> Thank you for the 64-8 & agreement to the 'HMRC Email Disclaimer'
>
> Please see attached correspondence issued Friday 8 April 2022 to your client.
>
> Kind regards"

54. On 13 February 2023 Officer Saker was asked by a colleague to respond to an email she had received from the HMRC insolvency department requesting copies of any correspondence he had with Mr Bejan or his solicitor since 25 January 2023. On reading Mr Bejan's witness statement, Officer Saker noticed that the email he exhibited appeared to have been altered. The copy email Mr Bejan exhibited had the following words immediately after "… 2022 to your client.": "Ignor them, till future correspondence" Mr Saker says that, on first reading this, he knew it was not something he would say, so he checked his sent emails and saved correspondence in the case record which show the email sent without those additional words.

Officer Pomroy's Evidence

55. John Pomroy is a HMRC officer. He became involved in this case when the original officer dealing with it left HMRC. He gave evidence about HMRC's post system.

56. He says that HMRC have a printing service they use to print and post out letters; this service is called HMRC Central Printing Service ("HCPS"). Letters are generated through templates by officers and then uploaded to the HCPS system for printing and posting. At the uploading stage, any required Fact Sheets are attached to the upload in the HCPS system to be included with the letter when posted.

57. Officer Pomroy said that "Once the letters have been posted a copy of the letter is uploaded into the case management system for the particular case."

58. Officer Pomroy exhibited a screenshot of HMRC's case management system for Kronstadt. He explained that the entry "HCPS Output" in the column labelled "Origin" against a particular document shows that it has been uploaded into the HCPS system, which Officer Pomroy says is HMRC's best available evidence that the letter in question has been posted. As it is not possible to click on the letters in question in the printout Officer Pomroy exhibited in order to review their contents, Officer Pomroy added an explanatory label to the right of each entry on the screenshot to identify the correspondence, and in this way he identified that the two PLN letters had been uploaded to the HCPS system.

MR BEJAN'S CONVENTION RIGHTS AND HIS ALLEGED INABILITY TO UNDERSTAND ENGLISH

59. Mr. Bejan says that he does not understand English. He was very clear about this in his witness statement, and he gave evidence in this tribunal with the assistance of an interpreter. HMRC are sceptical of this claim (Ms Inglis described the evidence around whether Mr Bejan understands English as "murky"), and we can understand why. Some of the statements Mr Bejan made in his witness statement in the insolvency proceedings appear at first sight to cast doubt on his claim. In addition, he has lived in this country for a number of years and run a business. He also clearly has a facility with languages. He told us that he is fluent in Moldavian, Romanian, and Russian. We find the idea that someone who has a facility for languages should live in this country for over 12 years and run a business here without making any effort to learn English quite a difficult one to come to terms with. However, we do not need to reach a concluded view on that question. The reason for this is that Mr Young uses Mr Bejan's alleged non-understanding of English to found an argument that, because HMRC have dealt with him only in English, his Convention rights have been breached and HMRC's actions are in consequence invalid. We say now that we do not accept Mr Young's submission on this point.

60. The authorities we will discuss in a moment make it abundantly clear that there is a margin of appreciation for tax authorities and, although tax penalties are criminal for the purposes of Article 6 of the ECHR, the Convention safeguards for individuals accused of such behaviour do not apply with the same rigour as those which apply to individuals who are accused of what one might call "really criminal" matters.

61. Article 6 of the ECHR provides as follows:

> "1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3 Everyone charged with a criminal offence has the following minimum rights:
>
> > a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> >
> > b to have adequate time and facilities for the preparation of his defence;
> >
> > c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> >
> > d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> >
> > e to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

62. In *Han and Yau v HMRC*, [2001] EWCA Civ 1048, the Court of Appeal held that the VAT civil penalty regime was a "criminal" matter for the purposes of Article 6. Mr Han and Mr Yau ran a "supper bar" selling fish and chips and Chinese meals. They were assessed for

unpaid VAT, interest and a civil penalty under section 60 VATA. Before the Tribunal Mr Han and Mr Yau denied that they had been dishonest. They also challenged the assessment of tax upon which the penalty was based. They did not accept that their interviews with Customs officers were fair, because the officers who carried out the interview were fully aware of Mr Yau's limited English but made no allowances for this. This case was heard along with the two others and the Court of Appeal decided, in principle, that the civil penalty regime was a "criminal matter". The Court did not make any comment on the particular shortcomings alleged in Mr Yau's case or the other two cases before it. As Potter LJ (with whom Mance LJ, but not Sir Martin Nourse, agreed) explained:

> "[I]t should be made clear that the appeal in this case concerns a decision upon a preliminary point of a general nature. Although I have set out the bare facts of the respondents' appeals to the Tribunal, each appeal gives rise to individual points of procedure, in respect of which objection is taken or certain legal consequences are said to follow which have not been argued before this court, or indeed below. Each will call for an individual ruling by the Tribunal in the light of this court's decision. The same will be true of the substantial number of cases awaiting disposal which have apparently raised a yet wider variety of points said to arise on the basis that Article 6 applies, not simply to the imposition of penalties for dishonest evasion under s.60…"

63. Although Mr Young spent quite some time on the authorities on the question whether the tax penalty regime engages Article 6, we do not need to explore this as HMRC entirely agree that Article 6 is engaged in a tax penalty case, and we do not understand there to be any real doubt about this.

64. Mr Young referred to the criticism made by Mr Han and Mr Yau that Customs and Excise had not taken Mr Yau's difficulties in understanding English into account, but (as we have just seen) the Court of Appeal did not explore (or make any ruling on) that particular criticism. Their ruling was on the (now uncontroversial) general principle that Article 6 is engaged in tax penalty cases.

65. Although Article 6 is engaged in tax penalty cases, it is clear from the ECHR jurisprudence that it is not applied with the same degree of rigour as it is in cases which one might (putting the point colloquially) call "really criminal". In *Jussila v Finland* (Application no. 73053/01), the Court commented at [43]:

> "Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (*Öztürk*, cited above), prison disciplinary proceedings (*Campbell and Fell v. the United Kingdom*, 28 June 1984, Series A no. 80), customs law (*Salabiaku v. France*, 7 October 1988, Series A no. 141-A), competition law (*Société Stenuit v. France*, 27 February 1992, Series A no. 232-A), and penalties imposed by a court with jurisdiction in financial matters (*Guisset v. France*, no. 33933/96 ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency (see *Bendenoun* and *Janosevic*, § 46 and § 81 respectively, where it was found compatible with Article 6 § 1

> for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body, and, *a contrario*, *Findlay*, cited above)."

66. In *Bendenoun v France* (Application no. 12547/86) (at [46]) the Court put the point like this:

> "As regards the general aspects of the French system of tax surcharges where the taxpayer has not acted in good faith, the Court considers that, having regard to the large number of offences of the kind referred to in Article 1729 para. 1 of the General Tax Code (see paragraph 34 above), Contracting States must be free to empower the Revenue to prosecute and punish them, even if the surcharges imposed as a penalty are large ones. Such a system is not incompatible with Article 6 (art. 6) of the Convention so long as the taxpayer can bring any such decision affecting him before a court that affords the safeguards of that provision."

67. We can see this approach working itself through in this Tribunal in *Easinghall Ltd v HMRC*, [2017] UKFTT 248 (TC). In that case a direct tax penalty was challenged on a number of grounds, including that the company director's human rights had been breached as HMRC did not write to her in a language she understood. HMRC accepted that, as it was alleging a deliberate inaccuracy, Article 6 was engaged. However, they said that they had not breached the taxpayer's human rights right by issuing the relevant penalty correspondence and leaflets in a standard form (in English only). HMRC's case was that the taxpayer had provided no evidence to show that the director did not understand the correspondence or the potential penalty position and no specific request was made at the time for translated correspondence or documents to be supplied. The Tribunal agreed, observing (at [90]):

> "The Tribunal considers that Ms Lin's Human Rights have not been breached. HMRC is under no obligation to issue correspondence in a language other than English until it has reason to believe that English is not understood, and an allegation of a criminal charge (in this case, deliberate inaccuracy) has been made. As soon as it was made aware that Ms Lin did not understand English, Chinese translation was made available. The letter of 30 January 2013 written in Chinese and English contains no request for a Chinese translation. In addition, throughout 2012, and continuing into 2013, letters written to Easinghall Ltd and Mr Feng in English had been replied to in English, giving no indication that English was not understood by the Appellant."

68. We respectfully agree with these observations, which are entirely in line with the approach in the ECHR authorities we have just discussed.

69. A person accused of conduct making them liable to a tax penalty clearly has a right to have HMRC's allegations explained to them in a language they understand before HMRC can enforce the penalty. However, HMRC must be entitled to operate the tax system on the basis that those they deal with understand English unless and until a particular taxpayer tells them that they don't and asks for HMRC to deal with them in a language they understand. HMRC must also be entitled to assume, unless and until they are told otherwise, that an individual who does not understand English but who is professionally advised is being given a clear picture of what HMRC are saying.

70. In a penalty case, HMRC are entitled to serve the assessment or PLN only in English unless the person they are dealing with has warned them that they do not understand English. An assessment or notice in English only which is otherwise validly served will not be invalidated because the recipient does not understand English, at least in a case where the recipient has not already warned HMRC of the need to communicate with them in another language. The recipient is, of course, entitled to ask HMRC to translate the relevant documents

into a language they understand, and that person's Convention rights can be respected by giving them time after any translation they request has been provided in which to appeal. The Tribunal can easily accommodate that by giving permission for a late appeal to the extent any time delay is caused by the need to provide and then consider any such translation.

71. Not only did Mr Bejan not ask HMRC for a translation, HMRC had every reason to believe that he understood English. Kronstadt filed statutory accounts in English signed by Mr Bejan. It filed quarterly VAT returns and corporation tax returns. Whilst Mr Bejan now says that he was helped with these formalities, there was (as Mr Bejan said in his witness statement in the insolvency proceedings) no appointed accountant for Kronstadt. Whether Mr Bejan understands English or not, there was nothing that would suggest to HMRC that he did not.

72. Here, Mr Bejan has not asked HMRC to provide him with a translation and he has been advised since March 2022 in a language he can understand, first by LL and then by LexLaw (the latter using an interpreter). Both LL and LexLaw have (of course) dealt with HMRC in English, and HMRC is entitled to assume that they understand what HMRC is saying and (if necessary) will translate HMRC communications for their client. If, despite all this, Mr Bejan still felt the need for an official HMRC translation of the PLN and other documents, he could ask for one. Starting with his grounds of appeal, he has complained about HMRC not providing him with a translation of the PLN, but he has never asked for one, nor (before that time) did he alert HMRC to the fact that he does not understand English. He has never suggested that, despite having the benefit of advice from LL and LexLaw, he needs HMRC to deal with him or his advisers in a language other than English in order to understand the allegations made against him. In the circumstances, service of the PLN is not invalidated because it was served only in English and HMRC have not infringed Mr Bejan's rights under Article 6 of the Convention by dealing with his advisers in English.

OFFICER SAKER'S EMAIL OF 11 APRIL 2022

73. Another area of dispute between the parties is Officer Saker's email of 11 April 2022. Mr Bejan exhibited a version of this email in the insolvency proceedings, but Officer Saker says that this is not the email as he sent it. The alleged change is the addition of the words "Ignor them, till future correspondence". We accept Officer Saker's evidence that the email as sent by him did not include these words and we do that for these reasons:

(1) If Officer Saker himself added those words, he would now be giving untruthful evidence to this Tribunal. That would be a very serious matter indeed. Despite having plenty of opportunity to do this, Mr Young has not called Officer Saker and put this to him;

(2) The language of the addition is most unlike anything else Officer Saker has written. The additional text is stilted and within the space of five words there are two spelling mistakes.

(3) This email was sent on the same day as the correspondence LL was now being invited to ignore. Except for receiving LL's authority to act (assuming this was received after Officer Saker had committed his correspondence with Mr Bejan to the post), nothing had changed. It is not obvious to us why receiving LL's authority to act would make Officer Saker want to withdraw the bankruptcy warning and payment request or, if he was minded to do that, why he would not also tell Mr Bejan.

(4) Officer Saker wrote to LL again on 25 April 2022 referring to the letters he had sent to Mr Bejan in which he had requested a reply by 25 April. It seems curious (to put it mildly) for Officer Saker to be expecting a reply to a letter he had invited LL and Mr Bejan to ignore.

74. As noted earlier, HMRC are not suggesting that Mr Bejan altered Officer Saker's email himself. We heard no evidence or submissions beyond HMRC's submission (which we accept) that the email Mr Bejan exhibited was not the email Officer Saker sent. In any event, we do not consider that a great turns on any of this. Even assuming (which we do not find to be the case at all) that Officer Saker had invited LL to ignore his correspondence until he wrote again, it was not long before he wrote again. A fortnight later (on 25 April 2022) HMRC emailed LL indicating that, in the absence of a response, the case would be forwarded to HMRC's insolvency department to start proceedings. The following day (26 April 2022) HMRC emailed LL advising of the possibility of making a late appeal to the tribunal. Even if Officer Saker's email contained the assurances Mr Bejan says it did, by 25/26 April 2022 it was clear that HMRC was expecting action on the part of Mr Bejan and his advisers. At most, Officer Saker's email explains two weeks of the (very much longer) delay in bringing an appeal against the PLN.

WAS MR BEJAN NOTIFIED OF HIS PERSONAL LIABILITY?

75. Mr Bejan's fundamental point, of course, is that he never received the PLN, and the first he knew about his difficulties with HMRC was when his neighbour in Gravesend gave him HMRC's enforcement letter in March 2022.

76. We have already noted that Mr Young told us that he is not suggesting that the alleged lack of notification means that no valid PLN has been (or can now be) served, only that Mr Bejan's time for appealing against a PLN which has not been given to him has not expired (more accurately, has not begun to run).

77. We are not sure that Mr Young can adopt that position. Paragraph 13 makes clear provision for when such notice must be given, and that period expired in June 2022. It seems to us (for the reasons discussed at [12]-[13]) that, if no notice has been served on Mr Bejan, it is now too late for HMRC to do so.

78. Both parties proceeded on the basis that section 7 of the Interpretation Act 1978 ("IA 1978") was relevant to the question whether Mr Bejan had been given notice. Section 7 provides as follows:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post*."*

79. HMRC say that the PLN was properly addressed and posted to Mr Bejan and so it is to be treated as having been delivered in the ordinary course of post. Mr Young says that HMRC have not proved posting and so, although section 7 is in point, it does not help them.

80. As we began to write up this decision, we realised that we could not find any provision in Schedule 24 which requires or authorises a document to be served by post. Accordingly, we asked the parties for written submissions on the question whether section 7 applies to notices under paragraph 19(1) of Schedule 24. The Appellant did not reply to our request, but HMRC made the following submissions:

> *(1)* Paragraph 22 of Schedule 24 provides: *"*Paragraphs 23 to 27 apply for the construction of this Schedule*."*
>
> *(2)* Paragraph 27 of Schedule then provides: *"*An expression used in relation to VAT has the same meaning as in VATA 1994*".*

(3) In the present case, *"*written notice to the officer*"* qualifies as *"*an expression used in relation to VAT*"* because the company penalty under paragraph 1 and the portion thereof to which the officer is liable under para 19(1) are VAT-related.

(4) Paragraph 27 means that we must look to VATA 1994 to find out what is meant by *"*written notice to the officer*"* in paragraph 19(1).

(5) Section 98 VATA 1994 provides:

> *"*Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative*."*

(6) A *"*written notice to the officer*"* falls within the category of *"*any notice… to be served on, given to… any person for the purposes of this Act*"*.

(7) Therefore a *"*written notice to the officer*"* under paragraph 19(1) of Schedule 24 may be sent by post as provided by section 98.

(8) In other words, paragraph 19(1) of Schedule 24 triggers section 98 (via paragraphs 22 and 27 of Schedule 24).

(9) Once section 98 is engaged, it in turn engages section 7 IA 1978.

81. The importance of section 7 is that, once posting of a notice is proved, it shifts the burden of proof to the intended recipient to show that the notice was not delivered. But, if section 98 is not engaged, then (in the absence of any provision in Schedule 24 as to how notices are to be given) two things follow. Firstly, section 7 is not engaged and, secondly, the question of how notices under paragraph 19 are to be given must be determined without regard to the provisions of section 98 allowing notices to be given by post.

82. There is a footnote in the version of section 98 VATA copied into the Authorities Bundle, which indicated that section 98 was applied by paragraph 11, Schedule 19 Finance Act 2021. When we followed that link, we noticed a stark contrast between the way section 98 is applied by paragraph 11 and the rather complex route through the legislation in HMRC's submissions in this case. Paragraph 19(1) provides as follows:

> "Section 98 of VATA 1994 (service of notices) applies to notices and notifications to be given under this Schedule as it applies to notices and notifications to be given under that Act."

83. There is no doubt about the position there. There is some doubt, at least in our minds, in this case. We are not convinced that "written notice to the officer" in paragraph 19 is "an expression used in relation to VAT". It is an expression used in relation to the harmonised penalty regime in Schedule 24. This particular penalty happens to be triggered by an alleged VAT default, but that does not (to our mind) mean that the expression we are concerned with is "used in relation to VAT". Also, section 98 applies to notices given "for the purposes of this Act" (i.e. VATA 1994), not any notice given in relation to VAT, and it is not clear to us that a notice given under paragraph 19, Schedule 24, FA 2007 has got anything to do with VATA 1994, even where that notice has got something to do with VAT, albeit rather tangentially.

84. On the other hand, it seems unlikely to us that the draftsman would have produced paragraph 19 without thinking about how the required notice is to be given (especially given its importance – as we have seen, giving notice in time here is much more important than in a case where the time limits apply to an earlier assessment) and the obvious answer (in the absence of making clear provision for the purposes of Schedule 24) is that it should be given

in the same way that notices relating to the underlying tax are given. For that reason, and in the absence of submissions by the Applicant, we will put aside our reservations and adopt HMRC's interpretation.

85. This means that, if HMRC can show that a PLN was posted, it is deemed by section 7 IA 1978 to have been served/given unless the Appellant (on whom the burden of proof then lies) can show that it was not.

86. Mr Young says that there is no evidence of posting and without that section 7 does not assist HMRC. He says that HMRC have not produced a certificate of service, nor have they produced any evidence that the envelope was properly addressed or stamped. There is no evidence that their IT system was working properly at the time. On the question of posting, Officer Pomroy has explained how HMRC's central posting system works. Although he was not involved in this case, his (unchallenged) evidence is that the HCPS system entries show that the two PLNs (i.e. the documents listed at [7](11) and (12)) were posted. We received no evidence that the envelopes in this case were properly addressed (or that the address on the letter was visible through a "window" in the envelope) or stamped/franked, but we accept Ms Inglis' submission that the HCPS must be designed to send out letters where the address is visible and in pre-paid envelopes.

87. In his witness statement Mr Akram says that the date on a notice from HMRC cannot be relied on without further enquiry. He says that he currently has conduct of another appeal before the Tribunal where two signed certificates of service have been provided by HMRC which predate two notices said to have been served. It has not been suggested that these PLNs (or any other document in this case) have had their date altered. Moreover, the HCPS print out provided by Officer Pomroy shows (he says) the date a document was uploaded. No one has suggested that the HCPS entries have been tampered with or that Officer Pomroy's screenshot is anything other than a faithful copy of what is visible in the system.

88. We are satisfied on the balance of probabilities that the two PLNs (one addressed to Mr Bejan at his usual residence (Gravesend) and one to him at his last known place of business as recorded at Companies House (Ilford)) were properly addressed and posted.

89. The only evidence that the PLNs were not received is Mr Bejan's denial of ever having received them. Mr Akram made some generic criticisms of HMRC's postal records and of the UK postal system, and we will all have experience of letters not arriving or arriving later than expected. However, none of this suggests to us that it is more likely than not that the PLNs, having been posted, were not safely delivered. Even Mr Akram's statistical evidence did not suggest that more than half of all post goes astray. All we are left with is Mr Bejan's statement that he never received the PLNs.

90. Mr Young referred us to a relatively recent case (*Mareel Ltd v HMRC*, [2023] UKFTT 283 (TC)), where this Tribunal considered an assertion that a surcharge liability notice (which the taxpayer accepted had been posted) had not been received. Previous decisions reviewed by the Tribunal in *Mareel* make it clear that, whilst section 7 IA 1978 shifts the burden to a taxpayer to show that a notice has not been received, that is a burden that can be discharged. In cases where a taxpayer has discharged the burden, they have generally produced evidence of factors such as persistent failures by the Post Office to deliver mail to the taxpayer or others in the locality and the taxpayer's procedures for dealing with business mail. Other relevant factors might be whether the notice was returned undelivered and steps the taxpayer took to search for the missing post.

91. Mr Bejan has not produced any evidence of postal difficulties where he lived or in Ilford around the time HMRC posted the PLNs. Nor has he told us about any steps he took to look for the PLNs or other HMRC correspondence or to make sure that he did not miss business

post sent to him or Kronstadt (which retained Ilford as its registered office) in Ilford or Gravesend. As Mr Bejan does not understand English, it is (of course) entirely possible that a PLN was delivered but he did not register what it was or that it was an important, official document requiring attention.

92. We also need to approach Mr Bejan's assertion that he has not received HMRC correspondence with some care. In his witness statement in the bankruptcy proceedings brought against him he stated that "I never received the statutory demand". However, the process server (Rebecca Wilkins) had this to say in her statement of service:

> "1. That on 8th June 2022 at 0803 hours an attempt was made to serve the Demand on the above-named Debtor by attending at 1 Wye Road, Gravesend, Kent, DA12 5QT. Here I made contact with the Debtor's partner, who confirmed the continued residence of the Debtor. I therefore placed an appointment letter into a sealed addressed envelope marked private and confidential and deposited the same through the front door letterbox stating that a return visit would be made at 1530 hours on 13th June 2022. A true copy of which is attached marked "B".
>
> 2. My appointment letter has not been returned through the Royal Mail or otherwise. I have not received any reply thereto save as referred to herein.
>
> …
>
> 5. That on 13th June 2022 at 1530 hours I duly re-attended at the directed address as per the said appointment letter where I was unable to elicit any response from within. I therefore effected substituted service of the Statutory Demand by placing the same into a sealed envelope marked private and confidential addressed to Ghenadie Bejan and depositing the same through the front door letterbox at 1534 hours.
>
> 6. That to the best of my knowledge, information and belief the demand will have come to the attention of the above-named Debtor the same day of service being effected."

93. Mr Bejan appears to be denying receiving a document that was hand delivered. At the very least, this suggests that Mr Bejan's recollection of what has (or has not) been delivered is not always reliable or that letters delivered to his home do not (for whatever reason) find their way to him.

94. We are not satisfied that it is more likely than not that the properly addressed and posted PLNs were not received in the ordinary course of the post.

95. We should pause to observe that, if we are wrong to have accepted HMRC's interpretation of how section 98 VATA and section 7 IA 1978 apply in this case, we would still have held that Mr Bejan had been given notice under paragraph 19. This is because we accept (for the same reasons as are outlined above) that it is more likely than not that the two PLNs were properly addressed and posted, that a properly addressed and posted letter would arrive at its destination in the ordinary course of posting and that, having been delivered addressed to him at his home, at least the PLN sent to Gravesend would have come to Mr Bejan's attention.

96. For the reasons set out above we are satisfied that Mr Bejan was properly notified in time of his personal liability as required by paragraph 19 of Schedule 24.

SHOULD THE TRIBUNAL ALLOW A LATE APPEAL?

97. Having decided that Mr Bejan was given the notice required by paragraph 19 of Schedule 24, we turn to consider whether he should be allowed to appeal against that notice out of time.

98. As discussed above, VATA 1994 and the FTT Rules give the Tribunal power to allow this appeal to be brought out of time. It goes without saying that this power must be exercised in a way which is fair and just in line with the overriding objective, and it is to factors relevant to this question that we now turn.

99. The locus classicus of approach to be taken in considering applications for permission to make late appeals is set out in the decision of the Upper Tribunal in *William Martland v HMRC* [2018] UKUT 0178 (TCC), where the Tribunal commented as follows (at [44]):

> "When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission."

100. Dealing with the length of the delay first. If we accept that (despite the PLN having been served) the first Mr Bejan knew and understood about this matter was when his neighbour gave him HMRC's letter in March 2022 and he sought advice from LL, there has still been an unconscionable delay. Even if LL and Mr Bejan were right to read Officer Saker's email as an invitation to do nothing until he was in touch with them again, that invitation expired at the end of April 2022. Even if Mr Bejan had no knowledge or understanding of this issue before he instructed LL, he (assisted by LL) should immediately have investigated the matter and sought permission to appeal late, which is what HMRC reminded LL about at the end of April 2022. Even accepting everything Mr Bejan says and giving maximum allowance to LL, this appeal should have been brought (with an application for permission to appeal late) by the end of May 2022. In fact, it was not brought until the middle of February 2023. On authority (in *Romasave (Property Services) Ltd v HMRC*, [2015] UKUT 254 (TCC), a three-month delay was considered to be serious and significant; see [96]), that is a very substantial delay and we have not been furnished with a good explanation for that delay.

101. To the extent LL were at fault in not starting an appeal in time, that is not a good excuse for Mr Bejan. It is only in cases of the most serious dereliction of duty by professional advisers that their behaviour will give their client a good excuse. This issue was explored by the Upper Tribunal in *HMRC v Muhammed Hafeez Katib, [2019] UKUT 189 (TCC)*, and more recently *Shafique Uddin and Kazitula Limited v HMRC*, [2023] UKUT 00099 (TCC). At [49], in the context of its discussion of a ground involving the waiver of privilege the Upper Tribunal in *Katib* accepted:

> "…HMRC's general point that, in most cases, 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 …Therefore, in most cases, a litigant seeking permission to make a late appeal on the grounds that

> previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers."

102. Mr Bejan has not produced any evidence of his dealings with LL which would enable us to conclude, if we were measuring time from March/April 2022, that the long delay can fairly be attributed to their conduct. We know that Me Bejan replaced LL with LexLaw in early 2023 (and LexLaw appear to have dealt with matters with commendable efficiency since their appointment), but Mr Young did not suggest that LL's conduct in the period they were advising Mr Bejan amounted to a serious dereliction of duty and certainly no evidence along the lines discussed in *Katib* was produced.

103. At the third stage of the *Martland* test we should consider all the circumstances of the case. That would include LL's conduct if (which is not the case) it had been shown to be sufficiently egregious.

104. Mr Young tells us that the consequences of the PLN are very serious for Mr Bejan; it will make him bankrupt. However, the amount at stake and the consequences of an appellant not being allowed to launch an appeal are generally not relevant in deciding whether to allow a late appeal. The Upper Tribunal in *Katib* were not swayed by the consequences for Mr Katib of not being able to appeal, observing at [60]:

> "[T]he FTT concluded that the financial consequences of Mr Katib not being able to appeal were very serious because his means were limited such that he would lose his home. That, the FTT concluded, was too unjust to be allowed to stand. We have considered this factor anxiously for ourselves. However, again, when properly analysed, we do not think that this factor is as weighty as the FTT said it was. The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them."

105. To an extent the merits of the case are relevant. The third stage of the *Martland* approach involves taking into account any obvious strengths or weaknesses in a taxpayer's case, but it does not require the tribunal to carry out a detailed analysis of its prospects of success. In *Martland* itself (at [46]) the Upper Tribunal observed:

> "[T]he 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 HMRCs' 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 HMRCs the corresponding opportunity to point out the weakness of the applicant's case."

106. Clearly, if an appellant's case is very strong, the unfairness to them of not being allowed to proceed will be more marked than in a case which (on the high-level review mandated in *Martland*) looks more evenly balanced or even weak. Here, if we had thought that Mr Bejan had a good argument that he had not been given notice under paragraph 19, we would have allowed his appeal to proceed. This is because (as we explained at [76]-[77]), if Mr Bejan has not been given notice in time, he has a complete answer to HMRC's case against him, and it would be unfair and unjust to refuse permission to proceed where an appellant appears to have a "copper bottomed" argument which is bound to succeed.

107. In terms of the other merits of the case, HMRC say that the PLN arises because Kronstadt rendered invoices (exhibited to Mr Bejan's witness statement in the insolvency proceedings and copied in the Hearing Bundle) from March 2019 to September 2019 purporting to charge VAT whereas the company's VAT returns for the periods 03/19, 06/19 and 09/19 (summarised in a table in the Hearing Bundle) and a final return (its VAT number was cancelled on 5 October 2019) show no VAT due. Mr Bejan says that he believed Kronstadt's VAT affairs were up to date when it was deregistered. In his witness statement in the insolvency proceedings he said:

> "I had believed that everything was in order when my company stopped trading and I had no reason to believe that HMRC had any concerns. All of my taxes were paid. My company records show this.
>
> …
>
> If the Tribunal extends time to allow me to appeal against the penalty, I believe my appeal will be successful. As I have made clear above, all of the payments to my company were made to its bank account. The bank statements show the true level of sale. There should have been no penalty at all."

108. We do not understand the second paragraph just quoted. It does not explain how Kronstadt could be issuing VAT invoices, charging VAT to its customers and yet not returning any VAT liability or making any payments to HMRC. Mr Young pointed to a letter of 7 January 2021 from HMRC to Mr Bejan which suggested that the VAT assessment was based on Construction Industry Scheme (CIS) returns from Kronstadt's clients, which is clearly different from comparing copy VAT invoices with VAT returns. He also suggested that Kronstadt's VAT returns could be explained by it being on the cash accounting system, although Mr Young did not explain how this would be the case.

109. We have looked through all the copy invoices and bank statements attached to Mr Bejan's witness statement. There are a small number of payments (none of them very large) to HMRC shown in the bank statements, but there are no payments to HMRC of the size one might expect from looking at the invoices. Mr Bejan did not exhibit his VAT returns to his witness statement.

110. At its simplest, we find it difficult to understand how Kronstadt could be issuing the VAT invoices Mr Bejan exhibited and yet filing VAT returns with entries of zero (not just input and output entries which net down to zero) and making no material payments to HMRC. We have not been given any explanation (still less pointed towards any evidence) as to how this situation came about. If it is the case (as Mr Young suggested it to be) that, at a substantive hearing, Mr Bejan could show that Kronstadt had no VAT liability and thus is not liable to any penalties for which he can be made personally liable, we have been shown nothing that would support that position. In short, we have seen nothing from which we can reliably conclude that Mr Bejan's case is on the face of it so much in his favour that it would be unfair and unjust not to allow him to proceed with his appeal.

111. Viewing the points we have just discussed through the prism of the need to acknowledge that giving proper force to the need for time limits (particularly those imposed by statute) to be

respected as a matter of principle is of particular importance in the exercise of this tribunal's discretion, there is nothing about this case that leads us to the view that fairness and justice requires that permission be given to appeal out of time.

CONCLUSION AND DISPOSITION

112. For the reasons set out above, we have concluded:

(1) PLNs were properly addressed and posted to Mr Bejan at Ilford and Gravesend;

(2) As they were properly addressed and posted, they are deemed to have been served on Mr Bejan in the ordinary course of posting, unless the contrary is proved, which it has not been;

(3) If we are wrong to hold that section 7 IA 1978 is in point (via section 98 VATA), we would still find on the balance of probabilities that Mr Bejan had received the PLN addressed to him at Gravesend;

(4) Accordingly, Mr Bejan has been properly notified in time as required by paragraph 19 of Schedule 24;

(5) Mr Bejan's Convention rights have not been infringed by HMRC only serving the PLN on him in English or by anything else HMRC have subsequently done in this matter;

(6) Applying the *Martland* test, even if the delay in Mr Bejan bringing his appeal is measured from March/April 2022, it is substantial and serious;

(7) No good reason has been given to explain that delay;

(8) In all the circumstances of the case, it would not be unjust or unfair to refuse to allow Mr Bejan to bring his appeal.

113. For these reasons we have concluded that Mr Bejan needs permission to bring his appeal out of time but that he should not be granted permission to do so and, accordingly, his appeal should not be admitted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

114. 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 24th OCTOBER 2024