[2020] UKUT 154 (TCC)

Appeal number: UT/2019 /0091

VAT – procedure- whether FTT made errors of law in permitting an appeal to proceed out of time – ss 83F, 83G and 98 VATA 1994- s 7 Interpretation Act 1978

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Appellants

- and -

WEBSONS (8) LIMITED

Respondent

TRIBUNAL: Judge Timothy Herrington
Judge Andrew Scott

Appeal determined without a hearing with the consent of the parties on the basis of the written submissions of the Appellants dated 10 April 2020, the written submissions of the Respondent dated 20 April 2020 and the response thereto of the Appellants dated 23 April 2020.

DECISION

Introduction

1. This is the appeal by the appellants ("HMRC") from the decision (the "Decision") of the First-tier Tribunal ("FTT") (Judge Christopher Staker) which was released on 9 April 2019. By that decision the FTT permitted the respondent ("Websons") to bring a late appeal in relation to a review decision of HMRC dated 21 December 2011 (the "Review Decision") to refuse a claim for overpaid output tax under s 80 of the Value Added Tax Act 1994 ("VATA"). The appeal had been lodged on 9 August 2018. On 29 July 2019 the Upper Tribunal (Judge Herrington) granted HMRC permission to appeal against the Decision.

2. In essence, the basis of HMRC's appeal is that the Decision grants Websons permission to bring its appeal, irrespective of the length of any delay or the reasons for it and without making any factual findings in this regard. HMRC say that the essential basis for the Decision is that any delay will not have delayed the determination of the appeal or prejudiced them because the appeal is a part of a piece of mass litigation and will therefore be stood behind a lead case. HMRC also say that the FTT Decision also does not place particular weight on the importance of litigation being conducted efficiently, proportionately and in accordance with the rules. HMRC submit that the FTT Decision's approach does not adhere to the guidance set out in *Martland v Revenue & Customs* [2018] UKUT 178 (TCC) ("*Martland")* and involved errors of law.

3. In response, Websons accepts that there are errors of law in the Decision. It accepts that the FTT erred in (i) failing to establish whether, as contended by Websons, the Review Decision was validly served and hence failed to establish the length of the delay (ii) failing to make any finding as to whether or not the Review Decision had been received by Websons (iii) failing to assess the merits of the reasons given for the delay and (iv) failed to take into account the particular importance of the need to conduct litigation efficiently and proportionately. Websons also accept that the FTT failed to consider the question of particular prejudice in mass litigation cases but this was not a factor which was advanced by HMRC at the hearing before the FTT and in respect of which any evidence was produced.

4. It is now common ground between the parties that these errors of law are material and that the Decision should be set aside. The only dispute between the parties that remains is whether this Tribunal should remake the Decision or remit the matter to the FTT for a fresh hearing.

5. HMRC contend that it is appropriate for this Tribunal to remake the decision on the basis that Tribunal has before it the materials needed to remake the decision. HMRC contend that this is not a case where the FTT has any advantage over the Upper Tribunal. HMRC say that the evidence is limited to the documentation in the appeal bundle. Furthermore, HMRC contend that the FTT is currently being significantly adversely affected by the Covid 19 crisis; avoiding remission would

assist in the effort to relieve pressure on judicial and administrative resources. In short HMRC contend that it would be more proportionate and efficient for this Tribunal to remake the decision.

6. HMRC invite the Tribunal to make findings of fact to the effect that there was a delay of over 6 years on the part of Websons in submitting its notice of appeal following the Review Decision and that there was no good reason for the delay. In those circumstances, HMRC submit that the application to admit the appeal out of time should be dismissed. Although HMRC accept that Websons will suffer prejudice in the form of the loss of a chance to win its appeal, HMRC will suffer prejudice if permission is given because of its interest in finality. Furthermore, HMRC contend that particular importance needs to be given to the need to conduct litigation efficiently and proportionately, and for statutory deadlines to be respected.

7. Websons contend that the overriding objective that the Tribunal should deal with cases fairly and justly should not be overridden for judicial and administrative convenience but in any event the Tribunal does not have all the material for it to remake the decision. Websons contend that remission to the FTT for a re-hearing is appropriate in order that the evidence which is not recorded in the Decision can be heard, recorded and considered.

The facts

8. The FTT made limited findings of fact at [3] to [8] of the Decision which are substantially repeated at [9] to [13] below.

9. On 30 June 2011, Websons' agent submitted a claim for overpaid output VAT under s 80 of VATA. The claim referred to the fact that Websons operated an amusement arcade and generated income from gaming machine takings. The letter of claim went on to say that Websons had always declared VAT on such takings but Websons' agent was of the view that this income should properly be treated as exempt from VAT.

10. In making the claim, Websons relied on relevant case law, in particular long-running litigation involving the Rank Group, for an argument that it breached the principle of fiscal neutrality for its gaming machines to be subject to VAT, when electronic lottery ticket vending machines were exempt.

11. In a decision of 17 October 2011 HMRC refused this claim. The decision considered that electronic lottery ticket vending machines could not be considered as being similar to the gaming machines operated by Websons.

12. Websons requested a review of that decision. In the Review Decision, dated 21 December 2011, HMRC maintained the 17 October 2011 decision.

13. In a notice of appeal dated 9 August 2018, the Appellant commenced the present appeal proceedings, seeking to appeal against the Review Decision. The grounds of appeal stated that "The principle of fiscal neutrality precludes legislation that treats 'similar' goods and services differently from a VAT perspective", and that

"In the case of Rank Group plc (which is the subject of on-going litigation known as Rank part 2) the Court will consider whether or not UK law infringed the European Law principle of fiscal neutrality by taxing the takings from standard 'slot machines'".

14. At [11] to [14] the FTT set out the basis on which Websons sought an extension of time to file the notice of appeal by summarising the contentions made by Websons in that regard. The FTT did not appear to make any express findings of fact in relation to those contentions.

15. At [11] the FTT recorded Websons' contention that although it received the 17 October 2011 decision and requested a review, neither Websons nor its representatives received the Review Decision.

16. At [12] the FTT recorded Websons' contention that its agent was responsible for a number of similar claims brought by various appellants and that in the course of undertaking a review of all of the cases for which it is responsible, the representatives identified that no decision had yet been received from HMRC in relation to Websons' case, and they therefore requested HMRC to provide a decision. HMRC then provided a copy of the decision issued in 2011. The FTT then records Websons' contention that immediately upon receiving that decision, the representatives filed the notice of appeal.

17. At [13] the FTT recorded Websons' contention that this was consistent with the approach of Websons' representatives to appeal immediately following receipt of HMRC decisions to reject claims submitted on behalf of gaming machine operators and that there had been no reason for it to chase a response from HMRC any earlier because there had been no movement in any of the claims or appeals until recently.

18. At [14] the FTT recorded Websons' contention that the delay caused no prejudice to HMRC because the appeal would merely have been stood behind the on-going Rank litigation and would not have progressed in any meaningful way during the last 7 years.

19. At [15] the FTT recorded HMRC's contentions that they did not accept that Websons did not receive the Review Decision and that Websons' representatives were aware that HMRC were issuing rejections for these types of claim. It then recorded that HMRC did not accept that Websons' representatives had no reason to chase an HMRC decision and that, on balance, the Review Decision was received by Websons' representatives and was not appealed due to an oversight.

20. We also observe that in its notice of objection to the appeal being admitted out of time that led to the hearing before the FTT HMRC asserted that its records show that the Review Decision had been sent to Websons.

The Decision

21. At [17] to [19] the FTT directed itself as to the relevant legal principles to be applied in deciding whether or not to grant permission to appeal out of time. It

observed at [17] that the Tribunal is required to conduct a balancing exercise, having regard to all factors that are relevant in the circumstances of the particular case and made reference briefly to the principles set out in the Upper Tribunal's decision in *Martland* at [44] and [45].

22. At [19] the FTT observed that the relevant factors include the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, but these do not have special weight or importance and the obligation of the Tribunal remains simply to take into account, in the context of the overriding objective of dealing with cases fairly and justly, all relevant circumstances, and to disregard factors that are irrelevant.

23. The FTT set out its reasoning for the Decision at [20] to [34].

24. At [23] it referred to the question as to whether at the time of its issue the Review Decision had been sent by HMRC, either to Websons personally or to its representative, observing at [24] that if an appellant never received an HMRC decision that would normally be a good reason for granting an extension of time to bring an appeal. The FTT then said at [25] that it "ultimately" found it unnecessary to make findings of fact in relation to that issue.

25. At [26] and [27] the FTT referred to the evidence given at the hearing that there are very many appeals against decisions of HMRC by appellants in a similar situation to Websons, on grounds similar to those advanced by Websons and that Websons' representatives represent numerous different appellants in various cases of this kind. The FTT also referred to HMRC's acknowledgement that if permission to bring a late appeal was granted the appeal ought to be stood behind a lead case.

26. Consequently, at [28] the FTT found that the delay in commencing an appeal has not caused delay in the determination of the appeal by the Tribunal because had the appeal been made in time the appeal would still have been stayed behind a lead case.

27. At [29] the FTT found that the delay has caused no prejudice to HMRC because the delay has not made it any more difficult or expensive for HMRC to defend the appeal and involves a question of law which HMRC will need to argue before the FTT in other cases in any event.

28. At [30] the FTT found that this is not a case where there has been a conscious decision not to appeal and concluded that even if Websons and/or its representatives received the Review Decision and failed to appeal against it, this was due to an oversight or unintentional omission, rather than a conscious decision.

29. At [31] the FTT said it also took into account the amount at stake in this appeal for Websons (£98,658.41). At [32] the FTT found that Websons had an arguable case.

30. The FTT then concluded at [33] and [34] as follows:

> "33.In all of the circumstances, even if there had been an oversight or unintentional omission by the Appellant or its representatives in this one particular case, the Tribunal would grant permission to bring a late appeal, given that it was unintentional, and given that it ultimately had no real impact on this appeal, for the reasons given above.
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> 34. However, the Tribunal makes no finding that there has been any such oversight or unintentional omission by the Appellant or its representatives. It does not need to, since it would allow the late appeal whether there has been or not. It is noted that the Appellant's representatives deny that there has been any oversight on their part."

The law

31. As we consider later, the question as to whether in this case a notice of appeal was in fact lodged in time is relevant to Websons' application for permission to appeal out of time. It is therefore helpful to set out a summary of the relevant provisions contained in VATA in that regard.

32. The statutory framework within which the decision making process subject to the appeal occurred is as follows.

33. Under s 83(1)(t) VATA, an appeal lies to the FTT with respect to a claim for the crediting or repayment of an amount under s 80 of VATA.

34. Section 83A VATA obliges HMRC to offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83. Under s 83C (1) VATA, HMRC must review a decision if P accepts an offer of a review.

35. Section 83F (6) VATA obliges HMRC to give P notice of the conclusions of their review within 45 days of P accepting the offer of a review. Under s 83F (8) VATA, where HMRC fails to give notice of its conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that the decision is upheld. Where subsection (8) applies, HMRC is obliged to notify P of the conclusion which the review is treated as having reached.

36. Under s 83G(3)(b) and (5) (read with s 83G(7)) VATA, an appeal under s 83 VATA in a case where a review has been conducted is to be made to the FTT "within the period of 30 days beginning with… the date of the document notifying [the conclusions of the review]."

37. Section 83G (6) VATA provides that a late appeal may be made after the end of the period specified in s 83G(3)(b) and (5), if the FTT gives permission.

38. In relation to time running from the date of the document "notifying" the conclusions of the review, s 98 VATA is relevant. Section 98 provides as follows:

> "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."

39. As the Upper Tribunal observed at [31] of *Romasave (Property Services) Limited v HMRC* [2015] UKUT 254 (TCC) ("*Romasave*") the effect of s 98, and its purpose, is to bring into play s 7 of the Interpretation Act 1978 ("IA") which provides:

> "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."

40. As the Upper Tribunal went on to say at [31] of *Romasave*, that provision applies only where another Act authorises or requires a document to be sent by post. Section 98 does not require postal notification of an assessment, but it does authorise it. What s 98 does is to enable s 7 IA to have effect in the circumstances it describes, namely where notice is sent by post in a letter addressed to the relevant person or his VAT representative at the last or usual business address of that person or his VAT representative. The Upper Tribunal went on to say this at [32] to [34]:

> "32. The effect of s 7 IA is not to prescribe a method of achieving postal service or notification, or to preclude the possibility of valid service or notification if its provisions are not satisfied. Its effect is limited to the evidential requirements of proving such service or notification by the postal method required or authorised by the particular statute. It achieves that by deeming service or notification to be effected if a letter containing the relevant document is properly addressed, pre-paid and posted as so required or authorised. Proof of those matters is proof of service or notification, and unless the contrary is proved such service or notification is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.
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> 33. On the other hand, the second half of s 7 IA expressly recognises that the actual state of affairs may be different from what is deemed to be the case. It admits the possibility of it being proved that, despite the requirements of s 7 IA having been met, service or notification has not in fact been effected, or not effected in the usual course of postal delivery. In the event that the intended recipient proves, according to the evidence and on the balance of probability, that he did not receive the relevant document, service or notification of it will not be deemed under s 7 IA to have been effected: see *R v County of London Quarter Sessions Appeals Committee ex parte Rossi* [1956] 1 QB 682 in the Court of Appeal as discussed in *Calladine-Smith v Saveorder Ltd* [2011] EWHC 2501 (Ch). (These cases also make it clear that, although only the second part of s 7 is expressly qualified by the words "if the contrary is proved", if it is in fact proved that a document was not served or notified, then in any case where it is necessary to decide whether the notification was actually received by a certain time, it is open to the court to find that the document was not served at all, despite the deeming language in the first half of s 7…

> 34. In any case where the requirements of s 7 IA are not met, for example if it is not proved that the letter was properly addressed or that the relevant document was posted, the effect is not to deem service or notification not to have been effected; the effect is only that service or notification cannot be deemed to have been effected. In such a case, instead of the intended recipient being required to prove, on the balance of probability, that he did not receive the document, the burden falls on the sender to prove that service or notification was indeed effected."

41. As is apparent from the statutory provisions we have referred to above, the starting point is that for time to run for the making of an appeal s 83G(3)(b) VATA requires the relevant decision to have been notified to the taxpayer. The question of the point at which time started to run for this purpose was referred to at [27] of *Romasave*. In that case the taxpayer argued that, on a purposive construction time must run, not from the date printed on the document, but the date when notice is given in accordance with any permissible means. As resolution of this issue was not material in that case, the Upper Tribunal did not come to concluded view on the point.

42. In this case, this point is not likely to be material. There is no dispute that the letter containing the Review Decision was dated 21 December 2011 so that on a strict reading of the wording of the relevant provisions of s 83G VATA time began to run from that date rather than the date on which the letter was actually posted. However, the factual dispute in this case concerns whether the letter was in fact posted at all.

43. We observe, however, that it appears from HMRC's submissions in this case that they accept that time starts to run from the date the decision is notified in accordance with the relevant statutory provisions. In this case, because notification is authorised by post, HMRC say the relevant date is the date on which the decision was received by Websons, whether that be by operation of the deeming provision in s 7 IA if, on the facts, the requirements of that deeming provision were met or, if those requirements were not met, the date on which a copy of the decision was provided, as referred to at [16] above. If, on the facts, the latter is the true position then, as HMRC accepted in their submissions, the appeal would have been notified in time and there would be no requirement to extend time to enable the appeal to be admitted.

44. It is common ground that the principles to be applied in deciding whether to grant permission to admit an appeal notified out of time are those set out by this Tribunal in *Martland* at [44] to [46] of its decision. The principles were summarised as follows:

> (1) When the Tribunal is considering applications for permission to appeal out of time, it must be remembered that the starting point is that permission should not be granted unless the Tribunal is satisfied on balance that it should be. In considering that question, the Tribunal should carry out a three stage process as follows:
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> > (a) 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

Tribunal 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;

(b) The reason (or reasons) why the default occurred should be established;

(c) The Tribunal 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.

(2) That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

(3) the Tribunal 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. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the Tribunal can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the Tribunal should decline to embark on an investigation of the merits and firmly discourage argument directed to them. 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 Tribunal's time is then wasted on an appeal which is doomed to fail.

45. The need to give particular importance to the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected was emphasised by the Upper Tribunal in *HMRC v Hafeez Katib* [2019] 0189 UKUT (TCC) where it found at [17] that the FTT made an error of law in that case "in failing to…give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion".

46. There has been some discussion in the authorities that we were referred to as to whether the fact that a late appeal can be conveniently heard with other appeals is a material factor in determining whether to admit the late appeal.

47. In *Romasave*, the position was that the taxpayer had already been granted permission to appeal in respect of a number of other related decisions. In relation to that situation, the Upper Tribunal said this at [100]:

> "We have considered whether the fact that Romasave will, according to our decision on the other issues in this appeal, be able to pursue its appeals against Decisions 2 – 6 and 8, is a material factor in determining whether an appeal should be permitted in relation to Decision 9. Whilst to add such an appeal to those otherwise able to proceed would not involve much, if any, additional time and expense in conducting the proceedings, the time and expense of such proceedings was not a factor to which we consider any particular weight should be given in the circumstances of this case. In principle, it seems to us that the question whether permission should be granted should be determined independently of the position on other appeals and that they are of limited, if any, relevance. If a clear conclusion is reached that it is not appropriate to grant permission to bring a particular appeal on its own merits, taking account of all the circumstances relating to that appeal, we do not think it right that the result should change solely because, as a result of our decision on the other appeals, it could conveniently be heard with them. The existence or otherwise of related appeals ought not to be a material factor. If it were, then the question whether an appeal that would otherwise not be permitted to proceed could be allowed to do so could turn on the happenstance that, at the time the application is considered, there are appeals to which it might be joined. That would be capable of operating unfairly as between taxpayers in otherwise identical situations, some of whom have concurrent appeals and others of whom do not."

48. In *Kimathi v Foreign and Commonwealth Office* [2017] EWHC 939 (QB), the High Court refused to allow an application that litigants be added to a register under a group litigation order after expiry of the deadline ordered by the Court. Stewart J found that, although the addition of the claims would not affect the trial timetable or prejudice the trial, due to unclear evidence a good reason for the default had not been proved and the court had to bear in mind the need for compliance with orders.

49. In our view, it is apparent from these authorities that the weight to be placed by the tribunal on the need to give particular importance to the need for litigation to be conducted efficiently and at proportionate cost is not to be diminished simply because, in the case of mass litigation, the appeal could be conveniently heard with other cases or because the addition of the claim would not affect the trial timetable for any lead case.

Grounds of appeal

50. HMRC were granted permission to appeal on the basis that it is arguable that the FTT made errors of law in the following five respects:

> (1) By failing to make a finding of fact as to whether and when, on the balance of probabilities and having regard to the burden of proof, notice of the Review Decision was duly given by HMRC in compliance with s 83F VATA, the Decision fails to have regard to the relevant and essential consideration of the length of any delay.
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> (2) By failing to make a finding of fact, on the balance of probabilities, as to the reasons for the delay (so far as there was any delay beyond the time limit for appealing), the Decision also fails to have regard to the relevant

consideration of the reasons for delay. It is relevant whether the reason the appeal was not brought in 2011/2012 was because of an oversight by Websons or its representatives or because of a failure to receive notice (whether duly given or not) of the outcome of the Review Decision.

(3) By finding that any delay in making an appeal has not delayed the determination of the appeal and, more generally, had no real impact on the appeal, the Decision mishandles and trivialises the relevance of delay.

(4) By finding that any delay caused no prejudice to HMRC because it has not made it more difficult or expensive for HMRC to defend the appeal, the FTT Decision applied an excessively narrow conception of prejudice thereby failing to take into account relevant considerations. The FTT should have taken into account the fact that having to defend an unanticipated appeal more than six and a half years after the event will cause prejudice to HMRC due to the staleness of the evidence. Leaving aside the substance of the appeal, such a length of delay has caused prejudice to HMRC because proving due notice and receipt of the Review Decision after such a long lapse of time is more difficult, due to staleness of evidence, than it would have been closer to the time of the Review Decision. More generally, and as explained at (5) below, HMRC suffers prejudice from the delay by reason of the lack of finality and certainty in relation to the sums of VAT at stake.

(5) By failing generally to pay any or any sufficient regard to the relevance of the purpose of the time limit imposed by s 83G of VATA, being the desirability of matters regarding the incidence of VAT not being reopened after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled.

Discussion

Errors of law in the Decision

51. We accept that the FTT made an error of law in failing to make any findings of fact as regards Websons' contention that it had not been notified of the Review Decision. As our discussion of the relevant law illustrates, the FTT should not have proceeded on the assumption that the appeal was out of time without having established whether or not that was the case. The FTT gave no consideration to the relevant statutory provisions which establish when time starts to run for the notifying of an appeal in respect of a review decision and therefore clearly did not have those provisions in mind when making the Decision.

52. To be fair to the FTT, it does not appear that it received much assistance in terms of relevant evidence that would enable it to make comprehensive findings of fact on that issue. It does not appear that there was any witness evidence. That is not unusual in a case where it is common ground that the appeal has been notified out of time and the only question to be determined is whether, having applied the three stage

set out in *Martland*, it is in the interests of justice that the appeal be admitted out of time.

53. This, however, was not such a case. The FTT would clearly have benefited from witness evidence from HMRC to support its assertion in its notice of objection referred to at [20] above that its records showed that the Review Decision had been sent to Websons. Likewise, witness evidence from both Websons and its representatives as to the procedures for receiving post and how it was dealt with at the relevant time would have been helpful. Had the FTT identified that it was incumbent on it to determine the question as to whether the Review Decision had in fact been notified to Websons at (or around) the time at which it was made, the FTT could have made directions for the filing of evidence that could have assisted it in determining that issue.

54. If, having applied to the facts that it found the relevant statutory provisions which we have referred to above, the FTT had concluded that on the balance of probabilities the Review Decision had not been notified to Websons before 2018 then that would be the end of the matter: the appeal would not have been made out of time and could be admitted.

55. It follows that it was only if the FTT had made a finding that the appeal had been made out of time that it could properly consider, applying the *Martland* principles, whether the appeal should be admitted.

56. The FTT's finding that it did not matter whether or not the appeal had been filed out of time led it to make other errors. As HMRC submitted, the FTT proceeded on the basis that because it had found that if the appeal were admitted it would be stayed behind a lead case, there would be no delay to the hearing of the case and no prejudice to HMRC because it would be no more difficult or expensive for HMRC to defend the appeal. In our view, by determining the question solely on the basis of those findings, the FTT failed to give any weight to the need for litigation to be conducted efficiently and did not give any weight as to the reasons for the delay, in respect of which it made no findings of fact.

Whether to remake the Decision or remit the matter

57. As the errors which we have identified in the Decision are material, we should exercise our power under s12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") to set aside the Decision. That leaves the question as to whether we should either remake the Decision or remit the matter to the FTT pursuant to our powers in s12 (2) (b) TCEA.

58. As we have indicated above, the evidence before the FTT, as reflected in the hearing bundle provided to us, is extremely limited. As we have explained, neither party adduced evidence to support their respective assertions, that is by Websons on the one hand that the Review Decision was never received and by HMRC, on the other hand, that its records demonstrated that the letter containing the Review Decision was posted to Websons. HMRC made no assertion as to whether or not the

letter was sent to Websons' representative, who, the correspondence shows, was duly authorised to communicate with HMRC a few days before the Review Decision was made.

59. We have therefore concluded that in the circumstances, we cannot properly do justice between the parties were we to seek to determine the matter solely on the basis of the written material before us. Neither would the FTT be in any better position were the matter to be remitted to the FTT for a fresh decision to be made on the basis of that material.

60. We have therefore concluded that we should remit the matter to the FTT. Whilst it may be the case, as HMRC submit, that the fresh hearing required may take longer than usual to arrange because of the effects of the Covid 19 pandemic we do not think that factor should influence our decision in circumstances where in our view remitting the matter to the FTT is the only correct course to adopt in order to do justice between the parties.

61. Furthermore, it appears to us that this is one of those rare cases where it would be appropriate for the FTT to be able to conduct the fresh hearing on the basis not only of the evidence that was originally before it but also on the basis of such further evidence that the parties may wish to adduce in relation to the particular issues in respect of which the FTT should have made (but did not make) findings of fact. Those matters are:

(1) Whether the Review Decision was sent to and/or received by either Websons or its representative; and

(2) If the Review Decision was received by Websons or its representative, the reason for the delay in filing the notice of appeal.

62. In addition, in its written submissions to us HMRC made assertions as to their being prejudiced if the appeal was admitted out of time because they relied on the statutory time limits for bringing proceedings to estimate and predict the potential revenue and expenditure implications of such litigation. They submit that the process of risk estimation and management of mass litigation would be undermined if it were the case that traders could potentially bring proceedings after the expiry of the statutory time limits, irrespective of the length of delay or the reasons for it.

63. As Websons pointed out in their submissions, there was no evidence before the FTT in respect of those matters, in particular, as regards the potential revenue at stake in the mass litigation and it does not appear that this point was argued before the FTT.

64. However, since we have decided that the FTT should be permitted to make directions as regards further evidence in relation to the other matters identified above, in our view it should also be permitted to make directions allowing HMRC to adduce evidence on this point.

Disposition

65. The appeal is allowed.

66. We set aside the Decision and remit the case to the FTT for its reconsideration. In accordance with s 12 (3) TCEA we direct that:

(1) the members of the FTT who are chosen to reconsider the case are not to be the same as those who made the Decision; and

(2) in reconsidering the case, the FTT may make directions so as to permit further evidence to be provided by the parties in respect of the matters referred to at [61] to [64] above.

JUDGE TIMOTHY HERRINGTON **JUDGE ANDREW SCOTT**

UPPER TRIBUNAL JUDGES
RELEASE DATE: 12 May 2020