[2012] UKFTT 87 (TC)

TC01783

Appeal number: TC/2011/06566

Amendments to self-assessment returns for 2000-01, 2001-01 and 2002-03 – closure notices – appeal against closure notices – review offered but no response received – appeal deemed determined – Appellant seeking permission of Tribunal to make a late appeal – balancing exercise in the light of the overriding objective - balance clearly in favour of HMRC - permission to appeal refused

FIRST-TIER TRIBUNAL

TAX

DONALD PORTER **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)
DAVID E WILLIAMS (TRIBUNAL MEMBER)

Sitting in public at Portal House, Southway, Colchester on 16 January 2012

Stuart Foster of Quantic Accountants, for the Appellant

Chris Wise of HM Revenue and Customs Appeals and Reviews Unit, for the Respondents

DECISION

1. This is Mr Porter's Application for permission to appeal out of time in relation to HMRC's amendment of his tax liability for the years 2000-01, 2001-02 and 2002-03.

2. The Tribunal decided to dismiss his Application.

The statutory framework

3. In this case an appeal was made to HMRC on 3 January 2008. This predated the introduction of the HMRC review procedures, and before the First-tier Tribunal replaced the General and Special Commissioners. Both changes came into effect on 1 April 2009.

4. However, by 1 April 2009 neither party had served notice on either the General or Special Commissioners for the case to be heard. It thus did not constitute "current proceedings" as defined by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, Sch 3 para 1.

5. As a result, the new statutory provisions relating to review procedures apply. So far as relevant to this Decision, these are set out in full in the Appendix. They can be summarised as follows:

(1) If notice of appeal has been given to HMRC, HMRC may offer to review the matter in question (s 49A Taxes Management Act 1970 ["TMA"])

(2) If HMRC offer a review to a taxpayer, he has 30 days from that offer to either accept it, or appeal to the Tribunal (s 49C TMA)

(3) If he does not respond, the appeal is deemed to be determined under s 54 TMA.

(4) However, the taxpayer may make a late appeal to the Tribunal, if the Tribunal gives permission (s 49H(3) TMA).

Brief outline

6. Mr Porter was assessed to tax for the three years 2000-01, 2001-02 and 2002-03 ("the relevant years"). The assessment followed an enquiry into the tax affairs of his employer.

7. The employer settled with HMRC in 2007, and HMRC subsequently raised assessments on Mr Porter, relating in particular to the benefit arising from the occupation of residential property in the UK which was provided for him by his employer.

8. A closure notice was issued on 10 December 2007; this was appealed on Mr Porter's behalf by his agent, Mr Halfhide of Quantic Accountants, on 3 January 2008.

9. Mr Halfhide did not submit any evidence to HMRC in support of the appeal, despite extensive prompting by HMRC.

10. On 18 June 2009 HMRC confirmed the decision and on 20 August 2009 they offered a review. No reply was received and so the appeal was deemed to be determined under s 54 TMA in accordance with s 49C(4) TMA.

11. At some point before 21 April 2010, HMRC initiated recovery action to collect the outstanding amounts from Mr Porter. On 21 April 2010 Mr Halfhide sought to re-open the appeal.

12. On 24 May 2010, HMRC refused Mr Halfhide's request and on 19 August 2011, Mr Porter appealed to the Tribunal, asking for permission to make a late appeal.

The evidence

13. The Tribunal was provided with Mr Porter's Notice of Appeal to the Tribunal.

14. HMRC provided the Tribunal with a bundle containing the correspondence between the parties and HMRC's notes of telephone conversations with Mr Porter and Mr Halfhide.

15. HMRC also provided:

(1) two Experian reports dated 22 December 2011 headed "Citizen view", one for Mr Donald Porter at 2, Mount Pleasant, Elm Corner, Ockham and one for Mr Donald Porter at 19, Green Lane, Cobham; and

(2) a Google Map showing the location of 19 Green Lane and 2, Mount Pleasant.

16. Mr Porter gave oral evidence and was cross-examined by Mr Wise.

17. Mr Foster provided the Tribunal and HMRC with a rental agreement for a "dwelling unit" known as "Fosters, 25 Blackhills, Esher, Surrey". The parties were HLW International LLP ("the Landlord") and Blackhills Investment Group of Thames Ditton, Surrey ("the Tenant"). The agreement was undated and has not been signed by the Landlord. Under the heading "name of tenant" at the end of the agreement is written "Donald Porter" together with his signature: this has been witnessed by Kate Mason of Cowper Street, London. That signature and that of Ms Mason are not dated.

18. Mr Foster had brought with him to the Tribunal copies of Mr Porter's US tax returns and asked that these documents should be accepted by the Tribunal as evidence in support of his case. We decided that the detailed content of the returns was not relevant to the issue which this Tribunal had to decide, although it might be material to the substantive issues were Mr Porter to succeed in his Application to make a late appeal. As set out below, we accepted Mr Foster's oral evidence that US tax returns had been submitted covering the relevant years.

19. Mr Foster gave evidence about the retirement of Mr Halfhide and his own purchase of Quantic Accountants.

The facts

20. From the evidence provided to the Tribunal, we find the following facts.

21. During the relevant years, Mr Porter was a director of HLW International Limited ("HLWI"), a UK company. Its parent company was HLW LLP, based in New York. Mr Porter was also a partner in the LLP.

22. At some point before December 2003, HMRC opened enquires into HLWI, and also into Mr Porter's self-assessment ("SA") returns for the relevant years. Mr Halfhide acted as agent for both HLWI and Mr Porter.

23. In answer to a question from the Tribunal, Mr Porter confirmed that he was UK resident for the relevant years. The Tribunal accepted Mr Foster's oral evidence, without sight of the detailed US tax returns, that Mr Porter had also filed US tax returns covering the relevant years.

24. In December 2003 Mr Porter ceased to be a director of the UK company, and ceased to be a partner in the LLP.

25. At some point before March 2008, Mr Porter moved to 19, Green Lane, Cobham.

26. On 21 February 2007, Mr Halfhide (acting for HLWI) met HMRC to discuss HMRC's proposed amendments to HLWI's returns and a settlement was reached between HMRC and HLWI. Mr Porter was not present.

27. On 27 February 2007, Mr Collins of HMRC wrote to Mr Halfhide, setting out the proposed amendments to Mr Porter's assessments, and enclosing computations in relation to each of the relevant years.

28. On 20 March 2007, Mr Porter called HMRC and spoke to Mr Anthony Smith. HMRC's telephone note of this call, which Mr Porter did not challenge before the Tribunal, is as follows:

> "The above named called with regard to the current ongoing enquiry. He has yet to hear [sic] from the agent acting following on from the meeting of 21 February 2007. I advised him that correspondence dated 27 February 2007 was issued to the agent with computations in respect of the above personal liability tax position. At the meeting it was agreed that the agent would approach the above to discuss the computations.
>
> Porter will approach the agent regarding the computations. If he is not in agreement with the figures he advises will approach us direct."

29. On 10 May 2007, Mr O'Connor wrote to Mr Halfhide, referring to the fact that Mr Porter had called on 20 March 2007, and saying that he would "consider closure notices and penalty action if I do not hear from you by 11 June 2007."

30. On 4 December 2007 and 10 December 2007, HMRC called Mr Halfhide's office and left messages for him to call back. These calls were not returned.

31. On 10 December 2007 HMRC issued closure notices and assessed Mr Porter to further tax as follows:

(1) 2000-01: £17, 958.18;

(2) 2001-02: £25, 281.13

(3) 2002-03: £34,730.70

32. On 3 January 2008 Mr Halfhide appealed the amendments to Mr Porter's SA returns. He said:

> "The grounds for the appeal are that the assessments to benefits in kind and salary are incorrect. Mr Porter has written evidence, which he has supplied to us, that the payments of rent and other amounts were in respect of an agreement made between Mr Porter, as a partner of HLW International LLP, a firm based in New York, and his partners. They therefore should not be taxed under PAYE as they were not paid as the remuneration for his Directorship of HLW International Ltd in the UK.
>
> Furthermore, Mr Porter has already accounted for any such amounts brought into the UK on his UK tax returns. Mr Porter was, throughout the period, non-UK domiciled and has, where relevant, accounted for amounts brought in under the remittance basis.
>
> As has been advised to Mr Connor some time ago, for part of the time, no remittance needed to be declared as Mr Porter was treated as a resident of the USA under the double tax treaty and the tax returns have claimed the appropriate relief.
>
> We are aware that an agreement has been reached with HLW International Ltd that PAYE tax should be paid on certain amounts but Mr Porter was not party to that agreement and believes that the conclusion is wrong in law.
>
> We will provide you with documentary evidence as soon as we recover one further piece of information, this being the rental agreement between HLW LLP and the UK landlord for Mr Porter's house. This agreement is currently in the archive store of HLW International Ltd and will be recovered as soon as possible."

33. On 22 January 2008, Mrs Quinn of HMRC acknowledged receipt of the appeals and stood over the tax. She said

> "I would be grateful if you would now let me have the information to which you refer in support of your client's appeals. Alternatively, please let me know when you expect to be able to provide me with the documents and evidence to which you refer."

34. Around March 2008 Mr Porter moved from 19 Green Lane, Cobham to Mount Pleasant, Ockham, Surrey. This is around five miles from the Green Lane property. In answer to questions from Mr Wise, Mr Porter said he informed Mr Halfhide of his new address, but did not inform HMRC.

35. Mr Porter told the Tribunal that he put a postal re-direct in place from 19 Green Lane but that his household was not "the world's most organised. The mail was put in numerous places when I am not there." He said he remained the owner of 19 Green Lane and that after he moved out it was tenanted for a period.

36. On 7 March 2008 Mr Giannasi of HMRC called Mr Halfhide, who returned his call the same day. The file note records:

> "[Mr Halfhide] said that Porter was currently in Qatar and that he had not been able to get him to provide the documents required to settle the appeal. He had not been given an estimated date of Porter's arrival in the UK and asked if I could extend the time required for the documents to be provided.
>
> I looked back in the file and said that nothing constructive had been received from Quantic Accountants to settle the enquiry for a considerable period of time. John O'Connor had written to them in May 2007 with figures and proposals and nothing had been received in reply.
>
> GH [Mr Halfhide] agreed that this was not good enough and said he would try Porter on his mobile to see if he could get the required documents...
>
> GH understood that if the documents were not provided then appeal proceedings would have to commence. He asked if he could be given a further two weeks to track down Porter and get a date when the additional information could be provided.
>
> CG [Mr Giannasi] said that he would expect GH to contact him by the 20 March 2008..."

37. On 8 April 2008 Mr Giannasi called Mr Porter. Mr Porter apologised for the delay which he said was due to "pressure of work." The note of telephone conversation records that

> "DP and GH had been unable to obtain the rental agreement between HLW LLP and the UK landlord from the company. They had also tried the landlord without success. He would however be responding to HMRC soon."

38. The call ended with Mr Halfhide promising to call HMRC on 14 April 2008 "to confirm letter and documents had been sent."

39. Mr Giannasi called and left messages for Mr Halfhide on 1 May 2008, 2 May 2008, 6 May 2008 and on one further date in May 2008 (the figure in the HMRC notes cannot be read clearly). On the last two occasions, Mr Halfhide's secretary confirmed that Mr Halfhide would return Mr Giannasi's call.

40. On 19 June 2008, Mrs Quinn of HMRC wrote to Mr Porter saying she was "making arrangements to have the outstanding appeals heard before the appropriate body of General Commissioners" as she had not received the documents which had been promised. The letter was sent to 19 Green Lane, Cobham, Surrey. A copy was sent to Mr Halfhide.

41. On 21 July 2008 Mr Halfhide sent a fax to Mrs Quinn, saying:

> "I had been having extreme difficulty in contacting my client, Mr Porter but now I know why. He fell of his roof in February, broke several ribs and punctured his lung in five places. He then contracted pneumonia and was seriously ill for several months.
>
> I have now re-established contact, have met with him and have obtained further documents such as signed lease agreements, copy internal memos etc and should now be able to provide you with detailed information to support my appeal."

42. There was a further exchange of letters about the documentation in July 2008. HMRC called Mr Halfhide and left messages on 12 August 2008 and on 13 September 2008. On both occasions HMRC was told that Mr Halfhide would return the call.

43. On 5 September 2008 Mr Giannasi called Mr Halfhide who said that he "was still having trouble obtaining all the information required." Mr Giannasi said that if this was not received by 18 September he would call Mr Halfhide.

44. On 18 September 2008, Mr Giannasi called Mr Halfhide. He was told that "Mr Halfhide was tied up at the moment" but would call him back.

45. In 2009 Mr Porter moved to the Middle East. In answer to questions from the Tribunal he said that he went alone, leaving his family in the UK, and that he communicated with his family via telephone, email and Facebook.

46. In answer to further questions from the Tribunal, Mr Porter said that:

(1) his employer in Dubai provided him with an email address;

(2) when he left the UK he told Mr Halfhide he was going to Dubai and discussed the tax effects of the move; and

(3) after he left, Mr Halfhide filed Mr Porter's UK tax returns each year.

47. Under cross-examination from Mr Wise, Mr Porter accepted that when he moved abroad he was aware that his tax affairs were under enquiry and he had received the revised assessments which had been sent to him in 2007.

48. On 18 June 2009, Mr Connor wrote to Mr Halfhide, referring to the closure notices, confirming the amendments, and concluding "you now have 30 days to accept the review decisions of [sic] seek referral to the Tribunal." The letter was copied to Mr Porter, and sent to 19 Green Lane, Cobham.

49. On 20 August 2009 Mr Chaudry of HMRC wrote to Mr Porter at 19 Green Lane, saying:

> "In his letter of 18 June 2009 my colleague, John O'Connor, did not make you aware of the fact that under the provisions of recently enacted legislation, you are also entitled to ask for the decision made by him, and outlined in his aforementioned letter, to be reviewed

> Derails of the review procedures and a form which you can use to request the review, if you so wish, are attached to this letter.
>
> In the circumstances I will allow a further 30 days to give you the opportunity to either:
>
> - Ask to have the decision made by John O'Connor reviewed, or
> - Notify your appeal to an independent tribunal.
>
> As stated in the final paragraph of the attached document...if i do not hear from you, or if you do not notify your appeal to the Tribunal your appeal will be treated as settled by agreement."

50. On 5 November 2009, Mrs Lenagan of HMRC wrote to Mr Halfhide, saying:

> "as no request for a review has been received, nor has an appeal been notified to the tribunal, you clients appeals against the closure notices are now settled by agreement under s54 TMA 1970...Please note that any amounts that have been postponed will now be released for collection."

51. At some point before 21 April 2010, HMRC initiated recovery action to collect the outstanding amounts from Mr Porter.

52. On 21 April 2010, Mr Halfhide wrote to HMRC asking them to re-open the appeals, saying:

> "it has been extremely difficult to contact Mr Porter, our client as he has been working out of the country in the Middle East and we had neither email nor postal contact details. Temporarily, when we last contacted you, we did have an e-mail address for Mr Porter but that then failed. Mr Porter has now contacted us again and provided us with appropriate contact details."

53. In the same letter, Mr Halfhide asked HMRC to "hold collection of these amounts pending your decision on whether to allow a review of the case or not."

54. On 24 May 2010, HMRC refused to reopen the assessments.

55. At some point in 2011, Mr Foster purchased the accountancy practice from Mr Halfhide. Mr Halfhide went into retirement. Until that point Mr Porter's appeal had been handled by Mr Halfhide and Mr Foster had not been involved with it.

56. On 19 August 2011, Mr Porter appealed to the Tribunal. The Notice of Appeal asked the Tribunal to grant permission for a late appeal.

Submissions by or on behalf of Mr Porter

57. The following submissions were made on behalf of Mr Porter by Mr Foster:

(1) Mr Porter did not receive any copies of letters sent by HMRC to 19 Green Lane, Cobham as he was not living at that address and the letters were not forwarded to him.

(2) Mr Porter has lived in "various Middle Eastern places" and currently lives in Cairo.

(3) During the years when Mr Porter was overseas, Mr Halfhide was unable to contact Mr Porter and so could not take instructions from him or obtain the supporting evidence necessary to proceed with his appeals.

(4) Quantic Accountants have now been able to assemble the evidence and Mr Porter should be given an opportunity to challenge the assessments.

58. In relation to the tax included in the assessment, Mr Foster submitted that at the time the 2007 agreement was made between HLWI and HMRC, Mr Porter was no longer a partner of the LLP or a director of the UK company, and so was unable to argue his side of the case. He had subsequently "never been given an opportunity to provide evidence that he had not received the sums in question." Furthermore, the US filings were evidence that Mr Porter had declared his income in the US.

59. In the letter dated 21 April 2010, Mr Halfhide states that:

> "Mr Porter is adamant that he never received the salaries on which he has bene assessed, and all payments were made to his US partnership; all he ever received are his partnership profit shares under the partnership agreement."

60. Mr Porter made the following submissions on his own behalf:

(1) He had been advised before the 21 February 2007 meeting that it did not affect his own affairs and his attendance was not therefore required.

(2) Mr Halfhide was also engaged by HLWI and so had a conflict of interest. He said he "should have fired him a long time before."

(3) He had emailed Mr Halfhide a copy of the lease and left it up to Mr Halfhide to deal with it. In answer to a question from the Tribunal, he said he did not have a copy of the email which he sent to Mr Halfhide with that lease.

(4) There was a second lease of another property which was relevant to the tax assessments; he had asked his former employer for this lease but they had refused to provide it.

(5) When he left for Dubai, he says Mr Halfhide told him that he would be informed "if anything turns up, but [he] never heard from him." The Tribunal asked if he followed up with Mr Halfhide, and Mr Porter said that he "eventually" he got a letter and he called Mr Halfhide and asked him what was going on. He was unable to recall whether the letter was from Mr Halfhide or from HMRC, or when this exchange took place.

61. In answers to further questions from the Tribunal, Mr Porter said:

(1) he had assumed Mr Halfhide would tell HMRC that he had moved from 19 Green Lane; he didn't think it was his responsibility;

(2) that "if Mr Halfhide had pursued matters, he might have got in touch [with him] via his family";

(3) he didn't provide Mr Halfhide with his address in Dubai;

(4) he didn't give Mr Halfhide his new email address in Dubai and his old email address had expired; although he did provide an email address to Mr Halfhide "eventually", he didn't recall when he did provide it.

HMRC's submissions

62. Mr Wise submitted that no technical arguments had ever been submitted to HMRC explaining why Mr Porter disputed the assessments made for the relevant years.

63. The appeals should not be re-opened because Mr Porter had had ample time and opportunity to put forward his arguments, and had not done so. In particular he said that:

(1) Mr Porter was personally fully aware of the enquiry; this is clear from the note of telephone conversation dated 20 March 2007 and from Mr Porter's evidence given under cross-examination, that he had received the closure notice letter.

(2) If he moved house it was Mr Porter's responsibility to inform HMRC of his new address.

(3) He invited the Tribunal to "look critically" at Mr Porter's claims that he did not receive HMRC's correspondence in relation to the enquiry, which was sent to Green Lane. He said that:

(a) Mr Porter's own evidence under cross-examination shows that he received some post from Green Lane, and no post had been returned to HMRC undelivered.

(b) When Mr Porter moved to Mount Pleasant, the Green Lane property continued to be owned by him, and it was only five miles away from his new property, as shown by the Google map.

(4) He said that all correspondence was also sent to Mr Halfhide. If it was true that Mr Halfhide was unable to make contact with Mr Porter because Mr Porter had not provided contact details (which he doubted), then this was negligent of Mr Porter.

(5) HMRC had tried on numerous occasions to invite settlement, but they had been ignored.

64. He submitted the only reason Mr Porter was now seeking to reopen the appeals was because HMRC had initiated recovery action.

65. He added that in addition to all the earlier prevarications, Mr Porter has waited a full year and three months after HMRC's decision not to re-open the appeals, before making an appeal to the Tribunal.

66. He also said that Mr Porter had not established to the satisfaction of HMRC that he had in fact been out of the country for the whole period since 2009. He drew attention in particular to Mr Porter's inclusion on the electoral roll (referred to in the Experian documents), which gives his address as Mount Pleasant.

67. In conclusion, he asked the Tribunal to refuse permission for a late appeal as the conditions for re-opening an appeal had not been established.

Discussion of the law

68. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") requires cases to be dealt with fairly and justly in all the circumstances.

69. Rule 20(4) allows the Tribunal to apply Rule 5(3)(a) to permit an extension of time for the filing of an appeal. In considering whether to extend a time limit, the Tribunal is required to seek to give effect to the overriding objective set out in Rule 2.

70. Guidance on when and whether to allow a late appeal was given in in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 where Lord Drummond Young said:

> [23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s 49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay....A third issue is the policy that it is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible and may of itself provide a reason for refusing leave to appeal late.
>
> [24] Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed, in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one another, for example in a case where there is a reasonable

> excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies."

71. In *Marijus Leliunga v Revenue and Customs Commissioners* [2010] UKFTT 229 (TC), the Tribunal held that, given the correlation between the overriding objective as expressed in the Tribunal Rules with that in Rule 1.1 of the Civil Procedure Rules (CPR), the provisions of Rule 3.9(1) of the CPR provide useful assistance when considering the exercise of our discretion. We agree.

72. Rule 3.9(1) provides as follows:

> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
>
> (a) the interests of the administration of justice;
>
> (b) whether the application for relief has been made promptly;
>
> (c) whether the failure to comply was intentional;
>
> (d) whether there is a good explanation for the failure;
>
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
>
> (f) whether the failure to comply was caused by the party or his legal representative;
>
> (g) whether the trial date or the likely trial date can still be met if relief is granted;
>
> (h) the effect which the failure to comply had on each party; an
>
> (i) the effect which the granting of relief would have on each party.

73. In *R (oao Cook) v General Commissioners of Income Tax and another* [2007] STC 499, it was held that one of the factors to be taken into account is the merits of the Appellant's case.

74. The Tribunal must therefore conduct a balancing exercise, considering inter alia the reason for delay, and in particular whether it was intentional; how long the delay has lasted; the effect on either party if permission is allowed or refused and the merits of the case.

75. We begin by looking at the extent of the delay and the reasons put forward for this delay.

The delay in notifying the appeal

76. Mr Porter was required, by s 49C(4) TMA, either to accept the review offered by HMRC in their letter of 20 August 2009 within 30 days, or to appeal to this Tribunal.

77. Mr Porter made an Application for a late appeal to this Tribunal on 19 August 2011, a delay of exactly two years.

78. This period can be divided into two: the nine month period from 20 August 2009 to 21 April 2010, when Mr Halfhide wrote to HMRC asking them to reopen the appeals, and the subsequent period of one year and three months.

The delay from 20 August 2009 to 21 April 2010

79. In his letter of 21 April 2010, Mr Halfhide explained this delay as being because

> "it has been extremely difficult to contact Mr Porter, our client as he has been working out of the country in the Middle East and we had neither email nor postal contact details."

80. We first consider Mr Porter's overseas work. We accept that he was working overseas. But his family remained in the UK. He owned two properties here. He continued to be on the electoral roll. When Mr Wise submitted that Mr Porter had not been out of the UK for the whole period since 2009, Mr Porter did not rebut this statement.

81. We thus find as a fact that Mr Porter, although living and working overseas in this period, visited the UK from time to time. We also find, on the balance of probabilities, that he visited the UK at some point in the nine month period between 20 August 2009 to 21 April 2010.

82. Second, we consider the assertion that Mr Halfhide was unable to contact Mr Porter by email or post.

83. We do not accept that this was the case. Mr Porter has given evidence to us that Mr Halfhide completed his UK tax returns each year: for this to happen, there must have been communication between them.

84. We found the evidence provided on the lack of emails and/or email contact confusing and contradictory. There is no doubt that Mr Porter had an email address during this period. His evidence is that he did not originally provide Mr Halfhide with his email address after he left the country, but did do so "eventually".

85. However, Mr Halfhide's letter of 21 April 2010 states "Temporarily, when we last contacted you, we did have an e-mail address for Mr Porter but that then failed."

86. We are thus asked to believe, by Mr Porter, that he initially did not provide an email address for Mr Porter, but did so later on; and by Mr Halfhide, that he had one initially, but that this email then failed.

87. On the balance of probabilities, we find that Mr Halfhide was informed of Mr Porter's email address throughout this period.

88. Mr Porter puts forward a further reason for this delay: he blames Mr Halfhide. He says he "never heard from him"; that Mr Halfhide had a conflict of interest, and that Mr Porter sent the lease to Mr Halfhide and left it for Mr Halfhide to deal with HMRC.

89. We do not accept that Mr Porter can shelter behind Mr Halfhide's failure to deal with the matter, for the following reasons:

(1) The statutory obligation for complying with the deadline rested with Mr Porter, and it is his responsibility to remain in contact with his appointed agent. If he is not satisfied with his agent (for instance, because of a conflict of interest) the onus was on him to appoint a new agent.

(2) Mr Porter has stated in evidence that it was he who did not provide Mr Halfhide with his contact details. If this were true, the blame must lie entirely with Mr Porter. However, as discussed above, we have found that Mr Halfhide and Mr Porter were able to contact each other during this period.

(3) On the specific question of the lease document, Mr Porter's evidence as to when he communicated with Mr Halfhide on this issue was vague and unclear;

90. In summary, we find that the three reasons given for delay – Mr Porter's absence overseas, the alleged lack of communication between him and Mr Halfhide, and Mr Porter's criticisms of Mr Halfhide's behaviour – are of little or no weight.

The delay in the period from 21 April 2010 to 19 August 2011

91. On 24 May 2010, around a month after HMRC had received the letter from Mr Halfhide asking for the appeals to be re-opened, HMRC wrote back, refusing to reopen the appeals.

92. Mr Halfhide's letter of 21 April 2010 states that "Mr Porter has now contacted us again and provided us with appropriate contact details."

93. The Tribunal was provided with no reasons for the significant delay between HMRC's letter of 24 May 2010 and Mr Porter's appeal to the Tribunal over a year later.

Conclusion on delay

94. We thus find that there was no good explanation for the long delay in making this Application to the Tribunal; that primary responsibility for the delay rests with Mr Porter and not Mr Halfhide and that the evidence discloses no good reason for not observing the statutory time limit.

95. The fact that no reason at all has been given for the delay of over a year between 24 May 2010 and the Application to the Tribunal further weakens Mr Porter's case.

The earlier period

96. We are required to consider "all the circumstances." One factor relevant to our considerations is the previous history of delay.

97. In his letter dated 3 January 2008, Mr Halfhide promised that he would send HMRC certain further information in support of the appeal, in particular the rental agreement between HLWI and Mr Porter's landlord. This would be provided "as soon as possible."

98. Between the date of that letter and 21 July 2008, HMRC made eight separate attempts to contact Mr Halfhide in order to obtain the promised information.

(1) On four occasions HMRC left messages either on Mr Halfhide's answering machine or with his secretary. On both of the latter occasions, the secretary said that Mr Halfhide would return the call at a particular time, but he failed to do so.

(2) HMRC twice succeeded in speaking to Mr Halfhide.

(a) On the first of these occasions, 7 March 2008 Mr Halfhide agreed that the failure to provide the information "was not good enough".

(b) The second occasion was 8 April 2008. Mr Halfhide agreed to call HMRC back on 14 April but failed to do so.

(3) HMRC also sent two letters dated 7 March 2008 and 19 June 2008.

99. By fax dated 21 July 2008 Mr Halfhide told HMRC that the reason for the delays was Mr Porter's accident in February 2008 and his subsequent illness. However, on 8 April 2008, when HMRC spoke to Mr Halfhide, he made no reference to any difficulties in contacting Mr Porter, but said the delays were due to "pressure of work."

100. In the same fax, Mr Halfhide said that he had now:

> "obtained further documents such as signed lease agreements, copy internal memos etc and should now be able to provide you with detailed information to support my appeal."

101. After receiving this fax, HMRC contacted Mr Halfhide five times. On three of these occasions, HMRC was promised that Mr Halfhide would call back, but he did not do so. On one occasion Mr Halfhide said he "was still having trouble obtaining all the information required".

102. In summary, during this lengthy period when HMRC were seeking to establish the grounds of Mr Porter's appeal, no information whatsoever was supplied to HMRC in support of the submissions made in the appeal, despite Mr Halfhide's statement that he was in possession of "further documents."

103. Specifically, the lease agreement for 2 Dorset Lodge was not provided to HMRC until this Tribunal hearing, more than three years after Mr Halfhide said that it was in his possession. No "copy internal memos etc" were provided at any time; HMRC was never provided with the second lease agreement. Mr Porter told the Tribunal he could

not obtain this from his former employer, although we note that Mr Halfhide's fax of 21 July 2008 stated that that he was in possession of "lease *agreements*".

104.In our judgment, this earlier pattern of delays, and the failure to respond to HMRC's repeated requests for the promised information, further weakens Mr Porter's Application to have his appeal re-opened.

Knowledge of the issues

105.Mr Foster submitted that Mr Porter has "never been given an opportunity to provide evidence that he has not received the sums in question."

106.The Tribunal has to deal with the case "fairly and justly" and we have considered whether there is unfairness here. We have found that there is not.

107.Mr Porter confirmed in cross-examination that he was aware of the HMRC enquiry, and that he had received the closure notice issued on 10 December 2007.

108.As is clear from the earlier parts of this Decision, Mr Porter had ample opportunity to provide evidence in support of his case to HMRC, whether in 2008, when he was still in the UK, or after he left in 2009, either directly or via his agent.

109.Mr Porter also seeks to rely on the fact that HMRC continued to use the Green Lane address, and that post delivered there was not received by him.

110.We find these submissions to be entirely without merit. The closure notice letter was sent to the Green Lane address before Mr Porter moved to Mount Pleasant and Mr Porter accepted that it had been received. It was Mr Porter's responsibility to inform HMRC of his change of address, and in any event we share HMRC's scepticism about the "lost post" argument. We note that the Green Lane property continued to be owned by Mr Porter, that it was a mere five miles from his other house in Mount Pleasant, and if, as he asserts, his household had a chaotic approach to dealing with post, such that letters might have been mislaid, he also had an agent who received all of HMRC's correspondence and with whom, as we have found above, he remained in contact.

The merits of the case

111.We also considered the merits of the case, recognising that the consequence of refusing Mr Porter's Application is that he will be denied the chance to argue his substantive case.

112.Before the Tribunal, Mr Porter said that he was seeking to argue that he has been overcharged to tax on employment earnings in the relevant years. The main issue in dispute is the treatment of his accommodation.

113.As we understand his case, HMRC have sought to tax his occupation of residential accommodation in the UK as a benefit in kind. His former employer has accepted that this was the position.

114.Mr Porter seeks to argue that the accommodation was leased by the US LLP and provided to him in his capacity as a partner; it was not provided "by reason of his employment" under s 83, Income Tax (Earnings and Pension Act) 2003.

115.Whether this is the case is essentially a question of fact, and depends on the evidence. Despite HMRC's many requests for supporting documentation, none was provided until the day of this hearing. Even the lease agreement provided to the Tribunal is deficient in a number of significant respects, as it is neither signed by the landlord, nor dated. The second lease agreement has not been provided at all and Mr Porter now says it cannot be located.

116.Thus, on the facts of the substantive case as it has been put to us, we find that it is unlikely that Mr Porter would succeed in displacing the assessments.

117.We note that the Notice of Appeal to the Tribunal set out the substantive case differently:

> "if permission is granted, further evidence will be supplied to support our contention, in our letter of 21 April 2010, that there is no link between the amounts Mr Porter received by way of drawings from his partnership in the US, HLP [sic] International LLP, and the amounts paid to that firm by way of management fees by HLW International Limited."

118.In fact the letter of 21 April 2010 does not refer explicitly to this assumed link between the drawings and the management fees:

> "Mr Porter is adamant that he never received the salaries on which he has bene assessed, and all payments were made to his US partnership; all he ever received are his partnership profit shares under the partnership agreement."

119.The Tribunal reads both these statements as being an appeal against an assessment to salary rather than to benefits. We are not in a position to assess the merits of such an appeal, given the paucity of information.

120.It is for Mr Porter to make his case, and he has failed to provide any further argument on this point, either to the Tribunal, when asked about the technical merits of his appeal, or to HMRC during the lengthy period during which the appeal remained open.

The prejudice to HMRC and the public interest

121.We find that there is prejudice to HMRC if this Application were to be allowed. Time limits exist is to give finality in legal proceedings, and to allow HMRC to move on to other tasks. They have already expended significant energy on this case, far more than many would consider reasonable in the circumstances.

122.If HMRC were now to have to defend a decision made in relation to assessments for 2000-1 through to 2002-3, they are likely to face significant evidential difficulties. They may wish to call witnesses from Mr Porter's employer, given that that company

has already agreed that Mr Porter's accommodation was provided "by reason of his employment."

123.Locating these witnesses is unlikely to be an easy task, a decade after the events in question. Even if such witness(es) could now be located, they would be required to give evidence about a situation which existed around ten years ago.

124.It seems to us that the words of Lord Drummond Young quoted earlier in this Decision are likely to be apposite:

> "If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible and may of itself provide a reason for refusing leave to appeal late."

125.More generally, time limits are set by Parliament and as a matter of public policy, should be respected. As Judge Brannan recently said in *Pytchley v R&C Commrs* [2011] UKFTT 277 (TC) at [23], permission to bring an appeal out of time should not be granted lightly.

Our decision

126.We have carefully considered the facts of this case and the submissions of the parties, and have conducted the balancing exercise required in this type of Application.

127.In our judgment, the balance overwhelmingly favours HMRC: as a result, it is not in the interests of justice to give permission to make a late appeal. The Application is dismissed.

128.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.

Anne Redston

TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 26/01/2012

EXTRACTS FROM THE STATUTORY PROVISIONS

TMA 1970, s 49A: Appeal: HMRC review or determination by tribunal

(1) This section applies if notice of appeal has been given to HMRC.

(2) In such a case—

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),

(b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or

(c) the appellant may notify the appeal to the tribunal (see section 49D)....

TMA 1970, s 49C: HMRC offer review

(1) Subsections (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.

(2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC's view of the matter in question.

(3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with section 49E.

(4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under section 54(1) for the settlement of the matter.

(5) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (4) applies.

(6) Subsection (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49H.

(7) ...

(8) In this section "acceptance period" means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question.

TMA 197049H : Notifying appeal to tribunal after review offered but not accepted

(1) This section applies if—

(a) HMRC have offered to review the matter in question (see section 49C), and

(b) the appellant has not accepted the offer.

(2) The appellant may notify the appeal to the tribunal within the acceptance period.

(3) But if the acceptance period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this section "acceptance period" has the same meaning as in section 49C

TMA 1970, s 54: Settling of appeals by agreement

(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the [tribunal]1, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the [tribunal]1 had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.

(2) Subsection (1) of this section shall not apply where, within thirty days from the date when the agreement was come to, the appellant gives notice in writing to the inspector or other proper officer of the Crown that he desires to repudiate or resile from the agreement.

(3) Where an agreement is not in writing—

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

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

(4) ...

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