TC02095

Appeal number: TC/2011/08337

Corporation tax – permission to make a late appeal in relation to the tax for the accounting period ending May 2003 – whether precluded by previous HMRC amendments – whether in the interests of justice to allow a late appeal – permission refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

CRISTEL LIMITED **Appellant**

- and -

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

TRIBUNAL: ANNE REDSTON (TRIBUNAL PRESIDING MEMBER)
DUNCAN MCBRIDE

Sitting in public at 30-31 Friar Street, Reading on 28 February 2011

Mr Robert McLeod FCA of RA McLeod & Co, Chartered Accountants for the Appellant

Mrs Karen Weare of HMRC's Appeals and Reviews Unit for the Respondents

DECISION

1. This was the application of Cristel Limited ("the company") that it should be allowed to make a late appeal against corporation tax of £7,883.11 charged for the year ended 31 May 2003.

The issues before the Tribunal.

2. Mrs Weare asked the Tribunal to consider whether the company was precluded from making a late appeal because of the wording of the legislation as it existed before corporate self assessment. We treat this as a preliminary issue.

3. If the company had a right to apply for permission to make a late appeal, the issue was whether the Tribunal agreed to give permission for that late appeal.

Preliminary issue[1]

4. As is apparent from the facts set out below, on 22 June 2006 HMRC amended the company's return to include £93,875 of "other income". On the following day they further amended the return to include an item previously identified as needing inclusion, but which had been accidentally omitted. The company was now seeking to appeal against the inclusion of the amount classified by HMRC as "other income".

5. In oral argument, Mrs Weare said that under Taxes Management Act 1970 ("TMA") s 34 as it existed before self-assessment, a company could only appeal an amendment to the company's return. She asked the Tribunal to consider whether the second HMRC amendment precluded the company making a late appeal against the first amendment. Mr McLeod submitted that the company had a right to make a late appeal.

6. It is clear to us that TMA s 34(3), as it was in 2006, allowed the taxpayer to appeal an amendment to the return. There is no reason why a taxpayer could not make a late appeal against the first amendment, or the second amendment, as long as the company was within the 30 day time limit prescribed by s 34(5). Where, as here, the taxpayer falls outside that time limit, then he must ask the Tribunal for permission to appeal under TMA s 49. This is the basis for the current Application and we have proceeded on that basis.

The evidence

7. The Tribunal was provided with the correspondence between the parties, the accounts and corporation tax ("CT") return of the company for 2003, 20 pages of

[1] The relevant statutory provisions are set out in the Appendix to this decision.

HMRC's notes in relation to the company covering the period from 22 August 2006 to 29 December 2011 and extracts from the company's nominal ledger for 2003.

8. Mr Telemachos Kyriacou ("Mr Kyriacou"), a director of the company, gave oral evidence under oath. He also provided the Tribunal with the signature pages for the company's accounts for 2003, 2004, 2005 and 2006.

The facts

9. From that evidence, we find the following facts. Further findings of fact are set out at paragraphs 67-69 below.

10. At the relevant time, the company was in business running a restaurant. Its year end was 31 May.

11. In September 2003, the company changed its accountants and instructed a new firm of chartered accountants[2] ("Firm 1").

12. On 20 March 2004 Mr E of Firm 1 submitted the company's accounts and CT return for the year ended 31 May 2003 to HMRC. They showed turnover of £726,647 and a trading loss of £60,716.

13. On 1 December 2004, Mr Burdon of HMRC opened an enquiry into the return. Questions were asked about five issues: rental charged; directors' loan accounts; closing stock value; other operating income and keyman insurance.

14. Correspondence was exchanged on these matters and Mr E agreed that both the keyman insurance and the rent should be disallowed.

15. By way of attachment to his letter dated 26 November 2005, he included nominal ledger sheets for the directors' loan account. These showed two credits, one of £78,000 and £15,875 (both dated 31 May 2003), together with four smaller amounts totalling £609.15. Mr E said that he "understands from the directors that the loans were cash introduced into the business to provide working capital."

16. By letter dated 13 December 2005, Mr Burdon said that "the amounts introduced of £78,000 and £15,875 are similar to the amounts described as 'other income' and 'service charges' in previous accounts." He asks Mr E for "documentation to confirm the source of these funds."

17. In the same letter Mr Burdon accepted the closing stock figure and agreed to further capital allowances. A colleague of Mr Burdon subsequently called Mr E on 24 February 2006. No reply was received to either the letter or the calls.

[2] Part of the company's case is that two firms of accountants were negligent. The identity of the accountants is not material to the decision in this case and the Tribunal considers that it is not in the interests of justice that they be named in this Decision Notice.

18. Mr Burdon sent a further letter dated 16 March 2006, saying:

> "an obvious answer to the issue of the lack of an entry for 'other operating income' is that the previous agent incorrectly entered the £78,000 and £15,875 as introduced by the directors when in fact these amounts were the proceeds described in earlier accounts as other operating income. In the absence of a full reply I will close my enquiry on the basis of the agreed points and that the £78,000 and £15,875 is income. A consequence of this is that it will amend the directors' loan accounts and a liability under s 419 ICTA will arise."

19. A copy of that letter was sent to the company secretary, N Kyriacou, together with a copy of the booklet COP14.

20. On 15 May 2006, Mr Burdon wrote to Mr E, closing the enquiry under FA 1998, Sch 18, para 32, and inviting the company to amend its return under para 34(1) to include adjustments for rent and other income (both of which had the effect of increasing taxable profits).

21. In the absence of an amended return from the company, on 22 June 2006 Mr Burden amended the return under para 34(2), and on 23 June re-amended the return to include the keyman insurance which he had previously overlooked.

22. By letter dated 24 June 2006, Mr E asked Mr Burden to correct the rental income for the three accounting periods preceding the 2002-03 year. By letter dated 16 September 2006, Mr Burden treated this letter as an appeal against the earlier periods, and accepted the rental deductions. As a result of the adjustments made to these earlier years, the directors' loan accounts were no longer overdrawn in the year ended 2003. Mr Burden therefore also accepted Mr E's letter as an appeal against the charge under Income and Corporation Taxes Act ("ICTA") s 419. The 2003 appeal was then determined under TMA s 54.

23. On 30 August 2006, a distraint letter for the outstanding 2003 corporation tax was issued to the offices of Firm 1.

24. On 12 September 2006, HMRC attempted to take distraint action but realised that the address they had was that of the accountants, so were unable to proceed.

25. By letter dated 16 September 2006, Mr E wrote to Mr Burden, saying:

> "the Collector is trying to collect £50,000 approx of corporation tax for the accounting period ending 31 May 2003....I am not quite sure how he reaches the conclusion there is tax to pay...the assessment...should be reduced to nil."

26. On 12 November 2006, Mr E wrote again, saying that the Collector was pursuing unpaid CT and asking "will you please clarify the reason for the adjustments."

27. By letter dated 23 November 2006, Mr Burden provided Mr E with a detailed explanation of the calculations which had led to the amended assessment. The letter

ends “the corporation tax for this AP is final and conclusive, as such the amount requested by the Collector is due...”

28. In April 2007, the company changed its agents and appointed Firm 2. On 12 April 2007 Firm 2 called HMRC and said they were unaware of the debt. HMRC agreed to delay any action for ten days.

29. On 3 July 2007, HMRC sent Firm 2 a copy of the letter dated 23 November 2006, and concluded “as you will notice, the assessment for the year ended 31 May 2003 is now considered to be final”.

30. On 15 June 2007, HMRC issued a distraint warning letter and sent it to 172 Northcote Road Battersea, SW11 6RE, which Mr Kyriacou confirmed to us, and we find as a fact, is the address of the restaurant.

31. On 29 June Firm 2 called HMRC and HMRC agreed to delay enforcement.

32. On 3 July HMRC sent copies of at least some of the correspondence to Firm 2.

33. By letter dated 17 July 2007, Firm 2 wrote back saying:

> “bearing in mind the inactivity of the previous accountants and the fact that Mr Kyriacou has not had sight of the letter as it was only addressed to the accountants, there is obviously a historic dispute. In the meantime we appreciate your statement that the assessment is now considered to be final but in view of the circumstances could we not attempt to clear any other points.”

34. HMRC replied on 24 July 2007, saying that they were happy to provide Firm 2 with copies of correspondence, assessment etc, but they couldn’t “enter into any discussions concerning your client’s liability for the year ended 31 May 2003.”

35. By letter of 31 July 2007, and a follow-up telephone conversation on 10 August 2007, Firm 2 confirmed that they were only seeking copies of correspondence.

36. On 13 August HMRC sent some further information to Firm 2.

37. On 16 August 2007, HMRC called Firm 2. Their contemporaneous record notes that the agent was “very vague claimed not to have received computation from HMI.”

38. On 29 November 2007, HMRC telephoned the company’s offices and asked for Mr Kyriacou. Their telephone notes record that “[Mr Kyriacou was] out all day today and tomorrow. Asked for another director. No-one else in.”

39. On 14 December 2007, Firm 2 called HMRC and said that the company had “no disposable assets” and the director was trying to raise personal finance. He asked if a Time to Pay (“TTP”) agreement could be considered. HMRC told Firm 2 that they were going to go ahead with collection and told Firm 2 to inform its client.

40. On 8 January 2008, HMRC received a letter from Firm 2 saying that Mr Kyriacou had booked a provisional appointment with the bank for the following week to discuss refinancing.

41. On 14 February 2008 HMRC called Firm 2 and was told by the agent that he thought the director had raised personal finance "but is not sure he will contact t/p and then recontact with an update."

42. On 27 February 2008, HMRC wrote to the company, enclosing a solicitor's letter and a Letter of Claim.

43. On 12 March 2008 HMRC received a letter from Firm 2 promising payment and asking for collection to be held for 30 days as the taxpayer was "raising finance".

44. On 8 July 2008 a County Court Proceedings ("CCP") letter was sent to the address of the restaurant at Battersea.

45. On 30 September 2008 a CCP claim form was sent to the company.

46. On 20 October 2008, Mr Kyriacou called HMRC. The call record says:

> "Tele call from tp director, Mr T Kyriacou, rang to say he has just rec. the claim pack but wants to respond to the claim, he will send it to his acc't & prob. put an admission in, agreed on 1 more week – to 27th to get his admission in, advised him to fax it here."

47. On 13 November 2008 the county court defence was received by HMRC. The HMRC record says "Defence states company would be grateful if the interest and penalties could be waived."

48. On 4 April 2009, the county court judgment was obtained.

49. On 28 May 2009, Mr Kyriacou called HMRC and spoke to a Mr Shuttleworth. The file note reads as follows:

> "Director called regarding a judgment that had been secured by the Collector for £10,894 (including costs) for the year ended 31 May 2003. He wanted to know if his accountant had been in touch with me. I explained I had not heard from him.
>
> He feels the company never made the profit assessed and wondered if there was anything that he could do about it. I explained I was not familiar with the case but the general impression given was that an assessment had been raised due to a failure to reply to correspondence. If this was the case and in view of the age of the assessment – nothing further could be done. However, if it can be shown that an error has been made, then this should be pointed out.
>
> His agent has copies of all correspondence and should have sufficient information to make a judgement. Meanwhile he will contact the collector of taxes to make payments by instalments."

50. On 17 March 2010, Firm 2 told HMRC that the business had been sold and the company was no longer trading. HMRC sent a "ceased company questionnaire" to Mr Kyriacou.

51. Mr Kyriacou confirmed to the Tribunal that the company was still active. It had sold the restaurant business to Bolingbroke, a public company, but had retained the lease from which the business operated.

52. Over the following months, HMRC made a series of calls to Firm 2, and also visited the restaurant premises. Most of the HMRC callers did not succeed in making contact with the agent; numerous messages were left.

53. On 13 May 2011 a message was left with Firm 2 saying that HMRC would take action to wind up the company.

54. On 2 September 2011 McLeod & Co were appointed as agents and wrote to HMRC's Debt Management Office saying that "it appears our client had liabilities going back to 2003 of which they were completely unaware" and asking HMRC to suspend action against the company.

55. On 30 September 2011 Mr McLeod wrote to HMRC asking them to re-open the 2003 year. HMRC refused and on 17 October 2011, this application was made to the Tribunal.

The company's submissions

56. The essence of the company's case is that Mr Kyriacou had been unaware of the amendment to the 2003 return until recently and had not been informed of the position either by Firm 1 or Firm 2, or directly by HMRC. Mr McLeod submitted that:

(1) Mr Kyriacou did not see any of the correspondence sent to Mr E.

(2) Mr Kyriacou subsequently reported "the negligence of Firm 1 to the Institute of Chartered Accountants in England and Wales for investigation".

(3) Firm 2 "seemed to ignore the debt."

(4) Mr Kyriacou was unaware of the enquiry into the company's 2003 return until May 2009 when he "did become aware of the debt being demanded but assumed it was incorrect and his accountants were dealing with it. They did not, and as with the previous accountants, acted in a negligent manner and our client is reporting the firm to its professional body."

(5) While all this was going on "HMRC made no contact directly with our client for about 7 years until the director received a winding up notice...our client has been unaware [that the debt] existed all this time. The agents failed to pass on to our client any of the tax demands, which were being sent to the registered office of the company."

57. Mr Kyriacou said in his oral evidence that he was "guilty of instructing not one but multiple bad advisers."

58. He also said that the signature on the 2003, 2004 and 2005 accounts was not in fact his signature although it purported to be his signature, and that he was kept "very much in the dark" by his accountants; the signature on the 2006 accounts was, however, his own.

59. Mr McLeod also submitted that the add back for other income was "a totally random figure, plucked out of the air, and not supported by any evidence."

60. In Reply, in answer to questions from the Tribunal as to the origin of the "other operating income," Mr McLeod said that he didn't know, but that at his office were "several boxes of records" and if the application is allowed he "will plough through and get to bottom of whole thing and thinks [he] can prove one way or the other what that figure came from."

Submissions on behalf of HMRC

61. Mrs Weare said on the evidence it was simply not the case that Mr Kyriacou was unaware of either the enquiry or the tax assessment and drew the Tribunal's attention in particular to the following:

(1) the distraint warning letter of 15 June 2007, sent to the restaurant;

(2) Firm 2's statements that Mr Kyriacou was attempting to raise finance and the firm's requests for a TTP agreement in the period December 2007 through to February 2008;

(3) the telephone call between Mr Kyriacou and HMRC on 20 October 2008 where he discusses his defence to the claim;

(4) the telephone call about the judgment which took place between Mr Kyriacou and HMRC on 28 May 2009.

62. She submitted that it was clear on the evidence that Mr Kyriacou was aware of the issue at least by May 2009, but "took no further action". It was not until September 2011, over two years later, that Mr McLeod wrote to HMRC asking for the year to be re-opened; this was then followed by this Application, dated 17 October 2011.

63. On the merits of the case, she said that the figure for other operating income was not "plucked out of the air" but was from the company's nominal ledger; no other explanation had been provided for these amounts, other than the suggestion that comprised injections of capital by the directors, for which no evidence had been provided.

64. She submitted that this was an attempt to re-open an enquiry more than five years after it was determined, and that permission to appeal should be refused.

Cross-examination and questions put to Mr Kyriacou

65. As set out above, Mr Kyriacou said in his oral evidence that he was "guilty of instructing not one but multiple bad advisers." Under cross examination by Mrs

Weare he said he had not reported either Firm 1 or Firm 2 to their professional bodies but "just made the enquiries." In answer to questions from the Tribunal he confirmed that no complaints had been made about either Firm, but said he would "get round to it."

66. The Tribunal asked Mr Kyriacou about the following specific points arising from the facts set out above:

(1) The conversation between Firm 2 and HMRC on 14 December 2007, in which Firm 2 said that that the director was trying to raise personal finance, and requesting a TTP agreement, and HMRC's response that they were nevertheless going to collect the debt. Mr Kyriacou said he had no recollection of seeking finance and was unaware of either the TTP request, or of the warning from HMRC that they were going to collect the debt.

(2) The letter received by HMRC from Firm 2 dated 8 January 2008, which said that Mr Kyriacou had booked a provisional appointment with the bank for the following week to discuss refinancing. Mr Kyriacou said he had no recollection of the meeting, or of having a conversation with his agent discussing such a meeting.

(3) The conversation between Firm 2 and HMRC on 14 February 2008 in which Firm 2 said that he thought the director had raised personal finance "but is not sure he will contact t/p and then recontact with an update." Mr Kyriacou said he had no comment to make.

(4) The County Court Proceedings ("CCP") letter sent to the address of the restaurant at Battersea on 8 July 2008. Mr Kyriacou said he had not seen the letter.

(5) The county court judgment obtained on 4 April 2009. Mr Kyriacou said "I don't remember this."

(6) On 17 March 2010 HMRC sent a "ceased company questionnaire" to Mr Kyriacou. The Tribunal asked Mr Kyriacou if he remembered receiving this. He said "I guess I did" and then, after a pause "No".

67. In answer to questions from the Tribunal Mr Kyriacou said:

(1) he was (at the same time as being a director of the company) also the director of another company, and that he had signed the accounts for that other company each year. He was aware of the need for a director to sign the accounts. He was asked why he had not signed those for the (Appellant) company until 2006 and said he was unable to explain this; and

(2) funds were injected into the company in 2000-01 when a small loan was received from his brother Nick, but subsequently the business was doing well and "there was no need for us to put more into the business." The only other time that funds were injected into the business was in 2006.

Further findings of fact

68. On the basis of the evidence provided, including Mr Kyriacou's responses to questioning, we find the following further facts in relation to delay.

(1) Mr Kyriacou was aware of the assessment leading to the liability from at least June 2007, when the distraint letter was delivered to the restaurant.

(2) During 2008 he was actively involved in seeking to prevent the county court judgment from proceeding.

(3) Mr Kyriacou communicated personally with HMRC on the issue in October 2008, almost exactly three years before Mr McLeod wrote to HMRC seeking to reopen the assessment.

69. We make the following further findings based on Mr Kyriacou's oral evidence:

(1) No funds were injected into the company during the year ended May 31 2003.

(2) At least by the date of this Tribunal hearing, Mr Kyriacou had not made any complaints to a professional body against either Firm 1 and Firm 2.

70. We also accept that the signature on the accounts for 2003 through to 2005 is not that of Mr Kyriacou and we thus find that he did not sign the accounts for the year ending May 31 2003.

The law

71. The relevant statutory provisions, so far as relevant to this case, are set out as an Appendix to this decision.

72. 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.

73. 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.

74. 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."

75. The Civil Procedure Rules ("CPR") at Rule 3.9(1) set out criteria which must be considered by the courts when considering a late appeal, and 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.

76. This Tribunal is, however, not governed by the CPR but by the Tribunal Rules. In *Former North Wiltshire District Council v Commissioners for HMRC* [2010] UKFTT 229 (TC) the tribunal accepted a submission that it was not obliged to consider the criteria set out in CPR 3.9(1) when deciding whether to grant an extension of time, but that "exercising our discretion to give effect to the overriding objective may however, and often will in practice, involve consideration of some or all of the criteria (a) to (i) set out in CPR 3.9(1)." The Upper Tribunal approved this approach in *Information Commissioner v PS* [2011] UKUT 94 (AAC).

Discussion

77. It is thus well-established that the Tribunal will only give permission for a late appeal where there is good reason to do so and where the interests of justice would be served by granting permission, having regard to all relevant circumstances.

78. The starting point is that normal statutory 30 day time limit on appeals serves an important purpose of producing finality and ensuring that HMRC can regard a taxpayer's affairs as closed off in respect of certain years where no appeals have been lodged. Therefore, permission to bring an appeal out of time should not be granted lightly.

79. Against this background, we must 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.

80. We consider first the issue of delay. We have accepted that Mr Kyriacou did not sign the 2003 accounts, but it does not therefore follow that he was "in the dark" about the company's affairs throughout the five year period from June 2006 to September 2011.

81. In particular, we have found as facts that Mr Kyriacou was aware of the assessment leading to the liability from at least June 2007, that during 2008 he was actively involved in seeking to prevent the county court judgment from proceeding and that in October 2008 he communicated personally with HMRC on the issue.

82. This means that there has been a delay of at least four years since he was aware of the assessment, and almost three years since he spoke to HMRC. It is thus clear that this Application has not been made promptly, not just in relation to the statutory time limit, but in relation to the state of Mr Kyriacou's own knowledge about the issue.

83. Mr Kyriacou seeks to blame his previous accountants. Despite Mr McLeod's submissions to the contrary, on Mr Kyriacou's own evidence he has not, in fact, made any complaints against either Firm 1 or Firm 2. This does not, of itself, mean that they were blameless. However, it is for the company to prove its case, and we find that Mr Kyriacou has failed to support his contention that the previous accountants had "kept him in the dark".

84. For completeness we note that it was not the company's case that Mr Kyriacou had been misadvised, either by HMRC or by either agent, as to the possibility of making a late appeal. He has not sought to argue, for instance, that he relied on Mr Shuttleworth's statement on 28 May 2009 that "nothing further could be done", or on any advice from either Firm 1 or Firm 2 that it was not possible to make a late appeal. Rather, the company's case has been consistently put on the basis that Mr Kyriacou was ignorant of what was happening and was unaware of the enquiry and the debt.

85. Despite this, we have however weighed in the balance Mr Shuttleworth's statement that "nothing further could be done". We consider that this should be seen in the context of his other comments that:

> "If it can be shown that an error has been made, then this should be pointed out. His agent has copies of all correspondence and should have sufficient information to make a judgement."

86. In our view, these subsequent sentences could reasonably have been expected to have alerted Mr Kyriacou to the possibility of further action. However, nothing happened for a further two years.

87. We also weigh in the balance the effect on the parties if the appeal is allowed to go forwards. Failure to give permission will of course adversely affect the company, as it will be unable to appeal the inclusion of the "other income" in its 2003 assessment. However, there is also prejudice to HMRC if an appeal is allowed to go forward almost ten years after the end of the year in question, and some six years since the closure notice was issued – resources will have to be diverted into re-opening this case instead of being deployed elsewhere.

88. The merits of the company's case rest on the argument that the amount of "other income" was "plucked out of the air" and has been incorrectly categorised. On the evidence, however, the quantum rested on the firm foundations of the nominal ledger. As to categorisation, the only alternative explanation suggested in correspondence – that the sums were "capital introduced" – was explicitly rebutted by Mr Kyriacou in his oral evidence. Mr McLeod expressed hope that he would "get to the bottom" of the question by searching through the boxes of files which he had in his office. On the substantive issue, therefore, the company has not put its case at all.

Decision

89. We have weighed the factors in the balance, and taking into account in particular the extent of the delay, Mr Kyriacou's state of knowledge and the merits of the case we find that it is not in the interests of justice for permission to appeal to be granted.

90. We therefore dismiss the company's application for permission to make a late appeal.

91. 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: 21 June 2012

APPENDIX: LEGISLATIVE PROVISIONS

Finance Act 1998 ("FA 1998"), Sch 18 para 32: Completion of enquiry

(1) An enquiry is completed when an officer of the Inland Revenue by notice (a "closure notice") informs the company they have completed their enquiry and state their conclusions....

The notice takes effect when it is issued.

FA 1998, Sch 18, para 34: Amendment of return after enquiry

(1)The company has 30 days beginning with the day on which the enquiry is completed in which:

(a) To amend the return that was the subject of the enquiry

(i) to accord with the conclusions stated in the closure notice...

(2) If after the end of that period of 30 days the Inland Revenue are not satisfied –

(a) that the return that was the subject of the enquiry

(i) is correct and complete...

they may, within the following period of 30 days, by notice to the company make such amendments of that return or those returns as they consider necessary.

(3) an appeal may be made against any such amendment of a company's return.

(4) Notice of appeal must be given-

(a) in writing,

(b) within 30 days after the amendment was notified to the company,

(c) to the officer of the Board by whom the notice of amendment was given

(5) ...

Taxes Management Act s 49:Late notice of appeal

(1) This section applies in a case where—

(a) notice of appeal may be given to HMRC, but

(b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if—

(a) HMRC agree, or

(b) where HMRC do not agree, the tribunal gives permission.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

(8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section).”