TC02587

Appeal number: LON/2007/1429

VALUE ADDED TAX – application to reinstate – appeal withdrawn on leading counsel's advice – subsequent failure to pay VAT assessed – HMRC withdrawing the Appellant's WOWGR licence as a result – Appellant's representative failing to communicate Tribunal's notification of right to reinstate appeal – parallel appeal against withdrawal of WOWGR licence raising same issues as original appeal – whether appeal should be reinstated – no – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PIERHEAD PURCHASING LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC

Sitting in public at Bedford Square, London WC1 on 11 January 2013

Mr John Shelley, Tax Consultant, for the Appellant

Mr Mark Bryant-Heron instructed by Howes Percival on behalf of HM Revenue and Customs

DECISION

The Application to reinstate

1. This is an application by the Appellant to reinstate its appeal, reference LON/2007/1429. This appeal related to the Commissioners' decisions to deny input tax claimed for the VAT periods 03/06 (£499,467.00), 04/06 (£665,787.50) and 05/06 (£775,250.00). As appears, substantial sums were in issue in the appeal. The basis for those decisions was that the relevant transactions were connected to the fraudulent evasion of VAT and that the Appellant knew or should have known of that fact.

2. The appeal was listed for a final hearing which commenced on 16 April 2012. On the first day of the final hearing, the Appellant withdrew its appeal. The circumstances in which the Appellant adopted that course of action are the subject matter of this application to reinstate and in respect of which the Appellant's director, Mr Richard Hercules, gave evidence before me.

3. On 17 April 2012, the Tribunal informed the Appellant by way of a letter to its representative in the appeal, Goldwyns, that the Appellant had 28 days to apply if it wished its appeal to be reinstated. No such application was made within the specified time. Mr Hercules' evidence was that the Appellant's advisers took no action to pass the Tribunal's letter to the Appellant or, at least, that if they did the letter was never received. Later, by a letter dated 16 October 2012, however, Mr Hercules wrote on behalf of the Appellant applying out of time to have the Appellant's appeal reinstated. A Notice of Appeal dated 18 October 2012 was also submitted and allocated the reference TC/2012/09616.

4. On 30 October 2012 the Commissioners served a Notice of Objection to the Appellant's application to reinstate. On 9 January 2013 the Commissioners served a witness statement of Alison Marie Kirby, the solicitor representing the Commissioners at the hearing on 16 April 2012. On 10 January 2013 the Commissioners also applied to file and rely upon a witness statement and exhibit of Julia Elaine Danson, an officer of Her Majesty's Revenue and Customs, dealing with a visit to the premises of Pierhead Drinks Ltd on 9 October 2012.

5. Following the Appellant's application to reinstate, some confusion ensued over the identity of the Appellant's representative and the appeal reference for the application. Mr John Shelley appeared before me on behalf of the Appellant and informed me that Bark & Co, who were originally on the record as the Appellant's representative in respect of appeal TC/2012/09616, were no longer instructed in that matter.

6. On 8 January 2013 the Commissioners applied to the Tribunal to stay the appeal TC/2012/09616 until 28 days after the release of the Tribunal's decision in respect of LON/2007/1429. This was because the Commissioners would otherwise be bound to serve a Statement of Case in appeal TC/2012/09616 by 8 January 2013. The Commissioners' application pointed out that appeal TC/2012/09616 related to the application to reinstate appeal LON/2007/1429. Mr Shelley confirmed that this was the case and that the application was correctly listed under reference LON/2007/1429.

He accordingly withdrew on the Appellant's behalf its appeal TC/2012/09616 relating to the same matter.

7. The Commissioners application of 8 January 2013 also included an application that the costs incurred and occasioned by the Commissioners as a result of the Appellant's Notice of Appeal dated 18 October 2012 giving rise to TC/2012/09616 should be paid by the Appellant, to be assessed by the Tribunal if not agreed. In the light of Mr Shelley's withdrawal of that appeal I did not understand the Commissioners to be pursuing their application for costs.

8. There is a separate appeal under the very similar reference number TC/2012/09676 in respect of the withdrawal of the Appellant's registration under the Warehousekeepers and Owners of Warehoused Goods Regulations (its "WOWGR" licence). Mr Shelley submitted for the Appellant that its application to reinstate LON/2007/1429 should be allowed and that the reinstated appeal should then be consolidated and heard together with the appeal TC/2012/09676. This was because the two appeals related to the same matter and would raise substantially the same issues.

The materials available to the Tribunal

9. There was before the Tribunal the Appellant's application to reinstate and the Commissioners' Notice of Objection. The parties produced various documents, notably the Appellant produced a bundle of documents in Parts A and B. The Commissioners provided their second further amended consolidated Statement of Case of 4 August 2010 in appeal LON/2007/1429. Mr Shelley called Mr Richard Hercules to give evidence for the Appellant and he was cross-examined by Mr Bryant-Heron for the Commissioners. As noted above, the Commissioners produced witness statements by Ms Kirby and Ms Danson and Mr Shelley raised no objection to these.

The facts and background to the application

10. The input VAT that was the subject of the appeal related to three periods, 03/06, 04/06 and 05/06. According to the Commissioners' Statement of Case, the amounts claimed in respect of the first two periods were released without prejudice by the Commissioners on 24 May 2006 and 8 June 2006. By the time the 05/06 return was received, however, the Commissioners had changed its policy and the return was selected for in-depth verification. That process was subsequently extended to the earlier returns and in due course the Commissioners issued decisions denying entitlement to the right to deduct the input tax in all three periods. Assessments to recover the input tax repaid for 03/06 and 04/06 were made on 28 January 2009 and 29 May 2008 respectively.

11. As one might expect, the account provided by the Commissioners' Statement of Case of the transactions giving rise the input tax and the account provided by Appellant's application to reinstate are rather different. The Appellant's application also questions why assessments to recover VAT for 03/06 and 04/06 were only made in 2008/2009. As matters stand the Appellant's appeal has been dismissed but I am not concerned directly with the substance of the matters raised in the Appellant's

appeal or the reasons why assessments were only raised when they were. The issues that I have to consider are why the Appellant withdrew its appeal on 16 April 2012, why its application to reinstate the appeal was made some five months later than it should and whether in the circumstances it is appropriate to allow its application to reinstate its appeal.

12. The Appellant's appeal was set down for hearing commencing on 16 April 2012. Sometime in February 2012 the long-standing counsel who had been instructed to represent the Appellant at the hearing was forced to withdraw for health reasons. The Appellant instructed leading counsel to take over the case. This was clearly unfortunate but there is no reason to think that leading counsel did not have time to prepare properly for the hearing.

13. The application asserts that leading counsel never became fully conversant with the long-term facts of the case. That apart, the application says very little about the circumstances leading to the withdrawal of its appeal. What it does say is that due to a personal issue relating to the Appellant's director, Mr Richard Hercules, leading counsel advised the Appellant to withdraw its appeal on the basis that (according to the application) the Commissioners had, "damning evidence which will be very difficult to overcome", albeit that this was said to be not in connection with the Appellant's VAT position. It was a personal tax issue for Mr Hercules.

14. The application frankly admits that the Appellant withdrew its appeal and, "this is our responsibility". It asserts, however, that since the time of doing so HMRC had not sought to contact the Appellant with regards to negotiating a settlement and that the next contact from HMRC had been the sudden suspension of the Appellant's WOWGR licence on 29 August 2012. The reason given in the notice of withdrawal was that the Appellant, "has a current VAT debt of £1,401,103" so that the Appellant, "is no longer deemed fit and proper to hold a WOWGR authorisation".

15. From the correspondence it appears that following the suspension of the WOWGR licence, Mr Shelley requested a review on behalf of the Appellant on 5 September 2012. HMRC gave a decision on that review on 15 October 2012 upholding the suspension. The review decision indicates that the reason for the suspension was the Appellant's large outstanding VAT debt following the withdrawal of its appeal. Again I am not concerned directly with whether this decision represents an appropriate exercise by HMRC of their discretion in relation to these matters. That is the subject of a separate appeal. What is undisputed is that the Appellant owed a VAT debt which, with interest, amounted to approximately £1.4 million. It is also clear from the decision on review that HMRC consider that the Appellant has been involved in significant non-compliance or fraud in respect of VAT matters and that there is a significant outstanding debt which the Appellant has made no effort to pay.

16. The decision on review was dated 15 October 2012 and the Appellant's application to reinstate its appeal was dated 16 October 2012. I was not told whether the former triggered the latter but I assume that the application must at least have been in preparation before the decision on review was received.

The Appellant's evidence

17. A certain amount of Mr Hercules' evidence in chief was concerned with the substance of the Appellant's appeal. I do not think that it is necessary to repeat that here. The thrust of his evidence was to justify his assertion that the Appellant was not doing business with a 'missing trader', that no amount of due diligence or enquiry by the Appellant could possibly have revealed any evidence of fraud and that the Appellant was prima facie entitled to the input VAT claimed. These are all issues that would have been resolved finally at the appeal and which will have to be considered further if I allow his application to reinstate. They may also arise in the appeal against the withdrawal of the Appellant's WOWGR licence.

18. Mr Hercules indicated that on the morning that the appeal was due to commence leading counsel had advised the Appellant to withdraw its appeal. It appears that Mr Hercules was the sole director concerned in the decision to do so and he said that he had been placed under some pressure to make a decision "there and then". It was on short notice and he said that he received no advice from counsel as to the likely consequences of withdrawing. He said that he did not give any thought at the time to the consequences of withdrawing the appeal. The Appellant's application, which was written by Mr Hercules, indicates that on the day he was, "rather shocked and confused to say the least".

19. With hindsight Mr Hercules said that he believed that the Appellant was not well advised at the time to abandon its appeal and that the reasons for doing so were based on suspicion not facts and without due consideration as to the consequences. According to his evidence, he considered that he should not have adopted the advice at the time and he had subsequently closed his eyes to the outcome until the matter was resurrected when HMRC revoked the Appellant's WOWGR licence. Furthermore, he said that if the licence had been revoked earlier, or if some prior notice had been given, the application would have been made earlier. In this respect it was Mr Hercules' evidence that his accountants, Goldwyns, who had acted simply as a 'letter box' without any other active involvement in the appeal, had failed to pass on the Tribunal's notification of 17 April 2012.

20. In cross-examination Mr Hercules confirmed that he had understood at the time of the original appeal that it concerned three VAT periods and that the input tax had been repaid in respect of two periods and that repayment had been denied in respect of the third. He said that it had not been pointed out to him that the VAT would have to be repaid. Nevertheless he said that he understood "to a degree" that this was the case but he had been confident at the time that the appeal would succeed. He also confirmed that he understood how VAT operated.

21. The reasons underlying leading counsel's advice to withdraw were only hinted at in the Appellant's application and were not referred to at all by Mr Hercules in his evidence in chief. The Commissioners' notice of objection, however, indicates that leading counsel for the Appellant made it clear to the Tribunal and to the Commissioners that the basis for withdrawal was the service of evidence shortly before the hearing relating to the Appellant's direct tax affairs, as well as the direct tax affairs of Mr Hercules. Ms Kirby's evidence, supported by her contemporaneous notes, was that in addressing the Tribunal leading counsel had accepted that the

evidence pointed to other dishonesty, was accepted to be relevant and was admitted, with the result that his instructions were to withdraw the appeal.

22. In cross-examination Mr Hercules accepted that he had admitted to failing to declare a number of his sources of income and to deliberately understating the Appellant's profits. He pointed out, however, that this evidence on behalf of the Commissioners related to direct tax and not to VAT. As regards the Appellant's VAT compliance record, I note in passing from HMRC's Statement of Case that Mr Hercules had previously admitted in November 2001 that he had dishonestly evaded the payment of VAT contrary to section 60(1) of the VAT Act 1994 for the VAT period 1 February to 28 February 2001. Mr Hercules was not asked about this but the fact of that admission must be a matter of record even if the circumstances in question are not known to me.

23. Ms Kirby's evidence, supported by her contemporaneous notes, was that the Appellant's counsel had sought confirmation from HMRC's counsel of the amount that was owed and had asked to be directed to evidence of the amount in the hearing bundles. Ms Kirby's note records that she directed him to the assessments totalling approximately £1.1 million. She also confirmed, following enquiry by the Appellant's counsel, that interest needed to be added to that amount. Her record of the submissions made by leading counsel in withdrawing the appeal indicates that he referred to the existence of the assessments.

24. Mr Bryant-Heron put to Mr Hercules that leading counsel had spoken to HMRC's counsel and their solicitor at the hearing to confirm the figures of VAT that were due in respect of periods 03/06 and 04/06 and that Mr Hercules would therefore have known what would have to be paid. Mr Hercules said that he was uncertain on the figures.

25. Mr Bryant-Heron also put to Mr Hercules that he knew the Appellant's case was hopeless. In response Mr Hercules said that he was confused and upset about HMRC's late evidence. He had been confident that the appeal would succeed but appreciated that HMRC had a strong case. As regards the payment of VAT if the appeal was withdrawn, Mr Hercules said that he understood that VAT would have to be paid but he hoped that it would be possible to negotiate some form of settlement with HMRC. In the event nothing had been heard from HMRC on the matter since the Appellant withdrew its appeal. He emphasised that it was not the Appellant's intention to run away from the debt. He asserted, however, that his understanding about payment was not true on the day of the appeal, when he had been "a fair bit confused".

26. In the Appellant's application for reinstatement, Mr Hercules had indicated that he did not realise at the time the appeal was withdrawn that, "we would have to re-pay despite the fact that the VAT authorities had ample time to collect and rectify this situation prior to taking such actions". This appears to refer to the fact that the Appellant had paid the input VAT and the suggestion (denied by HMRC) that HMRC failed to take steps to recover it from another party in the chain. It was in relation to the suggestion that the Appellant did not realise that it would have to repay the VAT that the Commissioners produced Ms Danson's witness statement.

27. This records her visit to the premises of Pierhead Drinks Ltd on 9 October 2012, when she met Mr Hercules and his son, Ian Hercules. Mr Bryant-Heron questioned Mr Hercules about Pierhead Drinks Ltd. From his answers it appeared that this company had been set up to take over from the Appellant, should anything happen to the Appellant, so that his son and the Appellant's employees could continue in business through a new company. HMRC's contemporaneous note of the meeting indicates that the Appellant may not be continuing to trade much longer and that there is a debt of £1.3 million on file. Pierhead Drinks Ltd, however, did not hold a WOWGR licence and Mr Ian Hercules was advised that it could not use the Appellant's WOWGR licence.

28. Ms Danson's evidence of her visit reveals that on 9 October 2012 she asked Mr Ian Hercules, as a former director of the Appellant, what plans were in place to repay the Appellant's outstanding VAT debt. Mr Richard Hercules replied that he was trying to pay the money back to HMRC, but the case was on-going and he was trying to arrange a face to face meeting with HMRC to discuss the debt and its repayment. Because of this situation he was unsure of the future direction (if any) for the Appellant.

29. In relation to Mr Hercules' evidence on this matter I can accept that on arriving at the door of the court it must have come as something of a shock to Mr Hercules that his counsel was advising that the Appellant should withdraw its appeal. It is undisputed that that was leading counsel's advice. I do not, however, accept Mr Hercules' evidence that he failed to appreciate the implications of doing so. I also do not accept Mr Hercules' evidence recorded in paragraph 19 above about 'closing his eyes' to the matter after the hearing. I accept his evidence that Goldwyn's never passed the Tribunal's notification of its right to apply to reinstate to the Appellant. Nevertheless, what then ensued, in particular the establishment of Pierhead Drinks Ltd, suggests that Mr Hercules was well aware of the Appellant's VAT debt and of the fact that it would have to be paid unless for some unexplained reason HMRC were prepared to forego payment (notwithstanding their pursuit of the case to the door of the court).

30. More particularly, I conclude that when the Appellant withdrew its appeal on 16 April 2012 Mr Hercules (and therefore the Appellant) understood at that time that a consequence of that action would be that it would have to repay the VAT previously repaid to it in respect of periods 03/06 and 04/06. Whether or not Mr Hercules was advised of or was otherwise aware of the precise amount of the VAT debt involved does not seem relevant to me: Mr Hercules must have been broadly aware of its order of magnitude and I find that to be the case. Mr Hercules may have hoped at the time that the full VAT debt might not eventually have to be paid but it seems to me that any such hope might merely have been a matter of self-delusion or anticipation based on the idea that if the Appellant volunteered nothing HMRC might eventually accept something rather than nothing. Whatever the truth of that, my finding is that on 16 April 2012 Mr Hercules knew that the Appellant would become liable for the VAT debt. What I accept is that on 16 April 2012 he (and therefore the Appellant) did not appreciate or think about the possibility that if the VAT debt remained unpaid the Appellant risked suspension of its WOWGR licence.

31. Other parts of Mr Hercules' evidence related to the impact of the suspension of its WOWGR licence on the Appellant's business and, in particular, the employment prospects of its 14 employees. The thrust of Ms Danson's evidence is that Mr Hercules and his son had already made contingency plans for Pierhead Drinks Ltd to assume responsibility for the employees, even if that company might not quite 'stand in the Appellant's shoes' in terms of the business it would conduct or be able to take advantage of a WOWGR licence. Mr Hercules replies to Mr Bryant-Heron's questions in cross-examination accepted the contingency nature of these arrangements.

32. Those arrangements must have been started to be put in place some time before Ms Danson's visit in early October. Mr Hercules said in cross-examination that Pierhead Drinks Ltd had been set up in April 2012 and the contemporaneous record of Ms Danson's visit indicates that Mr Ian Hercules had ceased to be a director of the Appellant some weeks before her visit. The inference that I draw from this evidence is that Mr Richard Hercules recognised that, having abandoned its appeal, the Appellant was liable to repay the VAT debt and that it was therefore necessary to take steps to deal with the possibility that HMRC would not compromise on the amount to be paid and that the Appellant might not be in a position to repay. Given Mr Hercules's evidence that Pierhead Drinks Ltd was set up in April 2012 against the contingency that the Appellant could not continue in business, the natural inference is that he recognised immediately the financial consequences of abandoning the Appellant's appeal even if that did not extend to the eventual revocation of the WOWGR licence.

The parties' submissions

33. For the Appellant Mr Shelley submitted that the Appellant was prima facie entitled to be repaid the input VAT concerned. He went through the transactions in question to demonstrate that the Appellant was properly entitled to claim the input tax and to make the point that the only triable issue in the appeal was the dispute about the Appellant's knowledge of the fraud involving third parties. As regards this Mr Shelley suggested that the Commissioners' case was no more than a combination of opinion, suspicion and innuendo that Mr Hercules had some guilty knowledge of the fraud.

34. Mr Shelley went on to suggest that there were five criteria that I should consider in relation to the Appellant's application to reinstate the appeal: the overriding objective to deal with the case fairly and justly; the issue of delay; whether HMRC would be prejudiced by the reinstatement; the issue of legal certainty and the question of the loss to the Appellant if reinstatement were refused. In support of these criteria Mr Shelley referred to *Former North Wiltshire District Council v HMRC* [2010] UKFTT 449 (TC).

35. In relation to the decision to withdraw the appeal, Mr Shelley drew my attention to the change in counsel shortly before the hearing and the fact that Mr Hercules had been presented with the decision 'at the door of the court'. Mr Hercules had accepted leading counsel's advice but this was a hasty decision made on the spur of the moment and it had been the wrong decision without consideration of all the material consequences.

36. The disputed issue had not been determined or resolved and in the circumstances the Appellant should not suffer the consequences of a hastily made and bad decision. While it was true to say that the Appellant had had its opportunity to resolve the dispute and had failed to take it, HMRC themselves had resurrected the disputed issues when they revoked the Appellant's WOWGR licence. The appeal against that revocation would raise all the same issues that had been in dispute in the original appeal and it was therefore appropriate that the appeal be reinstated and the issues determined in that context. He noted that if Mr Hercules had appreciated that a consequence of abandoning would be the withdrawal of the Appellant's WOWGR licence, he would never have decided to abandon the appeal.

37. Mr Shelley went on to make the point that HMRC had not claimed that they would be prejudiced by the reinstatement of the appeal. The appeal was fully prepared for hearing in April 2012 and reinstatement would therefore impose no significant new burden of preparation. Mr Shelley also made the point that there had been no inordinate delay in applying to reinstate and none by reference to the time when the WOWGR licence was revoked.

38. In reply Mr Bryant-Heron said that it was of the essence of MTIC fraud that the broker was not directly connected with the VAT loss and that the trading records should not disclose any irregularity. He noted that it was HMRC's case that this was 'directed' trading where the Appellant was part of the scheme and was told where to sell the goods. He took me through various aspects of the transactions to demonstrate HMRC's case. He suggested that the compelling evidential picture that emerged from HMRC's case was a factor in Mr Hercules' decision to abandon the appeal. This was not a case where the Appellant had misunderstood the position or had been misled. Instead it was a rational and informed decision on the advice of leading counsel to walk away from the appeal. No material new facts had emerged to justify reinstatement: the Appellant had just changed its mind.

39. He also noted that the Tribunal had notified the Appellant of its right to apply to reinstate its appeal within 28 days. While Mr Hercules had given evidence that this notification had not been passed on to the Appellant no evidence had been led from Goldwyns to support this statement. He also said that HMRC were currently entitled to payment and legal certainty demanded that there was a point at which the matter should be closed.

My decision

40. Rule 17(1) of the Tribunal Procedure (First-tier) Tribunal) (Tax Chamber) Rules 2009 allows a party to withdraw its case at any time before the hearing or orally at the hearing. It is not disputed that this is what happened in this case. Rule 17(3) then allows a party who has withdrawn their case to apply to the Tribunal for the case to be reinstated, provided that the application must be made in writing and received by the Tribunal within 28 days after the date of the hearing at which the case was withdrawn orally (Rule 17(4)).

41. It is not disputed that the Appellant was late in applying for its case to be reinstated. However Rule 5(3)(a) allows the Tribunal to extend the time for complying with any rule. Logically, I should therefore proceed by treating the

Appellant's application as an application for the Tribunal to extend the time allowed under Rule 17(4) and, assuming that I grant such extension, as an application to reinstate its appeal. I find it more productive, however, certainly in this case, to consider the two issues together if only because there are *prima facie* grounds for agreeing to extend the time allowed for the application. This follows from my finding that the Appellant never received the Tribunal's notification of 17 April 2012 and that on 16 April 2012 Mr Hercules did not consider the possibility or consequences of the Appellant's WOWGR licence being withdrawn.

42. It also seems to me that in the case of an application to reinstate an appeal there is a strong relationship between the grounds that are advanced to justify the application and the time that has elapsed since the appeal was withdrawn. If the application is made in time the only issue is whether the grounds advanced in support of the application justify reinstatement. If the application is made late, there may be a valid excuse for the late application that justifies an extension of time but the fact that more time has elapsed since the case was withdrawn is likely to be a relevant factor in deciding whether the application to reinstate should be allowed.

43. The Tribunal in *Former North Wiltshire District Council v HMRC* [2010] UKFTT 449 (TC) was faced with an application for an extension of time to appeal lodged some 14 and 21 months out of time. The Tribunal had directed that the parties to address in their submissions the criteria (a) to (i) set out under the heading "Relief from sanctions" in CPR 3.9(1), following *Sayers v Clarke Walker* [2002] EWCA Civ 645 at [21]. In the event the Tribunal concluded that the Tribunal was not obliged to consider those criteria although in exercising its discretion to give effect to the overriding objective in the Tribunal's rules the Tribunal might well in practice consider some of or all the same criteria (see [2010] UKFTT 449 at [56], [57]).

44. I respectfully agree in this respect with the Tribunal in the *North Wiltshire* case. The Tribunal further concluded that in exercising its discretion to give effect to the overriding objective, the Tribunal must pay particular attention to whether the taxpayer concerned has shown good reason for the delay in appealing and whether extending time would be prejudicial to the interests of good administration and legal certainty. I also agree with this.

45. The Tribunal also went on to conclude that in applying the overriding objective to deal with cases fairly and justly, the Tribunal ought to take account of all factors relevant to the proportionate exercise of its discretion and that such factors will include consideration of the merits of the proposed appeal *so far as they can conveniently and proportionately be ascertained*. As regards the merits of the appeal, the critical aspect, to my mind, lies in the qualification that I have italicised. I am clearly unable to take any view on the merits of the Appellant's appeal if I were to allow it to be reinstated. What I can do is to take note of Mr Shelley's submissions as to the nature of the point in issue in the appeal, recognising that the Appellant's contentions are hotly denied by HMRC (and vice versa). I can (and do) also take note of the fact that the appeal was withdrawn on the advice of leading counsel. The Appellant has not denied that that advice was given and was accepted at the time.

46. The position in relation to late applications for permission to appeal a decision of a lower court was briefly summarised by Lord Justice Brooke in *Smith v Brough* [2005] EWCA Civ 261 at [54] when he said—

> "In agreeing that this application should be dismissed, I wish to stress three matters which appear from the passage of the judgment of Lord Woolf CJ in *Taylor v Lawrence* [2002] EWCA Civ 90 at [6], [2003] QB 528, to which Arden LJ has referred: (1) that it is a fundamental principle of our common law that the outcome of litigation should be final; (2) that the law exceptionally allows appeals out of time; (3) that this, and the other exception mentioned in that passage, are the exception to a general rule of high public importance and reserved for rare and limited cases where the facts justifying the exception can be strictly proved."

47. As this indicates, allowing an appeal out of time is something that is "exceptionally" done in "rare and limited cases". It seems to me, however, that different considerations are in play in the case of an appeal from an existing judicial determination of a dispute as compared to a situation in which the person is seeking to launch an appeal (as in the *North Wiltshire* case) or to reinstate an appeal that has not been heard (as in the present case). It is still necessary, however, that facts justifying the extension of time and, in this case, the application should be proved.

48. Rule 17 offers no guidance as to when an appeal should or should not be reinstated and beyond the *North Wiltshire* case the parties did not draw my attention to any particular authorities on the question. I nevertheless identified a number of related cases which I have reviewed, albeit that I do not think it necessary to refer to them specifically: *Atec Associates Ltd v HMRC* [2009] UKFTT 178 (TC); *Pytchley v HMRC* [2011] UKFTT 277 (TC); *Harleyford Golf Club v HMRC* [2011] UKFTT 634 (TC) and *Globalised Corporation Ltd v HMRC* [2012] UKFTT 556 (TC).

49. It seems to me that Rule 17 does not just allow an appellant to change his mind within the time allowed for an application. There must be good and sufficient reasons why I should exercise my discretion in the Appellant's favour to resurrect an appeal, especially when the application is after the time at which HMRC could reasonably believe the matter was beyond recall. In many respects, given that the Rules contemplate reinstatement, the Tribunal should be slow to deny an appellant the right to have its appeal dealt with fully even when the appellant has initially chosen a different course. In the present case there has been a delay of some 5 months but I do not regard the delay itself as placing the Appellant's application out of order.

50. One reason given for the delay is the failure of the Appellant's appointed representative to pass on the Tribunal's notification of the Appellant's right to reinstate. I do not accord great significance to this. The Appellant was notified via its appointed representative and the obvious comment is that it is a matter between the Appellant and its representative if the latter did nothing.

51. In *Atec Associates Ltd v HMRC* [2009] UKFTT 178 (TC) the Tribunal considered the taxpayer's application to reinstate its appeal which had been dismissed by the failure to attend the hearing. It concluded that the incompetence of the taxpayer's professional adviser was not a basis for reinstating the appeal (assuming in the

circumstances that the Tribunal had power to do so). In doing so it drew attention to Lord Bridge's comments in *Al Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876 at 898E-G and Waller LJ in *R (Mathialagam) v London Borough of Southwark* [2004] EWCA Civ 1689 at [38], to the effect that the failings of an appellant's representative does not ordinarily confer any right to continue or reinstate an appeal.

52. That apart, I am unable to accord great significance to the Appellant's failure to receive the Tribunal's notification because I am not satisfied that it would have made any difference if it had been received. It seems to me that the Appellant had agreed to withdraw its appeal in the light of leading counsel's advice and (as I have found) with a full understanding that the VAT would then have to be repaid, even if Mr Hercules entertained some 'hope' that HMRC might forego collection of the full amount of VAT due. In those circumstances I could well understand if Goldwyns thought that it was not worth the time, effort and postage to forward the Tribunal's letter to the Appellant, and there is no evidence on which I can conclude that the Appellant would have done anything within the 28 days allowed even if the letter had been received.

53. That leaves the 'unanticipated' withdrawal of the Appellant's WOWGR licence. If the Appellant's licence had been withdrawn solely because HMRC took the view, in the light of the Appellant's dropping its appeal, that the Appellant had been involved in VAT fraud, there might be some substance to this ground for reinstatement. As the original notification of withdrawal indicates, however, the basis on which the licence is withdrawn is because a large VAT debt remains unpaid.

54. It is of course true that if the appeal had proceeded and if the Appellant had succeeded, the VAT debt would not arise (and indeed the Appellant would presumably have been due a further repayment of VAT). I have found, however, that the Appellant took the decision on leading counsel's advice to withdraw its appeal, understanding that the VAT would have to be repaid. It then appears to have taken no steps to settle the amount that it knew was due or to negotiate appropriate payment terms. What Mr Hercules and his son did do was to put in place alternative arrangements through Pierhead Drinks Ltd to guard against the contingency that HMRC would seek to recover the VAT in full and the possibility that the Appellant would not have the financial resources to pay.

55. The result of that course of action has been the withdrawal of the Appellant's WOWGR licence. Whether HMRC have properly exercised their powers in that respect is the subject matter of a separate appeal. The fact that the Appellant may seek in that appeal to raise many of the same issues as were live in its previous appeal before that was abandoned does not seem to me to be a reason, or at least a sufficient reason in itself, for agreeing to reinstate the previous appeal when no other good or sufficient reasons for that reinstatement have been given.

56. At the end of the day, the Appellant accepted the advice of leading counsel to abandon its appeal fully understanding that it would have to repay the VAT. The fact that its failure to repay has brought an unanticipated consequence does not in the circumstances merit my exercising my discretion to extend the time allowed for reinstatement or to grant the Appellant's application to reinstate. In effect, the Appellant seeks to change its mind after the event having discovered that HMRC are

intent on collecting the VAT in question and are not prepared to allow it to disappear unnoticed into oblivion. The Appellant's appeal was disposed of on 16 April 2012 and whatever 'hope' Mr Hercules may have entertained at that time regarding HMRC's consequential action in collecting the VAT debt is not a reason that I consider justifies my exercising my discretion in this case.

57. Consequently, the Appellant's application to reinstate is refused.

58. 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.

MALCOLM GAMMIE CBE QC
TRIBUNAL JUDGE

RELEASE DATE: 7 March 2013