TC04446

Appeal number: TC/2013/3854

PROCEDURE – permission to make a late appeal - whether the Tribunal should follow the* Denton v White *three-stage approach* – Leeds City Council *considered and followed – application of the principles in* Data Select *to the facts of this case – permission refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

CITIPOST MAIL LIMITED (FORMERLY CITIPOST DSA LIMITED} **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at the Royal Courts of Justice on 17 April 2015

Jeremy White of Counsel, instructed by Thrings LLP, for the Appellant

Sarabjit Singh of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The background to this appeal is a relief called Low Value Consignment Relief ("LVCR"). Until 1 April 2012, LVCR allowed low value goods to be imported into the UK from the Channel Islands without payment of import VAT. The threshold for that LVCR was £18 until 1 November 2011, when it was reduced to £15. There is a similar LVCR for customs duties, which applies to goods below £135.

2. HM Revenue & Customs ("HMRC") also grant Low Value Bulk Imports ("LVBI") approval to certain importers. Until 1 April 2012, importers who had LVBI approval could also benefit from LVCR. The exact legal status of LVBI approvals may be raised in the main proceedings and it is unnecessary to address that issue here.

3. Citipost Mail Limited (formerly Citipost DSA Limited) ("Citipost") specialises in the delivery of paper based products and packets. From September 2009 to March 2012, it delivered packages sourced in Jersey to the UK on the basis that its deliveries came within the LVBI approval granted by HMRC.

4. HMRC became concerned about the way Citipost were operating the LVBI. On 4 October 2011 they issued a decision letter stating that they were to issue a "post-clearance demand note" (a "PCDN" or "C18") for £4,153.89 of unpaid import VAT. The Tribunal has been provided with a PCDN for that amount, dated 2 November 2011. Whether this PCDN was issued by HMRC and/or received by Citipost is disputed, and I return to these points below. On 22 January 2013 HMRC issued a penalty of £2,500, followed on 23 January 2013 by PCDNs for £911,739.80 and £24,488.50.

5. On 19 February 2013, Citipost requested a formal Review of the two later PCDNs and the penalty. On 29 April 2013 HMRC issued its review decision ("the Review Decision") in which it upheld the decisions made on 22 and 23 January 2013, but noted that the PCDN dated 2 November 2011 had not been included in the Review Decision because it was out of time.

6. On 23 May 2013 Citipost notified an appeal to the Tribunal against all three PCDNs and the penalty. On 10 April 2014, HMRC asked for a preliminary hearing so that the Tribunal could decide whether to give permission for the late appeal against the PCDN dated 2 November 2011.

7. Citipost's application to admit that late appeal was listed and heard together with its applications for various directions. However, the parties agreed at the hearing that they would hold further discussions, with the aim of clarifying and narrowing the issues in dispute. Having done so, they will then inform the Tribunal of the position. In consequence, Citipost withdrew its applications for directions. The only issue the Tribunal therefore had to decide was whether to allow a late appeal in relation to the PCDN dated 2 November 2011, and this decision notice deals only with that matter.

8. For the reasons set out below, I decided to refuse permission to make the late appeal and dismissed Citipost's application.

The evidence

9. The Appellant provided a helpful bundle of documents which included:

(1) the PCDN dated 2 November 2011;

(2) the correspondence between the parties and between the parties and the Tribunal; and

(3) sample manifests, although these were not referred to by either party during the hearing.

10. In addition, Mr Garrie Francis, currently Head of International Services at Citipost, provided three witness statements, gave evidence in chief, and was cross-examined by Mr Singh. Ms Vivienne Burch, Higher Officer of HMRC, provided a witness statement, gave evidence in chief and was cross-examined by Mr White. I found both to be honest and credible witnesses.

11. On the basis of the evidence provided to me, I make the following findings of fact, which were not disputed. I make no findings about the penalty, as it is not relevant to this late appeal application.

12. Two factual matters were disputed: whether the PCDN dated 2 November 2011 had been received by Citipost, and whether Mr Francis had decided not to appeal the PCDN but changed his mind after 29 April 2014, the date of the Review Decision. I deal with those two matters separately below.

Facts not in dispute

13. On 24 June 2011, Ms Burch visited Citipost to discuss the LVBI approval. Mr Francis provided four sample manifests which listed goods imported into the UK by Citipost.

14. On 24 August 2011, having analysed the sample manifests and considered the matters discussed during her visit, Ms Burch wrote to Mr Francis saying that "it is apparent that Citipost is not currently complying with the conditions for the approval." She then set out the reasons why she considered this to be the case, being:

(1) the use of more than 99 items on each manifest;

(2) the failure to link consignments made to the same customer, so that some customers were receiving consignments in excess of the VAT LVCR threshold of £15 and/or the customs LVCR threshold of £135;

(3) Citipost's record keeping and management checks were insufficient to identify either these multiple items, or individual items above those thresholds; and

(4) some of the packages were for customers outside the EU, where a different procedure is required.

15. On 26 September 2011, Mr Francis responded to Ms Burch's letter, saying that:

(1) Citipost had been unaware of the "99 items" rule. He asked for further information;

(2) Citipost understood "the importance of VAT being due on consignments above the £18 or £135 threshold and we will ensure full compliance";

(3) Ms Burch's point about single items over the threshold was "fully understood and processes will be reinforced to ensure compliance for the future";

(4) Citipost "fully accepted" Ms Burch's point on record keeping and management checks and "will review its procedures and ensure a more robust application that meets HMRC policy"; and

(5) her point about non-EU customers was also "fully accepted and we will inform customers that we cannot accept items for delivery in non-EU countries using the LVBI scheme."

16. On 4 October 2011, Ms Burch responded. Her letter included the paragraph "this letter is to advise you that I will be raising an assessment for the amount of £4,153.89 (import VAT) which you will receive in due course from our Salford office." It went on to say that:

> "if you do not agree with this decision, there are three options available. Within 30 days of the date of this letter, you can either:
>
> - Send new information or arguments to me at the above address.
> - Request a review of the decision…in writing [address provided]
> - Appeal direct to the Tribunal…"

17. On 3 November 2011 Mr Francis replied, saying:

> "in response to your letter dated 4 October 2011, we have been working hard to accommodate all of the requirements that you have raised in your letter dated 24 August 2011.
>
> I am pleased to inform you that we have changed our procedures so that your requirements detailed in your letter will be met moving forward.
>
> Should you require any further information, please do not hesitate to contact me."

18. In 2012 more manifests were requested by, and provided to, HMRC's Audit Service. On 27 July 2012, Ms Burch wrote to Mr Francis again, saying HMRC had considered that material and now required some further information and manifests.

19. On 16 October 2012, Ms Lisa Maynard of Citipost emailed Ms Burch saying:

> "your details have been passed to me by Rob Farnwarth with regards to the non-payment of VAT import duty. Could I please ask if you are able to supply a copy of the C18 Schedule for reference no [xxxx]."

20. Ms Burch responded on the following day, saying "please find attached the C18 demand note, plus schedule providing the calculations."

21. On 19 November 2012, Ms Burch wrote again to Mr Francis, saying she had had no record of receiving a reply to her July 2012 letter and that:

> "in the absence of this data and due to the length of time that has now passed, additional VAT due has now been calculated on the basis of the information we do have, which is for a total of £911,739.80…I intend to raise a post-clearance demand note (C18) for £911,739.80…"

22. On 24 November 2012, Citipost provided further manifests, and on 11 December 2012, Ms Burch wrote to say that she was raising a further PCDN for £24,488.50.

23. On 22 January 2013 she sent two further letters to Citipost. The first said that "I will be raising an assessment for the amount of £24,488.50 (import VAT) which you will receive in due course from our CHIEF accounting office." The second used the same words, but with the figure of £911,739.80. In each letter, Ms Burch went on to say that Citipost could either request a review of the decision, or appeal directly to the Tribunal, and that in either case the deadline was 30 days from 22 January 2013.

24. On 19 February 2013, Thrings LLP, on behalf of Citipost, asked for a review of the two decisions dated 22 January 2013. HMRC's review period was extended by agreement, and on 29 April 2013 HMRC's Review Officer upheld those decisions. In that letter he also said:

> "your client was issued with three Post Clearance Duty Demands (C18s) for incorrectly claiming relief on import VAT on a number of import entries. An earlier one (ref…) in the sum of £4,153.89 and issued on 2 November 2011 remains unpaid but is out of time for review. Only the latter two (as referenced above) are the subject of this formal departmental review."

25. On 28 May 2013, Thrings completed a Notice of Appeal to the Tribunal on behalf of Citipost. The Notice related to all three PCDNs. In the box headed "reasons why the appeal is made or notified late," Thrings said:

> "the Appellant has appealed within the 30 day time limit from the completion of the Formal Departmental Review dated 29 April 2013. However, HMRC have not included the decision of 2 November 2011 in their review, as HMRC state that this decision is out of time for review. In the circumstances, if necessary, the Appellant request permission to appeal in respect of the decision dated 2 November 2011."

Whether the PCDN had been served

26. On 16 April 2015, the day before this hearing, Thrings wrote to HMRC saying that although Citipost had "proceeded on the assumption that a PCDN was issued on 2 November 2011, as this was stated in subsequent correspondence by HMRC" that is now disputed.

27. Attached to that letter was Mr Francis' third witness statement, in which he confirmed he had received Ms Burch's decision letter dated 4 October 2011 but stated that, having made further enquiries within the Citipost Accounts team:

> "if Citipost had received such a document from HMRC in November 2011 demanding payment of a debt the document would have been passed immediately to the Accounts team. The Accounts team do not recall receiving the PCDN. The Finance Head then employed by Citipost is no longer employed by the company to seek to confirm this information...I now believe that the first time Citipost became aware of the PCDN stated by HMRC to have been issued on 2 November 2011 was October 2012."

28. Under cross-examination, Mr Francis accepted that he had "no direct knowledge" of the procedures for dealing with post in the Citipost Head Office, where he had never worked, but said "I imagine that the post comes in to one single person who distributes it. Citipost is a well-run firm; it does not have trays of post lying around." He went on to say "I don't know who opened it, or distributed it. I don't actually know if it was received or not."

29. Mr Francis also placed reliance on the exchange of emails between Ms Maynard and Ms Burch set out at §19-20, saying that:

> "I have questioned Lisa Maynard of Citipost as to how and why she sent an email to Vivienne Burch of HMRC on 16 October 2012. It is Lisa's recollection that a representative of HMRC attended Citipost's offices as an unannounced visitor requesting payment of an unpaid debt. The visitor may have been Rob Farnworth who is mentioned in her email…as Lisa was then unaware of the debt she sent an email to HMRC requesting a copy of the PCDN. I was previously unaware of this."

30. Mr Francis drew attention to the copy of the PCDN included in the Bundle. He said that it does not include an "issuing office date stamp." I agree, and find as facts that this is the case, that the PCDN is correctly addressed, and that at the bottom of the page are the following words:

> "payment of these charges is now due. The enclosed remittance advice sheet or payment instructions are to be returned by 11/11/2011."

31. Although the focus of these new submissions is on whether the PCDN was *received*, from Citipost's reliance on the absence of a date stamp I have also taken it that Citipost are also disputing whether the PCDN had been *issued.*

32. In her witness evidence, Ms Burch said that the PCDN included in the Tribunal Bundle was that which had been provided from her records. It did not have the date stamp because it was an electronic copy. She did not issue the PCDN; that is done by a different office, and 10 days are normally given for payment. She had checked with her office on receipt of Thrings' 16 April 2015 letter, and been told that the HMRC computer system showed the PCDN as having been issued on 31 October 2011; ten days after that would be 10 November 2011. In fact, the date on the PCDN was 11

November 2011. She said that she had "no reason to doubt" that the PCDN had been sent out.

33. Mr White submitted that the absence of any dated copy of the PCDN, together with Mr Francis's statement that Citipost ran an efficient office, meant that, on the balance of probabilities, the PCDN had not been received by Citipost.

34. Mr Singh pointed out that the first time it had been suggested that the PCDN had not been received was the day before this hearing, and submitted that "even today Mr Francis cannot say with any confidence that it has not been received."

Discussion and decision

35. I have considered first the points which are in favour of the PCDN having been properly issued by HMRC:

(1) Ms Burch's decision letter of 4 October 2011 stated that a PCDN was being issued;

(2) Ms Burch was told that HMRC's computer system shows that it was issued on 31 October 2011. This is hearsay, but Ms Burch was a credible witness and there is no reason to doubt that she had asked her colleague to check the computer, and no reason to think that her colleague would not have told the truth. The conversation happened the day before this hearing. I accept her evidence, and find as a fact that the HMRC computer system shows that the PCDN was issued on 31 October 2011;

(3) the PCDN was correctly addressed;

(4) The copy of the PCDN included in the Bundle is the one which was printed off the system by Ms Burch and sent to Ms Maynard. Ms Burch's uncontested evidence is that the date stamp is added to the paper copy before it is sent out; and

(5) the section at the bottom of PCDN, giving the date on which payment was due, had been completed and showed 11 November 2011, albeit this is a day later than Ms Burch had expected.

36. The only contrary evidence is that the absence of a date stamp. I find as a fact, taking into account the other points above, that the PCDN was properly issued on 31 October 2011.

37. I next consider whether, having been issued, the PCDN was nevertheless not received by Citipost.

(1) Ms Maynard's evidence, provided via Mr Francis, is that "she was unaware of the debt." This is also, of course, hearsay evidence which HMRC have been unable to test in cross-examination. It is different to, and less reliable than, the hearsay evidence given by Ms Burch because:

(a) Ms Maynard is remembering something that happened in 2012, not recounting a conversation which occurred the day before this hearing;

(b) Ms Maynard is relying on her memory, whereas Ms Burch asked her colleague to check what is currently on the HMRC system.

(2) Mr Francis' witness statement says that Ms Maynard "sent an email to HMRC requesting a copy of the C18." In fact, the email requests "a copy of the C18 *Schedule*" and Ms Burch replies by saying "please find attached the C18 demand note, *plus schedule* providing the calculations." On the basis of this evidence, I find as a fact that Ms Maynard requested the schedule with the calculations, not the C18 itself.

(3) When Ms Maynard was sent that copy PCDN and the schedule on 16 October 2012, she did not respond by saying that the PCDN had never previously been received.

(4) Mr Francis' evidence about Citipost's administrative procedures. I place no weight on this evidence. He accepted that he knew nothing about those procedures.

(5) Mr Francis' first witness statement states that he believed that the PCDN had been received and that Citipost did not pay the amount demanded. It was not until the day before this hearing that he changed his evidence.

38. Having weighed and considered the evidence, I find that the PCDN was issued by HMRC on 31 October 2011 and served on the company soon afterwards.

Whether Mr Francis had decided not to appeal

39. Mr Francis's first witness statement says that Citipost "did not respond to the letter sent by HMRC dated 4 October 2011, by either requesting a review of the decision or commencing an Appeal" and goes on to say:

> "Neither HMRC nor Citipost took any action to either chase for payment, or request a review of the decision, as correspondence continued over a lengthy period with regard to the LVBI issues."

40. Under cross-examination, Mr Francis agreed with Mr Singh that there is "no inkling" in his letter of 3 November 2011 that Citipost intended to challenge HMRC's decision to issue the PCDN. When Mr Singh said "the reason you didn't seek to appeal is that you were trying to accommodate the issues raised by HMRC," Mr Francis responded "yes."

41. Mr Singh submitted that Mr Francis had decided in October 2011 not to appeal the PCDN, and the first indication that Citipost wanted to appeal came on 28 May 2013, when Citipost notified this appeal to the Tribunal, along with its appeals against the other two PCDNs and the penalty.

42. Mr White submitted that Citipost remained in negotiations throughout this period and the correspondence between Mr Francis and Ms Burch should be seen in that context.

43. However, the facts are at odds with this submission. Mr Francis' letter of 3 November 2011 said "I am pleased to inform you that we have changed our

procedures so that your requirements detailed in your letter will be met moving forward." That does not suggest a continuing dialogue, but rather indicates Citipost's intention to comply with HMRC's requirements. That conclusion is supported by the consistency in tone between that letter and Mr Francis' earlier letter of 26 September 2011, which says that Citipost accepted HMRC's position on all points other than the "99 items" rule (about which more information was requested), and in which Mr Francis reiterates that he will "ensure compliance." The absence of continuing dialogue is also clear from the fact that Mr Francis did not write to Ms Burch again for over a year: his next letter was sent on 24 November 2012. All that happened in the intervening period is that Citipost provided more manifests to HMRC in response to their request.

44. On the basis of those facts and the evidence given by Mr Francis under cross-examination, I find the further facts that (a) Mr Francis decided not to appeal the PCDN at the time it was issued; (b) Citipost was not in continuing negotiations with HMRC in the period between its issuance and the Review Decision and (c) Citipost decided to appeal after that Review Decision was issued.

Mr White's submissions on behalf of Citipost

45. Mr White submitted that the Tribunal should approach the question of giving permission for a late appeal in three stages, as set out at [24] of *Denton v White* [2014] EWCA Civ 906 per Lord Dyson MR and Vos LJ. The relevant passage reads:

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages r 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)].'"

46. Th meaning of "serious or significant" was further discussed at [26] of that judgment, where Lord Dyson and Vos LJ said:

> "…in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which 'neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation'. Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant."

47. Mr White submitted that Citipost's application succeeded at the first of these three stages because the failure to comply with the time limit had been neither serious or significant. Citipost was already appealing the other two PCDNs, which have the

same background law and facts as this PCDN. The merits of this case are identical to the appeal against the other PCDNs and so they can easily be decided at the same time. It was right that the three PCDNs should "stand or fall together." Adding this appeal to the others would have no detrimental effect on the timing or conduct of the Tribunal hearing.

48. He also submitted that:

(1) if the Tribunal refused permission, the prejudice to Citipost would be substantial, as it would lose any chance of defending itself against this PCDN;

(2) in contrast, there was no prejudice to HMRC, other than the loss of a possible windfall gain if Citipost were to succeed at the substantive hearing;

(3) Citipost had sought to appeal as soon as Thrings had become aware of the PCDN, which was after they received the Review Decision. Until then, Citipost had not had legal advice.

Mr Singh's submissions on behalf of HMRC

49. Mr Singh said in *Denton* the Court of Appeal was considering the application of Rule 3.9 of the Civil Procedure Rules ("the CPR"). The CPR does not apply to the First-tier or Upper Tribunals.

50. In *Leeds City Council v HMRC* [2014] 0350 Judge Bishopp stated that the correct approach for the Upper Tribunal to take in relation to late appeals was that set out in *Data Select v HMRC* [2012] UKUT 187 (TCC) (Morgan J) ("*Data Select*"). In Mr Singh's submission, the same approach applied to this Tribunal. As a result, what was said in *Denton* about how to apply CPR 3.9 was simply not relevant.

51. Even if he were wrong in this, paragraph [26] of *Denton* cited at §46 above needed to be read in context. The Court of Appeal was not saying that the only test of seriousness or significance was whether the conduct of future litigation was jeopardised. Paragraph [26] continued by saying that such an approach would leave out of account:

> "…those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance.

52. It was thus clear, Mr Singh said, that breaches can be serious even though they do not affect the conduct of future litigation. Citipost did not apply to make a late appeal until the Notice of Appeal was filed with the Tribunal on 28 May 2013. This was around eighteen months after the PCDN had been issued, and seven months after the copy of the PCDN, with the Schedule, had been emailed to Ms Maynard. This was a serious failure to comply with the statutory time limit.

53. Mr Singh submitted that, as Judge Bishopp held in *Leeds*, the correct approach was to consider all the circumstances of the case, see *Data Select.* Applying that approach:

(1) the delay was 18 months, compared to six days in *Leeds;*

(2) Mr Francis had decided not to appeal, and changed his mind when Thrings became involved. That was not a good reason for the delay;

(3) in a case such as this, prejudice was not the test. Allowing the appeal would defeat the purpose of the time limit.

Discussion: the CPR and *Denton*

54. The first question is whether I should follow the "three stage" approach in *Denton,* where "all the circumstances" are not considered until the third stage, or whether I should follow *Data Select,* which has no three-stage approach, but requires only that all the circumstances be considered and balanced.

55. Decisions of the Upper Tribunal are of course binding on this Tribunal, but if there are two decisions of equal standing, I am able to choose which to follow. That is the position here.

56. In *Leeds,* Judge Bishopp said at [19] that the proper course was that set out in *Data Select.* However, Judge Sinfield decided in *McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC) ("*McCarthy & Stone*") that the earlier guidance given by the Court of Appeal as to CPR 3.9 in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 ("*Mitchell*") should be followed by the Upper Tribunal,. Although that guidance has since been reformulated by *Denton,* this Tribunal could rely on *McCarthy & Stone* and follow *Mitchell* as updated by *Denton,* rather than Judge Bishopp's judgment in *Leeds.* That is, in terms, what Mr White is urging on me.

57. In deciding which authority to follow, I have looked at the reasons why Judge Bishopp decided that the decision in *McCarthy & Stone* was wrong. At [13] of *Leeds* he set out (a) the overriding objective at CPR 1.1, followed at [14] by the overriding objective at Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Upper Tribunal Rules"). This is identical to the overriding objective at Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules").

58. CPR 1.1 reads as follows:

> "(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate—
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders."

59. At [15] of *Leeds*, Judge Bishopp identified that the requirement at CPR 1(2)f) of "enforcing compliance with rules, practice directions and orders" is absent from the Upper Tribunal Rules. Instead, that Tribunal is required by Rule 2(2)(c) to "avoid unnecessary formality and to seek flexibility."

60. Judge Bishopp went on to say at [16] that:

> "…the CPR do not apply to the tribunals, and they cannot be used as they stand in order to fill gaps. They offer no more than a guide; and in using the CPR for that purpose the tribunal must not lose sight of the surrounding circumstances."

61. A comparison of CPR 1.1 with Rule 2 of the Tribunal Rules discloses other differences. The overriding objective of the CPR is to "deal with cases justly and at proportionate cost," whereas that of the Tribunal Rules is to "deal with cases fairly and justly." There is no reference to "proportionate cost."

62. It is unsurprising, therefore, that there is also no equivalent in the Tribunal Rules to CPR 1(2)(b): the requirement, so far as practicable, of "saving expense." Neither is there a formal obligation to allot to each case "an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

63. At [18] of *Leeds*, Judge Bishopp said:

> "It is plain that the changes to the overriding objective of the CPR and to rule 3.9 were made with the express purpose of ensuring that time limits and similar requirements were enforced more strictly in the courts: see *Mitchell* at [34] to [51], and *Durrant* at [3]. The Tribunals Procedure Committee, which is charged with the duty of drafting the rules of procedure used in the tribunals (see the Tribunals, Court and Enforcement Act 2007 s 22(2)) has not, so far, thought fit to introduce similar changes to the Upper Tribunal rules. It may do so at some time in the future, or it may not. It does not seem to me that it is open to a tribunal judge to anticipate a decision which might never be taken and apply, by analogy, changes to the CPR as if they had also been made to the Upper Tribunal rules. In my judgment, until a change is made to those rules, the prevailing practice in relation to extensions of time should continue to apply."

64. I respectfully concur. When the Court of Appeal said in *Denton* that a three-stage test must be used, they were giving guidance about the operation of the CPR, which, *inter alia*, emphasises the saving of costs; they were not giving guidance about the Tribunal Rules.

65. I therefore choose to follow *Leeds* and not *McCarthy & Stone.* As a result I agree with Mr Singh that when deciding whether or not to allow the late appeal, this Tribunal must consider all the circumstances of the case, and there is no "three-stage test." This does not mean, of course, that the seriousness and significance of the breach are ignored, but rather that those factors are considered and weighed along with others.

All the circumstances of the case

66. The approach set out by Morgan J in *Data Select* at [37] is to consider the overriding objective, together with the list of factors at "old" CPR 3.9, ie, before that Rule was amended with effect from 1 April 2013. It then read as follows:

> "On an application for relief from any sanction imposed for 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 representatives; (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; and (i) the effect which the granting of relief would have on each party."

67. These factors are largely self-explanatory, although further assistance as to the meaning of (a) – the interests of the administration of justice, was given by Norris J In *Woodpecker v HMRC* [2009] EWHC 3442 at [46]:

> "Woodpecker has been dilatory in the prosecution of its appeal and that the period of delay is so serious that…the interests of justice in achieving finality and in securing observance of the time limits laid down in the rules are weighty factors which come down in favour of refusing permission to extend time."

68. At [36] of *Data Select*, Morgan J endorsed the "helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [23]-[24]." The following extract from [23] of that judgment echoes the paragraph above, albeit without reference to old CPR 3.9. Lord Drummond Young asks:

> "…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…"

69. Lord Drummond Young's judgment continues at [24] by saying that the Tribunal, when exercising its discretion as to whether or not to allow a late appeal, is likely to find that the various factors will conflict with each other, and "must weigh the conflicting considerations and decide where the balance lies."

70. Judge Berner echoed this in *O'Flaherty v HMRC* [2013] UKUT 0161 at [27]. At [34]-[35] he confirmed that the merits of the case may be a relevant factor, as previously stated in *R (oao Cook) v HMRC* [2007] EWHC 167 (Admin) *per* Dyson LJ.

Application to the facts of this case.

71. In deciding whether or not to give permission for a late appeal in this case, I therefore consider, and balance, all relevant circumstances, guided by the case law set out in the previous paragraphs.

Factors against allowing a late appeal

72. The deadline for Citipost to appeal against the PCDN was 2 November 2011, namely 30 days after 4 October 2011. However, it was not until the other appeals were notified to the Tribunal on 28 May 2013 that Citipost indicated that it was seeking to appeal the first PCDN. Far from being "made promptly," the application was eighteen months late. In the context of a thirty day deadline, this is both serious and significant.

73. Mr Francis sent his letter of 3 November 2011 on the day after the statutory deadline and I have already found as facts that he had decided not to appeal the PCDN and that there were no continuing negotiations between Citipost and HMRC. The failure to comply was therefore intentional.

74. Mr White submits that Citipost appealed, once it received legal advice. In common with other taxpayers, Citipost had thirty days to obtain advice. Its failure to act within that time limit is not a "good reason" for the failure. It follows, too, that the failure was not caused by Citipost's legal adviser, but by the company itself.

75. Mr Singh did not dispute that the facts and the law relating to this PCDN were essentially the same as those which will be considered when the other two PCDNs come to the Tribunal. Adding this PCDN will therefore not compromise the litigation timetable. It is also unlikely to increase, to any material extent, the time taken for the hearing, or the costs of preparation.

76. Nevertheless, if permission is granted for a late appeal there would be some prejudice to the administration of justice. The 30 day time limit has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should

be allowed to proceed late. The period of delay here is very long, and HMRC should be able to regard decisions which were not appealed as final. Overriding that principle of finality, essentially because there are two other similar appeals, risks undermining the fairness of the system. In other words, is it equitable for Citipost to be granted permission, essentially because it has two other similar appeals before the Tribunal, when an application from a taxpayer with otherwise identical facts would be refused?

77. Of course, it is true that if Citipost wins its appeals against the other two PCDNs, and is not granted permission to appeal the first PCDN, it will have paid money which as a matter of law is not due. That would be a serious prejudice to Citipost, which is not matched by the prejudice to HMRC. But it is also an almost inevitable outcome of refusing permission to appeal in a tax or customs case. The same is not necessarily true in other civil litigation, to which the old CPR 3.9 principles were applied.

78. Neither party made any substantial submissions in relation to the merits of the case. So far as I can tell from the papers provided, this is not a hopeless case, where the absence of merits would weigh against the appellant being granted permission; but neither is it one where the appellant will obviously succeed. Instead, like many of the cases which come to the Tribunal, the outcome is uncertain. I find that the merits are neutral.

Decision and appeal rights

79. It is true that (a) this PCDN can be swept into the existing appeal without extra time or costs and (b) refusing a late appeal inevitably risks the payment of money which may not be due, but in my judgment these considerations are insufficient to outweigh the factors against giving permission, namely: the very signficant length of the delay; the lack of any good reason for not appealing within the time limit and the need to ensure fairness as between taxpayers.

80. I therefore refuse permission for the late appeal and dismiss the application.

81. 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 Rules. 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 REDSTONE

TRIBUNAL JUDGE
RELEASE DATE: 2 JUNE 2015