[2017] UKFTT 845 (TC)

TC06240

Appeal number: TC/2017/00092

PROCEDURE – income tax – applications to strike out different parts of appeal on the basis that (1) no jurisdiction in respect of interest on unpaid tax, payments on account and balancing payments, or County court costs awarded to HMRC; (2) no reasonable prospect of success in appeal against late payment surcharges under s 59C TMA; (3) permission should not be given for late appeal against assessment under s 29 TMA – appeal struck out but HMRC requested to consider matter again, taking account among other things of decision in Lobler and s 9 Finance (No.2) Act 2017

FIRST-TIER TRIBUNAL
TAX CHAMBER

THAKORAL TAILOR **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK

Sitting in public at Tailor House, 88 Rosebery Avenue, London EC1R 4QU on 3 October 2017

The Appellant in person

Beverley Levy, Officer of HMRC, for the Respondents

DECISION

1. Mr Tailor filed an appeal to the Tribunal on 13 December 2016 in respect of a total amount of £38,731,81. This is a decision in relation to three applications made by HMRC in respect of Mr Tailor's appeal, namely:

> (1) an application to strike out part of the appeal on the basis that the Tribunal does not have jurisdiction in relation to that part;
>
> (2) a further application to strike out part of the appeal on the basis that there is no reasonable prospect of that part of the case succeeding; and
>
> (3) in relation to the remaining part of the case, an objection to Mr Tailor's application for permission to make a late appeal.

I refer to these below as applications (1), (2) and (3) respectively.

Preliminary remarks

2. I explained to Mr Tailor at the hearing that I would have to grant HMRC's applications. I subsequently issued a summary of my findings of fact and reasons for the decision which aimed to explain the reasons to Mr Tailor, as I also attempted to do at the hearing. I fear that I failed in both attempts. This full decision is produced following a request made by Mr Tailor under Rule 35(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") for full written findings and reasons.

3. I should also record here, as I did in the summary decision, that I made it clear to HMRC's representative at the hearing, Mrs Levy, that I have significant concerns about enforcement action being taken against Mr Tailor in his current circumstances. He is an elderly gentleman, who seemed to me to be both in difficult financial circumstances and to have been diagnosed with some form of cognitive impairment. He appeared to me to be quite unable properly to understand why he owes HMRC money in circumstances where he was, and seems to remain, convinced that he is owed a significant amount by HMRC. Unfortunately, he was also unable to articulate the reasons for his views.

4. The principal aspects of the dispute relate to the tax years 2005-06, 2007-08 and 2008-09. Mr Tailor's taxable income for each of these years included gains on life insurance policies. The amounts are particularly significant for 2007-08 and 2008-09. I suggested to Mrs Levy that the underlying problem might be what I think it is appropriate to describe as a widely acknowledged unfairness in relation to the tax treatment of partial surrenders of life insurance policies. However, Mrs Levy was clearly unfamiliar with that issue (and had not had prior involvement in Mr Tailor's case), and so was unable to assist me at the hearing. I have therefore undertaken further research of my own. I have done this not because I consider that it makes any difference to the outcome of this case, but in order to try to assist Mr Tailor by directing HMRC's attention to what I consider to be the main underlying problem, a

problem which I do not think HMRC have really acknowledged in the context of Mr Tailor's affairs.

5. The unfairness I had in mind at the hearing, and which my further research has reinforced as a concern, is well illustrated by the case of *Lobler v HMRC* [2015] UKUT 152(TCC). Following a consultation process this case led to a change in law in the recently enacted Finance (No.2) Act 2017 ("F(No.2)A 2017"). In summary, the tax rules can deem a person who makes a partial surrender of a life insurance policy to realise taxable income, notwithstanding that there may be no actual profit or gain on the policy. Each partial surrender is regarded as a "chargeable event" which gives rise to a deemed gain, taxable as income, subject only to an annual allowance equivalent to 5% of premiums paid. Although the position effectively unwinds on a full surrender of the policy, the relief that arises at that point cannot be carried back. The problem can be avoided if individual policies are surrendered in full, but it appears that many policy holders were not warned of the problem.

6. Although the Tribunal is unable to assist Mr Tailor I did urge Mrs Levy to explain Mr Tailor's apparent vulnerability to her colleagues in the Debt Management Unit with a view to discretion being exercised appropriately in the circumstances. I now repeat that request, with specific reference to the result in the *Lobler* case and to the recently enacted change in law. That change in law allows an application to be made to HMRC for recalculation of a chargeable event on a just and reasonable basis, on the grounds that the gain is "wholly disproportionate". If that approach could be applied to Mr Tailor's case then my rough calculations indicate that it would have a very significant impact on the amounts that HMRC are currently seeking to collect.

7. In *Lobler* the Upper Tribunal decided that Mr Lobler's appeal should be allowed on the basis that he would have been entitled to rectification of his decision to make partial rather than full surrenders. In this case, as described below, Mr Tailor's appeal relates not to assessments in respect of the tax charged in respect of which the Tribunal can entertain an appeal (as in *Lobler*) but to related amounts, in particular interest and payments on account, in respect of which the Tribunal is unable to find for Mr Tailor. However, if I am right in my suspicion that the underlying issues with Mr Tailor's tax affairs relate largely to the problems with the legislation discussed in *Lobler*, then the unfairness is the same.

8. My reading of the new relief, provided by s 9 F(No.2)A 2017, is that it permits an application to be made for the gain to be recalculated within four years of the tax year in which the gain arose, or within such longer period as an HMRC officer may agree. I cannot see that it is limited to amounts taxed in periods after the legislation comes into force, so in principle it seems to me that, with an appropriate exercise of discretion, HMRC could recalculate the gains that Mr Tailor has been treated as making under this provision. If that was done then, as far as I can see, that would go a long way towards eliminating Mr Tailor's unpaid liabilities.

9. Before going further I will also make some general comments about the Tribunal's jurisdiction and about "top-slicing relief" which as will be seen has been a topic of dispute between the parties.

The Tribunal's jurisdiction

10. The Tribunal is a creature of statute. Its powers are limited to the powers that Parliament has chosen to confer on it. It has no ability to make decisions in respect of matters that it has not been given power to determine. It also has to act according to the law. The Tribunal has no power to find in favour of a taxpayer just because it considers that the law produces an unfair result, or to direct HMRC not to collect tax or other amounts that are lawfully due. In contrast, HMRC does have a level of discretion under what are traditionally known as its "care and management" powers, now reflected in s 5 and s 51(3) of the Commissioners of Revenue and Customs Act 2005. It is those powers I have in mind, together with the new relief introduced by F(No.2)A 2017, when urging HMRC to reconsider this matter.

Top-slicing relief

11. I received no submissions about top-slicing relief, but since it appears to have featured significantly in the underlying dispute between the parties I will attempt a brief summary, in the hope of creating further clarity.

12. The starting point is that chargeable event gains received in respect of life insurance policies are treated as already having been taxed at the basic rate (s 530 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA")). Top-slicing relief is a limited relief available in respect of tax payable at rates above the basic rate, and is provided for by sections 535 to 537 ITTOIA. The application of the relief is effectively limited to cases where (a) more than one year has elapsed between chargeable events (or if there is no previous such event, since the policy was taken out) and (b) the chargeable event in question has the effect of taking the taxpayer over the threshold for higher rate (or, these days, additional rate) income tax. The way in which the relief is calculated mean that it does not assist if either of these conditions is not satisfied. Where top-slicing relief applies, the effect of the relief is to reduce or eliminate the higher rate tax payable, very broadly (and in a way that ignores timing aspects and changes in rates and thresholds) by giving rise to a similar result as if the amounts received had been spread over the years that have elapsed since the policy was taken out, or since the last chargeable event.

13. HMRC's position that Mr Taylor was not entitled to top-slicing relief was based on the fact that he made a number of surrenders in successive years, so that he did not have the necessary gaps between chargeable events to benefit from the relief. Mr Tailor disagreed.

Findings of fact

14. The amount set out in Mr Tailor's appeal to the Tribunal is taken from a Statement of Liabilities issued on 10 November 2016. A detailed breakdown of this amount is set out [26] below, grouped in the manner relevant to the three applications rather than in the manner set out in the Statement.

15. Mr Tailor filed self assessment returns for each of the years most relevant to this appeal, 2005-06, 2007-08 and 2008-09. The returns appear all to have been filed in

paper form, leaving HMRC to calculate the tax. Electronic versions of the returns as captured to HMRC's system were included in the bundle. Each return included amounts in respect of "gains on UK life insurance (with tax paid)". The tax calculation for the 2005-06 return showed gains on life insurance policies of £13,676 and notional (basic rate) tax treated as paid on those gains of £2,735.20. The net result, taking account of other income and reliefs, was tax overpaid of £1,289.80. The total income for 2005-06 did not exceed the threshold for higher rate tax.

16. The return for 2007-08 resulted in a tax liability of £21,651.80 on HMRC's calculation, virtually all of which related to a life insurance gain of £148,275, on which the tax treated as paid was £28,597. (The reason this is less than 20% of the gain appears to be that other reliefs reduced the amount of the gain chargeable and therefore the related tax treated as paid.) However, it appears that Mr Tailor also contacted HMRC to claim that he was entitled to top-slicing relief, which he believed had the result of generating a tax refund for the year, rather than further tax being due.

17. I can see no indication that this claim was included in the return, so I infer that Mr Tailor contacted HMRC separately. I now understand that the relief may be provided by HMRC's systems automatically as part of the tax calculation, where HMRC considers that relief is due. This is consistent with the wording of the legislation, which does not appear to contemplate a separate claim and provides that the relief is given effect by a reduction in income tax at Step 6 in the calculation provided for in s 6 Income Tax Act 2007. In view of this it seems most likely that Mr Tailor contacted HMRC claiming the relief after he saw HMRC's tax calculation.

18. Following receipt of this claim, a review of Mr Tailor's tax affairs was carried out for previous periods. This resulted in an assessment being made under s 29 Taxes Management Act 1970 ("TMA 1970") in respect of the year 2005-06, reflecting HMRC's conclusion that £1,271.80 of tax was now due. Due to the passage of time this assessment is not available but it is recorded on HMRC's systems in the "SA Notes" and in Mr Tailor's self assessment statement. It also appears from correspondence Mrs Levy had with the relevant HMRC officer that this assessment may not have been attributable to the life insurance gain, which had already been reflected in the self assessment, and instead to revised income figures supplied by Mr Tailor, but this is unclear. Mr Tailor appealed against this assessment on 30 July 2009 and at the same time made a claim to reduce his payments on account for 2008-09 to nil.

19. On 4 August 2009 HMRC rejected the appeal against the assessment in respect of 2005-06 by a letter to the appellant. The letter offered the option of a review or to submit an appeal to the Tribunal. Mr Tailor did not accept the offer or appeal to the Tribunal, but did send a letter of complaint to HMRC dated 6 August 2009.

20. Mr Tailor's return for 2008-09 was filed under cover of a letter dated 17 August 2009, but it was initially sent back because the employment page was missing. Again, by far the most significant entry on the return related to life insurance gains, in an amount of £85,875, with tax treated as paid of £14,545. Again, the notional tax was restricted due to other reliefs. HMRC calculated that the tax due for the year was

£7,341. The effect was to reinstate the obligation to make payments on account for that year.

21. On 3 November 2009, in the absence of any request for a review or an appeal being submitted to the Tribunal, HMRC treated the appeal against the 2005-06 assessment as settled and released the tax for collection. A letter was sent to the appellant notifying him of this. HMRC also responded to the complaint by a letter dated 20 November 2009 in which it was explained that top-slicing relief was not due as the appellant had expected in respect of 2007-08. The letter stated that Mr Tailor had made a very large partial surrender in that year which had taken him into the higher rate tax band, but that smaller withdrawals in the two previous years meant that he was not eligible for top-slicing relief. The letter also explained that the writer had noted that Mr Taylor had made another large life assurance gain in 2008-09 which again took him into the higher rate tax bracket and resulted in additional tax of £7,341. The letter did confirm that certain penalties and surcharges were being cancelled.

22. Substantial further correspondence ensued between Mr Tailor and HMRC's complaints service, not all of which was available, in which Mr Tailor continued to claim that top-slicing relief should have been given for 2007-08 and also for 2008-09. It appears from some of the correspondence that both Mr Tailor and the complaints team overlooked the fact that there was also an outstanding assessment for 2005-06. The correspondence with the complaints team continued up to at least 2014 and included a letter dated 10 December 2011 in which Mr Tailor stated that he was making "a formal appeal regarding tax demands of £33,235.10 …". The correspondence from HMRC includes some detailed explanations of HMRC's views about the non-availability of top-slicing relief. Mr Tailor was also in correspondence with HMRC's Debt Management and Banking team by 2013, who were chasing for payment of an amount which by that stage was around £34,000. In addition to references to top-slicing relief the correspondence from Mr Tailor refers to losses in Mr Tailor's company and to Mr Tailor's age and ill-health, and states that HMRC owed him £62,076 plus interest. (Slightly different figures are mentioned in other correspondence.)

23. As far as I can tell, Mr Tailor's position appears to have been based on a fundamental misunderstanding not only about when top-slicing relief is available but also about its value. The correspondence suggests that he believed that the effect of the relief was to reduce the amount of income chargeable at the higher rate for each of 2007-08 and 2008-09 by 50%, resulting in relief (on his figures) of £21,677 for 2007-08 and £7,585 for 2008-09. The correspondence, and notes of phone calls, also indicate that the gains relate to a number of policies issued by a Halifax group entity in 2004, and that (among other things) Mr Tailor appeared not to have appreciated that taking small partial surrenders in 2005-06 and 2006-07 prevented him from benefiting from any top-slicing relief in respect of the more substantial partial surrenders in the following two tax years.

24. It does not appear that there was any specific discussion about the more fundamental unfairness inherent in the taxation treatment of partial surrenders, as

discussed in the *Lobler* case. However, the papers provided by Mr Tailor at the hearing included an annual statement from Halifax Financial Services as at 15 February 2017. This showed a plan start date of 13 February 2004, a total amount invested of £250,000 and total withdrawals of £341,798.73. The current plan value was shown as £2,598.29. This indicates a total economic profit of under £100,000. In contrast, the amounts taxed for 2007-08 and 2008-09 alone total well in excess of £200,000. Is also clear from the correspondence that the withdrawals were made in the form of partial surrenders across all the policies held, in other words precisely the situation discussed in *Lobler*. In the circumstances it is hardly surprising that Mr Tailor finds it hard to accept that his tax liability is as high as it is.

25. HMRC took County court action during 2015, and initially obtained judgment against Mr Tailor on 14 March 2016 in the amount of £37,485.05. It appears that this judgment was set aside or stayed but a further judgment was made on 28 September 2016 in the amount of £37,996.86 including costs of £1,886.81. The position was not entirely clear but my understanding is that enforcement of the judgment is currently suspended because Mr Tailor said he was appealing to the Tribunal. This appeal was clearly prompted by those proceedings.

26. The amount the subject of this appeal comprises the following:

Application (1)

Tax year	**Description**	**Amount (£)**
2000-01	Interest on balancing payment	85.41
2005-06	Interest	276.60
	Interest	12.60
	Interest	11.96
2007-08	Second payment on account	472.60
	Interest	167.73
	Interest on first payment on account	61.31
	Balancing payment	19838.44
	Interest	4661.34
2008-09	First payment on account	3670.50
	Interest	847.32
	Second payment on account	3670.50
	Interest	796.59
	Interest	71.53
	Interest	67.54
N/a	County court costs	1776.76
	County court costs	110.00
	Total interest	**7,059.93**
	Total tax	**27,652.04**
	Total County court costs	**1,886.76**
	TOTAL	**36,598.73**

Application (2)

Tax year	Description	Amount (£)
2005-06	First late payment surcharge	63.59
	Second late payment surcharge	63.59
2008-09	First late payment surcharge	367.05
	Second late payment surcharge	367.05
	TOTAL	**861.28**

Application (3)

Tax year	Description	Amount (£)
2005-06	Assessment	**1271.80**

Submissions

27. The grounds of Mr Tailor's appeal are really not possible to follow, although the general gist is that Mr Tailor believes that no tax is due. Unfortunately nothing Mr Tailor said at the hearing assisted further in relation to any of the points I needed to decide, either as a matter of fact or law. It is unfortunate that Mr Tailor has not benefited from any form of professional representation. I did explain the availability of pro bono assistance, but rather surprisingly Mr Tailor indicated that he had sought it but had been led to believe that he was not eligible for it.

28. I deal with HMRC's submissions in relation to each application below, under the relevant sub-heading.

Application (1)

29. Application (1) relates to interest in respect of late payment of income tax or surcharges, payments on account and a balancing payment in respect of income tax, and County court costs. HMRC applied to strike these parts of the appeal out under

rule 8(2)(a) of the Tribunal Rules on the basis that the Tribunal does not have jurisdiction. I agree with HMRC's submission that the Tribunal has no jurisdiction in relation to these amounts.

30. As already explained, the Tribunal is a creature of statute and its jurisdiction is limited to what statute provides. Where the Tribunal does not have jurisdiction in respect of proceedings, or any part of them, it must strike them out under rule 8(2)(a).

31. Interest is generally charged under s 86 TMA 1970. Although not mentioned at the hearing it appears that, in fact, some parts of the interest were charged under s 59C(6) TMA 1970, being interest on late payment surcharges. Whilst the Tribunal may well have jurisdiction in relation to tax to which an interest charge relates, the legislation does not confer any jurisdiction in relation to interest charges as such. This was confirmed in relation to s 86 in the Upper Tribunal case of *HMRC v Gretton and another* [2012] UKUT 261 (TCC), which makes clear at [13] that the Tribunal has no discretion in the matter. For another recent example of a case confirming this in the First-tier Tribunal see *Mursaloglu v HMRC* [2017] UKFTT 708 (TCC). The position is no different in relation to interest on late payment surcharges.

32. Payments on account and balancing payments in respect of income tax became due and payable under s 59A and s 59B TMA 1970, in respect of 2007-08 and 2008-09. The amounts payable reflected the figures provided in Mr Tailor's self assessment returns. It is clear from s 31 TMA 1970 that there is no right of appeal against a self assessment, so again the Tribunal has no jurisdiction in relation to these amounts. The absence of jurisdiction has been confirmed, for example, in *Pacita Ridley v HMRC* [2014] UKFTT 527 (TCC).

33. I have considered whether it makes any difference that Mr Tailor submitted the returns in paper form, leaving HMRC to calculate the tax. I have concluded that it does not. The basic rule in s 9(1) TMA is that a return must include a self-assessment of the tax chargeable. However, this obligation is disapplied by s 9(2) where the return is submitted by 31 October after the tax year (the usual time limit for non-electronic returns). In such a case HMRC is required to make the assessment under s 9(3), and s 9(3A) provides that an assessment under s 9(3) is "treated for the purpose of this Act as a self assessment and as included in the return". It follows from this that there is no right of appeal under s 31 TMA 1970.

34. On the face of it this is problematic because the result appears to be that there is no effective right of appeal in respect of issues that arise from the tax calculation performed by HMRC, such as the availability of top-slicing relief. I think the answer to this is that s 9ZA TMA 1970 gives a taxpayer a right to amend a return within 12 months of the filing date. The taxpayer could rely on this provision to amend HMRC's calculation. If HMRC disagreed then an enquiry could be opened, which could in due course lead to an appeal being made against the conclusions of the enquiry.

35. The Tribunal has no jurisdiction in relation to County court costs, which are a matter for that court.

36. Accordingly, the parts of the appeal covered by application (1) must be struck out.

Application (2)

37. Application (2) relates to late payment surcharges charged under s 59C TMA 1970. This application was initially framed on the basis that there was no reasonable prospect of the appeal succeeding and therefore that it should be struck out under rule 8(3)(c) of the Tribunal Rules. In the skeleton argument filed shortly before the hearing, and at the hearing, HMRC also argued that it did not appear that an appeal had been made to HMRC in respect of these charges, and as a result the Tribunal did not have jurisdiction. Mrs Levy said that the only document she had been able to identify as an appeal was the letter dated 10 December 2011 referred to at [22] above, but that was very generic and provided no details.

No appeal to HMRC?

38. If it is the case that Mr Tailor did not make an initial appeal to HMRC in respect of the late payment surcharges then the Tribunal has no jurisdiction to deal with an appeal in respect of them, and would be required to strike out the appeal. This is the effect of sections 49A to 49H TMA 1970 and rule 8(2) of the Tribunal Rules.

39. I have concluded that I should deal with this part of the appeal under rule 8(3)(c) and not under rule 8(2). The surcharges for 2005-06 were imposed on 16 February and 18 June 2010, and those for 2008-09 on 1 April and 11 August 2010. Due to the passage of time part of the complaints correspondence is no longer available, and it is quite possible that there is something in that correspondence that could properly be regarded as an appeal to HMRC. In particular, no correspondence is available for the period between 20 November 2009 and 28 September 2011, although it seems clear that there was ongoing correspondence during that time. It must have been quite clear to HMRC throughout the period that Mr Tailor was in dispute with them about his tax liabilities. Although HMRC's complaints team appears to have overlooked the existence of the 2005-06 assessment during this process, and therefore possibly the late payment surcharges relating to that year, I do not think that should be taken into account in HMRC's favour. The letter of 10 December 2011 might be generic but it is pretty clear, and covers what I consider must have been the full amount then in dispute, including in respect of 2005-06. In addition, HMRC did not take the point initially that there had been no appeal to HMRC against late payment surcharges, but only in a skeleton argument prepared shortly before the hearing and again orally at the hearing. I also note that HMRC do have a practice in some circumstances of accepting that notification of an appeal to the Tribunal amounts to notification of the appeal to HMRC, see HMRC's Manuals at ARTG2440.

Rule 8(3)(c) – no reasonable prospect of success

40. HMRC submitted that the late payment surcharges were issued correctly. In relation to 2005-6 they relate to tax in respect of which an appeal was made but not pursued. In relation to 2008-09 they relate to Mr Tailor's self assessment liability, determined from his own figures. For the relevant periods late payment surcharges

were charged under s 59C TMA 1970 at a rate of 5% of the unpaid tax for tax unpaid 28 days from the due date, and a further 5% if the tax remained unpaid for six months. Section 59C(7) permits an appeal to be made against the imposition of a surcharge. Under subsection (9) the Tribunal may set a surcharge aside "if it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax". Subsection (10) provides that inability to pay shall not be regarded as a reasonable excuse. Subsection (11) gives HMRC a discretion to mitigate or remit a surcharge, a discretion which is not available to the Tribunal.

41. Mr Tailor's grounds for not paying these amounts are that he does not agree that he owes HMRC any money, and that he cannot afford to pay them. I do not see how there is any realistic chance that either of these grounds could amount to a reasonable excuse, and reliance on the latter is specifically precluded by the legislation.

42. Under rule 8(3)(c) of the Tribunal Rules the Tribunal may strike out the whole or part of proceedings if it "… considers there is no reasonable prospect of the appellant's case, or part of it, succeeding". This test is very similar to the test in the Civil Procedure Rules for striking out and summary judgment ("no reasonable grounds" and "no real prospect"). It is a high hurdle. As explained in *Three Rivers District Council and others v Governor and the Company of the Bank of England* (3) [2001] UKHL 16, [2001] All ER (D) 269, and in particular by Lord Hope at [87] to [95], the power to dispose of a case summarily is a discretionary power which requires the exercise of judgment in weighing up the prospects of success. The test is essentially whether the prospect of success is fanciful. If serious consideration of the issues is required, such that a mini-trial might be necessary, that indicates that the power should not be exercised. The power is designed to deal with cases that are not fit for trial at all: *Swain v Hillman* [2001]1 All ER 91. The power must also obviously be exercised in accordance with the overriding objective of (in this case) the Tribunal Rules to deal with cases fairly and justly. This must include assessing whether there is any realistic possibility that evidence could be adduced at trial to support the case being put, such that it would not be a waste of time and resources to proceed to a hearing.

43. The Upper Tribunal's power to strike out is in similar terms and was considered recently in *Badaloo v Financial Conduct Authority* [2017] UKUT (158) TCC. Judge Berner referred at [50] to the power under rule 8(3)(c) being a discretionary one which requires consideration of all the circumstances, including the need for the appellant to have a tenable case and the consequences of the case not proceeding. He also referred at [51] to proportionality as being an important element in dealing with a case fairly and justly in accordance with the overriding objective (rule 2 of the Tribunal Rules).

44. Applying these tests I do not consider that there is any reasonable prospect of this part of the appeal succeeding, and I do not think it would be in the interests of justice to allow it to proceed. Although the consequence of striking out would be that Mr Taylor would not have the opportunity to seek to demonstrate that he had a reasonable excuse and accordingly would lose any chance to challenge the surcharges, I do not see that he has a tenable case such as would justify the time and resources required to

allow the appeal to proceed. Accordingly I have concluded that this part of the appeal should be struck out.

Application (3)

45. The final application relates to the appeal against the assessment under s 29 TMA 1970 in respect of 2005-06. HMRC's records show that Mr Tailor was offered a review and notified of the alternative of appealing to the Tribunal on 4 August 2009, in a letter which was their "view of the matter", within s 49C(2) TMA 1970. Under s 49C(4), if the taxpayer does not accept the offer of a review then the matter is treated as settled unless the appeal is notified to the Tribunal under s 49H TMA1970. That section allows a taxpayer to appeal to the Tribunal within 30 days. Any appeal after that period is possible only if the Tribunal gives permission.

46. Guidance has been provided in a number of cases as to the approach the Tribunal should take in determining questions of this kind. Most recently, important guidance has been provided by the Supreme Court in *BPP Holdings Limited and others v HMRC* [2017] UKSC 55. It is clear from the Supreme Court decision that I must take all relevant factors into account, but that close regard should also be paid to the approach now taken by the courts, under which importance must be attached to observing rules. The approach taken in the CPR (the Civil Procedure Rules) should generally be followed. Lord Neuberger referred in particular to the guidance given by Judge Sinfield in *McCarthy & Stone (Developments) Ltd v HMRC* [2014] UKUT 196 (TCC), [2015] STC 973 as being appropriate. Addressing the question of whether to permit an extension of time under the Upper Tribunal rules, Judge Sinfield referred to the Court of Appeal decision in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 as providing useful guidance. *Mitchell* made it clear that, whilst all the circumstances should be taken into account, particular weight should be given to the references in the CPR to the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions and orders. The Court of Appeal considered the issue again in *Denton v TH White* [2014] EWCA Civ 906 and provided some clarifications which were considered by the Upper Tribunal in *Romasave (Property Services) Ltd v HMRC* [2016] STC 1, which also considered the useful guidance provided by Morgan J in *Data Select Ltd v HMRC* [2012] STC 2195.

47. The guidance in *Data Select* suggests that the Tribunal should ask itself the following questions: what is the purpose of the time limit, how long was the delay, was there a good explanation for it, and what are the consequences for the parties of an extension or a refusal. The guidance in *Denton*, discussed and applied in *Romasave*, refers to a three-stage process, the first being to identify and assess the seriousness and significance of the failure, the second to consider why it occurred and the third to evaluate all the circumstances of the case, including those emphasised by the CPR rules.

48. The questions suggested by *Data Select* and *Denton* can be answered as follows. The purpose of the time limits for making an appeal is to ensure finality of litigation and legal certainty, in the public interest. In this case the appeal to the Tribunal was

over seven years late. On any basis that is a serious and significant delay. Mr Tailor only lodged an appeal in December 2016 as a result of the County court proceedings, rather than for any other reason. However, I need to take into account that Mr Tailor did complain to HMRC in August 2009, albeit that he clearly disregarded the terms of the 4 August letter which would have made it clear that he had 30 days to lodge an appeal with the Tribunal. It is quite possible that Mr Tailor did not really understand any of the letters he received and thought that he was addressing the matter through the complaints process. The reasons given for the late appeal in his notice of appeal to the Tribunal appear to be that he was unaware of the advice that he needed to appeal and that he was suffering from "neurology/dementia". He also referred to some of the ongoing correspondence.

49. My strong impression at the hearing was that Mr Tailor did indeed have a significant problem either in understanding the correspondence, or perhaps more likely in his unwillingness to accept that HMRC's points were valid. However, I also need to take into account the fact that, although Mr Tailor could clearly be prejudiced by his appeal not being heard, there is undoubted and real prejudice to HMRC because the passage of time has meant that there is virtually no information available about the circumstances that led to the assessment being made. In those circumstances I do not think that the appeal could be conducted fairly to both parties.

50. Taking all the circumstances into account, and having regard to the guidance given by the cases referred to above, including most recently *BPP*, I do not consider that it would be fair and just to admit the appeal against the 2005-06 assessment. In my view the length of the delay and the prejudice to HMRC outweigh factors which might otherwise point in favour of the appeal being admitted.

Decision and closing comment

51. HMRC's three applications are granted and accordingly the appeal is struck out under rule 8 of the Tribunal Rules.

52. I do however wish to reiterate the comments made at [3] to [8] above about my concerns relating to this case, not only in relation to Mr Tailor's personal position but also the apparently unfair application of tax rules to him. As far as I can tell a fundamental problem with Mr Tailor's tax affairs appears to have been the unfair impact of the system for taxing partial surrenders of life insurance policies, an unfairness now recognised by a change in law. This seems to have been confirmed by the annual statement from Halifax Financial Services referred to at [24], which indicates that Mr Taylor has been taxed on amounts well in excess of his economic profit on the policies in question. Earlier versions of this statement were provided to HMRC during the course of the correspondence, so the unfairness should have been apparent. It is unfortunate, although not at all surprising, that HMRC have not recognised that this issue applies in Mr Tailor's case and, following the developments since *Lobler*, taken steps to point out, and indeed act on, the proposed (and now actual) change in law. I urge HMRC to consider all these points very carefully before taking any enforcement action.

53. 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 the 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 25 NOVEMBER 2017