[2018] UKFTT 601 (TC)

TC06763

Appeal number: TC/2017/06234
TC/2017/04802

EXCISE DUTY – Refusal of AWRS approval – Assessments - application for permission to admit late appeals – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GOLDSHINE TRADE LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at Taylor House, London on 24 September 2018

Joshua Carey, counsel instructed by Alexander Whyatt solicitors for the Appellant

Isabel McArdle, counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. The Appellant applies to the Tribunal for permission to admit two late appeals, lodged outside the 30-day statutory time limit:

a. Appeal TC/2017/04802, against a decision dated 21 March 2017 to refuse the Appellant approval under the Alcohol Wholesalers' Registration Scheme ("AWRS"). The Appellant's Notice of Appeal was lodged on 14 June 2017, 54 days late and 85 days after the decision appealed. The acknowledgment that it was out of time, and request for it to be permitted to proceed out of time was made on 5 September 2018, over a year and two months after the Notice of Appeal;

b. Appeal TC/2017/06234, against a review decision dated 13 January 2017 upholding two excise assessments ("Excise Assessments") from July and August 2016. This appeal was lodged on 7 August 2017, 175 days (nearly six months) late and 206 days after the decision appealed.

2. HMRC object to the Appellant's application and, should the appeals be admitted, apply to strike them out.

The Facts

3. The Tribunal received three lever arch files of documents which included two witness statements from Matthew Whyatt, managing director of Alexander Whyatt, and one statement from Nitin Popat on behalf of the Appellant and Officer Susan Williams on behalf of HMRC. It heard oral evidence from Mr Popat, Director of the Appellant, who was cross examined.

4. The Tribunal finds the following facts on the balance of probabilities.

AWRS Factual Summary

5. As of 16 August 2016 Euro Andertons LLP accountants and tax advisors were acting on behalf of the Appellant.

6. By 08 September 2016 Bacchus Solutions Ltd accountants were instructed to act on its behalf.

7. On 02 March 2017 HMRC sent the Appellant a letter stating they were considering refusing it AWRS approval.

8. On 15 March 2017 the Appellant made representations in reply through its representative Alexander Whyatt solicitors.

9. On 17 March 2017 Alexander Whyatt solicitors sent a formal notice of acting on behalf of the Appellant to HMRC.

10. On 21 March 2017 an HMRC officer made the decision to refuse the Appellant's AWRS approval. Their letter concluded in standard terms:

'If you do not agree with my decision then you can ask for it to be reviewed by another HMRC officer who has previously not been involved in the matter, or appeal to an
5 independent tribunal. If you opt for a review you can still appeal to the tribunal after the review has finished.

If you want a review you should write to me at the address above within 30 days of the date of this letter, giving your reasons why you do not agree with my decision. If you want to appeal to the tribunal you should send them your appeal within 30 days of the
10 date of this letter.'

11. On 31 March 2017 the Appellant, through its representative, requested that it be temporarily approved for AWRS pending an appeal to the Tribunal of the decision to refuse approval failing which it would apply to the Administrative Court for injunctive relief to the same effect.

15 12. On 11 April 2017 Matthew Whyatt of Alexander Whyatt filed a claim for judicial review on behalf of the Appellant against HMRC's decision to refuse it approval and registration under AWRS. The claim sought an injunction as interim relief.

13. On 12 April 2017 the Appellant obtained an injunction from the Administrative Court from Mrs Justice Lang requiring HMRC to register and approve it to continue to
20 trade in alcohol until the determination of its claim for judicial review or further order. HMRC was granted liberty to apply to vary or discharge the injunction following determination of the linked claims for judicial review by other claimants and any statutory appeal by the Appellant to the First-tier Tribunal against the Defendant's decision to refuse its AWRS.

25 14. On the same date Alexander Whyatt sent a copy of the injunction to HMRC stating: 'You are aware from the correspondence generally that our client's business is being prejudiced daily by not having already been registered pending the outcome of its intended appeal'.

15. On 20 April 2017 the statutory deadline for appealing the AWRS refusal to the
30 Tribunal passed.

16. On 09 June 2017 the Appellant, through its representative, contacted HMRC, requesting the outcome of the independent review against the refusal of AWRS approval. HMRC responded, stating that no review request had been received.

17. On 14 June 2017 the Appellant's Notice of Appeal was lodged at the Tribunal in
35 the AWRS appeal, stating at section 6 that 14 June 2017 was the latest time by which it ought to have been lodged. There was no explanation given as to how that date was calculated as the AWRS refusal decision was dated 21 March 2017. No application to request permission to proceed out of time was made, or referred to, in the Notice of Appeal.

18. On 19 July 2017 HMRC's Statement of Case was lodged in the AWRS appeal.

19. On 22 September 2017 HMRC emailed the Appellant, requesting correspondence evidencing any review request in relation to the AWRS decision.

20. On 05 October 2017 HMRC sent a second email to the Appellant requesting correspondence evidencing any review request.

21. On 17 November 2017 HMRC sent a third email to the Appellant, requesting correspondence evidencing any review request, and how the date of the 14 June 2017 in box 6 of Notice of Appeal in the AWRS appeal was calculated. The email stressed that if the review request had not been made, the appeal was out of time and could not proceed without the Tribunal's permission.

22. On 17 November 2017 the Appellant's hardship application was granted.

23. On 07 December 2017 HMRC wrote to the Tribunal, copying in the Appellant, drawing to the Tribunal's attention the fact that the Appellant had not responded to three requests for evidence to support its assertion that a review had been requested and that its Notice of Appeal did not request permission to appeal out of time. The email also requested consolidation of the two appeals, the AWRS appeal together with the appeal against the Excise Duty assessment as described below.

24. On 7 February 2018 the Tribunal issued directions requiring the Appellant to provide a response.

25. On 19 February 2018 HMRC sent a fifth email to the Appellant requesting disclosure of any review correspondence and how the 14 June 2017 deadline had been calculated in the AWRS appeal.

26. On 28 February 2018 the Appellant served the first Witness Statement of Matthew Whyatt, following Tribunal directions of 7 February 2018, responding to the question of whether a review had been requested.

27. Mr Whyatt stated at paragraph 11 of his first statement: 'Given the correspondence of 31 March 2017, the Respondent (the Appellant) was under the presumption that a request for an independent review would be inferred from the correspondence. If the Applicant (HMRC) denies this inference then the Respondent apologies for this lack of clarity but asks the honourable Tribunal to take into account the context and pressure that the respondent (and its legal team) was under due to the lack of time (10 days) permitted by the Applicant before they would be forced to cease trading.'

28. It is now accepted that at no stage did the Appellant request an independent review of the AWRS decision nor provide evidence of such a request in this correspondence.

29. On 02 March 2018 HMRC submitted a sixth request as to how the 14 June 2017 deadline was calculated in the AWRS appeal and repeated that there had been no

application to request that the Tribunal allow its out of time application. In addition, the Appellant was requested to withdraw paragraph 4 of its grounds of appeal, stating that a review request had been made.

30. On 18 April 2018 HMRC requested that the Tribunal list the matter, in light of the Appellant's continuing lack of co-operation. Again, particulars as to how the 14 June 2017 deadline was calculated were requested and a third request that the Appellant lodge the appropriate application to enable the Tribunal to consider its appeal out of time.

31. On 19 April 2018 the Appellant sent an email stating that no formal application had been submitted by HMRC for the Appellant to respond to.

32. On 19 April 2018 HMRC sent an email confirming and listing their earlier representations objecting to the AWRS and excise appeals proceeding out of time.

33. On 18 May 2018 the Tribunal requested representations from the Appellant within 7 days or the file would be closed.

34. On 19 June 2018 the Appellant was visited by two HMRC Officers to inspect its compliance with AWRS conditions. This raised concerns including continuing non-compliance with due diligence requirements and the commercial viability of the business.

35. On 05 September 2018 Matthew Whyatt lodged his second witness statement clarifying how the date of the 14 June was calculated and accepting that the AWRS Notice of Appeal was filed out of time.

Excise Assessments Factual Summary

36. Between 13 April 2015 and 12 October 2015 HMRC made a series of visits to the Appellant’s premises, at the last of which Officer Matthews was told that the Appellant had vacated the premises around 14 September 2015.

37. Following the October visit, during contact with a VAT colleague in HMRC, Officer Matthews was advised that her colleague was still in touch with the Appellant through its accountant and that the VAT officer had uplifted purchase invoices for supplies to it from East Sussex Distribution Limited (ESDL) and he would forward these invoices to Officer Matthews. Her colleague also advised that a VAT assessment had been raised on the Appellant on 26 June 2015 denying VAT input tax where there was no evidence of purchases. The Appellant had produced purchase invoices and cash vouchers related to purchases from ESDL to substantiate the claim to input tax.

38. On 29 October 2015 HMRC Officer Matthews received copies of invoices but some were illegible so she asked Officer Mandalia to forward hardcopies. On 26 November 2015 on Officer Matthews received hardcopies of invoices, 44 of which were still illegible.

39. On 27 April 2016 HMRC issued to the Appellant an Excise pre-assessment letter (in the sum of £1,417,453).

40. On 08 July 2016 HMRC issued to the Appellant an additional Excise pre-assessment letter (in the sum of £1,272,788).

5 41. On 08 July 2016 an Excise Assessment was issued in the amount of £1,417,453.00 notified to the Appellant (based upon 49 invoices).

42. On 09 August 2016 an Excise Assessment was issued in the amount of £1,272,788.00 notified to the Appellant (calculation of duty based on the other 44 invoices which were still illegible).

10 43. On 16 August 2016 a request was received by HMRC on behalf of the Appellant that the Excise Duty Assessments be reviewed.

44. After a series of agreed extensions for information to be provided in support of the review, on 13 January 2017 HMRC made the review decision to uphold the two excise assessments. The letter concluded by setting out the standard appeal rights 'If
15 you do not agree with my conclusion you can ask an independent tribunal to decide the matter. If you want to appeal to the tribunal, you must write to them within 30 days of the date of this letter.'

45. On 12 February 2017 the statutory deadline passed for the Appellant to appeal the excise assessments to the Tribunal.

20 46. On 07 August 2017 the appellant lodged its Notice of Appeal against the excise assessments, this time, acknowledging that it was out of time.

47. On 25 May 2018 the Appellant sent a letter to the Tribunal requesting that the appeal against the excise assessments be admitted out of time.

The witness evidence

25 48. Mr Whyatt's statements provided explanations in support of why the appeals should be admitted late. The two witness statements of Mr Whyatt and that of Officer Collins were unchallenged so that the primary facts contained in their evidence is not in dispute. That is not to say that the quality of the explanation provided in Mr Whyatt's statement for lodging the appeals late was accepted by HMRC.

30 49. Paragraph 11 of Mr Whyat''s first witness statement is set out above. The remainder of the contents, to the extent relevant, are considered within the discussion section below.

50. Mr Popat gave oral evidence. Ms McArdle cross examined him on the basis that he had lied about whether he had received an income or salary from the Appellant
35 company in respect of the years ending 2016 and 2017 for which accounts had been filed and the extent to which the Appellant was loss making during this time. She went

on to cross examine Mr Popat on the basis that the explanation in his witness statement in support of the application to admit the appeals was unreliable.

51. It is unnecessary to make any finding about the extent of Mr Popat's salary or income from the Appellant company and whether he has given previous inconsistent and unreliable explanations in his witness statement in support of the judicial review and other documents. The Tribunal will focus on the witness statement in support of this application, proceeding on the basis it is reliable.

52. The relevant parts of Mr Popat's witness statement dated 9 August 2017, in support of an extension of time for making the Excise Assessments appeal, are considered in the discussion section below. The most noteworthy are:

'[5] I had always intended to appeal the Respondent's Excise assessments (13 January 2017) to the First Tier Tribunal and I made enquiries with Alexander Whyatt to appeal the assessments approximately in late February 2017.

[6] Before having time to instruct Alexander Whyatt formally to appeal the Assessments, I was advised by the Respondent on 2 March 2017 that they were considering refusing placement of the Applicant on to the Alcohol Wholesale Registration Scheme (hereafter "AWRS"). This was a great concern to me at the time as without the ability to trade alcohol, the Applicant would be forced to close the business. Therefore all my attention from March to May 02017 focused on the position of the Applicant as to challenging the Respondent's AWRS decision and I lost sight of the appeals against the Assessments.

[7] It was not until I returned to the country on 7 July 2017 after a short break that I realised the Assessments had not yet been appealed. This was done through receiving a windup petition from the High Court dated 27 June 2017. In addition, I was made aware that I would also be in need of appealing against the PAYE liabilities raised against me.

…….

[10] No disrespect was intended through the Assessments being appealed out of time and my intention had always been to appeal. It was only due to the circumstances surrounding AWRS; which would have had an immediate effect on my business that my attention was diverted away from appealing the Assessments. I immediately took steps to rectify my mistake as soon as I was made aware of this in July 2017.'

53. The Tribunal proceeds on the basis that Mr Popat's evidence in support of this applications is reliable. He gave an explanation in his statement for why the appeal against Excise assessments was lodged late which appears reasonable. Ms McArdle could not point to any specific part of his explanation that was said to be unreliable other than suggesting that he lacked credibility generally because of other statements made. The Tribunal is of the view that it is the quality of the explanation for the late appeal which should be focused upon. This is considered below in the discussion section.

54. It is noteworthy that Mr Popat's statement did not address the consequences of the appeal not being admitted. It does not therefore contain a suggestion that the non-admission of the appeal will have a serious impact either upon the Appellant business or upon Mr Popat personally, as sole director and shareholder. This is considered further below in the discussion section.

55. The only relevant oral evidence that the Tribunal need note, and is accepted to be reliable, is that Mr Popat is the Director and only person currently involved in the Appellant company's business. He accepted that 17 or 18 former employees left in September 2016 and the company was loss making in the years ending 31 July 2016 and 2017 as set out in its accounts. Since the Appellant company obtained its injunction in April 2017 it has traded only to a very limited extent, around three times, and there is no evidence that Mr Popat has drawn any salary or other income from the company since that time.

The Law

AWRS and Excise Out of time appeals

Legislative framework for appealing out of time

56. Rule 20(4) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides:

"20(4) If the notice of appeal is provided after the end of any period specified in an enactment ...but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal-

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal".

47. Section 16 of the Finance Act 1994 relates to "Appeals to a Tribunal" and provides:

"16(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision... may be made to an appeal tribunal within the period of 30 days beginning with—
(a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates...

16(1D) In a case where HMRC are requested to undertake a review in accordance with section 15E —
(c) if HMRC have notified P, or the other person, that a review will not be undertaken, an appeal may be made only if the appeal tribunal gives permission to do so.

16(1F) An appeal may be made after the end of the period specified in subsection... (16)...if the tribunal gives permission to do so."

The Test

57. In *R (on the application of Dinian Hysaj v Secretary of State for the Home Department* [2014] EWCA Civ 1633 at [36] the Court of Appeal made clear that an application for an extension of time is to be equated with an application for relief from sanctions. Further, the Court of Appeal stated that the merits of an appeal will generally have little to do with the question of whether it is appropriate to grant an extension of time and that the Tribunal should decline to embark upon an extensive investigation of the merits.

58. The Court of Appeal in *BPP Holdings v HMRC* [2016] EWCA Civ 121 at [44] (as affirmed by the Supreme Court [2017] UKSC 55) endorsed Morgan J's approach of applying CPR rule 3.9 by analogy to Tribunal cases in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) when dealing with the question of an extension of time.

59. The CPR provides rule 3.9 applies to an application for relief from sanctions:

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need —
(a) for litigation to be conducted efficiently and at proportionate cost; and
(b) to enforce compliance with rules, practice directions and orders.
(2) An application for relief must be supported by evidence.

60. The Court of Appeal in *Durrant v Chief Constable of Avon and Somerset Constabulary* Practice Note [2013] *EWCA civ 1624* took a strong approach to enforcing compliance with rule 3.9:

[38] "...it is vital that decisions under CPR r 3.9 which fail to follow the robust approach laid down in that case should not be allowed to stand. Failure to follow that approach constitutes an error of principle entitling an appeal court to interfere with the discretionary decision of the first instance judge. It is likely also to lead to a decision that is plainly wrong, justifying intervention on that basis too. We do not share Mr Payne's concern about this leading to an increase in appeals and thereby undermining the efficiency benefits of the Jackson reforms. As is stated in *Mitchell's case 120141 1 WLR* 795, para 48:
"once it is well understood that the courts will adopt a firm line on enforcement, litigation will be conducted in a more disciplined way and there should be fewer applications under CPR r 3.9 . In other words, once the new culture becomes accepted, there should be less satellite litigation, not more."

61. The approach to CPR r 3.9 was further refined by the Court of Appeal *Denton v TH White Ltd (and related appeals)* [2014] EWCA Civ 906 where it stated that the matters set out in CPR r 3.9 (1) (a) and (b) were of particular importance and should be given "particular weight" when all the circumstances of the case are considered.

62. The Upper Tribunal in *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC), at paragraph 89, has observed that there is no real difference between the tests governed by CPR and in the Tribunal: "...in this tribunal, and in the FTT, the factors identified by the courts in the revised form of CPR r 3.9 as having particular weight or importance, that is to say the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and

orders, are relevant factors, but have no special weight or importance. The weight or significance to be afforded to those factors, along with all other relevant factors, in applying the overriding objective to deal with cases fairly and justly, will be a matter for the tribunal in the particular circumstances of a given case."

63. The Supreme Court, in *BPP Holdings Ltd v HMRC* [2017] UKSC 55 [24-26], recently provided guidance on compliance with time limits and relief from sanctions. In particular, the Supreme Court found that it was appropriate for the FTT to have regard to the recent CPR jurisprudence on relief from sanctions.

64. Recently the Upper Tribunal has also endorsed the stricter approach in light of the new CPR 3.9 in *Clear Plc (in Liquidation) v HMRC* [2016] UKUT 347 (TCC):

"19 ...This would require the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with the rules, as set out in CPR 3.9, to be given particular weight when considering all the circumstances of the case. This indicates that a tribunal should take a stricter approach than might have been the case before the new rule was implemented**,** but is still the case that a consideration of all the circumstances must be made before deciding the application... it does indicate that if we were to decide to set aside and remake Judge Blewitt's decision it is likely that we would apply a stricter approach than she did in applying the approach set out in Data Select ..."
(Emphasis added)

65. The CPR case which is of particular assistance in an application for relief from sanction is *Denton,* which directed the Courts to conduct a three stage test to relief from sanction applications:

"[25] The first stage is to identify and assess the seriousness or significance of the "failure to comply with any rule, practice direction or court order", which engages rule 3.9(1) . That is what led the court in the Mitchell case to suggest that, in evaluating the nature of the non-compliance with the relevant rule, practice direction or court order, judges should start by asking whether the breach can properly be regarded as trivial.

………………

[28] If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance.

[29] The second stage cannot be derived from the express wording of rule 3.9(1), but it is none the less important particularly where the breach is serious or significant. The court should consider why the failure or default occurred: this is what the court said in the *Mitchell case 12014] 1 WLR 795* , para 41.

…………….

[31] The important misunderstanding that has occurred is that, if (i) there is a nontrivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in the Mitchell case: see para 37. Rule 3.9(1) requires that, in every case, the court will consider "all the circumstances of the case, so as to enable it to deal justly with the application". We regard this as the third stage."

66. The approach to the Tribunal's exercise of discretion was recently clarified in *William Martland v HMRC [2018] UKUT 178 (TCC)* [44]—[46]:

'44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:

"If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the

balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is
5 in dispute and should not do so unless there are exceptional circumstances."'

67. In the recent decision of *Safina London Limited v HMRC* [2018] UKFTT 0374 (TC) Judge Mosedale found that —

"[88] The consequences of not admitting the appeal are serious for the appellant
10 but that by itself is not enough to admit the appeal..."

The purpose of a time limit

68. Time limits are set for a purpose, to ensure that appeals are conducted fairly, efficiently and in a timely fashion to ensure finality in litigation.

15 69. The First Tier decision in *Olusequn Odunlami v HMRC* [2015] UKFTT 668 provides a clear statement on the purpose of time limits:

'"*What is the purpose of the time limit?*
41. It seems to us that the time limit of 30 days for a taxpayer to make an appeal is to provide taxpayers, as those liable to tax, and HMRC, as the enforcer of the payment of taxes, with
20 certainty as to the "cut-off' point when the amount of tax or penalties asserted by HMRC to be due as regards a particular matter or period becomes certain and final. In specifying a period of 30 days Parliament has set down what it regards as sufficient time for a taxpayer to consider whether he wishes to dispute a tax assessment or penalty determination and if so to make an appeal. The taxpayer is required to act promptly if he wishes to make an appeal thereby
25 providing efficiency in the conduct of the dispute (should there be an appeal) or finality (should there be no appeal).
42. On that basis we would not regard it as a matter of routine for a tribunal to allow an appeal to be made outside of the normal time limits. The starting point must be that the 30-day limit should usually be adhered to. Otherwise the purpose of the provision of the time limit**.** Judge
30 Bishop said in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC) at [24] stated that the purpose of the statutory time limit is to provide certainty and avoid delay in litigation:

"...[it] is to require a party asserting a right to do so promptly, and to afford his opponent the assurance that, after the limit has expired, no claim will be made." would be undermined. There
35 would be little incentive for taxpayers to comply with the time limit and the lack of certainty and finality would potentially cause difficulties with the conduct of resulting disputes and burdensome administrative and enforcement issues for HMRC."'

Strike out application

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70. Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides for the striking out of appeals in various circumstances including:

8. (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if—

…………………….

5 (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

……………………..

Appellant's submissions

10 71. Mr Carey, on behalf of the Appellant, observed at the outset that there is a difference between the number of days each respective appeal is out of time. However, he submitted in respect of the excise assessments appeal there are two factors that weigh particularly in favour of that appeal being granted permission to proceed out of time.

72. They were the merits of the case and the likely prejudice caused to the Appellant 15 (including the director).

Out of Time Appeals
Length of delay

73. As outlined above the time from the relevant decision until the appeal was lodged for the AWRS appeal is 85 days (nearly three months) and the time for the excise 20 assessments is 206 days (over six months).

Reason for delay - AWRS

74. The Appellant had adduced evidence in support of the delay for the AWRS appeals as set out in the two witness statements of Matthew Whyatt ("Mr Wyatt"), Head of Corporate Recovery, Insolvency and Fraud Department at Alexander Whyatt.

25 75. Mr Whyatt explained that his firm was instructed to assist the Appellant with his AWRS Application. On 31 March 2017 the Respondents notified the Appellant that the AWRS was to be refused. Consequently, the Appellant instructed Alexander Wyatt to notify of the intention to seek injunctive relief. The injunction was ultimately granted by Mrs Justice Lang on 12 April 2017. Mr Wyatt believed that the correspondence 30 regarding the AWRS injunctions which followed with the Respondents would be taken as confirmation that an internal review was sought.

76. It is accepted by the Appellant that there is no express reference to an independent review being sought. Nonetheless that was the intention. In his witness statement, Mr Wyatt indicates that it was the intention to appeal to the Tribunal if the independent 35 review was not successful. This did not happen, but that is not the fault of the Appellant.

77. Mr Carey submitted that the circumstances at the time that the independent review ought to have been sought where chaotic. There were a significant number of injunctions across a number of different taxpayers being applied for and defended by

the Respondents. In those circumstances the delay was occasioned by the confusion at the time relating to the injunction litigation and the subsequently the AWRS refusal.

Reason for delay – Excise Assessments

78. The Appellant requested an independent review of the decision to issue two excise assessments with a cumulative total of £2,690,240.00. The Respondents took *five months* to consider this review. The Appellant director, Mr Nitin Popat, was approached shortly after the conclusion of the independent review about the AWRS Application. In his witness statement, Mr Popat explained that because he was required to obtain and produce all the relevant information in support of the AWRS application he had to turn his attention to that issue.

79. The consequence of him losing such an approval would have been catastrophic on his business and therefore it is understandable that he needed to consider that aspect. However, this had the effect that he failed to appeal the excise assessments in time. As soon as he learned of the winding up petition in July 2017, and the error, he immediately instructed Solicitors and counsel to assist him in bringing the appeal in an expeditious way.

Circumstances of the case

80. Mr Carey submitted that this stage of the test requires the Tribunal to balance the factors as against the first and second stages. The Appellant observes in respect of both appeals that the prejudice to it in not being able to pursue them is substantial and significant.

81. To refuse permission to proceed will have the effect that the Appellant is shut out of business and wound up. It can be beyond doubt that it will be wound up for the non-payment of the excise assessments if they are not challenged because the Respondents have already attempted to do so. Without any means to pay the approximately £2.6 million, and having had the AWRS refused, this will have dire consequences for the Appellant and in all likelihood the director.

82. Furthermore, Mr Carey asserted that in a vast number of similar cases where the Appellant company has failed to be able to meet its obligations, HMRC have then assessed the company to a penalty (which they have done here) and transferred the liability to the director in their personal capacity. Having done this the Respondents have then sought to argue that *Johnson -v- Gore Wood & Co* [2001] 1 All ER 481 should apply so as to shut the taxpayer out from arguing the underlying merits of the case (see *Spring Capital Limited -v- HMRC* [2017] UKFTT 465 (TC) and *Hackett -v- HMRC* [2016] UKFTT 781 (TC)).

83. Mr Carey submitted that such a course would be profoundly prejudicial to a taxpayer in the position of the Appellant. HMRC had issued a penalty assessment, following the excise assessments, on the basis that the Appellant has not successfully challenged the underlying decision or paid it. It is of considerable concern, that the Appellant only recently learnt of the penalty assessment.

84. Since learning of the penalty assessment, Mr Carey submitted that the Appellant had sought confirmation about when and where this was sent by HMRC. To date the answers had been obstructive. The most recent being to cite the *Commissioners for Revenue and Customs Act 2005*, s18, regarding confidentiality as being the reason that proof of postage or issuance of the penalty would not be provided. With respect, this is a nonsense. HMRC had referred to s18(1) of the CRCA 2005 which refers to non-disclosure of information on the basis that it is held in connection with a function of the Revenue.

85. Mr Carey submitted that a failure to be able to prove when a penalty, which attracts the protection of Article 6, and which has serious consequences associated with the non-payment of it (including personal bankruptcy if the penalty is transferred to the director in his personal capacity) is completely unsatisfactory. This cannot be a sustainable argument, not least of all in circumstances where HMRC will likely rely on an absence of challenge being a bar to arguments being raised in subsequent proceedings. More importantly is the apparent disregard for the duty of candour which has been held to apply in tax proceedings (see *Kyriakos Karoulla t/a Brockley's Rock -v- The Commissioners for HM Revenue and Customs* [2018] UKFTT 255 (TCC) ("Karoulla").

86. Mr Carey submitted, that having regard to the above that HMRC may pursue this case to a personal liability notice (PLN). If that is right then exactly the same arguments that would be relevant to the excise appeal would be relevant to any PLN that was issued. In those circumstances the prejudice is nothing to HMRC because the arguments will be the same, whether they are had now or later.

87. Of course, it would be open to HMRC to indicate that they do not intend to issue a PLN. This must be a matter that goes to the prejudice to be suffered by both parties and a relevant matter for the Tribunal to consider; HMRC's future intention.

88. To the extent HMRC suggest that no PLN will be forthcoming, that is not the end of the matter. As the Upper Tribunal indicated, whilst the First-tier Tribunal should not become embroiled in an argument about the merits, where a taxpayer has a meritorious case, the Tribunal should be slow to shut it out from the litigation.

Merits of the Excise Assessment appeal

89. In this case the excise assessment grounds of appeal are that:

a. HMRC have assessed out of time; and/or

b. An earlier identifiable duty point was provided to HMRC.

90. In short, the Mr Carey submitted that HMRC had issued both excise assessments out of time which is clear from the face of the documents. Pursuant to section 12(4) of the Finance Act 1994 must assess an amount of duty after 4 years beginning with the time when his liability to duty arose, **or** the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners

to justify the making of the assessment, comes to their knowledge *whichever is the earlier.*

91. The only documents referred to for the assessments (which are dated 8 July 2016 and 9 August 2016) are: *"… records for the periods May 2014 to August 2014"*.

5 92. He submitted that this must be read alongside what is said in HMRC's review decision letter dated 13 January 2017 upholding the excise assessments as to when documents and assessments were said to have been made. It is submitted by Mr Carey that is clear that the invoices upon which the assessments were based were uplifted by HMRC by 26 June 2015 at the latest.

10 93. In those circumstances, Mr Carey submitted that it was clear that the HMRC had in their possession by 26 June 2015 (even if the Officer did not have it in her personal possession) the documents that were subsequently relied upon to issue the assessments in July 2016 and August 2016. The assessments were made over one year later, thus out of time for the purposes of section 12(4)(b) of the Finance Act 1994.

15 94. Mr Carey submitted, as the Upper Tribunal observed in *Martland:*

"… there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one."

95. Mr Carey submitted that *prima facie* the Appellant has an extremely strong case
20 regarding the time limit issue and it would be unreasonable to prevent it appealing out of time in those circumstances.

96. Mr Carey again noted that despite the Appellant's appeal being filed in excess of 1 year ago, HMRC had failed to produce, consistently with its duty of candour, any documents or information which would clearly indicate when the information relevant
25 to the assessment, sought to be challenged, were received. He submitted that where there is a very strong indication that the assessment is out of time, and HMRC had failed to disclose when the information relied upon to issue the assessment was received, it is submitted that this appeal must be permitted to proceed.

The AWRS appeal

30 97. If the Appellant is correct about the assessment time limit issue, then it must follow that the AWRS appeal should also be allowed to proceed out of time. Mr Carey submitted that the AWRS appeal is much less out of time than the excise assessments and accordingly a correspondingly less powerful reason is needed to grant permission to proceed.

35 98. It is further submitted that given the AWRS has as one of its central pillars for refusal the fact that there was an excise duty assessment (for approximately £2.6 million) it stands to reason that this must have been a factor that was wrongly considered when deciding whether to grant or refuse an AWRS.

99. Given that it was one of the main pillars of the decision, it must have infected the decision to refuse an AWRS to the Appellant.

100. Where the two matters are so closely interwoven, it is submitted that permission to proceed should be allowed in respect of both the AWRS and excise assessment.

5 *Consequences and prejudice to the Appellant*

101. Mr Carey similarly submitted that there is an absence of serious prejudice to HMRC if permission to proceed is granted. It is accepted that it must have a financial impact. However, to the extent that HMRC point to the fact that Officer Matthews is
10 leaving the revenue, this is a red herring. Section 2(4) of the CRCA 2005 relevantly provides that "*anything (including anything in relation to legal proceedings) begun by or in relation to one officer of Revenue and Customs may be continued by or in relation to another"*.

102. Equally Mr Carey submitted that in VAT MTIC cases, which traditionally run
15 over many years, officers of the Revenue often retire requiring other officers to step into the shoes of the retiring officer. There have also been examples of retired officers coming back to give evidence on behalf of the Revenue (albeit it is accepted this is less common).

Conclusion
20 103. Mr Carey submitted that it was lamentable that there has been delay in bringing the appeals. However, it is of some significance that the AWRS appeal was brought by Notice of Appeal dated 14 June 2017 and the excise assessments appeal was brought on 7 August 2017. More than 12 months has elapsed since the Notices of Appeal were filed.

25 104. There had already been substantial delay and it is likely that had the parties been able to agree to these matters progressing they would have been well advanced. Furthermore, Mr Carey submitted that the substantial and significant prejudice to be occasioned to the Appellant, and the possible impact on the Appellant director, should the appeals not be permitted to be brought out of time will have grave consequences.

30 105. Despite the delay, it is submitted that this is the type of case that was referred to in *Martland* where it would be the exception to the rule.

Discussion and Decision

106. Mr Carey, on behalf of the Appellant, made his submissions carefully and
35 attractively. Nonetheless, despite constructing a well-reasoned and able argument, the Tribunal is not persuaded it should admit the appeals. This is primarily for the reasons Ms McArdle submitted on behalf of HMRC which the Tribunal largely adopts.

The AWRS Appeal

Purpose of the time limit and the length of the delay
40 107. When considering the purpose of the time limit and the length of the delay, under the second head of the test in *Data Select,* the Tribunal is satisfied that the purpose of

the time limit is to assist in the smooth administration of HMRC's and the Tribunal's public functions and to protect them from being disrupted by delayed litigation brought after deadlines have passed. Moreover, time limits ensure that Appellants progress their appeals in a timely manner.

108. Applying the guidance in *Denton,* The Tribunal is satisfied that the breach in the AWRS appeal, a delay of 54 days (nearly two months) in filing a Notice of Appeal, is clearly serious. The Appellant describes the delay as "a minor mistake" and "a technicality" (Matthew Whyatt statement, paragraph 13). This is simply incorrect: a delay of 54 days is a significant delay. It is a substantial failure to comply with statutory deadlines imposed by Parliament.

109. In *Safina* Judge Mosedale found that a delay of nearly two months was a serious delay and that—

"[86] What is relevant is that there was a delay by the appellant lodging its notice [of] appeal for slightly under two months that was for no good reason ...
[87] There is a 30 day time table set for appeals, and the appellant took more than double this before it lodged its appeal. It was a serious delay and HMRC had proceeded to act as if the assessment was not challenged."

Explanation for the delay

110. In the light of the length of the delay, the second and third stages of the *Denton* test are important considerations. As for the second stage (which is essentially the same as the third *Data Select* question), why the default occurred, the Appellant has provided the following reasons.

111. The first was that the Appellant was under a presumption that a request for an internal review would be inferred from correspondence (paragraph 11 to the First Witness Statement of Matthew Whyatt). The correspondence in question, from March and April 2017, all relates to the AWRS refusal and related High Court proceedings for injunctive relief. The Appellant's legal representative accepts responsibility for this in the Second Statement of Matthew Whyatt (paragraph 5).

112. The second is that the Appellant had only 10 days between the AWRS revocation decision, and the decision taking effect (paragraph 6). This put the Appellant under pressure (paragraph 11, 14).

113. The Appellant's explanations above are unmeritorious reasons for delaying 54 days to lodge an appeal. In particular, there is nothing whatsoever in the correspondence relied upon which could sensibly be inferred to constitute a request for a review. No reasonable explanation as to how this inference was to be drawn has been provided.

114. The Tribunal is satisfied that legally represented Appellant should not allow an appeal deadline to pass simply because other legal proceedings are being considered or brought. There is authority in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [41] and also *KPF Civil Building & Engineering Limited v HMRC* [2018] UKFTT 531 (TC) at [62] that:

"A delay by a representative is no different from a delay by the litigant. If anything, a professional firm of solicitors has a much higher threshold to surmount before this kind of lapse and oversight within a practice can give rise to a sufficiently good explanation for any delay."

115. The reliance on the pressure of seeking an injunction in relation to AWRS refusal in a short timeframe is an insufficient excuse. Even if the Appellant was not legally represented the Upper Tribunal in *Martland* applying *Hysaj,* at [44] stated that —

"HMRC's appealable decisions generally include a statement of relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

116. The Appellant was aware of the time limit and was put on notice of the HMRC's proposed AWRS revocation that a refusal decision was likely by the "minded-to" letter of 2 March 2017.

117. Nitin Popat's witness statement dated 9 August 2017, at paragraph 6, acknowledged that 'I *was advised by the Respondent on 2 March 2017 that they were considering refusing placement of the Applicant on to the Alcohol Wholesale Registration Scheme (hereafter "AWRS'). This was a great concern to me at the time as without the ability to trade alcohol, the Applicant would be forced to close the business. Therefore all my attention from March to May 2017 focused on the position of the Applicant as to challenging the Respondent's AWRS decision and I lost sight of the appeals as to the Assessments.'* Further, at paragraph 10 `*...It was only due to the circumstances surrounding AWRS; which would have had an immediate effect on my business that my attention was diverted away from appealing the Assessments.'*

118. The Tribunal could reasonably expect that if the Appellant was so concerned about the closure of the business, due to the refusal of its AWRS, he would have ensured that the decision was appealed in time.

119. In *Safina* a similar situation arose where the Appellant had inadvertently overlooked the deadline. The Tribunal found that —

"[37] Mr Whyatt said Mr Dhariwal [the director of the Appellant in that case] told him that 'struggles of the business' had taken precedence in Mr Dhariwal's mind over the duty assessment and this led him to overlook it. While this is only hearsay, HMRC appear prepared to accept that Mr Dhariwal forgot or overlooked the assessment: they just do not accept it was a good reason for doing nothing.
[38] And I agree. I do not think any reasonable person acting responsibly could overlook or forget an assessment for over £400K. It is not a good. reason for the delay...
[40] ...I do not think any reasonable person acting responsibly could fail to appreciate the significance of an assessment for over £400K. Forgetting the assessment or not understanding its significance is not a good reason for the delay."

120. Further, the injunctive relief sought in the High Court was granted on 12 April 2017 by Mrs Justice Lang. The deadline for the review request or, in the alternative, an

AWRS appeal to be lodged at the Tribunal was 20 April 2017. Therefore, the Appellant still had over a week to lodge the appeal and did not do so.

121. The failure to appeal within a reasonable time is all the more striking because the Appellant had gone to all the time, expense and effort to obtain an injunction from the High Court to protect its trading pending an appeal against the AWRS refusal. The very purpose of the injunction was to safeguard its position pending an appeal to the Tribunal. The Appellant asked the High Court to exercise its urgent and exceptional jurisdiction to grant interim relief on the basis of an appeal it then did not lodge for a further two months.

122. For the Appellant having obtained this discretionary relief, then not to lodge the substantive appeal itself by the statutory deadline of one week later does not reflect well upon it. In the email of 12 April 2017 notifying HMRC of the injunction Alexander Whyatt expressly referred to the intended appeal. All that can be said in its favour is that at least the Appellant indicated its intention to appeal from an early stage but it does make its failure to observe the time limit in which to do so (or even request a review of the decision of 21 March 2017) all the more significant.

123. Similarly, there is no good explanation or evidence (other than the references to a belief that a review was to be inferred from the injunctive relief correspondence, discussed above) provided by the Appellant as to why a further 54 days passed after the deadline for appealing expired before the Appellant lodged the appeal. The Second Witness Statement of Matthew Whyatt indicates that, through a representative's error, it was wrongly assumed that a 45-day period for appeal would run from 30 days after a review request (paragraph 6). No explanation is given as to where this misunderstanding came from.

124. Excise Notice 2002, concerning AWRS, provides in simple language:

"19.2 Time limits for requesting a review or an appeal
If you want HMRC to review a decision, you must write to the person who issued the decision letter within 30 days from the date of that letter. Your written request should set out clearly the full details of your case, the reasons why you disagree with the decision, and you should provide any supporting documentation. You should also state what result you expect from the HMRC review. HMRC will complete a review within 45 days, unless they agree another deadline with you.
19.3 Appealing after HMRC has completed their review
If you still want to appeal to the Tribunal after the HMRC review has been completed you should send details of your appeal to the Tribunal within 30 days of the date of the HMRC review decision letter."

125. Misunderstanding the review or appeal process, particularly in the light of clear published information on it, is not a happy excuse, and is disappointing when committed by an experienced firm of lawyers.

126. In the circumstances, no good explanation or evidence has been provided as to why the Appellant failed to seek an internal review and/ or lodge its appeal in a timely manner, nor why it did not lodge an appeal until 54 days after the deadline.

All circumstances of the case including any consequences to the parties

127. Finally, the Tribunal should consider all the circumstances of the case at the third *Denton* stage (which would include the fourth and fifth questions in *Data Select,* which concern the consequences of extending time, and refusing an extension). The Appellant relies on the First Witness Statement of Matthew Whyatt to allege that the effect would be to cause the Appellant "serious harm" (paragraph 13).

128. It is not sufficient simply to say that the decision which the Appellant wishes to appeal will take effect. This point was recently considered in *Single Source Binding Machines Limited v HMRC* [2017] UKFTT 0823 (TC), with the Tribunal noting that:

"[22] It is clear that refusing the late appeal would prejudice SSBML in the sense that it could pursue its appeal and the surcharge amount would become due, but this same prejudice would apply in every late appeal and therefore cannot, of itself, be a reason to allow a late appeal."

129. The Appellant's most recently available financial records clearly indicate that it is trading at a loss and as a result this net deficit indicates that the Appellant is not a profitable business and it is unclear whether it any longer commercially viable (financial statements show significant net losses for accounting years in 2016 and 2017). During a recent HMRC alcohol trader monitoring visit it was concluded that "There is no operating infrastructure, you [the Director] personally bear the financial debt for expensive automotive repairs, Goldshine does not provide a return to its Director for the role and responsibilities that are being undertaken and the company has been operating at a loss for the past two years".

130. The Tribunal's decision will not change the precarious financial status of the Appellant which has not been trading at a profit for the past two years. It has not been able to demonstrate that the appeal not being permitted to proceed out of time carries severe negative consequences, given its serious deficit in any event.

131. Of course, it is right to record that there is inevitably a serious impact on the company itself when the nature of the Appellant's trade requires AWRS approval and registration but it does not appear that the company has engaged in much trading in the eighteen months since the injunction was granted in April 2017.

132. There is no independent evidence as to the current trading status of the business which can substantiate any prejudice. The oral evidence of Nitin Popat was to the effect that there is very limited business now ongoing. Since September 2016 he has no employees and his accounts suggested the company trading at a loss in years ending 31 July 2016 and 2017.

133. It does not appear that there will be a significant impact on individuals as a result of the company not holding AWRS approval or registration. There are no other employees other than Mr Popat. There was no evidence that Mr Popat, as sole director and shareholder, currently draws any salary or income from the company. Therefore, the Director has not even been proved to be financially dependent upon the outcome as he does not obtain an income from the business.

134. HMRC dispute that there is no prejudice to them from the appeal being brought after a significant delay and the Tribunal accepts that there is some. There is the unexpected cost to the public purse and time which is being expended to litigate a matter for which HMRC were entitled to rely on the finality of an appeal deadline meaning that a decision is not going to be challenged.

135. The Second Witness Statement of Matthew Whyatt makes an argument that, because in two other cases disclosure deadlines do not fall until November 2018, HMRC are not prejudiced in this case (paragraphs 7-9). The Tribunal is not satisfied by the relevance of these other cases to this appeal as those disclosure directions only relate to the substantive hearings which are in front of the Tribunal and not an interlocutory application to admit an out of time appeal. There are no disclosure directions in this case.

136. The Appellant's conduct following the late lodging of the appeal is also a relevant circumstance of concern. The chronology above indicates the lack of clarification provided by the Appellant in resolving the issues relevant to this limitation application.

137. In particular, the Appellant indicated that a review had been requested, and that the deadline for the appeal was 14 June 2017. The former was explained only by vague reference to correspondence "inferring" a request for review until the extremely late response in the Second Witness Statement of Matthew Whyatt (paragraph 6) which essentially states that a representative made an error about the interaction of the review process and appeal deadline. Why this mistake was made has not been adequately explained.

138. The First Witness Statement of Matthew Whyatt dated 28 February 2018 did not address HMRC's requests for clarification and instead suggested that an independent review would be possible if proceedings were stayed. This lack of clarification is itself a matter of concern and is disappointing when evaluating the attitude of the Appellant in relation to acting in a timely and open way.

139. Further, the extremely late lodging of the Excise Assessment appeal, discussed below, adds further to the impression that the Appellant conducts itself in a way which is non-compliant with Tribunal rules.

140. The case has parallels with *Mackin v HMRC* [2018] UKFTT 110 (TC). Prior to refusing permission to appeal out of time in *Mackin* the Tribunal, commenting on the Appellant's conduct, stated at [167] —

"... The fact that these actions were brought by HMRC should have alerted any competent and professional lawyers to the true state of affairs as regards the status of the intended appeal, namely, that there was no valid appeal in place. There was a gap in 2014 when no correspondence was exchanged over this matter. When HMRC did not act, the advisers took no action, (or perhaps more accurately, Mr Mackin gave no instructions for any actions). The pattern of response was one of passivity, of minimal

input, of reversing onus by asking HMRC to acknowledge the appeal, when in substance and form, no serious attempts had ever been made to lodge a cogent appeal supported by credible evidence."

141. The Appellant's silence in response to numerous requests from HMRC to clarify its position has some echoes of the uncooperative attitude of the Appellant towards the Tribunal in *Mackin.* The Tribunal should be slow to permit a party to benefit from a lack of cooperation. In *Ancell and Ancell v HMRC* [2017] UKFTT 0177 (TC) Judge Poole commented at [29] that —

"If Mr Cannon's submission is correct, then its logical consequence would be that every single notice of appeal received by the Tribunal would need to be judicially considered in detail before it was accepted for administrative processing, in order to ascertain whether the appeal was in fact being submitted late and (if it was) to decide whether permission to notify the appeal out of time should be granted. It is quite common for appellants simply to ignore the question of whether the appeal is late or not (and indeed, the structure of the appeals and reviews legislation is sufficiently complex that it may not always be immediately apparent whether an appeal is being notified late or not) and accordingly this process would in many cases be extremely difficult or quite simply impossible to carry out properly, if based purely on the information (if any) provided by the appellant. Also, of course, appellants may simply give false information in their application. It would be odd indeed if the legislation were to be interpreted so as to allow an appellant to circumvent the statutory time limit simply by being selective or downright disingenuous about the information provided in support of his application for permission to notify a late appeal."

142. The merits of the appeal are of only limited relevance but the Tribunal considers them on the basis that if they are obviously strong this should be weighed up in the balancing exercise.

143. It was not submitted that in the AWRS appeal the Appellant has a very strong or overwhelming case in this appeal. The highest it was put was that the AWRS decision was partly based upon the Excise Duty Assessments for which there are strong arguments to suggest were unlawful (see the Excise Assessment Appeal).

144. In making its AWRS decision, as challenged, HMRC relied upon a number of reasons. The Appellant, among other reasons, seeks to argue that HMRC’s decision on its fitness and properness to hold AWRS approval was outside the range of reasonableness on the basis that it disputes that it is not commercially viable or credible (paragraph 8.II). HMRC submit that in the light of the last two years' unaudited financial statements, this position is unsustainable, particularly in the light of the ongoing lack of commercial activity. HMRC’s criticisms of due diligence are also challenged, but they submit that this again without any real merit. Inadequate due diligence remains a concern of HMRC even now.

145. There is no need to resolve any of these arguments on the merits except to record that the appeal is not one of obvious, let alone overwhelming strength. However

arguable the Appellant's appeal might be it cannot be said of such strength that the Tribunal should places much weight on this in the balancing exercise.

Conclusion on the AWRS appeal

146. In the circumstances, the Tribunal must step back and consider each of the above factors in the balancing exercise. For the reasons set out above, the Tribunal is not satisfied that it should grant permission for the AWRS appeal to proceed out of time. To the extent that there is prejudice to the Appellant in not admitting the Appellant's appeal against AWRS refusal, this is not of the highest order and is outweighed by the length of delay and poor quality of explanation for that delay.

The Excise Assessments Appeal

Purpose of the time limit and the length of the delay

147. The Upper Tribunal in *Romasave v HMRC [2015] UKUT 254 (TCC)* considered that a delay of more than three months was serious and significant and permission to appeal would only be granted exceptionally.

148. Consequently, the delay of 175 days (nearly six months) in filing an appeal is very serious and significant.

149. As set out above, in relation to the purpose of time limits, the smooth administration of HMRC's public functions and protection of them from being disrupted by litigation brought late after relevant events are highly relevant.

Explanation for the delay

150. As for the second stage of the *Denton* test (which is essentially the same as the third *Data Select* question), why the default occurred, the Appellant has relied on the following reasons (paragraph references relate to the Witness Statement of Nitin Popat dated 9 August 2017, Director of the Appellant).

151. The first is that Appellant waited until after the appeal deadline had passed on 12 February 2017 to seek legal advice and made inquiries concerning appealing the assessments, amounting to less than formal instructions, of Alexander Whyatt solicitors in late February 2017 (paragraph 5, i.e. presumably after the deadline had passed on 12 February 2017). No details of why formal instructions were not given have been provided, nor why the Appellant waited until after the appeal deadline had passed on 12 February 2017 to seek legal advice.

152. The second is that Appellant received a "minded-to" letter dated 2 March 2017 in relation to the AWRS revocation and the Appellant's attention was focused on the AWRS case "from March to May 2017" (paragraph 6).

153. No explanation is provided in relation to how the Appellant conducted matters with HMRC in June 2017, however it is noted that the AWRS Notice of Appeal was lodged on 14 June 2017.

154. The third is that the Director was on holiday for "a short break", returning on 7 July 2017. At this stage it was recognised that the excise assessments review decision had not been appealed when a winding up petition dated 27 June 2017 was served and it was also realised that a PAYE demand needed to be appealed (paragraph 7).

5 155. The fourth is that Appellant's Director accepted that he had made a mistake (paragraph 8) and on 7 July 2017 Alexander Whyatt was notified of the intention to appeal. The appeal was lodged a month later on 7 August 2017.

156. The Appellant's explanations above are unmeritorious reasons for delaying 175 days to lodge an appeal. First, there is no explanation at all as to why the Appellant did 10 not instruct its representatives to act between 13 January and late February 2017 as the Appellant appears to have been represented by Bacchus Solutions Ltd in September 2016.

157. In the review conclusion letter, dated the 13 January 2017 on the first page, the review officer referred to considering information provided by two representatives; 15 Euro Ashfords and Bacchus Solutions.

158. It is not reasonable to say that the AWRS decision, with a minded-to letter being issued on 2 March 2017, occupied the Appellant until the end of May 2017. An Appellant should not overlook (already significantly missed) appeal deadlines simply because they have other legal proceedings underway. The Appellant had legal 20 representation at this time in relation to AWRS.

159. Further, the Appellant had from 13 January 2017 to 2 March 2017 in which to appeal the review decision upholding the Excise Assessments during which time it could not be preoccupied with challenging any AWRS decision and had no other litigation ongoing. Mr Carey submits that even during this time, there were AWRS 25 investigations ongoing which distracted or occupied the Appellant – there was for example a visit by HMRC on 17 January 2017. However, in these six weeks, during which the statutory deadline passed, there was only one live decision that the Appellant needed to challenge by way of appeal to the Tribunal, that of appealing the excise assessments as upheld on review.

30 160. In any event, as discussed above, the Appellant also failed to issue the AWRS appeal in time and had received its injunctive relief by 12 April 2017. Consequently, this cannot provide any explanation as to the failure to appeal the excise assessments review decision after 12 April 2017.

161. No explanation to account for the absence of activity in June has been provided 35 although instructions would have been provided as the AWRS Notice of Appeal was lodged on 14 June 2017.

162. The director of the Appellant having been on holiday is not an adequate excuse in relation to early July: the Appellant should have adequate arrangements to ensure that someone able to make appropriate decisions, including in relation to appeals, is 40 available when the Director is absent. In *Safina,* the Tribunal rejected being on holiday as a good reason for delaying in lodging an appeal [34].

163. There is then a lack of any adequate explanation of why it took a whole month, between instructing Alexander Whyatt on 7 July 2017, and lodging an appeal on 7 August 2017. Given the very serious delay in this case, it would be expected that an appeal would be lodged urgently.

5 164. The chronology provided by the Appellant is unsatisfactory in explaining the serious delay in this case. It belies an attitude of non-compliance with statutory deadlines.

All circumstances of the case including any consequences to the parties

165. Turning to all the circumstances of the case at the third stage of *Denton* (which 10 would include the fourth and fifth questions in *Data Select,* which concern the consequences of extending time, and refusing an extension), the Appellant relies on the Witness Statement of Nitin Popat. This statement fails to provide any details or independent evidence of any prejudice to the Appellant if the appeal cannot proceed.

166. The impact on the business of refusal of the AWRS approval has already been 15 considered above but is considered again in relation to the upholding of the Excise assessments.

167. There is no independent evidence as to the current trading status of the business which can substantiate any prejudice. The oral evidence of Nitin Popat was to the effect that there is very limited business now ongoing. Since September 2016 he has 20 no employees and his accounts suggested the company trading at a loss in years ending 31 July 2016 and 2017. There was no evidence that Mr Popat, as sole director and shareholder, currently draws any salary or income from the company. Therefore, it does not appear will be a significant impact on individuals as a result of the company not holding AWRS approval or registration.

25 168. Of course, there will inevitably be a serious impact on the company itself if the appeal is not admitted when there are two excise assessments outstanding for £2.6 million. While the Appellant has pointed to the fact that the upholding of the assessments will inevitably precipitate a further winding up petition, it has not proved that non-admission of the appeal will automatically drive the company into liquidation.

30 169. The letter from the Appellant's representative of 25 August 2018 alleges that immediate insolvency will follow refusal of permission for the appeals to proceed. This assertion is made without any independent evidence. Further as discussed above, the business may not be commercially viable and appears to be operating at a net loss since the accounting year ending in 2016.

35 170. Nonetheless, even if the consequence of liquidation had been proved or the Tribunal were to assume liquidation will follow, it does not appear that the company has engaged in much trading in the eighteen months since the injunction was granted in April 2017 (there were said to have been three trades during this time).

171. The current trading status of the business does not substantiate any prejudice. The 40 issue discussed above in *Single Source Binding Machines Limited v HMRC* [2017] UKFTT 0823 (TC) would again apply: it is not sufficient to say that the debt will have

to be paid if the appeals cannot proceed to show prejudice. This would be the case in every late appeal concerning a debt.

172. Mr Carey's alternative submission is that there is bound to be a serious impact upon Mr Popat from the excise assessments being upheld in the sum of approximately £2.6 million. This is because he submits that on the upholding of the assessments HMRC will proceed to issue a personal liability notice (PLN) against Mr Popat personally in respect of these Excise Assessments.

173. The Tribunal places little weight on this argument. First, it is hypothetical, the Tribunal can only realistically or reasonably entertain what is a certain or likely consequence of a decision, primarily for the Appellant but also for related third parties such as Mr Popat. It is simply unknown whether HMRC will take a separate decision to issue a PLN against Mr Popat (an independent but related third party to these proceedings). That matter is not before the Tribunal.

174. Second, even if HMRC proceed to issue a PLN then they will need to comply with the law in so doing and satisfy the statutory criteria applicable. Further, if Mr Popat is issued with a PLN, he will have a right of appeal should he disagree with the notice and wish to challenge the facts and law relied upon.

175. Mr Carey warned that HMRC may seek to rely upon the excise assessments being upheld, which would follow from dismissing this application, as a matter of fact and law to prove the lawfulness of the assessments against Mr Popat in the PLN proceedings. However, the issue of whether it would be an abuse of process or res judicata or whether Mr Popat would in law be estopped from challenging the underlying assessments in a PLN appeal would very much be a live one. In any PLN appeal, a broad merits based approach to Mr Popat's ability to challenge the excise assessments would have to be adopted following *Johnson v Gore Wood and Co* [2001] 1 All ER 481 and *Hackett v HMRC* [2016] UKFTT 781.

176. If there were a PLN against Mr Popat and if there were an appeal, all of those matter will be decided by a future Tribunal but they are too remote to carry much weight in these proceedings.

177. Again, there is some prejudice to HMRC from the appeal being brought after a very significant delay. The Respondents are entitled to rely on the finality of an appeal deadline meaning that a decision is not going to be challenged.

178. Further, while the merits of the excise assessments appeal are of limited relevance unless they are obviously strong, the Tribunal has considered the merits of these appeals in some detail. It has assessed these based upon the arguments by the parties and the evidence previously produced to the HMRC and recently to the Tribunal in the hearing bundles.

179. The Appellant raises a limitation Ground as to the timing of the Excise Duty Assessments occurring over one year after the relevant invoices were given to HMRC, by 26 June 2015. Mr Carey submits that new material needed to have arisen after 8

July 2015 for the assessments to have been made in time (they were made on 8 July 2016 and 9 August 2016).

180. HMRC's reply as to the merits is that the assessments were made taking into account invoices which were initially provided in illegible form. On 29 October 2015 HMRC Officer Mathews received copies of purchase invoices by e-mail, however some of them were illegible so she was sent hardcopies to assist with a more accurate assessment. These were received on 27 November 2015.

181. There is an argument between the parties as to the requirements under section 12(4)(b) of the Finance Act 1994 relying upon the Court of Appeal's judgment in *Lithuanian Beer v HMRC* [2018] EWCA Civ 1406 [29-30]. Mr Carey submits that the relevant invoices upon which the assessments were made were both collectively available to HMRC, and the officer making the assessment, from 26 June 2015 at the latest. He submits the one year time limit started to run from that date because the HMRC Officer had 'evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment'. Therefore, he submits that the assessments made in July and August 2016 were made out of time. He submits that this is a 'knock-down' or 'slam-dunk' point of overwhelming merit such that the appeal is bound to succeed.

182. Ms McArdle, for HMRC, submits that the point at which the evidence came to HMRC's knowledge runs from when the last document was before the actual assessing officer who took them into account and made the assessment. This was not before 29 October 2015 when legible invoices were passed to them and therefore the assessments made in July and August 2016 were made and notified within the one year statutory time limit.

183. The Tribunal is not required to determine the ultimate merits of these competing arguments and the prospects of the appeal succeeding. The Tribunal accepts that the appeal is clearly arguable on this ground. The Tribunal cannot go so far as to decide that the appeal has obviously strong prospects for at least two reasons.

184. The first reason is one of fact. It is by no means evident that the invoices in question upon which the assessments were premised were received by HMRC on 26 June 2015. That is simply one inference to be drawn from reading the terms of HMRC's review letter of 13 January 2017 but it is not completely clear and the Tribunal has insufficient evidence before it to determine this as a matter of fact.

185. The second reason is one of law. Constructive knowledge on the part of HMRC of evidence of facts is not sufficient for time to start running in which to make the assessment (see paragraph 25 of the Court of Appeal's judgment). It is not enough for the relevant HMRC officer to know that relevant evidence exists, even though he does not know what its contents are. Per Lord Justice Sales at paragraph 28 of the judgment in *Lithuanian Beers*:

> Both elements in the comparison turn on the subjective state of mind of HMRC officers regarding what they understand the evidence available to them actually shows. If the "evidence of facts" known to the Commissioners previously was the same as the evidence of facts which

led them to form the opinion later on that an assessment was justified (or, on a *Wednesbury* approach, should have led them to form that opinion), then it will be clear that the Commissioners have sat on their hands and the special, truncated limitation period in sub-paragraph (b) will apply.

5 186. It seems to the Tribunal that it cannot determine the merits of the time limit argument upon the lawfulness of the assessment without hearing evidence from the assessing officer as regards his or her subjective state of knowledge at the time he or she made the specific assessments in July and August 2016 compared to that subjective state of knowledge based upon receipt of invoices in June 2015 and / or October 2015.
10 It is not evident based solely on the dates of the assessment and the nature of the invoices available to HMRC at various times.

187. Mr Carey and Ms McArdle dispute the meaning of paragraphs 29-30 of *Lithuanian Beers*. Paragraphs 29 and 30 of that judgment appear more helpful to Ms McArdle when Sales LJ states:

15 In my view, it is clear that where he speaks of the last piece of evidence being "communicated" to the Commissioners, he means that it is communicated in such a way that the contents of the evidence are in fact known to them. He does not mean that it is sufficient that the evidence is made available to them, although it is not read and digested by them.

………

20 Despite Mr Jones's efforts to distinguish the present case from a situation in which documents are made available to an HMRC officer in a general sense, such as where he is simply presented with a room full of documents and told that he can look at anything he likes, there is no viable dividing line to be drawn. In that situation, the officer will not have knowledge of the "evidence of facts" contained in each and every document in the room. It is unrealistic to suppose that
25 Parliament intended that the special limitation period in section 12(4)(b) is applicable in such a case. The officer will only have such knowledge where he reads and digests the contents of particular documents.

188. Paragraph 31 of the judgment appears more helpful to Mr Carey when Sales LJ highlights that an officer can be fixed with knowledge on receipt of copies of evidence:

30 I agree with the way in which the UT explained the point at [39]-[40]:

> "39. … Mr Ansah was not fixed with knowledge of the evidence until he had acquired it, and in this case he acquired it, not when it was identified to him in the course of his visit, and when (as we understand the judge's findings) he went no further than to satisfy himself that it was relevant, but when the
> 35 copies sent to him were received.

189. What these paragraphs again emphasise that there must be a fact-finding exercise as to the assessing officer's state of knowledge available at various times as to evidence of fact sufficient to raise the actual and specific assessment raised. It will profitable to
40 compare the state of knowledge as of the date of the assessment with that one year earlier. The Tribunal cannot conduct that fact-finding assessment as part of this application.

190. The Appellant's second ground of appeal is that there was an earlier duty point and its supplier's supplier, Palace Drinks, should instead have been assessed (paragraph 24ff). HMRC's reply to this ground is that they have reasonably concluded that the invoices purported to demonstrate sales from Palace Drinks to the Appellant's supplier were unreliable invoices, including because they did not match the numerical sequence of legitimate invoices held nor did they have the appearance of invoices known to be issued by Palace Drinks. Ms McArdle submitted that HMRC are also not required as a matter of law to assess the earliest duty point. Mr Carey did not press this argument as being one which had obviously strong merit for the purposes of weighing up the balance of prejudice in the application.

191. Consequently, while it can be said that there is a properly arguable appeal with reasonable prospects of success of it cannot be said that the excise assessments appeal is such a promising appeal with obviously strong merit that it should carry heavy weight in the Tribunal's balancing exercise of the competing prejudice.

192. It is also important to bear in mind that in considering prejudice to the parties this is not a one-off matter of non-compliance by the Appellant. In failing to lodge the AWRS appeal and failing to clarify matters in reply to repeated requests for information relating to facts arising in the AWRS appeal, the Appellant has not demonstrated an attitude of the upmost co-operation and compliance with the overriding objective, but rather one belying a relaxed approach to compliance with Tribunal rules.

Conclusion on the Excise Duty Assessments Appeal

193. Taking all of the above into account and balancing the various matters it is required to consider, the Tribunal has decided that the appeal against the review decision upholding the £2.6 million in excise assessments should not be permitted to be admitted out of time. There may be serious consequences to the Appellant company, if not personally to its director, of not admitting the appeal but this prejudice is not as severe as it might be for a company that was actively trading on a day to day basis, employed a number staff and had proved that liquidation would inevitably follow. In any event, this prejudice is outweighed by the very substantial delay in lodging the appeal and poor explanation for it coming about.

194. The Appellant's application to admit its appeals are therefore dismissed.

195. In the circumstances there is no obvious need to proceed to consider HMRC's application to strike out the appeals should they be admitted. Nonetheless, the Tribunal considers HMRC's application for the sake of completeness or in the event this matter goes further.

HMRC's Application to Strike Out

196. HMRC initially sought to strike out TC/2017/04802 (the AWRS appeal), in part, under rule 8(2)(a) on the ground that the Appellant failed to make the required application to request that the Tribunal admit its Notice of Appeal out of time in accordance with r 20(4)(a).

197. On 5 September 2018 Matthew Whyatt lodged a further witness statement in which a formal request to admit the above appeal out of time under rule 20(4)(a) was made.

198. For the reasons given below in relation to the AWRS appeal, HMRC invited the Tribunal to strike out that appeal under rule 8(3)(b) on the basis that the Appellant had failed to co-operate with the Tribunal to such an extent that the Tribunal could not deal with matters fairly and justly.

HMRC's submissions

199. Ms McArdle submitted that, in the event that the Tribunal was minded to admit the appeal out of time, HMRC invited the Tribunal to strike out the appeal under rule 8(3)(b).

200. She submitted that it is evident from the above chronology that the Appellant has repeatedly failed to respond to reasonable requests for clarification and evidence both as to (i) the calculation of the date of 14 June 2017 and (ii) evidence as to the review request. These requests were made as far back as 22 September 2017. It was not until 5 September 2018 before any sort of clarification was provided, and even then, it has now been admitted, that the above statements were made in error by the Appellant's representatives. There is no reason why this explanation could not have been provided earlier so as to avoid the pointless and protracted correspondence that has since followed for nearly a year.

201. Ms McArdle submitted that in light of the Appellant's persistent failure to respond to reasonable requests, directions from the Tribunal, and general lack of co-operation, it had failed to assist the Tribunal to further the overriding objective as it was required to do, as a party to the proceedings, under rule 2(4). Accordingly, this has hampered the Tribunal's ability to deal with the application fairly as required by the overriding objective in that the Appellant's position had been put, on an admitted, incorrect footing. Much time, resources, and costs had been wasted by HMRC dealing with this Appellant when public funds and resources could have been deployed on other matters.

202. Finally, Ms McArdle submitted that the Appellant's conduct has unduly delayed the listing of this hearing, due to the Appellant's failure to respond promptly to requests from both HMRC and the Tribunal. Such actions by the Appellant were not commensurate with the overriding objective, of avoiding unnecessary delay.

203. Looking at both this history of these proceedings and the present hearing, Ms McArdle submitted that the Appellant's conduct has been such that the overall and just disposal of these proceedings has been substantially impaired by the Appellant's lack of co-operation.

Appellant's submissions on HMRC's Rule 8(3) strike out Application

204. Mr Carey observed that the burden was on HMRC to show that the Appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with matters fairly and justly.

205. HMRC had identified the following matters:

a. The matter has already taken a “substantial amount of the Respondents’ time and resources to deal with”;

b. Lack of information volunteered by the Appellant;

c. That the Appellant requested an extension of time to take instructions; and

d. The Appellant has not been cooperative.

206. Mr Carey submitted that HMRC’s application came nowhere near making out non-cooperation with the Tribunal to such an extent that the matter cannot be dealt with fairly and justly. HMRC notably had adduced no evidence in support of this Application.

207. HMRC’s complaint appeared to be that the Appellant does not correspond as often as they hope the Appellant will. This submission ignores the fact that every time a letter is sent by HMRC to the Appellant’s representative, the Appellant must pay for it to be considered and responded to. It goes without saying that litigation should not be by correspondence. It is also not correct to say that the Appellant does not respond to inquiries that are made.

208. Mr Carey submitted that the complaint from HMRC at paragraph 26 of their Application is that:

“The Appellant in this matter has consistently delayed in responding to reasonable requests by the Respondent [sic] *and appears to only reply to specific requests when Tribunal Directions are issued requesting representations.*

209. This was an extremely surprising submission. It appears to be a submission that the Appellant complies with the Tribunal’s directions whilst simultaneously being a submission that the Appellant has failed to co-operate to such an extent that the Tribunal cannot deal with these proceedings fairly and justly.

210. Mr Carey submitted that this is a *non sequitur*. The position was that HMRC did not agree with the responses it has received as opposed to there not being any responses at all. To strike out an appeal on this basis, should permission to proceed be granted, would be totally disproportionate and unreasonable in circumstances where there has been compliance with directions issued by the Tribunal and there have been written responses to HMRC where appropriate.

Conclusion on the strike out application by HMRC

211. Should the Tribunal have admitted the appeals, the Tribunal would not have granted HMRC’s strike out application for the reasons submitted by Mr Carey. While there may have been some lack of cooperation by the Appellant with HMRC (and to a very much lesser extent with the Tribunal) in providing clarifying information, this was insufficient to meet the test set out in Rule 8(3) such that the Tribunal could not deal with the appeals justly and fairly.

Conclusion on the applications

212. The Tribunal dismisses the Appellant's applications for permission to admit the late appeals. Permission is refused for the reasons set out above.

213. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 11 OCTOBER 2018