[2019] UKFTT 422 (TC)

PROCEDURE – VAT – whether Tribunal should give permission for appeals to be made late – Martland applied - no

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07237

Appeal number: TC/2018/06332
TC/2018/07802
TC/2018/07799

BETWEEN

(1) ANDERSON SECURITY SERVICES LIMITED
(2) ZAFAR ALI KHAN **Appellants**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 17 June 2019

Samuel Brodsky, counsel, instructed by Maya & Co Solicitors, for the Appellant

Anharul Qureshi, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. HMRC issued the following decisions:

   (1) Compulsory registration of Anderson Security Services Limited ("ASSL") for VAT, backdated to period 05/16 with a first return period of 08/17, on 2 August 2017 under paragraph 1 of Schedule 1 Value Added Tax Act 1994 ("VATA 1994");

   (2) Notice of requirement to give security of £100,181 issued to ASSL on 27 October 2017 under paragraph 4(2)(a) of Schedule 11 VATA 1994;

   (3) Assessment for the first period 08/17 of £137,408 issued to ASSL on 16 November 2017 under s73 VATA 1994;

   (4) Personal liability penalty notice for £86,567.04 issued to Zafar Khan, the shareholder and director of ASSL, on 6 March 2018 under Schedule 41 Finance Act 2008 ("FA 2008"); and

   (5) Failure to notify penalty of £86,567.04 issued to ASSL on 7 March 2018 under paragraph 22 of under Schedule 41 FA 2008.

2. Mr Khan gave Notice of appeal to the Tribunal on 9 October 2018. That notice states that the dispute is about HMRC applying VAT when the company, ASSL, is trading under the VAT threshold. In correspondence with the Tribunal it has since been established, and the parties agree, that the Notice of appeal should be treated as an appeal against all five of the decisions set out at paragraph [1].

3. HMRC have objected to ASSL and Mr Khan being granted permission to appeal late against these decisions as the appeal is seriously and significantly late and no good reason has been given for this lateness. HMRC were themselves late in providing their objection to one of these appeals.

4. Mr Khan had been notified of the hearing and, through his solicitors, had instructed counsel, Mr Brodsky to represent him and ASSL. Whilst, therefore, I had no doubt that the hearing should proceed (and no application was made to the contrary), this meant that no witness evidence was available before me.

RELEVANT FACTS

5. HMRC prepared a bundle of papers for the hearing and both parties handed up additional documents at the hearing. The findings below are therefore based on the papers before me and the inferences I have drawn from them. I have included the events subsequent to the giving of Notice of appeal to the Tribunal as Mr Brodsky made reference to a delay on the part of HMRC at this later stage and I have therefore set out the full chronology as it appears to me.

6. Mr Khan was director and shareholder of Anderson Security & Trading Limited ("ASTL"), which had provided various security services. The list on its webpage at 16 May 2014 had included CCTV cameras, intruder alarms, door entry systems, access control systems, time lapse, security operatives and time and entrance recording.

7. ASTL had been registered for VAT. ASTL went into voluntary liquidation on 29 June 2016. The liquidator's progress report in respect of ASTL, trading as Anderson Security Services, for the year ended 28 June 2017 under the heading "ASSETS" states:

> "Goodwill

> ...Anderson Security Services Limited, a company of which Zafar Ali Khan is a director, had made an offer to purchase the goodwill of the Company in the sum of £1,000 from the Liquidator. The Company's goodwill comprised the trading style "Anderson Security Services", the telephone and fax numbers, the client base and the webpage. As detailed below, this offer was accepted and the strategy therefore adopted within the liquidation has been to liaise with the purchaser and ensure that all purchase consideration was paid..."

8. The section of the report on liabilities states that National Westminster Bank holds fixed and floating charges over the assets of ASTL, but no amounts were due to the bank. The only unsecured creditor is HMRC, and the liquidator noted that at the date of the report he had received unsecured claims from HMRC of £3,509,513.

9. Mr Khan had incorporated ASSL on 5 May 2016. Mr Khan did not register ASSL for VAT.

10. On 31 July 2017 Luke Dorritt of HMRC wrote to ASSL setting out that HMRC had considered the application of the transfer of going concern ("TOGC") rules. HMRC noted that ASTL had been VAT registered from 1 February 2002 to 1 October 2016 and that when HMRC attended ASSL's business premises on 3 July 2017 it was determined that the new business satisfied the rules for TOGC and must also be VAT registered. Mr Dorritt informed ASSL that he would be completing a VAT1 registration form for the business. That letter set out the basis on which turnover and VAT assessed had been calculated for this purpose, based on the last annual return of ASTL. If ASSL did not agree with the figures, the letter states that they must contact "me" before 31 August 2017 with correct figures and supporting documentation.

11. On 2 August 2017 HMRC wrote to ASSL informing them that they had been registered for VAT with effect from 5 May 2016. The copy of the letter included in the bundle, which had been attached to the grounds of appeal, includes a correctly addressed cover page, but pages two and three were from the letter of 31 July 2017. At the hearing Mr Qureshi provided a copy of HMRC's own file copy of the 2 August 2017 letter. That file copy does not have the formal HMRC letterhead on it (consistent with it being an internal copy), and the second page of this letter does appear to follow on from the substance of the first page. That second page sets out the right to ask for a review or to appeal to the tribunal within 30 days.

12. Mr Brodsky invited me to conclude that the compulsory registration letter of 2 August 2017 had not included the review or appeal rights, ie that the version in the bundle was that which had been sent to ASSL. There was no evidence adduced by ASSL or Mr Khan in support of this, and I find that HMRC's file copy is an accurate copy of what was actually sent. I find that the version in the bundle reflects muddled photocopying of two items of correspondence with a similar subject-matter.

13. On 24 August 2017 LDP Luckmans wrote to Mr Dorritt of HMRC referring to HMRC's letter of 31 July 2017. That letter states:

(1) ASSL does not trade as a result of a TOGC from ASTL and no assets were sold to ASSL by ASTL;

(2) ASSL has its own contracts with new customers; and

(3) ASSL trades below the VAT threshold.

14. The letter of 24 August 2017 states "Please accept this letter as a formal appeal against your calculations together with any penalties issued in respect of a Failure to Notify". There is no indication on the face of this letter that any additional information or evidence was enclosed.

15. On 13 September 2017 Mr Dorritt wrote to Mr Khan in response to the letter of 24 August 2017 asking for additional information and evidence. He stated that he required a response by 13 October 2017 or he would use his current calculations for the VAT registration.

16. HMRC served notice of the requirement to give security under paragraph 4(2)(a) of Schedule 11 VATA 1994 on ASSL on 27 October 2017. The letter accompanying that Notice states that security is required immediately and "any further information that you wish the original decision maker to consider must be submitted as soon as possible". It then states that ASSL has 30 days from the date of the Notice to provide security, provide further information, request a statutory review or appeal to the Tribunal. The Notice itself, having specified the security amount of £100,181, states that HMRC will accept security of £76,381 if monthly returns are submitted. If ASSL wished to accept this offer, they should notify HMRC within 14 days.

17. HMRC issued a notice of assessment to tax of £137,408 for the period 08/17 to ASSL on 16 November 2017 under s73 VATA 1994. That notice sets out that ASSL must submit its overdue return showing the correct amount of VAT and make any payment due. It specifies that provided that the return and payment appear to be satisfactory, HMRC will adjust the account for this period to the amount shown on the return.

18. Sample invoices dated 30 November 2017 from ASSL show that company was trading as "Anderson Security Services" and had invoiced clients for CCTV monitoring, security services, access control system, power pack, fire alert system, provision of a uniformed security officer, a traffic marshal and a 3G mobile router.

19. On 11 January 2018 HMRC wrote to ASSL explaining that they intended to charge a penalty. They asked for any relevant information by 11 February 2018. It also says that if the taxpayer does not agree, it cannot appeal or request a review yet.

20. HMRC issued a personal liability penalty notice to Mr Khan on 6 March 2018 under Schedule 41 FA 2008. That notice sets out the taxpayer's rights to ask for a review or appeal to the Tribunal, and states the deadline for doing so is 8 April 2018. This letter was sent to both Mr Khan and to LDP Luckmans.

21. HMRC issued a notice of penalty assessment to ASSL on 7 March 2018 under paragraph 22 of under Schedule 41 FA 2008 in respect of the failure to notify. That assessment of a penalty of £86,567.04 sets out ASSL's right to ask for a review or appeal to the Tribunal, stating that there is a 30 day time limit in each case (although not specifying the date on which this time limit expires).

22. On 13 April 2018, Mr Dorritt wrote to ASSL in response to their accountant having contacted the VAT Helpline regarding the first VAT return which had been submitted. This letter refers to Mr Dorritt having received (on 25 August 2017) "a letter disputing my decision". It goes on to refer to HMRC having asked for evidence as to the assets acquired by ASSL, what happened to the assets of ASTL, and monthly turnover figures and all business/personal bank accounts to evidence turnover. As at the date of that letter, no information had been received. It also refers to the accountant having submitted a return on 7 February 2018 (with no further information as to the period covered by that return) but that the return was deemed unacceptable and Mr Dorritt's assessment maintained.

23. Notice of appeal was given to the Tribunal on 9 October. It was stated thereon that the taxpayer was "Mr Zaffer Ali Khan, Anderson Security Services Ltd", ie did not distinguish between the different taxpayers in respect of which the decisions which had been issued. The grounds of appeal attached thereto:

(1) explain that there had been no TOGC;

(2) state that ASSL was trading below the VAT threshold;

(3) refer to enforcement proceedings in the High Court in which the witness statement of one of HMRC's officers had stated that the VAT assessment had been stated to have been raised under s29 Taxes Management Act 1970 and this is wrong in law; and

(4) ASSL and Mr Khan honestly believed that appeals had been filed in time. The evidence in support of this was the letter from LDP Luckmans of 24 August 2017, and this is referred to as an "honest and understandable procedural mistake". The error was identified during the course of insolvency proceedings when ASSL/Mr Khan instructed solicitors who sought the advice of tax counsel.

24. The notice of appeal did not attach the supporting documents which were referred to therein, in particular letters from HMRC dated 2 August 2017, 27 October 2017 and 16 November 2017.

25. On 31 October 2018 the Tribunal emailed Mr Bhogal, the taxpayer's representative, asking for these letters to be sent within the next 14 days. No response was received, and the Tribunal chased again on 22 November 2018.

26. On 26 November 2018 Mr Bhogal emailed the Tribunal and that email states that it attached "supporting evidence", although the copy of such email before me does not include those attachments.

27. On 29 November 2018 the Tribunal proposed to divide the appeal into three distinct appeals against the separate decisions:

(1) compulsory VAT registration and penalties issued to ASSL (TC/2018/06332);

(2) personal liability notice issued to Mr Khan (TC/2018/07802); and

(3) requirement to provide security issued to ASSL (TC/2018/07799).

28. On 3 December 2018 the Tribunal directed that two of these appeals – TC/2018/06332 and TC/2018/07802 – should be heard together by the same Tribunal unless any party objected within 14 days. There is no evidence that any party objected. Those directions also required HMRC to provide separate Statements of Case to the Tribunal and ASSL/Mr Khan within 60 days.

29. On 3 December 2018 the Tribunal also gave directions in relation to the third appeal, against the notice of requirement to provide security (TC/2018/07799), that HMRC provide their Statement of Case no later than 4 January 2019.

30. On 1 February 2019 the Tribunal emailed HMRC noting that the Statement of Case for appeal TC/2018/07799, due on 4 January 2019, had not been received.

31. On 1 February 2019 HMRC applied for the appeals to be struck out in accordance with rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and stated that they object to ASSL/Mr Khan being granted permission to appeal late. That Application was served with Tribunal references TC/2018/06332 and TC/2018/07802. The substantive application does also address the notice of requirement to provide security, but the reference for that appeal is not set out on the Application.

32. On 7 February 2019 HMRC emailed the Tribunal to apologise for the failure to submit the statement of case for TC/2018/07799 by the due date, and noted that application of 1 February 2019 in respect of the other appeals against ASSL/Mr Khan contained HMRC's position on the requirement to provide security. HMRC asked that the Tribunal accept this application.

RELEVANT LEGISLATION

33. The relevant provisions of VATA 1994 are as follows:

> "**73 Failure to make returns etc.**
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> ...
>
> (4) Where a person is assessed under subsections (1) and (2) above in respect of the same prescribed accounting period the assessments may be combined and notified to him as one assessment.
>
> ...
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.
>
> ...
>
> (8) In any case where—
>
> (a) as a result of a person's failure to make a return for a prescribed accounting period, the Commissioners have made an assessment under subsection (1) above for that period,
>
> (b) the VAT assessed has been paid but no proper return has been made for the period to which the assessment related, and
>
> (c) as a result of a failure to make a return for a later prescribed accounting period, being a failure by a person referred to in paragraph (a) above or a person acting in a representative capacity in relation to him, as mentioned in subsection (5) above, the Commissioners find it necessary to make another assessment under subsection (1) above,
>
> then, if the Commissioners think fit, having regard to the failure referred to in paragraph (a) above, they may specify in the assessment referred to in paragraph (c) above an amount of VAT greater than that which they would otherwise have considered to be appropriate.
>
> (9) Where an amount has been assessed and notified to any person under subsection (1), (2), (3), (7), (7A) or (7B) above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.

(10) For the purposes of this section notification to a personal representative, trustee in bankruptcy, trustee in sequestration, receiver, liquidator or person otherwise acting as aforesaid shall be treated as notification to the person in relation to whom he so acts.

83 Appeals.

(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—

(a) the registration or cancellation of registration of any person under this Act;

(b) the VAT chargeable on the supply of any goods or services, on the acquisition of goods from another member State or, subject to section 84(9), on the importation of goods from a place outside the member States;

(c) the amount of any input tax which may be credited to a person;...

(k) the refusal of an application such as is mentioned in section 43B(1) or (2);

(ka) the giving of a notice under section 43C(1) or (3);

(l) the requirement of any security under section 48(7) or paragraph 4(1A) or 4(2) of Schedule 11;

(m) any refusal or cancellation of certification under section 54 or any refusal to cancel such certification;

(n) any liability to a penalty or surcharge by virtue of any of sections 59 to 69B;

(o) a decision of the Commissioners under section 61 (in accordance with section 61(5));

(p) an assessment—

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or

(ii) under subsections (7), (7A) or (7B) of that section; or

(iii) under section 75;

or the amount of such an assessment;

(q) the amount of any penalty, interest or surcharge specified in an assessment under section 76;

(r) the making of an assessment on the basis set out in section 77(4);

(ra) any liability arising by virtue of section 77A;

(rb) an assessment under section 77C or the amount of such an assessment;...

(2) In the following provisions of this Part, a reference to a decision with respect to which an appeal under this section lies, or has been made, includes any matter listed in subsection (1) whether or not described there as a decision.

83G Bringing of appeals

(1) An appeal under section 83 is to be made to the tribunal before—

(a) the end of the period of 30 days beginning with—

(i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or

(ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision, or

(b) if later, the end of the relevant period (within the meaning of section 83D).

(2) But that is subject to subsections (3) to (5).

(3) In a case where HMRC are required to undertake a review under section 83C—

(a) an appeal may not be made until the conclusion date, and

(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

(4) In a case where HMRC are requested to undertake a review in accordance with section 83E3—

(a) an appeal may not be made—

(i) unless HMRC have notified P, or the other person, as to whether or not a review will be undertaken, and

(ii) if HMRC have notified P, or the other person, that a review will be undertaken, until the conclusion date;

(b) any appeal where paragraph (a)(ii) applies is to be made within the period of 30 days beginning with the conclusion date;

(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 tribunal gives permission to do so.

(5) In a case where section 83F(8) applies, an appeal may be made at any time from the end of the period specified in section 83F(6) to the date 30 days after the conclusion date.

(6) An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so.

(7) In this section "conclusion date" means the date of the document notifying the conclusions of the review."

PRELIMINARY ISSUE

34. HMRC's Statement of Case in respect of TC/2018/07799 (notice of requirement to provide security) was due on 4 January 2019. The Tribunal had not received this at 1 February 2019 and on that same day received (on time) HMRC's objection to late notice for the other two appeals. That objection also dealt substantively with TC/2018/07799 (but the reference was not included on the objection), and this was explained to the Tribunal on 7 February 2019.

35. I consider that it is in the interests of fairness and justice that I accept this late objection. The delay was less than 30 days in respect of the substance of the matter, and I consider it clear to a reader of the objection to the two joined appeals that it in fact related to all three appeals, and that this short delay did not prejudice ASSL (the relevant appellant in respect of that appeal) in its ability to prepare for the hearing.

SUBMISSIONS

36. HMRC noted that the time limit specified in s83G VATA 1994 is 30 days from the date of document notifying the decision against which the appeal is brought. Statutory time limits should be adhered to - there are multiple failures to appeal on time, and the appeals are between 186 and 403 days late. HMRC refer to *Martland* and the guidance therein as to how this Tribunal should consider exercising its discretion, and *Romasave* for the seriousness and significance of the length of the delays.

37. HMRC state that the reason given for the late appeal, namely the procedural mistake by the accountant does not constitute a reasonable excuse or exceptional circumstance.

38. HMRC argues that the prejudice to ASSL in respect of the assessment and penalties has resulted from its failure to provide information and documents for the assessed period. This prejudice would have been displaced by providing information to establish the true liability in response to the decisions themselves or the various letters requesting information and documents. For HMRC, time limits provide finality in litigation and avoid re-opening matters after a lengthy interval where they were entitled to assume that matters had been finally fixed. Mr Qureshi emphasised that ASSL and Mr Khan had failed to fulfil their obligations to respond to notifications from HMRC over a prolonged period.

39. HMRC did not consider that prospects of success in the appeal was a key issue, but noted in any event that, contrary to the assertion in the accountant's letter that no assets had been purchased from ASTL, the liquidator's report clearly stated that goodwill (the trading name, phone number, client base and web page) had been purchased, and noted that ASSL was operating from the same premises and (as evidenced by the invoices) in the same industry. Furthermore, the assessment dated 16 November 2017 was issued under s73 VATA 1994 and HMRC submit it was not appealable to this Tribunal (and this is why it did not contain appeal or review rights).

40. Mr Brodsky emphasised that if there was no liability for ASSL to be registered for VAT then all five decisions are flawed and liable to be overturned on a substantive appeal. He submitted that ASSL and Mr Khan thought that they had made an appeal but in fact their accountant had made a procedural error and had failed to do so.

41. On the merits of the substantive appeals, Mr Brodsky submitted that there was no TOGC and that ASSL did not expect the value of its taxable supplies over the next 12 months to be above the registration limit. He submitted that ASSL's turnover did remain below the threshold for the period of 12 months after its incorporation.

42. Mr Brodsky drew attention to the delay by HMRC in filing its Statement of Case in respect of the appeal against the notification of requirement to provide security, and the absence of review and appeal rights in the 2 August 2017 notification of compulsory registration and the assessment of 16 November 2017.

DISCUSSION

43. In *Martland v HMRC* [2018] UKUT 178 (TCC) the Upper Tribunal gave guidance as to how this Tribunal should approach an application to allow the notification of a late appeal. It said:

> "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 in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore- Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the 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."

44. I am mindful of the fact that the subject-matter of the five decisions is related, and have considered whether this should mean that a conclusion that permission should be given to appeal late for one decision should then be a factor in relation to considering the other decisions. However, the Upper Tribunal was very clear in *Romasave v HMRC* [2015] UKUT 0254 (TCC) that this should not be a material factor. The Upper Tribunal stated at [100]:

> "We have considered whether the fact that Romasave will, according to our decision on the other issues in this appeal, be able to pursue its appeals against Decisions 2 – 6 and 8, is a material factor in determining whether an appeal should be permitted in relation to Decision 9. Whilst to add such an appeal to those otherwise able to proceed would not involve much, if any, additional time and expense in conducting the proceedings, the time and expense of such proceedings was not a factor to which we consider any particular weight should be given in the circumstances of this case. In principle, it seems to us that the question whether permission should be granted should be determined independently of the position on other appeals and that they are of limited, if any, relevance. If a clear conclusion is reached that it is not appropriate to grant permission to bring a particular appeal on its own merits, taking account of all the circumstances relating to that appeal, we do not think it right that the result should change solely because, as a result of our decision on the other appeals, it could conveniently be heard with them. The existence or otherwise of related appeals ought not to be a material factor. If it were, then the question whether an appeal that would otherwise not be permitted to proceed could be allowed to do so could turn on the happenstance that, at the time the application is considered, there are appeals to which it might be joined. That would be capable of operating unfairly as between taxpayers in otherwise identical situations, some of whom have concurrent appeals and others of whom do not."

45. I have therefore considered the three-stage process set out in *Martland* with a view to reaching a conclusion on each decision independent of the outcome on the other decisions (albeit that many of the relevant factors are the same).

46. HMRC have submitted that an appeal does not lie to this Tribunal against the assessment of 16 November 2017 in any event, as it is issued under s73 VATA 1994 (which applies where a person has failed to file a return) and, as stated in that assessment, the amount assessed is adjusted if the taxpayer submits a return for that period which is satisfactory to HMRC. Section 83 VATA 1994 does not provide a right of appeal in this situation. I am inclined to accept this submission that the Tribunal may not have jurisdiction to hear an appeal against this assessment, but as the correspondence indicates that ASSL's accountants did seek to file a VAT return (although I do not have evidence of the relevant period) and HMRC's refusal to accept it prompted a call to the VAT helpline, I leave open the possibility that ASSL might seek to argue that an appeal lies based on s83(1)(p) VATA 1994, which applies where an assessment has been made under s73 in respect of a period for which the taxpayer has made a return. I consider that if it were to be argued that an appeal against this assessment should be struck-out for lack of jurisdiction, that would need to be addressed specifically if these appeals progress. At this stage I have therefore dealt with this as a permission to make a late appeal against this assessment and have this issue resolved at such time. However, this approach should not be taken to mean that I have concluded that such an appeal would be available.

Length of the delay

47. It was not disputed that the appeals were late by the following:

(1) Compulsory registration notified by letter dated 2 August 2017, appeal should have been notified by 1 September 2017 – 403 days late;

(2) Notice of requirement to give security issued on 27 October 2017, appeal should have been notified by 26 November 2017 – 317 days late;

(3) Assessment for the first period 08/17 issued to ASSL on 16 November 2017 under s73 VATA 1994, appeal (if appealable, as to which see [46] above) should have been notified by 16 December 2017 – 297 days late;

(4) Personal liability penalty notice issued to Mr Khan, on 6 March 2018, appeal due 5 April 2018 – 187 days late; and

(5) Failure to notify penalty issued on 7 March 2018, appeal due 6 April 2018 – 186 days late.

48. In *Romasave* the Upper Tribunal stated at [96]:

> "The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

49. At between 186 and 403 days late, the delay is in each case serious and significant.

Reasons for the delay

50. The decision of Mr Khan not to attend and give evidence to explain the delays means that the only evidence is that on the papers before me and the inferences which I can reasonably draw from them.

51. Mr Brodsky submits that ASSL/Mr Khan had instructed their accountants to ensure matters were appealed, but there was a procedural error by LDP Luckmans (in that they sent an appeal to HMRC rather than the Tribunal).

52. I note that LDP Luckmans did send a letter to HMRC upon being notified that HMRC were intending to register ASSL for VAT. However, that letter refers to HMRC's letter of 31 July 2017 and is sent to Mr Dorritt (as requested in that letter of 31 July 2017). They ask that the letter is treated as an appeal. Given my finding at [12] above that the notification of 2 August 2017 did contain review and appeal rights, it should have been clear to ASSL/Mr Khan and LDP Luckmans that an appeal needed to be sent to the Tribunal in response to the compulsory registration, and this had not been done. I do not think that the letter of 24 August 2017 reflected a procedural error in the sense of a wrongly directed appeal to the compulsory registration of 2 August 2017 – it was a properly addressed response (albeit without the evidence requested) to the letter of 31 July 2017, and expressly refers thereto. I do not consider that it is reasonable for a taxpayer or its adviser to consider that a response to one communication would be sufficient to respond to all other communications dealing with that subject-matter.

53. Mr Brodsky pointed out that if HMRC had treated the letter of 24 August 2017 as a request for a review, then the review outcome letter would have set out that an appeal needed to be made to the Tribunal. I accept that contention – however, the evidence before me does not entitle me to infer that ASSL would then have submitted an appeal to the Tribunal in a timely fashion.

54. Furthermore, it is striking that I was not shown anything which constituted an appeal (even wrongly directed) or a request for a review in response to the other decisions set out at [47] above. In addition to the decisions against which an appeal is sought to be made, there were several additional letters from HMRC seeking information and there is no evidence of

any attempt by ASSL or Mr Khan to respond to these, other than an apparent attempt by LDP Luckmans to file a VAT return (which was rejected by HMRC). I should note that Mr Brodsky accepted that the letter of 24 August 2017, which does refer to itself as being an appeal against any penalties for failure to notify, could not be an attempt to appeal against decisions, notices, assessments or penalties which had not yet been made.

55. On the basis of the papers, there seems to have been almost complete disengagement by ASSL and Mr Khan until HMRC sought to take enforcement proceedings and I was not given any evidence as to the reason for this.

All the circumstances

56. The submissions addressed matters including prejudice to the parties (largely based on prospects of success), delays by HMRC and the alleged absence of review and appeal rights on relevant correspondence.

57. The prejudice to HMRC of permitting appeals outside of the statutory time limits is clear, as this results in an absence of finality to litigation and harms the ability to conduct litigation efficiently and at proportionate cost.

58. I have considered whether refusing permission would deny ASSL and Mr Khan the opportunity of presenting a case with reasonable prospects of success on an appeal. Very little information was before me and it is not appropriate for me to reach firm conclusions on these questions. However, the prejudice that would be caused to ASSL and Mr Khan formed the basis for Mr Brodsky's submissions (perhaps understandably given the lack of evidence as to the reasons for late appeals). I took the following from the submissions of both parties and the evidence which was available to me:

(1) Compulsory registration - Some of the assertions made on behalf of ASSL were contrary to the evidence put forward (eg the statement that ASTL had not transferred any assets to ASSL was contrary to the liquidator's report of ASTL, the latter being referenced in ASSL's own skeleton argument) and others did not directly address the relevant question (the statement that ASSL's turnover remained below the registration threshold for the 12 months after its incorporation failed to address the fact that it had co-existed with ASTL for the first 7 weeks of this period). Whilst ASSL may have an arguable case, I would not put it more highly than that.

(2) Assessment - Mr Brodsky drew attention to the fact that HMRC have used ASTL's turnover as the basis for assessing ASSL, and that the former was higher. Not being able to challenge this would prejudice ASSL.

Mr Brodsky also points out that this assessment did not contain appeal or review rights, and referred me to the decision of the Upper Tribunal in *HMRC v NT ADA Limited* [2018] UKUT 59 (TCC) which addressed whether, in issuing a penalty decision, HMRC had failed to comply with the requirements in s83A VATA 1994 to offer a review and, if so, the consequences of such failure. The Upper Tribunal concluded that the failure to offer a review does not affect the validity of a decision or the ability to appeal, but (at [34]):

> "A more rational approach is to have regard to the discretion of the tribunal to admit late appeals, the exercise of which could undoubtedly be influenced by a failure by HMRC to include important information of this nature, particularly about appeal rights but potentially (and depending on the circumstances) about the right of review as well."

HMRC submit in this regard that the assessment is not appealable, being a "prime assessment" in any event (see [46] above) and this is why there were no appeal rights.

(3) Requirement to provide security – The amount required is influenced by HMRC's use of the (higher) turnover numbers for ASTL. Mr Brodsky submits this is higher than appropriate for ASSL. HMRC's position is that the use of ASTL's numbers was reasonable in the circumstances, and that an offer was made of a lower security requirement if ASSL had agreed to submit monthly returns.

(4) Penalty - The penalty was imposed based on the "potential lost revenue", which was itself based on the turnover of ASTL, and on the basis that the failure to notify was deliberate. The latter is denied, as Mr Brodsky submits that ASSL genuinely and reasonably believed that there was no such obligation. An accusation of a deliberate failure is very serious, as explained by the Tribunal in *Patrick Cannon v HMRC* [2017] UKFTT 0859 (TC) at [29] to [30]:

> "29. By contrast, a deliberate error in a tax return requires that the taxpayer knew about the error and intended to misrepresent the true position to the respondents. Nothing short of that will do, save in circumstances where a taxpayer has deliberately shut his eyes to the true factual position, sometimes referred to as "Nelsonian blindness." In our judgement the position, as we have summarised it above, is properly to be taken from the decision of this Tribunal in *Auxillium Project Management Ltd v HMRC* [2016] UKFTT 249 at para 63.
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> 30. We also keep in mind that although there is only one civil standard of proof, it is a general requirement of a fair trial that the more serious the allegation relied upon by one party, such as an allegation of dishonesty or the making of a deliberate misrepresentation to the respondents, the fact-finding tribunal must be the more assiduous to ensure that the evidence relied upon by the person making that allegation is sufficiently credible, relevant and cogent to warrant such an adverse finding. In pointing that out we gratefully adopt what Lord Hoffmann said in *Re B* [2008] UKHL 35 at paragraph 45 of his speech. We need not set it out in full because the principle is well recognised and, we venture to think, necessary to render a decision in a case where such a serious allegation is made, compatible with article 6 of the European Convention on Human Rights."

(5) Personal liability notice - Mr Brodsky also emphasised that the personal liability notice issued to Mr Khan carried with it the allegation of dishonesty. He said it would be particularly unfair not to permit Mr Khan to address the dishonesty allegation by denying permission.

59. HMRC have suggested that the remedy for the prejudice caused to ASSL and Mr Khan should be a professional negligence claim against their advisers. Mr Brodsky has said this is unlikely to produce a satisfactory outcome. I do not consider that the possibility of such a remedy is particularly relevant here.

60. Mr Brodsky drew attention to the delay by HMRC in providing their objection to a late appeal against the notice to require security. The delay was in substance less than 30 days, and I concluded that this did not prejudice ASSL. It is also clear from the correspondence before me that in addition to notifying the appeals late there have been further delays on the part of ASSL/Mr Khan in this matter, including both the failure to provide requested information to HMRC and the time taken to provide material requested by the Tribunal.

Balancing exercise

61. Given the serious and significant length of the delay and (for at least four of the decisions) the absence of what I would conclude to be any good reasons for the delay, and bearing in mind that the starting point is that permission should not be granted, I consider that the factors which

I have considered under "All the circumstances" above need to be strong to tip the balance in favour of granting permission.

62. Dealing first with the compulsory registration (as there was a reason submitted for the late appeal namely the procedural error by the accountants) and acknowledging that without this decision the remaining assessments, notifications and penalties would not have been issued, I am not persuaded that I should exercise my discretion to give permission for the late appeal. There is undoubtedly prejudice to ASSL in reaching this conclusion, but (as explained at [52] above) I am not satisfied that the reason relied upon explains the lateness nor should it justify giving permission. I note that there were numerous requests from HMRC for information which appear to have been largely ignored.

63. Considering separately each of the assessment, requirement to provide security, penalty and personal liability notice, I start from the position that the delay in each case was serious and significant, no good reason was given for this delay and HMRC would be prejudiced if I permitted an appeal outside of the statutory time limit.

64. For the assessment (if an appeal lies at all) and the requirement to give security I do not consider that any of the submissions on behalf of ASSL justify exercising my discretion in favour of permitting a late appeal.

65. I have carefully considered whether Mr Brodsky's submission about the accusation of deliberate failure and thus dishonesty (which underpins the penalty and personal liability notice) being one which the taxpayers ought to be able to seek to address should tilt the balance for those decisions. However, it remains the case that ASSL and Mr Khan would have been afforded this opportunity if they had appealed in time. On balance, I have concluded that they, rather than HMRC, should bear the consequences of the delay. I have therefore decided not to give permission for late appeals to be made against the penalty or the personal liability notice.

CONCLUSION

66. Permission to make late appeals against the decisions set out in [1] above is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

67. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 26 June 2019