



[2019] UKFTT 605 (TC)

**TC07388**

*PROCEDURE – whether to give permission for late appeal to be made to Tribunal – reliance on adviser who had failed to act and misled taxpayer – permission refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/02046**

**BETWEEN**

**ANTHONY HIGGINS**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE JEANETTE ZAMAN  
IAN ABRAMS**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 13  
September 2019**

**Mr Liban Ahmed, of CTM Tax Litigation Limited, for the Appellant**

**Miss Alfair Mackoon, litigator of HM Revenue and Customs' Solicitor's Office, for the  
Respondents**

## DECISION

### INTRODUCTION

1. Mr Higgins is applying for permission to make late appeals to the Tribunal against assessments and penalties in respect of the tax years 2005-2006 through to 2014-2015 as further set out below.

### PRELIMINARY ISSUE

2. Mr Higgins gave Notice of appeal to the Tribunal on 4 April 2019. That Notice states that his appeal to HMRC was late and he is applying to be allowed to make a late appeal to HMRC. Unsurprisingly, the Tribunal initially treated this as an application for permission to make a late appeal to HMRC which, if successful, would revert to HMRC under s49B Taxes Management Act 1970 (“TMA 1970”). This can be seen from the letter sent by the Tribunal to the parties dated 28 April 2019.

3. However, Mr Higgins’ appeal to HMRC against these assessments and penalties had been made late (on 19 April 2019), but HMRC had exercised its discretion to accept late notice (in their letter of 19 May 2017). HMRC conducted the appeal and upheld their decisions but Mr Higgins had failed to appeal to the Tribunal within 30 days.

4. The application is thus an application for permission to make a late appeal to the Tribunal. Mr Higgins’ representative, Mr Ahmed of CTM Tax Litigation Limited (“CTM”), did not have a copy of all the relevant correspondence at the time he had completed the Notice of appeal, and this was the reason for the inaccuracy.

5. We considered that the correspondence between the parties, which is described in the Background below and was included by HMRC in the bundle, made it apparent that the Notice of appeal was incorrect. Miss Mackoon, whilst maintaining HMRC’s objection to the lateness (which was now relevant to the late appeal to the Tribunal) accepted that the hearing was to consider whether to give permission for a late appeal to the Tribunal. Having regard to The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and in particular the overriding objective in Rule 2 to deal with cases fairly and justly, we did not consider that HMRC could be said to have been prejudiced by that initial mistake, and the hearing should proceed to consider Mr Higgins’ application for permission to appeal late to the Tribunal.

### BACKGROUND

6. We had a bundle of papers which had been prepared by HMRC (and a supplemental bundle), and at the hearing we accepted the late admission of some additional papers from Mr Higgins (being copies of text messages and emails between Mr Higgins and Stuart Niall of JDSL Taxation (“JDSL”), his previous adviser) to which HMRC did not object and we had the opportunity to review.

7. We find that the correspondence between HMRC and Mr Higgins (and/or his advisers at relevant times) is as set out below. We note that much of his pre-dates the time period on which we need to focus when considering whether or not to give permission, but have set this out as it shows the context for later events. We then set out separately the submissions which were made on behalf of Mr Higgins, and the evidence he gave, and thus further findings of fact are made throughout the Decision.

8. On 25 February 2015 HMRC wrote to Mr Higgins at the address which we refer to as “4 HC Essex” explaining that they were carrying out a compliance check. They followed up with a letter on 3 June 2015, issued an information notice on 10 July 2015, charged a penalty of £300 on 11 August 2015, and issued a further information notice on 21 December 2015.

9. On 23 December 2015 Mrs Southgate of HMRC wrote to “Mr Diss” at 4HC Essex, referring to a conversation they had had when she had visited that address on 21 December 2015 and asking for a forwarding address for Mr Higgins.

10. On 27 January 2016 HMRC sent a request for information under s29 Data Protection Act 1998 to the Council Tax Department of Brentwood Borough Council asking for the names of individuals registered to pay council tax at the address at 4HC Essex from 11 April 2007 to that date.

11. A copy of that letter was stamped as received by Brentwood BC on 3 February 2016, and on the Request for Information is written “Mr Anthony Higgins 11/4/07-10/5/07 Mrs Debra Allix 11/5/07-Date”.

12. On 20 May 2016 the letter from HMRC dated 10 July 2015 was returned to HMRC, with the envelope having been marked “Moved Away Return to Sender”.

13. On 16 June 2016 HMRC sent a further information notice to Mr Higgins at 4HC Essex. That letter records the fact that information previously requested has not been received. (No mention is made of the letter of 10 July 2015 having been returned to HMRC.)

14. On 1 July 2016 another letter was returned to HMRC. It is not clear from the bundle which this was, but we infer it was the information notice of 16 June 2016.

15. On 18 July 2016 Mrs Southgate wrote to Mr Higgins at 4HC Essex, noting that he had not responded to her letters and that she was unable to contact him when she visited that address. That letter sets out HMRC’s estimate of self-employment income and rental income for each of the tax years from 2005-2006 to 2013-2014, and points out that penalties may be chargeable for failure to notify.

16. On 8 August 2016 the letter of 18 July 2016 was returned to HMRC.

17. On 13 September 2016 HMRC wrote to Mr Higgins at 4HC Essex, the substance of this letter being largely the same as that of 18 July 2016. A key difference is that in the tables of estimated taxable income, HMRC had by this time now included estimates for the tax year 2014-2015 in addition to the earlier years.

18. On 15 December 2016 HMRC issued the following assessments (all addressed to Mr Higgins at 4HC Essex):

<b>Tax year</b>	<b>Assessment</b>
2005-2006	£2,460.10
2006-2007	£3,354.16
2007-2008	£5,113.84
2008-2009	£4,473.08
2009-2010	£5,782.36
2010-2011	£9,607.28
2011-2012	£11,442.95
2012-2013	£18,288.15
2013-2014	£19,174.79
2014-2015	£19,318.31

19. On 15 December 2016 HMRC issued a penalty determination to Mr Higgins at 4HC Essex for £13,091 in respect of the tax years 2005-2006 to 2008-2009.

20. On 16 December 2016 HMRC sent a penalty explanation letter to Mr Higgins at 4HC Essex explaining that they intended to charge a penalty of £58,529.66 in respect of the tax years 2009-2010 to 2014-2015.
21. On 25 January 2017 HMRC wrote to Mr Higgins confirming that the compliance check had been completed, revenue assessments and penalty determinations had been issued and there had been no appeal.
22. On 19 April 2017 JDSL wrote to HMRC Debt Strategy referring to a letter from HMRC dated 12 April 2017 stating that they act for Mr Higgins, enclose a form 64-8 and saying:

“We would be very grateful to receive copies of all the letters issued and details of how these figures have been reached and on what basis.

Under the circumstances we would like you to accept this letter as a protective notice of appeal against the estimated figures and penalties charged.”
23. The copy of that letter before us was stamped with “Shipley 25 April 2017”, and the reverse includes a completed 64-8. We did not have a copy of the letter from HMRC dated 12 April 2017.
24. On 19 May 2017 HMRC wrote to JDSL Taxation. That letter starts:

“Thank you for your letter dated 19 April 2017 in which you make a late appeal against my decision to issue your client with revenue assessments and penalty determinations on 15 December 2016.

Please note that I have accepted your appeal and am enclosing the relevant paperwork you have requested.”
25. That letter then briefly explains the undisclosed income and states that it encloses a copy of specified correspondence which had been issued to Mr Higgins. That letter lists the six property addresses in respect of which HMRC were assessing tax on rental income. HMRC ask for a response within 21 days.
26. HMRC chased for a response on 28 June 2017 (by email) and on 21 July 2017.
27. JDSL wrote to HMRC on 27 July 2017 explaining they were still trying to obtain information from third parties. The principal delay was explained as involving archived bank statements.
28. On 9 August 2017, HMRC Debt Management wrote to Mr Higgins at 4HC Essex explaining that they had attempted to contact him on 8 August 2017 and asking him to contact them “immediately...to discuss your current liabilities”.
29. On 18 August 2017 HMRC wrote to JDSL explaining that unless they received accounts and evidence by 1 September 2017 they would proceed by offering a formal review of the decision.
30. JDSL replied on 30 August 2017 explaining that they hoped to provide detailed information in the next 10-14 days.
31. On 17 November 2017 HMRC wrote to Mr Higgins at 4HC Essex confirming HMRC’s view of the matter and stating that this had not changed since the letter of 13 September 2016, and stating that a copy of that letter was enclosed. That letter refers to the right to a review, and invites him to make any representations in support of his position, or to appeal to the Tribunal. A copy of that letter was sent to JDSL.
32. On 5 January 2018 HMRC noted that no response had been received and the compliance check was closed.

33. HMRC Debt Resolution then wrote to Mr Higgins at 4HC Essex on 18 January 2018 and 7 February 2018.

34. On 25 January 2019 HMRC wrote to Mr Higgins (at 4HC Essex) explaining that Revenue Assessments had been sent to him on 14 January 2017 as they had not received self-assessment returns for the tax years 2005-2006 to 2013-2014. That letter states that Mr Higgins could only appeal against this amount if he's sent HMRC his outstanding tax return within 30 days of the assessment date of 14 January 2017.

35. On 9 February 2019 JDSL Taxation wrote to HMRC's EIS Special Relief Team claiming Special Relief.

36. On 26 February 2019 HMRC wrote to JDSL Taxation explaining that the claim was not valid as no Revenue determinations had been made.

37. On 4 April 2019 Mr Higgins gave notice of appeal to the Tribunal seeking permission to make a late appeal.

#### **APPELLANT'S SUBMISSIONS**

38. Mr Ahmed submitted as follows:

(1) Mr Higgins had moved out of 4 HC Essex shortly before the assessments were raised. His estranged wife had continued to live there, but he had very little contact with her until April 2017. (They have since reconciled and he is now living at that property again, which is why that is now his correct correspondence address.) This was why he was late appealing to HMRC, and HMRC accepted that late appeal.

(2) Mr Higgins only became aware that there were any tax issues when his wife's daughter handed him the letter from HMRC dated 12 April 2017. He instructed Mr Niall of JDSL to respond to HMRC.

(3) JDSL then failed to respond to HMRC letters and failed to submit the self-assessment returns whilst informing Mr Higgins that all was being dealt with. This continued even after bankruptcy proceedings were commenced by HMRC.

(4) As well as generally failing to do what Mr Higgins was relying on him to do, Mr Niall also falsified his signature on:

(a) the self-assessment returns for the tax years 2005-2006 to 2013-2014 which were dated 18 November 2018. In addition to denying that the signature was that of Mr Higgins, Mr Ahmed drew attention to the date of these returns and noted that, as could be seen from the text messages, on 2 November 2018 (some two weeks earlier) Mr Higgins had been told these had already been submitted to HMRC; and

(b) the letter of 9 February 2019 which purports to enclose a letter from Mr Higgins in support of the claim for Special Relief was not only not written or signed by him, but also makes assertions which are rejected by Mr Higgins. In particular that letter states, as a ground for claiming Special Relief, that Mr Higgins had been suffering from depression in 2006-2007, had been kicked out of their home by his wife and had then moved in and out of temporary accommodation and hostels with no fixed above. This was not true. Mr Higgins had been estranged from his wife and moved out.

(5) The assessments raised by HMRC bear no resemblance to the self-assessments which have since been submitted by Mr Higgins, such that it would be unjust and extremely prejudicial for them to stand.

(6) Upon becoming concerned about Mr Niall's conduct (in February 2019, as described below), Mr Higgins then instructed CTM on 4 March 2019.

#### HMRC'S SUBMISSIONS

39. Miss Mackoon's submissions were that during the enquiry process HMRC was communicating with Mr Higgins at the only address which they had for him. Once he appointed JDSM as his agent in April 2017 then HMRC dealt with that agent. At various times, some correspondence was sent to Mr Higgins at his home address (as set out in Background) but in any event HMRC were entitled to deal with the agent who Mr Higgins had appointed as his representative. Any failures of that agent were failures of Mr Higgins and he is responsible.

40. Miss Mackoon referred to *Martland* and the process which this Tribunal should follow when considering whether to make a late appeal. She emphasised that HMRC's position was that there was no good reason for the long delay of over a year in making the appeal to the Tribunal.

#### EVIDENCE OF APPELLANT

41. Mr Higgins gave evidence on which he was cross-examined. He explained as follows:

(1) He usually communicated with Mr Niall by calling him or sending text messages. When he needed to send documents to him he would generally drop them round to his house.

(2) On 8 August 2017 Mr Higgins sent an email to Mr Niall stating "I now have bank statements...Bank could only give me statements going back 6 years. Would you like to collect them or I can drop them to you".

(3) In July 2018, he was asking Mr Niall about the bankruptcy hearing, and was told that it had been adjourned. This could be seen in a text from Mr Niall dated 28 July 2018.

(4) Mr Niall was telling him that HMRC had not yet confirmed how much was said to be owed. Mr Higgins was putting a property on the market for sale to raise the money (and there is reference to this being the case in the text messages in October 2018). This sale was ultimately blocked by HMRC, but Mr Higgins emphasised that he was trying to pay what he actually owed.

(5) There was another hearing in October 2018, and that was the first hearing that Mr Niall had told Mr Higgins he needed to attend himself (as well as Mr Niall). They made arrangements to go to the hearing together, and Mr Higgins asked in a text message "Is this a formality or do I need to worry"? The reply, one minute later, was "Not a formality but we have a good case." Mr Higgins was asking at this time how much HMRC were saying was owed to them. Mr Niall was telling him that HMRC had not confirmed a number, saying that HMRC were blaming this on not having received some paperwork. This can be seen from the text message exchanges on 19 October 2018.

(6) At that hearing at the bankruptcy court, HMRC told the court that they had not received any self-assessment returns. This was a complete surprise to Mr Higgins, and Mr Niall said he would send them in again.

(7) At the end of October 2018 Mr Higgins was then checking that his self-assessment returns had been sent in to HMRC. He was keen to get confirmation that this had been done and HMRC had confirmed that they had received them. He referred to the text messages again, which refer only to "paperwork", and note that on 2 November 2018 Mr Niall confirmed that this had gone to HMRC and that "Of course" (plus a smiley emoji) they had got signed confirmation of receipt by HMRC.

(8) He was chasing Mr Niall in December 2018 to find out the amount that was owed to HMRC.

(9) When asked how he had continued to trust that Mr Niall knew what he was doing and everything was under control when the letters from HMRC and the fact of bankruptcy hearings would suggest otherwise:

(a) Mr Niall told him that the right and left hands of HMRC did not know what the other was doing – ie debt management were not talking to those responsible for sorting out tax returns. He received similar reassuring messages when HMRC would write saying that they hadn't received a response to a letter.

(b) It was naivety on his part that meant he continued to rely on Mr Niall and trust him even once warnings of bankruptcy were made (in February 2018) and proceedings commenced (in July 2018).

(c) He only started to become concerned when, in around December 2018, he attended one of the bankruptcy hearings without Mr Niall being present. The judge said something to him along the lines that "You do realise eventually you will have to pay and can't put it off forever." This didn't sit right with the message from Mr Niall that the amounts were being negotiated with HMRC and nothing was final.

(d) Mr Higgins knew something was wrong when, in February 2019, on the way to a bankruptcy hearing at the High Court with Mr Niall, Mr Niall told him that he had come into an inheritance and had paid HMRC £5,000 to pay the debt. This was just odd, and not the sort of thing that an adviser would do.

42. We found Mr Higgins to be a credible witness. We did believe that he had trusted that Mr Niall was dealing with matters, and that the fact this was an individual he would meet in person (eg when handing over documents) had given him comfort that he could rely on him. We address the reasonableness of this approach in the Discussion.

#### **RELEVANT LEGISLATION**

43. Section 49A TMA 1970 sets out the steps which occur after an appeal has been made to HMRC. This provides:

##### **"49A Appeal: HMRC review or determination by tribunal**

(1) This section applies if notice of appeal has been given to HMRC.

(2) In such a case—

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),

(b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or

(c) the appellant may notify the appeal to the tribunal (see section 49D).

(3) See sections 49G and 49H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.

(4) This section does not prevent the matter in question from being dealt with in accordance with section 54 (settling appeals by agreement)."

44. Section 49C then sets out what happens if HMRC offer a review:

##### **"49C HMRC offer review**

(1) Subsections (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.

- (2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC's view of the matter in question.
- (3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with section 49E.
- (4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under section 54(1) for the settlement of the matter.
- (5) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (4) applies.
- (6) Subsection (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49H.
- (7) HMRC may not notify the appellant of an offer to review the matter in question (and, accordingly, HMRC shall not be required to conduct a review) if—
  - (a) HMRC have already given a notification under this section in relation to the matter in question,
  - (b) the appellant has given a notification under section 49B in relation to the matter in question, or
  - (c) the appellant has notified the appeal to the tribunal under section 49D.
- (8) In this section “acceptance period” means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question.”

45. Section 49H then deals with the position where HMRC have offered a review but this offer has not been accepted:

**“49H Notifying appeal to tribunal after review offered but not accepted**

- (1) This section applies if—
  - (a) HMRC have offered to review the matter in question (see section 49C), and
  - (b) the appellant has not accepted the offer.
- (2) The appellant may notify the appeal to the tribunal within the acceptance period.
- (3) But if the acceptance period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.
- (4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.
- (5) In this section “acceptance period” has the same meaning as in section 49C.”

**DISCUSSION**

46. Mr Higgins’ appeal to HMRC was made late, however HMRC accepted that late appeal in their letter of 19 May 2017. Having accepted the appeal, they then re-affirmed their conclusions in their letter of 17 November 2017. That letter states that Mr Higgins had 30 days to request a review or appeal to the Tribunal. He did neither.



47. The first action that was taken by JDSL on Mr Higgins' behalf was the claim on 9 February 2019 for special relief under paragraph 3A Schedule 1AB TMA 1970. No such claim lies, as HMRC informed JDSL on 26 February 2019. An appeal was then made to the Tribunal on 4 April 2019 by Mr Higgins' new advisers, CTM.

48. The appeal to the Tribunal was thus late. We need to consider whether to give permission for the appeal to be made late, and in doing so we consider the relevance (if any) of the invalid claim for special relief which was made on 9 February 2019.

49. 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.”

50. In addition, the Upper Tribunal in *HMRC v Katib* [2019] UKUT 0189 (TCC), which concerned an appeal by HMRC against a decision of the Tribunal to give permission for the taxpayer to make late appeals, emphasised the importance of adhering to statutory time limits at [17]:

“We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion. We accept Mr Magee's

point that the FTT referred to both BPP Holdings and McCarthy & Stone in the Decision. Paragraph 27 (1) of the decision (cited above) shows that the FTT seemed to have the point in mind. However, instead of acknowledging the position, the tribunal went on to distinguish the BPP Holdings case on its facts. Differences in fact do not negate the principle, and it is not possible to detect that the tribunal thereafter gave proper weight to it in parts of the decision which followed.”

51. We have taken the three-stage process set out in *Martland* when considering our decision.

### **Length of the delay**

52. HMRC set out their view of the matter (following the late appeal to them) on 17 November 2017. That letter referred to an enclosed fact sheet HMRC 1 which was said to explain the options that Mr Higgins had. We did not have a copy of that fact sheet. However, the letter itself refers to the possibility of having the decision reviewed, noting that this would be carried out by a different HMRC employee, and that alternatively he may appeal to the Tribunal. That letter stated that if he does not agree with HMRC’s view, he should write to the decision-maker within 30 days of the letter either accepting the offer of a review or to notify the appeal to the Tribunal.

53. Notwithstanding the absence of fact sheet HMRC 1 in our papers, we are satisfied that this letter offered Mr Higgins a review of HMRC’s decision for the purposes of s49C TMA 1970. The “acceptance period” for this offer is the period of 30 days beginning with 17 November 2017, ie the date of the document by which HMRC notified Mr Higgins of the offer to review the matter in question, and thus expired on 17 December 2017.

54. No action was taken within the 30 days, and accordingly on 5 January 2018 HMRC confirmed that the matter was now settled under s49C(4). At the hearing Miss Mackoon suggested that the 30 day window for appealing to the Tribunal started at the date of this letter. We do not agree. Section 49H provides that where HMRC have offered to review a matter and the taxpayer has not accepted that offer, the appeal may be notified to the Tribunal within the acceptance period, and the acceptance period has the same meaning as in s49C, which must be 30 days from 17 November 2017.

55. HMRC’s approach suggests that the delay was shorter than we consider it in fact was, but given the overall length of time involved this has not affected our decision. On our approach, Mr Higgins’ Notice of appeal to the Tribunal was over 15 months late; HMRC’s approach would treat it as 14 months late. This is unquestionably a serious and significant delay.

### **Reasons for the delay**

56. Mr Higgins’ explanation for the delay is based on his reliance on Mr Niall. We heard from him as to how he believed that he could trust Mr Niall, and we can see from the written evidence before us that Mr Higgins was chasing for reassurances as to what was happening, and providing information to Mr Niall during this period.

57. In *Katib* the Upper Tribunal stated that failures by the taxpayer’s adviser should generally be treated as failures by the taxpayer and confirmed as a general rule that the failure of an adviser to advise the taxpayer of the deadlines for making appeals, or to submit timely appeals on his behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland*.

58. Bearing in mind this guidance, we also consider that Mr Higgins should have been alerted to the fact that all was not proceeding well and that he should have had cause to doubt what he

was being told. These warning signs were occurring throughout the period from the submission of the appeal to HMRC and during 2018:

(1) Having instructed JDSL to appeal to HMRC (which they had done) in April 2017, Mr Higgins received the letter from HMRC Debt Management dated 9 August 2017 asking him to contact them “immediately”. This was sent to him, not JDSL, and he did not do so.

(2) HMRC’s view of the matter letter dated 17 November 2017 was sent to Mr Higgins as well as to JDSL. That letter not only confirmed that HMRC’s view had not changed since 13 September 2016 (thus alerting Mr Higgins to the fact that HMRC were still assessing the higher numbers which he says bear no resemblance to reality), and the second sentence of that letter is:

“I wrote to your accountant on 19 May 2017, 21 July 2017 and 18 August 2017, requesting further information and records, but these have not been forthcoming.”

That letter also invites Mr Higgins to call the sender, Paul Sanders, “if you wish to discuss the matter, or are unsure of what is required from you”. Mr Higgins did not do so.

(3) HMRC’s letter of 5 January 2018, confirming that “I have not received a response from you or anyone representing you, I now consider the matter settled...My compliance check has been closed accordingly” was sent to Mr Higgins as well as being copied to JDSL. This letter was thus clear that, following HMRC having finished the appeal process (in November 2017), they had not received anything (eg by way of review request or representations) and considered the matter completely finished.

(4) On 18 January 2018, the letter from HMRC Debt Resolution Team was sent to Mr Higgins headed “Notice of warning of enforcement by taking control of goods”, stating that “You must make payment in full now.”

(5) On 7 February 2018 HMRC wrote to Mr Higgins warning him of bankruptcy. We note that on 13 February 2018, Mr Higgins sent an email to Mr Niall headed “Please call me urgently”, and the short message included “I have a letter today with a threat of bankruptcy unless I contact them by 15 Feb”. That appears to be a reference to this letter.

(6) Hearings in respect of the bankruptcy proceedings commenced in July 2018.

59. These warning signs were occurring fairly regularly, and whilst it may have been credible for Mr Niall to blame HMRC’s incompetence initially, we conclude that by the end of January 2018 it should have been clear to Mr Higgins that it was unwise to continue to rely on Mr Niall – even if Mr Niall had been sending letters to HMRC and these were somehow all disappearing, a different approach was required. Mr Higgins did not contact HMRC himself at all to find out what was going on.

60. This leaves us in the position that whilst Mr Higgins has explained the delay, this explanation does not pass the threshold of being a “good reason”, albeit that we do weigh this up with the other factors when considering all the circumstances.

### **All the circumstances**

61. The final stage in the process is to evaluate all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the extent of the detriment to Mr Higgins which would be caused by our not giving permission and the extent of the detriment to HMRC which would be caused by our giving permission. We also note, as

set out in the Upper Tribunal decision in *Martland*, that the starting point is that permission should not be granted unless this Tribunal is satisfied on balance that it should be.

62. In conducting that process, we are required:

(1) to take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost and for the statutory time limits to be respected; and

(2) without descending into a detailed examination of Mr Higgins' case, to have regard to any obvious strength or weakness in that case because that is highly relevant in weighing up the potential prejudice to the parties of our decision.

63. We are clear that giving permission in the present instance would prejudice HMRC and the public interest - there is a public interest in ensuring that time limits set by Parliament in legislation are observed and are not extended without good reason. To allow a late appeal for no good reason might encourage others to regard time limits as optional. Furthermore, the appeals would stretch back to the tax year 2005-2006 and HMRC is entitled to expect that such assessments would be final and beyond challenge after all this time.

64. If we refuse to give permission then Mr Higgins would not be able to challenge the assessments and penalty determinations which have been issued. He has explained the reason for the delay, and we note that in *Katib* the Upper Tribunal acknowledged that exceptions to the general rule - that the failure of an adviser to submit timely appeals on a taxpayer's behalf, is unlikely to amount to a "good reason" for missing those deadlines - are possible, and it is a relevant consideration if a taxpayer was misled by his adviser. In the present instance there is evidence that Mr Higgins was misled by Mr Niall, both from the evidence he gave at the hearing and the text message exchanges which were before us. We accept that Mr Niall was telling Mr Higgins that HMRC were at fault in losing paperwork which had been submitted and that matters were being negotiated.

65. Acknowledging that we have only heard from Mr Higgins as to the conduct of Mr Niall, and that we have not seen anything from Mr Niall to seek to explain his conduct, we also have regard to the submissions made by Mr Ahmed (at [38(4)]) that Mr Niall was falsifying Mr Higgins' signature on papers sent by him to HMRC. No expert evidence as to handwriting was presented to us - instead, we were taken to examples of Mr Higgins' signature in the papers before us which he confirmed were his signature, and invited to note that the signatures on the claim for special relief and on the self-assessment returns looked different. HMRC did not challenge this submission, or the statements by Mr Higgins as to what was and was not his signature. We accept the submissions of Mr Ahmed on this - there is a visible difference in the signatures.

66. We also accept Mr Higgins' evidence that the contents of the claim for special relief, sent by JDSM to HMRC in February 2019, in what we infer was a last-ditch attempt to rescue the position in which Mr Niall now found himself, included inaccurate statements, in particular as to Mr Higgins' mental health.

67. Thus not only was Mr Niall misleading Mr Higgins, he was also seeking to mislead HMRC. We do have regard to this as a relevant consideration.

68. We have had regard to the letter from JDSL to HMRC on 9 February 2019 claiming special relief for another purpose as well, namely whether this letter should be treated as being an attempt at requesting a review or appealing the decision, thus rendering the delay slightly shorter? We have decided not to put any weight on this. It was sent too late to be treated as a misguided request for HMRC to review the decision, and would in any event still represent a serious and significant delay in taking action.

69. In assessing the prejudice to Mr Higgins that would result from our refusing permission, we can have regard (albeit without conducting a mini-hearing or detailed analysis) of the merits of his case. We note:

(1) The amounts assessed by HMRC were calculated without any input from Mr Higgins. The amounts set out in the Tax Calculation summary show accompanying the self-assessment returns which were submitted in November 2018 show tax due as follows:

- (a) For 2007-2008 – nil
- (b) For 2008-2009 - £384
- (c) For 2009-2010 - £1,278.52
- (d) For 2010-2011 - £499.60
- (e) For 2011-2012 - £52.40
- (f) For 2012-2013 – nil
- (g) For 2013-2014 - nil

We did not have a copy of the self-assessment return for the tax year 2014-2015.

(2) These amounts are dramatically less than those which had been assessed by HMRC, and which were used as the basis for calculating the penalties.

(3) We could see from the papers before us that HMRC have assessed rental profits assuming that there are six rental properties. Mr Ahmed submitted that there are only four - the other two having nothing to do with him (ie are not now owned by him, nor have they even been owned by him, he knows nothing about them). The six properties are specified in HMRC's letter of 19 May 2017 – that was addressed to JDSL and had not been seen by Mr Higgins.

(4) Mr Ahmed submitted that Mr Higgins was not a self-employed courier until 2009, and was only part-time at that point. HMRC held information for the tax years 2009-2010 and 2010-2011 (from the business for whom work was carried out) and scaled this forward and back.

70. We do not make any findings as to what the taxable income of Mr Higgins was for the tax years 2005-2006 to 2014-2015. Whilst there may well be significant evidential difficulties in respect of some of the earnings (and this represents a potential weakness in the case), we consider that it should be fairly straightforward for Mr Higgins to adduce evidence as to the rental properties he owned during the period (in particular as to how many he owned). This should not be taken to mean that we accept that the amounts shown in the self-assessment returns (at [69(1)]) are more likely to be correct than the amounts assessed.

71. No evidence was provided as to the financial position of Mr Higgins. It was submitted by Mr Ahmed that the liability of approximately £200,000 would wipe out the equity in his properties. Even though it was not claimed that the amounts involved would bankrupt Mr Higgins (notwithstanding the existence of bankruptcy proceedings), we nevertheless consider the amount to be substantial and, if this amount does not actually represent what would have been his tax liability if he had completed self-assessment returns for the years in issue, then not being able to appeal these amounts is of significant prejudice to Mr Higgins.

72. Taking all of this together, we are not persuaded that the reasons for the delay (noting our conclusions that Mr Higgins should have seen the warning signs but also that he and HMRC were misled by his adviser) and the possible strength of his case outweigh the principle that,

after a period, there should be certainty as to the liability created by the assessments and penalty determinations. We therefore refuse to give permission for these appeals to be brought late.

**CONCLUSION**

73. For the reasons given above, we refuse to give permission for these appeals to be brought late.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

74. 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 SEPTEMBER 2019**