[2019] UKFTT 698 (TC)

TC07470

Appeal number: TC/2018/02521

INCOME TAX – discovery assessments and penalties – appeal to HMRC made 20 months after assessments issued – HMRC refused to admit late appeal – Section 49(2) Taxes Management Act 1970 – whether Tribunal should grant permission for the appeal to HMRC to be admitted out of time* – Martland *applied* – Katib *considered – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

SIMRO KAUR	**Applicant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE JANE BAILEY

Sitting in public at Centre City Tower, Birmingham on 23 October 2019

Mr Rhys Thomas for the Appellant

Ms Pallavika Patel, presenting officer, for the Respondents

DECISION

Introduction

1. The matter before the Tribunal is an application, made under Section 49(2) of the Taxes Management Act 1970 ("TMA 1970") for an extension of time to make an appeal to HMRC. The appeal which the Applicant wishes to have considered by HMRC is against assessments to tax for the years 2004/05 to 2011/12 inclusive (totalling £40,537) and a penalty determination (in the total sum of £16,478).

Relevant legislation

2. Where HMRC refuse to consider a taxpayer's appeal because it is received more than 30 days after the relevant assessment or determination was imposed, the taxpayer may apply to the Tribunal for an extension of time in which to appeal. The relevant part of Section 49 TMA 1970 provides:

> **49 Late notice of appeal**
>
> (1) This section applies in a case where—
>
> (a) notice of appeal may be given to HMRC, but
>
> (b) no notice is given before the relevant time limit.
>
> (2) Notice may be given after the relevant time limit if—
>
> (a) HMRC agree, or
>
> (b) where HMRC do not agree, the tribunal gives permission.

3. There is no time limit for making such an application but, clearly, the longer it takes for an application to be made to the Tribunal, the greater the likelihood that HMRC will be considered to be prejudiced by the overall time which has passed.

The relevant test to apply

4. The Tribunal has the power to extend the time for a taxpayer to make an appeal to HMRC but must decide, in each case, whether it would be appropriate to do so given the particular circumstances of that case. When a party is late in undertaking any action, the onus of proof is upon that party to explain the reasons for their delay and to make the case for being given relief from their failure to comply with the relevant time limit.

5. The Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) considered what the First-tier Tribunal should consider when deciding whether an extension of time should be granted. The Upper Tribunal stated:

> 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.

6. Mr Thomas began his submissions on the basis of *HMRC v McCarthy & Stone* [2014] UKUT 196 (although he had neglected to bring copies of that decision to the hearing). I do not consider that there is anything in *McCarthy & Stone* that is at odds with *Martland*, but if there were, I would be bound to prefer *Martland* as it is a later decision. HMRC had included a copy of *Martland* in the bundle. I encouraged Mr Thomas to make his submissions on the basis of the above guidance in *Martland*.

7. I will consider this application on the basis of the *Martland* guidance, set out above. Therefore, I set out the factual background, in order to be able to consider the extent of the delay and whether there are reasons for all or part of that delay. I will then be able to weigh all the circumstances of the case.

Evidence before me

8. Before setting out the evidence before me, I record two case management decisions, taken shortly before and at the beginning of the hearing.

9. By way of background, on 25 June 2019, the Tribunal informed both parties that it would list a hearing of this application. The Applicant was directed to provide to HMRC and the Tribunal a copy of any documents she relied upon to HMRC within 14 days (i.e. by 9 July 2019). HMRC were directed to produce a bundle containing, amongst other things, the documents they relied upon and any documents received from the Applicant. No documents were received from the Applicant by 9 July 2019, and there was no application for an extension of time to produce documents. The Directions of 25 June 2019 contained the warning that the Tribunal might refuse to allow the Applicant to rely on evidence produced at a later date. HMRC complied with their obligations.

<u>The Applicant's postponement application</u>

10. On Friday 18 October 2019, the Applicant made an application for postponement on the following basis:

> The reason for this request is that the Appellant has confirmed that they will today be providing relevant documentation which we intend to rely on at the hearing.

> Having been requested, the GP has today provided the requested medical information which will form a significant aspect of the appeal.
>
> Clearly the respondents deserve an adequate amount of time to review documents prior to a hearing and as such we have copied HMRC into this request to seek its view of the matter.

11. The clear implication was that medical evidence (and only medical evidence) was to be provided, and that the GP letter had been served on HMRC on 18 October 2019.

12. HMRC objected to the postponement, stating that no further time was required. The postponement application was referred to me and, given that the application was apparently made for the benefit of HMRC and that HMRC did not require extra time, I refused the postponement application.

13. When the Tribunal communicated to the parties that the postponement application had been refused, the Tribunal also directed the Applicant to serve her additional evidence on HMRC, and file it with the Tribunal, as soon as possible, and also to bring two copies of that additional evidence to the hearing, in a paginated bundle if it consisted of more than 20 pages.

The Applicant's application to admit additional evidence

14. At the hearing the Applicant produced approximately 50 pages of additional material, and applied for that material to be admitted in evidence. The documents consisted of:

- An undated, signed witness statement from Mr Bains, the Applicant's son (pages 1 and 1b);
- Details of the Applicant's current prescriptions (pages 2-4);
- A letter from the Applicant's GP dated 12 December 2017, which had been included with the Applicant's Notice of Appeal (page 5);
- A fit note for the Applicant dated 20 November 2017, which had included with the Applicant's Notice of Appeal (page 6);
- A letter from an accountant dated 8 June 2018 (page 7);
- Pages 1 and 4 of the Applicant's IVA proposal to creditors (pages 8 and 8 (sic)) (pages 2, 3 and 5 onwards of the proposal were not included);
- The labels of medication prescribed to the Applicant with prescription dates from November 2018 to June 2019 (pages 9-20);
- Extracts from the Land Registry records (pages 21-23, 32-37 and 41-49);
- Letters from mortgage lenders to the Applicant dated 15th April 2008, 30th April 2009, 31st March 2009, 10 December 2007 and undated (pages 24-32 and 38-40);
- The first page only of what was obviously a multiple page letter, dated 21 October 2019, from the Applicant's GP's practice, purporting to set out a summary of the Applicant's medical conditions from 2000 (page 50); and

- A short decision concerning an unrelated taxpayer whom Mr Thomas had represented in 2017 (pages 51-51C).

15. I considered whether any of this material should be admitted in evidence, given the direction of 25 June 2019. Ms Patel objected to the documents being admitted, submitting that the documents were not relevant to the issue before the Tribunal, and also that there was no reason why the documents could not have been produced at a much earlier date.

16. The documents included with the Notice of Appeal were in the bundle prepared by HMRC, and thus already in evidence.

17. Of the remaining documents, it was clear that only the GP letter dated 21 October 2019 was not available by 9 July 2019, when the Applicant was due to serve and file her documents. Mr Thomas's explanation for why the other documents had not been filed and served in accordance with the Tribunal directions (or at any date earlier than 18 October 2019), was that there had been "a lack of communication" between his firm and the Applicant. I do not consider that to be a good reason for the delay.

18. Mr Thomas argued that, despite the delay, the documents should be admitted as they were "vital" to the Applicant's case. Given this submission I asked Mr Thomas to explain the relevance of the categories of document to the issue before the Tribunal. Mr Thomas argued that the medical evidence showed the current state of the Applicant's health, and that the Land Registry documents and mortgage lender letters demonstrated that HMRC's assessments were estimated.

19. Bearing in mind the comments of Judge Mosedale in *Masstech Corporation Limited v HMRC* [2011] UKFTT 649, I consider that only material which is relevant should be admitted in evidence but that material which is relevant should be admitted unless there is a compelling reason to the contrary. In considering whether there is a compelling reason not to admit relevant evidence, I balance the prejudice to the other party, the probative value of the evidence, good case management and the desirability of imposing a sanction for a party's failure to comply with Tribunal directions.

20. As only the GP letter of 21 October 2019 referred to the Applicant's health during the period of delay, I agreed with Ms Patel that the remainder of the medical evidence was not relevant, and I decided it would not be admitted. Having noted that HMRC had explained the basis on which they raised the assessments in a letter which was included in the hearing bundle, I concluded that there was no additional evidential value in the Land Registry documents and mortgage lender letters, and so I decided they would not be admitted. I did not draw attention to the 2018 accountant letter (which post-dated the period of delay) but Mr Thomas did not mention it or argue that it had any relevance. A short decision has no persuasive value. Therefore, I decided not to admit either of these documents.

21. I concluded that the remaining documents (pages 1, 1b, 8, 8, and 50) could be relevant to the issue before the Tribunal. While I agreed with Ms Patel that the documents were produced very late in the day, and that there was no good explanation for this delay, I took into account that HMRC had objected to a postponement on the basis that they did not need more time to consider the documents. (At the time of my decision I understood four of these pages to have been sent to HMRC on Friday 18

October 2019 with the GP letter of 21 October 2019 being disclosed on Monday 21 October 2019. After the hearing, and so after I had already made this procedural decision, it was brought to my attention that the witness statement and GP letter were not emailed to HMRC and the Tribunal until 4 p.m. on Tuesday 22 October 2019.)

22. I do not condone the shoddy practice of producing documents at the last minute, putting HMRC in the near impossible position of accepting either an unwanted postponement or the very late admission of documents which they may have insufficient time to consider. Nevertheless, in this case, there were only five pages which might have relevance and so might be admitted.

23. I took into account the potential prejudice to each party, the unjustified delay and breach of Tribunal Directions, and the over-riding objective to deal with cases fairly and justly. I also took into account that the Directions did not require witness statements to be served, and that Mr Bains would be permitted to give evidence whether or not the statement was admitted. It was a finely balanced decision but I concluded that it was in the interests of justice that the five pages be admitted, despite the very limited time which HMRC had had to absorb the contents. Therefore, I admitted in evidence pages 1, 1b, 8, 8 (sic) and 50 of the Applicant's bundle.

24. Having set out those decisions, I turn to the witness evidence.

The witness evidence

25. On 22 October 2019, the Applicant's agent notified the Tribunal and HMRC that the Applicant wished to rely on the evidence of Mr Bains. The 25 June 2019 Directions did not require either party to produce witness statements or to notify each other of the names of witnesses who would be called. Therefore, the Tribunal's permission was not required for Mr Bains to be called. Mr Bains gave evidence to the Tribunal.

26. The Applicant was present throughout the hearing, and (at the request of HMRC) a Tribunal appointed interpreter was in attendance to enable her to give evidence. Mr Thomas told the Tribunal that the Applicant would not be called but that she was willing to answer questions from HMRC. (Mr Thomas could not explain how a person who had not been called to give evidence could be cross-examined.) The Applicant did not give evidence.

27. In assessing the evidence, I took into account the difficulties for any witness in accurately recollecting events from months or years earlier when memories can be re-written in the brain each time they are retrieved. Therefore, where there was a conflict between oral evidence and contemporaneously created documents, I formed the view that contemporaneous documents were more likely to be accurate.

28. I found Mr Bains to be an honest witness and I am satisfied that Mr Bains did his best to assist the Tribunal. Where Mr Bains evidence concerned matters within his personal knowledge, I found him to be generally reliable and I largely accept those aspects of his evidence. However, where Mr Bains told the Tribunal about matters which could only have come to his knowledge through having been told about them by another person, especially when he was told about that matter only a considerable period after the event, then I do not consider that such evidence is as reliable.

Facts

29. On the basis of the documents before me and the oral evidence of Mr Bains, I find as follows:

30. The Applicant was born in 1949. In 1978, the Applicant came to the UK, with her husband, from a small village in the Punjab. The Applicant had not been educated and was unable to read or write. Mr Bains told the Tribunal that his mother was still barely able to read or write although she could sign her name and recognise some numbers.

31. In the bundle there is a letter from the Applicant's GP, dated 12 December 2017, in which he stated that the Applicant was:

> Unable to read or write in English or own language. Used to depend on late husband for reading mail / bills etc.

32. Ms Patel challenged the basis on which the GP had formed this opinion. I agree with Ms Patel that there is no explanation of how the GP concluded that the Applicant was unable to read or write. However, there is evidence (from the Applicant's childlike signature on various documents), and I find, that the Applicant has only a very limited ability to write English characters. I accept that the Applicant's ability to read English is similarly limited.

33. The Applicant's mother tongue is Punjabi. Mr Bains said that the Applicant was unable to speak any English. Ms Patel also challenged the extent of the Applicant's inability to speak English, pointing to occasions when she had telephoned HMRC and had answered verification questions before passing the telephone to her son. I note also that the GP's letter of 12 December 2017 does not refer to the Applicant being unable to speak English, only that she cannot read or write English. If the Applicant could not speak any English, I would have expected that to be a more pertinent observation to have been recorded by the GP.

34. On the basis of the SA Notes and answered verification questions, I find that the Applicant is able to speak some English and that she would be able to answer questions regarding matters such as her name and address. Verification would ordinarily require the giving of a National Insurance number or Unique Taxpayer reference so, on the balance of probabilities, I find that the Applicant was able to answer questions about this, perhaps with the assistance of her son. However, on the basis of Mr Bains evidence, I find that the Applicant is unable to speak English to a more advanced level, and that she would not be able to hold a conversation in English about her tax affairs.

35. After she came to the UK, the Applicant found work as a cleaner in a hotel. The Applicant continued working in this job until very early 2017.

36. From about 2004, the Applicant and her husband bought a number of properties to let to tenants. The Applicant did not register with HMRC at that time, or file tax returns at that time to declare any income that she received from letting these properties. While the Applicant's husband was alive, the Applicant relied upon him to manage the properties, to deal with paperwork and to manage bills.

37. Sadly, the Applicant's husband died on 5 October 2010. In her IVA proposal (apparently made in about June 2018) the Applicant stated that this loss caused her great grief and depression. Mr Bains told the Tribunal that after his father's death the Applicant had become more reclusive and had been depressed, and had received treatment for that depression. It is only natural to feel grief following bereavement, and I accept that the Applicant suffered the great grief she described in her IVA proposal. However, there is no medical evidence to support the assertion that the Applicant was diagnosed with, and treated for, depression. The GP letter of 21 October 2019 lists angina in 2000, a heart operation in 2006, impaired glucose intolerance in 2009, foreign travel advice in early 2010, type 2 diabetes in 2012 and a medication review in 2013. There is then nothing until the Applicant's heart attack in early 2017 (described below). There is no reference to depression at any time.

38. Mr Bains said that the omission of depression from this letter must be because the GP letter covered only medical matters involving Dr Beaumont, and that his mother had also seen another GP at the practice, and it was that other GP who had prescribed medication for depression. However, the GP letter of 21 October 2019 is headed with the practice details, not those of Dr Beaumont. It does not have a stamp to say it is from Dr Beaumont (as the letter of 12 December 2017 did). The onus is upon the Applicant to provide evidence to support her case, and she chose to provide only the first page of the 21 October 2019 letter. I agree with Ms Patel that it would be unusual if only some of the Applicant's medical history was set out in a document which purports to set out the whole of the Applicant's medical history but, if that is what has happened, then it was open to the Applicant to provide a letter from that other GP. Her application to the Tribunal was submitted in April 2018 so she has had plenty of time to request such a letter. There is no medical evidence before the Tribunal that the Applicant was diagnosed with or treated for depression at any time. The medical evidence, in fact, shows an absence of such diagnosis and treatment. Given that medical evidence, I find that the Applicant was not diagnosed with, or treated for, depression at any time.

39. In her IVA proposal the Applicant states that, following her husband's death, friends and family tried to help her with managing the properties and paperwork. Mr Bains said that the Applicant's joint account with her husband remained open (in both names) until 2018, and that direct debit payments continued to be made from this account. Mr Bains also said that a letting agent, Jas, who spoke Punjabi, assisted the Applicant to a certain extent, and that Jas gave the Applicant cheques in respect of the lettings. Mr Bains told the Tribunal that Jas helped the Applicant to sell two of the houses, and that was in 2011. The Applicant's IVA proposal states that three houses were sold and that was in 2014 and 2015. I make no findings as to which properties were sold at which date but I find that there were property sales, and that the Applicant was assisted in making these sales by her letting agent.

40. On 20 September 2012, HMRC wrote to the Applicant to state that they were conducting a review of her tax affairs, and required certain information from her in relation to her employment since 2008, properties she owned, bank accounts she held and tax returns (if any) which she had filed.

41. On 31 October 2012, HMRC issued the Applicant with a Notice to provide information. The deadline for compliance was 10 December 2012.

42. On 14 January 2013, HMRC issued the Applicant with a penalty of £300 for her failure to comply with the Information Notice.

43. On 24 May 2013, HMRC issued the Applicant with further penalties (of £10 per day for 30 days) because of her failure to comply with the Information Notice.

44. The Applicant did not reply to any of these four letters, and I accept that (even if she could read very limited elements of the letters) she did not understand the letters, or what she had been asked by HMRC. I find that although the Applicant did not understand these letters sent to her by HMRC in late 2012 and early 2013, she understood that they were important and that she could not ignore them. Mr Bains told the Tribunal that his mother recognised the letters as being from the same source due to the brown envelope. The Applicant took the letters from HMRC to a friend of her husband who she saw at the temple. That friend did not tell the Applicant the content of the letters, but told her that she needed an accountant and introduced her to one. That accountant was instructed on an unknown date in 2013.

45. In her IVA proposal the Applicant states that in 2013 she passed the letters she had received from HMRC to an accountancy firm and that they:

> … assured me that they would deal with matters raised and

46. The page provided ends there. The Applicant has chosen not to provide the next page of her IVA proposal, so I do not know what precisely the Applicant says that this firm of accountants promised her they would do in order to deal with matters. I have not been told what action (if any) the Applicant took following her instruction of this first agent or how often (if at all) the Applicant contacted this agent for an update on progress.

47. There is no evidence of any communication from that first agent to HMRC at any time, and no indication that HMRC were ever aware that accountant was acting for the Applicant. Although he was unaware of this at the time, Mr Bains told the Tribunal that at some point this first accountant ceased acting for his mother. There was no evidence about when this occurred.

48. I find that there was a period of time from 2013 when the Applicant was relying on her first agent to help her. I find that there was then a period of time when the Applicant knew that her agent had ceased to act for her. There is no evidence about the length of either of these periods of time. Mr Bains told the Tribunal that the Applicant took all the post she received to the first accountant (while that firm was acting) but there is no evidence of the Applicant taking any other action during this time such as asking her agent to let her know what was happening. The Applicant did not, at this stage, ask a family member to help her.

49. On 4 June 2014, HMRC wrote again to the Applicant asking her to complete a questionnaire about the properties she was letting. In June and July 2014, HMRC also sent late filing penalty warning letters to the Applicant in respect of her 2012/13 tax return so, on the balance of probabilities, I find that the Applicant also received late filing penalties in respect of her 2012/13 tax return, issued by HMRC in February 2014, August 2014 and February 2015.

50. On 28 January 2015, in the absence of any information or response from the Applicant, HMRC issued discovery assessments for each of the years 2004/5 to 2011/12. HMRC also raised a penalty determination in respect of these years, judging the Applicant's behaviour to be deliberate.

51. At some point after the first accountant ceased to act, the Applicant again went to her husband's friend, and he introduced her to another accountant. Mr Bains says that this was in about March 2015 but, as he was not involved at the time, he can only understand this to be the date on the basis of what his mother subsequently told him. For the reasons set out below, I do not accept that the Applicant instructed her second accountant in March 2015.

52. The SA Notes record that in June 2015, HMRC sent late filing penalty warning letters to the Applicant in respect of her 2013/14 tax return. I find, on the balance of probabilities, that the Applicant also received late filing penalties issued by HMRC in February and August 2015, and in February 2016.

53. The SA Notes record that HMRC's debt collection team in Worthing had taken responsibility for working the case from March 2016. On the balance of probabilities, I find that HMRC team in Worthing issued one or more letters to the Applicant from March 2016 in an attempt to collect the tax due. On the balance of probabilities, I find that one or more earlier debt collection letters had been issued by HMRC after March 2015, when no in-time appeal had been received.

54. The SA Notes record the receipt of an agent authorisation form on 5 May 2016. I consider contemporaneous documents are more likely to be accurate than Mr Bains understanding on the basis of what he was told, after December 2016, by his mother. I find that the second accountant was instructed in April or May 2016.

55. The first letter sent from the second accountant to HMRC is dated 17 August 2016 and is as follows:

> We have recently been approached to act for Mrs Kaur in connection with her personal tax affairs.
>
> We have obtained information from the Gateway reference the current position but should be grateful if you would provide a detailed breakdown of how all Assessments raised have been calculated.

56. HMRC replied in a letter dated 21 September 2016. The officer responsible for raising the assessments had retired by this time. Another HMRC officer explained to the agent the basis on which the assessments had been issued, and informed the agent that no appeal had been made against the assessments.

57. By letter dated 27 September 2016, the second accountant appealed against the assessments:

> We note your comments and should be extremely grateful if you would accept this letter as an appeal against those assessments.

> Mrs Kaur had never been involved in the management of her husband's properties; she inherited them upon his death and was not fully aware of her obligations in respect of HMRC at what was a particularly traumatic time for her.
>
> Mrs Kaur is now trying to get her tax affairs in order and has instructed us to assist her in providing information to HMRC. We have started the process of obtaining all necessary information and should therefore be grateful if you would accept our appeal and also to hold collection of the tax assessed for a period of 60 days to enable us to complete the outstanding returns.

58. Assuming that this appeal letter was emailed or faxed, then that appeal was received one year and seven months after the deadline for an in-time appeal against the assessments to tax and penalty determination to be received. In a letter dated 12 October 2016, HMRC refused to consider this appeal on the basis that it was received too long after the appeal deadline. HMRC's letter explained that an application could be made to the Tribunal for an extension of time.

59. On an unknown date in 2016, HMRC had issued the Applicant with a statutory demand for the amounts outstanding. On 14 October 2016, HMRC filed a court petition for the bankruptcy of the Applicant.

60. Mr Bains told the Tribunal that between 2012 and December 2016, he had seen his mother about seven or eight times. That is about once every six months. The Applicant did not tell Mr Bains about the HMRC letters until December 2016. The Applicant then showed her son the bankruptcy petition she had received. Mr Bains had no involvement in his mother's tax affairs before December 2016.

61. The second accountant was still instructed at this point. Mr Bains said that an accountant at that firm spoke Punjabi. There must have been some communication between the Applicant and the second accountant during the period between May and September 2016 for the agent to have been able to provide the details which were set out in their letter of 27 September 2016. However, Mr Bains said that it was not until he read HMRC's bankruptcy petition in December 2016 that his mother learnt of the extent of the sum (by then about £80,000 due to the accrual of interest) which HMRC said she owed.

62. In early January 2017 (the GP letter of 21 October 2019 records this as 12 January 2017), the Applicant suffered a heart attack and was admitted to hospital. Mr Bains was unable to discuss her financial affairs with his mother to any great extent at this time because of other relatives' fears that the stress would cause the Applicant to suffer another heart attack.

63. Mr Bains went to see the second accountant but told the Tribunal that his contact with that firm concerned him because the firm told him to make an untrue statement at the forthcoming bankruptcy hearing. Mr Bains attended his mother's bankruptcy hearing in January 2017 and told the court that his mother had suffered a heart attack. That hearing was adjourned. Mr Bains provided medical evidence to the court and (over the course of about the next six or seven months) subsequent bankruptcy hearings were also adjourned.

64. On 7 September 2017, the Applicant and her son telephoned HMRC. The Applicant passed the verification checks and gave her oral authority for HMRC to speak to her son. Mr Bains then spoke to HMRC. The SA Notes record that Mr Bains told HMRC that his mother had had a heart attack and was stressed. Mr Bains made a payment of £5,000 towards his mother's debt.

65. Mr Bains had fallen out with the second accountant by early autumn 2017, and realised that he needed to find another accountant to act for his mother. I find, on the balance of probabilities, that the third accountant was instructed in about October 2017. Mr Bains understood that his mother should file tax returns for the relevant years, and so instructed the third accountant to help with this task. Mr Bains was anxious to demonstrate that there were debts and liabilities of the lettings which had not been taken into account when the assessments were raised, and which reduced the profits of his mother's trade.

66. On 29 November 2017, the Applicant and her son again telephoned HMRC. After verification by the Applicant, Mr Bains told HMRC that his mother would file tax returns and asked HMRC to provide an employment history for his mother. HMRC asked Mr Bains to make this request in writing or online. HMRC wrote to the Applicant on 29 November 2017, following that telephone call, to advise her that filing tax returns would not overturn the assessments, and that she must appeal against the assessments. HMRC enclosed a copy of the 2016 appeal correspondence, and advised that the Applicant's only option was with the Tribunal. The HMRC officer also noted that the last adjournment of the hearing of the bankruptcy petition had been marked final, and that the next hearing was on 19 December 2017.

67. Mr Bains asked the third accountant to help him make an application to the Tribunal but that accountant refused as it was outside his area of expertise. Mr Bains searched the internet and identified a business in Porthcawl which held itself out as being a tax litigation specialist. Mr Bains instructed this business. SA Notes record that they received a new agent authorisation on 14 December 2017. I find that this was the Applicant's fourth agent.

68. In January 2018, Mr Bains paid the fourth agent the requested fees for his services in filing an application with the Tribunal. For unknown reasons, the fourth agent took no action until April 2018.

69. In early 2018, Mr Thomas was an employee of the Applicant's fourth agent. On 6 April 2018, the Tribunal received an email from Mr Thomas on behalf of the fourth agent with a completed Notice of Appeal form. Authorisation from the Applicant for the fourth firm to act on her behalf was received by the Tribunal on 10 April 2018.

70. On 17 April 2018, the Applicant was made bankrupt. The Applicant's fourth agent did not inform the Tribunal. On 4 May 2018, the Tribunal processed the Applicant's Notice of Appeal and directed HMRC to provide a Statement of Case.

71. On 10 June 2018, the Applicant instructed Mr Thomas's current firm (her fifth agent) to act in her Tribunal application. This instruction was given despite the Applicant being bankrupt and unable to progress her application. The fifth agent forwarded the invalid authorisation to the Tribunal on 21 June 2018.

72. On 1 July 2018, Mr Bains telephoned HMRC to discuss the assessments. Mr Bains explained about his mother's circumstances, that the properties were mortgaged and that one of the properties was empty. HMRC explained the basis on which the assessments were raised and that it was for the Applicant to provide them with information if she wanted it to be taken into account. HMRC informed Mr Bains that the matter was with the Tribunal.

73. On 4 July 2018, the fifth agent emailed HMRC to ask for copies of all correspondence. On 11 July 2018, an HMRC officer replied to the agent, promising to collate all the correspondence and send a copy to Mr Thomas. This was sent on 13 July 2018.

74. It was not until HMRC filed their original Statement of Case on 6 July 2018, that the Tribunal was notified of the Applicant's bankruptcy. The Tribunal then stayed proceedings so that the Applicant's trustee in bankruptcy could clarify whether he was willing to continue with the application.

75. Mr Bains telephoned HMRC again on 13 July 2018 because he understood that a caseworker could adjust an assessment. HMRC explained that nothing could be done unless the application was allowed by the Tribunal.

76. On 12 October 2018, the Official Receiver informed the Tribunal that the Applicant had entered into an IVA with her creditors on 18 July 2018, and the bankruptcy would be annulled shortly. Mr Bains told the Tribunal that his mother had been able to enter into the IVA only because he had contributed £30,000 from the sale of his home, and because an uncle had loaned her £50,000. That loan was only intended to last for six months and (12 months later) the uncle was pressing for the return of this money. Mr Bains had moved in with his mother after the sale of his home. Mr Bains told the Tribunal that if his mother was not successful in her application for an extension of time then they would be forced to sell her house as well, to pay his mother's creditors, and his mother would be homeless.

77. The Applicant's bankruptcy was annulled on 14 February 2019. This was communicated to the Tribunal on 18 March 2019. On 3 March 2019, the Applicant again authorised her fifth agent to act in her Tribunal application. Mr Bains emailed this authorisation to the Tribunal on 19 March 2019, and Mr Thomas emailed a copy on 25 March 2019.

78. On 29 April 2019 HMRC filed their Amended Statement of Case. On 25 June 2019, the Tribunal issued direction and notified the parties that a hearing would be listed. On 12 July 2019, the parties were notified of the hearing date.

Discussion and decision

79. Having set out that background, I can now follow the three stage process described in *Martland*.

Length of the delay

80. As set out above, the assessments and penalty determination were issued on 28 January 2015. Section 31 TMA 1970 provides that an appeal may be made against such

assessments. Section 31A TMA 1970 provides that an appeal under Section 31 must be made in writing and within 30 days of the date of the assessment. Therefore, the Applicant's appeal had to be received no later than 27 February 2015 if it was to be received in time. The Applicant's appeal was made on 27 September 2016. That is 19 months after the deadline.

81. As was made clear in *Romasave (Property Services) Limited v HMRC* [2015] UKUT 254, delay of three months cannot be considered to be anything other than "serious and significant". In that context of a 30 day time limit, delay of 19 months is extremely serious indeed.

Reasons for the delay

82. Mr Thomas submitted that the Applicant's reasons for her delay were her ill health, her difficulties in speaking English, and in reading and writing English, and her reliance upon her agents who let her down.

83. Looking first at the Applicant's health, I have found that the Applicant suffered with angina and was diagnosed with diabetes in 2012. The Applicant suffered from a serious heart attack in early 2017, but that was after an appeal had already been made. I do not accept that her angina or diabetes affected the Applicant's ability to deal with her tax affairs between January 2015 and September 2016.

84. Next I consider the Applicant's language difficulties, I have found that the Applicant can speak basic English and that she has a very limited ability to read or write in English. I am satisfied that the Applicant did not understand the letters which HMRC sent, and I accept that this would have caused the Applicant to take longer to respond because she would not initially have understood how to proceed or who would be best placed to help her. The limited contact from her son at that time would have meant that the Applicant had few people with whom she could have discussed private matters. Ms Patel commented adversely on the limited family contact which had been made with the Applicant, especially bearing in mind that she is an elderly widowed lady from a traditional Asian background who speaks limited English. I consider that the Applicant's language difficulties and the limited involvement of her family explain the Applicant's initial lack of reaction to the correspondence sent in 2012 and 2013. However, I am also satisfied that the Applicant did understand that the letters from HMRC were important and could not be ignored. If she had not understood that the letters required her response, the Applicant would not have sought help from her late husband's friend, as she did in 2013 (and again in 2016). With the help of her late husband's friend, the Applicant was (twice) able to instruct an agent, and the Applicant was apparently able to communicate in Punjabi with her agents. Therefore from 2013, the Applicant's limited English was no longer the hindrance it was initially; the Applicant was able to ask her accountants why HMRC was writing to her and what should be done to resolve the matter. If the Applicant failed to make those enquiries of her accountants from 2013 onwards, it was not due to her limited English. I do not accept that, from the time she instructed her first agent, the Applicant's limited English was any longer a reason for her being in ignorance of the contents of the letters sent by HMRC. Once she had instructed an agent and could have the correspondence explained, the Applicant should have understood the seriousness of HMRC's correspondence and the need to ensure a response was sent.

85. Finally, I consider the suggestion that the Applicant was let down by her agents. It is unclear whether the Applicant's first agent was still instructed when HMRC issued the assessments in January 2015. I have found that the Applicant's second agent was not instructed until April or May 2016. Therefore between 2013 and April/May 2016 there was first a period when the Applicant had an agent acting, and then a period when the Applicant was aware that she no longer had an agent acting. Between April/May 2016 and the appeal (made on 27 September 2016) the Applicant's second agent was acting.

86. In *HMRC v Katib* [2019] UKUT 189, the Upper Tribunal considered the situation where delay in appealing was said to be attributable to the inaction or incompetence of an agent. At paragraph 49, the Upper Tribunal stated:

> 49. We accept HMRC's general point that, in most cases, when the FTT is considering an application for permission to make a late appeal, failings by a litigant's advisers should be regarded as failings of the litigant and we will return to this issue in the "Disposition" section that follows. Therefore, in most cases, a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers.

87. Here the Applicant has chosen not to provide a "full account of exchanges and communications" between herself and either of her first two agents. The only evidence of any exchanges with the Applicant is the incomplete extract from the Applicant's IVA proposal (quoted in full above).

88. The Upper Tribunal in *Katib* continued at paragraphs 54 and 55:

> 54. It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant. In *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666, when considering the analogous question of whether a litigant's case should be struck out for breach of an "unless" order that was said to be the fault of counsel rather than the litigant itself, Ward LJ said, at 1675:
>
> > Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. *The basis of the rule is that orders of the court must be observed* and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself. [emphasis added]
>
> 55. We do not accept Mr Magee's general argument that this approach simply involves attributing the actions of legal representatives to their clients and has no bearing on the question whether incorrect advice provided to a client can be

a good reason for the client's default. Given the importance of adhering to statutory time limits, we see no reason why a litigant who says that a representative failed to file an appeal on time should necessarily be in a different position from a litigant who says that a representative failed to advise adequately of the time limits within which an appeal should be brought. In any event, it seems from [7] of the Decision that the FTT found that Mr Bridger had been instructed to appeal against the PLNs on Mr Katib's behalf but failed to do so and, therefore, Mr Katib is not simply complaining that Mr Bridger provided defective advice.

89. The Upper Tribunal continued at paragraphs 58 and 59:

> 58. It is clear from the Decision that Mr Bridger did not provide competent advice to Mr Katib, misled him as to what steps were being taken, and needed to be taken, to appeal against the PLNs and failed to appeal against the PLNs on Mr Katib's behalf (see [7] and [16]). But extraordinary though some of Mr Bridger's correspondence was, the core of Mr Katib's complaint is that Mr Bridger was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise.
>
> 59. Mr Magee urged us to give particular weight to the FTT's finding, at [15], that Mr Katib did not have the expertise to deal with the dispute with HMRC himself, but that does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena. We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against Mr Bridger or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of Mr Bridger's failings and, if he wishes, pursue a claim in damages against him or Sovereign Associates for any loss he suffers as a result. This conclusion is fortified by the fact that the FTT's findings demonstrate that there were some warning signs that should have alerted Mr Katib to the fact that Mr Bridger was not equal to the task. Despite Mr Bridger assuring Mr Katib that his appeals were in hand, he was still receiving threats of enforcement action ([9]). Mr Bridger's advice to "cease to be a man by making a declaration to this effect" should have alerted Mr Katib to the warning signs. Mr Katib is not without responsibility in this story.

90. Here, there is extremely limited evidence of the Applicant's involvement with her agents, what she asked, what she was told, what she provided to them and what she understood from them. When he was asked why he thought his mother had not told him about HMRC's letters until December 2016, Mr Bains said that he thought his mother had assumed that matters were under control. If Mr Bains understanding is correct, that suggests that the Applicant did not chase either agent for an update, did not ask what either agent was doing on her behalf, and did not enquire of either agent if

anything more was required from her. Even if it was the case that the first agent was instructed until March 2016, and the second agent was instructed from April/May 2016 (so there was only a very short time when the Applicant was without an agent) given the steady and continuing stream of correspondence from HMRC between February 2015 to December 2016 (which the Applicant recognised as being from HMRC due to the brown envelopes), I am afraid I do not accept that it was objectively reasonable for the Applicant to have thought that matters were under control at this time or for her to have taken no action on that basis.

91. In the absence of any evidence that the Applicant made concerted efforts to urge her agents to act promptly to resolve the dispute with HMRC, and in the absence of any other compelling reason, I do not consider I should depart from the general rule that the Applicant should bear the consequences of her agents' failings. If the Applicant considers that any of her agents have failed to act in accordance with her instructions, then she is able to pursue a claim in damages against those agents for any loss she believes she has suffered. I am not satisfied that the Applicant has demonstrated that she has a good explanation for her 19 months of delay in appealing against the assessments issued in January 2015.

Evaluation of all the circumstances of the case

92. In evaluating all the circumstances of this case, I remind myself that the onus is upon the Applicant, and that an extension of time should be granted as the exception rather than the rule.

93. If this application is granted then there will be prejudice to HMRC who will have considered this matter closed. The assessing officer retired from the department in 2015 and, at this remove, is highly unlikely to be available to give evidence if a Tribunal hearing is required. Had the Applicant appealed in 2015 then HMRC could, at the very least, achieved an orderly handover from the assessing officer to a successor. The Applicant's delay in making her application to the Tribunal means that it is more likely that relevant documents will have been destroyed by HMRC on the basis that they were not required. It is inevitable that HMRC will incur further costs in re-opening this matter, and there is also prejudice to the general body of taxpayers who expect the rules that they follow and respect to be upheld.

94. On the other hand, if this application is not granted then there will be prejudice to the Applicant. The extent of that prejudice depends on the likelihood of the Applicant being successful in persuading HMRC that they should revise the assessments. I do not propose to conduct a mini-trial of this issue. There is no evidence that the Applicant's case is either overwhelmingly strong or impossibly weak. There is a possibility that the Applicant would reduce the assessments on appeal, and so if this application is refused then she has lost the opportunity to make that case to HMRC (or, on appeal, to this Tribunal). Mr Thomas argued – as a side point – that the Applicant was prejudiced by not being able to obtain evidence which might have been available to her in 2015. I do not agree that this is an argument for the application to be granted – the loss of the Applicant's evidence is a consequence of her own inactivity.

95. More significantly, Mr Bains gave compelling evidence of the financial difficulties which the Applicant would suffer if the assessments are not reduced, and

gave his opinion that the Applicant would lose her current home and have insufficient resources to buy a new home. In considering this point I have derived further assistance from *Katib*. At paragraph 60 the Upper Tribunal considered the prejudice which would be suffered by Mr Katib:

> Turning to other factors relevant to that third stage, the FTT concluded that the financial consequences of Mr Katib not being able to appeal were very serious because his means were limited such that he would lose his home. That, the FTT concluded, was too unjust to be allowed to stand. We have considered this factor anxiously for ourselves. However, again, when properly analysed, we do not think that this factor is as weighty as the FTT said it was. The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them.

96. I have reached a similar conclusion as the Upper Tribunal. I accept that the prejudice which the Applicant will suffer is (at least) as great as the prejudice which HMRC will suffer if the application is granted. I accept that the Applicant is likely to suffer financial hardship, and that might not be alleviated by any action which she might bring against her agents. But those consequences of being unsuccessful do not overcome the very lengthy delay and the lack of good reason for that delay. I have reached the conclusion that this application should be dismissed. I am conscious that the Applicant is currently unwell and I appreciate that this decision will be a great disappointment to her. However, the delays are very significant, and there is no good explanation for any part of that very lengthy period of delay in appealing the assessments. Far too much time passed without action. It is not in the interests of justice for this application to be granted.

Conclusion

97. For the reasons set out above, this application is dismissed.

98. At the conclusion of the hearing I reserved my decision but gave the Applicant the choice of whether she wished to have a full or summary decision issued by the Tribunal. After a brief adjournment for Mr Thomas to give advice on the different types of decision and to take instructions, Mr Thomas informed me that the Applicant chose a summary decision.

99. On 29 October 2019, a summary decision was issued to the parties, dismissing this application. Although summary, that decision ran to 18 pages and is substantially the same as this decision notice. At the conclusion of the summary decision, the Applicant was put on notice that if she subsequently sought a full decision (as she was entitled) then I might decide to exercise the power under Rule 5 to abbreviate the time provided to the Applicant to make an application for permission to appeal, so that the deadline for making such an application would be no later than the deadline she would have faced if she had chosen, at the conclusion of the oral hearing, to have a full

decision. As it is not in anyone's interests for any onward appeal to be unnecessarily drawn out or delayed, I have chosen to exercise that power.

100. 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. Such an application must be received by this Tribunal no later than 5 p.m. on 24 December 2019, being 56 days after the (very similar) summary decision was issued to the parties. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 15 NOVEMBER 2019