[2020] UKFTT 0378 (TC)

TC07856

PROCEDURE– permission to make late appeals against personal liability notices – permission granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01404
TC/2019/01407

BETWEEN

MOHAMMED ABDUR RASHID **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MR JOHN WOODMAN

Hearing conducted remotely by video on 8 September 2020

Miss Jesmin Rehman of Tax Resolute Ltd for the Appellant

Ms Olivia Donovan, Officer of HM Revenue & Customs, for the Respondents

DECISION

INTRODUCTION

1. This is an application by the appellant for permission to make an appeal against personal liability notices which have been issued to him by HMRC under Schedule 24 Finance Act 2007. There are two such notices, one in respect of VAT (the "**VAT personal liability notice**") of an amount of £30,087. The second notice in respect of underpaid PAYE and national insurance contributions (the "**EC personal liability notice**") is in an amount of £83,813.

2. The VAT personal liability notice was issued to the appellant on 8 June 2017. The EC personal liability notice was issued to the appellant on 9 May 2017. However the appellant did not make an appeal against the VAT personal liability notice until 23 January 2019 and against the EC personal liability notice until 22 February 2019.

3. HMRC had also issued a personal liability notice to the appellant in respect of penalties relating to errors in reporting corporation tax, but that notice has been withdrawn and we make little further comment about it.

4. In a nutshell, the appellant's reason for bringing such a late appeal against the VAT personal liability notice is that he had instructed agents to look after his affairs including making such appeals, and they failed to do so. His reason for bringing a late appeal against the EC personal liability notice is that he was unaware that it had been issued to him.

BACKGROUND AND FINDINGS OF FACT

5. We were provided with a bundle of documents which was disappointingly light of what we consider to be relevant documentation. However this may be unsurprising in view of the fact that Tax Resolute Ltd ("**Tax Resolute**") have been unable to obtain much relevant paperwork from the appellant's previous agents and have not, therefore, been able to provide a comprehensive paper trail illustrating the appellants communications with those previous agents, and communications (if any) between those agents and HMRC. The appellant gave oral evidence on which he was cross examined by Ms Donovan.

The documentary evidence

6. On the basis of the documents, we make the following findings of fact:

   (1) At the relevant time, the appellant was a director of Megna Indian Cuisine Ltd ("**the company**"), a private limited company whose activities included the running of a small family Indian restaurant.

   (2) He had suffered a serious car accident in August 2013 and returned to work only in January 2014. In December 2014 he was fined £9,000 for food hygiene offences and paid costs of £2607.31. These offences had taken place whilst he was away from work. He did not have the resources to pay this fine which he paid by instalments and for which he used company funds.

   (3) Following an unannounced visit by officers of HMRC to the restaurant in November 2015, it was HMRC's view that the company had not fully recorded its

takings and it was their view the cash sales were being under recorded or suppressed.

(4) A meeting between the appellant, the appellant and the company's first advisers (Llewellyn Davies accountants) and representatives from HMRC was held on 5 April 2016 at which HMRC's visit and their views arising from that were discussed with the appellant and Llewellyn Davies.

(5) On 18 July 2016, Llewellyn Davies wrote to HMRC explaining that, from the records which the appellant had provided to them, they calculated that cash takings should represent between 20 and 25% of total sales and provided an analysis to support that contention.

(6) In a letter dated 10 October 2016, HMRC put forward their view that a more realistic estimate for cash takings was 30% and more realistic gross profit margin than that evidenced by the figures in the accounts was between 70 and 75% (net of VAT) rather than the 47-60% which was suggested by the accounts submitted by the company for the years under enquiry (those ended 2012-2015). In their view, their analysis indicated that the company had received considerable sums over and above those it had declared on its corporation tax VAT returns. For example, in HMRC's view (depending on the methodology adopted), additional sales of approximately £60,000 or approximately £81,000 had been suppressed by the company for the year ended 2014.

(7) In that letter HMRC gave the company the opportunity to respond to these revised figures but it seems that no such response was forthcoming, and in a letter dated 30 December 2016, HMRC indicated that they were going to issue a closure notices in respect of the corporation tax enquiry, and would assess for additional VAT. They would also be issuing penalties under Schedule 24 of Finance Act 2007 on the basis of deliberate and concealed behaviour.

(8) On 23 February 2017 HMRC wrote again to the company in relation to PAYE and national insurance contributions which HMRC considered were due as a result of the appellant withdrawing the under declared income from the company. They set out their view of the amount of that tax and national insurance and indicated that they were proposing to issue Regulation 80 determinations for those amounts. These totalled £111,750.71. We were not provided with copies of those determinations.

(9) On 17 March 2017 HMRC wrote to the company indicating that they had issued VAT assessments in an amount of £40,116 and enclosed copies of those assessments with that letter. Those assessments were not included bundle.

(10) On or around 4 April 2017 the company appointed Assurance Accountancy Ltd ("**Assurance**") to act as agents instead of Llewellyn Davies. The appellant dealt with a number of individuals at Assurance including Ian bright, Rezaul Hoque, and Phil Morgan, the latter being an individual who was employed by another organisation (Baldwins) but to whom Assurance subcontracted some of the work that they were instructed to carry out by the appellant. In the HMRC form 64-8 which was sent by Assurance to HMRC following their appointment by the appellant, the appellant, who signed the form, indicated that his address was 10 Croft Villas, Narbeth, SA67 7DY.

(11) On 27 April 2017 Assurance wrote to HMRC indicating that the appellant has "passed to us your letters of 22 March 2017 which includes a 'personal liability notice' which refers to the penalty charged on the company being a personal liability of Mr Rashid".

(12) On 9 May 2017 HMRC sent the EC personal liability notice to the appellant at his address at 10 Croft Villas Narberth. The postcode for this address is SA67 7DY.

(13) On 30 May 2017 HMRC's debt management court proceedings team wrote to the company indicating that HMRC intended to apply to the court for an indefinite adjournment of proceedings until "your appeal is settled".

(14) On 5 June 2017 HMRC issued a penalty assessment to the company in relation to VAT under Schedule 41 to the Finance Act 2008 (and not under Schedule 24 to the Finance Act 2007). Those penalties were for "failure to notify" for VAT quarters between 1 November 2011 and 31 October 2015.

(15) On 8 June 2017 HMRC sent the VAT personal liability notice to the appellant at a different address. The VAT personal liability notice was sent to the appellant at 3 Market Square Narberth. The postcode for this address is SA67 7AU.

(16) In both the VAT personal liability notice and the EC personal liability notice, HMRC stated that the "legislation that allows us to make you personally liable to pay is Para 19 (1) Schedule 24 of the Finance Act 2007".

(17) On 27 August 2018, Phil Morgan, on Baldwins headed notepaper, wrote to HMRC citing the company's VAT registration number and the case reference number for the PAYE matters, in which he explained that he had discussed HMRC's enquiry with Assurance in the presence of the appellant and that the appellant's financial position was, at that time extremely poor and would be so for the foreseeable future. And that the appellant "will have great trouble in meeting the personal penalty that has been attached to him by HMRC". He went on to say that the appellant "feels he can borrow £12,000 from family members to meet the penalty charge". And that Mr Baldwin realised that "this is far less than the penalty in charge".

(18) In January 2019 Tax Resolute were appointed to represent the appellant, and Miss Rehman wrote to HMRC to seek background information regarding the personal liability notices. She explained that the appellant had just received a letter on 16 January 2019 warning the appellant that he will be taken to court for bankruptcy proceedings and asks that those proceedings be held in abeyance pending disclosure to her of further details of the dispute between HMRC and the appellant and the entering into of constructive communications.

(19) On 23 January 2019 Tax Resolute made appeals against the VAT and EC personal liability notices, and also "against all discovery assessments, income assessments, VAT assessments, PAYE assessments Corporation tax and penalties issued in the name of Megna Indian Cuisine Ltd on the grounds that the tax liability are unreasonable and excessive".

(20) In their letter dated 21 February 2019 HMRC indicated that they were not prepared to accept these late appeals to which Tax Resolute responded on 22

February 2019 making further representations to justify why the appellant should be permitted to make a late appeal. In their letter of 4 March 2019 HMRC responded to those representations, but indicated, once again, that they were not prepared to accept the late appeals.

(21) On 6 March 2019 Tax Resolute on behalf the appellant notified his appeals against the personal liability notices to the Tribunal.

The appellant's oral evidence

7. The appellant gave oral evidence that any documents or information that he received from HMRC were given to Assurance. He had met Mr Morgan and Mr Hoque, but not Mr Bright. The only liability of which he was aware was the VAT personal liability notice. He did not receive the EC personal liability notice. He passed the information to Assurance personally and by electronic means (for example he would photograph a letter from HMRC and send it by email or text to Assurance). The appellant did not understand the contents of the documents that he received from HMRC, hence the reason for passing everything over to Assurance. He asked Assurance to do everything necessary on his behalf in relation to tax including appealing against any assessments. He was told on a number of occasions by Mr Morgan and Mr Hoque that they were happy with the position and that he was not to worry about things. He did not ask for any evidence that appeals had been submitted and when he found out in 2019 that Assurance could not help him, he turned to Miss Rehman to help him. Our findings of fact in relation to this oral evidence is dealt with below.

THE LEGISLATION

8. The provisions of Schedule 24 to the Finance Act 2007 that are relevant in this case are as follows:

(1) The respondents may assess a taxpayer for a penalty if a tax return contains an inaccuracy (paragraphs 1 and 13).

(2) The amount of the penalty depends on the behaviour of the appellant. It is calculated as a percentage of the potential lost revenue. The penalty for a careless error is capped at 30% of the potential lost revenue. The penalty for an error caused by deliberate but not concealed behaviour is capped at 70% of the potential lost revenue. The penalty for an error caused by deliberate and concealed behaviour is capped at 100% of the potential lost revenue (paragraph 4).

(3) These can be mitigated if a taxpayer makes disclosure of the errors, and the amount of mitigation depends upon the quality of the disclosure and whether it is unprompted prompted disclosure (paragraphs 9 and 10).

(4) The respondents may reduce the penalty for special circumstances (paragraph 11) and may also suspend the penalty (paragraph 14).

(5) A taxpayer may appeal against a penalty assessment (paragraph 15).

(6) A taxpayer is liable to a penalty even if the return is submitted by an agent (paragraph 18(1)).

(7) But he is not so liable if he can show that the inaccuracy arises because of an act or omission of his agent and he took reasonable care to avoid that inaccuracy (paragraph 18(3)).

(8) Where a penalty is payable by a company for a deliberate inaccuracy which was attributable to an officer of the company, HMRC may serve a notice on the officer (a "personal liability notice" or "PLN") specifying the proportion of the penalty payable by the company which the officer is liable to pay. Some or all parts of paragraphs 11, 13, 15, 16, 17 and 21 apply to personal liability notices as they apply to penalties visited on the company.

Service of documents

9. Under Section 115 Taxes Management Act 1970:

> "Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by HMRC may be so served addressed to that person..... at his usual or last known place of residence, or his place of business or employment....."

10. Under Section 7 of the Interpretation Act 1978:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is to be deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post"

RELEVANT CASE LAW

Late application

11. In considering whether to admit a late appeal to the FTT, the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*") considered that the approach to applications for relief from sanctions under CPR rule 3.9 should apply to applications for permission to appeal to the FTT outside the relevant statutory limit. The Upper Tribunal went on to say:

> "40. In *Denton*, the Court of Appeal was considering the application of the later version of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [24]):
>
> > "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including

[factors (a) and (b)]"."

41. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered."

42. The Supreme Court in *BPP* implicitly endorsed the approach set out in *Denton*. That case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FTT.

43. In its previous form, the "checklist" of items in CPR rule 3.9 can be seen to bear a number of similarities to the questions identified in *Aberdeen* and *Data Select*; to that extent, it is easy to regard them as little more than an aide memoire to help the judge to consider "all relevant factors" (and indeed, the list was preceded by the general injunction to "consider all the circumstances"). The question that naturally arises is whether the changes to CPR rule 3.9 and the evolving approach to applications for relief from sanctions under that rule also apply to applications for permissions to appeal to the FTT outside the relevant statutory time limit. We consider that they do. Whether considering an application which is made directly under rule 3.9 (or under the FTT Rules, which the Supreme Court in *BPP* clearly considered analogous) or an application to notify an appeal to the FTT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions – especially where the sanction in question is the striking out of an appeal (or, as in *BPP*, the barring of a party from further participation in it). The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".

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

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

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

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

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

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

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

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

considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

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

Katib

12. In *HMRC v Muhammed Hafeez Katib* [2019] UKUT 0189 ("*Katib*") the Upper Tribunal had to consider the extent to which reliance on agent was a justifiable reason for failing to make a timely appeal. On the facts of that case, the Upper Tribunal concluded that failings by the appellant's agent could not be relied upon by the appellant at any stage in the *Martland* analysis. The Upper Tribunal said this:

"53 The first stage of the *Martland* examination can be addressed briefly. Mr Katib's delay in appealing against the PLNs was, at the very least, 13½ months. That was "serious and significant". The real question is how the second and third stages of the evaluation should be performed, having regard to the particular importance of statutory time limits being respected.

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.

56. Nor do we accept Mr Magee's submission that the decision of the High Court in *Boreh v Republic of Djibouti and others* [2015] EWHC 769 establishes an "exception" to the principle where a representative misleads the client. Rather, we consider that the correct approach in this case is to start with the general rule that the failure of Mr Bridger to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland*. However, when considering the third stage of the evaluation required by *Martland*, we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration.

57. The FTT concluded at [27(3)] of the Decision that the general rule set out in *Coventry City Council* should not apply because Mr Bridger was "on a frolic of his own acting outside the scope of any possible brief that [Mr Katib] could have given". That conclusion, however, was reached without having regard to the particular importance of statutory time limits being respected and is thus vitiated by the error of law that has led to us setting aside the Decision. More significantly, we do not consider that the FTT's departure from the general principle is justified by that fact in this case (which we think is probably an additional error of law, though not one relied on in the grounds of appeal).

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.

60. For the same reasons we do not consider that Mr Bridger's conduct has any real weight when considering the factors relevant to the final stage of the three-stage approach outlined in *Martland*. 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.

61. Therefore, we have concluded that, in all the circumstances of the case, Mr Katib has not given a sufficiently good reason for a serious and significant delay in appealing against the PLNs. HMRC's appeal is allowed and we remake the Decision so as to refuse Mr Katib permission to make late appeals."

SUBMISSIONS

13. The appellant accepts that the delay in bringing his appeals is both serious and significant. But submits that the reason for this delay is, as regards the VAT personal liability notice, the fact that he put his tax affairs, including the responsibility for making any appeal on his behalf against a tax or penalty liability, into the hands of initially Llewellyn Davies and subsequently Assurance. He gave Assurance all information and communications that he received from HMRC. Mr Morgan and Mr Hoque assured him that he should not worry and that they would submit appropriate representations and appeals on his behalf. He was badly let down by his agents. Those agents may also have been confused given that this was a cross tax enquiry and may not have realised that there were two personal liability notices, one in respect of VAT and the other in respect of corporation tax given that the amounts of each were similar. As regards the EC personal liability notice, he did not receive a copy of that. Nor was he aware of it. The EC personal liability notice was not referred to in any of the communications with HMRC until the debt management liability statement was issued on 24 October 2018. The appellant passed all information he received from HMRC onto his accountants and the screenshots in the bundle show no such passing of information in relation to the EC personal liability notice notwithstanding they do show the transmission of other information concerning a liability for the same amount. If the appellant had received the EC personal liability notice, there would be a screenshot of him sending that to Assurance. There is no such screenshot. The appellant ran a small restaurant with only 32 covers and both the amount assessed to VAT and employment taxes as well as the penalties are excessive and unreasonable considering the size of the trade and given that it was a husband and wife team which ran the restaurant. It will be prejudicial to the appellant if his appeals were not admitted late since no representations have been made on his behalf in respect of these

penalties, and their amounts, and there would be a substantial injustice if he were not allowed to appeal against them. The impact of refusing permission would be excessive and disproportionate to the appellant.

14. On behalf of HMRC, Ms Donovan submitted that the lateness of over 20 months in the case of the EC personal liability notice and nearly 20 months in the case of the VAT personal liability notice outweigh all other considerations given the serious and significance of that delay. On the basis of *Katib* the appellant cannot absolve himself of the responsibility for making a timely appeal on the basis that failure to do so arose from a failing by his agent. It seems from the correspondence and in particular Baldwin's letter of 22 August 2018 that the appellant was aware of his liabilities and HMRC saw this as an acceptance of his liabilities. In June 2017 he was clearly aware of an amount of £83,813 which he owed HMRC (as evidenced by the screenshot dated 12 June 2017) so it is not credible for the appellant to say that the only liability of which he was aware was the VAT liability. The Assurance letter of 27 April 2017 cannot demonstrate their confusion concerning the VAT personal liability notice and the EC personal liability notice, given that that notice was not issued until May 2017, i.e. after the date of that letter. Both the VAT and EC personal liability notices were sent to the appellant at the correct address. No good reasons have been given by the appellant for his failure to submit timely appeals and we should reject his application.

DISCUSSION

VAT Personal liability notice

15. Both parties agree that we should follow the three stage process set out in *Martland.* The first of these stages is to establish the length of the delay. In the case of this notice it is a delay of nearly 20 months. The appellant accepts that this delay is both serious and significant and we agree with that.

16. Ms Donovan considers that this delay is so serious and significant that it outweighs the two other factors (namely the reasons for it and the evaluation of all the circumstances of the case). She is certainly right to emphasise the seriousness and significance of the delay, but we must go on to consider the next two stages.

17. The next stage is to consider the reasons for this delay. The appellant's only substantive reason, on which he gave oral evidence, was that he gave any communications that he received from HMRC to his agent (in the main, Assurance) who he had instructed to deal with all matters relating to HMRC including, but not limited to making appeals on his behalf. He had been assured by Assurance that they were doing this and he had nothing to worry about. This was plainly not the case. This evidence was not seriously challenged by Ms Donovan and we accept that the appellant did so instruct Assurance.

18. Miss Rehman suggested that the agents were confused by the fact that this was a cross tax investigation and that the personal liability notices for the corporation tax liability and for the VAT were in similar amounts. Evidence of this, she says, can be seen from the letter of 27 April 2017. We agree with Ms Donovan that they could have been no confusion between the VAT personal liability notice and the EC liability notice at that time since the latter notice had not been issued at that time. But given that the VAT personal liability notice was not issued until 9 June 2017, we cannot see how there could have been any such confusion concerning the VAT notice since at the date of that letter only one personal liability notice had been issued. But in any event that is speculation by Miss Rehman and we have no evidence on which we can base any finding of confusion by Assurance.

19. We are bound by the Upper Tribunal's decision in *Katib*, and especially, at this stage of the analysis, by the comments made at paragraph 56 of that decision namely that the correct approach in cases such as this is the start with the principle that, in general, failure of an adviser to advise a taxpayer of the deadlines for making appeals, or to submit timely appeals on the taxpayer's behalf, is unlikely to amount to a good reason for missing those deadlines when considering the second stage of the *Martland* evaluation. They can however be considered at the third stage of that evaluation.

20. So it is our view that the appellant's reliance on his agent to make a timely appeal on his behalf does not amount to a good reason for failing to make a timely appeal against the VAT personal liability notice.

21. We now come to the third stage of the *Martland* evaluation. We need to consider all the circumstances of the case and conduct a balancing exercise which assesses the merits of the reasons for the delay and the prejudice would be caused to both parties by granting or refusing permission, taking 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.

22. When conducting this evaluation we can consider, in outline, the merits of the appellant's case. This is not so that we can carry out a detailed evaluation but so we can form a general impression of its strength or weaknesses to weigh in the balance.

23. We can also consider that the behaviour of the appellant's agent.

24. Regrettably for the appellant, it is our view that such behaviour is very similar to that exhibited by the agent in *Katib*. In paragraph 58 of that decision, the Upper Tribunal indicated that the failure by the agent to do his job is not uncommon. It is true that the agent in *Katib* seem to have demonstrated some extraordinary behaviour which is missing in this appeal, and so this appellant was not on notice that his agents were not anything other than competent. But it is clear that simple incompetence by an adviser does not weigh heavily in a taxpayer's favour at this stage of the evaluation.

25. However, when perusing the documents in the bundle after the hearing, we came across what appears to be, on the face of it, a significant defence which the appellant might have to the VAT personal liability notice. That notice states that "the legislation that allows us to make you personally liable to pay is para 19 (1) Schedule 24 of the Finance Act 2007". In other words the notice has been issued under Schedule 24. However the notice of amended penalty assessment for the VAT which was assessed on the company which is in our bundle indicates that "this is a notice of a liability to a penalty or penalties under Schedule 41 of the Finance Act 2008". That notice makes it clear that the penalties for which the company is liable are for "failure to notify".

26. Under Paragraph 19 of Schedule 24, a personal liability notice can only be given where "a penalty under paragraph 1 is payable by a company". That is paragraph 1 of Schedule 24. On the evidence, no penalty under paragraph 1 of Schedule 24 is payable by the company even if a penalty might be so payable under Schedule 41 to the Finance Act 2008.

27. We have not undertaken a detailed evaluation of the strength of this point, but our cursory view is that it is a significant point. Whilst there may be saving provisions on which HMRC can rely, it might also be the case that the VAT personal liability notice is defective and so unenforceable.

28. This point was not raised by the appellant as part of his submissions. And we have considered whether or not it would not be fair to HMRC to take it of our own volition without giving them a chance to comment. However we have not done so for two reasons.

29. The first is that if we grant the appellant permission to appeal out of time, then that point can be fully aired at the substantive hearing and HMRC can make substantive comments on its relevance and validity at that time.

30. The second is that we have decided, as can be seen below, to grant the appellant permission to appeal against the EC personal liability notice. In other words the appellant will be allowed to appeal against a substantive decision. In these circumstances it is our view that the time and effort to which HMRC will be put to consider the validity of the VAT personal liability notice is likely to be the same whether they make representations on the point now, or whether they deal with it at the substantive hearing which will be convened to deal with the EC liability notice.

31. Given that the validity of the VAT personal liability notice is absolutely key to the appellant's liability under it, we would not wish to deprive him of the opportunity to make this point in a substantive appeal. If we were to do so, it seems to us that there is the possibility of a substantial injustice arising.

32. And so notwithstanding the significance and the seriousness of the delay, and the fact that reliance on agent is not a good reason for failing to make a timely appeal, it is our view that the apparent defect in the VAT personal liability notice outweighs these two factors at the final evaluation stage, notwithstanding the need for litigation to be conducted efficiently and for time limits to be respected.

33. And so we grant the appellant permission to appeal against the VAT personal liability notice.

EC Personal liability notice

34. The appeal against the EC personal liability notice was brought by the appellant more than 20 months late. This is serious and significant as the appellant accepts.

35. The reason given by the appellant for the delay is that he did not receive a copy of that notice. HMRC say that the notice was correctly addressed and indeed, in their review letter dated 4 March 2019, they stated that a copy was sent not only to the appellant but also to the appellant's then agent, Llewellyn Davies. However, they adduced no evidence that such a copy was sent to that agent. The only notice with which we were supplied was the copy sent to the appellant.

36. The appellant did not seriously challenge that HMRC had sent a copy of the EC personal liability notice to the address on the face of it. But he says he never received it. The relevant legislation provides that it is treated as being properly served unless he can prove to the contrary. So the burden is on him to establish that he failed to receive the notice, and the standard of proof is the balance of probability.

37. It is clear that when the appellants said in oral evidence that the only liability of which he was aware was the VAT liability, he was mistaken. As Ms Donovan has pointed out, HMRC's letter of 7 June 2017 refers to a sum of £83,813 being outstanding and it is inconceivable to her, and indeed to us, that the appellant failed to realise that this meant that

HMRC were owed that amount. But that letter was addressed to the company at the company's address (we think we are right when we say that 10 Croft Villas is the appellant's personal address whilst 3 Market Square is the company's address). It was not addressed to the individual appellant. So whilst it is clear that somebody owed that money, it was not necessarily clear that it was owed by the appellant personally. It is not evidence of receipt of the EC personal liability notice.

38. It is the appellant's evidence that he did not receive it, but given that he had received other notices from HMRC which he passed on to his agent, what, if any, corroboration is there of the appellant's assertion?

39. We think there are a number of corroborating circumstances.

40. The first of these is the fact that the appellant has said that he has not received it rather than saying he had received it, sent it or given it to his agent, who then badly let him down by not appealing against the EC liability notice. In other words the same reason why he brought a late appeal against the VAT personal liability notice. It seems to us that it would have been just as easy for him to have accepted that he had received EC personal liability notice, if indeed he had, and then relied on the same defence. But he didn't. He made a distinction between the VAT personal liability notice and the EC personal liability notice. We do not believe he did so because he thought there might be a flaw in his case. We think he did so because he was telling the truth.

41. We do not accept Miss Rehman's submission that because it was not included in the screenshot evidence it was not received by the appellant. The appellant's evidence was that he gave any correspondence he received from HMRC to his agent not only by electronic means but also in person. So if he had received the EC personal liability notice, he could readily have given it to his agent in person. Its absence from the electronic records is not significant.

42. Secondly, on the basis of the documents before us, all the notices relating to the VAT penalty were sent to the company's address at 3 Market Square. This includes the penalty explanation letter which was sent to the company in respect of its penalty, the notice of penalty assessment on the company and the VAT personal liability notice. Furthermore the penalty explanation letter and the notice of penalty assessment for the company EC penalty were also sent to 3 Market Square. The only document addressed to 10 Croft Villas was the EC personal liability notice. So it seems that the EC notice might not have been received by the appellant, notwithstanding it was clearly addressed to an address given to HMRC by the appellant, even though all the other notices in relation to both the VAT and the EC penalties might have been received by him since they were all sent to the company address.

43. Finally, on 22 August 2018, Phil Morgan sent a letter to HMRC. The reference that he used included the company's VAT number and also the reference number which HMRC had told the company that it should quote in correspondence with them regarding the PAYE enquiry. So it is clear to us that this letter could be dealing with both VAT and the PAYE enquiry. By the date of that letter, both of the personal liability notices had been issued. Yet in that letter Mr Morgan states that the appellant will have great trouble in meeting "the personal penalty". This is penalty (singular) and not penalties (plural) which would be the case if Mr Morgan was in possession of both notices. The letter goes on to say that the appellant could borrow £12,000 from family the members "to meet the penalty charge". And

that Mr Morgan realised that this is far less than "the penalty in charge". Again the letter refers to the penalty (singular) rather than penalties (plural).

44. As we have indicated above, we have accepted the appellant's evidence that he passed on any communications that he received from HMRC to his agent. And we have found that as a fact. Given this, it seems to us that Mr Morgan had not received more than one personal liability notice at the time of writing his letter on 22 August 2018. He had received the VAT personal liability notice. But our view is that that letter deals, too, with the PAYE enquiry (there is no reference to a corporation tax personal liability notice for the closing of enquiry) given the reference at its head, which militates towards corroboration of the appellant's assertion that he did not receive the EC personal liability notice. Had he done so he would have passed it on to Assurance and we think Mr Morgan would have referred to it in his letter of 22 August 2018.

45. None of these factors comprises absolute cast iron evidence to support the appellant's assertion that he did not receive the EC personal liability notice. But it is sufficient in our view to discharge the burden of proving, on the balance of probabilities, that he did not receive it.

46. This is a good reason why the appellant did not bring a timely appeal. He had no notice of the EC personal liability notice (even if he had notice of the company's penalty liability) and there is no evidence before us that HMRC served a copy on his authorised agent notwithstanding their submission to this effect.

47. We now go on to consider the third stage of the *Martland* evaluation, taking into account the balance of prejudice to each party and paying particular attention to the importance of litigation being conducted efficiently and proportionately, and that statutory time limits should be respected.

48. As mentioned above, we can consider the strengths or weaknesses of each party's case.

49. Once again, there appears to be a discrepancy within the paperwork which HMRC have provided in the bundle concerning the EC penalty. Whilst the notice of penalty assessment sent to the company clearly states that the penalty is under Schedule 24 of the Finance Act 2007, and the EC personal liability notice also refers to that schedule, the penalty explanation letter sent to the company dated 4 May 2017 refers to a "Grouped Failure to notify penalty charged under Schedule 41 Finance Act 2008".

50. Secondly HMRC have not, by their own admission, taken into account special circumstances/special reduction when considering the EC personal liability notice, notwithstanding that they have done so for the company's EC penalty liability.

51. Finally it is not clear to us what status any appeals against the original assessments might currently have. We simply do not have sufficient evidence. It might be the case that HMRC's letter of 30 May 2017 in which they indicate that they intend to apply to the court for an indefinite adjournment of proceedings brought in the County Court Money Claims Centre against the company, indicates that no appeals have been brought against the closure notices or assessments, which had become final, and HMRC had sought to enforce them before indicating an adjournment to those enforcement proceedings. But this is pure speculation.

52. It is the appellant's contention that the additional profit is erroneously large for a small family run Indian restaurant. And presumably this means that the appellant is challenging the potential lost revenue on which the penalties are based. We suspect that it will be difficult for him to do so if the original assessments were not challenged at the appropriate time.

53. But it is our view that the appellant should be permitted to raise these points at a substantive hearing, notwithstanding that the delay in bringing the appeal is serious and significant. The reason for that failure is, in our view, a good one. He did not receive the EC personal liability notice, and there is no evidence that one was given to his then agent. Notwithstanding that statutory time limits should be respected, it is our view the balance of prejudice weighs in favour of the appellant, and, accordingly, we grant him permission to appeal against the EC personal liability notice out of time.

DECISION

54. For the foregoing reasons it is our decision that this application is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

55. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 29 SEPTEMBER 2020