[2021] UKFTT 0267 (TC)

TC08212

PROCEDURE – MTIC decisions - application for permission for late appeal – Martland *and* Katib *followed – delay of over four months – no reasons for delay – all relevant circumstances considered and balanced – permission refused*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/08987

BETWEEN

INFINITY BUSINESS SYSTEMS LTD **Applicant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON
MR NOEL BARRETT

The hearing took place on 5 July 2021 using the Tribunal's video platform. A face to face hearing was not held because of the coronavirus pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings, and the hearing was therefore held in public.

Mr Ian Bridge of Counsel, instructed by OMSJ Consulting Ltd, for the Appellant

Ms Laura Stephenson of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. On 7 June 2019, HM Revenue & Customs ("HMRC") issued Infinity Business Systems Ltd ("the Company") with two decisions. One was a denial of input tax, and the other a refusal of zero-rating. Both decisions were made on the basis that the related transactions were connected with fraud, and that the Company knew or should have known this was the case, in other words, these were Missing Trader Intra-Community ("MTIC") decisions.

2. On 22 November 2019, the Company applied to make a late appeal against those decisions ("the Application"). The period of delay exceeded four months, for which no reasons were given.

3. The Tribunal considered the facts in the light of the relevant case law, in particular *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*") and *Katib v HMRC* [2019] UKUT 189 (TCC) ("*Katib*"). For the reasons set out in the main body of this decision, we refused the Application.

THE EVIDENCE

4. HMRC provided the Tribunal with a Bundle of documents, which included:

   (1) the Company's Notice of Appeal, including the Application;

   (2) previous correspondence between the Company and HMRC, including the decisions which the Company was seeking permission to appeal;

   (3) a letter dated 18 July 2019 from Mr Martin O'Neill of Keystone Law Ltd ("Keystone Law") to HMRC, followed by an email dated 21 July 2019;

   (4) HMRC's letter to Mr O'Neill, dated 24 July 2019; and

   (5) certain invoices and verification checks, although we were not referred to any of these in the course of the hearing.

5. The parties were not directed to provide witness statements, and none were provided.

6. On 30 March 2021, Mr Gerald O'Mahoney, director of OMSJ Consulting Ltd, the Company's representative, informed the Tribunal's Service that he would attend the video hearing, together with Counsel and Mr Sarj Cheema, the director of the Company. Mr O'Mahoney provided email addresses and phone numbers for each participant.

7. The hearing was due to begin at 10am. However, by 9.50 am Mr Cheema had not connected to the video hearing platform, and the Tribunal clerk called the number provided. Mr Cheema told the clerk he was not attending the hearing, but was leaving the matter in the hands of his representatives, and that he was content for the hearing to continue in his absence.

8. The proceedings therefore began shortly after 10am, and I informed Mr Bridge of the conversation between Mr Cheema and the Tribunal clerk. Mr Bridge said he had been unaware that Mr Cheema was not attending. I offered an adjournment so he could discuss Mr Cheema's decision not to attend with him and/or with Mr O'Mahoney. Mr Bridge said Mr O'Mahoney would contact Mr Cheema, and he would continue with the hearing, but would inform the Tribunal if an adjournment was required. No request for an adjournment was subsequently made.

9. The consequence of Mr Cheema's absence from the hearing was that there was no oral evidence as to the events which led up to the filing of the application for permission to appeal.

THE FACTS

10. We have made our findings of fact on the basis of the evidence provided. Most are set out in this part of our decision, but we also make further findings of fact later in the judgment.

The decision letters

11. On 7 June 2019, Ms Tracey Whitehouse, an HMRC officer, issued the Company with two decisions:

(1) a refusal of claims to input tax totalling £232,942.22 for periods 11/17 and 05/18 on the basis that the related transactions were connected with fraud, and the Company knew or should have known this was the case ("the *Kittell* decision"); and

(2) a refusal of claims to zero-rate exports of MacBooks totalling £205,035.96 in periods 02/18 and 08/18 on the basis that the transactions were connected to fraud carried out by the Company's customers, and the Company knew or should have known this was the case ("the *Meczek* decision").

12. At the end of the *Kittell* decision was a summary of the relevant transactions, as follows:

Period ending	**Net £**	**VAT £**	**Gross £**
11/17	251,339.40	50,267.88	301,607.28
05/18	913,971.70	182,674.34	1,096,046.05
Totals	**1,165,311.10**	**232,942.22**	**1,397,653.33**

13. In addition to the two decisions, Ms Whitehouse issued an assessment for the VAT due. The schedule to the assessment repeated the figures for each of the decisions referred to above, namely £232,942.22 and £205,035.96, but reduced the former by £9,142.34 because of a computational mistake on the VAT return. The total VAT assessed was £428,834, being the £232,942.22 + £205,035.96 - £9,142.34, less rounding.

14. In both decision letters, Ms Whitehouse set out a list of points which she had taken into account in coming to her conclusions including:

(1) the lack of any credible due diligence checks;

(2) the transactions being on a back-to-back basis;

(3) issues with insurance;

(4) issues with inspections;

(5) no continuity as to the explanations as to how the businesses came into contact with each other; and

(6) payment being made by a third party, not the customer.

15. Under the heading "further information, reconsiderations and appeals", both decision letters also contained the following paragraphs:

> "If you have any further information that you want me to consider, please send it to me within 14 days of the date of this letter.

> If you do not agree with this decision, you can ask for it to be reviewed by an HMRC officer not previously involved in the matter, or appeal to an independent tribunal. If you opt for review you can still appeal to the tribunal after the review has finished.
>
> If you want a review you should write to me at the above address within 30 days of the date of this letter, giving your reasons why you do not agree with my decision…
>
> If you want to appeal to the tribunal you should send the completed appeal papers to your nearest tribunal centre within 30 days of the date of this letter…
>
> Further information about appeals and reviews can be found on the HMRC website https://www.hmrc.gov.uk/dealingwith/appeals.htm or you can phone the number on this letter. Further information concerning tribunals, including ways to contact the tribunal, can be found on the Tribunals Service website www.tribunals.gov.uk/tax/."

Mr O'Neill's letter and Ms Whitehouse's response

16. The 30 day periods referred to in the decision letters expired on 6 July 2019. Twelve days later, on 18 July 2019, Mr O'Neill of Keystone Law wrote to Ms Whitehouse. The letter was headed with the Company's name and tax reference number. The first paragraph read:

> "I am instructed by the above company specifically in respect of the matters raised in your letters of 7 June 2019. This letter sets out those bases upon which we request the decisions set out therein are subject to a departmental review."

17. That was followed by detailed submissions, including the statement that the Company had been paid by its customers and not by third parties, but the letter did not refer to the fact that the statutory 30 day deadlines had already expired.

18. On Sunday 21 July 2019, Mr O'Neill resent the letter to Ms Whitehouse, because he had received a "despatch fault" in relation to the original email. On 24 July 2019, Ms Whitehouse wrote to Mr Cheema at the Company's address. She said:

> "I am unable to respond directly to Martin O'Neill of Keystone Law because we don't have a 64-8 in place. I have enclosed my letter to them, in response to the email with review letter attached, which was received by me on 23 July 2019. Would you therefore please forward on to them."

19. It was common ground that no 64-8 form was ever sent to HMRC authorising Keystone Law to act as the Company's agent in relation to its tax affairs.

20. Attached to Ms Whitehouse's letter to Mr Cheema was a letter addressed to Mr O'Neill, which, so far as relevant, read:

> "Unfortunately I am unable to respond directly to you because we don't have a 64-8 in place.
>
> I therefore sent my response to your email with the review letter attached to Mr Cheema for him to forward on to you.
>
> Our decision letter was issued to Infinity Business Systems Ltd on the 7 June 2019. They have 30 days in which to appeal. Infinity Business Systems Ltd are therefore out of time and must make a request to the Tribunal Centre to 'appeal out of time'

> As the case has been reviewed by two independent HMRC sections not connected with the case any request for an Independent Review would be rejected.
>
> Our decisions were based on the 'basket of evidence' and not individual facts. The main contributors to the decision was the fraudulent tax losses were identified [sic] and the company had significant knowledge of this type of fraud and have been unable to evidence that they took any steps to protect themselves from involvement in the fraud.
>
> At this stage we can only confirm that fraudulent tax losses have been established. No further details can be given at this time due to confidentiality of customer information. Detailed information can and will be supplied in any witness statement produced for the purpose of a First Tier Tribunal."

The Notice of Appeal

21. On 22 November 2019, Mr O'Neill filed a Notice of Appeal at the Tribunal, together with form T239, signed by Mr Cheema, authorising Mr O'Neill to act on behalf of the Company in relation to the Tribunal proceedings.

22. There was no documentary or witness evidence before the Tribunal about the period from Ms Whitehouse's letters of 24 July 2019 and the filing of the Notice of Appeal on 22 November 2019. Mr Bridge said he "understood" the Company had been contacted by HMRC's debt management office, and it was that contact which had triggered the Company to file the Notice of Appeal, but we had no evidence on that point, and we make no finding of fact.

23. One of the questions on the Notice of Appeal reads ""Did you ask for a review of the original decision" to which the answer was "yes". The next question asks "what response did you received" and the answer was "I have been waiting 45 days or more for a review to finish". In answer to the question "what is the amount of tax" the response was £1,397,653.22.

24. However, that figure is not the amount of tax in dispute, which we have already found to be £428,834, see §13. The figure of £1,397,653.22 on the Notice of Appeal is instead the gross value of the transactions on the disputed invoices in the two periods 11/17 and 05/18, see the table at §12. Neither party drew our attention to this mistake; instead, we identified it subsequently, in the course of a further review of the evidence. The hearing therefore proceeded on the basis that the tax in dispute was £1.4m.

25. The first question asked by the Notice of Appeal form under the heading "Appeal deadline" was: "is the appeal in time", to which the answer was "no". The next part of the form requires the appellant to give reasons for the late appeal, and the text there reads:

> "On the Appellant's behalf, a request for a review of the disputed decisions was sent to HMRC within the time limits prescribed. HMRC did not review the decisions on the basis that a 64-8 was not in place at the time. The results of the review were not communicated to the Appellant directly and the issue of the review remains unresolved. We have subsequently now been instructed to appeal the decisions. It is accepted that this application is outside of the 30 day time limit but consider that the issue of the review is unresolved and that it was only the recent correspondence from HMRC which notified the Appellant that the review was not being conducted."

26. We make the following further findings about the Notice of Appeal:

(1) Contrary to the statement made in the passage cited above, the request for a review was not sent to HMRC within the time limits prescribed. Mr Bridge accepted during the hearing that the statement was wrong.

(2) As noted at §22, there was no evidence as to any correspondence between the Company and HMRC after Ms Whitehouse's letter of 24 July 2019. We have therefore taken it that the reference to the Company being "instructed [by HMRC] to appeal the decisions" refers to the sentence in Ms Whitehouse's letter to Mr O'Neill which said that the Company was "out of time and must make a request to the Tribunal Centre to 'appeal out of time'".

(3) In relation to the review, the Company's Notice of Appeal is internally contradictory. It says (emphases added):

(a) the Company has been "waiting 45 days or more <u>for a review to finish</u>"

(b) "HMRC <u>did not review</u> the decision on the basis that a 64-8 was not in place"; and

(c) The <u>results of the review</u> were not communicated to the Appellant directly";

(4) On the basis of Ms Whitehouse's letter to Mr O'Neill, we find as facts that:

(a) HMRC did not carry out a statutory review of the decisions;

(b) Ms Whitehouse clearly communicated to Mr O'Neill that no review was to be carried out;

(c) Ms Whitehouse instead advised the Company to make an application to the Tribunal for the appeal to be admitted after the 30 day time limit; and

(d) her letter was sent to Mr Cheema, and the Company was therefore on notice that this was the position.

27. The final part of the Notice of Appeal set out the grounds of appeal, in which (in summary) the Company disputed that it either knew or should have known that the transactions were connected to fraud; said that the factors identified by HMRC were not indicators of fraud, and that payments were not made by a third party.

After the Notice of Appeal

28. On 15 March 2020, HMRC filed and served an Objection to the Application, drafted by Ms Stephenson. The hearing was then delayed by the pandemic, but on 25 February 2021 it was listed for 16 March 2021. On 2 March 2021, Mr Cheema emailed the Tribunal saying that the Company wanted to change its representative and asking for the hearing to be postponed (a) to allow time for the new representative to "read into" the case, and (b) because Mr Cheema was busy in March and unable to attend the hearing. The hearing was postponed and relisted for 5 July 2021.

THE LEGISLATION ABOUT REVIEWS AND APPEALS

29. Both parties made submissions about the correspondence between Mr O'Neill and Ms Whitehouse in the context of the relevant statutory provisions. For ease of reference we have also set out other provisions about reviews and appeals to which reference was made during the hearing. All statutory provisions are cited only so far as relevant to this decision.

The offer of a review

30. Section 83A of VATA 1994 is headed "offer of review", and begins:

> "(1) HMRC must offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision.
>
> (2) The offer of the review must be made by notice given to P at the same time as the decision is notified to P."

31. It was common ground that HMRC complied with this provision, because both decisions ended by offering a review to the Company.

The obligation to review

32. Section 83C is headed "Review by HMRC" and subsection (1) reads (emphasis added):

> "HMRC **must** review a decision if
>
> (a) they have offered a review of the decision under section 83A, and
>
> (b) P notifies HMRC accepting the offer within 30 days from the date of the document containing the notification of the offer."

33. As noted above, Mr Bridge accepted during the hearing that there had been no acceptance of the offer within the 30 day time specified. As a result, HMRC was not obliged to review the decisions on that basis.

Review out of time

34. Section 83E is headed "Review out of time" and reads (again, emphasis added):

> "(1) This section applies if
>
> (a) HMRC have offered a review of a decision under section 83A and P does not accept the offer within the time allowed under section 83C(1)(b) or 83D(3); …
>
> (2) HMRC **must** review the decision under section 83C if
>
> (a) after the time allowed, P…notifies HMRC in writing requesting a review out of time,
>
> (b) HMRC are satisfied that P…had a reasonable excuse for not accepting the offer or requiring review within the time allowed, and
>
> (c) HMRC are satisfied that P…made the request without unreasonable delay after the excuse had ceased to apply."

35. Mr Bridge submitted that Mr O'Neill's letter of 18 July 2019 was notification in writing to HMRC that the Company was requesting a review out of time. That was because HMRC might reasonably have accepted that letter as having been sent on behalf of the Company, even though no 64-8 had been filed with HMRC appointing Keystone Law to act as the Company's agent. Mr Bridge sought to make good that submission by saying he "understood" that Keystone Law had also acted for "other companies with the name Infinity" in relation to *Kittell* challenges, and he further understood those other companies to be connected to the Company. When asked by the Tribunal to clarify his submission, Mr Bridge said that, because Keystone Law had acted for related parties in similar litigation, HMRC should have inferred that the firm was also acting on behalf of the Company.

36. We reject that submission. There was no evidence before the Tribunal as to Keystone Law's clients, and no basis for us to make a finding that HMRC should have inferred that Keystone Law had been instructed by the Company. Instead, we agree with Ms Stephenson that in advising Mr Cheema that a 64-8 was required, Ms Whitehouse acted in accordance with

HMRC's normal procedures, the purpose of which is to ensure that HMRC only discuss a taxpayer's affairs with a person explicitly authorised by that taxpayer for that purpose. We add that this procedure should be understood in the context of the confidentiality obligations imposed on HMRC by the Commissioners for Revenue & Customs Act 2005, s 18.

37. We also agree with Ms Stephenson that, even leaving aside the 64-8 issue, the obligation to carry out a review referred to in s 83E(2) did not apply because Mr O'Neill's letter:

(1) did not acknowledge that the review request was out of time, and thus he was not "requesting a review out of time"; and

(2) gave no reasons as to why the request was late, and so HMRC could not be "satisfied that [the Company]…had a reasonable excuse for not accepting the offer or requiring review within the time allowed".

38. Mr Bridge also submitted that it was clear from Ms Whitehouse's letter that HMRC had no intention of carrying out a review under s 83E, because:

(1) instead of pointing out that the Company could request an late review under section 83E, she said the Company was "out of time and must make a request to the Tribunal Centre to 'appeal out of time'"; and

(2) also that "as the case has been reviewed by two independent HMRC sections not connected with the case any request for an Independent Review would be rejected."

39. Mr Bridge described these passages as "an unlawful decision to refuse a review", which would have been susceptible to judicial review.

40. We agree with Mr Bridge that had Mr O'Neill made a legally valid request for an out of time review under s 83E, it would have been unlawful for HMRC to refuse to carry out that review on the basis that the case had already been "reviewed by two independent HMRC sections". However, that is not what happened. Instead:

(1) the *Company* did not request a review of the decisions; instead an request was made by Mr O'Neill, without the relevant authority;

(2) that request was not for "a review out of time" as specified in s 83E, but for a review, with no reference to the fact that the 30 day time limit had passed;

(3) HMRC would only have been obliged to carry out a review under that section had they been "satisfied" that the Company had a reasonable excuse for not accepting the offer within the 30 day time limit. However, no reasons for the delay were provided to HMRC by Mr O'Neill (or, indeed, subsequently).

41. Ms Whitehouse's letter was thus not an "an unlawful decision to refuse a review". Instead, no valid request for a review had been made.

Nature of review

42. Section 83F is headed "Nature of review", and includes the following provisions:

> "(6) HMRC must give P, or the other person, notice of the conclusions of the review and their reasoning within
>
> (a) a period of 45 days beginning with the relevant date, or
>
> (b) such other period as HMRC and P, or the other person, may agree.
>
> (7) In subsection (6) "relevant date" means

(a) the date HMRC received P's notification accepting the offer of a review (in a case falling within section 83A), or

(b) … or

(c) the date on which HMRC decided to undertake the review (in a case falling within section 83E).

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that the decision is upheld."

43. The Notice of Appeal stated that the Company had "been waiting 45 days or more for a review to finish". We have taken this to be a reference to the 45 day period in s 83F(6)(a). However, as we have already found, HMRC did not carry out a review of the decisions, and had clearly communicated that this was the position to both Mr O'Neill and Mr Company. The 45 day period thus has no relevance to the Application.

Bringing of appeals

44. Section 83G reads:

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

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

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

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

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

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

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

(4) In a case where HMRC are requested to undertake a review by virtue of section 83E

(a) an appeal may not be made

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

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

(b) …;

(c) if HMRC have notified P…that a review will not be undertaken, an appeal may be made only if the tribunal gives permission to do so.

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

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

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

45. In the context of the Application, the key provision is subsection 6, namely that "an appeal may be made after the end of the period specified in subsection (1), (3)(b)...or (5) if the tribunal gives permission to do so". Of those listed subsections, it is the first which is relevant to the Company's position, namely that an appeal must be made "at the end of the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates". The first of the 30 days is thus the date of the decision, which in this case was 7 June 2019. Thirty days beginning from that date expired on 6 July 2019.

THE APPROACH TO THE APPLICATION

46. The parties disagreed as to how this case should be approached. We first summarise their submissions and then set out the approach we have taken.

The parties' submissions

47. Ms Stephenson's position was that the Tribunal should follow the three-stage test in *Martland,* and that the importance of time limits had been re-emphasised in *Katib.*

48. Mr Bridge submitted that in deciding whether or not to give permission, the Tribunal was required to apply the overriding objective at Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, which provides that the Tribunal must "deal with cases fairly and justly". He added that the rules about time limits had been over-emphasised by HMRC, and that the overriding objective had to take priority over any requirement to comply with rules and time limits. He sought to distinguish *Katib*, saying that the delay in that case had been much longer, and the judgment had been made on the basis of its own facts.

The Tribunal's view

49. The Tribunal is bound by the judgments of the UT as set out in *Martland* and *Katib,* and we also respectfully agree with them.

Martland: the nature of the jurisdiction

50. *Martland* sets out the nature of the FTT's jurisdiction when deciding whether to give permission to make a late appeal. In particular, the UT confirmed that the FTT was not exercising a case management discretion under which it was "bound in the first instance to apply the overriding objective set out in Rule 2 of the Tribunal Rules, to deal with cases fairly and justly", but that instead the jurisdiction derives from statute. The relevant paragraphs of that judgment are as follows:

> "[16] It has been suggested (both in relation to this and other similar appeals) that the issue is a matter of 'case management'…
>
> [17] This suggestion also finds some expression in the FTT's decision in this case, when it said (at [24]) that 'in considering whether or not to allow the appeal in this case to proceed out of time, the Tribunal are bound in the first instance to apply the overriding objective set out in Rule 2 of the Tribunal Rules, to deal with cases fairly and justly.'
>
> [18] We respectfully disagree. In deciding whether or not to permit a late appeal, the FTT is exercising a discretion specifically and directly conferred on it by statute to permit an appeal to come into existence at all. It is not exercising some case management discretion in the conduct of an extant appeal. As the Upper Tribunal said in *Romasave Property Services Limited v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC) at [96]:

> 'The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have'.
>
> [19] For this reason, it is not appropriate to regard the exercise of the discretion as involving a direct application of Rule 2 of the FTT Rules (Rule 2 being concerned with 'dealing with a case fairly and justly' in relation to the various procedural matters identified in it – i.e. once proceedings have been properly commenced before the FTT)…That said, as will become apparent below, the principle embodied in the overriding objective is a broad one, and one which applies just as much to the exercise of a judicial discretion of the type involved in this appeal as it does to the exercise of such a discretion in relation to more routine procedural matters."

51. At [55] the UT considered whether the FTT in that case had made an error of law by referring to the overriding objective, and said that it did not, adding:

> "…whilst that rule is not in our view directly applicable to the exercise carried out by the FTT, there is no doubt that the principles of fairness and justice underpinning that rule also underpin the general exercise of discretion with which the FTT was concerned."

52. Thus, in deciding whether or not to give the Company permission to make a late appeal, the Tribunal is exercising the jurisdiction given to us by VATA s 83G(6), set out above. There is no direct application of the overriding objective. However, the approach to be taken to the exercise of the Tribunal's statutory discretion in this Application must follow the same principles of fairness and justice.

Martland and Katib: the weight to be given to time limits

53. In *Martland*, the UT set out Rule 3.9 of the Civil Procedure Rules ("CPR"), which reads:

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

54. The UT then considered the authorities, in particular *Denton v TH White Limited* [2014] EWCA Civ 906 ("*Denton*") and *BPP v HMRC* [2017] UKSC 55 ("*BPP*"). The UT said*:*

> "[40] In *Denton*, 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.'"

55. At [42] the UT noted that the Supreme Court in *BPP* had implicitly endorsed the approach set out in *Denton.* That Court also confirmed at [26] that "the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach".

56. At [43] the UT said:

> "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'."

57. In *Katib*, HMRC had appealed to the UT on three grounds, the first of which was that:

> "The FTT erred in law by failing to follow binding guidance from the Upper Tribunal, endorsed by the Supreme Court, in relation to the 'stricter approach to compliance with time limits'."

58. The UT agreed, finding at [17] that the FTT in that case (emphasis in original):

> "did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion."

59. Contrary to Mr Bridge's submission, *Katib* was thus not decided on its own facts: HMRC succeeded because the FTT had failed to approach the case in the correct way. Although we must, when exercising our discretion, do so in accordance with the principles of fairness and justice, we must also as a matter of principle place particular weight on the need for statutory time limits to be respected.

The Tribunal's approach

60. We have thus followed the approach set out in *Martland* and endorsed by *Katib.* At [44] of *Martland*, the UT set out the following three stage approach:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason(s) why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to 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, and in doing so 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".

APPLICATION OF THE LAW TO THE CASE

61. We now apply the three stage approach in *Martland* on the basis of the facts, taking into account the parties' submissions. We have split the first stage into two parts.

The length of the delay

62. As set out earlier in this decision, s 83G provides that the appeal in this case must be made "at the end of the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates". The 30 day period thus began on 7 June 2019, and expired on 6 July 2019.

63. Mr Bridge's primary submission was that the delay was only eight days, from the decision date to the date of Mr O'Neill's letter. In fact, this first period of delay was at least 12 days, being from 6 July to 18 July, the date on which Mr O'Neill wrote the letter. However, as that letter was initially not delivered to HMRC, but was resent on Sunday 21 July, the period was in fact 15 days. We do not know how Mr Bridge arrived at his eight day figure, but he may have omitted weekends, and also may have begun his 30 day calculation from the date *after* the decision date, rather than from the decision date itself.

64. In any event, Mr Bridge submitted that this first period of delay ended when Mr O'Neill's letter was delivered to Ms Whitehouse, because from that date HMRC were clearly on notice that "there were issues which required a review and in all likelihood an appeal".

65. Ms Stephenson said that the delay ran from 8 July 2019 to the filing of the Notice of Appeal on 22 November 2019, a period of four months and 15 days. She disagreed with Mr Bridge's submissions because:

(1) it was wrong on the facts: Mr O'Neill's letter did not say an appeal was likely but instead asked for a review; and

(2) it was wrong in law: there was no authority to support Mr Bridge's suggestion that "a request for a review can be read as equivalent to lodging an appeal".

66. We have no hesitation in rejecting Mr Bridge's submissions. Section 83G(1) requires that "An appeal under section 83 is to be made **to the tribunal**" before the end of the 30 day period following the decision date. Its meaning is plain. The Company did not file its Notice of Appeal until 22 November 2019, and we agree with Ms Stephenson that the Company was therefore four months and 15 days late.

Serious and/or significant?

67. The parties took different views as to how to assess whether the delay was serious and/or significant.

The parties' submissions

68. Mr Bridge said that, even if Ms Stephenson were to be correct as to the length of the delay, it was not serious or significant because it should be seen in the context of the following, both of which "eclipsed the delays of the appellant":

(1) the time taken by HMRC to issue the decisions. These related to VAT periods 11/17 through to 08/18, yet the decisions were issued on 7 June 2019, well over a year after the first period, and almost a year after the final period; and

(2) the time taken by the Tribunal to list the Application, which ran from November 2019 until July 2021, a period of around 20 months, and this was "no fault of the appellant at all".

69. Furthermore, when deciding whether the delays were serious and/or significant, the Tribunal should also take into account that:

(1) the Company's delay in making the appeal would not prevent the case from being tried fairly and justly: it concerned returns submitted in 2018 and 2017, only three and four years ago, and the Tribunal frequently heard appeals about events which had occurred over four years before the hearing date;

(2) even had the Company had appealed by the statutory time limit, significant further delays would have been caused by the pandemic; and

(3) Mr O'Neill's letter had been received by Ms Whitehouse a few days after the expiry of the 30 day period, so HMRC was on notice that an appeal was likely.

70. Mr Bridge summarised his position by saying that the Company's delay in making the appeal was therefore "neither serious nor significant in the grand scheme of things".

71. Ms Stephenson said that a delay of 4 months and 15 days was plainly serious and significant and that the comparative periods of time referred to by Mr Bridge were not relevant.

The Tribunal's view

72. We reject Mr Bridge's submissions for the following reasons:

(1) The seriousness and/or significance of a delay is not to be assessed by reference either to the time taken by HMRC to make the decisions under appeal or by the time taken by the Tribunal to list the appeal for a hearing. Instead, as the UT said in *Romasave* at [96], that assessment must be made in the context of the time limit by which the appeal right should have been exercised, here 30 days.

(2) The seriousness/significance of the breach is not eliminated simply because the facts are sufficiently recent for the issue to be tried fairly and justly. Such an approach would self-evidently undermine the requirement set out in *Denton* and *BPP*, that courts and tribunals should "enforce compliance with rules, practice directions and orders".

(3) Although the pandemic caused some delay to the proceedings, that factor too is not relevant. It would be manifestly wrong to give permission to applicants who filed late notices of appeal shortly before the pandemic on a more relaxed basis than that which applied to previous applicants, or which will apply to subsequent applicants. We add that it would equally be possible to take the view that the greater pressure on tribunal time caused by the pandemic should make it *less* likely that permission be given. However, we have not taken that approach either. The pandemic began after the filing of the Notice of Appeal, and we have disregarded it entirely. In any event, Mr Bridge was wrong to say that the listing delay was "no fault of the appellant at all", given that the hearing was originally listed for March 2019, and was postponed at the Company's request.

(4) Mr O'Neill's letter is simply not relevant to this stage of the proceedings because:

(a) it did not announce an intention to appeal: instead, it asked for a review;

(b) it was not sent to the Tribunal, but to HMRC; and

(c) HMRC could place no reliance on it, because Mr O'Neill had no authority to act as agent for the Company.

73. Instead, we rely on *Romasave,* where the UT said at [96]:

> "In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

74. The delay in this case was 4 months and 15 days, around 50% more than the three months referred to in *Romasave,* and was clearly serious and significant.

Reasons for the delay

75. As noted earlier in this judgment, there was no evidence before the Tribunal as to the reasons why there was a twelve day delay before Mr O'Neill wrote his letter to HMRC, or as to why there was then a further delay of around four months before the Notice of Appeal was filed with the Tribunal.

Submissions by Mr Bridge

76. Mr Bridge invited the Tribunal to find that the reasons for both delays could be inferred from the facts. In relation to the first period, he asked the Tribunal to make an inference from the fact that this occurred in July, and we understood this to be a reference to the fact July is sometimes a holiday period. We refuse to make an inference. There is no information as to the reason for this delay, and there are many possibilities, only one of which is that Mr Cheema and/or Mr O'Neill were on holiday. We make no finding of fact as to the reason for the first period of delay.

77. In relation to the second period, Mr Bridge said that HMRC had provided the Company with "confusing" and "contradictory" advice, because on 7 June 2019 Ms Whitehouse had offered the Company the opportunity to have a statutory review of the decisions, but on 24 July she informed Mr O'Neill that no review would be carried out because the case had already been reviewed by "two independent HMRC sections". Mr Bridge submitted that "it was in the mind of the appellant" that he was entitled to be told why his request for a review had not been dealt with, and/or that it was still pending.

78. We decline to make those inferences because:

(1) the Tribunal has simply no information as to why:

(a) the Company did not authorise Keystone Law to act by signing a 64-8 form following receipt of Ms Whitehouse's letter;

(b) Mr O'Neill did not respond to that letter, for instance by explicitly asking for a review out of time and providing the reasons for the delay, as required by s 83E; and

(c) neither the Company nor Mr O'Neill made an appeal to the Tribunal, having been specifically advised to do so in Ms Whitehouse's letter;

(2) there is no evidence that Mr Cheema was confused by the correspondence from Ms Whitehouse;

(3) there is also no evidence that Mr O'Neill was confused by that letter, and very unlikely that he would have been confused, given that he worked for Keystone, an established tax advisory firm,.

Submissions by Ms Stephenson

79. Ms Stephenson pointed out, entirely correctly, Mr Cheema had declined to attend the hearing. He could clearly have given relevant evidence, but instead elected not to do so.

80. She also hypothesised that the Tribunal might infer that Keystone Law had caused the delay, and went on to submit that if so, that reliance would not provide the Company with a good reason. In *Katib* the UT held that failings by a litigant's advisers should "in most cases" be regarded as failings of the litigant, and that Mr Katib should have noticed "warning signs", and these "should have alerted him" to the risk of reliance on his adviser. Ms Stephenson said Mr Cheema should have been on notice as to the risk of using Keystone Law, because he would have been aware from Ms Whitehouse's letter that Mr O'Neill had failed to obtain a 64-8 before communicating with HMRC

81. On that issue, we respectfully agree with the approach taken by the UT in *Katib*. Had any evidence been provided on which to base a submission that Keystone Law was wholly or partly responsible for the delay to the filing of the Notice of Appeal, we would have considered whether the Company fell within or outside the general rule in *Katib.* However, no such evidence was provided. We also note that although Mr Bridge invited us to make various inferences from the facts, he did not ask us to infer that Mr O'Neill, or Keystone Law, was in any way responsible for the delay.

The Tribunal's conclusion

82. We find that no reason has been provided for any part of the period of delay.

All the circumstances

83. The third step in the *Martland* approach is to consider all the circumstances, and then to carry out a balancing exercise. We have considered the factors set out below.

The need for time limits to be respected

84. Significant weight must be placed as a matter of principle on the need for statutory time limits to be respected. This was described as "a matter of particular importance" in *Katib*; the same point is made in *Martland* at [46]. The delay in this case was both serious and significant, and there were no reasons for that delay.

Merits

85. Mr Bridge submitted that "there were real issues identified in [Mr O'Neill's] review letter" which were "not straightforward and require an analysis". With reference to the decision letters, he said that "back to back trading" and the issues HMRC had identified with insurance, could both be present in genuine trading, adding that Mr O'Neill's letter contained "evidence" that there had been no third party payments. He described Mr O'Neill's letter as raising "contentious issues which the appellant ought to have opportunity to put before Tribunal without being prevented from doing so" by being refused permission to appeal.

86. Ms Stephenson submitted that the merits of the appeal should not be considered as part of a late appeal hearing, unless the position was so clear that one party would be entitled to the equivalent of "summary judgment" were the case to proceed, and that was plainly not the case here. As a result, she declined to respond to the particular points made by Mr Bridge, including that relating to third party payments.

87. We considered the guidance provided by *Martland* at [46]:

> "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…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."

88. Mr Bridge did not submit that the merits of the Company's appeal were "overwhelmingly" in its favour, or that they have any "obvious strength", but instead that Mr O'Neill had raised issues which "were not straightforward" and were "contentious".

89. We also considered for ourselves both Mr O'Neill's letter and the Company's Grounds of Appeal, and we agree with Mr Bridge's assessment that the points raised were "not straightforward". Instead, as is common with MTIC appeals, they would be the subject of competing submissions and contested evidence in the course of a lengthy hearing.

90. We also do not accept that Mr O'Neill's letter included "evidence" that there were no third party payments. Instead it simply included a statement that this was the position. In any event, third party payments were just one of the many factors considered by HMRC in coming to the decisions.

Other prejudice to the parties

91. Mr Bridge submitted that there was an obvious prejudice to the Company if it did not obtain permission, because it would then be unable to challenge decisions relating to VAT of around £1.4m (the figure used on the Notice of Appeal). He added that if the decisions were confirmed, Mr Cheema might be subsequently served with a Personal Liability Notice ("PLN"), and this was a further prejudice.

92. Ms Stephenson said that if permission were given, HMRC would have to prepare for a lengthy hearing for which they would be unlikely to recover their costs. There would also be prejudice to other tribunal users, whose appeals would be delayed because of the time taken to deal with the Company's appeal. The prejudice to the Company was an inevitable consequence of losing the opportunity to challenge HMRC's decisions at the Tribunal. Were a PLN were to be issued, Mr Cheema would have the opportunity to make an in-time review application against that separate decision, and/or an in-time appeal.

Other factors?

93. No other possibly relevant circumstances were put forward by the parties, and we did not identify any.

Balancing the circumstances

94. Once the circumstances have been identified, they must be balanced. The consistent message from *Denton*, *BPP*, *Martland* and *Katib* is that particular weight is to be given to enforcing compliance with rules, practice directions and orders.

95. The Company failed to comply with the statutory time limit; that failure was serious and significant, and no reasons have been given for the failure. That weighs heavily against the Company. As Ms Stephenson said, there is also prejudice to HMRC and to other tribunal users if permission were given, which adds further weight to that side of the scales.

96. We accept that there is prejudice to the Company if permission is not given, because it will be unable to challenge two VAT decisions. As noted at §13, the total amount of VAT assessed by those decisions was in fact £428,834, and not the £1.4m in the Grounds of Appeal and referred to by Mr Bridge. However, we confirm that even had the VAT in dispute been £1.4m, our decision in this case would have been the same: quantum alone would not have been sufficient to change the balance in the Company's favour. Instead, we agree with Ms Stephenson that being unable to challenge the decision is the inevitable consequence of losing an application.

97. We accept that there is a possibility that refusing to allow the appeal may open the door to a PLN, but if so, Mr Cheema will have a separate opportunity to appeal against that decision. Finally, we considered the submissions on the merits, but as they were not "overwhelmingly" in one party's favour, we have accorded them no weight.

98. Having carried out the weighing exercise, the balance clearly favours HMRC, and we refuse the Company permission to notify its appeal late.

No undertaking

99. As noted above, there was some discussion between Ms Stephenson and Mr Bridge about the possibility of a PLN being issued to Mr Cheema. At one point, Mr Bridge thanked Ms Stephenson for having given an undertaking on behalf of HMRC that no PLN would be issued. Ms Stephenson responded by stating that she had not and would not give such an undertaking. We confirm that no undertaking was given.

DECISION AND APPEAL RIGHTS

100. The Application is refused. The Company does not have permission to notify its appeal late.

101. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 19 JULY 2021