



**TC08257**

*PROCEDURE – application for permission for late appeals against two HMRC decisions – delay of three months and one month – Martland followed and applied – meaning of “serious and significant” – common understanding provided a good reason for the first part of the delay – impact of Covid lockdown – balancing of factors – permission granted*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2020/01740**

**BETWEEN**

**SUNRISE MEDICAL LTD**

**Appellants**

**-and-**

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

**Respondents**

On 23 July 2021, the Tribunal determined the Appellant’s application to make a late appeal; the parties had agreed this should be decided without a hearing. The Tribunal’s decision was made after having considered:

- the Appellant’s application dated 15 April 2020;
- HMRC’s objection to that application, included in their Statement of Case dated 7 August 2020;
- the Appellant’s response to those parts of the Statement of Case, included in their Reply dated 29 September 2020;
- submissions made by Mr Hartley Foster of Counsel, instructed by Fieldfisher LLP, for the Appellants and by Mr Simon Pritchard of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents, in compliance with the Tribunal’s directions given orally at a case management hearing on 28 June 2021, and issued in writing on 6 July 2021, together with the Bundle of documents provided by the Appellant on 12 July 2021.

## DECISION

1. On 12 December 2019 and 14 February 2020, HMRC issued Sunrise Medical Ltd (“Sunrise” or “the Appellant”) with two decisions (“the Decisions”) following importations of mobility scooters between 2016 and 2018. Sunrise filed a Notice of Appeal against the Decisions on 15 April 2020, together with an application to make a late appeal (“the Application”).

2. The Tribunal considered the facts in the light of the relevant case law, in particular *Denton v TH White Limited* [2014] EWCA Civ 906 (“*Denton*”); *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, the Tribunal allowed the Application.

### The facts

3. The facts are based on the evidence provided to the Tribunal.

#### *The period before the Decisions*

4. In order to understand the Application, some background is necessary. HMRC had previously issued decisions relating to Sunrise’s importations of mobility scooters between 2004 and 2007. Sunrise had classified these imports under headings 8713 (carriages for disabled persons) and 8714 (related parts and accessories) of the Combined Nomenclature (“the CN”). HMRC’s view was that the scooters and parts should instead be classified under codes 8703 and 8708, as being motor vehicles principally designed for the transport of persons, and related parts.

5. HMRC had also made similar decisions in relation to other importers of mobility scooters, namely Invamed Group Ltd; Invacare UK Ltd; Days Healthcare Ltd; Electric Mobility Europe Ltd and Medicare Technology Ltd. Those importers, together with Sunrise, appealed HMRC’s decisions to the FTT.

6. The Tribunal (Judge Hellier and Ms Watts Davies) considered the position to be unclear, and made a reference to the Court of Justice of the European Union (“the CJEU”), see *Invamed and others v HMRC* [2015] UKFTT 113 (TC). The CJEU issued their judgment (“*Invamed CJEU*”) on 26 May 2016 (Case C-198/15), and concluded as follows:

“1. Heading 8713 of the Combined Nomenclature set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Regulation (EC) No 1810/2004 of 7 September 2004, must be interpreted as meaning:—the words ‘for disabled persons’ mean that the product is designed solely for disabled persons;—the fact that a vehicle may be used by non-disabled persons is irrelevant to the classification under heading 8713 of the Combined Nomenclature—the Explanatory Notes to the Combined Nomenclature are not capable of amending the scope of the tariff headings of the Combined Nomenclature.

2. the words ‘disabled persons’ under heading 8713 of the Combined 2. Nomenclature set out in Annex I to Regulation No 2658/87, as amended by Regulation No 1810/2004, must be interpreted as meaning that they designate persons affected by a non-marginal limit on their ability to walk, the duration of that limitation and the existence of other limitations relating to the capacities of those persons being irrelevant.”

7. Having considered the CJEU judgment, the FTT decided that the mobility scooters in issue were classified under heading 8713 as carriages for disabled persons, see *Invamed v HMRC* [2018] UKFTT 775 (TC). HMRC appealed the FTT decision to the Upper Tribunal (“UT”), which on 29 September 2018 agreed with HMRC that the scooters were classified as motor vehicles, see *HMRC v Invamed* [2018] UKUT 305 (TCC). The appellants appealed to the Court of Appeal.

8. After the importations with which the *Invamed* appeals were concerned, but before any of the litigation summarised above, the European Commission issued Regulation (EC) 718/2009 (“the Regulation”), which was effective from 27 August 2009. This classified “certain goods” as falling under heading 8703 if they came within the Annex to that Regulation. The Annex describes certain battery-powered vehicles which had not been “specially designed for the transport of disabled persons and [having] no special features to alleviate a disability”.

9. As the Regulation post-dated the importations at issue in *Invamed*, it could not be directly relevant. The FTT considered the role of EU Regulations generally, noting at [28] that in *Anagram* “the CJEU said that the application of a Regulation classification to similar products by analogy would be desirable” and at [204] that they “would feel bound to apply [the Regulation] by analogy”, had it applied to the importations they were considering.

10. The UT also considered the Regulation, saying at [83]:

“The absence of special features to alleviate disability beyond that of a non-marginal limitation on the ability to walk is not a determining factor, as has been confirmed by the CJEU in *Invamed CJEU*. It is apparent therefore that the Regulation draws a distinction between those vehicles with special features to alleviate disability beyond that non-marginal limitation and that it contrasts electric mobility scooters against powered wheelchairs in the same manner.”

11. They went on to state that the Regulation was therefore based on a “flawed understanding of the meaning of ‘disability’”, because it was inconsistent with the meaning of the term as set out in *Invamed CJEU*.

#### *The first Right to be Heard letter*

12. If HMRC believe a person is liable for customs debt, they send a letter setting out the decision they intend to make, and inviting the person to reply with any relevant information within the next 30 days. This is known as a “Right to be Heard” letter.

13. On 11 November 2019, Ms Rzepala-Lewis, a Higher Officer of HMRC, issued Sunrise with a Right to be Heard letter in which she said she had found errors in Sunrise’s records, and believed the company had underpaid a total of £374,096, made up of customs duty of £303,821.15 and import VAT of £60,635.94. She also said that her “explanation and calculation” of those figures was in “the enclosed schedule”. That schedule began with a section headed “misclassification of mobility scooters and parts”, the first paragraph of which read:

“Following a recent tribunal hearing for ‘The Commissioners for HM Revenue and Customs v *Invamed Group Limited and Others*: UKUT 0305 (TCC)’, the appropriate classification for mobility scooters is commodity code (CMCD) 8703 10 18 00. This CMCD attracts 10% customs duty. You can access the tribunal document via the GOV.UK website.”

14. Under the heading “legislation”, the schedule referred to the following::
- (1) Articles 162 and 163 of Council Regulation (EU) No. 952/2013 (Union Customs Code) and section 167(3) of the Customs and Excise Management Act (CEMA), and the similar earlier legislation;
  - (2) the UK trade tariff;
  - (3) guidance on customs classification on the gov.uk website;
  - (4) the CN Regulation (EEC) No. 2658/87, which provides the legal basis for the Common Customs Tariff; and
  - (5) how to apply for a Binding Tariff Information (BTI) decision
15. The Regulation was not referred to either in the text of the Right to be Heard letter, or in the schedule. Instead, as can be seen from the extract set out at §10 above, Ms Rzepala-Lewis said that she had come to her conclusion that there were errors in Sunrise’s returns following the UT judgment in *Invamed*.

*The Decisions and the Court of Appeal*

16. On 12 December 2019, Ms Rzepala-Lewis issued the First Decision. This said that Sunrise had underpaid the customs duty and VAT set out in the Right to be Heard letter. On 18 December 2019, HMRC issued Sunrise with a related post-clearance demand note (“C18”).

17. On 9 January 2019, Ms Rzepala-Lewis issued a second Right to be Heard letter, stating that she had found “additional errors” in Sunrise’s returns, as a result of which Sunrise had underpaid customs duty of £8,159.71 and import VAT of £1,480.09, a total of £9,639.80. The schedule to that letter contained the same paragraphs about legislation as in the earlier letter. The basis for the additional duty and VAT was explained under the heading “freight and insurance charges”, as follows:

“On 11th November 2019 I sent you a right to be heard letter relating to the misclassification of mobility scooters and parts. On 12<sup>th</sup> December 2019 I sent you my decision letter and informed you that I have still have further enquiries to make, in respect of the freight and insurance charges for each import. The freight and insurance charges were not included in my original right to heard letter and calculations. As the freight and insurance charges are included in the Customs Value at import, duty is chargeable against these costs. More information on customs value can be found in Notice 252 on GOV.UK. Please refer to the spreadsheet I have provided you, for a breakdown of imports and subsequent calculations. This is the same spreadsheet I sent you for the first right to be heard, with additional columns.”

18. Between 21 to 23 January 2020, the Court of Appeal heard the *Invamed* appeal.

19. On 14 February 2020, HMRC issued the Second Decision, which stated that Sunrise owed the further £9,639.80 as set out in the second Right to be Heard letter. Mr Hasling of Sunrise responded to Ms Rzepala-Lewis by return, acknowledging receipt, and saying:

“Just as an interesting update, we are waiting for the decision of the Court of Appeal (it has been 3 weeks since the hearing). We hope to be reclaiming this in a few weeks’ time (fingers crossed anyway).”

20. On 22 February 2020, HMRC issued the C18 relating to the Second Decision.

21. On 25 February 2020, the Court of Appeal overturned the UT judgment and restored that of the FTT (*Invamed v HMRC* [2020] EWCA Civ 314). Patten LJ gave the only judgment, with which Floyd and Arnold LJJ both agreed. At [22] he said that had the Regulation applied, it “would have been binding and definitive for present purposes subject only to a possible challenge to its validity in the CJEU”.

22. HMRC sought permission to appeal, initially from the Court of Appeal and then from the Supreme Court, but both applications were refused.

23. On 9 March 2020, Ms Rzepala-Lewis wrote to Mr Hasling, saying:

“The Court of Appeal judge [sic] have reinstated the First Tier Tribunal’s decision, therefore any C18s which have been raised and paid for, can be reclaimed via [specific web address].

Please be aware that the UK is carefully considering the judgement, in order to decide whether to appeal.”

24. On 24 March 2020, Ms Rzepala-Lewis wrote to Mr Hasling again, saying (emphases in original):

“I sent you an e-mail dated 9 March 2020, whereby I provided guidance to apply for repayment or remission following the recent Court of Appeal judgment [2018] UKUT 305 (TCC), 2018 WL 04685885 [sic].

I now need to correct this original advice as a repayment is not appropriate.

I refer to Commission Regulation (EC) No 718/2009, published in the EU Official Journal on 7 August 2009, which entered into force 20 days later on 27 August 2009, concerning the classification of certain goods in the Combined Nomenclature. The recent Court of Appeal judgment refers to imports **pre-regulation** No 718/2009. The C18 demand for payment that I issued, refers to imports **post entry into force of the regulation**. Therefore, I now need to inform you that, **a repayment claim in this instance is not applicable and should not be applied for.**

I apologise for any confusion caused.”

25. On 31 March 2020, Mr Hasling responded, saying:

“Thank you for the clarification. Despite your instruction below, we shall be making a repayment claim for the full period and will challenge any refusal under the normal appeal process. This is on the basis that the regulation is fundamentally flawed.”

26. On 15 April 2020, Sunrise filed a Notice of Appeal against the Decisions and the related C18s, together with the Application. Despite the fact that permission was required for the appeal to proceed, the Tribunal allocated the appeal to the complex category and directed HMRC to provide a Statement of Case, and HMRC complied.

27. Just over a year later, on 30 April 2021, Sunrise filed an appeal against a third HMRC decision dated 20 April 2021 refusing repayment of customs duties and VAT for the period 12 February 2018 to 28 September 2020. That appeal was also allocated to the complex category.

28. There is considerable overlap between the mobility scooters at issue in this later appeal and those in the appeal for which permission is being sought. If the Application were to be allowed, the appeals would be consolidated.

### **The legislation and *Martland***

29. Finance Act 1994, s 16 includes provisions about appeals against “relevant decisions”. The term “relevant decision” is defined by FA 1994, s 13A, and it was common ground that the Decisions came within that definition.

30. FA 1994, s 16(1B) provides that (unless HMRC have been required to provide a statutory review) an appeal against a relevant decisions “may be made to an appeal tribunal within the period of 30 days beginning with...the date of the document notifying [the person] of the decision to which the appeal relates”. However, FA 1994, s 16(1F) provides that “an appeal may be made after the end of the period specified in subsection...(1B)...,if the appeal tribunal gives permission to do so.

31. In *Martland* the UT considered the same legislation in the context of an application to make a late appeal against an excise decision, and decided it by applying the principles set out by the Court of Appeal in *Denton*.

32. The parties agreed that the Application should be determined in accordance with the guidance given in *Martland*. At [44] of that judgment, the UT set out a three stage approach, namely:

- (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”.

### **The length of the delay**

33. The First Decision was made on 12 December 2019, and the 30 day time limit for an appeal expired on 10 January 2020. Sunrise filed the Notice of Appeal on 15 April 2020, a delay of just over three months.

34. The Second Decision was made on 14 February 2020; the 30 day time limit for an appeal expired on 14 March 2020, and Sunrise filed the Notice of Appeal on 15 April 2020, so the delay was just over a month.

### **Whether the delays were serious and/or significant**

35. In its grounds of appeal and the Reply, Sunrise submitted that the delays in filing both appeals were “not excessive” albeit not “very short”. However, in the submissions made following the case management hearing, Sunrise accepted that its delay in the appealing the First Decision was serious and significant, noting that the UT had said in *Romasave v HMRC* [2015] UKUT 254 (TCC) at [96] that:

“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.”

36. Neither party’s submissions focused on the Second Decision. I considered the guidance given in *Denton*, where at [25]–[26] the Court of Appeal discussed *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and the related case law. In *Mitchell* the Court of

Appeal stated that judges should begin their review by asking whether the breach can be regarded as “trivial”; they also used the words “minor” and “insignificant”. In *Denton* at [26] the Court said:

“...we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which ‘neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation’. Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees.”

37. Having taken into account this further guidance, my understanding is that I must decide whether the breach has (a) disrupted the progress of future litigation, either of the parties themselves, or of the Tribunal more generally, and/or (b) has been serious/significant in some other way.

38. Sunrise delayed appealing to the Tribunal, so the litigation had not begun. Although the addition of a new case to the Tribunal’s workload would have some effect on other litigants, the factual and legal overlap with Sunrise’s later appeal made this less significant than in most cases. Finally, HMRC had been informed by Mr Hasling’s email of 31 March 2020 that an appeal was to be made, so the other party was on notice that Sunrise intended to challenge the Decision. Taking into account all the above factors, I find that the delay in making the appeal against the Second Decision was not serious or significant.

### **Reasons for the delays**

39. I first summarise the position of the parties as to the reasons for the delays, and then set out my conclusions.

#### *The Appellant’s position*

40. The Appellant said that the Decisions had been issued because of the UT’s judgment in *Invamed*, and that this was clear from the Right to be Heard letters, which made no reference to the Regulation but only to the UT judgment. In addition, the UT had been highly critical of the Regulation, saying that it was based on a “flawed understanding of the meaning of ‘disability’”.

41. In the Appellant’s submission, HMRC’s position only changed when Ms Rzepala-Lewis sent her email of 24 March 2020. Until that date:

“It had been the practice, and understanding, of the parties that any payment of customs duty by the Appellant, consequent on a classification of mobility scooters under heading 8703 by HMRC was made under protest and that reclaims of the customs duty would be allowed in the event that it was concluded judicially that the correct classification was under heading 8713.”

42. In relation to the period after receipt that email, the Appellant said that:

“Had a Covid-19 ‘lockdown’ not taken place all but simultaneously with HMRC’s email of 24 March 2020, the Appellant would have filed its notice of appeal even more swiftly, after it became aware of HMRC’s change of reasons for the C18s. The Appellant was unable, for a period, to obtain access to the paperwork needed to file an appeal at the Tribunal. It nonetheless used its best endeavours to ensure that the appeal was filed as swiftly as possible and it ensured that the notice of appeal was filed within 3 weeks from 24 March 2020.”

*HMRC’s position*

43. HMRC did not accept that the Appellant had provided a good reason for the delays. They submitted that Sunrise either knew or should have known about the potential impact of the Regulation on the importations covered by the Decisions. They drew attention to the FTT’s statement that had the Regulation applied to the importations being considered in that appeal, they “would feel bound to apply [it] by analogy”, and that Patten LJ had said that had the Regulation applied to the scooters at issue, it “would have been binding and definitive for present purposes subject only to a possible challenge to its validity in the CJEU”.

44. HMRC also stated that:

“At no stage did the Commissioners indicate to the Appellant that they could or should ignore the statutory deadlines for lodging an appeal and therefore the Commissioners deny that they are responsible in any part for the delay in the Appellant’s appeal.”

45. In relation to the 22 day period following Ms Rzepala-Lewis’s email of 24 March 2020, HMRC said that the Appellant has insufficiently particularised why it was unable to file the appeal more quickly.

*The Tribunal’s view*

46. I agree with the Appellant that until 24 March 2020, the common understanding of the parties was that if HMRC lost the *Invamed* litigation at the Court of Appeal, they would refund the customs duty and VAT assessed by the Decisions and related C18s.

47. This can be inferred from the Right to be Heard letters, which only refer to the *Invamed* litigation and make no reference to the Regulation. It is also explicitly stated in Ms Rzepala-Lewis’s emails: on 9 March 2020 she told Sunrise that “the Court of Appeal judge have reinstated the First Tier Tribunal’s decision, therefore any C18s which have been raised and paid for, can be reclaimed”, and on 24 March 2020 she said:

“I sent you an e-mail dated 9 March 2020, whereby I provided guidance to apply for repayment or remission following the recent Court of Appeal judgment....I now need to correct this original advice as a repayment is not appropriate.”

48. This common understanding provides the Appellant with a good reason for the first part of the delay in making an appeal to the Tribunal. Because of that understanding, there was no need for Sunrise to appeal to the FTT, because:

- (1) if HMRC lost at the Court of Appeal, the money would be repaid to Sunrise without the need for further litigation; and
- (2) as the legal and factual issues in dispute were understood to be the same as in *Invamed*, if HMRC won at the Court of Appeal, the FTT would be bound by that judgment.



49. The position only changed on 24 March 2020 when Sunrise was told HMRC had changed their position, and were now seeking to rely on the Regulation.

50. It follows that I do not accept HMRC's submission that the Appellant "knew or should have known" the Regulation had changed the legal position compared with that considered in *Invamed*. Although HMRC referred to the FTT's view of the Regulation, that had in effect been displaced by the UT's much more critical assessment. Patten LJ's comment was made on 25 February 2020, well over two months after the First Decision. And, of course, both statements were *obiter*. The Appellant instead reasonably relied on the approach taken by HMRC as set out in Ms Rzepala-Lewis's correspondence.

51. As regards the period from 24 March 2020 to 15 April 2020, I take judicial notice of the fact that on 23 March 2020 the UK entered lockdown; workers were instructed by government that they "must" stay at home, and this caused widespread interruption to normal business dealings. Ms Rzepala-Lewis's email was sent the very next day.

52. Against that background, there is no reason to reject as unparticularised the Appellant's statement that the lockdown caused difficulties accessing all the relevant paperwork. Moreover, the further delay was only 22 days. I therefore accept that Covid-related issues provided a good reason for the second period of delay.

53. I add by way of footnote that HMRC's approach (at least to the Second Decision) appears to be at odds with their public guidance on Covid. At <https://www.gov.uk/tax-appeals/decision> HMRC state that they will not challenge delays in filing appeals with the Tribunal, where those appeals are against decisions made in February 2020. The Second Decision was made on 14 February 2020. Although the First Decision was made in December 2019, it was not until 24 March 2020 that the Appellant was told of HMRC's change of position. Of course, HMRC's guidance does not bind the Tribunal, and I have come to my own view as to whether Covid provides a good reason for the second period of delay.

#### **All the circumstances: the factors**

54. The third step in the *Martland* approach is to consider all the circumstances, and then to carry out a balancing exercise. I have taken into account the factors set out below.

#### *The need for time limits to be respected, and good reasons*

55. 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 making the appeal against the First Decision was serious and significant. However, there were good reasons for the delays in making both appeals.

#### *Extent of prejudice to HMRC*

56. As noted earlier in this decision:

- (1) HMRC have already filed and served a Statement of Case in relation to this appeal; and
- (2) on 30 April 2021 Sunrise filed a further in-time appeal relating to a later period, and there is considerable overlap between the mobility scooters at issue in that appeal, and those to which the Decisions relate.

57. As a result, allowing the Application would require HMRC to carry out relatively little extra work. Moreover, as the Sunrise appeals have been categorised as “complex”, HMRC would be able to claim their costs were they to succeed, and this reduces the extent of the prejudice.

*Extent of prejudice to other litigants*

58. One of the factors which has to be considered is the extent of prejudice to other litigants. Granting permission to appeal means that the Tribunal will allocate time to this appeal, which will inevitably cause some delay to the litigation of other tribunal users. However, the amount of extra work required of the Tribunal will again be relatively small, given the overlap with Sunrise’s 2021 appeal and the fact that the appeals would be consolidated.

*Extent of prejudice to the Appellant*

59. If the appeal is not allowed to proceed, the Appellant will be required to pay £383,736 to HMRC. That is a significant prejudice, albeit one which is an inevitable consequence of losing an application for permission to make a late appeal.

60. The Appellant also submits that the Tribunal should take into account the merits of its case, which it summarised as follows:

- (1) the Regulation is legally flawed as it is incompatible with the jurisprudence of the CJEU on the meaning of the term “disability”; and in any event
- (2) the mobility scooters in issue do not share the same objective characteristics as the vehicles described in the Regulation.

61. For their part, HMRC submit that the merits of the Appellant’s appeal are “weak”, noting in particular the comment of Patten LJ at [22] as to the relevance of the Regulation. They also did not accept that Sunrise’s scooters fell outside the descriptions in the Annex to the Regulation.

62. In *Martland* at [46] the UT said:

“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.”

63. In my judgment, it is not possible to say either that the merits of the Appellant’s appeal are “overwhelmingly” in its favour, or that it has a “hopeless” case; it appears instead to have an arguable case. In addition, the key evidential issues are in dispute. I therefore find that the merits are not a factor to be weighed in the balance.

### **Balancing the factors**

64. Once the circumstances have been identified, they must be balanced. The consistent message from *Denton*, *Martland* and *Katib* is that particular weight is to be given to two factors:

- (1) for litigation to be conducted efficiently and at proportionate cost; and
- (2) to enforce compliance with rules, practice directions and orders.

65. The following factors favour allowing the Application:

- (1) there are good reasons for the delay;
- (2) if the Application were to be refused, the Appellant would be required to pay HMRC £383,736, which is a significant sum;
- (3) allowing the Application will have little impact on the litigation between Sunrise and HMRC, or on other Tribunal users, because of:
  - (a) the overlap with the second Sunrise appeal, which is progressing in any event; and
  - (b) the time already spent by HMRC considering the evidence and the issues involved in this appeal, to the extent of filing a Statement of Case.

66. Of those three factors, I must ascribe significant weight to the third. On the other side of the scales is the Appellant’s failure to meet the statutory time limit. That also is a matter to which I have to ascribe particular importance. However, I must also take into account that there were good reasons for the delays.

67. Having carried out the weighing exercise, the balance clearly favours Sunrise, and I grant it permission to appeal.

### **Appeal rights and the other directions**

68. 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: 03 AUGUST 2021**