



Neutral Citation: [2022] UKFTT 405 (TC)

Case Number: TC08631

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video

Appeal reference: TC/2021/00059

LATE APPEAL – Martland and Katib considered - length of delay serious and significant – whether good reason for delay – no - whether late appeal appropriate in all the circumstances - no – application refused – appeal not admitted

Heard on: 20 October 2022

Judgment date: 04 November 2022

Before

**TRIBUNAL JUDGE GREG SINFIELD
TRIBUNAL MEMBER DEREK ROBERTSON**

Between

ELIZABETH GREEN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Nigel Ginniff, counsel, instructed by Cobham Murphy PHD, accountants

For the Respondents: Christine Cowan, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. On 17 January 2020, the Respondents ('HMRC') issued four assessments to the Appellant, Mrs Green. The assessments were for income tax of £172,943.10 for tax years 2012-13 to 2015-16. Mrs Green's accountant notified appeals against the assessments to HMRC on 11 December 2020, almost ten months after the time limit for doing so had expired. HMRC refused to agree to the late appeals. Mrs Green now applies to the First-tier Tribunal ('FTT') under section 49(2)(b) of the Taxes Management Act 1970 ('TMA 1970') for permission to give notice of the appeals after the expiry of the time limit.

2. With the consent of the parties, the hearing was held by video using the Tribunal video hearing system. The video hearing was attended by Mrs Green, Mr Nigel Ginniff, her counsel, Mr Chris Russell of Cobham Murphy, her accountant, and her husband, Mr Marc Green. For HMRC, the hearing was attended by Mrs Christine Cowan, a member of HMRC's Solicitor's Office and Legal Services and Mr Andrew Wilkinson, the HMRC officer who made the decision to refuse to accept Mrs Green's late appeals and Ms Laura Woodsmith of HMRC who was an observer.

3. The documents to which we were referred were an HMRC hearing bundle of 65 pages, an Appellant's hearing bundle of 68 pages, an authorities bundle of 106 pages, Mr Ginniff's written submissions on behalf of Mrs Green of 7 pages and HMRC's submissions of 18 pages. The Appellant's hearing bundle included witness statements from Mrs Green, Mr Green and Mr Russell.

4. 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. As such, the hearing was held in public.

LEGAL FRAMEWORK

5. Section 31A(1) TMA 1970 provides that an appeal must be made within 30 days of the date of the issue of the assessments.

6. Section 49 TMA 1970 states:

“49(1) This section applies in a case where–

(a) notice of appeal may be given to HMRC, but

(b) no notice is given before the relevant time limit.

49(2) Notice may be given after the relevant time limit if–

(a) HMRC agree, or

(b) where HMRC do not agree, the tribunal gives permission.

49(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

49(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

49(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

49(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

49(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

49(8) In this section ‘relevant time limit’, in relation to notice of appeal, means the time before which the notice is to be given (but for this section).”

7. Rule 20(4) of the FTT Rules provides:

“(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal-

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.”

8. The Upper Tribunal has given guidance on the correct test to be applied when considering an application for permission to make a late appeal in *Martland v HMRC* [2018] UKUT 178 (TCC) (*‘Martland’*) at [23] – [47], the essence of which is summarised at [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 v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926]:

(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.”

ISSUE

9. The only issue is whether Mrs Green should be permitted to notify appeals in December 2020, almost ten months after the time limit for appealing had expired.

10. In deciding whether to give permission, we apply the three-stage approach in *Martland*. The first stage is to consider the length of the delay in notifying the appeals. The relevant time limit is 30 days and, in this case, the delay was almost 10 months. In the context of a 30 day time limit, we consider that such a delay cannot be described as anything other than serious and significant and Mr Ginniff did not contend to the contrary. That leaves the second stage which is consideration of the reason or reasons for the failure to comply with the time limit and the last stage of considering all the circumstances of the case.

EVIDENCE

11. As stated above, we were provided with two bundles of documents including witness statements from Mrs Green, Mr Green and Mr Russell. At the hearing, the witnesses all gave evidence and were asked questions by Mr Ginniff and Ms Cowan.

12. We found Mr and Mrs Green to be frank and honest in their evidence, both written and oral, about the delay which we accept in its entirety. As discussed below, we could not accept all of Mr Russell's evidence because there were gaps in his recollection or it was contradicted by the evidence of Mr and Mrs Green which we preferred.

13. On the basis of the written and oral evidence, we make the following findings of fact which are material to consideration of the second and third of the *Martland* stages.

FINDINGS OF FACT

14. Mr and Mrs Green had both been directors of a company called Safeguard Security Group Ltd ('SSG'). Mrs Green resigned as a director on 21 July 2010. Mr Green ceased to be a director 25 March 2016 when SSG was sold. During their time as directors of SSG, both Mr and Mrs Green had a director's loan account with SSG. Mrs Green said that, not long after she resigned, the amount of her director's loan was transferred to Mr Green.

15. In March 2016, HMRC raised an assessment charging Mrs Green with income tax on the operation of a director's loan account and indebtedness to SSG for the 2011-12 tax year. A late appeal against the assessment was made on 6 May 2016 and accepted by HMRC.

16. We mention these matters only as background to the assessments and make no finding that there was (or was not) a transfer from Mrs Green to her husband as it is not relevant to the issue of whether Mrs Green should be permitted to make a late appeal in 2020.

17. It is, however, potentially relevant that Mrs Green's mother died of cancer on 24 September 2019 and that this affected Mrs Green quite badly for some months afterwards. Mrs Green told us that, following her mother's death, she found coping with any matters very difficult although she did not necessarily appreciate it at the time.

18. On 4 November 2019, Mr Wilkinson of HMRC, wrote to Mrs Green setting out concerns about the accuracy of tax returns submitted by Mrs Green since 2011-12 relating in large part to the director's loan account issue referred to in [15] above. The letter stated:

"The various assessments will be issued to you shortly. You have the right of appeal against the assessments and should submit any appeals in writing clearly stating the grounds for your appeals."

19. Mrs Green's evidence was that she may have received the 4 November letter from HMRC but she could not remember it. She explained that she was not in good place and had a lot to deal with after her mother's death. Mr Green stated that his wife had not shown him any such letter or told him about it. We accept Mrs Green's evidence. Her mother had died less than two months earlier and she was, understandably, upset and preoccupied with other matters. That does not mean that Mrs Green did not receive the letter of 4 November but we find that, if she did, she did not appreciate its significance or give it the attention that she would have done in less difficult times. It is agreed, however, that the letter of 4 November was not sent to Mrs Green's accountant, Mr Russell of Cobham Murphy. HMRC acknowledge that the failure to send a copy of the warning of discovery assessments letter to Mr Russell was a mistake. Whether the letter of 4 November was received by Mrs Green and the fact that it was not sent to Cobham Murphy at the time are irrelevant to the application for permission to make a late appeal as the time limit for appealing only started to run when the assessments referred to in the letter were actually issued and there is no dispute that those were received by Mrs Green.

20. On 17 January 2020, HMRC issued four assessments for the tax years 2012-13, 2013-14, 2014-15 and 2015-16 and sent them to Mrs Green. Mrs Green told us that she remembered receiving the assessments in January. She said that she did not understand why she had received them and that she had no idea that she owed HMRC money. Mrs Green passed the assessments straight onto Cobham Murphy. This was corroborated by Mr Green who, in his witness statement and in oral evidence, said that the assessments of 17 January were sent to Cobham Murphy on or about 20 January 2020. Mrs Green said that she instructed Cobham Murphy to tell HMRC that they had got it wrong. Both Mrs Green and Mr Green understood that the matter was being dealt with by Cobham Murphy.

21. There is an inconsistency between the evidence of HMRC and Mr and Mrs Green and the evidence of Mr Russell of Cobham Murphy in relation to the assessments. Mr and Mrs Green state that they sent the assessments to Cobham Murphy and had a conversation with Mr Russell about them in which he mentioned the 30 day appeal period. HMRC stated that they also sent the assessments to Mr Russell. In evidence, Mr Russell said that he did not believe that he had ever received copies of the assessments from HMRC and that he had no record of receiving copies of assessments from Mr and Mrs Green. Mr Russell said that he could not find copies of the assessments from the Greens on Cobham Murphy's system. He said that he appreciated that Mr Green's evidence was that he had sent the assessments to him but offered no explanation for that discrepancy.

22. Mr Russell accepted in cross-examination that he had been made aware of the assessments in a telephone conversation with Mrs Green in January 2020. He said that he could not remember the details of a telephone conversation from that long ago. Mr Russell's evidence was that, at Cobham Murphy, they do not take file notes of telephone calls with clients. When it was put to him that Mr Green had said that, when he contacted Cobham Murphy in January, he had been told about the 30 day appeal period, Mr Russell said that he had no recollection of talking to the Greens in January 2020 but that the end of January was a very busy period. We believe that Mr Russell meant that he had no clear recollection of a conversation with Mr and Mrs Green at that time as he had accepted that he had been made aware of the assessments by Mr and Mrs Green in a telephone call.

23. There is no dispute that Mr Russell was aware from a telephone conversation with Mr and Mrs Green that HMRC had issued assessments and Mrs Green had received them on or before 20 January 2020. That was why Mr Russell attempted to contact HMRC by telephone on 23 January. We accept the evidence of Mr and Mrs Green that they sent copies of those assessments to Mr Russell on or around 20 January and find, on the balance of probabilities, that Mr Russell did receive them. We make that finding because, in subsequent communications with HMRC, Mr Russell asked for and was sent a copy of the letter of 4 November 2019 but never requested copies of the assessments. We consider that it is inconceivable that an adviser would not ask to see copies of the assessments about which clients had contacted them for advice. The fact that he did not ask Mr Wilkinson to send him copies of the assessments indicates that Mr Russell already had them. Another indication that Mr Russell had seen copies of the assessments is that it is not until 17 December 2020 (see [34] below) that Mr Russell said to Mr Wilkinson that he had never received copies of the assessments from HMRC. We also find that Mr Russell told Mr and Mrs Green that there was 30 day time limit for making an appeal because it is, in our view, an obvious and important point for an adviser to make when a client contacts them for advice about what to do when faced with an assessment.

24. On 24 January, Mr Russell contacted HMRC and discussed the position with Mr Wilkinson on the telephone. Mr Wilkinson sent Mr Russell a copy of the letter of 4 November 2019.

25. Mr Russell explained that Cobham Murphy had a document management system that recorded all post that was received. He said that he did not receive any correspondence from HMRC between 24 January and November 2020. Neither Mrs Green nor HMRC produced any evidence of any correspondence by post or email in relation to the assessments during that time. We find that, after 24 January, there was no further correspondence between Cobham Murphy and HMRC in relation to the assessments until Mr Russell emailed Mr Wilkinson on 12 November 2020.

26. The time limit for notifying an appeal against the assessments to HMRC expired on 16 February 2020 without any appeal being notified to HMRC. As the assessments had not been appealed, HMRC Debt Management wrote to Mrs Green on 6 March 2020 seeking payment of the amounts shown on the assessments. The letter from Debt Management was not copied to Mr Russell. Mrs Green said that did not remember receiving any letter from Debt Management in March 2020.

27. Mrs Green told us that she believed that Cobham Murphy were dealing with HMRC between February or March 2020 and November 2020 and attempting to resolve the issue the assessments. During that period, Mrs Green spoke to Cobham Murphy a few times on telephone calls about the assessments and other matters although she could not remember the dates when she spoke to them. She said that Cobham Murphy led her to believe they were dealing with it and were waiting to hear back from HMRC. This was corroborated by Mr Green who said that his wife had told him that she had had a number of conversations with Cobham Murphy between January and November and they had told her that they had been in communication with HMRC and were awaiting a response. Mr Russell said in evidence that he had no recollection of having any contact with Mr or Mrs Green between late January and November 2020. He speculated that Mrs Green may have been in contact with others at Cobham Murphy. We accept that Mrs Green was told or, at the very least, given the impression by someone at Cobham Murphy that they were dealing with HMRC in relation to the assessments. It is not necessary in this case for us to determine whether that someone was Mr Russell or some other person.

28. Due to the impact of the COVID pandemic, HMRC Debt Management paused any further recovery action for most taxpayers, including Mrs Green, between March and September 2020. In relation to Mrs Green's case, a debt recovery agent visited Mrs Green's home on 3 November and left a notice of appointment for 6 November. When the debt recovery agent called on 6 November, Mrs Green was not at home. The agent left a substitute service notice at the address.

29. Mrs Green informed Mr Russell at Cobham Murphy that she had received correspondence from HMRC which showed that they were pursuing collection of the tax shown on the assessments.

30. Mr Russell emailed Mr Wilkinson on 12 November. His email forwarded Mr Wilkinson's email of 24 January and said:

“This is the last correspondence we received in relation to the enquiry into Mrs Green

Please note that we understand a determination has been made.

Covid has impacted us all and neither myself nor Mrs Green has received correspondence until the threat of this demand

As such no one has been able to raise adequate appeals or defence.

I would therefore request that you hold collection whilst we are able to appeal, albeit late.

Any queries please ask”

31. On 17 November, Mr Wilkinson told Mr Russell that no appeals had been received in respect of the assessments last discussed on 24 January.

32. In an email on 11 December, Mr Russell notified an appeal to HMRC and made a late appeal application on behalf of Mrs Green.

33. On 17 December, Mr Wilkinson and Mr Russell exchanged emails. Mr Wilkinson said that he was minded to reject the late appeal application as so much time had passed without an appeal but gave Mr Russell a further opportunity to explain the reason or reasons why no appeal had been made before 11 December.

34. In an email at 12:42 on the same date, Mr Russell said:

“The assessments mentioned (to be issued in the future) in your email and letter of 24 Jan were never received by ourselves despite me requesting to be included in correspondence and being registered agent.

How can we expect to be in a position to appeal when HMRC are not following due process and sending us the information.

I disagree with your comments on debt management and have previously received many notices of determination and assessments in relation to our clients in the past.

If you let me have copies of the actual assessments you say were raised then I can appeal in more detail, if other taxes are due then I will recommend my client pays these, if however I believe they are not due I will formally appeal and request collection is held.

Based on the filings of HMRC I feel it far from acceptable to continually pressure my client with threats of debt collection which are for a contested debt that we have had no opportunity to defend.

I therefore formally request collection is held until such time as we have had the opportunity to appeal the assessment (we haven't had these yet) and due process has been upheld.”

35. In another email later on the same date, Mr Russell said:

“It is apparent that there has been confusion between HMRC, the client and ourselves in relation to these assessments and this client in general.

Mrs Green however has been reliant on professional advice but clearly this matter has fallen between the cracks as detailed above and below.

HMRC's published protocol is that they should not collect tax that is not due and clearly this case is one that seems to fit this criteria (sic).

Late appeals are allowed and we see no reason why one should not accepted (sic) at this juncture with the assessments being vacated in the interim.”

36. In yet another email at 15:35 on 17 December, Mr Russell said:

“We have a document management system – I have been through this for Mrs Green and there is no record of the assessments being received and filed.

As you have already mentioned HMRC debt management and yourself have not been in touch with CM which is why we have not dealt with this case and the appeal is late.

It is clear that the assessments are excessive, if you feel that your assessments are sound then there should be no reason to object to an appeal as they will stand anyway.

As mentioned Mrs Green relies on professional advisers and we haven't been in receipt of any of the Debt management correspondence

Please now accept the appeal and vacate these assessments.

37. In a letter dated 21 December to Mrs Green, Mr Wilkinson said that no satisfactory explanation had been given as to why Mrs Green had not submitted a timely appeal against each assessment within the 30 day time limit. Accordingly, Mr Wilkinson did not agree to Mrs Green giving notice of appeal after the relevant time limit.

38. On 29 December 2020, the FTT received a Notice of Appeal submitted by Mr Russell on behalf of Mrs Green. Mr Russell's covering letter acknowledged that the appeal was late. In the Notice of Appeal, Mrs Green applied to be allowed to make a late appeal. The reasons given for the appeal being late were as follows:

"The original appeal was late, this was due to HMRC not corresponding with us [ie Cobham Murphy] as agents in relation to the case or assessments. following (sic) this further correspondence in relation to any debt has also not been sent to us as agents.

Mrs Green relies on professional advisers.

During COVID no debt collection has taken place and due to this we were unaware the debt was under collection until recently when debt recovery commenced.

HMRC have now rejected our late appeal"

39. The grounds of appeal were as follows:

"The assessment includes amounts for tax on the write of (sic) of a loan to Mrs Green. This loan was not hers but her husbands (sic) Mr Green, he has paid tax on the receipt of this income. Further more (sic) as part of the sale of the company the loan related to, the purchasors (sic) were to settle any outstanding debt.

The irrecoverability of this loan is nothing to do with Mrs Green and it is inequitable to try and collect this money from her."

DISCUSSION

40. As it is accepted that there was a serious and significant delay in notifying the appeals, we move straight considering the reason or reasons for the delay. In the Notice of Appeal, the reasons given for the appeal being late may be summarised as follows:

- (1) HMRC did not correspond with Cobham Murphy as agents in relation to the assessments or debt recovery;
- (2) Mrs Green relied on professional advisers; and
- (3) no debt collection took place between March and September 2020 due to Covid so Cobham Murphy were unaware that HMRC were seeking to collect the debt until November 2020.

41. Mr Ginniff submitted that HMRC did not copy the assessments to Mr Russell when they were issued and there was no evidence that copies of assessments were sent to Mr Russell against which he could appeal on behalf of Mrs Green. He further submitted that Mrs Green was recovering from the death of her mother in September 2019 throughout the period from

January 2020 to March 2020 and, in any event, believed that her tax affairs were being dealt with by Mr Russell. Mr Ginniff also contended that the restrictions imposed by Covid were a factor.

42. We do not accept that the evidence shows that there was any good reason why Mrs Green's appeals were not notified to HMRC within the 30 day time limit, ie by 16 February 2020.

43. The first and third reasons can be taken together. In short, they are that HMRC did not provide copies of the assessments or the debt recovery correspondence to Cobham Murphy. Dealing with the latter point first, there is no requirement for HMRC to copy debt collection letters to representatives and, more importantly, the letters were only sent after the time for appealing had expired. Similarly, reference to Covid restrictions seems misplaced as lockdown did not start until 16 March 2020, ie one month after the time for appealing had expired.

44. In relation to the first reason, HMRC maintain that they sent copies of the assessments to Cobham Murphy but it does not matter if they did or not because there is no dispute that the assessments were received by Mrs Green on or shortly after 17 January and it is receipt by the taxpayer that starts time to appeal running. Mrs Green and Mr Green contacted Cobham Murphy and spoke to Mr Russell about the assessments and he mentioned that there was a 30 day time limit for making an appeal. We have found that Mr Russell probably did receive copies of the assessments which were sent to him by Mr Green on or around 20 January but, again, it does not matter for the purposes of this application whether Mr Russell received copies of the assessments or not. The material facts are that Mrs Green received the assessments and Mr Russell was aware that she had received them and had told her that she had 30 days to notify appeals against them but she did not do so and neither did Mr Russell.

45. The second reason suggested for the failure to notify the appeals in time is that Mrs Green relied on her professional advisers. That reliance was particularly important because Mrs Green was still feeling the effects of the loss of her mother a few months before. Mrs Green believed, quite reasonably, that Cobham Murphy were dealing with HMRC between February or March 2020 and November 2020 and attempting to resolve the issue the assessments. It is clear from Mr Russell's evidence that that was not the case: there was no correspondence with HMRC about the assessments during that period and no appeals were notified by Cobham Murphy on Mrs Green's behalf.

46. Unfortunately for Mrs Green, it is well established 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" (see the Upper Tribunal's decision in *HMRC v Katib* [2019] STC 2106 ('*Katib*') at [54]). In *Katib*, the Upper Tribunal had to consider the extent to which reliance on an adviser was a justifiable reason for failing to make an appeal in time. In that case, the adviser did not provide competent advice to Mr Katib, misled him as to what steps were being taken to appeal and failed to appeal on Mr Katib's behalf. On the facts of the 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 observed at [56] that:

"... the correct approach in this case is to start with the general rule that the failure of [the adviser] 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."

47. In [58] and [59], the Upper Tribunal said:

“... the core of Mr Katib’s complaint is that [the adviser] 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. [Counsel for Mr Katib] 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 [the adviser] or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of [the adviser’s] failings and, if he wishes, pursue a claim in damages against him or [the adviser’s firm] for any loss he suffers as a result.”

48. We are bound by the decision in *Katib* and, as a result, we are driven to find that the fact that Mrs Green was let down by Mr Russell and Cobham Murphy does not constitute a good reason for the failure to appeal.

49. The third stage in the *Martland* three-stage approach is to consider all the circumstances of the case, balancing 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. In considering the prejudice to the parties, we 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.

50. In relation to prejudice, Mr Ginniff contended that Mrs Green’s appeals had merit, the evidence relating to them was largely contemporaneous documentation which was not reliant on fading memories and she would be significantly prejudiced if the appeal is not admitted and that the prejudice to HMRC’s would be much less.

51. In relation to the merit or otherwise of Mrs Green’s case, the Upper Tribunal said in *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. In [*R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472], 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 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.”

52. It is not clear to us that Mrs Green’s case is hopeless or that it has merits which are overwhelmingly in her favour. We are unable to form a view on the strength or weakness of Mrs Green’s appeals without hearing and evaluating the evidence and arguments which would be inappropriate in an application for permission to make a late appeal. It is clear that there are some gaps and, therefore, areas of potential weakness in the evidence. Mrs Green’s case is based on the assertion that her director’s loan was transferred to Mr Green shortly after she resigned as a director in 2010. In their witness statements, Mr and Mrs Green both frankly admit that records of SSG may not have reflected the transfer of Mrs Green’s loan to Mr Green but state, in identical terms, that “it was what we had agreed between us as shareholders in the company and a married couple”. As the Upper Tribunal cautioned in *Martland*, we should be very wary of taking into account evidence which is in dispute and it would not be appropriate to do so in this case without hearing detailed evidence on the point and giving HMRC an opportunity to challenge it. In the circumstances, we cannot determine whether Mrs Green’s appeals are very likely to succeed or to fail or whether the balance of prejudice, based on the likely outcome of the appeals, is in favour of Mrs Green or HMRC. In conclusion, we are unable to give any weight, one way or another, to the merits or otherwise of Mrs Green’s appeals.

53. Of course, Mrs Green will be prejudiced if we refuse to grant her permission to notify the appeals late in that she will have lost her opportunity to contest the appeals and will be liable to pay a substantial sum of money. That, however, is a consequence of the failure to notify the appeals in time and it cannot be right that a delay which is significant and for which there was no good reason should be overlooked simply because the amount at stake is very large or significant to the would-be appellant. If that were so there would be no point in having a time limit for notifying high value appeals or appeals of lower value by poorer taxpayers.

54. Against that prejudice to Mrs Green, we balance the prejudice to HMRC and the public interest if the appeals are allowed to proceed after such a long period of delay and the need for statutory time limits to be respected.

55. We consider that Mrs Green has not given a sufficiently good reason for a serious and significant delay in appealing against the assessments and, in all the circumstances, it is not appropriate to give permission for Mrs Green to make late appeals in this case.

DECISION

56. For the reasons set out above, Mrs Green’s application for permission to notify the appeals late is refused and, accordingly, the appeals are not admitted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

57. 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.

**JUDGE GREG SINFIELD
CHAMBER PRESIDENT**

Release date: 04th NOVEMBER 2022