Neutral Citation: [2023] UKFTT 27 (TC)

Case Number: TC08686

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/06469

VAT – application for permission to make late appeal – whether an earlier Notice of Appeal had been posted to the Tribunal – credibility of evidence – Martland and Katib considered and applied – application refused

Heard on 19 December 2022
Judgment date: 05 January 2023

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

GOLDEN GROVE TRUST

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Robert Warne of Crowe UK LLP, instructed by the Appellant

For the Respondents: Ms Jessica Parlour, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

1. The Golden Grove Trust ("the Trust") is a registered charity. On 7 February 2019, Officer Jacob Mathers of HM Revenue & Customs ("HMRC") issued the Trust with a VAT assessment totalling £92,644 ("the Assessment"). On 5 December 2019, Officer Mathers issued the Trust with a decision that the input tax incurred on constructing a café and toilets was not recoverable as input tax ("the Decision").

2. The Trust applied for permission to make late appeals against both the Assessment and the Decision ("the Application"). For the reasons summarised below, and explained more fully in the main body of this judgment, I have refused permission for the Trust to make late appeals.

SUMMARY

3. If a party wishes to appeal against VAT decision made by HMRC, the law requires that a Notice of Appeal reach the Tribunal within 30 days of the date on which the decision appealed against was issued, or (if a review has been requested) within 30 days of the date of the HMRC review decision, unless an extension of time has been given by HMRC.

4. Mr Warne gave evidence that:

(1) he had sent a paper Notice of Appeal form to the Tribunal;

(2) it had been lost in the post, or lost by the Tribunal; and

(3) he had contacted the Tribunal to establish what had happened to that Notice of Appeal.

5. However, Mr Warne's evidence lacked credibility. I found as facts that no such Notice of Appeal had been posted, and that Mr Warne had not contacted the Tribunal to follow up. It was not until 17 September 2021 that he filed a Notice of Appeal form online, together with the Application.

6. In deciding whether or not to allow the Application, I applied the three-stage test set out by the Upper Tribunal ("UT") in *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*"), which is as follows:

(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".

7. Applying those tests, I found as follows:

(1) In relation to the Assessment, the delay was over two years and four months; in relation to the Decision, the delay was over one year and three months. These delays were plainly very serious and significant.

(2) They occurred because of Mr Warne's failure to make the appeals by the statutory time limits, and because of the Trust's confidence in his handling of the case.

(3) Although the consequence of refusing permission is that the Trust cannot challenge the Assessment and the Decision at the Tribunal, the circumstances of the case were overwhelmingly in favour of refusing permission. This was essentially because:

(a) significant weight must be given to the failure to respect statutory time limits;

(b) there was no good reason for the long delays;

(c) allowing cases to proceed when the appeal has been made out of time prejudices both HMRC and other taxpayers; and

(d) although Mr Warne had primary responsibility for the delay, the Trust shares some of the blame, see §77ff and §94ff.

THE EVIDENCE

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

(1) the Trust's Notice of Appeal, together with the Application;

(2) HMRC's Notice of Objection to the Application; and

(3) correspondence between the parties, and between the parties and the Tribunal.

9. Mr Warne is a VAT Partner at Crowe UK LLP ("Crowe") and the Head of its VAT practice. He gave oral evidence and was cross-examined by Ms Parlour. I found his evidence to be unreliable for the following reasons:

(1) He stated that an earlier Notice of Appeal had been posted to the Tribunal, but provided contradictory dates, see §48. Taking into account all the evidence, I found as a fact that no such Notice of Appeal had been posted, see §53.

(2) He repeatedly told HMRC that he had contacted the Tribunal to follow up on the Notice of Appeal, but this too was not correct, see §54.

(3) On 31 August 2021, in an email copied to the Trust, Mr Warne said he had sent Officer Mathers a copy of the Notice he had filed. The Tribunal has copies of the correspondence between the parties, and at no point did Mr Warne send a copy of a Notice of Appeal to Officer Mathers.

(4) On 2 August 2021 Mr Warne said he had submitted *two* previous Notices of Appeal to the Tribunal. There is no supporting evidence whatsoever for the statement that he had sent the Tribunal a second Notice of Appeal.

(5) When asked by Ms Parlour if he had any file notes of attempts to contact the Tribunal, he said "I could find out by looking to see if there are any notes". Ms Parlour then took him to her request, made over a year previously on 25 November 2021, that he provide any such evidence. Mr Warne then changed his position and said he had looked at the client file and there were no notes.

10. At the end of the hearing Mr Salmon, a Trustee of the Trust, asked to make a statement. I gave him permission to do so with the proviso that Ms Parlour had the right to ask him questions about any evidence within that statement, and could also respond to any submissions made. His evidence about the Trust's understanding has been included at §13; reference is made to his submissions at §98.

11. On the basis of the evidence summarised above, including my findings on credibility, I make the following findings of fact.

FINDINGS OF FACT

12. The Trust is a small charity. It operates the park and related buildings which constitute the Gelli Aur Country Park near Llandeilo in Carmarthen. Within the park is a café and gift shop. In 2015, a separate company, Golden Grove Ventures Ltd ("GGV") was established as the trading arm of the Trust. As noted above, Mr Salmon is a Trustee of the Trust.

13. None of the Trustees are experienced in VAT matters, and at some point before 3 October 2019, the Trust instructed Crowe to provide advice; Mr Warne is Crowe's Head of VAT.

The HMRC enquiries, the Assessment and the Decision

14. On 15 November 2017, Officer Mathers wrote to the Trust to say he was conducting an audit of its VAT returns for the period 11/13 to date. Correspondence ensued, and on 30 November 2018, Officer Mathers issued a "best judgment" assessment for period 11/14 denying all the £3,185 input tax claimed. This assessment was not appealed; it also was not referred to by Mr Warne in the context of the Application.

15. On 7 February 2019, Officer Mathers issued the Trust with the Assessment. It related to periods 02/15 to 11/18 and was for £92,644. It was raised on the basis that:

(1) when claiming input tax recovery, no restriction had been made by the Trust for exempt and non-business activities;

(2) income received by GGV had incorrectly been included in the Trust's VAT returns;

(3) holiday lettings and camping had been wrongly treated as exempt, when they are standard rated; and

(4) no taxable income had been received by the Trust for the VAT years ending 31 July 2015, 2016 and 2017, and as a result, no input tax was recoverable for those years; for 2018 and (provisionally) 2019, the recoverable percentage was 2.3%.

16. The Assessment included the following paragraph:

> "If you disagree with our decision, you need to write to us within 30 days of the date of this notice, telling us why you think our decision was wrong and we will look at it again. If you prefer, we will arrange for a review by an HMRC officer not previously involved in the matter. You will then have the right to appeal to an independent tribunal. Alternatively you can appeal direct to the tribunal within 30 days of this notice."

17. Further correspondence between the parties ensued, and Officer Mathers agreed to extend to 3 May 2019 the time limit for requesting a review or making an appeal. The correspondence in the Bundle refers to Mr Warne writing to Officer Mathers in June 2019, so Crowe must have been instructed from at least that date. The Trust did not accept the offer of a statutory review or make an appeal within that time limit.

18. On 3 October 2019, Mr Warne told Officer Mathers that in his opinion the construction work for the café constituted a continuous supply of services and that an invoice would be raised by the Trust.

19. Officer Mathers replied on 5 December 2019, saying that this was a new point, but (a) given the Trust's original intention, and (b) as any invoice would be raised in a later year, any such recharge would not change the position for previous periods. That letter constituted the Decision; it included a passage stating that the Trust had 30 days to ask for a review or to appeal.

20. Officer Mathers subsequently extended that time limit, and on 10 February 2020, Mr Warne requested a statutory review on behalf of the Trust. His letter said (text as in the original):

> "I now formally request a local review of your decision that these costs relate to a free supply. This is simply not the case. They are incurred in relation to a taxable supply of a recharge of construction costs being made by the Trust to the Trading Company…they are not in relation to a free supply as they are now being recharged in full to the trading company."

21. The statutory review was carried out by Officer Hills, who issued his decision on 26 March 2020. He upheld the Decision, noting that (a) at the time the costs were incurred, the Trust did not intend to charge GGV for the use of the café, and (b) under the lease GGV was not required to pay the Trust any consideration for the use of the building. Under the heading "what happens next" the Decision said:

> "If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. If you want to appeal to the tribunal, you must write to the tribunal within 30 days of the date of this letter. You can find out how to do this on the Tribunals Service website https://www.gov.uk/taxtribunal you can phone them on 0300 123 1024 or e-mail them at taxappeals@justice.gov.uk."

22. The Decision was sent to the Trust, and a copy was sent by post to Mr Warne at Crowe's office in London. Crowe's normal practice is that Notices of Appeal are completed and sent out by junior staff, not by partners.

The correspondence

23. Three days earlier, on 23 March 2020, the Prime Minister had announced the first coronavirus lockdown; the Coronavirus Act 2020 received Royal Assent on 25 March and lockdown measures came into force the following day. Crowe's offices were closed, and Mr Warne began working at home.

24. On 20 April 2020, mindful of the issues caused by the lockdown, Officer Mathers sent an email to Mr Warne, saying "if you are intending to appeal the outcome of the review that was recently carried out, I would be grateful if you would let me know". Mr Warne responded by email the same day, saying "What was the outcome? Nothing has been emailed to me??"

25. On 22 April 2020, Officer Mathers sent Mr Warne a copy of the statutory review letter; his covering email said "I have attached a copy of the outcome, I apologise if these have not arrived". On 27 April 2020, Mr Warne emailed Officer Mathers, saying "we will be appealing the decision and applying for hardship", and in a second email the following day, said:

> "As I say I will tick hardship and late application. As you can appreciate in these difficult times things were always going to be tricky!"

26. On 8 June 2020 Mr Warne emailed again, saying "VAT Tribunal documents have been submitted along with an application for hardship". On 26 October 2020, Officer Mathers replied, asking "have not received any news about the tribunal hearing, have you been provided a TC reference number for the appeal?" Mr Warne responded the same day, saying "Absolutely nothing from the VAT Tribunal [sic] in respect of Golden Grove Trust. Is there a back log due to Covid?"

27. Officer Mathers replied on 27 October 2020, saying "I am just trying to see if we can get any update from our end, please can you confirm the name and address used to register the appeal?" Mr Warne responded by return, saying "Forms were sent using Crowe LLP at St Brides House, Salisbury Square, London address".

28. Officer Mathers emailed again on 28 October 2020, as follows:

> "Thank you for confirming that. I have received a reply to say the Tribunal have been unable to trace an appeal under these details. I have also checked with colleagues who have received notifications for appeals submitted more recently than June. Please can I ask that you or the customer contact the Tribunal to establish what has happened to the application? If you receive any update I would be grateful if you could let me know."

29. Mr Warne replied, again by return, saying:

> "This is not very encouraging news and I would like to get this one settled. At the moment our office is closed and the GGT file is in that office. Due to the nature of the client, most things were sent by post so there is little that is stored electronically. As soon as I can get back into our office I will get the file and start chasing [the] Tribunal up and I will copy you in to all the correspondence as well."

30. Mr Warne did not provide the further update he had promised, and on 14 December 2020, almost two months later, Officer Mathers chased again, as follows:

> "Please could you let me know whether there is any update on the Appeal?
>
> I appreciate the difficulties still faced by many organisations during the ongoing Covid crisis and that this has caused problems accessing documents.
>
> Due to the time that has elapsed since the Independent Review Decision and the fact that there appears to be no record of any Appeal you may wish to contact the Tribunal Helpline for Advice (0300 123 1024). They may be able to advise on late Appeals and what to do in this situation."

31. Mr Warne replied the same day, saying (text as in original):

> "I'm not sure what the Courts are doing at the moment with regards to hearings. There hasn't been the report of a case for a couple of months. I will copy you in to the email I have sent and will copy you in to another one I will send this week. It is a very frustrating time to tax payers, advisors and HMRC. Time delays appear inevitable on all VAT matters both in Courts and internal matters."

32. Mr Warne did not send Officer Mathers a copy of any emails between him and the Tribunal. On 23 February 2021, Officer Mathers chased again, and on 1 March 2021, Mr Warne said "we will be responding this week when we have again chased the Tribunal". On 8 March 2021, he said:

> "I have finally got through to the tribunal today who say that this went to HMRC as it was a late appeal which needed your approval? Would it have gone to your Solicitors Office??"

33. Crowe's file for the Trust contains no note of any conversation between Mr Warne and the Tribunal on that date or any other date. Officer Mathers emailed back on 9 March 2021, asking Mr Warne to provide a Tribunal reference number, but Mr Warne did not respond. On 27 May 2021, Officer Mathers wrote to the Trust, copying Mr Warne. He said:

> "I was informed by your advisor Mr Warne on the 23rd of April 2020 that an application to the VAT Tribunal would be made following the outcome of the independent review. On the 8th of March 2021 I was advised by Mr Warne that he had spoken to the Tribunal who said it was with HMRC.
>
> On the 9th of March I requested a tribunal reference number so I could try and establish if we had received it. I have had no reply to my last email and have been unable to locate any records to show we have been contacted regarding the appeal.
>
> Please can you provide the Tribunal reference by the 9th of June 2021. If I have not received it by this point I will need to remove the inhibits on the assessments, meaning payment would be due on them, as I currently have no evidence to confirm a valid appeal has been made."

34. On 28 June 2021, Mr Warne responded, attaching a letter dated 21 June 2021 in which he said:

> "Despite submitting VAT Tribunal papers no record appears to exist of these being processed or even received by the Tribunal. During the pandemic, Crowe U.K. LLP moved offices. The client's file has yet to be scanned and therefore a request has been made to recover the file. Once this has been recovered in the next 7 days I will find the original papers and send them to you as proof that the application was made to the Tribunal…it will be our intention to resubmit the case with the permission of HMRC."

35. Mr Warne did not send Officer Mathers a copy of "the original papers". After allowing the seven days referred to by Mr Warne to elapse, Officer Mathers wrote again on 7 July 2022, saying:

> "As the Tribunal has apparently received no request for an appeal I have no choice at this point but to continue with lifting the inhibits currently in place. To the best of my knowledge any appeal should be sent to directly to the Tribunal service rather than to HMRC. They can then contact us through the normal channels."

36. On 2 August 2021, Mr Warne sent another email to Officer Mathers. He made no reference to his review of the file or to "the original papers", but instead said:

> "I sent you an email on 8th March…because the case had been referred to HMRC because it was a late appeal/and we were requesting hardship so not paying the VAT until the appeal had been heard . We also sent you a letter on 28th June 2022. As you aware I cannot take your decision on the business/non business to tribunal I did however apply to the Tribunal to appeal your decision on the partial exemption method and that your assessment against this charity has not been issued in 'best judgement'.
>
> I have sent you an email on the basis that we might be get a sensible 'direction of travel' on this matter but as yet nothing appears clear. Do you want me to resubmit the Trib1 for a third time."

37. Officer Mathers was on holiday during August, and on 31 August 2021 Mr Warne wrote again, copying the Trust, saying he had received a number of phone calls from the Trustees, and continuing:

> "Before the pandemic took hold we submit[ed] a Trib 1 Form to appeal against your assessment and also tried to negotiate a settlement with you in respect of reaching a conclusion on all matters that satisfied both parties to hopefully save the cost of litigation. We sent you copies of those forms along with the letter attached…Please explain why you have not acknowledge[d] our copy of the Trib 1…"

38. On 3 September 2021, Officer Mathers responded, copying the Trust (although his letter is dated 6 September, the covering email is dated 3 September). He apologised for the delay and repeated that HMRC had not received any correspondence from the Tribunal to confirm that an appeal had been made, and that Mr Warne needed to contact the Tribunal directly. He also said that the inhibits on collection had now been removed.

39. On 8 September 2021, the Trust e-mailed Mr Warne, with a copy to Officer Mathers, saying:

> "Could you please clarify for us why we can't still go to Tribunal, [Officer Mathers's] letter of the 3rd seems to imply that this is still a possibility, but that in the absence of any such application they are going ahead with demands. Can you not put in an application forthwith?"

The filing of the Notice of Appeal in September 2021

40. On 17 September 2021, Mr Warne submitted an online Notice of Appeal to the Tribunal. In answer to the question "is the appeal in time", Mr Warne wrote:

> "The original VAT tribunal form was submitted on 20 April 2020 which seems to have been lost by the Tribunal Centre. Following Covid it has for late [sic] been difficult to establish what happened to the original form. We have therefore decided in the interest of practicality to resubmit the tribunal appeal on behalf of this client having discussed the matter with HMRC and the Officer involved Mr J Mathers."

41. Under "Grounds for appeal", Mr Warne wrote:

> "The input tax recovered by Golden Grove on VAT returns is fully recoverable as it relates solely to taxable supplies made by the charity."

42. In answer to the question "What is the amount of tax", Mr Warne said "£99,790". This included the £92,644 charged by the Assessment; the balance is unexplained, but may be interest.

43. Attached to the Notice of Appeal was the review conclusion letter dated 26 March 2020. The Tribunal registered the appeal and allocated it the reference number TC/2021/06460. Because Mr Warne had not complied with the Tribunal requirement that he attach confirmation from the Trust that he was authorised to act as its representative, on 18 October 2021 the Tribunal wrote to the Trust attaching an Agent Authorisation form. On the same day, the Tribunal provided a copy of the Notice to HMRC.

44. On 9 November 2021, Ms Parlour wrote to the Trust, introducing herself as the litigator. She summarised the correspondence between Officer Mathers and Mr Warne, and then said (emboldening in original):

> "…for HMRC to properly consider your application to make a late appeal, we do need further information and evidence. **Could you please provide the following**:
>
> - An explanation as to why you did not submit a Tribunal appeal by 3 May 2019 against the assessment.
> - Evidence to support the submission of a Tribunal appeal on 20 April 2020 and any other submissions.
> - Evidence of any correspondence between yourselves and the Tribunal to establish what had happened to the April 2020 application between April 2020 and October 2021.
> - Evidence of any correspondence between yourselves and HMRC to establish what had happened to the April 2020 application between April 2020 and October 2021.
>
> You may wish to create a clear timeline in this instance, with evidence, to support your application."

45. Mr Warne's authorisation to act as agent was then provided to both the Tribunal and HMRC. On 23 November 2021, Mr Warne wrote to Ms Parlour, saying:

> "A Trib 1 was submitted in March 2020. However the original form appears to have been lost. It was posted to Tribunal Services during the 'COVID period' and has gone astray. Due to the National Lockdown this was not followed up and therefore was nobody to contact because nobody was in the offices. We therefore decided that the best course of action would be to submit a new Tribunal form…".

46. Ms Parlour replied, saying that Mr Warne had provided conflicting information about the filing of the Notice of Appeal, and repeating the bullet points set out at §44. Mr Warne replied on 16 December 2021, saying:

> "I have attached below the final correspondence I have had with Mr Mathers on this topic that the original Trib 1 was submitted on 27th April 2020 based on a decision we received from Mr Mathers on 22nd April 2020. We submit[ed] an appeal based upon the decision in the attached letter although the issue we have is there were earlier decisions on the business/non-business apportionment method and this was the review of the intention to make taxable supplies and recharge them onto the trading company.
>
> The issue we have is that our office was closed in April. The Trib 1 was sent in the post and that it either failed to arrive or was lost in Tribunal because they would also have been in lockdown at the time.
>
> I have looked through the file and no copy was made of the Trib 1 was made [sic] at the time it was sent or if it was copied nobody put it on the client file. So we can only go on the balance of probabilities that Crowe would have sent off a Trib 1 form as the correspondence with Mr Mathers indicated and implied."

Whether Mr Warne sent a Notice of Appeal to the Tribunal before September 2021

47. In order to decide whether a Notice of Appeal was posted to the Tribunal by Mr Warne (or by any other person), I considered the points set out below.

Evidence as to the date

48. As can be seen from the above correspondence, and as Ms Parlour rightly identified, Mr Warne gave conflicting information about the posting date:

(1) on 27 April 2020, he said "We will be appealing the decision";

(2) on 28 April 2020, he said "I will tick hardship and late application";

(3) on 8 June 2020, he said "VAT Tribunal documents have been submitted";

(4) on 31 August 2021, he said "Before the pandemic took hold we submit[ed] a Trib 1 Form to appeal against your assessment";

(5) on the Notice of Appeal filed on 17 September 2021, he said "The original VAT tribunal form was submitted on 20 April 2020";

(6) on 23 November 2021, he said "A Trib 1 was submitted in March 2020"; and

(7) on 16 December 2021, he said "the original Trib 1 was submitted on 27 April 2020".

49. Ms Parlour cross-examined Mr Warne about these dates at the hearing, and he said the Notice of Appeal must have been posted "after 27 April" because he didn't receive the Decision until 22 April 2020.

Other relevant information

50. In his email to Officer Mathers on 2 August 2021, Mr Warne said "Do you want me to resubmit the Trib1 for a third time". This implied that he had submitted *two* previous Notices of Appeal, but there was no other reference in the correspondence to a second Notice.

51. On 16 December 2021, Mr Warne said in a letter to Ms Parlour (my emphasis):

> "if it was copied nobody put it on the client file. So we can only go on the balance of probabilities that Crowe would have sent off a Trib 1 form as the correspondence with Mr Mathers indicated and implied…"

52. In the course of the hearing, Mr Warne said:

(1) Although Notices of Appeal were not normally sent out by partners but by more junior staff, he dealt with the Tribunal's Notice of Appeal himself and did not delegate it or ask any other person at Crowe to help, because the issues involved in the Trust's appeal were technically difficult.

(2) When lockdown started he had to work at home; he had never previously used a laptop and was very inexperienced with computers, and for those reasons he did not file the Notice of Appeal online.

(3) He had no machine at home which would have allowed him to take a copy of the Notice of Appeal before he posted it.

(4) He did not sent the Notice to the Trust for them to sign, neither did he ask them to complete the form authorising Crowe to act as the Trust's representative.

(5) He has looked on the client file and it contains no evidence of posting, such as a file note; it also contains no evidence of any communication between him and the Tribunal before the filing of the Notice of Appeal on 17 September 2021.

Findings of fact

53. I find as a fact that no Notice of Appeal was filed with the Tribunal before 17 September 2021 because:

(1) Mr Warne provided conflicting evidence as to when this alleged filing took place. Despite his email of 28 April 2020 stating that the Notice of Appeal "will" be filed, he subsequently gave dates ranging from "March 2020" and "before the pandemic took hold" to 20 April 2020 and 27 April 2020. His statement at the hearing that the Notice was posted "after 27 April" was arrived at by working back from the fact that he did not receive the Decision until 22 April, rather than because he had remembered the date.

(2) On 16 December 2021, Mr Warne asked Ms Parlour to accept "on the balance of probabilities" that *Crowe* "would have sent off" the Notice. He thus moved from his earlier position that as a question of fact he had personally posted the Notice, to one where a Notice "would have" been sent by "Crowe".

(3) As a matter of normal practice, professional firms require partners and staff to keep copies of documents sent out, and/or related file notes.

(4) On 28 June 2021, Mr Warne told Officer Mathers that the Trust's file was being scanned but that "once this has been recovered in the next 7 days I will find the original papers and send them to you as proof that the application was made to the Tribunal". On 31 August 2021, in an email copied to the Trust, Mr Warne said he had sent Officer Mathers a copy of the Notice he had filed. Those statements are:

(a) inconsistent with his evidence at the hearing that he had not made a copy of the Notice, because he had no machine at home which allowed him to make copies; and

(b) unsupported by the correspondence between Mr Warne and Officer Mathers. Despite frequent promises, Mr Warne did not attach a copy of a Notice to any of his emails.

(5) On 2 August 2021 Mr Warne said he had submitted *two* previous Notices of Appeal. There is no supporting evidence whatsoever for that statement.

(6) Mr Warne did not volunteer any particularised evidence about the completing and/or posting of a Notice of Appeal, for example:

(a) whether he had a blank Notice of Appeal at home during lockdown, despite it not being normal practice at his firm for partners to complete Notices of Appeal;

(b) whether he printed a blank form from the internet, despite his lack of computer equipment and his limited skills (which prevented him filing a Notice online);

(c) whether he had considered the requirement that Notices of Appeal filed by a non-legal representative be accompanied by the client's signed authorisation; and/or

(d) when he left the house to post the Notice during lockdown, and where he posted it.

Whether Mr Warne contacted the Tribunal before 17 September 2021

54. Consistently with the finding of fact that no Notice of Appeal was posted to the Tribunal, I also find that Mr Warne did not contact the Tribunal to ask what had happened, and that his evidence to the contrary is not credible. That is because:

(1) He made only one specific reference to such contact: when he emailed Officer Mathers on 8 March 2021 his email said (my emphasis): "I have finally got through to the tribunal today who say that this went to HMRC *as it was a late appeal which needed your approval*". However, the Tribunal does not send Notices of Appeal to HMRC without registering them, as can be seen by what happened after the Notice of Appeal was filed on 17 September 2021:

(a) that Notice included an application for a late appeal;

(b) the Tribunal registered the appeal;

(c) gave it a reference number, and

(d) sent a copy of the Notice of Appeal, including the file reference number, to HMRC.

(2) On 14 December 2020, Mr Warne emailed Officer Mathers and said he would forward to him a copy of an email already sent to the Tribunal, and would also copy him on "another one I will send this week", but he did not send any such copies to Officer Mathers.

(3) There is no other specific references in Mr Warne's correspondence to contacting the Tribunal; he instead made general statements, such as that the Notice of Appeal "seems to have been lost by the Tribunal centre" or "has gone astray".

(4) When Officer Mathers asked Mr Warne to provide a Tribunal reference number on 9 March 2021, he did not respond; Officer Mathers asked again on 27 May 2021 but Mr Warne never provided a number.

(5) When asked by Ms Parlour during the hearing if he had any file notes of attempts to contact the Tribunal, he said "I could find out by looking to see if there are any notes". Ms Parlour then took him to her request made on 25 November 2021 that he provide any such evidence; Mr Warne then changed his position and agreed he had looked at the client file and there were no notes of contact with the Tribunal. This lack of file notes is again inconsistent with the normal practice of professional firms.

THE LAW

55. I set out below both the relevant statutory provisions and the case law.

The legislation

56. The Value Added Taxes Act 1994, s 83 provides that there is a right of appeal against a "best judgment" assessment made under VATA s 73 and also against a decision refusing a person a deduction for input tax, see s 83(1)(p)(i) and s 83(1)(c). The Trust therefore had appeal rights against both the Assessment and the Decision.

57. Section 83G provides that the taxpayer can appeal directly to the Tribunal, but is required to do so within 30 days of the date of the assessment or decision, unless HMRC grant an extension. Alternatively, the taxpayer can accept HMRC's offer of a statutory review within 30 days (unless HMRC extend that period), and can then appeal the review decision to the Tribunal by 30 days after the date of that decision.

58. A person can only appeal to the Tribunal after those statutory deadlines if the Tribunal gives permission for a late appeal, see VATA s 83G(6).

The case law

59. The case of *Martland* concerned an application to make a late appeal against excise duty and a related penalty, but the principles there set out have been applied and followed when deciding late appeal applications in relation to VAT and other taxes and duties, see for example *Websons v HMRC* [2020] UKUT 154 (TCC).

60. In *Martland* at [37] 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."

61. 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.'"

62. The UT noted at [42] 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". 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'."

63. At [44] the UT set out the following three stage approach by way of guidance to this Tribunal:

(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".

64. The UT also said 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."

APPLICATION OF THE LAW TO THE TRUST

65. I now apply the three stage approach in *Martland* on the basis of the facts, taking into account the parties' submissions.

The length of the delay

66. The time limit for appealing the Assessment was 30 days after 7 February 2019, the date it was issued. Officer Mathers extended that time limit to 3 May 2019, but the Trust did not appeal to the Tribunal until 17 September 2021. It was therefore two years, four months and 14 days late.

67. The 30 day time limit for appealing the Decision was 26 April 2020; this was extended until 22 May 2020 by Officer Mathers. The appeal was not made until 17 September 2021, so it was one year, three months and 26 days late.

68. In *Romasave v HMRC* [2015] UKUT 254 (TCC) ("*Romasave*"), the UT said 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."

69. The delay in relation to the Assessment was over nine times longer than the three months referred to in *Romasave*, and the delay in relation to the Decision was over six times longer. Both delays were plainly serious and significant.

Reasons for the delays

70. I first discuss the reasons given by Mr Warne for the delays. I also consider whether the Trust has a good reason for the delay because it relied on Mr Warne.

The period from 3 May 2019 to 22 May 2020

71. This period is from the appeal deadline for the Assessment to the expiry of the extended time limit for appealing against the Decision.

72. Mr Warne said that this delay was because he had continued to have discussions with Mr Warne about the underlying issues. In the hearing, he said the Assessment and the Decision were "linked" and had "got merged into each other", and that the outcome of one would "impact" on the other.

73. I find that this is not a good reason for the delay because:

(1) The Assessment clearly stated that, if the Trust disagreed with the conclusions reached, it had 30 days to appeal to the Tribunal or ask for a review. Officer Mathers extended that time to 3 May 2019, but the Trust still did not appeal.

(2) The Decision followed from Mr Warne's statement that the Trust was going to issue an invoice (but had not yet done so). The Decision carried its own appeal rights; Mr Warne was aware of this because his request for a statutory review related only to the Decision, see §20.

The period from May 2020 to September 2021

74. The Decision was issued by post to the Trust and to Mr Warne on 26 March 2020. Because of lockdown, Mr Warne did not receive his copy until 22 April 2020; Officer Mathers extended the appeal time limit so that it ran from that date. Thus, the Trust's appeal against the review decision would have been in time had it been made by 22 May 2020.

75. Mr Warne said there was no delay, because he had filed a Notice of Appeal within that time period. For the reasons set out at §44ff I have found as a fact that this was not the case. No Notice of Appeal was filed until 17 September 2021.

76. I therefore reject Mr Warne's submission that the Trust has a good reason for the delay because he posted a Notice of Appeal to the Tribunal.

Reliance on Mr Warne?

77. Although the Tribunal was not provided with the date on which Crowe was first instructed, I have found as a fact that Mr Warne had conduct of this case from at least June 2019. It was Mr Warne who said he had appealed to the Tribunal (when he had not), and that he had contacted the Tribunal to follow up (when he had not), and it is thus Mr Warne who bears primary responsibility for the delays which occurred after Crowe was instructed.

78. Although neither Mr Warne nor those who attended the hearing on behalf of the Trust submitted that reliance on Mr Warne provided a good reason for the delays, I decided it was in the interests of justice to consider that possibility.

79. My starting point was *Katib v HMRC* [2019] UKUT 189 (TCC) ("*Katib*"), where the UT said at [49] (their emphasis):

> "We accept HMRC's general point that, in most cases, when the FTT is considering an application for permission to make a late appeal, failings by a litigant's advisers should be regarded as failings of the litigant."

80. The UT returned to this issue at [54], saying:

> "It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant."

81. The UT then cited the Court of Appeal's judgment in *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666 ("*Hytec*"). Ward LJ, giving the leading judgment, said at p 1675:

> "Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent..."

82. In *Katib*, the UT continued at [56] by concluding that the correct approach was:

> "…to start with the general rule that the failure of Mr Bridger [Mr Katib's 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*."

83. This was followed at [58] by the following passage:

> "It is clear from the [FTT] decision that Mr Bridger did not provide competent advice to Mr Katib, misled him as to what steps were being taken, and needed to be taken, to appeal against the PLNs [personal liability notices] and failed to appeal against the PLNs on Mr Katib's behalf. But…the core of Mr Katib's complaint is that Mr Bridger was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise."

84. In deciding that little weight should be given to Mr Katib's reliance on his adviser, the UT also took into account that Mr Katib should have noticed "warning signs", including direct contact from HMRC in the form of enforcement action, which "should have alerted him". The UT therefore concluded Mr Katib was "not without responsibility in this story".

85. In accordance with *Katib* and *Hytec*, this Tribunal should therefore not normally find that reliance on an adviser provides a good reason for delay. I considered whether the facts of the Trust's case took it outside that normal range.

86. I recognise that:

(1) The Trust relied on Mr Warne, and that reliance was plainly reasonable. He is the head of VAT at a well-known London firm of accountants.

(2) Most of the correspondence about the posting of a Notice of Appeal was between Mr Warne and Officer Mathers, and was not copied to the Trust.

(3) Although the Tribunal has not been provided with Mr Warne's communications with the Trustees, he copied the Trust on his letter of 31 August 2021 to Officer Mathers in which he said he had submitted a Notice of Appeal "before the pandemic took hold" and had sent a copy to Officer Mathers. Mr Warne therefore misled the Trust as to what had happened, and that misdirection encouraged the Trustees to believe that Mr Warne had posted an in-time Notice of Appeal.

87. However, the following points are also relevant:

(1) The Trustees had received the Assessment, which clearly set out the 30 day time limit for an appeal. There is no evidence that the Trustees ever asked Mr Warne what he was doing to appeal the Assessment.

(2) The Trustees also received the Decision, which also clearly stated that there was a 30 day time limit.

(3) The Trustees knew by 27 May 2021 that HMRC had "no evidence to confirm a valid appeal has been made", because Officer Mathers had emailed them directly on that date. This should have given them cause for concern. All that appears from the evidence is that they subsequently made several calls to Mr Warne, apparently during August (see §37).

(4) In particular, there is no evidence that the Trustees required Mr Warne to support his assertions by providing them with a copy of the Notice of Appeal, or that they instructed him to file a new Notice, despite having been told that the appeal time limit was only 30 days.

(5) It was instead a further three months before the Trust by its email of 8 September 2021 asked Mr Warne whether he could not "put in an application forthwith". Mr Warne filed the Notice of Appeal some two weeks later.

88. Taking all the above into account, I find as follows:

(1) Although the Trust relied on Mr Warne, from 27 May 2021 there were "warning signs" in the form of Officer Mathers's letter.

(2) The Trust's further delay after receipt of that letter was more than three months, which is also "serious and significant", see *Romasave*.

(3) As a result, like Mr Katib, the Trustees are "not without responsibility in this story".

(4) Although the Trustees were actively misled by Mr Warne as to the appeal position. the same was true in *Katib*, where the adviser had "misled him as to what steps were being taken" and "told Mr Katib that matters were in hand when they were not". As the UT said in *Katib*, 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".

89. As a result, I find that from 27 May 2021, the date of Officer Mather's letter, the Trust shares responsibility for the delay; and in relation to the earlier period, there is nothing exceptional about this case which takes it out of the normal range.

Conclusion on the second step in Martland

90. For the reasons set out above, I find that there was no good reason for the failure to make the appeals within the statutory time limits.

All the circumstances

91. The third step in the *Martland* approach is to consider all the circumstances, and then to carry out a balancing exercise.

The need for time limits to be respected

92. 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].

93. In this case the delay in relation to the Assessment was over two years and four months; the delay in relation to the Decision was over one year and three months. There was no good reason for these delays, and this factor weighs heavily against the Trust.

Reliance on Mr Warne

94. As already noted, in *Katib* the UT found at [56] that reliance on advisers was unlikely to amount to a "good reason" for missing the statutory deadlines in the context of the second stage of the evaluation required by *Martland*. The UT continued in the same paragraph:

> "…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."

95. At [59] the UT considered the submission made on Mr Katib's behalf that "Mr Katib did not have the expertise to deal with the dispute with HMRC himself", but went on to say:

> "…that does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena. We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against Mr Bridger or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of Mr Bridger's failings..."

96. I find that the Trust's reliance on Mr Warne is a factor to be weighed in the balance in favour of allowing a late appeal, but that relatively little weight is to be given to that factor as compared to the particular importance of respecting statutory time limits, for the reasons given in *Katib*. In addition, because the Trustees were put on notice from 27 May 2021 that there was no evidence that the Tribunal had received a Notice of Appeal, they share responsibility for the final three months of the delay.

The merits

97. The UT said in *Martland* that there is "much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one". The merits of the appeal may therefore be a relevant factor in the balancing exercise. However, the UT also said that the Tribunal should not " descend into a detailed analysis" of the merits of the appeal.

98. As Ms Parlour pointed out in the course of the hearing, the Trust's grounds of appeal consisted of a single sentence, namely that "the input tax recovered by Golden Grove on VAT returns is fully recoverable as it relates solely to taxable supplies made by the charity".

99. Mr Warne's only response to her challenge was to say that the VAT position was "complex". When Mr Salmon made his "statement" at the end of the hearing, he said it was "inappropriate" that a small charity such as the Trust should have to pay VAT, and that "a cold clear review should reveal the fact that all these matters should be reviewed" by the Tribunal, adding that the Trust had "facts and figures" it would like the Tribunal to consider.

100. It is clear from the above that there is nothing here which would allow the Tribunal to put any weight on the Trust's side of the scales in relation the merits of the appeal. If the Trust had a strong case, I would have expected this to have been particularised by Mr Warne; instead, he has put forward only the assertion contained in the grounds of appeal. It is too late for the Trust to ask the Tribunal, at the very end of this late appeal hearing, to be allowed to produce more documents to support its case.

101. The only evidence as to the merits was instead provided by HMRC, in the form of the Assessment and the Decision, but as Ms Parlour did not put HMRC's case on the basis of the strength of HMRC's underlying arguments, I decided that the merits are not to be weighed in the balance at all.

Other prejudice

102. The Trust will suffer prejudice if permission to make a late appeal is refused, because it will be unable to appeal against the Assessment and the Decision. That is however an inevitable consequence of losing the opportunity to challenge an HMRC decision.

103. HMRC will suffer prejudice if the Tribunal gives permission, because they will have to devote time and attention to defending the Assessment and the Decision before the Tribunal. I accept that this is the inevitable consequence of *granting* permission, but it carries more weight where, as here, there has been a significant delay: it generally takes longer for HMRC to locate all relevant documents and for the decision maker to refresh his reasoning, than where a timely Notice of Appeal has been filed.

104. Finally, granting permission also prejudices the position of other taxpayers, in that both HMRC and the Tribunal will divert resources away from other cases: as Davis LJ said in *Chartwell Estate Agents v Fergies Properties* [2014] EWCA Civ 506 at [28], the interests of justice include:

> "the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases..."

Balancing the factors

105. 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 the need to enforce compliance with statutory time limits.

106. The delay in relation to the Assessment was over nine times longer than the three months referred to in *Romasave*, and the delay in relation to the Decision was over five times longer. These delays were plainly serious and significant, and there was no good reason for them. Those factors weigh heavily against the Trust. Added to that is the prejudice to HMRC and to appellants in other cases if permission were to be given.

107. On the other side of the scales is the prejudice to the Trust of losing the opportunity of appealing to the Tribunal, together with the Trustees' reliance on Mr Warne. However, neither of those factors carry significant weight for the reasons given above. The result of the balancing exercise is therefore that permission is refused.

OVERALL CONCLUSION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

108. For the reasons set out above, I refuse permission for the Trust to make late appeals against the Assessment and the Decision.

109. 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: 05th JANUARY 2023