Neutral Citation: [2023] UKFTT 81 (TC)

Case Number: TC08714

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/01415

Application for permission to make a late appeal – Personal Liability Notice – VAT penalty of £874,238, 100% allocated to Appellant – appeal notified 38 months out of time – Martland applied – application refused

Heard on: 6 January 2023
Judgment date: 25 January 2023

Before

TRIBUNAL JUDGE KEVIN POOLE

Between

TAJINDER SINGH PAWAR

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Christopher McNall of counsel, instructed by SP Legal Solutions

For the Respondents: Jenny Goldring, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This decision relates to an application for permission to notify a late appeal to the Tribunal in respect of a personal liability notice issued to the Appellant on 5 October 2017 ("the 2017 PLN"), whereby HMRC seek to make the Appellant personally liable in respect of 100% of a penalty of £874,238 imposed on a company First Stop Wholesale Limited ("FSW"). The penalty was imposed in respect of errors HMRC had asserted to exist in the VAT returns of FSW.

2. The 2017 PLN was made the subject of a statutory review, the review conclusion letter confirming the decision to impose it being issued on 19 November 2018.

3. The Appellant sought to appeal against the 2017 PLN, notifying his appeal to the Tribunal on 22 February 2022. It is common ground that the appeal was notified just over 38 months late.

4. With the consent of the parties, the form of the hearing was V (video) using the Tribunal's video hearing system. A face to face hearing was not held because at the time the matter was listed for hearing, the public health emergency rendered a face to face hearing risky.

5. 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.

THE FACTS

6. I was provided with a main documents bundle in electronic form, running to 1,793 pages. Subsequently, I was provided shortly before the hearing with one additional page to add to that bundle and a separate document bundle of 22 pages. During the hearing, I was provided with an authorities bundle of 451 pages and a further 9 page document (a letter which had been attached to an email from the Appellant to HMRC on 3 November 2017 which was itself included in the original bundle, but without the attachment).

7. I find the following facts.

Events up to the issue of the 2017 PLN

8. Following an investigation which started in spring 2013, on 24 September 2014 HMRC issued VAT assessments to FSW in the total sum of £2,642,141, in respect of various VAT accounting periods between 1 June 2010 and 28 February 2014.

9. HMRC issued a "Penalty calculation summary" letter dated 17 December 2014 to FSW, notifying it of the penalties it proposed to charge in respect of the underpaid VAT, and on 29 December 2014 they presented a winding up petition to the Court based on an asserted total tax debt of £3,069,426.41 (which figure included the VAT assessments).

10. Following this, on 9 January 2015, HMRC issued an "inaccuracy" penalty assessment to FSW under Schedule 24 Finance Act 2007 ("Schedule 24") in the sum of £1,256,490.91. shortly afterwards, on 3 February 2015, HMRC issued a personal liability notice ("PLN") to the Appellant pursuant to paragraph 19 of Schedule 24, making him personally liable to pay 100% of the penalties imposed on FSW. This was on the basis that they believed FSW was likely to become insolvent and the Appellant was its sole director and 100% shareholder.

11. In the meantime, FSW had lodged an appeal with the Tribunal against, amongst other things, the VAT assessments and penalty assessment. The appeal was first lodged on 22 January 2015, but appears to have suffered from some defect as result of which the notice of appeal was returned by the Tribunal. It was relodged on 24 February 2015. In the meantime,

discussions continued between HMRC and Bahia & Co (the Appellant's accountants at the time) as to action that could be taken to reduce the VAT liability that had been assessed.

12. It appears that much of the assessment arose as a result of the disallowance of input VAT claimed by FSW in relation to purchase invoices addressed not to it but to the Appellant personally (trading under the style "The Wine Lodge"). The Appellant claimed that the goods were actually sold by FSW (which accounted for output tax on the sale) and he had only acted as agent or nominee in purchasing them, which was why FSW (and not he) had claimed the input tax on their purchase. In a letter dated 11 February 2015, Bahia & Co referred to a telephone conversation that had taken place with HMRC that day, in which there had been discussion about the course of action proposed to correct the position. On 27 February 2015 HMRC wrote back, saying that "as Mr Pawar holds valid VAT invoices he will be entitled to reclaim the input tax under his VAT registration numbers subject to the normal rules." The letter went on to say "However, HMRC cannot agree to the assumption that the goods have been sold and invoiced by First Stop Wholesale Ltd; one of the conditions for reclaiming VAT as input tax is that the goods purchased must be attributable to a taxable supply therefore Mr Pawar can only reclaim the input tax provided corresponding sales invoices are raised to First Stop Wholesale Ltd. The company will then be entitled to reclaim the VAT subject to the normal rules."

13. Bahia & Co replied on the same day, including the following text in their letter:

> As discussed on the phone, we will claim the invoices as mentioned on Mr Singh's personal VAT reference and raise a notional sales invoice to First Stop Wholesale Ltd for each quarter to the value of £1 in order to meet the requirement that goods purchased for reclaiming Vat must also have a corresponding sale.
>
> This treatment has already been reflected in the records of First Stop Wholesale Ltd with the value of input invoices having been reduced to zero following the enquiry.
>
> Could you please let me know HMRC's position on our proposed treatment of the invoices in dispute so that we can move forward in resolving the reclaim.

14. On the same day (27 February 2015), FSW was placed into administration with HMRCs agreement (the winding up petition being dismissed). Two partners of UHY Hacker Young LLP were appointed as administrators.

15. It seems that the discussions between HMRC and Bahia & Co continued after the administration (though whether this was with the agreement of the administrators is unclear). On 12 March 2015, HMRC wrote back to Bahia & Co, as follows:

> Thank you for your letter dated 27 February 2015.
>
> I can confirm that, due to the large number of invoices involved, we will exceptionally agree to your proposal to raise a notional sales invoice for each period to First Stop Wholesale Ltd in order to achieve a tax neutral position.
>
> In order for us to deal with your client's claim you may submit a voluntary disclosure i.e. notification to us in writing of the adjustments you have made in relation to the input tax and copies of the corresponding notional sales invoices.
>
> Please note that as there is no tax loss, the interest charged on the original assessment that was issued to First Stop Wholesale Ltd will be inhibited.

16. At some point in May 2015, the Appellant instructed Grant Thornton to act for him personally (there was also a corporation tax assessment, associated penalty and PLN, which are not the subject of this appeal, but which were based on essentially the same VAT investigation by HMRC). It seems they were appointed in succession to Bahia & Co because Mr Bahia emigrated to Canada. The details of what work they did in the first few months of their engagement is not clear, except that they obviously familiarised themselves as far as they could with the issues and the detail.

17. On 5 June 2015, FSW was placed into creditors' voluntary liquidation with the same individuals at UHY Hacker Young acting as liquidators. It is not clear what agreement was reached between the liquidators and the Appellant, but it is clear that discussions continued between HMRC and the Appellant (and his advisers) concerning the possibility of some or all of the VAT assessment against FSW being eliminated by means of what has subsequently been called "corrective action" (i.e. the identification of input VAT wrongly claimed by FSW rather than the Appellant's business, and the issuing of VAT invoices by the Appellant's business to FSW in respect of the relevant supplies in order to regularise the position). It was pointed out at an early stage that this was subject to a four year time limit.

18. Grant Thornton were clearly in touch with HMRC attempting to move matters along, but encountered difficulties as a result of the administration and subsequent liquidation of FSW. On 16 July 2015 they wrote to HMRC, asking them to accept that letter as a formal appeal against the 3 February 2015 PLN. The stated grounds were that "we believe HMRC's VAT computation to be incorrect and on the basis that there is no potential loss of revenue to the Crown, and therefore that any tax-geared penalty would be nil." HMRC clearly replied to this letter, but no copy of that reply was before me.

19. After at least one further exchange of correspondence, a meeting took place between HMRC and Grant Thornton on 1 December 2015, a note of which was contained in the bundle. This note includes clear indications that at that time there were still active discussions under way for the VAT position to be corrected to some extent by the proposed "corrective action", but there was clearly a lot of detail to be worked through. Grant Thornton had also identified that whilst the main issue was the incorrectly claimed input tax, there were also some issues around zero rating of supplies on which HMRC had assessed FSW to output VAT, some invoices where HMRC had challenged their "validity", and some duplications of sales on till rolls. It was agreed that Grant Thornton would prepare and submit detailed documentation to HMRC, referred to at one point as a "disclosure report".

20. Clearly the detailed work of Grant Thornton took some time, and it was only on 7 June 2016 that they sent their workings to the Appellant, amounting to 33 pages of detailed schedules and some supporting summaries and diagrams, covering VAT periods from 08/10 to 08/12 only. This was shared with HMRC, and a meeting took place on 27 June 2016 between HMRC and Grant Thornton. From the note of that meeting, it appears that discussions were constructive, but "credible evidence" was required to back up the information that had been presented. There was also some discussion about subsequent VAT periods, but it is unclear whether records had yet been provided for those periods to Grant Thornton. At that stage, however, it is clear that HMRC were still saying they were prepared to work through the figures provided to them and adjust the assessments that had been issued to FSW.

21. The summary of the outcome of GT's work showed that for the VAT accounting periods 08/10 to 08/12, they considered £516,087.06 of input tax claimed by FSW which was reflected in HMRC's assessment was "proper" to the Appellant's personal VAT registration, and therefore was capable of valid recovery by FSW, subject to the appropriate invoicing by the Appellant to FSW, so potentially reducing the assessment for that period by that amount. Since

the total assessments raised by HMRC in respect of those periods amounted to £667,966, this would represent a significant reduction, down to £151,878.94. The summary schedule presented by Grant Thornton suggested that in fact the net additional liability of FSW in respect of those periods might be significantly less even than that figure.

22. The work done by Grant Thornton did not cover the periods after 08/12. It was not explained to me why this was. For the two subsequent periods 11/12 and 02/13 (penalties for which were subsequently made subject to the 2017 PLN), HMRC had raised assessments totalling £676,859 and penalties totalling £470,604.33 (so more than half of the total penalties subsequently comprised in the 2017 PLN – see [28] below).

23. It is not clear what happened following the meeting on 27 June 2016. The appeal of FSW against the VAT assessments and penalties proceeded slowly. It was only on 9 May 2017 that HMRC granted hardship, and their statement of case in that appeal was not served until 25 September 2018. There is no clear picture as to the reasons for this delay, nor was there any evidence in the bundle before me of further correspondence or other action to progress matters pursuant to the actions agreed at the 27 June 2016 meeting.

24. So far as the Appellant is concerned, the next event following the meeting on 27 June 2016 which is recorded in the bundle was the issue by HMRC on 5 October 2017 of the PLN which is the subject of these proceedings.

The issue of the 5 October 2017 PLN and subsequent events

25. On 5 October 2017, apparently out of the blue, HMRC wrote to the Appellant. They sent him a new PLN bearing that date, along with a covering letter. The covering letter included the following text:

> Please find attached a replacement Personal Liability Notice (NPPS8A).
>
> I have enclosed copies of the original NPP8SA, NPPS8C, NPPS2 and NPPS100 with the accompanying schedule, for your information. As you will see the amount of the company penalty you are personally liable to pay has been reduced. The penalties in relation to periods ended 31 May 2013, 31 August 2013 and 28th every 2014, are no longer included.
>
> As a standard letter current dates are automatically populated but this replacement notice refers to the situation as it was in the original notice was issued.

26. The accompanying PLN was in exactly the same form as the PLN issued on 3 February 2015, except for the amount, date (and the due date for payment or for asking for a review or appealing to the Tribunal) and the table showing the penalties charged to the company and the amounts the Appellant was required to pay.

27. The PLN required payment of its amount by 4 November 2017, and stated that any request for a review (or appeal to the Tribunal) should also be received by that date.

28. The amount of the new PLN was £874,238. The table referred to a single penalty assessment on FSW but broke it down into two lines. The first line referred to the £874,238 that the Appellant was required to pay (based on him being personally liable for 100% of that part of the penalty). The second line referred to an additional £382,252.80 penalty, of which the Appellant was required to pay "0%". Thus this PLN proceeded on the basis that the original penalty to FSW was the total of those two amounts, namely £1,256,490.80.

29. In passing, it is worth recording that the original 3 February 2015 PLN included three different figures for the penalty amount. It stated that the company was liable for a penalty of £1,256,490.81 (1p more), that the Appellant was liable to pay £1,256,490.91 (an additional

10p), but he was actually required to pay £1,266,499.91 by the original due date (an additional £10,009.11). On any view (and particularly with respect to a document requiring a payment of well over £1.2 million) this document had been extremely carelessly prepared.

30. The new PLN included the following section:

> **What to do if you disagree**
>
> If you disagree with my decision, you can send me any new information relating to the matter and I will look at it again.
>
> Also you can:
>
> - ask for an HMRC officer not previously involved in the matter to carry out a review of my decision
> - appeal to an independent tribunal to decide the matter.
>
> If you want to review, you should write to me by 4 November 2017, telling me why you think my decision is wrong and send me any new information that you want me to consider.
>
> If you ask for a review and you are not satisfied with the outcome of that review, you can still appeal to the tribunal.
>
> If you do not want a review, you can appeal to the tribunal, but you must make sure they receive your appeal by 4 November 2017.
>
> If you choose to appeal to HM Courts and Tribunal Service you'll need to attach a copy of this letter with your appeal. If you don't then they may reject your appeal.
>
> You can find more information about appeals and reviews in fact sheet HMRC1 "HM Revenue & Customs decisions — what to do if you disagree". To get a copy of this fact sheet, go to www.gov.uk and search "HMRC1" or phone our orderline on 0300 200 3610.

31. On 17 October 2017, the Appellant emailed HMRC acknowledging receipt of the PLN. After noting the 4 November 2017 deadline, the Appellant said that insufficient detail had been provided of "the circumstances surrounding your decision" and he requested (a) an explanation of why the penalties from period 05/13 were no longer included and (b) an explanation of the circumstances leading to the issue of the revised PLN and the legislative basis for it having been issued within any relevant time limit.

32. On 20 October 2017, HMRC replied. It was explained that "the penalties relating to the VAT periods where no returns were submitted (those listed) are no longer being charged to the company officer". As to the time limit point, the statutory time limit of 12 months plus 30 days referred to in paragraph 13(3)(a) of Schedule 24 Finance Act 2007 was referred to, stating that "the notice of assessment of tax was issued on 14 October 2014, the penalty assessment was notified on 9 January 2015 with the original PLN notified on 3 February 2015. Therefore, the assessment of the penalty amounts was made in the time allowed by paragraph 13. The PLN has simply been amended and you have been notified accordingly." In this letter, it was also stated that the 4 November 2017 deadline date set out in the PLN was "automatically populated" and that there was in fact no such deadline. The original deadline set out in the February 2015 PLN were said to still apply.

33. The Appellant sent a long letter by email to HMRC on 3 November 2017 in response. In this letter, he raised a number of quite detailed and very specific points objecting to the calculations upon which HMRC's VAT assessments to FSW had been based (including the disallowance of large specific amounts of input tax deemed to be "proper" to the Appellant

personally). He also questioned the allocation of 100% of the FSW penalties to him, bearing in mind there was another director of FSW for a large part of the period under consideration. He asked for HMRC to review their decision in the light of all this.

34. HMRC responded by email dated 27 November 2017. They declined to reopen the question of the correctness of the VAT assessment raised against FSW, observing that it was the subject of a live appeal before the Tribunal. It was conceded that HMRC had agreed to consider proposals advanced by Grant Thornton, but "only if credible records were produced to support them". A justification was also provided for allocation of 100% of the penalties to the Appellant.

35. On 3 January 2018, the Appellant emailed HMRC to suggest a meeting "rather than engage in protracted correspondence". After HMRC had obtained confirmation from Hacker Young that they did not object, a meeting was arranged for 15 March 2018.

36. The Appellant attended that meeting with his new adviser, Chris Mann of Tiberius Solutions Limited. HMRC's note of that meeting was included in my bundle. It is clear from that note that HMRC did not wish to get involved in a detailed discussion of the underlying VAT liabilities of FSW, which were still subject to appeal before the Tribunal. They were simply interested in reaching a deal over the allocation of personal liability between the two directors and deciding on a "reasonable amount of tax" upon which it would be based. It was agreed that the Appellant and Mr Mann would "go away to discuss the figures on how much they think the assessment should be, and come back to Joanne [officer Joanne Jones, who was at the meeting] with the figures."

37. Following that meeting, in an email dated 29 March 2018, officer Jones said "I look forward to receiving your calculations for consideration of the tax due from First Stop Wholesale Limited. I think a month from the date of the meeting plus a little additional time to take account of the Easter break should be sufficient, so let's say by Friday, 27 April 2018."

38. Mr Mann wrote to officer Jones on 5 April 2018. This letter did not set out any proposals in relation to quantum, instead it set out a series of arguments why it was considered that no penalty should be imposed at all on the Appellant, by reason of supposed procedural shortcomings in the process leading up to imposition of those penalties.

39. Mr Mann chased for a response on 14 May 2018 and on 22 May 2018 officer Jones replied. She rejected the points made in the 5 April 2018 letter and asked for the expected computations by 7 June 2018, in default of which "the matter will be referred back to HMRC Solicitor's office for the Tribunal proceedings to continue".

40. In response, on 1 June 2018, Mr Mann maintained the argument about the overall lawfulness of the PLN, asserting that officer Smith, in the 15 March 2018 meeting, had "conceded that the penalty levied against Mr Pawar was incorrect and that the assessments issued against the Company were 'ridiculous' and had been raised to the highest amounts possible in order to force the Company to produce information." It was said that the exercise to review the assessments was "subject to the more pressing issue of the penalty concerns raised by ourselves being resolved". As a result, it was stated that the exercise of reviewing the assessments had not yet been started.

41. Officer Jones responded on 22 June 2018, forwarding a copy of the notes of the 15 March 2018 meeting to Mr Mann and observing that she had now "sent the correspondence to the solicitor dealing with the appeal".

42. The parties had now taken up entrenched positions. HMRC stated they did not accept the Human Rights Act arguments that had been raised in relation to the validity of the penalty, and in the absence of any proposals of the type referred to in their note of the 15 March 2018

meeting, they were content to let the quantum of the VAT assessments be decided in the course of the appeal of FSW before the Tribunal. Mr Mann was referred to the liquidators if he wished to seek to become involved in those proceedings. This was the position by the end of August 2018.

43. It seems to be common ground that a formal request to carry out a statutory review of the decision to impose the PLN was received by HMRC on 7 September 2018, and accepted by them in spite of it being, in their view, out of time. No copy of such request was included in my bundle. No reference was made by HMRC to the request for a review contained in the Appellant's letter dated 3 November 2017 (see [33] above). By letter dated 11 October 2018, officer Jones confirmed that the matter would be referred for independent review. In the meantime, on 25 September 2018, HMRC delivered their statement of case on FSW's appeal, restarting the process of bringing that appeal to a hearing. On 7 November 2018 the Tribunal issued case management directions to progress the appeal.

44. On 19 November 2018, HMRC issued their review conclusion letter in relation to the PLN. On the crucial issue of the quantum of the underlying assessments, and Mr Mann's assertion that "HMRC have conceded that the VAT assessments on which the PLN is based are incorrect and should be recalculated to reflect more accurately liabilities", the reviewing officer said this:

> I do not agree that HMRC have conceded this, and I cannot comment on the alleged comments made by officer Smith during the meeting.
>
> HMRC are defending the VAT assessments at Tribunal, so this is a measure of the fact that HMRC are satisfied that the VAT assessments are sound, justified and defendable.

45. The letter went on to uphold the decision in full, and concluded with the following section:

> Tax Tribunal
>
> If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. If you want to appeal to HM Courts & Tribunal service, you must write to them within 30 days of the date of this letter and include a copy of this Review Conclusion Letter. If you do not then they may reject your appeal.
>
> You can find out how to do this on the HM Courts & Tribunal Service website: www.gov.uk/tax-tribunal/appeal-to-tribunal or you can phone them on 0300 1231024.
>
> The email address is: taxappeals@justice.gov.uk
>
> You can find further information about appeals/reviews at www.gov.uk/tax-appeals/decision.

46. So far as the evidence before me is concerned, nothing happened in relation to the Appellant's appeal until 1 May 2019, over five months later. On that day, Mr Mann emailed officer Jones as follows:

> Dear Ms Jones,
>
> Further to the letter sent to our client by Mr Watts dated 19 November 2018, which stated that the responsibility for this matter had reverted back to you. Our client is still waiting to hear from you regarding the next steps available for resolving this matter.

47. In the meantime, it appears, FSW had not been engaging in the conduct of its appeal and HMRC had been seeking to enforce compliance by it with the case management directions. It seems that the Appellant sought to become involved, through his own solicitors, in the conduct of that appeal but apparently without the authority of the liquidators. On 29 May 2019, UHY Hacker Young (the liquidators' firm) wrote to HMRC and the Tribunal as follows:

> Following emails to the director's representative, we have had no response to assist with this matter. We shall therefore not be continuing with the appeal and agree to withdrawn any proceedings the Company is party to.
>
> As we have no solicitors instructed, please advise what action is required by us.

48. The following day, 30 May 2019, this was followed up by an email to the Tribunal (copied to HMRC) formally confirming the liquidators' wish to withdraw FSW's appeal.

49. The PLN appears to have been released for collection following the withdrawal of FSW's appeal, and the next correspondence in my bundle was an email dated 18 May 2021 to the Appellant from an officer Jacqui King in HMRCs "Targeted Enforcement Recovery Unit". This email refers to a previous email from a colleague at HMRC on 17 April 2021 "following your discussions with him regarding the penalties transferred to you as the Director of First Stop Wholesale Limited and the proposed bankruptcy action". Ms Goldring informed me (but without referring to any documentation) that the previous email had in fact been sent on 17 April 2020 in response to a phone call that day from the Appellant (who had himself been replying to letters from HMRC dated 12 December 2019 and 12 March 2020 warning him of possible bankruptcy proceedings). As it at least shows some further engagement by the Appellant in April 2020, I am prepared to accept this, even though there was no documentation about it in my bundle. In her email dated 18 May 2021, officer King invited the Appellant to contact her to discuss the outstanding matter "within the next seven days". Again, there is no evidence before me as to any response from the Appellant.

50. The next evidence in the bundle is a copy of a statutory demand dated 24 January 2022 addressed to the Appellant for the recovery of over £1.1 million in respect of various tax liabilities, including an amount of £874,238 in respect of a personal liability notice supposedly issued in respect of the year or period ended 28 February 2014. This is presumably intended to refer to the October 2017 PLN the subject of these proceedings.

51. There then followed a flurry of activity, including the submission to the Tribunal on 22 February 2022 of a late appeal against the 2017 PLN.

THE LAW

52. The parties are agreed that in deciding whether or not to grant permission for a late appeal, the Tribunal should follow the three stage process set out in *William Martland v HMRC* [2018] UKUT 178 (TCC) at [44] *et seq*:

> 44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

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

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

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

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

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

ARGUMENTS

For the Appellant

53. As to the length of the delay, it is accepted that the appeal was made approximately 38 months late.

54. As to the reasons for the delay, Mr McNall characterised them as "a muddle, contributed to as much by HMRC as by the Appellant". The Appellant was relying on his advisers (latterly Mr Mann) and he was not advised that he needed to appeal the conclusion of the review letter. So far as he was concerned, there was still an agreement in principle, which had been reached as long ago as March 2015 and subsequently acknowledged many times, and which simply needed to be implemented.

55. As to the evaluation of "all the circumstances of the case", Mr McNall argued that the history militated strongly in favour of granting permission. HMRC had acknowledged a number of times that the penalties claimed were excessive and had agreed a process whereby matters could be sorted out appropriately. Once FSW had effectively been forced into liquidation by HMRC, the Appellant no longer had full control of the situation. All the evidence was that the amount of the 2017 PLN was excessive (and recognised by HMRC to be so). It was of an amount which was likely to force the Appellant into bankruptcy. Furthermore, there

was evidence that a separate PLN issued to the Appellant in relation to corporation tax penalties imposed on FSW was still susceptible of an "in time" appeal; since the corporation tax assessments and related penalties arose out of all the same background facts as the VAT assessments, penalties and PLN, there was no prejudice to HMRC in having to address an appeal in relation to the VAT PLN alongside an appeal in relation to the corporation tax PLN.

56. Mr McNall had also sought to argue that the October 2017 PLN had been issued out of time, which would potentially constitute a "knockout blow" which ought to be taken into account in deciding whether or not to admit a late appeal. When the timing of the withdrawal of FSW's appeal was taken into account, however, he had to accept that the October 2017 PLN would have been issued in time. He did however continue to submit that its validity remained doubtful because there was no statutory provision for an earlier PLN to be "replaced" by a later one, and this doubt should be included in the evaluation of "all the circumstances of the case".

57. In short, all that the Appellant was seeking was the opportunity to implement the agreement in principle which had been reached with HMRC. The existence of this agreement had even been acknowledged in HMRC's statement of case in FSW's appeal. Whilst there is undoubtedly a public interest in the finality of HMRC's decision making, there is a public interest of no lesser importance in HMRC (a) only collecting the money which is due to it and (b) being held to the agreements which it reaches in good faith with taxpayers which are designed to achieve this end.

58. Whilst Mr McNall accepted that reliance on external advice could not provide a knockout argument for the Appellant, he pointed out that the courts can and do take into account, in considering "relief from sanction" cases, the prejudice caused to a claimant who might be reduced to a claim against their former advisers – see, for example, *Welsh v Parnianzadeh* [2004] EWCA Civ 1832 at [32] and [34] per Mance LJ.

For HMRC

59. Ms Goldring accepted that an agreement in principle may have been reached as to how matters could have been resolved, as early as March 2015. However, it was always clear that the agreement was conditional upon the provision of further material by the Appellant to back up the figures that were being advanced. This was reflected in HMRC's statement of case in FSW's appeal in September 2018, and there was no suggestion at any point that the necessary further documentation and records had been made available to HMRC to enable the earlier agreement in principle to be worked through and implemented. Additionally, there was no reliable indication as to what final liabilities might have been agreed if the "provisional agreement" had been properly implemented – there were significant other elements of the VAT liability apart from the incorrect input tax claim involving the Appellant's other business.

60. Matters had then simply been overtaken by the issue of the review letter in November 2018. There had been sterile discussions with the Appellant's new agent and the required material had not been forthcoming. Since the review letter, there had simply been no significant engagement by the Appellant. Mr Mann's email of 1 May 2019 was clearly not sufficient to keep matters alive, and in any event it was a single isolated email which altogether ignored the need to notify a formal appeal to the Tribunal (which would already have been several months late, even by that time).

61. Insofar as the Appellant argued that he should be allowed to appeal late because he had relied on his adviser, who had failed to advise him to appeal, Ms Goldring referred to the comment of the Upper Tribunal in *HMRC v Katib* [2019] UKUY 0189 (TCC) at [54]:

> It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late

> appeal, failures by a litigant's adviser should generally be treated as failures by the litigant.

62. The bottom line was that since the issue of the review conclusion letter in November 2018, the only substantial engagement by or on behalf of the Appellant before he became aware of the statutory demand in January 2022 was a single email from his representative on 1 May 2019 which sought to put responsibility back onto HMRC for progressing matters. Following indications of impending bankruptcy proceedings in December 2019 and March 2020, again there is no evidence of any response from the Appellant (apart from a single phone call in April 2020) until the statutory demand was actually served on him in January 2022.

DISCUSSION AND DECISION

63. Following the guidance in *Martland*, it is clear that permission for the late appeal should not be granted unless the Appellant has satisfied me that it is appropriate to do so.

64. I take the three stages of *Martland* in turn.

Stage 1 – length of the delay

65. First, it is accepted that the length of the delay is approximately 38 months.

Stage 2 – reasons for the delay

66. I find the reasons for the delay to be as follows.

67. First, in the absence of any evidence to the contrary, I accept that the Appellant was not specifically advised by Mr Mann of the need to notify an appeal to the Tribunal within 30 days of the date of the November 2018 review letter. No doubt, if he had been advised of the crucial need for this, an appeal would have been duly notified.

68. Second, I accept that the Appellant had believed that a way forward to a settlement of the matter had been agreed in principle. In the light of that, he must be taken to be arguing that a formal appeal was not therefore not necessary. This is effectively a rephrasing of Mr McNall's argument that the need to appeal was unclear due to the "muddle" for which HMRC were partly responsible. I reject this argument. Whilst HMRC might have contributed to a small extent to the historical "muddle", I consider that ceased to be relevant by the time of the issue of the review letter in November 2018. That letter brought clarity to HMRCs position. In short, therefore, I consider that the main reason for the delay was either wilful disregard (in the hope that the matter would simply "go away" if it were ignored), inattention, or an assumption that it would all be sorted out satisfactorily without further involvement on his part.

Stage 3 – overall evalution

69. I turn now to my overall evaluation of the circumstances of the case, balancing the merits of the reasons for the delay with the overall prejudice caused to the parties by granting or refusing permission. In doing so, I 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.

70. I do not find any of the reasons for the delay set out above to have any significant merit, for the following reasons.

71. Having been issued personally with a review conclusion letter which clearly stated HMRC's position after the lengthy history and which specifically advised the Appellant of the need to appeal to the Tribunal within 30 days if he disagreed, there would need to be a good reason why it was appropriate for the Appellant effectively to ignore this deadline.

72. There was no evidence before us as to any interaction between the Appellant and his then adviser in relation to HMRC's review conclusion letter. It is not known whether he even spoke

to his adviser about it. The review conclusion letter contained a clear statement of the Appellant's appeal rights if he disagreed with the conclusion. I do not consider that the Appellant can fairly claim that his adviser's failure to tell him he should appeal can be relied on as giving him a good reason for not doing so, even without regard to the Upper Tribunal's statements in *Katib* set out at [61] above.

73. I reject any suggestion that wilful disregard or inattention good be regarded as good reasons for delay on the Appellant's part.

74. That leaves the question of whether an assumption on the part of the Appellant that matters would all be sorted out satisfactorily without his further involvement can be regarded as constituting a good reason for the delay on his part in notifying his appeal.

75. This reason must be considered against the background of what steps the Appellant actually took in response to the review conclusion letter of November 2018. On the evidence before me, there was precisely no action taken by him or on his behalf until 1 May 2019, at which point there was one very short email from his adviser which sought to put the ball back in HMRC's court in terms of progressing matters, when in fact it was squarely in the Appellant's court (having been there since at least December 2015, as confirmed by HMRC as recently as June 2018). Nor did the Appellant or his adviser follow up that email when no substantive reply was received (whether or not, as HMRC denied, the email ever reached officer Jones).

76. Obviously an evaluation of the overall circumstances of the case requires consideration of the prejudice potentially suffered by both parties as a result of the granting or denying of permission.

77. Mr McNall argued that the prejudice to the Appellant if permission were denied would be extreme. He would likely be made bankrupt, and he would lose the chance to dispute a penalty liability of nearly £875,000 when there were strong indications in the history of the matter that this would be significantly more than the amount that might be justified after proper investigation. He would also lose the opportunity to argue that the "reduced" PLN was technically invalid.

78. So far as HMRC are concerned, the prejudice if permission were granted for a late appeal would be that they would have to devote resources to re-examining matters that they had long considered closed, in a situation where the Appellant had not availed himself for a period of several years of the opportunities that had been offered to him to make good his claims as to the massively exaggerated size of the penalties. It is said that HMRC will be required to examine effectively the same matters in any event in connection with a corporation tax penalty PLN which is also outstanding against the Appellant, in relation to which it is said he can still notify an "in time" appeal to the Tribunal. Whether or not that is the case, the material before me in relation to the corporation tax position was sketchy in the extreme, and in the circumstances I do not feel this factor can carry significant weight in my overall evaluation.

79. It is clear that the prejudice to the Appellant if permission is refused will potentially be very great. But this is common to all such cases. Given (a) that permission should not be granted unless the Appellant discharges the burden of satisfying the Tribunal that it should be, (b) the particular importance of the need for statutory time limits to be respected, and (c) what I consider to be the lack of any good reason for the delay, the balancing exercise I am required to carry out clearly militates against granting permission.

Conclusion

80. The application for permission to notify a late appeal to the Tribunal is therefore REFUSED. In consequence, the substantive appeal must be DISMISSED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

81. 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.

KEVIN POOLE
TRIBUNAL JUDGE

Release date: 25 JANUARY 2023