



Neutral Citation: [2023] UKFTT 786 (TC)

Case Number: TC08939

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Glasgow Tribunal Centre
George House, Edinburgh

Appeal reference: TC/2022/02706,
TC/2022/02708,
TC/2022/03949

LATE APPEAL – Martland considered – length of delay – whether serious or significant – serious but not significant – whether good reason for delay – yes – whether late appeals appropriate in all the circumstances – yes – applications allowed – appeals admitted

Heard on: 21 June 2023 & 24 August 2023

Judgment date: 22 September 2023

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

PEOPLE SERVICES SOLUTION LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Iain Mitchell, KC and Niall Mickel of counsel, instructed by Patrick Campbell, Solicitors

For the Respondents: Giles Reid, of counsel, instructed by the Office of the Advocate General

DECISION

INTRODUCTION

1. The substantive issues in the three appeals are denial of input tax, denial of zero rating and a decision to deregister for VAT respectively. The underlying factual matrix is common to all three appeals. There is a further appeal (TC/2022/04635) which was lodged within the statutory time limits. That appeal relates to an assessment of additional output tax in the sum of £12,639,284. No hearing date in that appeal has been fixed.

2. On 3 March 2022, the respondents (“HMRC”) issued a Review Conclusion letter in respect of VAT assessments for the periods 05/21 in the sum of £13,578,279.09 and the period 08/21 in the sum of £22,983,680.26 totalling £36,561,900.59. The Notice of VAT assessments was issued on 1 December 2021 and related to input tax disallowed due to a lack of evidence. The assessments are appealable under section 83(1)(p) Value Added Tax Act 1994 (“VATA”). The appellant’s tax adviser, Mr O’Donnell, notified an appeal to the Tribunal on 18 April 2022. The appellant now seeks permission to notify the appeal late.

3. On 4 March 2022, HMRC issued a Notice of VAT assessments for the periods 11/20, 02/21, 05/21, 08/21 and 11/21 in a total sum of £27,917,383. The assessments were raised on the basis that the appellant had failed to provide documentary evidence to support zero rating of sales made in the relevant period. Mr O’Donnell lodged an appeal to the Tribunal on 18 April 2022. The appellant now seeks permission to notify the appeal late.

4. On 8 March 2022, HMRC wrote to the appellant stating that the appellant had been deregistered for VAT with effect from 7 March 2022 on the basis that the VAT registration was being utilised solely or principally for fraudulent purposes. Mr O’Donnell lodged an appeal with the Tribunal on 22 April 2022. The appellant now seeks permission to notify the appeal late.

5. No evidence was led at the first hearing. The documents to which I was referred were a Hearing Bundle extending to 686 pages, a Supplemental Bundle produced by the appellant extending to 55 pages and an Authorities Bundle extending to 187 pages. The Supplemental Bundle included witness statements from a Mr Sabir, the sole director and shareholder of the appellant, and two witness statements from Mr O’Donnell. There was also medical evidence. On the morning of the hearing, the appellant lodged a Skeleton Argument.

6. In the course of the hearing Mr Mitchell lodged a copy of a Notice of Appeal in respect of TC/2022/046735 (“the fourth appeal”) which was a further appeal lodged by Mr O’Donnell on 26 April 2022 in respect of the assessment in the sum of £12,727,256 for the period 02/22. The appeal was submitted timeously and it stated that it was linked to the three appeals which were the subject matter of this hearing. It was argued that they should be conjoined.

7. At the end of the submissions advanced by Mr Mitchell, I drew his attention to paragraphs 51 and 53 of Mr O’Donnell’s witness statement which made it explicit that the appellant had forwarded the decision letters for the first two appeals to him on 11 March 2022 and the decision letter in respect of deregistration to him on 17 March 2022. That was in direct conflict with the line of argument put forward in submissions which was to the effect that the mental health issues of Mr Sabir combined with Covid and postal delays had meant that the decisions had not been received timeously by the appellant.

8. It also raised the possibility of there being a potential argument in terms of the Upper Tribunal decision in *HMRC v Katib* [2019] UKUT 189 (TCC) (“Katib”) since there was no evidence as to when and how Mr O’Donnell had been instructed beyond Mr Sabir’s statement in his witness statement that he had instructed him to deal with the decisions. After an adjournment, Mr Mitchell returned, and after advancing arguments in relation to *Katib*

requested an adjournment of the hearing to enable Mr O'Donnell to give evidence as to what happened between receipt of the decisions and lodgement of the appeals. That was vigorously opposed by Mr Reid.

9. After hearing argument from both parties and having had regard to Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") I granted the motion to adjourn on the basis that the appellant would bear the expenses of the abortive hearing that day and that a new date for hearing would be listed as soon as possible.

10. HMRC having lodged their application for expenses on 22 June 2023, on 28 June 2023 the Tribunal issued Directions to that effect.

11. No further witness statement from Mr O'Donnell was lodged so, on 9 August 2023, I issued further Directions directing that a witness statement be lodged by no later than 16 August 2023. It was duly lodged on that date.

12. On 18 August 2023, the appellant's solicitors wrote to the Tribunal enclosing an expert report from Mr Gerry Myton of HW Fischer LLP and sought leave for it to be adduced in evidence and for Mr Myton to be permitted to give evidence. I admitted the report *de bene esse* and intimated that its admission, or not, would be a preliminary issue at the hearing.

13. On 22 August 2023 a further Supplemental Bundle extending to 22 pages was lodged by the appellant.

14. On 23 August 2023, the appellant lodged a further Skeleton Argument and a further Bundle of Authorities extending to 52 pages.

15. Immediately prior to the hearing the appellant lodged a further Supplemental Bundle extending to 33 pages.

16. I heard evidence from Mr O'Donnell and Mr Myton.

Preliminary Issues

17. As far as costs are concerned, the parties confirmed that the costs of the first hearing had been settled by the appellant.

18. Mr Reid confirmed that he did not object to the admission of the witness statements and other supplementary materials.

Legal framework

19. It is not disputed that the relevant legislation for each of the matters purportedly under appeal, provides that an appeal must be made within 30 days of the date of the decision.

20. Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") provides:-

“20.—Starting appeal proceedings

...

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

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

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

21. The Tribunal's power to admit a late appeal is contained in section 49 TMA which, insofar as relevant, reads as follows:-

“49. Late notice of appeal

- (1) This section applies in a case where—
 - (a) notice of appeal may be given to HMRC, but
 - (b) no notice is given before the relevant time limit.
- (2) Notice may be given after the relevant time limit if—
 - (a) HMRC agree, or
 - (b) where HMRC do not agree the tribunal gives permission....”

22. Section 49H TMA gives the Tribunal power to grant permission to notify a late appeal to the Tribunal. Both parties were agreed that the proper approach to such applications is set out by the Upper Tribunal in *Martland v HM Revenue & Customs* [2018] UKUT 178 (TCC) (“*Martland*”). The Upper Tribunal reviewed the authorities and concluded as follows:-

“43. 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”.

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.”

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). 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.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that “being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules”; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.”

The Facts

23. The appellant is a limited company which was registered for VAT. As I have indicated, Mr Sabir was the controlling mind of the appellant.
24. On 16 June 2021, HMRC wrote to the appellant intimating that they were opening an enquiry because of concerns about potential payroll company fraud. They made a request for information. Correspondence with the appellant's solicitors ensued.
25. On 6 September 2021, HMRC issued an Information Notice in terms of Schedule 36 Finance Act 2008. Mr Sabir sought an extension of time to respond thereto since "the person dealing with the case is currently on compassionate leave due to family issues".
26. On 7 October 2021, Mr Sabir emailed HMRC attaching some books and records for the period to January 2021.
27. On 11 October 2021, HMRC issued a further Information Notice and Mr Sabir responded on 18 October 2021 requesting a further extension of time.
28. On 26 October 2021, Mr Sabir sent HMRC some trading records for the periods to February 2021.
29. On 10 November 2021, HMRC wrote to the appellant stating that, having reviewed the documents, further information was required by 25 November 2021.
30. On 26 November 2021, Mr Sabir emailed HMRC stating that documentary evidence could not be provided but enclosing copies of some due diligence.
31. On 1 December 2021, HMRC issued a Notice of VAT assessments in the sum of £36,561,959.35.
32. On the same day, HMRC raised a Court of Session action in relation to that Notice of VAT assessments. A Freezing Order was obtained in an English court on 2 December 2022. It is not in dispute that that Freezing Order is currently in the sum of £48,000,000 but that it is "open" and therefore could be extended.
33. On 6 December 2021, Mr Sabir met with Mr O'Donnell.
34. On 7 December 2021, HMRC wrote to the appellant issuing a Notice of Direction ("the First Notice") under Regulation 25(1)(c) of the Value Added Tax Regulations 1995 stipulating that a VAT return was required together with payment of the outstanding VAT for the period 1 September 2021 to 30 November 2021. HMRC imposed a deadline for both submission of the return and payment of the VAT of 13 December 2021.
35. On 9 December 2021, Mr Sabir wrote to HMRC and to the Office of the Advocate General enclosing a letter from Tax and Forensic Services Limited (Mr O'Donnell's firm) dated 12 October 2021. That was addressed to HMRC's Debt Management and Banking Unit stating that they had been instructed in regard to submission of the 08/21 VAT return and intimating that the appellant's bank account had been frozen so the VAT could not be paid. Mr Sabir also enclosed a letter from the appellant's bank to him dated 1 October 2021 dealing with his complaint in regard to the closure of his bank account.
36. On 9 December 2021, Mr Sabir wrote to HMRC referring to the Notice of VAT assessments issued on 1 December 2021 and referring to the litigation in the Court of Session. He intimated that he wished to appeal the Notice of VAT assessments because he was aware of the 30 day appeal period. He asked for a review of the decision. That letter was drafted for him by Mr O'Donnell.

37. On 13 December 2021, HMRC responded asking for the purchase listings and documentation for both of the VAT periods in question as a matter of urgency.
38. On 14 December 2021, HMRC wrote to Mr Sabir reminding him that the First Notice remained extant.
39. On 15 December 2021, Mr Sabir responded stating that he would lodge the return by Monday 20 December 2021 and asking for an extension of time until 22 December 2021 to furnish the relevant information. On the same day HMRC emailed Mr Sabir asking whether the VAT return had been submitted.
40. On 21 December 2021, the appellant's solicitor intimated that the appellant intended to defend the Court of Session action.
41. On 23 December 2021, the solicitors wrote to HMRC advising that the appellant had appealed the VAT assessments.
42. On 23 December 2021, Mr Sabir wrote to HMRC enclosing the "sales and purchase ledger from VAT period May 2021 and August 2021".
43. On 23 December 2021, HMRC wrote to the appellant pointing out that the VAT return had not been submitted and therefore they were issuing a VAT assessment in the sum of £28,008,897.53 for period 11/21. That was issued on the same day.
44. On 30 December 2021, Mr Sabir emailed HMRC stating that he was disappointed to have received the assessment and stating that he had posted the VAT return to HMRC on 22 December 2021. He attached a copy thereof and requested that the assessment be rescinded.
45. On 11 January 2022, HMRC wrote to the appellant with a further Information Notice requiring a response by 18 January 2022. A letter was issued on the same date requesting the outstanding information that had not been provided. Lastly on that date, a notification of deregistration of a company ("LKH") in the appellant's supply chain was issued. That letter made it explicit that deregistration was on the basis of alleged fraudulent behaviour.
46. On 17 January 2022, HMRC issued a further Notice of Direction ("the Second Notice") in relation to the VAT period from 1 December 2021 to 28 February 2022 requiring a return and payment of VAT by no later than 26 January 2022.
47. On 19 January 2022, HMRC wrote to the appellant stating that they required extensive further information evidencing the supplies made by LKH and then sold on by the appellant since the purchase invoices that had been provided did not meet the criteria in Regulation 14 Value Added Tax (General) Regulations 1995. In many cases no invoice had been provided. HMRC also asked for further information in relation to zero rated supplies that had been made by the appellant to two other companies.
48. On 20 January 2022, Mr Sabir responded to the letters of 11 January 2022 asking for a 14 day extension as the letters had only been received on 18 January 2022.
49. On 21 January 2022, HMRC responded granting an extension until 1 February 2022.
50. On 4 February 2022, HMRC wrote to the appellant pointing out the appellant's numerous failures to comply with the Notices of Direction and Information Notices. Mr Sabir was asked to telephone the HMRC officer by 11 February 2022 and warned that if he did not do so the appellant might be deregistered.
51. On 4 February 2022, the appellant's agents lodged written defences in the Court of Session.

52. On 7 February 2022, HMRC issued a Notice of VAT Assessment in the sum of £8,823,013.72 for the period 11/21.
53. On 9 February 2022, Mr O'Donnell wrote to HMRC stating that he had been instructed and requesting an extension of time until 23 February 2022. That was granted.
54. On 11 February 2022, Mr Sabir wrote to HMRC, copied to Mr O'Donnell, enclosing a PDF copy of the VAT return for the period ending 17 December 2021. He stated that going forward Mr O'Donnell would be dealing with matters on behalf of the appellant.
55. On 24 February 2022, HMRC issued another Information Notice requiring a response by 3 March 2022. That Information Notice related to the VAT return that had been filed for the period 1 December 2021 to 17 January 2022.
56. On 3 March 2022, HMRC wrote to the appellant upholding the assessments in the sum of £36,561,915.
57. On 4 March 2022, HMRC issued Notices of Assessment in the sum of £27,917,383.
58. On 8 March 2022, HMRC wrote to the appellant intimating that having checked the VAT position and having obtained information that led HMRC to believe that the appellant was using its VAT registration solely or principally for fraudulent purposes, the appellant had been deregistered for VAT with effect from 7 March 2022.
59. On 11 March 2022 at 09:42, Mr O'Donnell emailed HMRC stating that he had a copy of the letter of 7 February 2022, referring to the assessment and asking for confirmation that that had been issued because the records were outstanding. He said that he believed that Mr Sabir had given the records to HMRC. HMRC responded immediately stating that the records were outstanding.
60. On 11 March 2022 at 12:15, Mr Sabir emailed Mr O'Donnell with copies of the letters of 3 and 4 March 2022 from HMRC.
61. On 16 March 2022, HMRC wrote to the appellant confirming the outstanding balance on the appellant's VAT ledger.
62. On 17 March 2022, Mr Sabir emailed Mr O'Donnell enclosing a copy of the deregistration decision letter of 8 March 2022.
63. On 18 March 2022, Mr O'Donnell attempted to contact Mr Sabir by telephone to discuss:
- (i) Provision of the records in order to try to get the assessments withdrawn as he did not know at that stage that Mr Sabir had already sent the records by recorded delivery; and
 - (ii) Appealing to the Tribunal against the assessments.
- He made other unsuccessful attempts thereafter to contact Mr Sabir by sending WhatsApp messages and leaving voicemails.
64. On 1 April 2022, HMRC wrote to the appellant in relation to the non-compliance with the Information Notice dated 24 February 2022 and intimating an amended VAT assessment of £12,727,256.
65. On 12 April 2022, HMRC's adjusted pleadings in the Court of Session litigation were sent to the appellant and then acknowledged by the solicitors.
66. On 15 April 2022, Mr Sabir contacted Mr O'Donnell stating that he was in the process of collating papers for his legal team in relation to the Court of Session proceedings and the Freezing Order. Mr O'Donnell advised him that the assessments required to be appealed.

Mr Sabir stated that he would speak to his legal team and he subsequently instructed Mr O'Donnell to lodge the Notices with the Tribunal.

67. On 18 April 2022, Mr O'Donnell lodged two of the Notices of Appeal.

68. On 20 April 2022, the appellant's agents sought to extend the period by which the parties could adjust the pleadings in the Court of Session by six weeks on the basis that that would allow them time to obtain further information and to instruct senior counsel.

69. On 22 April 2022, the third Notice of Appeal relating to the deregistration was lodged.

70. On 26 April 2022, Mr O'Donnell lodged an in time Notice of Appeal in the fourth appeal relating to VAT assessments in the sum of £12,727,256. That appeal is currently sisted pending the outcome of these applications.

71. On 23 May 2022, the appellant's agents lodged a motion to sist the Court of Session action for a period of three months on the basis that there were four ongoing appeals in the Tribunal.

Mr Sabir's witness statement

72. That witness statement is dated 30 July 2023 and was stated to have been prepared following face-to-face, telephone and email discussions between the appellant's lawyers and him. He said that he had seen Mr O'Donnell's first two witness statements.

73. Mr Sabir states that he first contacted Mr O'Donnell in or around October 2021 and that Mr O'Donnell's explanation of events in his witness statement was correct and, in particular:

- (a) the appellant had been experiencing problems with the delivery of mail to its office;
- (b) as a result of Covid, neither he nor his employees were attending the office on a daily basis;
- (c) by January 2022 the appellant had had to vacate the offices as it was unable to meet its rental obligations;
- (d) he had only been visiting his office once a week to collect mail because of his mental state.

74. He stated that he had sent various documentation to HMRC by recorded delivery on or around 20 January 2022 but HMRC did not appear to have received that. He said that he had not kept the proof of postage and that "I was struggling with my mental health at the time...".

75. He referred to the letter from Dr Sheila O'Neill dated 9 June 2022 which had been sent to his solicitor and also to the first two psychiatric reports of Dr Appan. He stated that he struggles "with depression, anxiety and suicidal thoughts on a frequent basis" He said that that had often had a significant impact on his ability to function and concentrate on both personal and financial matters.

76. He argued that "At the material time" he had struggled to engage with HMRC and with Mr O'Donnell and often ignored attempts to contact him.

77. He stated that he had first been diagnosed in or around 2011. He had been prescribed anti-depressants and anti-anxiety medication "at various points" but that he did not always take that medication. He speculated that he had bipolar disorder but it had not yet been diagnosed.

78. He states that at the end of 2021 he became extremely depressed and anxious. He was unable to cope and struggled to motivate himself.

79. At paragraphs 31 and 32 he stated:-

“31. As a result of this, I was not going into the office on a regular basis and so did not receive the Letters or forward them to Mr O’Donnell straight away (i.e. in March 2022). As set out above, I had previously instructed Mr O’Donnell for advice and assistance in relation to PSS’s matters in or around October 2021; and I also instructed him to deal with the Letters. I found it very difficult, however, to assess the issues addressed in the Letters or provide Mr O’Donnell with any significant level of input.

32. The nature of my mental health meant that my ability to cope was not consistent on a day-to-day basis. Sometimes I felt like I could deal with things and sometimes I buried my head in the sand ...”.

80. In December 2022 he had been an in-patient in a hospital that “specialises in treating mental health conditions” for a month.

81. There was no opportunity to cross-examine Mr Sabir and there are obvious inaccuracies in his evidence and a significant lack of specification.

82. In particular, he did send the “Letters” to Mr O’Donnell on 11 March 2022, being the first two decision letters which are the subject matter of these applications, and the third on 17 March 2022. Those emails were produced to the Tribunal in the further Supplemental Bundle. The first simply read “Please see attached latest correspondence with HMRC” and, the second read “Please find attached letter from Alison Williams. Im (sic) available for a call anytime”.

83. Mr O’Donnell confirmed in his evidence that those were the emails that were sent to him and that he had tried to telephone Mr Sabir on 18 March 2022 and subsequently left voicemails and WhatsApp messages but to no effect.

84. Those emails from Mr Sabir do not amount to instructions and I accept Mr O’Donnell’s evidence that he did not get instructions before 15 April 2022 (which was Good Friday). Further I accept his very clear evidence that he would not have instigated appeals in a complex matter without instructions.

85. The evidence from Mr Sabir in relation to his mental health can only be described as lacking in relevant detail.

The medical evidence

86. On 8 June 2022, the appellant’s solicitors requested a medical report from Dr Sheila O’Neill who appears to have replied the following day. However, I think that the report should be dated 9 August 2022 because, on the second page, it goes on to state that Mr Sabir was “subsequently reviewed by telephone consultations” on 26 July 2022. The new medication that Dr O’Neill prescribed following that review is the one that Mr Sabir described taking for two weeks when he was seen by Dr Appan on 25 August 2022.

87. She confirmed that Mr Sabir had first attended her private practice in June 2021 when he said that he was very anxious and stressed. At his review appointment a month later he stated that he was feeling very low in mood and lacking motivation. He had previously been on an anti-depressant which he had stopped taking. He restarted that medication at a dose of 20mg (which is an entry dose) and gradually his mood improved over several months. He defaulted on several appointments thereafter but re-attended on 7 June 2022 at which point he was diagnosed as having developed an acute anxiety state. The timing of the appointments that he did not attend was not disclosed.

88. He had told the doctor that he had not been taking his medication and he had been struggling with those symptoms since Christmas 2021. He described poor concentration, insomnia and lack of motivation.

89. The doctor stated that he had described having had multiple episodes of depression in the past. She stated:

“I do believe his current mental health state could impact on his motivation and concentration and that this could have contributed to issues with dealing with his personal affairs”. (emphasis added)

90. Unsurprisingly Mr Reid pointed to the fact that that evidence was not contemporaneous and was expressed in very vague terms. That cannot be denied. I have added emphasis to the word “current” because, appropriately, the Doctor did not comment on Mr Sabir’s mental health in March and April 2022.

91. The appellant’s solicitors then instructed a psychiatric report and Doctor Appan interviewed Mr Sabir at the solicitors’ office on 25 August 2022. The Doctor recorded that he had been told that Mr Sabir was involved in an enquiry by HMRC and said:

“I am made to understand that Mr Sabir is involved in an enquiry by HMRC. It appears that he has struggled to engage with the HMRC (sic) and it’s agents in a timely manner. I am made to understand that Mr Sabir has ascribed this failure to engage as being an issue of a depressive condition for which he was receiving treatment from a GP.”

92. Appropriately the Doctor noted that “Whilst I may record statements by Mr Sabir during the course of my meeting with him, this does not necessarily imply that I accept their veracity”.

93. The Doctor stated that he had seen Dr O’Neill’s letter of 9 June 2022 and had perused Mr Sabir’s medical records.

94. He recorded that:-

(a) Mr Sabir claimed that he had been seeing his GP since 2012 (when he was aged 21) for mental health problems.

(b) He saw his GP once in 2018 and was prescribed an anti-depressant. He stated that he had taken the medication for six months but stopped taking it thereafter.

(c) He stated that his mental health had deteriorated since January 2022 and he had been suffering from suicidal thoughts since then. The Doctor stated “He claimed that he might have taken an overdose of medication in March 2022 when he took painkillers such as Ibuprofen, paracetamol and tramadol”.

(d) He had been taking anti-depressant medication for two weeks.

(e) He was due to see a psychologist on 3 September 2022.

(f) Mr Sabir confirmed that he had seen a private GP in 2021 (Dr O’Neill) and again in June 2022.

(g) He admitted to cannabis use since he was 16 but said that it made his anxiety worse so he had stopped five years previously. He denied having used any other illicit substance.

(h) Mr Sabir said that he had suicidal thoughts every day but denied any active plans.

95. Dr Appan recorded that the medical records showed that:-

(a) In 2011 Mr Sabir had said that for the “past couple of years” he had had “ups and downs and was rarely in the middle” but he denied suicidal ideation.

(b) That GP did not think that he had bipolar disorder but had offered referrals to psychiatry, medication or counselling. Mr Sabir had opted for counselling but he did not attend.

(c) In October 2012, Mr Sabir asked for an emergency appointment and a referral to psychiatric services claiming that he “felt bipolar”. He was again referred to counselling but it is not recorded whether he attended on that occasion.

(d) In June 2017, he had work related feelings of low mood and anxiety but there were no thoughts of suicide or self-harm. He was keen for a referral to psychiatric services but the GP simply noted that he was anxious and irritable with poor motivation.

(e) In December 2018, after a relationship breakup he again attended his GP and was recommenced on the anti-depressant. He was referred to a psychologist but by January 2019 it was recorded that he was feeling a lot better and had not yet received a psychology appointment.

96. Dr Appan then narrated Dr O’Neill’s findings concluding that his symptoms had gradually improved in 2021 but that he had suffered a relapse of his symptoms in June 2022.

97. Dr Appan’s opinion was that Mr Sabir “currently presents with symptoms consistent with a diagnosis of moderate depression...He also appears to suffer from significant symptoms of anxiety”. He stated that:

“It is possible that when not receiving regular treatment, the severity of Mr Sabir’s depressive and anxiety symptoms could have a significant impact on his ability to function. It is likely, that when unwell, his mood, sleep, and his ability to concentrate may be negatively affected. This might have contributed to his difficulties in dealing with his personal and financial affairs”.

98. At the request of the appellant’s solicitors, Dr Appan produced another report dated 14 April 2023. That report was predicated on the basis of an interview with Mr Sabir on 6 April 2023 at the solicitors’ office and perusal of records relating to Mr Sabir’s admission to a private hospital as an inpatient from 29/12/2022 to 26/01/2023.

99. On that occasion Mr Sabir explained to Dr Appan that things had really deteriorated towards the end of December 2022 but that things had been really quite bad since August 2022. He had not been taking his medication. He had not followed up on the referral to psychology. Whilst his mental health had improved as a result of the hospital admission, his mood began to dip in February 2023 and he spent a lot of time in his room.

100. He admitted that he had been regularly smoking cannabis and taking medication that had been prescribed for a friend.

101. The medical records disclosed that he was admitted to hospital on a voluntary basis for detoxification from cannabis and addiction to illicit prescription medications.

102. It is a private residential treatment centre that facilitates detoxification, rehabilitation and after-care for detoxification from substance abuse. Its advertisements state that it offers a “highly structured abstinence-based treatment program”.

103. The medical records state that:

- (a) Mr Sabir had used cannabis since he was a teenager and opiates since March 2022.
- (b) He had been using both on a daily basis until six days before admission when he stopped using the opiates.
- (c) On admission he had tested positive for cannabis.
- (d) Mr Sabir believed that he suffered from psychosis and bipolar affective disorder.

104. Doctor Appan’s opinion focusses on December 2022 which is not relevant for the purposes of this hearing. However, his diagnosis was that Mr Sabir continued to present with

symptoms that were consistent with a diagnosis of moderate depression having had a relapse in June 2022 and a significant deterioration in his mental health at the end of 2022. He found that it was likely that, particularly around the period of December 2022, the severity of his depressive and anxiety symptoms would have had a significant impact on his ability to function.

105. The final medical report was dated 6 June 2023 and was based purely on the previous two interviews and reports, Dr O'Neill's report and the medical records. The solicitors had asked the Doctor to focus on the period from December 2021 to the end of March 2022 and revisit his reports to "further clarify the precise difficulties under which he [Mr Sabir] was labouring at the relevant time".

106. Doctor Appan's opinion was that "Mr Sabir appears to suffer with symptoms which are in keeping with a diagnosis of Recurrent Depressive Order". He also presented with symptoms of anxiety. The records indicate that the depressive symptoms were consistently present from around December 2021. He opined that it is very likely that if Mr Sabir was not taking medication then he would suffer a deterioration in his mental health. He opined that the timescale for re-emergence of symptoms following cessation of medication is variable, sometimes within weeks and sometimes it takes up to a few months.

107. He was asked to comment on the impact of his symptoms on Mr Sabir's daily operational ability and effectiveness but stated that it would depend significantly on the severity of the symptoms. If he had severe depressive and anxiety symptoms, then it "could" have had a significant impact on his ability to function. Mr Sabir was diagnosed with a moderate depressive illness.

Discussion

108. Firstly, for the avoidance of doubt, I found the evidence from Mr O'Donnell and Mr Myton to be both straightforward and entirely credible.

109. At the first hearing there were conflicts in the evidence in that in his witness statement Mr Sabir had said that he had not sent the decision letters to Mr O'Donnell in March 2022, whereas in his witness statement Mr O'Donnell made it clear that Mr Sabir had done so. The three applications for leave to appeal out of time which were submitted to the Tribunal by the appellant's solicitors on 20 September 2022, stated explicitly that:

"Upon attending at his business address (ie at some time after 3 March 2022), he became aware of the Review Conclusion Letter and its decision. He immediately instructed Mr John O'Donnell ... who in turn drafted and submitted the current appeal".

110. I did not hear from the solicitors or Mr Sabir but I find that neither is accurate. My findings in fact are based on the evidence from Mr O'Donnell.

Length of the delays

111. The first stage is to consider the length of the delay in notifying the appeals. The relevant time limit is 30 days and in these appeals the delays were 16 days, 15 days and 15 days respectively.

112. Mr Reid argued that the delays were both serious and significant; they were not trivial. Furthermore they occurred at the end of an enquiry where there had been numerous delays.

113. Mr Mitchell argued that those delays were neither serious nor significant. I accept his argument that "serious" and "significant" are not synonyms and that therefore there are two tests.

114. Mr Mitchell relied on paragraphs 51 and 54 in *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472 where the Court of Appeal defined “significant” as being “in the sense of having an effect on the proceedings”. In that case the delay, being 42 days, was viewed as being serious but not significant because it did not significantly affect the progress of the appeal in the longer term.

115. At paragraph 54 the Court pointed out that the longer the delay, the less likely it was that a court would find that it would not have a significant effect on proceedings. Mr Reid fairly accepted that the delay in these appeals was not particularly long but he argued that it was not very short. That is correct. However, I find that it is comparatively short in the context of a 30 day time limit. I do not find that there was a significant delay in any of the three appeals.

116. Were the delays serious? Of course, I accept that there should be compliance with time limits and, in that context, any delay is potentially serious but, as the Upper Tribunal pointed out at paragraph 41 of *Umuthi Healthcare v FCA* [2022] UKUT 00275 (TCC), there are degrees of seriousness and that has to be considered in context.

117. In the applications for reasons for the delay, the solicitors referred to the delay and expressed it in terms of working days. Mr Mitchell also highlighted the fact that Easter had occurred during that period. The legislation refers only to the number of days.

118. It is true that the periods of delay spanned Easter. However, two of the appeals were in fact lodged on Easter Monday and contact with Mr Sabir was made on Good Friday. There has been no explanation as to why the third appeal was lodged four days after the other two. I cannot find that Easter was a contributing factor.

119. Mr Mitchell argued that part of the context was that it was a matter of some complexity where there had “been a lot of previous communication”. Whilst I accept that the substantive issues are complex, as can be seen from the findings in fact, HMRC had found it necessary to issue a number of Information Notices. The assessments were raised because of the paucity of relevant information. There had been a lot of communication but that was on the part of HMRC and not the appellant whose primary form of communication was to consistently request extensions of time. As Mr Reid said, there had been many delays.

120. As can be seen from the findings in fact, Mr O’Donnell had difficulty in contacting Mr Sabir to take instructions. I agree with Mr Reid that the delays are not trivial. On balance I find that, in the context of appeals that have been categorised as complex and where very large sums of money are involved, although the delays are not very long, nevertheless they are serious.

Reason for the delay

121. In the Notices of Appeal for the first two appeals, the reason given for the late appeal was:

“We are approximately two weeks late in appealing. It is not believed that HMRC are prejudiced by such a short time span. HMRC have a Freezing Order over the company’s bank accounts...”. In appeal 027060 it continued “which has caused issues for paying for professional representation.”. In appeal 02708 it continued “which has caused issues in securing professional representation.”.

122. *Martland* makes it explicit at paragraph 47 that lack of funding cannot be an excuse so the Freezing Order is irrelevant.

123. In the deregistration appeal the reason given for the late appeal was “There had been issues receiving post at the PPOB, as HMRC are aware of. The appeal is two weeks out of time, and it is not believed that HMRC are prejudiced by the late appeal.” HMRC denied that

there were any issues with the receipt of post and they were certainly not aware of any such issues. That address had been used for correspondence for some eight months.

124. On 20 September 2022, the appellant's solicitor had lodged more detailed applications for permission to make the three late appeals. In regard to the reason for the delays, those focussed entirely on Mr Sabir's mental ill-health arguing that had he not been suffering from a chronic illness, Mr O'Donnell would have been instructed well in advance of the time for lodging the appeals.

125. I find that the alleged postal delay is an unsustainable argument. The letter was posted by HMRC on 8 March 2022 which was a Tuesday. Mr Sabir emailed it to Mr O'Donnell on the Thursday of the following week. Given that a weekend intervened, that is not a long delay.

126. Mental health as an explanation is a much bigger problem. Firstly, as Mr Reid pointed out there is a lack of contemporaneous evidence. Mr Mitchell argues that each case must be decided on its own facts and that therefore *Peters v HMRC* [2019] UKUT 178 (TCC) ("Peters"), upon which Mr Reid relies, is of limited assistance.

127. Mr Reid placed particular reliance upon paragraph 32 of *Peters* where in considering whether a depressive illness was a *good* reason as opposed to being simply a reason it read:

"The only evidence presented to corroborate Mr Jones' own evidence was not contemporaneous to the delay, was expressed in general rather than specific terms, and was provided by a doctor who had seen Mr Jones for a single consultation."

128. Of course the factual matrices are very different and in this case we have four medical reports but none of them are contemporaneous and all are largely expressed in general rather than specific terms. One specific finding from Dr Appan was that Mr Sabir suffered from a **moderate** depressive illness and that was when his mental health was worse in June and December 2022. That is important because he also made it very clear that Mr Sabir's ability to function would depend significantly upon the severity of his symptoms.

129. Dr O'Neill could only say that Mr Sabir's mental health in June 2022 could impact on motivation and concentration and could have contributed to issues dealing with his personal affairs.

130. I have quoted from Mr Sabir himself at paragraph 79 above to the effect that his illness had a variable impact on his functional ability.

131. Undoubtedly, Mr Sabir has suffered from depression and anxiety at various stages in his life and he was particularly ill in the latter part of 2022. I accept that he was stressed in the earlier part of 2022 and that depression and anxiety would have been a reason for the delay.

132. As was the case in *Peters* however, there is a lack of comprehensive medical evidence as to what his functional ability might have been in March and April 2022. Since the solicitors were able to furnish Dr Appan with the medical records, it is disappointing that they were not produced. I can only look at the information that has been provided.

133. I do not accept the argument advanced for HMRC that because the appellant was represented in litigation in the Court of Session and had instructed solicitors in both Scotland and England that that demonstrated capacity. It was also argued that he had written to HMRC in December 2021 asking for the assessments to be reviewed. I have found that that letter was drafted for him by Mr O'Donnell. Mr O'Donnell was clear that he had told Mr Sabir on 6 December 2021 that he needed to instruct solicitors, and quickly, and that was why he had drafted the letter. In any event, the evidence is that the deterioration in Mr Sabir's mental health was at approximately Christmas time 2021, if not January 2022.

134. I do not place much weight on the suggestion, which was self-reported, to the effect that Mr Sabir “might” have attempted suicide in March 2021. Mr Sabir knew that the medical reports were being obtained in order to furnish an explanation for his failure to engage with HMRC and Mr O’Donnell. The drugs that he mentioned in that context were the drugs to which he later became addicted. There is no other evidence of such an attempt and it was not reported to Dr O’Neill.

135. On the balance of probability, the real issue is that in March 2022 Mr Sabir was choosing to use cannabis and opiates. He had been using cannabis for almost half of his life but he only started using opiates at some stage in March 2022. Addiction followed but in March 2022 it was a lifestyle choice. That in itself is not a good reason for the delay.

136. However, I must weigh in the balance the fact that he was depressed, anxious and understandably stressed. He had not been taking his medication. I was unable to ask any questions of the doctors. However, I have been convening Mental Health Tribunals for many years. Unfortunately, it is only too common for patients, and in particular, young men who are not taking prescribed medication, to self-medicate with alcohol and drugs. On the balance of probability I find that that is what Mr Sabir was doing from March until December 2022. I also find that that would be a reasonable explanation of the delay.

All the circumstances of the case

137. This evaluation proceeds from the starting point that it is important that litigation be conducted efficiently and at proportionate cost, and that time limits be respected (see *Martland* at paragraph 45). I must undertake a balancing exercise, assessing the reasons for the delay and the prejudice which may be caused to both parties by granting or refusing permission.

138. Mr Reid argues that one of the problems is that the appellant’s position has moved over time and that that raised an issue in relation to credibility. The Notices of Appeal did not mention ill health. I do not find that surprising. Mr O’Donnell was quite clear that it was only later that he became aware of the mental health issues. At the time he simply thought that Mr Sabir was stressed. I accept that. The extent of the mental ill-health, aggravated by substance abuse, has only latterly been ascertained in greater detail once Dr Appan had the opportunity to review the private hospital records which revealed the extent of the substance abuse.

139. Undoubtedly, HMRC would suffer prejudice if the appeals are to be admitted late, since the decision letter dated 8 March 2022 in respect of deregistration makes it explicit that HMRC were proceeding on the basis that the appellant was engaged in fraud and probably MTIC fraud. That is a complex issue and HMRC bear the burden of proof. The litigation would be at a considerable cost to the public purse. However, the likely outcome of MTIC appeals is not always clear cut. The appellant would be prejudiced if it is denied the opportunity to litigate and put HMRC to their proof.

140. However, in the context of the many alleged MTIC frauds that have been appealed to the Tribunal, the alleged trading activity by the appellant is comparatively recent. The three appeals are all linked. Further, as Mr Reid acknowledged there is an overlap with the in-time appeal. He did point out they related to different periods and the bulk of that appeal related to outputs rather than inputs which is what is the subject matter of the first appeal. Nevertheless, I observe that HMRC are relying on the pattern of trading and paucity of information in all of the appeals.

141. The appellant has lodged with the Tribunal a five page report with supporting Appendices extending to a further 285 pages from PriceWaterhouseCooper (“PWC”). Their conclusion is that there is a “good argument” that should be advanced in relation to the sufficiency, or not, of the VAT invoices in question.

142. Mr Reid pointed out that that was only relevant in the first appeal where the input tax had been disallowed because of a lack of evidence. He also pointed to the fact that PWC had declined to comment on the legitimacy of the transactions in question and that they had relied on HMRC's manuals. In regard to the other two appeals he correctly pointed out that there was very little material before the Tribunal. However, he conceded that he accepted that Mr Mitchell had argued that "...there is presently being assembled a very substantial quantity of documentation, Witness Statements and further Expert Reports which will be presented" to support the assertions that the exports in question were genuine and made to *bona fide* customers.

143. *Martland* makes it clear that I should not conduct a detailed evaluation, and I cannot. What I can say is that, particularly in a situation where HMRC bear a considerable burden of proof, at this juncture the appellant's substantive cases in these appeals could not be described as being, in the words of *Martland*, "hopeless" or very weak.

144. If the witness statements etc do not materialise in due course, and therefore the position changes, HMRC would be at liberty to apply for strike-out in any or all of the appeals on the basis of there being no reasonable prospect of success (Rule 8(3)(c) of the Rules).

145. Mr Reid argued that the history of delay should also be a factor that should be weighed in the balance. That has to be viewed in context. I accept Mr Mitchell's assertion that substantive defences both for the Court of Session litigation (which of course relates to the Notice of Vat assessments in the first appeal) and with a view to defending these appeals has commenced. These proceedings have not been inexpensive. It is clear that at least currently matters have been taken in hand.

Decision

146. This has not been a straightforward decision. I have weighed in the balance the factors that have been drawn to my attention or which I have noted from the Bundles. The applications for permission to notify the appeals late is granted and accordingly the appeals are admitted.

147. The parties are DIRECTED to agree Case Management Directions to allow these three appeals together with the fourth to be either conjoined or consolidated and to proceed without delay. Such Directions should be lodged with the Tribunal within one month of the date of issue of this decision. In the event that the parties cannot agree, then they should each lodge their own applications within the same timescale.

Right to apply for permission to appeal

148. 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 SCOTT
TRIBUNAL JUDGE**

Release date: 22nd SEPTEMBER 2023