Neutral Citation: [2023] UKFTT 867 (TC)

Case Number: TC08944

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2022/01792, TC/2022/02325 and TC/2022/14007

PROCEDURE – Applications for permission to notify late appeals – Martland *and* Katib *considered – length of delay serious and significant – whether good reason for the delay – no – whether late appeal appropriate in all the circumstance – no – appeals not admitted*

Heard on: 12 September 2023
Judgment date: 27 September 2023

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER JOHN ROBINSON

Between

MOHAMMED AKRAMI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Chris Calder of Calder Compliance and Consulting Limited

For the Respondents: David Corps, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The first hearing in this matter related only to the first two appeals and following the issue of various Directions and further correspondence between the parties, this hearing has been listed to hear the appellant's application for admission of late appeals in each of the three appeals. There is one further appeal, namely TC/2020/04081 (the "First Appeal") which was lodged with the Tribunal by the appellant on 18 November 2020 within the statutory time limit. It has been stayed pending the outcome of this hearing.

2. Appeal TC/2022/01792 ("the Second Appeal") relates to penalties imposed under Schedule 24 Finance Act 2007 ("Sch 24"), in respect of taxable rental income under the appellant's personal VAT registration as a sole proprietor. The penalties in the sum of £10,350 were notified to the appellant and his then agent on 24 November 2021 and the appeal made by the appellant's current representative, Mr Calder, on 3 March 2022. The appeal was 70 days late.

3. The appeal TC/2022/02325 ("the Third Appeal") relates to a Personal Liability Notice ("PLN") issued to the appellant in respect of VAT penalties in the sum of £16,906.05 for suppression of sales by Fuels For You Limited ("the Company"). The PLN was notified on 18 January 2021 and the statutory time limit was extended under section 83D Value Added Tax Act 1994 ("VATA") by three months. The appeal was lodged on 22 March 2022. The appeal was 308 days late.

4. The appeal TC/2022/14007 ("the Fourth Appeal") relates to a late appeal against penalties for submitting inaccurate tax returns charged under Sch 24 being:-

   (a) Capital Gains Tax penalties issued on 3 May 2018 in the sum of £4,196.59.

   (b) Income Tax penalties issued on 3 May 2018 in the sum of £30,706.85; and

   (c) Income Tax penalties in the sum of £17,929.45.

Mr Calder lodged an appeal with the Tribunal on 13 December 2022 which did not refer to any decision issued by HMRC but rather to a letter dated 16 November 2022 which threatened sequestration in relation to a debt of £57,419.04.

5. Following the first hearing in this matter Mr Calder had argued that the penalties totalling £30,706.85, which Mr Corps had very helpfully identified, had been suspended and wrongly brought back into charge. Whilst he argued that the decision to collect the penalties was an appealable decision. Mr Corps disagreed. On 16 June 2023, he wrote to Mr Calder pointing out that no appeal of any of these penalties had been made to HMRC and therefore the Tribunal had no jurisdiction to consider an application for a late appeal. On 24 June 2023, an appeal was made to HMRC. On 28 June 2023 Mr Corps wrote to Mr Calder pointing out that if that late appeal were to be successful, then the issue of suspended penalties "would fall away".

6. On 4 July 2023, HMRC formally refused to accept the late appeal. On 6 July 2023, the Tribunal now having jurisdiction, Mr Calder confirmed that he wished to continue with the appeal.

7. With the consent of the parties, the hearing was held by video using the Tribunal video hearing system. The video hearing was attended by Mr Calder for the appellant and Mr Corps and Ms Aziz for HMRC. At the outset, we explained that as Mr Corps had requested that the appeal be decided on the basis of available papers, which we confirmed that we had read, but Mr Calder had requested a hearing, we invited Mr Calder to highlight any particular aspects to which he wished to draw our attention. Unfortunately Mr Calder encountered serious technical

difficulties and it was not possible to hear him. After several attempts, he e-mailed the tribunal and HMRC stating that in the circumstances a decision should be made on the basis of the papers and submissions previously lodged. That being the case we did not hear from Mr Corps either.

8. The documents to which we were referred were a hearing bundle extending to 366 pages, a supplementary bundle extending to 221 pages, an authorities bundle extending to 239 pages and the correspondence that had been copied to the Tribunal in the period between the two hearings. We had a further submission from HMRC extending to 8 pages relating to the objections to the application in relation to the Fourth Appeal and an email dated 6 July 2023 from Mr Calder setting out his position in relation to these matters.

Legal framework

9. 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 (apart from in the case of the Third Appeal where there was an extension of three months because of Covid).

10. 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."

11. 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…."

12. Section 49H TMA gives the Tribunal power to grant permission to notify a late appeal to the Tribunal. 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."

13. In deciding whether to give permission, we apply the three stage approach in *Martland*.

The facts

14. On 30 November 2005 the appellant applied to register for VAT as a sole proprietor for property investment. He confirmed an option to tax the land and buildings comprising a petrol station from the date of registration of 30 November 2005. That petrol station was subsequently rented to the Company which was incorporated on 2 March 2010.

15. The appellant was a director of the Company from 2 March 2010 until 12 January 2019. The appellant had had a five hour meeting with HMRC on 11 January 2019 when the stock of diesel was seized. On 17 January 2019 when arranging a meeting with HMRC he did not mention that he had resigned as a director.

16. That resignation was only intimated to Companies House on 2 May 2019, yet in the intervening period the appellant had acted as an officer of the Company at meetings with HMRC and had signed the accounts for the Company as a director.

17. A Mr Mehmood was a director from 2 March 2010 and a Mr Thorburn was the Company secretary from 9 September 2021. Messrs Mehmood and Thorburn remained in office until the Company was wound up on 29 August 2022. We know nothing about Mr Mehmood.

18. On 9 March 2010, the Company had applied to register for VAT with effect from 5 March 2010 in order to trade as a petrol station. It was the appellant's accountant, Mr Tait, who submitted the VAT application.

19. On 22 May 2013, HMRC undertook a check of both the Company's VAT returns and the appellant's returns for Akrami Properties at the offices of Mr Tait. HMRC directed that, although the appellant was then using cash accounting, output tax would need to be declared where the Company claims the VAT on rent payments to the appellant as its input tax. The notes of that meeting (with the appellant, Mr Tait and his assistant) record that although the appellant "suffers poor health" and "had not been in a position to give his business affairs attention (sic) needed"; he worked in the business.

20. No VAT returns for Akrami Properties had been submitted from 11/10 to 02/13 inclusive and nor had computer generated assessments been paid. Those assessments were much less than the actual liability. The Company's returns had been brought up to date.

21. HMRC advised the appellant that poor health was not an excuse for the failures to make returns or to make payments of VAT. (The VAT debt was £33,875.05 and the surcharges were £7,123.48.) He was advised that he should have requested assistance.

22. On 9 November 2016, Officer Carmichael wrote to Mr Tait about appeals for the tax years 2008/09 to 2013/14. He also wrote to the appellant pointing out that there had been no response to an Information Notice issued under Schedule 39 Finance Act 2008.

23. On 29 June 2017, responding to previous correspondence, the officer wrote to Mr Tait and the appellant concluding that additional income tax in the sum of £151,837.20 and Capital Gains Tax of £34,730.46 was due and there would be penalties due in respect of both taxes being £72,448.99 and £17,625.71 respectively.

24. On 2 November 2017, the appellant and Mr Tait had two meetings with Officer Carmichael lasting more than two hours and provided further information. In the course of that meeting Mr Tait explained that the appellant had various health problems including a heart complaint.

25. On 30 November 2017, the officer wrote to Mr Tait and the appellant expressing his disappointment that no further information had been provided.

26. On 15 February 2018, Mr Tait wrote to the officer stating that he had reviewed the appellant's medical records. The appellant had told him that he had been "generally unwell and has been so for an extended period of time".

27. The half page summary of the medical records compiled by Mr Tait consisted of four columns. The first three were Date, Condition and Source. The fourth was Mr Tait's understanding of what two medical terms meant. The first was haematuria which he correctly stated is blood in the urine. The second was paroxysmal supraventricular tachycardia which is an abnormal heart rhythm which results in a regular but rapid heart rate. He described it as a rapid heart rate and as "problems relating to the heart. The latter condition appears to have been diagnosed by a consultant in 2012, 2013 and 2015 and noted in the medical records in 2012. It states explicitly that "Ongoing diabetes controlled by medication". The appellant had had a surgical procedure and chest pains in 2008 with an A & E visit later that year with chest pain. The conditions are not listed in date order and the source for all are the medical records, "consultant" as indicated above for three entries, hospital for the chest pains in 2008. Lastly, "stress related" in 2008 had as a source "dietary assessment".

28. There is only one entry relating to mental health other than the one for stress" and it states in the three columns: "04/11/2016, Neurology dementia, medical records". There is no detail. There is no reference to a consultant or referral to hospital which would be expected if there had been a referral to neurology.

29. In response, on 18 April 2018, the officer wrote to the appellant and Mr Tait reducing the penalties from "deliberate" to "careless" behaviour. On 3 May 2018 the officer wrote to both closing the enquiry. The total of the penalties imposed was £34,903.44 of which £30,706.85 were suspended. The suspension conditions included two to the effect that the appellant would liaise with Mr Tait and his son to ensure that all income and expenditure was recorded and accurate returns submitted on time. There was no response.

30. On 10 September 2018, the Income Tax penalties in the sum of £17,929.45 were issued. Explanations had been issued in August 2018.

31. On 9 October 2018, Mr Tait wrote to HMRC purporting to appeal all of the penalties. He was no longer the authorised agent so HMRC wrote to him on 26 October 2018 stating that his letter could not be accepted. On the same day the officer telephoned Mr McNally stating that the letter had been received from Mr Tait.

32. Mr McNally said that he was aware of the letter, and unless instructed to the contrary by the appellant, the Closure Notice, assessments and penalties would stand.

33. On 11 January 2019, HMRC's Excise Mobile Enforcement Team attended the Company's business premises. The appellant was interviewed by the officers. Laundered rebated kerosene was detected in the forecourt retail diesel tank and 33,210 litres of fuel were seized. The appellant signed a Seizure Information Notice and was given a copy of Notice 12A "What you can do if things are seized".

34. In the course of that interview, which lasted approximately five hours, the appellant stated that he was responsible for:-

(1) Making sales lodgements.

(2) Calculating the price at which fuel was sold.

(3) Contacting the main fuel suppliers.

(4) Overseeing the deliveries of fuel.

35. On 17 January 2019, Officer Villiers telephoned the Company and spoke to the appellant. He arranged to visit the Company to inspect the business records.

36. On 18 January 2019, Officer Villiers obtained the Company business records from the offices of the appellant's then accountant, Mr McNally.

37. On 22 January 2019, Officer Villiers met with the appellant and Mr McNally at the Company's business premises for one hour. The appellant held himself out to be the director and sole shareholder. It was a detailed meeting and in the course of the meeting the appellant telephoned the Company that provided back office information. He told the officer that he took a stock print every day and before every fuel delivery.

38. Following the meeting Mr McNally emailed further VAT records to the officer. HMRC contacted the Company's suppliers and bunkering customers to obtain information to try and corroborate the Company's purchases and sales.

39. On 14 March 2019, Officer Villiers wrote to Mr McNally intimating that he intended to make Excise assessments and charge penalties in respect of the undeclared duty on the laundered kerosene and if no reply was received before 12 April 2019, those would be issued. He also wrote a detailed letter to the Company.

40. On 3 April 2019, HMRC's VAT Officer Begg wrote to the appellant and Mr Tait to arrange to check the VAT return. The appellant did not respond to the letter to him.

41. On 8 April 2019, Mr Tait telephoned HMRC and confirmed that he no longer acted for the appellant and had not done so for approximately one year. He said that he had returned the VAT records to the appellant. That is consistent with information given to Officer Villiers on 18 January 2019 by Mr McNally who stated that he had received the records from Mr Tait.

42. On 12 April 2019, having received no response to his letter, Officer Villiers issued a Pre-Assessment and Penalty Notice to the Company in the sum of £316,736 for the duty and £264,474 for the penalty; a total of £581,210.

43. On 15 April 2019, Officer Villiers wrote to the appellant notifying him that he would be personally liable to pay the Company's excise wrongdoing penalty. That letter notified the appellant of his rights to appeal or request a review of the decision.

44. On 15 April 2019, Apex Services wrote to HMRC stating that they had been instructed to act for the Company. The reference they used was the excise duty reference.

45. On 26 April 2019 HMRC issued the Excise Penalty for a deliberate and concealed wrongdoing to the Company.

46. On 2 May 2019, Companies House received notification that the appellant had retired as a director on 12 January 2019 which was the day after the seizure of the fuel.

47. On 16 May 2019, Officer Villiers issued the PLN for the excise duty to the appellant.

48. On 30 May 2019, Officer Villiers received authorisation for a new firm of accountants, Tax & Forensic Services Ltd, ("TFS") to represent the Company in respect of excise matters. On 3 June 2019, Officer Villiers provided copies of the preceding correspondence to TFS.

49. On 18 June 2019, TFS emailed HMRC confirming that they had met with the appellant and his son the previous day and requested further information. They said that they would respond shortly.

50. On 3 July 2019, nothing having been forthcoming, Officer Villiers emailed TFS stating that they had closed the case.

51. On 6 November 2019, HMRC wrote to Mr McNally and the appellant about the suspended penalty. They requested completion of the relevant form confirming that the suspension conditions had been met. The due date for return of the form was 27 November 2019. There was no response so a reminder was sent on 16 December 2019 extending the due date for return until 9 January 2020.

52. On 24 May 2020, Officer Begg issued the PLN to the appellant in respect of the Company's VAT inaccuracy penalty (£64,177.95). That is the appeal where a Notice of Appeal was timeously lodged with the Tribunal.

53. On 23 June 2020, the appellant emailed Officer Begg requesting a review of that PLN. He also sent a copy by post. He said that between 1 February 2015 and 31 October 2018 Mr Tait had been dealing with his affairs and he blamed him for inaccuracies. He said that he had appointed Mr McNally in late 2018 but he had been unable to obtain papers from Mr Tait.

54. On 15 October 2020, Officer Begg wrote to the Company concerning assessments totalling £26,835 that he proposed to make in respect of the suppressed sales. A copy was sent to Mr McNally.

55. On 20 October 2020, Officer Begg wrote to the Company stating that he proposed to cancel the Company's VAT registration as no VAT return had been submitted since the 10/18 return and another business was now trading from the same business address. A copy of that letter was sent to Mr McNally. No response was received by HMRC.

56. On 28 October 2020, Officer Begg issued a Notice of VAT assessment to the Company in respect of suppressed sales in period 10/18. A copy was sent to Mr McNally.

57. On 30 October 2020, HMRC notified the Company that its VAT registration was cancelled with effect from close of business on 30 April 2019.

58. On 2 November 2020, HMRC issued their Review Conclusion letter to the appellant in respect of the PLN issued on 24 May 2020.

59. On 10 November 2020, Officer Begg wrote to both the appellant and Mr McNally explaining the assessments he proposed to make against the appellant as a sole proprietor. He asked for a response before 2 December 2020. There was no response.

60. On 18 November 2020, the appellant submitted the timeous appeal in respect of the PLN to the Tribunal. He blamed delays on Mr Tait stating that Mr McNally had been unable to retrieve the records from Mr Tait. However, see paragraph 41 above.

61. On 10 December 2020, Officer Begg wrote to both Mr McNally and the Company enclosing the VAT assessment in the sum of £17,250 and stating that penalties would be issued.

62. On 16 December 2020, Mr McNally wrote to HMRC objecting to the assessment.

63. On 18 December 2020, HMRC intimated that the penalty would be in the sum of £16,906.05.

64. On 23 December 2020, Mr McNally asked that the assessment be vacated which failing he wished a review.

65. On 11 January 2021, Mr McNally requested a review of the assessment. Officer Begg wrote to the appellant on 13 January 2021, with a copy to Mr McNally, seeking further information. There was no response.

66. On 18 January 2021, the penalty in the sum of £16,906.05 was issued. On the same day the PLN in respect of that penalty was issued to the appellant (the subject matter of the Third Appeal). Both were copied to Mr McNally. On the same day a letter was issued extending the time for appeals from 30 days to three months because of Covid.

67. On 17 February 2021, Mr McNally replied to HMRC referring to those letters and stating that he wished to avail himself of the extended time limit.

68. On 18 February 2021, HMRC's online service was accessed to change the appellant's principal place of business address but it is not known by whom.

69. On 17 March 2021, Mr Corps emailed the appellant pointing out that there was no record of a valid request for a review or appeal of the Excise Duty penalty.

70. On 22 March 2021, Mr Thorburn emailed Mr Corps in relation to the First Appeal enclosing an authority to act for the appellant.

71. On 12 April 2021, HMRC accepted the appellant's application for Alternative Dispute Resolution ("ADR") in relation to the PLN for the period 04/15 to 10/18 but that concluded without resolution on 7 September 2021.

72. On 9 September 2021, Mr Thorburn was appointed as Company Secretary of the Company.

73. On 20 September 2021, Officer Begg wrote to the appellant and Mr McNally pointing out that he had heard nothing from either since 17 February 2021 and he would be raising a penalty. Mr McNally replied that day requesting that the assessment be vacated. The following day the officer sent Mr McNally a copy of the assessment and the letter of 13 January 2021.

74. On 22 October 2021, Officer Begg issued a Penalty Explanation letter and the Penalty Assessment in the sum of £10,350 was issued on 24 November 2021. It explained the appeal rights and the 30 day time limit. On 2 December 2021, Officer Begg realised that the agent's copies of those letters and assessment had been sent to the appellant and he forwarded copies to Mr McNally.

75. On 28 February 2022, Mr Calder intimated that he had been instructed.

76. On 1 March 2022, Officer Begg wrote to Mr Calder explaining that:

(1) There were two assessments for non-declaration of output tax being £26,450, which was the subject matter of criminal proceedings, and £17,250 which was a civil matter. There was a penalty in relation to the latter in the sum of £10,350. None had been appealed.

(2) The VAT returns were up to date but there were arrears. The personal tax returns had been submitted and the tax paid.

(3) In relation to the Company, the appellant had copies of the assessment, penalty and PLN.

(4) The appellant was copied into that reply.

77. On the same day Mr Corps emailed the appellant and Mr Thorburn, noting the change in representation and pointing out that he had not seen a response to a letter from the Tribunal on 19 January 2022. He stated that if there was no response by 18 March 2022 he would consider requesting that the appeal be struck out.

78. Mr Calder emailed the Tribunal that day requesting an extension of time and explaining that the delay had been due to the appellant's ill health. He had a heart condition and diabetes and was being further examined by his doctors.

79. On 3 March 2022, Mr Calder requested a review of the £10,350 penalty. Officer Begg responded on the same day refusing that request. He pointed out that in the same time frame both the VAT and self-assessment returns had been filed. No excuse had been offered for the late review request.

80. The appeals to the Tribunal were subsequently lodged.

81. On 29 August 2022, the Company was wound up.

82. On 28 November 2022, HMRC withdrew the Excise Duty PLN because they had discovered that they had no power to issue such a PLN.

The length of the delays

83. As can be seen the length of the delay in the Second Appeal was 70 days. The length of the delay in the Third Appeal was 308 days. If we accept that an appeal was made on 13 December 2022 (as opposed to 6 July 2023) the length of the delay in the Fourth Appeal for the penalties issued on 3 May 2018 was four years, 6 months and ten days (ie 1654 days) and for the penalties issued on 10 September 2018 it was four years one month and three days (ie 1495 days).

84. As far as the Third and Fourth Appeals are concerned, those delays cannot be described as anything other than both serious and significant.

85. The position in relation to the Second Appeal is less clear cut but in the context of a 30 day time limit, it is a serious and significant delay.

What are the reasons for the delays? Are there good explanations?

86. In respect of the Second Appeal, apart from the arguments about ill health it was argued that the appellant had requested copies of VAT returns to which the penalties relate, and HMRC had not provided those. In fact, as HMRC have pointed out that request by Mr Calder on 2 March 2022 was made in the context that Mr Calder wished "…to inspect these returns prior to engaging with the fiscal for the criminal charge".

87. Furthermore, as can be seen from paragraph 41, Mr McNally had the VAT records. In any event the request for copies of the returns was after the period for lodging an appeal had expired. The apparent absence of copy VAT returns cannot be a good reason for any delay.

88. In respect of both the Second and Third Appeals, the Notices of Appeal stated that the appellant was undergoing major medical procedures at the time related to his chronic heart condition and diabetes. Because of those conditions he had had to self-isolate for long periods because of Covid.

89. In the Second Appeal it stated that the appellant had been bed bound around the period from November 2020 onwards "and has just been getting slightly better in the last week or so. This was due to several episodes in relation to his diabetes". Lastly, in that appeal it stated that Mr Calder had requested copies of the VAT returns to which the penalties relate and those had not yet been provided.

90. In the Third Appeal it stated that the appellant had been bed bound around the time when the HMRC investigation started and that was due to several episodes with his heart and diabetes. When the penalty was issued the appellant had not been well enough to deal with matters and a letter from the appellant's GP was enclosed.

91. That letter was dated 3 March 2022 and listed the appellant's medical conditions which included depression, stress, frequent panic attacks, poor memory, tiredness and insomnia and a number of physical conditions.

92. In the Fourth Appeal the Ground of Appeal was articulated in an email from Mr Calder to HMRC and the Tribunal dated 24 June 2023 which stated: "In terms of why these appeals are late. This is due to the health conditions of Mr Akrami he was not medically well (sic)".

93. HMRC accept that the appellant does not, and has not, enjoyed good health. The evidence that has been provided in relation to the appellant's health conditions consist of:-

(a) Mr Tait's original summary of the medical conditions in February 2018 (see paragraphs 26-28 above),

(b) The GP letter dated 3 March 2022 appended to the appellant's witness statement which listed his medical conditions. At that time his diabetes was poorly controlled (cf 2018) and he still had a rapid heartbeat. He had joint pains and had had Covid pneumonia in 2021 which had left him with ongoing anxiety and tiredness. As far as his other mental health issues were concerned he was described as having depression, frequent panic attacks, stress, insomnia and poor memory. That letter did not state what the impact of the appellant's various conditions had on his functional ability at any stage. It did not state that he had been advised to isolate or shield during the pandemic. It did not reference any hospital admissions or procedures and it is dated the same day as the Second Appeal was lodged. The appellant's own witness statement dated 15 March 2022 speaks only about his physical ill-health.

(c) A Soul and Conscience report dated 2 December 2022 from a Consultant Psychiatrist which had been produced in relation to Section 53F(2)(a) of the Criminal Procedure (Scotland) Act 1995 and confirmed his mental state as at that time (The appellant's plea

of not guilty was later accepted.). The appellant had produced to that Consultant a letter from his general practitioner which apparently described a diagnosis of depression with chronic anxiety and poor memory. The Consultant found that the appellant presented as having either vascular dementia or early onset Alzheimer's disease. The Consultant made it explicit that she was not in a position to comment on whether his mental disorder was present at an earlier stage.

(d) On 18 May 2023, Mr Calder provided a letter dated 12 May 2023 from the appellant's GP. That stated that the appellant had asked for a report on his medical condition at that time, in early 2022 and in 2013. His medical condition in 2023 is not relevant to these proceedings. He had been referred to a specialist in October 2022 for assessment of his memory problems and that specialist recommended a further assessment in March 2023. The appellant failed to make that appointment because he forgot to do so. As far as early 2022 is concerned, the GP stated that he had been seen with anxiety, insomnia and panic attacks and that he complained of tiredness, sweating and short term memory problems which had worsened after Covid-19 pneumonia in December 2021. As far as 2013 is concerned, apart from commenting on his physical health, it was noted that he had failed to attend diabetic reviews and follow-ups which was "likely due to forgetfulness".

(e) Mr Calder also provided a witness statement from the appellant's son which said that "around 2018" his father had started showing signs of what in layman terms, the son considered to be dementia and impairment because he was not able to remember things or function properly. He also said that due to his diabetes and heart condition, the appellant had not been involved with his business since early 2015. The business was managed by the staff and the son oversaw them "as best as I could". The son argued that his father was neither medically nor mentally fit to appoint anyone to deal with the HMRC penalties and assessments. It was only when the family became aware of those that they instructed Calder Compliance and Consulting Limited. The form 64-8 received by HMRC authorising Mr Calder to act for the appellant was signed on 22 February 2022.

94. Firstly, that evidence is not consistent with a neurology referral in 2016. We place little weight on that statement by Mr Tait. The GP makes no mention of any such referral. It is clear that the first referral was in October 2022.

95. Secondly, the suggestion that the diabetes and heart condition meant that the appellant was no longer involved with the business since early 2015 is not consistent with Mr Tait's statement that the diabetes was controlled as long ago as 2018. Further, as can be seen from paragraphs 34 and 37 above, the appellant was actively involved in the Company in early 2019.

96. There is no detail of any hospital treatment, in-patient stays or out-patient appointments in the last few years beyond the referral in October 2022 which is after the appeals in the first three appeals had been lodged. There is no information as to when and if the appellant was in hospital, shielding and/or bed bound beyond Mr Calder's assertions. I mean no disrespect to Mr Calder but as the Upper Tribunal made clear at paragraph 51 of *Edwards v HMRC* [2019] UKUT 131 (TCC) "An advocate's assertions and/or submissions are not evidence…".

97. The appellant was able to lodge the appeal himself in the First Appeal in November 2020. The Notice of Appeal bears his email address and he stated that he did not have a representative for that matter. He then went on to instruct Mr Thorburn to act for him and he subsequently participated in ADR with the assistance of Mr Thorburn.

98. The penalties in the Fourth Appeal had been intimated to Mr Tait, Mr McNally and the appellant in October 2018 when, presumably, the appellant's health was at least as good as it was two years later.

99. As can be seen from paragraph 31 above, HMRC went to some lengths to ensure that the appellant's representatives were aware of the decisions being made. We do not know why no action was taken beyond Mr McNally's response in 2018 (see paragraph 32 above) that no appeal was intended unless contrary instructions were received. We can only assume that, at that time, it was decided not to appeal.

100. That is consistent with the fact that in recent months it has been consistently asserted that £30,706.85 had been suspended and indeed HMRC have now produced documentary evidence that that was the case. That means that in agreeing the suspension conditions the appellant, aided by his son, had agreed the penalties including those that had not been suspended. As can be seen from paragraph 51 above the correspondence a year later about the suspension conditions was not answered and it was sent to both the appellant and Mr McNally.

101. Undoubtedly, the appellant's health has deteriorated over time. It is wholly understandable that he was very stressed and anxious given the HMRC enquiries and the threat of criminal proceedings. It is a reason for the delays but was it a good reason? The ill-health must be seen in context.

102. The appellant has instructed a number of advisers during the periods with which we are concerned. At all times the appellant has been professionally advised and there have been multiple delays and over a very long period. Crucially, the decisions that fell to be appealed were all copied to those representing the appellant.

103. To the extent, if any that the appellant blames any of his previous advisers, that is not a reasonable excuse for the delays. HMRC rightly rely on *HMRC v Katib* [2019] UKUT 189 (TCC) where paragraph 49 reads:-

> "We accept HMRC's general point that, in most cases, when the FTT is considering an application for permission to make a late appeal, failings by a litigant's advisers should be regarded as failings of the litigant and we will return to this issue in the 'Disposition' section that follows. Therefore, in most cases, a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers."

The Upper Tribunal did return to it at paragraph 54 which reads:-

> "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."

104. The Upper Tribunal went on to find that failures by an adviser would be unlikely to amount to a good reason for missing deadlines when considering the second stage required by *Martland* but might be a relevant consideration and therefore an exception to the general rule in the context of the third stage if the litigant was misled by advisers. We agree.

All the circumstances of the case

105. We have absolutely no evidence to the effect that the appellant was misled by any of his advisers. Therefore that cannot be a consideration in this case.

106. 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*)*. We 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.

107. By any standard the Fourth Appeal is exceedingly late and HMRC are entitled to expect finality.

108. In that regard, it would seem that given the suspension of the Income Tax penalties, there was a settlement by agreement at the end of the enquiry into the appellant's personal tax returns under Section 54 Taxes Management Act 1970. HMRC are entitled to consider that to be final and binding. It is in the public interest that that should be so.

109. If the appellant were to be permitted to bring the Fourth Appeal at this very late stage HMRC would suffer considerable prejudice because of the elapse of time.

110. The only ground of appeal that has been intimated was "We do not believe that appropriate behaviours were discussed with Mr Akrami why these inaccuracies took place".

111. However, it was also argued for the appellant that "…the action that Mr Akrami's son took was to get Mr Akrami to agree the suspended conditions…". Patently, the appellant and his son accepted at that time that the penalties were due.

112. The correspondence that has been produced shows that the penalties and penalty behaviours were discussed with the appellant and his agents. Penalty explanation letters were issued and submissions invited. There was no response. There was a further opportunity to challenge the matter when Mr McNally took over later in 2018 and nothing happened.

113. HMRC argue that the prospects of success, were the appeal to proceed are very low; indeed they say that there is no reasonable prospect of success. If they are correct in that assertion they would be entitled to seek strike out in terms of Rule 8(3)(c) of the Rules. On balance, looking to the guidance in *Martland* we find that the appellant's case on the merits in the Fourth Appeal is very weak.

114. Turning to the other two appeals, the same considerations in terms of finality and prejudice to HMRC are relevant. The appellant did know how to appeal and had done so successfully with the First Appeal.

115. The delays in both appeals were serious and significant. Mr McNally had received copies of all relevant papers and neither he nor the appellant had replied to correspondence let alone appealed the decisions. Although Mr McNally did not act for the appellant in the First Appeal, which was lodged in November 2020, he was corresponding with HMRC in December 2020 and February and September 2021. HMRC sent correspondence to him on a regular basis until December 2021and there was no indication that he was no longer acting until Mr Calder was appointed in February 2022.

116. If the appellant is denied the right to litigate, of course he will be prejudiced because he would not be denied the ability to advance arguments against the penalties and PLN. There are comparatively large sums of money at stake. However, we find that there is force in HMRC's arguments that the merits of his appeals in respect of the substantive issues are weak.

117. In relation to the Second Appeal, he personally rented the filling station site to the Company and had opted to tax the site. As a director of the company he knew that the Company was claiming input tax. He had previously had a VAT inspection relating to those issues (see paragraphs 19-21 above). In those circumstances, the prospects of successfully appealing a penalty imposed on the basis of deliberate, but not concealed, inaccuracies seem to be slim.

118. In relation to the Third Appeal, the issue for the appellant is that, as can be seen from paragraph 34 the contemporaneous evidence is that the appellant was the controlling mind of the Company at the time of the seizure. He does not appear to have a strong case in relation to the PLN.

119. Given the apparent section 54 TMA agreement in the Fourth Appeal and the suspension of the penalties, again, he does not appear to have a strong case.

120. If we allow permission for the appeals to be admitted late, HMRC will suffer undoubted prejudice not least since they would bear the burden of proof in relation to penalties. They would need to produce records going back many years. The litigation would be at a considerable cost to the public purse.

DECISION

121. Looking at the totality of the evidence, for the reasons set out above, the appellant's applications for permission to notify the appeals late is refused and, accordingly, the appeals are not admitted.

Postscript

122. For the avoidance of doubt, as far as suspension is concerned, a penalty can be suspended by agreement under paragraph 14 Sch. 24 where conditions can be set under paragraph 14(4). At the end of the suspension period paragraph 14(5)(a) places the onus on the taxpayer to satisfy HMRC that they have complied with the conditions. Otherwise the suspended penalty becomes payable under paragraph 14(5)(b).Whilst there are rights of appeal against a decision not to suspend a penalty or against the conditions there is no right of appeal stipulated anywhere in Sch.24 against the operation of paragraph 14 and in particular paragraph 14(5)(b).

123. The appellant and Mr McNally were reminded that there had been no compliance with the provisions and there was no response.

124. The Tribunal is created by statute and has jurisdiction only insofar as the legislation provides for a right of appeal. It was argued in correspondence that a right of appeal was conferred by Section 83(n) Value Added Tax Act 1994 but that has no application to penalties for Income Tax or Capital Gains Tax imposed under Sch.24. There is no right of appeal to the Tribunal in relation to HMRC's decision in relation to the operation of paragraph 14(5)(b) or whether, in fact, HMRC were able to rely upon it.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

125. 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: 27 September 2023