



Neutral Citation: [2023] UKUT 00268 (TCC)

Case Number: UT/2022/000061

**UPPER TRIBUNAL
(Tax and Chancery Chamber)**

The Rolls Building, London

LATE APPEAL – VAT and Landfill Tax assessments – FTT allowed late appeal for VAT assessments but refused late appeal for Landfill Tax assessments – new evidence in relation to Landfill Tax assessments – Martland criteria – whether appeal against Landfill Tax assessments should be allowed to be heard out of time on the basis of new evidence – yes

Heard on: 24 October 2023

Judgment date: 6 November 2023

Before

**JUDGE RUPERT JONES
JUDGE GUY BRANNAN**

Between

OCTAGON GREEN SOLUTIONS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Simon Farrell KC and James Bourne-Arton instructed by Watson Woodhouse Limited

For the Respondents: James Puzey, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against the decision (“the Decision”) of the First-tier Tribunal (the “FTT”). The Decision concerned whether the FTT should give permission to the Appellant, Octagon Green Solutions Limited (“Octagon”), to make a late appeal to the FTT against two assessments raised by the Respondents, HMRC. One of the two assessments, and with which this appeal is concerned, related to Landfill Tax, and the other related to VAT.
2. The FTT decided that Octagon’s application for an extension of time to appeal to the FTT should be refused in relation to the Landfill Tax assessment, but that, in relation to the VAT assessment, it should be granted.
3. On 11 March 2022, the FTT received an application for permission to appeal to the Upper Tribunal (the “UT”) against the Decision in relation its conclusion in respect of the Landfill Tax assessment. The FTT (Judge Bailey) refused permission to appeal but permission was subsequently granted on two grounds by the UT (Judge Ramshaw) on 13 July 2023. Before Judge Bailey and Judge Ramshaw new evidence (“the New Evidence”) was introduced. This was in the form of certain letters/emails, which, it was argued, indicated that the FTT had made a material error of law in the Decision. Judge Ramshaw gave permission for the New Evidence to be admitted on this appeal.
4. For the reasons set out below, we allow the appeal and grant permission for Octagon’s appeal against the Landfill Tax assessment to be heard out of time.

THE FACTUAL BACKGROUND

5. The following summary of the background to this appeal is largely taken from the Decision at [3]-[13]. References in square brackets are to the Decision unless the context otherwise requires.
6. Octagon was the operator of a landfill site. In 2014, HMRC commenced an investigation into Octagon’s operations at its landfill site. HMRC suspected that there had been fraudulent evasion of Landfill Tax and VAT in connection with the operations at the site. At the same time HMRC also investigated the activities of an associated company called Caird Peckford Ltd at another site.
7. HMRC seized paperwork from Octagon, conducted observations at the site in February 2015 and September 2015, interrogated Octagon’s computers and arrested and interviewed under caution suspects concerned in the operation of the site.
8. On 9 September 2016, HMRC wrote to Octagon with two assessments: one for Landfill Tax and the other for VAT. The Landfill Tax assessment was for some £57m for the period 28 February 2013 to 30 September 2015. The VAT assessment was for some £12m in respect of the same period.
9. In relation to the VAT assessment, Mr Longstaff of HMRC wrote two letters to Octagon on 9 September. In the first letter he explained that he was making an assessment following the criminal investigation but that the assessment was separate from that investigation. He considered that the investigation indicated that there was an under-reporting of tax. Mr Longstaff continued:

“If you do not agree with my decision to assess you for landfill tax¹ detailed above

...you can... ask for a review...or appeal to an independent tribunal.

... If you want to appeal to the tribunal you should send them your appeal within 30 days of the date of this letter.”

10. Mr Longstaff’s second letter of 9 September 2016, headed “VAT ASSESSMENT” stated that the assessment had been issued in order to protect HMRC’s position (in order to fall within the time limits for making an assessment) and was made without prejudice to the criminal proceedings. Mr Longstaff stated:

“However due to the fact that these periods are currently subject to an investigation, these assessments... will not be enforced until such time that the criminal proceedings have been finalised.

Therefore this letter and the enclosed schedule...is currently for your information only.

Following the conclusion of criminal proceedings, we shall write to you again outlining the current position in relation to these assessments.

For your information, if we took the decision to enforce these assessments, outside criminal proceedings then the following would apply.

What to do if you disagree

If you disagree with our decision you need to write to us within 30 days... Alternatively you can appeal direct to the tribunal within 30 days of this notice....” (*Emphasis added*)

11. Also on 9 September 2016, Mr Berry of HMRC wrote to Octagon in relation to Landfill Tax. Like Mr Longstaff, and in almost identical words, he explained that he was exercising his power to assess, explained that the assessment was separate from the criminal proceedings and explained that HMRC’s observations had led them to conclude that extra tax was due. Importantly, as the FTT noted at [11], Mr Berry’s letter did not include the four paragraphs (set out above in italics) that were included in Mr Longstaff’s letter. Mr Berry’s letter concluded:

“If you do not agree

If you have additional information that you think may effect this decision please send it to me now. If you do not agree with my decision to assess for the Landfill Tax detailed above you can;

- ask for my decision to be reviewed by an HMRC officer not previously involved in the matter, or

- appeal to an independent tribunal

If you opt for a review you can still appeal to the tribunal after the review has finished.

If you want a review you should write to me at the above address within 30 days of the date of this letter, giving your reasons why you do not agree with my decision.

¹ This was evidently a mistake and should have referred to VAT rather than Landfill Tax.

If you want to appeal to the tribunal you should send them your appeal within 30 days of the date of this letter.”

12. Next, on 1 November 2016 (just under two months later) Mr Berry wrote again to Octagon referring to his first letter of 9 September 2016 as follows:

“Landfill Tax — Notice of Decision

Further to my letter of 9 September 2016 in which I notified you of the fact that | had raised a Landfill Tax assessment please note the following:

The Landfill Tax Notice of Decision and assessment of tax due has been raised in order to protect the HMRC position and is issued without prejudice to any action the Commissioners may take under Paragraph 15 of Schedule 5 to the Finance Act 1996, under any other enactment or with regards to the ongoing criminal investigation.

However, due to the fact that these assessment periods are currently subject to an investigation, these assessments and any subsequent penalties and / or default interest will not be enforced until such time that criminal proceedings have been finalised.

Therefore the Notice of Decision and schedule detailing those assessments is currently, for your information only.

It follows that any review of the landfill tax decision and assessment would be held in abeyance pending the outcome of the criminal investigation.

Following the conclusion of criminal proceedings, we will write to you again outlining the current position in respect of these assessments.

For your information, if we took the decision to enforce these assessments, outside of any criminal proceedings, then the following would apply;

If you do not agree

If you have additional information that you think may affect this decision please send it to me now.

If you do not agree with my decision to assess for the Landfill Tax detailed above you can;

- ask for my decision to be reviewed by an HMRC officer not previously involved in the matter, or

- appeal to an independent tribunal

If you opt for a review you can still appeal to the tribunal after the review has finished.

If you want a review you should write to me at the above address within 30 days of the date of this letter, giving your reasons why you do not agree with my decision.

If you want to appeal to the tribunal you should send them your appeal within 30 days of the date of this letter.” (*Emphasis added*)

13. This letter of Mr Berry’s dated 1 November 2016 did include the four paragraphs that Mr Longstaff had included in his earlier letter of 9 September 2016 but it will be noted that the additional paragraph included (in italics above) did not appear in Mr Longstaff’s earlier letter.

14. HMRC liaised with the Crown Prosecution Service (“CPS”) during its investigation, providing reports in relation to particular court actions at various stages. In connection with these proceedings, on 13 June 2019, Samantha Gibson of HMRC provided a statement (“the Gibson Statement”) in which she said the following in relation to the two tax assessments:

“Between June 2016 and August 2016, a large amount of information was assimilated and analysed in order to prepare protective Landfill Tax and VAT assessments within the statutory 12 month time limit.”

“Between October and December 2016, the defence/suspects made approaches with regard to appealing the Landfill Tax and VAT assessments, and a decision was made to stay these until the conclusion of any criminal proceedings. A Case Conference was held November 2016.”

15. On 31 January 2020 HMRC submitted a file to the CPS seeking a charging decision. In August 2020 the CPS notified the suspected parties that criminal prosecutions would not be brought.

16. Octagon submitted appeals to the Tribunal against the Landfill Tax and VAT assessments on 18 December 2020, over four years after they had been made.

THE FTT’S DECISION

17. The FTT concluded at [16]-[22] that Octagon’s appeals in respect of VAT and Landfill Tax were late. The FTT considered at [17] that there was nothing in the legislation which permitted the parties to agree, or HMRC unilaterally to decide, to stay the process once an assessment had been issued.

18. Next, the FTT considered whether time to appeal should be extended in respect of the Landfill Tax assessment and the VAT assessment.

19. At [23]-[27] the FTT considered the strength of each party’s case and concluded at [27] that it was unable to evaluate the parties’ contentions with the result that, on the evidence available to the FTT, Octagon’s case was not obviously very strong or very weak.

20. In relation to the Landfill Tax assessment, the FTT at [28]-[31] refused permission for the appeal to be heard out of time for the following reasons:

“28. The letter of 9 September from Mr Berry does not contain the paragraphs quoted in paragraph [10]² above. Those paragraphs appear only in his later letter of 1 November 2016. The recipient of the 9 September letter could not have drawn from that letter any reason to consider that he had more than 30 days to seek a review or to appeal. *There was no evidence before us that enquiries had been made of HMRC on behalf of Octagon as to whether the terms of the VAT letters applied equally to the Landfill tax assessment - or as to whether more time would be given for a review (Mr Bourne-Arton [counsel for Octagon] explained that such evidence was not available because the company’s current advisors had taken over in 2018). It did not seem to us that the statement made by Samantha Gibson (see the extract at [6] above³) spoke to this period. In the period from 9*

² i.e. the italicised paragraphs in Mr Longstaff’s letter of 9 September 2016 quoted at paragraph 10 above.

³ i.e. the Gibson Statement quoted at paragraph 14 above.

September to 1 November we cannot therefore find that there was a good reason why a review was not sought or an appeal notified.

29. Thus even if delay after 1 November was occasioned by an understanding of that letter that HMRC had consented to additional time for a review or agreed to support an application for a late appeal, there was a significant period of delay for which there was no good reason.

30. We accept that the prejudice to Octagon which would arise if it could not dispute the assessment is potentially very great. We cannot say that it is great because we cannot evaluate the evidence, and the nature of the appeal is that its outcome would depend on the evidence. Set against that prejudice is the statutory interest in the compliance with time limits, the lengthy delay and the lack of a good reason for the delay in the period after 9 September 2016 and 1 November 2016.

31. We conclude that permission to notify the appeal should be refused.” (*Emphasis added*)

21. The FTT then considered whether permission to notify the appeal against the VAT assessment out of time should be granted. Although the FTT’s conclusion on this point is not the subject of the present appeal, the FTT’s reasoning is instructive.

22. The FTT at [32] drew attention to the letters from Mr Longstaff of 9 September 2016 and, in particular, to the letter which contain the phrases “will not be enforced”, “for your information only”, “awaiting outcome”, “if we took the decision to enforce... the following would apply... within 30 days.”

23. The FTT decided at [37] to grant permission for the appeal against the VAT assessments to be heard out of time. Its reasons were set out at [33]-[36] as follows:

“33.... To our minds the letters are ambiguous. The second letter suggests that the appeal and review procedure is relevant only “if [HMRC] took the decision to enforce these assessments”; the other that any request for a review or appeal had to be made within 30 days of the date of the letter. The meaning of the phrase “for your information only” is also unclear but it could not wholly unreasonably be taken to mean that no action was needed from or required by the recipient. (These statements of course were made at the time the VAT assessment was issued -which was not the case with the Landfill tax assessment).

34. We think that a cautious lawyerly appraisal of the letters would have prompted either a request for a review, as Caird Peckford did, a “protective” appeal (echoing HMRC’s words) or a request for clarification to HMRC. It seems to us likely however that the company’s reading was less formal and that in reliance on its understanding of the letters that the clock had stopped, it delayed asking for a review or making an appeal. We consider that this was not an unreasonable reading of the second letter.

35. We acknowledge that HMRC had no power to stay the process but we note that on a request from a taxpayer, section 83D requires HMRC to undertake a review (at the conclusion of which an appeal might be made) if they consider that the taxpayer has a reasonable excuse for failing to seek a review within the 30 days given for acceptance. Even a cautious lawyer might have read the letters as indicating that once criminal proceedings had been settled HMRC were

likely to allow, or even indicating that they would allow, a late review request on this basis.

36. We start our evaluation of all the circumstances by recognising that the delay in making the appeal of over 4 years was both serious and significant. We find the reason for the delay was the view taken by the company of the meaning of the letters, a view which we find not unreasonable, if not the best. Given the size of the assessment we find that the prejudice which would arise to Octagon if it could not dispute it is significant even where its chances of success are not obvious. The company's case was not obviously a very strong one or a very weak one. We think it is likely that HMRC expected the assessment to be challenged and that the prejudice to them in permitting a late appeal is therefore not great. Given the acceptance by both parties that the determination of the tax actually due would in any event have to await the settling of the criminal proceedings, it does not seem to us that regard for efficient conduct of litigation weighs against extending the time limit. We take into account the weight to be placed on the statutory time limits.

37. Taking all those factors into consideration we give permission for this appeal to be heard."

THE NEW EVIDENCE

24. In her decision of 13 July 2022, Judge Ramshaw gave Octagon permission to admit the New Evidence. The New Evidence comprised various emails between Mr Wanless of Octagon and Octagon's newly-appointed accountant, Mr Keeling of Inquesta Accountants, in September and October 2016 as well as an internal HMRC email between Mr Berry and Ms Alison Broughton dated 4 October 2016.

25. In an email from Mr Keeling to Mr Wanless dated 19 September 2016, Mr Keeling says:

"I write further to our discussion on Friday regarding the letters you have received from HMRC. Further to your instructions we will act on your behalf and shall make contact with Ivor Berry of HMRC. This shall initially be done by way of a telephone conversation, then subsequent written correspondence."

26. In an email dated 20 September 2016 from Mr Wanless to Mr Keeling, Mr Wanless states:

"Regarding the letters I received from the HMRC I would be happy that you contacted Ivor Berry to discuss the case."

27. In our view, "the letters" referred to in this email include the letter from Mr Berry dated 9 September 2016.

28. Next, on 26 September 2016, Mr Wanless wrote to Mr Berry as follows:

"Re: Octagon Green Solutions Ltd – Blaydon Landfill Site

I write further to your letter of 9 September 2016, regarding the Notice of Decision in respect of your assessment of under-declared Landfill Tax for Octagon Green Solutions Ltd.

I can confirm that I have instructed Mr Tim Keeling of Inquesta Accountants to assist me with this matter and have given my authority, in my position as Director of Octagon, for Mr Keeling to act on behalf of the business in respect of this matter.

I understand that you are currently on annual leave and that, in your absence, Mr Keeling that he has spoken to your colleagues Ms White and Mr Middleton, to acknowledge receipt of the letter and to request a meeting with yourselves.

Mr Keeling has advised me that he considers a meeting would be the best way forward, given the complexity of this matter and amounts that are assessed as owing. I also believe this the most sensible approach.

Mr Middleton advised that it best to wait until you return to be able to fix a date for the meeting.

I am conscious that there is a time limit to respond to your letter, and therefore in case your return to work is after this date, I considered it best to write to you also to let you know of the steps taken so far.

I trust that this is sufficient for the time being and look forward to hearing from you upon your return to work.”

29. On 5 October 2016, Mr Keeling emailed Mr Wanless informing him of his telephone conversation with Mr Berry:

“Further to our earlier discussion I detail below a summary of my conversations with HMRC that I had today, on behalf of Octagon;

Call to Ivor Berry re Landfill Tax Notice of Decision.

1. Mr Berry returned my call at 13:13, following an earlier message I had left for him.

2.1 queried whether he had received the letters from Mr Wanless and details of my previous calls with his colleagues during his absence.

3. He advised that he had done so and was aware of my involvement and reasons for me being instructed.

4. I advised that based on the information that had been provided in his letter of 9 September 2016, I had a number of queries which I wished to discuss.

5. I advised that given the complexity of the matter and the amounts involved that I believed the best approach would be for a face to face meeting in order that these details may be discussed, along with any solutions for resolution of this matter.

6. Mr Berry advised that his calculations had simply been based on the information provided to him by the investigating team for the criminal proceeding which he referred to as FIZ.

7. I advised that having reviewed through the information he provided there were a number of anomalies and gave the example of the number of vehicles shown as arriving and leaving the site in February not correlating.

8. Mr Berry advised that he had not prepared these, merely that FIZ provided the schedules to him. He stated that he had none of the records on which the schedules were based nor would he be able to

provide these, or indeed, any further information than that he provided in the letter.

9. He advised that these would need to be obtained from FIZ, and that they would need to be contacted directly.

10. I queried with him the part in his letter about this being a separate assessment and distinct from the criminal investigation. He advised that it is more the case that the two are intrinsically linked.

11. I advised that Octagon has all their records seized by the police and therefore I was unable to use there as a method to undertake any assessment. He said he was aware of this.

12. I advised that I had been instructed by Mr Wanless that he wished to resolve this matter if at all possible, but in the absence of the information it is not possible to verify the assessment made by HMRC.

13. Mr Berry advised that he did not have the authority to be able to be able to make any decision regarding the quantum or indeed for any resolution as the matter was been led by FIZ.

14. I advised of Mr Wanless' concerns in that there are now two matters, ie the civil and criminal matter running concurrently. The next date for anything to happen on the criminal case is December interviews, which Mr Berry was aware of. I advised, that there was concern therefore over the civil matter just being left in abeyance by Octagon, such that enforcement proceedings may ensue.

15. Mr Berry advised that he understood the predicament, and intimated to me that this would not be the case, and murmured agreement when I said the civil proceedings were therefore more a matter of protocol being followed.

16. Mr Berry further raised the point of the ramifications on the criminal proceedings were any meeting to take place.

17. I advised, that I would therefore discuss the situation with Mr Wanless and his solicitor acting on his behalf on the criminal matter, in order to see if it would be possible to obtain the information I require from FIZ.

18. I advised that I would keep Mr Berry appraised of the situation going forward, and whether this would be sufficient for him, at this stage in respect of the civil matter, such that no further action would be taken by him. Mr Berry confirmed that he was in agreement with this.

Call to Kevin Longstaff re VAT assessment.

1. I called Mr Longstaff immediately following my conversation with Mr Berry. I advised him of my conversation with Mr Berry and the current situation.

2. Mr Longstaff confirmed that his calculations were also derived from information provided to him.

3. Mr Longstaff was also in agreement that he was fine for the matter to be effectively stayed until such time as Octagan [sic] were able to obtain any further documentation. I advised, as with Mr Berry, I would keep him appraised of the situation.

I will speak to you soon with a view to arranging a further meeting.”

30. Finally, there was an email from Mr Berry to Alison Broughton of the HMRC criminal case team at 14:28 on 4 October 2016 which provided Mr Berry’s note of his conversation with Mr Keeling. The email (edited to remove references to another taxpayer) was as follows:

“Alison

Just to keep you updated I have spoken today to ... Mr Keeling of Inquesta representing OGS.

...

Mr Keeling followed up Mr W's letter with a request for a meeting. When I questioned the purpose of the meeting he started to talk about the number of vehicles in and out of the site on the observation days. I said that he would have to discuss that with yourselves as I was only responsible for putting together a Landfill Tax assessment from the information provided to me. He said that MR W had asked him to look at the quantum of the assessment but he was having difficulties because he has no access to the records which we seized. I directed him to you in relation to any request for disclosure/return of records. MR W seems to have a concern about us enforcing the assessments ahead of any criminal investigation and the impact on the business. In my letter we did not make it clear that the assesment would not be enforced while the crminal [sic] case was ongoing. I made it clear that whilst I was happy to discuss the methodology for the assessment with him I would not be able to discuss the evidence on which it is based. His plan now is to contact yourselves to obtain information to inform his review prior to seeking any meeting with Keith and I. He suggested that MR W was seeking a meeting to resolve the situation and again I stated that that I would not be in a position to make any agreement at such a meeting, I could only clarify any issues relating to the methodology.

Ivor [sic]”

GROUND OF APPEAL

31. Judge Ramshaw has given Octagon permission to Appeal on Grounds 2 and 3, refusing permission to appeal on Ground 1 (viz that Octagon had appealed in time). The grounds of appeal are as follows.

Ground 2

32. The FTT was wrong to find that the period between 9th September and 1st November 2016 was a significant period of delay for which there was no good reason.

Ground 3

33. The FTT failed to consider “all the circumstances” in relation to the Landfill Tax assessments.

APPLICABLE CASELAW

34. It was common ground that the correct test to be applied in the present case was that provided for by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) (“*Martland*”). Essentially, *Martland* laid down a three-stage test to be applied when determining whether to allow an application for an appeal to be heard out of time: (1) was the

delay serious? (2) what were the reasons for the delay? and (3) a consideration of all the relevant circumstances. In considering the third stage of the *Martland* test particular importance was 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.

DISCUSSION

Ground 2: The FTT was wrong to find that the period between 9th September and 1st November 2016 was a significant period of delay for which there was no good reason.

35. Mr Farrell KC, appearing with Mr Bourne-Arton for Octagon, submitted that with the benefit of the New Evidence it could now be seen that at [28]-[29] (set out at paragraph 20 above) the FTT made a material mistake of fact. Furthermore, Mr Farrell argued that given the terms of those paragraphs in the Decision it was clear that the error was material because it led to the conclusion that permission to allow an appeal out of time was refused.

36. In addition, Mr Farrell drew attention to the Gibson Statement. The FTT at [28] found that the Gibson Statement did not refer to the period from 9 September to 1 November 2016. However, the New Evidence gave further substance to the view that the Gibson Statement did, indeed, refer to that period.

37. Mr Puzey, appearing for HMRC, argued that Mr Berry's letter of 1 November 2016 did not say at any point that there was no requirement either to request a review or lodge an appeal. Furthermore, in Mr Puzey's submission, the email from Mr Keeling to Mr Wanless, recording his conversation with Mr Berry, stated that both Mr Berry and Mr Longstaff had agreed that the civil proceedings would be "effectively stayed". The email did not, Mr Puzey observed, refer to the prospect of any appeal being lodged and did not refer to any request from Mr Keeling for a review by HMRC. Mr Puzey further submitted that the email was unsupported by witness statement from Mr Keeling or any contemporaneous notes. Moreover, the email from Mr Berry to Ms Broughton of 4 October 2016, in Mr Puzey's view, merely suggested that HMRC would not enforce the Landfill Tax assessment pending the conclusion of the criminal investigation.

38. Mr Puzey submitted that at no point did HMRC inform Octagon that there was no need to appeal or that time limits for appealing were stayed or in abeyance. In any event, any such assurance could have no legal effect. Even if an unrepresented lay taxpayer might understand the New Evidence to suggest that no appeal needed to be filed and no request for a review made, the same could not be said of a professional representative.

39. We accept Mr Farrell's arguments. It seems to us that the conclusion drawn by the FTT at [28] cannot stand in the light of the New Evidence. The New Evidence indicated that enquiries were made of HMRC on behalf of Octagon and we think that Octagon could reasonably have formed the impression from those discussions that the Landfill Tax assessment was being held in abeyance pending resolution of the criminal proceedings and that no further procedural steps, such as seeking a review or lodging an appeal, were necessary. In our view, Mr Berry's letter of 1 November 2016 merely confirmed the prior understanding of HMRC and Octagon that it was not necessary to lodge an appeal or seek a review until after the criminal proceedings had been concluded.

40. Furthermore, we were informed that the underlying facts and evidence in relation to the VAT assessments were the same as for the Landfill Tax assessments. At the hearing, the two assessments were described as inextricably linked. To say that the VAT assessments should

be held in abeyance but that the Landfill Tax assessments should be progressed is a strange conclusion which, of itself, suggests that Octagon's understanding of the position was a reasonable one.

41. There is one further matter with which we should deal.

42. In August 2020, the CPS informed the Octagon-related suspected parties that criminal prosecutions would not be brought. However, it was not until 18 December 2020 that Octagon filed its notice of appeal in relation to the Landfill Tax assessments. We were informed that it was only on 15 December 2020, in forfeiture proceedings before the Magistrates Court, that it became apparent to Octagon that HMRC were arguing that Octagon was out of time to appeal those assessments. It then lodged its notice of appeal. However, we consider that Octagon were entitled to rely on the statement in Mr Berry's letter of 1 November 2016 which stated:

“Following the conclusion of criminal proceedings, we will write to you again outlining the current position in respect of these assessments.”

43. As we understand it, no such letter was ever written and it was not until 15 December 2020 that Octagon became aware of the need to file a notice of appeal. In our view that is a good reason for Octagon not filing its notice of appeal from the date in August 2020 on which the suspected parties in the criminal investigation were informed that no prosecution would be brought until 18 December 2020.

44. In conclusion under Ground 2, we consider that the FTT made an error of law in making factual findings at [28]-[29] that could not reasonably have been made having regard to the whole of the evidence, including the New Evidence. We further consider that the error of law was plainly material to the outcome in relation to the Landfill Tax assessment. No criticism can be made of the FTT in finding as it did – the New Evidence was not before it.

45. We therefore allow the appeal on Ground 2.

Ground 3: The FTT failed to consider “all the circumstances” in relation to the Landfill Tax assessments.

46. Because we have allowed the appeal on Ground 2, it is unnecessary for us to deal with Ground 3.

REMAKING THE DECISION

47. Pursuant to section 12 Tribunals, Courts and Enforcement Act 2007 we may (but need not) set aside the Decision. In the light of our conclusion that the Decision contains a material error of law, we set the Decision aside.

48. We must then decide whether to remit the case to the FTT or remake the Decision.

49. The FTT judge, Judge Hellier, has retired and it is therefore not possible to remit the case to an identically constituted FTT. In any event, we consider that there is no need to remit the case. The facts are not in dispute and are relatively simple. We therefore consider that we should remake the Decision.

50. Applying the *Martland* criteria described above, we first consider that the delay of approximately four years was significant and serious. Secondly, as we have already found, we consider that there was a good reason for the delay because Octagon reasonably formed the impression that the Landfill Tax assessments were being held in abeyance until the conclusion of the criminal proceedings and, specifically, that that impression held true in respect of the need to request a review or file an appeal.

51. Thirdly, considering all the circumstances of the case, we accept the finding of the FTT that Octagon's case was neither very strong nor very weak. We also accept that Octagon would suffer considerable prejudice if it were not able to contest the Landfill Tax assessment of some £57m. On the other hand, we accept that HMRC does suffer some prejudice by having to contest an appeal which it thought had been concluded, albeit that that prejudice is somewhat self-inflicted: HMRC should have realised that its statements to Octagon in September, October and November 2016 were, at the very least, ambiguous. Moreover, the extent of the prejudice suffered by HMRC in having to contest what is probably a fact-intensive appeal in respect of the Landfill Tax assessments is reduced by the knowledge that essentially the same factual matrix is already under appeal in relation to the VAT assessments. Therefore, considering all the circumstances and bearing in mind the need to observe time limits, we consider that the balance lies in favour of Octagon.

Conclusion

52. We therefore allow the appeal, set aside the FTT's Decision and remake it, granting permission to Octagon to appeal the Landfill Tax assessments out of time.

COSTS

Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

**JUDGE RUPERT JONES
JUDGE GUY BRANNAN**

**UPPER TRIBUNAL JUDGES
Release date: 06 November 2023**