[2015] UKFTT 0404 (TC)

TC04581

Appeal number:TC/2009/10886 & Others

PROCEDURE – withdrawal of appeals – Rule 17 – applications to reinstate appeals – applications to extend time – applications to extend time refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROLLS GROUP & OTHERS — **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Respondents**

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 5 May 2015

Mr Tarlochan Lall of counsel instructed by Jomobe Ltd t/a AMS for the Appellants

Mrs Ann Sinclair of HM Revenue & Customs for the Respondents

DECISION

Background

1. The appeal of Rolls Group and the other appeals listed in Annex 1 of this Decision ("the Appeals") were all withdrawn in early 2013. The appellants have all applied to reinstate their appeals pursuant to Tribunal Rule 17(3).

2. In all the Appeals the appellants are motor traders, the Appeals relate to VAT and what are known as "Italian Uplift claims" and the appellants all withdrew their appeals in early 2013 on the advice of their former adviser Deloitte. The appellants now say that advice was wrong.

3. The applications to reinstate the Appeals were made in November 2014 and February 2015. For the purpose of those applications the appellants rely on witness statements made by Mr Gerard Myton a partner in MHA MacIntyre Hudson ("MHA"), Mr Kenneth Berry of AMS an adviser to the appellants, Mr Barry Baynham a director of Tyn Lon Garage Ltd (one of the appellants) and Mr Ian Trevor the general manager of Hafod Garage Group Limited (another appellant). The respondents made no objection to the witness statements and I accept the contents of the witness statements.

4. There are two issues which arise on these applications. Firstly, whether I should exercise discretion to extend the time for applying to reinstate the Appeals. If so whether I should exercise discretion to reinstate the Appeals. In giving reasons for my decision on those issues I set out a chronology of events and relevant findings of fact which are drawn from the witness statements and the documentation before me in evidence.

The Law

5. Rule 17 of the Tribunal Rules provides as follows:

"*17(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case —*

(a) by sending or delivering to the Tribunal a written notice of withdrawal; or
(b) orally at a hearing.

(2) The Tribunal must notify each party in writing of its receipt of a withdrawal under this rule.

(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

(4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after —

(a) the date that the Tribunal received the notice under paragraph (1)(a); or

(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

6. The time limit for applying to reinstate is therefore 28 days from the date that the Tribunal received notice of withdrawal.

7. The factors to be taken into account in considering whether to extend a time limit are those set out by the Upper Tribunal in *Data Select Ltd v HMRC [2012] UKUT 187 (TCC)*, where Morgan J said at [34]:

"*Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? And (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.*"

8. Morgan J also said at [37] that the Tribunal should have regard to the overriding objective of dealing with cases fairly and justly and the factors set out in the Civil Procedure Rules at 3.9. In *Leeds City Council v HMRC [2014] UKUT 350 (TCC)* the Upper Tribunal recently endorsed the approach in *Data Select*. It also held that the amendments to the civil procedure rules reflecting a stricter approach to compliance described by the Court of Appeal in *Mitchell v Associated Newspapers Ltd [2013] EWCA Civ 1537* have not been incorporated into the rules of this tribunal (See also the decision of the Chamber President to the same effect in *Kumon Educational UK Co Ltd v HMRC [2014] UKFTT 772 (TC)*).#

9. In assessing the consequences of an extension of time or a refusal to extend time it is necessary to have regard to the merits of the underlying appeal, or in the present case the application to reinstate – See *O'Flaherty v HMRC [2013] UKUT 1619 TCC* per Judge Berner at [34] and [63].

10. Morgan J referred at [37] to the importance of finality in litigation:

"*37. … The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to*

an appeal against a determination by HMRC as it does to appeals against a judicial decision."

11. The factors relevant to whether an appeal should be reinstated on an application pursuant to Rule 17(3) were set out by Proudman J in *Pierhead Purchasing v Commissioners of Revenue & Customs [2014] UKUT 321 (TCC).* At [23] and [24] the Upper Tribunal set out the following criteria:

> "• *The reasons for the delay, that is to say, whether there is a good reason for it.*
>
> • *Whether HMRC would be prejudiced by reinstatement.*
>
> • *Loss to the appellant if reinstatement were refused.*
>
> • *The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration.*
>
> • *Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained.*"

12. It seems to me that the reference to delay in the first bullet point is relevant to the application to extend time which was also an issue in *Pierhead Purchasing*, as well as to the application to reinstate. Any delay in making an application to reinstate not only means that an extension of time is necessary, but it will also be relevant to the merits of the application itself. Further, in the context of whether an appeal should be reinstated an important consideration will be whether there is a good reason to explain the withdrawal and the circumstances in which reinstatement is being sought.

13. These factors are to be considered in the light of all the circumstances and by reference to the overriding objective of dealing with cases fairly and justly. Tribunal Rule 2(2) provides as follows:

> " *(2) Dealing with a case fairly and justly includes —*
>
> *(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;*
>
> *(b) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*
>
> *(d) using any special expertise of the Tribunal effectively; and*
>
> *(e) avoiding delay, so far as compatible with proper consideration of the issues.*"

14. It can be seen that there is some overlap in the factors relevant to the two issues. One question which arose in *Pierhead Purchasing* was the extent to which culpability

on the part of a representative can be attributed to the appellant in relation to the two issues. Reference was made to the decision of Briggs J (as he then was) in *ATEC Associates Limited v Revenue & Customs Commissioners [2010] UKUT 176 (TCC)*. In that case the incompetence of a representative led to an appeal being dismissed for want of prosecution. There was an application to set aside that decision. Briggs J viewed it as an application for relief from sanctions where the sanction of dismissal of the appeal had been applied because of incompetence on the part of the appellant's representative. He analysed the discretion of the tribunal on the basis that he was considering relief from sanctions. As such he held that it was relevant in mitigation of a default that the failure to comply had been caused by the representative rather than the party itself.

15. Briggs J distinguished two cases in the Court of Appeal (*Mullock v Price [2009] EWCA Civ 1222* and *Training in Compliance Ltd v Dewse [2001] CP Rep 46*) where the fault of a representative was held not to be a relevant mitigating factor. These were decisions in relation to setting aside default judgments rather than relief from sanctions. In the latter case Peter Gibson LJ stated:

> " *Of course, if there is evidence put before the court that a party was not consulted and did not give his consent to what the legal representatives had done in his name, the court may have regard to the fact, though it does not follow that this would necessarily, or even probably, lead to a limited order against the legal representatives. It seems to me that, in general, the action or inaction of a party's legal representatives must be treated under the Civil Procedure Rules as the action or inaction of the party himself. So far as the other party is concerned, it matters not what input the party himself has made into what the legal representatives have done or have not done. The other party is affected in the same way; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up in considering separately the conduct of the legal representatives from that which the party himself must be treated as knowing, or encouraging, or permitting.*"

16. The Court of Appeal in those cases was concerned with whether a party had applied promptly to set aside default judgments. In *Mullock v Price* Ward LJ stated that "*it seems to me wrong that a party should shield behind his representatives*". However that was in the context of delay in applying to set aside judgment. Further, this tribunal is subject to its own rules and the Civil Procedure Rules do not have direct application although they may provide guidance.

17. The present applications are only concerned with relief from sanctions in relation to the extension of time application. It seems to me therefore that if a representative were at fault in failing to meet a time limit then that may be a relevant mitigating factor in extending time, depending on all the circumstances generally.

18. I was not referred to any authority bearing on the significance of a party relying on professional advice in withdrawing an appeal or discontinuing proceedings and subsequently forming a different view as to the merits. I am not aware of any general principle to be applied, but it does seem to me that where a party applies to reinstate in such circumstances it will be relevant to consider whether the advice was such that no reasonably competent professional adviser could have given it. I would emphasise that I view that simply as one relevant factor and not as a test to be applied as such.

19. An application to reinstate is more akin to setting aside a default judgment than relief from sanctions. I should therefore take into account what the Court of Appeal has said as part of the balancing exercise that must be undertaken in exercising any discretion.

The Facts

20. Before considering the chronology of events, it is necessary to identify the relationships between various parties.

21. AMS, which stands for Automotive Management Services, was an adviser to various motor traders. It had a client called Blake Holdings which was a subsidiary of Vertu Motors. Vertu Motors was a client of Deloitte. In or about 2008 AMS and Deloitte agreed to work together and share fees in relation to VAT repayment claims by motor trader clients of AMS. Deloitte had particular experience of pursuing claims for repayment of VAT in relation to the margin on sales of demonstrator vehicles (so called "Italian Republic claims") and in relation to VAT on payments made by manufacturers (so called "Elida Gibbs claims").

22. Deloitte agreed to provide VAT advice to AMS clients in relation to such claims. The terms of engagement were recorded in an engagement letter dated 12 March 2009 although the agreement went back to 2008. In the engagement letter Deloitte stated:

> "*In preparing these claims, Deloitte has developed an understanding of how the motor industry operated historically. This has resulted in increased claims (referred to as 'Italian Uplift claims'*) *being made by its clients*
>
> *Deloitte has also researched the merits for arguing that claims should be extended to 1999 (referred to as 'Scottish Equitable claims').*"

23. Italian Uplift claims were based on an argument that payments by HMRC in relation to Italian Republic claims had been based on average margins which were too low. In 2009 HMRC did not accept that argument, and there was a lead case proceeding in the Tribunal known as Bristol Street Motors. Deloitte represented Bristol Street Motors.

24. Pursuant to the agreement between AMS and Deloitte, Deloitte was entitled to 50% of any fees received by AMS from its clients for the submission of Italian Uplift claims based on Deloitte methodology. A number of AMS clients including Blake

Holdings moved to become clients of Deloitte. In those circumstances AMS was entitled to 50% of fees earned by Deloitte from the claims. Other clients remained with AMS, and AMS was obliged to pay 50% of its fees from claims to Deloitte. Clients knew AMS was sharing fees with Deloitte.

25. The applications before me concern appellants who were clients of AMS but who moved to become clients of Deloitte in relation to Italian Uplift claims.

26. Ken Berry took over the business of AMS in July 2009 following the untimely death of his brother.

27. There was evidence before me which I accept for present purposes that an Italian Uplift claim made by Blake Holdings was repaid by HMRC in the year ended 28 February 2013. I also accept that this was not known to AMS until relatively recently.

28. Tyn Lon Garage Ltd ("Tyn Lon") was originally a client of AMS in relation to motor trader VAT claims. Tyn Lon retained a small high street firm of accountants for general accountancy and tax matters. That firm knew very little if anything about specialist VAT matters relevant to motor traders. On 10 March 2008 Tyn Lon appointed Deloitte to handle its Italian Uplift claim. It was introduced to Deloitte by AMS on the terms described above.

29. Tyn Lon lodged an appeal with the Tribunal on 16 October 2009. It was represented by Deloitte and the appeal was stayed behind Bristol Street Motors.

30. On 16 January 2013 Deloitte wrote to Tyn Lon seeking instructions in relation to its Italian Uplift claim. At that time that was the only matter on which Deloitte was acting. The letter set out some background, including the fact that Tyn Lon had been paid an Italian Republic claim but that HMRC had refused the Italian Uplift claim. The letter referred to that fact that Deloitte had assisted in submitting an appeal to the Tribunal which had been stood over behind Bristol Street Motors. The letter then said:

> "*Unfortunately the Bristol Street Motor case has been withdrawn, meaning that that appeal is no longer proceeding. We have discussed with HMRC whether there is any possibility of an additional payment in your case, but HMRC have refused to make any such payment. Their view is that any taxpayer who does not agree with their position will have to take their own litigation or find a new lead case. There is no Deloitte client who is intending to take their own litigation or become a lead case, and we would consider the chances for anyone doing so to be low.*
>
> *This means that the options for you are as follows:*
>
> *a) Instruct us to withdraw your appeal, and give up on this matter. With regret this is the route we would recommend.*
>
> *b) Proceed with your appeal to full litigation. We would not recommend this route, given the considerable cost of proceedings and the low chances of success. Deloitte would not be willing to act for any taxpayer in this position, so you would need to instruct new advisers on this point if you wished to continue, and we would notify the Tribunal that we were no longer your appointed representative in your appeal.*"

31. Deloitte asked Tyn Lon to provide instructions in writing. On 14 March 2013 Mr Baynham emailed Deloitte to confirm that Tyn Lon did not wish to proceed with the appeal. Shortly afterwards the appeal was withdrawn.

32. On or about 21 January 2013 Deloitte had sent a letter in identical terms to Hafod Garage Group Ltd ("Hafod Garage") who had appointed Deloitte on 1 October 2008. By email dated 21 January 2013 Mr Ian Trevor emailed Deloitte to confirm that Hafod Garage did not wish to pursue the appeal. Shortly afterwards the appeal was withdrawn.

33. I infer that all the other appellants received identical letters in or about early 2013 and as a consequence all the Appeals were withdrawn. I am satisfied that all the Appeals were withdrawn in reliance on advice from Deloitte and without reference to AMS. For example in the case of Rolls Group, Deloitte withdrew the appeal in or about March 2013. The Tribunal sent notification of the withdrawal to HMRC and to Deloitte on 23 March 2013. The Tribunal expressly drew attention to the existence of a 28 day time limit within which to apply for reinstatement. I am satisfied that such notifications were given to each of the appellants. There is no suggestion that the appellants were unaware of the existence of the notifications given by the Tribunal.

34. What was not known to the appellants or to AMS was that in 2013 Mr Myton of MHA was in correspondence with HMRC about Italian Uplift claims. He was acting for a number of motor traders with Italian Uplift claims, including Listerdale Motor Company Ltd ("Listerdale"). Mr Myton received a letter dated 13 December 2012 from HMRC in relation to appeals where MHA was instructed and which had been stood behind Bristol Street Motors. The letter informed him that the Bristol Street Motors appeal had been withdrawn and that HMRC had asked the Tribunal to list a case management hearing for appeals which had been stood behind it. The letter stated:

> "*HMRC now take the view that each of these appeals continue on its own merits, and submit that the category 'Italian Uplift' is unsuitable for either lead or indicative case treatment.*"

35. Mr Myton responded on 23 January 2013 asking why HMRC no longer considered that lead or indicative case treatment was appropriate. He also asked whether Bristol Street Motors had withdrawn their appeal unilaterally without payment or whether it had been settled with a payment to Bristol Street Motors. He did not wish to know the quantum of any payment which he recognised would be confidential.

36. In a subsequent telephone conversation with HMRC, Mr Myton was told that a settlement had been reached between HMRC and Bristol Street Motors in an agreement pursuant to section 85 Value Added Tax Act 1994.

37. Mr Myton wrote to HMRC on 18 February 2013 recording what he had been told about a section 85 agreement. He pointed out that there had been no definitive legal decision, to his knowledge HMRC had settled with at least one other motor trader apart from Bristol Street Motors but that HMRC had not contacted MHA to discuss settlement with its clients. He stated that MHA had instructed tax counsel and asserted that its clients were entitled to repayment of their Italian Uplift claims. If HMRC did not agree, MHA intended to seek a direction for a lead case.

38. I was not told what response there was to that letter. However, Kathy Whelan of HMRC's Solicitor's Office wrote to MHA on 5 December 2013 referring to Mr Myton's letter dated 18 February 2013 and "subsequent exchanges" with HMRC. The letter pointed out that MHA had not put forward any settlement proposals, and also that on 18 October 2013 MHA had made an application to the Tribunal in relation to Italian Uplift claims. That application proposed Listerdale as a lead case under Rule 18. Ms Whelan stated that:

> "*in principle, [HMRC] believe an application to progress just one of your Italian Uplift cases is sensible. However … HMRC do not believe this category is suitable for lead case treatment. In the event cases are incapable of settlement, then we believe the appropriate way forward would be for each representative to choose one of their appeals to progress and stand their remaining appeals behind it , but under Rule 5 rather than Rule 18.*"

39. Ms Whelan then referred to Italian Uplift appeals generally:

> "*It is important for you to know that HMRC have not agreed a method which will pay all Appellants with an 'Italian Uplift' claim. There has been no particular move by HMRC to settle these claims, unless litigants or their representatives have come to us with proposals which we are able to consider (each on their own merits and based on some evidence showing the original amounts paid [by HMRC] were incorrect). Even then there is no guarantee that this will lead to settlement, but we can say all proposals will be considered constructively.*
>
> *… For the avoidance of doubt we still consider the Italian tables give a reasonable result overall, and we still maintain this category is no longer suitable for a Lead case.*"

40. On 10 December 2013 Ms Whelan wrote to AMS in relation to Italian Uplift claims and appeals formerly being conducted by AMS. She wanted to clarify in particular whether AMS had conduct of any Italian Uplift claims or whether all former AMS clients had been taken on by Deloitte.

41. In fact in 2013 AMS was continuing to represent some clients with Italian Uplift claims who had not instructed Deloitte. Nothing was happening in relation to those appeals which remained stayed and HMRC was apparently content for the appeals to remain stayed. AMS had been waiting to see if another lead case was identified. AMS is not a professional accountancy firm and in the context of these appeals it has generally relied on other professional advisers.

42. As a result of Ms Whelan's letter to AMS, in early 2014 Mr Berry started to approach clients who had transferred to Deloitte to ascertain the status of their appeals, not least because AMS had an interest in the fees payable to Deloitte. It was at this stage that AMS became aware that Deloitte had advised the former AMS clients to withdraw their appeals.

43. In March 2014 AMS began to speak with other advisers including MHA about Italian Uplift claims. Mr Myton told Mr Berry that MHA was seeking a lead case direction from the Tribunal. Mr Myton also told AMS that the basis of a settlement with HMRC was becoming apparent. On 13 May 2014 AMS engaged MHA to assist in seeking a settlement of Italian Uplift claims for all AMS clients, including the

present appellants. AMS and MHA agreed that they would not seek to progress those cases including the present appellants until an agreement was reached with HMRC. They considered that approach would save time and costs for all parties.

44. Slightly out of sequence, I note that on 31 January 2014 the Tribunal had made a lead case direction under Rule 18 specifying Listerdale as a lead case for the purposes of Italian Uplift claims. On 18 February 2014 HMRC objected to the lead case direction but at a hearing before me on 1 July 2014 HMRC withdrew their objection and the lead case direction continued.

45. Initially at least I understand that there were approximately 140 appeals stayed behind Listerdale. That figure has since increased to approximately 200 appeals. Following the lead case direction MHA and HMRC reached agreement on a basis for settlement of the Italian Uplift claims. Agreement in principle was reached in or about October 2014. All issues were agreed, save with regard to (1) individual appellants establishing that they are the entity entitled to be paid the amounts claimed and (2) the quantum of individual claims. On 10 April 2015 I made case management directions by consent whereby those remaining issues could be identified on a case by case basis and if necessary determined by the Tribunal. As part of those directions the lead case direction under Rule 18 was set aside. I understand that there are a number of other appeals concerning Italian Uplift claims brought by other representatives which were not stayed behind Listerdale.

46. On the basis of figures provided by Mr Lall on instructions, the total VAT in issue in the Appeals is approximately £330,000. With the addition of simple interest the total sum in issue would be approximately £760,000. That figure is split between the various appellants. At one end of the spectrum is Brown Brothers where the total amount in dispute is £132,480. At the other end is Maxwell Motors Ltd where the total amount in dispute is £16,100.

47. On 14 November 2014 Rolls Group made an application to reinstate its appeal. The application was served by AMS. The only ground being put forward at that stage was that Rolls Group did not receive written notification of withdrawal from the Tribunal. HMRC objected to the application pointing out that notification of the withdrawal was given by the Tribunal to Deloitte, who were the representative of Rolls Group.

48. On 7 February 2015 AMS made an application on behalf of the other appellants to reinstate their appeals. More substantial grounds were put forward. On 21 April 2015 Rolls Group put in an amended application for reinstatement, essentially adopting the grounds of the other appellants.

Reasons

49. The substantive grounds on which the present applications are made may be summarised as follows:

(1) The appellants withdrew the Appeals in early 2013 on the advice of Deloitte. They relied on Deloitte's advice to the effect that continuing the litigation would involve considerable costs and low chances of success.

(2) At the time of withdrawal HMRC were aware that many other Italian Uplift claims were continuing.

(3) In early 2014 AMS acting on behalf of the appellants sought further professional advice and in May 2014 they appointed MHA to act on behalf of the appellants.

(4) On 1 July 2014 Listerdale was identified as the new lead case.

(5) Subsequently HMRC agreed in principle that the Italian Uplift claims could be paid.

(6) The appellant's original belief that there were low chances of success based on Deloitte's advice was mistaken.

(7) It would be unjust not to reinstate the appeals.

50. I shall consider the two issues in turn. Firstly whether I should extend the time for applying to reinstate and then whether I should reinstate the appeals. Having said that, there is considerable overlap between the two issues.

(1) Extension of Time

51. It is clear that there is power under Rule 5(3)(a) to extend the time within which an application to reinstate must be made. Rule 17(4) provides that such an application must be made within 28 days following receipt of the notice of withdrawal by the Tribunal. For example, in the case of Rolls Group the 28 day time limit expired in or about mid April 2013. The application for reinstatement was made on 14 November 2014, some 19 months later.

52. I turn to consider the relevant factors set out in *Data Select* and which I have described above.

53. The purpose of a 28 day time limit to make an application for reinstatement is clearly intended to promote finality. The time limit within which an application is to be made is short. The time limit is similar to the 30 day time limit for appealing a decision of HMRC. That time limit is also intended to promote finality. Subject to the facts of any particular case, in the ordinary course the longer an application is delayed the less likely it is that time will be extended.

54. Mr Lall accepted that there was a long period following expiry of the 28 day time limit before the applications were made. I have already recorded that in the case of Rolls Group it was some 19 months. In the case of other appellants it was a similar period. Mr Lall's principal submission was that there was a good explanation for the delay. The appellants did not discover that the advice they had received from Deloitte was wrong until early 2014.

55. The appellants must be taken to have been aware of the 28 day time limit for reinstatement. Having said that, it seems to me that in the context of an application to extend time based on wrong advice from Deloitte, the appellants could not be expected to make such an application until they appreciated that the advice was wrong.

56. It was apparent to AMS by March 2014 at the latest that the Appeals had been withdrawn and why they had been withdrawn. There was no application to re-instate until Rolls Group made an application in November 2014 and the other appellants in February 2015. The period from March 2014 onwards must be viewed against the background of a 28 day time limit.

57. In the period after March 2014 AMS and MHA had taken a view that negotiations were continuing with HMRC in relation to Italian Uplift claims generally. An agreement in principle was reached in October 2014 but a mechanism to deal with the claims was not agreed until my direction made on 10 April 2015.

58. In the context of a 28 day time limit I would have expected the appellants to act promptly once they had decided to pursue the Appeals and the applications to reinstate in March 2014. I take into account that the overriding objective includes avoiding unnecessary formality and dealing with cases in a proportionate way. However the appellants should at least have put HMRC on notice as to the situation and indicated that such applications were likely to be forthcoming. As far as I am aware no indication whatsoever was given to HMRC prior to November 2014 and February 2015 that these appellants wished to reinstate their appeals.

59. The application of Rolls Group made in November 2014 could not realistically have succeeded on the single ground then being put forward. Rolls Group had given instructions to withdraw its appeal and the Tribunal had given notice of the withdrawal to its representative. Further, there was no explanation as to why it took until 7 February 2015 before the other appellants made their applications to reinstate.

60. I am not satisfied that there was a good explanation for the delay after March 2014.

61. I must now consider the consequences for the appellants and HMRC of extending or refusing to extend time.

62. Mr Lall did not seek to identify any prejudice specific to individual appellants. It would be impossible for me to do so because other than the amount of each claim I have no evidence as to the impact of the loss of individual claims on individual appellants. Mr Lall restricted his submissions on prejudice to loss of the opportunity to put forward a reasonably arguable appeal and submitted that in itself is a significant prejudice. I accept that the appellants would lose that opportunity and that it does amount to significant prejudice.

63. Mr Lall also submitted that the appeals, if reinstated, could be dealt with by reference to the Listerdale directions referred to above, which already apply to a large number of current appeals. I accept there would be no great procedural difficulty or further delay if time is extended and the appeals reinstated.

64. Mr Lall submitted that there was no prejudice to HMRC arising from the delay in applying for reinstatement. Even if the appellants had not withdrawn the Appeals or if the applications to reinstate had been made within 28 days of withdrawal, it is only now in the light of my directions given on 10 April 2015 that the appeals would have moved forward.

65. Mrs Sinclair did not rely on any specific prejudice beyond an expectation of finanlity. I accept that HMRC has suffered prejudice. They were entitled to consider that the Appeals had been finalised and that the time for an application for reinstatement had long since passed.

66. There is a public interest in the finality of litigation. The strength of that argument, which was explicitly recognised by Morgan J in *Data Select*, is to some extent diminished in the context of litigation where a significant number of other

traders are raising the same issue in separate appeals which have been stood over. Further, as Mr Lall submitted the Appeals are not "one off" appeals which would otherwise have progressed towards a hearing. The progress of all the Appeals would depend on case management of the group as a whole which now comprises approximately 200 appeals. In that sense the withdrawals caused no delay. The Appeals would have been no further on even if there had been no withdrawal.

67. Strictly, the relevant prejudice to the appellants is losing the opportunity to pursue the application to reinstate. That is the second issue and I have all the material I need by way of evidence and submissions to decide whether that application would be granted or refused if time were to be extended.

(2) Reinstatement

68. I have described the factors relevant to reinstatement above, in the light of *Pierhead Purchasing*. The Upper Tribunal in *Pierhead Purchasing* identified at [21] that there is no guidance in the Rules as to how the discretion should be exercised:

> "*21. Withdrawal of cases before the FTT is dealt with in rule 17 of the Rules. Rule 17 (3) provides that a party which has withdrawn its case may apply to the FTT for the case to be reinstated. There is no guidance in the rules as to how such a decision is to be reached other than the application of the overriding objective.*"

69. The existence of a 28 day time limit to apply for reinstatement does not really give any indication as to what might constitute a good reason to seek reinstatement following a withdrawal. On one view it might be viewed as giving something akin to a cooling off period, recognising that an appellant might change his mind about withdrawal. Alternatively it might be viewed as simply giving time to identify and correct any mistake which led to a withdrawal. It is clear that there is no *entitlement* to reinstate following a withdrawal. The Upper Tribunal in *Pierhead Purchasing* is authority for the proposition that reinstatement remains a matter of discretion for the Tribunal and an applicant must still show sufficient reasons to justify reinstatement, taking into account the overriding objective. Each case must be considered on its own facts.

70. I take into account the period of time which has passed since the appeals were withdrawn and the prejudice to both parties which I have described above. There is also prejudice to the administration of justice where litigants seek to reinstate appeals which have previously been withdrawn.

71. I must also for the purposes of the application to reinstate consider the reasons for the withdrawal and the circumstances in which reinstatement is being sought, together with the underlying merits of the appeals in so far as they can be conveniently and proportionately ascertained.

72. This is not a case such as *Pierhead Purchasing* where the appellant did not receive advice on the consequences of withdrawal. There is no suggestion that the appellants did not appreciate the consequences of withdrawal. Namely that they could not pursue the Appeals unless the Appeals were reinstated. Deloitte advised the appellants in terms that withdrawal would mean giving up on the matter. At that stage the appellants had an opportunity to consider the advice they had received, to take

soundings within the industry or to raise the matter with AMS, their previous adviser whom they knew was sharing fees with Deloitte.

73. Mr Lall did not make any specific criticism of Deloitte, although he did submit that their advice was wrong. The explanation for the period from March 2013 to March 2014 was that the appellants were unaware that the Deloitte advice was wrong.

74. I am not entirely clear whether Mr Lall's submission was to the effect that the advice was wrong at the time and therefore negligent, or that it turned out to be wrong in the light of subsequent developments. Mr Lall did not say in terms that Deloitte had been negligent in their advice to the appellants. He submitted that the appellants were entitled to rely on the advice of a leading firm of professional advisers. I accept that is a factor to take into account, but for reasons given above it is also relevant to consider whether the advice was such that no reasonably competent professional adviser could have given it. If the advice was reasonable, then reliance on the advice would not really support the appellants' case on reinstatement. The grounds for seeking reinstatement could then fairly be described as subsequently taking a different view as to the prospects of success of the Appeals.

75. I should say that I am not satisfied on the evidence available to me that the advice given by Deloitte was wrong at the time it was given. I have no evidence as to the basis of Deloitte's advice to the appellants, and why that advice might have differed from advice given to its other clients, for example Blake Holdings Ltd. I do not know whether similar advice was given to Deloitte clients other than those introduced by AMS. It is not appropriate for me to speculate as to why Deloitte's advice might have differed as between different clients. I do not know whether Deloitte's advice to the individual appellants took into account the specific evidence available in relation to each appellant, and if so what that evidence was. In those circumstances I cannot be satisfied that the advice given by Deloitte fell below the standard of a reasonably competent professional adviser.

76. Mr Lall submitted that what was more important in the present context was not what Deloitte had advised, but what HMRC knew or must have known at the time of the withdrawals in early 2013. He submitted that HMRC must have been surprised by the withdrawals and might also have regarded them as a windfall in the sense that the appeals involved meritorious claims which they would not have to pay.

77. I accept that HMRC were aware that a number of claims had been paid and others would also be paid. However it does not follow these appellants would be paid or might reasonably expect to be paid given proper advice. There is no evidence before me to support Mr Lall's submission in this regard. The evidence is that HMRC were prepared to consider individual claims based on their own merits and evidence

78. Mr Lall submitted and Mrs Sinclair accepted that the Appeals have a reasonable prospect of success if they proceed. Mr Lall did not invite me to go any further than that. It is apparent that HMRC have at least accepted the principle of Italian Uplift claims, subject to evidence of entitlement and quantum from individual appellants. I understand that different representatives utilise different methodologies to identify the quantum of Italian Uplift claims. However I do not know what issues of entitlement or quantum might arise on the Appeals. In relation to quantum, I do not know whether the appellants will be able to satisfy the burden of establishing any entitlement to a repayment. There was no material before me from which I can find that the Appeals have anything more than a reasonable prospect of success.

79. The position therefore is that the appellants have withdrawn their appeals on professional advice. I am not satisfied that advice was wrong at the time, or that it was advice no reasonable professional adviser could have given. The most I can say is that a different view of the prospects of success has been taken and that the appeals do have a reasonable prospect of success.

80. I must carry out a balancing exercise taking into account all the circumstances and the overriding objective. On balance I do not consider that it would be appropriate to reinstate the Appeals.

Conclusion

81. For the reasons given above I would not exercise discretion to reinstate the appeals. Taking that into account I will not extend the time for applying to reinstate the appeals.

82. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 14 AUGUST 2015

ANNEX 1

TC/2009/10229	Brown Brothers Peebles
TC/2010/00511	Thomas of Caine Limited
TC/2010/02628	Tyn Lon Garage Limited
TC/2010/02907	Buntings of Harrow Limited
TC/2009/14849	Hafod Garage
TC/2009/09992	Neville Motors Limited
TC/2009/10120	Tudor Garage (Clacton) Limited
TC/2009/11667	Hindle & Walker Limited
TC/2010/00939	Nelmes Garage Limited
TC/2009/16087	Angus Clinton (Motors) Limited
TC/2009/14529	Ken Hope Cars Limited
TC/2009/13515	Maxwell Motors Ltd