[2019] UKFTT 477 (TC)

PROCEDURE – whether valid appeal made to the Tribunal – ss 83C, 83F and 83G Value Added Tax Act 1994 – yes – whether to reinstate proceedings following earlier strike-out under rule 8(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07280

Appeal number: TC/2010/04506

BETWEEN

FLORIDA FOODS LIMITED T/A SUBWAY **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROBIN VOS
DR CHRISTINA HILL WILLIAMS DL

Sitting in public at Taylor House, London on 15 July 2019

Kevin Prosser QC, Counsel for the Appellant

Olivia Donovan, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The underlying substance of this appeal relates to a VAT assessment for £533,466 made by HMRC in respect of the 05/06 – 11/08 periods of account on 16 November 2009.

2. The Appellant, Florida Foods Limited ("FFL"), through its subsidiary is a franchisee of the fast food restaurant, Subway. At the time of the VAT assessment, it owned and operated around 45 stores in the Greater Manchester and West Yorkshire areas.

3. The VAT assessment followed checks carried out by HMRC at four of FFL's stores in November 2008 as a result of which they concluded that the proportion of FFL's sales which were standard rated had been under declared.

4. FFL disputes HMRC's methodology and has submitted detailed arguments to HMRC explaining why this is the case.

5. Whilst all of this was going on, FFL became aware that another Subway franchisee, Sub One Limited had brought a case in the Tribunal arguing that toasted subs should be zero rated and not standard rated for VAT purposes (we refer to this as the "zero-rating" issue). FFL had always treated toasted subs as standard rated and so, although it continued to engage with HMRC in relation to the amount of the assessment, it also lodged an appeal against the assessment with the Tribunal in May 2010 so that it could benefit from any favourable decision in the case brought by Sub One Limited which had been designated as a "lead case" in relation to this particular issue.

6. Sub One however lost its appeal, culminating in a decision of the Court of Appeal in 2014 and a refusal by the Supreme Court to allow a further appeal.

7. Thinking that it could continue to negotiate the amount of the assessment with HMRC, possibly with the aid of alternative dispute resolution, FFL allowed its appeal to the Tribunal to be struck out in September 2015. However, in early 2017, HMRC made it clear that, as FFL's appeal to the Tribunal covered not only the zero-rating issue but also the correctness of the amount of the assessment, the striking out of the appeal effectively determined the matter in their favour and that FFL's only course of action was to apply to the Tribunal for the proceedings to be reinstated.

8. FFL made the application for reinstatement in June 2018 and we now have to decide that application.

9. FFL have however raised an additional issue which is that, as FFL appealed to the Tribunal whilst it was still engaging with HMRC in the process set out by statute for resolving disagreements about decisions made by HMRC, statute prohibited it from appealing to the Tribunal in May 2010 and so the appeal is invalid. If FFL are right on this, the effect would be that there has been no valid appeal to the Tribunal (and therefore nothing to reinstate) but that it would still have the opportunity to make a valid appeal to the Tribunal in accordance with the statutory process which we will discuss in more detail below.

THE EVIDENCE AND THE FACTS

10. The evidence consisted of two bundles of largely overlapping documents and correspondence, one prepared by FFL and one by HMRC together with evidence from FFL's Finance Director, Damian Bennett in the form of two witness statements and brief oral evidence at the hearing.

11. HMRC did not challenge Mr Bennett's evidence and we have no hesitation in accepting it.

12. Based on the evidence before us, we find the following material facts.

13. HMRC conducted VAT checks at four of FFL's stores in November 2008. As a result of this, HMRC concluded that 81.95% of FFL's sales were standard rated and that it had under-reported its VAT liability by over £2 million during the previous three years.

14. Following correspondence between FFL and HMRC over the next few months, HMRC accepted that this figure was too high. However, agreement could not be reached and, on 16 November 2009, HMRC issued a VAT assessment for £533,466.

15. FFL had always treated toasted subs as standard rated and so this was not an issue that was relevant to HMRC's assessment or the discussions between HMRC and FFL in relation to the alleged under-declaration of VAT.

16. The notes to the assessment included the following:

> "If you disagree with any of the amounts, please write to us, with your reasons, within 30 days and it will be reconsidered. If you prefer, and provided a VAT return has been submitted for the assessed period, we will arrange for a review by a person not involved in the decision. If you disagree with the review outcome, you will then have the right to appeal to an independent tribunal. Alternatively, you can appeal direct to the Tribunal within 30 days of this letter."

17. On 15 December 2009, Mr Bennett wrote to HMRC to appeal against the assessment. He asked for a response to the points made in his most recent letter but went on to say that:

> "If you consider that your letter of 24 July 2009 was your final position on this issue, we would be grateful if you would treat this letter as a request for the case to be reconsidered by another Officer, which we understand is the next stage in a formal appeal process."

18. HMRC responded on 22 December 2009 saying:

> "As discussed with you on the telephone, I have forwarded a copy of your letter requesting a local reconsideration of my assessment to the appropriate section which will make a review and contact you regarding this matter."

19. Although the correspondence with HMRC came from Mr Bennett/FFL, it was advised in relation to the dispute with HMRC about the amount of the assessment by Jacki Wells who, in 2009, was working at Mazars, accountants.

20. At around this time, FFL became aware of the appeal by Sub One Limited in relation to the zero-rating issue. FFL were invited to participate in this process. FFL agreed to do so and, in early 2010, instructed Dass Solicitors to act for it in relation to the proceedings.

21. FFL heard nothing from HMRC since their letter of 22 December 2009 until they received a letter dated 15 April 2010. This letter apologised that, due to an administrative oversight, the matter had not yet progressed to an "independent tribunal" and went on to set out HMRC's view of the matter. The letter concluded by inviting FFL to provide any additional evidence or technical arguments.

22. On 3 May 2010, Mr Bennett responded to ask for clarification as he had understood following the correspondence in December 2009 that the case had been passed on for a "local reconsideration" of the assessment. It appears that this letter was not actually sent to HMRC on 3 May 2010 but was sent by email on 10 May 2010.

23. On 13 May 2010, Dass Solicitors lodged a notice of appeal with the Tribunal on behalf of FFL. The notice of appeal challenged the assessment on various grounds including the zero-rating issue but also that the assessment was excessive and should be reduced as FFL did not understand HMRC's methodology.

24. On 14 May 2010, HMRC replied to Mr Bennett's letter of 3 May asking Mr Bennett to formally request an independent review.

25. Mr Bennett's response to this on 18 May 2010 was that he had thought that this was what he had done (and HMRC had agreed to) in their correspondence in December 2009.

26. The papers were then passed to HMRC's Appeals and Reviews Unit which wrote to FFL on 29 June 2010 referring to FFL's letter of 15 December 2009 requesting an independent review but saying that no review could be carried out as a result of s 83C(4) Value Added Tax Act ("VATA") given that FFL had now submitted an appeal to the Tribunal.

27. FFL (both directly and through Mazars) continued to try to persuade HMRC to review the assessment during 2010 and the first quarter of 2011. One of the arguments put forward by FFL and by Mazars was that the appeal to the Tribunal dealt only with the zero-rating issue and not with other issues connected with the amount of the assessment. However, in a letter dated 18 April 2011 addressed to Mr Bennett and responding to the most recent letters both from Mr Bennett and from Mazars, HMRC quoted the relevant extract from FFL's notice of appeal to the Tribunal which made it clear that the appeal to the Tribunal related not only to the zero-rating issue but also the amount of the assessment.

28. In December 2014, the Supreme Court refused permission for Sub One to appeal against the decision of the Court of Appeal in favour of HMRC.

29. HMRC wrote to FFL on 15 April 2015 to notify FFL of this development and the fact that they intended to apply to the Tribunal for FFL's appeal to be struck out. The letter concluded by saying:

> "If there are matters relating to the amount of the assessment, (the quantum), that were not decided in the above case, please let me know whether you wish to continue with your appeal. If so you should write to the First-tier Tribunal accordingly and apply for the case to be listed for hearing. If you believe that the matters of quantum could be settled without a Tribunal hearing, for example, because you have further information you wish to provide, please write to me with your information."

30. Mr Bennett passed HMRC's letter to Jacki Wells who was now working at a firm called Dow Schofield Watts for advice. Jacki Wells suggested that ADR may be the way forward. No response was sent to HMRC.

31. On 10 July 2015, the Tribunal wrote to Dass Solicitors asking to be told within 14 days if FFL intended to pursue its appeal. Having heard nothing, the Tribunal issued a direction on 29 July 2015 stating that FFL's appeal would be struck out unless it notified the Tribunal by 12 August 2015 that it intended to pursue the appeal.

32. The Tribunal's direction was not sent to FFL by Dass Solicitors until 4 August 2015. It was immediately sent on to Jacki Wells who asked for a copy of the original notice of appeal to the Tribunal so that she could see whether the appeal covered the amount of the assessment as well as the zero-rating issue.

33. Mr Bennett was not able to supply a copy of the notice of appeal and suggested that Jacki Wells try to obtain it from Dass Solicitors. It is not clear whether she did so. However, she

drafted a letter for Mr Bennett to send to HMRC reiterating their view that the appeal to the Tribunal did not relate to the amount of the assessment but instead only related to the zero-rating issue. Now that this issue had been dealt with by the courts and FFL's Tribunal appeal had now come to an end, the letter requested HMRC to consider whether the dispute as to the amount of the assessment could be resolved by alternative dispute resolution.

34. This letter was originally sent to HMRC on 13 August 2015 but was re-sent on 9 September 2015 as Mr Bennett became aware that the relevant HMRC officer had moved offices.

35. On 21 September 2015 the Tribunal notified FFL that its appeal had been struck out and that it had 28 days to apply for the proceedings to be reinstated.

36. Mr Bennett spoke to the HMRC officer in early October 2015 who agreed that FFL should apply for ADR.

37. There was no further contact between FFL and HMRC in relation to this issue until, in December 2016, Mr Bennett was called by HMRC's ADR Unit who agreed to look into the matter.

38. Having done so, the ADR Unit wrote to Mr Bennett on 13 January 2017 explaining that HMRC's position was that the appeal to the Tribunal covered not only the zero-rating issue but also was an appeal against the amount of the original assessment. As FFL had allowed the appeal to be struck out, despite being asked if it wanted to continue the appeal in relation to the amount of the assessment, the appeal was therefore unsuccessful and no further appeal could be made. The advice from the ADR Unit was that FFL's only course of action was to ask the Tribunal to reinstate the appeal outside the normal 28 day time limit.

39. Jacki Wells was at this stage no longer practising and so, in early 2017, FFL instructed another firm of accountants, RSM to advise them in relation to the matter.

40. Mr Bennett responded to HMRC's email of 13 January 2017 by asking if HMRC would consent to an application for reinstatement. Eventually he was told on 21 June 2017 that they would not.

41. Mr Bennett continued to try to persuade HMRC to agree to reinstatement but was told again on 22 August 2017 that HMRC would oppose any application.

42. At some point after this, FFL instructed Counsel to assist with the reinstatement application.

43. In the second half of 2017, there was a material down turn in Subway's UK business which resulted in Mr Bennett having to spend a significant part of his time stabilising the business.

44. In October 2017, HMRC commenced a PAYE inspection which ran until April 2018. Again, this took up a significant amount of FFL's resources.

45. In early June 2018, HMRC started to take action to try to recover the outstanding VAT represented by the 2009 assessment.

46. The reinstatement application was filed with the Tribunal on 20 June 2018.

THE VALIDITY OF FFL'S ORIGINAL APPEAL TO THE TRIBUNAL

The relevant legislation

47. Sections 83 – 83G VATA set out a statutory process which must be followed for VAT appeals. These provisions were introduced in April 2009 and so, at the time of HMRC's assessment in November 2009, were relatively new.

48. The basic structure of the legislation is fairly simple. Where HMRC makes an appealable decision (such as making an assessment) the taxpayer may either ask HMRC to conduct a review of the decision or may appeal direct to the Tribunal. If the taxpayer asks HMRC to review the decision, no appeal can be made to the Tribunal whilst the review process is continuing. It is this last point which is the key to deciding whether, in this case, FFL has made a valid appeal to the Tribunal.

49. The relevant parts of the legislation are as follows:

> "**83 Appeals**
>
> (1) Subject to section 83G and 84, an appeal shall lie to the Tribunal with respect to any of the following matters –
>
> …
>
> (p) an assessment –
>
> (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act;
>
> …
>
> or the amount of such an assessment;
>
> **83A Offer of review**
>
> (1) HMRC must offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision.
>
> (2) the offer of the review must be made by notice given to P at the same time as the decision is notified to P.
>
> …
>
> **83C Review by HMRC**
>
> (1) HMRC must review a decision if –
>
> (a) they have offered a review of the decision under section 83A, and
>
> (b) P notifies HMRC accepting the offer within 30 days from the date of the document containing the notification of the offer.
>
> (2) But P may not notify acceptance of the offer if P has already appealed to the tribunal under section 83G.
>
> …
>
> (4) HMRC shall not review a decision if P, or another person, has appealed to the tribunal under section 83G in respect of the decision.
>
> **83F Nature of review etc**
>
> (1) This section applies if HMRC are required to undertake a review under section 83C or 83E.
>
> …

(6) HMRC must give P, or the other person, notice of the conclusions of the review and their reasoning within –

(a) a period of 45 days beginning with the relevant date, or

(b) such other period as HMRC and P, or the other person, may agree.

(7) In sub-section (6) "relevant date" means –

(a) the date HMRC received P's notification accepting the offer of a review (in a case falling within section 83A).

…

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in sub-section (6), the review is to be treated as having concluded that the decision is upheld.

(9) If sub-section (8) applies, HMRC must notify P or the other person of the conclusion which the review is treated as having reached.

83G Bringing of appeals

(1) An appeal under section 83 is to be made to the Tribunal before –

(a) the end of the period of 30 days beginning with –

(i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates;

…

(2) But that is subject to sub-sections (3) to (5).

(3) In a case where HMRC are required to undertake a review under section 83C –

(a) an appeal may not be made until the conclusion date; and

(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

…

(5) In a case where section 83F(8) applies, an appeal may be made at any time from the end of the period specified in section 83F(6) to the date 30 days after the conclusion date.

…

(7) In this section "conclusion date" means the date of the document notifying the conclusions of the review."

The parties' submissions

50. Mr Prosser notes that s 83C(4) prevents HMRC from conducting a review if the taxpayer has made an appeal to the Tribunal. However, he says that this must be interpreted in the light of s 83G and, in particular, s 83G(3) which makes it clear that, where the taxpayer has asked

for a review, no appeal can be made to the Tribunal until HMRC have notified the taxpayer of the conclusion of the review.

51. Bearing this in mind, Mr Prosser argues that s 83C(4) must refer to the position at the date the taxpayer asks for the decision to be reviewed. It cannot have been intended to mean that HMRC should stop the review process if the taxpayer purports to appeal to the Tribunal after requesting a review given that s 83G prevents the taxpayer from appealing to the Tribunal once HMRC has been required to carry out a review.

52. Although HMRC rely on s 83C(4) in their correspondence with FFL as the reason for not carrying out a review, Ms Donovan did not try to suggest with any force that s 83C(4) could be invoked by HMRC in circumstances where the purported appeal to the Tribunal only took place after the request for a review.

53. So far, we agree with Mr Prosser than an appeal to the Tribunal cannot be made once a review has been requested until HMRC give notice of the conclusion of the review.

54. The question then arises as to what the position is if HMRC fail to carry out a review or to give notice of their conclusion. Mr Prosser accepts that this is dealt with in s 83G(5) and also accepts that, in these circumstances s 83G(5) overrides the provisions of s 83G(3).

55. Section 83G(5) applies in a situation where HMRC are required to undertake a review but do not give notice of their conclusions within the relevant time limits which are set out in s 83F(6), being 45 days after the request for the review or such other period as HMRC and the taxpayer may agree. In these circumstances, the taxpayer may appeal to the Tribunal at any time after the time limit has expired. The only restriction is that the appeal to the Tribunal must be made no later than 30 days after HMRC have notified the taxpayer of their conclusion. In a case where HMRC have failed to carry out a review within the relevant time limit, s 83F(8) deems HMRC to have upheld their original decision and s 83F(9) requires HMRC to notify the taxpayer of this deemed conclusion.

56. Both Mr Prosser and Ms Donovan agree (as do we) that what this means is that if FFL had, in December 2009, requested a review, they could only make a valid appeal to the Tribunal in May 2010 if the time limit within which HMRC had to carry out the review had by then expired.

57. Mr Prosser observed that the default time limit for HMRC to carry out the review is 45 days from receipt of the request for the review (s 83F(6) and (7)). It is Mr Prosser's position that FFL requested a review in its letter of 15 December 2009 and that this was received at the latest by HMRC on 22 December 2009, being the date of HMRC's reply to FFL. On this basis, the 45 day time limit would have expired in early February 2010. Therefore, if this was the end of the matter, FFL would have had the ability to appeal to the Tribunal at any time after that and so the appeal made in May 2010 would have been valid.

58. Mr Prosser however submits that the course of conduct of both FFL and HMRC show that there was an implicit agreement that HMRC should have longer than 45 days in order to carry out their review. He accepts that no specific period (in place of the 45 day period) was ever agreed but argues that this is not necessary. By way of analogy, he suggested that if a taxpayer and HMRC agreed specifically that HMRC should have a reasonable period from the date of the review request to carry out the review, this would be a valid agreement for the purposes of s 83F(6)(b).

59. In support of his submission, Mr Prosser refers to the correspondence between HMRC and FFL in April and May 2010. In their 15 April 2010 letter, HMRC do not ask for additional time to carry out the review (even though 45 days has already passed) but simply apologise for

the delay. Mr Bennett's response on 3 May 2010 makes it clear that FFL is continuing to ask HMRC to carry out the review.

60. Although this correspondence takes place after the 45 days has expired and Mr Prosser conceded that any agreement to extend the time limit must be made before the original time limit has expired, he made it clear that his argument was that this correspondence was not itself an agreement to extend the 45 day time limit but was simply evidence of the fact that the parties had implicitly agreed at the outset that HMRC should have as much time as they needed to carry out the review.

61. Ms Donovan on the other hand argued that there was no implied agreement between the parties and that if there were an agreement, it should have been in writing.

62. We cannot accept Mr Prosser's submissions on this point. There is no evidence at all that, when FFL requested a review on 15 December 2009 and HMRC acknowledged that request on 22 December 2009, the normal 45 day time limit should not apply. Indeed, in his letter of 15 December (admittedly in a different context) Mr Bennett specifically refers to the relevant deadlines and the formal appeal process. It is impossible to infer from this or from HMRC's response that there was some common intention that the 45 day time limit should be extended.

63. Whilst the exchange of correspondence between HMRC and FFL in April/May 2010 does not refer to any time limit for the review, this does not in our view give rise to any inference that there was some sort of agreement at the outset that HMRC should have as long as they like to carry out the review. Indeed there seems to have been some confusion on the part of HMRC as to whether they had understood FFL to have asked for an independent review in the first place and they appear to be trying to re-start the review process by asking FFL in their email of 14 May 2010 to "formally request an independent review".

64. This clearly demonstrates that HMRC at least did not think that they were in the middle of a review process which they had an unlimited time to complete and is strong evidence that there was no implicit agreement in December 2009 of the sort suggested by Mr Prosser. At best, there was confusion on the part of HMRC as to how the statutory appeal process should be operated, perhaps as a result of the relatively recent introduction of these rules.

65. As there was no agreement that HMRC should have longer than 45 days to carry out their review, the time limit for carrying out the review expired in February 2010 and FFL was therefore free to make an appeal to the Tribunal in May 2010 in accordance with s 83G(5) VATA.

66. In her submissions on this aspect, Ms Donovan raised a separate point which is whether or not FFL's letter of 15 December 2009 actually requested a review in accordance with s 83C VATA. She suggested that, at least from HMRC's perspective, FFL had only requested that HMRC reconsider their original decision rather than conduct a statutory review.

67. Having rejected Mr Prosser's submissions, we do not need to consider this alternative argument although, given the statutory framework, the notes accompanying the assessment and the subsequent correspondence between the parties, we would find it difficult to interpret FFL's letter of 15 December 2009 as anything other than a request for a statutory review.

Valid appeal to the Tribunal – our conclusions

68. As explained above, we do not accept that there was any implied extension to the normal 45 day time limit for HMRC to carry out their review. HMRC failed to do this within the time limit and FFL therefore had the right to notify its appeal to the Tribunal when it did so in May 2010 and the appeal is a valid appeal.

69. We must therefore consider whether the proceedings, having been struck out in 2015, should now be reinstated.

SHOULD FFL'S APPEAL BE REINSTATED

The relevant test

70. Both Mr Prosser and Ms Donovan agreed that, in reaching its decision, the Tribunal must seek to give effect to the overriding objective contained in rule 2 of the Tribunal Rules which is to enable the Tribunal to deal with cases fairly and justly (see, for example, *Jumbogate Limited v HMRC* [2015] UKFTT 64 at [45]).

71. There was also no disagreement that, in reaching its decision, the Tribunal must take into account all of the relevant circumstances of the case. In this context, both parties referred to the decision of the Upper Tribunal in *Martland v HMRC* [2018] UKUT 0178 (TCC).

72. Although *Martland* was a case dealing with an application for permission to make a late appeal, it is clear that the Upper Tribunal based its approach on that which has been adopted by various courts and tribunals in the context of relief from sanctions which is of course the substance of FFL's application for reinstatement in this case. Although some of the previous cases have attempted to set out a list of relevant factors (see, for example, *Jumbogate* at [45] and *Pierhead Purchasing Limited v HMRC* [2014] UKUT 0321 (TCC) at [23], the Upper Tribunal, following the approach of the Court of Appeal in *Denton & Others v T H White Limited & Others* [2014] EWCA Civ 906, stressed at [45] that:

> "The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist."

73. In its helpful guidance, the Upper Tribunal in *Martland* went on to say at [45-46] that the 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 as well as confirming that the Tribunal should have regard to any obvious strengths or weaknesses of the applicant's case as long as this does not become a detailed analysis of the underlying merits of the appeal.

74. Finally, Mr Prosser accepted that the correct starting point is compliance with Tribunal directions, so that the reinstatement application should not be granted unless the Tribunal is satisfied on balance that there is good reason why it should be.

The relevant circumstances

75. There has in this case been a significant delay in applying for reinstatement since FFL's appeal was struck out on 21 September 2015. Rule 8(6) of the Tribunal Rules requires a reinstatement application to be made within 28 days after the date on which the Tribunal notifies the appellant that the proceedings have been struck out. The reinstatement application was not made until 20 June 2018, more than 2½ years after the proceedings had been struck out.

76. Ms Donovan submitted that FFL had in fact been guilty of a much longer delay. This is on the basis that, following the Tribunal's decision in the Sub One case, the Tribunal wrote to all of the other appellants (including FFL) on 19 October 2010 stating that they were bound by the decision in Sub One unless they applied for a direction that the decision does not apply to their particular appeal. FFL did not respond to the notice. Ms Donovan suggests that, had FFL responded to make it clear that it did not agree with the amount of the assessment, this would somehow have made a difference to subsequent events.

77. Mr Bennett's answer to this was that he thought that if FFL asked not to be bound by the Sub One decision, it would not be able to take the benefit of any successful appeal on the zero-

rating issue. Mr Prosser agreed with this saying that the notice from the Tribunal was asking only whether the other appellants agreed to be bound by the decision in relation to zero-rating and was not asking them whether there was any other basis for their appeals against the relevant assessments.

78. Leaving to one side precisely what the Tribunal was asking in October 2010, we cannot see that this is a significant factor in deciding whether we should now reinstate FFL's appeal. Whether or not FFL had responded to the Tribunal in 2010, the Tribunal would still have asked the same questions as it did in 2015. We therefore need to look in more detail at why FFL acted as it did in 2015 and subsequently, culminating in its application for reinstatement in June 2018.

79. In this respect, Mr Prosser submits that the evidence clearly shows that the reason FFL did not respond to HMRC's and the Tribunal's communications and allowed its appeal to be struck out is that it was advised by a reputable adviser that the appeal related only to the zero-rating issue and not to the amount of the assessment which should be pursued by direct discussions with HMRC including asking them to undertake the review which had never been carried out and exploring the possibility of alternative dispute resolution.

80. There are also two mistakes which Mr Prosser says were made by HMRC and which, had they not been made, might have prevented FFL and Jacki Wells from making the mistake which they made.

81. The first mistake was HMRC's failure to carry out the statutory review which FFL had asked them to undertake. Had they done so and had (as Mr Prosser suggests is likely) they upheld the original decision, it would have been clear that the May 2010 appeal to the Tribunal would be dealing with the amount of the assessment as well as the zero-rating issue and, submits Mr Prosser, FFL would not therefore have allowed the appeal to lapse.

82. The second mistake referred to by Mr Prosser relates to Mr Bennett's conversation with HMRC in early October 2015 when HMRC agreed that an application for ADR was appropriate but did not at any point suggest that the appeal was at an end or that ADR could not be pursued at that stage even though, at the time of the conversation, the proceedings had been struck out by the Tribunal. Mr Prosser argues that, had the HMRC officer mentioned this, FFL would have taken immediate steps to apply for the proceedings to be reinstated and that this could have been done within the relevant 28 day period.

83. Although FFL took no action between October 2015 until HMRC's ADR Unit got in touch in December 2016, Mr Prosser points out that this was because Jacki Wells advised FFL that the ball was in HMRC's court and so there was nothing it needed to do.

84. Turning to the further delay between January 2017 when FFL was told that it needed to apply to reinstate its appeal and June 2018 when the application for reinstatement was made, Mr Prosser referred to Mr Bennett's evidence as to the reasons for this. In summary, up to August 2017, there was continuing correspondence with HMRC to try to persuade them to agree to support the application for reinstatement. Once they refused to do this, FFL instructed Counsel to advise on the reinstatement application but the lodging of the reinstatement application took longer than anticipated as a result of the following:

(1) the need to appoint new accountants as Jacki Wells was no longer practising;

(2) FFL had to prepare a case history and supporting documents for the new accountants which FFL's small management and finance teams had to fit in alongside their day to day work;

(3) in the second half of 2017 there was a down turn in Subway's UK business requiring Mr Bennett to spend much of his time stabilising the financial position of FFL as well as its franchisees;

(4) further resources were taken up dealing with an HMRC PAYE inspection between October 2017 – April 2018; and

(5) the finance team was busy preparing year end financial information in January and February 2018.

85. Mr Prosser stressed that it is clear from the evidence that FFL always intended to apply for reinstatement and that HMRC were never led to believe otherwise.

86. Whilst Mr Prosser accepts that reliance on an adviser may, in certain circumstances, not amount to a reasonable excuse for a taxpayer's failure, in the context of relief from sanctions, it does provide an explanation of the failure and is a relevant circumstance to take into account.

87. Ms Donovan's position is that FFL could and should have pursued their appeal to the Tribunal, that there has been a significant delay and that reliance on a professional adviser is not a reason for the Tribunal to allow the proceedings to be reinstated.

88. As far as the first point is concerned, Ms Donovan referred to HMRC's letter to FFL dated 15 April 2015. This warns FFL that HMRC will be applying for the proceedings to be struck out but specifically asks FFL to let HMRC know if they wish to continue with the appeal on the basis that there are matters relating to the amount of the assessment which still need to be decided. It also advises FFL to write to the Tribunal requesting a hearing should this be the case.

89. Ms Donovan then drew attention to the Tribunal's letter to Dass Solicitors dated 10 July 2015 asking whether FFL intends to pursue its appeal and the Tribunal's subsequent directions dated 29 July 2015 directing that the appeal will be struck out unless FFL notifies the Tribunal by 12 August 2015 that it intends to pursue the appeal and that it may be struck out if FFL does not supply revised grounds of appeal.

90. Ms Donovan submits that, in the light of these communications, it should have been clear to FFL that the appeal to the Tribunal should be pursued in relation to the amount of the assessment.

91. In addition, Ms Donovan submits that FFL had a clear opportunity to apply for reinstatement within 28 days of being notified by the Tribunal in September 2015 that the appeal had been struck out and yet failed to do so.

92. As far as the delay is concerned, Ms Donovan argues that it was not reasonable for FFL simply to do nothing between October 2015 and December 2016. As to the period between August 2017 and June 2018, Ms Donovan argues that seeking advice is not a good reason for such a long delay.

93. On the subject of delay, Ms Donovan invites the Tribunal to take a strict approach to compliance with the Tribunal's directions as advocated by the Court of Appeal in *HMRC v BPP Holdings Limited* [2016] EWCA Civ 121 where the court laid down the following guidelines at [37 and 38]:

> "[**37**] There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with

> the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
>
> [**38**] A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect of the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party."

94. Turning to reliance on advisers, Ms Donovan relied on the decision of the First-tier Tribunal in *Atec Associates Limited v HMRC* [2009] UKFTT 178 (TC) where Sir Stephen Oliver QC refused to reinstate a case which had been withdrawn by the appellant despite the possible incompetence of the appellant's professional adviser. Mr Prosser's response to this was that *Atec* was dealing with a completely different situation and was based on possible procedural impropriety or denial of natural justice which is not the case here.

95. In any event, although neither party referred to it, the decision in *Atec* was reversed by the Upper Tribunal (*Atec Associates Limited v HMRC* [2010] UKUT 176 (TCC)). The Upper Tribunal stated at [48] that:

> "In the context of obtaining relief from sanctions under the Civil Procedure Rules, it is relevant (in mitigation of the applicant's default) that the relevant failure to comply was caused by the party's legal representative, rather than by the party himself: see CPR 3.9(1)(f)."

96. Although the Tribunal is not required to consider a specific list of factors (let alone those contained in a previous version of CPR 3.9), we do accept that the conduct or advice of a professional adviser may well be a relevant circumstance to take into account as part of the balancing exercise which the Tribunal must undertake.

97. Mr Prosser urged the Tribunal to take into account two further issues. The first is that there will be significant prejudice to FFL if it is not allowed to pursue its appeal. It will now have to pay the VAT of £533,466 plus interest. Mr Bennett gave evidence that FFL's profit margins were slim and that the VAT would more than wipe out any profits on the sales in question.

98. The final point put forward by Mr Prosser on behalf of FFL was that, should the appeal proceed to a hearing, FFL has a good prospect of success. He took us in particular to the correspondence in 2009 from FFL explaining the various different reasons why the results of HMRC's check should not be extrapolated across all stores and all time periods. Based on this he submits that the overwhelming likelihood is that HMRC's assessments are wrong as they have used the wrong starting point. He also points out that Ms Donovan does not make any

submission in her skeleton argument about FFL's prospects of success, nor did she do so during the hearing.

99. Ms Donovan does not deny that there would be a prejudice to FFL if its appeal is not reinstated. However, she argues that there would be a prejudice to HMRC if the appeal were reinstated. Firstly she submits that HMRC were entitled to believe that the appeal had been finally disposed of when it was struck out by the Tribunal. However, she also makes the point that if the Tribunal were to reinstate FFL's appeal, this would open the floodgates to other appellants whose cases were stood behind the Sub One appeal who may feel that they could apply for their own proceedings to be reinstated in order to challenge the amount of any assessment if FFL are successful in having their appeal reinstated.

100. We have carefully considered all of the factors put to us by each of the parties. Whilst we have considerable sympathy for FFL's predicament, we have decided that it would not be in accordance with the overriding objective of dealing with cases fairly and justly to allow FFL's appeal to be reinstated.

101. As Mr Prosser accepts, the starting point is compliance with orders or directions of the Tribunal unless there is some good reason to the contrary (see the guidance of the Court of Appeal in *BPP* which the Supreme Court confirmed it was appropriate for the Court of Appeal to give).

102. The main reason for non-compliance in this case was initially the advice given to FFL by its adviser, Jacki Wells and more recently the time taken for FFL and its advisers to put together the application for reinstatement once it became clear in August 2017 that this was required.

103. We have accepted that the fact that the strike out resulted from professional advice is a relevant factor but that cannot on its own mean that reinstatement is justified. It is necessary to look carefully at the circumstances surrounding that advice.

104. We have found as a fact that FFL and Jacki Wells had extensive correspondence with HMRC in 2010/11 which culminated with a clear explanation from HMRC to Mr Bennett that FFL's appeal to the Tribunal covered not only the zero-rating issue but also the amount of the assessment. It should therefore have been clear both to FFL and to Jacki Wells that the appeal to the Tribunal did indeed include the amount of the assessment.

105. Whilst it might be unrealistic to expect Mr Bennett and Jacki Wells to remember in 2015 exactly what was said in 2011, it is clear from the exchange of emails between Mr Bennett and Jacki Wells when the Tribunal's "unless" order was received, that Jacki Wells was alive to the need to consider whether the appeal to the Tribunal dealt with the amount of the assessment. To this end, she asked Mr Bennett for a copy of the original notice of appeal. Mr Bennett was unable to provide this and there is no evidence that either Mr Bennett or Jacki Wells obtained a copy of the notice of appeal before allowing the Tribunal's deadline to pass and before Jacki Wells advised that FFL should write to HMRC to request ADR. There was therefore a conscious decision taken to ignore the Tribunal based on what appears to be incomplete information which could easily have been verified simply by looking back at the previous correspondence.

106. We accept that HMRC's failure to alert Mr Bennett in October 2015 to the fact that the striking out of the appeal was, as far as they were concerned, the end of the matter contributed to FFL's delay in making an application for reinstatement and that an in time application would no doubt have had a better chance of success. However, there is no evidence that this failure was deliberate on HMRC's part and it is not HMRC's role to advise the taxpayer how to proceed. We have therefore given this factor relatively little weight in our balancing exercise.

107. Mr Bennett's evidence was that, following the discussion with HMRC about ADR in October 2015, Jacki Wells' advice was simply to wait until FFL heard from HMRC.

108. However, Mr Bennett's email to Jacki Wells after his conversation with HMRC in October 2015 reads as follows:

> "Jane Blades called me and to cut a long story short said apply for ADR. Just waiting on a group of franchisees in London going down the ADR route to see their outcome before we push the button. I assume HMRC won't start chasing for why we've not submitted the ADR request?"

109. It seems clear from this email that FFL knew in October 2015 that it needed to take further action in order to progress matters and yet Mr Bennett was clear in his evidence that he did nothing until he was contacted by HMRC's ADR Unit in December 2016 on the basis that he was advised by Jacki Wells that the ball was in HMRC's court. Given the evidence before us, we do not believe that simply waiting to hear from HMRC was a responsible way of acting. Had FFL actively pursued the possibility of ADR, it would no doubt have discovered much sooner than it did that it needed to apply for its appeal to be reinstated.

110. Turning to the period between August 2017 when HMRC reiterated its refusal to support a reinstatement application and June 2018 when the application was finally made, we do not accept that the reasons put forward by Mr Bennett for the reinstatement application taking ten months to put together are sufficient to justify a decision to reinstate the appeal. Although the business no doubt had competing priorities as explained by Mr Bennett, FFL was clearly aware that its appeal could only be pursued if a reinstatement application was made and that such an application would already be extremely late. It should have been a high priority for FFL to make the application as soon as possible.

111. Mr Bennett's own evidence is that FFL appointed new accountants to assist with the matter in early 2017. They had therefore already had over six months to familiarise themselves with the background by August 2017. In these circumstances, it is difficult to see why it should have been such a time consuming task to prepare the application for reinstatement and the supporting documents. It is certainly not a task which would normally take ten months, even bearing in mind the need to take advice.

112. Mr Bennett mentions in his second witness statement that FFL received a demand for payment of the outstanding VAT on 8 June 2018. It is hard to escape the conclusion that the only reason the reinstatement application was filed on 20 June 2018 rather than being delayed even further was that this had now become a higher priority given HMRC's attempt to recover the tax due. However, bearing in mind that the starting point is compliance with the Tribunal Rules and directions, making the reinstatement application should have been a high priority ever since FFL found out in January 2017 that such an application was needed.

113. Turning to other factors, we would accept that FFL has some prospect of persuading a tribunal that the amount of the assessment should be reduced. However, without considering the detailed evidence on both sides (which would amount to hearing the substantive appeal), we cannot say that there are any obvious strengths or weaknesses in FFL's case. We do not therefore place much weight on this factor.

114. We appreciate that there will be a significant prejudice to FFL in our decision not to reinstate the appeal as it will now have to pay the tax and interest due but, taking all the relevant factors into account, this is not enough to persuade us that it is appropriate to allow the appeal to be reinstated.

115. It is true that in this particular case there is little prejudice to HMRC in allowing the appeal to go ahead. They have not sought to argue that they are prejudiced by the delay and,

at least until August 2017, they appear to have been under the impression that FFL would try to pursue its appeal.

116. We acknowledge HMRC's concern that other appellants might be encouraged to apply for their appeals to be reinstated should FFL be successful. We think that this is a legitimate concern but, as we did not have any evidence of the number of cases potentially involved, this has not been a significant factor in our decision.

117. As the Court of Appeal pointed out in *BPP* at [37], the overriding objective in the Tribunal rules incorporates proportionality, cost and timeliness. That is part of the reason why compliance with Tribunal rules and directions is the correct starting point. There have been very significant delays in this case and, whilst FFL may have been poorly advised, this is not the only reason for those delays. There needs to be good reasons to grant relief from sanctions and, although FFL has explained how it comes to be in the position which it finds itself, our conclusion is that these reasons are not sufficiently good to persuade us that it is in the interests of fairness and justice to depart from the normal starting point and to allow its appeal to be reinstated.

DECISION

118. FFL made a valid appeal to the Tribunal in May 2010 in accordance with s 83G(5) VATA as there was no implicit agreement that the time for HMRC to carry out its review should be extended beyond the normal 45 day period.

119. It would not in this case be in the interests of fairness and justice to allow the proceedings to be reinstated. FFL's application for reinstatement is therefore refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

120. 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.

ROBIN VOS
TRIBUNAL JUDGE

Release date: 25 July 2019