



Keywords: Late Appeal,

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/01786

BETWEEN

YOULI HE

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE Heather Gething

The hearing took place on 17 February 2021. With the consent of the parties, the form of the hearing was V (video) and all parties attended remotely using the Tribunal video platform. A face to face hearing was not held because of the restrictions imposed by the Covid 19 pandemic. The documents to which I was referred were contained in an authorities bundle of 53 pages, and a trial bundle (“the Bundle”) of 537 pages. I was also provided with a summary bundle of 17 pages by the Appellant and a skeleton argument by the Respondents. After the hearing I received a letter dated 5 August 2019 from the Appellants representatives to HMRC.

Miss Gace Wu, of CE Accountants Limited, for the Appellant

Miss Kabla Konvell, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant had made an application for an appeal against (a) a VAT assessment and (b) an income tax assessment (and associated penalties) to be made out of time. Section 83G (6) VAT Act 1994 permits an appeal to be made outside the 30 day period if the Tribunal gives permission. There is an equivalent provision for appeals against an income tax assessment. Following the guidance of the Upper Tribunal in *William Martland V HMRC* [2018] UK UT 0178 (TCC) (“*Martland*”) the Tribunal should follow the three-step approach which involves a consideration of the 5 issues identified *Data Select v HMRC* [2012] UKUT 187(TCC) (“*Data Select*”). After identifying the delay and the reason for it the Tribunal must balance the merits of the causes of the delay against the disadvantages that would ensue if permission were given. HMRC recognised the disadvantage the Appellant had been unable to speak read or write English but felt the Appellant had not done enough to comply with his obligations. The Appellant was totally reliant on his advisers. He necessarily had to find advisors that spoke Mandarin and when he was being assured all was well, he had no way of detecting that that was not the case. But once he discovered the problem, he appointed new advisors who acted quickly. The pool of Mandarin speaking accounting advisors is small and the firm appointed to assist had no experience of handling tax appeals. The public interest in this case is best struck by allowing this late appeal.

DATA SELECT - CONSIDERATIONS THAT MAY BE TAKEN INTO ACCOUNT

2. The five considerations identified in *Data Select* that may be taken into account in considering an application to the Tribunal to depart from the time limits prescribed by Statute are as follows:

- (1) What is the purpose of the time limit imposed by statute?
- (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 out of time?
- (5) What will be the consequences for the parties of a refusal to extend time?

3. The Upper Tribunal in *Martland* reduced the stages of the decision making to three but all of the factors identified in *Data Select* are considered within the three stages. The stages are:

- (1) Establish the length of the delay
- (2) Establish the reasons for the delay
- (3) Evaluate all the circumstances of the case, which will involve a balancing exercise that will essentially assess the merits of the reasons given for the delay against the prejudice which would be caused to both parties by granting or refusing permission.

THE FACTS AND ISSUES

4. There are two periods in respect of which the Appellant seeks to appeal assessments:

- (1) 2016/17
 - (a) the VAT liability is £34,944.00 and associated penalty is £23,237.76

(b) the income tax liability is 33,416.68 and the associated penalty is £22,808.88

(2) 2017/18

(a) there is no VAT liability for this period

(b) the income tax liability is £45,018.72 and associated penalty of £30,725.27

The aggregate liability is £190,149.31.

(3) The dates of the assessments in respect of which permission to appeal out of time is sought, are as follows:

(a) VAT assessment - 11 February 2019, and

(b) income tax assessment - 5 June 2019.

5. The Appellant is of Chinese origin and speaks only Mandarin. He is unable to speak or read English but can understand Arabic numbers. He has no understanding of the meaning of terms like “*sole trader*” and of the difference between him conducting his business, and him doing so through a company.

(1) He bought a take-away restaurant. the take-away restaurant in respect of which the VAT and income tax assessments are contested, tin June 2016. He engaged a solicitor who spoke Mandarin and received letters from his solicitor which had passages in English and Mandarin. Regrettably, the letter informing him that he was required to register for VAT as the transaction was a transfer of business as a going concern, did not contain the necessary passage in Mandarin.

(2) The takeaway restaurant had been called Sammy’s kitchen and sold Chinese food. When the Appellant took over it was renamed the China Dragon and continued to sell Chinese food. The business conducted by the Appellant was not successful. There was high staff turnover. The Appellant failed to find a good chef. The situation with the staff was so bad that friends often helped out in the kitchen.

(3) The clientele of the prior owner did not patronise the China Dragon. HMRC have informed the Tribunal that the turnover of the prior proprietor had been over £130,000 per annum. The Appellants records show that the turnover of the China Dragon for the periods was:

Year	Gross Profits	VAT	Net Income
2016/17	£57,766.00	£9,627.33	£48,138
2017/18	£73,321.60	£12,220.77	£61,101

(4) The Appellant received an unannounced visit just before cashing up time one evening shortly before 14 March 2017. The Appellant’s personal statement refers to this visit and the correspondence from HMRC that followed the unannounced visit also referred to the visit and the hospitality the staff had offered to the officers of HMRC. The check on the till recorded a turnover that evening of £110. HMRC have not provided a note of the visit. At the hearing, the officer of HMRC said that there had never been such a visit. That is the first denial that there had been such a visit. There is no denial in the correspondence between the parties. I find on balance, that there had been an unannounced visit, and HMRC failed to make a record or the record can no longer be found.

(5) During the unannounced visit, the officers spoke to a member of the kitchen staff who took orders over the phone but whose English is poor and whose understanding of terms like sole trader are meaningless. A number of misunderstandings seem to have arisen as a result concerning whether the Appellant carried on the business as a sole trader or through a company. At the hearing the Appellant's representative said that they were not seeking to contest that issue. his issue was not contested at the hearing.

(6) Following the unannounced visit, HMRC commenced an enquiry and made a pre-arranged visit to the take-away restaurant on 24 April 2017. Mr Mughal the officer of HMRC attended and requested a number of documents. Again, a member of kitchen staff at the restaurant had acted as unofficial interpreter.

(7) The Appellant appointed a local firm of accountants Nathaniel Consultancy Ltd ("**NCL**"). A Mandarin speaker called Zoe had originally been assigned to the case. On 24 April 2017 NCL sent form 64-8 to HMRC. On 5 May 2017 HMRC sent a letter to NCL confirming the request for documents. Between May 2017 and 22 February 2019 HMRC corresponded with NCL. Regrettably, Zoe had departed to go on maternity leave, she was succeeded by another woman and then by Shawn. The Appellant received copies of the letters from HMRC and simply took them unopened to NCL. On each visit NCL's representative assured the Appellant all was in order. The Appellant was unaware that NCL had failed to provide to HMRC the documents that he had provided NCL. In consequence, HMRC raised income tax and best estimate VAT assessments based upon the turnover of the former owner of the takeaway restaurant. This was so, notwithstanding that NCL had invited HMRC to provide best judgment assessments based upon the actual records provided to HMRC.

(8) The Appellant became aware of the situation when he opened the 22 February 2019 letter from HMRC. Although he could not read the text, he could understand the numbers and alarmed at the size of them he confronted NCL but was unable to obtain satisfaction.

(9) The Appellant had appointed Zoe at NCL as she was recommended by a contact from his hometown in China. Unfortunately for the Appellant, her replacements failed to handle the enquiry.

(10)The Appellant then appointed Cheung Associates as his agent. On 13 May 2018 Cheung sent to HMRC Form 68-4 and a letter asking for copies of the correspondence and documents as NCL had failed to return them to the Appellant. HMRC replied a month later, on 13 June. They advised Cheung that the enquiry was closed. This seems to have exhausted Cheung's capability to handle the enquiry.

(11)The Appellant lost no time in finding another agent. On 1 July, the Appellant appointed Mr Nong of EC Accountants Limited ("**EC**") as his agent and on 5 July 2019 EC wrote to HMRC seeking information and documents from HMRC, having failed to secure copies of them from NCL. Mr Nong is a Mandarin speaker and accountant but he has no experience of handling tax appeals.

(12)Unknown to the Appellant, on 12 July 2019 HMRC had raised income tax assessments and sent them to NCL, the former agent.

(13)EC wrote to Ms McClosky (who was handling the income tax aspects of the enquiry for HMRC) on 5 August 2019 indicating they had not had a reply to their letter of 5 July and indicating they are assisting the Appellant to "*finalise the case and fulfil his taxpayer's responsibility*". I note that this letter does not use the word

“appeal” but as it post-dates the assessments to income tax and refers to them it seems to the Tribunal impossible to treat that letter as accepting the liabilities.

(14) EC wrote and called HMRC three times before HMRC responded on 4 September with some of the earlier correspondence as requested. EC specifically queried the amount of the liability on 12 September 2019 and, after a further chaser, Mr Mughal replied on 7 October providing the VAT assessment dated 11 February 2019 and the income tax assessment dated 12 July 2019.

(15) On 22 October 2019 EC wrote to HMRC contesting the calculations in relation to income tax and in relation to VAT.

(16) Miss McClosky replied on 30 October. She said she has “*stood over all of the tax charged under the self-assessment*” and indicated that she was waiting for her colleague Mr Mughal regarding any amendment to the assessable figure. From this, Mr Nong of EC believed the issues of quantum were to be dealt with by Mr Mughal. Correspondence in relation to both income tax and VAT were dealt with using the same case reference number CFS-1358677.

(17) Mr Mughal of HMRC replied on 7 November after having been chased and indicated he was in the process of reopening the case and which he expected would be completed in one week when he would be able to give a detailed response.

(18) Detailed exchanges took place between EC and Mr Mughal of HMRC. A personal statement was obtained from the Appellant who explained the situation. HMRC wished to have a meeting with the Appellant. EC managed to obtain some of the books and records that had been given to NCL and provided them to HMRC on 7 January 2020. EC chased on 11 February to ensure they had been received. HMRC replied on 11 February indicating that he had received the books and records sent but there were no bank statements and no details of employees. EC responded on 14 February 2020 that the business did not have a bank account and operated on a cash basis as the records show- all bills including rent and services charges were paid in cash at a bank directly into the supplier’s account. It was also explained the employee records had been sent to NCL and that they had not yet been able to retrieve them. It was explained that there had been a high turnover of staff and frequently friends of the Appellant had to come to the restaurant to help out.

(19) On 3 March 2020 Mr Mughal responded to EC indicating that he did not intend to reopen the case. The business records were, he claimed incomplete. He indicated that the Appellant would need to apply for permission to appeal out of time and after that is granted there were various options on how to proceed. A link was attached for more information together with formal document of appeal.

(20) EC applied to the Tribunal for permission to make a late appeal on 17 April 2020. They were unaware of the time limitations. None were referred to in Mr Mughal’s email of 3 March.

THE APPELLANT’S CASE

The delay

6. In relation to the VAT assessment, it was issued on 22 February 2019. The appeal ought to have been made by 21 March 2019. The appeal was made on 17 April 2020. There are three periods of time to be considered:

- (1) 21 March 2019 to 1 July 2019 – a period of 107 days (3.5 months).

- (a) During this period until shortly before 13 May 2019 NCL had been appointed as the Appellant's adviser. As he was unable to read or speak English, the Appellant was completely reliant on his advisors to progress the investigation and obtain and provide to HMRC all that was required. The Appellant correctly remunerated NCL for services, and NCL had consistently advised him everything was in order. The Appellant only discovered the matter was far from being settled when in May 2019 he opened one of the letters from HMRC, and although he cannot read English, he could see enormous figures being referred to. He confronted NCL and asked them to return his papers to enable him to instruct new advisors. NCL failed to return the papers.
- (b) As soon as the Appellant realised there was a problem, he sought recommendations of another Mandarin speaking accounting advisor and appointed Cheung Associates. Cheung filed form 68-4 and wrote to HMRC on 13 May 2019 asking for copies of material correspondence and documents that had been provided by NCL. HMRC replied 4 weeks later, on 13 June 2019, indicating that the enquiry was now closed but did not provide copies of any documents or correspondence.
- (c) In June, the Appellant again received recommendations on Mandarin speaking advisers and appointed EC as his advisor on 1 July, EC made contact with HMRC on 5 July and filed form 64-8.
- (d) The Appellant was unaware HMRC were waiting for information and documents because of his lack of English speaking and reading capability. Once aware of the issue he acted swiftly appointing new Mandarin speaking advisors. He had been completely cooperative, within his capabilities, throughout the enquiry. Four weeks of this period was lost waiting for HMRC to respond to the letter from Cheung of 13 May.
- (2) 1 July 2019 to 3 March 2020 – (a period of 247 days)
- (a) The 1 July 2019 was the date the Appellant appointed EC as his agent by completing form 68-4.
- (b) As soon as EC were appointed, they were seeking a full understanding of the issues as NCL had failed to provide the documents and correspondence. EC were relentless in pressing HMRC to provide the information they needed to enable them to assist the Appellant.
- (c) On 7 November 2019 Mr Mughal advised EC that he was reopening the case and the process would be completed within a week.
- (d) HMRC asked for bank statements and information about the business records and employee records. The documents relating to the business records so far as they exist were provided to HMRC. EC informed HMRC there were no bank account records as the Appellant did not have one. EC explained that NCL had the employee records and had not returned them to the Appellant. The correspondence shows EC constantly asking HMRC for an update and ensuring that HMRC had received copies of letters and documents that had been sent.
- (e) On 3 March 2020 Mr Mughal informed EC that he had decided not to reopen the enquiry.
- (f) There was no delay on the part of the Appellant or his agent in this period.
- (3) 3 March to 17 April 2020 - (44 days)

(a) During this period, EC prepared and submitted the application for permission to appeal out of time. EC had been unaware of the time limits. EC are not tax experts. This is the first tax dispute they have handled. They were unaware of the time limit as there was no mention of the time limits in the letter from HMRC of 3 March.

(b) A reasonable period of time would have been needed by EC to prepare the notice of appeal and application for permission to appeal out of time.

7. In relation to income tax, the assessments were issued on 12 July 2019 and by their letter of 5 August 2019 EC consider that they had effectively challenged the quantum of the assessment which amounts to an appeal in-time but this appeal covers both assessments if that is not agreed.

8. In relation to the merits of the Appellant's case, they recognise that the appeal should not focus unnecessarily on the underlying case but that HMRC had sufficient information about turnover on a daily and weekly basis to assessments to be made.

9. The Appellant has insufficient assets to pay such a sum and would be made bankrupt if the assessments are left un-challenged.

10. The Appellant's representatives were effectively saying that the Appellant had done all he could do to comply with his obligations having regard to his limitations, as a Mandarin speaker, and having regard to the merits and the adverse impact not allowing the late appeal, the balance of the public interest lies in the late appeal being allowed.

HMRC's CASE – Appeal against VAT assessments

11. HMRC refer the Tribunal to the following decisions dealing with late applications:

(1) *BPP v HMRC* [2017] UKSC 55 (“**BPP**”),

(2) The Commissioners for *HM Revenue & Customs v Websons (8) Limited* [2020] UKUT 0154 (TCC) (“**Websons**”) and

(3) the most recent of which is the decision of the UT in *Martland* where the Tribunal said that permission to appeal out of time should not be granted,

“*unless the FTT is satisfied on balance that it should be*”.

In *Martland* the delay of 15 months was regarded as a significant and serious delay.

The delay

12. In relation to the VAT assessments, HMRC's case as set out in their skeleton argument was that they consider the delay to be 14 months (commencing on 22 February 2019 and ending on 17 April 2020) which is a significant period. The fact that HMRC allowed the Appellant to provide further information the period during between 5 July 2019 until 3 March 2020 should not be taken as HMRC accepting there was a reasonable excuse for the delay and nor do HMRC accept that the letter of 5 July amounted to a notice of appeal because HMRC state there is no mention of a challenge to the values of the assessment.

13. During the hearing HMRC conceded that there was a reasonable excuse for the delay during the period 5 July 2019 to 3 March, as during that period HMRC were “looking into the case”. I note that to have done otherwise would have been un-conscionable as Mr Mughal had indicated he was reopening the case in November and that the process would be completed in a week. That representation would have put the most experienced tax advisor to sleep and unaware of the need to apply for permission to appeal immediately.

14. The VAT assessments were dated 22 February 2019 and the 30-day time period to appeal expired on 24 March 2019. There are two periods in contention:

Between that 24 March and 5 July:

(1) On 13 May 2019 HMRC received a letter from Cheung Associates and a duly completed form 64-8 indicating they were now acting for the Appellant and asking for copies of the important documents and correspondence. There was a four-week delay on HMRC's part. HMRC reply on 13 June 2019 saying the enquiry was closed and an appeal lay to the Tribunal but if the agent had new relevant information HMRC would consider it.

(2) On 5 July 2019 HMRC receive from EC a completed form 64-8 dated 1 July, and a letter seeking copies of the correspondence and documents provided by NCL. The letter of 5 July did not contain any statement that EC contested the figures in the assessments. That is a period of 103 days. This is a significant delay.

Between 4 March 2020 and 17 April 2020

(3) The final letter of 3 March contained a link to HMRC website on appeals which indicates that an application for an appeal out of time must be made to the Tribunal. The application for permission to appeal out of time was made on 17 April 2020. This is a delay of 44 days. This is a significant delay

Reason for the delay

15. HMRC recognise that the Appellant had a language barrier, but the Appellant ought to have taken steps to understand what was required of him to comply with his obligations.

All other facts and circumstances

16. HMRC consider that, when all the other facts and circumstances are taken into account, the balance lies in the Tribunal denying permission to appeal out of time. HMRC refer to the following:

(1) The purpose of the time limit is a combination of:

(a) the need for finality per *Martland* at [34],

“the purpose of the time limit is to bring finality, and that is a matter of the public interest, both from the point of view of the taxpayer and the wider public.”

(b) that *“compliance was expected unless there was good reason to the contrary”*, per *BPP*.

(c) The need for litigation to be conducted efficiently and at proportionate cost and for statutory deadlines to be respected (see *Websons*)

(2) The consequences to the parties in allowing an extension of time. HMRC state that other taxpayers would be adversely affected if the time limit were extended, as the resources of HMRC will not be available to handle other taxpayers' appeals. To allow this appeal would be inconsistent with the principles of good administration of justice, which require litigation to be conducted efficiently and at proportionate cost. HMRC is entitled to expect the statutory time limits to be met.

(3) The consequences of denying the extension of time. HMRC recognise that the taxpayer will be denied the opportunity to contest the assessments if the Appellant's application fails. But this alone ought not to outweigh the other factors in this case. HMRC are entitled to rely on the time limits being observed.

(4) A detailed evaluation of the merits of the Appellant's substantive case need not be carried out for the Tribunal to be able to evaluate the outcome of the application to appeal out of time. To do so would increase the time to consider the issues and increase the costs. The UT in *Martland* stated at [48 :

“Only in cases where the Tribunal can see the merits to be very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the Court should decline to embark on an investigation of the merits and firmly discourage argument directed to them.”

In any event HMRC consider the Appellant's substantive case is weak.

17. HMRC consider the public interest lies in the application being dismissed.

HMRC's case re the income tax assessments

18. HMRC had not appreciated the application covered both VAT and income tax assessments. In relation to application for permission to appeal the income tax assessments, the assessment was made on 12 July 2019, HMRC were unaware that the income tax assessments were also subject to the appeal. The officer of HMRC informed the Tribunal that whereas a VAT appeal must be notified to the Tribunal, an income tax appeal must be notified to an officer of HMRC who then is required to review the decision and only once the review had been completed should the appeal be referred to the Tribunal.

DISCUSSION

35. The notice of appeal is clear, the Appellants were seeking permission to appeal late for both the VAT assessments and the income tax assessments. This decision covers both assessments as the principles that govern the application for late appeals against an income tax assessment are the same as those that govern the late VAT appeals.

36. The public interest balancing act requires the 3-step approach identified by the UT in *Martland* (see [3] above) to be followed. I deal with the three steps below.

Step 1- How long was the delay?

19. HMRC conceded at the hearing that there had been no delay attributable to the Appellant in the period between 5 July 2019 and 3 March 2020. That leaves two periods in contention

(1) . The first period is from 24 March 2019 to 5 July 2019, a period of three and a half months.

(2) The second period is from 4 March 2020 to 17 April, a period of 44 days.

20. HMRC consider both are significant periods.

21. I note that after the Appellant appointed Cheung as his agent in May and Cheung wrote to HMRC on 13 May 2019 and it took HMRC a month to reply, adding 31 days' delay to this period. The period of delay attributable to the Appellant's advisors in the first period is therefore two and a half months.

22. I consider that neither period of itself is beyond the pale but in aggregate the period of delay attributable to the Appellant amounts to 3.5 months which is not insignificant.

Step 2- Is there a good explanation for the delay?

The first period:

23. HMRC recognise that the Appellant's difficulties arose from what they describe as "*a language barrier*", but the Appellant ought to have taken steps to understand what was required of him to comply with his obligations.

24. In my view, the Appellant was particularly vulnerable being a Mandarin speaker who is unable to read, write or speak English. He is totally dependent on his advisors. The pool of advisors is necessarily limited to those that speak Mandarin. Unlike local authorities, HMRC do not publish their guidance or their letters in foreign languages not even the most important letters. The Appellant sought recommendations of Mandarin speaking advisors, and appointed and appropriately remunerated Mandarin speaking advisors to assist him on every aspect. The VAT issue arose because although he had found an English lawyer that spoke Mandarin to handle his property purchase and the lawyer produced letters in English with Mandarin translations, the aspect dealing with VAT, the lease being acquired as a business as a going concern and the need to register for VAT had not been translated into Mandarin. The Appellant sought and followed recommendations. It is difficult to see what more the Appellant could have done to enable him to comply with his obligations and prevent the issue arising in the first place.

25. It is noteworthy that immediately after the first unannounced visit by HMRC at the China Dragon, the Appellant appointed NCL as his tax agent, following the recommendation of a fellow countryman. He was ultimately let down by NCL who failed to advise him of the situation, failed to give to HMRC information and documents the Appellant provided to them, and then failed to hand back documents provided to them after the Appellant realised the true situation. NCL's behaviour prevented subsequent advisors Cheung and CE from being able to open a full dialogue immediately following their appointment.

26. Cheung was appointed as agent on 13 May 2019 and it took HMRC 4 weeks to reply and instead of providing to Cheung the documents they had asked for, HMRC simply advised them that the enquiry was closed.

27. The Appellant then appointed CE on 1 July 2019, whose opening correspondence begins with a request for documents and correspondence to enable them to represent the Appellant.

28. There is a clear explanation of the cause of the delay. It stems from the Appellant's vulnerability as a non-English Mandarin speaking individual. He took all reasonable steps to level the playing field by the appointment of Mandarin speaking professional advisers but was incapable of ascertaining that the enquiry was not being handled effectively until it was too late. He took steps to appoint another adviser on 13 May 2019. Regrettably, Cheung seem to have been defeated by HMRC's letter of 13 June advising them the enquiry was closed. CE were appointed on 1 July 2019 and they were undeterred. Their determination paid off. They obtained the documents HMRC had received from NCL and obtained and provided to HMRC all the documents the Appellant had given to NCL other than the PAYE records.

29. I infer from the need to involve a member of the kitchen staff as unofficial interpreter during HMRC's visit on 14 March 2017, that HMRC were aware from the date of that visit, that the Appellant's lack of knowledge of English, and I note in this connection that HMRC did not provide copies of significant letters in Mandarin or offer the services of an interpreter. As a result of this, and the shortcomings of NCL, and then of Cheung, the Appellant was, otherwise than by his own fault, or the fault of others that can properly be attributed to him,

to a large extent ignorant of the course of events during period 1 and when he became aware he sought to remedy the situation. I consider that this ignorance was excusable and the short delay to appoint Cheung and then EC also excusable. I note HMRC did not criticise the appointment of either Cheung or EC despite their lack of experience in handling tax appeals.

30. I cannot see how the Appellant could have done more to overcome his disadvantage and comply with his obligations.

The second period

The second period is from 4 March 2020 to 17 April 2020, a period of 44 days. HMRC's letter of 3 March included a link to HMRC's guidance on appeals which CE failed to review. HMRC say there is no valid reason for the delay. CE say the 3 March letter did not mention any time limit, CE are not tax advisers and as they had not previously conducted a tax appeal they were unaware of the need to file the notice with any particular time frame. It seems to me that this failure arose from the lack of a pool of appropriately qualified tax accountants who are Mandarin speakers. The need for a Mandarin speaker was at the heart of the problem. It is clear CE are diligent. They were pursuing HMRC vigorously from 5 July to 3 March. It was not lassitude that caused the delay. They would in any event have to take time to prepare the notice of appeal. The statute would have provided them 30 days. That leaves a delay of 14 days.

31. I refer to the case of *HMRC v Khatib* [2020] UKUT where the issue of attributing the acts of an agent to the Appellant was considered. This is not a case where the short comings of NCL, Cheung and EC must be regarded as shortcomings of the Appellant. I consider the Appellant was justified in relying on each of his advisors to help him overcome his significant difficulties. I infer from the need to involve a member of the kitchen staff as unofficial interpreter during HMRC's visit on 14 March 2017, that HMRC were aware from the date of that visit that the Appellant's knowledge of English was very limited, and I note in this connection that HMRC did not provide copies of significant letters in Mandarin or offer the services of an interpreter. As a result of this, and the shortcomings of NCL, the Appellant was, otherwise than by his own fault, or the fault of others that can properly be attributed to him, to a large extent ignorant of the course of events during period 1. I consider the Appellant took reasonable steps to find another advisor to avoid delay. Appointing Cheung and EC in very quick succession. I consider that this ignorance was excusable until EC were appointed on 1 July 2019. Further, HMRC concede as indicated at [ref] above, that the period from November 2019 to 3 March 2020, should not be attributed to the appellant and should not be counted. In the result, the effective period of delay is 44 days rather than the 14 months. 30 of that 44 day period is perfectly understandable. EC had to prepare the notice of appeal. That reduces the delay to 14 days which is an insignificant period.

Step 3- All other surrounding facts and circumstances.

32. The consequences of the parties of an extension of time

(1) HMRC consider that if permission is not refused, they will have to divert resources from handling other appeals and enquire to handling this appeal. That is not in the public interest. HMRC consider they are entitled to expect that appeals are made in time and that the public interest lies in appeals being pursued within statutory time limits to bring finality for the taxpayer, and for the wider public.

(2) I consider that the Appellant will have the opportunity, through the appointment of a court approved interpreter, of communicating on a level playing field and explaining to the Tribunal why the "*best judgment*" assessments are erroneous. The Tribunal will be enabled to determine the correct amount of tax to be assessed.

(3) HMRC consider that the merits of the Appellant's case are weak. On the evidence of the turnover determined by HMRC on the unannounced visit, and on the turnover summaries provided to HMRC by NCL and EC in January 2020, HMRC's assessment of the merits seems to me questionable and the magnitude of difference in the turnover figures is not inconsiderable.

(4) I recognise HMRC's resources are finite, and resources used in this case cannot at the same time be deployed in handling another appeal. But this is not a case which went cold and where the appeal came out of the blue which would cause HMRC difficulties and expense. HMRC staff are very much aware of the facts and issues. To defend an appeal of this nature will not involve delving into historical files of which no officer has any knowledge, nor will it demand significant resource. HMRC's team will not suffer prejudice.

33. What is the purpose of the time limit imposed by statute?

(1) The appeal in this case in relation to VAT is an appeal under section 83 VAT Act. Section 83G VAT Act sets out the time limits within which an appeal must be brought. It provides as follows:

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

(2) 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....

(ii) ...

(b)

(2) But this is subject to subsections (3) to (5)

(6) An appeal may be made after the end of the period mentioned in (1) if the tribunal gives permission.

(2) The Tribunal rules set out how proceedings in the Tribunal are to be commenced. Rule 20(1) indicates that a person making an appeal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal, Rule 20(2) sets out what the notice of appeal must include, Rule 20(3) requires a copy of the decision being appealed against to be attached and Rule 20(4) deals with later appeals. It states that:

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

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

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

(3) It is clear from Section 83G VAT Act that it was Parliament's intention that appeals may be brought after the 30-day period for notifying the appeal to the Tribunal has expired, but that an appeal out of time cannot proceed unless the Tribunal gives permission.

(4) It is not difficult to understand the intention behind the 30-day general requirement for notification of appeal, to enable appeals to be determined quickly and effectively, to create certainty for all parties and to assist HMRC in its duty to collect and the taxpayers in their duty to pay, the right amount of tax. Nor is it difficult to understand the intention behind the potential extension of the 30 day period, in section 83G(6) VAT Act. In civil litigation the statutory limitation periods to bring claims in tort or contract are expressed in terms of years. Even judicial review of Government decisions may be commenced up to three months of the date of a material decision. Rigid adherence to a 30-day period could result in public interest not being served. The Tribunal has been given permission by Parliament to allow appeals to be notified out of time to avoid this situation arising. I note that that permission ought not to be granted unless the Tribunal is satisfied, on balance, that it is in the public interest that it should be.

(5) I note that the provisions of the TMA allowing late appeals of income tax assessments also permit a late appeal in identical terms.

32. *What will be the consequences for the parties of a refusal to extend time?*

(1) HMRC staff will be able to focus on other appeals and enquiries and the public interest will be served in ensuring statutory time limits are met in all cases.

(2) If the Appellant is not able to present his case and show that the best judgment assessments are excessive, he will become bankrupt as the turnover of the China Dragon was regrettably nothing like that of the previous owner, as was seen by HMRC on the night of the unannounced visit when the turnover was £110.00 and as shown by the records provided to them by NCL and EC.

Conclusion

33. Taking all the above into consideration, the balance of the public interest lies, in this case, in allowing the late appeals against the VAT and income tax assessments because there was nothing more the Appellant could have done to prevent the delays arising, HMRC's communications were in English. All the Appellant could do was appoint a Mandarin speaking advisor from the small pool available. The acts of an advisor ought not to be attributed to the Appellant in this case. It is in the public interest, in this case, that I exercise the discretion and allow the late appeal.

34. If HMRC consider that Mrs McClosky's letter informing the Appellant that the tax had been stood over pending the values being agreed by her colleague, has the effect that HMRC will amend the income tax assessments when the VAT turnover figures are determined by the Tribunal, a separate income tax appeal would be unnecessary and HMRC should notify the Appellant immediately.

Decision

I give permission for the late appeal in respect of the VAT and income tax assessments.

35. 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.

**JUDGE HEATHER GETHING
TRIBUNAL JUDGE**

RELEASE DATE: 19 MARCH 2021