[2021] UKFTT 0086 (TC)

TC08068

Appeal number: TC/2018/03846

VALUE ADDED TAX – procedure – application for decision to be set aside – Applicant represented by agent who was notified of substantive hearing but who did not attend – appeal subsequently dismissed – six months later same agent made application to set aside decision – whether good reason for delay in making application – no – whether decision should be set aside – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

OATEIN LIMITED **Applicant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the application on 17 March 2021 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Applicant's application to set aside, received on 18 February 2020, the Applicant's application for an extension of time, received on 19 August 2020, the Applicant's submissions in support dated 19 August 2020 and 11 September 2020, the Respondents' submissions in opposition dated 26 August 2020, the documents in the application bundle and the documents on the Tribunal file.

DECISION

Introduction

1. The proceedings before the Tribunal consist of two applications made by the Applicant. The first application, made on 18 February 2020, is an application under Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") to set aside the summary decision released by the Tribunal on 21 August 2019. As the deadline for making a set aside application is 28 days from the date on which the decision was released, the second application, made on 19 August 2020, is an application under Rule 5 of the Tribunal Rules for an extension of time to make that set aside application.

Factual background to these applications

2. On the basis of the documents before me and the submissions made by each party, I find as follows:

3. The Applicant, then represented by its previous agent, filed an appeal with the Tribunal on 26 June 2018. That appeal was against an assessment for four VAT periods in the sum of £36,272. The dispute between the parties concerned the rating of "Oatein bars", also described as protein flapjacks, produced by the Applicant. The Respondents considered that these Oatein bars were standard rated because the main ingredients were not the ingredients usually found in flapjacks. The Applicant considered that the Oatein bars should be zero rated because the protein that had been added was added for nutrition, and conventional flapjacks were zero rated.

4. The Applicant's appeal was filed slightly late but the Respondents did not object to that lateness. The Respondents agreed that hardship applied, and they filed and served their Statement of Case on 19 November 2018. In their Statement of Case, the Respondents made clear their position was that:

> The Oatein bars were sweetened prepared foods usually eaten with the fingers, and so were an item of confectionary.
>
> Looking at items of confectionary, the Respondents concluded that the Oatein bars were not cakes as they were not made from a batter containing flour and eggs, and were not biscuits as they were not made from wheat flour, fat and sugar.
>
> The Respondent also concluded that the Oatein bars were not flapjacks as they were not made with the traditional recipe or with only a minor variation to the traditional recipe. In reaching this conclusion the Respondents also took into account that:
>
> > The main ingredients of the Oatein bar were not the traditional ingredients of a flapjack

The traditional ingredients of a flapjack were included in the Oatein bar but on a much lower scale

The Oatein bars did not have the same taste or texture as a traditional flapjack.

The Respondents final conclusion was that the Oatein bars were standard rated confectionary as they were not cakes, biscuits or flapjacks.

5. On 4 January 2019, the Tribunal issued case management directions. These required both parties to provide (1) their list of documents by 15 February 2019, (2) their witness statements by 15 March 2019 and (3) their listing information by 29 March 2019. The listing information required was the number of people attending the hearing, the names of witnesses, the estimated duration of the hearing and the dates to avoid for the period from 13 May 2019 to 16 August 2019.

6. On 13 March 2019 the Tribunal received a letter from the Applicant's agent, not copied to the Respondents. In this letter the agent provided the Applicant's list of documents (consisting only of the Applicant's agent's letter of appeal to the Respondents, dated 24 November 2017) and the following information:

1. No witnesses being called

2. N/A

3. Dates to avoid:

1st-30th April 2019 as working away

Since we are am unable to attend any tribunal meeting in April I am asking if the court if this case can be based on a paper instead of a full tribunal as I am representing myself and feel everything I have explained is in the documents.

If it cannot be a paper case I would be grateful if the case will be held in May onwards.

7. The Respondents had provided their list of documents to the Tribunal and the Applicant on 4 January 2019; they provided their listing information by email to the Tribunal, copied to the Applicant, on 27 March 2019. Very shortly after that email was sent by the Respondents, the Applicant's agent emailed the Tribunal and the Respondents as follows:

We refer to the Tribunal's letter dated 4 January 2019 and provide below listing information from HMRC.

Please find below HMRC's dates to avoid for the hearing window of 13 May to 16 August 2019:

June: 19-24

July: 15-31

August: 1-7

8. It seems that the Applicant's agent had cut and pasted the text of HMRC's email to provide the Tribunal with an update to his own dates to avoid, but had neglected to update the party he represented.

9. On 11 April 2019, the Tribunal wrote to the Applicant's agent to say that an oral hearing was required due to the nature of the appeal, and so his request for a paper hearing could not be accommodated.

10. On 2 May 2019, the Tribunal informed both parties that the hearing had been listed to be heard in Manchester on 16 August 2019. This hearing date took account of the dates to avoid provided by both parties.

11. The case management directions had required the Respondents to serve a bundle of documents on the Applicant by 12 April 2019. The Applicant's agent did not dispute, at the time, that he did not receive this bundle and I find, on the balance of probabilities, that this bundle of documents was served by the due date.

12. The case management directions also required both parties to file and serve their skeleton arguments no later than 14 days before the hearing. As the hearing was listed for 16 August 2019, the deadline for both parties to file and serve their skeleton arguments was 2 August 2019.

13. On 31 July 2019, the Respondents filed and served their skeleton argument. This skeleton argument set out the authorities that the Respondents intended to rely upon, and expanded the arguments made in the Statement of Case (set out above). There were no new arguments in the Respondents' skeleton argument.

14. The Applicant's skeleton argument was not filed or served by the 2 August 2019 deadline.

15. The case management directions required the Respondents to serve a bundle of authorities no later than seven days before the hearing date, i.e., by 9 August 2019. That bundle contained the authorities contained in both parties' skeleton arguments but, as the Applicant did not file a skeleton argument by the deadline, I find, on the balance of probabilities, that the bundle contained only the authorities in the Respondents' skeleton argument.

16. On 13 August 2019, the Applicant's agent emailed the Tribunal and the Respondents:

> We have just HMRC bundle.
>
> My apologies I was on my honeymoon and assumed skeleton appeal would have been sent by another member of our team unfortunately this was not the case.

17. Attached to that email was the Applicant's skeleton argument, dated 24 July 2019. In this skeleton argument, the Applicant referred to two authorities, described

the size and appearance of the Oatein bars and set out its reasoning for considering the Oatein bars to be cakes.

18. The Applicant's agent did not disclose the date on which he had returned from honeymoon but, if the agent had returned to work earlier than 13 August, it is more likely than not that he would have emailed the Tribunal to file the Applicant's skeleton argument on that earlier date. Therefore, I find, on the balance of probabilities that the agent returned to the office on 13 August 2019.

19. At 11:44 on 14 August 2019, the Applicant's agent emailed the Tribunal and the Respondents as follows:

> I am asking for a postponement to the Oatein Ltd v HMRC due to take place on the 16 August at 10:30.
>
> The reason for the postponement request is due to air traffic travel cancelations and delays, which in turn affected my time away from the office while on my honeymoon, while I was away new evidence has emerged that could have a major baring on the case however I have not had enough time to review this and submit this to the relevant departments.
>
> I understand the lateness in this request however I implore you to set a new date.

20. At 13:09 on the same day, the Respondents emailed the Tribunal and the Applicant to oppose this postponement request. The Respondents noted the time and costs already invested for the hearing on 16 August, and pointed out that there was no explanation of what the new evidence consisted of, or how it had emerged at such a late date.

21. The postponement request was referred to Judge Cannan who refused the Applicant's request, directing that the hearing would go ahead. The Order issued to the parties informed the Applicant that it could renew the request at the hearing on 16 August but that the hearing judge would expect a full explanation of what the new evidence was, why it had not been presented before and an explanation of the relevance of the agent's absence.

22. The order refusing the postponement was emailed to the parties at 16:27 on 14 August 2019. That was less than five hours after the request had been made, and one clear working day before the hearing was due to take place.

23. The hearing took place in Manchester on 16 August 2019. Neither the Applicant nor the agent attended the hearing. The Tribunal panel (Judge Malek and Ms Stott) decided that the Applicant had been duly notified of the hearing and that it was in the interests of justice for the hearing to proceed.

24. On 21 August 2019, the Tribunal's summary decision was issued to the parties. In this decision the panel referred to both parties' skeleton arguments, and to the Applicant's arguments. The Tribunal concluded that the Applicant had not satisfied

the burden of demonstrating that the Oatein bars were within the cake exception and so they should be standard rated. The appeal was dismissed.

25. On 18 February 2020, the Tribunal received an email from the Applicant's agent. (This is set out in more detail below.) This email was referred to Judge Malek who directed that the email would be treated as a late application to set aside the summary decision. On 26 February 2020, the parties were notified of Judge Malek's instruction (although it appears that this email was not received by HMRC at the time). On 28 February 2020, the Tribunal issued directions for the parties to prepare for a set aside hearing.

26. The Applicant's previous agent did not comply with those directions.

27. On 18 May 2020, the Applicant's current agent emailed the Tribunal and came on the record. The agent stated:

> I would be grateful for an update and details of any current directions.

28. On 30 July 2020, the Tribunal wrote to both parties, providing a comprehensive background to the appeal, setting aside the previous directions and issuing fresh directions to both parties to prepare for a set aside hearing.

Rule 5 of the Tribunal Rules – the application for an extension of time

29. Rule 5 of the Tribunal Rules permits the Tribunal to extend the time for complying with any rule or direction. In any case where the Tribunal has the power to extend time, the Tribunal must decide whether it would be appropriate to do so given the particular circumstances of the case.

30. Where a person is late in undertaking any action or complying with any rule, the onus of proof is upon that person to explain the reasons for their delay and to make the case for being given relief from their failure to comply with the relevant time limit.

The test to be applied by the Tribunal

31. The Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) considered what the First-tier Tribunal should consider when deciding whether an extension of time should be granted. Although that decision was given in the context of an extension of time to make an appeal out of time, the principles also apply to an application to make a set aside application out of time. The Upper Tribunal stated:

> 44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

32. Having set out that guidance as to how to proceed in considering the Applicant's application for an extension of time to make its set aside application, I now consider the extent of the delay and whether there are reasons for all or part of that delay. I will then be able to weigh all the circumstances of the case.

The extent of the delay

33. The Tribunal's substantive decision was released to the parties on 21 August 2019. In accordance with the Tribunal's usual practice, this decision was sent to the authorised agent for the Applicant. The deadline for either party to make an in-time set aside application was 18 September 2019. The Applicant's application to set aside that substantive decision was made to the Tribunal on 18 February 2020. Therefore, the set aside application was made five months late.

34. Delay of five months is both "serious" and "significant".

The reasons given for the delay

35. The original application (made by the Applicant's previous agent) did not explain why it was made late. In July 2020, (by which time the current agent had come on the record) the Applicant was directed to make an application for an extension of time that included an explanation for the delay.

36. In the application dated 19 August 2020, the Applicant's agent explained:

> The delay … lies with the previous Appellants representative and has reflected poorly on the [Applicant] who has relied upon the representative to act in their best interest. We have been made aware, from HMRC, of the emails provided by the previous representative and with discussions with the Appellant that they relied entirely upon the advisors and they were unaware of the exact position of the case and the proposed hearing. We cannot comment on the timing of the emails or work undertaken by the previous advisors but we can comment of the

> appellants actions in receiving the notification that the appeal work was not being carried out in a timely fashion that they appointed a new representative to act on their behalf.

37. It was subsequently clarified that the current agent had not received any emails from HMRC but instead the agent had received, from the Tribunal, a copy of the previous agent's set aside application of 18 February 2020 and the Tribunal's response dated 26 February 2020 (both enclosed with the Tribunal's 30 July 2020 update and directions).

38. In his submissions of 11 September 2020, the Applicant's agent explained that the Applicant had not received any case papers from its previous agent, that the Applicant was still being advised by its previous agent that "the tribunal has been overturned" and "we will still get our day in court", and that the Applicant had put its previous agent on notice that he would be sued for negligence.

39. The Applicant's agent also stated that the Applicant did not receive the decision, and that it relied on the previous advisor because it was unaware of time limits and had no experience of Tribunal litigation. It was stated that the Applicant had instructed its current agent because "no communication or copy documentation was ever received" from the previous agent.

40. In *Katib v HMRC* [2019] UKUT 189, the Upper Tribunal explained (at paragraph 49):

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

41. In this case there is no statement from an officer of the Applicant, or any documents, to show what exchanges (if any) took place with the previous agent or how often (if at all) the Applicant chased the previous agent for updates or a response. There is also no evidence about why the Applicant did not consider it odd that it was not provided with copies of any of the appeal documents. There is nothing on the Tribunal file to indicate that the Applicant ever contacted the Tribunal directly to try to find out more information. The previous agent had been instructed since (at least) November 2017 (when the Applicant first appealed to HMRC) and remained instructed until May 2020 (when the current agent came on the record). Although the current agent has referred to the Applicant "receiving the notification that the appeal work was not being carried out in a timely fashion" there is no evidence about what this notification was that prompted the Applicant to lose faith in its previous agent, or when that occurred or what happened thereafter.

42. The Applicant's current agent has stated that the Applicant was not familiar with Tribunal proceedings but, at paragraph 59, the Upper Tribunal in *Katib* said the following (in response to a similar argument made on behalf of a taxpayer whose agent had failed to meet deadlines):

> We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against Mr Bridger or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of Mr Bridger's failings and, if he wishes, pursue a claim in damages against him or Sovereign Associates for any loss he suffers as a result.

43. The correspondence between the Applicant and its previous agent, if disclosed, might have explained the Applicant's failure to act more promptly. No other explanation for the delay in making the set aside application has been put forward by the Applicant.

Weighing the circumstances of the case

44. If I do not grant the Applicant an extension of time then it will lose the opportunity to make its set aside application. I accept that the loss of that opportunity is some prejudice to the Applicant. On the other hand, if I grant an extension of time to the Applicant then the Respondents will be required to respond to a set aside application when, six months after receiving the Tribunal decision that disposed of the proceedings, they were entitled to assume that this matter was concluded. There will also be prejudice to other Tribunal users who are entitled to expect that the deadlines that they comply with will be enforced for all.

45. As set out above, the onus is on the Applicant to explain the reasons for its delay and to make the case for being given relief from its failure to comply with the 28 day time limit for making its set aside application.

46. I remind myself that the grant of permission should be the exception rather than the rule. The Applicant has not adequately explained or justified its delay in making its application. There has been no disclosure of the interactions between the Applicant and its previous agent to demonstrate the efforts made by the Applicant to chase its previous agent or to be more involved in its appeal. In the absence of any evidence from the Applicant to demonstrate that its case is exceptional, I conclude that the general rule should apply and that the Applicant should bear the consequences of its previous agent's delay. As the Applicant's current agent has already indicated, the Applicant is able to seek redress from the previous agent if it considers that the previous agent's actions or inaction have caused the Applicant loss.

47. Weighing all of these factors I have concluded that the Applicant should not be given an extension of time to make its set aside application.

Rule 38 of the Tribunal Rules – the application to set aside the Tribunal decision

48. Given my conclusion about the Applicant's application under Rule 5 for an extension of time, it is not necessary for me to consider the Applicant's application under Rule 38 to set aside the Tribunal's summary decision of 21 August 2019.

49. However, in case I am wrong with regard to the Applicant's application for an extension of time, I have considered this application and I set out my decision with regard to this application below.

50. Rule 38 of the Tribunal Rules provides as follows:

> (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if-
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) is satisfied.
>
> (2) The conditions are-
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
>
> (c) there has been some other procedural irregularity in the proceedings; or
>
> (d) a party, or a party's representative, was not present at a hearing related to the proceedings.
>
> (3) A party applying for a decision or part of a decision to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.
>
> (4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as possible.

51. As can be seen, Rule 38 is concerned with procedural irregularities that have resulted in it being unfair for a Tribunal decision to remain in place. Rule 38 allows the Tribunal to set aside a decision and allow a re-hearing if one party did not have the same opportunity as the other because of a procedural mishap. However, even if one or more of the conditions are met, it must be in the interests of justice for the decision to be set aside; the Tribunal will not set aside a decision when it is not in the interests of justice to do so. When considering the interests of justice, I bear in mind that that includes not only the interests of both parties to this appeal but also the wider interests of other participants in the justice system whose own hearings might be delayed if the 21 August 2019 decision is set aside and a re-hearing listed.

The application

52. As noted above, the Applicant's application to set aside was made on 18 February 2020, following the release of the summary decision on 21 August 2020. This application, made by the previous agent, was as follows:

> We are requesting that the case of Oatein Limited v HMRC v The Commissioners for Her Majesty's Revenue and Customs is reheard at the first stage tribunal.
>
> The reasons for the appeal is due to us being unable to prepare an argument due to me still being on honeymoon when HMRC sent the bundle on the 13 August for the 16th August hearing.
>
> After receiving HMRC bundle we were in no place to handle such a complex case and were wanting to hand this over to a tax solicitor, we rushed through a skeleton appeal on the same date not to missed any deadlines and tried to postpone the hearing.
>
> HMRC rejected the postponement, with the lateness of receiving the documents and the logistics of getting to Manchester we were unable to attend the hearing.
>
> Since we only received HMRC bundle three days before the hearing and HMRC rejecting our request for a postponement and that a specialist will be overseeing the appeal we hope you agree on rehearing the case.

53. There are a number of arguments raised in this application. In addition, the Applicant's current agent has also argued that:

- The Applicant did not receive a copy of the decision when it was issued
- No one from the Tribunal or HMRC had contacted the Applicant directly
- The current agent had requested copies of Tribunal documents from the Tribunal when he came on the record
- ADR would relieve pressure on the Tribunal service and enable consideration of the full arguments

54. As I have already noted, a decision can be set aside only if one (or more) of the conditions in Rule 38 is satisfied and if it would also be in the interests of justice for the decision to be set aside. I consider each argument made by the Applicant in turn, looking first at the arguments made by the previous agent.

The previous agent's arguments

55. The first reason given by the previous agent for seeking to have the decision set aside was that the agent did not have time to prepare a skeleton argument. While an

insufficiency of time could constitute a procedural irregularity, the Applicant's previous agent had known since 4 January 2019 (when the directions were issued) that a skeleton argument should be filed not later than two weeks before the hearing, and he had also known since 2 May 2019 (when the parties were notified of the hearing date) that the skeleton argument was required by 2 August 2019. Therefore, even though the agent had stated he would be unavailable to attend a hearing from 15 July to 7 August 2019, I am satisfied that the agent had more than sufficient notice to be able to arrange his affairs so that he could prepare and file the Applicant's skeleton argument in advance of the hearing.

56. Additionally, and in contrast to the 18 February 2020 application, the agent had implied in his 13 August 2019 email that the Applicant's skeleton argument was prepared before he went on his honeymoon. If that was what happened then it is difficult to see how it could also be the case that the skeleton argument was prepared in a rush on 13 August 2019. In either case, I do not accept that the Applicant did not have enough time to prepare, and I do not consider that the agent's need to draft a skeleton argument in hurry (if one was not prepared before the agent went on honeymoon) constitutes a procedural irregularity in the circumstances of this case.

57. The previous agent's next argument is that it was only when he received the bundle of authorities on 13 August 2019, that he appreciated that the appeal was too complex for him to manage. Late receipt of a document is one of the conditions specified in Rule 38(2) above, and I accept that a bundle of authorities could constitute documents. However, in this case, it appears that the reason that the previous agent did not receive the bundle of authorities until 13 August 2019 was because it was not until 13 August 2019 that he returned to the office after his honeymoon. There is no evidence that the bundle of authorities was sent late to the Applicant.

58. It is also unclear why it was only upon receipt of the bundle of authorities that the agent concluded that the appeal was too complex for him to manage. The case to be put by the Respondents had not changed, and the authorities relied upon by the Respondents were in the public domain at all relevant times. The agent was able to read those authorities before receiving the bundle prepared by the Respondents, and he would have been expected to have considered relevant authorities when he provided his initial advice to the Applicant. Additionally, the Applicant was given notice of the specific authorities relied upon by the Respondents when they served their skeleton argument on 31 July 2019 (slightly ahead of the deadline set out in the directions). If the previous agent was concerned that two weeks would be insufficient for him to absorb the details in the Respondents' skeleton argument, then he could have applied (at any date from 4 January 2019 onward) for the deadlines in the directions to be revised.

59. Additionally, and in contrast to the 18 February 2020 application, the previous agent stated in his 14 August 2019 application for a postponement that fresh evidence had come to light and that was why the postponement was requested. There was no mention on 14 August 2019 of a desire to instruct a solicitor because of a sudden realisation that the appeal was too complex for the previous agent to manage.

60. I have concluded that the agent's late receipt of the bundle of authorities was self-inflicted, that the late receipt did not cause unfairness, and that it would not be in the interests of justice for the decision to be set aside because of this.

61. The previous agent's next argument is that his delay in receipt of the bundle, combined with the logistics of getting to Manchester, prevented him from attending the hearing. The absence of a party or representative is one of the conditions specified in Rule 38(2) above. However, in this case, it seems that the decision not to attend was a deliberate choice of the previous agent. I have already concluded that the delay in the agent's receipt of the bundle of authorities was due to the agent's extended absence from the office. There is no explanation of why his delayed return to the office (and thus delayed receipt of the bundle) prevented the agent from making travel arrangements on 13, 14 or 15 August, or any explanation of why the agent had not made his travel arrangements from 2 May 2019 when the hearing date was fixed. It is clear that the previous agent was aware of the hearing date and that he knew, by 5 p.m. on 14 August 2019, that the hearing in Manchester on 16 August 2019 was going to proceed. Manchester is the nearest Tribunal main centre to the previous agent (and the Applicant), taking approximately two hours driving time to reach, or two and half hours away by train. I have concluded that the agent was not prevented from attending the hearing by late receipt of the bundle of authorities, or by logistics, that the agent was notified of the hearing with sufficient time to make travel arrangements and that it was a deliberate choice by the agent not to attend. I do not consider it would be in the interests of justice for the decision to be set aside by reason of the previous agent's decision not to attend the hearing.

62. The previous agent's final point is that a specialist will be appointed to represent the Applicant if a fresh hearing is listed. It is difficult to see how this satisfies any of the conditions in Rule 38(2). In addition, more than a year passed between the appeal being filed and the hearing taking place, so the Applicant had had sufficient time to instruct a solicitor for the hearing on 16 August 2019. I do not consider it would be in the interests of justice for the decision to be set aside because the previous agent apparently realised he was out of his depth only two days before the hearing and, possibly as a consequence of this realisation, decided not to attend the hearing.

The current agent's arguments

63. The first two points made by the Applicant's current agent are that no copy of the decision was sent directly to the Applicant, and no one from HMRC or the Tribunal directly contacted the Applicant. I can take these two points together because, once the Applicant had authorised an agent to represent it in the Tribunal appeal, there was no reason for the Tribunal (or HMRC) to contact the Applicant directly. As the current agent should be aware, the Tribunal does not correspond directly with a party when that party has authorised the Tribunal to correspond with its agent. I conclude that issuing of the Tribunal decision to the Applicant's authorised agent, rather than directly to the Applicant, does not mean that the condition in Rule 38(2)(a) is met. It was the Applicant's free choice to instruct its previous agent, and that instruction continued for (at least) two and a half years. I cannot conclude that it would be in the interests of justice to set aside the 21 August

2019 decision because the 21 August 2019 (and Tribunal correspondence) was issued to the Applicant's authorised agent.

64. The current agent's next argument is that he had requested copies of documents from the Tribunal when he came on the record. The current agent came on the record in May 2020, nine months after the summary decision had been issued to the parties. I have set out the agent's email to the Tribunal in full above as that is the only request for Tribunal documents and it only relates to directions. As set out above, the Tribunal's response included a comprehensive update, explained that previous directions were set aside and issued fresh directions to both parties. The current agent did not ask the Tribunal for copy documents on any other occasion even though, once he had received the Tribunal update, he would have been aware that a substantive decision had been issued. When the current agent asked HMRC for a copy of the appeal documents, in September 2020, these were provided within one hour of the request.

65. However, even if the current agent had been correct in stating that he was not supplied with copy documents after he came on the record in May 2020, this was nine months after the hearing had taken place and the summary decision had been issued to the parties. The Tribunal's failure to provide copy documents to a new agent cannot render unfair a hearing that took place nine months earlier. Therefore, I do not accept that this complaint (even if it was justified) meets any of the conditions in Rule 38(2) because it does not relate to events leading up to the decision issued on 21 August 2019. I conclude that the Tribunal's perceived failure to provide copies documents in 2020 does not constitute an unfairness relevant to a decision reached and issued in 2019, and so it not in the interests of justice for the decision issued on 21 August 2019 to be set aside.

66. The current's agent's final argument for setting aside the decision is that ADR would relieve pressure on the Tribunal system. While I agree that an appeal settled by negotiation would not need a hearing, the Applicant's current desire to settle the appeal by ADR does not meet any of the conditions in Rule 38(2). The appeal was filed with the Tribunal in June 2018 and the Applicant was able to make an ADR application at any time between then and August 2019 if it considered that an application for ADR would be productive. I do not consider it is in the interests of justice for the decision to be set aside so that the Applicant can have a second opportunity to run its appeal, this time adopting a different strategy; that is not the purpose of Rule 38.

67. I have considered whether there were any other points or issues that suggest there was a procedural irregularity, not raised by the Applicant, that would mean it was in the interests of justice for the decision to be set aside. I have been unable to identify any such points. It appears that the Applicant chose an agent to represent it, and now that it understands that the appeal has been unsuccessful, the Applicant feels let down by that agent. Those feelings are understandable. However, as the Upper Tribunal noted in *Katib*, that is a matter for the Applicant to take up with its previous agent. The deliberate actions, or inaction, of the previous agent do not mean that it is in the interests of justice for this decision to be set aside.

Conclusion

68. For the reasons set out above, both applications are dismissed.

69. 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 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 26 MARCH 2021