[2021] UKFTT 152 (TC)

TC08121

PROCEDURE – application by appellant to notify an appeal late – Martland, Katib and BMW Shipping Agents considered – application allowed – application by HMRC for further and better particulars of the appellant's grounds of appeal – Unicorn Shipping and Allpay considered – application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/09151
TC/2020/04487

BETWEEN

BHANU CHOUDHRIE **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Application determined on the papers and without a hearing on 4 May 2021

DECISION

INTRODUCTION

1. This application relates to two matters. The first is whether I should give permission for the appellant to notify his appeal 2019/09151 to the Tribunal some 13 days late. The second is that if I do give permission, whether I should order the appellant to provide further and better particulars of his grounds of that appeal.

2. The appeal is against a discovery assessment which was raised by HMRC in respect of the tax year ended 5 April 2013. That assessment was issued on 14 December 2018. Although this appears to be slightly out of time, HMRC have not taken that point, and the lateness issue arises not in respect of the appeal against the assessment, but in the notification of that appeal to the Tribunal.

3. HMRC have also issued a second discovery assessment against which the appellant has appealed under appeal number TC/2020/04487. There is no suggestion that either that appeal nor the notification of it to the Tribunal is late. I am solely concerned with the notification of the appeal against the first discovery assessment. This second assessment appears to be a protective assessment issued in case their arguments which form the basis of the first discovery assessment are unsuccessful. However HMRC's application for further and better particulars does now extend to this second appeal.

BACKGROUND FACTS

4. I was provided with a modest bundle of documents which included the appellant's original application, HMRC's initial objections thereto, a comprehensive response to those objections by the appellant which included a witness statement from Mr John Brassey, and a response from HMRC to the appellant's response. From those documents I find the following facts:

(1) The appellant is UK resident but not UK domiciled and pays UK tax on the remittance basis. HMRC enquired into the appellant's tax return tax ending 5 April 2013. During that enquiry they were told that approximately $3million had been transferred from a non-UK entity to his UK bank account. It was HMRC's view that this remittance was untaxed foreign income and on 14 December 2018 issued the discovery assessment in the sum of £1,197,669.42. The appellant appealed against this assessment on 21 January 2019.

(2) John Brassey ("**JB**") was first appointed to represent the appellant on 6 December 2017 when he worked with the firm Lancaster Knox. He joined the firm of Hamilton Rose Tax Ltd ("**HR**") in March 2018. However during the period relevant to this appeal, the appellant's incumbent adviser was Jeffcote Donnison ("**JD**") JD recognised they did not have the necessary expertise to deal with the enquiry into the appellant's tax affairs, and so JB provided assistance to them since he had the relevant expertise in dealing with tax investigations.

(3) During the course of 2019 further information was supplied to HMRC. It is my understanding that this was supplied by JD even though I suspect that behind the scenes it was JB who was providing the relevant expertise to JD and to the appellant.

(4) On 13 May 2019, JD sent an email to Jayne Davidson, of the customer relationship team of HMRC asking that an independent review of the appellant's case be undertaken in the interests of trying to avert unnecessary costs of going to the Tribunal. In response to that email, by way of a letter dated 31 July 2019 Mrs Davidson requested further information and indicated that at that stage, she had not requested an independent review pending receipt of that information. On the same date she sent a letter to the appellant at his London address which included information about penalties and indicated that at a meeting on 22 August 2018 with your agent "JD" they had discussed the Requirement to Correct legislation. JD responded to that letter on 21 August 2019. They set out their views regarding the relevance of the Requirement to Correct legislation and its application to the appellant and pressed for the independent review that they had previously requested.

(5) HMRC's review conclusion letter dated 22 October 2019 was sent to the appellant at his home address and a copy was sent, on that date, to JD which was received by them on 24 October 2019.

(6) On 29 October 2019 JD sent a copy of the review conclusion letter by email to the appellant and to JB.

(7) The review conclusion letter concluded that the discovery assessment needed to be varied to reflect the amount being charged as a capital gain rather than as income. It also made clear that if the appellant wished to appeal against that conclusion, it should appeal to the Tribunal within thirty days from the date of the letter. And if no such appeal was made within that time, the matter would be treated as being settled by agreement, and HMRC would then make arrangements for any amounts due to be collected.

(8) The appellant appealed to the Tribunal on 4 December 2019 via JB as representative. The notice of appeal recognise that the appeal was late and gave reasons for that late appeal. These were that: HR and JD had been advising the appellant, JD being the incumbent adviser and HR providing support; HR had requested an independent review to be undertaken and had been conversing with the inspector in the case; but the letter from the independent review was sent to JD when the individual dealing with the case was away; HR was unaware of the contents of the review letter for well over a week after it was received; JB was unwell with a heavy cold and a chest infection; the adviser at JD was away in the previous week meaning the decision to appeal could not be made until 4 December 2020; the lateness of the appeal is not the appellant's fault and is due to a combination of HMRC writing to the wrong advisers and the fact that the client advisers have not been in the office; the appeal is being made 12 days late due to the foregoing reasons.

(9) The Tribunal acknowledged receipt of the appeal on 14 January 2020 and informed the appellant that the appeal had been allocated to the complex track. It also informed the appellant that HMRC might object to the appellant's application for permission to make a late appeal.

(10) On 28 January 2020 HMRC sent an email to HR following up a letter/email which HR had sent to HMRC on 24 October 2019 in which they indicated that the appellant may wish to apply for ADR, and suggested that if that was indeed the case, the appellant should so apply within the next 14 days. HR on behalf the appellant applied for ADR

which was accepted by HMRC. The ADR took place and was completed on 17 November 2020 but did not resolve the dispute between the parties.

(11) In a document dated 4 February 2021, HMRC objected to the appellant's application for permission to make a late appeal and made an application, in turn, that the appellant should provide further and better particulars of its grounds of appeal if the appellant is granted permission to make a late appeal. And that HMRC's obligation to serve a statement of case is deferred until 30 days after receipt of the appellant's further and better particulars.

THE LAW- LATE APPEAL

5. There is little, if any, dispute between the parties as to the relevant law. The dispute lies in its application to the facts of this particular appellant. A combination of section 49G (3) of the Taxes Management Act 1970, and rule 20 (and in particular rule 20(4)) of the First-tier Tribunal rules confer a discretion on me to allow the appellant to bring his appeal to the Tribunal later than the specified 30 day period.

6. When exercising that discretion, the most important decision which I must consider and which I am bound by is the Upper Tribunal decision in *Martland v HMRC* [2018] UKUT 178 ("*Martland* ") *Martland* deals with the principles which should be considered on an application to admit a late appeal. The relevant passage from *Martland* is set out below:

> "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*:
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> (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.
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> (2) The reason (or reasons) why the default occurred should be established.
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> (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.
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> 45. That 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. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either 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."

7. The Upper Tribunal decision in *HMRC v Katib* [2019] STC 2106 ("*Katib*") is also relevant given the appellant's reasons for making the appeal late include reliance on agent.

8. In *Katib* the Upper Tribunal had to consider the extent to which reliance on agent was a justifiable reason for failing to make a timely appeal. On the facts of that case, the Upper Tribunal concluded that failings by the appellant's agent could not be relied upon by the appellant at any stage in the *Martland* analysis. The Upper Tribunal said this:

> "53 The first stage of the *Martland* examination can be addressed briefly. Mr Katib's delay in appealing against the PLNs was, at the very least, 13½ months. That was "serious and significant". The real question is how the second and third stages of the evaluation should be performed, having regard to the particular importance of statutory time limits being respected.
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> 54. It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant. In *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666, when considering the analogous question of whether a litigant's case should be struck out for breach of an "unless" order that was said to be the fault of counsel rather than the litigant itself, Ward LJ said, at 1675:
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> > Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. *The basis of the rule is that orders of the court must be observed* and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself. [emphasis added]

55. We do not accept Mr Magee's general argument that this approach simply involves attributing the actions of legal representatives to their clients and has no bearing on the question whether incorrect advice provided to a client can be a good reason for the client's default. Given the importance of adhering to statutory time limits, we see no reason why a litigant who says that a representative failed to file an appeal on time should necessarily be in a different position from a litigant who says that a representative failed to advise adequately of the time limits within which an appeal should be brought. In any event, it seems from [7] of the Decision that the FTT found that Mr Bridger had been instructed to appeal against the PLNs on Mr Katib's behalf but failed to do so and, therefore, Mr Katib is not simply complaining that Mr Bridger provided defective advice.

56. Nor do we accept Mr Magee's submission that the decision of the High Court in *Boreh v Republic of Djibouti and others* [2015] EWHC 769 establishes an "exception" to the principle where a representative misleads the client. Rather, we consider that the correct approach in this case is to start with the general rule that the failure of Mr Bridger to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland*. However, when considering the third stage of the evaluation required by *Martland*, we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration.

57. The FTT concluded at [27(3)] of the Decision that the general rule set out in *Coventry City Council* should not apply because Mr Bridger was "on a frolic of his own acting outside the scope of any possible brief that [Mr Katib] could have given". That conclusion, however, was reached without having regard to the particular importance of statutory time limits being respected and is thus vitiated by the error of law that has led to us setting aside the Decision. More significantly, we do not consider that the FTT's departure from the general principle is justified by that fact in this case (which we think is probably an additional error of law, though not one relied on in the grounds of appeal).

58. It is clear from the Decision that Mr Bridger did not provide competent advice to Mr Katib, misled him as to what steps were being taken, and needed to be taken, to appeal against the PLNs and failed to appeal against the PLNs on Mr Katib's behalf (see [7] and [16]). But extraordinary though some of Mr Bridger's correspondence was, the core of Mr Katib's complaint is that Mr Bridger was incompetent, did not give proper advice, failed to appeal on time and told Mr Katib that matters were in hand when they were not. In other words, he did not do his job. That core complaint is, unfortunately, not as uncommon as it should be. It may be that the nature of the incompetence is rather more striking, if not spectacular, than one normally sees, but that makes no difference in these circumstances. It cannot be the case that a greater degree of adviser incompetence improves one's chances of an appeal, either by enabling the client to distance himself from the activity or otherwise.

59. Mr Magee urged us to give particular weight to the FTT's finding, at [15], that Mr Katib did not have the expertise to deal with the dispute with HMRC himself, but that does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena. 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. This conclusion is fortified by the fact that the FTT's findings demonstrate that there were some warning signs that should have alerted Mr Katib to the fact that Mr Bridger was not equal to the task. Despite Mr Bridger assuring Mr Katib that his appeals were in hand, he was still receiving threats of enforcement action ([9]). Mr Bridger's advice to "cease to be a man by making a declaration to this effect" should have alerted Mr Katib to the warning signs. Mr Katib is not without responsibility in this story.
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> 60. For the same reasons we do not consider that Mr Bridger's conduct has any real weight when considering the factors relevant to the final stage of the three-stage approach outlined in *Martland*. Turning to other factors relevant to that third stage, the FTT concluded that the financial consequences of Mr Katib not being able to appeal were very serious because his means were limited such that he would lose his home. That, the FTT concluded, was too unjust to be allowed to stand. We have considered this factor anxiously for ourselves. However, again, when properly analysed, we do not think that this factor is as weighty as the FTT said it was. The core point is that (on the evidence available to the FTT) Mr Katib would suffer hardship if he (in effect) lost the appeal for procedural reasons. However, that again is a common feature which could be propounded by large numbers of appellants, and in the circumstances we do not give it sufficient weight to overcome the difficulties posed by the fact that the delays were very significant, and there was no good reason for them.
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> 61. Therefore, we have concluded that, in all the circumstances of the case, Mr Katib has not given a sufficiently good reason for a serious and significant delay in appealing against the PLNs. HMRC's appeal is allowed and we remake the Decision so as to refuse Mr Katib permission to make late appeals."

9. So I shall bear in mind that when I am considering the third stage of the *Martland* process, namely an evaluation of all the circumstances of the case, and the balancing exercise which essentially assesses the merits of the reasons given for the application and the prejudice which might be caused to both parties by granting or refusing permission, I should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate costs, and for statutory time limits to be respected. But when undertaking this final evaluation I am alive to the sentiments expressed by the Upper Tribunal in the recently reported case of *HMRC v BMW Shipping Agents Ltd* [2021] UKUT 0091 ("*BMW*") where at paragraph 52 of their decision, the Upper Tribunal said:

> "52. We will approach the third *Martland* stage by performing, as *Martland* requires, a balancing exercise. In that balancing exercise, the need for litigation to be conducted efficiently and at proportionate cost and for directions to be complied with must be given particular weight. However, it remains a balancing exercise which invites, among other considerations, a consideration of the nature of the reasons for the breach of direction and the results that would follow if the appeal is, or is not reinstated."

10. BMW was a case which involved an application for permission to apply, out of time, to reinstate an appeal that had previously been struck out the failure to comply with an "unless" direction. The Upper Tribunal therefore had to consider two things. Firstly whether it should give permission to apply out of time, to which it was clear that the *Martland* criteria applied. Secondly, having reversed the First-tier Tribunal's decision not to give permission, and having given permission itself, whether it should reinstate. In considering whether it should reinstate,

the Upper Tribunal applied the three stage approach set out in *Martland*. It is in this context that the foregoing sentiments expressed in paragraph 52 of their decision were made. It is my view however that they are equally applicable to an application for permission to notify a late appeal.

SUBMISSIONS- LATE APPEAL

11. In his notice of appeal, the appellant set out the reasons why it was submitted late. I have set those out at [4(8)] above. In his submissions to the Tribunal and in JB's Witness Statement the appellant makes the following further submissions: the appeal is only 13 days late which is neither serious nor significant; it is a high value claim and the appellant should not be denied the opportunity to have it heard; the appellant has appointed tax agents throughout; HMRC's offer of ADR suggests that HMRC had accepted that the Tribunal had accepted a late appeal; HMRC should not have objected to the late appeal; if they were going to they should have done so much earlier than they did; the appellant prepared for and attended the ADR which can only be done when a valid appeal is in existence which demonstrates that HMRC had accepted the late appeal; HMRC is now attempting to unfairly and unreasonably block the appellant's appeal; HMRC are seeking to secure more time to submit their statement of case; the appellant has a good chance of succeeding in the substantive appeal on the basis that there was no remittance, the appellant was not the beneficial owner of the amount which forms the basis of the assessment and to the extent that there has been a remittance it has not been correctly computed; in light of the foregoing the *Martland* criteria weigh in favour of the appellant.

12. HMRC submit that: the 13 days is both serious and significant in the context of a 30 day appeal period; none of the reasons given by the appellant for the delay are good ones; HMRC have corresponded with the correct agent throughout, namely JD; it is clear from the email referred to at [4(6)] above and the appellant's notice of appeal that the review decision letter dated 22 October 2019 had come to JD's attention within four or five days of the date on which it had been received by JD; there is no justification for the assertion made by the appellant in his submissions to the Tribunal that on 21 August 2019 HR asked HMRC for a review of the discovery assessment; no evidence has been submitted to support the assertion that JB was suffering from an illness; any such illness is in any event not debilitating; merely overlooking the deadline on account of over work or otherwise is unlikely to be a good reason; likewise, the fact that the relevant case worker at JD was away is not a good reason either; if the appellant is denied the opportunity of challenging this high-value assessment, that is simply a consequence of having failed to comply with a time limit; participating in ADR did not indicate an acceptance that HMRC would not challenge the late appeal; they simply took a pragmatic view and if it had been possible to settle the matter through ADR, that would have been of benefit to all parties; however neither that of itself, nor any other action by HMRC comprise an acceptance of the late appeal; permission to appeal out of time should be the exception rather than the rule, and the appellant's circumstances are not exceptional.

DISCUSSION

13. Turning first to the length of the delay of what the parties agree is 13 days, whilst I do not consider that it is "very short" (in the language of the first stage of *Martland,*) which would mean that I might need to spend little time on the second and third stages of the process, I do not consider it to be either serious or significant. I appreciate that a period of 13 days relative to a period of 30 days to bring an appeal might be seen to be relatively significant, but in absolute terms 13 days is not serious and in the context of this case, certainly not significant. As I have said, HMRC have issued a second discovery assessment against which the appellant

has made an in time appeal. HMRC are hedging their bets on the basis that they want to ensure that the remittance is charged either to capital gains or to income tax. I suspect that appeals against both the assessments will be joined and heard together, and, although I am straying into the third stage of the process here, the fact that the appeal against the first assessment was made 13 days late will have no significance in the context of the joined appeals.

14. However I am firmly of the view, as is HMRC, that there are no good reasons for this delay. I reject any suggestion from the appellant that HMRC have corresponded with the incorrect agent, and I can find no evidence, notwithstanding assertions to this effect, that HR displaced JD as the appellant's agent and that failure to correspond directly with HR led to the delay. It is abundantly clear that JB was made aware of the review conclusion letter on 29 October 2019, something which he accepts in the appellant's notice of appeal. As a professional whose expertise lay in the field of tax investigations, which was the reason that was given for his ongoing involvement, he would have been well aware of the significance of making an appeal in time, and even though he was only made aware of the review conclusion letter on 29 October 2019 that gave him, and indeed JD, more than ample time to put in an appeal. He could have submitted a notice which was broadly pleaded, with more detailed grounds of appeal being submitted later. Nor do I accept that the absence of the relevant case worker at JD is a good reason. Where time limits are involved, professionals should be aware that the current approach by Tribunals is that they should be respected, and that failure to do so has serious consequences. JD should have had sufficiently robust systems in place so as to ensure, notwithstanding JB's illness, that the 30 day time period was met. Nor do I accept that the appellant should be exonerated since the fault was that of his agent. It is clear from *Katib* that the appellant must bear the consequences of his agent's failings. In summary therefore I think that the reasons given by the appellant for justifying the lateness of the appeal are bad reasons.

15. Turning now to the third stage of the process i.e. an evaluation of all the circumstances of the case, I must undertake a balancing exercise, assessing the reasons for the delay and the prejudice which may be caused to both parties by granting or refusing permission. And when undertaking that balancing exercise I am conscious that I should pay particular importance to the need for litigation to be conducted efficiently and at proportionate costs and for statutory time limits to be respected.

16. I have undertaken that evaluation and it is my view that the balance of prejudice weighs in favour of allowing the late appeal. I say this for the following reasons:

> (1) It is evident from *Katib* that, as submitted by HMRC, the lost opportunity of running a meritorious appeal is simply a consequence of failure to comply with a time limit. In *Katib* that consequence was very serious because it meant that the appellant lost his home. And so he suffered serious prejudice. But that prejudice is something that I can weigh in the balance, an approach endorsed in *BMW*. On the other side of that balance is the prejudice which would be suffered by HMRC if I were to allow the late appeal. And I cannot see that allowing this late appeal prejudices HMRC at all. As I have mentioned above, HMRC have issued a second discovery assessment to cover their position if the remittances are subject to capital gains tax. And they will have to prepare for that appeal on I suspect the same basis as they will have to prepare for the appeal against the first discovery assessment. The only difference will be that submissions will be made that the remittances are subject to capital gains tax rather than income tax. So by allowing this appeal to be made late, I am not increasing the administrative burden on HMRC. Furthermore, this is not a case where HMRC have undertaken a great deal of preparation which will now be wasted if I allow the appellant to bring his appeal late. All that has

happened since the appeal was originally made, it seems to me, is that the parties have prepared for and attended an ADR meeting which has proved unsuccessful. I return to this below but I do not believe that HMRC, having concluded that ADR, have now stowed their files regarding this appeal on the basis that they believed the appeal to be made out of time and will now be prejudiced by having to get the files out again. This matter is very much alive, and more so because of the appeal against the second discovery assessment. So, as I say, the fact that the appellant is permitted to appeal against the first discovery assessment seems to me to have no operational impact on HMRC. On the other hand it could have a significant impact on the appellant. It is very difficult for me to undertake a sensible review of the merits of the appellant's case on the basis of the evidence which was submitted to me for this application. But the fact that HMRC themselves have issued a second discovery assessment to protect themselves suggests that the appellant may have a justifiable case that the remittances are not subject to income tax as assessed by the first discovery assessment. I think that the appellant should be given the opportunity to challenge this discovery assessment and should not be denied that opportunity by dint of a 13 day delay in notifying his appeal to the Tribunal.

(2) Secondly, the appellant has clearly engaged with HMRC and the process of resolving his dispute with them, by dint of suggesting, and then taking up the offer of ADR, and then participating in an ADR meeting. I suspect it was a matter of disappointment for all concerned that ADR did not resolve the situation, but the fact that the appellant was prepared to participate in, and indeed did actively participate in, that ADR is a factor which weighs in his favour at this stage of the evaluation. This is an appellant who has taken his tax responsibilities sufficiently seriously as to incur the costs and time of seeking to resolve them without recourse to the Tribunal. I do not accept the submissions by the appellant that HMRC have in some way accepted, through engaging in ADR, that the appellant could bring his appeal out of time. But equally, had the appellant known that HMRC were challenging his application to bring a late appeal, he may have wanted to deal with that before incurring the costs of engaging in ADR.

(3) Thirdly, as suggested by the appellant, if I were to deny the appellant the opportunity to challenge the first discovery assessment, this might result in an unjustifiable windfall for HMRC. HMRC have assessed the appellant to both income tax and capital gains tax on the remittances. Let us say (and I make absolutely no finding or suggestion that this is the case) that the remittances were received beneficially by the appellant and are subject to capital gains tax. It is right that the appellant should be given the opportunity to challenge that and indeed he has done so by appealing against the second discovery assessment. The consequence of denying the appellant the opportunity to challenge the first discovery assessment is that that assessment will become final and the appellant will be obliged to pay tax in accordance with it. That assessment has been for income tax. In these circumstances there will be no need for HMRC to prosecute the second discovery assessment which is technically the correct one. They would have recovered the tax which they alleged is due, as income tax, under the first discovery assessment. This seems to be an unconscionable consequence of submitting an appeal only 13 days late.

17. And so, notwithstanding that there are no good reasons for the late appeal, given that the delay is neither serious nor significant, and that, notwithstanding that time limits should be respected and litigation needs to be conducted efficiently and at proportionate cost, it is my view that at the final evaluation, the balance of prejudice weighs in favour of allowing the appellant to make a late appeal, and that he should be able to do so.

18. Finally, given that I have mentioned this above, I wish to make it clear that I can see no justification for what I consider to be a wholly unwarranted assertion that HMRC have behaved unreasonably or that they have a hidden motive in opposing the appellant's application in that the simply want to extend time for submitting their statement of case. The appellant has provided no evidence of this and I reject that submission.

DECISION ON THE LATE APPEAL

19. I allow the appellant's application and I give him permission to notify his appeal to the Tribunal out of time.

FURTHER AND BETTER PARTICULARS

20. Having given the appellant permission to bring his appeal out of time, I now need to go on to consider HMRC's application that the appellant provide further and better particulars of his grounds of appeal. In their objection to the appellant's application for permission dated 4 February 2021, HMRC submit that the current grounds of appeal are very brief, vague, and lack any proper particulars and that in the circumstances they are unable to provide a statement of case which they can confidently state deals with all the grounds of appeal as filed. Their view is that the grounds of appeal are essentially that the appellant believes that HMRC have not considered all relevant facts and have been trying to assess the maximum amount of tax rather than the correct amount of tax. It seems clear to me that this application is for further and better particulars of the grounds of appeal against the first discovery assessment which is appeal 2019/09151.

21. In the appellant's submissions in support of his application to bring a late appeal, the appellant deals with HMRC's application for further and better particulars. The appellant submits that the grounds of appeal are clearly, that as a matter of fact and law, there was no remittance by the appellant, the appellant was not the beneficial owner of the alleged amounts which forms the basis of the assessment and to the extent that there is a remittance it has not been correctly computed. He says this on the basis that the grounds of appeal go further than those suggested by HMRC, and emphasised that in those grounds of appeal, HMRC having amended the assessment from a remittance of income to a remittance of a capital gain, have not allowed any base cost to be factored into the calculation of the gain, and that the appellant has presented evidence that following receipt of the money into his account, payment was then made to a third party indicating that the money was not beneficially owned by the appellant and any capital gain is not his to be taxed when money was brought into the UK. He also says that establishing the validity of the discovery assessment is a matter on which the legal burden rests with HMRC, implying, although this is not stated explicitly, that he does not have to set out any case regarding inadequacies in the discovery assessment. In those submissions he also sets out the grounds of appeal against the second discovery assessment noting that the appeal is in conjunction with the appeal against the first assessment, HMRC have assessed the disputed amount to both capital gains tax and income tax and that HMRC have not proven the amounts are taxable let alone under which tax code they should be taxed. In the appellant's submission, this is more than adequate to allow HMRC to discharge their obligation to provide a statement of case. This is even more so given the extensive investigation carried out by HMRC and the previous engagement with the appellant's agents, and the ADR process. The appellant goes on to say that his representatives do not understand why HMRC are asking for further and better particulars as it is obvious from their own correspondence why they raised the second discovery assessment and why the appellant has appealed against it.

22. In HMRC's reply to the appellant's submissions HMRC extend their application for a request for further and better particulars of the grounds of appeal not just for appeal 2019/09151, but for further and better particulars of the grounds of appeal for appeal 2020/04487. HMRC go on to make the point that the fact that correspondence may have been exchanged about the relevant issues in the case does not assist in ensuring that the Tribunal has the correct dispute before it as it is for the parties to litigation to define the scope of the dispute for the Tribunal. They do not however deal with the other substantive points made by the appellant set out above.

23. They cite as authority for their application the First-tier Tribunal decision in *Unicorn Shipping Ltd v HMRC* [2017] UKFTT 464. This case sets out certain principles with which, although not binding on me, I agree with. These include that grounds of appeal must be sufficiently detailed to enable the defendant to understand the case and prepare a statement of case in answer to it and the appellant must in the first instance state its grounds of appeal in sufficient detail for HMRC to understand its case.

24. Under the First-tier Tribunal Rules I must deal with cases fairly and justly, (Rule 2) when submitting a notice of appeal to a Tribunal, the notice of appeal must include the grounds for making the appeal (Rule 20) and HMRC's statement of case must set out their position in relation to the case (Rule 25).

25. In the First-tier Tribunal decision of *Allpay Ltd v HMRC* [2018] UKFTT 273, Judge Mosedale set out some further principles regarding the adequacy of grounds of appeal with which I also agree. These include the function of pleadings is to give the party opposite sufficient notice of the case which is being made against him; what is important is that the pleading should make clear the general nature of the case of the pleader; pleadings are critical to identify the issues and extent of the dispute between the parties; the Tribunal's Rules require HMRC to explain its position in sufficient detail to enable an appellant to properly prepare its case for hearing and anything less may lead to injustice; it is not procedurally fair for a party without the burden of proof to do no more than say that the other party must prove every part of their case; both parties should set out the key parts of their legal and factual case in advance.

26. *Allpay* was a case in which HMRC suggested that since the burden of proof of establishing that certain services were "payment services" rested with the appellant, they did not need to plead that those services were not payment services. Judge Mosedale disagreed. Even though HMRC might have difficulty in "pleading a negative", it was her view that HMRC ought to plead their case on payment services if they wish to make an issue of it at the hearing and they ought to specify in summary terms what element of the facts (as they see them) mean that the appellant's services are not payment services and why. In my view the comments made by Judge Mosedale about HMRC's obligations of what they need to set out in their statement of case apply equally to an appellant's obligations to set out adequate grounds of appeal.

27. In this case it is clear to me that the extent and detail of the appellant's grounds of appeal against the first discovery assessment extend beyond those suggested to me by HMRC in their submissions. However I do not think they go far enough. Firstly although the grounds of appeal against the first discovery assessment refer to the amendment which HMRC have made from assessing the remittance to income to a remittance of a capital gain and goes on to deal with deal with base cost, those grounds do not set out the basis on which the appellant challenges that it was not income. It seems from the review conclusion letter that the appellant challenges the validity of the first discovery assessment on the basis that any remittance was capital which was derived from the sale of real property, and not income. In order for to comply with the

principles set out at [25] and [26] above, this should be plainly stated. And whilst the base cost issue might be highly relevant to the challenge to the second assessment, it is of secondary importance to the challenge to the first assessment. For the first assessment, the relevant issue is whether the payment reflects capital or income not the computation of the capital gains. Secondly although the appellant suggests in his submissions that the grounds of appeal clearly state that there was no remittance by the appellant, that is not clear to me. Whilst the grounds do state that a payment was made to a third party, the appellant does not state, squarely, that there was no remittance by or to him. Thirdly the appellant raises no suggestion that the discovery assessment is anything other than valid. For the reasons given in *Allpay* it is my judgment that if the appellant wishes to make an issue of the validity of the discovery assessment at the hearing, then he must specify in summary terms what elements of the facts as he sees them suggest that the discovery assessment may not be valid. Finally, my understanding is that currently the appeals are not joined, and I am unhappy that given this, the grounds of appeal for 2020/04487 cross refer to the grounds of appeal in 2019/09151, are of themselves very short on detail, and would not allow HMRC to provide a sufficiently detailed statement of case.

DECISION ON FURTHER AND BETTER PARTICULARS

28. It is my decision therefore that HMRC's application that the appellant provides further and better particulars of his grounds of appeal in appeals 2019/09151 and 2020/04487 is allowed, and I shall issue appropriate directions in a separate order which will follow the release of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 14 MAY 2021