[2021] UKFTT 0262 (TC)

TC08208

PROCEDURE – application for permission to make a late appeal - ss 83F, 83G and 98 VAT Act 1994 - s 7 Interpretation Act 1978 – no deemed receipt of letter sent to HMRC - Appellant's belief amounted to a reasonable excuse for failure to appeal in time but not for the entire length of the delay – permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2020/03945

BETWEEN

JOHN CODONA'S PLEASURE FAIRS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE KIM SUKUL

The hearing took place on 6 May 2021. With the consent of the parties, the form of the hearing was video, attended by Mr Alfred James Codona, Mr Alan John Codona, the Appellant's representative, counsel for the Appellant and HMRC's litigator. The hearing was conducted on the Tribunal's video platform. A face to face hearing was not held because I considered a video hearing to be appropriate in view of the current pandemic restrictions. The documents to which I was referred were contained in the 177-page PDF hearing bundle, 2 additional bundle documents submitted by HMRC and an additional authority submitted on behalf of the Appellant.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Philip Simpson QC, Counsel , instructed by Messrs Anderson Anderson Brown, for the Appellant

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

DECISION

INTRODUCTION

1. The matter before the Tribunal is the application of John Codona's Pleasure Fairs Limited ('the Company') for permission to bring their appeal out of time under section 83G(6) of the VAT Act 1994 ('VATA 1994'). The Respondents ('HMRC') oppose the application. The Company contends that they do not need such permission but, to the extent that they do, make such an application.

2. My finding is that the Company do require permission to appeal out of time and that permission is refused. My reasons are set out below.

BACKGROUND

3. By letter dated 1 February 2006, the Company sent to HMRC an unquantified claim for overpaid output tax in respect of gaming machine takings.

4. The Company's representative wrote to HMRC regarding the claim on 28 October 2011 and 3 July 2012. HMRC responded on 16 July 2012 and 17 August 2012 stating that the 2006 letter had not been received and that as the claim was not quantified, it could not be accepted as valid. The quantified claim was subsequently submitted on 16 November 2012.

5. By a single letter dated 14 January 2013, HMRC notified the Company of a repayment in the amount of £253,920 VAT, plus interest of £44,335.51 and issued assessments under section 80(4A) and section 78(A) VATA 1994 in almost identical amounts. The letter was set out as follows:

> I refer to your claim submitted on 1 February 2006.
>
> The amount of £253,920 has been repaid or credited to your account together with associated statutory interest of £44,335.51 and your VAT account will be automatically adjusted to take account of any other credit or debit balances on file.
>
> This repayment/credit is made in line with the judgment of the High Court in CRC v The Rank Group [2009] EWHC (Ch) 1244; [2009] All ER (D) 65 (Jun) and the decision of the First Tier Tribunal in December 2009.
>
> In view of the continuing litigation you should note that this letter forms an assessment under section 80(4A) VAT Act 1994 in the amount of £253,920 and an assessment under s78(A) VAT Act 1994 in the sum of £44,335.31 which relate to the tax and associated statutory interest under consideration.
>
> If HMRC is successful in overturning the earlier decisions, we will expect you to pay the amounts of £253,920 and £44,335.31 charged by the assessment(s), together with interest.
>
> **We will not take any action to collect the tax charged by these assessments at this time. If this changes we will write to you and tell you what action we intend to take.**
>
> In the event that we do ask you to pay the amounts charged by these assessments, you must do so within 30 days of the letter asking for payment. If you do not, we will raise an additional assessment under section 74 of the VAT Act 1994 charging interest on the unpaid amounts from the date of the repayment to you until the date the amount is repaid to HMRC.
>
> If you do not agree with the assessment(s), you can
>
> - ask for it/them to be reviewed by an HMRC officer not previously. involved in the matter, or

- appeal to an independent tribunal

If you opt for a review you can still appeal to the tribunal after the review has finished.

If you want a review you should write to the address below within 30 days of the date of this letter, giving your reasons why you do not agree with the assessment(s).

If you want to appeal to the tribunal you should send them your appeal within 30 days of the date of this letter.

You can find further information about appeals and reviews on the HMRC website

http://wwwhmrcgov.ukldealingwith/appeals.htm

You can find out more about tribunals on the Tribunals Service website

www.tribunals.gov.uk/tax/ or you can phone them on 0845 223 8080.

Direct Tax implications

There may be direct tax implications where amounts of over-declared output tax are repaid to businesses and your attention is drawn to Revenue & Customs Brief 14/09.

Statutory interest

The statutory Interest included with the repayment credit is chargeable to income tax or corporation tax as appropriate. You should note that HMRC have not deducted any tax from the interest payment. This payment will form part of your taxable income or profits and you are obliged by law to notify HMRC in your Tax Return or otherwise of the amount of interest you have received. If you are an individual chargeable to income tax this payment will be taxable in the year in which you receive it. Companies chargeable to corporation tax will include statutory interest payments as interest on a loan relationship. The period in which this interest will be taxed will, in general. follow the treatment of the interest in the accounts of the company. The amount of income tax or corporation tax which is due will depend upon your particular circumstances.

If you have any questions regarding this letter please do not hesitate to write to the above address quoting your VAT registration number and the reference shown at the top of this letter

Yours faithfully

6. On 8 February 2013 Mr Alan Codona, on behalf of the Company, wrote to HMRC as follows:

I write to you regarding your letter dated 14th January 2013 that we subsequently received on the 4th February 2013.

As well as setting out the amounts that are being repaid to us your letter also seems to form an assessment. We would like to take this opportunity to formally appeal these assessments.

We look forward to your response on this matter.

Yours faithfully

7. On 17 September 2014 HMRC issued a demand for payment in respect of the amount notified in the protective assessments and received full payment from the Company during October 2014.

8. On 21 August 2020, the Company's representative wrote to HMRC to progress the claim and referred to the outcome of the Rank Group Upper Tribunal decision released on 15 April 2020. That letter stated "our client wrote to HMRC on 8 February 2013 (See Attachment 6) requesting an independent review of these assessments. Our client has not received a response to this request. Consequently, we consider that this request for an independent review is still open and this letter should be taken as additional evidence in support of that review".

9. HMRC's responses stated that they had no record of receiving the company's original correspondence dated 8 February 2013 and had it been received, they would have again informed the Company that any appeal would have to be made to an independent tribunal and that the Company was now out of time to request a review but could apply to the Tribunal for permission to make a late appeal against HMRC's decision of 14 January 2013.

10. The Company lodged their appeal with the First-tier Tribunal on 6 November 2020.

LEGISLATION

11. The time limit to bring an appeal under section 83 VATA 1994 is set out in section 83G(1) of the 1994 Act, which provides:

> " An appeal under section 83 is to be made to the tribunal before-
>
> (a) The end of the period of 30 days beginning with-
>
> (i) In a case where P is the Company, the date of the document notifying the decision to which the appeal relates…
>
> …
>
> (6) An appeal may be made after the end of the period specified in subsection (1) … if the tribunal gives permission to do so."

12. The provision under which HMRC must conduct a review of their decision is section 83C VATA 1994, which states:

> "(1) HMRC must review a decision if—
>
> (a) they have offered a review of the decision under section 83A, and
>
> (b) P notifies HMRC accepting the offer within 30 days from the date of the document containing the notification of the offer."

13. Section 98 VATA 1994 regarding service of notices provides:

> "Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative."

14. Section 7 of the Interpretation Act 1978 provides:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

15. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules') provides, so far as material:

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it -
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction."

16. Rule 20 of the FTT Rules provides:

> "(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.
>
> …
>
> (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; and (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

THE EVIDENCE

17. The bundle of documents for the hearing, prepared by the Company, comprised of the notice of appeal, grounds of appeal, notice of objection of late appeal, the Company's skeleton argument and the correspondence between the parties. The bundle also contained the witness statement of Mr Alfred Codona.

18. I heard witness evidence from Mr Codona. I found him to be a credible witness and accepted his evidence, the key parts of which were given as follows:

> "I am a Director at John Codona's Pleasure Fairs Ltd. The family run business has 6 directors with 3 of them involved in the day to day management of the business. I have worked for JCPF for 25 years which is the whole of my working career. I have had no other employer and I was appointed a director in 1997.
>
> The company has been operating gaming machines in our arcades since its inception in 1970. In 2006 I found an article in our weekly Coin Slot trade magazine which referred to the Linneweber case and the judgement made by the European Court of Justice. Subsequently we discussed this matter with our trade organisation BACTA. The advice from BACTA was the case would take considerable time to be confirmed but the important fact was to make sure you

have written to HMRC to formalise the claim. The letter was sent but as mentioned BACTA explained the process would take a significant amount of time to complete.

During this period the topic of the case was regularly discussed with colleagues within our industry and the fact HMRC had not responded was considered normal. The general consensus within our industry was if you had submitted a letter your position was covered. From these discussions we were safe in the knowledge our case had been opened by our letter of 01.02.06. I can confirm we never received a response from the 01.02.06 HMRC letter and as previously mentioned we assumed the claim was open and no additional information would be requested until a decision had been made.

On the 4th February 2013, we received the HMRC letter dated 14th January 2013 informed us of the positive decision regarding the Rank case and that we were to be repaid the overpaid tax plus interest. This was fantastic news but at the same time the content of the letter was confusing and ambiguous. Our understanding was that if a future decision was made in HMRC's favour, we would have the opportunity to appeal that decision at that time. However, the letter stated we had thirty days to reply but as previously mentioned it did not arrive until the 04/02/2013 giving us only nine days to respond. Therefore to make sure our position was covered and due to the tight timescales, it was agreed we would send an appeal immediately. Myself, my brother John Codona and my father Alan Codona, who drafted the original 01.02.06 letter, would draft the response. This was hand-written by my father then I typed it and it was sent to HMRC on the 08/02/2013.

The fact we had not received a response from HMRC regarding our appeal did not concern us. I can also confirm we did not receive a response from HMRC when we sent our original claim letter (01.02.06). Furthermore at no point did we ever consider HMRC had not received our appeal letter. Additionally if our appeal letter had not been received this would have been the second time correspondence sent directly from ourselves had not been received by HMRC. We fully believed no further action was required and that our position was protected.

By e-mail dated 8th September 2020, HMRC confirmed that the appeal relating to the periods 10/07 to 07/11 was still live before the First-tier Tribunal. HMRC requested that if an appeal had been made to the First-tier Tribunal in relation to earlier periods, the Company should provide the FTT reference number for it.

It was at this point in time that my brother John and I became aware of the differences between a request for a review and an appeal to the Tribunal. In 2013 my brother John, my father Alan and I were unaware that a request for review was dealt with by HMRC and an appeal was dealt with by a third-party independent tribunal. We thought HMRC dealt with both of these procedures and we never understood the difference between the options.

To conclude we are a 4th generation family run business that has operated in Aberdeen for over fifty years. During this period we have experienced only professional and constructive dealings with HMRC. All information requests have always been dealt with efficiently, all payments have been made punctually and our overall relationship has been excellent."

FINDINGS OF FACT

19. Based on the evidence summarised above, I made the following findings on the key facts:

(1) The Company sent to HMRC a claim for overpaid output tax in respect of gaming machine takings by letter dated 1 February 2006. HMRC did not receive the Company's letter dated 1 February 2006 when it was originally sent. The Company was made aware in August 2012 that their letter dated 1 February 2006 was not received by HMRC.

(2) The Company sent a letter to HMRC on 8 February 2013 in response to HMRC's assessments issued by letter dated 14 January 2013. The Company's letter was prepared without professional input and the Company does not have any in-house legal or tax expertise. The Company's letter made no reference to an independent review but instead stated that the Company "would like to take this opportunity to formally appeal these assessments". HMRC did not receive the Company's letter dated 8 February 2013 when it was originally sent.

(3) From February 2013 to September 2020, the Company believed that their letter dated 8 February 2013 had been received by HMRC. Being unfamiliar with the relevant procedure and based on discussions with colleagues within the industry, the Company did not expect any particular response from HMRC and consequently made no attempt to contact HMRC regarding their claim or appeal during the intervening period.

OUT OF TIME

20. The first issue to be determined is whether the appeal is out of time. The Company submitted that the appeal was not lodged late because their letter dated 8 February 2013 should be read as an acceptance of HMRC's offer of review, made in HMRC's letter dated 14 January 2013. They argued that their letter was properly addressed, pre-paid and posted on or around 8 February 2013, thus the Company notified HMRC accepting the offer within 30 days from the date of the document containing the notification of the offer as required by section 83C(1)(b) VATA 1994. The Company contended that the effect of section 7 of the Interpretation Act 1978 is that the notification by the Company is deemed to have been received by HMRC on or around 9 February 2013 and, that being so, HMRC were obliged to conduct a review.

21. The Company further submitted that as notice of the conclusions of the review was not given within 45 days of the receipt by HMRC of the Company's notification, it follows that the review is to be treated as having upheld the conclusions in the original decision, namely the assessment dated 14 January 2013. In these circumstances, an appeal could be lodged by the Company with the Tribunal at any time between (i) the end of the period of 45 days starting with the date on which HMRC received the letter dated 8 February 2013 and (ii) the date 30 days after the document by HMRC notifying the conclusions of the review. To date, there is no document notifying the Company of the conclusions of the review. It follows that the present appeal was lodged timeously.

22. I understand there are examples where HMRC decide to treat an unrepresented taxpayer's statement of appeal as a request for a review (such as the case of *Markland v HMRC* TC/2011/04113, which the Company brought to my attention). However, I disagree with the Company's contention that the letter dated 8 February 2013 amounted to an acceptance of HMRC's offer of review in this case. Whilst I accept Mr Codona's evidence that those representing the Company at the relevant time did not understand the differences between a request for a review and an appeal to the Tribunal, the letter is unambiguous in stating that the Company "would like to take this opportunity to formally appeal these assessments". I do not consider such a clear statement in this case should be read by the Tribunal as an acceptance of HMRC's offer of review instead.

23. Further, my finding, on the basis of the documentary evidence before me which refers to HMRC being unable to confirm receipt of the Company's letter after conducting a search of their relevant databases, is that it is more likely than not that HMRC did not receive the

Company's letter dated 8 February 2013 when it was originally sent. The deemed receipt effect of section 7 of the Interpretation Act 1978 applies "unless the contrary is proved" and I find the contrary to have been proved, on a balance of probabilities, in this case. The deeming provision therefore does not apply in these circumstances. I also find that section 98 VATA 1994 concerns service of notices to a person or their VAT representative, not to HMRC.

24. HMRC are not obliged to conduct a review in these circumstances where they did not receive notification of acceptance of an offer to review. My finding in this case is that the 30-day time limit to appeal was not affected by the requirement to conduct a review and the appeal was therefore lodged out of time.

RELEVANT FACTORS FOR PERMISSION

25. The factors to be considered in respect of an application for permission to appeal out of time, established in *Martland v HMRC* [2018] UKUT 178 (TCC) ('*Martland*'), are as follows:

> "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."

26. I must also bear in mind the overriding objective of the FTT Rules is to enable the Tribunal to deal with cases fairly and justly.

Length of Delay

27. Rule 20 of the FTT Rules requires an appeal to be brought within the prescribed time limits, in this case within 30 days from the date of the document notifying the decision to which the appeal relates (under Section 83G(1) VATA 1994). The deadline for an appeal against the assessment dated 14 January 2013 was therefore 13 February 2013. The Company made an appeal to the Tribunal on 6 November 2020, which is more than 7 years after the statutory time limit had passed. The parties agree that the length of the delay is serious and significant and it is clear that this delay can only be described as such.

Reasons for the Delay

28. I accept the evidence adduced by the Company on this issue and I find that the reason for the delay is that the Company believed that it had already taken the necessary step to keep its claim on foot by sending their letter dated 8 February 2013 in response to the assessments raised by HMRC's letter dated 14 January 2013.

Overall Circumstances

29. The overall circumstances of this case must be framed within the context of the Rank Group litigation. The Company submitted that it understood that the outcome of the claim would depend on the final result in the Rank case and that once the decision of the Upper Tribunal was released on 15 April 2020, the Company instructed its advisers to progress what the Company thought was a live claim. It was on 22 September 2020 that HMRC first stated

that they could not find the Company's letter dated 8 February 2013 in their files and the present appeal was then lodged on 6 November 2020, following correspondence between the parties as regards the Company's letter dated 8 February 2013.

30. HMRC contended that even if the Company held the belief that an appeal had been lodged, no reasonably prudent taxpayer would expect to receive absolutely no response for over 7 years and that it is not reasonable for the Company to suggest that they considered, at all stages over the 7 years, that an appeal or independent review was ongoing, without receiving a single response from HMRC or having requested information or an update as to progress.

31. In terms of prejudice, the Company submitted that if the appeal is not allowed to proceed, they will miss out on what they consider to be a more or less certain repayment of VAT, suggesting that HMRC has already in effect conceded that the claim is well-founded and that the amount of money at stake is significant for the Company.

32. HMRC contended that, as the appeal is over 7 years late, they were entitled to consider this matter finalised. They argued that the considerable length of the delay is relevant as it leads to HMRC potentially being unfairly prejudiced because some of the decisions relate to tax years that are 17 years in the past and, as a Government body bound by Data Protection law, the vast majority of documentation relating to this period has been destroyed. HMRC argued that the unfair prejudice they will be burdened with as a result of considering this appeal will prevent it being dealt with fairly, thereby breaching Rule 2 of the FTT Rules, that they will have to divert resources to defend an appeal which they were entitled to consider closed and that other taxpayers will be prejudiced as their resources, which would otherwise have been used in respect of those who have made appeals in accordance with statutory time limits, will be diverted to consider the Company's appeal.

DISCUSSION

33. I have concluded that the appeal made by the Company was made out of time. In considering whether to grant permission for that appeal to proceed, the starting point is that permission should not be granted unless I am satisfied on balance that it should be.

34. Following the three-stage approach suggested in *Martland* and having found that the appeal was significantly late and the reason for the delay is that the Company believed that it had already taken the required action, I must now consider all the circumstances of the case to assess the merits of that reason and the prejudice which would be caused to both parties by granting or refusing permission.

35. On the issue of prejudice, I agree with HMRC that they are entitled to expect finality when the decision is not challenged within the statutory period. I recognise the need for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected. I am mindful of the comments of the Court of Appeal in *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121 where it was held that compliance must be expected unless there was "good reason to the contrary".

36. I also take into consideration the significant prejudice the Company will face if permission is refused as their appeal concerns a substantial sum, although I must also consider that serious financial consequences of not being able to appeal do not overcome the difficulties in granting permission where delays are very significant and there is no good reason for them (see *HMRC v Katib* [2019] UKUT 0189 at [60]).

37. The parties made brief comments regarding the merits of the appeal in their submissions. The Company contended that their claim is valid and the appeal will almost certainly lead to a substantial VAT repayment. HMRC, on the other hand, suggested the Company's case is weak because the claim was settled in full in 2011 and the Company was out of time to amend or

make a related claim. I am not satisfied, in the absence of further investigation, that the grounds of appeal are either very strong or very weak and I have declined to embark on a detailed investigation as I do not consider the merits of the substantive appeal to have a significant part to play when it comes to balancing the various factors that have to be considered (in accordance with *Martland* at [46]).

38. Turning now to the merits of the reason for the delay, Judge Sinfield previously considered similar out of time applications in the First-tier Tribunal case of *Ashington and Ellington Social Club and Institute Limited and others v HMRC* [2017] UKFTT 612 (TC), which concerned 3 appeals ('Ashington', 'Ashtead' and 'Darfield') relating to claims for repayment of VAT on takings from gaming machines.

39. The circumstances in Ashtead and Darfield differ from the Company's because they both had existing appeals against the initial refusals of their claims which had never been withdrawn. The reason for their late appeal was their failing to recognise that the protective assessments were new appealable events that required separate appeals. Judge Sinfield commented, at [29], that the letters that formed the protective assessments contained mixed messages that had the potential to confuse, with a reference in the final paragraph to the Appellants' existing appeals which only suggested that they may want to reconsider their position in respect of the appeals, meaning that the Appellants could have reasonably gained the impression that they had an option to continue their existing appeals and those would embrace the later protective assessments. Such circumstances do not apply in the Company's situation. Whilst I accept that the Company reasonably found the content of HMRC's protective assessment letter to be confusing and ambiguous, the letter did not give them the impression that they had an option to continue an existing appeal, instead they recognised the need to send an appeal immediately to protect their position.

40. In respect of Ashington, Judge Sinfield concluded, at [28], that "on balance, the length of the delay, lack of any good reason for it and some prejudice to HMRC mean that Ashington's application to make a late appeal to the FTT should be refused". Although the Company's application bears some similarity to that of Ashington's, the key difference between them is the reason for the delay. The Company's delay was due to its belief that it had already taken the required action and Ashington's delay was because of an administrative error on the part of their representative. Judge Sinfield did not consider the administrative error on the part of Ashington's representative constituted a reasonable excuse for the delay and concluded "that there was no reason, and certainly no good reason, why the notice of appeal was not provided to the FTT within the time limit" (at [26]).

41. On the question of whether the Company's belief that it had already taken the required action amounted to a good reason for the delay in this case, it is helpful, as HMRC suggested, to consider the Upper Tribunal's four-stage guidance on what constitutes a reasonable excuse, as set out in the case of *Perrin v HMRC* [2018] UKUT 156 at [81]; First, establish the facts asserted to give rise to a reasonable excuse. Second, decide which of those facts are proven. Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times by asking the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?". Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time, deciding the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

42. Adopting this approach, I have established the facts regarding the appeal letter sent to HMRC on 8 February 2013 giving rise to the reasonable excuse that the Company believed it took the necessary steps to maintain its claim and I have found those facts to be proven. I consider, when viewed objectively, those proven facts amount to an objectively reasonable excuse for not providing the notice of appeal within the 30-day time limit. I have taken into account the Company's lack of tax or legal expertise and the situation involving the lengthy Rank litigation that the Company found itself at the relevant time. However, the Company's omission, over several years, to seek clarification from HMRC on the appeal process which they found to be confusing, and their omission, again over several years, to seek an acknowledgment from HMRC of their appeal, having had an earlier experience of their correspondence not being received by HMRC, leads me to the conclusion that what the Company omitted to do was not objectively reasonable for this taxpayer in those circumstances. It is my finding that, having not received a response from HMRC within the first few months of sending the letter, the time came when that objectively reasonable excuse ceased and, viewed objectively and taking into account the experience and other relevant attributes of the Company and the situation in which it found itself, the Company did not remedy the failure without unreasonable delay after that time. I therefore do not consider the reason given by the Company for the delay amounts to a good reason for the entire length of the delay.

CONCLUSION

43. Having considered the merits of the reason given for the delay and the prejudice which would be caused to both parties by granting or refusing permission, and having taken into consideration the overriding objective of the FTT Rules, I am not satisfied that, on balance and in the interest of fairness and justice, permission to appeal out of time should be granted in the circumstances of this case.

44. The application for permission to appeal out of time is therefore refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

KIM SUKUL
TRIBUNAL JUDGE

RELEASE DATE: 12 JULY 2021