[2022] UKFTT 00030 (TC)

TC 08382/V

LATE APPEAL – Martland considered – length of delay is serious and significant – no good reason for delay – in all the circumstances, extension of time not justified – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2021/00410

BETWEEN

MR GERARD MCVEIGH **Appellant**

-and-

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

TRIBUNAL: JUDGE NEWSTEAD TAYLOR
SUSAN STOTT

The hearing took place on 13 December 2021. With the consent of the parties, the form of the hearing was video with the parties attending through the Tribunal video platform. A face-to-face hearing was not held because of the ongoing Covid 19 pandemic and social distancing guidance.

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.

Mr Brown of Counsel for the Appellant

Mrs Brown of Counsel for the Respondents

DECISION

INTRODUCTION

1. This is an application ("the Application") by Mr McVeigh ("the Appellant") for permission to appeal out of time against a personal liability notice ("PLN") in the sum of £927,187.94 made pursuant to Paragraph 19 (1), Schedule 24 of the Finance Act 2007 ("the FA 07.")

2. The Commissioners for Her Majesty's Revenue and Customs ("the Respondents") oppose the Application.

THE EVIDENCE

3. We were provided with 2 skeleton arguments, a main hearing bundle of 378 pages and an authorities bundle of 106 pages.

4. The main hearing bundle included the following:

   (1) Pleadings;

   (2) Documents re: GMV Ltd Assessments appeal;

   (3) Other documents;

   (4) 2 x Witness Statements for the Appellant, namely one from Mr McVeigh dated 12.11.21 and one from Mr McLean dated 26.11.21;

   (5) 2 x Witness Statements for the Respondents, namely one from Officer McMahon dated 5.11.21 and one from Officer Stretton dated 5.11.21;

   (6) Officer McMahon's Affidavit dated 23.11.20;

   (7) The Appellant's application to admit further evidence;

   (8) The Respondents' response to the Appellant's application to admit further evidence;

5. Mr McVeigh gave oral evidence, was cross-examined by Mrs Brown and answered questions from the Tribunal. Mr McVeigh's recollection of events was, by his own admission, incomplete. On more than one occasion, he candidly admitted that he could not remember matters. In particular, he could not remember whether or not the box of documents received on 5.06.20 contained separate envelopes. Also, perhaps due to his incomplete recollection of events, we noted a tendency in Mr McVeigh's answers to say what he thought had occurred as opposed to what he positively recollected. Finally, we discerned a slight reluctance to answer some of Mrs Brown's more probing questions.

6. Officer McMahon and Officer Stretton both gave oral evidence, were cross-examined by Mr Brown and answered questions from the Tribunal. We found them both to be straightforward and credible witnesses.

7. Mr McLean's evidence was, with the consent of HMRC, taken out of turn. He was the last witness to give evidence. He gave oral evidence, was cross-examined by Mrs Brown and answered questions from the Tribunal. We found him to be an honest witness who was doing his best to assist the Tribunal.

8. Based on the evidence provided, we make the following findings of fact. Some of the facts were in dispute, and we also make further findings later in our decision. Where a factual matter was in dispute, for the reasons detailed at paragraph 5 above, we prefer the evidence of Mr McLean, Officer McMahon and Officer Stretton to that of the Appellant.

THE FACTS

9. On 9.04.02, GMV Limited ("GMV") was incorporated. GMV's main business activity was that of a car dealership selling new and used cars to the public and to other dealers. The Appellant and his wife (Mrs Bronagh McVeigh) were the sole directors and shareholders of GMV. The Appellant was also GMV's company secretary. The registered office of GMV was 84 Cunninghams Lane, Dungannon, BT71 7BX.

10. On 1.01.06, GMV was registered for VAT and thereafter consistently submitted quarterly VAT repayment returns.

11. In July 2015, Code of Practice 9 ("COP 9") opening letters were issued to the Appellant and Mrs McVeigh as directors of GMV. In May 2016, Officer Catherine McMahon assumed conduct for HMRC's investigation. She retains responsibility for it.

12. On 23.08.19, HMRC issued VAT Assessments to GMV totalling £1,922,608.20 in respect of alleged VAT frauds ("the Company Assessments.") The alleged VAT frauds broadly relate to two different circumstances, namely VAT Fraud 1 and VAT Fraud 2. In brief:

(1) VAT Fraud 1: The Appellant admitted that GMV gave its VAT registered customers in the Republic of Ireland ("ROI") margin scheme invoices for VAT Qualifying cars. This enabled GMV's customers to sell the cars on to their customers with VAT only charged on the profit margin and not on the full sale price. This resulted in a VAT loss to the ROI tax authorities. The assessments in relation to VAT Fraud 1 total £106,216.69.

(2) VAT Fraud 2: This involves 523 cars all of which had VAT Qualifying Status when purchased by GMV. The Respondents allege that GMV, in a variety of ways, mistreated VAT Qualifying Cars as Margin Scheme cars and made false claims for input VAT as a result of GMV paying VAT only on the profit element and not the full sale price. The assessments in relation to VAT Fraud 2 total £1,816,391.53.

13. On 17.09.19, the Appellant, who was aware that there was a 30-day time limit to request a review of or appeal the Company Assessments, wrote, on behalf of GMV, to HMRC, Fraud Investigation Service, BX9 1LL formally appealing against part of the Company Assessments. In this letter, the Appellant confirmed in respect of VAT Fraud 1 that *"On your letter of 23 August Page 4 last point the errors were identified and agreed and assessments relating to the same are accepted."* The Appellant provided this letter to his agent to send. The letter was not sent within the 30-day time limit which annoyed the Appellant. In fact, Officer McMahon had not seen this letter before its inclusion in the Appellant's witness statement for this appeal.

14. On 18.09.19, Officer McMahon received a letter from J M Hughes & Co, being the Appellant's agent. This letter had some of the same paragraphs as the letter dated 17.09.19, but was not identical. The 18.09.19 letter was unclear as to whether a review or an appeal was being requested. Officer McMahon wrote to JM Hughes & Co seeking clarification.

15. On 24.10.19, J M Hughes & Co emailed the Respondent requesting an independent review by another member of the Respondents and requesting copies of meeting notes. Further, JM Hughes & Co forwarded a letter containing an explanation and further information for consideration. For the avoidance of doubt, this forwarded letter, whilst possibly an abbreviated version of the letter dated 17.09.19, was not the letter dated 17.09.19.

16. On 14.11.19, Officer McMahon, having received advice from the Appeals and Review Team, wrote to GMV confirming that:

(1) She had reviewed the information and supporting documents provided, but concluded that there was nothing that altered her decision.

(2) She would, when she was able to provide all relevant information that GMV wished to submit, refer GMV's letter and accompanying documents on to the Appeals and Review Team for an independent HMRC officer to review the papers.

(3) The deadline to request an internal review would be extended to 29.11.19. Officer McMahon notified JM Hughes & Co of the expiry of the deadline. JM Hughes & Co advised that GMV had entered administration and, accordingly, GMV had gone and there was no appeal.

(4) Officer McMahon confirmed that she was waiting on advice from the VAT Policy Team regarding release of the meeting notes. Ultimately, these were not released. The principal reasons for this were, first, that on administration, standing passed from the Appellant to the Administrator and, second, it is the Respondents' policy not to release such documentation until an appeal is issued.

17. On 22.11.19, GMV entered administration.

18. On 29.11.19, Officer McMahon received a letter from the Administrator requesting 14 days to consider an appeal against the assessments.

19. On 5.12.19, Officer McMahon saw a letter from the Administrator detailing the causes of GMV's insolvency. The Respondent's Insolvency Team responded to this letter.

20. On 13.12.19, the Respondents received a telephone call and subsequently a letter from the Administrator requesting an extension of time to seek the professional opinion of a firm of accountants. The Respondents granted a final extension of time until 10.1.20. The Administrator did not request a review or seek to appeal. Therefore, JM Hughes & Co's letter dated 24.10.19 was not passed on to the Appeals and Review Team.

21. On 4.06.20, the Respondents:

(1) Issued a penalty on GMV ("the Company Penalty") and the PLN. The Company Penalty was calculated at £927,187.94 and 100% of this penalty was attributed to the Appellant via the PLN.

(2) Obtained, without notice, a freezing injunction over the Appellant's assets to secure the sum assessed under the PLN ("The FI Application.")

(3) The Application Bundle for the FI Application contained an affidavit with supporting exhibits from Officer McMahon. At pages 80 and 81 of the Application Bundle there was an undated draft of the PLN in the sum of £926,795.73 with a deadline for a review/appeal of 15.01.20 ("the Draft PLN.") The difference in amount between the draft PLN (£926,795.73) and the final PLN (£927,187.94) was noticed and corrected by Officer McMahon prior to the hearing of the FI Application. However, the draft inserted in the Application Bundle was the original containing the erroneous amount of £926,795.73.

(4) Following the application for the freezing injunction, Officer McMahon dated and signed both the Company Penalty and the PLN in the sum of £927,187.94. Also, as the 30-day deadline for a review or appeal fell on Saturday 4.07.20, the date for review/ appeal was extended to Monday 6.07.20, as specified in the PLN. She then placed the Company Penalty in an envelope along with a covering letter addressed to the Appellant stating *"Please see enclosed correspondence issued to GMV Ltd c/o the Administrator Orla Wallace."* The Company Penalty was sent by email and post to the Administrator. Also, she placed the PLN in a separate envelope addressed to the Appellant. For the avoidance of doubt, no covering letter was supplied along with the PLN.

22. On 5.06.20:

(1) At approximately 10.00am, Officer Stretton received verbal authorisation to serve paperwork in respect of the FI Application on the Appellant at his residential address.

(2) At approximately 10.30am, Officer McMahon drove to Belfast city centre to collect 2 copies of the approximately 300-page Application Bundle, each in a lever arch file, and the Freezing Injunction Order from the Crown Solicitor. She then drove onwards to Craigavon to meet Officer Stretton who was going to serve the documents on the Appellant by hand.

(3) At approximately 12.00 noon, Officer McMahon and Officer Stretton met and went through the documents to ensure they were accurate and in order. Officer McMahon handed over to Officer Stretton (i) the signed and dated PLN in an envelope address to the Appellant, (ii) the signed and dated Company Penalty along with a covering letter addressed to the Appellant in a separate envelope, (iii) the Freezing Injunction Order and (iv) two copies of the Application Bundle in lever arch files.

(4) Officer Stretton then drove home and deposited the documents detailed paragraph 22 (3) above in her home office.

(5) At approximately 15.00, Officer Stretton re-checked the documents and placed them into a box for transportation. She then drove to the Appellant's residential address.

(6) At approximately 15.30, Officer Stretton arrived at the Appellant's residential address. On arrival, the gate was closed and Officer Stretton rang the bell. The Appellant approached the gate and Officer Stretton identified herself, explained that she was from HMRC and that she had some documents for the Appellant. However, on checking her vehicle she realised that she had not put the box in the car. She explained this to the Appellant and advised that she would return with the box of documents. The Appellant advised that he would speak to his accountant.

(7) Officer Stretton drove home, collected the box of documents and, at approximately 16.00, returned to the Appellant's address. Again, she rang the bell at the gate. The Appellant approached. Officer Stretton placed the box of documents on the garden wall adjacent to the gate. She advised the Appellant that the box contained some important documents, namely assessments and court order papers for himself and Mrs McVeigh. She told him that he needed to read the documents therein and alert Mrs McVeigh. She did not say anything specifically about the PLN.

(8) The Appellant picked up the box of documents. He received all of the documents detailed at paragraph (3) above. Specifically, the Appellant received the PLN dated 4.06.20 in the sum of £927,187.94 with a deadline for review / appeal of 6.07.20. In his evidence, the Appellant stated that he thought he saw the Draft PLN and not the PLN. We do not accept that this is correct. We note that the Appellant did not have a positive recollection of seeing the Draft PLN as opposed to the PLN, albeit in closing

submissions, having taken instructions, it was submitted that the Appellant saw the Draft PLN and only saw the PLN recently. He simply thought that this was the document he had seen. We consider, on the balance of probabilities, that the Appellant is mistaken and that he opened the envelope containing the PLN dated 4.06.20 in the sum of £927,187.94 with a deadline for review / appeal of 6.7.20 and read this. We have reached this finding because we consider it inherently more likely that the Appellant would have opened and read the PLN in the separate envelope than that he would have found and considered the Draft PLN at pages 80-81 of the Application Bundle.

(9) Further or alternatively, if, in fact, the Appellant did see the Draft PLN and not the PLN then he took no steps to query the deadline for review/appeal of 15.1.20. The Appellant knew or ought to have known that the date was a typo as at 5.6.20, that deadline had already expired. However, the Appellant took no steps to query the date with the Respondents or any other party.

(10) At approximately 16.15, Officer Stretton left the Appellant's address.

(11) At approximately 16.30, the Appellant telephoned Mr Howard McLean, a solicitor, and the Administrator and asked them both to come to his residential address that day, which they did. Mr McLean was instructed by the Appellant in relation to the Freezing Injunction proceedings and, later, in relation to the defence of a High Court Writ issued on 9.6.20. Mr McLean was not instructed by the Appellant in relation to any VAT matters, which would have been outside Mr McLean's area of expertise. He did not look into the reasons for the FI Application in any detail considering these to be background. Mr McLean's impression was that all VAT matters were being dealt with by the Administrator, albeit this cannot be correct in respect of matters personal to Mr McVeigh as the Administrator's remit relates solely to GMV.

(12) A 10-15 minute discussion took place between the Appellant, Mrs McVeigh, Mr McLean and the Administrator in the kitchen at the Appellant's residential address. The documents were spread out across the work tops. Mr McLean's sole focus during this discussion was on the Freezing Injunction. He did not discuss the content of the Application Bundles. Specifically, Mr McLean did not identify during this discussion the undated PLN at pp.80-81 of the Application Bundle. The Appellant's evidence was that Mr McLean took away all of the documents that had been delivered by Officer Stretton. However, Mr McLean's evidence was that he took only the correspondence from the Crown Prosecution Office and both Application Bundles. Specifically, he did not take the PLN which remained with the Appellant. On this point we prefer the evidence of Mr McLean. He is, and was at the time, a solicitor acting in his professional capacity. He was instructed solely in relation to the FI Application. He would have known which documents he required and which he did not.

23. Throughout the period 5.6.20 to 11.12.20, Mr McLean was instructed by the Appellant in respect of the FI Application and the Writ. In addition, the Appellant instructed a Mr Dunlop QC in respect of the FI Application and the Writ. At an unspecified date in this period, Mr McLean became aware of the undated PLN at pp.80-81 of the Application Bundle and raised it with the Appellant. During this period, the Appellant and his representatives engaged with HMRC in respect of the Freezing Injunction Order and the Writ.

24. The Administrator's Progress Report to 21.05.20, is dated 18.06.20, and states:

"2.15... Prior to my appointment as administrator I understand that Mr McVeigh took advice from Baker Tilly Mooney Moore in relation to assessments raised by HMRC against the company. Mr McVeigh subsequently commenced the process of challenging assessments raised by HMRC against GMV Limited. The initial step was to seek another member of HMRC staff

to consider the assessments raised. Although, this initial process had not been completed during the review period after the close of business on Friday, 5 June 2020 I received further assessments from HMRC and these were subsequently received by post on Tuesday, 9 June 2020. Under the provisions of the Finance Act 2007 HMRC have powers to hold directors of companies personally liable in the event of liabilities falling due to HMRC I have been advised that Mr McVeigh is seeking his own legal advice in relation to the further assessments issued by HMRC and I have written to both Mr McVeigh and his solicitors seeking their comments on the further assessments raised and await their response...

2.17 Upon receipt of Mr McVeigh's comments in relation to HMRC's assessments I will seek independent advice on the merits of further appealing the assessments raised against [GMV] and to seek to recover the VAT refunds due to [GMV.] For the purposes of my Administrator's proposals I had estimated that no VAT refunds will be recoverable and that HMRC claims for approximately £2m will be admitted for dividend purposes and at this time, pending further information being received, I have not amended the estimate."

25. On 6.07.20, the extended 30-day deadline for a review / appeal of the PLN expired without the Appellant having request a review or issued an appeal.

26. On 19.11.20, GMV moved from administration into liquidation. In the Administrator's Final Report, to 19.11.20 it is stated that:

"2.7 ... Prior to my appointment the company sought advice from a Baker Tilly Mooney Moore in relation to the assessments raised by HMRC and I am advised they assisted Mr McVeigh in drafting a letter to HMRC setting out the grounds he objected to the assessments raised.

2.8 Mr McVeigh is very passionate regarding his belief that he has done nothing wrong which have resulted in the assessments being raised by HMRC against the company. However, I have obtained advice from specialist counsel in London which has indicated that there is little likelihood of successfully challenging the assessments. These advices were provided to Mr McVeigh to consider, take his own advice on and provide me with a response.

2.9 In the absence of Mr McVeigh providing me with an alternative professional advice challenging that which I had obtained I consider that I have little choice but to accept that HMRC represents the majority in value of the company's creditors."

27. On 11.12.20, the Appellant requested a review. In their skeleton argument, the Respondents contend that this was a review of the PLN. Upon reading this letter, we consider that, in fact, the Appellant was seeking to request a review of the PLN and to continue the review of the Company Assessments. In any event, this request was 189 days after notification of the PLN on 5.06.20 and 158 days after expiry of the extended 30-day deadline on 6.07.20. The Respondents advised the Appellant that he was out of time to request a review and should make an out of time application to the First-tier Tribunal (Tax Chamber) ("FTT.")

28. On 22.12.20, the Appellant attempted to appeal against the Company Assessments. On 18.01.21, the appeal was rejected because the Appellant had failed to attach a copy of the decision. Ultimately, the Appellant withdrew this appeal because, as a result of GMV's insolvency, he lacked standing to appeal the Company Assessments.

29. On 8.02.21, the Appellant lodged his appeal against the PLN. To the extent that this appeal seeks to challenge either the Company Assessments and/or the Company Penalty it is conceded by the Appellant that he does not have standing to do so. Accordingly, the appeal solely relates to the PLN.

THE APPELLANT'S CASE

30. The Appellant accepts that his application for permission to appeal out of time engages the principles in **Martland v HMRC [2018] UKUT 178 (TCC)**. In this regard, the Appellant submits that for the following reasons it is in the interest of justice to grant permission:

(1) As to the length of the delay, this was approximately 5 months; being 158 days from 6.07.20 to 11.12.20 when he requested a review of the PLN.

(2) As to the reasons for the default, the Appellant relies on the fact that that the Draft PLN was undated and stated that the date for a review / appeal was 15.01.20. He believed that this date was a typographical error for 15.01.21. Further, the Appellant assumed that no separate process was required under the Value Added Tax Act 1994 to challenge the PLN for the following reasons:

(a) The Appellant had requested a review of the Company Assessments and he considered the request remained extant.

(b) GMV had entered administration.

(c) The FI Application related to the amount of the PLN.

(d) The documents relating to the FI Application had been delivered together with the PLN.

(3) As to all the circumstances, the Appellant considers that the Draft PLN was incorrect and misleading, there was an extant review of the Company Assessments alternatively he was unaware that the review had concluded, there were simultaneous High Court proceedings for the recovery of the penalty amount and those High Court documents were delivered at the same time as the PLN. Further, as to the merits of the underlying appeal, the Appellant contends that in the absence of any evidence of fraud the burden of proof is on the Respondents.

THE RESPONDENTS' CASE

31. Similarly, the Respondents accept that this application for permission to appeal out of time engages the principles in **Martland v HMRC [2018] UKUT 178 (TCC)**. In this regard, the Respondents submit that for the following reasons it is not in the interest of justice to grant permission:

(1) As to delay, the length of delay is 217 days, from 6.07.20, being the extended deadline for review / appeal, until 08.02.21, being the date, the Appellant lodged his notice of appeal. In accordance with **Romasave (Property Services) Limited [2015] UKUT 254 20 (TCC)** the Respondents contend that this delay is both serious and significant.

(2) As to the reasons for the default, the Respondents submit that there is/are no good reason(s). Once GMV entered administration the Appellant had no standing in relation to the company and the Respondents were no longer entitled to communicate with him. As to the Company Assessments, whether or not to appeal these was a matter for the Administrator who decided not to do so. In any event, the procedures referable to the Company Assessments and the PLN were clearly separate. The PLN was not misleading.

The Appellant decided not to engage with the Respondents in respect of the PLN until 11.12.20. As the Appellant received the PLN on 5.06.20, there was no confusion as to the deadline for a review/appeal of the PLN, being 6.07.20. Further and for the avoidance of doubt, the Appellant's purported reliance on an assumed deadline of 15.01.21 without taking any steps to verify that date is unreasonable.

(3) As to all the circumstances of the case, the Respondents emphasise the importance of statutory time limits, the finality of litigation and the prejudice caused to the Respondents if the matter is re-opened. The Respondents also note that the fact that the PLN is for a significant sum is not a relevant circumstance when considering the balance of prejudice, **The Commissioners for Her Majesty's Revenue & Customs v Muhammed Hafeez Katib [2019] UKUT 0189**. Finally, the Respondents contend that the merits of the underlying appeal are very weak.

THE LAW

32. S. 83A of the Value Added Tax Act 1994 ("VATA") states:

*"**Offer of review***

(1)HMRC must offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision.

(2)The offer of the review must be made by notice given to P at the same time as the decision is notified to P.

(3)This section does not apply to the notification of the conclusions of a review."

33. S. 83B of VATA states:

"Right to require review

(1) Any person (other than P) who has the right of appeal under section 83 against a decision may require HMRC to review that decision if that person has not appealed to the tribunal under section 83G.

(2)A notification that such a person requires a review must be made within 30 days of that person becoming aware of the decision."

34. S.83 C of VATA states:

*"**Review by HMRC***

(1) HMRC must review a decision if—

(a)they have offered a review of the decision under section 83A, and

(b)P notifies HMRC accepting the offer within 30 days from the date of the document containing the notification of the offer.

(2) But P may not notify acceptance of the offer if P has already appealed to the tribunal under section 83G.

(3) HMRC must review a decision if a person other than P notifies them under section 83B.

(4) HMRC shall not review a decision if P, or another person, has appealed to the tribunal under section 83G in respect of the decision."

35. S. 83D of VATA states:

*"**Extensions of time***

(1) If under section 83A HMRC have offered P a review of a decision, HMRC may within the relevant period notify P that the relevant period is extended.

(2) If under section 83B another person may require HMRC to review a matter, HMRC may within the relevant period notify the other person that the relevant period is extended.

(3) If notice is given the relevant period is extended to the end of 30 days from—

(a)the date of the notice, or
(b)any other date set out in the notice or a further notice.

(4) In this section "relevant period" means

(a) the period of 30 days referred to in—

(i)section 83C(1)(b) (in a case falling within subsection (1)), or
(ii)section 83B (2) (in a case falling within subsection (2)), or

(b)if notice has been given under subsection (1) or (2), that period as extended (or as most recently extended) in accordance with subsection (3)."

36. S.83E of VATA states:

*"**83E Review out of time***

(1) This section applies if—

(a) HMRC have offered a review of a decision under section 83A and P does not accept the offer within the time allowed under section 83C(1)(b) or 83D (3); or

(b) a person who requires a review under section 83B does not notify HMRC within the time allowed under that section or section 83D (3).

(2) HMRC must review the decision under section 83C if—

(a) after the time allowed, P, or the other person, notifies HMRC in writing requesting a review out of time,

(b) HMRC are satisfied that P, or the other person, had a reasonable excuse for not accepting the offer or requiring review within the time allowed, and

(c) HMRC are satisfied that P, or the other person, made the request without unreasonable delay after the excuse had ceased to apply.

(3) HMRC shall not review a decision if P, or another person, has appealed to the tribunal under section 83G in respect of the decision."

37. S.83F (6 & 8) of VATA state:

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

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

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

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

38. S.83 G of VATA states:

*"**Bringing of appeals***

(1) An appeal under section 83 is to be made to the tribunal before—

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

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

(ii)in a case where a person other than P is the appellant, the date that person becomes aware of the decision, or

(b)if later, the end of the relevant period (within the meaning of section 83D).

(2) But that is subject to subsections (3) to (5).

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

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

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

(4) In a case where HMRC are requested to undertake a review in accordance with section 83E—

(a)an appeal may not be made—

(i)unless HMRC have notified P, or the other person, as to whether or not a review will be undertaken, and

(ii)if HMRC have notified P, or the other person, that a review will be undertaken, until the conclusion date;

(b)any appeal where paragraph (a)(ii) applies is to be made within the period of 30 days beginning with the conclusion date;

(c)if HMRC have notified P, or the other person, that a review will not be undertaken, an appeal may be made only if the tribunal gives permission to do so.]

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

(6) An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so.

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

39. Further, Rule 20 (4) of the Tribunal Rules states that:

"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."

40. In **Martland v HMRC [2018] UKUT 178 (TCC),** the Upper Tribunal held at paragraph 44 that when considering applications for permission to appeal out of time the Tribunal can follow the three-stage process established in **Denton and Ors v TH White Limited and Ors [2014] EWCA Civ 90**:

"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.

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."

41. In **Romasave (Property Services) Limited [2015] UKUT 254 20 (TCC)** the Upper Tribunal observed that:

"In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

42. In **The Commissioners for Her Majesty's Revenue & Customs v Muhammed Hafeez Katib [2019] UKUT 0189 @ 60** the Upper Tribunal stated that:

" *... Turning to other factors relevant to the 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."

DISCUSSION & CONCLUSIONS:

43. The first stage of the **Denton** process is to establish the length of the delay which involves identifying the breach. Thereafter, we are required to assess the seriousness and significance of that breach. The breach in question is the Appellant's failure to request a review or seek to appeal the PLN by 6.07.20. The Appellant requested a review of the PLN on 11.12.20, being 158 days after the 6.07.20 deadline. The Respondents informed the Appellant that he was out of time to request a review and should make an out of time application to the FTT. The Appellant lodged his appeal against the PLN on 8.02.21, being 217 days after the 6.07.20 deadline. We consider that the length of the delay is serious and significant. In reaching this consideration, we have reminded ourselves of the Upper Tribunal's observation in **Romasave** that "*... a delay of more than three months cannot be described as anything but serious and significant."*

44. The second stage of the **Denton** process requires us to establish and evaluate the reason or reasons why the default occurred. The reasons for the default relied on by the Appellant are summarised at paragraph 30 (2) above. We do not think that these reasons either individually or cumulatively constitute good reasons for the late appeal. In reaching this conclusion we rely on the following principal points:

(1) We have found as a fact that on 5.06.20 the Appellant received, opened and read the PLN. We accept that he also received the Draft PLN, but we do not accept, for the reasons given at paragraph 22 (8) above, that this was the document he read on 5.06.20. Further, we note that Mr McLean took away with him both copies of the Application Bundle containing the Draft PLN. Accordingly, the Appellant was left only with the PLN. He was not left with a copy of the Draft PLN. Therefore, as at 5.06.20 he knew or ought to have known that the extended deadline for review/appeal was 6.07.20. In the circumstances, we do not accept the Appellant's purported reliance on the Draft PLN and the deadline for review / appeal of 15.01.20. Further or alternatively, if, which we do not accept, we are wrong and on 5.06.20 the Appellant read the Draft PLN specifying a deadline for review / appeal of 15.01.20 then we consider his assumption that the date was a typographical error for 15.01.21 to be unreasonable in the absence of any steps to verify his assumption. This is particularly so as the Appellant knew that the deadline for a review/appeal of the Company Assessments was 30-days and, in fact, he had been unhappy that his then agent had missed it. For the avoidance of doubt, this is not to say that because the Appellant knew that the deadline for appealing the Company Assessments was 30-days that he knew the same deadline applied to a request for a review /appeal of the PLN. Instead, it is our view that this should have alerted him to the improbability of the deadline for review / appeal of the PLN being 15.1.21 and led him to make enquiries.

(2) We accept that the Appellant requested a review of the Company Assessments. However, on 14.11.19 Officer McMahon wrote to GMV upholding her decision, advising that she would refer GMV's letter on to the Appeals and Review Team for review when she was able to provide all relevant information that GMV wished to submit and, consequently, the deadline would be extended to 29.11.19. The Appellant, who as director of GMV would have received this letter, was therefore fully aware of the position in respect of the requested review. Thereafter, GMV entered administration and the Respondents were required to communicate with the Administrator and not the Appellant. The Administrator requested and received extensions of time to consider the position, but, after obtaining specialist advice, decided not to challenge the Company Assessments. It is clear that the Administrator communicated with the Appellant on the issue of challenging the Company Assessments. In the circumstances, the Appellant knew the Administrator's position in respect of the request to review / appeal the Company Assessments. Therefore, the Appellant knew or ought to have known that no request for a review was extant.

(3) We accept that the FI Application, the PLN and the Company Assessments are to some extent interrelated. Specifically, that the FI Application seeks to secure the amount under the PLN which has been calculated by reference to the Company Assessments. We also accept that the box delivered to the Appellant on 5.06.20 contained the PLN and documents relating to the FI Application, but no covering letter clearly setting out the contents of the box. Whilst the Appellant, via Mr McLean and Mr Dunlop QC, took a number of steps in relation to the FI Application none of these related directly to the PLN. It was not until 11.12.20 that the Appellant took any steps in relation to the PLN. We consider that the Appellant knew or ought to have known that the FI Application was a separate process to the PLN which was itself a separate process to the Company Assessments. In reaching this conclusion, we note Mr McLean's clear evidence that he, and presumably Mr Dunlop QC, was only instructed in relation to the FI Application. Certainly, we have not seen any retainer or equivalent to show that either Mr McLean and/or Mr Dunlop QC were instructed in respect of the PLN. In fact, Mr McLean's evidence was that he was not a tax specialist and, by inference, that he would not have taken on such instructions. He understood that the VAT matters were being dealt with by the Administrator, on whom the Appellant cannot seek to rely as she was acting for GMV not him. Therefore, there is no reasonable basis on which the Appellant could believe that Mr McLean and/or Mr Dunlop QC were dealing with the PLN. At its highest, this appears to have been the Appellant's assumption which he took no steps to verify despite being aware of the extended deadline of 6.07.20.

(4) At paragraph 22 (a-c) to 23 of the Appellant's skeleton argument, the Appellant argued that the Draft PLN was misleading because it provided three options, (i) to provide further information, (ii) to seek a review and (iii) to appeal to the FTT, and infers that if a tax payer chooses the first there will be another opportunity to seek a review. This was not a point that was pressed either in cross-examination or in closing submission, but nor was it formally withdrawn. For the avoidance of doubt, we note our view that this point is academic as the Appellant did not exercise the first option. Further, the inference alleged by the Appellant is unsupported by the wording of the PLN which simply states *"If you disagree with my decision, you can send me any new information relating to the matter and I will look at it."* It says nothing about a further opportunity to review / appeal the PLN.

45. The third stage of the **Denton** process requires us to consider all the circumstances of the case. This involves a balancing exercise which takes into consideration the merits of the reasons

for the delay, the prejudice caused to both parties by granting or refusing permission, the importance of complying with statutory time limits and the need for finality of litigation. In addition, we can have regard to the strengths or weaknesses of the Appellant's case as this goes to the question of prejudice. However, we are not required to conduct an in-depth analysis of the underlying merits.

46. As to all the circumstances of the case, the delay is serious and significant and there is no good reason for it for the reasons detailed at paragraphs 44 (1 – 4) above. In respect of the prejudice to both parties, if permission is given then the Appellant will be able to proceed with his appeal and the Respondents will be required to reopen matters they considered closed which would impact the finality of litigation. If permission is refused, this will mean that the Appellant will be unable to proceed with his appeal, but it will reinforce the importance of complying with statutory time limits and the finality of litigation. This is not a case where the merits of the Appellant's appeal are so clear cut that it would be appropriate to factor in those merits when deciding whether to extend time. We have anxiously considered the value of the penalty, being £927,187.94. We heard no evidence as to the financial impact or otherwise on the Appellant if permission to appeal is refused. It is not for us to speculate. In any event, we note that in **Katib** the serious financial consequences on Mr Katib of refusing permission to appeal were not sufficient to outweigh the serious and significant delay for which there was no good reason. Accordingly, we do not consider that all the circumstances of the case, when considered both individually and cumulatively, outweigh the serious and significant delay for which there was no good reason.

47. We have conducted the required balancing exercise taking into consideration all of these reasons, we have reminded ourselves that permission should not be granted unless we are satisfied on balance that it should be. We have concluded that permission should not be granted and, accordingly, the Appellant's application is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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.

JENNIFER NEWSTEAD TAYLOR
TRIBUNAL JUDGE

Release date: 24 JANUARY 2022