Neutral Citation: [2022] UKFTT 228 (TC)

Case Number: TC08549

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/04068

INCOME TAX – two issues in dispute – one issue already settled by agreement – TMA s 54 therefore applied – that part of appeal struck out – whether HMRC had issued fresh decisions on the second issue – no – whether to give permission to notify late appeal – no – appeal on second issue deemed determined under TMA s 54

Heard on: 13/7/2022
Judgment date: 27 July 2022

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

IRAQUE MIAH

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Paul Rippon, of The Independent Tax and Forensic Services LLP

For the Respondents: Ms Helen Davies, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. At the heart of this decision are two applications:

(1) one by HMRC, to strike out Mr Miah's appeal on the basis that the issues had all been settled by agreement under s 54 of the Taxes Management Act 1970 ("TMA"); and

(2) one by Mr Miah, made on his behalf by The Independent Tax and Forensic Services LLP ("Independent Tax"), to notify his appeal late.

2. That apparently simple position was complicated by five confusing documents issued by HMRC in October 2020 ("the October Documents"), some eight months after a statutory review decision. Mr Miah's position was that the October Documents constituted new appealable decisions. As explained below, I decided that this was not the position. Instead, the October Documents simply recorded the outcome of the earlier statutory review.

3. The applications related to two substantive matters: rental profits and the use of a company car with fuel (abbreviated in this decision to "car benefit"). I decided that:

(1) the rental issue had been expressly settled by agreement between the parties, so that TMA s 54 applied. The Tribunal therefore had no jurisdiction in relation to that dispute and that part of the appeal is struck out under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"); and

(2) HMRC had issued a statutory review decision on the car benefit issue, but Mr Miah had not notified his appeal against that decision within the statutory 30 day time limit. Having applied the principles set out by the Upper Tribunal ("UT") in *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*") and *Katib v HMRC* [2019] UKUT 189 (TCC) ("*Katib*"), I refused permission to notify the appeal late. As a result, TMA s 49F provides that this issue too is deemed to have been settled by agreement under TMA s 54.

4. It follows that all the issues in dispute are already settled and none remains to be decided by the Tribunal.

WITNESS EVIDENCE AND THE POSTPONEMENT APPLICATION

5. Two procedural issues were decided before the hearing. The first concerned the witness evidence of Ms Jesminara Rahman of Tax Resolute Ltd ("Tax Resolute"), Mr Miah's accountant; the second was a postponement application. These two applications and their outcomes are summarised below because they are relevant to the evidence taken into account in coming to this decision.

Ms Rahman's witness evidence

6. The hearing date of 13 July 2022 was agreed by both parties. On 20 May 2020, after the hearing had been listed, Independent Tax filed and served a witness statement from Ms Rahman. The covering email said:

> "The Witness, Ms Jesminarah Rahman, is unable to attend the video hearing, and will therefore not be in a position to be cross-examined. As such, we would be grateful if the Respondents can advise if there are any points in the Statement that they do not agree with."

7. The email therefore did not include an application for the hearing to be relisted so that Ms Rahman could attend. On 24 May 2022, HMRC wrote to the Tribunal, copying Independent Tax, saying:

> "HMRC has a number of issues with the witness evidence provided, which it considers can only be addressed by way of cross examination. In light of this, HMRC respectfully requests that the witness statement is not given any weight as evidence, as it has not been tested via cross examination. HMRC also notes that no exhibits to the witness statement have been received."

8. That correspondence was referred to me, and on 13 June 2022, the Tribunal clerk wrote to Independent Tax at my direction as follows:

> "[Judge Redston] notes that Ms Rahman is not attending the hearing, and that HMRC do not accept the evidence in her witness statement. Judge Redston agrees with HMRC that the Tribunal is therefore likely to place little or no weight on this witness statement. It is a matter for [Independent Tax] whether they now wish to ensure that Ms Rahman can attend the hearing, which is after all by video."

Postponement application

9. On 28 June 2022, Independent Tax filed an application for the hearing to be postponed. The application opened by saying that:

(1) the person previously identified within Independent Tax to represent Mr Miah was Mr Gary Brothers, but he had changed his role and his availability was therefore "much more unpredictable, and [he] does not have the capacity to prepare for the hearing"; and

(2) the person now identified to represent Mr Miah was a Mr Colin Smith, who had joined Independent Tax after that firm had agreed the hearing date, and he was unavailable.

10. The application then said:

> "Lastly, it was made clear in Tribunal's most recent communication on 13 June 2022 that Tribunal would likely place 'little to no weight' on Ms Rehman's Witness Statement due to her being unable to attend the hearing."

11. The application concluded by saying that if the hearing was not postponed, Mr Miah would "not be able to rely upon a suitably qualified advocate to represent their [sic] case at the hearing"; his response would therefore "most likely be insufficient", and he "would be further prejudiced by being unable to rely on the evidence provided by Ms Rahman".

12. On 30 June 2022 I refused the postponement application. The refusal decision included the following points:

(1) If neither Mr Smith nor Mr Brothers nor any other individual working for Independent Tax were able to rearrange their commitments to attend the hearing, the firm could provide a written submission.

(2) Rule 2(2)(e) of the Tribunal Rules provides that the Tribunal should avoid delay so far as compatible with the proper consideration of the issues. The Tribunal is well-used to adjudicating on cases involving a litigant in person such as Mr Miah, and to taking into account all the relevant evidence, documents and submissions.

(3) A postponement does not only engage the position of the parties, but also other Tribunal users. Each time a hearing is postponed, it means that the time allocation is lost and the new time slot necessarily delays another appellant. Relisting also takes the time of the Tribunal staff, which would otherwise be used for other appellants. In *Chartwell Estate Agents Ltd v Fergies Properties* [2014] EWCA Civ 506 Davis LJ

(with whom Sullivan LJ and Laws LJ agreed) said at [28] that the interests of justice include:

> "the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases by reason of non-compliance."

What happened at the hearing

(4) HMRC provided the Tribunal with a bundle of documents ("the Bundle") which included various communications between the parties, and between the parties and the Tribunal. It also included Ms Rahman's witness statement, but she did not attend the hearing. I asked Mr Rippon why she had not attended, but he did not know. However, he said that Independent Tax had asked for the hearing to be relisted so she could attend, and the Tribunal had refused that application.

13. It is however clear from the previous part of this decision that:

(1) at the time Ms Rahman's witness statement was filed, there was no related application for a postponement;

(2) although the later postponement application refers to her non-attendance, the reason for that application was that Independent Tax considered they were unable to provide a representative to attend the hearing;

(3) at no point was the Tribunal provided with the reason for her non-attendance, or told Ms Rahman could attend if another date was provided; and

(4) no application was made to the Tribunal for the hearing to be postponed so as to allow her to attend.

14. As Ms Rahman had not attended the hearing to be cross-examined on matters which were in dispute, little or no weight can be given to that disputed evidence. I return to this at §80..

Mr Miah

15. Mr Miah also did not attend the hearing or provide a witness statement. I asked Mr Rippon why he was not present, and he said Mr Miah was content to rely on his advisers. As a result, the Tribunal had no evidence about some arguably relevant matters, see for example §89..

THE FACTS

16. I find the facts set out in this section of the decision on the basis of the facts as disclosed by the correspondence in the Bundle.

The issuance of the assessments

17. In 2015, HMRC began an investigation into the tax affairs of Mr Miah, the director and owner of a company called STRL Ltd. On 16 September 2015, Mr Miah agreed in a meeting with HMRC that he had not disclosed a number of properties; he subsequently provided HMRC with a schedule detailing six properties.

18. Apart from rental income, the other focus of HMRC's investigation was an Audi Q7 valued at £52,000, insured for "social domestic and pleasure purposes", with Mr Miah, his wife and brother (who did not work for STRL) being named drivers. The car was owned by STRL, which also paid for all the fuel. It was Mr Miah's case that this was a "pool car".

19. On 29 January 2019 and 12 February 2020, Ms Parker of HMRC issued Mr Miah with the following discovery assessments:

(1) for the tax years 2009-10 through to 2011-12, on the basis that he had failed to include the rental income for each of those years in his tax returns. The total assessed was £27,758.22; and

(2) for the tax years 2012-13 through to 2016-17, on the basis that he had failed to include both the rental income and the car benefit. The total assessed for these years was £79,630.57.

20. Ms Parker also issued Mr Miah with penalties, to which I return at the end of this judgment.

The appeals and the review

21. On 27 February 2019, Ms Rahman appealed all the assessments to HMRC on behalf of Mr Miah. She and Ms Parker entered into discussions, and on 12 November 2019, Ms Parker wrote to Mr Miah saying that "HMRC are required by law to confirm our most recent view of the matter" and that her view remained the same as set out in the discovery assessments made earlier that year. She continued:

> "Should you disagree with my 'view of the matter' position as stated above I would like to invite you to request an independent review of my decision. Please write to me within 30 days from the date of this letter to notify me in writing that you accept my offer of a review. I would also invite you to make any representations to support your position.
>
> Alternatively, you may wish to notify your appeal to the Tribunal. If you do not accept my offer of a review nor notify your appeal to the Tribunal your appeal will be treated as settled by agreement on the basis of my 'view of the matter' above."

22. On 11 December 2019, Ms Rahman replied, setting out the reasons why she disagreed with the car benefit charges, and adding:

> "We have come to an agreement over the rental income as the figures are based on our client's figures. There was a misunderstanding by our client, which led to the dispute, but this has now been clarified."

23. On 12 December 2019, Ms Parker wrote again, asking Ms Rahman to confirm within seven days whether Mr Miah was asking for a statutory review. On 20 December 2019, Ms Rahman replied, saying:

> "Our client in regard to the pool car would like to ask for a review, but in respect of the rental income will agree to HMRC's decision."

24. On 4 February 2020, Ms Parker asked if Mr Miah wanted the statutory review to include the penalties, and on 7 February 2020, Ms Rahman confirmed that the penalties were to be included.

25. On 12 February 2020, Ms Andrea Smith, an HMRC Review Officer, issued a statutory review of the assessments to the extent that they related to the car benefit; her review did not refer to the rental income because HMRC understood that issue to have been settled. She varied the discovery assessments for the years 2012-13 through to 2016-17 because she decided the car benefit had been wrongly calculated. Her review letter set out the new figures: for each of those five years, as the result of which the total due from Mr Miah was £80,616.57 rather than the £79,630.57 in the discovery assessments. Of this, £47,783.60 related to car benefit and the balance related to the rental profits.

26. Under the heading "what happens next", Ms Smith said:

> "If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. If you want to notify the appeal to the tribunal, you must write to HM Courts and Tribunals Service within 30 days of the date of this letter…
>
> If you do not notify your appeal to the tribunal, my conclusions are to be treated as if they were agreements in writing under Section 54(1) Taxes Management Act 1970 for the settlement of the appeal. This is by virtue of Section 49F (2) of that [A]ct."

The October Documents

27. On 23 October 2020, Ms Parker sent Mr Miah a document entitled "Notice of assessment for the year ended 5 April 2013", together with similar documents for 2012-13 through to 2016-17 ("the October Documents").

28. The tax shown in October Documents was identical to the figures Ms Smith had decided in the review decision as being due from Mr Miah The text of each Document said:

> "I am sending this notice of amended assessment to you because we have reached agreement following your appeal against the assessment dated 29 January 2019. Our amended assessment shows the revised tax due. We have made our assessment under Section 29 of the Taxes Management Act 1970. Your appeal is now settled under Section 54(1) Taxes Management Act 1970."

29. Under the heading "what do you do if you disagree", each of the October Documents said "if you have changed your mind and want to withdraw from the agreement settling the appeal, you need to write to us within 30 days of the date of our assessment, telling us why".

THE NOTICE OF APPEAL AND THE APPLICATIONS

30. On 17 November 2020, Ms Rahman filed a Notice of Appeal with the Tribunal on behalf of Mr Miah against "the amended discovery assessments", namely the October Documents. Under "grounds for appeal" she said that Mr Miah believed both the "charges on the company car" and the "disallowed costs for rental income" to be unreasonable.

31. The Tribunal issued an acknowledgement of receipt by return, and Ms Rahman forwarded that receipt to Ms Parker the same day, saying "I have just submitted the tribunal appeal. Please can you put the tax on hold until the tribunal appeal has been dealt with".

32. On 15 December 2020, HMRC made an application for Mr Miah's appeal to be struck out on the basis that all issues had already been settled between the parties under TMA s 54, and the October Documents simply notified Mr Miah of the sums due as a result.

33. In his skeleton argument on behalf of Mr Miah, Mr Rippon submitted that:

(1) the October Documents were new appealable decisions;

(2) the appeals had not been settled under TMA s 54;

(3) the Notice of Appeal was not late because it had been made within 30 days of the date of the October Documents; but

(4) if he was wrong in those submissions, so that Mr Miah was out of time to notify his appeals, the Tribunal should allow him to notify late.

THE PARTIES' PRIMARY SUBMISSIONS

34. The parties' primary submissions related to the status and effect of the October Documents. Where the parties relied on specific legislation, those provisions are set out as part of my analysis, which follows at §43..

Mr Rippon's submissions on behalf of Mr Miah

35. Mr Rippon submitted that the October Documents were themselves assessments: this was clear from the headings, which said they were each a "notice of amended assessment". In addition, the text specifically said those assessments had been made under TMA s 29.

36. Mr Rippon went on to say that since the October Documents were assessments, TMA s 30A(4) gave Mr Miah a right to appeal those assessments within 30 days of the date of issue, namely 23 October 2020; Ms Rahman had complied with that time limit by filing the Notice of Appeal on 17 November 2020 and copying that document to Ms Parker on the same day.

37. He added that the October Documents specifically set out the total amount payable by Mr Miah for each of the years, and those amounts included sums relating to the rental income as well as to the car benefit. The October Documents therefore allowed Mr Miah to make in-time appeals against the whole of those assessments, including the part relating to the rental income.

38. He asked the Tribunal to find that in the October Documents, HMRC were "explicitly, clearly and consciously offering the Appellant the opportunity to resile from the agreement settling the appeal, and provided them with 30 days to do so". In his submission, the wording must have been "a purposeful decision" by Ms Parker "to allow a further dispute to be considered", and that in doing so she was exercising HMRC's powers of care and management. In his submission, Ms Rahman's email to Ms Parker on 17 November 2020 constituted Mr Miah's resilement from any agreement as to the tax due for the relevant years.

Ms Davies's submissions on behalf of HMRC

39. Ms Davies said that the October Documents were not new assessments carrying their own rights of appeal, because:

(1) HMRC had already issued discovery assessments for each of the relevant years under TMA s 29. Those discoveries were that Mr Miah had not disclosed his rental income or his car benefit.

(2) HMRC do not have the power to make a new discovery relating to the self-same issues. This was clear from the Supreme Court's judgment in *Tooth v HMRC* [2021] UKSC 17("*Tooth*") at [64], which reads:

> "Section 29 TMA refers to an assessment being issued after a discovery. Therefore on the words of the legislation HMRC are not able to use section 29 on two separate occasions to raise assessments on the basis of the one discovery."

40. In Ms Davies's submission, by the time the October Documents were issued:

(1) the issue of the rental income had been settled by agreement between the parties on 11 December 2020, as confirmed by Ms Rahman on 20 December 2020. TMA s 54 provides that the "like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation". As a result, Mr Miah was not able to notify to the Tribunal his appeals against the assessments (or part of the assessments) which related to the rental income; and

(2) the issue of the car benefit had been the subject of a statutory review. TMA s 49F(2) provides that the conclusions of such a review "are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question" unless an appeal was notified to the Tribunal within 30 days in accordance

with TMA s 49G. No appeal had not been notified within 30 days of 12 February 2020, and TMA s 54 was therefore deemed to have taken effect.

41. In Ms Davies's submission, the October Documents were simply a notification to Mr Miah that the amendments made by the statutory review had been processed by HMRC.

42. Ms Davies also disagreed with Mr Rippon as to the status of the email sent to Ms Parker by Ms Rahman on 17 November 2020. She said this was not an appeal to HMRC against the "new" decisions, and neither was it a resilement from the s 54 agreement; instead, it was clear from its wording that Ms Rahman had simply asked HMRC to suspend collection because an appeal had been made to the Tribunal.

The Tribunal's view on the primary submissions

43. I first review some of the key statutory provisions and then consider the rental income, the statutory review and the status of the October Documents.

The relevant provisions

44. In January and February 2019, Ms Parker issued discovery assessments under TMA s 29. There was no challenge to the validity of those assessments – for instance, because they were out of time, or because of earlier disclosure in Mr Miah's self-assessment returns.

45. As Ms Davies said, TMA s 30A(4) provides that those assessments could not be altered "except in accordance with the express provisions of the Taxes Acts". An example of such a provision is TMA s 32, which allows HMRC to vacate all or part of an assessment previously made if there has been "double assessment", so that "a person has been assessed to tax more than once for the same cause and for the same chargeable period".

46. TMA s 31(1)(d) provides that a person has a right of appeal against "any assessment to tax which is not a self-assessment" and it was common ground that this included the discovery assessments issued to Mr Miah.

47. TMA s 31A is headed "Appeals: notice of appeal" and includes the following provisions:

> "(1) Notice of an appeal under section 31 of this Act must be given
>
> (a) in writing,
>
> (b) within 30 days after the specified date,
>
> (c) to the relevant officer of the Board.
>
> (2)-(3) …
>
> (4) In relation to an appeal under section 31(1)(d) of this Act…
>
> (a) the specified date is the date on which the notice of assessment was issued, and
>
> (b) the relevant officer of the Board is the officer by whom the notice of assessment was given.

48. There was no dispute that on 27 February 2020, Ms Rahman appealed the discovery assessments to HMRC on behalf of Mr Miah in accordance with TMA s 31(1A).

49. The next relevant provision is TMA s 49A, which is headed "Appeal: HMRC review or determination by tribunal". It reads:

> "(1) This section applies if notice of appeal has been given to HMRC.
>
> (2) In such a case

> (a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),
>
> (b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or
>
> (c) the appellant may notify the appeal to the tribunal (see section 49D).
>
> (3) See sections 49G and 49H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.
>
> (4) This section does not prevent the matter in question from being dealt with in accordance with section 54 (settling appeals by agreement)."

50. That final subsection refers to TMA s 54, which is headed "Settling of appeals by agreement". It begins:

> "(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.
>
> (2) Subsection (1) of this section shall not apply where, within thirty days from the date when the agreement was come to, the appellant gives notice in writing to the inspector or other proper officer of the Crown that he desires to repudiate or resile from the agreement."

51. The "like consequences" referred to in TMA s 54(1) can be found at TMA s 50(10). This provides that "where an appeal is notified to the tribunal, the decision of the tribunal on the appeal is final and conclusive". In other words, once an issue has been settled under TMA s 54, it is treated as if it has already been finally and conclusively decided by the Tribunal, and it is therefore not possible to notify an appeal on that issue to the Tribunal.

The rental income

52. I reject Mr Rippon's submission that the statutory review encompassed the rental income as well as the car benefit. I instead agree with Ms Davies that the rental income was settled by agreement between the parties on 11 December 2020, and that Ms Rahman confirmed this on 20 December 2020, see §23.. It is also clear from the content of the review letter that Ms Smith was only reviewing the car benefit.

53. As a result, TMA s 54 applied, so it is not possible for Mr Miah to notify an appeal to the Tribunal in relation to the rental income. Rule 8(2) of the Tribunal Rules provides that:

> "The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them…"

54. Where TMA s 54 applies, the Tribunal has no jurisdiction to decide the appeal, and I therefore strike out the part of the proceedings which relates to the rental income.

The statutory review

55. Ms Parker notified Mr Miah on 12 November 2019 of her "view of the matter in question", confirming that the position remained as set out in the discovery assessments. On 20 December 2019. Ms Rahman notified Ms Parker that Mr Miah wanted a statutory review of the car benefit issue.

56. TMA s 49B is headed "Appellant requires review by HMRC", and reads:

> "(1) Subsections (2) and (3) apply if the appellant notifies HMRC that the appellant requires HMRC to review the matter in question.
>
> (2) HMRC must, within the relevant period, notify the appellant of HMRC's view of the matter in question.
>
> (3) HMRC must review the matter in question in accordance with section 49E.
>
> (4) …
>
> (5) In this section 'relevant period' means—
>
> (a) the period of 30 days beginning with the day on which HMRC receive the notification from the appellant, or
>
> (b) such longer period as is reasonable."

57. As is clear from the wording of that section, HMRC's "view of the matter" is to be provided *after* the request for a review, not (as in this case) before the request has been made. However, Mr Rippon did not seek to argue that the statutory review was invalid as a result, and I agree. Legislation must be interpreted purposively, and the purpose of this provision is to provide the parties with a clear starting point from which to begin the review. In a case such as this, where discussions about the assessments had continued for almost a year, and where the HMRC officer then crystallised the position by issuing her view of the matter, that statutory purpose had been met.

58. The legislation then sets out at TMA s 49E, the nature of the review which HMRC is to conduct. Subsection (5) provides that "the review may conclude that HMRC's view of the matter in question is to be (a) upheld, (b) varied, or (c) cancelled".

59. TMA s 49F is headed "Effect of conclusions of review", and reads:

> "(1) This section applies if HMRC give notice of the conclusions of a review….
>
> (2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.
>
> (3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.
>
> (4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49G."

60. TMA s 49G provides that if a person wishes to challenge a review decision at the Tribunal, that person must notify the appeal within 30 days of the date of the review decision; a person can only notify his appeal late if the Tribunal gives permission.

61. The effect of the above provisions is that:

(1) HMRC have the power, when making a review decision, to vary HMRC's "view of the matter", see TMA s 49E(5).

(2) This is not, in law, an amendment to the assessments previously made. Instead, the review decision forms the basis for a deemed agreement between the parties under TMA s 54.

(3) However, there is no such deemed agreement if:

(a) the appeal is notified to the Tribunal within the 30 days; or

(b) the Tribunal gives permission for the appeal to be notified late.

62. Mr Miah did not notify an appeal to the Tribunal against the review decision within the 30 days, and his appeals were thus deemed to have been settled under TMA s 54, unless he applied for and received permission to notify the appeals late.

The October Documents

63. At the time the October Documents were issued there had been no application to the Tribunal for permission to notify appeals against the review decisions after the 30 day time limit. The text of those Documents therefore correctly stated that the appeals had been settled under TMA s 54, because they were deemed to have been so settled by TMA s 49F(2). However, the October Documents were incorrect to say that Mr Miah had any right to resile from that settlement, because that right is removed by s 49F(3).

64. I agree with Ms Davies that the October Documents could not, in law, have been new discovery assessments with their own rights of appeal, because:

(1) they relate to exactly the same issues as the original assessments made in January 2019, and it is not possible "on two separate occasions to raise assessments on the basis of the one discovery", see *Tooth* cited earlier;

(2) TMA s 30A(4) provides that assessments can only be amended "in accordance with the express provisions of the Taxes Acts", and there is no such provision operating here;

(3) although Mr Rippon sought to rely on HMRC's care and management powers, those powers do not extend to issuing an assessment. Instead, as Lord Hoffman said in *R (oao Wilkinson*) *v HMRC* [2005] 1 WLR 1718 at [21]:

> "This [care and management] discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of parliamentary time."

65. If the discovery assessments had been new decisions, they would have required Mr Miah to appeal *to HMRC*, see TMA s 31(1A) cited at §47.. Ms Rahman did not do that. She instead filed a Notice of Appeal with the Tribunal, and copied that Notice to HMRC. The Tribunal has no jurisdiction to hear an appeal that has not first been made to HMRC, see *Flash Film Transport Ltd v HMRC* [2019] UKFTT 4 (TC) at [73]-[77], recently confirmed in *Rotaru v HMRC* [2022] UKFTT 00080.

Conclusion on the car benefit

66. It follows from the above analysis that the October Documents did not give Mr Miah a new right to notify his appeals against the parts of the assessments relating to the car benefit within 30 days of their issuance.

67. Instead, he could only prevent the review decision from constituting a deemed agreement under TMA s 54 if he obtained permission from the Tribunal to notify his appeal after the expiry of the 30 day time limit.

68. As set out at §(4), Mr Rippon had submitted that, if he was wrong in his primary submissions as to the nature and effect of the October Documents, so that Mr Miah was out of time to notify his appeals, the Tribunal should allow him to notify his appeals late. I now consider that alternative submission.

PERMISSION TO NOTIFY LATE

69. I first set out the relevant case law and then apply it to the facts of the case in the light of the parties' submissions.

The case law

70. The UT decisions in *Martland* and *Katib* relate to failures to make appeals to HMRC within the relevant time limit, rather than to failures to notify appeals to the Tribunal. However, it was common ground that I should take the same approach when deciding whether to allow Mr Miah to notify his appeal late.

71. In *Martland*, the UT set out Rule 3.9 of the Civil Procedure Rules, which reads:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

72. At [44] the UT set out the following three stage approach by way of guidance to this Tribunal:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason(s) why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to 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, and in doing so 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".

73. The UT also said at [46]:

> "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…It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the

> applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

Application of the law to Mr Miah's case

74. I now consider and apply the three stage approach in *Martland*.

The length of the delay

75. The statutory time limit is 30 days after HMRC issued the review decision, see TMA s 49G. Mr Miah was therefore required to notify his appeal within 30 days of 12 February 2020.

76. The Notice of Appeal filed on 17 November 2020 did not include an application to notify the appeal late; that application was instead made on 14 July 2022, the day before this hearing, by being contained within Mr Rippon's skeleton argument.

77. The reason the application was not included in the Notice of Appeal was because Ms Rahman had misunderstood the October Documents. Ms Davies accepted that the confusing wording of those Documents gave Mr Miah a good reason for the delay as between the Notice of Appeal and the filing of the skeleton argument, and it was common ground that the application should be approached on the basis that the delay was from 12 March 2020 to 17 November 2020, just over eight months.

78. In *Romasave v HMRC* [2015] UKUT 254 (TCC), the UT said at [96] 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."

79. The delay in Mr Miah's case was almost three times longer than the period referred to in *Romasave*. It was clearly serious and significant.

Reasons for Ms Rahman's delay

80. Mr Rippon sought to rely on Ms Rahman's witness evidence as providing the reasons for her delay. This said that:

(1) her father was terminally ill at the end of 2019 and passed away on 22 December 2019;

(2) the pandemic "impacted the case", as Ms Parker was reallocated internally by HMRC and Ms Rahman's offices were "impacted by COVID"; and

(3) during this time, Ms Rahman "suffered from further bereavements".

81. Mr Rippon asked the Tribunal to accept that the above statements were factually correct, and to find that they provided good reasons for the delay.

82. Ms Davies did not dispute that Ms Rahman's father passed away on 22 December 2019, but submitted that:

(1) the illness and death of Ms Rahman's father did not prevent her from communicating with Ms Parker on 11 and 20 December 2019 and again on 7 February 2020, and so those factors did not cause the delay in notifying Mr Miah's appeal;

(2) the coronavirus lockdown was not relevant because it was announced on 23 March 2020, eleven days after the end of the time limit for notification;

(3) Ms Parker's reallocation within HMRC was also irrelevant, because Ms Rahman did not need any input from Ms Parker in order to notify the appeal to the Tribunal, and that reallocation occurred after the end of the 30 day notification period; and

(4) Ms Rahman's references to "further bereavements" were vague and imprecise: there was no information or supporting evidence as to who had passed away, or as to their relationship to Ms Rahman.

83. Mr Rippon responded by saying that although lockdown began after the end of the 30 day period, the pandemic was nevertheless relevant, because had it not occurred, the appeal would have been notified without such a long period of delay.

84. It was not disputed that Ms Rahman's father had passed away on 22 December 2019 following a terminal illness, and I find this to be a fact. However, I agree with Ms Davies that Ms Rahman was nevertheless able to communicate with Ms Parker both before and after her father's death, and I therefore find that she could also have notified the appeal. I also agree that (a) the lockdown arrived too late to provide a reason for the delay; (b) there is no basis on which I could make a finding of fact as to the effect of the unparticularised further bereavements; and (c) there is no reliable evidence as whether, or if so how, he pandemic had "impacted" on the notification of the appeal. It follows that there is no good reason for Ms Rahman's delay in notifying the appeals late.

Reliance on adviser

85. Mr Rippon also submitted that, even if Ms Rahman did not have a good reason for the delay, Mr Miah had reasonably relied on her and her firm, and that reliance was a good reason for *his* delay. Mr Rippon provided a printout from the internet which said that Tax Resolute marketed itself as "HMRC Tax Investigation specialists" and "experts in tax disputes" which could "help keep your company safe from adverse tax enquiries" and would "take care of your tax investigation". It was therefore, he said, reasonable for Mr Miah to trust Ms Rahman and Tax Resolute to deal with all aspects of the case.

86. For her part, Ms Davies relied on *Katib,* where the UT said at [49] (their emphasis):

> "We accept HMRC's general point that, <u>in most cases</u>, when the FTT is considering an application for permission to make a late appeal, failings by a litigant's advisers should be regarded as failings of the litigant."

87. The UT returned to this issue at [54], saying:

> "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."

88. The UT then cited the Court of Appeal's judgment in *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666 ("*Hytec*"). Ward LJ, giving the leading judgment, said at p 1675:

> "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..."

89. I agree with Ms Davies that in accordance with *Katib* and *Hytec* the Tribunal should not normally find that a person's reliance on his adviser provides a good reason for delay. I

considered whether the facts of Mr Miah's case took him outside that normal range, and decided that they did not. That is because:

(1) Mr Miah was sent Ms Smith's statutory review decision. This set out the amounts due for the years 2012-13 through to 2016-17 and included his right to notify the appeal to the Tribunal within 30 days. Mr Miah would thus have been aware of that deadline.

(2) There was no evidence of any communications between Mr Miah and Ms Rahman at any point, for instance, asking what had happened and whether she had notified the appeal.

(3) There was no evidence before the Tribunal as to Mr Miah's position during the nine month period after the statutory review decision.

90. I therefore find that Mr Miah's reliance on Ms Rahman and/or Tax Resolute does not provide him with a good reason for the delay.

All the circumstances

91. The third step in the *Martland* approach is to consider all the circumstances, and then to carry out a balancing exercise. I take into account the following factors:

(1) Significant weight must be placed as a matter of principle on the need for statutory time limits to be respected. This was described as "a matter of particular importance" in *Katib*; the same point is made in *Martland* at [46]. In Mr Miah's case, the delay was over 8 months, and there was no good reason for that delay. This factor weighs heavily against him.

(2) If permission were to be given to notify the appeal late, HMRC would have the time and costs of defending the review decision, when they reasonably believed after some eight months that the appeals had been settled in accordance with its terms.

(3) If permission were not given, this would prejudice Mr Miah, who would have no route to challenge the car benefit assessments, which totalled £47,783.60. However, that is the inevitable outcome whenever an application of this nature is refused.

(4) Mr Rippon's skeleton argument did not refer to the merits of the appeal, but in oral submissions he said that evidence existed to support Mr Miah's position that the Audi was a "pool car". Ms Davies responded by saying that HMRC had already fully considered all the evidence. It is therefore clear that any evidence which might be put forward by Mr Miah would be disputed. In accordance *Martland* cited at §73., the merits are therefore not to be taken into account when assessing the circumstances.

(5) As set out above, the UT in *Katib* found that reliance on advisers was unlikely to amount to a "good reason" for missing the statutory deadlines in the context of the second stage; the UT continued at [56] by saying: "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". However, there is no evidence as to what Mr Miah knew or understood, other than that he had been informed of the notification deadline. I find that reliance on Ms Rahman and/or Tax Resolute does not assist Mr Miah at this third stage, any more than it did at the second stage.

92. In balancing the circumstances, it is clear that the weighting overwhelmingly favours HMRC. I therefore refuse Mr Miah permission to notify his appeal late.

PENALTIES

93. As noted earlier in this decision, Mr Miah had also been charged with penalties for all years for which discovery assessments had been issued, namely 2009-10 through to 2016-17.

94. The Notice of Appeal referred only to the October Documents, each of which included the sentence “I have written to you separately about the penalties that we are charging you for the inaccuracies in your return”. No copy of that other correspondence was attached to the Notice of Appeal or included in the Bundle.

95. Mr Rippon said he understood that suspension had been agreed as between Ms Rahman and HMRC, but had no instructions on that point. For completeness, I record that this decision does not relate to the penalties.

CONCLUSION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. To the extent that Mr Miah sought to appeal against the rental income part of the assessments made on him for the years 2009-10 through to 2016-17, that issue was settled between the parties; the Tribunal had no jurisdiction to decide that issue, and that part of his appeal is thus struck out for want of jurisdiction.

97. To the extent that Mr Miah was seeking to appeal against the car benefit part of the assessments made for 2012-13 to 2016-17, he was out of time to notify his appeal to the Tribunal, and so required permission to do so. For the reasons explained above, permission to notify his appeal late is refused. As a result, the conclusions of the statutory review are deemed to have been agreed between the parties under TMA s 49F(2).

98. 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.

ANNE REDSTON
TRIBUNAL JUDGE

Release date: 27 JULY 2022