Neutral Citation: [2023] UKFTT 414 (TC)

Case Number: TC08815

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/02978

Landfill Tax – application for permission to appeal out of time - section 54G(6) Finance Act 1996 – appeal extremely (in excess of 7 years) late – no reasonable explanation for delay – permission refused

Heard on: 19 December 2022
Judgment date: 10 May 2023

Before

TRIBUNAL JUDGE MARK BALDWIN

Between

CITY PLANT LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondent

Representation:

For the Appellant: Mr Charles Bott KC, of counsel, instructed by Cohen Cramer, Solicitors, Leeds

For the Respondent: Mr James Puzey, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. On 15 October 2020, the Appellant ("City Plant") sought permission to commence a late appeal against an assessment (the "Assessment") to Landfill Tax ("LFT") in the sum of £1,673,701 raised by the Respondents ("HMRC") on 2 October 2012.

2. LFT was introduced in the Finance Act 1996 ("FA 1996"). Part III of FA 1996 sets out the principal features of LFT and provides for its administration, including the raising of assessments and the bringing of appeals against a number of decisions relating to LFT, such as decisions relating to assessments or the amount of an assessment; section 54(1)(d).

3. Section 54G provides that an appeal under section 54 must be brought within 30 days of the date of the document notifying the decision to which the appeal relates or, where HMRC undertake a review, within 30 days of the "conclusion date" (defined in subsection (7) as the date of the document notifying the conclusions of the review). In this case HMRC undertook a review of their decision to raise the Assessment and the "conclusion date" was 4 April 2013. On that basis, City Plant should have brought its appeal by 4 May 2013.

4. Section 54G(6) allows an appeal to be brought after the end of the specified period "if the appeal tribunal gives permission to do so". The only question for me is whether I should give City Plant permission to bring its appeal more than seven years after the expiry of the period set out in section 54G.

WHEN SHOULD THE TRIBUNAL ADMIT A LATE APPEAL?

5. For HMRC, Mr Puzey argued that *William Martland v HMRC*, [2018] UKUT 0178 (TCC), is the leading authority on how the tribunal should respond to applications for permission to appeal tax assessments out of time and is binding authority for the "three stage" approach on such applications. Mr Bott agreed that Mr Puzey had correctly stated the test for considering applications of this kind, although he did not agree with Mr Puzey as to the outcome of applying that approach.

6. *William Martland* was an excise duty case, but the approach adopted by the Upper Tribunal in that case has been followed generally by this tribunal in VAT and other cases. For example, the approach outlined by the Upper Tribunal in *Martland* was adopted by the (differently constituted) Upper Tribunal in *HMRC v Muhammed Hafeez Katib*, [2019] UKUT 189 (TCC), where the Upper Tribunal observed:

> "16. Mr Magee accepted, quite rightly, that the FTT should apply a "strict approach" to compliance with rules (including statutory time limits for bringing appeals) just as the courts do in analogous situations. However, he also rightly emphasised that, even applying a "strict approach", the exercise of judicial discretion must include the possibility of making allowances in exceptional circumstances. …
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> 17. We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion. We accept Mr Magee's point that the FTT referred to both *BPP Holdings* and *McCarthy & Stone* in the Decision. Paragraph 27 (1) of the decision (cited above) shows that the FTT seemed to have the point in mind. However, instead of acknowledging the position, the tribunal went on to distinguish the *BPP Holdings* case on its facts. Differences in fact do not negate the principle, and it is not possible to detect that the tribunal thereafter gave proper weight to it in parts of the decision which followed."

7. *HMRC v Websons (8) Limited*, [2020] UKUT 154 (TCC), concerned an application to bring a late appeal in relation to a review decision of HMRC dated 21 December 2011. The appeal was lodged on 9 August 2018. The issue in that case was the VAT liability of gaming machine takings in the light of the *Rank* litigation. The Upper Tribunal, having observed that it was common ground that the principles to be adopted in deciding whether to admit a late appeal were those set out in *Martland*, went on to comment (at [45]) on the importance of observing statutory time limits, as follows:

> "[45] The need to give particular importance to the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected was emphasised by the Upper Tribunal in *HMRC v Hafeez Katib* [2019] UKUT 189 (TCC) where it found at [17] that the FTT made an error of law in that case "in failing to…give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion"."

8. The statutory language dealing with appealing assessments is very similar both for VAT and LFT and I agree that there is no reason why the approach to late applications in the context of LFT should be any different from the approach in VAT cases, just as the approach in VAT cases is no different from that in excise duty cases.

9. Although Mr Bott agreed that Mr Puzey had correctly stated the test for considering applications of this kind, his "take" on the way the test works included two particular points. First, he said that, even where there is a long delay, there is no requirement for an appellant to show that their case is "exceptional" before permission to appeal out of time will be given. Secondly, he said that "The test confers a broad discretion on the FTT to act in the interests of justice. It suggests a case specific approach that is not unduly technical or restrictive in its approach to the application of the time limit or to other procedural errors that a meritorious Appellant might have made."

10. Mr Bott suggested that the tribunal's approach is, or should be, different from that of the civil courts where issues such as the limitation rules are in point. However, although the Civil Procedure Rules ("CPRs") do not apply to the Tribunals, in *HMRC v McCarthy & Stone (Developments) Limited*, [2014] UKUT 196 (TCC), the Upper Tribunal commented that tribunals should not adopt a different, more relaxed, approach to compliance with rules, directions and orders than the courts which are subject to the CPRs. This approach was endorsed by the Supreme Court in *BPP Holdings Ltd v HMRC*, [2017] UKSC 55.

11. In *York Burton Lane Club and Institute Limited & Ors v HMRC*, [2022] UKFTT 406 (TC), I recently had occasion to review the authorities on the approach the tribunal should take to late applications and the conclusions I drew (set out in paragraph [45] of the decision notice) were as follows:

> "What I draw from these cases is that the approach I should take in deciding whether to give the appellants permission to appeal out of time is the following:
>
> (1) I should first establish the length of the delay. If it was very short then I am unlikely to need to spend much time on the second and third stages. In all cases, all three steps need to be taken, but it can very likely be concluded quite readily that a short delay is unlikely to prejudice anyone and can be excused, despite the general need for time limits to be respected.
>
> (2) Then I should consider the reason (or reasons) why the default occurred. In *Denton* (at [29]) the Master of the Rolls and Vos LJ observed that this step is "particularly important where the breach is

> serious or significant" and (at [30]) "It would be inappropriate to produce an encyclopaedia of good and bad reasons for a failure to comply with rules, practice directions or court orders. Para 41 of *Mitchell* gives some examples, but they are no more than examples."
>
> (3) I can then move on to evaluate "all the circumstances of the case". This will take into account 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. That in turn will include any obvious strength or weakness of the applicant's case. In carrying out this exercise I must give particular weight to the need for litigation to be conducted efficiently and at proportionate cost, and for time limits to be respected. I consider that this is particularly the case given that the time limit we are concerned with is contained in primary legislation, section 83G VATA. But I must also bear in mind that the need to consider "all the circumstances of the case" admits of the possibility of making allowances in exceptional circumstances; it does not follow automatically from there being a serious or significant breach for which there is no good reason that the application will automatically fail.
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> It will be readily apparent that this summary is little more than the "three stage" approach in *Martland* modestly augmented by observations from the other judgments and decisions I have considered."

12. In adopting the *Martland* approach, I note three important points. First, while the fault for failing to bring an appeal in time may in many cases lie at the door of an appellant's professional advisers, that does not justify or excuse any delay. The general rule (to which, of course, there may be exceptions) is that the failings of an adviser are laid at the door of their client. This was made clear by the Upper Tribunal in *Katib* and underlined by the (very recent) Upper Tribunal decision in *Shafique Uddin and Kzitula Limited (in liquidation) v HMRC*, [2023] UKUT 00099 (TCC).

13. Secondly, the third stage of the *Martland* approach involves taking into account any obvious strengths or weaknesses in City Plant's case, but it does not require the tribunal to carry out a detailed analysis of its prospects of success. In *Martland* itself (at [46]) the Upper Tribunal observed:

> "[T]he 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 HMRCs' 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 HMRCs the corresponding opportunity to point out the weakness of the applicant's case."

14. Thirdly, the amount at stake (over £1.6m here) and the consequences of an appellant not being allowed to launch an appeal are not relevant in deciding whether to allow a late appeal. The Upper Tribunal in *Katib* were not swayed by the consequences for Mr Katib of not being able to appeal, observing at [60]:

> "[T]he 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."

THE FACTS

15. A review of City Plant's LFT returns indicated a high proportion of exempt and lower rated waste declared when compared to standard rated waste. A LFT compliance audit of City Plant was opened on 12 April 2012.

16. HMRC determined that disposals described in City Plant's schedule of waste materials as "screening fines" (a fine is a particle produced by a waste treatment process involving an element of mechanical treatment) had been wrongly declared to the lower rate of LFT.

17. Accordingly, on 28 September 2012 HMRC assessed City Plant for unpaid LFT in respect of the accounting periods ending July 2011 to July 2012. The assessment letter notified City Plant of its right to a review and of its appeal rights, and the applicable 30 day deadline.

18. On 8 January 2013 City Plant's representatives (KPMG) requested a review of the decision. It was agreed that enforcement action would be suspended pending the outcome of the review.

19. On 10 and 23 January 2013 City Plant provided further information about the source and composition of the disputed disposals.

20. The review decision, which upheld the Assessment, was notified to City Plant in a letter dated 4 April 2013. Nevertheless, City Plant was invited to provide further documentary evidence to justify the application of the lower rate of LFT to the disputed disposals.

21. On 20 May 2013 a meeting took place between Officer Middleton and Officer Berry of HMRC and Mark Betts, then a director of City Plant, together with Paul O'Neill, then of KPMG. At this meeting, HMRC say, the basis of the Assessment was explained to City Plant together with the further evidence required from them. City Plant say that they emerged from this meeting confident that they had persuaded HMRC of their case, but HMRC say that there was no acceptance by them of City Plant's position in respect of the Assessment, and no agreement to withdraw the Assessment. HMRC however offered to "examine the period again" and consider explanations for the "screening fines" waste being lower rated waste on provision of further evidence.

22. On 12 July 2013 Officer Middleton wrote to City Plant to request a schedule of materials declared to the lower rate of LFT in respect of the accounting periods ended July 2011 to April 2013 together with a description of City Plant's sampling and waste analysis regime.

23. City Plant responded to HMRCs' information request on 30 July 2013.

24. On 6 August 2013 Officer Middleton wrote to City Plant requesting further information not provided with the City Plant's letter of 30 July 2013, in default of which he said he would withdraw the Assessment and "issue a revised assessment for screening fines, based upon the schedule of lower rated materials provided with your letter dated 30 July 2013." The amounts in such an assessment would have been higher than those in the Assessment.

25. On 14 August 2013 City Plant responded to HMRCs' further information request.

26. On 22 August 2013 HMRC issued City Plant with a formal notice to provide information under Paragraph 2 of Schedule 49 to the Finance Act 2009 with a deadline of 19 September 2013. City Plant responded on the same day by return of email, referring HMRC to their letter of 8 January 2013.

27. On 18 August 2014 HMRC wrote to KPMG stating that "there is an assessment on file which remains extant but is not being pursued at this time". KPMG forwarded this to City Plant stating "clearly this is not an acceptable position and we will challenge it accordingly". No such challenge appears to have been made.

28. During 2014 to 2016 a criminal investigation was undertaken by HMRC in relation to parties including City Plant and Transwaste Ltd (the supplier of "screening fines" to City Plant). Following the investigation, assessments were raised on two landfill site operators who accepted waste from Transwaste Ltd, but no further assessments were raised on City Plant.

29. On 7 December 2018 HMRC wrote to City Plant to advise that the Assessment liability was still outstanding. City Plant was instructed to make payment within seven days, failing which a winding up petition would be issued.

30. City Plant responded by way of letter dated 12 December 2018. The letter stated that the debt was disputed as the Assessment had been withdrawn following a meeting which took place between the City Plant and HMRC in 2013. City Plant also claimed not to have received any correspondence about the Assessment since 2013.

31. HMRCs replied on 7 January 2019, disputing City Plant's version of events and confirming that the Assessment was still outstanding.

32. Thereafter the parties exchanged correspondence in relation to the Assessment. HMRC reiterated their position that no agreement had been reached in relation to the Assessment but agreed to suspend recovery action until August 2019 to allow City Plant further time to provide the outstanding evidence to support the application of the lower rate of LFT.

33. No further evidence was provided and in January 2020 HMRCs' debt management department commenced winding up proceedings in the High Court.

34. On 26 February 2020 HMRCs' winding up petition was dismissed by the High Court on a motion entered by HMRC on the basis of representations received from City Plant that the debt remained disputed.

35. Despite this City Plant did not file any notice of appeal until 28 July 2020, five months later, although that notice of appeal was invalid as it was made without payment of the tax in dispute, provision of security or any hardship application.

36. On 15 October 2020, City Plant served a notice of appeal together with a hardship application.

HMRC's ARGUMENTS

37. HMRC divide the period of delay between conclusion of the review of the Assessment and the notice of appeal into four periods:

(a) First period – 4 April 2013 to 18 August 2014, during which enforcement of the Assessment was suspended to permit further representations.

(b) Second period – 18 August 2014 to 7 December 2018, during which the Assessment was in place but enforcement remained suspended.

(c) Third period – from commencement of enforcement proceedings on 7 December 2018 to the filing of the initial, defective, appeal notice on 28 July 2020.

(d) Fourth period – from 28 July 2020 to the filing of the valid notice of appeal on 15 October 2020.

38. In respect of the First period and the Second period HMRC say that their suspension of enforcement action does not justify City Plant not filing an appeal. The Assessment was at all times stated to be in force.

39. In respect of the Third period HMRC say that, during a period it was resisting the winding up action on the grounds the tax debt claimed was in dispute, City Plant was not justified in not filing an appeal against the tax debt. HMRC consider that this further delay of one year and six months is both serious and significant in itself. By this stage City Plant was clearly on notice that HMRC still considered the debt to be due and payable.

40. In respect of the Fourth period HMRC note that City Plant explained that the further eleven week delay caused by its filing of incorrect documentation was an administrative error due to Covid-related exigences during the physical closure of its offices. HMRC accept that City Plant promptly dealt with the error in its initial filings of 28 July 2020 once this was notified to them on 8 October 2020, filing revised grounds of appeal supported by a hardship application on 15 October 2020.

41. HMRC summarise City Plant's explanation for the late delay as follows:

(a) They immediately challenged the basis of the Assessment and refer to the analysis of the merits of its position in a KPMG report of 8 January 2013.

(b) An alleged general change of position by HMRC regarding lower rate landfill tax.

(c) At the meeting of 20 May 2013 HMRC accepted that City Plant's position in relation to the Assessment was justified and correct.

(d) HMRC gave City Plant the clearest possible indication in August 2013 that the Assessment was not being pursued. No further steps were taken by HMRC to pursue the Assessment for almost five years.

(e) There is a reasonable excuse for not appealing against this assessment within the usual time limits.

42. In reply, HMRC say:

(a) They accept that City Plant promptly challenged the basis of the Assessment in seeking a review. However, following conclusion of that review on 4 April 2013 they did not make any attempt to appeal to the Tribunal until 28 July 2020, and only filed a valid appeal on 15 October 2020. The KPMG report

was considered in the review decision and so it does not provide a good reason for delay in filing an appeal after the review decision.

(b) A new approach to the testing of "qualifying fines" was introduced by the Landfill Tax (Qualifying Fines) (No 2) Order 2015. However, this did not have retrospective effect to the disposals subject to the Assessment. This change in law does not justify the late submission of this Appeal.

(c) No such representation was made. Subsequent correspondence made clear that additional information or explanation was required from City Plant for the Assessment to be reconsidered. Following HMRC's email of 18 August 2014 confirming the Assessment would remain in force, City Plant's advisors KPMG told them of the need to appeal the Assessment, stating: "clearly this is not an acceptable position and we will challenge it accordingly".

(d) HMRC believe that the reference to a representation of "August 2013" refers to their email of 18 August 2014. They say they made clear throughout that the Assessment remained extant. Their decision not to pursue debt management actions does not affect the statutory deadline for an appeal. Such suspension supported wider HMRC and Environment Agency actions related to City Plant and related organisations.

(e) Reasonable excuse is not the applicable legal test.

43. As far as the merits of the appeal are concerned, HMRC say that the disputed disposals were of material described as "screening fines", which are not a qualifying material within the terms of the Landfill Tax (Qualifying Material) Order 2011 ("the Order"). Regulation 7 of that Order provides that, to constitute qualifying material (eligible for the lower rate of LFT), the material must be of a specified type and the "relevant condition" must be met. This is that the transfer note (a required document where the operator of a landfill site and the owner of the waste immediately prior to disposal to the operator are not the same person) includes, in relation to each type of material in the disposal, a description of the material which accords with the description in the Schedule to the Order or the notes thereto or is some other accurate description. HMRC say that City Plant's case is "fundamentally flawed from the outset" as the description applied to the materials in the assessed disposals does not meet this "relevant condition".

CITY PLANT'S ARGUMENTS

44. For City Plant, Mr Bott says that the initial cause of the delay in appealing was the uncertainty created by HMRC. The Assessment was raised in September 2012. KPMG sent a detailed response letter on 10 January 2013 and further evidence on 23 January 2013. When HMRC replied, on 4 April 2013, their letter contained the following statement "We have suspended any enforcement of the assessment and are prepared to look at any documentary evidence you or your client can produce to show that some of the material concerned does in fact meet the description of qualifying material.".

45. On 20 May 2013 there was a meeting between KPMG, City Plant and HMRC. Directors of City Plant attended the meeting. Mr Bott says that City Plant's understanding was that, following the meeting, there was, with the exception of one relatively minor issue, an acceptance by HMRC that the company's position in relation to the Assessment was justified and correct. No further documentation was requested from City Plant. HMRC were chased for a response.

46. In an email of 18 August 2014 Mr Berry (of HMRC) commented that City Plant's case was "caught up in some more general issues" concerning the application of the lower rates of

LFT but concluded that, "The position therefore remains unchanged, there is an assessment on file that remains extant but is not being pursued at this time. We will of course inform you when that position changes." In the period between KPMG's submissions in January 2013 and that email HMRC and KPMG had been engaged in correspondence (described by Mr Bott as a "sterile game of tennis") where HMRC ask for more information and KPMG seek to provide it, in some cases resending material they have already sent over. On 27 January 2014, in response to a request to resolve the matter, HMRC had informed City Plant that they were still awaiting a response from their policy unit.

47. HMRC then appear to do nothing about the Assessment until December 2018 (nearly four and a half years later), when they start enforcement and winding-up procedures. City Plant's submission to the High Court was that the enforcement action had come "out of the blue" and they considered that the matter had been resolved some time ago. City Plant denied the tax claim in its entirety and, having recited the history of City Plant's dealings with HMRC, concluded that "there is a clear triable issue given the length of time that has elapsed between the meeting, the lack of any notes or memoranda and the inaction of HMRC for 4 years 4 months." There was correspondence between HMRC and City Plant's then representatives until HMRC consented to a stay in February 2020.

48. Mr Bott says that City Plant took advice as soon as the Assessment was raised and made representations to HMRC. City Plant's position was set out very early on in the KPMG report of 8 January 2013. He stresses City Plant's understanding that, following the May 2013 meeting, HMRC accepted their position. That was, he says, vindicated by the subsequent changes to the law introduced by HMRC and the long delay (until 2018) demonstrates that the Assessment was not being pursued as a result of this policy change.

49. Mr Bott says that the most substantial period of delay (July 2014 – December 2018) occurred in circumstances where a reasonable person would have concluded that HMRC did not intend to pursue the Assessment in any meaningful way.

50. The subsequent period (December 2018 to July 2020) reflects a time when City Plant were resisting the winding up action and disputing liability. This led to the dismissal of the winding up petition by consent on 26 February 2020. The only purpose, Mr Bott says, of HMRC consenting to the dismissal of the petition was to enable City Plant to challenge the Assessment by an appeal, so it would be remarkable if HMRC now took points on time limits for appealing.

51. As far as the merits of the case are concerned, a much lower rate of LFT is charged where the material disposed of consists entirely of qualifying material (section 42, FA 1996) and section 63 (1) and (2), FA 1996 gives HMRC power to direct that material disposed of must be treated as qualifying if it would be qualifying but for the presence of a small quantity of non-qualifying material, in which case the question whether a quantity is small must be determined in accordance with HMRC's direction. HMRC gave a direction in Notice LFT1 (at paragraph 3.3) allowing an incidental quantity of standard rated waste in a mainly lower rated load to be ignored and giving various examples of loads that would qualify for LFT at the lower rate. KPMG's report observed:

> (1) It was not possible for a taxpayer to know with any certainty what quantity would be determined a small or incidental quantity
>
> (2) Given this uncertainty and the subjective element that it implied, City Plant's policy of treating material which contains less than 1% of contaminated waste as small or incidental was prudent and reasonable.

(3) Anything less that 5% was, as a matter of relevant practice, within the margins of tolerance for the lower rate of LFT.

(4) Reliable chemical analysis supported this conclusion – and sampling was consistent because the fines came from a single source.

(5) According to this policy, if contaminants exceed 1% the load was treated as attracting the standard rate of LFT.

(6) In all the sample loads, the level of contamination was less than 1%.

52. The Assessment was based (as others at the time were, Mr Bott says) purely on written descriptions. Mr Bott described this as a "limited and flawed approach".

53. In Summary, Mr Bott submitted that HMRC were trying to stop City Plant pursuing a meritorious appeal in circumstances where they are themselves responsible for much of the delay and City Plant's procedural failings are limited by comparison. There is, he says, no overriding reason of policy why this application should not be allowed and it would be reasonable to permit City Plant to argue its case on the merits.

DISCUSSION

54. A core part of Mr Bott's submission is that the tribunal's approach is, or should be, different from that of the civil courts where issues such as the limitation rules are in point and that accordingly there is no policy reason why this application should not be allowed. For the reasons summarised at [11] above, that submission is simply wrong. As the Upper Tribunal commented in *McCarthy & Stone* and the Supreme Court endorsed in *BPP Holdings*, tribunals should not adopt a different, more relaxed, approach to compliance with rules, directions and orders than the courts which are subject to the CPRs.

55. In that light, I turn to apply the three-step approach in *Martland*. I can deal with the first step very briefly. The Assessment should have been appealed by 4 May 2013. It took City Plant until 28 July 2020 to file its initial, defective appeal notice and until 15 October 2020 to file a valid notice of appeal. That delay is clearly very substantial and very serious. In fairness, Mr Bott did not suggest that it was not.

56. Turning to the reasons for the delay, I accept that there was, at least until August 2014, some ongoing (if episodic) discussion between City Plant and HMRC about the merits of City Plant's position. KPMG submitted a report in January 2013, there was a "high level" meeting in May 2013 and subsequent correspondence (the "sterile game of tennis" as Mr Bott described it). This drew to a close at the latest with Mr Berry's email of 18 August 2014 to KPMG stating that "there is an assessment on file which remains extant but is not being pursued at this time". KPMG forwarded this to City Plant explaining that "clearly this is not an acceptable position and we will challenge it accordingly". No such challenge appears to have been made.

57. Mr Bott asserts that City Plant emerged from the May 2013 meeting sure that HMRC agreed with their position. The hearing bundle included HMRC's note of the meeting. This records HMRC asking for additional evidence/information; there is nothing in this note which comes anywhere near suggesting that HMRC had adopted a position in relation to the Assessment, still less that they endorsed City Plant's analysis. HMRC certainly continued to ask questions, and in his letter of 6 August 2013 Mr Middleton said that he had "received no evidence which would cause me to reverse my decision to raise an assessment". (I pause to note that, in his witness statement referred to below, Mr O'Garra suggested that this letter might not have been sent, but this is not a suggestion Mr Bott repeated before me.) Mr Middleton also indicated that, given KPMG's failure to respond to his questions, he intended to cancel the Assessment and issue a larger one together with a penalty.

58. City Plant have not produced a copy of their own (or KPMG's) note of the meeting in May 2013, nor has any of the Directors of City Plant given evidence before me of their understanding following that meeting. I appreciate that (as Mr Michael O'Garra, who is a solicitor and who was acting for City Plant in the winding-up proceedings, indicated in his witness statement in the winding-up proceedings) there had been some difficulty in obtaining information from KPMG in Leeds, as they were no longer acting for City Plant and their key employee on the City Plant account had moved on.

59. The hearing bundle included a witness statement of Paul Hornshaw (also prepared for the winding-up proceedings). Mr Hornshaw was an indirect shareholder in City Plant and he attended the May 2013 meeting. He recorded his understanding that only one, relatively small, waste transfer was not agreed, but otherwise "the misunderstanding on the part of HMRC was clarified".

60. City Plant have not produced any contemporaneous evidence of their (or KPMG's) understanding of the meeting, nor have they produced anyone to give evidence in this tribunal of their understanding of the outcome of that meeting. In the circumstances, I am unable to reach a conclusion as to what the individuals involved with City Plant believed after the May 2013 meeting and how reasonable (or not) their view was. However, I do not need to reach a view on this issue as, even if the directors of City Plant had felt confident that they had persuaded HMRC of their position in May 2013, that confidence should not have lasted very long. It is clear that, within months (and certainly by August 2013), HMRC were far from convinced of City Plant's position and were continuing to ask questions and take a robust approach to City Plant. HMRC's letters of 12 July and 6 August 2013, for example, are quite expansive in their scope (not to mention assertive in tone), as are KPMG's answers on 30 July and 14 August; they do not appear to be focused on a single small waste transfer.

61. It is not disputed that the discussions between City Plant, KPMG and HMRC played out against a backdrop of a wider policy debate. It would appear that these discussions led to changes in the law as a result of which, City Plant say, had the waste in question been disposed of after the relevant change, the (new) criteria for the lower rate of LFT would clearly have been met. These policy discussions would seem to be the "more general issues" Mr Berry referred to in his email of 18 August 2014. However, despite this, Mr Berry made it clear that the Assessment "remains extant but is not being pursued at this time". KPMG considered this to be a highly unsatisfactory state of affairs which should be challenged, but still nothing was done about it.

62. Reviewing the reasons for the Assessment not being challenged in this period, it is clear that City Plant via KPMG were in dialogue with HMRC. Left to their own devices (as it were), City Plant might have considered that, because HMRC continued to discuss relevant issues and to receive evidence, there was something provisional about the Assessment. This is, of course, not the case at all. As the Assessment made clear, it is a formal assessment which needs to be appealed within 30 days. There is nothing provisional or tentative about it at all. Even if City Plant themselves might have (wrongly and unjustifiably) formed the view that HMRC had not reached a conclusion which had legal consequences, they had the benefit of KPMG's advice and KPMG would have known the significance of an assessment and should have protected City Plant's position by appealing the assessment within the statutory period, even while they continued their discussions with HMRC. HMRC may have suspended enforcement of the Assessment during this period and (no doubt) would have withdrawn it if they were satisfied they were wrong in law (or conceivably on policy grounds), but it was never withdrawn. There is no evidence before the tribunal to suggest that HMRC ever suggested that the Assessment was incorrect or that they agreed with City Plant and were prepared to withdraw the Assessment.

63. From the witness statements prepared for other proceedings, it would appear that individuals involved with City Plant may have formed the view that they had won HMRC over in May 2013. But, even if they believed that (of which no evidence was produced in this tribunal), it is clear that they could not reasonably have continued to hold that view for long. None of KPMG's communications in the months after May 2013 express any surprise that, in the light of that meeting, HMRC were continuing to ask questions which go wider than a single waste disposal and nothing HMRC wrote would support the conclusion City Plant say they drew from that meeting.

64. A long period then follows (until December 2018) when very little happens as far as the Assessment is concerned, beyond Mr Berry's email of 18 August 2014. It was clear that he regarded the Assessment as still being valid and KPMG considered his position to be unacceptable, but nothing was done about it. Even if they were unaware of anything to challenge their view that the Assessment was something that did not have consequences, KPMG's email to Mark Betts of the same date should have shaken them out of their complacency and alerted them to fact that something needed to be done. (Mr Hornshaw's witness statement indicates that Mr Betts was a director of City Plant until the beginning of June 2014, which is shortly before Mr Berry's email, but it was not suggested before me that anything turns on the fact that KPMG emailed a former Director of City Plant, indeed it is something I noticed for myself in writing this decision notice.)

65. The discussions between City Plant/KPMG and HMRC over factual and wider policy issues are not a good explanation for City Plant's failure to appeal the Assessment in time. They had no reason to believe that HMRC were going to withdraw the Assessment and it should have been appealed in parallel to the discussions with HMRC.

66. There followed a long (four year and four month) period of apparent inactivity as far as the Assessment was concerned. I understand that at least some of this period was occupied by a criminal investigation which did not result in proceedings being brought against City Plant. The fact that minds might have been focused elsewhere, at least for part of the time, is no good explanation for continuing to ignore the Assessment.

67. In December 2018 HMRC began to seek to enforce the Assessment and this ultimately resulted in their winding-up petition. This was defended by City Plant, with Mr O'Garra making a witness statement in those proceedings in which he stated that "there is a clear triable issue", giving as his principal ground HMRC's inaction over more than four years which, he said, supported City Plant's (and Mr Hornshaw's) view that the matter had been settled in 2013. HMRC agreed to the petition being withdrawn. Mr Bott says that this indicates that HMRC accept there is a valid issue to be tried. Why else would they agree to the winding-up petition being withdrawn? Mr Puzey agrees that the test for withdrawing a winding-up petition is whether there is a genuine triable issue, but he says that it is easy to see why someone would take the view that there might be an issue and withdraw a winding-up petition, which is a draconian matter, but that is not the same as deciding to extend time.

68. In any event, even if time could be reset at this point, there is then a further 18 month delay until 28 July 2020, when City Plant filed its initial, defective appeal notice, and a further delay until 15 October 2020 when it filed a valid notice of appeal. Despite asserting that there was a valid, triable issue, Mr O'Garra does not seem to have done anything about trying to protect City Plant's ability to bring that issue to trial for 18 months. Nothing was said in the tribunal about why nothing was done at this point. I note that *in Romasave (Property Services) Ltd v HMRC*, [2015] UKUT 254 (TCC), a three month delay was considered to be serious and significant; see [96]. Mr Bott's point about whether HMRC were accepting that there is a serious issue to be canvassed here may be relevant to the third

stage of the *Martland* analysis, but I agree with Mr Puzey that, even if we were just looking at the period after December 2018, we would still be faced with a serious and significant breach for which there is no good explanation.

69. Pausing to take stock, we are confronted with a significant and serious failure to observe the statutory time limit for appealing the Assessment, for which at no stage (let alone throughout the period of failure) is there a good explanation. As I have already indicated (see [12] above) the fact that City Plant was professionally advised by KPMG (in the period up to August 2014, at least) and a firm of solicitors (during the winding-up proceedings and subsequently) is not a good explanation for this failure. Nor, absent countervailing factors (such as the appellant diligently pressing its advisers and being repeatedly "fobbed off", and I should note that it was not suggested to me that there were any countervailing factors), is the fact that a failure to observe a time limit or other requirement might be attributed to a professional adviser, whom a lay client could reasonably trust to protect their position, a relevant factor at the third stage of the *Martland* analysis, to which I now turn. This requires me to consider all the circumstances of the case so as to ensure that the application is dealt with fairly and justly.

70. As I explained at [14], the amount of tax at stake and the consequences for an appellant of not being able to challenge a decision involving a significant (in absolute terms or relative to its consequences for the appellant) sum are not a material factor at the third stage of the *Martland* analysis when weighed against a significant and serious delay for which there is no good explanation.

71. The next issue to consider is the merits of the case. At [13] above I set out the approach to be followed at this point. In particular, I remind myself that it is not for me carry out a detailed evaluation of the case; my task is to form a general impression of its strength or weakness to weigh in the balance. The obvious point, of course, is that an appellant possessed of a compelling case would suffer more prejudice in not being allowed to proceed with it than one whose case appears merely to be arguable. In this case even such a relatively "high level" review is not without difficulty, given that the dispute turns on the nature of waste disposed of many years ago at a time when the legal requirements for lower rate LFT were different from those which currently obtain. Mr Bott says that there clearly must be a triable issue, and HMRC must know this or they would not have withdrawn the winding-up petition. The position is, he says, as explained in the KPMG report, that less than 1% of the waste disposed on in each load was "non qualifying" and so the conditions for lower rate LFT were met. If there were to be a trial, he says HMRC would not be prejudiced. There was a criminal investigation looking in detail at waste disposals with much factual material being gathered, all of which would presumably still be available. As regards Mr Bott's submission that HMRC must have considered there to be a triable issue when they withdrew the winding-up petition, that is not conclusive. The tribunal must evaluate the strengths and weaknesses of the case for itself and not rely on the conclusions of others reached for a different purpose some years ago.

72. Mr Puzey submits that, even if it is the case that the disposals in question were of "qualifying material" with a very small amount of other material (of which, he says, there is no evidence), that would not be sufficient. At the time, there was a "relevant condition" relating to the description of "qualifying material", which is that the transfer note described the waste by reference to the Schedule to the relevant statutory instrument or was "some other accurate description"; see [43] above. The description applied here ("screening fines") is not one found in the Schedule, or its notes, nor is it an accurate enough description to justify the treatment of the fines as "qualifying material".

73. As I recorded at [52], Mr Bott submitted that the Assessment was based (as others at the time were) purely on written descriptions, and he described this as a "limited and flawed approach". Mr Bott has not engaged with Mr Puzey's point that, as well as being a substance listed in the Schedule (with, in the case of a mixed load of qualifying and non-qualifying material, only a very small amount of non-qualifying material), to be a "qualifying material" the relevant condition had to be met. In other words, relying on (or requiring) written descriptions was not "limited and flawed"; it was exactly what the law required. There may have been shortcomings in this approach, and that may well explain why the requirements were subsequently changed, but the point for this application is that, at the relevant time, the requirements included the "relevant condition". Mr Bott has not challenged Mr Puzey's analysis of the law on this point (which appears to me to be correct) or his assertion that the description of the materials ("qualifying fines") was inadequate. I have read through the Schedule to the Order and it is not at all obvious to me how one could begin to relate a particular "screening fine" (bearing in mind that a "fine" is a broad, generic term- see [16] above) to the materials listed in the Schedule to determine whether the materials qualified for lower rate LFT.

74. Subsequent changes to the law and HMRC's policy deliberations in the lead up to that are irrelevant. The Assessment is to be judged against the law in force at the time it was issued.

75. As far as prejudice is concerned, Mr Puzey reminded me that, if there were to be a trial and the nature of the waste was an issue, the waste was disposed of more than ten years ago. It would be difficult to be sure that any reliable evidence could be found about what City Plant disposed of. Even if HMRC/City Plant dug up the land, it is far from clear that anything relevant or reliable would be discovered. KPMG might still have some relevant background papers, but Mr O'Garra clearly struggled to get anything useful at the time of the winding-up proceedings. This case, he submits, is a paradigm example of why appealing promptly is so important and allowing a late appeal potentially so prejudicial. I note Mr Bott's submission that the materials in the criminal investigation would fill this vacuum, but there was no evidence before me (as opposed to an assertion by Mr Bott) that they are either extant or adequate.

DISPOSITION

76. For the reasons set out above, my conclusions are as follows:

(1) City Plant's delay in giving notice of appeal was very significant and serious;

(2) Nothing drawn to my attention amounts to anything approaching a good reason/explanation for that delay;

(3) I am not satisfied that City Plant's case is compelling. If anything, based on the points discussed before me, it appears to be rather weak;

(4) I consider that, if there were to be a trial where the nature of the waste was an issue (which would be the case if HMRC did not win on the "relevant condition" point alone), the passage of time will have made it difficult to collect the necessary evidence and I consider that the parties would likely be prejudiced accordingly.

77. Viewing these conclusions, and the other points discussed in this decision notice, through the prism of the need to acknowledge that giving proper force to the need for time limits (particularly those imposed by statute) to be respected as a matter of principle is of particular importance in the exercise of this tribunal's discretion, there is nothing about this case that leads me to the view that fairness and justice requires that permission be given to

appeal out of time and so is inevitable that City Plant should not be granted permission to make a late appeal and, accordingly, its appeal should not be admitted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

78. 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 10th MAY 2023