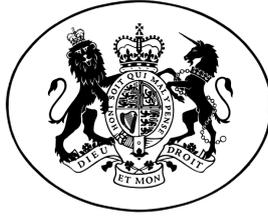


[2011] UKFTT 775 (TC)



**TC01609**

**Appeal number TC/2011/00213  
TC/2011/00216  
TC/2011/00218**

*Application for leave to appeal out of time – whether reasonable excuse.*

**FIRST-TIER TRIBUNAL**

**TAX**

**RAMESH HIRANI  
VINOD HIRANI  
DINA HIRANI**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: WDF COVERDALE (TRIBUNAL JUDGE)**

**Sitting in public in Manchester on 20 May 2011**

**Mr Baig, Tax Adviser, for the Appellants**

**Mr T Fieldsend, of HM Revenue and Customs, for the Respondents**

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## DECISION

1. There are three Appeals before the Tribunal namely Applications by Mr Ramesh Hirani (“Ramesh”), Mr Vinod Hirani (“Vinod”) and Miss Dina Hirani (“Dina”) for the admission of late Appeals against penalties imposed by HMRC. Those penalties were issued under Schedule 36 of the Finance Act 2008 and were in respect of failures to comply with formal information notices relating to personal tax enquiries.
2. On 16.09.2009 HMRC opened enquiries into the 2007-08 Tax Returns for both Ramesh and Vinod. Messrs LP Patel and Co had been acting for both of them. A similar enquiry into the Return for Dina was opened on 04.03.2010. Dina had no Agent acting for her at that time. On those dates Notices were issued to all three taxpayers with informal requests for information.
3. Evidently the information was not supplied and accordingly formal notices were issued under Schedule 36 Paragraph 1(1) of the Finance Act 2008 requiring the provision of information and the production of documents on the basis that the information was reasonably required by HMRC for the purpose of checking the taxpayers’ tax position. Those Notices were issued against Ramesh and Vinod on 03.03.10 and against Dina on 26.04.10. The dates by which the information was to be supplied were 19.04.10 for Ramesh and Vinod and 10.06.10 for Dina.
4. In the continuing absence of the requested information penalty warning letters were issued to all three taxpayers on 27.04.10 (Ramesh and Vinod) and 28.06.10 (Dina). These were non-statutory warnings and provided details of proposed actions and the level of penalty under consideration in the absence of co-operation.
5. In the continuing absence of the information formal £300 penalty notices were issued against all three taxpayers, on 18.05.10 against Ramesh, on 14.05.10 (or 18.05.10) against Vinod and on 22.07.10 against Dina.
6. Paragraph 29 of Part 5 of Schedule 36 of the Finance Act 2008 makes provision for a right of appeal against any notice such as those mentioned above. None of the three appellants exercised that right of appeal.
7. Following the issue of the penalty notices the Agents for Ramesh and Vinod evidently delivered some relevant Bank Statements to HMRC on 25.05.10 and 14.06.10 respectively but these did not answer all of the questions that had been asked.
8. On 17.06.10 additional penalty warning letters were issued to Ramesh and Vinod but there was no further disclosure by them at that time.
9. On 27.07.10 daily default penalty notices were issued to both Ramesh and Vinod. Paragraph 40(2) of Schedule 36 of the Finance Act 2008 provides that this penalty may be up to £60 “for each subsequent day on which the failure...continues”. In fact HMRC applied a penalty rate of £30 per day and calculated the number of days as being 69 i.e. starting with the day after the issue of the standard penalty notice

(19.05.10) and ending on the day before the date of the notice (26.07.10). £30 x 69 = £2,070.

5 10. A similar daily default penalty notice was issued to Dina on 08.09.10 and the level of penalty applied was the same, namely £30 per day, and the period was from 23.07.10 to 07.09.10 which is 47 days: £30 x 47 = £1,410.

10 11. There was a continuing failure to comply with the requests for information and on 08.09.10 HMRC issued additional daily default penalty notices to both Ramesh and Vinod, the level of penalty now being increased to £45 per day. HMRC calculated the period for the penalty from the end of the previous penalty period to the date of the penalty notice, namely from 27.07.10 to 08.09.10 inclusive, as 44 days: £45 x 44 = £1,980.

15 12. It is HMRC's contention that the failures were continuing on the date of the penalty notices and therefore the persons against whom they were issued were liable to a daily penalty for that day. The Tribunal accepts that if the penalty notices were properly issued then they will indeed impose a continuing liability up to and including the date on which they were issued.

13. On 18.10.10 the Agent for both Ramesh and Vinod telephoned HMRC and advised that he had now received instructions from them to provide the outstanding information and to appeal against the penalties.

20 14. The majority of the information and documents required by the notices issued to Ramesh and Vinod was supplied to HMRC in letters dated 19.10.10 and 18.10.10 respectively. Those letters also contained Appeals against all three penalty notices issued to both Ramesh and Vinod.

25 15. HMRC responded by asking for comprehensive details of the reasons why the appeals were late. On 10.11.10 a letter was sent to HMRC by M&R Tax Advisers Ltd confirming that Ramesh and Vinod wished to submit late appeals against the penalty notices "on the ground that our client has a reasonable excuse". On 13.11.10 M&R Tax Advisers sent a similar letter on behalf of Dina.

30 16. The requested information was supplied by Dina by letter dated 29.10.10 but this did not evidently come into the hands of HMRC until a facsimile copy was sent by her Agent on 23.11.10.

17. In a letter to M&R Tax Advisers Ltd dated 13.12.10 HMRC said that in their view the taxpayers did not have a reasonable excuse for the delay in appealing and they could not accept the late appeals.

35 18. On 30.12.10 all three appellants submitted appeals to the Tribunals Service and in each case the grounds of Appeal state specifically that "this is an Appeal against the HMRC Decision to refuse the late appeal on the grounds that the appellant had a reasonable excuse".

19. The original late appeal letters of 18.10.10 and 19.10.10 and the supplementary late appeal letters dated 10.11.10 and 13.11.10 contained different grounds depending on the appellant. HMRC has summarised the various grounds of Appeal in a comprehensive Schedule of Appeals. There are numerous grounds of appeal although  
5 many of them are similar in nature. Several are duplicated for all three appellants.

20. The Tribunal is conscious of the fact that the appeals before it today are appeals against penalty notices and are not appeals against the information notices.

21. Since the Tribunal has been asked to address the issue it is appropriate at this point to confirm the Tribunal's finding of fact that, upon perusing all correspondence,  
10 it is clear that HMRC has not, at any time, admitted these late appeals. All relevant correspondence from HMRC says the contrary namely that the late appeals are not admitted and that is why the matter has come before the Tribunal today.

22. All three appellants must have been aware of their rights of appeal in relation to both the original information notices under schedule 36(1) of the Finance Act 2008  
15 and in respect of the standard and daily default penalty notices because those formal documents contain details of the appeal procedure and reference to the statutory time limit of 30 days. It is HMRC's submission that any reasonable person, subject to a formal enquiry by HMRC and in receipt of something as serious as these documents, would be expected to act in a prudent manner and read those details and act upon  
20 them without delay. Furthermore it is submitted that in these circumstances any reasonable person who may have been unsure of what action to take would have either sought professional assistance or contacted HMRC to obtain advice. HMRC contends that the Appellants did not act in a reasonable manner, they did not contact HMRC to obtain advice and did not telephone the enquiry officer at any time. The  
25 attention of the Tribunal is drawn to the fact that Ramesh and Vinod did not instruct their Agent to appeal on their behalf until 18.10.10 when their Agent rang the enquiry officer to advise that his clients had instructed him to appeal on their behalf and to provide the outstanding information required by HMRC.

23. HMRC points out to the Tribunal that Dina did not respond to any of the correspondence send to her by HMRC until her late appeal letter dated 29.10.10 and this was not received by HMRC until 22.11.10, after the letter dated 13.11.10 from M&R Tax Advisers Ltd. Similarly Dina did not contact HMRC to seek advice.

24. HMRC contends that supply of the information required in the Notices was neither unduly onerous nor inappropriate.

25. The Tribunal has compared the letters from LP Patel & Co Ltd dated 19.10.10 (Ramesh) and 18.10.10 (Vinod) with the letters from M&R Tax Advisers dated 10.11.10 in respect of both those Appellants. The grounds of appeal are not the same: the LP Patel letters both say that "the ground of the appeal is that he had not any known taxable information to provide you with as already declared in his tax return  
35 2008" whereas the M&R Tax Advisers letters say that the ground of appeal is "that our client has a reasonable excuse".  
40

26. Paragraph 45 of schedule 36 of the Finance Act 2008 specifies that a penalty does not arise if the person satisfies HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the failure to comply. For the purpose of that paragraph there are three conditions namely

- 5           (i)     An insufficiency of funds is not a reasonable excuse unless attributable to events outside a person’s control,
- (ii)     Reliance on a 3<sup>rd</sup> party is not a reasonable excuse unless the 1<sup>st</sup> person took reasonable care to avoid the failure,
- 10           (iii)    If the person had a reasonable excuse which has ceased it is treated as having continued if the failure is remedied without unreasonable delay after the excuse ceased

27. Paragraph 47 sets out a right of appeal to the First-tier Tribunal against the imposition of penalties and the amount of such penalties. The appeal procedure is set out paragraph 48 in provisions which are similar to requirements of Section 31 of the  
15 Taxes Management Act 1970.

28. Appeals out of time are governed by Section 49(1) of the Taxes Management Act 1970 which states that late notice of appeal may be give after the “relevant time limit” (which in this instance is the requirement of “before the end of the period of 30 days beginning with the date on which the notification was issued”), but only if HMRC  
20 agree. Where HMRC do not agree then late notice of appeal may be given “if the Tribunal gives permission”. Section 49 also sets out a number of conditions which, if satisfied, require HMRC to agree to the late notice of appeal.

29. The Tribunal is aware that Rules 2, 5 and 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 are also relevant. In particular the overriding  
25 objective of those rules is to enable the Tribunal to deal with cases fairly and justly. That is the principal objective of today’s Tribunal.

30. The Tribunal also takes note of Rule 3.9(1) of the Civil Procedure Rules which are relevant and in particular sub paragraphs (b), (c), (d) and (f): the Tribunal is concerned to see whether the Application for Relief has been made properly, whether  
30 the failure to comply was intentional, whether there is good explanation for the failure and whether the failure to comply was caused by the party or their legal representative.

31. Notwithstanding that the Tribunal is principally concerned with the issue of the reasons for the lateness of the appeals against the penalties imposed by HMRC,  
35 nevertheless most of the oral evidence received by the Tribunal today has dealt with the unhappy circumstances prevailing for the three appellants and their respective trading activities and it is the submission by and on behalf of the appellants that it is important for the Tribunal to take note of those circumstances in order to place the imposition of the penalties in perspective. The Tribunal has heard a large volume of  
40 evidence and this is summarised below so that the appropriate law can be applied to that evidence for the purpose of making a decision in these appeals today.

32. All three appellants have submitted witness statements and the Tribunal has studied them carefully. All three Appellants have given oral evidence and this has been consistent with their written statements.

5 33. In his witness statement and in his oral evidence Ramesh explains that he had been the Director of Demand and Supply Ltd (D&S), a cash and carry wholesale business selling alcoholic and non-alcoholic beverages. That business has been placed into provisional liquidation by a Court Order under the instruction of HMRC but the affairs of that company are subject to ongoing civil litigation. He argues that, in summary, the extreme trauma of HMRC action has left him bewildered and unable  
10 to handle his own affairs in a proper manner, hence his failure to comply with HMRC requests for information in the present case.

15 34. Ramesh explains at great lengths how he feels he has been badly treated by HMRC who, in September 2009, “raided” the premises of D&S and took away large quantities of stock and, in particular, large amounts of documentation and records relating both to his personal affairs and to the business. He refers to being in a state of shock following these events. He explains that such was his involvement in the business that he spent long hours at D&S and kept all his personal and business documents at the office. He feared that HMRC action would lead to the destruction of his business and his family’s livelihood.

20 35. Ramesh feels aggrieved that the enquiries conducted against him and members of his family in respect of their personal tax affairs were being conducted by HMRC personnel who may have had contact with those officers who were pursuing other enquiries with regard to the limited company. Liquidators had visited the offices of LP Patel, accountants to the Hirani family and to D&S, and had taken documents  
25 from them also. Ramesh says that “the Commissioners further placed a worldwide freezing injunction on me. At this stage I felt cornered, ambushed and helpless”.

30 36. Ramesh goes on to say in his witness statement that “by this stage I was fighting on various fronts on a variety of angles with the Commissioners in reference to D&S, the liquidators, my business associates such as suppliers and buyers and not to mention the demand of information from the Commissioners regarding my family’s personal income tax affairs. With no documents at hand responding to any of these enquiries became impossible”.

35 37. Ramesh explains how he was unable to supply the requested information and documentation, to which these Appeals relate, because that information and documentation was held by HMRC itself or by the liquidators of the limited company. He could not produce what he did not have and he complains that HMRC were less than helpful in giving him access to his own documents. In late 2010 there was evidently some access to the documentation at the premises of the liquidators and this enabled Mr Patel to make all necessary information available to HMRC by 19.10.10.

40 38. In summary, in his witness statement Ramesh says that he and his family members had a reasonable excuse for “the delay” and he considers that he has sufficient grounds of appeal for HMRC’s decision on penalties to be reversed.

39. Neither in his witness statement, nor in his oral evidence to the Tribunal, does Ramesh truly address the matter of his alleged reasonable excuse and it has to be repeated, at this stage, that the appeals in this case are against penalty notices, not against the information notices.

5 40. Vinod's witness statement and his oral evidence to the Tribunal are largely similar to Ramesh's evidence. Vinod is a Director of M&JJ Ltd (M&JJ) which is a cash and carry wholesaler business selling alcoholic and non-alcoholic beverages. M&JJ traded with the business of his brother Ramesh, D&S. He says that, like Ramesh, he used the offices of D&S for storage of his personal documents and these have been  
10 seized by HMRC.

41. Dina's witness statement and oral evidence pursues a similar theme. She is a self-employed beautician and operates her business on a part time basis without a substantial turnover. She also assisted her father Ramesh with his business D&S and indeed is recorded as an employee in her father's business and she pays tax and  
15 national insurance as an employee.

42. Dina is the Company Secretary of S&D Retail Ltd (S&D Retail) which is operated by her boyfriend although she takes very little active part in this business.

43. Dina confirms that the facts of her appeal are very similar to those of Ramesh; she used the offices of D&S to keep her personal documents and HMRC have seized  
20 documentation relating to her personal and business matters together with large quantities of stock. She repeats the allegation that the information being requested by HMRC was being sought solely to aid an inquiry into D&S. She describes the actions of HMRC against her as "draconian". She says that her livelihood has been placed in jeopardy and the whole family has been placed under great pressure. She believes  
25 that she and her family members have a reasonable excuse for the delay in providing requested information and that she therefore has sufficient grounds of appeal for the penalty decisions to be reversed.

44. It is important, at this stage, to consider the contents of the information notices originally issued by HMRC against the three appellants. Referring to Ramesh, the  
30 "information that we need to see" was set out in the section 36(1) notice as follows..-

1. A list of business/private records examined by yourselves
2. Details of all properties owned either solely or jointly with any other person/company.
3. Confirm details of all companies that Mr Hirani is a participator in.
- 35 4. Full schedule of all loans/mortgages applied for.
5. Confirmation that no benefits/expenses were received.
6. Details of all rental income received, including payments of housing benefits.

7. Details of all interest received whether in the United Kingdom or otherwise

45. With regard to “Documents that we need to see” requests were also made for copies of all private bank statements, all building society statements or passbooks, all credit card statements and details in respect of all loans and mortgages applied for in the period 06.04.07 to 05.04.08.

46. With regard to Vinod the request was very similar; it included the same questions asked of Ramesh with the exception of the question about benefits/expenses and specifically requested a detailed analysis showing the properties let, rental income received and expenses incurred. In his case “Documents that we need to see” were identical to those requested in respect of Ramesh.

47. The Section 36(1) notice addressed to Dina requested all business books and records in respect of the income received and expenditure incurred for her income as a beautician during the period 06.04.07 to 05.04.08 to include bank statements, invoices, cash book etc. A copy of her Contract of Employment was also requested.

48. There were also requests for other documentation and information with regard to Dina namely:

1. A copy of the accounts prepared.
2. The P60 regarding the income received from D&S.
3. Details of the duties performed for the company.
4. All private bank statements for accounts held in the United Kingdom or otherwise, including statements for any account used, or that you had signatory right over, for the year ending 05.04.08.
5. All building society statements or passbooks for accounts held in the United Kingdom or otherwise, including statements or passbooks for any accounts used, or that you had signatory rights over, for the year ending 05.04.08.
6. All credit card statements for accounts held in the United Kingdom or otherwise, including statements for any accounts held jointly with any other person, or any other account used, for the year ending 05.04.08.
7. Let me have the application form in respect of all loans/mortgages applied for in the period 06.04.07 to 05.04.08.
8. Let me have details of all loans made to any individual or company for the period 06.04.07 to 05.04.08.

49. Having scrutinised the requests for information made by HMRC it is now appropriate to consider details of the information eventually supplied by or on behalf of the three appellants. This is disclosed in letters from LP Patel & Co Ltd dated 19.10.10 (Ramesh) and 18.10.10 (Vinod). Disclosure by Dina was made by letter

dated 29.10.10 (which did not evidently come into the hands of HMRC until some weeks later). Upon comparing details of information requested with details of the information supplied the Tribunal concludes that most, if not all, of the information supplied would clearly have been available to the three appellants without requiring access to documentation which had been removed by HMRC from the D&S premises.

50. In the letter dated 19.10.10 from LP Patel & Co Ltd they confirm that they prepared company accounts. Those are documents of record. There will have been other copies apart from any copies seized by HMRC.

51. Likewise, in answer to the question about properties owned by Ramesh, LP Patel & Co Ltd give details of three properties but Ramesh would not have required access to his paper records seized by HMRC in order to disclose the addresses of properties that he owned. The Tribunal would find it hard to believe that he could not remember the addresses of his three properties in London, Lancashire and Bolton.

52. HMRC asked for details of all companies in which Ramesh participated. The reply by LP Patel & Co Ltd was that he was a Director of D&S. Access to the company records would not have been necessary to enable Ramesh to supply this information because he will have known that, at all material times, he was a Director of that company.

53. Ramesh was asked to supply details of loans and mortgages. LP Patel & Co Ltd supplied confirmation of one mortgage alone and, again, it is hardly likely that Ramesh would have required access to his documentation in order to recall that he had a mortgage on one property only.

54. Ramesh was asked to confirm that no benefits/expenses were received and LP Patel & Co Ltd did indeed confirm that. Stating a negative in this way does not require access to documentation.

55. Likewise confirmation that Ramesh did not receive rental income or housing benefits does not require access to his personal documentation.

56. LP Patel and Co Ltd confirmed the identity of Ramesh's bank accounts; again, it would not be necessary for access to be gained to historical documentation in order simply to supply these bank account numbers.

57. Moving on to "documents that we need to see" and requested from Ramesh the Tribunal considers that he would have been able to obtain duplicate bank statements for the year ended 05.04.08 from his bank without any difficulty and it is not reasonable to plead that he cannot produce his bank statements because he does not have access to the original documents sent to him, presumably month by month, by his bank.

58. LP Patel & Co Ltd confirmed that Ramesh did not hold building society accounts and, again, he did not need access to documentation to prove a negative.

59. In so far as LP Patel & Co Ltd supplied copies of Barclaycard credit card statements there were only four such Statements supplied (June, July, August and September 2007) and Ramesh could very easily have requested duplicates from Barclaycard, presumably at minimal expense.

5 60. Production of the mortgage offer in respect of Ramesh's purchase of his Bolton property might have been more difficult without access to the original document but, again, the mortgage lender could presumably have supplied a copy from their records if requested.

10 61. The Tribunal has carried out a similar exercise in scrutinising the request for information and documents addressed to Vinod. In his case the letter from LP Patel & Co Ltd dated 18.10.10 refers. It will not be helpful to go through that letter item by item because that exercise has been carried out above in respect of Ramesh but the situation is almost identical. Nearly all of the information could have been supplied without access to Vinod's records and in some respects he is simply stating a  
15 negative.

62. The same applies to Dina. She was asked for copies of her trading accounts and it would be hard to believe that the only copy of those accounts (for the year 06.04.07 to 05.04.08) was among the papers seized by HMRC. Dina has had the services of an accountant and the accounts would therefore be documents of record and a duplicate  
20 could easily be obtained. Dina stated that she had no contract of employment so, again, she was simply confirming a negative.

63. Dina was asked for a P60 and she could have obtained a duplicate rather than waiting to retrieve the original from HMRC's seized records. Duplicate bank statements could have been obtained. In so far as she was requested to produce  
25 building society statements or passbooks or credit card statements, again these could all have been obtained from the appropriate organisation in duplicate.

64. The conclusion drawn by the Tribunal, therefore, is that the alleged turmoil, following seizure of personal documentation by HMRC, did not impact upon the three appellants to the extent that they were unable to comply with the requests for  
30 information made by HMRC.

65. The Tribunal now focuses upon the question of whether there is a reasonable excuse for failure to appeal against the penalty notices within the prescribed time. Reference has already been made to section 49(1) of the Taxes Management Act 1970.

35 66. The matter of "reasonable excuse" has been considered in a number of cases. The case of R (Browalia Cal Ltd) v General Commissioners of Income Tax [2004] STC 296 referred to a wide discretion on the part of the General Commissioners (now the Tribunal) and Evans-Lombe J said, at paragraphs 12 to 14:-

40 "12. It is submitted before me by the taxpayer that section 49, when properly construed, confers upon the General Commissioners, on reference to them of an application to an inspector for permission to lodge an appeal out of time, a wider

5 discretion than that which the Inspector himself had. That discretion is not  
confined, as the Inspector's discretion is confined, to determining whether there  
was a reasonable excuse for the failure to lodge the appeal within that time, but  
would also embrace such considerations as the lack of any prejudice to the  
Commissioners as a result of failing to lodge an appeal in time, and  
demonstrable injustice to the taxpayer if such an appeal is not permitted to be  
lodged out of time.

10 13. I accept that submission. It seems to me that this is a proper construction of  
the Act. It is apparent from subsection 1 of section 49 that it contemplates two  
stages, the first stage being an application to the Inspector who can, if he can  
discern a reasonable excuse, properly allow an appeal to be lodged out of time,  
thus saving the necessity of reference to the General Commissioners for that  
permission to be granted; but that if he does not find that there was reasonable  
excuse, the second stage then arises, which is a reference of the application by  
15 the Inspector to the General Commissioners for them to determine.

20 14. The section does not purport to guide the General Commissioners in any way  
as to how that discretion to permit appeals to be lodged out of time should be  
exercised. It seems to me, therefore, to follow that the General Commissioner's  
discretion is at large and they can consider the sort of matters which I have  
referred to which an Inspector of Taxes had no power to take into account."

67. In R on the application of Philip Cooke v General Commissioners of Income Tax  
and another [2007] STC 499 Burton J said, at paragraph 27, that :-

25 "27. On the other hand, of course, there must be balanced against that the lack of  
explanation for the delay and the prejudice, such as it may be established to be, on the  
part of the Revenue. This balancing act is not one that was carried out by the  
Commissioners, because they were told that it was not appropriate for them to do so.  
Browallia refers of course to the existence of prejudice. But the depriving of a party of  
30 the opportunity of putting forward an arguably meritorious appeal is itself an obvious  
prejudice, and so the reference to lack of prejudice in paragraph 12 of the judgment of  
Evans-Lombe J must carry with it the question of whether basic appeal was arguable. In  
any event, Evans-Lombe J clearly did not mean the examples that he gave of the matters  
which would fall within the discretion of the Commissioners but not within the original  
discretion of the inspector was exclusive, and the merits are obviously an important part  
of that consideration. Although the Commissioners' letter in the protocol correspondence  
35 asserted consideration of the merits, it is quite plain that they did not in the end consider  
them".

68. Accordingly the Tribunal in this case has considered the merits of the basic  
Appeals themselves against the penalty notices.

40 69. In The Commissioners of Inland Revenue for Judicial Review of a Decision of the  
General Commissioners of Income Tax (Hugh Love) [2005] CSOH 135, at  
paragraphs 21-24, Lord Drummond-Young said:

"21. In a sense a tension exists between these two sections. On its face, section  
49 might be thought to confer an unrestricted power to reopen assessments by  
means of a late appeal. Section 33, by contrast, is limited in its application, both

by the six year limit stipulated in subsection (1) and by the exclusion for generally prevailing practice contained in to the proviso to subsection (2). If section 49 is unlimited in its application, however, it provides an obvious route to circumvent the restrictions in section 33. That might be thought contrary to the statutory scheme. A similar point can be made in relation to section 29, dealing with discovery assessments, which is subject to a broadly similar limitation for generally prevailing practice. This difficulty arises, I suspect, because the assessment and appeal provisions that are not contained in the Taxes Management Act 1970 have their origins in a number of different Finance Acts, passed over a long period, and no attempt has been made to develop them into a coherent code using systematic concepts and terminology. It must be said that on the whole the assessment mechanism seems to work well in practice, but this is no doubt due to the good sense of Inspectors of Taxes and tax advisers rather than the coherence of the statutory provisions. In the present case, however, I have come to the opinion that the tensions are more apparent than real. They can readily be resolved by a proper analysis of section 49(1), and I now turn to that analysis.

22. Section 49 is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.

23. Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by section 49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to section 33(2) of the Taxes Management Act. A third issue is the policy that it is to be

discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible and may of itself provide a reason for refusing leave to appeal late.

24. Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed, in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one another, for example in a case where there is reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies.”

70. In R (on the application of Cook) v General Commissioners of Income Tax and another (No 2) [2009] STC 1212 (“Cook No 2”) Dyson LJ (as he then was) agreed, at [18], that the analysis in the judgement of Lord Drummond Young provided valuable guidance as to the correct approach to section 49 TMA.

71. The Tribunal today now applies the fact of this case to the consideration set out by Lord Drummond Young in the Hugh Love case. The Tribunal finds that there was no reasonable excuse for these three appellants not observing the time limits for appeals in this case. All three appellants had letters requesting information, they ignored the first penalty notices and took no timely action on the final penalty notices. The notices themselves, on the face of them, made quite clear the consequences of failure to comply with the information notices.

72. Delays in this case have not been caused by the actions of HMRC. The appellants have had no reasonable excuse from the outset and so it is not necessary to consider whether they have proceeded with reasonable expedition once any excuse had ceased to operate. With regard to prejudice HMRC is entitled to receive the penalty monies from the three appellants and it is not right that there should be procrastination so that their receipt of the penalty monies is delayed. With regard to public interest it is right that HMRC are seen to be pursuing matters with diligence; other taxpayers have to comply with proper requests for information and it is right that HMRC should be permitted to carry out their public duties without delays imposed by others.

73. The Taxes Management Act 1970 clearly displays a policy of insistence that appeals proceed in a timely manner. These appeals have not been pursued by these appellants in a timely manner.

74. The Tribunal concludes that even if leave to appeal out of time were to be given there is no merit in any appeal against these penalty notices. They were properly imposed. The issues in this case have been blurred by the unfortunate commercial

situation faced by the appellants in connection with matters which are not strictly relevant to the appeals. The penalties were properly imposed, they shall remain in place and these three appeals are dismissed.

5 75. 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  
10 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

15 **WDF COVERDALE**  
**TRIBUNAL JUDGE**  
**RELEASE DATE: 30 November 2011**

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