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TC02011

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Appeal number:TC/2011/03811

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PROCEDURE – Application to strike out notice of appeal – application for permission to appeal out of time – appellant’s explanation for delay considered – relevance of when appellant became aware of assessment against which appeal could be made – company in liquidation – relevance of advisors’ role in lack of clarity over standing and representation of appellant– balance of prejudice to parties – permission to extend time limit granted – jurisdiction of Tribunal to hear issues on whether assessment valid

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SUNLANDER OUTDOOR PRODUCTS LIMITED Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at 45 Bedford Square, London on 2 March 2012

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**Mr Tarlochan Lall, counsel for the Appellant, instructed by Debenhams
Ottaway**

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**Mr Alan Bates, counsel for HM Revenue and Customs, for the Respondents
instructed by the General Counsel and Solicitor for HM Revenue and Customs.**

DECISION

5 *Introduction*

1. This case concerns an application by HMRC to strike out the Appellant's appeal on the grounds that the appeal is out of time and that there is no good reason why time should be extended to enable the appeal to be pursued.

2. The Appellant argues that the circumstances surrounding the assessment against which the appeal is made are such that an extension of time to file its notice of appeal should be granted.

3. The underlying dispute relates first, to whether certain correspondence between HMRC and the appellant constituted a valid assessment, and second if there was a valid assessment, whether there were under and over payments of VAT.

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Scope of strike out application / Permission to extend time for appeal

4. HMRC's Notice of application dated 16 November 2011, the grounds of which were set out in its skeleton argument of the same date, stated 3 grounds for the strike out:

20 (1) The agent, Minney & Co. had no authority to act on behalf of the appellant company and its liquidators in lodging and pursuing the appeal.

25 (2) The demanded tax had not been paid or deposited as required by s84 of the Value Added Tax Act 1994 and no hardship application had been made on behalf of Mr Richard Swift and Mr Martin Morris (the ex-directors of the company, who had instructed Minney & Co. to bring the appeal).

(3) The appeal is long out of time and time for bringing the appeal should not be extended.

5. At the beginning of the hearing Mr Bates informed me that HMRC had received correspondence from the liquidators which meant that HMRC no longer took issue with whether Minney & Co had authority to act on behalf of the appellants and therefore (1) fell away. This also meant that (2) above fell away too as HMRC were prepared to admit to the appellant (as opposed to Mr Swift and Mr Morris) being permitted to appeal without paying or depositing the tax. This left ground (3). Here HMRC clarified that while it did not take issue with the appeal being out of time in so far as it related to whether or not there was a valid assessment in the first place, HMRC did maintain the appeal was out of time in so far as it was an appeal against the assessment itself.

6. The issue of validity of the assessment and of the time limits for appealing against the assessment are intimately linked given that by definition there must first be an assessment to appeal against before the time limits become relevant. One option would have been to hear argument on the validity issue first to establish that there was

a valid assessment against which to appeal, (given the assumption the Tribunal has jurisdiction to hear the validity issue as to which see paragraphs 54 to 56 below).

7. However, as both parties were content to deal with the issue of permission to extend the time for appeal and had instructed counsel for the hearing, and taking
5 account that a decision on the point on extension of time could potentially narrow down the issues for further determination, I decided to proceed to hear the arguments on that issue rather than defer the matter to a later date.

8. The deliberation would be based on the assumption that the assessment in contention (maintained to be made on 2 February 2006) was a valid assessment. Of
10 course if the conclusion on a subsequent hearing is that that assessment was not valid, the issue on permission to extend the time for appeal against the assessment falls away. If the assessment is found to be valid then this decision determines whether the appeal against that assessment can be heard out of time.

9. Under Rule 4 of the Value Added Tax Tribunal Rules 1986 the notice of appeal
15 was required to be served on the tribunal before the expiration of 30 days after the date of the document containing the disputed decision. An appeal against an assessment dated 2 February 2006 ought therefore to have been filed by 5 March 2006.

10. Under Rule 19 of the above rules the predecessor tribunal had power to:

20 “...extend the time within which a party to the appeal or application or any other person is required or authorised by these rules...to do anything in relation to the appeal or application...upon such terms as it may think fit.”

11. Since 1 April 2009, the Tribunal is governed by the Tribunal Procedure (First-tier
25 Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”). Under rule 20(4) as amended by SI 2010/2653 (with effect from 29 November 2010):

“(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.

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(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal –

35 (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the notice of appeal.”

12. Accordingly I am asked to extend the time within which the appellant is required to file its Notice of Appeal.

13. The appeal was lodged on 13 May 2011. It is that appeal which the Appellant now seeks permission to make out of time.

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Evidence

14. I had before me a bundle prepared by the appellant containing correspondence between variously the appellant, HMRC, and the liquidators of the appellant company. I had witness statements from Mr R. Swift an ex-director of the appellant, and Mr L. Minney, the appellant company's accountant. The witnesses did not give oral evidence and were not subject to cross-examination. I was also at the hearing handed a marked up draft copy of the deed for sale of the right of appeal, and e-mails between HMRC's solicitors and the liquidators' solicitors. At the end of the hearing I asked for a copy of the final version of the deed of sale and received this on 30 March 2012. I should admit that having made that request I have not, in the event, found it necessary to refer to that document for the purposes of this application and have not therefore considered it further in this decision.

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Background / Chronology

15. I set out the background so far as relevant for the purposes of this hearing:

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(1) The main business of the appellant, Sunlander Outdoor Products Limited ("SOPL") was to sell outdoor furniture.

(2) Mr Swift and Mr Morris were directors of SOPL and Mr Minney was the company's accountant.

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(3) Some time in 2005 SOPL ceased trading.

(4) Ongoing discussions between HMRC and SOPL in relation to VAT led to HMRC collecting the books and records of SOPL from Mr Minney on 10 January 2006.

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(5) Following inspection of those books and records HMRC wrote to SOPL on 2 February 2006 to say that examination of the records had revealed that several errors were found which resulted in both under and over declarations of VAT.

(6) The letter included the following paragraph:

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"You will, therefore, shortly be receiving a Notice of Assessment (VAT 655) for £144,152. This assessment is issued without prejudice to any further action that may be taken by the Department. You will find a list of the errors in the enclosed Schedule of Assessment. A more detailed schedule will be sent to you in due course"

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(7) It is in dispute whether the "Schedule of Assessment" was enclosed or received with the letter. A copy of the Schedule of Assessment was attached in later correspondence but there is also a dispute as to its date.

The appellant draws attention to the fact this is dated 17 November 2006, HMRC say this merely reflects that when a copy report is printed out it bears the date it is printed out rather than the date of the original assessment.

5 (8) In relation to the “more detailed schedule” HMRC later confirmed in their letter of 28 April 2009 that this was not sent.

(9) In relation to the VAT 655 neither the witness statements of Mr Swift or Mr Minney make any mention of the VAT 655 being sent. A copy was not produced in any of the documents before me.

10 (10) HMRC maintain its correspondence from this period (February 2006) constitutes a valid best judgment assessment. This is disputed by the appellant.

(11) On 21 March 2007, upon the petition of the creditor HMRC to the High Court, it was ordered that SOPL be wound up under the provisions of the Insolvency Act 1986.

15 (12) On 7 September 2007, Mr P J Clark and Mr P D Williams of Menzies Corporate Restructuring were appointed as joint liquidators of SOPL.

(13) On 25 March 2008 the liquidators’ solicitors, Clarke Wilmott wrote to the Directors of SOPL, Mr Morris and Mr Swift, to request payment of sums of unlawful dividend payments they claim had been made. (The claim for unlawful dividend payments arose on the basis that amounts in dispute in the current appeal, when counted as a liability to HMRC, meant the payments in dividend that had been made were in excess of the company’s profit.)

20 (14) A copy of the above letter was forwarded to Mr Minney who then wrote on 27 March 2008 to Clark Wilmott to query the amounts and the unlawful dividend payment claim.

(15) On 18 July 2008 Mr Minney wrote to HMRC in relation to the VAT sum of £144,000 asking for more information on how this had been calculated. HMRC responded on 22 July 2008 asking him for a form 64-8. There then followed correspondence between Mr Minney and HMRC in relation to the amounts in dispute.

30 (16) On 16 December 2008 HMRC wrote to Mr Minney to explain that the assessment would be reduced by £54,030 and the basis for that reduction.

35 (17) Further correspondence followed between Mr Minney and HMRC in which Mr Minney continued to query the figure assessed.

(18) On 28 April 2009 in a letter from HMRC to Mr Minney HMRC observed that the “more detailed schedule” referred to in its letter of 2 February 2006 was not sent because Mr Swift had not contacted the HMRC officer to arrange a meeting as had been requested in the 2 February 2006 letter. HMRC told Mr Minney they were unable to do

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anything and suggested that if he wanted to take the matter to a higher authority he should contact the VAT Tribunal and seek permission to appeal outside of the 30 day time limit.

5 (19) On 6 May 2009 Mr Minney informed HMRC he was ready to move forward with the appeal but requested a review prior to going ahead with that.

(20) There then followed correspondence between Mr Minney and HMRC which led to internal review by HMRC which was completed on 28 June 2009

10 (21) On 18 August 2009 the liquidator's solicitors Clarke Wilmott wrote to Mr Minney. The letter mentioned the right to appeal:

15 "…lies with the Company which is now acting by its Liquidators. It seems to us that your client is not able to challenge the VAT assessments via formal court or tribunal proceedings without involvement or agreement at least by the Liquidators. We need to know how you intend to proceed so we can consider how best to approach the matter".

20 (22) Having lodged first appeal 27 August 2009 Mr Minney on 28 August responds to Clarke Wilmott informing them of this and responded to the query above by saying:

25 "…our clients are of course defending their joint positions against claims by yourself. In order to do so, they are automatically required to discuss, amend and adjust the constituent parts that make up the claim. In doing so they must converse with the VAT Office. We are sure you would agree."

30 (23) On 25 September 2009 Clark Wilmott issued an application for an order in relation to the unlawful dividend payment claim before Luton County Court. It was noted that the progress of the application would depend on the outcome of the VAT appeal and indicated in the documents supporting the application that a stay of the application for a sufficient period to await the outcome of the VAT appeal would be sought.

(24) On 22 June 2010 HMRC made an application to strike out the appeal on the grounds that the appeal had been lodged by representatives who were not acting on the instructions of the supposed appellant, SOPL.

35 (25) On 10 January 2011 a deed headed "DEED comprising an agreement for sale of a right of appeal" was executed between (1) SOPL, (2) Paul Clark and Paul Williams (in their capacities as joint liquidators of SOPL) and (3) Mr Swift and Mr Morris.

40 (26) HMRC's application to strike out was listed for hearing and after being postponed twice was finally heard on 28 April 2011. The Tribunal directed the appeal of 27 August 2009 be struck out on the grounds that the appeal against the assessment could only be brought by SOPL and that the appeal had been lodged by Mr Minney who the Tribunal found did not have the authority of the Company by its liquidators to lodge the appeal at

the time that it was lodged. Further, to the extent Mr Minney had purported to lodge the appeal on behalf of Mr Swift, at the time the appeal was lodged the Tribunal considered that Mr Swift did not have locus standi to bring the appeal as he was neither the maker nor recipient of the supplies assessed to VAT and was not liable to pay the tax, nor at that time had any rights been assigned to him.

(27) The appeal under consideration in this hearing was then lodged on 13 May 2011.

(28) Between 23 February 2012 and 1 March 2012 there followed a series of correspondence between Clark Wilmott, HMRC and Debenhams Ottaway solicitors confirming that Mr Swift and Mr Morris, through their legal representatives (Debenhams Ottaway) were bringing the appeal in the name of SOPL and acting for and on behalf of SOPL under the authority of the liquidator.

Legal test on permission to extend time

16. Mr Lal referred me to the case of *B Fairall Limited (In Liquidation)* [2010] UKFTT 305 as a case which usefully sets out the tests the Tribunal should apply in exercising its discretion to grant permission to pursue the appeal out of time and also to the overriding objective of the First Tier Tribunal rules set out in Rule 2 of the Tribunal Rules to deal with cases fairly and justly. The judgment in *B Fairall* in addition to stating that the discretion involves balancing the interests of the parties mentions the following propositions drawn from the authorities.

17. In *R (on the application of Browallia Cal Ltd) v General Commissioners of Income Tax* [2004] STC 296, the High Court held that the discretion of the tribunal to allow a late appeal to proceed is a discretion at large.

18. In *R (on the application of Cook) v General Commissioners of Income Tax and another* [2007] STC 499, one of the factors to be taken into account is whether the appellant has a prima facie case.

19. Factors that the Tribunal ought to weigh in the balance include whether the failure to comply was caused by a party's legal representatives and not by the party itself, *Sayers v Clarke Walker* (a firm) [2002] 1 WLR 3095 (para [27]), or the fact that advisers had a misconception as to what the law required, as in *R v Commissioners of Customs and Excise, ex parte British Sky Broadcasting* [2000] EWHC Admin 370 (at p 9).

20. In *Marijus Leliunga v Revenue and Customs Commissioners* [2010] UKFTT 229 (TC), it is suggested that having regard to the correlation between the overriding objective as expressed in the 2009 Rules with that in Rule 1.1 of the Civil Procedure Rules 1998 ("CPR"), the factors set out in Rule 3.9(1) of the CPR are relevant to the exercise of the Tribunal's discretion.

5 21. CPR Rule 3.9(1) sets out the following factors for consideration :

- (a) *The interest of the administration of justice*
- (b) *Prompt application for relief*
- (c) *Intentional failure to comply*
- (d) *A good explanation for the failure*
- 10 (e) *Compliance with other rules and directions*
- (f) *Failure caused by legal representative*
- (g) *The trial date could still be met.*
- (h) *Impact of failure to comply on both parties*
- (i) *Effect of granting relief*

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22. In relation to the relevance of the checklist of factors above, I note the analysis set out in *Aston Markland v Commissioners of Revenue and Customs* [2011] UKFTT 559 (TC) of the amendments to rule 20(4) which were made by SI 2010/2653 to the effect that it cannot be assumed that the overriding objective overlays the Tribunal's discretion to give permission.

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23. To the extent the relevance of the checklist is dependent on the correlation between the overriding objective and CPR Rule 1.1, the relevance of the checklist is arguably diminished. But even if that is so, in my view, that does not preclude me from choosing to have regard to the factors in the checklist in exercising the Tribunal's discretion.

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Discussion: Test applied to facts here

24. Having considered the checklist set out in Rule 3.9(1) against the background of this matter I find the following factors to be of particular relevance in the exercise of my discretion and that is convenient to start by considering whether there is a good explanation for the failure to appeal on time.

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Good explanation for the failure? (Rule 3.9(1)(d))

25. While this discussion proceeds on the basis that the time limit for appealing started to run on 2 February 2006, even if it is possible for an assessment to be valid if the appellant is not actually aware of it, the lack of awareness and the circumstances surrounding that are, in my view, relevant to the explanation for the failure to file on time.

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26. The letter from HMRC of 2 February 2006 which, for the purposes of this decision, is assumed to be the assessment against which the appeal lies, was stated to enclose a schedule. It is in dispute whether that schedule was received by the appellant. The letter also refers to a detailed schedule which was to be sent later and a

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form VAT655. It is agreed that the detailed schedule was not in fact sent. Neither the witness statements of Mr Swift or Mr Minney make any mention of the VAT655 being sent and a copy was not produced in any of the documents before me. HMRC's letter of 16 December 2008 to Mr Minney refers to the HMRC officer leaving messages with Mr Swift after this date which was not responded to, but there is no further detail on when these were left and the content of the messages.

27. Should the dispute on whether there was a valid assessment come before a court or tribunal it will, no doubt with the benefit of witness evidence and cross examination on such evidence consider whether and if so what findings should be made on what further documents were sent and when. But, for present purposes and on the basis of what has been put before me, in assessing whether the appellant knew there was an assessment against which an appeal ought to be made within 30 days, I am unable to make a finding that the appellant was so aware until a much later date.

28. While it is unsatisfactory that there appears to be no clear reason why the matters raised in HMRC's letter of 2 February 2006 were not actively pursued in correspondence between the parties, the fact remains the appellant does appear to have been left in doubt as to whether time was running for the purposes of lodging an appeal. For this reason the fact that there was a significant period of inactivity should not of itself be held against the appellant. In accepting as I do that there was a good explanation for the failure file the appeal during this period I do not mean in any way to endorse the inactivity of the appellant in seeking to clarify matters but only mean to say that the explanation is good in the sense that if a person does not know there is an assessment against which to appeal that may provide a good explanation of why the person has not appealed. The position would be different if for instance an appellant had contrived to not be fixed with knowledge that they could appeal but I do not find that to be the case here.

29. From March 2008 there was protracted correspondence between Mr Minney, HMRC and the liquidators. Reviewing this I find that the appellant company through its liquidators and in turn through their solicitors became aware that there was an assessment that could be appealed against at the very latest by 18 August 2009. But since the liquidators seemed content for Mr Minney to correspond with HMRC on their behalf prior to that and the liquidators had it appears themselves been in correspondence with HMRC in April 2009 over the matter, I infer that SOPL became aware of the need to appeal at the earlier date of 28 April 2009 being the date HMRC wrote to Mr Minney.

30. Having become aware of the need to appeal there was still then a delay of nearly 2 years until a valid appeal was filed on 13 May 2011 (an abortive appeal having been filed on 27 August 2009 following HMRC's review letter of 28 July 2009). I consider the explanation for this delay in the context of who was at fault for this in more detail from paragraph 31 onwards below.

Was the failure to comply with the time limit intentional on the part of the Appellant? (Rule 3.9(1)(c))

31. I do not find there is anything on the materials before me to suggest that the Appellant intended not to comply with the time limit.

Failure caused by legal representative? (Rule 3.9(1)(f))

5 32. Given the broader range of representation that may be allowed before this Tribunal I shall consider this factor on the broader terms of whether the fault for the delay lay with the appellant's professional advisers.

10 33. From April 2009 it seems the parties proceeded with reasonable expedition once alive to the issue that there was a dispute. However there then followed a series of abortive attempts to get a valid appeal before the Tribunal. In particular there were issues relating to the standing of the appellant and its representation before the Tribunal which were not regularised until shortly before the hearing of this application.

15 34. The appeal filed on 27 August 2009 was defective and struck out on the ground that Mr Minney did not have authority to act for the appellant. A deed purporting to sell the appeal was executed on 10 January 2011 but even assuming the deed was effective, an appeal was not lodged in the name of the buyers of the appeal but in the name of the seller. The question arises as to who was responsible for the delay of close to 2 years while the abortive attempts to get a valid appeal filed were made.

20 35. It seems to me both Clark Wilmott and Mr Minney were remiss in failing to get sufficient clarity at the outset on the fact the company's appeal lay with the liquidators and in ensuring that at the time the appeal was filed the representative filing it had authority to do so. An appeal was filed in the name of the company but Mr Minney lacked authority to file that appeal on behalf of the company. HMRC accordingly made an application to strike out. The deed of 10 January 2011 appeared to be an attempt to remedy the issue but did not do so. The continuing failure to file a valid appeal arose because of the misapprehensions of the advisors as to who had standing to appeal and who was to represent the appellant.

30 36. I should mention that at the hearing Mr Lal made a number of arguments in relation to construction of the deed of 10 January 2011, namely that it was on its terms capable of being construed as confirming that Mr Minney had the right to represent the company in the appeal or that if it could not be so construed the document as a whole, being inconsistent with the parties' intentions was liable to rectification by a court. Those arguments were put to me in the context of whether there was an appellant before the Tribunal on this matter who had standing. The deed was certainly not clear in this regard and as Mr Bates pointed out even contained a warranty that Mr Morris and Mr Swift would not join SOPL or the liquidators to any proceedings in relation to the appeal. As the issue of standing was resolved through written confirmations obtained from the liquidator shortly prior to the hearing I need not go into whether I agree with Mr Lal's submissions from the perspective of standing in this matter. But, I mention them here because they provide a further indication that despite the involvement of professional advisers the issue of who was to progress the appeal and on what basis was not properly resolved.

Impact of failure to comply on both parties / Effect of granting relief (Rule 3.9(1)(i) and (h))

37. I consider that that these factors on the checklist can be taken account of by
5 considering the respective prejudice to HMRC of permitting the appeal to proceed out
of time and to the appellant of refusing the appeal to proceed out of time and also by
having some regard, to the extent possible, to the merits of the appeal.

38. Mr Bates for HMRC submitted there would be extreme prejudice to HMRC to
have to deal with the substantive arguments in this matter many years later.
10 Documents are not kept and people move on, it is precisely for these reasons that
there are time limits. In this case details and calculations that were available are no
longer so and the relevant HMRC officer had moved on. To the extent the appellant
was seeking to challenge the best judgment assessment it would be very difficult so
many years later to ascertain what books and records the officer had before her in
15 making the best judgment assessment.

39. Mr Bates further submitted that in so far there was any prejudice to the appellant
this was of its own making. It had been given the opportunity to respond to the
assessment but had taken no action. The assessment was made in the officer's best
judgment with books and records she had collected. This was the best she could do in
20 the circumstances. SOPL did not argue or produce further material in 2006. In relation
to the subsequent reduction in the assessment in December 2008, when further
information was produced, HMRC had acted upon it accordingly.

40. Mr Lal submitted that there were various matters, including arithmetic errors but
also adjustments to do with sale and banking figures, credit note adjustments, and
25 zero-rated sales, which reduced the assessment down further to £30,135. Taking
account of overpayments this left a balance of around £16,000 owing. Mr Lal
submitted there was documentary evidence (the detail of which was not before me at
this hearing) to back this up and that there was a strong basis for the further reduction
of the assessment.

30 41. The quantum of the assessment if it is found to be valid will also have a direct
consequential impact on the proceedings against the former directors for unlawful
payment of dividends which have been stayed pending the resolution of this appeal.
That however is prejudice to the former directors in their personal capacity, not to the
appellant so should not in my view be a factor in exercising the Tribunal's discretion.
35 I consider the relevant prejudice to the appellant is in being found liable to an amount
of tax which is larger than that which it maintains is correct. To the extent there is a
possibility that the appellant may be able to mitigate the effects of such prejudice, if it
is successful in the proceedings for unlawful payment of dividends that is not I think
something that ought to weigh in the balance.

40 42. While it is not entirely clear from the appellant's notice of appeal whether the
appellant is mounting a challenge to whether the assessment was made in best
judgment it seems that the substance of the appellant's appeal does contain a

challenge to the quantum of the assessment. Further the appellant maintains they have documentary evidence to back up their claim for further adjustments.

5 43. To the extent the appellant has an arguable case which would lead to a reduction in the quantum of the assessment it is this which they would lose if permission to extend the time for appeal was not granted.

44. At this stage of these proceedings which have not as yet got to the filing of statement of case, lists of documents, or other evidence, it is difficult to say discern that arguments on the strength of the merits will assist me in assessing the prejudice to the appellant.

10 45. In relation to HMRC's arguments that given the length of time that has passed it will be difficult to find out what documents were in the officer's possession at the relevant time I do not doubt that is the case but it seems the appellant's case, if it is challenging best judgment, is not simply limited to that but also covers the amount of the assessment. If the matter were to come to hearing before the Tribunal, the
15 Tribunal would not be restricted, when it came to assessing quantum to looking only at the materials which were before the HMRC officer at the time of the assessment.

46. In *Mithras (Wine Bars) Limited* [2010] UKUT 115 (TCC) the Upper Tribunal, after having analysed the relevant authorities on best judgment assessments stated [para 16]:

20 "the Tribunal is not restricted to any kind of quasi-supervisory function which involved referring to the Commissioners' judgment on quantum at the time the Commissioners made their assessment. The Tribunal's function is truly appellate, in that it can consider further information or
25 argument at the hearing of the appeal and reduce the amount of the assessment, thereby substituting its own view on quantum for that of the Commissioners."

47. On the assumption there is a valid assessment this will stand good and the burden will be on the appellant to bring evidence to show why the quantum should be varied by the Tribunal. In those circumstances despite the significant length of time that has
30 passed I do not think the prejudice to HMRC is so extreme that it can of itself provide a conclusive answer.

Conclusion on permission to extend time limit to appeal

35 48. There has undoubtedly been an extremely long delay between the assumed assessment of 2 February 2006 and the filing of the Notice of Appeal of 13 May 2011.

49. The circumstances of this matter are perhaps unusual in that a significant period of the delay (2 April 2006 to April 2009) is in my view accounted for by the appellant not being aware that there was an assessment against which an appeal ought to have been made.

40 50. Subsequent to that, a further significant period of delay arose because of continuing misapprehensions by advisers. In particular advisers instructed by SOPL's

liquidators relied on the ex directors' accountant to correspond in relation to the appeal and did not proceed to put in a protective appeal on behalf of the liquidators which they could have done in April / May 2009.

5 51. There is prejudice to HMRC in that officers will have moved on, memories will
have faded and documents will be disposed of, and to the public interest in terms of
achieving finality of tax decisions. But, taking into account variously the
explanations for the delay set out above, the fact it will be for the appellants to show
why the assessment should be displaced, and that the appellants maintain there are
documents demonstrating why they have been overcharged, then in my view it is in
10 the interests of justice that I exercise my discretion to allow the appellant to proceed
with an appeal against the assessment, should it be determined that the assessment is
valid.

15 52. Permission to extend the time limit for service of the notice of appeal to 13 May
2011 is therefore granted and HMRC's application to strike out on the grounds the
appeal is out of time is dismissed.

Further directions and jurisdiction of Tribunal to hear arguments about validity of assessments

53. Directions for the further conduct of the appeal are issued separately to the parties.

20 54. Both parties are, I understand, agreeable to this Tribunal hearing the issue of the
validity of the assessment and have not raised any issue on the Tribunal's jurisdiction
to do this. Indeed Mr Bates in submissions to me suggested that it would be preferable
to have the validity issue brought before the Tribunal given its specialist expertise as
an alternative to bringing it in proceedings before the County Court.

25 55. I was not referred to any direct authority on the point but note that there are
numerous examples of cases heard on validity of assessments before the predecessor
VAT Tribunal which proceeded to higher courts without any issue being taken on
jurisdiction (see e.g. *C&E Comrs v Laura Ashley Ltd [2003] EWHC 2832 (Ch)*
[2004] STC 635).

30 56. In any case, the issue of whether or not there was a valid assessment would itself
go to whether the Tribunal had jurisdiction to hear the appeal against such assessment.
Given that Rule 8(2) and 8(4) of the Tribunal Rules envisage the Tribunal considering
whether it has jurisdiction (because of the requirement for the Tribunal to strike out if
it does not have jurisdiction and the requirement to afford the appellant the
35 opportunity to make representations before striking out on this basis) I am satisfied
the Tribunal does have jurisdiction to consider whether HMRC's correspondence of
February 2006 constituted a valid assessment.

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58. 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.

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**SWAMI RAGHAVAN
TRIBUNAL JUDGE**

RELEASE DATE: 18 April 2012

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