TC04786

Appeal number: TC/2015/00221

INCOME TAX – application for permission to make a late appeal against income tax assessments and penalty determinations - application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR OLUSEGUN ODUNLAMI **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER GILL HUNTER

Sitting in public at Fox Court, 30 Brooke Street, London on 24 July 2015

Mr Opara of Icon Accountants, as adviser to the Appellant

Ms Williams, an officer of the Respondents, for the Respondents ("HMRC")

DECISION

1. The appellant applied to be allowed to make a late appeal against closure notices and discovery assessments dated 13 November 2012 and penalty determinations dated 20 November 2012 issued as a result of an enquiry by HMRC into the appellant's self assessment tax returns for the tax years 2006-07, 2007-08, 2008-09 and 2010-11. HMRC submitted that the appellant's application to make a late appeal should be refused.

2. The appellant did not attend the hearing. Mr Opara said that the appellant was unable to attend as he was ill. He produced two letters:

(1) A letter dated 20 July 2015 stated to be from Dr O Banerjee of Lakeside Medical Practice. Dr Banerjee confirmed that the appellant was registered at that practice and that he saw Dr Banerjee on the date of the letter with symptoms of stress, anxiety and low mood. Dr Banerjee noted that the appellant had not consulted the practice about this previously and he had not had mental health issues in the past according to his past medical history.

(2) A letter dated 17 July 2015 from Lanre Dada of Joshua Herbal Medicine at an address in Nigeria. This confirmed that Joshua Herbal Medicine had been supplying local herbs and natural medication to the appellant since 2012. The herbs and natural medication were stated to be for the appellant's regular treatment.

3. We considered that we were not able to conclude from the letters presented whether the appellant was unable to attend the hearing given that they did not address his condition in any detail. The appellant's representative confirmed that he had prepared for the hearing and the appellant was happy for matters to proceed. In the circumstances we considered that it was in the interests of justice to proceed with the hearing.

Facts and evidence

4. HMRC had carried out an enquiry into the appellant's self assessment tax returns for each of the tax years 2006-07 to 2010-11 (inclusive). We were not given details of when the enquiry commenced or of the conduct of the enquiry except as set out in 5.

2012 correspondence

5. On 16 October 2012 HMRC wrote to the appellant's adviser, Mr Adelani Awe of Lemo Corporate Accountants ("**Lemo**"), in response to a letter of 18 September 2012 (which was not produced to the tribunal). In the letter HMRC noted that the appellant contested HMRC's figures for the computation of the correct amount of income tax due on the profits of his mini-cab and property rental businesses but had not produced documentary evidence in support of his own figures in particular as regards rental income and expenses of the property rental business. The appellant was asked to provide all such information.

6. HMRC issued closure notice and income tax assessments to the appellant on 13 November 2012 (the "**assessments**") and penalty determinations on 20 November 2012 (the "**determinations**"). The total amount of income tax and penalties which is shown as potentially the subject of the appeal is £119,449,70. The assessments each contained statements notifying the appellant of his appeal rights and of the relevant time limit being 30 days from the date of the issue of the relevant assessment or determination.

2014 correspondence

7. On 19 March 2014 S Bunger of HMRC was contacted by Cecilia Laird of Breather Financial Services. The note of the telephone call produced by HMRC recorded that Ms Laird advised that the appellant swore that he did not owe the amount HMRC were claiming and it seemed a previous accountant may have been negligent. S Bunger explained that the enquiry had been closed for some time and that the previously requested documents would need to be produced in support of the appellant's position and as he was out of time he would need to appeal to the tax tribunal giving reasons for the lateness.

8. On 28 March 2014 Icon Accountants ("**Icon**") wrote to HMRC enclosing a form 64-8 from the appellant authorising them as his tax agent for self assessment purposes. The letter stated:

> "Monies allegedly attributed to our client were not in fact his own and as such we are ascertaining these figures with a view to bringing them to your knowledge. We hope to complete this exercise in the next three weeks before contacting you again."

9. On 22 April 2014 S Bunger of HMRC wrote to Icon in a letter noting that the enquiry into the relevant tax years had been closed by the issue of the assessments in November 2012 and that these had become final and conclusive as the appellant had not appealed or requested a review. The appellant and Lemo had been advised of this in a letter from HMRC dated 3 February 2013. Lemo had written to the Debt Management and Banking campaign on 27 June 2013 objecting to the assessments and enclosing a copy of their letter of 18 September 2012. HMRC had already responded to that letter in their letter of 16 October 2012. In order to re-open the matter, the appellant would need to submit a request for late review or make a late appeal along with providing the outstanding documentation and information requested in the letter of 16 October 2012. The appellant would need to provide reasons for making a late appeal or request for a review and why the appellant had reasonable grounds for making the late request. HMRC noted that the appellant could not appeal against their refusal to review the case but could ask the tribunal to consider a late notice of appeal and referred the appellant to HMRC's and the tribunal's websites for further information.

10. On 24 May 2014 Icon wrote to S Bunger of HMRC noting that amounts lodged in the appellant's account did not actually belong to him and that Icon had advised the appellant "to comb the world and locate other people who lodged monies

in his account." The relevant monies were described as deposits belonging to people that the appellant was undertaking joint monthly contributions with, monies deposited in the appellant's account whereby recipients of the sterling funds gave the parents/dependents of the depositors the equivalent in local currencies overseas, monies taken from credit cards, additional borrowings form mortgagors deposited in the appellant's bank accounts and withdrawals from one account deposited in another account (referred to as loans). Icon referred to enclosures to the letter in support of this and drew particular attention to copies of bank account entries marked with an asterisk. Icon requested HMRC to carry out a late review of their decision taking this information into account. Icon stated that the appellant had not raised these issues before because:

> "[he] completely forgot these facts as a result of the prevailing economic difficulties which have heavily militated against his business and trading and the weight and stress which the enquiry placed upon him. Equally his former advisers have inadvertently failed to go through the bank statement with him as we have done."

11. The enclosures sent with the letter of 24 May 2014 were:

(1) A list of bank loans/credit card accounts the majority of which were stated to be "Closed" with handwritten notes as to the amounts of the loans being in total £40,600.

(2) A letter dated 12 May 2014 expressed to be from Mrs Taiwo Adedoyin form an address in Nigeria addressed "To whom it may concern":

> "I, Mrs Twaio Adedoyin am the Aunty of Mr Olusegun Odunlami. I am writing this letter to confirm that I made a payment of the sum of £23,000 in instalments into his Lloyds TSB and Barclays bank accounts in 2008. The payments were made in order to enable my purchase of truck from Cross Commercials Ltd in Stoke."

(3) A letter dated 14 May 2014 expressed to be from Mrs Yetminde Odunlami from an address in Kent and addressed "To whom it may concern"

> "This is to confirm that I, Yetminde Odunlami (Mrs) borrowed my husband Olusegun Odunlami the sum of £20,000 in 2007. This is to offset some outstanding debts. Thank you for your attention."

(4) A statement regarding a loan from HFC Bank to the appellant showing the balance, repayments and interest in the period from 5 September 2006 until 2 January 2007. The outstanding amount as at 2 January 2007 was stated to be £29,990.

(5) Various bank statements with highlighted entries (being those marked with an asterisk as referred to above) as follows:

(a) A debit item shown in a Barclays Account of £1,930;

(b) A receipt of £6,000 shown in a Barclays Bank flexible saving account held by the appellant as credited on 29 August 2008 and

stated to be received from "Odunlami O" with the reference "Southward Park Rd".

(c) Amounts of £6,450 and £4,000 debited from a Lloyds TSB Account held by the appellant on 27 and 28 August 2008 respectively. The amounts debited were in each case described as bill payments with "Cross Commercial" listed under the details.

(d) An amount of £2,000 credited to a current account held by the appellant with Barclays Bank on 30 September 2008 described as "deposit at Barclays Woolwich 34".

(e) An amount of £4,000 credited to the current account held by the appellant with Barclays Bank on 20 October 2008 described as "Bank Giro credit" "received from O Odunlami."

12. On 19 June 2014 HMRC wrote to Icon making the following points:

(1) A full review had already been carried out of the bank statements of the appellant for the tax year 2006-07. HMRC had identified from those all income, including loans, which were not part of the appellant's mini-cab trading income or property rental income. HMRC explained that they had then used the figures established for that year to find the income amounts for the other years by extrapolating backwards and forwards and adjusting the figures under the retail prices index. Adjustment to the rental income was based on information and documents supplied by the appellant. The bank statements provided by Icon with their letter of 24 May 2014 related to a later period.

(2) The signed letters form Mrs Odunlami and Mrs Adedoyin as regards loaned sums "are easy to produce but difficult to verify". HMRC would need to see the corresponding bank statement from them showing the withdrawals if the enquiry was to be reopened. HMRC would also require evidence of those parties' means to support the fact they were in a position to make the loans. HMRC had seen no evidence of the contributions made from the appellant's bank statements sent to HMRC.

(3) To consider the matter further HMRC would need to receive specific details of all non-business income with supporting documentation for the tax year 2006-07.

(4) The letter repeated that the appellant would need formally to request a review or make an appeal on the same basis as set out in the letter of 22 April 2014.

13. On 4 August 2014 Icon wrote to HMRC asking again for HMRC to review their previous decision and enclosing a letter expressed to be from Mr Onakedo dated 16 June 2014 from an address in Nigeria and addressed "To whom it may concern":

> "I, Niji Onadeki, made regular payments into Mr Odunlami's account in the United Kingdom for the maintenance and upkeep of my son when he was a student in the UK between the years of 2007 and 2011."

14. In a letter dated 18 August 2014 HMRC wrote to Icon enclosing a further copy of their letter of 19 June 2014 and noting that:

(1) The information requested in that letter had not been provided and "as stated in that letter, the letters such as those from Niyi Onadeko are easy to produce but difficult to verify. Furthermore I have seen no evidence of the regular payment being made into Mr Odunlami's bank account by Mr Onadeko as suggested by him in his letter".

(2) No reason had been put forward as to the late request for the review and that, as there appeared to be no reasonable excuse for the late request, it was refused. The letter noted that the appellant could apply to the tribunal for permission to make a late appeal and referred to the information provided in the earlier letter of 19 June 2014.

Witness statement

15. The tribunal also received a copy of a witness statement from the appellant dated 6 July 2015. In outline the appellant stated the following:

(1) His actual tax liability for 2003-04 to 2009-10 is £16,490.12.

(2) He had been doing his self assessment tax returns on his own and without the assistance or guidance of an accountant. He had make mistakes without realising it and not being able to classify appropriately rental income and income from his mini-cab work. With hindsight he now knew that he did not treat the loans appropriately in his returns and had mixed up his figures for many years.

(3) He had co-operated with HMRC's enquiries and at their prompting had sought professional advice and on the basis of that advice had requested HMRC to amend their assessments. However, HMRC has continued "to latch on to the initial return I made which I now know contain errors". HMRC chose to make assessments for 2003-04, 2004-05, 2005-06 and 2009-10 and ignored computations professionally prepared and presented to them. The letters from Icon and enclosures described above were attached to the statement and cited as evidence of the correct figures.

(4) The appellant submitted that:

"16. In my opinion the essence of an enquiry is to establish facts and correct errors whether it favours the appellant or respondent.

17. I submit that I should not be made to suffer prejudice as a result of ignorance of accounting rules, the extent which in this case is colossal.

18. The respondent has refused to conduct a review even where there are available records to do so.

19. Instead the Respondent has been unreasonable in their conduct and engaged in high level of highhanded to enforce alleged and unsubstantiated debt.

20. That is why I implore the tribunal to take into account the level of highhandedness the Respondent is engaging in trying to enforce disputed amounts and the prejudice which the Respondent is exposing me to in refusing to either amend my tax returns or conduct a review of their own assessments.

21. I pray the Tribunal to take into account the prejudice and possible ruin which I will suffer if I am denied amendment of my tax return records as well as deny me a review of any assessments based on factual evidence and records in my possession."

16. The appellant concluded by requesting the tribunal to allow the appeal and:

"23 That the professionally revised tax computation be admitted by the Respondent and used to amend my prior year tax return as in Exhibit A.

24. Or direct the Respondent to conduct a review of all their assessments taking into consideration facts, figures and available records

25. Or both paragraphs 22 and 23 above."

17. The computations referred to by the appellant in his witness statement showed figures for income from the mini-cab business and property rental business for each of the tax years from 2003-04 to 2009-10. There were no detailed computations. As regards the property rental business, the schedule showed a breakdown of the income on a property by property basis as well as showing a breakdown of expenditure claimed to be deductible.

18. The witness statement also had the documents referred to above attached as exhibits in support of the statement. Also attached were (a) list of taxpayer credits paid to the appellant in the period from 3 May 2012 to 6 October 2012 and (b) letters to the appellant and his wife from Pendeford Mortgage Processing Centre dated 4 September 2007 and 5 August 2008 offering "further" loans in each case for an unspecified amount.

Appeal to the tribunal

19. A notice appeal was sent to the tribunal dated 12 May 2015 by Mr Opara of Icon as the representative of the appellant. The reason why the appeal was made late was specified to be as follows:

"Our client was suffering from a mysterious illness for which diagnosis is still on-going, he is on local herbs even at the moment. While ill, his former advisers went into liquidation. Matters concerning him were left unattended to. The level of prejudice he will suffer will be very enormous if this request is not granted. He may face total ruin. In the interest of justice he seeks the assistance of the tribunal to intervene in this matter."

20. The grounds of the appeal against the assessments and penalty determinations were stated as follows:

"(1) Some monies/deposited lodged in his bank account did not belong to [the appellant].

(2) Please see letter of 24/05/14 from Icon Accountants to S Bunger of HMRC.

(3) There is now evidential proof of the above fact that some deposits were not [the appellant's] own over the years.

(4) To assess tax liability on amounts that do not belong to [the appellant] is injustice."

Submissions

21. In outline, Mr Opara made the following submissions for the appellant:

(1) The appellant was late in making the appeal for two reasons:

(a) He was and is suffering from a mysterious illness for which diagnosis is still ongoing.

(b) While the appellant was ill, his former agents went into liquidation and matters concerning him were left unattended to. His accounting records were lost as he could not trace his former advisers/agents. Mr Opara considered that the copy HMRC had produced of page printed from the internet from a website of a firm called Lemo Corporate Accountants was not sufficient to evidence that these advisers were still in business. In any event, a firm by the name of Lemo Corporate Accountants were not the relevant advisers who had become insolvent.

(2) HMRC failed to carry out a review because of the time lapse but suggested in their letters of 19 June 2014 and 18 August 2014 that an application be made to the tribunal. It is therefore misleading for HMRC to object to this appeal as it was made in compliance with HMRC's advice.

(3) The appellant's failings were not intentional and for much of the time he had not been in receipt of professional advice. Once he had taken advice from Icon he had tried to sort matters out with HMRC.

(4) The appellant will suffer great prejudice by being deprived of the opportunity of putting forward an arguably valid appeal. New evidence has been produced as set out in the letter from Icon to HMRC of 24 May 2014.

22. HMRC made the following submissions:

(1) The appellant had not provided any evidence of him seeking help or advice from any medical practitioners regarding his illness or the effect his illness had on his ability to deal with affairs. He has also not provided any evidence to show his former accountants went into liquidation and lost his records. HMRC have seen evidence that the former agents are still in business by internet researches showing current web pages advertising their business.

(2) HMRC have given the appellant several opportunities to provide outstanding information in order for them to reconsider the decisions. HMRC also explained the appeal process and time limits. In particular:

(a) The letter dated 16 October 2012 detailed the further evidence required for HMRC to reconsider the matter.

(b) The letter dated 12 November 2012 explained the appeal process and time limits for making the appeal.

(c) In the telephone call on 19 March 2014 HMRC again asked for outstanding information and explained that as the appeal was out of time a reasonable excuse was needed in order for HMRC to accept it.

(d) The letters from HMRC dated 22 April 2014, 19 June 2014 and 18 August 2014 stated what further evidence and information was required and asked for a reasonable excuse for the delay in making the appeal.

(3) It is not in the interests of justice to permit appeals after long periods of delay. There is a public interest in the finality of decisions. The notice of appeal was not served until 12 May 2015 which was a delay of over 2 years.

(4) Judge John Walters QC in the decision of *Jem Leisure Limited* usefully highlights (at paragraphs 17, 19, 20, 24, 25 to 27 and 31 to 33) the factors to be considered when exercising the balancing exercise in reaching a decision on an application to allow an appeal out of time.

(5) In conclusion:

(a) the public interest in the need for good administration, legal certainty and respect for the general time limit for bringing an appeal which parliament has laid down,

(b) the discerned prejudice to HMRC in having to reopen their examination of the appellant's claim were an extension of time for appealing be granted, and

(c) the appellant's discerned culpability for their long delay in initiating the appeal

outweighs the assumed real and practical loss or injury to the appellant of being prevented from pursuing a claim of this value and assumed merit.

Law

23. The appellant has a right of appeal against the amendment made by the closure notice and against the assessments under s 31 of the Taxes Management Act 1970 ("**TMA 1970**"). The appellant also has a right of appeal against the penalty determination under s 100B TMA. This provides that the provisions of the TMA relating to appeals have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax.

24. The appeals are required to be made to the relevant officer of the Board who issues the closure notice or assessment or determination within 30 days of the date on which the relevant notice of assessment, determination or closure notice was given (under s 31A TMA).

25. Where a notice of appeal is given late HMRC may agree to the appeal being made late or the tribunal may give permission for the appeal to be made late under s 49 TMA). This provides as follows:

"49 Late notice of appeal

(1) This section applies in a case where—

(a) notice of appeal may be given to HMRC, but
(b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if—

(a) HMRC agree, or
(b) where HMRC do not agree, the tribunal gives permission.

26. This section also provides that HMRC shall agree to notice being given after the deadline where (a) the appellant has requested HMRC in writing to agree, (b) HMRC consider that there is a reasonable excuse for not giving the notice before the time limit and (c) HMRC are satisfied that the request was made without unreasonable delay after the reasonable excuse ceased (sub-s 49(3) to (6) TMA). HMRC did not agree to the appellant making a late appeal on the basis that they were not satisfied that the appellant had a reasonable excuse for the late appeal in this case.

27. If the appellant is permitted to make a late appeal to HMRC, the further consequence would be that the appellant may then appeal to the tribunal (under s 49A) subject to the outcome of any review by HMRC of their decision.

Discussion

28. The task of the tribunal is to consider whether to allow the appellant to give notice to make an appeal against the relevant assessments notwithstanding that no appeal was made to HMRC within the applicable 30 day time limits. As HMRC has refused to give permission for a late appeal on the basis that they were not satisfied that the appellant has a reasonable excuse for the lateness, the appellant may make a late appeal only if the tribunal gives permission under s 49 TMA.

29. There is no further guidance or restriction in the statute as to when the tribunal may give permission so that on the face of it the tribunal's discretion is unfettered. However, there have been a number of cases on the correct approach to be adopted. Although some of the cases relate to applications for extension of time limits rather than an appeal made out of time, the same principles have been held to apply.

Upper Tribunal cases

30. As explained below, our view is that the correct approach is to follow the principles set out by the Upper Tribunal in *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC). In that case, Mr Justice Morgan set out (at [34]) five questions which the tribunal should ask itself in deciding whether an extension of time is permitted:

> "Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions."

31. Mr Justice Morgan went on to note (at [35]) that the Court of Appeal had held that when considering an application for an extension of time for an appeal to the Court of Appeal it will usually be useful to consider the overriding objective and checklist of matters set out in rule 3.9 of the Civil Procedure Rules ("**CPR**") governing court procedure. The text of 3.9 as in place at that time setting out a list of factors is set out in the Annex. He also noted (at [36]) that he was shown a number of decisions of the tribunal which had adopted the same approach and he concluded (at [37]):

> "In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases."

32. In the same passage he also noted that some of the cases he had referred to stress the importance of finality in litigation. Whilst those comments are not directly applicable where an application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position:

> "Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

33. Following the decision in *Data Select*, changes were made to the CPR. Under the new version of rule 3.9, rather than requiring the court to consider a list of factors, only two factors were specifically referred to as follows:

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

34. The question then arose of what effect the new CPR rules had on an application for extension of time or to make a late appeal and whether this altered the approach to be adopted by the tribunal as set out in *Data Select*. There have been two conflicting decisions on this in the Upper Tribunal.

35. In the case of *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC) Judge Sinfield concluded that the introduction of the new CPR 3.9 and comments made by the Court of Appeal on its application clearly showed that the courts must be tougher and more robust than they had been previously in dealing with whether to extend time limits. He referred in particular to the Court of Appeal decisions in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624. He rejected the argument that differences in the wording of the overriding objectives of the Upper Tribunal rules and the CPR meant that the tribunal should adopt a different approach to that taken in those cases. He thought the tribunal should apply the same approach as in the *Mitchell* case that although consideration should be given to all the circumstances of the case these should be given less weight than the two conditions specifically mentioned in rule 3.9.

36. However, in the case of *Leeds City Council v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT 596 (TCC) Judge Bishopp rejected the approach taken by Judge Sinfield. He decided that the correct approach was still to follow the principles set out in *Data Select* as described in 30 to 32 above.

37. In considering to what extent the tribunal should have regard to the CPR, Judge Bishopp noted (at [16]):

> "As Judge Sinfield said, the CPR do not apply to the tribunals, and they cannot be used as they stand in order to fill gaps. They offer no more than a guide; and in using the CPR for that purpose the tribunal must not lose sight of the surrounding circumstances. The correct approach, at least until *Mitchell*, was described by Morgan J, sitting in this tribunal, in *Data Select*…," [he then set out in full the passages from *Data Select* referred to above.]

38. Judge Bishopp continued that the changes made to the overriding objective and rule 3.9 of the CPR were made with the express purpose of ensuring that time limits and similar requirements were more strictly enforced in the courts (at [17]). However, as those changes had not been introduced in the tribunal rules (and may or may not be in future) (at [18]):

> "It does not seem to me that it is open to a tribunal judge to anticipate a decision which might never be taken and apply, by analogy, changes to the CPR as if they had also been made to the Upper Tribunal rules. In my judgment, until a change is made to those rules, the prevailing practice in relation to extensions of time should continue to apply. In addition, the changes to the CPR were announced in advance; their adoption in the Upper Tribunal, by contrast, was not. I do not think it is appropriate to introduce significant changes in practice without warning.

39. He concluded at [19]:

> "In my judgment, therefore the proper course in this tribunal, until changes to the rules are made, is to follow the practice which has applied hitherto, as it was described by Morgan J in *Data Select*

40. The tribunal is bound to follow decisions of the Upper Tribunal but where there are conflicting decisions of the Upper Tribunal, the tribunal is free to decide which decision to follow. We agree with Judge Bishopp that, for the reasons he has set out in full in the *Leeds City Council* case, the correct approach is to follow the principles in the *Data Select* case. Accordingly, we have approached our decision on whether to allow the appellant to make a late appeal on the basis of the principles set out in that case.

What is the purpose of the time limit?

41. It seems to us that the time limit of 30 days for a taxpayer to make an appeal is to provide taxpayers, as those liable to tax and, HMRC, as the enforcer of the payment of taxes, with certainty as to the "cut off" point when the amount of tax or penalties asserted by HMRC to be due as regards a particular matter or period becomes certain and final. In specifying a period of 30 days Parliament has set down what it regards as sufficient time for a taxpayer to consider whether he wishes to dispute a tax assessment or penalty determination and if so to make an appeal. The taxpayer is required to act promptly if he wishes to make an appeal thereby providing efficiency in the conduct of the dispute (should there be an appeal) or finality (should there be no appeal).

42. On that basis we would not regard it as a matter of routine for the tribunal to allow an appeal to be made outside of the normal time limits. The starting point must be that the 30 day limit should usually be adhered to. Otherwise the purpose of the provision of the time limit would be undermined. There would be little incentive for taxpayers to comply with the time limit and the lack of certainty and finality would potentially cause difficulties with the conduct of resulting disputes and burdensome administrative and enforcement issues for HMRC. Therefore, the tribunal can permit a late appeal only, as set out in *Data Select*, if it is satisfied that on balancing all relevant factors (the length of the delay, the reason for the delay and the effects on the parties of granting or not granting the application for the late appeal), it would be unjust and unfair not to do so.

How long was the delay?

43. The assessments and determinations were issued in November 2012 and the time limit for making an appeal to HMRC therefore expired in December 2012. The chain of events and delays is as follows:

(1) Initially an objection was raised by the appellant's former advisers, Lemo, in a letter of 27 June 2013 written to the Debt Collection division within HMRC which enclosed their previous letter to HMRC of 18 September 2012. By 27 June 2013 the appellant was already several months late for making an appeal or requesting a review by HMRC. No formal request for a review or appeal was made at this stage.

(2) From 27 June 2013 there was a gap of nearly a year before Breather Financial Services contacted HMRC on 19 March 2014.

(3) From 28 March 2014 onwards Icon became involved as the appellant's adviser and asked for a late appeal/review by HMRC on the basis that they had evidence to demonstrate that amounts included by HMRC as taxable income in the relevant assessments were not in fact funds belonging to the appellant.

(4) On 18 August 2014 HMRC confirmed that the appellant's late request for a review of their earlier decision was refused on the basis that the appellant had not provided a reasonable excuse for making the request outside of the applicable time limits.

(5) The notice of appeal was submitted to the tribunal on 12 May 2015. This was nearly 9 months after HMRC's letter of 18 August 2014 formally refusing to review HMRC's earlier decisions and over two years after the expiry of the time limit for making an appeal to HMRC.

Is there a good explanation for the delay?

44. We are unable to conclude that there was a good explanation for any of the periods of delay by the appellant in taking action as set out above. In the notice of appeal to the tribunal and in Mr Opara's submissions, the reason put forward is that the appellant was suffering from a mysterious illness and that his previous advisers had gone into liquidation leaving his affairs and records in disarray.

45. As regards the appellant's illness, no evidence has been produced to us that the appellant had an illness which would have prevented him from dealing with his tax affairs at the relevant time when the appeal should have been made or to account for the subsequent delays (looking at the history of the correspondence in this matter as set out above). The two letters referred to in 2 above merely confirm (a) that the appellant was anxious and in low mood at 20 July 2015 when he saw a doctor in the UK and (b) the appellant was receiving herbs from a centre in Nigeria as part of a treatment which he had been receiving since 2012. No specific details are available of when the appellant became ill, the precise nature of the illness and how this affected the appellant in a way which meant he was not able to deal with his tax affairs by making an appeal within the applicable time limits or to account for the on-going delay.

46. As regards the asserted difficulties caused by the appellant's former advisers going into liquidation, HMRC submitted that Lemo, who they had previously corresponded with as the appellant's agent, appear to be in business still. HMRC produced a copy of a website of a firm of that name which they had found on a recent internet search. Mr Opara responded that in fact it was a different adviser to which the appellant was referring, which had gone into liquidation, but he did not know the name of that adviser.

47. It is clear that the appellant did have Lemo as his advisers, as HMRC had corresponded with them as his agent, and they were involved until at least June 2013 when they sent a letter to HMRC. No information was provided as to the identity of any other advisers involved in the appellant's tax affairs, when such advisers were involved in the appellant's tax affairs that such advisers went into liquidation and how this prevented the appellant from dealing with his tax affairs at the relevant time. In any event, it seems to us implausible that all of the delays involved could be accounted for by difficulties associated with obtaining records and information from former advisers.

What will be the consequences for the parties of an extension of time or a refusal to extend the time?

48. In considering the consequences for the parties of an extension of time or a refusal to extend the time limit, our view is that it must be relevant to consider whether the appellant's appeal would have any reasonable prospect of success if the appellant were to be allowed to make a late appeal ultimately to the tribunal. In this regard we follow the approach in the Upper Tribunal case of *O'Flaherty v R&C Commrs* [2013] UKUT 161 (TC). In that case the tribunal considered that, in applying the approach in *Data Select* of conducting a balancing exercise considering all relevant circumstances, depriving a party of the opportunity to put forward an arguable meritorious appeal was an obvious prejudice which should be part of that exercise (referring to the decision in the High Court in *R (oao Cook) v GCIT* [2007] EWHC 167 at [27]).

49. We do not regard this as requiring a full assessment of the appellant's appeal but as requiring us to take a view on whether, if permission were granted, the appellant would have a reasonable prospect of succeeding.

50. There appears to be no dispute that the assessments and determinations were validly made. The appeal is made on the basis that the assessments are excessive. No specific grounds have been put forward as regards the penalty determinations.

51. The main basis of the assertion that the assessments are excessive is that funds should be excluded from the appellant's taxable income for the relevant years as they were loans made to the appellant (including loans made by the appellant's wife and aunt) or other amounts which did not form part of the appellant's taxable income namely:

(1) Loans from the appellant's wife and aunt of £20,000 and £23,000 in 2007 and 2008 respectively and "regular payments" from Mr Onadeko for maintenance for his son from 2007 to 2011.

(2) A loan from HFC Bank which had an outstanding balance as at 2 January 2007 of £29,000.

(3) Loans/credit card funds of around £40,000 according to a schedule.

52. The evidence provided to HMRC over the prolonged period of correspondence in 2014 as regards these amounts is not very substantial and in many respects wholly inconclusive. The loans from the appellant's wife and aunt are evidenced by letters stated to be from these parties dated in 2014 some years after the loans are asserted to have been made or the funds provided. Whilst Icon provided the appellant's bank statements with highlighted entries relating to August, September and October 2008 which they asset support the fact the loans were made, these do not in any evident way correlate to these funds. Whilst letters have been submitted to HMRC showing that the appellant was offered further bank loans in letter of September 2007 and August 2008, no information was provided as to whether these loans were in fact taken up or what the amounts were or when any further loans were made. The total amount of credit card loans asserted to be made is shown only in a handwritten note with no indication of when the amounts were outstanding.

53. Moreover, in the 2014 correspondence no evidence or submissions have been put forward to HMRC as to whether or how any of the asserted amounts have been included as taxable income in HMRC's assessments. The appellant has not responded to HMRC's request for specific information on the figures HMRC used for computing the rental and mini-cab business income for the tax year 2006/07 (which HMRC have then used as a basis for the years) as set out in their letter of 16 October 2012. The appellant has produced revised figures in its own tax schedules attached to the witness statement but with either very limited breakdowns of the figures used (as regards the property rental business) or no breakdown (as regards the mini cab business). The appellant did not submit any documents or information in support of the figures used and made no attempt to explain the differences between its figures and those used by HMRC.

54. We note that the asserted receipt of the relevant funds was raised for the first time in April 2014 and not at any time during the course of the enquiry. Icon state that the appellant simply forgot about these facts due to difficult financial circumstances and the stress of the HMRC enquiry. Icon also notes that the appellant's former advisers had failed to go through his bank statements with him.

55. To succeed in an appeal, assuming (as does not appear to be disputed that HMRC's assessments and determinations were validly issued) the appellant would be required to demonstrate that HMRC's assessments and related penalty determinations were not correct in the relevant respects on the balance of probabilities. In all the circumstances, given the amount of time that has elapsed, the limited and inadequate nature of information and evidence produced during a prolonged period of correspondence as to the correct level of taxable profits in the relevant years, the lack of credibility of the information given and the delay in coming forward with it, we do

not consider that the appellant's appeal would have any reasonable prospect of success.

56. If the time limit were to be extended, HMRC would face the prospect of dealing with a matter which they would have regarded as closed in December 2012 with the inherent difficulties the time delay brings. We note that in the *Data Select* case Morgan J commented on the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled. In this case, HMRC were in our view entitled to view this case as finally fixed or settled given that the time limit for the appeal expired in December 2012 and no material correspondence was received until March 2014.

Conclusion

57. In conclusion, taking into account the considerable delays by the appellant in making an appeal, the absence of any credible reason for the delay in the making the appeal, the absence of credible submissions and evidence indicating that the assessments and determinations could be successfully appealed against, the potential difficulties in the conduct of the case for HMRC given that they had considered the matter final in 2012 and the interests of ensuring finality in such matters, our view is that the appellant's application to make an appeal outside the applicable time limits should be refused.

58. For all of the reasons set out above, the appellant's application for permission to appeal against the assessments and determinations outside of the statutory time limits is refused.

59. 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.

HARRIET MORGAN

TRIBUNAL JUDGE
RELEASE DATE: 10 DECEMBER 2015

ANNEX

List of factors in Rule 3.9 of the CPR as in place at the time of the *Data Select* decision:

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practices, directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party;

(i) the effect which the granting of relief would have on each party.