[2015] UKFTT 0675 (TC)

TC04792

Appeal numbers: TC/2011/00576 and 2015/01803

FIRST-TIER TRIBUNAL
TAX CHAMBER

DECISION
ON APPLICATIONS TO EXTEND THE TIME LIMIT FOR MAKING AN APPLICATION FOR A DECISION TO BE SET ASIDE AND PERMISSION TO APPEAL

IN THE CASE OF

DAVID JAMES CUMMAFORD and ABCOMA LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE MICHAEL CONNELL

Sitting in public at Alexandra House, The Parsonage, Manchester on 7 September 2015

Mr Liban Ahmed for the Appellant

Mr Julian Winkley, Solicitor and Mr Bryn Morgan, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, by applications dated 9 February 2015, requests, in appeal TC/2011/00576, permission to bring a late application to set aside a decision ("the Decision") of the of the First-tier Tribunal, released on 29 August 2012, and in appeal TC/2015/01803, an extension of time within which to appeal the Decision.

2. By the Decision, the Tribunal dismissed the Appellant's appeal against the refusal by the Respondents ("HMRC") to allow recovery of input Value Added Tax ("VAT") in the sum of £360,021 incurred in VAT periods 02/07, 08/07, 11/07, 02/08 and 05/08. The assessment related to input tax claims for which the Appellant had produced no purchase invoices or other evidence of entitlement to deduct the said input tax.

3. The time within which this application should have been made, as the Appellant accepts, has long since passed. Furthermore, the Decision was previously the subject of an unsuccessful application ("the first application") to have the time limits for seeking permission to appeal extended.

4. The Appellant submits that there are special circumstances which attach to the application which warrant further and proper examination, in particular that it has only recently been a viable option for the Appellant to consider his position with regard to the appeal. He says that he has only now recovered sufficiently from injuries he sustained in a helicopter crash on 23 July 2008 to be able to participate fully in the appeal process.

5. It is the Appellant's contention that the decision to proceed with the original appeal in his absence ran contrary to the interests of justice and that those interests would best be served by setting aside the Decision and remitting the appeal for a re-hearing. His grounds are set out in more detail below.

Background

6. The Tribunal, on 20 August 2012, heard the original appeal in the Appellant's absence, being satisfied that it was in the interests of justice to proceed with the hearing. Judge Tildesley explained the Tribunals reasons for doing so:

> "(1) HMRC accepted that Mr. Cummaford had incurred serious injuries from a helicopter crash on 23 July 2008 which had a deleterious effect on his mobility. The precise nature of his injuries was unknown. Mr Cummaford referred to himself as a paraplegic. The report on the crash stated that he had broken a leg in two places. Mr Doyle, the assessing officer, met Mr Cummaford at the Oldham premises on 18 September 2009, who, according to Mr Doyle, was walking, albeit slowly. Mr Cummaford attended the case management hearing on 29 March 2011. In the Tribunal's view there was no compelling evidence that Mr Cummaford's disability prevented his attendance at the hearing.

(2) HMRC and the Tribunal have extended considerable latitude to Mr Cummaford with the conduct of his dispute. HMRC agreed to undertake an independent review of the assessment on 26 November 2010, even though Mr Cummaford submitted his application almost 12 months after the disputed decision. He submitted the Notice of Appeal late. On 29 March 2011 the Tribunal extended the time limit for submission of the Appeal. On 23 March 2012 the Tribunal postponed the hearing of the substantive appeal. Mr Cummaford had informed the Tribunal on 14 March 2012 that he was ill and would not be able to attend until August 2012. HMRC did not object to the postponement.

(3) The Tribunal does not accept Mr Cummaford's assertions that he did not receive HMRC's bundle of documents and that he was under the impression the Appeal solely concerned Abcoma Ltd. Mr Cummaford was present at the directions hearing on 29 March 2011 when he was made a party to the Appeal. HMRC's documentation: statement of case (served 30 August 2011), list of documents (served 6 October 2011) and bundle (15 March 2012) bore the heading David Cummaford (Abcoma Ltd). HMRC sent its bundle track and trace on 15 March 2012 to Mr Cummaford at his business address. The bundle was signed for by Hughes. On 20 July HMRC sent Mr Cummaford an e mail reminding him that the bundle of documents had been sent out.

(4) HMRC gave Mr Cummaford various opportunities to produce the requisite evidence to substantiate the disputed input tax claims. Mr Cummaford has failed to avail himself of those opportunities.

(5) Mr Cummaford's case as set out in the Notice of Appeal and various correspondence was not strong.

(6) Mr Cummaford advanced no reason why it was necessary to adjourn the hearing. There was no suggestion that the adjournment would benefit his case.

(7) HMRC was in a position to proceed with its witness in attendance."

7. The Tribunal dismissed the Appeal, finding that:

(1) The legislation required Mr Cummaford to produce a VAT invoice or other documentary evidence to substantiate his claims for input tax for 02/07, 08/07, 11/07, 02/08 and 05/08 periods. He failed to do so despite being given various opportunities. Mr Cummaford has given contradictory and unconvincing explanations for his failure to provide the requisite evidence. The Tribunal was, therefore, satisfied that Mr Cummaford was not entitled to the amounts claimed in input tax for the said periods.

(2) Under section 73 of the 1994 Act HMRC was entitled to assess Mr Cummaford for the input tax wrongly credited to him. Mr Doyle calculated the amount due under the assessment by starting with the figures for input tax declared by Mr Cummaford in the said returns. Mr Doyle was entitled to disallow the whole amount of the input tax claimed but instead he allowed part of the input tax because a business was being carried out albeit not to the scale claimed by Mr Cummaford. Mr Doyle's decision as to the amount assessed was reasonable and based on a clear rationale.

8. The Decision was released on 29 August 2012.

9. On 9 November 2012, outside the 56 day time limit (Rule 39 of the The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) the Appellant appealed the Decision.

10. Because the appeal was late, the Appellant, requested an extension of the time limit for making the appeal. HMRC objected to the application. The application was heard by Judge Tildesley on 9 May 2013. The Appellant appeared in person.

11. The Appellant's grounds for extension as stated in his application, centred upon his reasons for not attending the hearing on the 20 August 2012. He did not advance any reason for why he was late with his application.

12. The Appellant suggested that he did not see a copy of the Tribunal's decision until 5 November 2012, when he contacted a barrister to discuss his appeal.

13. The Appellant accepted that the Decision was sent in good time to the correct address for his private residence, namely, 14B Nile Street, Stoke on Trent. The Appellant explained that he probably did not see the Decision when it arrived because from mid-August to the end of September 2012, he was at a retreat in Wales undergoing holistic therapy, and after that he was working for DuPont and the American military in New York and Delaware for the whole month of October 2012.

14. At the hearing of the first application the Appellant stated that he had good grounds of Appeal, and was able to refute the findings of the Tribunal in the Decision. Further he contended that any judgment should be against Abcoma Ltd, not against him personally.

15. At the hearing, Mr Hicks for HMRC objected to the application. In his view, the Appellant had not put forward a good reason for submitting the application late. Mr Hicks considered the Appellant's explanation that he did not see the decision until November implausible, particularly as the decision was sent to his home address. Also, the Appellant produced no documentation to corroborate the dates that he was away from his home. Mr Hicks pointed out that ill-health was not the cause of the Appellant's difficulties over the time limit, particularly as the Appellant accepted that he was fit to travel to the USA, and work there in October 2012. Mr Hicks stated that the Appellant's failure followed a familiar pattern of non-compliance with deadlines.

16. Mr Hicks said that the Appellant's appeal was without merit. The Appellant's main grounds for permission to appeal were that the VAT assessment should have been against Abcoma Limited. Mr Hicks pointed out that Abcoma was not the registered entity for the input tax claims. The disputed claims were made under VAT number 562 4926 20 which was for the registered entity of David Cummaford trading as a sole proprietor as D M Engineering. Mr Cummaford was fully aware of this situation as it was discussed at a case management hearing on 29 March 2011, when he was added to the Appeal. The substantive issue concerned Mr Cummaford's failure to provide evidence of entitlement for the VAT repaid to him. Mr. Hicks asked for the application for an extension of time to be refused.

17. Judge Tildesley, in refusing the application said:

> "(1) I acknowledge that the Appellant suffered serious injuries and disability from the helicopter accident in July 2008, and that he has made great efforts since the accident to overcome those difficulties. I am, however, satisfied that the Appellant's disability was not a contributory factor to the late delivery of his application. The Appellant admitted that in October 2012 he had travelled to and worked in the USA. He attended today's Tribunal without any visible form of assistance.
>
> (2) The Appellant's explanation of not seeing the Tribunal decision until November 2012 was unconvincing. By his own admission, he must have received a copy of the decision. The Appellant made no mention of being at a retreat in Wales in his e mail of 17 August 2012, when he said that he did not know what to do about the hearing on 20 August because he was recovering from another operation and had very little mobility.
>
> (3) Throughout this dispute the Appellant has not complied with requests for information from HMRC and not met the deadlines for issuing proceedings.
>
> (4) The Appellant has not provided a good reason for submitting a late application.
>
> (5) The Appellant's appeal has no real prospect of success. He is the registered entity that made the repayment claims not Abcoma."

18. The decision was released on 20 May 2013.

19. On 10 February 2015 the Tribunal received the Appellant's current applications for permission to apply for the Decision to be set aside and for permission to appeal out of time. The Appellant accepts that his application is, in his representative's words:

> "an exceptionally unusual if not unprecedented course of action… the Tribunal erred in finding that it was in the interests of justice to proceed in the absence of the Appellant, and insufficient weight was given to the extremely unusual and highly relevant extenuating circumstances associated with Mr Cummaford's situation. There is, at the very least, an arguable case that errors have been committed which justify further review."

The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

20. The set aside application, submitted on the Appellant's behalf by his professional advisers, is said to be made pursuant to Rule 41(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2008, However those Rules were superseded by the 2009 Rules, and Rule 41 sets out the restricted circumstances in which the First-tier Tribunal may review one of its own decisions:

> 41(1) The Tribunal may only undertake a review of a decision -
> (a) pursuant to rule 40(1) (review on an application for permission to appeal); and
> (b) if it is satisfied that there was an error of law in the decision.

Rule 41(1) is therefore not relevant to the current set aside application.

21. Rule 38 of the 2009 Rules is the Rule which sets out the provisions for setting aside a decision of the Tribunal which disposes of proceedings:

> 38 (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if -
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
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> (b) one or more of the conditions in paragraph (2) is satisfied.
>
> (2) The conditions are -
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
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> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
>
> (c) there has been some other procedural irregularity in the proceedings; or
>
> (d) a party, or a party's representative, was not present at a hearing related to the proceedings.
>
> (3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.
>
> (4) If the Tribunal sets aside a decision or part of a decision under this rule, the Tribunal must notify the parties in writing as soon as practicable.

22. Rule 39 sets out the provisions relating to an application for permission to appeal:

> 39.(1) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.
>
> (2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 56 days after the latest of the dates that the Tribunal sends to the person making the application -
>
> [(za) the relevant decision notice;
>
> (a) where -
>
> (i) the decision disposes of all issues in the proceedings, or
>
> (ii) subject to paragraph (2A), the decision disposes of a preliminary issue dealt with following a direction under rule 5(3)(e),
>
> full written reasons for the decision;]
>
> (b) notification of amended reasons for, or correction of, the decision following a review; or
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> (c) notification that an application for the decision to be set aside has been unsuccessful.
>
> [(2A) The Tribunal may direct that the 56 days within which a party may send or deliver an application for permission to appeal against a decision that disposes of a preliminary issue shall run from the date of the decision that disposes of all issues in the proceedings.]

(3) The date in paragraph (2)(c) applies only if the application for the decision to be set aside was made within the time stipulated in rule 38 (setting aside a decision which disposes of proceedings), or any extension of that time granted by the Tribunal.

(4) If the person seeking permission to appeal sends or delivers the application to the Tribunal later than the time required by paragraph (2) or by any extension of time under rule 5(3)(a) (power to extend time) -

(a) the application must include a request for an extension of time and the reason why the application notice was not provided in time; and

(b) unless the Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Tribunal must not admit the application.

(5) An application under paragraph (1) must -

(a) identify the decision of the Tribunal to which it relates;

(b) identify the alleged error or errors in the decision; and

(c) state the result the party making the application is seeking.

The Appellant's case

23. The Appellant's grounds for the applications are:

i. Procedural Irregularity - Absence of the Appellant.

a. The Appellant argues that it is a fundamental component of the right to a fair trial and that serious allegations of wrongdoing should be put to a witness. In *HMRC v Noel Dempster* [2008] EWHC 63 (Ch), the Court stated at [26]:

> "... it is a cardinal principle of litigation that if serious allegations, in particular allegations of dishonesty are to be made against a party who is called as a witness they must be both fairly and squarely pleaded, and fairly and squarely put to that witness in cross examination."

In breach of that principle, the Tribunal erred by making findings within the Decision which, on any view, equate to dishonesty and/or fraud on the part of the Appellant.

b. In making such findings - which clearly demonstrate the Tribunal's evaluation of the Appellant as, at best, dishonest - the Tribunal wrongly held that it was entitled to make findings of such gravity against the Appellant, in absentia. Such an approach is impermissible and undermines confidence in the Tribunal's fact-finding process such that a new hearing should be directed.

c. Further or alternatively, the Tribunal erred in concluding that it was in the best interests of justice to permit it to dispense with the Commissioners' obligation to put its factual case to the Appellant's

witnesses during cross-examination. As a result, key allegations were not put to the Appellant.

ii. Breach of Right to Fair Trial

a. VAT is a European tax, levied pursuant to the recast VAT Directive 2009/162/EU. The Appellant's right to a fair trial is protected by Article 47 of the EU Charter of Fundamental Rights which reflects the rights under Article 6 of the European Convention on Human Rights.

b. The right to a fair trial was breached by the Tribunal's approach to its fact-finding role which is the subject of the first ground of appeal, namely a willingness to accept the Commissioners' invitation to make findings of fact in respect of issues which were not put to the Appellant.

c. Any allegation of fraud must be pleaded clearly and distinctly. In *Armitage v Nurse* [1998] Ch 241 (CA) Millett U stated at 254-7:

> "The general principle is well known. Fraud must be distinctly alleged and as distinctly proved."

Davy v. Garrett (1878) 7 Ch.D. 473, 489, per Thesiger L.J.:

> "It is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct complained of fraudulent are pleaded; but, if the facts pleaded are consistent with innocence, then it is not open to the court to find fraud."

As Buckley L.J. said in *Belmont Finance Corporation Ltd. v. Williams Furniture* Ltd. 119791 Ch. 250, 268:

> "An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. *This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used . . . The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged.* If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity." [emphasis added]

d. Therefore, the mere absence of the words "dishonesty" or "fraud" is not in and of itself sufficient to discount the argument that the Tribunal did, in fact, and on the basis of no more than the evidence of the assessing Officer, find that the Appellant had acted dishonestly or fraudulently.

e. Consequently, one cannot have confidence in the Tribunal's fact-finding process and the results thereof and a new hearing is necessary.

iii. Failure Properly to Consider Appellant's Circumstances.

a. Insufficient consideration has been given to the injuries - and their aftermath - suffered by the Appellant in the helicopter crash in which he was involved. The fact that the Appellant sent an e-mail to both the Commissioners and the Tribunal on 17 August 2012 is evidence that the Appellant was extremely concerned to learn that he had been attached to the appeal.

b. Furthermore, he clearly expressed his worry that he was unable to attend the hearing and no longer had access to the documentary evidence in the case. However, no mention is made of any reply having been sent to the Appellant, and it would therefore appear that no effort was made on the part of either the Tribunal or the Commissioners to address his concerns or advise him as to an appropriate course of action in order to safeguard his position.

c. Both the Commissioners and the Tribunal appear to have concerned themselves solely with the fact that (as Judge Tildesley states at para 8 (2) of the Tribunal decision) "...considerable latitude" had been given to the Appellant.

d. The facts of the Appellant's accident are set out briefly in the following sub-paragraphs, to afford the Tribunal a more detailed perspective than was available during the original hearing of the appeal.

1) In mid-2008, the Appellant was involved in a serious accident. The helicopter in which he was travelling on his way back from a business meeting crashed, and he fell some 200 feet to the ground. It was later determined that the crash had been caused by the rotor blades having stalled in what were, on that day, extremely windy conditions.

2) Since the meeting from which he was returning had been with a potential buyer for the business, Abcoma, Mr Cummaford had with him all of the business records, and these were lost in the accident.

3) As a result of the crash, the Appellant sustained some extremely serious injuries and was required to stay in hospital for almost a year, undergoing numerous surgeries and intense physical therapy.

4) The Appellant was given a less than 10% chance of surviving his injuries, which included a broken back, two broken legs, a broken wrist and severe concussion, as well as the inevitable mental trauma and shock which invariably result from events which cause such a catastrophic series of injuries.

5) During the lengthy recovery process, Mr Cummaford was given painkillers, including large doses of morphine, and the rehabilitation process was extremely arduous and, in itself, was often traumatic.
6) After many months of intense physical therapy, Mr Cummaford was discharged. His injuries are such that he is still classed as being paraplegic, and, although he is occasionally mobile, with effort, he has no feeling or control over large areas of his legs. His mobility - as noted by Officer Doyle, and remarked upon by Judge Tildesley - is, at best, sporadic.
7) It is unlikely that the Appellant will regain any sexual function following the accident.
8) In addition, the Appellant is doubly incontinent, and is required to manage these conditions on a daily basis. The Tribunal is invited to agree that, in the face of these trials, it is little wonder that the Appellant's focus was not centred upon the Commissioners and their various enquiries.
9) Equally unsurprisingly, the Appellant required a great deal of psychological help. He still suffers from clinical depression, and this debilitating condition was not helped by the fact that, whilst he was in hospital and unable to operate his business, the company collapsed.
10) The prospective purchaser with whom he had been meeting on the day of the crash pulled out and, on the personal front, the Appellant's marriage broke down.
11) In the face of such devastating circumstances, he considered taking his own life. However he has, to a large extent, managed to fight back, and although he is still dependent upon pain medication, he has succeeded in reducing his morphine intake.
12) Additionally, the Appellant has succeeded in obtaining alternative employment with a US-based company but he retains very little memory of the accident itself, and, therefore, has inevitably found it extremely difficult to react in any coherent or meaningful manner to the various allegations levelled against him by the Commissioners.

e. Therefore, although it may very well be the case that both the Commissioners and the Tribunal have extended to the Appellant a deal of latitude, it remains the case that he was, for much of the material time, simply incapable of playing any rational or meaningful part in the conduct of the appeal.

f. This is borne out by the fact that - as is readily apparent from the contents of the e mail which he sent to the Tribunal and the Commissioners on 17 August 2012 - he had clearly forgotten that, following the case management hearing in March of the previous year, he had been attached personally to the appeal.

g. It is conceded by the Appellant that there is little doubt the course of the litigation to date has been characterised by a degree of contradiction, misunderstanding and error. However, the majority of that confusion has

been as a direct result of the Appellant's accident and its horrific aftermath.

h. In the Appellant's submission, although a deal of latitude has already been given to the Appellant, it was, nonetheless, insufficient, and he should be afforded the opportunity to answer the allegations as they are put clearly to him in cross-examination in the Tribunal.

HMRC's case

24. The Tribunal was entitled to and did, exercise its discretion to proceed in the absence of the Appellant on 20 August 2012. That power is provided for in Rule 33 of the Tribunal Rules.

25. Rule 38 of the Tribunal Rules provides for "setting aside" a decision disposing of proceedings which, in terms, has to be a written application of a party by no later than 28 days after notification by the Tribunal of the decision in question. There is, an "overlapping" rule, that is Rule 39, which provides for a party to apply for permission to appeal no later than 56 days after notification of the decision.

26. In this case, the Appellant lodged an application with the Tribunal for permission to appeal on 9 November 2012. HMRC responded to this by Notice dated 26 November 2012.

27. The application was called on before the Tribunal on 9 May 2013 (again Tribunal Judge Tildesley). The Appellant attended and therefore had the opportunity of putting his case, including all substantive issues in support of his application. On 20 May 2013 the Tribunal's Decision was released giving full written reasons refusing the application to extend time to appeal. The fullest consideration was given to the merits of the application, not least whether in any event there was any real prospects of success.

28. The decision of 20 May 2013 fully advised the Appellant as to next steps if dissatisfied, namely that a refreshed application for permission to appeal, could be made directly to the Upper Tribunal no later than one month after the date of the decision. This is founded on Rule 21 of the Upper Tribunal Rules at Rule 21(2)(b). Accordingly, by no later than on or about 20 June 2013, the Appellant was required to apply for permission to the Upper Tribunal.

29. The present application is to this Tribunal by virtue of the Appellant's representative's Notice of Application dated 10 February 2015. That application was originally called on before the Tribunal on 27 May 2015. There was no attendance by the Appellant but it transpired that, unbeknown to HMRC and, it appears, Tribunal Judge Cannan, the listing had been postponed by Birmingham as being associated with a more recent TC/2015/01803 appeal relating to the Appellant's direct tax affairs where applications of HMRC were extant. The matter was postponed to be re-listed together with the direct tax appeal.

30. In short, HMRC's position is:

i. Rule 41 of the Tribunal Rules, on which the Appellant's application is premised is not engaged, and has no applicability to the present chronology of the appeal. It certainly, provides no power to set aside the original decision of the Tribunal dated 29 August 2012.

ii. Rule 41, as read with Rule 40, is engaged in limited circumstances and provides for a restricted power of the Tribunal to review one of its own decisions subject to conditions, which in this application are neither satisfied nor relevant.

iii. The Appellant made no timeous application to set aside the Decision heard in his absence. Any such application had to be made within 28 days. Instead, the Appellant chose to seek permission to appeal to the Upper Tribunal, albeit late.

iv. It is clear that Tribunal Judge Tildesley gave fair and careful consideration to exercising any discretion to allow the application to extend time for permission to appeal to be made, but refused the application for reasons given in the decision. That decision fully appraised the Appellant of the next steps, namely a refreshed application to appeal direct to the Upper Tribunal.

v. The Appellant failed to make any application to appeal to the Upper Tribunal, whether in time or at all, noting that the latter has itself a power to extend time for making an application for permission to appeal by virtue or Rule 21 (6) of the Upper Tribunal Rules.

vi. The reality of the Appellant's first application, whilst on its face an application for permission to appeal the Decision, was in essence, a late application to 'set aside' the Decision as within Rule 38 of the Tribunal Rules. Any such extended analysis was, if at all, clearly within the overall purview of Tribunal Judge Tildesley at the time. He gave careful consideration to the Appellant's case and position as a whole, not just the merits of the late application for permission, but also the merits of the appeal generally and the overall conduct of the litigation by the Appellant.

vii. The Tribunal has no further jurisdiction over this appeal. The appeal having already been determined is, in essence, funtus officio.

Conclusion

31. In respect of the Decision (of 29 August 2012) if the Appellant felt that it was not in the interests of justice that his appeal was disposed of in his absence, as it had been, his remedy was to apply to the Tribunal within 28 days, for the Decision to be set aside. However he did not do so. If he had an arguable case that there was an error of law in the Decision, the remedy available to him was to apply, within 56 days of being sent the full written reasons for the Decision, for permission to appeal to the Upper Tribunal. Again he did not do so. He applied out of time on 9 November 2012,

for permission to bring an appeal against the Decision but his application was refused for the reasons set out.

32. Where permission to appeal has been refused by the First-tier Tribunal, or the application to the First-tier Tribunal was not admitted because it was out of time, the applicant may make a further application for permission to appeal to the Upper Tribunal. The application must be made within one month of the date of the First-tier Tribunal's decision refusing permission or refusing to admit the application (Upper Tribunal Rules, Rule 21(3)(b)). The Appellant in this case has not made an application for permission to appeal to the Upper Tribunal until now, that is, over two years out of time.

33. In his decision, released on 20 May 2013, Judge Tildesley noted that the Appellant did not advance any reason why he was late with his application. Judge Tildesley further noted (at para 14(3)) that:

> "Throughout this dispute the Appellant has not complied with requests for information from HMRC and has not met the deadlines for issuing proceedings."

34. The decision explained (at para 16) that the Appellant had a right to apply, within one month, to the Upper Tribunal for permission to appeal, but he did not do so.

35. There is clearly no ongoing or interminable right for the Appellant to renew his applications to the First-tier Tribunal, nor is there any jurisdiction of the First-tier Tribunal to entertain them. The Tribunal has disposed of the substantive appeal and has refused to entertain a late application for permission to appeal to the Upper Tribunal. The Appellant chose not to apply to the Upper Tribunal for permission to appeal against the decision refusing his application for an extension of time. He has therefore exhausted all available avenues.

36. The Tribunal has already considered, and dismissed, the Appellant's claim that he was too unwell to fully participate in the appeal process. The Tribunal noted that he was well enough to attend a retreat in Wales from mid-August until the end of September 2012. He was well enough to work in New York and Delaware for the whole of the month of October 2012. He was well enough to attend and make representations at the hearing on 9 May 2013 without any visible form of assistance. He has not attended the hearing of this application. The explanation offered by his representative is that he is now "in finance travelling regularly between the UK and the United States" and that he is currently "abroad on business".

37. With regard to Abcoma Limited, the Appellant's application has been treated as a new appeal by the company. The Appellant contends that any judgment should be against Abcoma Ltd, not against him personally. That aspect of the matter has already been determined by the Tribunal in the Decision, and as Mr Morgan for HMRC says, the company has in any event never appealed any direct tax assessments raised against it. Mr Ahmed for the Appellant does not dispute that. A separate appeal is extant in respect of the Appellant's direct tax assessments but that is an entirely separate matter.

38. The Tribunal has therefore no jurisdiction to entertain the applications and even if it had, it has already given all full and due consideration to the Appellant's case. The applications are therefore refused.

39. 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.

2.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 17 DECEMBER 2015