TC 04889

Appeal number: TC/2015/02247

VAT – Application to appeal out of time – assessment of underpaid VAT- four year delay-accountant thought appeal had been submitted-appeal returned by Tribunal-Appellant out of the country and travelling

FIRST-TIER TRIBUNAL
TAX CHAMBER

BENJAMIN MYLES MARSHALL HALL **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER
MR HENRY RUSSELL OBE

Sitting in public at Northampton on 8 January 2016

The Appellant in person

Ms E Hickey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

1. *Background*

2. This case concerns an application for permission to appeal out of time against an assessment to VAT made by HMRC in relation to allegedly suppressed sales in the Appellant's business.

3. Mr Hall was a second hand car dealer. He also bought and sold come commercial vehicles. In the course of a self-assessment enquiry, HMRC discovered that there had been significant omissions of sales and purchases from the business records, resulting in the turnover being underdeclared by approximately one third in each of the financial years 2003, 2004 and 2005. The parties reached a settlement in the direct tax enquiry, the profits were adjusted and Mr Hall paid penalties of 40% of the tax underpaid.

4. A notice of assessment for £6.808 of unpaid VAT was issued on 4 October 2010 in relation to the periods 07/02 to 04/06. A civil evasion penalty was assessed on 3 January 2011. Mr Hall's accountant requested a review of the assessment on the grounds that it was out of time. Under section 77(1) Value Added Tax Act 1994 (VATA) an assessment may not be made more than four years after the end of the prescribed accounting period.

5. HMRC responded that under section 77(4) and (4B) VATA, the four year time limit was extended to 20 years in a "case involving a loss of VAT brought about deliberately by [a person]…". HMRC contended that Mr Hall's behaviour was "deliberate" and so the assessment was in time.

6. Following further correspondence with the accountant, a review letter was issued by HMRC on 14 June 2011 upholding the original assessment. This is the decision against which the substantive appeal was made.

7. The normal time limit for appealing against a decision is 30 days from the date of the decision; in this case by 14 July 2011. The appeal was, in fact, received by the Tribunal on 12 March 2015, approaching four years late.

8. By section 83G(6) VATA an appeal may be brought after the specified time limit "only if the Tribunal gives permission to do so".

9. Mr Hall, in this application, is seeking the Tribunal's permission to appeal late and HMRC object to the application.

10. *The evidence and the facts*

11. At the time of the initial enquiry and up to January 2015, Mr Hall was represented by his accountant, Mr Harris. At the time of the enquiry Mr Harris was with the firm of Chantry Vellacott, but by the time the VAT assessment was issued, Mr Harris had set up his own practice; Harris & Clarke.

12. On 28 November Mr Harris wrote to HMRC appealing against the assessment on the basis that it had been made more than three years after the relevant period and was accordingly out of time. HRMC replied on 10 December, explaining that the time limit was extended to 20 years in "a case involving a loss of VAT brought about deliberately by [the taxpayer]". HMRC stated "…we are of the opinion

based on the information provided by your client that the underdeclarations were deliberate and dishonest. As such, s77(4) [VATA] is relevant and allows me to assess for years outside the normal capping rules…which stipulates a four year cap."

13. A letter sent by Mr Harris on 25 February 2011 was treated as a request for a formal review. Following further correspondence, Mr Harris emailed HMRC on 9 June with submissions concerning Mr Hall's errors in relation to VAT and, in particular, seeking to refute the allegations of dishonesty. Mr Harris stated that Mr Hall was "incensed by the allegation of dishonesty" and further stated "I have known Mr Hall for 35 years and know him to be honest. He has no criminal record and is a good man". HMRC took these submissions into account as part of the review, but the review letter, dated 14 June 2011 upheld the 4 October 2010 assessment and determined that it was issued within the statutory time limits as the 20 year period applied. The letter concluded with the usual explanation that Mr Hall had the right to appeal to the Tribunal within 30 days of the date of the letter, i.e. by 14 July 2011.
14. Mr Hall said that he instructed Mr Harris to appeal to the Tribunal.
15. On 1 July 2011, Mr Harris submitted a notice of appeal to the Tribunal and this was stamped as received on 5 July. The Tribunal returned the appeal to Mr Harris on 18 July as Mr Harris had not included the decision letter being appealed with the application. The letter had a reference "RTC/2011/00727. This was *not*, however a Tribunal case reference, but indicated that the appeal had been returned. Mr Harris wrote again to the Tribunal on 20 July 2011stating that he was returning the form and further letters as requested.. This letter was stamped received 25 July 2011. The Tribunal wrote to Mr Harris in response to this letter, saying that he had still not enclosed HMRC's decision letter and so they were unable to proceed with the appeal. This letter was wrongly dated 18 July 2011 and it may have been that Mr Harris was confused by two letters with the same date asking for the same thing and he might have thought that he had already provided the necessary documents. We do not, of course, know if that was the case.
16. Meanwhile, Mr Harris wrote to HMRC, also on 1 July, to say that Mr Hall had applied for a Tribunal hearing and also to request that the payment of the tax be "held over" as Mr Hall would suffer hardship. HMRC wrote to Mr Hall on 29 September 2011 allowing the hardship application.
17. The correspondence between Mr Harris and HMRC was copied to Mr Hall, but Mr Harris' correspondence with the Tribunal was *not* copied to him. So far as Mr Hall was concerned, he had instructed his agent to submit an appeal and his agent informed him that this had been done. Mr Hall did not see the correspondence between Mr Harris and the Tribunal showing that the appeal was returned and resubmitted and returned again until January/February 2015 when he personally took over the appeal.
18. HMRC wrote to Mr Harris on 29 November 2011 confirming the success of the hardship application but stating that they had not received notice of Mr Hall's appeal and that unless confirmation of the appeal was received within 30 days, they would take action to recover the tax debt. When Mr Hall telephoned Mr Harris, in response to receiving a copy of this letter, he was assured that the Tribunal had been provided with all the required information. On 11 January

2012, HMRC removed the "debt collection inhibit" from Mr Hall's file, which would have allowed the VAT debt to be pursued. HMRC state that they considered the matter to be closed at that point. However, no action appears to have been taken.

19. Apart from Mr Hall notifying HMRC of a change of address in March 2012, nothing happened until October 2012 when Mr Harris applied to cancel Mr Hall's VAT registration as he had ceased trading. A debt collector did visit Mr Hall, as a result of which Mr Harris sent VAT returns for the periods ending 31/10/10 to 31/01/11 to HMRC. Mr Hall stated that this visit related to a small VAT debt of £300 relating to these VAT returns and had nothing to do with the assessment under appeal.
20. On 27 February 2013, Mr Harris wrote to HMRC in response to their letter of 13 February. We did not have a copy of the 13 February letter, but we infer it contained a request for payment of the October 2010 VAT assessment. Mr Harris said "Mr Hall has already appealed against the assessment and consequently would be grateful if you would now move the process towards Tribunal if that is your intention. Perhaps you would check your records once again", presumably for notification of the appeal. The letter also informed HMRC that Mr Hall had sold his residence ("Rushmere Avenue") and requested that they send all correspondence to Mr Harris.
21. In fact, Mr Hall left the UK in February 2013. He intended to make his home in France and spent 12 months or so travelling around in a camper van, looking for a suitable home. He finally settled in the Gironde in France, but in the interim had no permanent address and only intermittent access to his post. Mr Hall continued to own a property in Northampton ("Adnitt Road") which had never been his residence and was occupied by tenants. Correspondence sent to Adnitt Road was intermittently forwarded to Mr Hall, though he did not always receive it and he also collected correspondence from that address when he visited England.
22. HMRC did not reply to Mr Harris' letter of 27 February until 24 April 2013 They stated quite clearly that they had no record of any Tribunal appeal by Mr Hall and asked Mr Harris for the reference number, or if he had none, suggested he should pursue the matter with the Tribunal. HMRC said they would suspend debt collection action for 30 days to allow Mr Harris to look into the matter further. This letter was not copied to Mr Hall as HMRC had no address for him. Mr Harris replied on 3 May saying that he left Chantry Vellacott in 2009 to establish Harris & Clarke LLP and "the question of the appeal has clearly fallen between the two partnerships. Consequently I will now have to contact my old firm with a view to reviewing the correspondence and appeal". This was somewhat disingenuous; as noted, Mr Harris had already established Harris & Clarke LLP in October 2010 when the assessment was issued. He asked for additional time-until 30 June 2013-to respond.
23. Nothing further happened until September 2013. Letters demanding payment of the VAT were sent to Mr Hall at Rushmere Avenue (though HMRC had been notified that he had sold the property) on 16 and 25 September. The 16 September letter appears to have found its way to Mr Harris who replied on 8 October again asking HMRC to re-check their files and stating "This liability is the subject of a tribunal hearing/appeal the date of which has yet to be determined".

24. All went quiet again for a further eight months until19 June 2014, when HMRC's Debt Management section wrote to Mr Hall at the Adnitt Road address setting out their options for collecting the debt. This letter seems to have found its way to Mr Harris who replied on 9 July "Would you please review your file as these matters have been appealed against and we are waiting for a tribunal."
25. HMRC replied on 21 August, copying the letter to Mr Hall at Adnitt Road. They reiterated that they had had no notification of an appeal and said "you replied on 3 May 2013 saying the matter of the appeal had been overlooked…". In fact the 3 May letter said that Mr Harris would be checking his old firm's files to see what had happened, although that does not seem to have been followed up, either by Mr Harris, or HMRC. It also said that the debt management team "advised you verbally that I had confirmed that no appeal had been received". HMRC said they had instructed the debt management team to continue with their action and "if your client wishes to appeal against the assessment…he needs to make an appeal to the tribunal…" and gave information about where to obtain the forms and information. Mr Hall argued that this meant that HMRC were suggesting that he make an appeal at that point and that it implied they would not object to it being late. HMRC, rightly in our view, argued that the letter simply gave information about how to make an appeal if he wished to, and did not contain any agreement to a late appeal.
26. This letter reached Mr Hall and he appears to have contacted Mr Harris about it. Mr Harris emailed Mr Hall on 3 September 2014 saying "I am satisfied that the letter does not say that we have not lodged an appeal. It says that HMRC verbally told us that an appeal is still outstanding. You will see that we have the option of a tribunal which I recommend…" . Mr Hall challenged Mr Harris about this in an email of 5 September 2014 saying "I realise that we did appeal and received confirmation of this but do we have the paperwork to support our claim? Is it possible to check your records and confirm that we have such evidence. Do we need to produce it at this stage to prevent the bailiffs being instructed and taking action."
27. On 5 September 2014 Mr Harris sent HMRC a copy of the letter of 1 July 2011, purportedly making the appeal, which was stamped as received on 5 July. He did not send the other correspondence with the tribunal. He also sent Mr Hall a copy of this letter.
28. On 11 September, HMRC replied (copy to Mr Hall), again stating they had had no notice of appeal from the tribunal and suggesting that the appeal might have been returned (which was, as we know, what happened). Mr Harris then wrote to the Tribunal Service (copying HMRC) on 16 September stating that "for the avoidance of doubt I would like to make a fresh appeal against your assessment…". HMRC sent Mr Harris a copy of the correct form of appeal and copies of the assessment and penalty saying that he would need to submit these with the appeal. Mr Harris appears to have submitted a new appeal (we did not have a copy of this) but on 25 September 2014 the tribunal returned the appeal because Mr Harris had again omitted to include a copy of the decision which was the subject of the appeal.
29. Mr Hall was unaware of this. He informed us that he had chased Mr Harris on 7 October by telephone and was assured that all was well. He asked if anything else

could be done and Mr Harris suggested making a settlement offer to HMRC and this was done in a letter of 8 December 2014. HMRC refused the offer on 17 December 2014 and stated that they had instructed the Debt Management team to recommence recovery action "which will continue unless HMRC is notified of an appeal by the Tribunal Service". The letter was copied to Mr Hall at Adnitt Road.

30. On 23 January 2015, Mr Harris wrote to HMRC saying "please note that we are currently getting the files from archive to fully review position [sic] and will be in contact as soon as we are in a position to do so."

31. Mr Hall contacted Mr Harris and asked for copies of the correspondence with the tribunal. He had seen a copy of the 1 July 2011letter when this was sent to HMRC in September 2014, but it was only now that he saw the remaining correspondence. He had been unaware that the appeal had been returned a second time and did not realise that the "RTC" reference meant that the appeal had been returned. He then telephoned HMRC and the tribunal himself and was informed by the tribunal that there was no outstanding appeal.

32. In February 2015 Mr Hall dispensed with the services of Mr Harris and took over the appeal himself. He obtained copies of the assessment, penalty letter and review letter from HMRC on 10 March and submitted the appeal on 12 March 2015. Although we have not seen all the correspondence on the matter, Mr Hall stated that once he took over the matter, he submitted the appeal within 13 days.

33. The chronology of the events highlights a number of important points.

34. First, neither HMRC nor Mr Hall had seen Mr Harris' correspondence with the Tribunal in 2011, or indeed, in 2014, until early 2015 except for the 1 July 2011 letter, which indicated an appeal *had* been made. Even that was only copied to them in September 2014.

35. Secondly, although HMRC say that they thought the matter had been closed in January 2012, it appears that the removal of the "debt collection inhibit" was not followed up until 13 February 2013, a delay of over a year and if the matter had ever been closed, it was reopened by the subsequent correspondence.

36. At about this time, Mr Hall left the UK and had no permanent address for about a year. For this reason, he was not sent copies of the correspondence between HMRC and Mr Harris. Mr Hall may or may not have seen the VAT demand sent to Rushmere Avenue, but following Mr Harris' letter, there was another long gap in action by HMRC. Debt collection efforts seem to have begun in earnest only in June 2014. The demand letters were sent to Mr Hall at Adnitt Road, which HMRC must have discovered he owned. It had never been notified to HMRC as a correspondence address and as noted, it had never been Mr Hall's residence but was let. To the extent that Mr Hall received correspondence sent to that address, it would have been subject to delay. It seems that some post was forwarded to Mr Hall from that address, including the debt collection letters. HMRC pointed out that they had made attempts to contact Mr Hall by writing to him at a property they believed he owned. They tried to trace him for two years and said that "the agent [Mr Harris] kept putting them off", which we can readily believe. Mr Hall believed that he had done enough by requesting HMRC to send all correspondence to his agent.

37. When Mr Hall received the 21 August 2014 letter stating there was no record of an appeal and demanding payment, he challenged Mr Harris and was sent a copy

of the receipted letter of 1 July 2011 which indicated that an appeal had indeed been made.

38. We have to say that we find Mr Harris' behaviour extraordinary. He seems to have been an experienced accountant who had worked for a well-known firm for many years before setting up on his own and we would have expected him to have a better knowledge of the tax appeals process. He might have been lulled into thinking that the appeal had been successfully submitted in the light of the long gaps in the correspondence with HMRC but we are unable to understand why he proceeded with his assertions in the light of HMRC repeatedly informing him they had not had notice of the appeal, and why he failed to chase up the tribunal if he genuinely believed that the appeal had been lodged. Some of his correspondence is misleading. For example, he sent HMRC and Mr Hall a copy of the 1 July 2011 letter, but did not mention the subsequent return of the appeal.

39. *The Law*

40. The time limit for making an appeal against a VAT assessment is the end of the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates (section 83G(1)(a) VATA). That decision is the review letter of 14 June 2011. An appeal was not effectively submitted until 12 March 2015, some three years and eight months out of time. Section 83G(6) VATA provides that an appeal may be made late if the tribunal gives permission to do so.

41. The principles a court or tribunal should apply when asked to extend a time limit are set out in the Upper Tribunal decision of *Data Select Limited v The Commissioners for HMRC* [2012] UKUT187 ("Data Select"). Morgan J said, at para 34 that the court or tribunal should ask 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."

42. The judge went on to say:

> "…the approach of considering the overriding objective [set out in the Tribunal Rules to decide cases fairly and justly"] and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA…. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the 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."

43. The Court of Appeal gave further guidance on the approach to be adopted in relation to an application for relief from sanctions in *Denton and others v T H White Limited; Decedent Vapours Ltd v Bevan and others; Utilise TDS Ltd v Davies and others* [2014] EWCA Civ 906 (Denton). This was in the context of litigation and CPR rule 3.9(1). The majority of the Court of Appeal said:

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]".

44. The court emphasised that no factor or factors had greater weight than the others; the court or tribunal must carry out a balancing exercise looking at all the circumstances of the case in order to deal with the matter justly.
45. The Upper Tribunal in *Romasave (Property Services) Limited v The Commissioners for HMRC* [2015] UKUT 254 (Romasave) considered the passage from Denton quoted above and concluded that the Court of Appeal's approach was no different in principle to that set out in Data Select.
46. The Court added:

> "We are also mindful of the comments of Sir Stephen Oliver, sitting in the First-tier Tribunal, in *Ogedegbe v Revenue and Customs Commissioners* [2009] UKFTT 364 (TC) (discussed in *Markland v Revenue and Customs Commissioners* [2011] UKFTT 559 (TC) and by this tribunal in *O'Flaherty v Revenue and Customs Commissioners* [2013] UKUT 0161 (TCC)) that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely."

47. So the approach to deciding an application to appeal out of time, derived from the authorities, is that the tribunal should consider the answers to the five questions in Data Select and then weigh up all the circumstances of the case in order to deal with the matter justly, bearing in mind that permission to appeal late should only be granted in exceptionally and not as a matter of routine.

48. *The Appellant's submissions*

49. Mr Hall pointed out that the tribunal has a wide discretion to grant permission to appeal late.
50. Mr Hall considered that the failure to submit and pursue the appeal was caused by his agent. Mr Harris had acted for him for many years and he considered that he had acted reasonably in asking a chartered accountant to deal with his affairs, especially once he had left the country and for a period had no permanent address.
51. He had asked HMRC to send all correspondence to Mr Harris.
52. He had chased Mr Harris on a number of occasions and had been assured that the appeal had been submitted. HMRC's long delays in pursuing the liability were consistent with an appeal being in progress.
53. When the debt collection activity intensified in August/September 2014 and Mr Hall challenged Mr Harris, Mr Harris sent to him and HMRC the receipted letter of 1 July 2011 which appeared to show that an appeal had been submitted.
54. Mr Hall genuinely believed that he had submitted an appeal and thought it was progressing through the system.
55. He would be prejudiced if the application were refused as he would be unable to argue his substantive case or challenge HMRC's allegations of deliberate and dishonest behaviour (without which they would have been out of time for making the assessment).
56. Once he had obtained the documents in January/February 2015 and ascertained from the tribunal that no appeal had in fact been submitted, he sent in the appeal within two weeks and pursued it diligently thereafter.

57. *The respondent's submissions*

58. HMRC had not had sight of Mr Harris' correspondence with the tribunal (except the 1 July 2011 letter) until Mr Hall had sent it to them.
59. HMRC had made every attempt to contact Mr Hall and had tried to trace him for two years. They tried to collect the debt in September 2013, writing to Rushmere Avenue and in 2014 writing to Adnitt Road.
60. HMRC went on to consider the five questions posed in Data Select.
61. Ms Hickey submitted that the purpose of time limits in appeals relating to tax matters is to give both parties finality and to enable the government to budget without concerns that tax could be clawed back by late appeals.
62. HMRC had assumed finality on many occasions. Debt collection activities were commenced five times then suspended following correspondence with Mr Harris asserting that the matter was subject to an appeal. Ms Hickey pointed to the comments in Data Select that stressed "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 those in Romasave that allowing a late appeal was an exception. She submitted that there were no exceptional circumstances in this case.

63. In Romasave the delay was more than three months and the tribunal considered that this "cannot be described as anything but serious and significant". In other cases delays of a matter of days have been considered significant.
64. Ms Hickey submitted that there was no good reason for the delay. Whilst Mr Hall argued that he was unaware that the appeal had not been correctly lodged, he had received at least some of the debt management letters and had had a visit from a bailiff in October 2012. Ms Hickey contended that a reasonable and prudent person "would not rely on an agent if there were bailiffs at the door".
65. In the First Tier Tribunal case of *Baljit Singh v The Commissioners for HMRC* TC/2014/03863 TC/2015/05512 Mr Singh sought professional advice in relation to a VAT assessment of nearly £100,000. He was advised to do nothing and he did nothing until HMRC took enforcement action against him. The tribunal stated "the advice given by [the accountants] to do absolutely nothing was so obviously inappropriate that Mr Singh cannot be given any credit in the balancing exercise as a result of having decided to follow that advice". Ms Hickey submits that reliance on a third party cannot be a good excuse where the third party's actions are at odds with what is happening in terms of debt letters and so on. She contends that a reasonable person would have contacted the tribunal themselves.
66. The Data Select questions 4 and 5 were dealt with together. If the application is refused, Mr Hall will be unable to argue that HMRC themselves are out of time for raising the assessment and penalty and will not be able to challenge whether the tax and penalty are due. The debt will become enforceable once and for all.
67. If the application is allowed, HMRC will have to open a case which they thought was closed four years ago.
68. Mr Hall had argued that it would be unfair if the appeal could not proceed and that the fact that a lower penalty percentage was agreed in the direct tax settlement indicated that he had not acted dishonestly. HMRC had pointed out that the penalties were calculated under different legislation on different bases.
69. The additional VAT had been calculated on the basis of the direct tax profit adjustments, so that if the case proceeded they would have to obtain the direct tax file relating to the 2008 enquiry.
70. Mr Hall had admitted shoddy book-keeping but denied that he had deliberately understated his profits or acted dishonestly. HMRC's view at the time was that, based on the quantity of errors and the impact on profits, on the balance of probabilities his behaviour was deliberate. Accordingly, HMRC believe that there is no merit in Mr Hall's substantive case.
71. HMRC considers that a reasonable and prudent person in Mr Hall's position would have questioned his agent more frequently, would not have let matters continue for four years with no indication of progress, and would have contacted the tribunal himself. Ms Hickey submits that Mr Hall's actions were not those of a reasonable and prudent person, diligently pursuing an appeal.

72. *Discussion*

73. We must now ask ourselves the Data Select questions and carry out the balancing exercise, taking account of all the circumstances so as to achieve a fair and just result.
74. The purpose of time limits in litigation is to achieve finality and as stated in Data Select, it is undesirable to reopen matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled.
75. In this case, it is difficult to see that matters were regarded as finally fixed and settled. As HMRC pointed out, the debt management process was started and stopped five times. This was not a case where there were long periods of inaction by the taxpayer. Indeed, the longest periods of inaction were by HMRC who failed to pursue collection of the debt for months at a time, leading the appellant to believe that all was well. When HMRC's renewed activity resulted in an assertion by Mr Harris that the matter had been appealed, the debt collection was again called off, indicating that the matter was regarded as revived.
76. A delay of nearly four years in submitting an effective appeal is unarguably a significant and serious delay.
77. So what was the explanation for the delay? In Denton, the Court said "The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted."
78. The reason for the delay was that Mr Hall thought that an appeal had been lodged within the time limit. He relied on the accountant who had acted for him for many years and who assured him that the appeal had been submitted and that he was waiting for the tribunal to proceed. Mr Harris repeatedly stated this, not just to Mr Hall, but also to HMRC. He eventually sent a copy of the receipted letter to the tribunal to both, but did not send the subsequent correspondence showing that the appeal had been returned. Mr Harris must have known that the appeal had not been submitted successfully. Even if he believed that it had as a result of the confusion in the dates of the tribunal's letters, he was an experienced accountant and must have had some knowledge of the time taken to progress appeals. He further delayed matters by saying that he needed to consult files from his old firm though the assessment and appeal had throughout been dealt with by his current firm. We cannot understand why Mr Harris acted in the way he did, asserting that an appeal had been made when in all likelihood he knew it had not, and if he thought it had been made, failing to follow up with the tribunal.
79. The question is whether Mr Hall acted reasonably in relying on Mr Harris. In Baljit Singh, the tribunal said:

> "We would agree that , if a taxpayer acted (or failed to act) on the basis of professional advice which, on the face of it, appeared to be reasonable (even though it may turn out to be incorrect), this would be a factor which would count in favour of the taxpayer when considering an application for leave to appeal out of time. However, in this case…the advice given by [the

accountants] to do absolutely nothing was so obviously inappropriate that Mr Singh cannot be given any credit in the balancing exercise as a result of having decided to follow that advice"

80. In the present case, Mr Harris did not advise Mr Hall to do nothing. He advised him to appeal against the VAT assessment and Mr Hall instructed him to do so and believed that he had. There were long periods when HMRC took no action which indicated to Mr Hall that matters were progressing, albeit slowly. Mr Harris repeatedly assured Mr Hall that the appeal was ongoing. In this he misled both Mr Hall and HMRC, apparently deliberately. Mr Hall had no reason not to believe his long-time advisor. It should also be borne in mind that, at the time that HMRC began to take more serious debt collection action, Mr Hall was out of the country travelling around and receiving his post on an intermittent basis. By this stage, the matter had already been going on for over two years. Mr Hall did receive some of the letters, but Mr Harris continued to reassure him that matters were in hand and things went quiet again. When, in 2014, HMRC again attempted to recover the debt and Mr Hall demanded evidence that there was an appeal, Mr Harris sent him a copy of the 1 July 2011 letter.
81. We consider that it was initially reasonable for Mr Hall to accept what Mr Harris said. However, after nearly four years of no progress with the tribunal, HMRC's repeated assertions that they had not been notified of an appeal and various attempts to collect the tax debt, at least some of which Mr Hall was aware of, his action, or inaction, begins to look less reasonable. Why did he not chase the tribunal himself? He might have thought he was doing enough by leaving everything to his agent, but he should have begun to doubt Mr Harris' assertions long before he did take action, or at least thought it worth checking the position independently. This was not a situation where he was relying on a professional for advice on a technical matter which he could not be expected to understand fully. It was a very simple question: had an appeal been made or not? Mr Harris said it had and HMRC said it had not. He could have checked sooner.
82. If we refuse the application, there will clearly be prejudice to Mr Hall. We have not heard any arguments on the merits of the case, but we will assume that there is an arguable case.
83. Mr Hall will have to pay the tax and penalty assessed. He will not have the opportunity to argue that the assessment was out of time and he will not have the opportunity to refute the serious allegations that he acted deliberately and dishonestly to evade VAT. HMRC's assertion of their view that on the balance of probabilities his behaviour was deliberate does not make it so.
84. If we allow the application, HMRC will have to obtain the direct tax file from the 2008 enquiry as the figures which were agreed in the settlement of that enquiry were used to calculate the additional VAT. There was not, however, any suggestion that the information was not available.
85. On balance, we consider that Mr Hall would be more prejudiced by a refusal to permit the late appeal than HMRC would be by our allowing a late appeal.

86. *Decision*

87. We have weighed all these considerations carefully, taking account of the guidance contained in Data Select and Denton and bearing in mind that permission to appeal late should not be given routinely but only in exceptional circumstances.

88. In Mr Hall's favour, he believed that his agent had submitted an appeal and he appears to have been misled by the agent over an extended period of time as to the true position. It was not unreasonable of him to rely, at least initially, on his advisor of many years who was a qualified chartered accountant. In addition, the balance of prejudice is in Mr Hall's favour as a refusal of permission would have serious consequences for him and the granting of permission would not have serious consequences for HMRC.

89. Against Mr Hall is the length of the delay; a period of nearly four years is by any standards "significant and serious". Whilst that, in itself, would not necessarily be fatal if there was a good explanation for the delay, we consider that there came a point, long before January 2015, when it was no longer reasonable for Mr Hall to rely on Mr Harris' assertions in the light of all the evidence pointing the other way. Mr Hall could and should have contacted the tribunal himself much sooner than he did. There accordingly came a point when the explanation ceased to be a good one. Whilst it is difficult to state any exact point at which Mr Hall's reliance on Mr Harris ceased to be reasonable, this must have been the case by 5 September 2014 at the latest.

90. In the light of the above we have decided to refuse permission to bring a late appeal.

91. In passing, we observe that Mr Hall may well have a remedy against Mr Harris, although we did not take this into account in reaching our decision.

92. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 16 FEBRUARY 2016