[2016] UKFTT 0251 (TC)

TC05026

Appeal numbers: **TC/2011/04451**
TC/2012/04436

PROCEDURE – withdrawal of appeals – Rule 17 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – applications to reinstate appeals – late applications – applications refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT STAYTON **Appellant**

- and -

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

TRIBUNAL: JUDGE ASHLEY GREENBANK

Sitting in public at Nottingham Justice Centre, Carrington Road, Nottingham on 3 February 2016

Mr Paul Lynam, of Lynam Tax, for the Appellant

Ms Harry Jones, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. These applications relate to two appeals: the first is an appeal against the issue of a personal liability notice by the Respondents, HMRC, to the Appellant, Mr Stayton, under section 121C of the Social Security Administration Act 1992; the second is an appeal against a direction raised by HMRC on Mr Stayton under Regulation 72 of The Income Tax (Pay As You Earn) Regulations 2003.

2. The appeals were withdrawn by notices to the Tribunal which were acknowledged by the Tribunal on 27 July 2012 and on 20 February 2013. Mr Stayton, applies to reinstate the appeals pursuant to Rule 17(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules").

3. There are two issues which I have to decide in relation to these applications:

   (a) whether I should exercise discretion to extend the time limit for making an application to reinstate the appeals; and

   (b) if so, whether I should exercise discretion to reinstate the appeals themselves.

The hearing

4. HMRC produced a bundle of documents for the hearing. The documents included witness statements of Mr Keith Axbey, an officer of HMRC, and Mrs Lesley Hilton, an officer of HMRC. Both HMRC and Mr Stayton produced various other documents for the hearing, which I accepted as evidence.

5. At the hearing, I heard oral evidence from the Appellant, Mr Stayton. Mr Axbey and Mrs Hilton also gave evidence and were questioned on their witness statements.

Backgound

6. Before I set out the events that surround these applications, I should set out some of the background.

7. There is a long history of investigations by HMRC into the tax affairs of Mr Stayton and companies of which Mr Stayton was a shareholder or a director. These investigations began in January 2008. Some of the details of these investigations were set out in the witness statement of Mr Axbey. He answered questions on that statement at the hearing.

8. I have not recorded that evidence in detail in this decision particularly insofar as it relates to the period before 2011 or to other companies with which Mr Stayton was involved as the detail is not directly relevant to the applications in question. However, as it is necessary to provide some context for the circumstances in which these applications arose, I do record that the appeals to which these applications relate

form only a small part of HMRC's investigations into the affairs of Mr Stayton and companies of which he was a shareholder or director and that the events that I have recorded below took place against the background of the continued investigation by HMRC into the affairs of Mr Stayton and his companies.

9. Mr Stayton was the sole shareholder and sole director of Stayton Homes Limited. This company is now known as Drayton Designs Limited, but I have referred to it as "Stayton Homes" in this decision.

10. The affairs of Stayton Homes were under investigation by HMRC when it was put into liquidation in April 2010 on the petition of HMRC.

11. As a result of a review into the affairs of Stayton Homes, a personal liability notice under section 121C of the Social Security Administration Act 1992 was raised by HMRC on Mr Stayton on 9 February 2011. The personal liability notice was in the sum of £312,326.40 and related to national insurance contributions deducted from salaries paid by Stayton Homes to Mr Stayton and others, but not accounted for to HMRC whilst Mr Stayton was the sole director of Stayton Homes.

12. At the request of Mr Stayton's then solicitors, Gallant Macmillan LLP, HMRC conducted a review of the decision leading to the issue of the personal liability notice. The review confirmed the original decision. Mr Stayton was informed of the conclusion of the review in a letter dated 13 May 2011.

13. On 10 June 2011, Mr Stayton gave notice to the Tribunal of his appeal against the personal liability notice. In summary, the grounds given for the appeal were that the company's failure to pay the national insurance contributions was not due to the fraud or wilful neglect of Mr Stayton as required by section 121C. The appeal was given appeal number TC/2011/04451.

14. On 9 August 2011, HMRC issued a direction under Regulation 72(5) of The Income Tax (Pay As You Earn) Regulations 2003 in respect of income tax that should have been deducted and paid to HMRC in respect of Mr Stayton's salary from Stayton Homes. I have referred to that direction in this decision as the "Regulation 72 direction". Pursuant to that direction, HMRC directed that Stayton Homes was no longer liable to account for the tax and that Mr Stayton was now liable to pay tax and interest in the amount of £127,108.98 (including interest to that date).

15. There followed a chain of correspondence between HMRC and Gallant Macmillan LLP relating to the Regulation 72 direction.

16. On 27 March 2012, Mr Stayton gave notice to the Tribunal of his appeal against the direction. The grounds of Mr Stayton's appeal were that he had not received the payments knowing that his employer, Stayton Homes had wilfully failed to deduct tax as required by Regulation 72. This is appeal number TC/2012/04436.

17. At or around the same time, and as I have recorded above, various meetings were held with the aim of reaching an overall settlement of Mr Stayton's affairs and

those of the companies controlled by him. These meetings were usually held on a "without prejudice" basis.

18. A hearing of the appeal against the issue of the personal liability notice had been listed for 30 July 2012. On 27 July 2012, Mr Stayton's solicitors, Gallant Maxwell LLP (which I assume had changed its name from Gallant Macmillan), wrote to the Tribunal to give notice of the Mr Stayton's withdrawal of his appeal against the personal liability notice. That letter was sent by email.

19. On the same date, Mr David Middleburgh of Gallant Maxwell LLP wrote by email to Mrs Hilton. In that email, he states:

> "One issue which is imminent is Mr Stayton's appeal against the personal liability notice, which is due to be heard next week. Michael [Leong] and I have advised Mr Stayton that in the spirit of our discussions it would be appropriate for him to withdraw his appeal and I confirm that Mr Stayton has accepted our recommendation and the appeal has, this morning been withdrawn."

20. Also on 27 July 2012, the Tribunal gave notice of the withdrawal of the appeal to the parties. The letter from the Tribunal to Gallant Maxwell LLP states:

> "Please note that you have 28 days from the date of your withdrawal to apply to the Tribunal if you wish the case to be reinstated."

21. On 30 July 2012, Mrs Hilton replied to Mr Middleburgh. In her email, she states:

> "Thank you for letting me know that Mr Stayton has withdrawn his appeal. I am pleased to note that he intends to become fully compliant."

22. A hearing of the appeal against the Regulation 72 direction was listed for 23 November 2012. The hearing was adjourned with the agreement of both parties.

23. Throughout this period, further meetings were being held and the chain of correspondence continued in relation to the other matters. As before, most of the meetings took place on a without prejudice basis.

24. The meeting on 10 January 2013 is regarded by the parties as being of some importance. It was not held on a "without prejudice" basis. The meeting was attended by Mr Stayton, Mr Middleburgh and Ms Helen Arnold of Gallant Maxwell LLP (Mr Stayton's solicitors), Mr Michael Leong of Michael Leong & Co (Mr Stayton's accountants), Mrs Hilton, Mr Axbey, Mr Matthew Wilson and Mr Steve Smith of HMRC.

25. The aim of the meeting was to discuss a possible compromise settlement of Mr Stayton's outstanding liabilities and those of the companies that he controlled. The discussion was wide-ranging and referred to the Regulation 72 direction only briefly. From the minutes of the meeting provided by HMRC, the first reference to the Regulation 72 direction is at paragraph 88. It states:

> "Axbey referred briefly to the Reg 72 action. He had emailed Middleburgh a schedule confirming where the figures originated from and Middleburgh was satisfied that there had been no double counting. Axbey explained that the appeal would need to be withdrawn as the figures would now need to be incorporated into the settlement".

26. The other references to the Regulation 72 direction are at paragraphs 109 and 112 of the minutes. Paragraph 109 appears when the meeting has discussed the basis on which HMRC might accept an instalment offer. It states:

> "109 Axbey advised that the Reg 72 appeal should also be withdrawn as the liabilities were now to be included in the instalment offer. The alternative would be to risk losing the appeal and having to pay it all in one go."

Paragraph 112 appears immediately following a break in the meeting during which Mr Stayton and his advisers considered the basis on which HMRC might accept an instalment offer.

> "112 Middleburgh confirmed that Stayton will produce a letter of intent and that the appeal against the Reg 72 determination would be withdrawn."

27. As I have mentioned above, the discussion at the meeting on 10 January 2013 was wide-ranging. Most of the remainder of the discussion is not directly relevant to these applications. There was no reference to the personal liability notice. However, there was one other matter to which reference was made in argument. This related to a default surcharge notice that had been issued to one of the companies that was controlled by Mr Stayton. In relation to that notice, there is a reference to an appeal against the default surcharge. The minutes record, at paragraph 86:

> "Hilton emphasised that the VAT and the penalty were non-negotiable. She was prepared to allow a deal on direct taxes but if Stayton was serious about settling his affairs the appeal against the surcharge would have to be withdrawn. The penalty would be taken into account when discussing the final settlement…."

28. The extracts set out in paragraphs [25] to [27] are taken from HMRC's minutes of the meeting. Mr Lynam put on record that Mr Stayton does not necessarily agree that those minutes represent an accurate record of the meeting. However, he did not advance any other version of the events at that meeting and, indeed, relied upon the minutes in his arguments. I have therefore accepted the minutes as an accurate record of the meeting.

29. A hearing of the appeal against the Regulation 72 direction was listed for hearing on 18 April 2013.

30. On 18 February 2013, Mr Stayton's solicitors, Gallant Maxwell LLP wrote to the Tribunal to give notice of the Mr Stayton's withdrawal of his appeal against Regulation 72 direction.

31. On 20 February 2013, the Tribunal gave notice of the withdrawal of the appeal to the parties. The letter from the Tribunal to HMRC states:

> "If I do not hear from you within 28 days, the appeal will be treated as withdrawn, the file closed and hearing date of 18 April 2013 cancelled."

32. Following the withdrawal of the proceedings, there were various other telephone calls and meetings involving HMRC, Mr Stayton and Mr Stayton's advisers discussing the terms of a potential settlement.

33. A revised settlement offer was made by Mr Stayton in May 2016. The proposed settlement offer was rejected by HMRC on the grounds that Mr Stayton had failed to make full disclosure of his potential liabilities and those of companies controlled by him and had failed to take steps to bring his affairs up to date. The rejection of the offer was communicated to Mr Middleburgh and Mr Leong by Mrs Hilton at a meeting on 16 May 2013.

34. In June 2013, two of the companies controlled by Mr Stayton, 100 New Kings Road Limited and Stayton Human Resources Limited, were put into liquidation. At some point, the liquidator applied for and obtained a worldwide freezing order over Mr Stayton's assets. No evidence was provided on when the order took effect. The order was not lifted until September 2014.

35. On 19 July 2013, HMRC drew up a statutory demand. The statutory demand was served on Mr Middleburgh, on behalf of Mr Stayton, on 1 August 2013. The statutory demand included the liabilities under the personal liability notice and the Regulation 72 direction.

36. Communications continued between HMRC and Gallant Maxwell LLP in September 2013 regarding the insolvency proceedings relating to the two companies.

37. In December 2013, there were discussions between Smith & Williamson and HMRC regarding a possible individual voluntary arrangement for Mr Stayton. Those discussions came to nothing.

38. On 12 December 2014, a bankruptcy petition was served on Mr Stayton. The petition was in the amount £653,640.58 of these amounts, £335,173.30 relates to the personal liability notice and £129,007 relates to Regulation 72 direction.

39. The hearing for the bankruptcy petition was in January 2015. Mr Stayton travelled to the UK on 5 January 2015 and instructed lawyers to defend the bankruptcy petition. The hearing took place on 8 January 2015. It was adjourned. In a conference with counsel on 16 January 2015, Mr Stayton was advised to apply to reinstate the appeals which are the subject of these applications.

40. By letter dated 3 February 2015, Mr Stayton applied to the Tribunal to reinstate the appeals. In his letter he states:

> "I had issued notices of appeal in respect of two personal liability notices and these matters were proceeding to hearing. However, at the time, I was involved in negotiations with HMRC to try to come to a global settlement on all of my outstanding tax affairs. However, HMRC insisted that I drop that (sic) the above appeals if I wished

for the negotiations to continue and to be successful. I agreed to do this and although negotiations continued, HMRC refused to accept any of the offers put forward and it seems to me that they never had any intention of settling and therefore a conclusion was never reached".

Witness evidence

41. I have set out in the following paragraphs some of the key points arising from the witness evidence.

Mr Stayton's evidence

42. As regards the withdrawal of the original proceedings, Mr Stayton said that his affairs had been under investigation since 2008. He had been subject to various demands from HMRC in amounts ranging up to £10 million. There were negotiations for a compromise settlement of his affairs. He was advised that if he did not withdraw the appeals in relation to these matters, there would be no chance of an overall settlement. The advice was that he should withdraw the appeals in order to generate some goodwill with HMRC in order to encourage a settlement.

43. Ms Jones asked Mr Stayton to confirm that HMRC had at no stage represented that he had to withdraw the appeals. Mr Stayton said that it was his understanding that he would be required to withdraw the appeals so that the amounts could be included in any global settlement. The impression that had been given both in meetings and in correspondence was that he would have to withdraw the appeals in order to obtain the settlement.

44. When questioned about his desire to settle his liabilities under an instalment plan, Mr Stayton said that he simply wanted to be able to settle all of his tax affairs under one settlement. All of the offers were very large sums. He did not have the liquid cash to settle the amounts required. It would have taken some time for him to realize the relevant assets in order to be able to meet the demands that were being made and so it was important to negotiate a settlement which would give him time to pay.

45. Mr Stayton said that he had not offered a lesser figure in relation to the personal liability notice or the Regulation 72 direction. HMRC had produced various different figures but the final figures had never been agreed.

46. As regards, the circumstances surrounding the delay in making an application to reinstate the proceedings, Mr Stayton recounted that there had been various offers made to settle the investigations into his tax affairs. Many of these offers were made on a without prejudice basis. A final offer to settle was made in May 2013. That offer was rejected.

47. When the statutory demand was issued in August 2013, it was followed by a freezing order over his assets. As a result of the freezing order, it had been very difficult for Mr Stayton to retain advisers.

48. Ms Jones also raised questions about statutory demand. She said that from that point in time Mr Stayton must have understood that HMRC were taking steps to recover the amounts that were subject to the personal liability notice and the Regulation 72 direction. Mr Stayton accepted this, but pointed to the fact that no action was taken by HMRC until December 2014. Also, his assets were under a worldwide freezing order. He constantly had to go back to court in order to release funds. He was not in a position to do anything in order to contest the statutory demand.

49. Mr Stayton said that he had spent up to 18 months seeking revisions to the freezing order. From the time of issue of the statutory demand, he did not hear anything further from HMRC until the bankruptcy petition was served on him in December 2014.

Mr Axbey's evidence

50. Mr Axbey referred to the paragraph in his minutes of the meeting on 10 January 2013 in which he referred to the withdrawal of the appeal. He said that the meeting had reached a stage in which they were trying to assess all the amounts that Mr Stayton owed. The amounts that were subject to the personal liability notice and the Regulation 72 direction were as far as HMRC were concerned already admitted. The aim had been to include all of the amounts within the overall settlement. If Mr Stayton had not withdrawn the appeals, the two amounts would have had to be left out of the settlement. Mr Axbey's understanding had been that Mr Stayton wanted to include the two amounts within the settlement so that they would benefit from the instalment payment plan.

51. In response to a question from Mr Lynam, Mr Axbey accepted that it was not HMRC practice to require appeals to be withdrawn before the entry into any settlement. He said that he had thought that it had been intended to include the two items in the overall settlement. The numbers in the personal liability notice the Regulation 72 direction were not disputed. They had been taken from Mr Stayton's personal returns and P35s.

52. Mr Lynam asked why it had taken so long to serve the bankruptcy position following the issue of the statutory demand. Mr Axbey said that HMRC had had difficulty locating Mr Stayton. His understanding was that the bankruptcy petition had to be served personally. HMRC had been directed to two addresses in the UK, but Mr Stayton was not at either address.

Mrs Hilton's evidence

53. Mrs Hilton referred to reference to the VAT default surcharge in the minutes of the meeting of 10 January 2013. She said that the appeal in that case had been solely about the surcharge. The VAT amount was taken from the return and the surcharge had been issued because the payment was late. The amount of the surcharge was fixed by statute. She was not in a position at the time of the meeting to consider accepting a lower amount for the VAT or the related surcharge. The comments

regarding withdrawal of the appeal were simply to establish that Mr Stayton was serious about complying with his obligations.

54. Mrs Hilton explained her understanding of the wording of paragraph 88 of the minutes of the meeting of 10 January 2013. She had understood that the figures in the personal liability notice and the Regulation 72 direction were based on Mr Stayton's figures and that there were no grounds for appeal. When she was challenged by Mr Lynam about the assertion that there were no reasonable grounds for appeal, Mrs Hilton said she had not been party to any discussions around the two particular matters. They were dealt with by specialists.

55. Mrs Hilton said that Mr Stayton had wanted to include the amounts within the overall settlement. In order to do so, it was necessary to withdraw the appeals. The aim was to help Mr Stayton and to allow the amounts to be incorporated within the settlement. HMRC had not refused to negotiate unless the appeals were withdrawn. When the appeals were withdrawn, Mrs Hilton had not thought that it made much difference to the negotiations. It was simply evidence of Mr Stayton's willingness to reach an overall settlement. The figures had been already worked out.

56. Mr Lynam asked whether it was usual for appeals to be withdrawn in advance of a settlement. Mrs Hilton said that it was very unusual. She had not encountered a case like this. However, the withdrawals had been made at the instigation of Mr Stayton's advisers.

57. Mr Lynam asked whether Mr Stayton understood the implications of the withdrawal. Mrs Hilton thought that he had. In any event, the figures that were to be included in the settlement were based on his figures and so he had not been prejudiced by the withdrawal.

58. Regarding the circumstances in which the final settlement offer was rejected, Mrs Hilton said that Mr Stayton had asked that the settlement be on terms that it was "in consideration of no proceedings against me". There were concerns that Mr Stayton had not made a full disclosure of his potential liabilities. As a result, it would have been prejudicial to HMRC to agree to wording in a settlement offer which might prevent HMRC from taking action against under disclosed liabilities. Her concern was to ensure that no items were left out of account.

The parties' arguments

The Appellant's arguments

59. Mr Lynam, on behalf of Mr Stayton, made the following points.

60. In relation to the substantive appeals, Mr Stayton does not dispute the fact that the PAYE income tax and national insurance contributions were not paid by the company to HMRC. He does dispute HMRC's allegations that the PAYE and national insurance contributions were not deducted from payments made to him and other employees. Mr Stayton also disputes any suggestion that the failures to account

for tax to HMRC arose from the wilful default or neglect of the companies or Mr Stayton.

61. The withdrawal of the appeals took place against the background of negotiations to agree a settlement of Mr Stayton's personal tax liabilities and the liabilities of companies which he controlled. When Mr Stayton withdrew the appeals he thought that he was doing so in order to facilitate a compromise settlement of his liabilities and those of companies that he controlled under which the amounts payable by him would significantly less than the amounts originally demanded by HMRC. It was clear throughout that Mr Stayton did not accept that the amounts set out in the Regulation 72 direction and the personal liability notice were correct and that Mr Stayton was only prepared to enter into a settlement on the basis of a significant reduction in the overall amounts that were being sought by HMRC.

62. Throughout the period both before and after the appeals were withdrawn by Mr Stayton, HMRC continued to negotiate in order to achieve a compromise settlement covering both his personal tax liabilities and the tax liabilities of a number of companies that were controlled by Mr Stayton. Although the negotiations collapsed in May 2013, HMRC accepts that it remained opened to the prospect of a settlement. At no time had HMRC intimated to Mr Stayton that a settlement would no longer be considered.

63. Although a statutory demand was issued in August 2013, no formal proceedings were taken to recover the tax due until the service of the bankruptcy petition on Mr Stayton on 12 December 2014. In the interim, Mr Stayton had sought to enter into an individual voluntary arrangement with HMRC. The lack of enforcement action on the part of HMRC, the willingness of HMRC to consider an individual voluntary arrangement, and the continued negotiations, all led Mr Stayton to believe that the withdrawal of the proceedings did not have an effect on his ability to contest the claims.

64. It was only following the service of bankruptcy proceedings in December 2014 that Mr Stayton realized that HMRC were attempting to collect the income tax and national insurance contributions charged in the personal liability notice and the Regulation 72 direction. At that point, Mr Stayton acted promptly to seek to reinstate the appeals.

65. It is clear from HMRC's meeting notes that HMRC insisted on the appeals being withdrawn as a pre-condition to a settlement. This could be seen from the references to the Regulation 72 direction and the VAT default surcharge. At no point did HMRC officials explain to Mr Stayton the potential consequences of withdrawing the appeals. HMRC knew that Mr Stayton's adviser (Mr Middleburgh) was not experienced in dealing with tax investigations. It was incumbent upon HMRC officials to explain to Mr Stayton the consequences of withdrawing the appeals.

66. As regards the factors which the Tribunal should take into account in exercising its discretion in accordance with the overriding objective, Mr Lynam referred to the decision of Mr Justice Morgan in *Data Select Limited v HMRC* [2012]

UKUT 187 and to the decision of Judge Cannan in *Rolls Group & Others v HMRC* [2015] UKFTT 0404.

67. Mr Lynam also referred to a VAT Tribunal case, that of *Medical House Plc* (19859) and to the criteria referred to in argument by Counsel for HMRC at [9] in that case. He submitted that adopting those criteria it would be in accordance with the overriding objective to reinstate the appeals.

(a) Length of the delay. Mr Lynam accepted that there was a material delay in this case. But he argued that there was no practical effect of the withdrawal of the original appeals because negotiations continued. As a result, the length of the delay was not a material factor. Mr Stayton applied to reinstate the appeals as soon as he became aware of the consequences of the withdrawal.

(b) Reasons for the delay. Mr Stayton had not been aware of the consequences of the withdrawal. As far as he was aware there was no practical effect of the withdrawal as the negotiations continued. There was therefore no reason for him to apply for a reinstatement.

(c) Chances of the appeals succeeding if an extension was granted. Mr Lynam argued that there was a significant chance of the appeals succeeding given the burden of proof on HMRC.

(d) The degree of prejudice to HMRC if an extension were granted. Mr Lynam said that HMRC had not collected the tax and national insurance contributions from Mr Stayton. There would be no effective prejudice to HMRC if the appeals were allowed to continue. HMRC had already prepared for the hearing of the appeals in 2012 and 2013.

68. Also with reference to the *Medical House* case, Mr Lynam submitted that reference could be had to the factors that are taken into account under Rule 3.9 of the Civil Procedure Rules, although he accepted that those rules were not binding on the Tribunal. On that basis he submitted that taking into account those criteria it would be in accordance with the overriding objective to reinstate the appeals in this case. He referred to the criteria in Rule 3.9 at the time of the *Medical House* case.

(a) The interest of the administration of justice. Mr Stayton felt that he had been wrongly advised by HMRC and by his previous adviser. The amounts of tax charged were out of proportion to any benefit that Mr Stayton had received. The allegations against Mr Stayton and the companies were serious. It was in the interests of the proper administration of justice for those issues to be properly tested before a Tribunal.

(b) Whether the application for relief had been properly made. The proper process for making reinstatement had been followed.

(c) Whether the failure to comply was intentional. Mr Stayton did not intentionally fail to make the reinstatement request on time. He was unaware

of the implications of not making the request. He was not advised by HMRC or his previous advisers of the consequences of not making the application.

(d) Whether there was a good explanation for the failure. Mr Stayton did not realize that there was any effect of not applying for reinstatement. He was confirmed in his belief by the failure of HMRC to take any action to enforce the liabilities between August 2013 and December 2014.

(e) Compliance with other rules and practice directions. There were no other compliance failures by Mr Stayton.

(f) Whether the failure was caused by the party or his legal representative. Mr Stayton was not properly advised by his previous adviser. HMRC failed in its public duty to advise him properly.

(g) Whether any fixed date could still be met. This factor was not relevant in this case.

(h) The effect which the failure to comply had on each party. There was no effect on HMRC as it had failed to collect the debt.

(i) The effect which granting of the relief would have on each party. If relief was granted Mr Stayton was more likely to be subject to a debt that he could pay without being made bankrupt. HMRC were likely to collect broadly the same amount of money in any event.

69. Mr Lynam also commented on the decision in the *Rolls Group* case. He made the following points.

(a) The decision makes reference to the statements of Mr Justice Morgan in *Data Select* concerning the desirability of not reopening matters after a lengthy interval where one or both parties were entitled to assume that matters have been finally fixed and settled. In this case, neither party believed nor acted as if the matter had been finally fixed and settled.

(b) It was acknowledged in the *Rolls Group* case (see paragraph [55]) that the appellants could not be expected to make an application until they had appreciated that the advice they had received was wrong. As soon as Mr Stayton became aware of the effect of the incorrect advice that he received, he took action to reinstate the appeals.

(c) In the *Rolls Group* case, the taxpayers had not notified HMRC of their disagreement with HMRC's decision (see paragraph [59]). Mr Stayton had always made his disagreement clear.

(d) The loss of the opportunity to pursue this argument would represent significant prejudice to Mr Stayton. This argument was recognized in the *Rolls Group* case (see paragraph [62]).

(e) There would be no great procedural difficulty or delay if time were extended and the appeals were reinstated. This is similar to the *Rolls Group* case (see paragraph [63]).

(f) In the *Rolls Group* case, HMRC were entitled to consider that the matter was finalized (see paragraph [65]). In this case, HMRC knew that the matter was not finalized. Indeed HMRC continued negotiating.

(g) In paragraph [72] in the *Rolls Group* case, there is a reference to the decision in *Pierhead Purchasing Limited v HMRC* [2014] UKUT 321 where the appellants did not receive advice on the consequences of the withdrawal. Mr Stayton was in a similar position. Although Mr Stayton did receive advice from his solicitor, his solicitor was effectively passing on the instructions of HMRC. It was not pointed to Mr Stayton that if the negotiations failed, he would be liable for the full amounts and would not have an effective remedy.

HMRC's arguments

70. Ms Jones made the following points for HMRC.

71. As an initial point, Ms Jones commented on the grounds given for the application. The original notice given by Mr Stayton suggested that HMRC had insisted that Mr Stayton withdraw his appeals if HMRC were to continue negotiating a compromise settlement and that once the appeals had been withdrawn HMRC had acted in bad faith by not pursuing a negotiated settlement. HMRC rejected the allegation that it had insisted that the appeals were dropped. It also rejected the allegation that it had had no intention of reaching a negotiated settlement.

72. It was clear that the applications to reinstate these appeals had been submitted very late. The withdrawal of the appeal in the relation to the personal liability notice was acknowledged by the Tribunal on 27 July 2012. The deadline to reinstate that appeal was on 24 August 2012. The withdrawal of the appeal in relation to Regulation 72 direction was acknowledged by the Tribunal on 20 February 2013. The deadline to apply for a reinstatement of that appeal was therefore 20 March 2013.

73. The reinstatement application for the personal liability notice was therefore 893 days late and the reinstatement application for the appeal against the Regulation 72 direction was 685 days late.

74. Ms Jones referred to the decisions in the *Rolls Group* and *Data Select* cases. She submitted that the onus fell on the Appellant to persuade the Tribunal that the appeals should be reinstated and that the bar which the Appellant has to reach in reinstating an appeal which it has voluntarily withdrawn should be relatively high.

75. Mr Stayton had not given sufficient reason why an application to reinstate the appeals was not made following the failure of the negotiations in May 2013 and the issue of the statutory demand in August 2013.

76. No pressure was put on Mr Stayton to withdraw the appeals. It is not clear what events led to the withdrawal of the appeal against the personal liability notice in 2012.

77. Mr Stayton had asserted that there was a duty on HMRC to advise and assist him in this matter. However, Mr Stayton was represented at all times by both lawyers and accountants. HMRC was entitled to assume that he was receiving appropriate advice.

78. Mr Stayton was represented at all relevant times by his lawyers and accountants. David Middleburgh of Gallant Maxwell did not hold himself out as a tax specialist, but the procedure in relation to the investigation was not a complex one. A competent solicitor should be capable of advising his or his client in these circumstances. It was for the individual taxpayer to select his or her own advisers.

79. In any event, there was no evidence that Mr Stayton was given negligent advice. He seemed to have been advised that it might be beneficial to him in terms of progressing the negotiations to withdraw the appeals as a gesture of goodwill. There was always a risk when he did so that the negotiations might fail.

80. HMRC did not know what advice was given, whether it was incorrect or whether it was simply a risk that Mr Stayton agreed to take which did not work in his favour.

81. The decision to withdraw was the Appellant's decision. It should be assumed that Mr Stayton weighed up the position and took advice at the time. If he had been advised that he had a strong case, he would not have withdrawn.

82. HMRC had relied on the withdrawal of the proceedings. It had assumed that the relevant figures were settled as part of the negotiations of the compromise settlement. HMRC should be entitled to finality in the litigation. It was now being asked to rework cases which had been dealt with appropriately at the time. Mr Stayton had his chance to pursue the appeals in these matters. He had voluntarily withdrawn.

83. The issue of the statutory demand in August 2013 made it clear that HMRC was taking steps to enforce the tax debts. There was no credible explanation why Mr Stayton did not take action to reinstate the appeals at that time. It was not reasonable to say that the delay in serving the bankruptcy petition was evidence that HMRC was not pursuing the debts. The statutory demand was sufficient.

The late applications

The law

84. Rule 17 of the Tribunal Rules provides:

"17 **Withdrawal**

(1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case-

(a) by sending or delivering to the Tribunal a written notice of withdrawal; or

(b) orally at a hearing.

(2) The Tribunal must notify each party in writing of its receipt of a withdrawal under this rule.

(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

(4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after-

(a) the date that the Tribunal received the notice under paragraph (1)(*a*); or

(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(*b*).

85. The time limit for applying to reinstate an appeal that has previously been withdrawn by written notice is therefore 28 days from the date on which the Tribunal received notice of withdrawal.

86. There is no specific rule in the Tribunal Rules which deals with circumstances where an application to reinstate an appeal that has previously been withdrawn is made outside the 28 day time limit in Rule 17(4) and which sets out the criteria which should be taken into account.

87. The Tribunal has a power as part of its general case management powers to extend or shorten the time to comply with any rule (Rule 5(3)(a) of the Tribunal Rules). The Tribunal must exercise that power to give effect to the overriding objective in Rule 2(1) of the Tribunal Rules "to deal with cases fairly and justly".

88. Mr Justice Morgan in *Data Select Limited v HMRC* [2012] UKUT187 summarized the questions which the Tribunal should ask itself when dealing with applications to extend a time limit. He said, at paragraph [34] of his judgment:

> "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?

(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."

89. Some helpful guidance is also to be found in the decision of the Court of Appeal in *Denton v T H White Limited (and related appeals)* [2014] EWCA Civ 906 at [24].

"We consider that the guidance given at paragraphs 40 and 41 of *Mitchell* remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. 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…".

90. In the passage from the *Denton* case to which I have just referred, there is reference to Rule 3.9 of the Civil Procedure Rules. Rule 3.9 is now in rather different form to that referred to in argument by Mr Lynam following changes made in 2013. In its current form, Rule 3.9 states as follows:

"**Relief from sanctions**

(1) 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 and court orders.

(2) An application for relief must be supported by evidence."

91. The change in the drafting of Rule 3.9 is seen as embodying a stricter approach by the civil courts to compliance with rules and time limits. There is evidence of that approach in the decision of the Court of Appeal in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537 (which is referred to in the extract from the *Denton* case to which I referred at [89] above). In that case, Lord Dyson MR giving the judgment of the court said at paragraphs [40] and [41]:

"[40] We hope that it may be useful to give some guidance as to how the new approach should be applied in practice. It will usually be appropriate to start by

considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can be properly regarded as trivial, the Court will usually grant relief provided that an application is made promptly. The principle "de minimis non curat lex" (the law is not concerned with trivial things) applies here as it does in most areas of law. Thus, the Court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.

[41] If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the Court to grant relief. The Court will want to consider why the default occurred. If there is a good reason for it, the Court will be likely to decide that the relief should be granted. For example if the reason why a document was not filed with the Court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of over work or otherwise, is unlikely to be a good reason….

…..[The] need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue. We should add that applications for an extension of time made before the time has expired will be looked upon more favourably than applications for relief from sanction made after the event."

92. That approach was largely endorsed in the *Denton* case.

93. There has been some discussion in recent cases (such as *McCarthy & Stone (Developments) Ltd v HMRC* [2014] UKUT 197 (TCC), *Leeds City Council v HMRC* [2014] UKUT 350 (TCC), and most recently *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121) as to the precise approach which the Tribunal should take in the case of late applications and, in particular, whether the Tribunal should adopt the stricter approach to compliance with rules resulting from changes to Rule 3.9 of the Civil Procedure Rules and the subsequent decisions in the *Mitchell* and *Denton* cases.

94. There is no equivalent provision to Rule 3.9 of the Civil Procedure Rules in the Tribunal Rules. However, following the decision of the Court of Appeal in *BPP Holdings*, it is clear that the stricter approach should be adopted. In that case, the Senior President of Tribunals (with whom the other Judges agreed) said at paragraph [37]:

"There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient

conduct of litigation at proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the Tax Tribunal Rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*."

95. The Senior President of Tribunals in *BPP Holdings* referred with approval to Mr Justice Morgan's application by analogy in *Data Select* of Rule 3.9 of the Civil Procedure Rules.

96. In summary, therefore, in considering the overriding objective of dealing with cases fairly and justly, the Tribunal must conduct a balancing exercise taking into account all the facts and circumstances of the case. This will include matters listed in Rule 3.9 of the Civil Procedure Rules both in its current form (and so including the requirement for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders) and in the previous form which contained a more detailed list of factors. However, none of the factors is to be given any special weight.

Discussion

97. In accordance with the approach that I have set out above, I must first consider the purpose of the time limit. I received no direct submissions on this matter. However, both Ms Jones and Mr Lynam referred me to the decision of Mr Justice Morgan in *Data Select*. In that case, Mr Justice Morgan said at [37]:

> "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 reopening 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."

98. Those comments were made in the context of a late appeal against an HMRC decision. They are equally apt to apply to a late application to reinstate an appeal that has been withdrawn. The need for finality in tax matters is therefore a factor that I should take into account in deciding whether or not to grant an application to extend the period of time for reinstating the appeals.

99. The next question that I need to consider is the seriousness of the delay. In *Romasave (Property Services) Limited v HMRC* [2015] UKUT 254, Judge Berner and Judge Falk decided that a delay of three months was both serious and significant. The applications to reinstate the appeals in this case have been made, in each case, several years after the expiry of the 28 day period in Rule 17(4). There is no doubt in my mind that the delay in each case is both significant and serious.

100. I must then consider why the default has occurred.

101. Mr Lynam suggests that one reason for the delay was that Mr Stayton was not aware of the consequences of the withdrawal of the appeals. Mr Stayton believed that

the withdrawals did not affect his ability to contest the claims and when he became aware that they might do so, Mr Stayton acted promptly to apply for reinstatement.

102. There are various aspects to this point. First, Mr Lynam argued that the surrounding circumstances led Mr Stayton to believe that there were no practical consequences on his ability to contest HMRC's claims if he withdrew the appeals. Mr Lynam says that Mr Stayton was confirmed in this belief by the continued negotiations with HMRC and the delay of HMRC in taking action to initiate bankruptcy proceedings following the issue of the statutory demand in August 2013. Once bankruptcy proceedings had been served on Mr Stayton and it became apparent that HMRC was pursuing the claims, Mr Stayton took prompt action.

103. In essence, Mr Lynam says that HMRC's action and/or inaction led Mr Stayton to believe that he would be able to contest the appeals and therefore there was no need for him to make an application to reinstate the appeals. For the reasons I give below, I am not persuaded that it was reasonable for Mr Stayton to take that view.

104. The negotiations, which continued until May 2013, were negotiations regarding a possible compromise settlement. Those negotiations related to a possible settlement of all of Mr Stayton's liabilities and those of the companies controlled by him. The liabilities were numerous and the liabilities in relation to the personal liability notice and the Regulation 72 direction were only two.

105. As regards, the specific liabilities which are the subject of these appeals, it is clear that HMRC regarded the liability under the personal liability notice as being no longer in dispute by the time of the meeting on 10 January 2013. There is no reference to the liability under the personal liability notice in the minutes of the meeting of 10 January 2013. There is no evidence that the personal liability notice remained in dispute, or that any negotiations in relation to the liabilities under the personal liability notice were continuing.

106. For these reasons, in my view, it was not reasonable to conclude, as a result of the continued negotiations in relation to the overall settlement, that it would be open to Mr Stayton to reinstate the appeal in relation to the personal liability notice.

107. The liability under the Regulation 72 direction was referred to at the 10 January 2013 meeting. But the discussion at the meeting in 10 January 2013 is consistent with HMRC's explanation that the amounts were regarded as settled and that the only issue that arose at the meeting was the extent to which the liability under the Regulation 72 direction could be included in the wider proposed settlement of Mr Stayton's liabilities. I accept the evidence of Mr Axbey and Mrs Hilton in that regard.

108. The negotiations as a whole broke off in May 2013, after which HMRC issued a statutory demand which included both the liability under the personal liability notice and the liability under the Regulation 72 direction. At that point, even if it could be said that, whilst the negotiations continued in relation to the compromise settlement, it was reasonable for Mr Stayton to believe that it was open to him to pursue the appeal

in relation to the Regulation 72 direction, it must have become apparent to Mr Stayton and his advisers at that point that HMRC regarded those amounts as settled.

109. Mr Lynam also referred to HMRC's continued willingness following the issue of the statutory demand to negotiate a settlement as a good reason for a delay in making an application to reinstate the appeals. For similar reasons, the inference that I draw from the facts is that HMRC was willing to discuss with Mr Stayton a broader settlement of his liabilities including the personal liability notice and the Regulation 72 direction. There was no understanding that the specific appeals in relation to the personal liability notice and the Regulation 72 direction could continue to be contested.

110. Mr Lynam also refers to HMRC's failure to prosecute the statutory demand by issuing bankruptcy proceedings and the delay in serving those proceedings on Mr Stayton until 2014 as reasons for the delay in making the applications. HMRC says that one reason for the delay in serving the bankruptcy proceedings was difficulties in physically serving those proceedings on Mr Stayton. However, even if HMRC's progress in bringing proceedings might be regarded at dilatory, its lack of progress should not be regarded, in my view, as sufficient to support the belief on Mr Stayton's part that HMRC regarded the appeals in relation to the personal liability notice and the Regulation 72 direction as open. There is no evidence in this period that HMRC suggested to Mr Stayton that it was doing anything other than proceeding to collect the liabilities.

111. Mr Lynam also referred to the fact that Mr Stayton was either wrongly advised by his advisers to withdraw or not advised of the consequences of the withdrawal of the appeals by his advisers. The question as to whether he was wrongly advised to withdraw the appeals goes more directly to the question of whether there was good reason for the withdrawal, which I will discuss later in this decision. I consider, at this stage, whether Mr Stayton was wrongly advised of the consequences of withdrawal.

112. At the time of the withdrawal of both appeals, the Tribunal gave notice to Mr Stayton of the period in which an application for reinstatement could be made. I have not seen the advice given by Mr Stayton's advisers in relation to the withdrawal of the appeals. Mr Middleburgh said in his email to Mrs Hilton on 27 July 2012, in relation to the withdrawal of the appeal against the personal liability notice, that he and Mr Leong had advised Mr Stayton, which suggests that Mr Middleburgh had had discussions with Mr Stayton, which it might be reasonable to expect would have extended to the consequences of the withdrawal. Mr Middleburgh and Mr Leong were also advising Mr Stayton at the time of the withdrawal of the appeal against the Regulation 72 direction in February 2013. Once again, I have not seen the advice that was given at the time.

113. It is clear that there were discussions between Mr Stayton and his advisers at or about the time of the decision to withdraw each of the appeals. Mr Stayton says that his understanding was that the aim of the withdrawal of the appeals in each case was to generate goodwill with HMRC to aid the discussion in order to allow the amounts

to be incorporated in a wider settlement. I am prepared to accept that he did not fully appreciate the consequences of withdrawing the appeals, either because he was not advised or because he was concentrating on other matters that were more important to him, namely receiving the wider settlement. If he was not advised of the consequences, he may have some recourse against his advisers. However, if, as I suspect is more likely, he did not fully appreciate the consequences because he was more concerned with the wider negotiations, once again, that would only to my mind be a good reason for the delay until the negotiations broke down and the statutory demand was issued. At that point, Mr Stayton was still being advised by his advisers and, it would seem to me, it would have been reasonable for him to make an application to reinstate the appeals.

114. Mr Lynam also suggests that one reason for the delay was that Mr Stayton was not advised on the consequences of the withdrawal by HMRC. HMRC undertakes in the charter for taxpayers, now entitled "Your Charter" to deal even-handedly with taxpayers. One might also expect HMRC to provide some assistance to taxpayers in determining their liabilities and it may well be that those expectations are greater where HMRC is dealing with an unrepresented taxpayer. In this case, however, Mr Stayton was represented at all relevant times by accountants and solicitors. The notices from the Tribunal were clear. It was not inappropriate for HMRC to assume in such circumstances that Mr Stayton was being properly advised of the consequences.

115. For these reasons, in my view, these other issues do not represent a good reason for the delay once the negotiations in relation to the potential compromise settlement ceased in May 2013 and, in particular, after the service of the statutory demand in August 2013.

116. I must then turn to the consequences for the parties of an extension of time or a refusal to extend the time limit.

117. If I agree to extend the time limit, Mr Lynam says that there is no particular prejudice to HMRC in having to litigate these matters. He says that it has always been clear that Mr Stayton was still disputing these claims. HMRC has already prepared the cases back in 2012 and 2013 and, of course, has not yet collected the relevant tax and national insurance contributions.

118. I disagree. It was not clear that Mr Stayton was still disputing these specific claims until he sought to reinstate the appeals in January 2015. HMRC will suffer material prejudice if I agree to extend the time limit. It has treated these matters as settled for some time and has relied upon that state of affairs in drawing up statutory declarations and initiating the bankruptcy proceedings. I will take the potential prejudice to HMRC into account in the balancing exercise.

119. If I refuse to extend the time limit, the prejudice to Mr Stayton is equally clear in that he will not be able to contest the appeals. In strict terms, of course, the prejudice that Mr Stayton would suffer would be his inability to pursue his applications to reinstate; that is the second issue that I have to consider and I have set

out my reasoning below. However, I also acknowledge that, if I do refuse to extend the time limit, Mr Stayton will not have an opportunity to pursue the substantive appeals. There is a significant amount of tax at stake and I assume, without the benefit of any submissions on this point, that Mr Stayton may have an arguable case. I therefore take into account the potential prejudice to Mr Stayton in the balancing exercise.

Reinstatement

120. The second question is whether the Tribunal should exercise its discretion to allow the appeals to be reinstated on the assumption that late applications are allowed to proceed.

The law

121. Rule 17(3) of the Tribunal Rules, which I set out at [84] above, permits a party to make an application to reinstate a case that has been withdrawn. Except where the withdrawal was made formally at a hearing, that application must be made within 28 days of the Tribunal receiving the notice of withdrawal.

122. The Tribunal Rules do not set out any specific guidance as to how the discretion to reinstate an appeal should be exercised. It follows that the Tribunal must exercise its power to reinstate to give effect to the overriding objective "to deal with cases fairly and justly".

123. In *Pierhead Purchasing Limited v HMRC* [2014] UKUT 321, Mrs Justice Proudman set out the following criteria at [23]:

> "The criteria were:
>
> - The reasons for the delay, that is to say, whether there is a good reason for it.
> - Whether HMRC would be prejudiced by reinstatement.
> - Loss to the appellant if reinstatement were refused.
> - The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration.
> - Consideration of the merits of the proposed appeal so far as they can be conveniently and proportionately be ascertained."

124. She also emphasised at [24] the need to balance all of the factors in deciding a case in accordance with the overriding objective.

125. Although in the case of a late application to reinstate an appeal there are logically two separate questions for the Tribunal to answer (as set out at [3] above), as can be seen from the criteria set out by Mrs Justice Proudman in *Pierhead Purchasing*, given that the discretion to reinstate is to be exercised in accordance with the overriding objective having regard to all facts and circumstances of the case, it is inevitable that, to some extent, similar factors will be taken into account in the exercise of the discretion to reinstate and the discretion to permit a late application.

126. For example, as is clear from the principles set out by Mrs Justice Proudman in *Pierhead Purchasing*, the length of any delay in making an application for reinstatement will, in addition to being relevant to the question of whether to permit a late application, also be relevant to the exercise of the discretion to reinstate itself. There are various reasons for this: first, consistent with the comments of the Court of Appeal in the *Mitchell* case, it would not be unreasonable to expect a Tribunal to be more willing to accept a reinstatement application if it is made within the period allowed by the Tribunal Rules; second, it is more likely that a significant delay will raise considerations concerning the interests of justice in the finality of litigation; and finally, a more lengthy delay will, as a practical matter, be more likely to prejudice the other party.

127. In addition to the factors listed by Mrs Justice Proudman in *Pierhead Purchasing*, I should also take into account the reasons for the withdrawal (see the decision of Judge Cannan in *Rolls Group* at [12].)

Discussion

128. I will not restate, at this point in my decision, the comments that I have previously made on the issue of legal certainty, the reasons for the delay, and the potential prejudice to HMRC and to Mr Stayton of either allowing the reinstatement or refusing the reinstatement.

129. The additional issues that I should consider at this stage are whether there was any good reason for the withdrawal of the appeals and, to the extent possible, the merits of the appeals insofar as they can be reasonably ascertained.

130. Mr Lynam has put forward various reasons why the original appeals were withdrawn. First, Mr Lynam says that Mr Stayton was advised that it was necessary to withdraw the appeals to generate some goodwill with HMRC and to facilitate a settlement of all of his liabilities. In this respect, Mr Lynam says that Mr Stayton was wrongly advised by his advisers at the time to withdraw the appeals. Second, Mr Stayton was to some extent led to believe by HMRC that he must withdraw the appeals before HMRC would enter into a settlement.

131. As regards the first issue, it is clear from the decision in *Pierhead Purchasing* that the fact that a taxpayer was wrongly advised may be a consideration that is relevant to take into account in deciding whether to exercise the discretion to reinstate.

132. In this case, Mr Stayton was advised about the withdrawal of both appeals at the time. There is no evidence as to the content of that advice. Mr Stayton says that he was advised that it was necessary to withdraw the appeals to generate some goodwill with HMRC in order to facilitate a settlement. It is not clear whether or not he was advised of the consequences of withdrawing the appeals.

133. Even the witnesses from HMRC agreed that it was unusual for an appellant to withdraw an appeal before the settlement was reached. It would have been possible to

apply for the proceedings to be stayed whilst a settlement was negotiated. This might have been the more normal course of action.

134. It is not, however, clear to me that the advice was demonstrably wrong. The advice was given as part of the negotiations of a wider settlement in which Mr Stayton was seeking to obtain a greater advantage from his perspective, namely the wider settlement and ability to settle his liabilities over a period of time. It would appear that the decision to withdraw the appeals was a tactical one which, with hindsight, proved to be inadvisable, but at the time that it was made was, perhaps, considered the most appropriate course of action.

135. The next issue was whether or not Mr Stayton was led to believe by HMRC that it was necessary to make the withdrawals before a settlement could be agreed.

136. I have seen no evidence concerning the circumstances in which the appeal against the personal liability notice was withdrawn. It is clear that the withdrawal was made as part of the settlement negotiations, but there is no evidence that HMRC's actions played any part in it.

137. As regards the withdrawal of the appeal against the Regulation 72 direction, this withdrawal was discussed at the meeting on 10 January 2013. As I said at [107], I accept the evidence of the HMRC witnesses that they considered that the amounts of the liabilities had, in effect, been agreed and that they were seeking to incorporate the liabilities within a wider settlement.

138. That having been said, it is clear from the minutes of the meeting that the impression could have been gained from the manner in which that position was expressed that HMRC was making a prior withdrawal of the appeal a condition of the settlement. But, even if that were the case, and that accordingly it might be said that HMRC's actions could be a good reason for the original withdrawal, that factor would need to be balanced with the delay of the Appellant in making the reinstatement applications. For the reasons that I gave in relation to the late applications, even if it was a good reason for the withdrawal at the time, it was not a good reason for a delay in making the applications to reinstate once the negotiations leading to the settlement broke off and the statutory demand was issued.

139. On the final issue, I did not hear any argument about the merit or otherwise of the substantive appeals. I have assumed for the purposes of this decision that Mr Stayton may have an arguable case. The amounts at stake are, of course, substantial.

Decision

140. I have considered the factors to which I have referred above in the context of dealing with these applications fairly and justly.

141. I have considered in favour of allowing these applications to proceed the significant amount of tax at stake and the inevitable prejudice to Mr Stayton in not permitting him to reinstate his appeals.

142. I have also considered in favour of not allowing these appeals to proceed the significance and seriousness of delay in making the applications and prejudice to HMRC in reinstating matters that it has regarded as closed for some time.

143. I have also taken into account in dealing with these applications fairly and justly the need for litigation to be conducted efficiently and at proportionate cost, and that compliance with rules and orders and time limits should be enforced.

144. Taking all of the factors into account, I have concluded that it would not be in the interests of fairness and justice to permit these applications to proceed out of time.

145. I refuse these applications.

Rights of appeal

146. 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.

Amended version

147. Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 22 April 2016.

ASHLEY GREENBANK
TRIBUNAL JUDGE

RELEASE DATE: 6 April 2016