[2016] UKFTT 0315 (TC)

TC05083

Appeal number: TC/2014/00988

PROCEDURE – application to make appeal out of time – closure notice – assessments and penalties – income tax and VAT – whether ill health a reasonable excuse – Rules 5(3) (a) and 20 (4) of the* 'Tribunal Rules 2009' – Data Select *and* Aberdeen City *applied* – BPP Holdings *discussed* – *application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANTHONY LORIMER **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
MICHAEL ATKINSON

Sitting in public at the Social Security and Child Support Tribunal (SSCSA), York House, 31 York Place, Leeds on 22 October 2015

Miss Rebecca Murray, Counsel, instructed by Gilbert Tax, for the Appellant

Mrs Shari McMullen and Mrs Elizabeth McIntyre, Presenting Officers of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an application by Mr Lorimer for permission to extend the time to notify his appeal to the Tribunal under s49G(3) of the Taxes Management Act 1970 ('TMA') and s83 of the Value Added Tax Act 1994 ('VATA'). His appeal is against two separate review conclusions which followed the issue of a closure notice dated 16 April 2012 for the year of enquiry 2007-08; assessments ensuing from the closure notice include additional income tax for 2007-08 and five other years, the penalties related thereto, and assessments to VAT and civil evasion penalty.

2. The Hearing was for the purpose of determining whether the Tribunal should exercise its case management powers by extending the time limit to admit Mr Lorimer's late appeal under Rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('Tribunal Rules'). Rule 20(4) clearly states that unless the Tribunal gives such permission, the Tribunal must not admit a late appeal.

3. In applying the two specific rules in relation to the admission of a late appeal, the Tribunal also has regard to the overriding objective stated under Rule 2, which is 'to deal with cases fairly and justly', and 'in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties'.

The appealable decisions and time limits

4. The appealable decisions are the decision notices issued by HMRC on the conclusion of a review under s49E of TMA (for income tax), and s83C of VATA (for VAT). The requirement for notifying the Tribunal of an appeal within a time limit is derived from s49G(5) TMA, which provides that an appellant 'may notify the appeal to the tribunal within the post-review period'. The applicable *post-review period* is defined by s49G(5)(a), being 'the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review'. Similar provision as regards the time limit for VAT is under s83G(3)(b) of VATA.

5. For the income tax assessments and penalty determinations, the appealable decision is the review conclusion by HMRC Higher Officer Mrs Durkin dated 21 December 2012, which means an appeal against the decision notice has to be notified to the Tribunal by Friday 18 January 2013, as noted by HMRC during the hearing.

6. For the VAT assessments and civil evasion penalty notice, the appealable decision is the review conclusion dated 30 August 2013, and the time limit to notify the appeal to the Tribunal is, according to HMRC, Monday 30 September 2013.

7. The Tribunal notes that the time limit fell on a Saturday in both instances, namely on 19 January 2013 and 28 September 2013, and the inconsistency in HMRC's reckoning of time limit in these two instances. For consistency, the Tribunal would have adopted the time limit of Friday 27 September 2013 for notifying an appeal against the VAT review conclusion to accord with the meaning of

'*within* the period of 30 days beginning with the conclusion date' (s83G(3)(b) VATA). However, due to the date of 30 September 2013 having been used and referred to by both parties as the time limit for appealing against the VAT review conclusion, the Tribunal has not sought to revise their references either in evidence or submissions to what we consider to be the relevant date of 27 September 2013.

Notice of Appeal

8. Mr Lorimer's Notice of Appeal was dated 13 February 2014 and stamped as received by the Tribunal on 17 February 2014. The appeal covers both review conclusion decisions dated 21 December 2012 and 30 August 2013. The timing of the appeal was in consequence of debt management actions taken by HMRC.

9. The reasons given for notifying the appeal late are:

> 'A letter from Mrs Helen Durkin dated 21.12.12 was not received by me until 21.1.14.
>
> I only received a copy of Mrs Durkin's above letter via a letter dated 16.1.14 from Mrs L. Smith.
>
> Additionally I have an Agent – Craig Tully of Gilbert Tax – who only received a copy of Mrs Durkin's letter when I sent it to him on or around 21.1.14.
>
> Although letters from HMRC frequently state that copies of such an HMRC letter has been sent to my Agent, he frequently states he has not received them. I then forward copies to him.'

10. The grounds of appeal as stated on the Notice are:

> '- the amounts demanded by HMRC are based on estimated figures by HMRC
> - all extra documentation required by HMRC have been unreasonably dismissed as invalid and not allowed
> - other reasons'

Evidence from witnesses

11. Miss Murray, counsel appearing for the applicant, led the evidence of Mr Lorimer, and his ex-wife, Ms Sandra Hill. The Tribunal requested the evidence of Mr Craig Tully of Gilbert Tax, who acted for Mr Lorimer in respect of the enquiry.

12. The principal ground of the application, as advanced on the day of the hearing, was to plead reasonable excuse on the ground of ill health of Mr Lorimer and his partner, Ms Kirstine Proud, at the relevant times.

13. We heard in evidence that Ms Proud was the cohabiting partner of Mr Lorimer and the book-keeper for his business, and that her ill health was relevant for all the periods of the assessment from 2003 to 2008. Her doctor's letter dated 6 August 2014 was produced with Ms Proud's consent, which confirms that Ms Proud 'has been

suffering from bouts of severe Migraines with Aura and some Visual Disturbances over the last couple of years'; on 5 June 2014, she was hospitalised on suffering a stroke; she continues to require rehabilitation to assist with recovery, and preventive medications to minimise the risk of further strokes.

14. The Tribunal pointed out that the timing of Ms Proud's stroke in June 2014 was nearly 18 and 8 months after the respective time limits had expired on 18 January 2013 and 30 September 2013 for notifying the appeals. In response, Mr Lorimer referred to the specific set of circumstances and what stopped him from taking action in January 2013. He explained that Ms Proud had been very ill over a long period of time leading up to her stroke; that his own state of health caused him to suffer from 'various severe depression' and sent him into 'an absolute depression' in and around January 2013; that he 'did not look at' and he 'could not deal with' correspondence; that his priority was Ms Proud and that he was her primary carer.

15. Referring to the enquiry, Mr Lorimer said he tried to work with HMRC; that he contacted somebody to get assistance; that the estimated amount of money in question sent him into a 'panic'; that he knew not how to deal with it; that 'depression then started – can't answer it in any way other than that'.

16. Mr Lorimer's doctor provided a letter dated 1 August 2014, which states that he suffers from spinal stenosis at the L4/5 level caused by a central disc prolapse, which gives him low back pain, posterior thigh pain with numbness in his lower legs, and is being treated 'conservatively' at present but may require an operation in the future; that he also suffers from migraine for which he is taking medication at night.

17. Mr Tully also provided a letter dated 11 August 2014, which elaborates on Mr Lorimer's condition; much of the detail is based on the email communication dated 8 August from Ms Hill to Mr Tully, giving her account of the condition of Ms Proud and Mr Lorimer. While we have read the contents of these communications, we consider the doctors' letters as providing the professional and fair account of the couple's state of health. The elaborated versions from Mr Tully and Ms Hill represent largely the perception of the situation by Ms Hill, and the Tribunal is unable to assess the fairness of her account or to accord significance to it.

18. The Tribunal heard from Ms Hill that she returned to Scotland in 2007 after having separated from Mr Lorimer in 1994. Ms Hill has worked in an administrative role at the Industrial Tribunal. She commented that 'the investigation was getting so overwhelming' that she was asked to help out; that she started helping Ms Proud 'put things together for the court' for about 4/5 months in the period leading up to the Review Decision in 2012.

19. Ms Hill testified to Ms Proud's state of ill health; she informed the Tribunal that Ms Proud had previously been a store manager with Asda; that Ms Proud had no training as a book-keeper; that Ms Hill did try to explain double entry book-keeping to her; that Ms Proud responded to HMRC's letters doing what she could to provide information requested but that 'quite often, not understand what was asked of her'.

20. Mr Tully, partner at Gilbert Tax, gave evidence on the request of the Tribunal. He previously worked for HMRC for about ten years in areas dealing with fraud, civil evasion and avoidance of taxation. He has been involved with the enquiry from 2010 to the present, but has been assisting Mr Lorimer on a *pro bono* basis since mid-2013.

21. Mr Tully is based in Leeds, and with Mr Lorimer in Dumbarton, the distance would seem to have been a hindrance to communication; that Mr Lorimer is not responsive to emails, and that even with phone calls, it is not often easy to get hold of him; that had Mr Lorimer been more local, Mr Tully said he 'could have taken a more active interest'; that Mr Tully tried a couple of times to call upon Mr Lorimer when he was driving up to Glasgow: in May 2015 and the year before (August 2014 perhaps) when passing, but Mr Lorimer was either not very well or could not find him. Mr Tully commented that 'because of [Mr Lorimer's] chaotic family situation' he tired to ensure that he could have some help locally and had referred him to the Citizens Advice Bureau, which could not offer assistance due to the complexity of the matter.

22. The Tribunal specifically directed Mr Tully's attention to the decision notices of the review conclusions dated 21 December 2012 and 30 August 2013, and asked if Mr Tully could remember having received the letters. Mr Tully replied, 'Can't remember, but more likely than not to have.' Mr Tully observed that the contents of the letters were 'fairly familiar' to him.

23. The Tribunal asked Mr Tully to relate the system and procedure in operation in his office to deal with incoming mail and how mail is prioritised for action. He explained that it is pivotal to get the contents of the incoming mail, and if it is a statutory review conclusion, the letter will 'come to my desk' for priority action. In respect of client contact, the letter will be scanned and then emailed or posted to client, and in a normal situation, he would have made notes and copied by email to client, and in the case of Mr Lorimer, also would have followed up with a phone call.

24. Mr Tully also related his understanding of the income tax and VAT enquiries – that 'the two cases work hand in glove', and that if the direct tax had been concluded, the VAT review would not have been impartial, and since the VAT review was offered as an impartial review, Mr Lorimer was entitled to consider the income tax enquiry was not closed.

Submissions by the parties

25. Miss Murray relied on the authority from *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC) ('*Leeds City*') in which Judge Bishopp distinguishes the Civil Procedure Rules ('CPR') from the Upper Tribunal Rules. At [15], it is observed that 'the obligation to enforce compliance with rules, practice directions and orders [under CPR rule 1(20)f)] … is absent from the Upper Tribunal rules which instead, by rule 2(2)(c) require the tribunal to avoid unnecessary formality and to seek flexibility'.

26. Miss Murray submitted that while technically different time limits should apply to the review decisions on direct and indirect taxes, all the assessments and penalties for both income tax and VAT had been issued in consequence of the same enquiry

into 2007-08. For this reason, Miss Murray urged the Tribunal to consider that there should only be *one* applicable time limit to all appealable decisions and that time limit should be referential to the later date in respect of the VAT review conclusion, namely 30 September 2013; that the 18 January 2013 time limit should be set aside; that the delay in notifying the appeal was limited to 'September 2013 to January 2014, rather than the entire year'; that there was a reasonable excuse for the delay of four and a half months due to the ill health of Mr Lorimer and his partner; that with regard to Mr Tully's evidence that Mr Lorimer was not responsive to emails or phone calls, 'it was not to be held against him' that Mr Lorimer had to go out to work.

27. For HMRC, Mrs McMullen first of all dealt with the point raised by Mr Lorimer as a ground for the substantive appeal, namely: 'that the amounts demanded by HMRC are based on estimated figures'. She asserted that there was no evidence to rebut the presumption of continuity for the conclusions reached in respect of the year of enquiry 2007-08 to be applied to other years.

28. Citing the authority of *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) ('*Data Select*') at [37], Mrs Mullen stressed the importance of 'finality in litigation'. Turning to *Obhloise Benjamin Ogedegbe* [2009] UKFTT 364 (TC), Mrs Mullen urged the Tribunal to consider Sir Stephen Oliver's judgment at [7]: 'While this Tribunal has got power to extend the time for making an appeal, this will only be granted exceptionally.'

29. As regards whether there should be one applicable time limit in Mr Lorimer's case, Mrs McMullen submitted that there were two separate decisions for the two types of tax involved, each with its own time limit as determined by the post-review period set down by the statute; that each review conclusion letter stated clearly under the heading of '*What Happens Next*' the relevant time limit to notify an appeal to the Tribunal; that there was no reasonable excuse for the inordinate delay in notifying the appeal; that Mr Lorimer only took action to notifying his appeal following debt management actions; that the enquiry period was extensive with a lot of work done; that nothing had been accepted by HMRC to disprove the figures of assessments; that nothing had been produced to displace those figures with evidence.

30. Mrs McIntyre represented HMRC in respect of the VAT review conclusion; she did not rehearse further grounds for refusal of the application but emphasised that the review decision of 30 August 2013 had substantially reduced the VAT assessments and the civil evasion penalty charged.

Discussion

31. In deciding whether to admit Mr Lorimer's late appeal, the Tribunal adopts the general approach set out in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 ('*Aberdeen City*') by Lord Drummond Young in the Court of Session judgment, which is endorsed by Morgan J in *Data Select* at [36]. The criteria from *Aberdeen City* are: (i) whether there was a reasonable excuse for failing to observe the time limit; (ii) whether matters have proceeded with reasonable

diligence once the excuse has ceased; and (iii) whether there is prejudice to one or the other party if the appeal proceeds or is refused.

32. Before applying the criteria, the Tribunal has to address first of all Miss Murray's submissions that there should be one time limit referential to the later of the two decision notices. The time limit for the post-review period is as defined by s49G(5)(a) TMA and s83G(3)(b) VATA; there are no statutory provisions for any discretionary powers to vary the time limit for notifying an appeal under either statute. The overriding objective under Rule 2 of the Tribunal Rules refers to 'seeking flexibility in the proceedings', and varying the basis for determining statutory time limit does not fall under 'proceedings'. Notwithstanding Miss Murray's submissions, the Tribunal cannot consider the application as referential to the time limit being at 30 September 2013 by eliding the two decision notices into one.

33. As to whether there was a reasonable excuse on the ground of ill health, the Tribunal has to consider the delay in notifying the appeal as from 18 January 2013 to 13 February 2014 for income tax, and from 30 September 2013 to 13 February 2014 for VAT. The ground of reasonable excuse obtains *only* if events are not reasonably foreseeable. From the evidence given, both Mr Lorimer and Ms Proud have medical conditions that represent an ongoing state of affairs. While the stroke was a sudden onset, it happened in June 2014, some 16 months and 8 months after the lapse of the respective time limits.

34. The Tribunal cannot find there being a reasonable excuse for notifying the appeals late in January 2013 and in September of 2013, or for the inordinate delay in notifying the appeal on the ground of ill health. If ill health had been an ongoing issue, a responsible taxpayer would seek professional assistance to deal with his tax affairs. In any event, Mr Lorimer did have the assistance of Mr Tully to keep him compliant with important dates such as time limits. The delay was inordinate in both instances, and even if a reasonable excuse had existed at the inception of the time limit, it had not been remedied without unreasonable delay.

35. On the Notice of Appeal, the main reason given for making the appeal out of time is that the decision notice dated 21 December 2012 was not received by Mr Lorimer or by Mr Tully at the time. At the hearing, the non-receipt of the decision letter was not advanced as a ground for the application. Nevertheless, the Tribunal will address this ground from the evidence we have heard. Referring to the time of his own depression, Mr Lorimer had indicated that he 'did not look at' and 'could not deal with' any correspondence. From Mr Tully, we heard that his office internal mail system would have flagged up a decision notice and that it would have 'come to his desk' as priority mail for action. Mr Tully admitted it was 'more likely than not' that he would have received the December 2012 decision notice; that the contents of both decision letters looked 'fairly familiar' to him.

36. The onus is on the party alleging non-receipt of a letter to prove the case. The serving of the review conclusion letter in December 2012 falls within the provision of s7 of the Interpretation Act 1978:

> 'Where an Act authorises or requires any document to be served by post … then, unless the contrary intention appears, the service is *deemed to be effected* by properly addressing, pre-paying and posting a letter containing the document and, *unless the contrary is proved*, to have been effected at the time at which the letter would be delivered in the ordinary course of post.' (emphasis added)

While Mr Lorimer has stated the non-receipt of the December 2012 review conclusion letter as the reason for his appeal being notified out of time, no evidence has been produced to prove his case. In the absence of contrary evidence, the *deeming* provision of s7 Interpretation Act 1978 applies as regards the effects that should be flowing from the serving of the decision letter dating 21 December 2012.

37. From the documents bundle, there is evidence that HMRC's correspondence did reach Mr Lorimer at the same address as the decision notice of December 2012. Reviewing the documents provided to the Tribunal, it had been HMRC's practice to send both Mr Lorimer and Mr Tully a copy of the same letter; there was no suggestion that HMRC's previous correspondence had routinely failed to reach either Mr Lorimer or Mr Tully. On the balance of probabilities, the decision notice of December 2012 would have reached both Mr Lorimer and Mr Tully.

38. In any event, as the detailed chronology appended to this Decision shows, both Mr Lorimer and Mr Tully were well aware that the review conclusion to income tax would follow at some point when Mr Tully wrote to accept the review offer on 31 August 2012 on behalf of Mr Lorimer. He informed HMRC that Mr Lorimer '*is in the process of undertaking further work in respect of the years under enquiry*'. There was only one year under enquiry, that of 2007-08, and the use of plural for years in this context would suggest that Mr Tully meant the other years being assessed under the presumption of continuity.

39. The 'further work' referred to by Mr Tully dating from August 2012 would seem to correspond with Ms Hill's evidence that she was helping Ms Proud in the four to five months before the December decision to 'put things together for the court'. However, whatever work had been undertaken from August onwards, the result of which never reached HMRC. There was no record that any further evidence was produced by Mr Lorimer in those intervening months to address the outstanding issues arising from the income tax enquiry, or indeed after the issue of the review decision in December 2012.

40. What is evident though was that there was an awareness and expectancy that a review decision would follow suit. 'We look forward to hearing from the reviewing officer' – that is how Mr Tully ended his 31 August 2012 letter. If HMRC, on issuing the review conclusion decision in December 2012, heard no further from either Mr Lorimer or Mr Tully for over a year after the expiry of the 'post-review period', HMRC are entitled to infer from the silence as an acceptance of the *finality* of the review decision.

41. In *Data Select*, Justice Morgan considers the particular comments in the cases cited in his decision on the 'finality in litigation' as being 'not directly applicable

where the application concerns an intended appeal against a determination by HMRC'. However, he continues at [37] by stating:

> '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.'

42. The Tribunal notes that the review request for VAT was made on the same letter dated 31 August 2012 by Mr Tully. The letter, while directed for the attention of Officer Carmichael, was addressed to both Miss Carmichael (for income tax) and Mr Stewart (for VAT), and was interpreted by HMRC as an acceptance of a review offer for both direct and indirect taxes. It would seem that 31 December 2012 was given as the date for the conclusion of both reviews.

43. While the review conclusion for income tax was reached on 21 December 2012, there was considerable delay for VAT. Officer Stevens wrote on 17 January 2013 to confirm that the original date of 31 December 2012 was to be revised (after a telephone conversation with Mr Tully) to 27 February 2013. Five further revisions of conclusion date followed: to 21 March, 2 April, 23 April, 21 May, and finally to 31 August 2013.

44. On 30 August 2013, HMRC's review decision was issued, addressed to Mr Lorimer and copied to Gilbert Tax. The VAT assessments were substantially reduced to £6,406 (from £31,770), and the related civil evasion penalty revised to £4,270 (from £28,580); the revisions were in part due to some earlier years being out of time. The letter advised an appeal to the Tribunal has to be notified within 30 days of the date of the decision notice.

45. It is not necessary for the Tribunal to comment on HMRC's six successive revisions to the conclusion date for the VAT review, or whether it is a reasonable assumption for a professional adviser such as Mr Tully to hold that the two review conclusions are conjoined and work 'hand in glove' so that the post-review period for the income tax decision can be disregarded. We note only that even by Mr Tully's reckoning, the finality of VAT review conclusion should have brought both enquiries to a close; but the fact remains that the notification of the appeal on 13 February 2014 was made some four months after the expiry of the VAT post-review period on 30 September 2013. We note also that the further delay in delivering the VAT review conclusion would not seem to have been to the detriment of Mr Lorimer's position. On the contrary, the delay would seem to have rendered some assessments for earlier years out of time, and contributed to the substantial reduction in the liabilities.

46. The notification of an appeal is not of itself an onerous task; the completion and lodgement of the Notice of Appeal does not require arduous mental application but the presence of mind and due regard for the purposes of time limits. The course of the enquiry starting in November 2009 and ending with the review conclusion in December 2012 lasted for just over 3 years. There had been many opportunities for the production of information and documents to refute HMRC's conclusions

regarding the year of enquiry 2007-08. Throughout the course of the enquiry, Mr Lorimer had *not* acted with due diligence, as illustrated by the chronology of events.

47. The material points of the income tax enquiry concern (a) the cash deficit identified within the business, and (b) the source of capital introduction shown on the accounts. There were unexplained lodgements into Mr Lorimer's bank accounts which his accountant seemed to have assigned to 'capital introduction' year on year in order to balance the books. We heard Ms Hill's evidence of the records that might have been maintained by Ms Proud for Mr Lorimer. The books were not in an order capable of addressing the queries raised by HMRC. It is doubtful whether any records exist for evidence to be produced to refute the assessments, and the passage of time will only make the reconstruction of records more arduous, if it were ever possible.

48. The Tribunal is very conscious of the prejudice against Mr Lorimer in refusing his application. The income tax assessments totalling £51,700 and related penalties at £25,850 will stand, together with the VAT assessments of £6,406 and penalty of £4,270. For this reason, we have considered the likelihood of Mr Lorimer's appeal ever succeeding in the light of the evidence available during the course of the enquiry. The substantive issues behind these assessments do not concern a point of law; they can only be addressed by evidence from Mr Lorimer to prove that the cash deficit and the capital introduction figures were not omitted sales in 2007-08. There was a dearth of evidence to explain these questionable lodgements, and the Tribunal considers that there is no reasonable prospect of the appeal succeeding, even if it were admitted.

49. The prejudice to HMRC if the late appeal is admitted needs also to be weighed in the balance. As discussed earlier, HMRC are entitled to consider the review conclusions as finally fixed and settled, or at least accepted, in the absence of a timely appeal against each. Tremendous amount of time and efforts have been expended in the enquiries to arrive at the assessments and the review conclusions. We have examined in some detail the supporting schedules to Officer Carmichael's enquiry findings; we consider she had conducted the enquiry with clarity and consistency, and had maintained the momentum of the enquiry despite the lack of co-operative efforts from Mr Lorimer. A fair balance was struck between giving Mr Lorimer time to respond and moving the enquiry to a conclusion. The figure of £38,416 arrived at for cash deficit for 2007-08 is supported by schedules of workings that have been constructed in a methodical, meticulous and professional manner. It cannot be said that the figure is based on estimates. As for the unverified source of capital introduced in 2007-08, that of £20,901, the figure has come from the set of accounts used for completing the 2007-08 return. The onus is on Mr Lorimer to disprove the result of the enquiry, and he had not done so with any credible evidence in the course of enquiry that had lasted three years. There are significant costs to the public purse in conducting this kind of enquiry, and the Tribunal needs to consider the wider interests of public justice as regards the use of time and resources by HMRC and the courts.

50. Lastly, we will address the distinction observed in *Leeds City* between the Tribunal Rules and CPR, which was referred to in Miss Murray's submissions. The recent decision of *BPP Holdings v HMRC* [2016] EWCA Civ 121 ('*BPP*') by the

Court of Appeal is a clear pronouncement that settles the differing views[1] as regards whether the Tribunals (First-tier and Upper) should apply the changes in the CPR by analogy. The judgment is delivered by Ryder LJ, who is 'of the firm view that the stricter approach [under CPR] is the right approach' [16]; that there is 'no justification for a more relaxed approach to compliance with rules and directions in the tribunal rules'; that 'the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness' [37].

51. In *BPP*, HMRC was debarred from further participation in the proceedings for 'their serious and prolonged breach of an order requiring them to give proper particulars'. The enforcement of time limits by the courts applies equally to HMRC as to an appellant. The *BPP* case concerns the compliance to an order and does not correspond directly to the non-compliance of a statutory time limit as in *Data Select* or in the present case. However, Ryder LJ concludes his judgment by stating 'Morgan J [in *Data Select*] applied CPR 3.9 by analogy … in just the manner I have suggested is appropriate'. Miss Murray urged the Tribunal to consider 'seeking flexibility in the proceedings', but as Ryder LJ puts it at [38]: 'Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.'

Decision

52. The application for permission to make or notify the appeal out of time is refused.

53. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 9 MAY 2016

[1] The approach by Judge Bishopp in *Leeds City* and the stricter approach set out by Judge Sinfield in *HMRC v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC) by following the approach under the CPR as set out in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795.

Appendix to the Decision

Background and chronology

VAT visit in October 2009

1. Mr Lorimer is a landscape gardener based in Dumbarton in West Scotland, and has been in business since 1989. A VAT visit on 2 October 2009 at his business premises situated at his home by Officer O'Toole who examined the business records of June to August of 2009 in some detail. She raised concerns about the amount of capital introduced by way of cash deposits, and noted the accounts for 2007 showed capital introduced of £24,186, and that Mr Lorimer's accountant had queried the £27,581 introduced in 2008.

Enquiry opened into tax year 2007-08

2. By letter dated 26 November 2009, HMRC opened an enquiry into Mr Lorimer's Self Assessment Return for the year 2007-08. A schedule of information accompanying the letter requested details of his turnover and cost of sales, an analysis of expenses, and the financing of the capital introduced of £25,327.

3. On 24 May 2010, a meeting took place between Officers Carmichael and O'Toole and Mrs Anderson (Mr Lorimer's accountant), with Mr Lorimer and Ms Proud in attendance. It became known that Mr Lorimer regularly (once every 6 weeks weather permitting) sold plants at car boot sales, and the nature of the activity led HMRC to conclude that Mr Lorimer had a second business in plant sale, which was never included as part of Mr Lorimer's business turnover. During the meeting, Mr Lorimer confirmed that he had not received any inheritance, or winnings from betting or gaming during 2007-08.

4. From around September 2010, Mr Tully of Gilbert Tax started acting for Mr Lorimer in relation to the enquiry. Enough information was provided for HMRC to carry out a detailed analysis of Mr Lorimer's bank accounts, invoices rendered, and expenses claimed.

5. By letter dated 15 March 2011 to Mr Tully, Officer Carmichael related the outcome of HMRC's review into the records for 2007-08, which identified potential profits understated in the sum of £41,895. The figure represented the discrepancy between the sales declared in the 2007-08 return and the adjusted total for lodgements into Mr Lorimer's numerous bank accounts; 14 account holdings were identified by HMRC, of which 10 had lodgements, and the adjustments removed any contras between accounts. The schedules with the listing of accounts and lodgements and any adjustments made to arrive at the cash deficit of £41,895 accompanied the letter.

Concerns with capital introduction in earlier years

6. In the 15 March 2011 letter, HMR noted their '*serious concerns regarding the capital introduced in the balance sheet in other years*' and requested a breakdown and

documentary evidence for capital introduction recorded in four other Self Assessment Returns: (1) year 2008-09 for £47,471, (2) year 2006-07 for £24,816, (3) year 2005-06 for £12,489, and (4) year 2004-05 for £41,582.

7. In the 15 March 2011 letter to Mr Tully, HMRC also proposed a further meeting with Mr Lorimer, and notified that protective assessments in respect of prior years 2004-05, 2005-06 and 2007-08 had been issued to Mr Lorimer, who was also sent a copy of the March letter.

Schedule 36 notice for information on capital introduction in earlier years

8. There was no response to the information request made in the 15 March 2011 letter: (a) in relation to the £41,895 cash deficit to be explained for 2007-08; and (b) the source of capital introduction for other years named. On 5 May 2011, HMRC issued a notice to provide information and produce documents by 3 June 2011 under paragraph 1 of Schedule 36 to the Finance Act 2008 ('Schedule 36 notice').

9. On 6 June 2011, HMRC issued a 'Penalty Warning' letter for the requested information and documents to be provided by 20 June 2011.

Progress of the enquiry concerning 2007-08

10. By letters dated 15 and 20 June 2011 (not included in the bundle), Mr Tully provided statements of assets and liabilities at 1 April 2007 and 31 March 2008. By letter dated 26 July 2011, HMRC replied to and referred to the two June letters from Gilbert Tax. It would seem that the June letters provide various explanations for the differences between lodgements and account records for 2007-08, and made an attempt to account for the origin of £3,500 capital introduced as from the proceeds of sale of personal effects (£1,000 for a ring, £500 for a necklace, and £2,000 for various items). HMRC were not satisfied with the typed letters from the purchasers as sufficient proof of the lodgements being from the named sources, applying *Hellier v O'Hara* (42 TC 155).

11. The total cash deficit identified for 2007-08 was £41,895, and the attempt to explain £3,500 of the total had not been based on satisfactory evidence. The material point as regards how Mr Lorimer funded capital introduction in other years as highlighted in HMRC's March 2011 letter was still not addressed by the June letters.

12. HMRC's July 2011 letter also related the impracticality of trying to arrange a meeting in Leeds where Mr Tully is based, with Miss Carmichael and Mr Lorimer both being based in west Scotland. It was suggested that telephone contact as the best way to discuss the way forward.

13. Mr Tully's reply dated 18 August 2011 (included in the bundle) addressed sundry discrepancies between cash book/invoices entries against bank lodgements, and 'business' items that should have been personal. No information or documents were produced in respect of capital introduced in earlier years, and Mr Tully's only comment thereon was: 'your enquiries must remain reasonable and proportionate, we

have yet to see any enquiry in to [*sic*] earlier years nor do we believe it is reasonable or proportionate for you to request this information at this time.'

Events leading to the issue of closure notice for 2007-08

14. In reply to Mr Tully's letter of August 2011, HMRC wrote on 16 September 2011, setting out the position to date and advising the outstanding information required to move forward with the enquiry with the hope of negotiating a settlement. No response from either Mr Tully or Mr Lorimer to HMRC's letter.

15. On 16 January 2012, HMRC wrote to inform Mr Lorimer that in the absence of any reply to the September 2011 letter, and if no response was received within 30 days, HMRC would issue closure notice with amendments to the 2007-08 return, and to the returns for the 5 years ended 5 April 2004, 2005, 2006, 2007 and 2009. The 4-page letter summarised the amendments to 2007-08, and the basis the amendments to other five years were calculated under the presumption of continuity. Attached to the letter were seven pages of analysis on spreadsheets of the cash inflow and outflow identified for 2007-08, and a two-page schedule summarising the analysis of the spreadsheets to arrive at a revised cash deficit figure of £38,416.

16. On 20 February 2012, Mr Tully replied; the main point of his letter was to query the legitimacy of widening the scope of amendments to include the tax returns for the other years, and the basis of widening the enquiry into VAT. Mr Tully concluded the letter by stating that he was keen to agree 'which years, on a without prejudice basis' for a possible settlement.

17. On 12 March 2012, Officer Carmichael replied in detail why the amendments to prior years were necessary as 'protective assessments'. The letter summarised HMRC's position as follows:

> 'Throughout this enquiry no additional voluntary information has been received or explanation offered regarding income, drawings, cash and Capital introduced in other years other than the initial disclosure regarding car boot plant sales and capital introduced in the year of enquiry [ie: the £3,500 proceeds from sale of private effects].
>
> My colleague Mr Stewart [the Higher Officer who took over the VAT enquiry] agreed to PN160 procedure being dealt with via correspondence on the condition Mr Lorimer chooses to co-operate and disclose details of the true liability. The years 2004 to 2009 are the years we wish to include in a without prejudice settlement.
>
> As previously explained Mr Lorimer's behaviour would entitle us to assess within 20 years of the end of the relevant tax period (Mr Lorimer commenced this source 03/04/1989), but we have chosen not to do so to facilitate a negotiated contract settlement and bring this enquiry to a close whereby both parties are satisfied.'

18. HMRC's March 2012 letter finished by inviting Mr Tully to submit proposals for settlement negotiation. There would seem to be no proposals made, and on 3 April 2012 HMRC wrote to Mr Lorimer that (a) closure notice for 2007-08, (b)

assessments for the 4 years to 2006-07 and 2008-09, and (c) penalty notices and determinations for 2003-04 through to 2008-09 would be issued in the next few days.

The closure notice, assessments and penalty determinations on 16 April 2012

19. On 16 April 2012, HMRC issued:

(1) The closure notice for 2007-08 and assessment for additional income tax of 12,854.94.

(2) assessment for 2003-04, additional tax of £3,443.58

(3) assessment for 2004-05, additional tax of £5,526.02

(4) assessment for 2005-06, additional tax of £10,287.27

(5) assessment for 2006-07, additional tax of £11,860.89

(6) assessment for 2008-09, additional tax of £7,728.04

20. For the five years from 2003-04 to 2007-08, penalty determination notices totalling £21,934 under section 95(1)(a) of the Taxes Management Act 1970 ('TMA') for 'negligently' delivering incorrect returns were issued to charge 50% penalty on the additional tax liabilities assessed. For 2008-09, penalty determination was made under Schedule 24 to the Finance Act 2007 ('FA 2007') for £3,921.98. All penalty determination notices were issued on 6 April 2012.

Mr Lorimer's 'appeal' to HMRC on 19 April 2012

21. Significantly, Mr Lorimer himself wrote on 19 April 2012 to Officer Carmichael to appeal against all the 'assessments and determinations on the basis that they are estimated and do not take into account the facts, also other reasons'. He continued by stating that he was 'making application for the tax and penalties shown [in a table] to be stood over in full'. He concluded the letter by requesting 'confirmation that the appeals have been acknowledged and the amounts stood over'.

22. Officer Carmichael replied by letters dated 23 April 2012, and 11 June 2012 (not included in the bundle), which are referred to in HMRC's letter dated 18 July 2012 to Mr Lorimer. The July letter would seem to re-send the 11 June 2012 letter, which Gilbert Tax advised HMRC was never received by Mr Lorimer. The contents of the June 2012 letter to Mr Lorimer and the spreadsheets and schedules attached would seem to be duplicates of those sent to Mr Tully on 16 January 2012.

23. The July letter also addressed the Mr Lorimer's 'appeal' made of 19 April 2012 by advising that the grounds of his appeal were not validly made; invited him to take up the offer of a statutory review; and informed him of the alternative route to notify the appeal to the tribunal if he declined the review offer.

Statutory review and the appealable decision of 21 December 2012

24. Mr Tully wrote on 9 August and 13 August 2012 (not included in the bundle) to confirm Mr Lorimer's appeals against all income tax and VAT assessments and requested all tax and VAT to be stood over. It would seem that additional information

was provided regarding the capital introduced in other years, which Mr Tully referred to as 'the main point of contention'.

25. On 22 August 2012, Officer Carmichael replied to Mr Tully in respect of the 'main point of contention' by stating that:

> 'Mr Lorimer and you are under no illusion that the main point of contention is a cash deficit in the year of the check which could only have come from omitted sales for the tax return year ended 5 April 2008 amounting to **£38,416**. I note once again that this has not been addressed. I will therefore assume that Mr Lorimer accepts this addition in the enquiry year is correct.'

She highlighted in her summary conclusion that the cash deficit of £38,416 remained unexplained, and of the £24,816 capital introduced per return for 2007- 08, £20,901 remained unverified.

26. The 22 August 2012 letter also detailed the review into the records submitted for other years. Officer Carmichael listed the substantial amounts of capital that remained unverified after the additional information, and that the unverified capital introduced would be the *minimum* addition in each year to sales, with further addition by taking into account personal and business *cash* expenditure (ie: the cash deficit).

27. On 31 August 2012, Mr Tully replied to inform HMRC that Mr Lorimer was undertaking further work in respect of the years under enquiry and that he accepted the review offer from HMRC in the meantime.

28. On 21 December 2012, Officer Durkin wrote to Mr Lorimer to give her review decision, which upheld the assessments and penalty determinations for all years from 2003-04 to 2008-09. The letter informed Mr Lorimer of his right to appeal to the Tribunal within 30 days of the date of the letter.

Statutory review for VAT and the appealable decision of 30 August 2013

29. Enquiry into Mr Lorimer's VAT affairs started by letter dated 3 February 2012. Mr Lorimer responded to the letter himself on 11 February 2012, and would seem to deal with the VAT correspondence direct with HMRC through the course of the VAT enquiry, with Gilbert Tax being copied into the correspondence.

30. Mr Lorimer was at first assessed to additional VAT of £31,770 for the relevant years, and civil evasion penalty in the sum of £28,580.

31. On 30 August 2013, HMRC's review decision was issued, addressed to Mr Lorimer. The VAT assessments were substantially revised to £6,406, and the related civil evasion penalty revised to £4,270; the revisions were in part due to some earlier years being out of time. The letter advised the right of appeal to the Tribunal within 30 days of the date of the letter.