



TC05094

Appeal number:TC/2013/05004

VAT – liability to registration – assessment – civil penalty – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SUSAN WILSON

Appellant

- and -

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

**TRIBUNAL: JUDGE JENNIFER DEAN
MRS BEVERLEY TANNER**

Sitting in public at Manchester on 6 April 2016

Mr Wilson for the Appellant

Mrs Sinclair, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. By Notice of Appeal dated 26 July 2013 the Appellant appealed against the decisions of HMRC dated 17 April 2007, 11 August 2008 and 22 August 2008 as follows:

(a) to notify the Appellant that she was liable to be registered for VAT;

(b) to issue a Notice of Assessment for VAT due during the periods for which the Appellant was due to be registered; and

(c) to issue a Notice of Assessment in respect of the Appellant's liability to a civil penalty for her failure to notify of the liability to be VAT registered.

2. The three aspects to HMRC's case can be summarised as follows: whether the Appellant was liable to be registered for VAT with effect from 6 April 1991, whether the Notice of Assessment in the sum of £70,000 is correct and whether the civil penalty arising out of the Appellant's failure to register for VAT in the sum of £10,000 is correct.

Background to HMRC's decision

3. The Appellant carried on business as a sole proprietor trading as a second hand car dealer under the trading style of Elgarbridge Motors. Following an examination of the Appellant's Self-Assessment returns ("SA returns") it appeared to HMRC that the Appellant was trading above the VAT threshold. Consequently HMRC made an unannounced visit to the Appellant on 17 January 2007 to the address held for the Appellant's SA returns. The Appellant was not present and contact details were left.

4. The following day the Appellant telephoned HMRC and advised that she had sold the business to Mr Elliott; she stated she could not recall the date of the transfer and would advise HMRC at a later date.

5. HMRC established that the Appellant was still paying business rates and took the view that she was still trading. In a telephone call on 24 January 2007 the Appellant requested that HMRC contact her representatives at the time, Higgins, Fairbairn & Co. HMRC did so and were advised that:

- The Appellant operated as a sole trader from 1987 to 30 September 2005;
- The Appellant's SA returns indicated that she should be registered for VAT from 1999 to 2005;

- It appeared that the business had continued to trade since September 2005.
6. On the basis of the information provided HMRC registered the Appellant for VAT with effect from 6 April 1987.
 7. Subsequently the Appellant appointed Ling Phipp as her representative and on 3 April 2007 they advised that missing accounts from 1995 to 1998 had been located and they were in the process of preparing the accounts to March 2006 including VAT calculations and VAT payable from 1 April 2006 to 30 April 2007. A spread sheet was also enclosed for the years 1994 to 2005 showing VAT due as £102,880.16 and claiming back VAT of £55,213 for vatable expenses. Ling Phipp also requested confirmation that the registration date had been amended to 6 April 1991 and asked if HMRC would like to visit their offices to agree the basis of the calculation from 6 April 1991 to 31 March 2005.
 8. By letter dated 17 April 2007 the EDR was amended to 6 April 1991.
 9. The Appellant subsequently appointed Vantis to represent her. By letter dated 13 July 2007 Vantis advised that:
 - The Appellant purchases imported 10 year old cars;
 - Any necessary changes to the vehicles are made by Mr Elliott or outsourced;
 - Mr Elliott decides the purchase value of the cars;
 - On occasions Mrs Wilson advances cash to Mr Elliott to make purchases;
 - Sales documents are under a “self bill” arrangement whereby Mr Elliott signs, often in batches of more than one, and often after the vehicle has been sold to the Appellant.
 10. On 1 August 2007 a Late Registration Penalty was notified in the sum of £177,285 calculated on a Tax Amount Liable to penalty of £1,181,900 for the period 6 April 1991 to 13 February 2007.
 11. The VAT return for the first period was submitted on 7 September 2007 and declared £341.06 output tax and £211.31 input tax.
 12. By letter dated 13 December 2007 Ling Phipp advised that they had used the accounts information available for 1995 to 2005, estimated 6 April 1987 to 6 April 1994 and established the amount due as £73,146.75 described as “part potential liability.”
 13. HMRC accepted the figures proposed for the years 1995 to 2005 however stated that any estimate for 1987 to 1994 would need to be calculated using the known figures.
 14. On 27 May 2008 Ling Phipp advised that:

- The Appellant's previous business was called Portertour Ltd which ceased trading at the beginning of 1991;
- A VAT number had already been provided for Portertour Ltd;
- The Appellant then traded from her home premises between 1991 and 1995 on a reduced turnover imposed by the restriction of a Court injunction;
- Between 1990 and 1994 there would have been on average a sale of one car per month and the annual draft calculation for the period 1991 to 1994 was £4,500 net profit;
- In 1995 trading took place from a lock-up unit and turnover increased.

15. Ling Phipp enclosed calculations of the VAT due for 1995 to 2007 in the net sum of £66,999.46.

16. HMRC were unable to verify the VAT number provided for Portertour Ltd due to the length of time since de-registration but accepted that the Appellant had accounted for VAT until April 1991.

17. On the basis of figures supplied by the Appellant's representative HMRC issued a Notice of Assessment on 15 August 2008 in the sum of £70,668. On 22 August 20-8 HMRC issued a civil penalty notice in the sum of £10,550.

18. On 3 September 2008 the Appellant advised HMRC that she had appointed Edgington Accountancy as her representatives.

19. On 2 June 2010 Edgington Accountancy advised that:

- The Appellant now understands that she should have been VAT registered but she had relied on her previous representative;
- There are no documents between 1991 to 1994 as the Appellant was not required to keep documents beyond 7 years;
- The level calculated from HMRC returns is disputed;
- The level of gross profit would have been reduced by 17.5% thus income tax and NIC would have been overpaid;
- The civil penalty will add hardship to reaching a solution and HMRC should consider reducing the liability to an amount the Appellant could start to pay immediately.

20. The appeal against HMRC's decisions was made out of time. It is not relevant to set out the history of the application to extend time to appeal. However to assist the reader we have set out Judge Cannan's decision at appendix A which provides a comprehensive overview of the history of the appeal.

Evidence

21. We heard evidence from HMRC officer Sarah Jones who made the decisions appealed against, the Appellant Mrs Wilson and Mr Wilson, a forensic accountant.

22. Ms Jones set out the background to the decisions. She clarified that she had contacted Nottingham City Council on 18 January 2007 to confirm who was paying the business rates where Elgarbridge Motors had registered for VAT on 20 March 2006 and de-registered on the same day after being told by Mrs Wilson on 3 November 2006 that the company never traded. The Business Rate Payer was confirmed as Susan Wilson T/A Elgarbridge Motors and Mr Elliott was described as the manager. On 6 February 2007, in the absence of any response from Mrs Wilson, Ms Jones registered the Appellant for VAT on a compulsory basis with an EDR of 6 April 1987. The turnover was based on that declared on the VAT 1 for Elgarbridge Motors Ltd which was estimated at £500,000 for the next 12 months. Ms Jones made a number of amendments to her decision on the basis of the information provided by the Appellant's representatives.

23. In oral evidence Ms Jones explained that in respect of Portertour Ltd she had accepted that the company was VAT registered and VAT had been paid between 1987 to 1991 even though the VRN could not be verified.

24. Ms Jones was questioned by Mr Wilson as to how the calculation of the Assessment had been reached. She explained that for the period 1991 to 1994 she had worked back from the net profit shown on the SATR; Ms Jones had used the car selling price and purchase price advised by Ling Phipp who said they had spoken to the Appellant. An allowance was given for repairs as suggested by the Appellant and once the average amount of cars sold was established Ms Jones had calculated the amount. The calculation for period 1995 to 2007 was based on the figures provided by the Appellant's accountant and allowed for the operation of the margin scheme as requested by the representative.

25. Ms Jones was asked by Mr Wilson if her conduct was governed by the Constitutional Reform and Governance Act 2010 however Ms Jones was unaware of the statute. She clarified that the assessment was not based on the SATR which had initiated the enquiry but rather the annual accounts and figures provided by the Appellant and her representatives. Ms Jones was asked if she had taken into account the fact that Mrs Wilson does not function normally; she explained that she was aware that the Appellant had health issues but had dealt with the representatives when requested by the Appellant to do so. Ms Jones was unable to comment on whether the Appellant understood bookkeeping or not. Ms Jones would not comment on whether or not any action had been taken against Mr Elliott as to do so would breach taxpayer's confidentiality.

26. In addition to a witness statement, Mrs Wilson gave oral evidence in which she stated that she had health problems which caused her to feel tired. Mrs Wilson said she could not understand how the figures put forward by Ling Phipp had been reached due to the mind-altering drugs she was on; she had relied on her accountants to sort

out the financial matters. Mrs Wilson could not answer whether or not she had failed to register for VAT nor did she know if the figures used in the assessment were reached by HMRC and her representative together.

27. Mrs Wilson contended that the figures for 1991 to 1994 which had been provided by her were made up on the advice of officer Jones “*who told me to put in fictitious figures*”.

28. Mrs Wilson denied that a table showing income tax and NIC from 1990/91 to 1993/94 had been provided by her despite a letter dated 15 February 2008 signed by Mrs Wilson to Ling Phipp stating “*I have found a note of tax paid 1991 – 1994 the amounts are...*” which she stated came from a meeting at which she was told to make up the figures. Mrs Wilson denied that she had agreed any figures, stating that she was not fully functioning due to the medication she was on.

29. Mrs Wilson was referred to an email dated 19 December 2007 from Ling Phipp to HMRC which referred to a “*lengthy conversation with Susan Wilson who is adamant that the percentage applicable to 2005 is 5%...I have agreed with her to recalculate...*” Mrs Wilson stated she could not recall what had been said so long ago and that she had taken the advice of her representatives. Mrs Wilson was taken to a letter dated 1 September 2008 from Mrs Wilson to Ms Jones at HMRC in which it stated: “*I accept that I have been working under the false impression that registration was not needed until my margin sales exceeded the threshold, I have obviously been incorrectly advised. As I am now required to register and pay VAT retrospectively for my business.*” Mrs Wilson denied that this was correct, stating that she did not really know.

30. In re-examination Mr Wilson clarified that the Appellant sold vehicles on commission and the figures had been put on the SATRs. Mrs Wilson said she had no idea what the trading income or commission was and that she had asked Ling Phipp not to send HMRC any figures because she believed they were incorrect. Mrs Wilson accepted that she had seen figures but could not recall which ones. Mrs Wilson could not recall a note entitled “*Information for an appeal against the assessment*” which was signed by Mrs Wilson and dated 3 June 2010 in which it stated “*I understand that I should have been registered for VAT.*” *The note explains that Mrs Wilson was considering action against her representatives for professional misconduct “as they should not have undertaken preparation of my accounts unless I had registered for VAT”.* Mrs Wilson denied that any information had been provided by her.

31. Mr Wilson gave oral evidence on behalf of the Appellant together with a witness statement. He explained that as a forensic accountant he has a good knowledge of this type of matter and that a satisfactory explanation for the assessment had never been provided by HMRC. Mr Wilson referred us to a number of judgments involving Mrs Wilson which he said demonstrated that the courts had not been content with HMRC’s assessment. Mr Wilson contended that there had been no detailed investigation into these matters and that although he could not put forward a figure to show that the assessment is wrong, he could say that it is more likely that Mrs Wilson owes nothing than that she does have a liability.

Submissions

32. We invited the parties to provide written submissions. HMRC made the following submissions:

- a) The Appellant's SATRs for 1999 to 2005 indicate that she was trading above the VAT threshold;
- b) Officer Jones was advised by the Appellant's former representatives that a VAT registered business had operated from 1987 to 1991 and on that basis it was accepted that VAT may have been accounted for in that period. The EDR was therefore changed to 6 April 1991 which was agreed by the former representatives;
- c) The calculation for period 1991 to 1994 was based on information from the former representatives that the Appellant had found a note of tax paid in this period which was provided with her calculation of the net profit for those years. The Appellant also confirmed that she had sold one car per month at a price of £1,750 with a profit of £1,000 per car;
- d) Using the figures provided HMRC made an assessment to the best of their judgment;
- e) For the period 1995 to 2007 the former representative confirmed that their calculations were based on accounts from 1995 to 1998, accounts information from 1995 to 2005, accountancy records including the sales and purchase car log book for the year ending 31 March 2004 and VAT paperwork for 2004-05 and 2005-06;
- f) The Appellant accepted that she should have been VAT registered;
- g) The Appellant provided revised calculations as to the gross profit;
- h) The assessment, which was based on the calculations of the former representatives was made to best judgment for the period 1995 to 2007;
- i) The Appellant has failed to provide any evidence to displace the assessment;
- j) The calculations were amended to reflect a percentage for repairs which was a calculation reached with input from the Appellant;
- k) Income from commission sales should be included in taxable income for VAT purposes;
- l) There is no evidence to support an allegation of incompetence on behalf of the former representative;
- m) The Appellant has not discharged the onus of proof in respect of the all three matters under appeal.

33. On behalf of the Appellant it was submitted that the grounds of appeal against the assessment are three-fold. First, HMRC has failed to provide a clear, detailed and unambiguous document setting out the basis of the calculation. Second, numerous factors which would prove that the Appellant owed no VAT were not properly investigated or at all and third, HMRC has not exercised proper judgment and due diligence in arriving at the figure assessed.

34. In addition it was submitted that the Tribunal should take account of the following:

- a) That the credibility of Ms Jones was undermined by the fact she did not deny telling the Appellant to make up fictitious figures;
- b) Ms Jones' conduct fell far short of what can reasonably be expected from a public servant;
- c) There was no attempt to establish the split between commission paid to the Appellant and turnover generated;
- d) The Appellant suspended payment to Ling Phipp on 22 July 2010 due to the veracity of documents supplied by them to HMRC;
- e) Ling Phipp contend that all information was provided with the Appellant's authority however the Appellant requested a copy of a letter sent by her to Ling Phipp which confirmed that Ling Phipp was not authorised to accept HMRC's estimated calculations;
- f) The Appellant defended County Court proceedings commenced by Ling Phipp for monies owed and the Claim was ultimately struck out;
- g) Between 2006 and 2010 the Appellant suffered severe health difficulties with side-effects including, inter alia, loss of memory and trouble performing routine tasks;
- h) The evidence of HMRC is not credible and the appeal should be allowed.

Discussion and Decision

35. We carefully considered the evidence before us, both documentary and oral. There was a significant amount of detail provided by the Appellant and we have set out an overview above.

36. We found Ms Jones' evidence cogent and compelling. We did not accept that her credibility was undermined by the allegation that she told the Appellant to make up fictitious figures which was a matter not put to the witness. We found the Appellant's evidence vague, unconvincing and unreliable. Mr Wilson's evidence was limited as he had not represented the Appellant during the relevant periods although since his instruction in August 2010 he has clearly tried to assist the Appellant in this matter. Mr Wilson is not a qualified accountant but has experience as a forensic accountant;

we found his evidence of limited assistance as he was unable to provide evidence as to what the Appellant asserts the correct calculation of liability should be, only that it was more likely that nothing was owed than was.

37. We accepted the evidence that it was the Appellant's SATRs for 1999 to 2005 which indicated that she was trading above the VAT threshold and which caused HMRC to initiate enquiries into the Appellant's turnover. As regards the period 1991 to 1994 we accepted that the calculation was based on information from the Appellant's former representative. We noted that in fact the information was provided by the Appellant herself in the form of a note of tax paid in the period. The Appellant's evidence on this issue was wholly unpersuasive; even accepting (as we do) that the Appellant suffered health problems, the information was supported by a letter dated 15 February 2008 which was signed and dated by the Appellant. We did not accept that the Appellant had been told to make up figures and we noted that throughout HMRC's enquiry the Appellant had been involved in discussions as to the calculation exercise undertaken by HMRC and her representative.

38. We noted the Appellant's assertion that she had not agreed the figures nor authorised Ling Phipp to put them forward. The Appellant's closing submissions attached evidence in support of this; namely a letter to Ling Phipp dated 22 July 2010 in which the Appellant stated she had suspended payment to Ling Phipp due to an issue as to the veracity of documents supplied by them to HMRC. We also noted that Ling Phipp's response on 26 July 2010 denied the accusation, stating "*we have details on our files and advise that information submitted by ourselves to HM Revenue and Customs in connection with their initial enquiry was with your full approval...*" Aside from the fact that these documents had not been produced before and no application has been made to admit them, we concluded that the issue was one between the Appellant and her former representative and not a matter within the Tribunal's jurisdiction. We noted that the Appellant was on medication as a result of a serious road traffic accident, the risk of malignant melanoma returning after an operation on 29 March 2006 and a hip replacement in 2008, amongst other illnesses. That said, we could not ignore the evidence of letters written by the Appellant to her representative and MP together with references to telephone calls discussing these matters which we find demonstrated that the Appellant was fully aware of the situation and able to challenge HMRC's calculations. We found that the evidence indicated that the calculations were provided on the basis of information given by the Appellant to Ling Phipp and were reviewed by HMRC before agreed.

39. The calculation in respect of the period 1995 to 2007 was again based on information from the Appellant's former representative. The information comprised accounts, accounts information, accountancy records and VAT paperwork. The fact that the Appellant subsequently disagreed with the figures and alleges negligence against Ling Phipp is not a matter upon which it is appropriate to comment. We were satisfied that the figures provided, as with those for period 1991 to 1994 were reviewed by HMRC in order to achieve the a best judgment assessment.

40. We rejected the Appellant's submission that the assessment was unsatisfactory in that the basis was unclear; that the calculations were based on the information set out

above was reiterated on numerous occasions throughout HMRC's enquiry and the decision notice. We also rejected the contention that HMRC had not carried out sufficient investigation. It would be wholly improper for HMRC to have provided details as to what, if any investigations were made into Mr Elliot's tax affairs. Nor would any such details be relevant to the appeal before us which is concerned with the turnover and liability to VAT registration of the Appellant. HMRC referred us to the authority of *Van Boeckel v C&E Commissioners* [1981] STC 209 in which it was stated:

“The contentions on behalf of the taxpayer in this case can be summarised by saying that on the facts before the tribunal it is clear, so it is contended, that the assessment in question was not valid because the commissioners had taken insufficient steps to ascertain the amount of tax due before making the assessment. Therefore it is important to come to a conclusion as to what are the obligations placed on the commissioners in order properly to come to a view as to the amount of tax due, to the best of their judgment. As to this, the very use of the word ‘judgment’ makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment.

Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.

Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words ‘best of their judgment’ does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words ‘best of their judgment’ envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them.”

Later in the decision, at page 296, Woolf J stated:

“As I have indicated, unless the situation is one where no material is before the commissioners on which they can reasonably base an assessment, the commissioners are not required to make investigations. If they do make investigations then they have got to take into account the material disclosed

by those investigations. Obviously, as a matter of good administrative practice, it is desirable that the commissioners should make all reasonable investigations before making an assessment. If they do that it will avoid, in many cases, the necessity of appeals to the tribunal. However to try and say that in a particular case a particular form of investigation should have been carried out, is a contention which, in my view, as a matter of law, bearing in mind the wording of s.31(1), is difficult to establish.”

41. We were wholly satisfied that HMRC had fairly and honestly considered and reviewed all material put before them and reached a decision on the basis of that material.

42. As to the Appellant’s submission that HMRC had failed to differentiate between commission and turnover, we concluded that the issue for us to determine was whether the Appellant was liable to be VAT registered and whether the assessment was made to best judgment; the onus rests with the Appellant to displace the assessment and the vague assertions made without any evidence or calculations in support wholly failed to displace the assessment or discharge the burden of proof.

43. We concluded that:

- (a) The Appellant was liable to be VAT registered for the period 1991 to 1997;
- (b) The assessment was made to best judgment;
- (c) The civil penalty for failing to register for VAT was correctly imposed.

44. Accordingly, we dismiss the appeal.

45. 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.

**JENNIFER DEAN
TRIBUNAL JUDGE**

RELEASE DATE: 13 APRIL 2016

APPENDIX A



Appeal number: TC/2013/05004

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SUSAN WILSON

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

UPON HEARING Mr William Wilson of Global-365 Ltd for the Appellant and Mrs Ann Sinclair of HM Revenue & Customs for the Respondents

IT IS DIRECTED that:

1. The Respondents' application to strike out the appeal is refused.
2. The Appellant's grounds of appeal shall be treated as being those grounds contained in the Appellant's Particulars of Grounds of Appeal dated 27 October 2014.
3. The Respondents shall notify the Tribunal and the Appellant in writing on or before 31 August 2015 whether or not they are satisfied that the Appellant would suffer hardship if required to pay the VAT in dispute before the appeal proceeds.

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REASONS FOR DIRECTION

5 *Introduction*

1. This appeal and the associated applications have a complex procedural history.

2. The Appellant makes an application to re-instate two appeals (references MAN/2008/1414 and MAN/2008/1415 (“the Original Appeals”). The Original Appeals were previously struck out by the Tribunal in January 2010. The application
10 to re-instate arises following a new appeal (reference TC/2013/05004) (“the New Appeal”) which was made on 26 July 2013.

3. On 12 December 2013 HMRC applied to strike out the New Appeal on the basis that it was seeking to re-litigate matters which had been the subject of the Original Appeals. In the course of case management on the New Appeal, the Appellant applied
15 to re-instate the Original Appeals. The applications before me are therefore as follows:

(1) An application by HMRC to strike out the New Appeal.

(2) An application by the Appellant to re-instate the Original Appeals.

4. The New Appeal was made following litigation between the Appellant and the
20 Respondents in Nottingham County Court (“the County Court Proceedings”). What follows is a brief chronology of events.

Chronology

5. On 6 November 2008 Peter Smallwood & Co lodged the Original Appeals with the VAT & Duties Tribunal as it then was. They related to an assessment to VAT in
25 the sum of £70,668 for the period 6 April 1991 to 30 April 2007 and a civil penalty for failing to register for VAT in the sum of £10,550. The assessment and the penalty had both been notified to the Appellant in August 2008.

6. The grounds of appeal were as follows:

(1) The date of registration used by the Respondents was incorrect,

30 (2) The assessment was excessive,

(3) The appellant had a reasonable excuse and no penalty should be charged,
and

(4) The penalty should be mitigated.

7. The Tribunal files for the Original Appeals are no longer available, but from
35 information provided by the Respondents it seems that the appeal reference 1414 was against the assessment to VAT (“the Assessment Appeal”) and 1415 was against the penalty (“the Penalty Appeal”). The two appeals were apparently consolidated.

8. On 19 August 2009 there was a hearing before the Tribunal which related to a hardship application made by the Appellant. The Respondents were represented but there was no appearance on behalf of the Appellant. The Tribunal directed that the Appellant should serve further and better particulars of her grounds of appeal. It also
5 directed that unless she served a list of documents relied on in support of her hardship application by 19 January 2010 then the appeal would be struck out.

9. On 8 January 2010 Mr Smallwood wrote to the Tribunal to say that he was no longer instructed and that he had forwarded the directions, which had been amended at some stage, to the Appellant.

10 10. It seems from a letter dated 1 February 2010 from the Respondents, although there is some confusion over the references, that the Penalty Appeal may have been de-consolidated and stoodover pending the hardship application in the Assessment Appeal.

11. On 2 February 2010 the Tribunal wrote to the Appellant to state that the Penalty
15 Appeal had been struck out. It is not entirely clear why that happened, or what happened to the Assessment Appeal. It may be that because of the consolidation both appeals were struck out.

12. In or about the early part of 2011 the Respondents commenced bankruptcy
20 proceedings against the Appellant. They served a statutory demand and commenced bankruptcy proceedings. I understand that the bankruptcy proceedings were dismissed and the Respondents then commenced the County Court Proceedings.

13. On 15 July 2013 the Nottingham County Court ordered that an application by the Respondents for summary judgment be stayed pending an application to the Tax Tribunal, whether by way of a new appeal or reactivating the previous appeals.

25 14. The New Appeal was lodged by Mr Wilson on behalf of the Appellant on 26 July 2013. On 12 December 2013 HMRC applied to strike out the New Appeal. On 6 July 2014 the Appellant applied to Re-instate the Original Appeals.

Reasons

15. It is clear that the New Appeal is against the same matters as were in dispute in
30 the Original Appeals. As such, it is clear that the real question I have to decide is whether to re-instate the Original Appeals. The New Appeal should not continue if it would be wrong to re-instate the Original Appeals.

16. Re-instatement of an appeal that has been struck out for failure to comply with a
35 direction is governed by Tribunal Rule 8(5) and (6). The relevant parts of Rule 8 provide as follows:

“(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

...

(3) *The Tribunal may strike out the whole or a part of the proceedings if -*
(a) the appellant has failed to comply with a direction which stated that
failure by the appellant to comply with the direction could lead to the
striking out of the proceedings or part of them;

...

(5) *If the proceedings, or part of them, have been struck out under*
paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or
part of them, to be reinstated.

(6) *An application under paragraph (5) must be made in writing and*
received by the Tribunal within 28 days after the date that the Tribunal
sent notification of the striking out to the appellant.”

17. Rule 5(3)(a) gives power to the Tribunal to extend the time for complying with
any rule or direction.

18. There are essentially two issues before me. Firstly, whether I should extend the
time for applying to re-instate the Original Appeals. Secondly, whether I should re-
instate the Original Appeals.

19. The factors to be taken into account in considering whether to extend time are
those set out by the Upper Tribunal in *Data Select Ltd v HMRC [2012] UKUT 187*
(TCC), where Morgan J said at [34]:

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

20. Morgan J also said at [37] that the Tribunal should have regard to the overriding
objective of dealing with cases fairly and justly and the factors set out in the Civil
Procedure Rules at 3.9. In *Leeds City Council v HMRC [2014] UKUT 350 (TCC)* the
Upper Tribunal recently endorsed the approach in *Data Select Ltd*. It also held that the
amendments to the civil procedure rules reflecting a stricter approach to compliance
described by the Court of Appeal in *Mitchell v Associated Newspapers Ltd [2013]*
EWCA Civ 1537 have not been incorporated into the rules of this tribunal (See also

the decision of the Chamber President to the same effect in *Kumon Educational UK Co Ltd v HMRC [2014] UKFTT 772 (TC)*.

21. I am satisfied that the relevant factors in considering whether to re-instate the Original Appeals are those set out by Proudman J in *Pierhead Purchasing v Commissioners of Revenue & Customs [2014] UKUT 321 (TCC)*. That case concerned an application to re-instate under Tribunal Rule 17 following a withdrawal of the appeal. At [23] and [24] the Upper Tribunal endorsed the application of the following criteria:

- 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 conveniently and proportionately be ascertained.

22. It can be seen that there is considerable overlap in the factors relevant to the two issues and I propose to consider both issues together. I make the following findings of fact, based on the documentary evidence before me and evidence from the Appellant.

23. The Appellant states that she was not aware of the directions of the Tribunal in the Original Appeals. Those directions were given in the period August 2009 to February 2010. I accept that was the case. On 10 July 2009 the Appellant was involved in a very bad car accident on the M6. She was stationary in roadworks when a lorry ploughed into the back of her vehicle. As a result she suffered very significant injuries which immobilised her for more than 12 months and she was unable to deal with business matters. It is understandable that the Appellant was not able to devote attention to the Original Appeals during that period.

24. Having said that, by July 2010 the Appellant was clearly challenging the liability to VAT and the penalty. She had contacted her local MP who wrote to HMRC on her behalf on 19 July 2010. In a response dated 9 August 2010, HMRC suggested that the Appellant should contact the Tribunal to re-instate the appeals. That suggestion was repeated in a letter dated 17 September 2010.

25. On 29 August 2010 the Appellant appointed Mr Wilson to act on her behalf. Mr Wilson has been acting pro bono since then. He is not a qualified accountant but has experience of acting as a forensic accountant. He has no direct experience in relation to tax or VAT. Since 2010 he has been trying to find out from HMRC how the assessment to VAT was calculated and has been helping the Appellant to challenge the assessment and the penalty in the bankruptcy proceedings and in the County Court Proceedings.

26. The Respondents commenced the County Court Proceedings on 9 May 2012 for recovery of the sums said to be due. The Appellant and Mr Wilson attended 8 hearings in connection with the bankruptcy proceedings and the County Court Proceedings between July 2011 and July 2013.

5 27. The Respondents object to the application to re-instate on the following grounds:

(1) The period of time since the Original Appeals were struck out and the New Appeal was lodged was a matter of some 3 ½ years;

10 (2) There would be prejudice if the Original Appeals were re-instated. In particular the Respondents were entitled to expect finality in relation to the assessment and the penalty.

15 28. In the light of the Appellant's car crash and the injuries sustained it is at least understandable that the Appellant did not apparently engage with her then adviser or the Tribunal for the purposes of the hearing in August 2009 and in December 2009 and January 2010.

20 29. It is clear that by the middle of 2010 the Appellant was engaging in the process and was challenging her liability to the Respondents. From August 2010 she has had the assistance and advice of Mr Wilson. He is acting pro bono and is not a qualified accountant or a tax specialist. He is simply a commercial man doing his best to help Mrs Wilson out of a sense of public service.

25 30. The delay in seeking to re-instate the appeals is very long. Some 3 ½ years. It is also the case that during the course of correspondence with the Appellant's MP in 2010, the Respondents indicated that the Appellant should apply to re-instate the Original Appeals. However in all the circumstances it does not seem to me that the Appellant should be unduly criticised for not having applied to re-instate the appeals sooner. This is an exceptional case.

30 31. The respondents would normally be entitled to expect finality after such a long period of time. The time limit of 28 days provided for in Rule 8(6) reflects the need for finality. There is also prejudice to the interests of good administration when directions and time limits are not complied with. However, the Respondents were aware from 2010 to 2013, or at least their debt management unit must have been aware, that the Appellant did not accept the liability and wished to challenge the assessment and the penalty.

35 32. Mrs Sinclair did not rely on any more specific prejudice that might arise from re-instatement. For example, there was no suggestion that the Respondents might be prejudiced in terms of the evidence they might adduce to defend the appeals.

40 33. For the purposes of the present application the Appellant has served further particulars of the grounds of appeal she wishes to pursue in relation to the Original Appeals. Mrs Sinclair was prepared to accept that the Appellant would suffer a significant prejudice if the Original Appeals are not re-instated. That prejudice arises

from the loss of opportunity to have the Original Appeals heard on their merits. It is difficult for me to assess what prospects of success the Original Appeals would have. For present purposes I accept that there is at least a reasonable or realistic prospect of success in relation to some of the proposed grounds of appeal.

- 5 34. Balancing all these factors I am satisfied, just, that the time for applying to re-instate the Original Appeals should be extended and that, subject to what I say below they should be re-instated.

Conclusion

- 10 35. In the ordinary course I would strike out the New Appeal and re-instate the Original Appeals. However the files for the Original Appeals have been destroyed in accordance with the Tribunal's administrative procedures. It seems to me therefore that I should not strike out the New Appeal which can proceed as an appeal against the VAT assessment and the penalty. I have therefore given appropriate directions for the conduct of the New Appeal.

- 15 36. For the appeal against the VAT assessment to proceed it will still be necessary for the Appellant to either pay the VAT in dispute, a sum of £70,668 or establish to the satisfaction of the Respondents or the Tribunal that she would suffer hardship if she was required to pay that sum. I have therefore directed that the Respondents shall notify the Tribunal on or before 31 August 2015 whether or not they are satisfied that
20 the Appellant would suffer hardship if required to pay the VAT in dispute.

37. For the purposes of that direction the Respondents and the Appellant should use all reasonable endeavours to request and provide whatever information is necessary for the Respondents to form a view on that matter.

- 25 38. 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
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 29 JUNE 2015