



**TC05175**

**Appeal numbers: TC/2014/03349  
TC/2014/03351**

*PROCEDURE – income tax – discovery and penalty assessments – appeals – non-compliance with directions – lack of action following further correspondence leading to unless order – appeal struck out – application for reinstatement – factors relevant to application, including overriding objective – whether obligations on Appellant or representative – held, on either basis, that application should be refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ANDREW GREEN**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE JOHN CLARK  
                    JOHN ROBINSON**

**Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 12 April  
2016**

**James Blue of Blue Tax for the Appellant**

**Bill Brooke, Senior Litigator, HM Revenue and Customs, for the Respondents**

## DECISION ANONYMISED FOR PUBLICATION

1. This version of our decision is for publication; for the reasons which we set out  
5 later concerning the Appellant's representative's personal and professional position,  
we agreed that this published version should be anonymised. We have referred to the  
Appellant as Andrew Green and to his representative as James Blue; these names are  
entirely fictitious and are not intended to refer to any real persons of the same or  
similar names.

### 10 **Background**

2. Mr Green was the subject of a Code of Practice 9 (COP9) investigation.  
Following that enquiry, he provided a Disclosure Report. Mr Green formally adopted  
the contents of that report.

3. The contents of the report led the Respondents ("HMRC") to decide that Mr  
15 Green had failed to make an accurate declaration of his income. On 27 February 2013  
HMRC issued discovery assessments to Mr Green for the years 2000-01, 2000-02,  
2002-03, and 2003-04.

4. On 5 April 2013 appeals were made to HMRC. In a letter dated 4 September  
2013 HMRC proposed to amend the quantum of those assessments.

20 5. On 5 November 2013, HMRC issued penalty assessments to Mr Green pursuant  
to Schedule 24 of the Finance Act 2007 ("Sch 24"). These related to the years 2008-  
09, 2009-10 and 2010-11. Appeals against these penalty assessments were made to  
HMRC on 18 November 2013.

25 6. The assessments to tax and penalties were raised by HMRC on the basis of the  
figures included within Mr Green's disclosure report.

7. A request was made for a review of HMRC's decisions to make the tax  
assessments and penalty assessments. The review conclusion letter was dated 16 May  
2014. The outcome of HMRC's review was to vary the tax assessments to the figures  
which had been proposed by them in their letter dated 4 September 2013, to withdraw  
30 the Sch 24 penalty for 2008.

8. According to the information provided in HMRC's Skeleton Argument, but  
adjusted to refer to the relevant years, the tax in dispute is £6,469.95 for 2000-01,  
£8,408.05 for 2001-02, £13,541.40 for 2002-03, and £14,359.98 for 2003-04. The  
penalties in dispute are £1,092.66 for 2009-10 and £704.25 for 2010-11.

35 9. On 10 June 2014, Mr Green gave Notice of Appeal to HM Courts & Tribunal  
Service ("HMCTS") in respect of the income tax assessments; the Notice named Mr  
Blue's firm as Mr Green's representative.

10. On the same date, Mr Green gave Notice of Appeal to HMCTS in respect of the penalty assessments, again naming Mr Blue's firm as his representative.
11. The appeal against the income tax assessments was allocated the HMCTS reference number TC/2014/03349. The appeal against the penalties was allocated the reference number TC/2014/03351. On 14 July 2014 HMCTS acknowledged the Notices of appeal, together with another under reference TC/2014/03352, relating to certain Regulation 80 determinations.
12. On 12 June 2014, Blue Tax sent by email to HMCTS an undated letter from Mr Green referring to the recent appeal notices sent and asking HMCTS to treat his letter as authority to correspond with his agent.
13. By a Direction released on 14 July 2014 (which referred also to other appeals not directly relevant to the present proceedings), Mr Green's appeals against the income tax assessments, the penalty assessments and the Regulation 80 determinations were consolidated. These consolidated appeals were in turn directed to be consolidated with other appeals, and HMRC were directed to provide a single Statement of Case covering all the appeals.
14. As a consequence of the raising of hardship considerations in respect of VAT matters, all the appeal proceedings were temporarily stayed.
15. On 24 June 2015, following HMRC's decision to withdraw their Regulation 80 decision and replace it with another, the Tribunal directed that appeal TC/2014/03352 should be de-consolidated.
16. On 24 August 2015 HMRC served their consolidated Statement of Case. On 22 September 2015, no further directions having been made at that stage, HMRC served their List of Documents in accordance with Rule 27 of the Tribunal Rules.
17. On 25 September 2015 Directions given by Judge Bailey were released. Direction 1 required Mr Green to provide a List of Documents by 6 November 2015. Direction 2 required the parties to provide listing information by the same date, and stated that shortly after that date the Tribunal would fix the date of the hearing even if the relevant party did not provide dates to avoid.
18. Mr Green did not comply with either of these Directions.
19. HMRC made an application dated 11 November 2015 to amend their Statement of Case, referring to certain documents. On 24 November 2015 they made a further application, withdrawing their application dated 11 November 2015 and instead applying for permission to amend their List of Documents. The Tribunal indicated by letter dated 30 November 2015 that HMRC's amended List of Documents was accepted. The Tribunal also referred to Mr Green's non-compliance with Direction 1 and 2, and requested him to supply details of the position within seven days.
20. On 11 December 2015, HMRC made an application for an unless order, in terms that the appeal should be struck out unless, within 14 days of such order, Mr

Green complied with Directions 1 and 2 of the Directions of Judge Bailey released on 25 September 2015.

21. On 18 December 2015 HMCTS wrote to Mr Blue in the following terms:

5 “You have not complied with the Direction the Tribunal issued on 25<sup>th</sup> September 2015, a copy of which is enclosed nor have you replied to the Tribunals [*sic*] letter dated 30<sup>th</sup> November 2015.

Do you wish to continue with your appeal? If the Tribunal does not hear from you within 14 days from the date of this letter it is likely the Judge will strike out your appeal. Please find enclosed Direction.

10 If you do wish to continue your appeal, please write and tell the Tribunal this. You should also comply with the directions dated 25<sup>th</sup> September 2015, tell the Tribunal that you have done so, and provide an explanation of why you complied late.”

15 22. The Direction mentioned made reference to the non-compliance with the September 2015 Directions and the absence of any reply to the 30 November 2015 letter, and stated that unless no later than 5 pm on 4 January 2016 Mr Green confirmed in writing to the Tribunal that he intended to proceed with the appeal and complied with Directions 1 and 2 of the September 2015 Directions, then the proceedings “. . . MAY be STRUCK OUT without further reference to the parties.”

20 23. By a Direction released on 19 January 2016, Judge Sinfield referred to Mr Green’s non-compliance with the Directions released on 18 December 2015 and directed that the proceedings were now struck out. HMCTS wrote to Mr Blue on 19 January 2016 to inform Mr Green as Appellant that his appeal was unsuccessful. HMCTS also gave details of the requirements for an application for reinstatement of  
25 the proceedings and the need for reasons to be provided in support of such an application.

24. On 25 January 2016, Blue Tax wrote to HMCTS:

30 “Thank you for your letter of 19 January 2016 and the enclosed direction striking out the appeals with the above reference numbers. Firstly we wish to apologise to the Tribunal for the lack of progress to date and would respectfully request that the appeals are re-instated, for the following reasons:

- 35 1. The failures are in no way the fault of the appellant and the fault lies entirely here. Unfortunately I have been suffering from a long term bout of depression which has made it incredibly difficult for me to deal with complex issues;
2. The impact on the appellant of the striking out of the appeals is disproportionate, he will be bankrupted, when compared to the inconvenience to HMRC in having the appeals re-instated;
- 40 3. The history of the appeals has been complex and delay has arisen on both sides;

4. We do wish to pursue the appeals and we will comply with any further directions of the Tribunal to ensure that the appeals are heard fairly and quickly.
5. The correspondence has been sent to the old address of the company and none of the paperwork was received by me until 19 January 2016.

A copy of this letter has been sent to HMRC.”

### **Arguments for Mr Green**

25. Mr Blue apologised for the need to have a hearing. He had thought of making an application in private. If there was a need for a decision, he asked that it should be anonymised.

26. He referred to the background history of Mr Green’s appeals, and to the decision to strike them out. Mr Blue had no dispute with the reasons leading to that decision, but sought reinstatement of the proceedings. He referred to Tribunal Rules 2, 11 and 8; Rule 8(5) allowed an appellant to apply for reinstatement. Under Rule 8(6), such an application had to be made in writing and received by the Tribunal within 28 days of the release of the strike-out decision. In Mr Green’s case, this time limit had been met.

27. There was no restriction on the Tribunal’s discretion either way. Mr Blue referred to the case law, in particular to *Vaultdawn Limited and others v Revenue and Customs Commissioners* [2015] UKFTT 0383 (TC), TC04565 at [25]-[26].

28. The reasons for the delay in Mr Green’s case were Mr Blue’s responsibility. From April 2015 he had been suffering from serious depression. He acknowledged that he could produce no records to show this.

29. He stated that from late 2015 Mr Green had become increasingly concerned, and had emailed Mr Blue. Mr Green had also visited Mr Blue’s previous home to try to contact him. Mr Blue produced copies of emails; we refer to these later.

30. Mr Blue asked for permission for Mr Green to explain in his own words to the Tribunal the steps which he had sought to take. Although this did not amount to formal evidence, we agreed that Mr Green should tell us the position from his point of view.

### *Mr Green’s explanation*

31. He had been worried that he had had no notification of the date for the hearing of his appeals by the Tribunal. He had spoken to the accountant who had introduced him to Mr Blue. After a while, Mr Green had become so desperate that he found one of the invoices issued by Blue Tax and visited the address shown on that invoice. A lady had answered at the door; she had explained that Mr Blue did not live there, and that they had been going through a “messy divorce”; she would try to contact Mr Blue by email.

32. Mr Blue had eventually contacted Mr Green, who had not been happy with the situation; there was no paperwork at all. He had thought of changing from Mr Blue, but he was familiar with Mr Green's case.

5 33. Mr Green stated to the Tribunal that he was really, really sorry; he had not been able to get hold of his adviser. He had not even known that the case had been struck out; he had only found this out later from Mr Blue.

10 34. In response to our question, Mr Green stated that he had not been provided with a copy of the Directions; he had received nothing at all. He had not changed his address. The only thing that he had received from the Tribunal was the letter about this application hearing.

15 35. Mr Brooke put one question to Mr Green. He had said that he was desperate; did he not contact HMRC? Mr Green's reply was that he had not; he had an adviser. He had thought that something had happened to Mr Blue. Mr Green had tried telephoning Mr Blue; the phone was ringing but Mr Blue did not answer, nor did he reply to any messages.

#### *Mr Blue's submissions*

36. Mr Blue submitted that whilst there was no contemporary evidence, it was clear that there had been serious personal issues. He believed that these passed the threshold of good reasons for delay.

20 37. There was no prejudice to HMRC. His understanding was that they had prepared their case.

38. The loss to Mr Green in not being able to proceed with his appeals was disproportionate; he would face difficulties in paying the tax due.

25 39. To proceed would produce legal certainty and good administration; Mr Green wished to pursue his appeal.

40. It was understood that any further delays from his side would be completely unacceptable.

30 41. On the merits of the appeals, there were considerable difficulties in relation to the numbers involved; for example, the corporation tax on Mr Green's company had been agreed in a small proportion of the amount first sought by HMRC. The advice from Mr Green's previous adviser who had prepared the report had been incorrect, incomplete and open to criticism in other ways.

35 42. Mr Blue submitted that the balance was significantly in favour of Mr Green as the Appellant in this case. Mr Blue requested that the Tribunal should reinstate the appeals. He also requested that any published decision should be anonymised, to the extent that such a decision was necessary.

## Arguments for HMRC

43. Mr Brooke referred to the history of the matter. The Disclosure Report had been prepared by Mr Green's previous adviser. Mr Green had never retracted from his acceptance of that report.

5 44. HMRC acknowledged that the reinstatement application had been made within the time limit specified in Rule 8(6).

45. Mr Brooke gave further background information concerning the appeals. Once HMRC's enquiry had been completed, various assessments had been made; as a result, Mr Green and his company had brought about seven appeals in total. Two of these had been about VAT matters.

10

46. The outcome of the cases on reinstatement was that relief from the sanction should be the exception rather than the rule. Mr Blue had referred to delays with the body of the appeals. On the question of interaction of the appeals, the question of hardship had not been resolved.

15 47. In HMRC's submission, the actions relevant to the question of reinstatement were those following the release of the Directions of Judge Bailey in September 2015.

48. HMRC contended that they had complied with those Directions. They had sent the bundle to Mr Blue's new business address, pursuant to the Direction.

49. Mr Blue sought to take full responsibility. HMRC's starting position was that the responsibility fell on Mr Green as Appellant. He had shown in his statements to the Tribunal at this hearing that he had taken some action; however, he had not contacted either HMRC or HMCTS to enquire as to the progress made in respect of the appeals.

20

50. HMRC were aware of the decision in *JDG Wilkinson v Customs and Excise Commissioners* (VAT Decision 583), in which it had been accepted by the Tribunal that the appellant had been under the impression that his solicitors were dealing with the appeal so that they would attend on his behalf. In Mr Green's case, HMRC considered that there was a significant difference in circumstances; until the current hearing, their impression had been that he had stepped back from pursuing the appeal.

25

51. If HMRC's submission as to the responsibility falling on Mr Green was not accepted, HMRC contended that there was no documentary evidence of Mr Blue's long term illness on which he sought to rely. He had referred to being unwell in April/May 2015, but he had brought the appeals in June on Mr Green's behalf after HMRC's decision. [We think it appropriate to insert our comment here that Mr Green's appeals were notified to HMCTS in June 2014, not 2015.]

30  
35

52. Mr Brooke referred to the decision of the Tribunal (Judge Jane Bailey and Mr John Coles) in *Bazaar Limited v Revenue and Customs Commissioners* (apparently released to the relevant parties on 9 February 2016 but not currently shown on the Tribunal's website). In that decision at [62] the Tribunal had referred to *Data Select*

*Limited v Revenue and Customs Commissioners* [2012] UKUT 187 at [34 and [38], and had applied that approach to the reinstatement application before it.

53. Mr Brooke submitted that it was appropriate to apply that approach to Mr Green's reinstatement application, adapting the tests to the specific circumstances of his case. The questions were:

- (1) What was the purpose of the unless order?
- (2) What was the delay in serving the List of Documents?
- (3) Was there a good explanation for Mr Green's failure?
- 10 (4) What would be the consequences for the parties if the appeal were to be reinstated?
- (5) What would be the consequences for the parties if the application were to be refused?

Mr Brooke made factual submissions in relation to each of these questions; we return to the factual matters at a later stage below when we review both parties' submissions.

15 54. He submitted that Mr Green's application for reinstatement of the appeals should be refused.

55. In response to our question as to the application of the recent Court of Appeal decision in *BPP Holdings Limited v Revenue and Customs Commissioners* [2016] EWCA (Civ) 121, Mr Brooke commented that it was a continuation of the authorities, as a result of which HMRC had suffered the consequences.

56. He referred to a lack of clarity as to the context of the application; all six of the extant appeals stood struck out, not just the two the subject of the present application.

### **Discussion and conclusions**

25 57. For us to be in a position to consider the factors relevant to Mr Green's application for reinstatement of his appeals, we need first to consider whether the responsibility for ensuring that the relevant steps are taken in respect of an appeal falls on the appellant who has made the relevant appeal, or whether it can be regarded as having been devolved on such appellant's representative, where details of the representative have been given in the Notice of Appeal.

30 58. In *Vaultdawn* at [81] the Tribunal considered the purpose of Tribunal Rule 11(4)(a), and stated:

35 " . . . On the contrary, we consider that the purpose of Rule 11(4)(a) is to require (not merely permit) everyone involved in the proceedings – parties, representatives, witnesses, and the Tribunal – to communicate with a party's duly appointed Rule 11 representative rather than the represented party."

59. Rule 11 relates to the appointment of representatives. Rule 11(4) is as follows:

“(4) A person who receives due notice of the appointment of a representative—

(a) must provide to the representative any document which is required to be provided to the represented party; and

5 (b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.”

60. Rule 13 relates to the sending and delivery of documents. Rule 13(5) provides:

10 “(5) The Tribunal and each party may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary.”

15 61. In our view, Rule 11 permits the appointment of a representative, but does not displace the obligations falling on the relevant appellant; these are the same whether or not that appellant, as a party to the proceedings, has appointed a representative.

20 62. Thus if for any reason the representative has not performed the obligations necessarily arising from the appointment to that position, this cannot affect the position of the appellant in those proceedings. Were the position to be otherwise, it could conceivably put an appellant with an incompetent or non-performing representative in a better position than an appellant whose choice of representative had proved to be satisfactory.

25 63. For these reasons, our view is that we must examine the history of Mr Green’s appeals on the basis that it fell to him to ensure that the relevant requirements were complied with and that this was done within the appropriate time limits. Any question as to the lack of adequacy of the service provided by a representative is a matter between the appellant and the representative and cannot be the concern of HMCTS, the Tribunal, or the other party to the appeal.

30 64. We accept that in considering Mr Green’s application for reinstatement of his appeals, it is appropriate for us to ask the questions posed by the Tribunal in *Bazaar Limited* at [63] as modified in the manner suggested by Mr Brooke. As Mr Brooke indicated in argument, those questions follow the approach in *Data Select* at [34].

35 65. We refer to question (1); what was the purpose of the unless order? Mr Brooke submitted that this was to ensure that Mr Green prosecuted his appeal within a set timetable or would suffer the sanction of his appeal being struck out. Mr Blue had commented that he had been unable to [contend with] complicated matters; in HMRC’s submission, it would have been within his capability to have advised the Tribunal that he was unwell. Mr Brooke had contacted Mr Blue, who had said that his wife had been in a serious car accident; this had been the last time that HMRC had heard from Mr Blue. Notwithstanding that Mr Blue had changed his address between  
40 the time when the appeals had been brought and the present, he had been copied into all of HMRC’s communications to the Tribunal, these having been made by email.

66. Mr Blue accepted that it would have made things clearer if he had visited a physician. He accepted that there was no documentary evidence concerning his condition. He also accepted that he had been in a position to do some work; however, he had not been able to do anything complex. His partner had had a serious accident  
5 in 2015, and had been unconscious from her impact with the ground until she was in hospital. Although this was not relevant to later events, this had formed the background to the issues that he had had.

67. We have concluded that the lack of appropriate action by a representative does not absolve the relevant party to the proceedings from the obligations to take the  
10 required steps in pursuing those proceedings. Thus we do not consider that we should take into account the health difficulties to which Mr Blue referred. Instead, we review the position in the light of the steps which Mr Green attempted to take once he became concerned as to the lack of information about the progress of his appeals.

68. His first attempt to contact Mr Blue was by a brief email dated 2 November  
15 2015 asking whether there was any update concerning the Tribunal or HMRC. On 20 November 2015 Mr Green sent a further brief email asking for an update on the Tribunal. At around the same date, Mr Green spoke to the accountant who had introduced him to Mr Blue; on 20 November the accountant sent Mr Green an email. This referred to a conversation which the accountant had just had with Mr Blue, who  
20 had said that he had been very busy and planned to be in contact with Mr Green the following week when he had something tangible for Mr Green.

69. These steps taken by Mr Green need to be examined against what was happening in the appeal proceedings. Judge Bailey's Directions had been released on  
25 25 September 2015, requiring Directions 1 and 2 concerning the List of Documents and the listing information to be complied with no later than 6 November 2015. Although Mr Green had sent his first email to Mr Blue on 2 November 2015, his further attempts to contact him either by email or indirectly through his accountant did not occur until after the expiry of the 6 November time limit.

70. From the copy emails which he provided to us, it is clear that Mr Green's later  
30 further steps in relation to the appeals were taken from 22 January 2016 onwards; as these steps came after the release of the Direction striking out the consolidated appeal, and after notification of this to the parties, we do not think that they can be taken into account in considering what attempts he made to pursue the conduct of his appeals.

71. Mr Green explained at the hearing that he had not contacted HMRC about the  
35 Tribunal proceedings, as he had an adviser. He also stated that he had not contacted HMCTS. We consider this to have been a significant omission; given his position as the Appellant in the proceedings, it was open to him to make direct contact without having to involve Mr Blue as his representative.

72. We acknowledge that Mr Green would not have received correspondence  
40 concerning his appeals either from HMCTS or from HMRC, because he had appointed Mr Blue as his representative and therefore as a result of Tribunal Rule 11(4), as construed by the Tribunal in *Vaultdawn* at [81], such correspondence would

be sent to Mr Blue and not to Mr Green. The reason why he received a letter notifying him of his reinstatement application hearing was that letters in the same terms were also sent to Mr Blue and to HMRC, ie all parties involved in that hearing.

5 73. In our view, as Mr Green did not seek to contact HMCTS at any stage, he did not take sufficient steps to pursue his appeals. We accept Mr Brooke’s submission that the purpose of the unless order was to ensure that Mr Green prosecuted his appeal within a set timetable or would suffer the sanction of his appeal being struck out.

10 74. Question 2 as put by Mr Brooke was as follows: what was the delay in serving the List of Documents? The Directions of Judge Bailey were released on 25 September 2015. The unless order was released by the Tribunal on 18 December 2015, and the appeal was struck out by the Direction of Judge Sinfield released on 19 January 2016; Mr Brooke referred to the decision of the Upper Tribunal in *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC) at [96].

15 75. We have referred to the time limit of 6 November 2015 for compliance with Directions 1 and 2 of Judge Bailey’s Directions. We consider the delay to have been substantial and material; no steps had been taken by the time of the January 2016 order striking out the consolidated appeal.

20 76. Question 3 is whether there is a good explanation for Mr Green’s non-compliance. We have already considered the extent to which he took action in relation to the appeal, and concluded that he did not do enough to pursue it.

77. Question 4 is what the consequences for the parties will be if the appeal is reinstated. Mr Brooke relied on the decision of the Tribunal in *Bazaar Limited* at [85]:

25 “[85] In drawing all these factors together we bear in mind that time limits should generally be respected and that it is undesirable for litigation to carry on indefinitely. We accept that there is a considerable amount of tax at stake and that if we dismiss the Appellant’s application then it will be unable to challenge the input tax assessments or recover the input tax it has claimed, and that this will be  
30 a heavy consequence.”

The Tribunal went on to review the delays in that case, and continued:

“In all of the circumstances of this case we do not consider it just and appropriate for the Appellant’s appeal to be reinstated.”

35 78. We are aware of other authorities in which the question of finality of litigation has been weighed against the other factors in determining whether appeals should or should not be reinstated. We are also aware that, although the Court of Appeal in *BPP Holdings* did not specifically comment on the substantive matters raised in *Data Select*, nothing was said by the Court of Appeal to question or contradict the principles set out in *Data Select*.

79. One matter which particularly concerns us is that in his submissions at the hearing, Mr Blue appeared to question the basis on which the tax assessments on Mr Green had been calculated. Mr Blue referred to the Disclosure Report as having been flawed to a great extent. We note that in the Grounds of Appeal set out in Mr Green's  
5 Notice of Appeal against the assessments, the following statement was made:

“Please note that subject to the above matter [*see the following paragraph of this decision*] the quantum of the assessments has been agreed at the figures detailed in HMRC's letter dated 5 December 2013 which is attached.”

10 80. The ground of appeal against the assessments was that Mr Green's behaviour did not pass the threshold for “Deliberate Behaviour”; the assessments were all made more than six years after the end of the year of assessment, and therefore without any “Deliberate Behaviour” all the assessments were out of time.

15 81. In his submissions Mr Brooke emphasised that Mr Green had never retracted from his acceptance of the Disclosure Report. We accept that submission. The hearing was the first point at which any question had been raised as to the status of that report as the underlying basis for the assessments, and subsequently for the penalties.

20 82. The consequences for the parties if we were to admit Mr Green's application would be that, if the grounds of appeal were to be permitted to be amended to permit questions to be raised as to the status of the Disclosure Report (a matter which we do not consider to be before us for decision), HMRC would be put in the position of arguing these appeals on a basis entirely different from that on which HMRC's Statement of Case has hitherto been prepared. Mr Green would be able to raise matters not ventilated in correspondence with HMRC.

25 83. We consider this to be a significant matter in the context of the argument in favour of the finality of litigation. Although Mr Blue referred to the other appeals with which these had been consolidated as having resulted in much lower liabilities than those originally sought by HMRC, he did not specify the position in any detail, and we note Mr Brooke's submission that all six of the appeals involving Mr Green  
30 currently stood struck out.

84. Mr Brooke referred to *Bazaar* at [83]:

35 “[83] If we reinstate the Appellant's appeal, then the Respondents will be deprived of the finality they considered had been achieved, and will need to expend scarce resources upon responding to the Appellant's appeal.”

85. We return to this below in considering all the relevant factors together.

40 86. Question 5 is what the consequences for the parties will be if the application for reinstatement is refused. We agree with Mr Brooke's submission that Mr Green would be deprived of an opportunity to challenge the timing of the issuing of the discovery assessments. Mr Brooke submitted that the quantum of those assessments

was not in dispute; for the reasons to which we have just referred, we agree that this is the case as matters stand at present.

87. Mr Blue submitted that the loss to Mr Green would be disproportionate; he would face difficulties in paying the tax due.

5 *Consideration of the factors in combination*

88. We have set out above an extract from *Bazaar* at [85]. In reviewing the factors, the Tribunal referred to the delay in that case:

10 “[85] . . . However, we consider that the Appellant has been aware since at least 17 December 2014 of the necessity of progressing its appeal. The total delay in this case is 18 months. . . .”

15 89. In Mr Green’s case, the appeals were made on 10 June 2014. After the temporary stay due to hardship considerations in respect of the VAT-related appeals, HMRC served their consolidated Statement of Case in late August 2015, and their List of Documents on 22 September 2015. These steps were followed by the Directions of Judge Bailey released on 25 September 2015.

20 90. The delay in pursuing the appeals in Mr Green’s case could therefore be regarded as less than 18 months. However, the purpose of the September 2015 Directions was to progress the consolidated appeal. No steps were taken by him or on his behalf, despite the letter from HMCTS dated 30 November 2015, and as a result of the failure to progress matters, the Tribunal issued the unless Direction on 18 December 2015. By his Direction released on 19 January 2016, Judge Sinfield exercised the discretion conferred by the December 2015 Direction to strike out the proceedings. We have concluded that the steps taken by Mr Green, including his visit to Mr Blue’s former address, did not occur until after the release of Judge Sinfield’s strike-out Direction.

30 91. We have concluded that Mr Green did not take sufficient steps to pursue his appeals. The time limit for compliance with the direction as to the List of Documents was 6 November, and by the time of the strike-out Direction there had been no such compliance. We are not satisfied that there is a good explanation for his non-compliance; we return below to the question whether an appellant can rely on his representative to carry out his obligations in relation to an appeal.

35 92. We have referred to the consequences for the parties if we were to admit Mr Green’s application. Apart from the lack of finality of the litigation, with the implications for HMRC referred to above, we do not consider it appropriate to make it possible for the basis of the litigation to be fundamentally changed by amending the grounds of appeal in the manner implied by Mr Blue in his argument.

93. As to the consequences for Mr Green of a refusal of his application, we accept that the liabilities to tax and penalties are substantial. However, this has to be weighed together with all the other factors.

94. In *BPP*, the unanimous judgment of the Court of Appeal was given by the Senior President of Tribunals, Ryder LJ. At [44] he stated that the question in *Data Select* had been the principle to be applied to an application to extend time where there had been no history of non-compliance.

5 95. In Mr Green's case, what is under review is whether his consolidated appeal, struck out on the basis of non-compliance with the Tribunal's Directions and subsequent correspondence, should be reinstated. His application is thus one seeking relief from the sanction of striking out his appeal. In that context, the judgment of the Court of Appeal in *BPP* shows that the parties to an appeal before the Tribunal are  
10 within the stricter approach to rules and directions in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and related cases.

15 96. We take into account Mr Blue's submission that Mr Green's position differed from that in a number of other reinstatement application cases referred to by Mr Brooke, in that Mr Green's reinstatement application was made in time; in those other cases the applicants were seeking extensions of time. As a consequence of that submission, we do not think it necessary to refer specifically to any of those other cases. In the same way, we do not consider that cases concerning applications for reinstatement under Rule 17(3) of the Tribunal Rules following withdrawal of appeals are of a precisely similar nature to applications under Rule 8(5) following the striking  
20 out of appeals under Rule 8(3)(a).

97. As Mr Blue submitted, we are required in considering the reinstatement application to take account of the overriding objective in Rule 2 of the Tribunal Rules, which is to enable the Tribunal to deal with cases fairly and justly.

25 98. We consider that we are required to carry out a balancing exercise taking into account all the circumstances and the overriding objective. Taking into account all the factors to which we have referred, we are not persuaded that we should exercise our discretion to grant Mr Green's application for reinstatement of his consolidated appeal.

30 99. We have arrived at that conclusion on the basis of our view that the obligations in respect of the consolidated appeal fall upon Mr Green as Appellant. In case we are incorrect in that view, we go on to consider the position in the light of the history of Mr Blue's involvement with the appeal process in his capacity as Mr Green's representative.

35 100. Mr Blue was involved at the time of the notification of the two appeals to HMCTS in June 2014. He stated to us that in April 2015 he had begun to suffer from serious depression.

40 101. We note that this was during the period while the proceedings were stayed due to hardship considerations in the context of the VAT matters. From the copy correspondence provided to us from the Tribunal file, it is clear that on 24 August 2015 a copy of HMRC's consolidated Statement of Case and supporting documentation was sent by email to Mr Blue's professional email address. In the

same way, on 22 September 2015 Mr Brooke sent a copy of HMRC's List of Documents to Mr Blue's email address. On 25 September 2015 HMCTS sent Mr Blue an email attaching the Directions of Judge Bailey.

5 102. Without going through the specific details of subsequent correspondence, we are satisfied that copies of the relevant correspondence concerning the appeal were sent by HMRC and by HMCTS to Mr Blue's email address.

10 103. Mr Blue acknowledged to us that he had no contemporaneous medical or other documentary evidence to show that he had been suffering from depression. He accepted that he had been able to do some work, but explained that he had not been able to do anything complex.

15 104. Without independent evidence, we do not consider that we are in any position to make findings concerning Mr Blue's condition. Instead, we think it appropriate simply to work on the hypothesis that he was suffering from depression and that this interfered with his capacity to carry out his work, without preventing him altogether from being able to work. In that context, Mr Green's account of his discussion with Mr Blue's former wife supports to some extent the possible background reasons for him to have become depressed, although her statement in her email to Mr Blue dated 25 January that she had assured Mr Green and his accountant that Mr Blue was fit and well and that she had seen him the previous week raises some question as to his condition at that point. On balance, as the relevant period under review in the context of this application is that from 25 September 2015 to 4 January 2016 (the date specified in the unless order dated 18 December 2015), we think it better to follow our working hypothesis rather than seeking to pursue the factual enquiry.

25 105. As Mr Blue had been provided with the copy correspondence, we consider that he was in a position to make contact with HMCTS to inform them of the difficulties which he was encountering in relation to the appeal proceedings. He did not do so. At the hearing he did not comment on his reasons for his omission to raise this issue. Although the substantive details of Mr Green's appeal might have involved a degree of complexity in determining the nature of Mr Green's conduct, we do not consider that it would have been beyond Mr Blue's capabilities at the relevant time to make contact with HMCTS in order to explain the difficulties which he was in as a result of his condition.

35 106. The result of his failure to contact HMCTS was that he did not perform his professional obligations as Mr Green's representative. As a consequence, the absence of action in relation to Mr Green's appeal led to the unless order and ultimately to the striking out of the appeal.

40 107. Taken together with the factors which we have already reviewed, our conclusion on this alternative basis, that the obligations in respect of the appeal fall on Mr Blue as representative rather than on Mr Green as Appellant, is unchanged; we are not persuaded that we should exercise our discretion to grant Mr Green's application for reinstatement of his consolidated appeal.

**Result of the application**

108. For the reasons which we have set out above, we refuse Mr Green’s application for reinstatement of his consolidated appeal.

**Right to apply for permission to appeal**

5 109. 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 10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

15

**JOHN CLARK  
TRIBUNAL JUDGE**

**RELEASE DATE: 16 JUNE 2016**