[2016] UKFTT 0484 (TC)

TC05234

Appeal number: TC/2014/01745

INCOME TAX – application to make a late appeal against an assessment under s 29 TMA 1970 amendments made under s 28 TMA and related penalties – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

MRS FRANCINE FRANCIS **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER: MR LESLIE HOWARD

Sitting in public at Fox Court, 30 Brooke Street, London on 2 February 2016

The Appellant did not appear and was not represented at the hearing

Mr Matthew Mason, an officer of the Respondents, for the Respondents ("HMRC")

DECISION

1. The appellant applied to be able to make a late appeal against an income tax assessment made by HMRC for the tax year 2006/07 (under s 29(1) of the Taxes Management Act 1970 ("**TMA**")), amendments to the appellant's self assessment tax returns for the tax years 2008/09 to 2011/12 (made under s 28A TMA) and related penalties as further set out in the facts below.

2. The appellant did not attend and was not represented at the hearing. We attempted to contact the representative by telephone but received no response. The appellant did not give any prior notification or reason for not attending. We were satisfied that the appellant and the representative had been notified of the hearing and given the full opportunity to attend. Having regard to the rules governing the tribunal and, in particular, the overriding objective of dealing with matters fairly and justly, we decided that, as the appellant had been given the opportunity to attend and had not requested a postponement and as HMRC were present and prepared, we should proceed with the hearing.

Facts

3. We have based our view of the facts on the bundle of documents presented by HMRC.

4. On 18 October 2012 HMRC notified the appellant of an enquiry into the appellant's self assessment tax returns for the tax years 2008/09, 2009/10, 2010/11 and 2011/12 (under s 9A TMA). The enquiries related to the level of the appellant's taxable income from her activities as an accountant both as an employee and as a sole trader. On the same day HMRC issued an information notice under para 1 of schedule 36 to the Finance Act 2008 ("**schedule 36**") requiring the production by 23 November 2012 of the specified information and documents for the tax years 2010/11 and 2011/12.

5. The appellant's agent at the time, Macs Accountants Ltd, provided some of the requested information on 19 November 2012. On 29 November 2012, as not all the requested information and documents had been produced, HMRC issued two fixed penalties of £300 under para 39 of schedule 36. The penalty notices stated that further penalties may be due if the requested information and documents were not produced by 31 December 2012. The notices were issued direct to the appellant. On the same day HMRC wrote the appellant explaining what had been received to date from Macs Accountants Ltd and what remained to be produced.

6. On 8 January 2013 as no further information or documents had been received HMRC issued daily penalties under para 40 of schedule 36. On the same day HMRC wrote to the appellant setting out HMRC's proposals to settle the enquiries and warning of further penalties for submitting inaccurate returns. HMRC advised that similar inaccuracies were identified in the appellant's tax return for the tax year 2006/07.

7. On 13 February 2013 HMRC issued an assessment for the tax year 2006/07 under s 29(1) TMA 1970.

8. On 18 March 2013 HMRC:

(1) issued closure notices and amendments to the appellant's returns under s 28A(1) and (2) TMA for each of the tax years 2008/09, 2009/10, 2010/11 and 2011/12;

(2) advised that penalty notices would be issued under s 95 TMA for the tax year 2006/07 and under schedule 23 of the Finance Act 2007 for the tax years 2008/09, 2009/10, 2010/11 and 2011/12; and

(3) issued the penalty notice for the tax year 2007/08.

9. On 24 April 2013 HMRC issued penalty notices for the tax years 2008/09, 2009/10, 2010/11 and 2011/12.

10. The various assessments and notices contained details of the appellant's appeal rights and the time limits for making such an appeal.

11. On 18 December 2013 the appellant's representative, Lennox McCloud of Taylor Allen Ltd, contacted HMRC regarding the above matters. HMRC advised that, as they held no authority from the appellant regarding that firm, they were unable to discuss the matter with him. HMRC subsequently received this authority in a letter from Taylor Allen Ltd dated 18 December 2013. In this letter they also requested further information regarding the enquiries and stated that delays in dealing with these were due to the appellant's previous advisers, Macs Accountants Ltd.

12. On 18 December 2013 HMRC had a telephone call with the appellant who confirmed that she had received all of the above amendments, assessments and notices.

13. On 30 January 2014 HMRC informed Mr McCloud of Taylor Allen Ltd of the closure of the enquiries and that the appellant had confirmed that she had received all of the closure notices and related amendments, assessment and penalty notices. They noted that the time limit for appealing against each of these had expired and that they could accept a late appeal only if the appellant had a reasonable excuse for not appealing within the applicable time limit and appealed as soon after she could after the excuse ended. They did not consider the appellant had a reasonable excuse for not appealing to HMRC within the applicable time limits.

14. In that letter HMRC said they did not understand why Taylor Allen Ltd considered any delays on the appellant's behalf to be the fault of Macs Accountants Ltd as HMRC records show that Mr McCloud worked for that business prior to working for Taylor Allen Ltd. HMRC also noted that the appellant's tax returns for 2007/08 to 2011/12 showed that she was employed by Macs Accountants in the years 2008/09, 2009/10, 2010/11 and 2011/12. A copy of the letter was also sent to the appellant.

15. On 21 March 2014 the appellant submitted a late appeal to HMRC as follows:

> "I am writing to inform you that I am appealing against your decision to close my tax enquiry. In the circumstances I am hereby requesting that all request for payment to be suspended until we know the outcome of the appeal. I believe that my circumstances are a good reason for the perceived lack of cooperation. Re-opening the enquiry will afford me the opportunity to respond fully."

16. On 28 March 2014 the appellant applied to the tribunal for permission to make a late appeal. The appellant states the reason for why the appeal is made late to be as follows:

> "I was only made aware recently that the enquiry has been closed. This was never communicated to me by any means."

17. The grounds for appeal are stated to be that:

> "I am appealing because I was not given a fair chance to respond fully to the enquiry. My previous accountants (Macs Accountants Ltd) went into liquidation during the time, and I was not made aware of this until HMRC contacted me. I have managed to put some information together, and now have a new agent who assured me that they will be able to assist if given the opportunity."

18. The appellant states in the notice of the appeal that the result should be that the enquiry is reopened to allow her to respond fully.

19. On 10 June 2014 HMRC notified the appellant that they did not agree to the late appeal on the basis that the appellant did not have a reasonable excuse.

Submissions

20. We have taken the appellant's submissions to be as set out in the notice of appeal.

21. HMRC's submissions are as follows:

> (1) The appellant has no reasonable excuse for the failure to make the appeal within the applicable time limits. HMRC's view is that a person has a reasonable excuse only where an event beyond the person's control prevents them from sending in an appeal within the time limit.
>
> (2) In this case the appellant states the failure was due to her previous accountants, Macs Accountants Ltd, going into liquidation, and that she was unaware of the closure of the enquiries as this information was not communicated to her.
>
> (3) As regards the position of the former accountants, HMRC's view is that reliance on a third party does not constitute a reasonable excuse.

(4) As regards the claim that the appellant was not notified of the relevant matters, this is not correct. The letters were sent to the appellant's home address and she confirmed that this was her address and that she received HMRC correspondence at that address in a telephone call of 18 December 2013. Under s 7 of the Interpretation Act 1978 documents sent by post are deemed to be effective when there has been proper prepayment as there was in this case.

(5) As set out above the appellant was employed by Macs Accountants Ltd in the tax years 2008/09 to 2011/12 and Mr Lennox McCloud of Taylor Allen Ltd also worked previously at Macs Accountants Ltd. This also indicates that the appellant and both her sets of advisers must have been aware of the enquiries and both the appellant and of the liquidation of Macs Accountants Ltd given their involvement with that firm.

(6) The appellant and her advisers were therefore well aware of what was requested by HMRC and the time limits for providing that as well as the time limits for providing the notice of an appeal. The time limits and applicable appeal rights were set out in each of the amendments, the assessment and the penalty notices.

(7) HMRC note that the application to make an appeal was in each case more than 300 days late. No action was taken until the appellant was given notice that her tax affairs were to be monitored under the "managing serious defaulters (MSD) programme".

(8) Under the applicable case law, time limits should be respected as they are there to ensure finality which is in the public interest. There are no valid reasons for allowing a late appeal in this case. HMRC referred to the cases of *Obhloise Benjamin Ogedegbe v HMRC* [2009] UK FTT 364 (TC), *O'Flaherty v HMRC* [2013] UKUT 161 (TC), *Former North Wiltshire District Council v HMRC* and *Data Select* (see 29 below).

Law

22. The appellant has a right of appeal under s 31 TMA against the amendment made by the closure notice and against the assessment made under s 29 TMA. The appeals are required to be made to the relevant officer of the Board who issues the amendment or assessment within 30 days of the date on which the relevant notice of assessment or amendment was given (under s 31A TMA).

23. The appellant also has a right of appeal against the penalty notices (under s 100 TMA as regards the penalty issued under s 95 TMA and under the provisions of schedule 24 of the Finance Act 2007 as regards the penalties issued under those provisions). An appeal against such penalties must also be brought within 30 days of the issue of the relevant notice. Such a notice is treated for appeal procedure purposes in effect as though it is an assessment to tax (under s 100B as regards the penalty issued under s 95 TMA and under schedule 24 as regards penalties issued under that schedule).

24. Where a notice of appeal is given late HMRC may agree to the appeal being made late or the tribunal may give permission for the appeal to be made late under s 49 TMA. This provides as follows:

> **"49 Late notice of appeal**
>
> (1) This section applies in a case where—
>
> (a) notice of appeal may be given to HMRC, but
> (b) no notice is given before the relevant time limit.
>
> (2) Notice may be given after the relevant time limit if—
>
> (a) HMRC agree, or
> (b) where HMRC do not agree, the tribunal gives permission.

25. This section also provides that HMRC shall agree to notice being given after the deadline where (a) the appellant has requested HMRC in writing to agree, (b) HMRC consider that there is a reasonable excuse for not giving the notice before the time limit and (c) HMRC are satisfied that the request was made without unreasonable delay after the reasonable excuse ceased (sub-s 49(3) to (6) TMA). HMRC did not agree to the appellant making a late appeal on the basis that they were not satisfied that the appellant had a reasonable excuse for the late appeal in this case.

26. If the appellant is permitted to make a late appeal to HMRC, the further consequence would be that the appellant may then appeal to the tribunal (under s 49A) subject to the outcome of any review by HMRC of their decision.

Discussion

27. The task of the tribunal is to consider whether to allow the appellant to give notice to make an appeal against the relevant assessment, amendments and notices notwithstanding that no appeal was made to HMRC within the applicable 30 day time limits. As HMRC has refused to give permission for a late appeal on the basis that they were not satisfied that the appellant has a reasonable excuse for the lateness, the appellant may make a late appeal only if the tribunal gives permission under s 49 TMA.

28. There is no further guidance or restriction in the statute as to when the tribunal may give permission so that on the face of it the tribunal's discretion is unfettered. However, there have been a number of cases on the correct approach to be adopted. Although some of the cases relate to applications for extension of time limits rather than an appeal made out of time, the same principles have been held to apply.

29. In the Upper Tribunal decision in *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC) Mr Justice Morgan set out (at [34]) five

questions which the tribunal should ask itself in deciding whether an extension of time is permitted:

> "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."

30. Mr Justice Morgan went on to note (at [35]) that the Court of Appeal had held that when considering an application for an extension of time for an appeal to be made it will usually be useful to consider the overriding objective and checklist of matters set out in rule 3.9 of the Civil Procedure Rules ("**CPR**") governing court procedure. The text of 3.9 as in place at that time setting out a list of factors is set out in the Annex. He also noted (at [36]) that he was shown a number of decisions of the tribunal which had adopted the same approach and he concluded (at [37]):

> "In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases."

31. In the same passage he also noted that some of the cases he had referred to stress the importance of finality in litigation. Whilst those comments are not directly applicable where an application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position:

> "Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

32. Following the decision in *Data Select*, changes were made to the CPR. Under the new version of rule 3.9, rather than requiring the court to consider a list of factors, only two factors were specifically referred to as follows:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—(a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions."

33. The question then arose of what effect the new CPR rules had on an application for extension of time or to make a late appeal and whether this altered the approach to be adopted by the tribunal as set out in *Data Select*. There have been two conflicting decisions on this in the Upper Tribunal.

34. In the case of *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC) Judge Sinfield concluded that the introduction of the new CPR 3.9 and comments made by the Court of Appeal on its application clearly showed that the courts must be tougher and more robust than they had been previously in dealing with whether to extend time limits. He referred in particular to the Court of Appeal decisions in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624. He rejected the argument that differences in the wording of the overriding objectives of the Upper Tribunal rules and the CPR meant that the tribunal should adopt a different approach to that taken in those cases. He thought the tribunal should apply the same approach as in the *Mitchell* case that, although consideration should be given to all the circumstances of the case, these should be given less weight than the two conditions specifically mentioned in rule 3.9.

35. However, in the case of *Leeds City Council v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT 596 (TCC) Judge Bishopp rejected the approach taken by Judge Sinfield. He decided that the correct approach was to follow the principles set out in *Data Select* as described in 29 to 31 above.

36. In considering to what extent the tribunal should have regard to the CPR, Judge Bishopp noted (at [16]):

> "As Judge Sinfield said, the CPR do not apply to the tribunals, and they cannot be used as they stand in order to fill gaps. They offer no more than a guide; and in using the CPR for that purpose the tribunal must not lose sight of the surrounding circumstances. The correct approach, at least until *Mitchell*, was described by Morgan J, sitting in this tribunal, in *Data Select*…." [he then set out in full the passages from *Data Select* referred to above.]

37. Judge Bishopp continued that the changes made to the overriding objective and rule 3.9 of the CPR were made with the express purpose of ensuring that time limits and similar requirements were more strictly enforced in the courts (at [17]). However, as those changes had not been introduced in the tribunal rules (and may or may not be in future) (at [18]):

> "It does not seem to me that it is open to a tribunal judge to anticipate a decision which might never be taken and apply, by analogy, changes to the CPR as if they had also been made to the Upper Tribunal rules. In my judgment, until a change is made to those rules, the prevailing practice in relation to extensions of time should continue to apply. In addition, the changes to the CPR were announced in advance; their adoption in the

Upper Tribunal, by contrast, was not. I do not think it is appropriate to introduce significant changes in practice without warning.

38. He concluded at [19]:

> "In my judgment, therefore the proper course in this tribunal, until changes to the rules are made, is to follow the practice which has applied hitherto, as it was described by Morgan J in *Data Select*

39. Most recently the Court of Appeal in *BPP Holdings v HMRC* [2016] WLR (D) 114 considered the correct approach to be taken by a tax tribunal as regards non-compliance with rules and directions given by the tribunal. The particular issue in that case was whether this tribunal was correct to barr HMRC from proceedings for such non-compliance.

40. In considering this the Court of Appeal noted at [15] the two conflicting decisions in the Upper Tribunal as set out above which they described as concerning "whether the stricter approach made under the CPR as set out in *Mitchell* and *Denton* applies in relation to cases in the tax tribunal". The President of Tribunals states at [17] that "I am of the firm view that the stricter approach is the right approach".

41. At [37] he continues that:

> "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals … to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunal and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's."

42. At [44] there is the following comment on the decision in *Data Select*:

> "The UT found support for its decision to overrule the FtT in the decision of Morgan J in *Data Select* supra. This is not an appropriate case to analyse the decision in *Data Select*. Suffice it to say that the question in that case was the principle to be applied to an application to extend time where there has been no history of non-compliance. In this case, HMRC neither acknowledged that they had breached a time limit nor made an application for an extension of the same. In my judgement, therefore, the question in this case turns on an antecedent principle of compliance. Had I been minded to analyse *Data Select*, that would have created a further difficulty for HMRC. Morgan J applied CPR 3.9 by analogy without

waiting for the TPC to amend the UT Rules in just the manner I have suggested is appropriate."

43. We take from the above that the general approach in *Data Select* remains the correct one to follow in cases where the tribunal is considering an extension of a time limit or whether to allow a late appeal. The Court of Appeal noted that it did not need to consider that decision in full in the different circumstances of the *BPP* case. However, what is not clear to us is the extent to which we are required to focus on or give greater weight to the principles in CPR 3.9 applying a stricter approach (along *Mitchell* lines) as advocated in the decision in the *McCarthy* case which the Court of Appeal cited with approval. In any event, our view is that there is no justification for allowing the appeal to be made out of time in this case whether following the stricter approach or not.

44. We have considered each of the questions posed in the *Data Select* case.

What is the purpose of the time limit?

45. It seems to us that the time limit of 30 days for a taxpayer to make an appeal is to provide taxpayers, as those liable to tax and, HMRC, as the enforcer of the payment of taxes, with certainty as to the "cut off" point when the amount of tax or penalties asserted by HMRC to be due as regards a particular matter or period becomes certain and final. In specifying a period of 30 days Parliament has set down what it regards as sufficient time for a taxpayer to consider whether he wishes to dispute a tax assessment or penalty determination and if so to make an appeal. The taxpayer is required to act promptly if he wishes to make an appeal thereby providing efficiency in the conduct of the dispute (should there be an appeal) or finality (should there be no appeal).

46. On that basis we would not regard it as a matter of routine for the tribunal to allow an appeal to be made outside of the normal time limits. The starting point must be that the 30 day limit should usually be adhered to. Otherwise the purpose of the provision of the time limit would be undermined. There would be little incentive for taxpayers to comply with the time limit and the lack of certainty and finality would potentially cause difficulties with the conduct of resulting disputes and burdensome administrative and enforcement issues for HMRC. Therefore, the tribunal can permit a late appeal only, as set out in *Data Select*, if it is satisfied that on balancing all relevant factors (the length of the delay, the reason for the delay and the effects on the parties of granting or not granting the application for the late appeal), it would be unjust and unfair not to do so.

How long was the delay?

47. As noted above, the delay from the expiry of the applicable time limit to the submission of the appeal was over 300 days in each case. The delay from the expiry of the time limits for appealing until Taylor Allen Ltd tried to make contact with HMRC on 18 December 2013 varies from over 9 months (as regards the assessment made on 13 February 2013), 8 months (as regards the amendments and penalty notice

issued on 18 March 2013) and nearly 7 months (as regards the penalties issued on 24 April 2013). The late appeal was not actually made to HMRC until just over 3 months after Taylor Allen Ltd first made contact with HMRC, on 21 March 2014. The application for permission to make the late appeal was submitted to the tribunal in a notice dated 28 March 2014.

Is there a good explanation for the delay?

48. We are unable to conclude that there was a good explanation for the delay. The appellant says in the notice of appeal to the tribunal that she was not aware of the closure of the enquiries until "recently" which we take to mean shortly before she made the late appeal. However, it is clear from the correspondence produced by HMRC that, in a telephone conversation with HMRC on 18 December 2013, the appellant confirmed that she had received all of the relevant correspondence including the amendments, assessment and notices. We note the appellant asserts in the notice of appeal that this was not the case but she has not appeared to give any evidence to that effect.

49. In the notice of appeal the appellant also puts the delay down to her previous adviser, Macs Accountants Ltd, going into liquidation which she states she found out about only when contacted by HMRC (presumably in December 2013). That the appellant was unaware of this is not credible given that the evidence produced by HMRC states that the appellant worked for Macs Accountants Ltd during the relevant period and that Mr McCloud of Taylor Allen Ltd, her current adviser, also worked for that firm. No further reason has been given as to why that liquidation affected the appellant's ability to make an appeal. In these circumstances, given the appellant and her adviser cannot have been unaware of the liquidation and the continuity, in the sense that Mr McCloud continued to be her adviser, we cannot see how the liquidation can have affected matters adversely.

What will be the consequences for the parties of an extension of time or a refusal to extend the time?

50. In considering the consequences for the parties of an extension of time or a refusal to extend the time limit, our view is that it must be relevant to consider whether the appellant's appeal would have any reasonable prospect of success if the appellant were to be allowed to make a late appeal ultimately to the tribunal. In this regard we follow the approach in the Upper Tribunal case of *O'Flaherty v R&C Commrs* [2013] UKUT 161 (TC). In that case the tribunal considered that, in applying the approach in *Data Select* of conducting a balancing exercise considering all relevant circumstances, depriving a party of the opportunity to put forward an arguable meritorious appeal was an obvious prejudice which should be part of that exercise (referring to the decision in the High Court in *R (oao Cook) v GCIT* [2007] EWHC 167 at [27]).

51. We do not regard this as requiring a full assessment of the appellant's appeal but as requiring us to take a view on whether, if permission were granted, the appellant would have a reasonable prospect of succeeding. In this case we have little to go on

in making such an assessment. The appellant has only put forward that she did not have sufficient time to deal with HMRC's enquiries as she was not made aware that Macs Accountants Ltd had gone into liquidation until HMRC contacted her. She states in the notice of appeal that she has now managed to put some information together and that she has a new agent who assured her that they will be able to assist if given the opportunity.

52. As set out above, we do not accept that the appellant and her agent were unaware of the liquidation of Macs Accountants Ltd or the conclusion of the enquiries. During the period of the enquiry of around 6 months the appellant did not provide information requested by HMRC. Despite being fully aware of the issue of the closure notices (and the assessment, amendments and penalty notices) the appellant took no action at all as regards this matter for around another 7, 8 or 9 months after the expiry of the applicable time limits for making an appeal. She has not provided any further information to HMRC in that period or subsequently and has not given any details of what further information of relevance she has. In these circumstances it is not credible that new material information affecting the position will be produced.

53. To succeed in an appeal, assuming it is demonstrated that HMRC's assessment and amendments were validly issued (and to date the appellant has raised no issue on this) the appellant would be required to demonstrate that the amendments and the assessment were not correct in the relevant respects on the balance of probabilities. In all the circumstances, given the amount of time that has elapsed, the limited and inadequate nature of information produced during the enquiry, the lack of any credible reason as to why no action was taken and, in all these circumstances, the resulting lack of credibility that new information of relevance will be produced, there is no basis to conclude that an appeal against the amendments and assessment would have a reasonable prospect of success. As regards the penalties the appellant has not put forward any other submission.

54. If the time limit were to be extended, HMRC would face the prospect of dealing with a matter which they would have regarded as closed certainly by the end of May 2013 with the inherent difficulties time delay brings. We note that in the *Data Select* case Morgan J commented on 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. In this case, we note that HMRC were entitled to assume that the matters were settled certainly no later than the expiry of the 30 day time limit for the making of an appeal against the last of the penalty notices issued on 24 April 2013. It could be said that HMRC have been on notice that the appellant may seek to make an appeal since the time when Taylor Allen Ltd contacted them on 18 December 2013 although this was some 7 months after the expiry of the applicable time limits for an appeal against the last of the penalty notices issued (and around 8 and 9 months after the expiry of the time limits for the earlier assessment, amendments and penalty notice). As noted the late appeal was not actually made to HMRC until 21 March 2014.

55. In conclusion, taking into account the delays by the appellant in making an appeal, the absence of any credible reason for the delay, the absence of credible

submissions and evidence indicating that the appellant has any viable basis for appealing against the amendments, assessment and penalty notices, the potential difficulties in the conduct of the case for HMRC given the substantial delay in the appellant contacting them from the time they would have considered the matter final (at the end of May 2013) and the raising of the issue in December 2013 and the interests of ensuring finality in such matters, our view is that the appellant's application to make an appeal outside the applicable time limits should be refused.

56. If we are wrong to apply this balancing exercise approach, on the basis that we should be applying a stricter *Mitchell* type of approach (as advocated in *McCarthy & Stone* cited with approved in the Court of Appeal in *BPP*) the result would be the same. On that approach, arguably we should give greater weight to the principles in CPR 3.9 (for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules) compared with other circumstances. That would simply add even more weight to the factors indicating that permission to appeal should not be given.

Conclusion

57. For all of the reasons set out above, the appellant's application for permission to appeal against the assessment, amendments and penalty notices outside of the statutory time limits is refused.

58. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 8 JULY 2016

ANNEX

List of factors in Rule 3.9 of the CPR as in place at the time of the *Data Select* decision:

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practices, directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party;

(i) the effect which the granting of relief would have on each party.