[2016] UKFTT 0597 (TC)

# TC05333

**Appeal number: TC/2016/01896**

***INCOME TAX – application for permission to make late appeals - application refused***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**RAYMOND HARVEY** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE REDSTON**

**Sitting in public at the Tribunal Centre, Fox Court, Brooke St, London on 2 August 2016**

**Mr Alan Arenstein, of WLH Taxation Limited, for the Appellant**

**Mr Stephen Goulding, instructed HM Revenue & Customs Appeals' and Reviews Unit, for the Respondents**

DECISION

1. This was Mr Harvey's application for permission to make late appeals against assessments, amendments to assessments and penalties totalling £167,340.31 for the years 1994-95 through to 2011-2012 ("the assessments and penalties"). The amounts in question are set out in the Appendix.

2. The Tribunal decided to refuse permission to make these late appeals.

**The evidence**

3. HMRC provided a bundle of documents which contained correspondence between the parties and HMRC's debt management action records.

4. Mr Arenstein also provided some correspondence and other documents. He initially said that, although Mr Harvey was in attendance at the hearing, he was not a witness. However, during the proceedings, and after a short adjournment during which he discussed this with his client, Mr Arenstein said that Mr Harvey would give evidence. Mr Harvey then gave oral evidence in chief, led by Mr Arenstein. He was cross-examined by Mr Goulding and answered questions from the Tribunal.

5. On the basis of the evidence provided, I find the facts set out in the next part of this decision. I make limited factual findings later in this decision.

**The facts**

6. Mr Harvey runs a company called Aspect Four Demolition Limited ("AFDL"). It specialises in demolition associated with building work and construction. In the 2016-17 tax year, AFDL's turnover is expected to be around £2.5m. It currently has 10 full time employees and up to 20 temporary workers. A firm of accountants based in central London provides it with accountancy and tax advice.

7. On 18 November 2011, Mr Davidson, an HMRC Higher Compliance Officer, opened enquiries into Mr Harvey's return for 2006-07 through to 2010-11.

8. On 21 May 2012 Mr Harvey instructed Mr Williams, of Compaccs Accountancy Services Ltd ("Compaccs") to act for him in relation to the enquiries. Compaccs provides "bookkeeping, accounting and business management services" including "computerised bookkeeping, accountancy and tax and payroll." Mr Harvey decided not to instruct the firm which provides accountancy services to AFDL because they were too expensive.

9. The enquiries generated significant correspondence. Mr Davidson sometimes wrote directly to Mr Harvey, copied to Mr Williams, and sometimes he wrote to Mr Williams alone. Mr Harvey told the Tribunal that he always read the letters sent to him by Mr Davidson, and he then forwarded them to Mr Williams; I accept that evidence.

10. Mr Davidson issued the following assessments and penalties:

(1) on 30 May 2014, penalty determinations in respect of the tax years 1994-95 through to 2005-06 and penalty assessments in respect of the tax years 2008-09 through to 2011-12;

(2) on 3 June 2014, notices of assessment/amendment in respect of the tax years 1994-95 through to 2005-06 and 2011-12; and

(3) on 30 June 2014, a penalty assessment in respect of the years 2008-09 and 2011-12.

11. The letters setting out the assessments and penalties each included the offer of a statutory review, and said that, in the alternative, Mr Harvey could appeal directly to the Tribunal.

12. On 17 July 2014 Mr Williams appealed to HMRC against the assessments and penalties but said that "at this point" he was not asking for a statutory review or asking the Tribunal to decide the appeals, because some information remained outstanding from his client in relation to the years which had been assessed.

13. On 23 July 2014, Mr Davidson replied, saying:

> "I have been requesting further information and documentation from your client for some considerable time and given that no further information or documentation has been provided to date I would advise that my decision has not changed and the assessments I have issued will remain in place."

14. On the same date, Mr Davidson wrote to Mr Harvey (with a copy to Mr Williams) repeating the offer of a statutory review. On 27 August 2014, Mr Williams emailed Mr Davidson to tell him that Mr Harvey had accepted that offer.

15. On 24 February 2015, HMRC issued a statutory review letter to Mr Harvey upholding the assessments and penalties; a copy was sent to Mr Williams. The letter concluded:

> "if you want to appeal to the tribunal, you must notify your appeal to the tribunal, enclosing a copy of this letter, within 30 days of the date of this letter."

16. On 1 July 2015 Mr Williams wrote to HMRC's debt management office, saying:

> "as you are aware, Mr Harvey does not agree with the estimated assessments made by Mr Davidson and is insistent that the amounts that have been assessed are far too high. He is also not admitting any liability to the amounts assessed."

17. The letter continues by offering £30,000 "in full settlement". This was rejected by HMRC.

18. On 12 November 2015, as Mr Harvey had not paid the tax and penalties which had been assessed, he was sent a "distraint warning letter" by HMRC's debt

management office. On 18 November 2015 that office confirmed with HMRC's compliance department that "there is no tribunal hearing as no appeal has been made". A further letter was then sent to Mr Harvey on the same day, threatening bankruptcy proceedings.

19. The debt management records from which the information in the previous paragraph was taken is set out in closely written typescript at the back of HMRC's Bundle; Mr Harvey was taken to these records by Mr Goulding during cross-examination and asked to read them to the Tribunal, which he did without difficulty. Mr Goulding asked what action he took in response to those two letters. Mr Harvey said he passed them to Mr Williams.

20. On 18 January 2016, HMRC's debt management office received a letter from Mr Williams disputing Mr Harvey's tax debt. The letter again asked if HMRC would accept £30,000 in full and final settlement. This offer was rejected by HMRC, and on 22 January 2016 Chelmsford County Court refused Mr Harvey's application to have HMRC's statutory demand set aside.

21. On 11 February 2016, Mr Harvey instructed WLH Taxation. On 28 March 2016 WLH filed an application with the Tribunal, asking for permission to notify the appeals against the assessments and penalties to the Tribunal.

22. On 12 May 2016, Mr Arenstein wrote to Mr Davidson and said Mr Harvey wished to appeal against penalties charged during the enquiry for failure to comply with information notices issued under Finance Act 2008, Sch 36 ("Sch 36 Notices").

23. On 2 June 2016, Mr Davidson responded, stating that "neither the information notices or the imposition of the initial and daily penalties were appealed or contested during the enquiry", that in any event, it was too late to appeal against these penalties, given the statutory time limits.

24. On 22 June 2016, the Tribunal asked the parties to seek to agree what matters were to be decided at this hearing. On 7 July 2016, the parties confirmed that the purpose of the hearing was only to determine the application to make late appeals against the assessments and penalties; it did not extend to the Sch 36 Notices. Mr Goulding and Mr Arenstein reconfirmed this at the beginning of the hearing.

## The law

25. Taxes Management Act 1970 ("TMA") s 49E makes provision for HMRC to review decisions. So far as relevant to this case, it says:

> **49E Nature of review etc**
>
> (1) This section applies if HMRC are required by section 49B or 49C to review the matter in question.
>
> (2)-(5)…
>
> (6) HMRC must notify the appellant of the conclusions of the review and their reasoning within
>
> (a) the period of 45 days beginning with the relevant day, or

(b) such other period as may be agreed.

(7) In subsection (6) 'relevant day' means

(a) in a case where the appellant required the review, the day when HMRC notified the appellant of HMRC's view of the matter in question,

(b) in a case where HMRC offered the review, the day when HMRC received notification of the appellant's acceptance of the offer.

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that HMRC's view of the matter in question (see sections 49B(2) and 49C(2)) is upheld.

(9) If subsection (8) applies, HMRC must notify the appellant of the conclusion which the review is treated as having reached."

26. TMA s 49G applies where a person seeks to notify an appeal to the Tribunal after the conclusion of a statutory review. It reads:

**"49G Notifying appeal to tribunal after review concluded**

(1) This section applies if–

(a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or

(b) the period specified in section 49E(6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

(3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this section "post-review period" means–

(a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6), or–

(b) in a case falling within subsection (1)(b), the period that–

(i) begins with the day following the last day of the period specified in section 49E(6), and

(ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(9)"

27. Mr Harvey was required by TMA s 49G(5) to notify his appeals to the Tribunal within 30 days of the date of the review letter. After that 30 day period, he is only able to notify his appeal if the Tribunal gives permission, see TMA s 49G(3).

28. Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") is also relevant. It states:

> "If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal–
>
> (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
>
> (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

**The case law on giving permission for late appeals**

29. In *Data Select Ltd v HMRC* [2012] STC 2195 ("*Data Select*"), Morgan J said:

> "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.
>
> 35. The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker* [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see *Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc* [2007] STC 1196
>
> 36. I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [23]-[24] which is in line with what I have said above.
>
> 37. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 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. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not 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."

30. Morgan J referred in [37] of his judgment to Rule 3.9 of the Civil Procedure Rules ("CPR"). This has since been amended and now reads:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need–
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

31. The case of *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121 ("*BPP*") was concerned with whether the guidance in the CPR applied by analogy to this Tribunal. The Senior President of Tribunals gave the only judgment, with which Richards and Moore-Bick LJJ concurred. He said:

> "37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at 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 tribunals 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. If it needs to be said, I have now said it.
>
> 38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the

> tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party."

32. Although he did not expressly analyse *Data Select*, see [44] of the judgment, the President said: "Morgan J applied CPR 3.9 by analogy…in just the manner I have suggested is appropriate".

33. In *R (oao Dinjan Hysaj) v SSHD* [2014] EWCA Civ 1633 ("*Hysaj*"), Moore-Bick LJ, giving the judgment of the Court of Appeal, said at [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases."

34. In *Romasave Property Services v HMRC* [2015] UKUT 254 (TCC) ("*Romasave*"), the Upper Tribunal (Judges Berner and Falk) at [91] summarised the position, saying that the Tribunal must:

> "…take into account, in the context of the overriding objective of dealing with cases fairly and justly, all relevant circumstances, and…disregard factors that are irrelevant."

35. The Tribunal went on to say at [96] that:

> "Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

36. In *Leeds City Council v HMRC* [2014] UKUT 250 (TCC) ("*Leeds*") Judge Bishopp said at [24] that the aim of any rule imposing a time limit:

> "is to require a party asserting a right to do so promptly, and to afford to his opponent the assurance that, after the limit has expired, no claim will be made."

**The parties' approach to the case**

37. Both parties approached the case by using the structure set out in *Data Select;* Mr Aranstein then added further observations. I have followed the same approach.

**The purpose of the time limit**

38. In relation to the purpose of the 30 day time limit, Mr Goulding relied on Judge Bishopp's statement in *Leeds,* set out above. Mr Arenstein said that the purpose of the time limit was:

> "to provide certainty to all parties and in particular to allow HMRC to bring cases to a swift conclusion in cases where the taxpayer does not contest the figures put forward by HMRC. However, in this case the figures have been contested by the taxpayer throughout."

39. I cannot accept this. The time limit applies to all cases where a review decision has been issued, not simply to those where "the taxpayer does not contest the figures put forward by HMRC". Not only is this wrong, given the statutory provisions, but if the taxpayer does not contest the figures, he will not notify his appeal at all, so the time limit would be meaningless.

40. Instead, I agree with Mr Goulding that the position is encapsulated in the *dictum* from *Leeds* on which he relies. The same point is also made by Morgan J in *Data Select*, when he says that the purpose of a time limit is to ensure finality in litigation "where one or both parties were entitled to assume that matters had been finally fixed and settled".

41. That is exactly what HMRC's debt management office was doing when it checked to see if an appeal had been made before it began bankruptcy action.

**How long was the delay?**

42. Mr Arenstein said that HMRC had been aware, since Mr Williams' letter of 1 July 2015, that Mr Harvey continued to be "insistent that the amounts that have been assessed are far too high". He invited the Tribunal to find that the delay could therefore be regarded as being three months rather than twelve months. He did, however, accept that Mr Williams' letter to HMRC's debt management office did not in fact constitute the notification of an appeal to the Tribunal.

43. Mr Goulding said that the delay was just over a year. He relied on *Romasave,* and in particular the Upper Tribunal's finding that, in the context of a 30 day time limit, "a delay of more than three months cannot be described as anything but serious and significant".

44. I cannot accept that Mr Williams' letter to the debt management office can in any sense be treated as some sort of proxy for notification of the appeals to the Tribunal. Not only was it sent to HMRC rather than to the Tribunal, but it only served to register Mr Harvey's disagreement with the assessments; it said nothing at all about an intention to commence litigation.

45. Even if, which I do not accept, Mr Williams' letter was in any way relevant to compliance with the time limit, it was sent over three months after the deadline for notifying the appeal had expired, itself a "serious and significant" delay.

**Was there a good reason for the delay?**

46. Mr Arenstein said that Mr Williams was not experienced in enquiry work, and appears not to have realised that he needed to notify the appeals. He sought to rely, by analogy, on the fact that Mr Williams did not appeal against the Sch 36 Notices, when in Mr Arenstein's submission they should have been.

47. Mr Arenstein also submitted that Mr Harvey "relied entirely on his adviser" and always passed any HMRC correspondence to Mr Williams. Mr Harvey had, he said, described himself to WLH Taxation Limited as "so poor at reading and writing that [he has been] described as 'semi-literate'". Mr Harvey told the Tribunal that, although he read the correspondence sent to him by HMRC, he did not understand it.

48. Mr Goulding said that reliance on his adviser was not "a good reason for the delay". Mr Harvey had been sent a copy of the HMRC review letter, which clearly set out the 30 day time limit.

49. I agree with Mr Goulding that there is no good reason for the delay. I find Mr Harvey's statement, made via Mr Arenstein, that he was semi-literate to be unreliable. He was able to read aloud from the pages of the HMRC debt management file which was included in the Tribunal bundle and was able to answer questions on it.

50. I also reject the claimed reliance on Mr Williams as providing Mr Harvey with a "good reason" for the delay. Mr Harvey read the HMRC correspondence which was sent to him. The paragraph setting out the time limit for notifying appeals is clear, simple and unambiguous and I find as a fact that Mr Harvey both read it, and was able to understand it.

**What are the consequences of an extension of time?**

51. Mr Arenstein submits that the main consequence for Mr Harvey of an extension of time is that he will have the opportunity to negotiate a fair settlement with HMRC. He accepts that HMRC will have some further work, but on the other hand they "will have no need to go through bankruptcy proceedings" at least at this stage; they will also "have the opportunity to correct mistakes they have made during the course of the enquiry".

52. Mr Goulding submits that, if permission is given:

> "HMRC will have to re-open many years' assessments which were previously thought to have been closed. HMRC will have to allocate staff to working the case with substantial consequential costs."

53. I accept, of course, that if permission were given, Mr Harvey would be able come to the Tribunal and seek to argue that the assessments and penalties should be set aside. I do not accept that notifying an appeal will necessarily allow Mr Harvey, or Mr Arenstein, to re-open negotiations with HMRC or to make any changes to the assessments and/or penalties: that would be a matter for the parties. I am also unable to accept Mr Arenstein's submission about bankruptcy proceedings, to which I refer again below.

54. I agree with Mr Goulding that if permission were given, HMRC would have to write a Statement of Case in relation to the many years of assessment; they would also have to spent time complying with Tribunal directions and preparing a skeleton argument and attend the hearing. These tasks would involve time and costs.

**What are the consequences of refusing permission?**

55. Mr Arenstein said that if permission is refused, HMRC will no doubt go ahead with their bankruptcy proceedings. Mr Harvey may be able to seek time to pay ("TTP"), but otherwise "there is the very real prospect of being declared bankrupt"; his career will be curtailed and he may lose the house which he shares with his partner; AFDL's business will be damaged and may be forced into liquidation; and finally Mr Harvey himself is unlikely to find alternative employment.

56. Mr Goulding accepts that if permission is refused, the debt will be recoverable. He said that TTP is not a relevant matter in the context of this application; that might (or might not) be agreed between a debtor and HMRC.

57. I accept, of course, that if permission is refused, HMRC will be able to take legal action to recover the money due following the assessments and the penalties, and that the manner of recovery might (but might not) involve TTP.

58. There was no information before the Tribunal as to Mr Harvey's assets or the position of his company, other than that its turnover this year was some £2.5m. In other words, Mr Arenstein was making submissions for which no supporting evidence was provided.

59. Even had it been clear on the facts that Mr Harvey will in fact be made bankrupt, that on its own cannot be a reason for giving permission. Otherwise those who owe large sums to HMRC and whose financial position is fragile would be allowed access to the Tribunal to dispute their liability, while those who owe lesser amounts, and those who had the financial resources to pay the debt, would be refused permission. That cannot be in the overall interests of justice.

**The merits?**

60. Both parties took as their starting point the Court of Appeal's judgment in the case of *Hysaj*, where it was said that the merits should only be considered "in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak".

61. Mr Goulding submitted that the prospects of success were very weak. The enquiry had been opened in 2012 and Mr Harvey had been given many opportunities to provide evidence and explanations, but none was convincing. In his submission, a Tribunal would uphold the assessments and penalties.

62. Mr Arenstein said that he could show "without much investigation" that the merits were very strong. He attached to his skeleton argument a detailed four page analysis of the Sch 36 Notices, which in his submission could have been challenged

by Mr Williams; he added nearly three pages about the level of mitigation given in the penalty assessments, which he said was too low.

63. Whether or not the Sch 36 Notices could have been challenged is not material to the substantive issues which underpin the assessments and penalties. The level of mitigation is a matter of judgment, and very unlikely on its own to provide a "very strong" basis for a merits-based argument.

64. Mr Arenstein makes numerous other detailed submissions, including: that Mr Harvey's explanations for unexplained deposits in his partner's bank account should be accepted; that some of HMRC's assumptions "seem unlikely to say the least"; that the firms for which Mr Harvey worked would have been aware of the Construction Industry Scheme and HMRC should have considered this as a relevant factor; and that HMRC had incorrectly relied on the principle of continuity.

65. These are exactly the sort of submissions which are discouraged by the Court of Appeal in *Hysaj*. Considering them would "occupy a great deal of time and incur substantial costs".

66. I find that this is not a case in which the Tribunal "can see without much investigation that the grounds of appeal are either very strong or very weak". I therefore decline to embark on any investigation of the merits of Mr Harvey's case.

**Other submissions**

67. Mr Arenstein also sought to rely on *O'Flaherty v HMRC* [2013] UKUT 0161, in which Judge Berner says that one of the factors which the Tribunal must consider is "whether there would be demonstrable injustice to the taxpayer if permission were not to be given". He also cited the following extract from *Leeds:*

> "The change to r 3.9, as Jackson LJ put it [in *Denton v T H White* [2014] EWCA Civ 906] at [96], was 'not intended to introduce a harsh regime of almost zero tolerance, as some commentators have suggested'."

68. These *dicta* have no relevance to Mr Harvey's application. He is a year late in notifying his appeal to the Tribunal; there is no good reason for that delay and his grounds of appeal are not demonstrably "very strong". Although it is true that Mr Harvey will be prejudiced by losing his application, it is equally true HMRC will be prejudiced if it is allowed. In summary, refusing Mr Harvey permission to appeal does not amount to a "demonstrable injustice". Neither does it reflect "a harsh regime of almost zero tolerance"; instead, it is the outcome which follows from applying the overriding objective and the case law to the facts of Mr Harvey's case.

**Decision**

69. Having balanced the factors set out in *Data Select*, I therefore have no hesitation in refusing permission to appeal in this case.

70. That this is the right outcome can also be seen when *BPP* is considered. It is true that the issue in *BPP* was whether to impose a sanction for non-compliance, and

refusing permission for a late appeal is not a "sanction". Nevertheless, *BPP* is based on new CPR r. 3.9, and in *Data Select* Morgan J said that the approach in (old) r 3.9 should be taken into account when deciding whether to give permission to make a late appeal. It is therefore reasonable to assume that regard should also be had to new CPR r 3.9 and the related case law.

71. Like *Data Select,* the approach taken by *BPP* requires that all the circumstances to be considered, but it also places more weight on the need for compliance with rules and procedures. *BPP* therefore further reinforces my decision that permission to make a late appeal must be refused.

72. 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 Rules. 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.

**ANNE REDSTON**

**TRIBUNAL JUDGE**
**RELEASE DATE: 18 AUGUST 2016**

## ASSESSMENTS AND PENALTIES

| Year ended | Legislation | Assessment/Penalty | £ |
|---|---|---|---|
| 5/4/1995 | TMA s 29 | HMRC Assessment | 5,306.90 |
| 5/4/1996 | TMA s 29 | HMRC Assessment | 5,430.32 |
| 5/4/1997 | TMA s 29 | HMRC Assessment | 5,279.40 |
| 5/4/1998 | TMA s 29 | HMRC Assessment | 5,314.66 |
| 5/4/1999 | TMA s 29 | HMRC Assessment | 5,364.91 |
| 5/4/2000 | TMA s 29 | HMRC Assessment | 5,457.96 |
| 5/4/2001 | TMA s 29 | HMRC Assessment | 5,773.04 |
| 5/4/2002 | TMA s 29 | HMRC Assessment | 5,794.80 |
| 5/4/2003 | TMA s 29 | HMRC Assessment | 5,996.48 |
| 5/4/2004 | TMA s 29 | HMRC Assessment | 6,400.80 |
| 5/4/2005 | TMA s 29 | HMRC Assessment | 6,609.60 |
| 5/4/2006 | TMA s 29 | HMRC Assessment | 6,767.70 |
| 5/4/2007 | TMA s 28 | HMRC Assessment | 7,102.80 |
| 5/4/2008 | TMA s 28 | HMRC Assessment | 7,407.90 |
| 5/4/2009 | TMA s 28 | HMRC Amendment | 8,084.20 |
| 5/4/2010 | TMA s 28 | HMRC Amendment | 3,430.96 |
| 5/4/2011 | TMA s 28 | HMRC Amendment | 5,342.80 |
| 5/4/2012 | TMA s 29 | HMRC Assessment | 4,249.75 |
| 5/4/1994 to 5/4/2006 | TMA s 7(8) | Penalty determination | 41,698.00 |
| 5/4/2007 to 5/4/2008 | TMA s 95(1) | Penalty determination | 8,707.00 |
| 5/4/2009 to 5/4/2012 | FA 2007, Sch 24 | Penalty determination | 11,820.31 |
| **Total** | | | **167,340.31** |