[2016] UKFTT 0784 (TC)

TC05511

Appeal number: TC/2015/04225

INCOME TAX – late notices of appeal – application for permission to give notices of appeal to HMRC after the relevant time limit – section 49 Taxes Management Act 1970 – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PHILLIP REES **Appellant**

- and -

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

TRIBUNAL: JUDGE ROBIN VOS
LESLEY STALKER

Sitting in public at Fox Court on 1 November 2016

Mr Andrew McKenna of Smith & Williamson LLP, accountants for the Appellant

Mr Dan Hopkins, Presenting Officer and Mrs Anne Rees, Tribunals Caseworker, both of HM Revenue and Customs, for the Respondents

DECISION

Background

1. The appellant, Mr Rees is a solicitor who has worked with a number of different law firms and also as a legal technology consultant, developing and promoting a particular software product. His tax affairs are not straightforward.

2. In 2013, HMRC opened enquiries into Mr Rees' self-assessment tax returns for the years ended 5 April 2009 – 5 April 2012 which in due course led to closure notices issued on 7 October 2014 amending Mr Rees' self-assessments for each of those years and resulting in significant additional amounts of tax.

3. In the meantime, as a result of these enquiries, HMRC had on 3 April 2014 issued a discovery assessment in relation to the tax year ended 5 April 2009, again assessing additional tax.

4. The total amount of tax assessed by the closure notices and the discovery assessment is approximately £235,000.

5. In a letter to HMRC dated 22 April 2015, Mr Rees sought to appeal against the discovery assessment and the closure notices. HMRC took the view that Mr Rees did not have a reasonable excuse for submitting his appeals outside the statutory time limit and therefore refused to accept the late appeals.

6. Mr Rees has applied to the Tribunal (as he is entitled to do under s 49(2)(b) Taxes Management Act 1970 ("TMA")) asking the Tribunal to give its permission for the notices of appeal to be given after the relevant time limit.

The evidence and the facts

7. The evidence consisted of a bundle of correspondence and documents prepared by HMRC together with copies of the relevant closure notices and the discovery assessment which were provided to the Tribunal on the day of the hearing.

8. In addition, on the day of the hearing, Mr Rees provided HMRC and the Tribunal with a copy of a letter dated 23 November 2015 from his doctor relating to an ongoing medical condition.

9. Mr Rees presented the majority of his case himself with some assistance from Mr McKenna. Inevitably, in the course of presenting his case, Mr Rees gave a certain amount of oral evidence and was cross-examined on some of that evidence by Mr Hopkins.

10. There is no significant dispute about the evidence. The salient facts are set out below.

11. During the period covered by the tax returns in question (6 April 2007 – 5 April 2012), Mr Rees worked for a number of different law firms as a salaried partner but

was also separately providing software licensing services and legal technology consultancy services to those firms and to third parties trading under the name Altea Consulting.

12. In 2011, Mr Rees set up a company, Altea Consulting Limited. This company was initially dormant and only became active at the end of 2012 or the beginning of 2013, issuing its first invoice in January 2013.

13. Mr Rees filed his tax returns for the years ended 5 April 2009 and 5 April 2010 on 18 November 2011. He submitted his tax return for the year ended 5 April 2011 on 26 April 2012.

14. It is not clear from the evidence whether these tax returns were prepared by Mr Rees himself or by an accountant on his behalf.

15. HMRC opened enquiries into each of the tax returns for the years ended 5 April 2009 – 5 April 2011 on 24 January 2013.

16. At some point prior to 26 March 2013, Mr Rees instructed Hacker Young, accountants to deal with these enquiries.

17. Following conference calls between John Rowely, the HMRC officer dealing with the enquiries, Charles Homan, the individual at Hacker Young dealing with Mr Rees' affairs and Mr Rees himself on 2 May 2013 and between Mr Rowely and Mr Homan on 16 July 2013, it was agreed that Hacker Young would submit amended figures for each of the tax years 5 April 2009 – 5 April 2012 (an enquiry into the tax return for the year ended 5 April 2012 having apparently been opened at some point between 2 May 2013 and 16 July 2013).

18. Mr Homan duly submitted the figures he had agreed to provide and on 15 August 2013, Mr Rowely sent computations of the tax due on the basis of these figures to Mr Rees. Mr Rees agreed these figures in a telephone conversation with Mr Rowely on 26 September 2013.

19. On 3 April 2014, Mr Rowely gave Mr Rees notice of a discovery assessment which he had issued for the tax year ended 5 April 2008. Although the Tribunal has no direct evidence on the point, we infer that the additional tax charged by this assessment was based on the amendments which had been agreed for the tax years ended 5 April 2009 – 5 April 2012.

20. At some point after this, responsibility for the enquiries into Mr Rees' tax affairs were taken over by Ms Cathy Rice at HMRC. On 7 October 2014, she issued closure notices for each of the tax years ended 5 April 2009 – 5 April 2012 in accordance with the figures agreed with Hacker Young and Mr Rees in August/September 2013. We had no explanation for the delay between agreeing the figures in August/September 2013 and issuing the closure notices more than a year later in October 2014 other than the change of personnel at HMRC which, as mentioned above, took place at some point after 3 April 2014.

21. In the papers before us there is reference to correspondence between Mr Rees and HMRC which shows that on 4 November 2014, Mr Rees confirmed in writing to

Ms Rice that he did not dispute the figures agreed with Mr Homan and referred to in the closure notices and that Ms Rice wrote to Mr Rees on 18 November 2014 noting his confirmation of agreement to the amounts chargeable for the tax years ended 5 April 2008 – 5 April 2012. Although we do not have copies of that correspondence in the evidence we have seen, there was no suggestion from Mr Rees that this exchange of correspondence did not take place and so we infer from the material before us that it did.

22. Since 2010, Mr Rees has suffered from a medical condition which flares up from time to time requiring him to take two or three days off work when an attack occurs. These episodes increased in frequency from approximately May 2014 onwards with attacks occurring approximately every couple of weeks after that time.

23. Mr Rees approached Mr McKenna for assistance in February 2015. On Mr McKenna's advice, Mr Rees called HMRC on 15 April 2015 to discuss the possibility of a late appeal and then wrote to HMRC on 22 April 2015 appealing against the discovery assessment and the closure notices.

24. After some further correspondence, Ms Rice informed Mr Rees on 11 June 2015 that she was unable to accept the late appeals as Mr Rees did not have a reasonable excuse for appealing out of time. That decision was confirmed on 8 July 2015 in a more detailed exchange of correspondence between Ms Rice and Mr McKenna.

25. Mr Rees applied to the Tribunal on 10 July 2015 for permission to make his appeals after the relevant time limit.

26. On 10 September 2015, Mrs Glynis Millward, the HMRC officer dealing with the applications that had been made to the Tribunal for leave to appeal out of time, wrote to Mr McKenna drawing his attention to the possibility of alternative dispute resolution ("ADR"). At the same time, Mrs Millward applied to the Tribunal to stay the proceedings on the basis that "the appellant is considering ADR". The Tribunal granted this application.

27. Mr McKenna duly applied on Mr Rees' behalf for the case to be dealt with via ADR. The initial discussions with the ADR team were positive in that there was an indication that the case was suitable for ADR. However, on 13 October 2015, Mr McKenna was notified that ADR was not possible as there was no open appeal given that permission to make a late appeal had been refused.

28. On 5 November 2015, Mrs Millward notified the Tribunal that the case was not considered suitable for ADR and confirmed that the appellant had been notified of this fact.

29. The application was listed for a hearing on 25 February 2016 but this was postponed as Mr Rees was not available. A further hearing date was listed for 19 April 2016.

30. On 11 April 2016, Mr Rees wrote to the Tribunal requesting that the hearing which had been listed for 19 April 2016 be postponed on the basis that Smith & Williamson had been informed by HMRC that the matter would be dealt with by ADR. In support of this, he attached a copy of Mrs Millward's letter of 10 September

2015 referred to above. Mrs Millward did not object to the application to postpone and on 15 April 2016, the Tribunal wrote to the parties to say that:

> "The application made for the hearing on 19 April 2016 to be postponed has been allowed to allow parties time to explore resolving their dispute by ADR."

31. Mrs Millward wrote to the Tribunal on 22 June 2016 to point out that, as there was no open appeal, ADR could not take place and that this could only happen if the appellant's application for permission to make a late appeal is upheld.

32. The application was therefore re-listed for 3 August 2016 although this was postponed as Mr Rees was again unavailable with the result that the hearing only took place on 1 November 2016.

33. Each of the letters from the Tribunal to the parties notifying them of the date for the various hearings started in exactly the same way as follows:

> "The Tribunal refers to the application made by the appellant for permission to make a late appeal. The respondents have objected to this application. The application has therefore been listed for a hearing on …"

Late appeals

34. Mr Rees' right of appeal arises under s 31 TMA. Section 31A TMA provides that notice of an appeal under s 31 must be given within 30 days after the date on which the closure notice or the assessment was issued.

35. In this case, that means that the appeal against the closure notice relating to the tax year ended 5 April 2008 should have been lodged by 3 May 2014 and the appeals against the closure notices relating to all of the other tax years in question should have been given by 6 November 2014.

36. Section 49(2) TMA provides for notice to be given after the relevant time limit if HMRC agree or, if they do not agree, the Tribunal gives permission.

37. HMRC must agree (ss 49(3) – 49(6) TMA) if they are satisfied that there was a reasonable excuse for not giving the notice before the relevant time limit and that the request to appeal late was made without unreasonable delay after the reasonable excuse ceased.

38. The legislation does not give any guidance as to the circumstances in which the Tribunal should give or refuse permission to appeal out of time.

39. However, the law in relation to late appeals is well understood. The function of the Tribunal is to give effect to the overriding objective of dealing with cases fairly and justly. The Tribunal must conduct a balancing exercise taking into account all of the circumstances of the case. This will include the matters listed in Rule 3.9 of the Civil Procedure Rules both in its current form and in the previous form which contained a more detailed list of factors. However, none of the factors is to be given any special weight: *Romasave (Property Services) Limited v HMRC* [2015] UKUT

254; *Data Select Ltd v HMRC* [2012] UKUT 187; *BPP Holdings Ltd v HMRC* [2016] 1 WLR 1915.

40. Mr Hopkins referred the Tribunal to the useful summary by Mr Justice Morgan in *Data Select* at [34] of the questions which the Tribunal should ask itself:

(1) What is the purpose of the time limit?

(2) How long was the delay?

(3) Is there is good explanation for the delay?

(4) What will be the consequences for the parties of an extension of time?

(5) What will be the consequences for the parties of a refusal to extend time?

41. Judge Berner in *Romasave* approved this approach and also referred to helpful guidance from the Court of Appeal in *Denton v T H White Ltd (and related appeals)* [2014] EWCA Civ 906 at [24]:

> "We consider that the guidance given at paras 40 and 41 of Mitchell remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A Judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice, direction or Court Order" which engages Rule 3.9(1). If the breach is neither serious nor significant, the Court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case so as to enable [the Court] to deal justly with the application....".".

42. *BPP Holdings* considered whether the stricter approach to compliance with rules resulting from changes to Rule 3.9 of the Civil Procedure Rules and the subsequent decisions in *Mitchell v News Group Newspapers Limited* [2014] 1 WLR 795 and *Denton* should apply in the First Tier Tribunal and Upper Tribunal. The Senior President of Tribunals (with whom the other judges agreed) was clear that it should. He said at [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 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*".

43. Although that case (and *Mitchell* and *Denton*) dealt with breaches of court/Tribunal rules rather than time limits for an appeal from a decision of HMRC, it is clear from Mr Justice Morgan's comments in *Data Select* (see paragraph [58] below) that similar principles apply when conducting the balancing exercise in relation to an appeal against a decision made by HMRC.

44. It is worth noting that the Senior President of Tribunals in *BPP Holdings* referred with approval to Mr Justice Morgan's application by analogy in *Data Select* of Rule 3.9 of the Civil Procedure Rules. The Tribunal must therefore, in considering the overriding objective of dealing with cases fairly and justly, take into account the requirement for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.

Has the Tribunal already given permission to appeal out of time?

45. Mr Rees and Mr McKenna argued that the effect of the Tribunal's letter of 15 April 2016 cancelling the hearing which had been listed for 19 April 2016 "to allow [the] parties time to explore resolving their dispute by ADR" effectively amounted to a decision by the Tribunal to allow the late notification of the appeals. This was on the basis that any Tribunal judge must have been aware that ADR could only be considered if there was an open appeal and so it would be impossible to explore ADR unless permission to appeal out of time had been granted.

46. Mr Hopkins accepted that HMRC's reference to ADR in September 2015 had been a mistake. However, this had soon been remedied and it had been made clear at the end of October/beginning of November 2015 both to the Tribunal and to Mr McKenna/Mr Rees that ADR was not possible unless and until Mr Rees' application for permission to make a late appeal had been granted by the Tribunal.

47. Mr Hopkins submitted that the letter from the Tribunal dated 15 April 2016 could not be construed as a direction granting the application to make the late appeals. Instead, he said, the letter was simply a reflection of the Tribunal's understanding of rule 3 of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 which requires the Tribunal (where appropriate) to bring the possibility of ADR to the attention of the parties and to facilitate the use of ADR.

48. It is clear to us that the Tribunal's letter of 15 April 2016 could not on any basis be interpreted as a decision to allow Mr Rees' application to make his appeals late. The letter was in response to Mr Rees' email of 11 April requesting that the hearing be postponed on the basis that Smith & Williamson had been informed by HMRC that the matter would be dealt with by way of ADR.

49. Mrs Millward did not object to Mr Rees' application to postpone.

50. As the Tribunal had, in effect, been told by both parties that ADR was being considered, it agreed, in accordance with rule 3 of the Tribunal rules, to postpone the hearing. We accept that, had proper thought been given to the matter by the Tribunal, it might have realised that ADR was out of the question until the matter of the late appeal had been decided. However, in a routine request such as this where no objection was received, it is not in our view surprising that the Tribunal simply agreed to the request.

51. There is no suggestion in the letter of 15 April 2016 that it was implicitly granting permission to appeal out of time and it is inconceivable that the Tribunal intended to do so without using clear words.

52. It is also apparent from the subsequent letters sent by the Tribunal to the parties on 22 June 2016 and on 12 August 2016 re-listing the hearing of the application that it had not intended to make a decision on the application in April 2016. Those letters both state very clearly that the hearing is to determine the appellant's application for permission to make a late appeal.

53. There is therefore in our view absolutely no merit in the suggestion put forward by Mr Rees/Mr McKenna that the Tribunal has already granted permission for the appeal to be made out of time.

54. We therefore go on to consider whether such permission should now be granted.

The balancing exercise

The purpose of the time limits

55. Mr Rees/Mr McKenna made no submission on this point but Mr Hopkins referred us to the Tribunal's decision in *Olusegun Odunlami v HMRC* [2015] UKFTT 668. As with this case, the application was for permission to make a late appeal against closure notices and discovery assessments. In relation to the 30 day time limit, the Tribunal said [at 41-42]:

> "41. 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).
>
> 42. 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."

56. Mr Hopkins built on the comments in paragraph 42 of *Odunlami* by suggesting that it would be unfair to those taxpayers who abide by the time limits if permission to appeal out of time is granted routinely.

57. The fact that permission to appeal out of time should only be given sparingly was emphasised by the Upper Tribunal in *Romasave* which said [at 96] that:

> "Permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely."

58. The need for finality was stressed by Mr Justice Morgan in *Data Select* at [37]:

> "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 reopening 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."

59. It is clear therefore that, in the case of late appeals, there is a real purpose in having a time limit and this is therefore a factor against allowing Mr Rees' application.

How long was the delay

60. As mentioned above, the appeal against the closure notice for the tax year ended 5 April 2008 should have been lodged by 3 May 2014. Mr Rees made his appeal on 22 April 2015 and so the delay in this case was almost a year.

61. As far as the closure notices are concerned, the appeal should have been notified by 5 November 2014 with the appeal again being made on 22 April 2015, giving a delay of 5½ months.

62. When looking at the length of the delay, what we are really considering (in the words of the Court of Appeal in *Denton*) is the seriousness and significance of the failure to comply.

63. Judge Berner in *Romasave* said at [96] that:

> "In the context of an appeal right which must be exercised within thirty 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. We note, although judgement was given only after we heard this appeal, that in *Secretary of State for the Home Department v SS (Congo) and*

> *others* [2015] EWCA Civ 387 the Court of Appeal, at [105], has similarly described exceeding a time limit of twenty eight days for applying to that Court for permission to appeal by twenty four days as significant, and a delay of more than three months as serious."

64. Taking these comments into account, we would therefore describe the delay in this case as both significant and serious.

65. This conclusion is reinforced by the fact that, although the closure notices and the discovery assessment were not issued until 2014, Mr Rees was in August 2013 aware of (and had agreed) the profits which would be assessed and the tax which would, as a result, be due. He therefore in effect had over 6 months before the discovery assessment was issued and more than a year before the closure notices were issued to take action if he was unhappy with the result which had been reached. We are not suggesting that this period should be taken into account as part of the delay between the issue of the discovery assessment/closure notices and the late appeal to HMRC but it should be seen as background when considering the next aspect of the balancing exercise which is the reason for the delay.

Is there a good explanation for the delay

66. Mr Rees and Mr McKenna put forward a number of reasons for the delay in appealing against the discovery assessment and the closure notices. These are set out below.

67. Mr Rees contacted his previous advisers, Hacker Young after he received the closure notices in November 2014 who advised him that he should accept the figures. He did not therefore believe at that stage that there was any reason to make an appeal. It was only when he sought further advice from Mr McKenna in February 2015 that he was made aware that Hacker Young's advice may not be correct and that he should in fact appeal against the assessment and the closure notices.

68. The reason for the delay between the first discussions with Mr McKenna and the actual appeal in April 2015 was that both Mr McKenna and Mr Rees were travelling a fair amount during the eight week period in question and had found it difficult to get together to discuss the case.

69. Mr Rees told us that he had been very busy running his legal technology and consulting business, with two large contracts having been signed just before the closure notices were issued in October 2014 and another contract with a large financial institution being discussed and which commenced in January 2015. His work involved a fair amount of travelling although, in the relevant period, it appears that these were mainly relatively short trips to Europe with the possible exception of one trip to the US in January 2015.

70. Mr Rees also gave evidence that he had little work between January 2014 and September 2014 and was relying on savings and family payments of living expenses to continue with the development of Altea Consulting during this period. Mr Rees suggested that, as a result of this financial pressure, he was unable to afford to take proper advice about his position. He was therefore trying to understand how to

defend himself against HMRC's arguments without any real professional support or advice on the matter.

71. At the same time, Mr Rees explained that he was struggling to cope with his medical condition which hindered his ability both to deal with his business activities as well as his tax situation.

72. It was only in April 2015 when two of Mr Rees' larger contracts came to an end that he had time to consider his tax position properly. It was at this time that he notified his appeal to HMRC and formally instructed Mr McKenna to give an opinion on his position.

73. Mr Hopkins argued that, although Mr Rees may have given an explanation for the delay in notifying the appeals, the explanations given did not amount to good reasons for the delay. He made the point that the closure notices contained clear information about Mr Rees' statutory rights including the time limit for appealing as well as a link to information on HMRC's website with further information.

74. As far as Mr Rees' financial situation is concerned, Mr Hopkins suggested that HMRC had no record of any contact with Mr Rees about his financial situation. This is however clearly a mistake as the evidence before us shows that there had been significant discussion about Mr Rees' financial situation and that, between 2009 – 2012, he was in fact subject to a time to pay arrangement in respect of tax liabilities from previous tax years.

75. In the context of this limb of our enquiry, Mr Hopkins submitted that we should draw an analogy with the question as to whether the reasons given by Mr Rees for the delay amount to a reasonable excuse. He encouraged us to consider those reasons from the perspective of a prudent person exercising reasonable foresight and due diligence and having proper regard to their responsibilities under the legislation in question. On this basis, he would have expected a reasonable taxpayer who knew the time limits to appeal within 30 days or at least to contact HMRC within the relevant time limit – which Mr Rees did not.

76. As far as Mr Rees' medical condition is concerned, Mr Hopkins made the point that Mr Rees had admitted in his response to HMRC's outline of the arguments it intended to put forward that, when the closure notices were issued in October 2014, he was "fully engaged" in providing services to his clients. It would not therefore be unreasonable he said to think that Mr Rees could have addressed his tax affairs despite his illness. Instead, he suggested that Mr Rees had made a conscious decision to defer dealing with his tax affairs and that this was not something influenced by unforeseen or uncontrollable circumstances. There were in his view no circumstances or events which prevented Mr Rees from making his appeals sooner than he did.

77. Stepping back from the detail, our very clear impression from the evidence before us is that, on the basis of the advice he had received from Hacker Young, Mr Rees had accepted that the figures in the discovery assessment and the closure notices were correct and that there was therefore no point appealing against them. He certainly indicated his agreement on more than one occasion in August/September 2013 and he told us he spoke to Hacker Young again in November 2014, shortly after

the closure notices were issued. He then confirmed to HMRC that he did not dispute the figures.

78. It was only when he sought advice from Mr McKenna at Smith & Williamson in February/April 2015 that he was given different advice and at that stage decided that he should make an appeal.

79. It seems to us that this is exactly the sort of situation that the time limit is intended to prevent from occurring. It cannot be right that a taxpayer who initially accepts an assessment and does not therefore appeal can take further advice months later and then try to lodge an appeal based on the new advice he has received. That would give rise to precisely the sort of difficulties identified by the Tribunal in paragraph 42 of *Odunlami* referred to above.

80. One of the reasons given for failing to take advice at an earlier stage is that Mr Rees was in financial difficulties and could not afford to pay for that advice. This is a point which was addressed by Moore-Bick V-P in the Court of Appeal in *R (on the application of Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633. That was a case dealing with a late notice of appeal although admittedly in a completely different context. However, it is difficult to see why the following comments [at 43] should not have general application:

> "Mr Benisi sought to explain part of the delay that had occurred in his case by asserting that he did not have sufficient funds at his disposal to enable him to instruct solicitors to file a notice of appeal at the right time. In my view shortage of funds does not provide a good reason for delay. I can well understand that litigants would prefer to be legally represented and that some may be deterred by the prospect of having to act on their own behalf. Nonetheless, in the modern world the inability to pay for legal representation cannot be regarded as providing a good reason for delay. Unfortunately, many litigants are now forced to act on their own behalf and the rules apply to them as well."

81. The other reasons given by Mr Rees for his failure to take action any earlier relate to his illness and his preoccupation with his business. As far as the illness is concerned, it is clear (as pointed out by Mr Hopkins) that Mr Rees made a conscious decision to devote his time and energy to his business rather than considering whether to appeal against the discovery assessment and the closure notices. It clearly did not on its own prevent him from devoting time to his tax affairs.

82. We think it would be very unusual for the pressures of work to provide a good explanation for a failure to adhere to a clear time limit, still less to provide a reason why the time limit should be exceeded by months rather than days or weeks. There is no suggestion that Mr Rees was struggling with potential insolvency of his business. Indeed, it is clear from the tax assessments that his income from his activities was quite substantial. As we understand it, Mr Rees does not contest the amount of the income but rather how it should be split between his legal and consulting activities and what expenses can be set against it.

83. Our conclusion therefore is that, whilst there are reasons for the delay, these do not constitute a "good explanation" in the sense intended by Mr Justice Morgan in *Data Select*. This therefore weighs in the balance against granting permission to appeal out of time.

What will be the consequences for the parties of either granting or refusing permission to appeal out of time

84. Mr Hopkins argued that there would be significant prejudice to HMRC if we give Mr Rees permission to make his appeals out of time. The matter will need to be referred back to the HMRC decision maker who will need to reopen the files and consider the further points which will be put forward by Mr Rees/Mr McKenna in support of his appeal. There may need to be an ADR process if no agreement can be reached and/or a further appeal to the Tribunal, all of which will involve time and expense on the part of HMRC.

85. Mr Hopkins did not however suggest that there would be any prejudice to HMRC in the sense that, as a result of the delay, there would be any difficulty in obtaining information or otherwise dealing with any points which might be raised by Mr Rees as part of his appeal.

86. Mr Rees/Mr McKenna did not make any specific submissions as to the consequences for Mr Rees of the Tribunal granting or refusing permission to appeal out of time. However, it is self-evident that, if we refuse permission to make the late appeals, Mr Rees will have to pay a very significant amount of tax (approximately £235,000 plus interest) and will not have the opportunity to argue that his tax liability should be lower than this or indeed that he has no further tax liability over and above what was reported on his tax returns.

87. We heard no argument on the merits of Mr Rees' case. Indeed, as we understand it, Mr Rees has not put forward any specific reasons why the assessments are incorrect other than to say that his case will focus on the tax treatment of licensing of intellectual property rights, his status as a partner of the law firms he worked with, the nature of the services he provided and the possibility of reopening the partnership accounts of the law firms with which he was working.

88. There have been different decisions in the First-Tier Tax Tribunal as to whether the merits of an appeal should be taken into account as part of the balancing exercise. However, in *Hysaj*, More-Bick V-P said [at 46-47] that:

> "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."

89. Although *Hysaj* was not dealing with a tax appeal, we can see no reason why the approach taken by the Court of Appeal should not be followed in the First-Tier Tax Tribunal. It would clearly not be sensible for an application for leave to appeal out of time to become a mini-hearing of the substantive appeal.

90. It is not apparent in this case that the prospects of any appeal succeeding are very strong or very weak and we have therefore not taken into account the merits of any appeal.

91. Looking at this part of the balancing exercise therefore, it is clear that there would be a very significant prejudice to Mr Rees if we refuse permission to appeal out of time given the amount of tax he will have to pay. There will be some prejudice to HMRC in terms of time and money spent defending any appeal. Overall, this factor would weigh in favour of granting permission to appeal out of time.

Our decision

92. We have considered very carefully all of the factors which need to be weighed up in coming to a decision in accordance with the overriding objective of dealing with cases fairly and justly.

93. Mr McKenna argued that HMRC should be trying to get the tax right rather than objecting to an appeal just because it has been made late. He urged the Tribunal to facilitate a resolution of any disagreement as to the amount of tax payable, including the use of ADR which, he says, was not addressed correctly at the time of the original enquiry. This would in his view be the only way of satisfying the overriding objective.

94. Whilst we agree that this is one factor which we must take into account, we do however also have to take into account the other factors we have considered, all of which point away from granting Mr Rees' application.

95. There is a clear purpose to the time limit for making appeals against HMRC's decisions. It is not in the interests of fairness and justice (in its widest sense and not just looking at the position of one particular taxpayer) to allow appeals to be made outside the statutory time limit unless there is some good reason for doing so.

96. The delay in this case was a number of months rather than days or weeks. It was a serious and significant delay.

97. We agree with HMRC that there was no good reason for the delay. The reality is that, on the basis of advice from Hacker Young, Mr Rees initially agreed with HMRC's calculations and with the assessment and closure notices. He subsequently sought further advice and changed his mind. It would in our view be extremely undesirable if this were a good reason for allowing a taxpayer to make a late appeal. The time for putting forward technical or other arguments is during the course of the enquiry and not after HMRC have made their decision. Accepting that this amounted to a good reason for allowing a late appeal would strike at the very heart of the purpose of having a time limit for making an appeal in the first place.

98. As described above, even if the main reason for the appeal being late was not as a result of a change of mind, we do not accept that the other reasons put forward by Mr Rees (his illness and the requirement to devote time to his business) are, in this case, good reasons for a delay of several months.

99. Whilst we have sympathy for Mr Rees' position, our conclusion therefore is that, having weighed up all of the factors, the interests of fairness and justice would not be served by allowing Mr Rees to notify his appeals out of time. Mr Rees' application is therefore refused.

100. 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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 24 NOVEMBER 2016