



TC05487

Appeal number: TC/2016/02171

*PROCEDURE – income tax assessments and penalty assessments –
application for admission of late appeal – Data Select and BPP criteria*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GIRISH KANTILAL PATEL

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOHN CLARK

**Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 17
October 2016**

The Appellant in person

**David Linneker, Officer, HM Revenue and Customs Appeals and Reviews, for
the Respondents**

DECISION

1. The Appellant, Mr Patel, applies for permission to make or notify a late appeal. I considered his application at the hearing and announced to the parties that I refused his application.

Background to the application

2. I set out the description of the factual background as explained in the Skeleton Argument provided by Mr Linneker on behalf of the Respondents (“HMRC”). Mr Patel did not challenge that description, and I have therefore taken it to be an accurate description, in particular because it is in accordance with the documentation contained in the hearing bundle.

3. Mr Patel seeks to appeal against decisions made by HMRC to bring into charge additional income tax and to impose penalties for the nine years ended 5 April 2004 to 5 April 2012 inclusive. Following the conclusion of a review, HMRC’s decision in respect of the year 2009-10 was upheld and all the other decisions were varied. The total of the revised additional income tax was £98,521.38 and the total revised penalties amounted to £55,383.71.

4. In the relevant periods Mr Patel ran a “mini market” in Brixton trading as Kirshen News. This operated as a grocers and off-licence and also sold confectionery, tobacco and newspapers. He had purchased the business in March 2003 and commenced trading in April 2003.

5. On 7 December 2010 HMRC opened an enquiry under s 9A of the Taxes Management Act 1970 (“TMA 1970”) into Mr Patel’s tax return for the year 2009-10.

6. HMRC’s analysis of the business records showed no clear record of sales and Mr Patel was unable to explain how returned figures had been reached from the records provided. The records also showed unusual gaps in purchase records maintained.

7. At a meeting on 23 June 2011, Mr Patel confirmed that he had always run his shop and kept his business records in the same way.

8. HMRC also established that Mr Patel purchased a house in October 2010 for £220,000 with a mortgage of £175,000 and a deposit of £45,000, a deposit which HMRC considered that Mr Patel could not have funded from known savings in his private accounts and for which Mr Patel had been unable to corroborate the source.

9. A visit by HMRC to the shop on 22 February 2013 also confirmed poor cash control procedures.

10. Having been provided with authority from Mr Patel, HMRC sought information from a number of HMRC’s suppliers, but received information from only one. From the information obtained it was established that the purchase records were incomplete.

The purchases from that supplier reported in the records amounted to only one third of the purchases reported by that supplier. The total unrecorded purchases from that supplier alone amounted to approximately £21,000.

11. On 27 November 2013, and in the absence of co-operation from Mr Patel, HMRC set out the basis for making adjustment to Mr Patel's reported income from his business by applying the reported mark-up rate to a revised cost of goods sold figure three times that reported on the basis of omissions in respect of that supplier and applied the adjusted net profit to the other years based on a Retail Prices Index adjustment.

12. On 9 December 2013 HMRC closed the enquiry and amended Mr Patel's tax return for the year 2009-10 in accordance with s 28A TMA 1970. On the same day, HMRC issued assessments in respect of all other years ended 5 April 2004 to 5 April 2012 in accordance with s 29 TMA 1970.

13. On 20 December 2013 HMRC issued a penalty determination under s 95 TMA 1970 in respect of the years ended 5 April 2004 to 2008 and penalty assessments under Sch 24 Finance Act 2007 in respect of the years ended 5 April 2009 to 5 April 2012.

14. On 23 January 2014, Mr Patel appealed against HMRC's decisions. Despite further discussions and correspondence between Mr Patel's daughter as his representative and HMRC, agreement on the matter could not be reached. On 24 October 2014, HMRC offered Mr Patel a review of the decisions. On 6 November 2014 Mr Patel wrote to accept that offer.

15. On 12 January 2015, HMRC wrote to Mr Patel setting out the results of their review. The review officer upheld HMRC's decision in respect of 2009-10, and varied all the other decisions by applying the reported mark up rate to the same percentage of suppressed purchases for the years ended 5 April 2006, 2007, 2008, 2009, 2011. In the absence of reliable purchase information for the years ended 5 April 2004, 2005 and 2012, a Retail Prices Index adjustment was applied.

16. On the same date, 12 January 2015, Alternative Dispute Resolution ("ADR") was offered to and taken up by Mr Patel. A meeting was held on 12 May 2015. The conclusion of that meeting was that Mr Patel would provide HMRC with a statement of his assets and liabilities and current expenditure, and seek to raise the necessary funds to settle the liability. A timetable for that action was set and confirmed in a letter from HMRC to Mr Patel dated 12 May 2015. One of the terms agreed was that Mr Patel would go to see his accountant by 19 May 2015 for further help with his tax affairs and assistance with a loan application.

17. HMRC heard nothing further from Mr Patel. As a result, this brought to an end the ADR process. In the absence of an appeal to the Tribunal HMRC concluded matters by treating the conclusions of the review as if they were an agreement in writing under s 54(1) TMA 1970 for the settlement of the matter in question in

accordance with s 49F(2) TMA 1970. HMRC wrote to Mr Patel on 23 July 2015 to notify him of this.

18. On 10 March 2016 HMRC wrote to Mr Patel to give him warning of bankruptcy action. A Statutory Demand dated 30 March 2016 was personally served on Mr Patel
5 on 25 April 2016 at his business premises detailing the particulars of the debt. The agency appointed by HMRC for this purpose was BTC Associates Limited.

19. On 15 April 2016 Mr Patel submitted a Notice of Appeal to the Tribunal, which included an application to make or notify a late appeal.

20. On 20 June 2016 HMRC notified to Mr Patel and the Tribunal their objection to
10 Mr Patel's application to make a late appeal.

Points put by Mr Patel

21. The start of the hearing had been delayed by over half an hour to establish whether Mr Patel's accountants Doshi and Company, whose name appeared on the Notice of Appeal as his representative, would be representing him at the hearing.
15 Shortly after the parties came into the hearing room, Mr Patel's mobile phone rang and I permitted him to answer the call.

22. After the end of the call, he informed me that the accountants would only be able to represent him if he first deposited £3,000 with them to cover their fees. They had also informed him that they would not be able to attend the hearing on that day,
20 and that an adjournment would have to be requested.

23. My decision on what I took to be an application for adjournment was to refuse it. The parties had been notified of the hearing on 17 September 2016, which had given adequate time for any representation to be arranged.

24. Mr Patel then explained that while the relevant events had been happening, he
25 had been in prison. I asked him what evidence he could provide as to the dates of his prison term. His response was that he was not sure. He accepted that he had no evidence to present on this subject.

25. He emphasised that he would need to pay £3,000 to his accountants in order for
30 him to be represented. He would have to make such payment by credit card. He was not making money at present. His income was not enough to be taxable.

26. Currently he had substantial debts, already at £315,000, and was having to take out a bank loan now.

27. He confirmed that he was relying on the points set out in his Notice of Appeal.

28. Those points, in relation to the reasons for the late appeal, were the following:

35 “Mr Patel has not been professionally represented since October 2013.
 He has not been keeping well and he has also been to Prison. Her [sic]

daughter who has no academic qualifications in Accounts or Tax has made appeals for him. Mr Patel now finds himself facing Bankruptcy as HMMRC are demanding as a combination of both Income Tax, Penalties and Interest a sum of £185,416.04.

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We refer to Rule 2 of the Tribunal Procedure rules 2009

The overriding objective of these rules is to enable the Tribunal to deal with cases fairly and justly

(2) Dealing with a case fairly and justly includes (a) dealing with the case in ways which are proportionate to the importance of the case

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Mr Patel nor his daughter [*sic*] fully understood the consequences of not appealing to the Tax Tribunal or to be Professionally represented; ie They made no real presentations to HMRC to argue that there really is no possibility of them having made such profits. One has only to visit the business premises.”

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Arguments for HMRC

29. Mr Linneker referred to s 49G(2) TMA 1970, which provides that

“... the appellant may notify the appeal to the tribunal within the post-review period”.

30. The latter was defined by s 49G(5)(a) as

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“... the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review . . .”

31. As HMRC had concluded the statutory review of the decisions on 12 January 2015, the time limit for Mr Patel to submit an appeal to the Tribunal was therefore 11 February 2015.

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32. Mr Patel’s Notice of Appeal was dated 15 April 2016, more than 14 months after expiry of the time limit for making or notifying it to the Tribunal. This was therefore significantly out of time, despite the clear advice provided in HMRC’s review conclusion letter setting out what he should do if he disagreed with HMRC’s decision.

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33. Mr Linneker referred to Rule 5(3)(a) of the Tribunal Rules, and also to rule 20(4). The Tribunal could exercise its discretion as to whether to admit a late appeal.

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34. He referred to the general criteria relevant to the exercise of that discretion. The general approach in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 had been endorsed by Morgan J in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC), [2012] STC 2195.

35. The criteria from *Aberdeen City* were:

(1) Whether there was a reasonable excuse for failing to observe the time limit.

(2) Whether matters had proceeded with reasonable diligence once the excuse had ceased.

(3) Whether there was prejudice to one or the other party if the appeal proceeded or was refused.

5 36. The key questions posed by Morgan J in *Data Select* at [34] in considering the discretion of the First-tier Tribunal to admit late appeals were summarised as:

(1) What was the purpose of the time limit in issue?

(2) How long was the delay?

(3) Was there a good explanation for the delay?

10 (4) What would be the consequences to each party in granting or refusing an extension?

37. Mr Linneker set out HMRC's case for refusing Mr Patel's application. First, on the question of the length of the delay, Mr Patel's Notice of Appeal was significantly out of time, being given more than 14 months after the expiry of the time limit for doing so.
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38. He referred to the decision of the Upper Tribunal in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC). In that case Judge Sinfield had refused HMRC permission to extend time for the filing of a Notice of Appeal to the Upper Tribunal, which had been filed 56 days late. That decision had clearly placed an emphasis on timely compliance with rules.
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39. He also referred to *Romasave Property Services v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC) at [96], where the Upper Tribunal had referred to a delay of more than three months as "serious and significant".

40. On the criterion of length of the delay, HMRC submitted that given the significant delay in the present case, the Tribunal should also refuse Mr Patel permission to extend time for filing his Notice of Appeal, which had been filed more than 400 days late.
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41. On the question of the purpose of the time limit, Mr Linneker submitted that this was to provide finality in relation to a decision. HMRC were entitled to finality. Given the amount in dispute in the proposed appeal, and given the length of time that had elapsed since the decision in the review conclusion letter, HMRC submitted that Mr Patel should have acted promptly with all due diligence. Because he had not done so, HMRC were entitled to infer an acceptance of the finality of the review decision.
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42. This submission was supported by the comments of Morgan J in *Data Select* at [37]. Mr Linneker also referred to *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 0350 (TCC) at [24], in which Judge Bishopp had stated the aim of the relevant rule setting out the time limit.
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43. In HMRC's submission, they were entitled to finality in relation to the review decision.

44. As to the explanation for the delay, HMRC submitted that there had been no reasonable excuse for the late appeal. HMRC took the reasons set out in Mr Patel's Notice of Appeal, although unclear, as being advanced as reasonable excuses for the appeal being submitted outside the time limit. In HMRC's submission, these reasons
5 did not amount to reasonable excuses.

45. The absence of professional representation since October 2013 did not constitute a reasonable excuse for failing to observe the time limit. Mr Linneker referred to a note of a meeting on 23 June 2011 at which Mr Patel had advised HMRC that he had instructed his accountant not to attend, on the grounds of cost; Mr Patel
10 had stated that he was happy to proceed in his accountant's absence, that HMRC should write to him direct, and that he would pass any correspondence on if he needed assistance.

46. At a meeting on 22 February 2013, and in a letter dated 17 October 2013, HMRC had highlighted the seriousness of the matter and encouraged Mr Patel to
15 reconsider his decision not to involve his representative.

47. Also, at the meeting on 12 May 2015, Mr Patel had agreed to see his accountant for further help with his tax affairs, as confirmed in HMRC's letter dated 12 May 2015.

48. Thus it had been by choice that Mr Patel had decided to deal with matters
20 himself and by choice that he felt confident to do so, only requiring assistance if he needed it. In HMRC's submission, Mr Patel's own decision not to appoint professional representation did not amount to a reasonable excuse for not submitting an appeal on time. Since HMRC had not heard anything further from him and had not received any of the information requested, it had been reasonable for HMRC to
25 conclude Mr Patel's acceptance of the decision in the review letter.

49. Mr Patel had been made well aware of the consequences of not making an appeal to the Tribunal. The details had been set out in the review letter. Further, in the letter to him from HMRC dated 23 July 2015, HMRC had confirmed that in the absence of an appeal to the Tribunal:

30 “. . . your appeals are now treated as settled under Section 54(1) Taxes Management Act 1970 . . . I will now take action to collect the tax and penalties due as outlined in Mr Musgrove's letter.

In the same letter HMRC had stated to him:

35 “If you are not content with this you can ask the Tribunal to accept a late appeal against my decision.”

50. Thus, even when having been invited to make a late appeal to the Tribunal in July 2015, Mr Patel had taken no action to do so. In the absence of any such action by him, HMRC submitted that it was reasonable for them to conclude that he accepted their varied decision; his only difficulty appeared to be the question of his ability to
40 pay.

51. In HMRC's submission, Mr Patel's grounds that he was not aware of the consequences of not submitting a late notice of appeal should not be accepted as a reasonable excuse for making the appeal so late.

52. HMRC were aware that Mr Patel had been to prison, because under cover of an undated letter received on 23 January 2014 they received a signed Letter of Authority from Mr Patel giving authority for Miss Shandya Patel to act on his behalf while he served a 14 month prison sentence. HMRC understood that this was for stealing money.

53. The timing of that letter suggested that Mr Patel would have served his sentence at the latest by March 2015. HMRC noted that Mr Patel telephoned the HMRC enquiry officer on 30 October 2014, as shown by the officer's contemporaneous note, to request a review of the decisions and followed this up with a letter dated 6 November 2014. In HMRC's submission, this all suggested that Mr Patel had not only put in place arrangements for Miss Patel to deal with his affairs in his absence, but also that at the point when the review letter was issued on 12 January 2015, Mr Patel was also in a position to deal with this himself. On this basis, he would have had no reasonable excuse for not submitting an appeal to the Tribunal within the permitted time limit as a result of his term in prison.

54. Mr Patel had stated in his grounds that he was not keeping well. This appeared to be a rather vague reference to his general health; he had made HRMC aware of this throughout the enquiry into his tax affairs. In HMRC's submission, there was no evidence of the existence of a reasonable excuse for notifying the appeal late, or for the inordinate delay in notifying the appeal, on the grounds of ill health.

55. Even if ill health had been an ongoing issue, a responsible taxpayer would have sought professional assistance to keep him compliant with important dates such as time limits; it was clear from the steps which he had taken to give authority to Miss Patel that he was aware of the need to appoint representatives to deal with such matters should he not be able to do so.

56. If Mr Patel was using ill health as an excuse for not meeting the time limit to submit an appeal, HMRC contended that he should show with evidence that ill health had prevented him from making an appeal to the Tribunal in the period from 11 February 2015 to 15 April 2016. He had not produced any such evidence.

57. On the question of the need for qualifications as referred to in Mr Patel's reasons for the late appeal, it was not necessary either for him or his daughter to have qualifications in accounts or tax for him to have made appeals on time. In HMRC's submission, notification of an appeal was not an onerous task. The completion and lodgement of the Notice of Appeal did not require arduous mental application but the presence of mind and due regard to the purpose of time limits.

58. Mr Patel had had the presence of mind to appoint Miss Patel to deal with his affairs while he was in prison, and she had made a written appeal against HMRC's

written decisions in January 2014. This indicated that both of them were well aware of the importance of appeal time limits.

59. The absence of any qualifications in accounts or tax should not be taken as a reasonable excuse for not having made an appeal within the time limit.

5 60. On the question of bankruptcy, HMRC contended that it was no coincidence that the timing of the Notice of Appeal to the Tribunal appeared to be a consequence of the debt management actions which HMRC had taken. The very, very late appeal could only have been for the purpose of delaying bankruptcy action. Mr Linneker suggested that this amounted to an abuse of process.

10 61. The fact that Mr Patel now found himself facing bankruptcy was not a reasonable excuse for not having submitted an appeal on time, but a consequence of him not having paid his debts.

15 62. On the issue of prejudice to them, HMRC agreed with Mr Patel that the overriding objective as contained in Rule 2 of the Tribunal Rules was to enable the Tribunal “to deal with cases fairly and justly”. This also included the words “in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties.”

20 63. In *Data Select* at [34], Morgan J had raised the question of the consequences to the parties of either granting an extension of time or refusing such an extension. In Mr Patel’s case, HMRC were very conscious that if Mr Patel’s application were to be refused, the result would be that his debt to HMRC would be recoverable.

25 64. If, however, his application were to be granted, HMRC would suffer prejudice. They would have to write a Statement of Case in relation to the many years of assessment and penalties. They would also have to spend time complying with Tribunal directions and preparing a skeleton argument, and attending a hearing. This would all involve further time and costs.

30 65. Mr Linneker referred to the judgment of the Court of Appeal in *R (oao Hysaj) v Secretary of State for the Home Department* [2014] EWCA (Civ) 1633 at [46], in which caution was expressed as to considering the merits of the substantive appeal when hearing an applications for extension of time. Moore-Bick LJ continued:

35 “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 which have to be considered at stage three of the process.”

66. Mr Linneker submitted that the prospects of Mr Patel’s case were very weak, and set out detailed arguments in support of that submission. HMRC contended that even if the Tribunal were to allow Mr Patel’s application for the admission of a late appeal, there was no reasonable prospect of the appeal succeeding.

67. HMRC submitted that the wider interests of public justice as regards the use of time and resources by HMRC and the courts outweighed any prejudice to Mr Patel in refusing his application.

5 68. Mr Linneker referred to *Revenue and Customs Commissioners v BPP Holdings Ltd and others* [2016] 3 All ER 245, [2016] STC 841, CA at [37]-[38]. This required that all circumstances should be considered, but placed more weight on the need for compliance with rules and procedure.

10 69. HMRC asked that the application for permission to make or notify the appeal out of time should be refused and that consequently there would be no requirement on HMRC to submit a Statement of Case in response to the grounds of appeal.

Consideration and conclusions

15 70. Mr Linneker relied on the approach set out by Morgan J in *Data Select* at [34]. Morgan J then made reference at [35] to the checklist of matters set out in CPR (Civil Procedure Rules) r 3.9. It needs to be kept in mind that the version of r 3.9 which he was considering differs from that now in force. A comparison between the two versions is set out in the decision of Judge Sinfield in *McCarthy & Stone* at [27]-[28].

20 71. In the latter decision, Judge Sinfield referred to the decisions of the Court of Appeal in *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Durrant v Avon & Somerset Constabulary* [2013] EWCA Civ 1624. At [47] he said:

25 “[47] As the Court of Appeal recognised in *Mitchell* at [49], regard must still be had to all the circumstances of the case but the other circumstances should be given less weight than the two considerations which are specifically mentioned. In this case, applying the principles of the new CPR 3.9, as explained in *Mitchell* and *Durrant*, means that, in considering whether to grant relief from a sanction, I should take account of all the circumstances, including those listed in the old CPR 3.9, but I should give greater weight to the need for litigation to be conducted efficiently and the need to enforce compliance with the UT Rules, directions and orders.”

30 72. At [48] he stated:

35 “[48] Accordingly, in considering HMRC’s application to be allowed to serve a notice of appeal after the time limit for doing so has passed, I have treated the need for appeals to be conducted efficiently and the need to enforce compliance with the UT Rules as important issues which carry greater weight than the other issues in the case. I turn to consider those issues next. As discussed below, I have also had regard to the different matters listed in the old CPR 3.9 but I have given them less weight in making my decision. They are discussed in more detail below.”

40 73. In *BPP*, the Court of Appeal compared the approaches taken by, respectively, Judge Sinfield in *McCarthy & Stone* and Judge Bishopp in *Leeds City Council*. Ryder

LJ made clear at [16] that the stricter approach as taken in *McCarthy & Stone* was the right approach. He concluded at [32]-[33] that Judge Mosedale had not made an error of law in according the efficient conduct of litigation at a proportionate cost and compliance with rules, practice directions and orders significant weight as part of her consideration of the overriding objective.

74. At an earlier point in *BPP*, Ryder LJ referred at [16] to the question whether the stricter approach to compliance with rules and directions made under the CPR as set out in *Mitchell* and in *Denton v TH White Ltd* 2014 1WLR 3926 applied to cases in the tax tribunals. His firm view was that the stricter approach was the right approach.

75. As a result, the three stages referred to by the Court of Appeal in *Denton* at [24] for consideration of an application for relief from sanctions are relevant to tax appeals:

“[24] . . . 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 including [factors (a) and (b)]".

76. In *BPP* at [44] Ryder LJ indicated that *BPP* was not an appropriate case in which to analyse the decision in *Data Select*, in which the question had been the principle to be applied to an application to extend time where there had been no history of non-compliance.

77. In the light of the views expressed by the Court of Appeal in *BPP* and by Judge Sinfield in *McCarthy & Stone*, I take it to be the correct approach, in considering an application to appeal out of time, to follow the same course as Judge Sinfield in his decision at [48] (see above).

78. As a result of an application in a different case which I heard on the day after this hearing, I am aware of another First-tier Tribunal decision on this question, *Mr Nirmal Singh Sunner v Revenue and Customs Commissioners* [2016] UKFTT 511 (TC), TC05261, in which Judge Kempster took the view that he should first apply the approach taken by Morgan J in *Data Select*, and then the three stages directed by *BPP*. It appears to be a question of interpretation of the authorities binding on these Tribunals whether these tests should be applied separately or in some form of combination. That question is perhaps best answered by considering the various factors in the context of the facts of Mr Patel’s case.

79. The first question is the purpose of the time limit in issue. I agree with Judge Kempster’s conclusion in *Sunner* at [34] that the statutory time limit for notification of an appeal is important for the orderly administration of the tax system. He explained the reasons for that conclusion:

assist him. She was able to deal with making an appeal to HMRC. If he was unavailable for this reason at the time of the review letter (a point on which there is some doubt, for the reasons mentioned by Mr Linneker) it should have been possible for her to act on his behalf in taking the administrative step of completing and submitting the Notice of Appeal form.

85. On the question of Mr Patel's health, there is no basis for taking this into account in the absence of specific medical evidence to show that it prevented him from taking the appropriate steps in relation to his appeal.

86. Another point made in Mr Patel's Notice of Appeal form as a further reason for making the appeal late was his and his daughter's absence of qualifications in accounts or tax. For the reasons put by Mr Linneker, I do not accept that this was a factor preventing Mr Patel, or Miss Patel on his behalf, from submitting a Notice of Appeal form within the 30 day time limit.

87. In the form Mr Patel made reference to facing bankruptcy. I accept Mr Linneker's submission that this is a consequence of Mr Patel's failure to pay his debts, arising because he took no steps to notify his appeal to the Tribunal. It cannot be an explanation for making a late appeal, in particular because the bankruptcy process did not begin until HMRC wrote to Mr Patel on 10 March 2016, over a year after the issue of the review letter. This suggests to me, as it did to HMRC, that the commencement of these proceedings was the real reason for Mr Patel seeking to appeal when he did.

88. In terms of the second *Denton* factor to be applied following *BPP*, I am not satisfied that there is any satisfactory explanation for the default in failing to notify the appeal within the 30 day time limit.

89. The next question, following *Data Select*, is what the effect would be on the parties if the application were to be granted. For Mr Patel, it would provide the prospect of pursuing his appeal and seeking to challenge the assessments and penalty assessments. As I have already pointed out, it would be necessary for him to have professional assistance to do so; I do not consider that he is equipped to pursue his appeal as a litigant in person.

90. As Mr Linneker submitted, there would be some prejudice to HMRC. The apparent finality of their decision as contained in the review letter would vanish. They have already incurred expense in instructing BTC Associates Ltd to take steps in relation to the bankruptcy proceedings. They would spend time and incur cost in preparing a Statement of Case and preparing for and attending any hearing of the appeal.

91. For the reasons set out in *Hysaj*, I do not consider it appropriate to go into the detailed merits of the substantive appeal. The matters described in argument by Mr Linneker relate to issues in respect of which factual questions would need to be determined in the light of the evidence found as a result of hearing the parties and the relevant witnesses. Despite the documentation provided for the hearing before me,

running to 181 pages, I do not consider that I am in any position to arrive at any view as to the merits of Mr Patel's appeal.

5 92. As I have already indicated, I am not persuaded that Mr Patel is in a position to conduct a substantive appeal without professional assistance. It is clear that such assistance will not be available to him without payment to his advisers. I note that although he stated immediately after receiving the call at the beginning of the hearing that the costs figure mentioned by his advisers was £3,000, he stated to me in the course of his reply to HMRC's submissions that his account with Doshi and Company had been closed and that the firm would only reopen it if he paid £5,000. They would 10 provide no representation for him without payment. He indicated to me that he would have to apply for a loan in order to be represented.

15 93. Whatever the actual figure which had been mentioned to him in that call, the required level of fees for any necessary professional assistance would appear to be high, if his submissions as to the state of his finances were to be accepted as an appropriate basis for determining the results of his application. In the absence of any evidence to corroborate his submissions, I am not in a position to arrive at any conclusion on this issue. I merely express doubt whether there is a realistic prospect of any appeal being properly conducted.

20 94. Having considered the various factors separately, I now consider Mr Patel's application in the light of all the circumstances. The lengthy delay between the date of the review letter and the serving of the Notice of Appeal has not been satisfactorily explained. Mr Patel has not been without assistance while he did without professional help, as his daughter was able to deal with the making of his appeal to HMRC. At various stages he has chosen not to retain his advisers, whether or not his reasons for 25 that choice were purely financial. I have accepted that there would be some prejudice to HMRC if his appeal were to proceed; given the 14 month delay between the issuing of the review letter and the service of the Notice of Appeal, it was reasonable for them to have assumed that their decision had become final.

30 95. My conclusion is that this is not a case in which it would be appropriate for the time limit for giving notice of appeal to be extended. I therefore refuse Mr Patel's application. I have therefore issued Directions refusing his application and confirming that there is no requirement on HMRC to submit a Statement of Case.

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Right to apply for permission to appeal

96. 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.

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**JOHN CLARK
TRIBUNAL JUDGE**

RELEASE DATE: 14 NOVEMBER 2016

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