



TC05465

Appeal number: TC/2015/05448

INCOME TAX – late notice of appeal – section 49G and section 49H Taxes Management Act 1970 (“TMA”) – whether leave to appeal out of time should be granted – no – application dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WAYNE LEWIS

Appellant

- and -

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

TRIBUNAL: JUDGE ROBIN VOS

Sitting in public at Fox Court, London on 10 October 2016

Mr Nik Hurst of Nick Hurst Ltd, tax adviser, for the Appellant

Mr Justin Kruyer, Appeals Officer, HM Revenue and Customs, for the Respondents

DECISION

Background

- 5 1. Mr Lewis is a Barrister. He wishes to appeal against income tax assessments for each of the tax years ended 5 April 2006 – 5 April 2008 and 5 April 2010 – 5 April 2012. He also wishes to appeal against a closure notice relating to enquiries into his self-assessment tax return for the year ended 5 April 2009.
- 10 2. These appeals would include associated appeals against surcharges and penalties for late payment of tax, late filing of returns and filing inaccurate returns.
3. The total amount at stake is approximately £77,000.
4. HMRC is seeking a bankruptcy order against Mr Lewis. The bankruptcy proceedings have been stayed pending the outcome of this appeal.
- 15 5. Mr Lewis' original notice of appeal dated 8 September 2015 stated on the face of it that it was an appeal against all of the assessments to tax, penalties and surcharges covered by the statutory demand which preceded the bankruptcy petition. This did not include the tax assessments or the inaccuracy penalties for the tax years ended 5 April 2011 and 5 April 2012 which were only assessed after the date of the statutory demand but before the bankruptcy petition was lodged. It was however
20 agreed that the appeal should be treated as covering all of the tax, penalties and surcharges for each of the tax years ended 5 April 2006 – 5 April 2012 which were assessed before the date of the original notice of appeal but not any penalties relating to those tax years which were assessed after the date of the notice of appeal.
- 25 6. Mr Lewis' appeal to the Tribunal against all of these matters was submitted out of time. Further details of how late the appeals were are set out below but the delay ranges from a few months to over three years.
- 30 7. HMRC objects to Mr Lewis notifying his appeal to the Tribunal out of time. The hearing dealt only with the question as to whether the Tribunal should, in accordance with s 49G(3) and/or s 49H(3) give Mr Lewis permission to make a late appeal.

Evidence

8. The main evidence consisted of a bundle of documents and correspondence produced by HMRC.
- 35 9. On the morning of the hearing, Mr Lewis produced to the Tribunal and to HMRC a witness statement together with a number of exhibits including in particular a medical report which he sought to rely on in support of his application for permission to appeal out of time.

10. Mr Lewis had not previously suggested that he had any medical condition which had contributed to his failure to appeal within the relevant time limits. Mr Hurst's explanation for this was that he had only acted for Mr Lewis for a few months and that it only occurred to him after going through the papers in detail that there must
5 have been a problem other than what he described as normal non-compliance. It did not appear to him that Mr Lewis was the sort of person who simply did not care about his tax compliance obligations and he therefore decided to investigate whether there were any medical problems which contributed to Mr Lewis' failure to comply with his obligations. The medical report had only been finalised on 6 October 2016 which
10 is why it had not been possible to produce it before the day of the hearing.

11. Mr Kruyer surprisingly did not raise any significant objection to admitting the witness statement and its exhibits.

12. The Tribunal on the other hand had the following concerns:

- (1) No notice of a wish to introduce expert evidence had been given.
- 15 (2) The expert was not available to answer questions.
- (3) HMRC had not had an opportunity to consider the evidence, to respond to it or to instruct its own expert.

13. Despite these failures/deficiencies, the Tribunal, having considered the overriding objective to deal with cases fairly and justly, agreed to admit the witness
20 statement and the exhibits into evidence making it clear however that, given the deficiencies outlined above and the fact that the medical report was in any event in very general terms, it would not be possible to give much weight to the evidence.

14. Mr Lewis also gave some oral evidence at the hearing.

The relevant facts

25 15. On the basis of the evidence before me, I find the following material facts.

16. Mr Lewis was practicing as a Barrister throughout the relevant period (the tax years ended 5 April 2006 – 5 April 2012).

17. All of Mr Lewis' tax returns for the years ended 5 April 1997 – 5 April 2012 were submitted late with the exception of his tax returns for the years ended 5 April
30 2009, 5 April 2010 and 5 April 2012.

18. On 10 December 2010, HMRC opened an enquiry into Mr Lewis' self-assessment tax return for the year ended 5 April 2009. At that time, his accountants were S&K Services.

19. S&K Services initially dealt with the enquiry and provided detailed information
35 about Mr Lewis' income and expenses as a Barrister.

20. In May 2012, S&K Services ceased to act for Mr Lewis. They notified HMRC of this in a letter dated 31 May 2012 which also notified HMRC of Mr Lewis' new business address at Gibson House in Tottenham which Mr Lewis confirmed has been his business address since 1 December 2011.
- 5 21. Mr Lewis spoke to HMRC on 29 June 2012 and asked for all correspondence to be sent to his business address.
22. In July 2012, Mr Lewis appointed Alan Solomons & Co as his new accountants.
23. Alan Solomons continued to deal with the enquiry into Mr Lewis' tax return for the year ended 5 April 2009 although this was hampered by disagreements between
10 Mr Lewis and Mr Solomons in relation to Mr Solomons' fees.
24. Having failed to elicit a satisfactory response either from Mr Solomons (as he had not been paid) or from Mr Lewis (who did not reply to HMRC's letter), HMRC wrote to Mr Lewis (at his business address, as requested) on 29 January 2013 setting
15 out their intention to issue a closure notice showing increased profits for the tax year ended 5 April 2009 and discovery assessments for each of the tax years ended 5 April 2006 – 5 April 2008 and 5 April 2010 using figures extrapolated from the figures obtained as a result of the enquiries into the tax return for the year ended 5 April 2009.
25. The formal closure notice and discovery assessments were issued on 10 April
20 2013. These were sent to Mr Lewis at his business address as well as to Mr Solomons.
26. A formal appeal against the assessments and the closure notice was made by Mr Solomons on behalf of Mr Lewis on 10 May 2013. As a result of this, HMRC offered a review on 13 May 2013. The offer of review was again sent both to Mr Lewis at his
25 business address and to Mr Solomons.
27. Further letters were sent by HMRC to Mr Lewis and to Mr Solomons on 27 June 2013 giving notice of their intention to charge inaccuracy penalties for the tax years ending 5 April 2006 – 5 April 2010 as well as opening enquiries into Mr Lewis' tax returns for the tax years ended 5 April 2011 and 5 April 2012.
- 30 28. On 8 July 2013, Mr Solomons informed HMRC that he was no longer acting for Mr Lewis.
29. On 10 July 2013, Northwest Associates notified HMRC that they had now been appointed as Mr Lewis' accountants. Northwest Associates are based on the same floor of the same building in Tottenham as Mr Lewis.
- 35 30. These letters were not received by HMRC until 9 August 2013 which is the same date as HMRC issued the penalty determinations for the inaccuracy penalties for the years ended 5 April 2006 – 5 April 2008 together with a notice of their intention to charge penalties for the tax years ended 5 April 2009 and 5 April 2010. The penalty notices were sent under cover of a letter addressed to Mr Solomons.

31. The copy letter provided in the bundle of evidence has been annotated by HMRC to show that it was copied to Mr Lewis but does not state which address was used. HMRC sent a separate information notice to Mr Lewis on the same date (which was enclosed with the letter about penalties to Mr Solomons). This letter is addressed
5 to a residential address for Mr Lewis which he had not lived at since August 2010. The penalty notices themselves were however addressed to Mr Lewis at his business address.

32. It appears however (and I find as a fact) that Mr Lewis must have received the penalty notices as Northwest Associates wrote to HMRC on 27 August 2013 referring
10 to HMRC's letter dated 8 August 2013 (which is the date shown in HMRC's annotation of the letter to Mr Solomons dated 9 August 2013 as being the date on which the letter was copied to Mr Lewis) asking for additional time to deal with the proposed penalties.

33. HMRC wrote to Northwest Associates on 24 September 2013 explaining that
15 assessments and a closure notice had been issued for the tax years ended 5 April 2005 – 5 April 2010. It also explained that a review had been offered in May 2013 but that this had not been taken up and that no appeal had been made to the Tribunal. The letter also mentioned that enquiries have been opened into Mr Lewis' tax returns for the years ended 5 April 2011 and 5 April 2012 and that there was an outstanding
20 information notice in respect of those tax years. It appears that, throughout this period, any letters addressed to Mr Lewis were sent to his old residential address and were not therefore received by him.

34. In January 2014, HMRC began to take action to enforce Mr Lewis' outstanding tax liabilities.

25 35. Despite various further letters and a telephone call, HMRC did not have any contact with Northwest Associates until a telephone conversation at the end of February 2014.

36. No further information was provided to HMRC by June 2014 and HMRC therefore wrote to Mr Lewis at his business address and to Northwest Associates
30 confirming their intention to issue closure notices amending Mr Lewis' self-assessments tax returns for the years ended 5 April 2011 and 5 April 2012.

37. On 31 October 2014, HMRC spoke to Northwest Associates who informed HMRC that Mr Lewis was no longer their client and had decided to go to another agent approximately two months earlier.

35 38. Mr Lewis gave evidence that Northwest Associates continued to represent him after this date and indeed continue to represent him today. He said that he used another firm (Okhai & Co) in February 2015 but this relationship was very brief as he did not get on with them and they were not formally authorised by him to communicate with HMRC in relation to his affairs.

40 39. This is however to some extent contradicted by HMRC's contemporaneous records of telephone conversations with Mr Lewis. These records show that Mr

Lewis told HMRC on 6 November 2014 that he had appointed Okhai & Co and so it appears that Okhai & Co were acting for Mr Lewis between at least November 2014 and February 2015. It is however also clear from HMRC's telephone records that Northwest Associates were once again acting for Mr Lewis later in 2015.

5 40. HMRC wrote to Northwest Associates on 26 November 2014 with copies of penalty explanation letters of the same date relating to inaccuracy penalties for the tax years ended 5 April 2011 and 5 April 2012. The letters were addressed to Mr Lewis at a new residential address which Mr Lewis had presumably communicated to HMRC but which he claims he left on 15 September 2014.

10 41. HMRC issued a statutory demand for payment of Mr Lewis' outstanding tax liabilities on 27 November 2014. It was served on Mr Lewis on 11 December 2014.

15 42. On 6 January 2015, HMRC issued closure notices in respect of the tax years ended 5 April 2011 and 5 April 2012. Again, these were sent to Mr Lewis at the residential address which he claims to have vacated on 15 September 2014 and were copied to Northwest Associates.

43. The bankruptcy petition was issued on 15 January 2015.

44. At the end of March 2015, Mr Lewis instructed a firm called LEXe FISCAL to deal with the bankruptcy and more generally to deal with his tax affairs. LEXe FISCAL describe themselves as "international tax – law consultants".

20 45. LEXe FISCAL wrote to the HMRC officer dealing with the bankruptcy on 9 April 2015 purporting to appeal against all of the "outstanding self-assessments".

46. LEXe FISCAL ceased acting for Mr Lewis on 2 June 2015 due to "fee issues".

25 47. The HMRC officer dealing with the bankruptcy proceedings wrote to Mr Lewis at his business address on 8 July 2015 advising him that a bankruptcy hearing on 10 June 2015 had been adjourned by the Registrar in order to enable Mr Lewis to submit all outstanding VAT and self-assessment returns as well as to make late appeals against assessments raised under his self-assessment account. The letter also advised him that "precise details" of the assessments which had been raised were included in a witness statement which the HMRC officer had made in March 2015. This was in fact the schedule attached to the statutory demand issued in November 2014 and did not therefore include the tax and the inaccuracy penalties relating to the tax years ended 5 April 2011 and 5 April 2012.

30 48. Mr Lewis replied on 15 July 2015 to advise that the appeals had already been lodged with HMRC but was told in a reply dated 31 July 2015 that the appeals needed to be sent to the correct HMRC office and not to the office dealing with the bankruptcy proceedings.

35 49. On 15 July 2015, Mr Lewis' accountants submitted appeals against late filing penalties for each of the tax years ended 5 April 2006 – 5 April 2012.

50. HMRC reviewed these appeals and issued a review letter on 29 September 2015. The conclusion of the review was that there had been no late filing penalties for the tax years ended 5 April 2009 and 5 April 2012 (as these returns had been submitted on time). In addition, the late filing penalties for the tax years 5 April 2006 – 5 April 2008 and 5 April 2010 had been reduced to nil as, under the penalty regime in force at the time, the late filing penalty could not exceed the amount of tax shown as owed on the tax return submitted (which was nil).

51. The only outstanding late filing penalty was therefore the penalty for the tax year ended 5 April 2011 which Mr Solomons had issued a late appeal against in November 2012 and where HMRC had previously rejected the late appeal against this penalty. The review upheld HMRC's previous rejection of this appeal.

52. Mr Lewis submitted an appeal to the Tribunal on 8 September 2015. This was received by the Tribunal on 14 September 2015 even though it had been sent to the wrong address. Having discovered that the appeal was sent to the wrong address Mr Lewis sent a second notice of appeal to the Tribunal on 9 November 2015 which was received by the Tribunal on 10 November 2015.

53. Although it does not make any real difference to the outcome of this application, I am treating the appeals as having been made when the original notice of appeal was received by the Tribunal on 14 September 2015.

20 **The law**

54. An appeal against a tax assessment (including a closure notice and an assessment to penalties) must be brought within 30 days of the date of the assessment or the closure notice (ss 31 and 31A TMA).

55. If notice of appeal to HMRC is given late, the appeal can only be considered either if HMRC agrees (which it must do if there is a reasonable excuse for the delay) or if the Tribunal gives permission (s 49 TMA).

56. Where an appeal has been made to HMRC within the relevant time limit, HMRC must offer a review of the matter. If they fail to do so, the taxpayer can appeal to the Tribunal and there is no time limit for making this appeal (s 49D TMA).

57. If a review is offered, the time limit for appealing to the Tribunal is either 30 days after the review is concluded or, if the taxpayer does not take up the offer of the review, within 30 days of the date the review is offered (s 49G and s 49H TMA).

58. The status of the appeals against the various assessments is as follows:

(1) Assessments/closure notice for the tax years ended 5 April 2006 – 5 April 2010 – in time appeal to HMRC; review offered 13 May 2013; no acceptance of review or appeal to the Tribunal until 14 September 2015.

(2) Inaccuracy penalties for tax years ended 5 April 2006 – 5 April 2008 assessed on 9 August 2013; possible appeal to HMRC in July 2015 but taken by

HMRC only to be an appeal against late filing penalties; appeal to Tribunal on 14 September 2015.

5 (3) Closure notices and inaccuracy penalties relating to the tax years ended 5 April 2011 and 5 April 2012 – assessed on 6 January 2015; possible appeal to HMRC in July 2015 but treated by HMRC as an appeal only against late filing penalties; appeal to Tribunal on 14 September 2015.

10 (4) Late filing penalties for tax year ended 5 April 2011 – assessed in March 2012 – September 2012 and February 2015; late appeal against March – September 2012 penalties made on 11 November 2012; appeal rejected by HMRC on 22 November 2012 as out of time; further appeal to HMRC by Mr Lewis in July 2015; treated by HMRC as a request for a review; review concluded on 29 September 2015 again concluding that the appeal failed on the basis that it was made out of time; covered in appeal to Tribunal received on 10 November 2015 and/or 14 September 2015.

15 (5) Penalties/surcharges for late payment of tax for each of the tax years ended 5 April 2006 – 5 April 2012 – penalties assessed at various dates between September 2013 and March 2015; possible appeal to HMRC in July 2015 although treated by HMRC as an appeal only against late filing penalties; appeal to Tribunal 14 September 2015.

20 59. From the above, it can be seen that there are no assessments where an in time appeal has been made by Mr Lewis but HMRC have not offered a review. The normal 30 day time limit therefore applies in every case.

25 60. 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.

61. Mr Justice Morgan in *Data Select* at [34] summarised the questions which the Tribunal should ask itself:

- 35 (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?

40 62. 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].

5 “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....”.

15 63. *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]:

20 “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*”.

30 64. 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 66 below) that similar principles apply when conducting the balancing exercise in relation to an appeal from a determination by HMRC.

35 65. 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.

The balancing exercise

The purpose of the time limits

40 66. The parties did not make any specific submissions on this point. It was however addressed by Mr Justice Morgan in *Data Select* at [37]:

5 “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.”

10 67. This is therefore a factor against allowing Mr Lewis’ late appeals, particularly where the delay in making those appeals is significant.

How long was the delay

15 68. The longest delay relates to the assessments and closure notice for the tax years ended 5 April 2006 – 5 April 2010 where a review was offered in May 2013. It was two years and four months before Mr Lewis appealed to the Tribunal, having not accepted HMRC’s offer of a review. The appeal against the inaccuracy penalties for the tax years ended 5 April 2006 – 5 April 2008 should have been made by 8 September 2013 and was therefore two years and one month late. Appeals against the closure notices and inaccuracy penalties for the tax years ended 5 April 2011 and 5 April 2012 should have been made by 5 February 2015 and were therefore approximately seven months late.

25 69. The appeals against the late filing and late payment penalties are late by periods which range from one year and eleven months to approximately six months with the exception of some of the late filing penalties for the tax year ended 5 April 2011 where an appeal was made one month late.

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

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

30 “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
35 *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
40 serious.”

72. On this basis, all of the delays in making the appeals were both serious and significant with the possible exception of the November 2012 appeal against some of the late filing penalties for the tax year ended 5 April 2011.

5 73. I have also taken into account the fact that there was a bankruptcy hearing on 10 June 2015 which was adjourned by the Registrars specifically so that Mr Lewis could submit his late appeals against the various assessments, that he was reminded of this on 8 July 2015 by the HMRC officer dealing with the bankruptcy proceedings but that appeals were still not submitted to the Tribunal until September 2015.

Is there a good explanation for the delay

10 74. Mr Hurst made a number of points on behalf of Mr Lewis as to why the delays had occurred.

15 75. His first point was that Mr Lewis was unfamiliar with the whole process of tax compliance. For example, he had signed his business accounts but did not recall signing any actual tax returns. This showed that he was not aware of the difference between business accounts and tax returns.

76. Mr Lewis told us he relied on his accountants and did not keep a close enough eye on what they were doing. He was poorly advised. The very fact that he had changed accountants on more than one occasion showed that he was trying to get his affairs in order when he realised that there was a problem.

20 77. Mr Hurst suggested that Mr Lewis had not received all of the correspondence from HMRC. As we have found, some of the correspondence was sent to addresses which Mr Lewis no longer occupied. Mr Hurst in particular drew attention to the letters accompanying the assessments and penalty notices dated 6 January 2015 which were addressed to Mr Lewis at an address on Finchley Road which Mr Lewis says he
25 vacated on 15 September 2014. Mr Lewis acknowledged that he may not have told HMRC about his change of address but this, says Mr Hurst, does not change the fact that Mr Lewis was not aware of the assessments/penalties relating to the tax years ended 5 April 2011 and 5 April 2012.

30 78. Mr Hurst made the point that the letter written to HMRC by LEXe FISCAL on behalf of Mr Lewis on 9 April 2015 contained a table setting out Mr Lewis' tax liabilities for each of the relevant years. This gave specific figures for the tax which had been assessed for the tax years ended 5 April 2006 – 5 April 2010 but for the tax years 5 April 2011 and 5 April 2012 simply stated "no data". This, in his view, supported Mr Lewis' assertion that he was not aware of the closure notices/penalties
35 for those years.

79. It is worth noting in this context that Mr Hurst did not seek to argue that the assessments/closure notices had not been properly served on Mr Lewis – simply that he was unaware of them.

80. Mr Lewis gave evidence that he did not become aware of these closure notices/penalty assessments until he received the bundle of documents for the Tribunal hearing. This however seems surprising as the appeals against the late filing penalties submitted by Northwest Associates in July 2015 and signed by Mr Lewis
5 included appeals for the tax years ended 5 April 2011 and 5 April 2012 and attached a printout from Mr Lewis' self-assessment tax account for each of those years showing the tax, interest and penalties due for each of those years.

81. Mr Kruyer pointed out that HMRC had written to Mr Lewis on 13 June 2014 to his business address giving details of the assessments which they intended to raise for
10 the tax years ended 5 April 2011 and 5 April 2012. He should therefore have been aware that tax would be assessed for these years and that there was a possibility of penalties being assessed as well.

82. Despite this, I am prepared to accept that Mr Lewis was not aware of the 6 January 2015 assessments in April 2015 when LEXe FISCAL wrote to HMRC.
15 However, it seems clear to me that Mr Lewis must have been aware of them at the time he signed the notices of appeal against the last filing penalties as there are clear statements from his self-assessment tax account attached to those appeal notices which show the tax and penalties which had been assessed.

83. Mr Hurst explained that Mr Lewis is a busy man. He has a stressful job and has
20 his hands full coping with his clients' problems and making sure he keeps his clients happy. He simply did not have time to focus properly on his own tax affairs.

84. Mr Hurst also referred to the medical report exhibited to the witness statement produced on the morning of the hearing. This records that Mr Lewis has diabetes and sleeping problems. The report states that these conditions can affect a person's
25 memory and that there can be periods of confusion. The conclusion of the report is that Mr Lewis "is more likely than the average person to forget items particularly those which are not regular items or related to his work". Mr Hurst suggested that these medical conditions and in particular, the effect on Mr Lewis' memory, may have contributed to his compliance failures.

30 85. Finally, Mr Hurst suggested that, since January 2015, Mr Lewis had been focused on the bankruptcy proceedings and not on making an appeal to the Tribunal. This distraction was part of the reason for the delay.

86. Mr Kruyer made the point that Mr Lewis' failure to comply with his tax obligations is not new. Indeed, he described it as "a pattern of behaviour", referring
35 to Mr Lewis' consistent failure since at least 1997 to file his tax returns on time. According to Mr Kruyer, Mr Lewis had a tendency simply to stick his head in the sand rather than dealing with compliance issues.

87. As far as the January 2015 closure notices are concerned, Mr Kruyer submitted that, even if those closure notices had gone astray, Mr Lewis had received
40 correspondence in June 2014 which attached calculations of the amendments to Mr Lewis' self-assessment which HMRC was proposing to make resulting in close to

£20,000 of additional tax. It would be expected that, in the light of the gravity of the situation, Mr Lewis would at least talk to his accountants or to HMRC in relation to these potential liabilities and yet HMRC received no communication either from Mr Lewis or from his accountants between this date and the date of the issue of the closure notices.

88. Although the question for the Tribunal is not whether Mr Lewis has a reasonable excuse for his failure to appeal within the specified time limits, Mr Kruyer suggested that reliance on a third party (i.e. Mr Lewis' accountants) is not a good reason for his failure to submit appeals on time.

89. Having considered all of these points, it is clear to me that there is no good reason for Mr Lewis' failure to submit timely appeals. He has persistently submitted his tax returns late. He is an intelligent man with a legal background and must have appreciated in May 2013 that something needed to be done about the assessments/closure notice which had been issued. He changed accountants at that time as a result of a dispute over fees. His new accountants were based across the corridor from him on the same floor of the same building and yet no action was taken and no information was provided to HMRC during the entire period from the date Northwest Associates were appointed in July 2013 up to the issue of the bankruptcy petition in January 2015 despite the fact that, in January 2014, HMRC had started taking enforcement proceedings against Mr Lewis in respect of the outstanding tax debts.

90. Mr Lewis was given ample opportunity during the course of 2015 to submit appeals to the Tribunal. His bankruptcy hearing was adjourned in June 2015 to enable him to do this. He was reminded in early July 2015 by HMRC that it was something he had to attend to and yet it was not until September 2015 that the appeals were lodged.

91. The previous version of rule 3.9 of the Civil Procedure Rules refers specifically, in item (f) to whether the failure to comply was caused by the party or by his legal representative. I have therefore taken into account whether the failure to comply was caused by Mr Lewis' accountants rather than by Mr Lewis. However, by his own admission, Mr Lewis did not keep a close enough eye on his accountant. He appointed a new accountant at a critical point in July 2013 and did not make sure that the accountant responded to HMRC's offer of a review. I had no evidence as to what discussions took place between Mr Lewis and Northwest Associates in July 2013 but if they did not discuss HMRC's most recent correspondence and agree what action to take, they certainly should have done so. This is not something which Mr Lewis can rely solely on his accountants to deal with. Similarly, when Mr Lewis became aware of the penalty determinations in August 2013, he should have discussed these with his accountants and agreed with them what action should be taken. He cannot have expected his accountants to take action on their own initiative without his instructions.

92. The other key time is January 2015 when the closure notices for the years ended 5 April 2011 and 5 April 2012 were issued along with associated penalty assessments. I have accepted that Mr Lewis may not have been aware of these until July 2015 and

so I have not considered the delay between January 2015 and July 2015. It is clear that in July 2015, Mr Lewis was working closely with his accountants and that appeals needed to be lodged with the Tribunal. It was however a further two months before the appeals were made.

5 93. I do not consider, even taking into account the medical report which has been provided, that there is sufficient evidence that Mr Lewis' medical condition had any significant impact on the timing of Mr Lewis' appeals or his failure to make appeals any earlier than he did.

10 94. Whilst it may be true that Mr Lewis is a busy man, this does not excuse him from dealing with his tax compliance obligations; nor does it in my view amount to a good reason for making appeals significantly outside the statutory time limit.

15 95. I can accept that Mr Lewis may have been distracted by the bankruptcy proceedings. However, it might perhaps be expected that this would be a spur to him to get his tax affairs in order. It cannot seriously be suggested that this was a reason why the appeals were made late, particularly given that, as mentioned above, the June bankruptcy hearing had been adjourned specifically in order to enable Mr Lewis to submit his tax appeals. On the contrary, it should have ensured that Mr Lewis submitted those appeals sooner rather than later.

20 96. Overall, I am not satisfied that there is any good reason for the delay and this is therefore a factor against allowing Mr Lewis' application.

What will be the consequences for the parties of an extension of time

25 97. Clearly, as far as Mr Lewis is concerned, if I allow his application to appeal out of time, he will be able to put forward his case that the assessments/closure notices overstate his tax liabilities and that the assessments and any corresponding penalties should be reduced or possibly eliminated entirely.

98. I did not hear any argument on the prospects of Mr Lewis succeeding in his appeal.

30 99. It is apparent from the decision of Moore-Bick LJ in *R (Dinjan Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 at [46-47] that, in most cases, the merits of an appeal will have little to do with whether it is appropriate to grant an extension of time:

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 that have to be considered."

100. I certainly cannot say on the basis of the evidence I have either that the grounds for appeal are very strong or very weak. I have not therefore taken into account in my

decision whether Mr Lewis would be successful were he allowed to notify his appeals out of time.

5 101. Mr Kruyer submitted that there would be some prejudice to HMRC and significant additional work for HMRC if the appeals proceed. He pointed out that the assessments relate to events which took place between 4-11 years ago and that it is going to be difficult to obtain reliable figures going back that far.

10 102. Mr Kruyer also told us that no information had been provided to HMRC to support the appeals. Mr Hurst had, at the hearing, a copy of what he said were accounts relating to Mr Lewis' business activities for all of the relevant tax years which had been prepared by Northwest Associates in January 2014. These were not part of the evidence before me. Mr Lewis told the Tribunal in evidence that the bundle of accounts had been handed to the HMRC officer dealing with the bankruptcy proceedings at one of the bankruptcy hearings in 2015 (he could not remember which one) but conceded that they had not been provided to the officer dealing with the self-
15 assessment appeals.

103. Not having these accounts in evidence, it is impossible to say how comprehensive they are. Also no evidence was offered as to what supporting documents exist in order to verify the accounts. HMRC would no doubt need to make extensive enquiries in order to satisfy itself about the figures presented. There is no
20 doubt that this would be a time consuming exercise both for HMRC and for a Tribunal.

104. To summarise, if I allow the appeals to go ahead, there will be a benefit to Mr Lewis in that he will be able to try to persuade a Tribunal that he has been overcharged but it will involve HMRC in substantial work in re-opening their files and reviewing the information provided by Mr Lewis in support of his appeals.
25

What will be the consequences for the parties of a refusal to extend time

105. This is of course the best outcome for HMRC as their files remain closed and they proceed with collecting the tax due.

30 106. There would however be very significant prejudice to Mr Lewis. He will not be able to contest the assessments/closure notices which he maintains are excessive. He will have to pay the tax, interest and penalties which have been assessed and, as a result, may be made bankrupt.

107. Being made bankrupt is not in itself a disciplinary offence or a bar to practising as a Barrister.

35 108. There is however no doubt that, in conducting the balancing exercise, this factor is one which would weigh in favour of allowing the appeals to be notified out of time.

Decision

109. I have considered very carefully all of the factors which need to be weighed in the balance in the context of dealing with this case fairly and justly.

5 110. It will be apparent from the discussion of the factors involved in the balancing exercise set out above that, in my view, the only factor in favour of allowing Mr Lewis' application is the serious consequences which will result for him if I do not allow the application.

10 111. Whilst I acknowledge the impact this will have, it does not in my view outweigh all of the other factors. In particular, it cannot be doubted that there has been a serious and significant delay in appealing against all of the assessments and closure notices with the possible exception of some of the late filing penalties for the tax year ended 5 April 2011. No good explanation has been put forward for those delays in the sense that the reasons which have been given are not good or convincing reasons for Mr Lewis' failure to comply with his obligations or to submit timely appeals.

15 112. I do also bear in mind the clear statement in *BPP Holdings* at [38] that "the correct starting point is compliance unless there is good reason to the contrary" and in *Romasave* 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".

20 113. There clearly is a purpose behind the statutory time limits and a Tribunal should only be prepared to relax those time limits if, having weighed up all of the factors, including the need for finality in tax matters, it is right to do so in order to deal with a case fairly and justly.

25 114. Having weighed up all of the competing factors, I am not satisfied that it would be right for the Tribunal to give Mr Lewis permission to make his appeals at this late stage. The consequences for Mr Lewis are severe but in this case, these do not outweigh the other factors I have identified which point away from granting permission to make the late appeals.

30 115. 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)"
35 which accompanies and forms part of this decision notice.

ROBIN VOS
TRIBUNAL JUDGE

40 **RELEASE DATE: 1 NOVEMBER 2016**