TC05540

Appeal number: TC/2015/06273

VAT – application for permission to appeal out of time – Data Select criteria

FIRST-TIER TRIBUNAL
TAX CHAMBER

AGM (RIVERSIDE) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES
MRS RAYNA DEAN FCA

Sitting in public at the Manchester Tribunal Service, Alexandra House on 19 September 2016

Mr Andreas Georgiou, director, for the Appellant

Anne Sinclair, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

1. This an application by the appellant, AGM (Riverside) Ltd, for the tribunal to grant permission to bring its appeal out of time.

2. The appeal, TC/2015/06273 proceeds by way of appeal notice dated 28 July 2015. It is an appeal against a review decision of 5 September 2014 of HMRC. The review decision upheld three decisions to deny credits in respect of three VAT periods, 01/11, 04/11 and 04/12 and upheld two assessments in respect of the periods 01/09-10/10 and 01/11-01/12 resulting from recalculations of output tax and input tax allowed for the periods.

3. The appeal notice was lodged outside the 30-day time limit for appeals against decisions provided under section 83G of the Valued Added Tax Act 1994 (VATA). The appeal was lodged over ten months after the review decision and therefore over nine months late.

Background facts

4. On 5 September 2014 HMRC issued the review decision as set out above. The total of the three adjustments denying credit was £47,907.18 and the total of the two assessments was £27,620. The review concluded that one assessment of £4,380 in respect of the VAT periods 01/10-10/10 was to be withdrawn. The letter was sent directly to the appellant at its address.

5. The review concluded that if the appellant did not agree with the conclusion then the appellant could appeal to an independent tribunal within 30 days of the date of the letter. The letter went on to inform the appellant how to do this on the Tribunals Service's website or by phoning it on the telephone number provided.

6. On 23 October 2014 HMRC wrote to the appellant to notify it that that the amount of surcharge for the accounting period from 1 May 2014 to 31 July 2014 had been reduced to nil. The statement of liabilities of the appellant contained therein was £77,225.63 which was already subject to legal proceedings. These liabilities were made up a variety of taxes including VAT but also PAYE and Corporation Tax and spanned the period 2003 to 2014.

7. On 27 October 2014 the Appellant's representative, Peter Horler, Company Secretary of the appellant and director of Stevenson Rosedon & Co Ltd Accountants, wrote on behalf of the appellants to the Debt Management Enforcement unit of HMRC further to the correspondence dated 23 October 2014 regarding 'the outstanding debt of £38.1k'. The letter stated '*we appeal against the above indebtedness for the reason as below: AGM (Riverside) Ltd has had a VAT inspection and we are positive the inspector has charged VAT on zero rated items. In fact, we calculate we are in credit with you approximately 15k. The director Mr Andreas Georgiou would appreciate a*

visit from one of your officers so he can explain the matter further and hopefully bring to a satisfactory conclusion.'

8. On 6 November 2014 HMRC wrote to Mr Horler to explain that the case had been fully reviewed and the review decision letter issued on 5 September 2014. The letter went on to explain that '*As a result of the review I have been notified by the compliance office that nothing further will be accomplished by a visit. If the company has new evidence relating to the assessments then this should be sent to the compliance office at Manchester. However if the company would like a further review they will need to appeal directly to Tribunal. Please notify me within 7 days if the company intend to take this next course of action.*'

9. On 2 February 2015 Mr Andreas Georgiou, the director on behalf of the appellant, wrote to the enforcement and insolvency unit within HMRC setting out his case as to why he disputed HMRC's figures in the assessments, stating that he had made all documents available and again requesting a meeting with a senior member of HMRC.

10. On 11 February 2015 HMRC's debt management and enforcement and insolvency service replied by letter to Mr Georgiou. The letter stated that the matters raised in the letter had been fully reviewed by the appeals and review unit. It also stated that the author was not aware that the appellant had made an appeal to an independent tribunal and Mr Georgiou did not refer to the same in his letter. The letter stated that if nothing further was heard by 18 February 2015 and the debt was unpaid the papers would be forwarded to the solicitor for HMRC with instructions to file a winding-up petition.

11. On 20 April 2015 Mr Burke of Pearson solicitors, on behalf of the appellant, wrote to the debt enforcement unit of HMRC regarding the VAT assessments. HMRC had filed a winding up petition based upon these assessments and Mr Burke asked that the petition be adjourned.

12. On 27 April 2015 HMRC debt management enforcement & insolvency service wrote to the appellant's solicitors confirming that the appellant was given two options in September 2014, namely an appeal to the First Tier Tribunal or to make an application for Alternative Dispute Resolution. The time limit to take up either of the options was said to be 30 days after the issue of the letter of 5 September 2014 so this should have happened by 6 October 2014. The letter did agree to adjourn the hearing of the winding up petition which was due to take place on 11 May 2015.

13. On 1 May 2015 Mr Horler, company secretary, wrote on behalf of the appellant to HMRC's VAT office to request a copy of the appellant's quarterly VAT returns for the periods 01/11 to 04/12.

14. On 20 July 2015 Mr Georgiou's MP wrote on his behalf to the VAT enquiries team of HMRC asking for a member of the team to contact Mr Georgiou

directly to arrange for an official to meet with Mr Georgiou's accountant to discuss the disputed amount.

15. Also on 20 July 2015 Pearson solicitors on behalf of the appellant wrote to request a further adjournment of the winding up petition that was due to be heard on 3 August 2015. The letter stated that the appellant / its accountant had not been able to progress its appeal to the tribunal due to the fact that they were still waiting for VAT returns to be returned to it by HMRC's VAT office in Liverpool.

16. The appellant's notice of appeal to the tribunal was dated 28 July 2015. Pearson solicitors were noted to be the representative on the form but Mr Georgiou signed it on behalf of the appellant.

17. The grounds of appeal were that HMRC had stated the appellant was in debt of £44,097.65 as at 13 February 2014 but the appellant's calculations show HMRC was in debt to the appellant to the amount of £47,320.61. The reasons set out by the appellant for permission to appeal outside the relevant time limit were set out as follows within section 6 of the notice:

'*the company has been under constand (sic) flooding, as a result substantial amount of VAT claim has been made, as a result of the claims there has been a dispute with the customs and excise, the customs & excise has made estimated claims, as a result of the dispute further and better particulars have been put forward to the customs & excise and the customs & excise has approved late appeal, as a result of the floods important documentation has been destroyed; we requested information from the customs & excise, as of today we have been unable to obtain this documentation, On the 16th September 2015 the customs & excise has sent us a letter (copy enclosed) saying that they are unable to obtain copies of the Companies VAT returns, and they suggested we use letters sent by the customs & excise to complete the application for appeal. We followed the customs & excise suggestions & completed the appeal, & all figures for the returns are enclosed and are correct. I can also confirm the customs & excise have accepted the circumstances in question & allowed for a late appeal to be submitted*'

18. On 16 September 2015 HMRC debt management unit wrote to Mr Horler to state that it had been unable to obtain copies of the company VAT returns requested. However they enclosed copies of letters sent to the company from the VAT office concerning these same returns and the reasons for the amendments to the returns and the refusal of the reclaims the company had sought. The letter stated that the claims disallowed by the VAT office for the period in question, namely January 2011 to April 2012, totalled £47,906.91 and the amount of debt contained within the winding up petition amounted to £83,234.20 so even if the tribunal found in favour of the appellant the amount for set off would be insufficient to clear the amount of debt.

19. On 16 September 2015 HMRC also wrote to the appellant's MP.

20. It is clear from the grounds seeking permission to appeal out of time that the appellant's notice of appeal, as actually filed and accepted by the tribunal, was after the receipt of HMRC's letter of 16 September 2015. Indeed, the date stamps of the tribunal service upon the notice are 12 October 2015 and 19 October 2015. The Tribunal wrote to Pearson Solicitors on 13 October 2015 returning the appeal as it did not give the information needed to support a late appeal.

21. Therefore it is likely that the appeal was actually filed on 19 October 2015. However for purposes of this application, 28 July 2015 will be taken as the date of filing.

The witness statement on behalf of the appellant

22. On 29 January 2016, Mr Georgiou, director of the appellant filed a witness statement in support of the appellant's application for an extension of time in which to lodge their appeal.

The appellant stated as follows:

> The Appellant believes there to be a good explanation as to the delay and that having regard to the overriding objective it would be unfair and unjust, not to grant an extension of time in respect of the appeal. Further it is the Appellant's view that no prejudice would be suffered by the Respondent by granting the extension of time.
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> As stated above, the Review Letter was dated 5 September 2014 and was received thereafter. The Appellant did not have the benefit at the time of a legal representative to advise respect of any deadline and/or procedures they were required to follow. It is noted in the Review Letter that the Respondent accepted that the sum of £4,380 was to be withdrawn. The Appellant awaited confirmation from the Respondent that the reduction had been applied. The reduction of surcharge was not confirmed by the respondent until 23 October 2014. The Respondent further provided a Statement of Liabilities dated 23 October 2014.
>
> On receipt of the updated Statement of Liabilities and confirmation of reduction of the surcharge a letter was sent to the Respondent dated 27 October 2014 from the Appellant's accountant confirming that they wish to appeal against the stated indebtedness. The Appellant did not have the benefit of a legal representative at the time however, reasonably believed that the content of the letter of 27 October 2014 was sufficient to note their intention to dispute the purported indebtedness to the Respondent. The Appellant invited the Respondent to engage further in this matter to bring it to an amicable and satisfactory conclusion.
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> A further letter was sent to the Respondent on 2 February 2015 confirming that the Appellant wished the matter to be dealt with amicably and again requested a meeting with the Respondent. It is apparent from the content of this letter that

the Appellant believed that the review/appeal process was still ongoing and submitted a number of points that the Appellant wished for the Respondent to reconsider/consider further.

As the Respondent appeared unwilling to enter into dialogue in respect of this matter, the Appellant met with their local MP who then sent further correspondence to the Respondent on or around 11 February 2015.

At no point prior to this did the Respondent confirm or seek to clarify with the Appellant that any intention to appeal must or should be filed within 30 days of the Review letter.

The Respondent subsequently, and without notice to the Appellant, issued a Winding Up Petition at the High Court of Justice, Chancery Division on 10 March 2015 with a hearing date of 11 May 2015. It was at this point that the Appellant sought to obtain legal advice and arrange an initial meeting with Pearson Solicitors and Financial Adviser on 27 March 2015. The appellant subsequently instructed Pearson Solicitors on 4 April 2015.

It was the Appellant's position that they are unable to fully particularise the grounds upon which they seek to dispute the decision of the Respondent without copies of the submitted VAT returns. Pearson Solicitors wrote to the Respondent on 20 April 2015 confirming that the VAT element sought is disputed and provided documentation. It was requested the Winding Up hearing be adjourned. The Respondent wrote to Pearson Solicitors on 27 April 2015. The Respondent refused a meeting to resolve this matter and invited the Appellant to apply to the First Tier Tribunal. Without copies of the VAT returns, it is highly unlikely (for the reasons detailed below) that the Appellant is unable to fully document their position in respect of the amount of VAT due to be paid, or, as a case may be, credited.

The Appellant wrote to the Respondent on 1 May 2015 and requested a copy of a number of VAT returns. As no response was received the Appellant's solicitors wrote to the Respondent on 20 July 2015 further requesting copies of the VAT returns.

It was subsequently agreed between the parties that the Winding Up hearing be adjourned with a return date on 3 August 2015. At that hearing it was further agreed that the matter would be adjourned for a 3 month period.

It was not until 16 September 2015 that the Respondent confirmed that they were unable to supply the requested VAT returns. However, they have not stated why they are unable to do so. They did, however, enclosed copies of letters sent to the Appellant from the VAT office concerning those returns and the reasons for the amendments to the returns and in their opinion that was sufficient information for the Appellant to proceed with their appeal.

It should be noted at this point that the Appellant's premises are situated alongside the River Roch. The property was severely flooded between 2004 and

2007. A number of documents during that period were therefore lost and the Appellant does not have copies. There were further incidences of break ins at the property resulting in a loss of both goods and documentation.

The Appellant did lodge the notice of appeal (dated 28 July 2015) on [confirmed date] (sic). However, this was returned on 13 October 2015 as information had not been given in respect of section 6 of the notice. This was subsequently completed and re-sent on 16 October 2015.

It is therefore submitted that whilst there has been a delay in respect of submitting the formal Notice of Appeal, it is apparent from the above time frame that it was the intention of the Appellant to dispute the original decision as early as 27 October 2014. The Appellant was without legal representation at the time of receiving the Review Letter however, upon being served with an updated Statement of Liabilities on 23 October 2014 notice of an intention to dispute the purported liability was sent to HMRC no more than 4 days later.

Prior to presentation of the Winding Up Petition the Appellant was under the impression that the Respondent was further considering the points raised by the Appellant and that their intention to dispute had been registered and was in fact being dealt with. Having been served with a copy of the Winding Up Petition the Appellant sought legal advice and made a request of the Respondent for documentation to fully particularise their position in May 2015. However, a response was not received in respect of that request until September 2015. Upon confirmation that the Respondent was unable to produce the requested information a Notice of Appeal was lodged properly.

The Law

23. Section 83G of the Valued Added Tax Act 1994 (VATA) provides that an appeal should be made to the tribunal before the end of a 30 day period beginning with the date of the document notifying the decision to which the appeal relates.

24. The tribunal has the power to give permission to admit an appeal under Rule 20(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('Tribunal Rules') and extend time for the notice of appeal under Rule 5(3)(a) of the Tribunal Rules.

25. The tribunal must also apply the overriding objective under Rule 2(1) of the Tribunal Rules to deal with cases fairly and justly. This is supplemented by Rule 2(2) which provides:

(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, the complexity of the issues, the anticipated costs and the resources of the parties; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of

the Tribunal effectively; and (e) avoiding delay, so far as compatible with proper consideration of the issues.

26. The tribunal notes the useful summary provided by the First-Tier Tribunal (Tax Chamber) at paragraph 4 of its decision in *Assaf Ali Butt v The Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 95 (TC) on applications to appeal out of time:

'In terms of the tests and general approach that we must adopt in dealing with applications to appeal out of time we have considered the recent decisions of the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2103] EWCA Civ 1537 and *Denton v T H White Ltd* [2014] EWCA Civ 906, and those of the Upper Tribunal in *McCarthy & Stone (Developments) Limited* [2014] UKUT 196 (TCC), *Data Select Limited* [2012] UKUT 187 (TCC) and *Leeds City Council* [2014] UKUT 350 (TCC). Taking together all those decisions, we concur with the conclusion reached by this Tribunal in the recent case of *Aeron Mathers* [2014] UKFTT 893 (TC) (at [25]):

"… briefly, we consider the main points to be that:

- even if Tribunals are not required to follow the full requirements of the latest guidance given to the higher courts in terms of seeking to ensure much stricter adherence to time limits and other directions, in order to ensure the efficient and most cost-effective conduct of litigation, we must certainly pay some regard to that intended stricter adherence to such matters;
- as Tribunals, we are entitled to approach matters slightly more flexibly than the higher courts are now encouraged and directed to do;
- we must certainly not, however, allow litigation to be side-tracked by other parties in litigation seeking to rely on, and exploit, trivial procedural steps that their opponents may have failed to address; and
- in considering generally how to deal with late applications (for instance to bring an appeal, as in this case) we should still address the list of points summarised by Mr. Justice Morgan in *Data Select.* Those points are that we should address the questions:

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

  (2) How long was the delay?

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

  (4) What will be the consequences for the parties of a refusal to extend time or the grant of such an extension?

- We also consider it appropriate in this case to pay some regard to whether we consider that the Applicant was likely to have been able to raise valid and compelling points, should an appeal proceed, particularly because it seemed that the tax and penalties being imposed would be a serious matter for the particular appellant; and

- It is also relevant to pay some regard to the whole conduct of the enquiries, and to the issue of whether there have been repeated delays, non-cooperation and failures to advance points, arguments and explanations at many earlier times."'

27. Subsequent to this decision the Court of Appeal handed down judgment in *BPP Holdings v HMRC* [2016] EWCA Civ 121; 2016 1 WLR 1915 in which the Senior President of Tribunals stated at paragraph 15-16 and 37-38 of his judgment:

15.There are two conflicting decisions of the UT about the principles that are to be applied when non-compliance with rules and directions falls to be considered by a tax tribunal. The first in time is the decision of Judge Sinfield in *McCarthy & Stone (Developments) Ltd v HMRC* [2014] UKUT 197 (TCC), [2014] STC 973 and the second is the decision of Judge Bishopp in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC) where he declined to follow Judge Sinfield's approach. The *Leeds* decision was promulgated after Judge Mosedale's determination in this case and accordingly she could not have known of it. Judge Bishopp followed his earlier reasoning in *Leeds* in coming to the conclusion that the FtT in this case had erred in law.

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16.The key question underlying the two decisions can be characterised in the following way: whether the stricter approach to compliance with rules and directions made under the CPR as set out in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3926 applies to cases in the tax tribunals. The two conflicting decisions of the UT on the point came to different conclusions. For the reasons I shall explain, I am of the firm view that the stricter approach is the right approach.

……..

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

38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party.

28. Although he did not expressly analyse *Data Select Limited v HMRC,* at [44] of the judgment in *BPP Holdings* the Senior President said: "Morgan J applied CPR 3.9 by analogy…in just the manner I have suggested is appropriate".

29. Mr Justice Morgan referred to Rule 3.9 of the Civil Procedure Rules ("CPR") at [37] of his judgment in *Data Select*. Rule 3.9 has since been amended and now reads:

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

30. In *R (oao Dinjan Hysaj) v SSHD* [2014] EWCA Civ 1633 ("*Hysaj*"), Moore-Bick LJ, giving the judgment of the Court of Appeal, gave guidance on whether the merits of a substantive appeal should be considered in applications for extension of time. His Lordship stated at [46]:

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

Comment [2]: Sorry, I don't have this case in the authorities bundle

31. In *Raymond Harvey v HMRC* [2016] UKFTT 597 (TC) the First-Tier Tribunal in considering an application for permission to appeal out of time adopted the approach of using the structure and the criteria set down by Mr Justice Morgan in *Data Select* at paragraph 34 of that decision:

> As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

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Discussion and Decision

32. The submissions on behalf of the appellant were in line with the witness statement of Mr Georgiou as set out above.

33. HMRC submitted that 1) the purpose of the time limit was to ensure the finality of litigation; 2) there was long delay before the appellant filed its appeal; 3) the appellant did not have a good explanation for the delay; 4) the consequences of granting an extension would mean HMRC would have to expend significant

resources in defending an appeal which they were entitled to conclude was out of time; 5) the consequences of not granting an extension is that the appellant's appeal would fall away and HMRC's denials of credit and assessments would stand.

34. This decision is not the forum in which to analyse the potential effect of the stricter approach to compliance with rules and directions mandated by *BPP Holdings* when balancing or giving weight to the competing factors in *Data Select*. However, the Tribunal adopts the approach of considering the *Data Select* questions in the context of the stricter approach in *BPP Holdings*.

Purpose of the time limit

35. The purpose of the time limit in which to bring an appeal is in pursuit of a clear public interest in the finality of the decisions of HMRC. Time limits enshrine the need to bring the conduct or prospect of litigation to a speedy conclusion. As time limits, whether imposed by statute, tribunal rule or tribunal directions, serve the public interest, compliance is normally to be expected. Indeed, at paragraph 44 of the Court of Appeal's judgment in *BPP Holdings*, the Senior President declined to analyse *Data Select*. However, the fact that the deadline for appeal in this case is set by statute, namely section 83G VATA, rather than the Rules only emphasises its importance.

36. In *John O'Gaunt v HMRC* TC/2014/04510, the Tribunal explained the purpose of such time limits at paragraph 21 of its decision: '*It is designed to provide certainty and it is not in the interest of justice to permit appeals after long periods of delay. There is a public interest in the finality of decisions of the commissioners.*' In *North Berwick Golf Club* [2015] UKFTT 0082 (TC) at [33] the Tribunal stated '*time bar provisions are created for a reason and that is that they provide finality and certainty and that is not a matter that should be lightly disregarded*'.

Comment [4]: Sorry, I don't have this case in the authorities bundle

37. Rule 2(2)(e) of the Tribunal Rules, part of the overriding objective, requires the tribunal to avoid delay so far as compatible with proper consideration of the issues.

38. In applying the law to the facts of this case, the purpose of the time limit in which to bring an appeal, is in pursuit of a clear public interest in the finality of decisions of HMRC. Time limits enshrine the need to bring the conduct or prospect of litigation to a speedy conclusion.

Length of the delay

39. The length of the delay in this case before a notice of appeal was filed by the appellant at the Tribunal, on 28 July 2015 at the earliest, was long. It amounted to a minimum of nine months later than the 30-day deadline and ten months after the decision appealed of 5 September 2014. We note that the Upper Tribunal in *Romasave (Property Services) Limited v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC) at paragraph 96 stated that 'a delay of more than three months cannot be described as anything but serious and significant.' We also note

that the Upper Tribunal in *O'Flaherty v Revenue and Customs Commissioners [2013]* UKUT 0161 (TCC) stated 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.

Good explanation for the delay

40. It seems to us that the appellant's explanation for the delay is not good. HMRC's review decision letter of 5 September 2014 was clear as to the appeal route available, the timescale involved and the sources of information which could be utilised. HMRC's letter of 6 November 2014 re-iterated the appeal route available and invited submissions within 7 days. HMRC's letter of 11 February 2015 also reminded the appellant of the availability of the appeal to the tribunal. It was at least a further five months after this letter until the appellant appealed.

41. All three of these letters would have put a reasonable company or taxpayer on notice as to the seriousness of the issues contained therein.

42. It was not reasonable of the appellant to consider that the letter of 27 October 2014 constituted a notice of the appeal to the tribunal, if indeed it did, given the information it had been provided on 5 September 2014.

43. HMRC provided a fourth mention of the availability of the appeal and the timescale involved in its letter of 27 April 2015 to the appellant's solicitors. Yet still the appellant did not take up the opportunity to pursue an appeal for a further three months. HMRC's four operative letters were sent either directly to the appellant or its representatives then instructed.

44. It is impossible to accept the appellant's contention that at no time prior to 11 February 2015 did the Respondent confirm or seek to clarify with the appellant that any intention to appeal must or should have been filed within 30 days of the review decision.

45. Furthermore, the tribunal does not accept that the appellant acted reasonably in waiting for the provision of its VAT returns before filing the appeal. Even if copies of these had not been retained by the appellant, and HMRC's copies had been lost and were not available, the appellant had repeatedly been given notice of the availability of the appeal and had the opportunity to pursue it. At all times it had a copy of the review decision letter of 5 September 2014 which was the subject of the appeal and was sufficient material on which to base any notice of appeal.

46. Mr Georgiou submitted that there had been constant flooding at his premises in the period 2000 to 2012 and again in December 2015. Therefore he had lost much documentation. Even if this is correct, and it had not ceased in 2007 as per his witness statement, this might only go to the merits of the substantive appeal and not this application where the relevant time period is September 2014 to October 2015 at the latest.

47. The appellant cannot reasonably rely on any lack of understanding or awareness of the procedure to appeal where HMRC's notifications were clear and the appellant had its own responsibility to comply with the appeal procedures, notwithstanding the involvement of professional advisers, solicitors and accountants.

Consequences to the parties of extending time

48. In terms of the consequences for both parties of granting an extension and permitting the appeal to be admitted, HMRC would not be greatly prejudiced by the substantive appeal being heard. HMRC did not suggest that it would be unable to reply to the substantive points raised nor submit that documents or evidence relevant to the appeal had become unavailable. However, it is fair to say that HMRC would be put to the expenditure of time and cost in defending the substantive appeal and this will require some resources.

49. If permission is granted then the appellant will benefit from its appeal being heard. It would of course be noted that the appeal would only concern the subject matter of the review decisions concerning at most £75,000 of the appellant's liability to HMRC. The debt which HMRC is seeking from the company is understood to be a greater sum than this and involve other time periods and taxes.

50. HMRC submitted that the appellant's appeal would have little prospect of success on its substantive merits. It was submitted that the review decision accurately reflected the adjusted account to HMRC. However the tribunal, following *Hysaj*, has not taken into the prospects of the appellant's appeal succeeding in making this decision given that the outcome is not manifest or unarguable.

Consequences to the parties of not extending time

51. The consequences for the appellant of the tribunal refusing permission would be dramatic in the sense that the appeal would fall away and the assessments and denials of credit would stand without consideration of the merits of the appeal. The total debt to HMRC would then become enforceable in a winding up petition brought against the appellant.

Conclusion

52. The majority of the factors weigh against admitting the appellant's appeal. In particular we considered that the appellant was repeatedly warned of the opportunity and method of appeal and had no good explanation for what was a long delay.

53. Therefore we considered that it would not be in accordance with the interests of justice and overriding objective to extend time for lodging the notice of appeal. We refuse to grant permission for the appeal to be brought out of time under Rule 20(4).

54. The application is dismissed.

55. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 8 DECEMBER 2016