Neutral Citation: [2024] UKFTT 00178 (TC)

Case Number: TC09092

FIRST-TIER TRIBUNAL
TAX CHAMBER

Glasgow Tribunal Centre

Appeal reference: TC/2023/08288

PROCEDURE – late appeal – Martland considered – length of delay – serious and significant – whether reasonable excuse – no – all the circumstances of the case – application refused

Heard on: 16 February 2024
Judgment date: 28 February 2024

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER SONIA GABLE

Between

GRAEME WARDROP

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Grame Wardrop

For the Respondents: Liam Ellis and Matthew Mason, litigators of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This was a hearing listed to consider the application dated 14 June 2023 by the appellant seeking permission to commence a late appeal against two discovery assessments issued by the respondents ("HMRC") on 29 March 2019.

2. The discovery assessments were issued under section 29 of the Taxes Management Act 1970 ("TMA") for the tax years 2015/16 and 2016/17 in respect of invalid claims under the Enterprise Investment Scheme ("EIS").

3. In his covering emails the appellant stated:

> "I have attached the original copies of my Case. The appeal at the time wasn't looked into correctly and was unfair. This has been proved without any doubt with the case *Robson v HMRC* [[2023] UKFTT 00226 (TC)] where he won his case in front of a Judge
>
> …
>
> The reason I am appealing is because at the time of receiving the decision from HMRC 3 years ago, that I owed them the money my head wasn't in the right place to deal with the decision and appeal it at the time.
>
> My mental health was affected. MY wife split from me because of this, couldn't get any credit, had to enter into a trust deed (form of bankruptcy)
>
> There has been new evidence came (sic) to light that a case the exact same as mine to which I have referred to has won their appeal against HMRC, as HMRC have been found to not (sic) following the correct procedures [*Robson*]…".

4. We had Skeleton Arguments for both parties, a hearing bundle extending to 182 pages and a legislation and authorities bundle extending to 433 pages. In the course of the hearing Mr Ellis produced the amended version of *Huntly v HMRC* [2022] UKFTT 00135 ("Huntly") with Judge Gething's reasoning for the amendments dated 25 October 2022.

Background facts

5. The appellant is an electrician who, at all relevant times, has worked offshore. He still does. Prior to the events with which this appeal is concerned the appellant had been a PAYE employee. He said that it was possible that on one occasion, many years ago, he might have filed a tax return but he could not recall. He said that prior to March 2019 he had had no dealings with HMRC.

6. In or about 2015 the appellant and approximately six or seven colleagues, who all worked offshore, took the advice of another colleague and decided to approach a Mr Richard Hall of Capital Allowances Consultants Ltd ("CACL"). The appellant could not recall when he had had contact with Mr Hall.

7. We asked about emails and the appellant said that contact with Mr Hall was largely by WhatsApp and telephone. No records of that have been produced. Mr Hall asked for details of the appellant's income. The appellant's evidence was that Mr Hall undertook to obtain a tax rebate for him. It was the appellant's understanding that the rebate related to expenses such as those for mileage, clothing and tools. He expected that to amount to "a couple of thousand pounds" in any given year. The appellant had no recollection of any other details of messages or calls beyond the fact that Mr Hall said that he would act as the appellant's tax agent.

8. In order for an agent to be authorised via the online authorisation service the agent accesses their agent services account and completes the authorisation request. HMRC send an authorisation code by post to the taxpayer within 7 days. The taxpayer must provide the code to the agent within either 28 or 30 days or it expires. Using the code, the agent can sign into their account to enter the code and complete the authorisation process.

9. The appellant's evidence was that Mr Hall asked him to send that code, which had been sent to him by HMRC, and that he did so on two occasions. HMRC's records show that the first code was received on 30 September 2016, the 2015/16 self-assessment tax return was received on 4 October 2016 and the repayment of £16,114.06 was issued six days later.

10. Subsequently, on two occasions Mr Hall sent money to the appellant's bank account. He cannot recall either the amounts involved or the dates that those sums were received.

11. On 4 March 2019, HMRC wrote to the appellant stating that they were going to check the appellant's tax returns for 2015/16 and 2016/17 because EIS claims in both returns were invalid. He was asked for information about the two alleged EIS companies, which were Cryoblast Limited in 2015/16 and Eco Cooling Solutions Limited in 2016/17.

12. On 19 March 2019, the appellant telephoned Officer Barclay stating that he was a victim of fraud and that this had been reported to the police. He confirmed that he had made no EIS investments and argued that he should not be paying any money to HMRC.

13. On 20 March 2019, HMRC issued the Notices of Assessment for 2015/16 and 2016/17 in the amounts of £16,114.60 and £12,600 respectively.

14. On 29 March 2019, HMRC issued amended Notices of Assessment for both years. They were in the same sums but the only difference was that there were separate assessments for each year and the period for an appeal was extended to 29 April 2019.

15. On 28 April 2019, the appellant emailed HMRC intimating that he wished to appeal the assessments on the basis that he had not been aware that he had been put into an EIS scheme. He believed that his accountant had perpetrated a fraud and was being investigated in that regard.

16. In the interim, the appellant had been in contact with the police and he has produced copies of correspondence. There were a number of emails dated 23 March 2019 when he contacted the police at 14.34 stating that he had information about a tax case that they were investigating and asked that they contact him. They responded asking for information and he replied at 17.23 stating he was in the "collective investigation" with a Mr Tweddle (who assisted Mr Robson with his tax appeal, is a personal friend and organised what the appellant described as the "Tweddle Collective"). He went on to say:

> "Richard Hall done what I thought was a tax rebate/return for my self (sic) for 2 years.
>
> Last year he told me it was a different set up and wanted me to invest money into a company Cyroblast that he would put into my account. He put the money into my account saying it was another investment and to put it into another bank account.
>
> When this happened I know this was not right and I stopped my dealing with him. This was last August when I got in contact with [Mr Tweddle]. At this point I knew he was trying to use me as a pawn and I started the proceedings with our group to start a police investigation.
>
> I have the copies of his emails and I have bank statements that I will send to you."

17. The last email that day was at 19.55 when the appellant confirmed that he had received a bill from HMRC for £28,000 and it was causing a lot of stress. He went on to say:

"Thanks very much for helping us and listening as a lot of lawyers and even HMRC don't want to know. I will be going offshore on Friday but I will be available through this email address."

18. Correspondence continued and on 30 May 2019, the police wrote to the appellant asking for more information about the bank accounts from which he had received monies from either CACL or the two alleged EIS companies. The police said that it looked at that stage that there was an EIS fraud but the police did not know if Mr Hall had actually "claimed for your tax" and they did not know what the appellant "had been entitled to in each tax year that Hall gave you money". The appellant was told "make sure you get in touch with your HMRC inspector and let them know" that the police were liaising with HMRC.

19. There is no record of any such contact.

20. On 7 June 2019, Officer Barclay wrote to the appellant stating that he was continuing to seek some technical advice surrounding aspects of the appellant's appeal.

21. On 13 September 2019, HMRC issued their View of the Matter letter. This explained that:

(a) The 2015/16 tax return had been submitted with a claim for EIS shares of £55,000 and that had generated the tax refund of £16,114.06 which was issued on 10 October 2016. The nominee for the repayment was Cryoblast and a notification was sent to both the appellant and his agent intimating the amount of the repayment and the identity of the recipient.

(b) The 2016/17 tax return was submitted with a claim for EIS shares of £42,000 and that generated the tax refund of £12,600 but on this occasion the nominee was Eco Cooling Solutions Limited. The repayment was issued on 26 April 2017 and a notification was again sent to both the appellant and his agent.

(c) The appellant had authorised his agent to submit the return by completing the electronic form.

(d) It was not disputed that the appellant had never made the investments and that therefore the returns were incorrect.

(e) The area of dispute was the question of responsibility. The appellant had maintained that he was a victim of fraud. HMRC's argument was that whether or not the appellant was what they described as "an innocent dupe" or a "knowing participator" it was nevertheless a fraud and the appellant should have taken action when he saw the identity of those receiving the repayments. CACL could not have perpetrated the fraud without the appellant's co-operation in providing the code.

(f) The appellant's rights to seek a review of the decision or to appeal it to the Tribunal within 30 days were explained as was the fact that collection of the tax would be postponed until the appeal was settled.

22. On 17 September 2019, the appellant contacted HMRC by telephone, stating that he had received that letter and although he was offshore his wife had communicated the detail to him. He said that he was "stressed out about the amount owed and the interest but he wanted to appeal" and would do so within the time limit. On the same day he wrote to HMRC to make a payment and set up a monthly payment plan. He did so on the basis that this was:

"…not an admittance of guilt but an act of good faith and willing gesture to resolve the current situation. I can not take the stress of having this debt hanging over my head. Im

(sic) aware of the criminal investigation ongoing and I plan to challenge this decision taken against me."

23. On 18 September 2019, HMRC responded confirming that the payments would be treated as being made on a without prejudice basis. Officer Barclay reiterated the time limits including in relation to an appeal to the Tribunal. He went on to say that: "The amount due will remain 'suspended' if you appeal to tribunal (sic) or ask for an independent review. If you do not then the full amount will become due after the 30 days have passed."

24. On 2 October 2019 the appellant emailed the officer asking for confirmation of the expiry date for an appeal and if he could appeal by email. The officer replied two minutes later confirming that either a request for a review or an appeal to the Tribunal would have to be lodged by no later than 13 October 2019; the former could be done by email and the officer explained how to appeal to the Tribunal.

25. On 10 October 2019, the appellant requested a review of the decision and asked if he was still being considered as part of "the collective". The officer replied stating that he would arrange for a review. He confirmed that from HMRC's perspective there was no "collective", and each case was considered on its own merits.

26. On 15 November 2019, HMRC issued their Review Conclusion Letter upholding the assessments. In that letter, that officer stated that:

(a) The appellant had appointed CACL as his agent and authorised them to access his online account and submit tax returns.

(b) When each repayment was issued he had been sent a notice detailing the "make up of the repayment" and an intimation that a bank GIRO credit for the relevant amount had been sent to Cyroblast Ltd and Eco Cooling Solutions Ltd respectively.

(c) As those nominees were not CACL, HMRC would have expected that that should have prompted the appellant to contact HMRC to query who the nominee was and why he had only received a portion of the repayment, if he had, if that was not what he had agreed or arranged.

(d) The appellant had not made any contact until HMRC contacted him in March 2019.

(e) The officer expressed regret that the appellant had been a victim of fraud and that that had caused him stress but HMRC were simply recovering tax repayments to which the appellant was not entitled and which had been claimed in his tax returns.

(f) His right to appeal to the Tribunal, the time limit for that and the consequential postponement of tax were reiterated.

27. On 24 December 2019, the appellant signed a Trust Deed for Creditors which was subsequently advertised on the Register of Insolvencies on 3 January 2020. It states that it is due to expire on 24 March 2024. The relevant details are:

(a) The total debt is £51,519.60.

(b) There were 11 creditors and the largest creditor was HMRC in the sum of £28,714.60.

(c) The expected dividend to each creditor was expected to be 9.93 pence for each pound.

(d) At the time the appellant was in employment.

(e) His wife was not. He paid all the household bills. He had the use of his wife's car.

(f) The income and expenditure accounts shows a surplus of income over expenditure.

(g) The Reason for the insolvency was stated to be:

"The tax bill from HMRC was unexpected and they are not willing to negotiate on this. I cannot afford all of my current debts."

28. On 6 January 2020, the appellant telephoned HMRC referring to the letter of 15 November 2019 and asking what HMRC's next steps would be. The Review Officer confirmed that the sums due would be released for collection and he would email Officer Barclay to that effect. The appellant asked for a copy of the demand or bill so that he could send it to his lawyer. On 9 January 2020, Officer Barclay wrote to the appellant referring to that call and enclosed a copy of the appellant's self-assessment statement which showed the previously assessed amounts which were now due to be paid in full.

29. On 14 June 2023, the appellant lodged his application for a late appeal in the terms quoted at paragraph 3 above. His citation of the *Robson* case was not the neutral citation used for publication which we have used but the Tribunal administration's reference.

30. On 10 August 2023, Mr Mason wrote to the appellant asking for more information about the reasons for his late appeal.

31. The appellant responded on 14 August 2023 and an overview is that:

(a) He outlined some of the detail of his contact with HMRC.

(b) His email of 17 September 2019 had been sent "during a time of turmoil" in his life when he was at his "lowest point" but he had tried to act honourably to resolve the situation.

(c) His wife's concerns about why he had demands from HMRC for sums of money that were greater than the sums that he had told her that he had received as rebates had led to a breakdown in his relationship with her. They had eventually separated. He had had to find a new home.

(d) His mental health had suffered because he had lost his wife and bankruptcy was "looming". He said that "I could barely function in life".

(e) He had reported Richard Hall for fraud. Just before he became bankrupt he knew that the police and HMRC were in communication about the reported fraud.

(f) He argued that he had been forced into bankruptcy by HMRC.

(g) He complained about an inappropriate debt collection visit by HMRC on 5 February 2020 which had "compounded" his mental health problems and "added" to the deterioration in his mental health.

(h) His appeal in 2023 was because his mental health had improved, the Trust Deed would end in December 2023 and he could see "light at the end of the tunnel". He had done a lot of research.

(i) On the one hand he advanced a number of arguments to the effect that the tax returns had been "invalid and void" and cited numerous cases and the Bill of Rights Act 1688.

(j) On the other hand he relied on the decisions by Judge Dean in *Robson*, which was issued on 2 March 2023, and Judge Gething in *McCumiskey v HMRC* [2022] UKFTT 00128 (TC) ("McCumiskey") which was issued on 12 April 2022 (again we have used the neutral citation). Both involved Richard Hall and that gave him "the courage and confidence for a late appeal".

32. On 15 September 2023, HMRC lodged their Notice of Objection to the Application for a late appeal.

33. The appellant lodged a Rebuttal on a number of bases referring to numerous cases including some of those to which he had already referred in the context of "void acts" etc.

34. On 10 November 2023, HMRC made an application to make a few minor factual amendments to the Notice of Objection and in the absence of any objection the amendments were admitted.

The Legal Framework

35. HMRC rightly relied upon *Martland v HMRC* 2018 UKUT 178 (TCC) ("Martland") at paragraphs 43 to 47 which sets out the approach that must be adopted by the Tribunal when considering a late appeal. Those paragraphs read:

> "43. The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".
>
> 44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton:*
>
> > (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being 'neither serious nor significant'), then the FTT 'is unlikely to need to spend much time on the second and third stages' – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
> >
> > (2) The reason (or reasons) why the default occurred should be established.
> >
> > (3) The FTT can then move onto its evaluation of 'all the circumstances of the case'. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this 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."

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.

Approach to the evidence

36. As we indicated during the hearing, whilst, of course, it deals with a completely different part of the tax legislation, nevertheless, we agree with Judge Amanda Brown KC and Member

Duncan McBride in *Cry Me A River Limited v HMRC* [2019] UKFTT 244 where they state at paragraphs 11 to 14 as follows:-

> "11. There are a number of cases which, over the last decade, have considered the approach to be taken in respect of oral evidence received, particularly concerning facts and matters which occurred sometime before the giving of the evidence. These cases have been comprehensively reviewed in the judgment of Judge Brooks in *Hargreaves v HMRC* [2019] UKFTT 244.
>
> 12. So far as material in the present appeal the Tribunal notes, from that judgment, that a certain degree of caution is to be taken because:
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> "26 …
>
> - memories are fluid and malleable, being constantly rewritten whenever they are retrieved …
>
> - the process of … litigation … subjects the memories of witnesses to powerful bias …
>
> - witnesses, especially those who are emotional, who think they are morally right, tend very easily and unconsciously to conjure up a legal right that did not exist …".
>
> 13. The judgments summarised by Judge Brooks conclude that:
>
> 'The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose … But its value lies largely … in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."'
>
> 14. This approach is particularly relevant in the present appeal."

37. It is also very relevant here.

Discussion

38. We say that it is relevant because when we endeavoured to explore with the appellant the detail of what had happened, and when, in his dealings with HMRC his oral evidence was in conflict with the documentary evidence. For example, when asked why, on receiving the HMRC letter of 13 November 2019, he had not contacted HMRC to say that, as he now argued:

(a) he had not authorised CACL to submit tax returns, and

(b) he had not received notification about the payments to the nominees and the amounts.

He suggested that he was sometimes not staying in the marital home and therefore he was not receiving mail. As can be seen that is in direct conflict with the record of the telephone call and email on 17 September 2019. He conceded that the latter would have been accurate at the time. We find that it is. He then tried to suggest that he had probably not read the letter but the Note of telephone call states that he told HMRC that his wife had told him all of the details.

39. We are bound by *Martland* and have therefore adopted the three stage approach set out there. We have also had in mind the provisions of Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") which reads:

2.—Overriding objective and parties' obligations to co-operate with the Tribunal

(1) 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, 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.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

The length of the delay

40. The delay in this case is three years, five months and 30 days after the expiry of the statutory time limit set out in Section 49G Taxes Management Act 1970 ("TMA").

41. We are bound by the decision of the Upper Tribunal in *Romasave (Property Services) Limited v HMRC* [2015] UKUT 254 (TCC) where it states at paragraph 96 that:-

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

The delay here is undoubtedly very serious and significant.

What is the reason or reasons for the delay?

42. The Skeleton Argument for the appellant states that the appellant could not have been expected to "keep up with any sort of legal proceedings or timelines, when Mr Wardrop's life was falling apart and (sic) did not have a guarantee of a roof over [his head] or food on the table".

43. The income and expenditure details in the Trust Deed make it clear that there was a surplus of income over expenditure and that he lived in a rented property with his family. We have no evidence to the contrary.

44. We explored with the appellant his explanation that his mental health had been adversely affected since beyond the assertions in correspondence and in his appeal there was little detail.

45. As can be seen from paragraph 31 above, he had argued that he could barely function. We cannot accept that. Throughout, he has held down his job offshore which not only involves

a rota offshore which at that time was either two weeks on and two weeks off or possibly three weeks, but also the related travel.

46. Although it was argued in his Skeleton Argument that Covid-19 had meant that his "chance of finding assistance for his mental health greatly depreciated which delayed his recovery", he told the Tribunal that he had not visited his doctor or sought any help for mental health issues. He said that instead he had been drinking too much and he had argued a lot with his wife.

47. When he suggested that he had been unable to deal with HMRC when offshore we put it to him that we knew that whilst offshore it was perfectly possible to contact HMRC (and indeed do many other things) whilst off-duty. He conceded that that was accurate. We then pointed to his email (see paragraph 17 above) where he had indicated that he was contactable by email whilst offshore.

48. We then put it to him that he could not drink whilst offshore and again he had to concede that that was true. He eventually said that he had found working to be a release from his worries and that it was probably the case that he had buried his head in the sand.

49. We tried to ascertain when he had separated from his wife since it seemed clear from the Trust Deed that they were together in December 2019 when the Trust Deed was signed (and therefore when the appeal should have been lodged). He said that it had been an on/off situation and he could not remember even in which year they had separated.

50. However, latterly, when saying that he had only put in motion an appeal once he was "sorted" and in a more stable situation, he said that he had had to find a new home which had involved a lot of upheaval because he had had to arrange everything, down to buying a couch. When pressed he thought that that had been two or maybe three years ago which is after the end of 2019 when the appeal should have been lodged.

51. He denied any suggestion that he had prioritised work and other things like accommodation rather than dealing with HMRC.

52. When he was asked about the bankruptcy and, for example, his request at that time for details of the amount due to HMRC to be sent to his lawyer, he said that he had organised the bankruptcy himself.

53. In summary, whilst we have little doubt that he would have been stressed, we do not accept that at any time he was unable to function. He held down a job and dealt with other aspects of his life.

54. More pertinently, he eventually conceded that, as is evident from the documentary evidence, he did know about the time limit for appealing. He took a decision, and it seems to have been a deliberate decision, which will not have been taken lightly, not to appeal to the Tribunal and have the tax postponed but rather to enter into the Trust Deed (see paragraph 27 above).

55. He now relies on the decisions in *Robson* and *McCumiskey* which he says gave him the courage to appeal. Both of those appeals relate to the validity of discovery assessments issued in the context of fraudulent claims. However, as can be seen, the latter case was issued more than 15 months before the appellant lodged his application and *Robson* was issued more than four months before the application, ie in both cases long after the time for appealing had expired.

56. We agree with Mr Ellis when he argued that there would be no point in Parliament enacting the time limits in Section 49G TMA if taxpayers could simply wait as long as it took

to find a decision which cast doubt on the decision with which the taxpayer was concerned. As *Martland* and all the cases to which it refers make clear, time limits are there to be observed.

57. As can be seen from paragraph 16 above, Mr Tweddle, is a friend upon whom the appellant has relied. The appellant told the Tribunal that he was a great friend with whom he had been in contact throughout. Indeed, apparently had he not been on holiday he would have attended the hearing and he had assisted in preparing the appellant's Skeleton Argument and other documents. Mr Tweddle appeared in *Robson* and so, on the balance of probability, the appellant would have been aware of the outcome some months before he made the application.

58. Initially he told the Tribunal that Mr Tweddle had told him to "challenge" HMRC on the basis of *Robson* but when asked about the delay he denied that he had said that although all present had noted him as having said so and we confirmed that. He then said that the appeal had been made by him alone. His only explanation for the elapse of time to August 2023 was that it was only then that he felt strong enough to lodge the appeal.

59. We simply do not accept that the lengthy arguments to the effect that HMRC's actions were void and invalid and breached the Bill of Rights Act 1688 can be a good reason for delaying lodging an appeal. One of the appellant's argument is that if the assessments were void then it is never too late to raise an appeal. Whilst the Judges in *Robson* and *McCumsikey* did decide that in the particular circumstances of those cases the relevant assessments were not validly issued, that is not authority for a proposition that the assessments in this case must be void. We will revert to that in the next section.

All of the circumstances of the case

60. This evaluation proceeds from the starting point that it is important that litigation be conducted efficiently and at proportionate cost, and that time limits be respected (see *Martland* at paragraph 45). We must undertake a balancing exercise, assessing the reasons for the delay and the prejudice which may be caused to both parties by granting or refusing permission.

61. By any standard the appeal is exceedingly late and HMRC are entitled to expect finality. If the appellant were to be permitted to bring the appeal at this very late stage HMRC would suffer considerable prejudice because of the elapse of time.

62. We do not accept the argument that HMRC and, in particular, Officer Barclay were in breach of a duty of care to the appellant because they neither offered assistance in relation to his mental health nor "any major advice on his rights of appeal". As far as mental health is concerned, the alleged duty of care has not been identified but all that the officer knew was that the appellant was "stressed out" which is unsurprising and a far from unusual assertion where tax assessments are likely to be issued. Further we know that the appellant denies having sought any assistance in relation to mental health. It is far from clear what more the officer could have done.

63. As can be seen from the findings in fact, the methods of appealing and the time limits were repeatedly explained to the appellant. We find that at all times he was aware of not only the time limit for appealing but the method of so doing.

64. This was not a case where the appellant simply failed to appeal because he was ignorant about the time limit or the mechanism to do so. He had actively engaged in the appeal process until he received the Review Conclusion letter. We find that in December 2019 he made a deliberate decision not to appeal the assessments.

65. We have no information about any legal advice that may or may not have been given but it is clear from the Trust Deed that he knowingly entered the Trust Deed explicitly to "deal" with payment due in terms of those assessments. He knew that once the Trust Deed ended (he

mistakenly thought in December 2023) HMRC would have no further right to collect payment from him. All that they will have recovered is the dividend which, as can be seen, is comparatively tiny.

66. He has advanced no argument that any advice he received was wrong (and he told the Tribunal that he handled the bankruptcy himself) but he could not use any such argument as a reasonable excuse for the delay in lodging an appeal (see *HMRC v Katib* [2019] UKUT 189 (TCC) ("Katib") at paragraph 58.

67. Incidentally, whilst referring to *Katib,* we observe that at paragraph 17, the Upper Tribunal said that:

> "17. We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion."

68. The appellant had a further opportunity to revisit his decision not to appeal when, in January 2020, he was advised that the assessments would be released for collection and he asked for information to pass to his lawyer. He knew what the debt was and that it would be managed within the Trust Deed; hence his anger when collectors came to his home in February 2020.

69. Even if he is correct in arguing that *Robson* and *McCumiskey* are a good reason for lodging a late appeal he did not do so as soon as he knew about the outcome of those cases. He also relies on *Huntly* issued on 14 April 2022, and amended in terms of the Rules on 25 October 2022, for the proposition that a delay in lodging an appeal could be justified on the basis of fraud, Covid-19 and working offshore. We do not know when the appellant became aware of *Huntly* but it seems likely that it was after he submitted his application for a late appeal.

70. The point is that each and every appeal depends upon its own facts. The appellant argues that any appeal now would be successful based on the decisions in those cases. Paragraph 46 of *Martland* makes it clear that this Tribunal can only look at whether there is a really strong or a very weak case.

71. The appellant argues that he is in the same position as each of those three appellants and therefore he has a strong case. Of course all three cases involve allegations of fraud but that alone does not suffice.

72. Judge Dean made it explicit in *Robson,* at paragraph 80, that her decision turned on:

> "80. The facts of Mr Robson's appeal are unusual and specific and as I have concluded that CACL were not authorised to act on behalf of Mr Robson, I do not accept that *Clixby* supports HMRC's case to the extent submitted. While cases such as this must be rare, it appears to be an unfortunate loophole in HMRC's system that this process was open to abuse.
>
> 81. I concluded that CACL was the not authorised agent of Mr Robson. That being so, the return cannot be deemed to have been submitted on behalf of Mr Robson. As s29 TMA requires the filing of a return the statutory requirements are not satisfied."

73. In *McCumiskey*, Judge Gething found that there was no evidence that the appellant in that case had appointed CACL as an agent and therefore they did not act on behalf of that appellant.

74. In *Huntly* at paragraph 17, Judge Gething found as fact that Mr Huntly had not been told how to appeal.

75. Without going into the detail, on those matters alone, the cases are not the same. The appellant told us that that he did pass the HMRC codes authorising CACL to Mr Hall, that CACL acted thereon and that he received monies derived from HMRC thereafter. He was certainly repeatedly told how to appeal.

76. Furthermore, although he now argues that he did not authorise CACL to submit tax returns on his behalf, the terms of his email to the police (see paragraph 16 above) do not assist him in that he explicitly refers to Mr Hall "having done what I thought was a tax rebate/**return**". We add emphasis since if he thought, as he now suggests, that only a rebate was being sought the word return would not have been included. We observe that at that stage he had been part of the Tweddle Collective for approximately nine months.

77. It is clear from what we narrate at paragraph 16 above that the appellant knew about Cyroblast Ltd in 2018 and that CACL had used the appellant's bank account. He chose not to contact HMRC and his only explanations to the Tribunal about his failure to have done so were that:

(a) He had become involved with the Tweddle Collective and liaised with the police about fraud, and

(b) He had never had any involvement with HMRC and saw no point in talking to them; he thought that the police were the appropriate body to be involved since this was different to the previous two years.

We find it difficult to accept why, if he suspected fraud, he did not check what CACL had done in his name.

78. The facts in the cases upon which the appellant relies are not the same as in this case as a cursory analysis of the evidence produced in those cases demonstrates. We do not accept that if we granted leave to appeal that any appeal would have a strong prospect of success.

79. HMRC argue that there would be prejudice to them if they now have to litigate a case that they had long believed to be closed. That is correct in that they would have to divert resources, at a cost to the public purse, in order to do so. The appellant argues that there would be no such prejudice because other cases from members of the Tweddle Collective are due to be litigated in 2024. He went so far as to say that it would not affect HMRC since his case is a "carbon copy" of *Robson.*

80. As Judge Dean pointed out at paragraph 13 of *Robson*, even where cases may be similar, the Tribunal is concerned only with the facts in each individual appeal. Although some of the arguments which would be advanced are similar such as the argument at paragraph 26 of *Robson* that "HMRC have acted negligently by pursuing him instead of prosecuting the person who committed the fraud", nevertheless the underlying facts may not be the same.

81. For example, in *Robson* there was reliance on a meeting with Officer Barclay in November 2019 and, of course, there was no such meeting in this case. A chain of emails was produced and relied upon. As can be seen from paragraph 7 above, the appellant stated that there were no emails but there were WhatsApps. We observe, however, that the appellant told the police that he would send them copy emails (see paragraph 16 above). The content of any WhatsApps or emails is not known and may not be the same or may not be produced. In fact they are unlikely to be the same since, unlike the appellant who states that he had had no prior contact with HMRC, Judge Dean found at paragraph 63 that Mr Robson had contacted HMRC

on a number of occasions and had used CACL in relation to a possible underpayment of tax; the emails that are quoted at paragraph 27 of *Robson* reflect that.

82. In this case, the appellant denies having received the notifications about the payments to the EIS companies but at paragraph 66 Judge Dean relies on Mr Robson's account of what happened when he received that notification.

83. We do not propose to further analyse the differences but what is clear is that this appeal is not a carbon copy and if it were allowed to proceed HMRC would indeed be prejudiced and put to time and trouble in defending it.

84. It is also argued in the Skeleton Argument that HMRC did not listen to advice from the police. On the contrary it would seem that it was the appellant who did not take the advice from the police (see paragraph 18 above).

85. We asked the appellant why he had said to the police on 23 March 2023 that "HMRC don't want to know". He could not answer and ultimately said that it was just a feeling, and perhaps he was reflecting on the experiences of others in the collective.

86. It is clear to us that both officers involved in this matter did take the argument that fraud was involved into account and both addressed that explicitly in their decisions, as we have narrated.

87. It is clear to us that the decisions in *Robson* and *McCumiskey* were the trigger for this application for a late appeal and the appellant agreed with that.

88. We have already discussed those cases but there is also the issue as to whether it could ever be a reasonable excuse for a delay in appealing because a decision in another case some time later might mean that a successful appeal would be possible. HMRC cited a number of cases in support of a refutation of that concept but by far the most persuasive was the decision of Judge Cannan in *Moore v HMRC* [2022] UKFTT 411 (TC) where he said at paragraph 95 that:

> "In my view, the publication of a new authority which prompts an appeal out of time might have some weight in the balancing exercise at stage three. However, it is not in itself a good reason for not appealing in time. If it was, then it would nullify to a large extent the benefit of finality recognised in *Data Select* and *Aberdeen City*. It seems to me that the longer the delay, the less weight that should be attached to the fact that the law was in effect misunderstood or misconstrued."

In that case the delay was four years which is not dissimilar to the delay here but in that case the issues in the appeal upon which reliance was placed were already being litigated and it was the outcome of the appeals, including to the CJEU, which was awaited.

89. In this case the decisions upon which the appellant relies were not being litigated at the time that he should have lodged an appeal. They are decisions in the Tribunal and those, unlike the decision in issue in *Moore,* are at best persuasive and only if the facts are aligned. No decision has retrospective effect and in this instance we are looking at an appeal that should have been made a number of years earlier.

90. In summary, we agree with the Tribunal in *Marissa Lincoln v HMRC* [2023] UKFTT 26 (TC) at paragraphs 34 and 35 where it said:-

> "34. The case was not cited to us but the Upper Tribunal in *HMRC v BMW Shipping Agents Ltd* [2021]UKUT 91 (TCC) ("BMW") at paragraph 52 and 53 of their decision, said:

> ‘52. We will approach the third Martland stage by performing, as Martland requires, a balancing exercise. In that balancing exercise, the need for litigation to be conducted efficiently and at proportionate cost … must be given particular weight…’.
>
> 35. In this case there was no doubt as to the time limit for lodging an appeal with the Tribunal. The appellant simply did not see the point and did not want to do so until a very late stage. If we were to allow the late appeal in the circumstances of this appeal that would be contrary to the principle of ensuring that time limits are respected. Litigation should be conducted efficiently and at proportionate cost.”

In this instance the appellant decided that there was no point in lodging an appeal and opted for bankruptcy. That was his right. He cannot now change his mind.

Decision

91. We have weighed in the balance every relevant factor that has been drawn to our attention and looking at the totality of the evidence, for the reasons set out above, the appellant’s application for permission to notify the appeal late is refused. Accordingly, the appeal is not admitted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

92. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 28th FEBRUARY 2024