[2018] UKFTT 195 (TC)

TC06436

Appeal number: TC/2012/09471

PROCEDURE – application to reinstate appeal – tax sought under Regulation 72 Directions under Income Tax (PAYE) Regulations 2003 – Rule 17 of the Tribunal Rules 2009 – application being out of time –* Pierhead Purchasing *considered – relevant criteria for consideration – reasons for delay – the effect on legal certainty – prejudice to parties – merits of the appeal: estoppel and time limit – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD HADLAND **Applicant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
MR IAN MALCOLM

Sitting in public at the Magistrates' Court, Parkgate, Darlington, on 6 November 2017

Mr John Warbey, for the Appellant in attendance

Mrs Rosanna Oliver, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The interlocutory hearing was for the sole purpose of considering the application by Mr Richard Hadland to reinstate his appeal, which was originally lodged with the Tribunals Service by Notice on 9 October 2012.

2. The appeal had been listed for a substantive hearing on 18 April 2016, but was withdrawn as notified to the Tribunal by a letter dated 15 April 2016 from Mr Warbey, accountant acting as representative of Mr Hadland in these proceedings.

3. Following the withdrawal of the appeal, Mr Hadland wrote to Tribunals Service on 29 September 2016 to apply for reinstatement.

4. HMRC opposed the reinstatement application by notice dated 19 October 2016.

5. Mr Hadland attended the hearing with Mr Warbey, who made representations on his behalf. Mrs Oliver represented HMRC. No evidence was led by either party.

Relevant law

6. The procedural provisions for considering this application come under the Tribunal Procedural (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (the Tribunal Rules). Rule 17 provides specifically for withdrawal and reinstatement of an appeal as follows:

> "**Withdrawal**
>
> 17 (1) Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case –
>
> (a) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) The Tribunal must notify each other party in writing of a withdrawal under this rule.
>
> (3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.
>
> (4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after –.
>
> (a) the date the Tribunal received the notice under paragraph (1)(a); or
>
> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

7. As with any other tribunal rules, Rule 17 is to be considered in conjunction with the overriding objective under Rule 2, which is "to deal with cases fairly and justly", which 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."

8. This application has not been brought within the time limit stipulated under Rule 17(4), being 28 days of the date of the notice under Rule 17(2) given by the Tribunal in writing to advise the parties of the withdrawal. The Tribunal needs therefore to consider whether it will extend its case management powers under Rule 5 "to extend the time for complying with any rule", which includes compliance with the 28-day time limit to make an application to reinstate an appeal.

9. In respect of the capacity of a representative in tribunal proceedings, Rule 11(3) provides that:

> "Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement."

Factual background

10. On 25 February 2003, HMRC opened a corporation tax enquiry into Penthouse Fitness Suite Ltd. Mr Hadland was a director and the controlling shareholder in charge of the day to day running of the company. During the enquiry, it was discovered that Mr Hadland had drawn company funds by cash or cheques. The funds so withdrawn were not returned as part of his remuneration, and therefore not subjected to any deduction of tax.

11. On 23 March 2006, HMRC issued protective Discovery assessment for the untaxed remuneration received by Mr Hadland. The assessment was appealed.

12. In a meeting with HMRC attended by Mr Warbey on 1 May 2007, various aspects of the company's tax liabilities, including corporation tax and those under PAYE, together with the figures for the untaxed income received by Mr Hadland for the years 1997-98 to 2003-04 were discussed with a view to settlement.

13. Following the settlement meeting, the revised figures were agreed in writing by exchange of correspondence between HMRC and Mr Warbey in May 2007. The contents of these letters were the subject matter of a s 54 TMA agreement.

14. In 2009, when HMRC reviewed the case, it was identified that the company as the employer had failed to pay the liabilities in relation to the PAYE due on Mr Hadland's untaxed income received in the form of company funds withdrawn.

15. On 26 June 2009, HMRC wrote to Mr Hadland to advise of their intention to apply Regulation 72 of the Income Tax (Pay As You Earn) Regulations 2003 ("the 2003 Regulations") in respect of the unpaid PAYE. Regulation 72 comes under the heading of: "Recovery from employee of tax not deducted by employer".

16. On 21 October 2011, after protracted discussions over more than two years which failed to reach an agreement, HMRC issued Directions under Regulation 72(5) Condition B of the 2003 Regulations, which provides as follows:

> "(5) The Inland Revenue may direct that the employer is not liable to pay the excess to the Inland Revenue."

17. The reference to "Condition B" is a reference to the provision under Regulation 72(4) of the 2003 Regulations, which states:

> "(4) Condition B is that the Inland Revenue are of the opinion that the employee has received payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments."

18. The Directions of 21 October 2011 were in respect of the seven tax years from 1997-98 to 2003-04. The "additions" figure for each of the tax years was at £50,000, on which "additional duties" were charged, and ranged between £15,178.70 at the lowest to £17,298.35 at the highest.

19. The total sum of additional duties for the seven years was £113,731.46, on which interest would appear to be payable as provided by Regulation 72(7):

> "(7) If condition B is met, tax payable by an employee as a result of a direction carries interest, as if it were unpaid tax due from an employer, in accordance with section 101 of the Finance Act 2009."

20. On 17 November 2011, the Directions were appealed by Mr Warbey, accountant acting on behalf of Mr Hadland.

21. On 14 February 2012, HMRC wrote to Mr Warbey advising that they did not accept the appeal, and offered an independent review.

22. On 11 March 2012, Mr Warbey accepted the offer and requested a review.

23. On 6 September 2012, the Review conclusions upholding the Directions were notified to Mr Hadland and Mr Warbey.

24. On 9 October 2012, the Notice of Appeal (dated 5 October 2012) was received by the Tribunals Service, and as such the appeal was made out of time (after 30 days of the appealable decisions of 6 September 2012). Correspondence between the Tribunals Service and Mr Warbey followed in respect of the late appeal.

25. On 14 December 2012, the late appeal was accepted by the Tribunals Service.

26. On 11 December 2015, the Tribunals Service issued a notice of hearing to Mr Hadland for the appeal being listed for substantive hearing on Monday 18 April 2016.

27. The prolonged delay (of three years) in listing the appeal would appear to be due to the appellant's state of health, that he "remain[ed] unfit to attend a hearing" (per Tribunal's Directions dated 20 January 2015 to adjourn the proceedings for a further six months following an application by the appellant in December 2014).

28. On 15 April 2016, the Friday immediately before the scheduled hearing, Mr Warbey wrote to the Tribunals Service as follows:

> "I have had many meeting with my client [Mr Hadland] since my letter [of 26 October 2015] and yours [11 December 2015] as it is difficult for him to concentrate for any length of time and [he] is having panic attacks.
>
> Mr Hadland has taken the view that he cannot travel to North Shields and does not believe that the system is taking him seriously.
>
> His belief is based on the fact that no reply to my letter appears to have been given and that the evidence required has still not been provided by HMRC.
>
> He therefore thinks he will not get a fair hearing and that the decision is a foregone conclusion which is despite assurances from me to the contrary.
>
> I understand from his doctors that this response is not unusual to any kind of stress let alone this when he cannot get the information to proceed with his appeal and as such is resigned to his fate and simply wants an end to things.
>
> He has therefore instructed me to abandon the appeal."

29. Mr Warbey's letter continued by making the following suggestions as to the course of proceedings:

> (1) that "the tribunal might consider a further adjournment given his comments to allow HMRC to comply";
>
> (2) that "should the tribunal decide to proceed with the hearing rather than [Mr Hadland] abandoning or withdrawing the appeal", the Tribunal was asked to consider the question of time limits of "four years" for the making of assessments or determinations under schedules 39 and 51 of FA 2008.

30. By letter dated 26 April 2016, the Tribunals Service wrote to HMRC as follows:

> "The appellant has informed the Tribunal that it has withdrawn its appeal in this case (copy letter enclosed).
>
> The effect is that the appeal has failed and any hearing date is cancelled.

> If you have any further application with regards [sic] to this appeal it should be made within 28 days from the date of this letter, in the absence of which the filed will be closed."

The application to reinstate the appeal

31. On 29 September 2016, Mr Hadland wrote to the Tribunals Service. The letter was received on 6 October 2016, and treated as an application to reinstate the appeal.

32. Mr Hadland gave his grounds for the application as follows:

> "I have been advised by HMRC that my appeal has been withdrawn. I have researched the matter and can advise you that I have heard nothing from the tribunal in respect of the appeal.
>
> I understand that I should have been told that the withdrawal of the appeal had been accepted and that I may have been given time to apply to reinstate the appeal. I would draw your attention to the fact that HMRC would not disclose evidence to enable me to pursue my appeal and the tribunal did not order them to. This is the reason I believed that I would not win and that the parties were in collaboration.
>
> I would say that this was due to my state of mind at the time ... I would say that I have made a good recovery not least because the pressure of the hearing has been lifted given that I believed I would not be given a fair hearing.
>
> Consequently I have come to the conclusion I would like to reinstate the appeal especially as the determinations were made out of time and after the statutory time limit. This is apart from the fact that Mr. Baird (the inspector) agreed that the department would not pursue this when negotiating the original settlement and obviously I would not have agreed that had I known that HMRC would renege on that agreement and as such the original settlement should be resiled from. [...]"

HMRC's objections to the application

33. By letter dated 19 October 2016, HMRC opposed the application for reinstatement of the appeal for the following reasons:

> (1) HMRC were at the hearing scheduled for Monday 18 April 2016 which neither the appellant nor his representative attended. The Tribunals Service then confirmed to HMRC by letter dated 26 April 2016 that the appellant had withdrawn his appeal.
>
> (2) HMRC would presume that notice confirming the withdrawal of his appeal would have been issued by the Tribunals Service to the appellant and /or his representative at the same time as the withdrawal notice was issued to HMRC.
>
> (3) In the event that no notice was given, HMRC note that their records indicate that the appellant was advised of the withdrawal of his appeal before the Tribunals Service in a telephone call with HMRC Debt Management Unit on 9 June 2016.

(4) HMRC take exception to the appellant's "accusation of non-compliance" and refute any suggestion of an attempt to withhold the evidence, which HMRC infer as "copies of the manuscript notes of meeting with the HMRC inspectors". HMRC advised that the typed notes of the meetings were provided to the appellant and his representative, receipt of which had been acknowledged by his representative. As such, HMRC consider that all evidence, on which the appellant intend to rely, was provided.

(5) As regards the determinations being made out of time and after the statutory time limit, HMRC note the matters under appeal were the Directions issued under Regulation 72 Income Tax (Pay As Your Earn) Regulations 2003, for the tax years 1997-98 to 2003-04. HMRC would advise that a Regulation 72 Direction can be made at any time: there is nothing within the legislation which enforces a time limit by which notices must be issued.

Submissions at the hearing

34. A hearing scheduled on 20 June 2017 to hear the application was postponed to allow Mr Hadland the recovery time following his injury in a car accident.

35. The hearing eventually took place on 7 November 2017, during which Mr Warbey made representations mainly on two issues:

(1) That the assessments to tax were made out of time;

(2) That HMRC did not produce the meeting notes by Inspector Baird with Mr Hadland and Mr Warbey on which the appellant intended to rely.

36. On the first issue, Mr Warbey maintained that the assessments were raised in the context of discovery assessments under s 29 of the Taxes Management Act 1970 ("TMA"), and as such they are out of the time limit stipulated under s 29, being six years from the end of the year to which they related.

37. On the second issue, Mr Warbey referred to there being a letter of offer from Mr Hadland and a letter of acceptance from HMRC which constituted a contract settlement under s 54 of TMA. The terms of this settlement would have been evidenced by the manuscript meeting notes between Inspector Baird and Mr Hadland, which HMRC have declined to produce. By withholding the meeting notes, the appellant could not pursue the appeal in the way he wanted.

38. As for Mr Hadland, his principal submission was to maintain that he had never received a copy of the letter from the Tribunals Service of 26 April 2016, the contents of which are as cited above.

39. The Tribunal emphasised to Mr Hadland that regardless whether there had been a withdrawal confirmation letter sent by the Tribunals Service to him, the letter from Mr Warbey of 15 April 2016 contained a clear statement of the withdrawal of the

appeal. We questioned the circumstances under which the letter was written so close to the scheduled hearing, which Mr Warbey was able to confirm as follows:

> "[Mr Hadland] did instruct me to write the letter and I did write it."

40. Mr Hadland did not object to the statement so made by Mr Warbey, that the withdrawal letter was written as instructed by him on the Friday before the Monday hearing on 18 April 2016.

41. Furthermore, Mr Warbey informed the Tribunal that it was an "exceptional, unusual case"; that due to Mr Hadland's state of mental health at the time, and having to travel for the hearing which was not in Darlington, and "without the information from HMRC", Mr Hadland felt "he could not pursue the appeal effectively".

42. For HMRC, and in response to the first issue on time limit, Mrs Oliver averred that the assessments were not raised as discovery assessments under s 29 TMA, but as Directions under Regulation 72, which are not subject to any statutory time limit.

43. On the second issue, Mrs Oliver contended that HMRC would not have pursued the Directions under Regulation 72 if there had been a contract settlement under s 54 TMA as the appellant alleged to have been agreed by Inspector Baird.

44. Mrs Oliver submitted that either Mr Warbey had completely misunderstood the situation, or HMRC had decided to pursue matter in a different way before such an agreement was finally reached. In that regard, what the appellant could argue was at most that he had a "legitimate expectation" that such an agreement was reached; but that it was not open to the appellant to argue that such an agreement had been reached.

45. Mrs Oliver further submitted that if the application to reinstate the appeal were to be granted, HMRC would apply to strike out the appeal on the grounds that:

(1) The Tribunal has no jurisdiction to consider "legitimate expectation",

(2) The appeal has no reasonable prospect of success.

46. HMRC provided the Tribunal with the following documents at the hearing:

(1) HMRC's Statement of Case dated 10 November 2015 for the scheduled hearing listed on 18 April 2016;

(2) The letter from the Tribunals Service dated 26 April 2016 to notify HMRC of the withdrawal of the appeal by Mr Hadland;

(3) Notes of meeting at Penthouse Fitness on 1 May 2007 between HMRC (Inspectors Baird and Ivison) and Mr Warbey;

(4) HMRC's letter to Mr Warbey dated 2 May 2007 from Inspector Ivison;

(5) Mr Warbey's reply of 9 May 2007 to Inspector Ivison.

47. Inspector Ivison's letter of 2 May 2007 began as follows: "Further to our meeting of 1 May 2007, in order to bring my enquiries to a conclusion, can I please have your formal agreement to the determination of the appeals under s 54 TMA 1970

in the following figures?" The letter continued by setting out the figures under the headings of: (a) Employer Compliance Review for the years 1999-2000 to 2002-03; (b) Corporation Tax amendments to profits for accounting periods ended 28 February 1998 through to 2002; and (c) Mr Hadland's Income Tax; amendments to the years 1997-98 to 2003-04.

48. The letter was accompanied by two schedules setting out the figures for the corporation tax profits after amendments, and of the "additions" to profits that came under Mr Hadland's income tax. The addition to profits was at £50,000 for each of the seven years in question, apart from 2002-03 when it was £175,000, though the "additional duties" were raised on £50,000 for each year.

49. Mr Warbey's reply confirmed his agreement to the figures and to each section he added: "I can confirm that no appeal will be made against the notices and insofar as any further agreement is required you have it also."

Post-hearing information

50. Subsequent to the hearing, the Judge contacted the Tribunals Service to seek confirmation if a letter of notification similar to that sent to HMRC on 26 April 2016 was also sent to Mr Hadland.

51. The Tribunals Service confirmed that Mr Hadland's appeal file was destroyed in August 2016 in accordance with the data retention policy. The file currently held for this appeal only dates back to 6 October 2016, when the reinstatement application was received, and is a reconstructed file.

Discussion

52. The substantive matter for this Tribunal is the reinstatement application, and not the substantive appeal which would have been heard on 18 April 2016. This distinction was made clear to Mr Hadland at the hearing.

53. The grounds for the reinstatement application as stated in Mr Hadland's letter of 29 September 2016 can be summarised as follows:

(1) That Mr Hadland had not received a notice of his withdrawal from the Tribunals Service;

(2) That he was in a state of mind to believe that he would not be given a fair hearing;

(3) That HMRC failed to disclose evidence to enable Mr Hadland to pursue his appeal;

(4) That HMRC's determinations were made out of time and after the statutory time limit.

54. Mr Hadland's application for reinstatement was made out of time. Under Rule 17(4), the time limit of 28 days form the date of issue of the notification on 26 April

2016 meant that an application for reinstatement had to be made by 24 May 2016. Mr Hadland's application was made on 29 September 2016, over four months after the time limit allowed for making an application to reinstate.

55. Procedurally, before the Tribunal can consider the substantive application, we should decide whether to grant an extension of the time allowed under Rule 17(4) to admit the late application by exercising our case management powers under Rule 5(3). To do so means to adopt a two-stage approach, by first deciding whether to grant an extension of time for the application, and assuming that we grant an extension of time, to consider the substantive application for reinstatement.

Whether an extension of time granted for a late application

56. In a case of a reinstatement application which was made out of time, Judge Gammie's approach at the First-tier Tribunal (FTT) in *Pierhead Purchasing Limited v HMRC* [2013] UKFTT 172 (TC) ('*Pierhead*') was that the two issues: an extension of time and reinstatement, are so strongly related that it is "more productive" to consider them together. His reasoning was given at [41] and [42]:

> "[41] ... Logically I should therefore proceed by treating the Appellant's application as an application for the Tribunal to extend the time allowed under Rule 17(4) and, assuming that I grant such extension, as an application to reinstate its appeal. I find it more productive, however, certainly in this case, to consider the two issues together, if only because there are *prima facie* grounds for agreeing to extend the time allowed for the application. ...
>
> [42] It also seems to me that in the case of an application to reinstate an appeal there is a strong relationship between the grounds that are advanced to justify the application and the time that has elapsed since the appeal was withdrawn. If the application is made in time the only issue is whether the grounds advanced in support of the application justify reinstatement. If the application is made late, there may be a valid excuse for the late application that justifies an extension of time but the fact that more time has elapsed since the case was withdrawn is likely to be a relevant factor in deciding whether the application to reinstate should be allowed."

57. While we agree with the strong relationship between the two issues, we are aware of the potential issues that this approach may cause, as related in the Upper Tribunal decision of *Pierhead Purchasing Ltd* [2014] UKUT 0321 (TCC). By considering the two matters together, and when a late application to reinstate is refused as in *Pierhead*, it may not be readily discernible whether the refusal is in consequence of a refusal to allow an extension of time, or a refusal on the substantive application to reinstate. For this reason, we address first and separately the matter whether to grant an extension of time for the late application.

58. In *Pierhead*, the FTT found that the Appellant never received the Tribunal's notification made pursuant to Rule 17(2), which states: "The Tribunal must notify each other party in writing of a withdrawal under this rule".

59. In the present case, the Tribunal's notification under Rule 17(2) is evidenced, at least insofar as HMRC were concerned, by the letter dated 26 April 2016 to advise of the appellant's withdrawal of the appeal. Mr Hadland, however, was emphatic that he had not received such a notice.

60. The standard procedural practice is that a letter identical in content would have been sent to Mr Hadland by the Tribunals Service on the same date to the appellant as the other party under Rule 17(2). The Tribunal file has, however, been destroyed in August 2016, and a copy of that letter can no longer be evidenced.

61. One possible explanation why Mr Hadland had not received the notice from the Tribunal could be that it had been sent to Mr Warbey. The notice of withdrawal of 15 April 2016 was sent by Mr Warbey with his office address as the sender's address. If there had been a notice sent by the Tribunals Service on 26 April 2016 for the appellant's attention, it would most probably have been addressed to Mr Warbey at his office address.

62. We note also from the few letters in the reconstructed file that the Tribunals Service was corresponding directly with Mr Warbey as the representative of Mr Hadland with regard to the substantive appeal. To send the notification letter of 26 April 2016 to Mr Warbey would seem to be consistent with the ongoing course of correspondence between the appellant and the Tribunals Service. However, we note also that Mr Warbey was silent as to any communication from the Tribunals Service that could have been the notice.

63. Without putting the fact to further proof, we make no finding as regards whether effective service by the Tribunal of the notice under Rule 17(2) could have been deemed in accordance with the terms of s 7 of the Interpretation Act 1978. So far as Mr Hadland is concerned, he had never received the notice. The significance we draw is that the assertion of non-receipt by Mr Hadland, arguably, was the reason why the application was made out of time. We therefore give an extension of time and admit his late application.

The criteria for considering reinstatement

64. The relevant criteria for considering a reinstatement application are summarised by Mrs Justice Proudman in the Upper Tribunal decision of *Pierhead* at [23]:

> "Although as I have said, there is no guidance in the rules, the FTT applied the additional principles set out (in the context of delay in lodging an appeal) in *Former North Wiltshire DC v HMRC* [2010] UKFTT 449 (TC). Those were the criteria formerly set out in CPR 3.9(1) for relief from sanctions: see the decision of the Court of Appeal in *Sayers v Clarke Walker* [2002] EWCA Civ 645 at [21]. In *North Wiltshire* (see [56]-[57]) the FTT concluded that it was not obliged to consider these criteria but it accepted that it might well in practice do so. The same reasoning applies to the present case. The criteria were,
>
> - The reasons for the delay, that is to say, whether there is a good reason for it.

- Whether HMRC would be prejudiced by reinstatement.
- Loss to the appellant if reinstatement were refused.
- The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration.
- Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained."

65. Mrs Justice Proudman continued at [24] by qualifying the approach in the following terms:

> "I was asked ... to provide guidance as to the principles to be weighed in the balance in the exercise of discretion to reinstate. Because of the view I have formed I do not think it is appropriate to set any views in stone. I agree with the FTT in the *Former North Wiltshire* case that the matters they took into account are relevant to the overriding objective of fairness. I also believe that the guidance in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537 in relation to relief from sanctions is helpful. It is perhaps instructive that CPR 3.9 (which does not of course apply to the Tribunals in any event) does not exist in its original form. Fairness depends on the facts of each case, all the circumstances need to be considered and there should be no gloss on the overriding objective."

66. With those qualifying comments in mind, the relevant criteria as summarised at [23] of the Upper Tribunal decision in *Pierhead* are to be applied to consider "all the circumstances" of the case, and as a tool to aid the enforcement of the overriding objective under Rule 2 of the Tribunal Rules.

The reasons for the delay and prejudice to the appellant

67. The purpose of Rule 17(2) is three-fold. Firstly, to confirm the receipt of the withdrawal notice made under Rule 17(1) from the relevant party to both parties in the appeal. Secondly, to confirm to both parties the effect on the appeal after the withdrawal notice. Thirdly, to notify the parties of the time limit of 28 days from the date of the notice for any further application.

68. In relation to not having received the notification from the Tribunals Service of the withdrawal on 26 April 2016, the material point in Mr Hadland's first ground of application is that he could not have been aware of the time limit of 28 days for making an application to reinstate the appeal, which was reckoned from the date of issue of the Tribunal's notice.

69. Mr Hadland's application was made on 29 September 2016, over four months after the time limit of 24 May 2016 to make the reinstatement application, and would seem to have been prompted by the actions of HMRC Debt Management.

70. We accept that Mr Hadland or Mr Warbey did not receive, or did not register the notification of 26 April 2016. However, we are satisfied that the letter dated 15 April 2016 had the effect of giving such a notice as prescribed under Rule 17(1).

71. The letter was written by Mr Warbey as Mr Hadland's representative. Under Rule 11(3), Mr Warbey was able to effect the withdrawal on Mr Hadland's behalf, since anything permitted or required to be done by a party under these Rules "may be done by the representative of that party, except signing a witness statement".

72. In the letter of 15 April 2016, Mr Warbey clearly stated that: "[Mr Hadland] has therefore instructed me to abandon the appeal." At the hearing, Mr Warbey reiterated: "He did instruct me to write the letter and I did write it." It is clear to us that Mr Hadland did not dispute that it was according to his instruction that Mr Warbey wrote the letter intimating the withdrawal of his appeal.

73. That said, Rule 17(3) clearly contemplates that an appellant may change his mind after a withdrawal notice. This brings us to the second ground of the application, which is that Mr Hadland's mental state at the time of giving instruction to abandon the appeal had subsequently changed.

74. Not only does Rule 17(3) contemplates the likelihood of a change of mind, but that Rule 17(4) allows such a change of mind to be made within the time allowed to make an application to reinstate the appeal. The Tribunal should therefore be slow to deny Mr Hadland the right to have his appeal dealt with fully, even though he had given an effective notice to withdraw.

75. We accept that Mr Hadland, on this occasion, was not fully aware of the exact time limit of 24 May 2016. However, we are of the view that it is reasonable to expect that a taxpayer of his experience, in the capacity as a director of a company, should have been aware that a time limit of some kind must apply to reinstate an appeal that he had expressly withdrawn. We are also of the view that Mr Warbey, as Mr Hadland's professional representative in this matter, should also have been aware of the existence of time limits to govern the progress of any appeal proceedings.

76. Mr Hadland did not contend that he was unaware of the date he gave instruction to withdraw his appeal; he must have some reference point from the date of 15 April 2016 that if he wanted to reinstate the appeal, it would be expedient to do so promptly.

77. We also have regard to the understanding demonstrated by Mr Hadland when he related his view on the "settlement" with Inspector Baird, and that "had [he] known that HMRC would renege on that agreement and as such the original settlement should be resiled from." Mr Hadland would seem to appreciate that the action or non-action of one party can have legal effects and be construed accordingly by the other party in an alleged agreement. It is no difference when it comes to the non-action through his delay in making the reinstatement application.

78. The prejudice to Mr Hadland by refusing the application is to deny him the right to have his appeal dealt with fully. While the application is Mr Hadland's, in determining the outcome of his application, considerations other than those concerning his right as the appellant are of significance too, and need to be weighed in the balance. The Tribunal must have good and sufficient reasons to reinstate the appeal after an effective withdrawal by Mr Hadland, especially in the light of the

overriding objective of the Tribunal Rules: "to deal with cases fairly and justly" means that we must consider the implications of reinstatement in the wider context of the effective administration of justice.

The effect on legal certainty and prejudice to HMRC

79. In assessing HMRC's position, the Tribunal have regard to the overall time span of the appeal proceedings before the withdrawal notice. The Notice of Appeal was dated 5 October 2012, the appeal only reached the hearing stage on 18 April 2016, some 42 months later.

80. From the copy of the letter dated 15 April 2016 provided to us, we note that the letter was date-stamped as received by the Tribunals Service on 18 April 2016. There was a postal tracking bar code with "1pm" on the label, which suggests that the letter was sent by registered post to guarantee delivery by 1pm on the next working day.

81. It would appear that the letter of 15 April 2016 was only delivered to the Tribunals Service on 18 April 2016; hence the hearing of 18 April 2016 went ahead as there was no advance notice. From HMRC's notice of objection to the reinstatement application (second paragraph), HMRC clearly did not know of the withdrawal until after they had attended the hearing. Both HMRC and the tribunal as constituted to hear the appeal would have incurred wasted costs.

82. Neither Mr Hadland nor Mr Warbey attended the hearing scheduled on 18 April 2016. The notification of the withdrawal dated 26 April 2016 from the Tribunals Service enclosed Mr Warbey's letter of 15 April 2016: it was clearly stated as a decision to "abandon" the appeal, not an application to postpone the appeal. The non-attendance of the appellant or his representative confirmed that decision.

83. The time limit of 24 May 2016 expired without any further application being lodged. A further four months elapsed. HMRC could reasonably believe the matter was beyond recall during that period, until the reinstatement application was related to them in early October of 2016.

84. Meanwhile, the Tribunal had destroyed the appeal file, in August 2016, three months after the expiry of the time limit.

85. With each day that passes after a stipulated time limit, the effect of legal certainty strengthens its hold. The principle of legal certainty is central to the administration of justice, without which there can be no finality in dispute resolution. Where there is no finality in litigation, there can be no ultimate enforcement of justice, and the legal system would cease to command the respect of all concerned.

86. The Tribunal emphasised to Mr Hadland at the hearing the importance of legal certainty. In the present case, the lapse of four months presented a serious prejudice to the respondents, who could reasonably have relied on the effect of legal certainty to confer finality to Mr Hadland's appeal when the time limit to a possible reinstatement expired on 24 May 2016.

The merits of the substantive appeal

87. The third and fourth grounds of Mr Hadland's application concern the merits of his appeal. We need only to consider the merits of the proposed appeal so far as they can be "conveniently and proportionately be ascertained".

88. The third ground concerns the evidence that Mr Hadland wanted to rely on to pursue his appeal, namely, the manuscript notes of meeting with Inspector Baird. It would seem that Mr Hadland considered these meeting notes would prove that there had been an agreement between Inspector Baird and him as the taxpayer, which had the effect of estoppel.

89. From HMRC's statement of case for the appeal in question, it seemed that PAYE liabilities were expected to be settled by the company in relation to the company funds drawn by Mr Hadland. The funds should have been treated as remuneration to Mr Hadland as an employee, and borne PAYE before being drawn. The liability to PAYE was originally assessed on the company, *not* on Mr Hadland.

90. The statement of the case also referred to "protective Discovery assessment [issued] on 23 March 2006 for the untaxed remuneration received by the appellant". The discovery assessment was raised on the company (not Mr Hadland) following the corporation tax enquiry in February 2003, and was appealed at the time. The matter of the discovery assessment was not further pursued after the meeting on 1 May 2007.

91. At paragraph 5.4 of the statement of case, it was stated that "HMRC issued a revised calculation of the untaxed income received by the appellant for the years 1997/98 to 2003/04", and continued at paragraph 5.5 as:

> "These figures were subsequently agreed at a settlement meeting between HRMC, the appellant and Mr Warbey and again agreed in writing on the appellant's behalf by Mr Warbey."

These would be references to the meeting on 1 May 2007, and the letter by Inspector Ivison on 2 May 2007 and Mr Warbey's agreement to the revised figures by letter dated 9 May 2007.

92. It would seem that Mr Hadland was referring to the manuscript notes of the "settlement meeting" on 1 May 2007, which he believed would contain statements or undertakings from Inspector Baird to establish promissory estoppel not otherwise evidenced in the typed version of the meeting notes.

93. According to Mr Hadland, HMRC would not provide these meeting notes. On the other hand, HMRC in their notice of objection to this application stated that the meeting notes were provided at the time to Mr Hadland and Mr Warbey.

94. What was agreed at the settlement meeting, and confirmed in writing by both sides, would seem to include the "additions" of £50,000 for each of the seven years under the section for Mr Hadland's income tax. While the figures of annual additions form part of the s 54 TMA agreement, the tax treatment of the additions of £50,000 untaxed income might not have been made clear in the s 54 TMA agreement.

95. What became contentious would seem to be the tax treatment of the additions of £50,000 for those seven years. When it transpired in 2009 that the company did not make PAYE payments for those "additions", HMRC entered into protracted discussion with Mr Hadland. When no agreement was reached, HMRC issued Regulation 72 Directions in October 2011 to assess the PAYE liabilities on Mr Hadland as the employee. The Regulation 72 Directions served on Mr Hadland were the subject matter of the appeal now sought to be reinstated.

96. It appears to us highly improbable that the manuscript meeting notes Mr Hadland had in mind, even if they existed and were produced, would contain undertakings that could be construed to have the legal force of a promissory estoppel capable of displacing or vacating the assessments raised under the terms of the relevant statute.

97. It seems to us that what Mr Hadland had, at the very most, was a legitimate expectation that he had such an undertaking from HMRC beyond what had been agreed between the parties as evidenced by their respective letters dated 2 and 9 May 2007. To make a claim on the ground of legitimate expectations is to make a judicial review claim, and this Tribunal has no jurisdiction to consider a claim of judicial review in general.

98. The grounds of appeal as stated by Mr Warbey in the Notice of Appeal of 5 October 2012 would suggest that Mr Hadland was making a judicial review claim:

> "Directions made outside statutory time limit pursuant to relevant contract HMRC are estopped from making direction. Breach of contract renders all assessments, directions, determinations or closure notices unlawful. HMRC duty of care and rules of natural justice breached making all notices and actions unlawful and not in accordance with reasonable test. All notices excessive and unlawful as no such income arose. Other parties to transactions should have been at least considered to be taxed on their [sic] same as no joint and several liability."

99. As a special area of public law, the jurisdiction for judicial review is reserved to the High Court and its appellate courts. The function of the court in judicial review proceedings is to review decisions of statutory and public authorities to see if they are lawful, rational and reached by a fair process. The normal grounds of challenge in a judicial review action include: (a) illegality (where a decision has involved an error/errors of law or fact), (b) irrationality (*Wednesbury* unreasonableness from the Court of Appeal precedent in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223), (c) procedural impropriety, (d) fettering of discretion, and (e) proportionality.

100. On the basis that the Tribunal has no jurisdiction to hear a judicial review claim, that part of Mr Hadland's appeal must be struck out under Rule 8(2), even if his appeal were reinstated.

101. Turning to the fourth ground in the application, which is to say that the assessments of tax were raised outside the time limit under s 29 of TMA, it is plain

that the assessments for the tax years 1997-98 to 2003-04 were made under the Directions pursuant to Regulation 72 of Income Tax (Pay As Your Earn) Regulations 2003 (SI 2003/2682).

102. Even though Income Tax (Pay As Your Earn) Regulations 2003 is a creature of delegated legislation, it has the force of a statute, and Regulation 72 does not stipulate a statutory time limit for the making of such Directions.

103. The time limit under s 29 TMA simply does not apply to these disputed assessments, which were made by way of Directions under Regulation 72. For this reason, Mr Hadland's fourth ground of application means that the substantive appeal has no reasonable prospect of success.

104. Even if the appeal were reinstated, Mrs Oliver indicated that HMRC would apply to strike out the appeal, which would be granted in accordance with Rule 8(3)(c) on the basis that there is no reasonable prospect of the appellant's case succeeding.

Decision

105. For the reasons stated, the appellant's application to reinstate is refused.

106. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 10 April 2018