TC06689

Appeal number: TC/2017/01869

INCOME TAX AND VAT – application for permission to make late appeals – whether good explanation for delay – no

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FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN PATRICK WALSH **Appellant**

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Taylor House, London on 2 and 3 May 2018

Respondent's written closing submissions and
Appellant's written reply to Respondent's closing submissions made after the hearing

Ms Harriet Brown, Counsel, instructed by Ellistons SLP, for the Appellant

Mr Brian Horton, presenting officer for HMRC's Solicitor's Office and Legal Services, for the Respondents

DECISION

1. This is an application by the Appellant ("Mr Walsh") for permission to appeal out of time in relation to the Respondent's decisions set out in the Appendix. The Respondents ("HMRC") have objected to the application and ask for the application to be dismissed.

Background

2. On 10 March 2014 HMRC obtained a County Court judgment against Mr Walsh in respect of tax debts. These liabilities arose because Mr Walsh had failed to notify HMRC that he is chargeable to income tax and capital gains tax and he had failed to account for income tax and capital gains tax for most, if not all, of his working life. Mr Walsh also has VAT liabilities. The amount claimed by HMRC in the County Court proceedings was £2,504,283.89 ("the judgment debt") and this included the amounts outstanding in respect of the assessments and determinations listed in the Appendix. In April 2014 HMRC obtained interim charging orders in respect of the sale of properties owned by Mr Walsh and these were made final in July 2014.

3. On 2 June 2016 the High Court received HMRC's claim for an order for sale of Mr Walsh's properties in order to recover the judgment debt. Mr Walsh is seeking to challenge the judgment debt in the High Court. The High Court proceedings have been stayed pending the outcome of this application for permission to appeal against the assessments and determinations out of time.

Facts found

4. I have considered the evidence in the Tribunal's bundles and the witness evidence given by Mr Walsh, Mr Melvyn Sobell and HMRC officers Patricia Luk and Christopher McMeeken at the hearing. The witness statement of Christine Casson was excluded from the evidence as she was not able to attend the hearing to be cross-examined. The witness statement of Rosalynn Try-Hane of HMRC's Solicitor's Office was accepted by the parties. I find the following facts from the evidence and have set them out by reference to the sequence of events concerning Mr Walsh first and then by reference to specific issues also raised in evidence from Ms Luk and Mr Sobell:

Mr Walsh

5.1 Mr Walsh bought a house at 54 Myrtle Road, Romford ("Myrtle Road) in September 1989. It was the family home for Mr Walsh, his wife and daughter for many years. Mr Walsh's wife prepared ledgers for a re-insurance broker and was the main breadwinner for much of their married life. Mr Walsh described how his wife dealt with the household's paperwork as he had left school at 15 to do an apprenticeship. Mr Walsh worked in a number of roles, including security and as a lorry driver in the early years of their marriage.

5.2 In 1987 Mr Walsh had set up a haulage business. The business grew gradually and, after a few years, it was operating half a dozen vehicles on the basis that one or more was off the road for repair by Mr Walsh at any time. At some time in the 1980s Mr Walsh appointed an accountant. He claims that this accountant told him that he was not liable to tax as long as he took no more than £100 a week out of the business.

5.3 In 1989 Mr Walsh took a lease of premises (that he refers to as "the Yard") at Crescent Wharf in Silvertown for his business. He spent long days there repairing vehicles while the drivers that he had engaged locally drove the vehicles.

5.4 In 1996 Mr Walsh registered for VAT with effect from 1992. He was charged a VAT penalty. This followed an issue that had arisen in relation to a lorry at Dover. Mr Walsh's accountant prepared the VAT returns for the business for a number of years. At some point this accountant 'disappeared' and Mr Walsh took over the preparation and filing of VAT returns for the business.

5.5 In 1996 Mr Walsh sold his haulage business and he set a new small transport business using vans some months later. The business name was changed to T-Vans. The record of a VAT visit in 1999 notes that no annual accounts were available, but the officer was satisfied that the VAT records accurately reflected the records seen. It was noted that there were some 10 vans, some of which were off the road for repairs at any time due to their age, and that there were between 4 and 7 employees. Mr Walsh continued to use the same VAT registration and prepared the returns for T-Vans.

5.6 In 2000 Mr Walsh's wife was diagnosed with cancer and he cared for her until her death in 2004. During this period Mr Walsh reduced his work commitments in order to care for his family. He went to see his doctor on one occasion and his doctor told him that he may be depressed following his bereavement. I accept that medical evidence is not required in order to determine that Mr Walsh was understandably affected by his wife's illness and his bereavement. His T-Vans business continued during this period and VAT returns were made, but his low mood and the need to look after his daughter affected his ability to work full-time until 2007. In 2007 he considered that he could return to work because his daughter had started work. This coincided with a major change in his business affairs as outlined below.

5.7 In 2007 Mr Walsh received an offer of £2 million for his Yard in Silvertown. Mr Walsh and his neighbours' properties were required in connection with the redevelopment of the area. He signed a contract for the sale of the Yard in 31 May 2007. The contract for the sale of the Yard was completed on 17 April 2008. Mr Walsh attended a meeting that was organised for those selling their properties as part of the redevelopment. He claims that an HMRC officer led the meeting and advised that they would not be subject to tax on the sale of the properties as long as they reinvested their proceeds in another business property. HMRC have no record of such a meeting being held.

5.8 Mr Walsh continued the T-Van business from the Yard until December 2007 when he stopped taking on new business, presumably because of the imminent sale of

the Yard. He told his bank and the VAT office to send correspondence to Woodways when he sold the Yard. Mr Walsh claims that he did not receive a number of the VAT letters and decisions from HMRC that were sent to Woodways, but he accepts that he did receive other letters and decisions sent there, without specifying which were received or when. He continued to prepare VAT returns as he was continuing to collect T-Vans debts until 2010 and he also used the VAT registration for his new property business for a period.

5.9 After completion of the sale of the Yard Mr Walsh worked with property agents to reinvest the proceeds of sale in ten investment properties between August 2008 and May 2009. He chose properties that were cheaper as they required work and he engaged a builder to work with him to improve the properties for rentals. Some, such as Woodways Farm ("Woodways") purchased in July 2009, required considerable work before they could be occupied. Once Woodways was habitable in 2010 Mr Walsh's daughter moved in. Mr Walsh also decided to refurbish Myrtle Road for letting after he decided to move out in early January 2010 to undertake a period of travelling. Later in 2010 Myrtle Road was let to Mr Ellis who Mr Walsh is acquainted with. Mr Walsh used the same builder for a number of properties, Ian Mercer. A man referred to as Jack worked with Mr Walsh for many years in his property businesses.

5.10 Mr Walsh used Eastern Counties Residential agency to manage his rental properties until they ceased trading in August 2014. From 2014 Mr Walsh engaged a man for maintenance work and Jack supervised the business until Mr Walsh took over on his return to live at Woodways in 2015. Mr Walsh's witness statement for the High Court proceedings in November 2016 states that he estimated that the rental properties were worth just over £3 million at that time.

5.11 As noted above, Mr Walsh decided to move out of Myrtle Road in early 2010 to go travelling. His haulage businesses had closed and the proceeds from the sale of his Yard were invested in the properties, with the rentals managed by an agent. On 20 February 2010 Mr Walsh wrote to the VAT Central Unit saying "I have now reached the age of 60 and see no point in continuing trying to maintain a lost cause in this economic climate, simply put I've had enough and early retirement is far more appealing…I no longer have a business income reaching the VAT threshold and wish to deregister from effect from now." He had moved his business records, such as the T-Vans records and invoices, and property documents, to Woodways, but he did not provide any person or agency with a new residential address as he intended to travel abroad for some time.

5.12 Between January 2010 and 2015 Mr Walsh was itinerant, travelling around Europe in his caravan, but he returned to the United Kingdom almost monthly. During his visits to the United Kingdom he stayed with his daughter at Woodways for a few days and sometimes visited others. His property agent and builder knew that he would see them to collect paperwork or pay them when he next visited the United Kingdom. He continued to collect outstanding debts for T-Vans during his visits to the United Kingdom in 2010. He allowed Jack and his daughter to use a debit card on his account and to pay in cheques from his property investment business. I find that Mr Walsh had no residential address in the United Kingdom from January 2010 until he returned to

live at Woodways in 2015, but that he used Woodways as his address for VAT purposes.

5.13 Ms Brown put forward a number of claims about Mr Walsh's state of mind and personal characteristics, describing him as a 'simple' or 'unsophisticated' man. As noted in 5.6 above, I accept that he was understandably affected by his wife's illness and his bereavement and that he is a practical man, but I find that Mr Walsh's ability to acquire, refurbish and let ten residential properties between 2008 and 2016 demonstrates that he was able to manage his business affairs throughout this period. There is also other evidence of his ability to manage his business affairs. For example, he was able to take over the preparation and filing of his VAT returns when his accountant 'disappeared'. HMRC's notes of an inspection visit in 1999 suggest that they considered that he was managing his VAT returns to their satisfaction, although the absence of accounts was noted. Further, Mr Sobell explained that he had prepared his report using accounting records kept by Mr Walsh ("red books"). Finally, Mr Walsh explained that he used his regular visits to England to sign and file VAT returns, make contact with his agents and to check up on his business interests. The weight of the evidence of his activities shows that he that he was able to continue to manage his affairs and to engage, instruct and delegate to others as necessary while he was travelling, despite his feelings following his bereavement. Mr Walsh was not a vulnerable adult requiring appropriate adjustments to be made (as in the case of *E v HMRC* [2017] UKFTT 348 (TC)) as suggested by Ms Brown.

5.14 On 22 June 2010 HMRC wrote to Mr Walsh to advise him that they had opened an investigation into his tax affairs. The letter was sent to Myrtle Road and Royal Mail's track and trace record shows that it was signed for my 'A. Walsh' (Mr Walsh's daughter) on 24 June 2010. A further letter to this address was signed for by the husband of A. Walsh on 9 August 2010. Mr Walsh claims that he did not receive the letters. Mr Walsh knows the tenant who moved into Myrtle Road after it was refurbished, Mr Richard Ellis, and he confirmed at the hearing that Mr Ellis still lives there. Ms Luk sent a number of further letters about the investigation to Mr Walsh at Myrtle Road, urging Mr Walsh to contact HMRC.

5.15 On 4 March 2013 Mr Walsh called Ms Luk of HMRC to arrange the meeting that HMRC had requested. Mr Walsh admits that he was aware that HMRC were trying to contact him. The meeting took place in Southend on 8 March 2013. Mr Walsh attended the meeting on his own. He said that he was surprised that there were two HMRC officers at the meeting (Ms Luk who he had spoken to about the meeting and Mr Hanton). Mr Walsh agreed to stay at the meeting and sat down.

5.16 HMRC opened the meeting by explaining that they had been trying to contact Mr Walsh since 2010 as there was an ongoing suspected fraud enquiry into his tax affairs. HMRC had tried to visit him at Myrtle Road and at Woodways to no avail. Ms Luk recorded in her note of the meeting that Mr Walsh responded that there was no point sending him any communication as he doesn't live at 54 Myrtle Road and that he does not have an address anywhere. He was currently living in the South of France in a caravan with the intention of moving to Turkey permanently soon. He gave HMRC the address of a camp site in the South of France where he pulled up overnight at

times, but noted that he was not sure what would happen to post there. He did not receive any post from HMRC or anyone else at this address. He told HMRC that he did not have a UK landline or mobile phone number and that he could not remember his French and Turkish mobile numbers. He had no email address or fax number. The officers gave Mr Walsh their cards so that he could contact them.

5.17 When questioned about the meeting at the hearing Mr Walsh told the Tribunal that HMRC didn't seem to understand the English language as he repeatedly told them that he didn't have an address. He then said that he had told HMRC that they could send post to Woodways. This is not recorded in the note of meeting or in Mr Walsh's witness statement and it is not recalled by Ms Luk. The statement that is recorded is that Mr Walsh did not want to involve anybody else to despatch mail to him, which suggests that he would not therefore suggest that post should be sent to his daughter's address. I find that on the balance of probabilities that he did not tell HMRC that they could send post to Woodways at this meeting. On his own evidence Woodways was not his residential address in 2013 as he did not have an address, and so his last residential address was Myrtle Road until he returned from travelling in 2015. This is supported by his statement that he used Myrtle Road for his passport renewal application in 2014 because it had been issued to that address and he had no other address.

5.18 The meeting continued for one hour forty minutes. The note of the meeting records that Mr Walsh was told that he couldn't reclaim VAT in his property business in the same way as he had done in his T-Vans business. He was also told that he had serious income tax and capital gains tax liabilities to address and that they wouldn't go away if he did not cooperate as HMRC would raise assessments and put charges on his properties to recover the tax. Mr Walsh said that he had no intention of selling the properties. He agreed to provide his VAT records as he wanted to out sort the VAT, but he did not want to discuss the other issues raised at the meeting.

5.19 HMRC had prepared a bundle of papers for Mr Walsh to take away from the meeting on 8 March 2013. This included copies of all of the letters that HMRC had sent to him in relation to their investigation. Mr Walsh said that he could not physically take it with him because he was returning to his caravan in France and had nowhere to store them. Mr Walsh gave his permission for HMRC to keep the papers.

5.20 On 20 September 2013 Ms Luk sent a pre-decision letter to Mr Walsh at Myrtle Road. On 30 October 2013 HMRC issued section 29 tax assessments and penalty assessments to Mr Walsh at Myrtle Road as Ms Luk had not heard further from Mr Walsh. The assessments were largely based on information taken from Mr Walsh's VAT returns, information from the land registry and information from the local council.

5.21 The next contact that HMRC had with Mr Walsh was on 7 August 2014 when he called Ms Luk to arrange a time to collect the copies of correspondence from HMRC's office. Before going to collect the papers Mr Walsh met with a new tax adviser, only known to him as 'Paul'. He was referred to Paul by an acquaintance who took him to Paul's house. Mr Walsh said that he was 'under instructions' from Paul to

say nothing when he met with HMRC. On 13 August 2014 Mr Walsh met with Ms Luk and a colleague Mr McMeeken in the reception of HMRC's Dorset House office. Mr Walsh accepts that he took the bundle of papers prepared by Ms Luk, but denies that he signed the receipt for the bundle. I find that on the balance of probabilities the bundle contained all of the documents listed in the covering letter.

5.22 After meeting with HMRC Mr Walsh took the bundle of papers to Paul. Mr Walsh said at the hearing that he assumed that everything was 'OK' as he didn't hear from Paul. In contrast, he also said that he tried to visit Paul and banged on his door on a number of occasions, but that he was told by neighbours that he had gone away. I find that Mr Walsh hoped that his tax problem would go away, but not that he believed that everything was being dealt with by Paul as he hadn't heard from him and he had found out that he had gone away.

5.23 By October 2015 Mr Walsh had returned to the United Kingdom to live with his daughter and her family at Woodways. He did not contact HMRC in 2014 or 2015 to obtain a copy of the documents that he had given to Paul or to provide an address following his return to live with his daughter.

5.24 In August 2016 Ian Mercer brought a package to Mr Walsh that had been delivered to Mr Mercer's address at Briar Road. HMRC had sent correspondence to this address, as well as the house in Myrtle Road, as Mr Walsh had used it for his driving licence renewal. The documents in the bundle related to HMRC's application to obtain an order for the sale of his properties. Mr Walsh took immediate action on reading this information. He instructed Mr Gilbert, a solicitor, who in turn engaged Mr Sobell. They entered into correspondence with Ms Try-Hane of HMRC in August 2016 in order to reach a settlement. Mr Sobell understood from a conversation with Ms Try-Hane that she could enter into negotiations to settle Mr Walsh's liability and Mr Gilbert followed up with a letter asking for a stay for settlement of the proceedings in the sale claim and execution of the default judgment. Ms Try-Hane's response dated 19 September 2016 referred to the CGT calculation that Mr Sobell had been able to provide, but she noted that, as regards the remaining liability, for a period of at least two years Mr Walsh "was in a position to take action to bring appeals but has chosen not to."

5.25 The decision to allow a late appeal against the assessments remained with Ms Luk at the time of this correspondence and she set out in a statement dated 25 November 2016 (for the High Court proceedings) that she had not received any appeal to that date and why she would oppose an application to make a late appeal in the circumstances of the case. Mr Walsh acknowledges that at this point it was apparent that the assessments could only be challenged by an appeal to the Tribunal. It is not clear why there was then a further delay of nearly three months before the appeal was filed. On 15 February 2017 an application was made to appeal against the assessments and this included an application for permission to appeal out of time.

Ms Luk

5.26 Ms Luk is a senior investigator of fraud within HMRC. On 22 June 2010 she opened an enquiry into Mr Walsh's tax affairs. The case was passed to her from HMRC's hidden economy team. Ms Luk sent the opening letter by recorded delivery to the Myrtle Road address. She sent it to this address because her Land Registry enquiries showed that it was the first property that he had bought and she believed that it was his home. Mr Walsh did not respond to the letter and so Ms Luk sent further letters to this address by personal service to the letterbox on at least one occasion. Mr Walsh eventually made telephone contact with Ms Luk on 4 March 2013 and they arranged to meet at HMRC's office in Southend on 8 March 2013 as noted above.

5.27 Mr Walsh claims that Ms Luk did not treat him fairly. Her note of their meeting on 8 March 2013 records that Mr Walsh said that he didn't have an address and was a 'gypsy by choice'. It is claimed that if Ms Luk believed this statement to be correct she should have made appropriate adjustments, but that it is not correct as he said that he was traveling by choice. It is clear from other evidence that there was a communication problem between them, but I accept Ms Luk's evidence that the note of the meeting reflects her understanding of what Mr Walsh said at the meeting and that it did not affect the way in which she handled the investigation. Mr Walsh also claims that Ms Luk acted in a deliberately careless and prejudiced way when considering his tax investigation. I found from her evidence that she considered that Mr Walsh had failed to comply with his obligations to declare his income and gains and that he was not cooperating with her investigation, but I have not found that this led her to make deliberately careless or unfair decisions in relation to the preparation and notifications of the decisions to Mr Walsh. Ms Luk acted in the same way when dealing with Mr Walsh's affairs as she did in relation to other taxpayers' affairs.

5.28 I have considered Ms Luk's use of the Woodways business address for VAT letters and the Myrtle Road residential address for direct tax matters. Ms Luk's letter of 22 December 2011 was returned to HMRC by Mr Ellis, the tenant at Myrtle Road. Ms Luk was then informed by Romford Council that Mr Walsh had a 'care of' address at Woodways, but Ms Luk believed that his last residential address was Myrtle Road because a land registry search showed that he had owned it since September 1989 and there was no evidence that he lived anywhere else. I have concluded that Ms Luk followed HMRC's procedures for the notification of her decisions and the provisions of section 115(2) Taxes Management Act 1970 summarised in paragraph 8 below.

Mr Sobell

5.29 Mr Sobell, an accountant, explained that he had been appointed to prepare a tax report to challenge the order for sale of Mr Walsh's properties and the underlying charging order judgments.

5.30 Mr Sobell met with Mr Walsh and had access to his 'red books' in order to prepare the report. The report concludes that the judgment debt in the sum of some

£2.5 million was vastly in excess of the amount he considered to be Mr Walsh's liability, being only £635,359. He acknowledged that it was not unreasonable for HMRC to use VAT output information for sales figures in the absence of information from the taxpayer, but he considered that the profit figures calculated were excessive because they used only VAT inputs for expenses and these do not include items such as wages costs that are outside the scope of VAT or allow for rents not paid or gaps in rentals. Mr Sobell also queried the extrapolation of 2004 profits to the opening years of Mr Walsh's business, when he would have expected profits to be non-existent or very low. HMRC noted that this ignored the fact that the earliest assessment is for 1992-93 because statutory time limits prevented HMRC assessing earlier years, whereas Mr Walsh had been in business for some six years by 1993. Mr Sobell also said that he considers that a more accurate estimate could be made by looking at the gross profits of other businesses, but again this was challenged by HMRC.

5.31 Mr Sobell identified that the capital gain realised on the sale of the Yard had been included in the 2008-09 tax year whereas the contract had become unconditional in the 2007-08 tax year as the landlord had given his consent in May 2017. HMRC did not have access to this information when raising the assessment and did not challenge the information or conclusion at the hearing. Mr Sobell also raised a number of careless errors in HMRC's calculations, which he suggested could have arisen from the transposition of numbers or incorrect data entry, and these errors were accepted as such by HMRC. HMRC therefore agreed that the penalty determinations for the tax years ended 5 April 2009 and 5 April 2011 may be appealed.

5.32 I noted that Mr Sobell did not have full information and that he had relied on information from Mr Walsh with regard to the matters such as the expenses and rental figures. I find that elements of this information mentioned at the hearing were put in question by Mr Walsh's oral evidence. For example, Mr Walsh had told him that Woodways was his home but Mr Walsh said that it was a business property in his oral evidence. Similarly Mr Sobell referred to employees in the business whereas Mr Walsh said that he did not have any employees or a payroll. I also noted that an appendix to Mr Sobell's report showed that Myrtle Road was purchased in 2009 whereas it was the home purchased in 1989. In other words the facts of the underlying appeal with regard to such matters are not clear or based on evidence which is agreed between the parties.

Relevant law

6. The relevant provisions relating to the notification of assessments, time limits for appeals and late appeals are set out in the following paragraphs.

7. Section 98 Value Added Tax Act 1994 ("section 98 VATA") provides that any notice, notification, requirement or demand to be served on any person for the purposes of the VATA may be served, given or made by sending it by post in a letter addressed to that person at the last or usual place of business of that person.

8. Section 115(2) Taxes Management Act 1970 (" section 115 TMA") provides that:

"Any notice or other document to be given … under the Taxes Acts may be served by post, and, if to be given ... to… any person by the Board, by any officer of the Board, or by or on behalf of any body of Commissioners, may be so served addressed to that person:

(a) at his usual or last known place of residence, or his place of business or employment, or…"

9. Section 7 of the Interpretation Act 1978 ("section 7 IA") provides that:

"Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

10. Section 83G Value Added Tax Act 1994 ("section 83G VATA") provides that an appeal is to be made to the Tribunal before the end of the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates, or within 30 days beginning with the date of the document notifying the conclusion of a review if one was required or requested. Section 83G (6) VATA provides that an appeal may be made after the end of the relevant 30 day period if the Tribunal gives permission to do so.

11. Section 49(2) Taxes Management Act 1970 ("section 49 TMA") provides that notice of an appeal may be given after the relevant time limit if HMRC agree or, where HMRC do not agree, the tribunal gives permission. Section 49 (3) provides that if conditions A, B and C are met, HMRC shall agree to notice being given after the relevant time limit. Condition A is that the appellant has made a request in writing, condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit and condition C is that HMRC are satisfied that the request was made without reasonable delay after the reasonable excuse ended.

12. Rule 20 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("Tribunal Rules") provides that where an enactment provides for a person to make or notify an appeal to the Tribunal, the appellant must start proceedings by sending or delivering a notice of appeal to the Tribunal within any time limit imposed by that enactment. If the appeal to the Tribunal is made later than the time specified it must include a request for the Tribunal to give an extension of time and provide the reason why the notice of appeal was not provided in time. If the Tribunal does not extend the time for the notice of appeal it must not admit the notice of appeal.

13. The Tribunal must seek to give effect to the overriding objective when it exercises any power under the Tribunal Rules. The overriding objective is set out in rule 2 of the Tribunal Rules ("rule 2") as follows:

"(1) The overriding objective of these [Tribunal 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."

14. The decision of Morgan J in the Upper Tribunal in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) ("*Data Select*") sets out the five questions that the Tribunal should ask itself when asked to extend a time limit under a provision such as section 83G VATA. These are as follows:

1. What is the purpose of the time limit?

2. How long was the delay?

3. Is there a good explanation for the delay?

4. What will be the consequences for the parties of an extension of time?

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

15. In *Denton v TH White Ltd (and related appeals)* ("*Denton*") [2014] EWCA Civ 906 the Court of Appeal provided guidance on how the provisions of Civil Procedure Rule ("CPR") 3.9 should be given effect by first instance judges considering an application for relief from sanctions. The new CPR 3.9, which came into force in April 2013, requires the court to consider all the circumstances of the case when considering an application for relief for a failure to comply with a rule or direction, including the need to enforce compliance with rules or directions. The Court of Appeal's guidance (at paragraph 24) is that a judge should consider an application for relief in three stages. The first stage is to identify and assess the seriousness and significance of the failure to comply. The second stage is to consider why the default occurred. The third stage is to evaluate all the circumstances of the case in order to enable the court to deal justly with the application.

16. Article 6 of the European Convention of Human Rights ("Article 6") applies to penalties that are 'criminal' for the purposes of the convention. This has been confirmed in case law such as *Jussila v Finland* (2006) (A/73053/01) ("*Jussila*") and this Tribunal in *Bluu Solutions Limited* [2015] UKFTT 95 (TC). HMRC accept that the tax geared penalties in this case are 'criminal' for the purposes of Article 6. Article 6 gives an entitlement to a "fair and public hearing … by an independent and impartial tribunal established by law". Mr Walsh had an entitlement to appeal to the

Tribunal within 30 days, and his application to make late appeals has been heard by this Tribunal in accordance with the legislation and Tribunal rules. In this context it is for the Tribunal to consider the consequences of refusing permission to appeal against the penalties in weighing all the circumstances of the case.

17. I was referred to a number of authorities on the approach to be taken by the Tribunal in considering the merits of the underlying appeal as part of the consequences of allowing or refusing permission to appeal. These make clear that the Tribunal should understand the grounds on which the appeal would be made if the application were to be allowed in order to evaluate the strength or weakness of the case, but it should not allow the parties to engage in a mini-hearing. In *R (oao Dinjan Hysaj) v SSHD* [2014] EWCA Civ 1633 ("*Dinjan Hysaj*") Moore-Bick LJ said that "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" on applications for extensions of time. The Tribunal must therefore consider the grounds to understand their obvious strength or weakness, and this evaluation can then be taken into account in considering all the circumstances of the case.

18. In *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290 Woolf J identified the obligations placed on HMRC in order to come to a view as to the amount of tax to the best of their judgment. Assuming that there is some material before HMRC on which they can base their value judgment, they must perform that function bona fide but they "should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to their best judgment, is due". In *Rahman (trading as Khayam Restaurant) v Customs and Excise Commissioners* [1998] STC 826 Carnwath J commented on Woolf J's guidance and added that in order for a tribunal to treat an assessment as invalid, it needs to find, for example, that the assessment has been reached "dishonestly or vindictively or capriciously" or that it is a "spurious estimate or guess in which all elements of judgment are missing", being in substance "tests [that] are indistinguishable from the familiar *Wednesbury* principles…".

19. In *Romasave (Property Services) Limited v HMRC* [2015] UKUT 0254 (TCC) ("*Romasave*") the Upper Tribunal considered an application to make a late appeal under section 83G VATA. It noted that the approach described by Mr Justice Morgan in *Data Select* had been endorsed in Upper Tribunal decisions, and that the three stage process in *Denton* also provides helpful guidance for tribunals. In considering the length of the delay the Upper Tribunal was mindful that permission to appeal out of time should only be granted exceptionally and made the following comment (at paragraph 96):

> "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."

20. In *BPP Holdings Limited v HMRC* [2017] UKSC 55 ("BPP") the Supreme Court considered a number of Upper Tribunal and Court of Appeal decisions in cases that post-dated the introduction of the new CPR rule 3.9, including *Denton*, in order to determine whether the Tax Tribunal should follow a similar approach to that required by CPR rule 3.9. Lord Neuberger concluded that the guidance given by Judge Sinfield in *HMRC v McCarthy & Stone (Developments) Ltd and another* [2014] UKUT 196 (TC) and by Ryder LJ in the Court of Appeal hearing of BPP should be adopted. This guidance is that while the CPR rules do not apply to tribunals, there is no justification for a more relaxed approach to compliance with rules and directions in tribunals than in courts.

Submissions

21. Ms Brown submits that permission to appeal out of time should be granted because Mr Walsh has a good explanation for the delay on the following grounds:

21.1 HMRC failed to put Mr Walsh on notice of the need to appeal by failing to properly address correspondence to the alternative address that he suggested or the address that the local council provided for correspondence;

21.2 HMRC were on notice as to Mr Walsh's lifestyle and they should have been aware of his precarious mental health. HMRC failed to make reasonable adjustments; and

21.3 Mr Walsh is an unsophisticated person who through sheer luck ended up with tax affairs that were more complex than he was able to deal with. The advisers that he appointed let him down.

22. Ms Brown submits that the Human Rights background to the appeals must be considered. If Mr Walsh is not given permission to appeal out of time he will be denied his right to a fair and public hearing under Article 6. Although this right relates to the penalties, these cannot be properly challenged without also allowing late appeals of the underlying assessments because the penalties are 'tax geared' by reference to these assessments.

23. Ms Brown also highlighted other factors that she submits are relevant to determining whether or not to give permission to appeal. These are HMRC's failures, the strong merits of Mr Walsh's case and the fairness of the situation.

24. Ms Brown submits that the purpose of the time limit, being finality, is not infringed because HMRC did not consider matters to be final and because the tax in dispute is based on wildly inaccurate estimates that HMRC has no right to collect. Similarly, it is claimed that HMRC would not be prejudiced if they are not able to collect money that to which they are not statutorily entitled. Further, it is submitted that HMRC will be adequately compensated by the interest and penalties payable in relation to the tax due.

25. HMRC submit that Mr Walsh failed to engage with the appeal process because he had limited regard to his tax obligations. The delay in making the appeal is over three

years and a serious breach of the Tribunal rules. The purpose of the time limit is to ensure finality of the decisions of HMRC and in this case the matter was treated as final as County Court action was taken.

26. The burden of proof lies with Mr Walsh to show good cause for the delay. HMRC submit that the circumstances of the case are not those in which the Tribunal should use its discretion to allow an extension. The Tribunal's rules and the Tribunal are sufficient protection to ensure that Mr Walsh's Article 6 rights are protected.

Discussion

27. This application is for permission to make late appeals against HMRC's decisions that are listed in the Appendix. I have considered the application as a whole in considering the applicable law and overall circumstances, but I was concerned to identify an accurate list of the assessments the subject of this application as there are factors to be applied to the assessments on an individual basis. As it was not clear from the notice of appeal or the bundles prepared for the hearing which assessments are the subject of the application, I have produced the list in the Appendix based on the information provided by the parties after the hearing. I accept from these submissions that the application includes the penalties listed in section IV of the Appendix as they were included in the judgment debt.

Consideration of application to make late appeals

28. As set out in paragraphs 10 and 11 above, section 83G VATA and section 49 TMA provide that the Tribunal may give permission for an appellant to appeal after the relevant time limit. I have considered whether to give permission for the appeals to be made late in accordance with these provisions, the Tribunal Rules and the guidance provided in the case law referred to in the submissions. As the parties have agreed that the Tribunal should ask itself the questions listed in *Data Select*, as well as considering all the circumstances of the case and case law relevant to this case, I have followed this structure in making my decision.

Purpose of time limits

29. The purpose of the time limits to make an appeal is to provide finality and efficiency for HMRC. This is in the public interest and is in accordance with the guidance provided in *Denton* and *BPP*.

30. Ms Brown has suggested that HMRC had not expected finality in this case because Ms Try-Hane had engaged with Mr Walsh's advisers in 2016, suggesting to them that the tax liability could be adjusted by reference to figures agreed with Mr Sobell. This ignores the fact that the assessments were notified in 2013 (other than those relating to 2011-12) and that the delay continued throughout 2014 even though Mr Walsh had collected the bundle of HMRC's correspondence, throughout 2015 even though Mr Walsh returned to live at Woodways and throughout 2016 even though Mr Walsh had engaged appropriate advisers. The exchanges in 2016 related to HMRC's application to enforce collection of the County Court debt by obtaining an

order for sale of Mr Walsh's properties. The assessments were final as far as Ms Luk was concerned and any late appeal was to be considered by her.

Length of the delay

31. In considering the time limits and the length of the delay I have determined whether they were properly notified to Mr Walsh as part of his explanation is that he was not notified of the decisions or the need to appeal.

32. The law relating to the notification of VAT decisions is set out in section 98 VATA. This provision allows service to be made by addressing a letter to the taxpayer's last or usual place of business. The VAT assessments the subject of this application were sent to Mr Walsh at Woodways. This is the address that he notified to HMRC as his business address on 30 May 2009. Service of the VAT assessments and penalty determinations by post to this address is therefore deemed to have been effected pursuant to section 7 IA.

33. The provisions in relation to the notification of direct tax assessments and penalties are set out in section 115 TMA. This provides that a document served by post may be so served addressed to a person at his usual or last known place of residence. As I have found that Mr Walsh's last known place of residence was Myrtle Road at the time that the assessments were posted, service is deemed to have been effected pursuant to section 7 IA. Only one letter was returned undelivered in 2011 and, as Ms Luk knew Mr Walsh still owned Myrtle Road, she continued to use this address in the absence of notification of a new residential address.

34. Mr Walsh had a period of 30 days to make the appeals but did not do so until 15 February 2017. The delay in this case is not only over three months and therefore "serious and significant" as described in *Romasave*, but over three years in relation to all but the last three penalty assessments listed in section IV of the Appendix. The length of the delay is so long that HMRC's debt recovery team had obtained the County Court debt judgment, secured charges over Mr Walsh's properties and begun the claim for the sale of the properties before he took action.

Explanation for the delay

35. The explanation for the delay put forward on behalf of Mr Walsh is a combination of a number of factors. These are that he was not put on notice of the need to appeal, that HMRC should have made reasonable adjustments to reflect his personal characteristics and that Mr Walsh is an unsophisticated person who took poor advice because he did not have the ability to appoint an appropriate adviser.

36. I do not accept Mr Walsh's claim that HMRC failed to put him on notice of the need to appeal. As noted in paragraphs 32 and 33 above, the assessments were sent to correct address for service and Mr Walsh was informed by the letters of the 30 day period to appeal. He was aware that HMRC were trying to contact him and, when they met in March 2013, HMRC explained that he had tax issues to address. HMRC had prepared a bundle of documents for him in March 2013 and this included the assessments and leaflets when he collected it in August 2014.

37. I have considered Ms Luk's use of the Myrtle Road address in paragraph 5.27 above. At the hearing it was made clear that Mr Walsh has in fact been collecting rent from the same tenant at Myrtle Road, Mr Ellis, throughout the relevant period for the appeals. There was no requirement on Ms Luk to send copies of the assessments to another address, especially as Mr Walsh had expressed doubts about how post might be managed at the French address. I have found that Mr Walsh did not tell HMRC to send post to Woodways at the meeting in March 2013 and, in any event, he claims that he did not receive some VAT assessments that HRMC sent to Woodways. In contrast, Mr Walsh did have Ms Luk's contact details, which he used when he arranged to collect copies of the assessments in August 2014, and he could have used again at any time to make contact with HMRC or to provide a reliable point of contact.

38. Ms Brown submits that HMRC should have been aware of Mr Walsh's precarious mental health and made reasonable adjustments. It was also submitted that his limited education and being 'unsophisticated' contributed to his lack of attention to his tax matters. HMRC noted that Mr Walsh did not produce medical evidence about his mental health following his bereavement, but I have accepted that he was understandably affected for some years. The question for me was how these factors affected his actions in relation to making the appeals. I have found that Mr Walsh was dealing with his business and VAT matters effectively from 2008 and engaged agents as and when required as noted in paragraph 5.13 above. There is no good explanation of why he was able to undertake these activities but not to manage his tax affairs. I find that HMRC correctly dealt with Mr Walsh in the same way as they would deal with another taxpayer in a tax investigation of this nature.

39. Ms Brown submits that "Mr Walsh's conduct does not make him sympathetic but again, this is not relevant to the FTT's considerations". I agree that I am not required to make a decision about Mr Walsh's conduct, but I have had to make certain findings that are relevant to the claims made. In the context of Mr Walsh's explanation for the delay, I have found (in paragraph 5.21 above) that he took all of the relevant documents to Paul and (in paragraph 5.22) that he hoped that the tax problem would go away, but not that he thought that Paul was dealing with it. As Mr Walsh was able to appointed appropriate agents to deal with his property business and he was able to engage appropriate tax advisers in 2016, I find that he had the ability to engage an appropriate adviser when he discovered that Paul had gone away.

Consequences of an extension of time / refusal to extend time for parties

40. If I allow Mr Walsh to make late appeals he would be able to challenge HMRC's decisions. The grounds for his appeals can be summarised as (1) the assessments are invalid or excessive; (2) there has been no discovery within section 29 TMA; and (3) the penalties are excessive and disproportionate. If I refuse to give permission in relation to any assessment or determination Mr Walsh will be denied the opportunity to raise his grounds before an independent tribunal. In this context I have considered Ms Brown's submissions in relation to the strength of the underlying appeals in the light of the cases summarised in paragraph 17 above. My conclusion, without carrying

out a mini-hearing, is that the merits of the case do not have "a significant part to play when it comes to balancing the various factors" as stated in *Dinjan Hysaj*.

41. In reaching this conclusion I noted that there is no uncertainty about the underlying law but that the grounds relate to the applicable facts. For example, the capital gains tax assessment in relation to the disposal of the Yard was included in the assessment for 2008/09, whereas the disposal became unconditional in 2007-08. However, the facts relating to the claims for allowable deductions and the income and expenses for the relevant years are disputed or less clear. This is because Mr Sobell does not claim to have full information and I have found that there are at least two discrepancies between what he was told by Mr Walsh and what Mr Walsh told the Tribunal. The arguments are in relation the assessments and determinations are not "so strong that there is no real answer to them" (at [47] in *Dinjan Hysaj*).

42. I noted Ms Brown's submission that the appeals should be allowed to proceed because the assessments were made capriciously, if not vindictively, and that they are wild estimates and therefore inaccurate and unenforceable by HMRC. The assessments under section 29 TMA are necessarily estimates, being made in the absence of disclosure from Mr Walsh. It is not appropriate for me to consider the underlying appeals, but I note that Mr Sobell acknowledged that Ms Luk only had the VAT information and third party information available and that, subject to errors in calculation which were noted and accepted by HMRC as such and disputed information/figures used, they were understandable. Ms Luk believed that this was a very serious case of non-compliance and that Mr Walsh's behaviour was deliberate but, as noted in paragraph 5.27 above, I have not found that this led her to make deliberately careless or unfair decisions in relation to the preparation and notifications of the decisions to Mr Walsh. Ms Luk acted in the same way when dealing with Mr Walsh's affairs as she did in relation to other taxpayers' affairs.

43. Mr Walsh has claimed that he and his family could be made homeless if he is not able to make the late appeals because the amount of the liability could result in HMRC selling the family home at Woodways. HMRC have responded that the sale of any property would be the responsibility of the trustee in bankruptcy, if one is appointed, and not HMRC. The current value of properties as compared to the tax debt was not identified at the hearing but Mr Walsh has begun the sale of his properties and has made a payment to HMRC. What was made clear is that as the outstanding judgment debt is some £2.1 million it will have very serious consequences for Mr Walsh in any event.

44. The consequence of allowing or refusing an extension of time for Mr Walsh has to be weighed against the consequences for HMRC. Ms Brown submits in this context that her client does not deny his default and poor compliance behaviour, but she submits that the penalties provide the necessary deterrence against delay and punishment, and that interest compensates for the prejudice due to the delay in payment, and so the threshold for allowing a late appeal can therefore be lower than HMRC suggest. I do not accept that HMRC's need for finality and swift litigation is reduced by the penalties and interest that go into the public coffers. The system cannot operate on the basis of generally allowing taxpayers to wait until assessed tax

liabilities are enforced before making an appeal. The legislation therefore imposes a time limit and the case law provides guidance about the circumstances in which a late appeal should be allowed in order to balance the rights of taxpayer with the desired objective of finality for HMRC.

45. Ms Brown submits that HMRC failed to accept late notice in circumstances in which they should have done. In particular, she submits that HMRC should have accepted the late notice in relation to those assessments and penalties which they have since agreed may be appealed in view of the errors highlighted by Mr Sobell. It is clear that HMRC refused the late appeals because they considered that Mr Walsh did not have a 'reasonable excuse' for the delay, but the test to be applied by the Tribunal is the different test of whether he has a 'good explanation' for the delay. HMRC's actions form part of the wider circumstances to be considered in deciding this application, and this includes the fact that they considered the decisions to be final when they obtained the judgment debt in 2014, if not before. There would be clear prejudice to HMRC if the finality of the decisions were to be removed and they had to undertake the time and costs of the process for the appeals.

46. In contrast, if I refuse permission for an appeal to be made in relation to an assessment or determination, it will remain final and HMRC will proceed with the asset recovery litigation.

All the circumstances

47. I have considered all the circumstances of the case for the purposes of this application. I have found that Mr Walsh was duly notified of the assessments and that that he was able to deal with significant business issues and engage appropriate advisers at the relevant times. I have weighed the consequences for Mr Walsh and HMRC of both allowing and refusing permission to appeal. In considering the consequence of refusing permission to appeal, I have weighed the very serious financial consequence for Mr Walsh with the length and circumstances of the delay, the prejudice to HMRC of allowing late appeals and the need to avoid delay and enforce compliance with time limits. I have concluded that based on the all the circumstances of the case and the overriding objective in rule 2 that it would not be in the interests of justice to allow a late appeal in these circumstances, other than in relation to the following decisions:

47.1 the VAT assessment dated 26 January 2012 for £50,274 which has been / is to be withdrawn by HMRC;

47.2 the income tax assessment dated 30 October 2013 for the tax year 1993 for £17,286.07 which is to be withdrawn by HMRC;

47.3 the penalty determination made on 30 October 2013 for the tax year 2009 for £263,040 as HMRC agree that it may be appealed; and

47.4 the penalty assessment issued on 5 November 2013 for the tax year 2011 for £51,391.20 as HMRC agree that it may be appealed.

48. HMRC will adjust the penalty determination issued on 20 October 2013 for the tax years 1993 – 2008 to reflect their withdrawal of the assessment for 1993.

Decision

49. For the reasons set out above I refuse permission to appeal to the Tribunal out of time other than in relation to the decisions set out in paragraphs 47.1 to 47.4 above. These are shown in italics in the Appendix for clarity.

50. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 29 August 2018

APPENDIX

I - VAT assessments and penalty assessments

26January 2012 – assessment s73 VATA 1994:£50,274 – withdrawn by HMRC
23 January 2013 – penalty assessment, s60 VATA 1994: £9,154
23 January 2013 – penalty assessment, schedule 24 FA 2007: £26,034
27 March 2013 – assessment s73 VATA 1994: £21,679

II - Income Tax and Capital Gains Tax assessments under section 29 TMA 1970

28 March 2013 – assessment s29 TMA 1970 – tax year 1993 IT: £53,915.63
30 October 2013 – assessment s29 TMA 1970 – tax year1993 IT £17,286.07
30 October 2013 – assessment s29 TMA 1970 – tax year 1994 IT: £39,692.02
30 October 2013 – assessment s29 TMA 1970 – tax year 1995 IT: £41.083.06
30 October 2013 – assessment s29 TMA 1970 – tax year 1996 IT: £42,429.21
30 October 2013 – assessment s29 TMA 1970 – tax year 1997 IT: £43,108.55
30 October 2013 – assessment s29 TMA 1970 – tax year 1998 IT: £44,429.77
30 October 2013 – assessment s29 TMA 1970 – tax year 1999 IT: £45,601.16
30 October 2013 – assessment s29 TMA 1970 – tax year 2000 IT: £46,258.40
30 October 2013 – assessment s29 TMA 1970 – tax year 2001 IT: £47,949.93
30 October 2013 – assessment s29 TMA 1970 – tax year 2002 IT: £48,173.55
30 October 2013 – assessment s29 TMA 1970 – tax year 2003 IT: £49,657.20
30 October 2013 – assessment s29 TMA 1970 – tax year 2004 IT: £52,506.05
30 October 2013 – assessment s29 TMA 1970 – tax year 2005 IT: £54,361.86
30 October 2013 – assessment s29 TMA 1970 – tax year 2006 IT: £41,597.92
30 October 2013 – assessment s29 TMA 1970 – tax year 2007 IT: £44,280.79
30 October 2013 – assessment s29 TMA 1970 – tax year 2008 IT: £59,164.35
30 October 2013 – assessment s29 TMA 1970 – tax year 2009 IT&CGT: £337,585.67
30 October 2013 – assessment s29 TMA 1970 – tax year 2011 IT: £20,842
30 October 2013 – assessment s29 TMA 1970 – tax year 2012 IT: £3,672.80

III - Penalties in relation to Income Tax and CGT

30 October 2013 – determinations s7 (8) TMA 1970 - tax years 1993-2008: £502,305
30 October 2013 – determination s7 (8) TMA 1970 – tax year 2009: £263,040
5 November 2013 – assessment under Schedule 55 FA 09 – tax year 2011: £51,391.20

IV- Finance Act 2009 Schedule 55 and 56 penalty assessments for 2012

21 March 2013 – late filing penalty: £100
12 December 2013 – daily penalty: £900
12 December 2013 – 6 month late filing: £300
3 April 2014 – 12 month late filing: £300
20 February 2014 – 30 days' late payment penalty: (£183 being 5% of £3,672)
17 July 2014 – 6 months late payment penalty: (£183 being 5% of £3,672)