[2018] UKFTT 531 (TC)

TC06701

Appeal number: TC/2017/04292

PROCEDURE – application to notify appeal out of time – whether burden of proof met to enable effective service of notice of appeal to be deemed – whether administration error in a professional firm a good explanation for the delay – whether respondents' notices to extend time to carry out review relevant – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

KPF CIVIL BUILDING & CIVIL ENGINEERING LIMITED **Applicant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
PATRICIA GORDON

Sitting in public at the Royal Courts of Justice, Belfast on 18 June 2018

Heather Phillips of Logan and Corry Solicitors, for the Appellant

Rupert Davies, Officer of HMRC, for the Respondents

DECISION

Introduction

1. On behalf of the appellant, KPF Civil Building and Civil Engineering Limited ("KPF"), Logan and Corry Solicitors ("Logan Corry") notified its appeal against HMRC's review conclusion decision dated 14 March 2017 ("the appealable decision").

2. HMRC's decision was in relation to Excise Duty Assessment for fuel laundering under ss 6, 12(2) and 13(1A) of the Hydrocarbon Oils Duty Act 1979, and ss 12 and 12A of the Finance Act 1994, and a wrongdoing penalty levied pursuant to Schedule 41 to the Finance Act 2008.

3. The review conclusion varied the quantum of the Excise Duty Assessment from £73,589 to £25,931 by removing five vehicles from the list of assessable vehicles. The wrongdoing penalty, assessed as a percentage of the potential lost revenue, was also reduced, from £50,224 originally assessed to £17,797 as varied on review.

4. The issues for the Tribunal to determine are:

(1) Whether the appeal was notified to the Tribunal after the relevant time limit;

(2) If so, whether the Tribunal should exercise its discretion to give permission for the late appeal to be admitted.

The relevant legislation

5. The substantive appeal is against HMRC's review conclusion decision delivered on request by Logan Corry on behalf of KPF in accordance with the provisions under s 15 of the Finance Act 1994 ("FA 1994"). In turn, HMRC gave notice on three occasions for an extension of time to deliver the review conclusion under s 15D, and the relevant parts of the provisions are as follows:

> **15 Review procedure**
>
> (1) […]
>
> (2) Where —
>
> (a) it is the duty of the Commissioners in pursuance of a requirement by any person under section 14 or 14A above to review any decision; and
>
> (b) they do not, within the period of forty-five days beginning with the day on which the review was required, give notice to that person of their determination on the review,
>
> they shall be assumed for the purposes of section 14 or 14A to have confirmed the decision.
>
> […]
>
> **15D Extensions of time**

(1) If under section 15A, HMRC have offered P a review of a decision, HMRC may within the relevant period notify P that the relevant period is extended.

(2) If under section 15B another person may require HMRC to review a matter, HMRC may within the relevant period notify the other person that the relevant period is extended.

(3) If notice is given the relevant period is extended to the end of 30 days from—

(a) the date of the notice, or

(b) any other date set out in the notice or a further notice.

(4) In this section "relevant period" means—

(a) the period of 30 days referred to in—

(i) section 15C(1)(b) (in a case falling within subsection (1)), or

(ii) section 15B(5) (in a case falling within subsection (2)), or

(b) if notice has been given under subsection (1) or (2), that period as extended (or as most recently extended) in accordance with subsection (3).

6. In relation to an appeal notified to the Tribunal following the issue of a review conclusion decision, the relevant provisions under s 16 of FA 1994 are:

16 Appeals to a tribunal

(1) An appeal against a decision on a review under section 15 … may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

[…]

(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) may be made to an appeal tribunal within the period of 30 days beginning with—

(a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates, or

[…]

(1C) In a case where HMRC are required to undertake a review under section 15C—

(a) an appeal may not be made until the conclusion date, and

(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

[...]

> (1F) An appeal may be made after the end of the period specified in subsection... (1B), (1C)(b)... If the appeal tribunal gives permission to do so.
>
> […]
>
> (1G) In this section "conclusion date" means the date of the document notifying the conclusion of the review.

7. As regards the penalty assessment, para 18 of Sch 41 to the Finance Act 2008 ("FA 2008") provides that the appeal against the penalty assessment "shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or the Upper Tribunal)." Accordingly, the same 30-day time limit applies to the penalty appeal, subject to the same discretion for the Tribunal to give permission for notification of a late appeal.

8. Section 7 of the Interpretation Act 1978 provides as follows:

> 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.

Evidence

9. Mr Conor Sally is a solicitor at Logan Corry, and in his words, has "carriage of this case on behalf of the Appellant Company". For the matter in front of us, Mr Sally was a witness for the appellant. He lodged an affidavit with two exhibits, and gave oral evidence and was cross-examined by Mr Davies.

10. While we have no issue as to Mr Sally's credibility, for reasons we set out in our decision, we do not find Mr Sally's evidence reliable, or in any event, conclusive as to matters of fact.

Background

The assessments to duty and penalty

11. On 2 September 2015, officers of HMRC attended KPF's premises in conjunction with the Police Service of Northern Ireland. Fuel samples were taken from vehicles and a bowser used by KPF in the course of their business. The fuel samples were tested and revealed that they were the product of fuel laundering.

12. On 31 August 2016, an assessment of duty was made in the sum of £73,589 and a wrongdoing penalty levied in the sum of £50,224. The vehicles from which the fuel

samples were taken were seized, along with 2,250 litres of fuel. The vehicles were later restored.

Request for review and notices to extend time to carry out review

13. By letter dated 29 September 2016, Logan Corry requested a review on behalf of KPF of the assessment raised and of the related penalty.

14. On 16 February 2017, Officer Tunnah of HMRC wrote to KPF requesting an extension of the review period until 10 March 2017. The letter also asked KPF to provide details of which vehicles were off-road and the relevant dates or periods, and the evidence of the start date of the SORN notices for the vehicles in dispute. The letter was returned to HMRC undelivered. (The letter is not included in the bundle but the content of the letter was referred to in HMRC's letter of 3 March 2017.)

15. On 3 March 2017, Officer Mutter wrote to Logan Corry (instead of KPF) and related the content of the February 2017 letter that had been returned undelivered. Officer Mutter confirmed that the submission of the requested documents was not crucial by then for the completion of the review, but asked for confirmation of agreement to the extension of the review period to 10 March 2017.

16. In respect of the extension of the review period, Officer Mutter referred to the subsection 15D(1) of the Finance Act 1994, which provides for a review period to be extended by mutual consent of the parties. Officer Mutter continued by stating:

> "If we cannot agree an extension of time this may result in the decision being treated as upheld under the provisions of the Finance Act 1994, subsection 15(2). Agreeing to this extension will not affect your right to appeal the review conclusion with the tribunal service, if you are not happy with the outcome."

17. By letter dated 10 March 2017, HMRC wrote again for an agreement to extend the review period to 20 March 2017. This letter was referred to by Ms Phillips but not included in the bundle. A third extension of the review period was not disputed.

The review conclusion

18. The review conclusion by Officer Beattie was issued by letter dated 14 March 2017. The decision varied the duty assessment to £25,931 on the basis that the vehicles notified as off-road and an agricultural tractor should be excluded from the assessment. In total, five vehicles were removed from the assessment. The penalty assessment was also varied to £17,796 in line with the reduced potential lost revenue.

19. The 10-page long review conclusion detailed the facts and the information available to raise the assessments. Despite numerous requests from HMRC, there seemed to have been a lack of documents provided by KPF to facilitate the quantification of excise duty that might have been due on fuel shortfall. Observations from Officer Beattie's review in this respect include the following:

(1) "The formal samples taken during the visit on 2 September 2015 were sent to the Laboratory of the Government Chemist (LGC) and the results confirmed that the fuel in the vehicles tanks was laundered UK rebated Marked Gas Oil (MGO). I therefore consider it is clear that you were found to be misusing UK rebated MGO."

(2) "…fuel shortfalls identified in the period 01/09/2012 to 02/09/2015. The assessment calculation was explained to you in the duty schedule, and included all 16 commercial vehicles registered to KPF … during the period of the assessment. Where KPF was not the owner of the vehicle for the whole period, this has been reflected in the calculation."

(3) "Officer Tunnah requested information to help him establish your liability on multiple occasions. In the letter issued to you on 9 August, Officer Tunnah included a schedule of records which clearly detailed the documents and information he required. You have not responded to any of his requests for information, therefore Officer Tunnah has used his best judgment in the assessment calculation."

(4) "You also contend that HMRC have calculated the alleged loss for times when vehicles had SORN notices and were off the road. You have not however provided any details of which vehicles were notified as off-road to the DVLA, or the dates and periods where the SORN notices were in place. Checking the DVLA website for vehicles [followed by 5 registration numbers] shows the vehicles above have valid SORN notices in place for the lifetime of the vehicle. It does not however state when these SORN notices were effective from. …"

(5) "… you were contacted on 16 February 2017 to provide evidence of the start dates for the vehicles you claim to have SORN notices in place. This letter was returned as undelivered to HMRC. Nevertheless, I have not been provided with any evidence that disputes your contention that the vehicles were notified as off-road, and had valid SORN notices. Therefore I consider that vehicles [5 registration numbers] should be removed from the assessment."

20. The review conclusion letter under the section "What Happens Next" has as one of its last statements the following:

> "If you do not appeal to the tribunal within 30 days of the date of this letter I will assume that you agree with my conclusion and I will then make arrangements to give effect to my decision."

The notice of appeal to the Tribunal

21. The Notice of Appeal on record has hand-written entries and was dated 4 April 2017, but it was date-stamped as received by the Tribunals Service on 24 May 2017.

22. On 2 June 2017, the Tribunals Service wrote to Logan Corry. The letter was addressed to Conor Sally, and bears the reference for "Lit-CS-KPF", being the one stated on the Notice of Appeal under the section for "representative's details". The letter returned the Notice of Appeal and enclosures with the following explanation:

> "You have provided the notice of appeal to the Tribunal later than the time required, but have not included in your Notice of Appeal:
>
> - A request for an extension of time.
> - The reason why the Notice of Appeal was not provided in time."

23. Subsequently, Logan Corry re-lodged the Notice of Appeal, which was date-stamped as received by the Tribunal on 15 September 2017, with Section 6 showing a hand-written entry as follows:

> "Application appears to have been delayed in Post. It is in the interests of justice to allow application. No prejudice is caused to any party and HMRC have failed to meet deadlines in previous reviews of this case."

Mr Sally's evidence

24. Mr Sally did not provide a witness statement, but an affidavit which opens by stating that he has been directed by Counsel to swear this document on Oath to confirm a number of matters relevant to the case. The substantive paragraphs are:

> "4. The HMRC Review Conclusion letter to the Appellant dated 14th March 2017, was sent to our offices by correspondence dated 17th March and was received on 20th March 2017.
>
> 5. Mr Michael Ferrity, Director of [KPF] attended with me on Tuesday 4th April 2017 and a Notice of Appeal … relevant to this matter was completed and signed.
>
> 6. The Notice of appeal required (sic) number of documents from the file which were collated and attached to same. All documents were then sent to HM Courts and Tribunals Service on Thursday 13th April 2017, by first class post. I can confirm this from our internal office postal record for that day. I beg leave to refer to a copy of the said postal record printed from the PC at reception, marked "CS1" at the time of swearing hereof. The documents are stamped as received in Birmingham Tax Tribunal on 24th May 2017.
>
> 7. The documents were returned to our office by way of correspondence dated 2 June 2017 and are stamped as received in our office on 6th June 2017.
>
> 8. Due to internal office administrative issues within our office, the documents received in incoming mail were not scanned onto the internal case management system within our office and placed on the computer file. As a result I was unaware of the documents being returned until the hard copy of same came to my attention on 14th September 2017. Immediately upon become aware of same I completed the request for an out of time extension and returned the documents to the Tax Tribunal 14th September 2017 by first class post. I beg leave to refer to a copy of our internal postal record printed from the PC at reception and marked "CS2" at the time of swearing hereof. The documents are stamped as received by Administrative Support on 15th September 2017."

25. The affidavit was signed by Mr Sally, with the following annotation:

> "Sworn at Omagh in the County of the Division of Fermanagh any Tyrone this 14th day of June 2018 before me a solicitor empowered to administer Oaths."

26. The exhibit CS1 comprises four lists under the headings of DX, 1st Class, 2nd Class, By Hand. For the list of "1st Class", there are 16 entries of addressees, of which the fifth one is stated as: "HM Courts and Tribunal Service".

27. The exhibit CS2 comprises four lists similarly headed, and for "1st Class", the first item is stated as: "HM Courts and Tribunals POSTAGE PAID". Apart from the names of the addressees, the exhibits bear no further inscriptions of dates or matter references to enable any matching of the addressees to client matters.

28. In cross-examination, Mr Davies asked Mr Sally how he could tell the exhibits related to the relevant dates, since the exhibits CS1 and CS2 are basically lists of the names of the addressees. Mr Sally advised that the lists were the printouts relating to 13 April 2017; that the reception would log the post going out of the office according to the methods of posting onto the daily excel sheet.

29. When asked how he could be so sure that the fifth entry on CS1for HMCTS was for the Notice of Appeal for KPF and not for another client matter, since there was nothing else to identify the client matter to which the post was related, Mr Sally replied that the office did not deal with many matters relating to the Tax Tribunal and that he had no reason to think it was not KPF.

30. As to the returned Notice of Appeal, Mr Sally confirmed that all incoming post in the office is date-stamped. At the hearing, Mr Sally produced the hard copy of the covering letter from HMCTS accompanying the returned Notice of Appeal. The file copy bears the internal office date stamp of 6 June 2017. Another inscription on the hard copy of the covering letter is a hand-written client matter reference, identifying "CS" (for Conor Sally) as the fee-earner on the matter. Mr Sally was able to confirm that the hand-written matter reference, while relating to a different matter for KPF he was carrying, was correctly identified as a client matter relating to KPF.

31. Mr Sally attributed his unawareness of the Notice of Appeal having been returned until 14 September 2017 to the fact that the returned document was not scanned onto the case management system. When the Tribunal asked him to provide further particulars as to the circumstances under which the hard copy of the returned Notice of Appeal came to his awareness, Mr Sally stated that it was the afternoon of 14 September when he returned to the office after attending a hearing at a local court. The time was around 4pm, and the hard copy of the returned Notice of Appeal was placed there on his desk, with the case file. Mr Sally also advised that when the entry for 14 September indicated "Postage Paid", it meant it was posted with a pre-paid envelope. Mr Sally said he acted on the matter straightaway and put the Notice of Appeal in the post-room on the same day.

32. In cross-examination, Mr Sally stated that his case load is around 300 to 400; across a "spectrum" of matters. When asked how he would be able to recall the

particulars of returning the Notice of Appeal in September 2017 among all the regular post he dealt with, Mr Sally replied that he was "acutely aware" that a Notice of Appeal was "particularly important" and not "run-of-the-mill" documents; that he "would have enveloped" the Notice of Appeal himself in September 2017 and put it in the post-tray which was next door to his desk.

33. When asked by Mr Davies why in filling in section 6 in September 2017, Mr Sally had merely referred to "delay" and did not give more substantive details as to the date of original posting or carried out the investigation as to why there had been a delay, Mr Sally said the only explanation he could think of was that it was "delayed" but not sure why it had been delayed.

The appellant's case

34. Ms Phillips submitted that there are two aspects to the application, namely:

> "(a) The failure of the Notice to arrive the following business day when posted on 13 April 2017 (arriving on 24 May 2017);
>
> (b) The administrative error resulting in the submission of the amended Notice of appeal being submitted on 14 September 2017 (arriving on 15 September 2017)."

35. The first delay was "entirely outside the knowledge of the Appellant's solicitor and the Appellant". This period of delay "should not be accumulated in the calculation of any delay due to the genuine and reasonable belief that the Notice had been received in advance of the expiry of the time limit". In any event, this was a delay of approximately 5 weeks and should not be considered significant (*R (Hysaj) v Secretary of State for the Home Office* [2014] EWCA Civ 1633).

36. As to the second delay, the appellant's solicitor and the appellant were unaware that any issue had arisen; that there was no wilful non-compliance, or ignorance of the Rules such as the case in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC). The respondents' submission that non-compliance weighs against permitting an extension in these circumstances is misplaced, given that this is not a case where there was wilful non-compliance with rules, practice directions and orders.

37. The consequences for the appellant if time is not extended are substantial, as the appellant disputes the duty assessment calculation as having included dates when KPF was not the registered owner of the vehicles, and that the penalty was calculated from the date of inception of KPF in 2012 as opposed to the date of purchase of the relevant vehicles.

38. HMRC had made three requests for extension of time during the review process. The appellant had raised no objection.

HMRC's case

39. There is no good reason for the breach or delay. The explanation was that the "application appears to have been delayed in post". No evidence in support of this contention has been provided, such as proof of postage.

40. The letter from the Tribunal dated 2 June 2017 made it clear that the original time limit still applies; no explanation is offered for the delay in re-filing the corrected notice of appeal between 2 June and 15 September 2017.

41. By notice dated 7 December 2017, HMRC apply to strike out the appeal. The strike-out application is in effect a notice of objection to the appellant's application to make a late appeal. The notice states that HMRC will be prejudiced in having to divert resources to defending an appeal which they are entitled to consider closed after the expiry of the relevant time limit: "it would be contrary to the overriding objective of justice and fairness to reopen matters which had been thought were settled" (*BSI International Ltd v HMRC*).

Discussion

42. The purpose of the time limit is to provide finality. Parliament has set the time limit of 30 days to notify the appeal so that as a party to potential litigation, HMRC can rely on the time limit to establish with certainty that the assessment is enforceable on the expiry of the time limit.

43. There is no contention that the appellant and its representative were aware of the statutory time limit of 30 days from the date of the review conclusion to notify an appeal to the Tribunal. The burden is on the appellant to persuade the Tribunal that it should be given leave to challenge the assessment out of time.

The length of delay

44. The appeal was brought against "a relevant decision" under s 16(1B), which provides for the time limit as within the period of 30 days beginning with the date of document notifying the decision or "if later, the end of the relevant period" within the meaning of s 15D.

45. The appealable decision was dated 14 March 2017. Ms Phillips submitted that the decision was received on 20 March 2017, and that the time limit "would have expired" on 17 April 2017. Parties are agreed on the time limit being 17 April 2017.

46. The appeal was re-lodged on 15 September 2017. The overall delay is approximately 5 months.

47. The length of delay reckoned from the date of the receipt of the Tribunal's letter of 2 June 2017 to the re-lodgement of the notice of appeal on 15 September was approximately 3.5 months. Ms Phillips urged on the Tribunal to reckon the delay from 2 June 2017, and to disregard the period of delay prior to 2 June.

48. In *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254, the Upper Tribunal's guidance as respects the length of delay is at [96]:

> "... The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the Tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. 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."

49. It is "a matter of material import" because an extension of time to admit a late appeal is to allow an otherwise non-existent appeal to come into existence. In *William Martland v HMRC* [2018] UKUT 0178 (TCC), it is emphatically stated at [18] that the Tribunal "is not exercising some case management discretion in the conduct of an extant appeal", but "to permit an appeal to come into existence at all".

50. Even if the length of delay is to be reckoned from 2 June 2017, the delay of 3.5 months in the context of an appeal right which must be exercised within 30 days from the date of the decision notice, cannot be described as anything but "serious and significant". From HMRC's perspective, the delay can only be reckoned as 5 months from 17 April 2017, since HMRC would not have knowledge of an impending appeal until after its re-lodgment on 15 September 2017.

The explanations for the delays

51. For the first period of delay, being from 17 April 2017 when the time limit expired to 24 May 2017 when the Notice of Appel was received by the Tribunal Service, the fact in issue is the actual date when the Notice of Appeal was effectively served by post.

52. We find as a fact that the date of receipt of the Notice by the Tribunal was 24 May 2017. We are unable to make a finding of fact that there had been effective service by post of the Notice of Appeal on 13 April 2017. The fact in issue remains in doubt, and therefore, has to be decided on the burden of proof.

53. Section 7 of the Interpretation Act 1978 provides that the burden of proof is on the appellant (as the sender) to prove that service of the Notice of Appeal can be "deemed to be effected by properly addressing, pre-paying and posting a letter containing the document". The appellant has to meet the burden of proof in this regard to enable the Tribunal "to deem service to have been effected at the time at which the [Notice of Appeal] would be delivered in the ordinary course of post".

54. It is Mr Sally's claim that the date of posting of the Notice was by first-class post on 13 April 2017, which would mean that the Notice of Appeal had been in limbo for some 6 weeks before being delivered at HMCTS on 24 May 2017. The Notice was neither lost nor returned as undelivered, but would have undergone an odyssey of a six-week duration. Six weeks is a long time for an inland first-class post to be cast around in the postal system. The date of receipt of the Notice cast doubts as to the veracity of the date of posting being 13 April 2017.

55. Notwithstanding the affidavit served by Mr Sally, the date of 13 April 2017 remained a claim unsubstantiated by any proof of posting. We do not regard exhibit CS1, which is supposed to reproduce the log maintained by the administrative staff at Logan Corry of the outgoing post on 13 April 2017, to be conclusive in establishing the actual date of posting of the Notice of Appeal. Error in logging or omission in posting could have happened, or the alleged post to HMCTS on 13 April 2017 could have been for another matter unrelated to the current appeal.

56. We conclude that the appellant has not met the burden of proof that there had been effective service by post of the Notice of Appeal on 13 April 2017 for service to be deemed as having been effected on that date as provided by s 7 of the 1978 Act.

57. The length of delay should be reckoned from the original time limit of 17 April 2017 as being approximately 5 months.

58. Even if we were wrong in our conclusion as regards the deemed service of the Notice of Appeal on 13 April 2017, the second period of delay from 2 June 2017 to 15 September 2017 of 3.5 months is still to be described as serious and significant.

59. The explanation given for the second period of delay was that there had been an administration error, and the returned Notice of Appeal was never scanned into the system. Consequently, Mr Sally was unaware of the returned Notice until 14 September 2017, when it physically appeared on his desk upon his return at around 4pm from a day at court. Ms Phillips emphasised that this was "a unique situation" and was not due to "an ignorance of the rules" or wilful non-compliance.

60. We accept Mr Sally's explanation. However, the error arose within a professional firm of solicitors which can be properly relied upon to implement an internal procedure of check and follow-up on all important communications. Mr Sally himself acknowledged that a Notice of Appeal is not a run-of-the-mill kind of correspondence and that was the reason he could remember the specific circumstances in re-lodging the notice.

61. It seems odd to us that the absence of *any* communication from the Tribunal Service for over 5 months since the alleged submission on 13 April 2017 was not followed up in any manner by a firm of professional solicitors. Admittedly, Mr Sally said he had a case load of some 300 to 400 clients covering a spectrum of matters, which would include matters being litigated. We heard that Mr Sally returned from a day at court on 14 September 2017. Even if Mr Sally was unable to follow up all his client matters, the case management system should have integrated certain dates for follow up of matters, and for these dates to be highlighted to the case worker or to a team leader with oversight. It was readily admitted by Mr Sally that it was an administrative error, and one which the Tribunal does not consider to be a good explanation for the delay in re-lodging the appeal.

62. A delay by a representative is no difference from a delay by the litigant. If anything, a professional firm of solicitors has a much higher threshold to surmount before this kind of lapse and oversight within a practice can give rise to a sufficiently

good explanation for any delay. After all, these are professionals paid by their clients to observe time limits, among other things, on their behalf; this is a firm with specialism in litigation; they owe their clients a professional duty to ensure time limits are not breached; they have to put in place professional indemnity to cover the consequences of such lapses. Indeed, the circumstances that caused the second period of delay suggest an internal office system with weaknesses which might have been a contributory factor, even if not the cause, of the first period of delay.

Consequences for the appellant

63. Ms Phillips submitted that the prejudice to the appellant in refusing the late appeal is more severe than the prejudice to HMRC. To be denied the opportunity to litigate when the quantum of the assessment is disputed and supportable by documentation does not accord with the overriding objective.

64. Ms Phillips emphasised that HMRC had requested three extensions of time to carry out the review, and the appellant had raised no objection. The relevance of this fact to the application, as we understand it, is that the appellant should be given an extension of time on a *quid pro quo* basis; or in any event, the respondents have no ground for objection.

65. For the respondents, Mr Davies submitted that had KPF objected to the extensions of time required by HMRC to carry out their review, then it would mean that the original assessments would be upheld. The extensions of time had therefore benefitted the appellant, and were not for HMRC's benefit.

66. We first consider whether HMRC's requests for extension of time to deliver their review is of any relevance to this application for appeal out of time.

67. The original assessments to duty and penalty were by notice dated 31 August 2016. The appellant exercised its right to require a review under s 15B of FA 1994 within the statutory time limit stipulated under sub-s 15B(5), that is, "within 30 days of that person becoming aware of the decision". In this case, the request of a review was made on his behalf by Logan Corry by letter dated 29 September 2016 to HMRC.

68. Pursuant to sub-s 15D(2) of FA 1994, which provides that if "under section 15B another person may require HMRC to review a matter, HMRC may within the relevant period notify the other person that the relevant period is extended", HMRC had served notice on Logan Corry to extend time to carry out the review. For present purposes, the "relevant period" is defined under sub-s 15D(4) as "the period of 30 days referred to in … section 15B(5)".

69. The first request to extend time to 10 March 2017 was by letter dated 16 February 2017 to KPF, which was returned as undelivered. The second request was made to Logan Corry by letter dated 3 March 2017, and sought to back date the request from 16 February to 10 March 2017. The third request was by letter dated 10 March 2017 for the period from 10 March to 20 March 2017. The review conclusion was dated 14 March, and received on 20 March 2017.

70. The consequence of the Commissioners not giving a determination within the period of 45 days beginning with the date the review was required is clearly set out under subs-15(2): the Commissioners "shall be assumed" to have confirmed the original decision.

71. The notices to extend time should have heightened the awareness in Logan Corry (even if not in KPF) that the review conclusion would be imminent. HMRC's letter of 10 March 2018 effectively narrowed down the review conclusion release date to the period between 10 and 20 March 2018, which meant the time limit to notify an appeal could be readily ascertained as expiring in mid-April, even before the review decision was issued.

72. The Tribunal is not bound to consider the merits of the appeal to reach our decision. If there had been indeed documentation to support a lower quantum of assessment, the appellant had been requested to provide such documentation on multiple occasions, during the audit and throughout the review process. The review conclusion has reduced the duty assessment from £73,589 to £25,931 by removing five vehicles. The agreement to extend time for HMRC to complete their review had not been to the detriment of the appellant.

73. If anything, the notices to extend time would seem to have benefitted the appellant. In the absence of any substantive documentation, it would seem that HMRC took the initiative to check on the DVLC website to enable five vehicles to be removed from the assessment. It would also seem that in the absence of the effective dates for the SORN registrations on DVLC website, HMRC took the more favourable approach to the appellant by assuming that the vehicles were off-road for the entire period of assessment by excluding the vehicles altogether. In other words, HMRC had not sought to pro-rate the SORN period for any of these five vehicles as being only effective part-way during the assessment period. It would appear that HMRC had done what was reasonably possible within their reach of information to reduce the quantum of the assessment in the appellant's favour.

74. To whatever extent, the repeated requests by HMRC for documentation to be provided to carry out their review would have contributed to the delay in completing the review. The extensions of time should have given the appellant the benefit of time to produce the material documentation. There is no explanation as to why the appellant chose not to provide to HMRC at the review stage the purported documentation that Ms Phillips submitted to be material to its appeal.

75. In these circumstances, we do not consider that the prejudice to the appellant is strong enough to override the obtainable fact as respects the length of delay that can only be described as serious and significant.

Consequences for HMRC

76. Mr Davies submitted that HMRC are entitled to rely on time limits to consider a matter closed. It is prejudicial to HMRC to have the matter re-opened and to divert

resources to defend the assessment. Ms Phillips, on the other hand, submitted that to refuse the appellant an extension of time is contrary to the overriding objective.

77. The overriding objective for this Tribunal is to deal with cases fairly and justly, not only the appellants', but also the respondents'. Following the *Jackson* reforms, the Tribunal's consideration of justice should also encompass a public interest dimension as respects the access to justice. Master McCloud's dictum of what the overriding objective means after the *Jackson* reforms is at [59] in *Mitchell v News Group Newspapers Ltd* [2013] EWHC 2355 (QB), and cited with approval by the Court of Appeal on appeal of the case in [2013] EWCA Civ 1537 at [17]:

> "Judicial time is thinly spread, and the emphasis must, if I understand the *Jackson* reforms correctly, be upon allocating a fair share of time to all as far as possible and requiring strict compliance with rules and orders even if that means that justice can be done in the majority of cases but not all. Per the Master of the Rolls in the 18th Lecture ...
>
> '*The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now.*'" (emphasis original)

78. Following the approach in *Mitchell*, the guidance from the Upper Tribunal (Tax Chamber) in *HMRC v McCarthy & Stone (Developments) Limited* [2014] UKUT 0196 (TCC) makes it clear that this Tribunal likewise should adopt a "tougher and more robust" approach in considering applications to extend time. Neither the circumstances that had caused the appeal to be out of time, nor the alleged merits of the appeal, give rise to any good reasons for the Tribunal to depart from the tougher and robust approach in its exercise of discretion in the present case.

Decision

79. For the reasons stated, the application to notify the appeal out of time is refused.

80. 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: 4 September 2018

Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 29 November 2018
RE-RELEASE DATE: 29 November 2018