[2019] UKUT 58 (TCC)

Appeal number: UT/2018/0062

PROCEDURE – appeal against refusal to grant permission to make late appeal - Martland applied – effect on delay of appellant's mental illness – approach to merits of dispute – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DANIEL PETERS **Appellant**
(also known as INKEY JONES)

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 7 February 2019

Michael Ripley, counsel, instructed by Barnes Roffe Legal Limited, for the Appellant

Sadiya Choudhury, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is the decision on the appeal by the appellant against the decision of the First-tier Tribunal ("FTT") released on 5 April 2018 and reported at [2018] UKFTT 187 (TC) ("the Decision").

2. Although the proceedings are in the name of Daniel Peters, the appellant's legal name is Inkey Jones, and we refer to him in this decision as Mr Jones.

Background

3. Mr Jones applied to the FTT for permission to make late appeals against the following HMRC decisions, HMRC having refused permission:

(1) notices of assessment for all of the tax years from 1996-97 to 2011-12 and for the tax year 2013-14, which were issued on 28 July 2016;

(2) a penalty determination under section 7 of the Taxes Management Act 1970 ("TMA 1970") in respect of the tax years from 1996-97 to 2007-08 which was issued on 28 July 2016;

(3) a closure notice for the tax year 2012-13 which was issued on 2 August 2016; and

(4) two penalty assessments under Schedule 24 to the Finance Act 2007 for the tax years 2010-11 to 2014-15, both of which were issued on 16 August 2016.

4. In the Decision the FTT refused permission to bring late appeals against any of the HMRC decisions. The FTT having refused Mr Jones permission to appeal the Decision, the Upper Tribunal granted permission to appeal on three grounds, namely that:

(1) The FTT applied an unduly strict approach to Mr Jones' application to make a late appeal, by following decisions such as *BPP Holdings v HMRC* [2017] UKSC 55 and *Denton v TH White* [2014] EWCA Civ 9106 which relate to relief from breaches of court or tribunal sanctions, and not to statutory time limits.

(2) The FTT failed to take proper account of Mr Jones' mental illness.

(3) The FTT improperly discounted the merits of the substantive dispute as to the amounts assessed.

5. There was no dispute about the material facts concerning the history of the proceedings, which can be summarised as follows:

(1) HMRC opened an enquiry into Mr Jones' self-assessment return for 2012-13 on 21 October 2014.

(2) Mr Jones instructed JK Shah Accountants to deal with the enquiry. Matters were handled by Mr Tariq Zaman.

(3) Following various letters to Mr Jones, copied to Mr Zaman, and a telephone call between HMRC and Mr Zaman, in July 2016 HMRC issued notices of assessment for 1996-97 to 2011-12 inclusive and for the tax year 2013-14 together with penalties for the tax years 1996-97 to 2007-08.

(4) In August 2016 HMRC issued a closure notice amending Mr Jones' return for 2012-13 and gave notice of penalty assessments for the years 2010-11 to 2014-15 inclusive.

(5) On 19 January 2017 Mr Zaman stated during a telephone conversation with HMRC that Mr Jones had not received any of the HMRC correspondence as it had been addressed to Daniel Peters while he was now known as Inkey Jones. HMRC queried this and explained the process for seeking HMRC's permission for a late appeal.

(6) On 5 April 2017 JK Shah wrote to HMRC appealing against the assessments and penalties, without giving any reasons. HMRC refused to accept the late appeal, having reached the view that Mr Jones had no reasonable excuse for bringing his appeal out of time.

(7) On 19 June 2017 Mr Jones submitted a notice of appeal to the FTT, on the grounds that the assessments were based on estimated income, had not been agreed and were excessive.

6. The total amount of tax, interest and penalties shown in the assessments, determinations and the closure notice was approximately £1.9 million.

7. In June 2017 HMRC served a bankruptcy petition in the High Court against Mr Jones for an amount of approximately £3.5 million.

Application to admit further documents

8. At the start of the hearing we considered an application by HMRC to admit four further documents.

9. The power of the Upper Tribunal to admit fresh evidence on appeal is found in Rule 15(2) of the Upper Tribunal Rules. The discretion conferred by Rule 15 must be exercised having regard to the overriding objective in Rule 2 of the Upper Tribunal Rules to deal with cases "fairly and justly". In this case, Mr Ripley on behalf of Mr Jones did not object to the admission of any of the documents, although he reserved the right, quite properly, to challenge their relevance.

10. In these circumstances, we decided that since the documents were in principle relevant to the proceedings, and Mr Ripley did not object, we would admit them under Rule 15. The documents in question were as follows:

(1) The Schedule to a letter from HMRC to Mr Jones dated 31 May 2016 setting out the calculations behind the estimated assessments from HMRC described in that letter.

(2) HMRC's bankruptcy petition against Mr Jones dated 12 June 2017.

(3) An email dated 14 November 2017 from HMRC to Mr Jones' current representative, Barnes Roffe LLP ("Barnes Roffe").

(4) Correspondence between the parties subsequent to the FTT hearing.

11. In reaching our decision, we took into account only document (1), which was relevant in relation to the ground of appeal concerning the merits of the substantive dispute.

The FTT's approach

12. The first ground of appeal for which Mr Jones was granted permission was that "the FTT wrongly applied an unduly strict approach to Mr Jones' application to make a late appeal" on the basis of various authorities relating to court or tribunal rules.

13. Subsequent to the Decision, this Tribunal released its judgment in *Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (TCC). In light of that judgment, Mr Ripley withdrew the first ground of appeal. While he was right to do so, we nevertheless consider it helpful to summarise the FTT's approach and the effect of *Martland*, not least because this serves to set the second and third grounds of appeal in context.

14. The FTT began by observing that since the legislation on late appeals does not set out any specific criteria which the FTT must take into account in determining whether to grant permission, it should exercise its discretion in a manner which gives effect to the overriding objective "to deal with cases fairly and justly". The FTT derived three key principles from the leading authorities. These were that the tribunal must take into account all relevant facts and circumstances; that appropriate weight must be given to the requirement for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, and that it is useful to adopt the structure of enquiry suggested in *Data Select v Revenue and Customs Commissioners* [2012] STC 2195, *Denton* and *Romasave Property Services v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC).

15. The FTT applied the structure of enquiry adopted in *Denton*, to reach the following conclusions:

(1) As the parties accepted, the length of delay was both significant and serious, being between 6 and 8 months after the expiry of the statutory time limits.

(2) The FTT considered three reasons for the delay put forward by Mr Jones. The first was that Mr Jones was suffering from depression during the relevant period. The second was that Mr Jones had relied on his agent, JK Shah, who had not acted diligently and had failed to appeal in time.

The third was that Mr Jones did not receive much of the correspondence from HMRC because of the confusion over his name. Having concluded that the third reason was not a good reason for the delay, the FTT set out its conclusions as to the reasons for the delay as follows:

> "64. On balance, it seems to me that the reasons for Mr Jones's failure to make an appeal before the relevant time were that Mr Jones was suffering from depression and that he placed too much of a reliance on his agent. I take these issues into account, but that the weight I should give them is affected by the lack of more comprehensive medical evidence on the effect of Mr Jones's condition."

(3) In its consideration of the other circumstances, The FTT took into account the need for litigation to be conducted efficiently and for time limits to be complied with, and also the consequences of refusal or grant for each of the parties: paragraphs 65 and 73. We deal below with the FTT's consideration of the merits of the case.

(4) Having taken all these factors into account, the FTT summarised its reasons for refusing the application as follows:

> "75. It seems to me that, while there is a plausible reason for the delay in in the form of Mr Jones's depression and the failure of his agents to take appropriate action, and the potential consequences for Mr Jones are very significant, the evidence of the effect of Mr Jones's condition on his ability to deal with his affairs is not strong. In the final analysis, those factors are insufficient to outweigh the seriousness of the delay, and the need to ensure that litigation is pursued efficiently and that time limits are adhered to."

16. The three-stage *Denton* approach adopted by the FTT in this case was specifically endorsed in *Martland*: see paragraphs 44 to 46. The argument raised by Mr Jones that a less strict approach to compliance with statutory time limits (as contrasted with court or tribunal rules or directions) should apply was laid to rest in *Martland*. Although the FTT in this case, like the FTT in *Martland*, referred to the overriding objective when it is not directly applicable, as *Martland* makes clear (at paragraph 55 of the decision) the principles of fairness and justice underpinning the overriding objective also apply to the exercise of discretion engaged by an application for a late appeal. The approach adopted by the FTT therefore gave rise to no error of law.

Jurisdiction

17. This Tribunal's jurisdiction is conferred by section 11 of the Tribunals, Courts and Enforcement Act 2007. This limits our jurisdiction to questions of law, that is to say, whether the FTT made an error of law in the Decision which needs to be corrected. Mr Jones does not challenge the FTT's findings of fact as giving rise to errors of law under the principles set out in *Edwards v Bairstow* [1956] AC 14. The question for us is therefore as set out at paragraph 22 of *Martland*:

> "22. That is not the situation in this case. There is no dispute about the facts. The question therefore is whether the FTT either misdirected itself as to the correct law, or plainly misapplied the law to the facts

> before it. Such a misapplication might be obvious on the face of the FTT's decision or it might become apparent because the decision made by the FTT was outside the possible range of decisions which it could properly have made by applying the correct legal approach to the facts found by it."

18. Mr Ripley correctly accepts that the FTT's approach to Mr Jones' application was not wrong in law. In relation to case management decisions, the following statement by Lawrence Collins LJ in *Walbrook Trustee (Jersey) Limited v Fattal* [2008] EWCA Civ 427 at [33] was endorsed by the Supreme Court in *BPP Holdings Limited v Revenue and Customs Commissioners* [2016] EWCA Civ 121:

> "An appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion afforded to the judge."

19. While the Decision was not a case management decision, as *Martland* makes clear (at paragraph 56) it was nonetheless an exercise of judicial discretion and the principles set out above in *Walbrook Trustee* are equally applicable to it.

20. Mr Ripley submitted that he did not need to convince us that the Decision was "plainly wrong". That was because, in failing to give proper weight to Mr Jones' illness and in improperly discounting the merits of the underlying dispute, it must follow that the FTT had failed to apply the correct principles or taken into account the wrong factors. Specifically, Mr Ripley argued that the FTT "failed to take into account" the fact that Mr Jones' depression was a good reason for the delay in appealing and, by wrongly labelling the merits of the appeals as "neutral", the FTT "failed to take into account" their strong merits.

21. We reject that submission. The correct approach which we must take is first to assess whether the FTT took the wrong overall approach to Mr Jones' application, or took into account the wrong factors in reaching its decision. We have found (and Mr Ripley accepts) that in light of *Martland* the FTT's overall three-stage approach and weighting of the need for compliance with time limits was correct in law. It is also clear that both Mr Jones' illness and the merits of the case were relevant factors, and that the FTT took them into account. There is no suggestion that there were other relevant factors that the FTT failed to take into account. Mr Ripley's criticisms outlined at [20] above are simply another way of saying that Mr Jones disagrees with the way that the FTT exercised its discretion having taken relevant factors into account. We must therefore move to address the second stage of the approach, which is to determine whether nevertheless the Decision was plainly wrong (or outside the "generous ambit") in the light of the facts found by the FTT: see paragraph 56 of *Martland*.

Mr Jones' illness

22. Mr Jones stated before the FTT that one reason why he did not deal diligently with his tax affairs was that he was suffering from depression during the period in question. Other than his own witness evidence, the only evidence produced by Mr Jones to support this was a letter from a doctor. The letter was dated 22 January 2018 and was signed by Dr Gurpreet Gill of "samedaydoctor Canary Wharf". The complete text of the letter was as follows:

> "To Whom It May Concern
>
> **Re: Mr Inkey JONES dob 27/12/72**
>
> Today I met with the above named patient. He has described symptoms of depression dating back to the end of 2014. Symptoms include insomnia, not leaving the property, weight gain and lack of motivation to get things done. Over this period, he has not been able to make decisions and deal with bad news. This has had a big impact on him being able to deal with his tax affairs promptly.
>
> It was evident from my interaction and assessment of Mr Jones that he has been suffering moderate to severe symptoms of depression. Mr Jones has not had any treatment and his symptoms have been left untreated for at least 3 years. He would have benefited from both medication and a talking therapy. It is common during depression to be in denial and not admit that there is a problem. Patients find it difficult to seek help.
>
> It is also common in depression with the low mood to find everyday tasks a challenge. Dealing with problems and not fully appreciating the impact of them being left untreated is often observed. It is difficult to be able to see ahead to the future and even appreciate that life can get better.
>
> [suggested treatment plan]."

23. The FTT set out its conclusions on this issue as follows:

> "54. As regards Mr Jones's medical condition, I agree with HMRC that the evidence presented to the Tribunal is not particularly strong. It is limited to the letter from Dr Gill, a walk-in doctor, who had not previously seen Mr Jones. In preparing that letter, Dr Gill did not have access to Mr Jones's medical records. Dr Gill was not available to be cross-examined at the hearing.
>
> 55. Notwithstanding those limitations, I accept that Mr Jones was suffering from depression during the period in question. This is a factor that I will take into account. That having been said, as HMRC point out, it is also necessary to consider the limitations of the evidence. Dr Gill's letter suggests that it would be common for a patient with depression to find everyday tasks a challenge. Perhaps not unsurprisingly, it does not provide any specific guidance as to the extent to which Mr Jones's particular condition affected his ability to deal with his tax affairs promptly."

24. So, the FTT found as a fact that Mr Jones was suffering from depression during the relevant period, but took into account the significant limitations of the third-party evidence as to the effect of that depression on Mr Jones' ability to deal with his tax affairs. At paragraph 64 of the Decision (set out at [15] above) the FTT accepted that the depression was a reason for the delay, and took that into account, but afforded that reason less weight because of the lack of more comprehensive medical evidence as to the effect of the depression.

25. Mr Ripley argued that the FTT had failed to give proper weight to Mr Jones' illness as a result of three inter-related errors, namely:

> (1) The FTT wrongly recorded that Mr Jones adduced no evidence other than a letter from Dr Gill. In fact, Mr Jones himself gave evidence on the effect of his depression, and that evidence was not challenged by HMRC.
>
> (2) The FTT discounted the weight of Mr Jones' illness, apparently on the basis that Dr Gill did not appear as a witness. However, Dr Gill could not have given further details of the effect of Mr Jones' condition at the relevant time because the condition at that time was untreated.
>
> (3) The FTT's approach of reducing the weight of this factor "in the absence of compelling evidence of the effects on Mr Jones of his particular condition" (paragraph 59 of the Decision) was wrong in law because it imposed a burden on him that he could not possibly meet. Since his depression was untreated, the only person who could give evidence as to its effect on his ability to manage his tax affairs was Mr Jones himself. Mr Jones had given such evidence, but the FTT had wrongly rejected it because it was uncorroborated. In analogous situations, differently constituted tribunals have accepted evidence from taxpayers themselves (or from relatives) as to the effect of untreated depression and the FTT should have done the same.

26. The first error suggested by Mr Ripley does not withstand scrutiny. The FTT referred to and took into account both Mr Jones' own evidence (see paragraphs 27 and 36 of the Decision) and the letter from Dr Gill (paragraphs 36, 54 and 55). There was no other evidence presented to the FTT.

27. The second and third suggested errors both go to the question of whether the FTT was justified in discounting the weight of that evidence in all the circumstances.

28. While Dr Gill did not appear as a witness, we find nothing in the Decision to suggest that the FTT considered that to be the only shortcoming in the evidence. Further, while Mr Ripley argued that Dr Gill's evidence could not have assisted the FTT, that is mere speculation. Mr Ripley invited us to conclude that the FTT discounted the weight of the evidence relating to Mr Jones' depression because, in Mr Ripley's words, it thought that Mr Jones had only just "limped over the line" in proving he suffered from depression at all, but we see no support for that conclusion in the Decision which makes a clear finding that Mr Jones did suffer from depression.

29. In terms of what Mr Ripley calls the burden of proof imposed by the FTT, he took us to a number of tax and non-tax decisions relating to the evidential aspects of illness. We did not find any material assistance in those decisions. They concerned materially different factual circumstances, different legal issues (such as reasonable excuse in a penalty context or adjournment of hearings) or related to the correct approach under the CPR.

30. In this case, the only issue before the FTT was to assess the illness as one of three reasons put forward by Mr Jones for the serious and significant delay. In carrying out that exercise, the FTT found as a fact that Mr Jones was suffering from depression. However, the FTT would have erred in law if its consideration had ended with that finding. As the Decision states, the illness was a *reason* for the delay. The required task of the FTT was to determine whether it was a *good reason*. As the Decision states:

> "52. The second stage is to determine whether there was a good reason for the delay".

31. Assessing whether a reason is a good reason does not take place in a vacuum. It is likely to depend among other things on the length of delay; with a serious and significant delay, it will be particularly important to weigh up the strength of the reason, its effect on the delay in question both in terms of causation and duration, and the steps taken to overcome the reason and avoid further delay. All those factors will be critically affected by the available evidence. We sympathise with the point that proof of a mental illness is often more difficult than proof of a physical illness or injury, and that this is more marked where the mental illness is both undiagnosed and untreated. However, the FTT must still evaluate and weigh the evidence which an appellant puts before it.

32. The evidence that the illness caused the lengthy delay in this case was clearly limited. The only evidence presented to corroborate Mr Jones' own evidence was not contemporaneous to the delay, was expressed in general rather than specific terms, and was provided by a doctor who had seen Mr Jones for a single consultation. The FTT made no error of law in discounting the weight to be given to this factor in all the circumstances. Indeed, it is not evident what other decision it might reasonably have reached.

Decision

33. The appeal on this ground is dismissed.

The merits of the case

34. At the third stage of its enquiry, namely consideration of the other circumstances of the case, the FTT considered the arguments of the parties as to whether the merits of the appeal should be taken into account. Mr Ripley (who also appeared for Mr Jones before the FTT) argued that the merits of Mr Jones' appeal were very strong. This was therefore one of the unusual cases in which the merits should be taken into account by the FTT, following the suggested approach of Moore-Bick LJ in *R (oao*

Dinjan Hysaj) v SSHD [2014 EWCA Civ 1633, at [46], set out at paragraph 40 of this decision below.

35. HMRC argued that the merits of the appeal were generally irrelevant in considering an application for a late appeal, relying on the judgment of Lord Neuberger in *Apex Global* [2014] UKSC 64 at [29].

36. The FTT's conclusions on the issue were as follows:

> "70. For my own part, I did not perceive any material difference in the statements of Moore-Bick LJ in *Hysaj* and Lord Neuberger in *Apex Global*. The judgments are given in slightly different contexts, but the principle is the same, namely that the strength of a party's case is not usually relevant in deciding whether an application for permission to make a late appeal should be granted unless that party's case is particularly strong and can be demonstrated without a substantial enquiry into the evidence.
>
> 71. Mr Jones presented some evidence of particular points arising from the assessments and the closure notice in order to demonstrate that the amounts claimed were excessive. HMRC did not contest this evidence. It is inevitable given the nature of the assessments that there will be some discrepancies. That was a matter that should have been addressed by disclosure during the enquiry process. I do not have before me comprehensive evidence to determine whether the amounts assessed are or are not properly charged and it would not, for the reasons given in cases such as *Denton*, *Hysaj* and *Apex Global*, be appropriate for me to embark upon such an enquiry now. On this basis, I will treat the merits of the case as neutral."

37. Mr Ripley submitted that the FTT improperly discounted the merits of the dispute. The FTT accepted Mr Jones' evidence that rental income and a capital gain included in the estimated assessment were incorrect, and HMRC did not challenge this. It was therefore clear that the merits of the appeal were very strong. The FTT erred in law when it stated that discrepancies in the assessment "should have been addressed by disclosure during the enquiry process", because the conduct of the parties during the enquiry was irrelevant to the merits, and in any event HMRC controlled the enquiry and assessment process. The FTT was also wrong to refer to a lack of "comprehensive evidence", because Mr Jones had demonstrated that his grounds were strong and there were discrepancies in the assessment. Further, HMRC's failure to justify the assessment or provide evidence to support it was consistent with this conclusion.

38. For HMRC, Ms Choudhury submitted that the FTT took the correct approach, and that the approach was consistent with *Martland*. There was no error in the FTT's finding that, while some elements of the assessment could be challenged, this was not a dispute in which the merits were "overwhelmingly" in favour of Mr Jones. The FTT was therefore correct not to enquire further into the merits. The examples given by Mr Jones of incorrect items of charge in the assessment reflected only a small proportion of the total tax assessed. Put simply, the FTT was not satisfied on the basis of the evidence presented by Mr Jones that he did have an overwhelmingly strong case.

39. In terms of the approach taken by the FTT to this issue, the FTT stated that it saw no material difference between the approaches in *Hysaj* and *Apex Global*. We agree with the statement in *Martland* (at paragraph 54 of the decision) that *Apex Global* does not apply to an exercise of judicial discretion which will determine whether or not jurisdiction arises. Therefore, whether or not the approach in *Apex Global* was similar to that in *Hysaj*, the FTT was not correct to consider that *Apex Global* gave any guidance on how it should approach the merits of Mr Jones' appeal.

40. However, notwithstanding the FTT's reference to *Apex Global*, we consider that its approach was consistent with the guidance set out on this issue in *Martland*, as follows:

> "46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:
>
> > "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."
>
> *Hysaj* was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's

> case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

41. There was incomplete agreement between the parties as to which discrepancies in the assessment were accepted and found as a fact by the FTT. In his witness statement, Mr Jones gave three examples, drawn from a review by his advisers Barnes Roffe, of what he said were incorrect assumptions in HMRC's estimated assessment. The first related to rental income. The second related to a capital gain. The third was that in relation to Mr Jones' business HMRC had "vastly underestimated" costs. In his oral submissions, Mr Ripley argued that these were only examples of inaccuracies distilled from an email of 12 November 2017 that Barnes Roffe had sent HMRC (which was exhibited to his witness statement) which also set out other inaccuracies. For example, in their email, Barnes Roffe set out Mr Jones' position that he had only been running his comedy club business since 2011, whereas HMRC had based their assessments on an assumption that he had been in business since 1996.

42. In the Decision, the FTT's description of Mr Jones' evidence stated as follows:

> "The merits of the appeal
>
> 39. The assessments raised by HMRC involved estimates of profits based on incorrect assumptions and gains arising from disposals of property that Mr Jones had never owned. Some of these estimates arose from discussions between HMRC and JK Shah in which incorrect information had been provided.
>
> 40. HMRC did not challenge this evidence. I accepted it as fact."

43. Unhelpfully, it is not clear from the Decision precisely what unchallenged evidence of Mr Jones was accepted as a fact. Mr Ripley submitted that it included all three of the specific examples of inaccuracy given by Mr Jones in his witness statement and may even have extended to an acceptance that Mr Jones had only been in business since 2011. Our conclusion is that the capital gain was clearly included (see also paragraph 68 of the Decision). We consider that it also included the rental income, HMRC having accepted that there was no such income.

44. In relation to the estimate of profits in Mr Jones' business, although the words used in paragraph 39 considered in isolation could be read as accepting the example in Mr Jones' witness statement in its entirety, we consider it most likely that the FTT was accepting as a fact that the estimate of taxable profits was not accurate, but was not finding as a fact that it "vastly underestimated" costs. We reach this conclusion for three reasons. First, it would have been highly surprising if HMRC had not challenged the assertion that the costs were vastly underestimated. Secondly, such a finding would (at least without some explanation) have been inconsistent with the conclusion at paragraph 71 that the merits of the case were neutral. Finally, as the FTT made clear at paragraph 71, it simply did not have the detailed evidence available to make such a finding, relating as it did to detailed items of expenditure over a period of many years.

45. For similar reasons, we do not accept that the FTT found as a fact that HMRC's assessments overcharged Mr Jones by assuming that he had been in business since 1996 whereas he had actually been in business only since 2011. Such a finding would amount to a conclusion that, although HMRC had made assessments covering 19 tax years, Mr Jones only owed additional tax for four of those years and would be completely inconsistent with the FTT's later conclusion that the merits of Mr Jones' appeal were "neutral".

46. Mr Ripley's basic proposition was that, having found various discrepancies, the FTT was bound to conclude that the merits of Mr Jones' case were very strong, and should therefore go into the balance. As eloquently as Mr Ripley presented his case, we consider that that proposition fails to distinguish between the total taxable amount included in an estimated assessment and the individual items which make it up. It is in the nature of an estimated assessment that it will be inaccurate to a greater or lesser degree. Mr Ripley took issue with the statement in paragraph 71 that "discrepancies should have been addressed by disclosure during the enquiry process". It seems to us that this is simply making the obvious point that the greater the level and granularity of engagement between a taxpayer and HMRC during an enquiry, the greater the likelihood that errors in the assessment will be reduced or eliminated. The fact that such engagement did not occur in this case was addressed by the FTT in its evaluation of the reasons for the delay.

47. An appeal against an estimated assessment does not become very strong simply because a taxpayer can demonstrate that detailed elements of it which do not go to the heart of the assessment are inaccurate. That was effectively the conclusion which the FTT was expressing at paragraph 71. The "comprehensive evidence" which it lacked would have been needed to determine whether the assessment *as a whole* appeared excessive, and the authorities (now including *Martland*) indicated that embarking on an enquiry to obtain that evidence would have been inappropriate.

48. The FTT might perhaps have chosen different language in concluding that the merits were "neutral", but it is clear that this was another way of expressing what *Martland* describes as a finding that the merits of the appeal were not "overwhelmingly" in Mr Jones' favour and therefore had no material impact on the balancing process.

49. The FTT's decision on this issue fell comfortably within the generous ambit of reasonable decisions on the facts, and accordingly the appeal on this ground fails.

Disposition

50. The appeal is dismissed.

JUDGE JONATHAN RICHARDS **JUDGE THOMAS SCOTT**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 25 February 2019