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Case Number: UT/2022/00017
UT/2021/000144

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

PROCEDURE – Appeals against FTT decisions refusing appellants permission to appeal out of time – whether when appeal concerned company in liquidation there was duty on FTT to consider practical difficulties that generally arose from liquidation – no – appeals dismissed

Heard on: 6 February 2023
Judgment date: 19 April 2023

Before

JUDGE SWAMI RAGHAVAN
JUDGE MARK BALDWIN

Between

SHAFIQUE UDDIN
KAZITULA LIMITED (IN LIQUIDATION)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Howard Watkinson, Counsel, instructed by ASW Solicitors

For the Respondents: Isabel McArdle, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. Mr Uddin is the sole director and shareholder of the second appellant, Kazitula Limited ("**the Company**") which ran a restaurant business. HMRC imposed a series of VAT and corporation tax assessments and deliberate inaccuracy penalties on the Company (totalling some £532,266.90) based on HMRC's view that sales had been suppressed over a number of years. Shortly afterwards the Company went into creditors' voluntary winding up. HMRC imposed Personal Liability Notices ("**PLNS**") on Mr Uddin totalling £212,506.35. Mr Uddin, and the liquidators of the Company lodged their respective appeals with the tribunal between 16 and 18 months outside of the 30-day time limit. In both appeals, it was argued there was a good explanation for the late filing on bases which included that Mr Uddin had relied on his accountant to notify the appeals and had been misled by assurances given by the accountant that all was in hand. Following two separate hearings before the First-tier Tribunal (Tax Chamber) ("**FTT**") by differently constituted panels, Mr Uddin, and subsequently the Company, were refused permission to appeal late.

2. With the permission of the Upper Tribunal, both Mr Uddin and the Company, appeal against those two FTT decisions. The appeals were heard before us together at a joint hearing given the common underlying issues, although separate grounds were raised in relation to each appeal. Mr Uddin argues the FTT did not engage with his argument that he was misled by his adviser and that its fact-finding and reasoning in respect of that were inadequate. The Company argues, first, that the FTT failed to take account of the particular practical difficulties that are generally faced, where a company goes into liquidation, in complying with a 30 day time limit and thus reached an unjust result. Second, it is argued the FTT failed to recognise that the issue of whether Mr Uddin was misled by his accountant was, according to the case-law principles, a relevant factor to consider when, in exercising its discretion, it came to considering all the circumstances of the case.

FTT DECISIONS AND BACKGROUND

3. In both decisions, in considering whether it should exercise its discretion to permit the late appeal, the FTT adopted the familiar three stage approach set out in *Denton v TH White*, [2014] EWCA Civ 906, as explained by the Upper Tribunal in *Martland v HMRC,* [2018] UKUT 178 (TCC). In summary, the tribunal should 1) establish the length of the delay and whether it was serious and significant, 2) establish the reasons for the default, and 3) evaluate all the circumstances of the case, which involved balancing the merits of the reason given for the delay, any prejudice in granting or refusing the application, taking into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected.

4. There was no dispute that the length of delay in notifying each of the appeals to the FTT was serious and significant. In Mr Uddin's case, the PLNs were issued on 16 July 2017 (corporation tax) and 30 June 2017 (VAT), but the appeals to the tribunal were not made until 19 November 2018, some 16 months after the expiry of the 30-day notification deadline.

5. In the Company's case, the VAT and corporation tax assessments were notified on 7 April 2017, and 10 April 2017 and the associated penalties on 20 June 2017 and 26 June 2017. Mr Uddin filed a notice of appeal on 19 November 2018. The FTT noted that, taking that date, the appeals were between 16 and 18 months late. That was a generous calculation, in the appellant's favour, on the FTT's part because, as the FTT noted, the delay ought arguably to have been calculated as continuing until 11 November 2020. That was when the liquidator authorised Mr Uddin to conduct the appeals on behalf of the Company subject to him providing an indemnity, which he was taken to have done. (The Company was put into Creditors

Voluntary Liquidation on 13 April 2017, and therefore all of the period of delay (barring a small number of days in relation to the assessments, but not the penalties) occurred in the period when the Company was in liquidation and only the liquidator had power to take legal proceedings.)

6. In both decisions, the respective FTTs referred to the Upper Tribunal's decision in *HMRC v Katib* [2019] UKUT 189 (TC). There was no real dispute about the relevant principles to be taken from that decision although, as we will come on to, the second ground in the Company's appeal alleges the FTT erred in the way it applied those principles.

7. *Katib* also concerned an appeal against an FTT decision on whether permission should be granted for the appellant to appeal out of time. It found errors of approach in the FTT's decision (which had granted permission) and went on to remake the decision so as to refuse permission. For present purposes, the decision's significance lies in the principles to be applied when attributing failings by an adviser to the litigant, and the approach to be taken to situations where the litigant had been misled by the adviser.

8. At [49], in the context of its discussion of a ground involving the waiver of privilege the Upper Tribunal accepted:

> "…HMRC's general point that, in most cases, when the FTT is considering an application for permission to make a late appeal, failings by a litigant's advisers should be regarded as failings of the litigant …Therefore, in most cases, a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers."(Upper Tribunal's original emphasis)

9. At [50], it dismissed HMRC's submission that the Upper Tribunal should issue general guidance to the FTT that a formal waiver of privilege was necessary in all cases explaining:

> "Provided that an FTT follows the guidance set out in *Martland* referred to above and acknowledges that, in most cases, failings by a litigant's adviser are, for the purposes of an application for permission to appeal late, to be regarded as failings of the litigant (as discussed in more detail in the next section), it will be able to determine future applications of this nature."

10. In remaking the FTT's decision the Upper Tribunal returned to the question of attribution of failures in its consideration of the second stage of *Martland* explaining at [54]:

> "It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant."

11. At [56] the Upper Tribunal rejected the taxpayer's submission:

> "…that the decision of the High Court in *Boreh v Republic of Djibouti* and others [2015] EWHC 769 establishes an "exception" to the principle where a representative misleads the client. Rather, we consider that the correct approach in this case is to start with the general rule that the failure of Mr Bridger [*Mr Katib's representative*] to advise Mr Katib of the deadlines for making appeals, or to submit timely appeals on Mr Katib's behalf, is unlikely to amount to a "good reason" for missing those deadlines when considering the second stage of the evaluation required by *Martland*. However, when considering the third stage of the evaluation required by *Martland*, we should recognise that exceptions to the general rule are possible and that, if Mr Katib was misled by his advisers, that is a relevant consideration."

12. As Mr Watkinson, who appeared for both appellants, highlighted, these passages were carefully expressed so as not to lay down a "bright-line" rule that reliance on an adviser would never be a good reason at the second stage of the analysis. (This was evident from the Upper Tribunal's reference to "in most cases" which it specifically underscored in [49], its reference to "generally" in [54] and to the analysis starting with the "general" rule in [56]). That last paragraph also, critically in Mr Watkinson's submission, stated, without any qualification, that where a representative had misled the client, that that was a relevant consideration at the third *Denton/Martland* stage of considering all the relevant circumstances of the case.

13. As regards the background facts these were not disputed. We need only refer to a small part of these to provide context to the grounds concerning the treatment of Mr Uddin's case that he was misled by his adviser. We derive these from the FTT's decision in the Company appeal – noting that part of the complaint raised in Mr Uddin's appeal before us was that the FTT failed to make findings on whether Mr Uddin was misled.

14. Both FTTs had Mr Uddin's witness statement of 18 November 2018 which set out his case on why both his appeals and the Company's were late. Mr Uddin attended but was not required for cross-examination at the FTT hearing dealing with his appeal. In the Company appeal the FTT recorded that he was "briefly" cross-examined but that "much of [his] evidence…went unchallenged".

15. In that evidence (which the FTT hearing the appeals of the Company accepted) Mr Uddin explained how he had gone to see his accountant after receiving the VAT and corporation tax assessments on the 11 April 2017 and had asked him to look into the assessments as a matter of urgency and that the accountant had assured him, he would "seek to resolve the matter". In the course of "the next few months" following HMRC's issue of the PLNs (which Mr Uddin provided to his accountant) Mr Uddin and his son enquired on progress. Each time the accountant "advised that [both the assessments and penalties] were in hand and that [Mr Uddin and his son] were not to worry". Up until 6 July 2018 (when Mr Uddin was advised the Insolvency Service were seeking to bring disqualification proceedings against him) Mr Uddin was convinced by his accountant that the assessment and penalties were "in the process of being resolved". Mr Uddin sought legal advice later that month, received a counsel's opinion in late September and then came to realise that the appeals, contrary to his belief, had not been filed, giving instructions to his solicitors to file those on 31 October 2018. In relation to the Company appeals, it was not until 5 January 2021 that the liquidator wrote to the Tribunal to confirm that Mr Uddin was authorised to act on the Company's behalf in relation to the tribunal appeals (on the basis that Mr Uddin had provided an indemnity to the liquidator).

FTT Decision in Mr Uddin's application in relation to PLNs

16. We turn now to the relevant parts of the FTT decision on Mr Uddin's late appeal application before moving on to the ground of appeal before us in relation to that.

17. The FTT recorded the appellant's submissions as follows:

> 16. The appellant submitted that the delay arose because the appellant's representative had misled him. He had provided the assessments and the penalties to the accountant who had advised that he would resolve them. The appellant was struggling with his health at the time.
>
> 17. The appellant was reliant on his accountant due to mental health issues at the time, but over the next few months he and his son enquired of the accountant as to the progression of the resolution of the penalties and were told that the matter was in hand and not to worry. He believed that his accountant had been corresponding with HMRC to resolve any issues relating to the assessments and the penalties.

…

> 23. It was submitted that the appellant had a good reason for the delay. Although he had relied on his adviser, he had done what was expected of him in routinely checking on progress. This could therefore be distinguished from the case of [*Katib*]as there was no reason to consider that the appellant's accountant was being negligent.

18. The FTT recorded HMRC's argument, relying on *Katib,* that the failings of an adviser should be attributed to the appellant and that, although the appellant had argued he was misled, he had not provided any copy correspondence ([25][26]). The FTT prefaced the "Balancing exercise" section of its decision by stating that:

> "having established that there was a serious significant delay and the reasons given for that delay it is necessary to consider all the circumstances of the matter".

19. The FTT noted the need for the balancing exercise to take account of the "importance of the need for litigation to be conducted efficiently and at proportionate cost and for the statutory time limits to be respected". In relation to the financial consequences to the appellant, if permission were refused, it noted that there was nothing unusual in respect of those consequences so as to outweigh the general rule that time limits should be respected ([30]).

20. After quoting [49] [50] of *Katib* (at [8] and [9] above) the FTT's reasoning continued as follows. (It is convenient to set this out in full given the appellant's challenge includes a challenge to the adequacy of that reasoning):

> "32. The Tribunal was provided only with cursory information about communications with the accountant: the appellant stated that he had enquired as to the progression, but no details were given as to when or how regularly such enquiries were made. No copies of any correspondence were provided.
>
> 33. The appellant also makes reference to his state of health as a reason for relying on the adviser, but again provides no details as to his health conditions and why they meant that he had to rely on his adviser.
>
> 34. Finally, I note that the appellant also states that he was unaware that there was a deadline for appealing or requesting a review, although the PPLN sent to him clearly states the relevant deadlines. There was no indication that he had asked his adviser what steps should be taken. As such, it appears that he left everything to his adviser and that any enquiries made were cursory enquiries rather than specific requests for information on the steps being taken with regard to the PPLNs.
>
> 35. Case law such as *Katib* has established that reliance on an adviser may, in some circumstances, be a relevant consideration when considering all of the circumstances of the case. However, given the particular importance of respecting time limits, I do not consider that the appellant's reliance on his adviser in this case displaces the general rule noted in *Katib* that an appellant should bear the consequences of his adviser's failings.
>
> *Merits of the case*
>
> 36. The appellant acknowledged that there were no particularly strong merits advanced for either side in respect of the substantive case.
>
> **Decision**

> 37. Taking all of the circumstances into account, I do not consider that this is an appropriate case for permission to be given to bring a late appeal and so the appeal is dismissed."

GROUNDS OF APPEAL

1) The FTT failed to deal with Mr Uddin's case as advanced and to give reasons for why it was rejected

21. Under this ground, Mr Uddin argues the FTT erred in law because it failed to deal with his core submission, that Mr Uddin had been misled by his representative either at the second or third stages of the *Denton/Martland* approach. It did not make findings of fact on that issue. Nor, he submits, did it deal with whether his being misled amounted to a good reason. Instead, it only considered an argument that Mr Uddin had relied on his representative (an argument that would, as Mr Watkinson emphasised, obviously have had far slimmer chances of succeeding because of the principles in *Katib*). The FTT's reasoning was inadequate; it did not enable Mr Uddin to understand why he lost on the case he advanced.

Discussion on Ground 1

22. We consider that when the decision is read as a whole, as it clearly must, then it is plain the FTT did consider Mr Uddin's case.

23. As the appellant acknowledges, the FTT recorded his submissions to the effect that he had been assured by his accountant the matters were in hand at [16] and [17]. The decision of *Katib* was obviously relevant: the FTT specifically referred to the appellant's submission in relation to it at [23]. Accordingly, it was clear the FTT was aware of Mr Uddin's submissions. It was also aware of the need to consider *Katib.*

24. Mr Watkinson highlighted, however, that the FTT failed to mention the part of *Katib* ([56]) of crucial relevance to Mr Uddin's case; that was the paragraph which confirmed that the situation where a taxpayer was misled was relevant to the third stage. It is correct the FTT did not cite this paragraph. But we disagree this means the FTT failed to consider the misleading of Mr Uddin as relevant. At [16] the FTT expressly recorded that "The appellant submitted that the delay arose because the appellant's representative had misled him." It is clear from [16] and [17] that the tribunal understood that Mr Uddin's case was that he had put matters into his accountant's hands and was, from time to time, told that matters were in hand, when they very clearly were not.

25. It is also clear from what the FTT said at [35] that the tribunal understood the relevance of Mr Uddin's argument. They commented, "Case-law such as *Katib* …may…be a relevant consideration when considering all the circumstances of the case", which was plainly a paraphrase of the proposition at [56] of *Katib*. Although that paraphrase put the question of the issue's relevance in more qualified terms, we do not consider that anything turns on that given the FTT did go on to consider the point in its consideration of all the circumstances. This is evident from when the FTT concluded at [35] that it did not consider "the appellant's reliance on his adviser in this case…". Those words plainly signal it had in mind the particular circumstances – i.e. what Mr Uddin had been told and the extent and nature of the enquiries he had made (including the lack of information about Mr Uddin's dealings with his accountant) - and that a key part of Mr Uddin's case was that he had relied on his adviser, who had led him to believe that everything was in hand.

26. It is also plain from [32], which discussed the lack of information about Mr Uddin's communications with his adviser, that the FTT was addressing [49] of *Katib* which concerned situations where the taxpayer was alleging the previous advisers were "deficient" – a term which could capture both deficiencies in the sense of the representative not doing what they

were supposed to unbeknown to the appellant, and deficiencies in terms of the representative misleading an appellant.

27. Mr Watkinson put a lot of store by the FTT's reference to "reliance" (at [33] and [35]). His submission was to the effect that the use of that word indicated the FTT simply had in mind cases where a taxpayer had instructed someone else to do something rather than do it themselves and did not acknowledge the (more serious) situation where the appellant had been misled by the representative. We agree with Ms McArdle's submissions that *Katib* does not contemplate such a stark contrast. Mr Uddin was relying on his representative, both in the sense of the representative acting on his behalf, but also in the sense of relying on what he was told by that representative. The case of a taxpayer being misled may, as Ms McArdle suggested in oral submissions, better be understood as a sub-set of the cases where the taxpayer relies on an adviser. This view, we note, is consistent with the Upper Tribunal's clarification in *Katib* (at [56]) which made clear there was not a special rule for situations where the adviser misled a taxpayer. It fell within the general principle that errors of the adviser were attributable to the appellant, although a client being misled is a relevant consideration.

28. It is true the FTT did not, as it might usefully have done, expressly clarify that it was accepting that Mr Uddin had been misled. But in view of the FTT's line of reasoning, that was not an error of law. In essence, the FTT considered that in all the circumstances of this case Mr Uddin being misled would not constitute a reason sufficient to outweigh the importance of complying with time limits pointing against the grant of permission.

29. As to the ground's criticism that the FTT erred because its reasoning was inadequate, there was no dispute around the relevant principles and rationale for such inadequacy constituting an error of law. These were set out by the Court of Appeal in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at p.381-382). The key points are that the losing party should be left in no doubt why they have lost. If reasons are not provided neither they nor an appellate tribunal will be able to tell whether the tribunal has misdirected itself. The principles also make clear that the extent of the duty to provide reasons will depend on the nature of the dispute.

30. We are not persuaded the FTT's reasoning was inadequate so as to constitute an error of law. The reason why Mr Uddin lost, despite his argument that he had been misled, was clear. That was that, even though Mr Uddin may have relied on his accountant (and been misled into believing that everything was in order), the cursory and general enquiries he made were insufficient to displace the general rule that the taxpayer should bear the consequences of the representative's failings. The FTT's reasoning was such that it did not need to make express findings of fact on whether Mr Uddin was misled because it would not, in its view, have made a difference to the outcome. The fact the FTT engaged with the particular limitations of the evidence it had on Mr Uddin's communications tends in any case to suggest, that it did accept Mr Uddin's account, as far as it went, of what he was told by the adviser. Put another way, a client will always rely on their advisers, but their adviser's failings are still laid at their door. Why the adviser failed and how they led their client to continue to rely on them is not relevant to the *Martland* analysis, unless the client can show that they did whatever a reasonable taxpayer in that situation would have done (which would generally be to make sufficient efforts to keep tabs on the adviser and make sure that matters were on track). Mr Uddin lost because he did not demonstrate more than a cursory interest in what was (not) going on, he had not done what a reasonable taxpayer in his position would be expected to do, rather than because the tribunal failed to recognise that such cursory enquiries as he made were met with untruthful answers.

31. We also agree with Ms McArdle's submission that there was not in any case a disputed issue on the evidence requiring explanation. As already mentioned, Mr Uddin, who had served a witness statement in advance of the hearing and who was present at the hearing, was not required for cross-examination by HMRC. Although this was not recorded in the decision, both parties accept that was the case. Relying on HMRC's written objections and submissions before the FTT in relation to the application to appeal out of time, Mr Watkinson submitted however that the lack of challenge did not mean the issue of Mr Uddin being misled was not a disputed one. But we note those objections were not in terms saying Mr Uddin's account was to be disbelieved but focussed on the lack of detail in the communications. That was consistent with what was said in *Katib* about the taxpayer providing a full account of the communications and also relevant to the issue of the extent to which Mr Uddin bore any "responsibility in the story". In any event, by the time of the hearing, it would have been clear that HMRC were not seeking to challenge Mr Uddin's account as far as it went, (and would have been in difficulty if they had tried) because they did not call him to be cross-examined.

32. We accordingly reject the sole ground of appeal in relation to the FTT's decision on Mr Uddin's late appeal application. Mr Uddin's appeal against that decision is dismissed.

The FTT decision in relation to the Company appeals:

33. The Company's permission to appeal out of time application was heard before a different FTT on 29 September 2021. That FTT therefore had the FTT's earlier decision in relation to Mr Uddin before it. In setting out the background facts, the FTT explained how Mr Uddin had had no authority to file the notice of appeal, as he did on 19 November 2018, given the Company was in liquidation, but that the position was eventually regularised in November 2020 when the liquidator authorised Mr Uddin to continue with the appeals in the name of the Company.

34. The FTT recorded the appellant's submissions on stage 2 (whether there was a good explanation for delay) as including that Mr Uddin was reliant on and misled by its accountant and that the delay was due to the liquidator not appealing the decisions. Regarding stage 3 the submissions reflected that the issue of Mr Uddin's being misled should be considered here. It was argued his situation was distinguishable from the appellant in *Katib* (who was not without responsibility for the failings/delay). Here Mr Uddin had taken steps to check progress.

35. The FTT then set out the facts it found from Mr Uddin's witness statement (noting the fact, as mentioned above, that although Mr Uddin was cross-examined briefly his evidence was largely unchallenged). The facts set out the chronology of the advice he received at various points and included that every time he contacted the adviser, he was told both the assessment and penalty issues were "in hand" and that he was not to worry (see above [15]).

36. The FTT then applied the three stage *Denton/Martland* analysis. As it was accepted the delay was serious and significant, the FTT moved on to consider the second stage setting out its reasoning as follows:

> "30. These late appeals are brought by the Appellant. As of 13 April 2017, the Appellant was in CVL and was controlled by, and could only act through, its liquidator. The deadlines for appealing were all after the Appellant had entered CVL. I was provided with no evidence or explanation as to why the Appellant (acting through its liquidator) did not file the appeals by the statutory deadlines. Nor was I provided with any evidence that the liquidator was privy to, less still reliant on, any of the advice given by SN. I do not, then, see that the Appellant has established that it (as opposed to Mr Uddin personally) was reliant on advice by SN [*the representative*] and that it was that advice that led to the Appellant not filing its appeals by the statutory deadlines. Nor has the Appellant established that there was some other good reason for its failure to

> (through its liquidator) file its appeals by the statutory deadlines, or that it (through its liquidator) was unaware of the deadlines for appealing."

37. On the premise that it was wrong in the above analysis, the FTT then went on to consider the case the appellant had advanced. Here the FTT accepted (at [33]) the factual evidence that the representative had told Mr Uddin on a number of occasions that all was in hand. It continued:

> "34. However, the starting point, as made clear in *Katib*, is that failures by a litigant's adviser should generally be treated as failures by the litigant. There is no "exception" to this rule even where it is established that the an (sic) adviser has misled the taxpayer. That SN led Mr Uddin to believe that all was in hand (by which Mr Uddin took to mean that appeals had been filed) and he need not worry does not, applying *Katib*, constitute a "good reason" for the delay."

38. Next, at [35], echoing the words of *Katib* (at [59]), the FTT explained why it considered Mr Uddin was not "without responsibility in this story" and that he did not act as a reasonable taxpayer would have acted (in summary because 1) he was never provided with, and it was not suggested he had asked for, a copy of the appeal he believed had been filed 2) there was no evidence he asked the adviser to confirm progress and the steps taken, in writing 3) despite realising something was wrong in July 2018, he gave no adequate explanation for the four subsequent months taken to notify the appeal to the tribunal (the FTT rejected his explanation in relation to his having received two subsequent conflicting pieces of legal advice)).

39. The FTT continued:

> "36. The third stage of the *Denton/Martland* process requires me to consider all the circumstances of the case so as to ensure that the application is dealt with fairly and justly. There is nothing about this case that leads me to the view that fairness and justice requires that permission be given to appeal out of time."

40. Central to the Company's second ground of appeal before us, the FTT then cross-referred back to its earlier reasoning:

> "37. In relation to the advice provided by SN, I repeat what I have said at paragraphs 30 and 34-35 above."

41. The FTT then considered various factors (at [38] –[40]): the serious financial prejudice to the appellant, and that the appellant was deprived of the opportunity to defend itself including against criminal penalties, matters which it held were insufficient to outweigh the significant delay for which there was no good reason. It rejected the appellant's submission that finality was to be given little weight, finding that, even if that were made out, that too, would not tilt the balance in favour of allowing late appeal.

GROUNDS OF APPEAL

Ground 1: the FTT came to an unjust result based on analysis that liquidator had not appealed in time

42. As can be seen from the above summary, the FTT's primary analysis, was that as there was no evidence from the liquidator as to why the company did not appeal, there was no good reason for the company not to have appealed. Under this ground, the appellant argues that analysis failed to consider, as it should have done, the relevant practical realities and consequences that arise whenever a company is put into liquidation. That then led to the FTT reaching an unjust result.

43. Mr Watkinson's submissions set out the following generic concerns (the underlying legal references were clarified in a helpful agreed note the parties provided after the hearing). Once a company entered into liquidation the director's powers ceased. The director could not initiate proceedings, that power lay with the liquidator (s103 and para 4 Schedule 4 Insolvency Act 1986 "**IA 1986**"). The liquidator's duties could include those owed to the creditors[1]. A liquidator may decide it is not expedient to appeal a tax assessment even on a protective basis based on the current statement of assets or because there was insufficient information to incur the costs of lodging a protective appeal.

44. There was also a tension when a director sought to take over litigation in the company's name because a liquidator would be enquiring into the director's conduct prior to liquidation (as set out in s7A Company Directors Disqualification Act 1986). There were various options for a director to obtain control: assignment from the liquidator (which might require specialised advice, given an appeal right could not be assigned if, pertaining to a liability, it amounted to a bare right of appeal), or to bring the appeal in the company's name if permission from the liquidator was obtained on the basis of provision of an appropriate indemnity (as was the case here). Alternatively, if the liquidator did not want to pursue the appeal and the director wished then to remove the liquidator that would require action in the High Court (s108 and s171 IA 1986). The prospect of any of these options being worked through within the 30 day appeal limit was, submits Mr Watkinson, "vanishingly slight".

45. Mr Watkinson (who had appeared before both the FTTs below) acknowledges none of these points were made before the FTT but argues that that does not stand in the way of his ground given the ground concerns a proposition of law. This was, in essence, that the FTT was under a duty, on its own initiative, to engage with the status of appellant as liquidator taking account of the particular practical difficulties that arise when a company is placed in liquidation. Moreover, the point being a general legal proposition, it was not undermined by a lack of evidence on the part of the liquidator. Even, assuming the worst, the liquidator's evidence was that it did not want to appeal simply for financial reasons, that did not detract from the duty on the tribunal to take account of the relevant practical consequences arising from a company being in liquidation.

Discussion on Ground 1

46. We start by noting the points raised concern an amalgam of difficulties which arise from the perspective of the liquidator and those which arise from the perspective of a director. In neither case, as Mr Watkinson, recognised, was there any authority cited to us to support the view that liquidators, or directors who have taken over litigation, are entitled to expect that their particular status will be taken account of by a tribunal considering whether to grant permission to permit a late appeal as a matter of course on the tribunal's own initiative.

47. The lack of direct authority does not of itself stand in the way of the appellant's ground. The more problematic issue is the fact that, as Ms McArdle submitted, many of the difficulties arise from the ordinary operation of the established legal framework surrounding the consequences of a company going into liquidation. Entitlement to pursue proceedings, and the decision making regarding that, is, in accordance with the legislation transferred to a different person, the liquidator, who operates under a different set of duties set out in the framework of insolvency laws and rules.

48. We put to Mr Watkinson that, when legislating the 30 day time limit, Parliament would be taken to know there was a framework with these sorts of features in place, and that if it had wanted to carve out a different treatment for liquidators it could have done so but did not. Mr

[1] *MacDonald v Carnbroe Estates Ltd* [2020] BCC 294, SC at [38]

Watkinson's response was that should not be assumed, because Parliament must be taken to have known there was the "safety valve" of a tribunal's discretion to nevertheless grant permission to appeal late. That is true, but the fact a discretion has been granted, with no special relaxation, for a readily identifiable class of appellant (companies in liquidation), to our minds, points against there being a hard and fast rule that an appellant's status as a company in liquidation would, as matter of course, be required to be considered, in a way that would effectively afford a more generous treatment.

49. In addition, as Ms McArdle pointed out, where the appeal is taken by the liquidator or if the director, as here, is authorised by the liquidator to act on behalf of the company, the practical difficulties relied on are only difficulties when viewed from the perspective of a third party, the liquidator or the director. By dint of legislation operating in the way it was intended, the appeal remains however in the name of the company. There is no reason to suppose that the tribunal is duty bound to consider the difficulties faced by a third party; rather its focus should remain on the appellant before it, in other words the company in liquidation.

50. In any case, an obligation on the tribunal to take account of the particular status of companies in liquidation as a general matter is difficult to reconcile with the underlying issues being inherently fact sensitive. For instance, the difficulties Mr Watkinson suggested in the reasonableness of a liquidator being expected to lodge a protective appeal, and the time at which that could reasonably have been done, will necessarily depend on what view is taken of the individual circumstances of the particular case, such as the resources available, and the nature of any advice reasonably required.

51. We accordingly reject the proposition advanced by this ground of appeal. That there is, in our judgment, no specific obligation on the tribunal to take into account the fact of the Company being in liquidation together with the general issues around insolvency processes which Mr Watkinson highlights, should not result in injustice. There is nothing to preclude the tribunal taking account, as part of its analysis when exercising its discretion, any particular issues that arise in a given case from a company having been put into liquidation and anything that flows from that. That will however require the appellant to advance evidence regarding the particular facts and circumstances relied on to justify the delay and in support of the appellant's application, so that the tribunal hearing the application can evaluate those in the light of the parties' submissions in the normal way. Mr Watkinson's submissions referred in general terms to FTT decisions which had recognised the particular "sensitivity" around appellants who were liquidators. Given a company's status will be part of the background factual matrix, it would not be surprising if facts concerning the liquidation process, so far as it was relevant to the issue before the tribunal, were mentioned. If the appellant was seeking to extract a general principle from such decisions, we would need to have been taken to them.

52. In this case, as the FTT rightly identified, the appellant, a company in a creditors' voluntary liquidation, was controlled by and could only act through its liquidator. No account was provided as to why the liquidator was late in filing its appeal (which, although it had authorised the director to represent it, remained in the company's name) for the FTT to assess. There was no error, for the reasons discussed above, in the FTT not taking account of the particular circumstances of companies in liquidation more generally.

Ground 2): the FTT failed to recognise that whether Mr Uddin was misled by his accountant was relevant to *Denton/Martland* third stage

53. The essence of this ground is that, when it came to its consideration of all the circumstances (the third stage of *Denton /Martland),* the FTT, in stating at [37] that it repeated its earlier reasoning by reference to earlier paragraphs (in particular [34]), misapplied *Katib.*

54. The misapplication, Mr Watkinson says, occurred as follows: Paragraph 34 was in the section of the FTT's decision dealing with the second stage, whether there was a good explanation for the delay. The paragraph explained that there was no exception, where the adviser had misled the taxpayer, to the general rule that the adviser's failures were to be treated as those of the litigant. He says that the FTT erred, however, by incorporating this paragraph into its analysis of all the circumstances at the third stage. That was because *Katib* made it clear that the fact a taxpayer was misled (even if that did not stop the representative's failure being attributed to them) was nevertheless a relevant factor to consider when considering all the circumstances (the third stage). The FTT therefore erred in law by failing, in accordance with *Katib*, to take account of a relevant factor.

Discussion on Ground 2

55. We start by noting that the FTT directed itself properly (at [36]) to consider all the circumstances of the case, concluding there was nothing in the case which meant permission to appeal out of time should be granted. The circumstances which it then outlined in support of that conclusion included specific mention of the point raised regarding the advice given by the representative (at [37]). We agree with Ms McArdle that the fact the FTT referred back at the third stage of its analysis to the sections of its decision which discussed the issue of Mr Uddin being misled clearly show the FTT did take account of the issue of whether Mr Uddin had been misled as part of its consideration of all the circumstances.

56. That answers the more general criticism raised by this ground (that no account was taken of Mr Uddin being misled). However, as we have outlined above, the core of the appellant's ground is a narrower legal point around whether the FTT erred, when taking into account the fact of Mr Uddin being misled as part of all the circumstances of the case, because it wrongly assumed that that fact could not constitute an exception to the general rule on attribution.

57. We can see that the FTT's incorporation of paragraph 34, taken at face value, incorrectly transposes the analysis in *Katib* to the extent it does not make clear that, even if the situation where the taxpayer is misled is not an exception to the general rule on attribution, it can nevertheless be considered as part of all the circumstances. But, when that incorporation is viewed in the wider context of the other paragraphs, in particular [35] (see [38] above) it is clear that the FTT was not shutting its mind to the possibility that the fact of Mr Katib being misled could be a relevant factor which pointed in his favour. At [35] the FTT considered the circumstances surrounding Mr Uddin being misled. It considered whether Mr Uddin had acted in the way a reasonable taxpayer in his position would have acted and concluded he had not. As Ms McArdle submitted, if the FTT had simply considered the fact of a taxpayer being misled was the end of the story it would not have conducted this further analysis and then referred back to it.

58. We therefore consider the FTT did not misapply *Katib* in the way suggested. We note in passing that in *Katib* at [60] the Upper Tribunal's evaluation of the representative's conduct (which included misleading the appellant) at the third stage, similarly referred back to the Upper Tribunal's earlier reasoning under the second stage where the Upper Tribunal had referred to the taxpayer not being without responsibility. This should not be surprising. Many of the factors relevant to the second stage of the *Martland* analysis will also be relevant at the third stage too, and not repeating them *in extenso* in a decision does not seem to us to be an error, as long as it is clear (as it is here) that the tribunal has considered all relevant factors at both stages.

59. Even if there was an error on the face of the decision in the way the FTT transposed its earlier analysis in paragraph 34, without any clarification regarding the non-exceptionality of cases where the taxpayer was misled, then that was an error in the FTT misstating the principle

it took from *Katib.* It would not, however, be an error that was material so as to justify setting aside the FTT's decision as it is clear the FTT did not then, as just explained, misapply that principle. We are satisfied the FTT correctly considered the issue of Mr Uddin being misled and the circumstances surrounding that in its consideration of all the circumstances at the third stage. We therefore reject this ground of appeal.

CONCLUSION

60. The appeals of Mr Uddin and the Company are dismissed.

Signed on Original

JUDGE SWAMI RAGHAVAN
JUDGE MARK BALDWIN

Release date: 19 April 2023