**[2013] UKUT 0161 9TCC)**
**Appeal number: FTC 79/2012**

***Procedure – appeal out of time – whether First-tier Tribunal applied the correct approach in considering whether appellant had a reasonable excuse – discretion at large – all relevant factors and circumstances to be taken into account, including merits of the case – no requirement for exceptional circumstances***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**DOMINIC O'FLAHERTY** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ROGER BERNER**

**Sitting in public at 45 Bedford Square, London WC1 on 20 March 2013**

**Nigel Ginniff, instructed by Shahabuddin & Co Limited, for the Appellant**

**James Rivett, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by the Appellant, Mr O'Flaherty, against the decision ("the Decision") of the First-tier Tribunal (Judge David Porter) ("the FTT") released on 22 November 2011, by which the FTT refused to grant Mr O'Flaherty permission to bring certain appeals out of time.

2. Mr O'Flaherty sought permission to appeal from the FTT which was refused. The FTT did, however, conduct a review of the Decision. It did so on the basis that it had failed to take account of the amendment to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which, with effect from 29 November 2010, had amended Rule 20(4) so as to exclude reference to Rule 5(3)(a), and consequently the FTT's case management power to extend time, in the context of a statutory power to permit the making of late appeals. In its decision in that respect ("the Review Decision") the FTT took the opportunity to clarify some aspects of the Decision. Mr O'Flaherty also criticises certain elements of the Review Decision.

3. Following an oral hearing in this Tribunal, Judge Herrington granted permission to appeal on a number of grounds. Those grounds assert that the FTT made errors of law in finding certain facts contrary to the evidence, in failing to take into account matters it should have done and in taking into account other matters that it should not have done. The grounds of appeal also make the submission that the FTT made an error of law in not permitting Mr O'Flaherty's representative to present evidence in the form of a bundle of correspondence between Mr O'Flaherty's accountant and HMRC on the grounds that the representative did not have copies of the correspondence.

4. HMRC's case, put shortly, is that, first, the Decision was an exercise of a discretion vested in the FTT with which this Tribunal should not (and indeed cannot) interfere in the absence of a relevant error of law; and secondly that neither the Decision nor the Review Decision contains any relevant error of law.

## Background

5. Mr O'Flaherty was at the material time the proprietor of the Peacock Pub and the Molyneux Hotel in Liverpool. He ran those businesses as a sole trader. The pub business commenced in 2003 and the hotel business in 2004. He engaged an accountant, Mr Jones, who provided certain services to the businesses until around June 2009.

6. In October 2008, the businesses were the subject of an Employment Compliance Review by HMRC. It was found that Mr O'Flaherty had failed to obtain certain required information and documentation when engaging staff as required by the Income Tax (PAYE) Regulations 2003.

7. As a consequence of the HMRC review, HMRC issued two notices of assessment to Mr O'Flaherty. The notice in respect of the pub business was issued on

23 July 2009 in the sum of £21,276, which represented an estimated liability to unpaid PAYE payable on staff wages for the tax years 2004/05 to 2008/09 inclusive. The notice in respect of the hotel business was issued on 17 August 2009 for £21,200 in respect of the same periods. In each case the notices referred to the requirement that an appeal be made within 30 days of the date of issue of the assessment.

8. The issue of each of these assessments had been preceded by letters from HMRC to Mr O'Flaherty's then accountants, Shahabuddin & Co, on 18 May 2009 and 17 July 2009. Those letters in each case informed Shahabuddin & Co that HMRC intended to issue assessments in respect of PAYE. Understandably, no reference was made in the letters to rights of appeal, or any requirement as to the exercise of those rights.

9. Following receipt of those letters Mr Shahabuddin wrote to Mr O'Flaherty in similar terms, on 22 May 2009 in respect of the pub business, and on 22 July 2009 in respect of the hotel business. In each case Mr Shahabuddin informed Mr O'Flaherty that he was unable to answer the queries raised by HMRC as he had not acted for Mr O'Flaherty at the relevant time. The letters record that Mr O'Flaherty had told Mr Shahabuddin that he had had a previous accountant who might have all the records. Each of the letters concludes with the warning:

> "Unless you provide me with the records I am unable to appeal against the assessments. Please note that we have 30 days from the date of their letter to lodge an appeal."

10. The letter from HMRC accompanying the assessment in respect of each of the pub business and the hotel business referred to Mr O'Flaherty's right to appeal within 30 days of the date of issue of the determination. It made clear that the issue of the formal charges did not preclude any appeal, and stated that any appeal would require the production of documents and records to substantiate "that petition".

11. On 10 August 2009, Shahabuddin & Co wrote to HMRC in relation to the assessment in respect of the pub business. The letter referred to the inability of Mr O'Flaherty to obtain the relevant documents from Mr Jones, and said:

> "We are unable to raise a formal appeal as noted in your letter [the letter of 23 July 2009 accompanying the pub business assessment] that any appeals requires (sic) the production of documents and records to substantiate the petition which our client has not yet provided to us."

The letter also refers to a previous telephone conversation where Shahabuddin & Co say they mentioned to HMRC that karaoke, DJs and entertainers were self-employed and should not be part of the payroll.

12. On 1 September 2009 HMRC wrote to Mr O'Flaherty in relation to the pub business informing him that in the absence of an appeal the pub assessments would be treated as final and conclusive, and would be referred to the collector of taxes for collection. A similar letter was sent to Mr O'Flaherty on 17 September 2009 in respect of the hotel business. In each case the letter advised that, if a late appeal were

to be considered, full information should accompany the late appeal, together with the grounds "surrounding" the late appeal.

13. On 1 October 2010, HMRC's Debt Management, Enforcement and Insolvency division wrote to Shahabuddin & Co concerning Mr O'Flaherty, covering a number of matters. The letter notes that Mr O'Flaherty had not submitted his PAYE end of year returns for the years 2005/06 to 2009/10 and requests the accountants to liaise with Mr O'Flaherty to arrange for full payment to be made by 25 October 2010, or arrangements would be made for the service on Mr O'Flaherty of a statutory demand, and the possibility of a bankruptcy petition.

14. On 26 October 2010 a statutory demand was made to Mr O'Flaherty in respect of unpaid amounts of tax.

15. On 29 November 2010 Shahabuddin & Co wrote to the Debt Management division seeking to set aside the statutory demand on the ground that Mr O'Flaherty was disputing the PAYE debt. The letter records that Shahabuddin & Co had been informed by Mr O'Flaherty that all the information requested by the Inspector had been provided. This was followed by a letter from Shahabuddin & Co of 20 December 2010 recording that Debt Management had agreed that the demand would be "set aside" or postponed until 5 January 2011.

16. Under cover of a letter dated 31 December 2010, Shahabuddin & Co sent the Debt Management division forms P35 and P14 for the tax years 2005/06 to 2009/10. That letter noted that the business had ceased trading on 31 December 2007.

17. The next correspondence is a letter of 1 June 2011 from Shahabuddin & Co to the HMRC Local Compliance caseworker, Mr King. That letter informed Mr King that documents had been sent to Debt Management. Further copies were enclosed, with a request that the demand for payment be postponed until the matter was resolved.

18. Miss Taylor, the HMRC debt manager, responded to that letter on 29 June 2011 referring to the fact that the determinations had become final and conclusive, and that the liabilities were legally due and payable.

19. Shahabuddin & Co wrote to Miss Taylor on 14 July 2011 commenting that they had been unable to provide the information to the inspectors as the matter had been dealt with by Mr O'Flaherty's previous accountants. Shahabuddin & Co referred to their letter of 31 December 2010, and the documents that had been sent, and stated that they were in the process of putting in a late appeal to the tribunal against the assessments.

20. That appeal was made by letter from Shahabuddin & Co dated 18 July 2011. It said:

> "As we have submitted all the documents now, we shall be obliged if [you] could accept our late appeal and review the case. The reason for delay is that it took us considerable time to get the information from

> our client's previous accountants. If you don't accept our late appeal we will have no option but to go to the tribunal."

21. By letter dated 22 July 2011 HMRC wrote to Shahabuddin & Co and informed them that HMRC could not accept a late appeal.

22. As a consequence, Mr O'Flaherty applied to the FTT for permission to make a late appeal. It is from the FTT's refusal to grant permission, by its Decision and the Review Decision that Mr O'Flaherty now appeals, with leave, to this Tribunal.

**The role of the Upper Tribunal**

23. An appeal lies to the Upper Tribunal only on a point of law (s 12, Tribunals, Courts and Enforcement Act 2007). Special considerations apply where what is complained of is the exercise of a discretion by the lower tribunal. As Mr Rivett rightly reminded me, the courts have emphasised the width of what constitutes a reasonable exercise of a discretion vested in a court or tribunal. He referred me in particular to the judgment of the Court of Appeal in *Walbrook Trustee (Jersey) Ltd and Others v Fattal and Others* [2008] EWCA Civ 427. The leading judgment, with which the other members of the Court agreed, was given by Lawrence Collins LJ, who said (at [33]):

> "These were case management decisions. I do not need to cite authority for the obvious proposition that 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 matters 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 entrusted to the judge."

24. Although *Walbrook Trustee* concerned case management decisions, the comments of Lawrence Collins LJ are equally apposite to the exercise of the discretion afforded to the FTT in considering whether to grant permission for an appeal to be made out of time. As an initial stage, however, it is necessary to consider the scope of the FTT's discretion, and whether the FTT properly instructed itself as to that discretion or whether there was any error of law in the FTT's approach.

**The scope of the FTT's discretion**

25. The power to permit a late appeal has been conferred on the FTT by statute. Section 49 of the Taxes Management Act 1970 provides:

> **49 Late notice of appeal**
>
> (1) This section applies in a case where—
>
> (*a*) notice of appeal may be given to HMRC, but
>
> (*b*) no notice is given before the relevant time limit.
>
> (2) Notice may be given after the relevant time limit if—

> (*a*) HMRC agree, or
>
> (*b*) where HMRC do not agree, the tribunal gives permission.
>
> (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
>
> (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
>
> (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
>
> (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
>
> (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
>
> (8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section).

26. It will be seen that, although s 49 makes provision that HMRC are required to accept a late notice of appeal where certain conditions are satisfied, and in particular where HMRC is satisfied that there was a reasonable excuse for the delay, no such provision is made in respect of the FTT. There is considerable authority that, on an application of this nature, the FTT's discretion is at large. The FTT must consider all material factors, including the reasons for the delay, whether there would be prejudice to HMRC if the taxpayer were to be permitted to appeal out of time, and whether there would be demonstrable injustice to the taxpayer if permission were not to be given.

27. That this is the correct approach has recently been confirmed in this Tribunal by Morgan J in *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC); [2012] STC 2195. He held (at [37]) that the approach of considering the overriding objective, to deal with cases fairly and justly, and all the circumstances of the case, was correct, and that the matters referred to in CPR r 3.9 would be included in the matters for consideration. I will return to CPR r 3.9 a little later, but it is clear that the FTT should consider all the relevant circumstances, and should conduct a balancing exercise in reaching its conclusion whether to grant permission for the late appeal or not.

28. Although the grant of permission to appeal out of time does not involve an extension of time as such, the approach to be followed is essentially the same. The broad principles are, as Morgan J described them in *Data Select*, well established. He said (at [34]):

> "Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what

> is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions."

29. Mr Justice Morgan went on to refer to the approach of the Court of Appeal in holding that, when considering an application for an extension of time for an appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker* [2002] 1 WLR 3095. In that case, referring to item (f) on the checklist ("whether the failure to comply was caused by the party or his legal representative"), it was held to be a relevant factor that the failure to comply was caused by the party's legal representatives and not by the party himself (see [27]). Another example of the same type is *R v Commissioners of Customs and Excise, ex parte British Sky Broadcasting* [2000] EWHC Admin 370, where the advisers had a misconception of what the law required (see p 9).

30. Other cases have considered the scope of the discretion to grant permission to make late tax appeals. In *R (on the application of Browallia Cal Limited) v General Commissioners of Income Tax* [2003] EWHC 2779 (Admin), there was a judicial review of a decision of the General Commissioners refusal to extend time for lodging an appeal against the disallowance of certain losses. Giving judgment, Evans-Lombe J accepted that the General Commissioners had a wider discretion in that respect than the inspector of taxes. That was a question of construction of s 49(1) TMA in the form then in force, but that version drew the same distinction in relation to reasonable excuse as the current section does between the approach to be adopted by the Revenue and the Commissioners. Evans-Lombe J said (at [14]):

> "The section does not purport to guide the General Commissioners in any way as to how that discretion to permit appeals to be lodged out of time should be exercised. It seems to me, therefore, to follow that the General Commissioner's discretion is at large and they can consider the sort of matters which I have referred to which an Inspector of Taxes had no power to take into account."

31. Those matters included such considerations as the lack of prejudice to the Revenue as a result of failing to lodge an appeal, and demonstrable injustice to the taxpayer if such an appeal is not permitted to be lodged out of time (see [12]).

32. *Browallia* was followed in *R (on the application of Cook) v General Commissioners of Income Tax and another* [2007] EWHC 167 (Admin). In *Cook*, the case concerned assessments to PAYE and NICs. The taxpayer asserted that he had delivered three boxes of records to the Inland Revenue office in Northampton on 26 June 2003. This was disputed by the Revenue. In July 2003 the relevant assessments were issued. There was no appeal at that stage. In December 2003 the taxpayer received a letter stating that the assessments were final and that tax was due and payable. Again the taxpayer took no steps to appeal. However, he wrote to the National Insurance office to complain that the Revenue had the documents from

which the proper assessments could have been made. The taxpayer was informed by the Revenue on 9 March 2004 that they did not have the documents and they stood by the original assessments. Once more the taxpayer took no steps.

33. A statutory demand was issued on 6 October 2004 in respect of the full sum, and that was served on 8 November 2004. That prompted the taxpayer to instruct an accountant. The accountant wrote to the Revenue on 31 December 2004 recording that the taxpayer was adamant that all records that had been held by him had been delivered to the Revenue. He sought discussions with the Revenue about the amount due. It was only following the issue by the Revenue of a bankruptcy petition that the appeal was then pursued.

34. The General Commissioners refused to permit the appeal to proceed on the basis that they had found that the dispute about the whereabouts of the records was not a reasonable excuse, and certainly not one such as to justify the length of the delay. On judicial review of that decision, Burton J found (at [22]) that there had been no reference by the General Commissioners to the exercise of discretion or a balancing act, to the presence or absence of merits, or to the presence or absence of prejudice. The only issue addressed was whether there was a reasonable excuse for the delay. Burton J went on to hold (at [27]) that the depriving of a party of the opportunity to put forward an arguably meritorious appeal is itself an obvious prejudice, and that the reference by Evans-Lombe J in *Browallia* to prejudice must carry with it the question whether the basic appeal was arguable. The approach of the General Commissioners had been wrong in law. The decision to refuse the application to make a late appeal was quashed, and the case was remitted to the General Commissioners.

35. It can thus be seen that it is not simply a question whether the relevant tribunal, in this case the FTT, has exercised its discretion properly. The threshold question is whether the tribunal has correctly identified the approach to be adopted. In *Cook* and *Browallia* the General Commissioners had not.

36. I was referred to *Ogedegbe v Revenue and Customs Commissioners* [2009] UKFTT (TC), a case in the First-tier Tribunal where Sir Stephen Oliver refused permission to appeal out of time. In the course of his decision, Sir Stephen made the point that permission to appeal out of time will only be granted exceptionally. It is in my view important that this comment should not be thought to provide a qualitative test for the circumstances the FTT is required to take into account. It should properly be understood as saying nothing more than that permission should not routinely be given; what is needed is the proper judicial exercise of a discretion, taking account of all relevant factors and circumstances.

37. The exercise of such a discretion is a very material one, as it gives to the Tribunal a jurisdiction that it otherwise would not have. Time limits are prescribed by law, and as such should as a rule be respected. As the First-tier Tribunal (Judge Poole and Mr Marjoram) noted in *Aston Markland v Revenue and Customs Commissioners* [2011] UKFTT 559 (TC), referring to the comments of Sir Stephen Oliver in *Ogedegbe*, it should be the exception rather than the rule that extensions of time are

granted. But neither *Ogedegbe* nor *Aston Markland* provides any guidance on the nature of the circumstances that will justify a tribunal exercising its discretion in favour of granting permission.

38. These references to permission being granted exceptionally should not be elevated into a requirement that exceptional circumstances are needed before permission to appeal out of time may be granted. That is not what was said in *Ogedegbe*, nor in *Aston Markland*, and it is not the case. The matter is entirely in the discretion of the FTT, which must take account of all relevant circumstances. There is no requirement that the circumstances must be exceptional.

**Was an appeal made on 10 August 2009?**

39. Before moving to the decision of the FTT on the application for permission to appeal out of time, I can deal quite shortly with one point raised on behalf of Mr O' Flaherty. Mr Ginniff submitted that the letter of 10 August 2009 was sufficient to amount to an appeal, and it ought to have been treated by HMRC as such. He argued that the letter was clear in setting out that Mr O'Flaherty disagreed with the assessments, both as to amount and basis. He submitted that the request in the letter to "keep the matter pending" had to be construed as being in the nature of an appeal.

40. I can say at the outset that on any basis the letter of 10 August 2009 could not amount to an appeal in relation to the assessment in respect of the hotel business; that assessment was not notified until 17 August 2009.

41. In any event, the letter of 10 August 2009 cannot on its terms amount to an appeal. Mr Shahabuddin was evidently well aware of the nature of an appeal. He took the view that an appeal could not be made because of the absence of Mr O'Flaherty's records. It was suggested in argument that Mr Shahabuddin might have been misled into believing this was the case by the terms of HMRC's letter accompanying the assessment in respect of the pub business (23 July 2009), which referred to the need for documents and records to be produced on an appeal; indeed the letter of 10 August 2009 makes reference to that statement. But that was not the case, as is demonstrated by the terms of Mr Shahabuddin's earlier letters to Mr O'Flaherty of 22 May 2009 and 22 July 2009.

42. The letter of 10 August 2009 makes clear on its terms that it is not an appeal. It cannot be treated as such. There was in my judgment no appeal in respect of the assessments in relation to either the pub business or the hotel business until 18 July 2011. There is no arguable case that the appeal was made at any earlier time. The case was correctly treated as an application for permission to appeal out of time in respect of both the pub business and the hotel business. I turn therefore to the decision of the FTT in that regard.

**The decision of the FTT**

43. It is clear that the FTT did not apply the correct approach, and that this appeal must consequently be allowed.

44. At [14] of the Decision, the FTT recites Mr Shahabuddin, who represented Mr O'Flaherty at the hearing before the FTT, as having made a submission that, on the basis of the forms P35 that had been submitted, Mr O'Flaherty was not liable to pay any tax or NICs. The argument put was that all the staff worked for 12 hours per week and that this was their main employment, so that no liability arose. Mr Shahabuddin is also recorded as having argued that, from the information provided by Mr O'Flaherty, the costs of the karaoke and entertainment showed that the estimates made by HMRC were grossly overstated.

45. In the immediately following paragraph, which is not individually numbered, but which is separated from [14] by a new heading "The decision", the FTT said this:

> "Judge Porter explained to Mr Shahabuddin that this appeal concerned whether Mr O'Flaherty had a reasonable excuse and did not delay making the appeal after that excuse had finished. The Tribunal was not primarily concerned with the issues in the case. I have heard the evidence and considered the law and I refuse the right to appeal out of time."

46. It is evident from this that as a matter of principle the FTT saw the issue before it as confined, or being at least primarily, as to whether there had been a reasonable excuse for the delay in making the appeal, and whether there had been any unreasonable delay after the excuse had ceased. It is apparent that it took this approach from two sources to which it referred in its summary of the applicable law. At what appears to be numbered [5](d) the FTT refers to s 118(2) TMA, the general provision concerning reasonable excuse, which uses the language employed by the FTT. The FTT also referred (at [4]) to the provisions of s 49 TMA as requiring three conditions to be satisfied, including that of reasonable excuse and no unreasonable delay after the excuse has ceased. As I have noted, those particular provisions are applicable only to whether HMRC will agree to the appeal being made late. No reference is made by the FTT to the wider discretion afforded to the tribunal.

47. Mr Rivett argued that the FTT was correct to identify that the only issue before it was whether Mr O'Flaherty had a reasonable excuse for bringing appeals some 22 months late. I do not agree. It is abundantly clear from the authorities I have referred to that the FTT is required to exercise a discretion, and not simply consider the question of reasonable excuse.

48. In the same paragraph of the Decision where it referred to the appeal concerning reasonable excuse, the FTT referred to the Civil Procedure Rules. It identified the factors from CPR r 3.9 which, as has subsequently been described in *Data Select*, are apt to be considered. These are of course factors relevant to the exercise of a discretion. Accordingly, although the FTT did not refer in terms to its jurisdiction being one of discretion, or to any balancing exercise having to be carried out, it is necessary to consider what the FTT actually decided, and whether, despite the indications to the contrary, it in fact exercised a discretion and did not focus unduly on the question of reasonable excuse.

49. Paragraph 15 of the Decision sets out the detailed reasoning of the FTT. It is a dense paragraph containing a number of separate findings which need to be broken down into their constituent parts in order to appreciate the basis upon which the FTT reached its decision.

50. The FTT considered the evidence it had heard from Mr O'Flaherty. It found it to be "far from convincing". The FTT found that Mr O'Flaherty was unable to identify what bookkeeping activities he had. It recorded Mr O'Flaherty as having stated that such records as he possessed had been placed in a box and handed to his accountant. It then found that there was no evidence as to exactly what records Mr O'Flaherty had handed to Mr Jones. That finding was directed at the question whether the difficulty asserted by Mr O'Flaherty in recovering those records was a reasonable excuse.

51. The FTT found that, although Mr O'Flaherty was a person who had been in business for several years and who was aware of his obligation to provide information to HMRC, he had not been able to explain why no action had been taken with regard to the assessments, except to say that Mr O'Flaherty's papers had been taken and not returned by Mr Jones. The FTT inferred that Mr Jones had disappeared in June 2009. An inference was also drawn, from Mr O'Flaherty's ability to compile a list of staff towards the end of December 2010, that such a list could have been produced when the assessments were raised. Those findings were looking at the failure of Mr O'Flaherty to act when the assessments were raised, and go therefore to whether there was a reasonable excuse for that inaction.

52. Based on the assumption that a list of staff could have been made available at the time of the assessments, the FTT suggested that Mr Shahabuddin could at that stage have contacted HMRC in an attempt to resolve the matter. The FTT then found that no such attempt appeared to have been made. This again goes solely to the question of reasonable excuse.

53. The FTT referred to a suggestion that Mr O'Flaherty's health had led to delay. It stated that no medical evidence had been provided, nor any explanation why the medical condition made it impossible for Mr O'Flaherty to complete his returns over such a prolonged period. This is a pure issue of reasonable excuse.

54. The FTT then referred to its acceptance of a submission by HMRC that it would be prejudiced if it were required to re-open such long-standing assessments. This is the only reference in the Decision to a factor other than reasonable excuse.

55. The FTT stated that Mr O'Flaherty had been the author of his own misfortune, in that he had failed to keep proper books of account and to recover them. This is effectively a finding that Mr O'Flaherty had no reasonable excuse.

56. The FTT then went on to say: "Permission to appeal out of time can only be given in exceptional circumstances. In this case there are no exceptional circumstances." For the reasons I have explained, that is not a proper approach to the exercise of the FTT's discretion, and was itself an error of law.

57. The FTT found that, contrary to the position that had been asserted by Mr O'Flaherty, Mr Jones, his former accountant, could not have had all the books for the entire period. It based this finding on Mr O'Flaherty having confirmed that he only gave the details to Mr Jones each month so that Mr Jones could advise as to the wages for the businesses for that month. The FTT found that Mr O'Flaherty must therefore have returned the earlier information from which the appropriate details could have been taken to complete the relevant forms for HMRC. This is another finding that goes to the question of reasonable excuse.

58. It is apparent from an examination of these individual findings that the FTT directed its attention almost exclusively to the question whether Mr O'Flaherty had a reasonable excuse for failing to make an appeal within the proper time limits. It did so because, as it had said in the opening paragraph of the section headed "The decision", this is what it perceived to be the correct question as a matter of law.

59. In so doing the FTT was in error. The FTT should, as I have described, have approached the issue as one of discretion. It should have conducted a balancing exercise, having taken into account all the relevant factors and circumstances. Those factors should have included the arguable merits of Mr O'Flaherty's case. The focus given by the FTT to the question of reasonable excuse had the result that the submissions on merits were ignored by it.

60. I should mention that in the Review Decision, the FTT makes the point, at [6], that it took the view that, given that the first assessment related to the year 2004/05, it was unlikely that Mr O'Flaherty or his family could usefully remember the terms and conditions of his then employees, and that as a result the FTT took the view that the prospect of the substantive case being successful was unlikely. This is the only reference to the merits of the case. In my judgment it is inadequate to remedy the evident failure to consider this issue as a factor in the balancing exercise.

61. Were the FTT properly to have considered the merits of the proposed appeal, and come to the view that there was an arguable case, that would have been a factor to weigh in the balance against the FTT's findings on the reasons for the delay and Mr O'Flaherty's explanation, as well as the finding as to the prejudice to HMRC, a factor referred to by the FTT but not weighed against any countervailing prejudice to Mr O'Flaherty.

62. Furthermore, by concentrating on the issue of reasonable excuse, the FTT failed to heed its own direction to itself to take account of certain of the factors in CPR r 3.9. Of particular import in that connection is that the FTT did not consider whether the failure to appeal in due time was caused by Mr O'Flaherty or by Shahabuddin & Co, and consequently was unable to bring that factor into the balancing equation.

63. In its approach, therefore, the FTT made an error of law. The FTT should have considered the submissions of Mr Shahabuddin as to the merits. It did not need to reach any conclusion on Mr O'Flaherty's substantive case, but it did need to consider whether that case had any arguable merit, in order that this factor could be taken into

account as part of the balancing exercise. It failed to do so because it adopted an erroneous view of the proper approach to be taken in law.

64. That is sufficient to dispose of this appeal. I am conscious that I have not considered the detailed grounds of appeal and submissions on evidential matters. However, as the appeal must be allowed for the reasons I have expressed, I do not need to do so. Furthermore, as I have concluded that this case should be referred back to the First-tier Tribunal, to be re-heard by a different panel, it would not be appropriate for me to make any observations on factual matters which the new tribunal will have to decide.

65. I considered whether I was in a position to re-make the Decision. As no argument was addressed to me on the merits, I am unable to do so. The case must therefore be remitted to the First-tier Tribunal. In those circumstances I also considered whether it would be expedient for me to refer the case back to the original tribunal. I have decided that would not in this instance be an appropriate course. The FTT made a fundamental error in its approach, and consequently the way the proceedings were conducted will have been affected by that error. Justice can accordingly, in my view, only be done by allowing the parties to present their respective cases afresh, before a new panel.

**Decision**

66. For the reasons I have given I allow this appeal. This case is remitted to the First-tier Tribunal, to be heard by a new panel.

**Costs**

67. Any application for costs should be made in accordance with rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008. As any order will be for detailed assessment, it is not necessary for the application to be accompanied by a schedule of costs.

**ROGER BERNER**

**UPPER TRIBUNAL JUDGE**
**RELEASE DATE: 04 APRIL 2013**