[2018] UKUT 0178 (TCC)

Appeal number: UT/2017/0015

Excise Duty – assessment to duty and wrongdoing penalty – application for permission to make late appeal – test to be applied – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

WILLIAM MARTLAND **Appellant**

-and-

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

TRIBUNAL: **JUDGE ROGER BERNER**
JUDGE KEVIN POOLE

Sitting in public at the Royal Courts of Justice, London on 24 April 2018

The Appellant did not attend and was not represented

Paul Luckhurst, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is the appeal of the appellant, William Martland, from the decision of the First-tier Tribunal ("FTT") (Judge Anne Fairpo), neutral citation [2016] UKFTT 0717 (TC). In that decision ("the FTT Decision"), the FTT refused his application for permission to notify a late appeal to the FTT in connection with an assessment of Excise Duty of £24,694 and a related wrongdoing penalty of £9,507. Accordingly, it struck out the appeal.

2. The appellant appeals against the FTT Decision with permission of the Upper Tribunal (Judge Herrington).

3. The appellant had been represented by Rainer Hughes, solicitors, but the Tribunal received notice on 28 March 2018 (less than a month before the hearing) that they were no longer acting. When no skeleton argument was submitted by the appellant two weeks before the hearing as directed by the Tribunal, he was contacted and required to indicate his intentions in relation to the appeal. He did so, informing the Tribunal that he had not been told about the hearing date by his former representatives, had not seen the grounds of appeal to this Tribunal or the permission to appeal that had been granted. He indicated that he would not be able to attend the hearing as he had just started full time employment, but he still wished the matter to go to the Tribunal. He submitted some short written representations in support of his appeal.

4. In the circumstances, we decided it was in the interests of justice to proceed with the hearing in the appellant's absence, taking account of the written representations which he had put forward and the formal grounds of appeal which had previously been submitted by his former representatives.

The FTT Decision

5. The FTT made the following findings of fact (at [2] to [12] of the FTT Decision):

> "2. The Respondents (HMRC) issued the applicant with an assessment in respect of excise duty on a load of mixed beer brought into the United Kingdom on 18 December 2013 on a vehicle driven by the applicant. It appears that the importation was a 'mirror load' as the Administrative Reference Code (ARC) used for the import had been used on a previous occasion. The load and the vehicle were accordingly seized at the border. Neither the seizure of the load nor the seizure of the vehicle was challenged by any person.
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> 3. The CMR and the Electronic Movement Control System showed the haulier as "Walker Transport"; the applicant advised HMRC that he had been engaged by "T & C Metals & Haulage" to drive the load. He was paid cash in hand and had no documentary evidence of employment.
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> 4. HMRC were unable to establish contact with either Walker Transport or T&C Metals & Haulage.

> 5. On 17 May 2014, HMRC wrote to the applicant to inform him that they intended to issue him with an assessment to excise duty on the basis that he was the person 'holding the goods intended for delivery' under Regulation 13(1) & (2) of the Excise Goods (Holding, Movement & Duty Point) Regulations 2010. A wrongdoing penalty was issued under Regulation 41(4)(1)(a) Finance Act 2008 on the basis that the applicant had acquired possession of the goods as he had physically carried the goods.
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> 6. On 17 June 2014, the applicant's solicitors wrote to HMRC to advise that they had been instructed on the applicant's behalf. HMRC requested written authorisation from the applicant to enable them to respond to the solicitors' correspondence.
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> 7. The assessment for excise duty of £24,694 and a penalty of £9.507 was raised on 30 June 2014.
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> 8. A letter of authority from the applicant in respect of his solicitors was received by HMRC on 20 July 2015.
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> 9. The applicant requested a review of the decision to issue the assessment and penalty on 27 August 2015. On 22 September 2015 HMRC requested that the applicant provide reasons for the late review request.
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> 10. On 1 October 2015, the applicant's solicitors wrote to HMRC to advise that they had not been in receipt of funds or instructions and so had not been able to take action earlier.
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> 11. HMRC rejected the late request for a review on 5 October 2015.
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> 12. The notice of appeal in respect of the assessment and penalty was submitted on 29 October 2015."

6. Put briefly, the FTT decided:

(1) that, in considering the exercise of its jurisdiction to permit the appeal to be notified out of time, it was "bound in the first instance to apply the overriding objective set out in Rule 2 of the Tribunal Rules[1], to deal with cases fairly and justly" (at [24]); and

(2) (at [25]) that, in doing so, it was appropriate to carry out a balancing exercise, considering the questions set out by the Upper Tribunal in *Data Select Limited v Revenue & Customs Commissioners* [2012] UKUT 187 (TCC), namely:

(a) What is the purpose of the time limit?

(b) How long was the delay?

[1] Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules")

(c) Is there a good explanation for the delay?

(d) What will be the consequences for the parties of an extension of time?

(e) What will be the consequences for the parties of a refusal to extend time?

(3) In considering these questions, it was appropriate to consider all the circumstances of the case, including the matters set out in Rule 3.9 of the Civil Procedure Rules. In that context, following the decision in *BPP Holdings Limited v Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 121, where the Court of Appeal had held that compliance ought to be expected unless there was "good reason to the contrary", there was no justification for tribunals taking a more relaxed approach than that under the CPR, and the interests of justice in this context encompassed not just the particular parties but also the wider justice system.[2]

7. Under the five headings which it derived from *Data Select*, the analysis of the FTT was, in summary, as follows:

(1) The purpose of the time limit was, in the public interest, to promote legal certainty and security. As such, it was to be respected unless there was good reason to the contrary.

(2) The length of the delay in this case was from 30 July 2014 (the statutory deadline for the appeal) to 29 October 2015, almost 15 months. This was "clearly a significant and serious delay".

(3) The explanation for the delay was that the appellant could not afford representation earlier, though he had instructed solicitors when first advised by HMRC that they would be issuing an assessment and penalty. The FTT observed that "limited information as to the applicant's finances has been provided and, in any case, an applicant's financial position cannot be determinative." It saw no reason why the appellant could not have brought his appeal without legal representation or, at the very least, have continued his communication with HMRC or obtained other advice as to how to proceed. He could also have asked his solicitors what his options were when they informed him they were unable to continue acting. The FTT went on to say that, in summary, "I do not consider that it has been shown that a lack of funds for representation is a reasonable excuse for the delay in bringing the appeal."

(4) Clearly an extension of the time limit would be of significant benefit to the appellant, allowing him to bring his appeal. It was argued that HMRC would not be prejudiced, as the appellant had at least a prima facie case, and cases on

[2] This approach was subsequently effectively endorsed by the Supreme Court in *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55

similar facts were under examination by the Upper Tribunal. The FTT discounted that argument altogether:

> "I do not consider the fact that there are similar cases which may be appealed should be regarded as meaning that HMRC cannot be entitled to regard the matter as closed, nor should that fact mean that time limits can be breached."

The FTT also made this comment about the merits of the appeal:

> "the evidence provided and the state of case law do not indicate however that the case is not without merit…this case seems neither very strong nor very weak and so I have concluded that no significant weight for or against the extension of time should be given to the strength or otherwise of the applicant's case in the substantive appeal."

(5) The FTT noted that the appellant would quite possibly be made bankrupt if not permitted to appeal, but essentially regarded that as a simple consequence of the appellant failing to appeal in time without good reason. HMRC might be regarded as receiving a "windfall" if the appeal was not allowed to proceed, but the appellant's argument that "the procedural rules should not permit a potential misapplication of the law in a case where the legal principles are not settled" did not, in the FTT's view, afford sufficient reason for extending time:

> "To permit an extension of time of more than a year because there is potential legal uncertainty in the subject matter of the substantive appeal would have a significant impact on the wider system and not just on the parties involved in this case."

8. After "[c]onsidering the various questions in *Data Select*, and all the circumstances of the case", the FTT decided not to allow the appeal to be notified out of time, and accordingly struck out the proceedings.

9. The appellant sought permission to appeal against the FTT Decision, essentially on two grounds. In summary, these were:

(1) First, that the FTT had wrongly "meshed together two questions that it was required to consider separately, namely (a) the reason for the delay; and (b) the consequences of a refusal to extend time." This arose from the FTT's statement at [46] as follows:

> "The submissions in respect of the applicant's financial position are noted, but payment of the duty and penalty is a necessary consequence of a failure to appeal in time without [no] (sic.) reasonable reason for the delay."

(2) Second, in the circumstances of this case (where it was said to be unclear whether HMRC had correctly applied the law in imposing a liability on the appellant as the "person holding the goods", because applications for permission to appeal to the Upper Tribunal on that very point had been granted in a number

of other cases), the FTT had clearly been wrong to find there was no "sufficient reason for extending time to appeal, which should be the exception rather than the rule".

10. Permission was initially refused in the FTT by Judge Fairpo. By way of explanation of her decision to refuse permission, Judge Fairpo said this:

> "In relation to the first ground, the Tribunal considered (at paragraph 46) the applicant's financial position in considering the consequences of a refusal to extend time. The submissions with regard to the applicant's financial position included specific reference to the likelihood that he would be made bankrupt if the appeal was not allowed to continue (paragraph 13 of the Decision) and it was clearly these submissions, as to the effect on the Applicant, that the Tribunal considered when concluding that the financial impact on the Applicant should not be a deciding factor in extending time to appeal where there is no reasonable reason for the delay.
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> In relation to the second ground, the Tribunal found that the state of the law was not a sufficient reason for extending time to appeal by more than a year (paragraph 48). The Application is, in effect, reiterating the position of the Applicant that an application for a late appeal should be granted where doubt has been cast on HMRC's interpretation of the law. The Tribunal disagreed with this position, following the decision in *BPP Holdings* [2016] EWCA Civ 121, which requires that impact on the wider system be considered. The Tribunal concluded that to allow a late appeal on the basis of legal uncertainty would have a substantial impact on the wider system and so legal uncertainty did not give a sufficient reason for extending time."

11. In granting permission to appeal, the Upper Tribunal (Judge Timothy Herrington) said this:

> "This application relates to an appeal against a case management decision. It has consistently been recognised that this Tribunal will be slow to interfere with the proper exercise by the FTT of its discretion in case management decisions and will not do so unless the Tribunal 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.
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> The Applicant therefore has a high hurdle to surmount if he is to be successful on this appeal. However, in my view it is arguable in this case that the FTT did not fully take into account in the balancing exercise which it undertook the likelihood that any hearing of the substantive appeal was likely to be delayed for a considerable period of time in the light of the cases recently decided in the Upper Tribunal referred to at paragraph 4 of the Applicant's application for permission to appeal. There is a possibility of an appeal in those cases to the Court of Appeal in Northern Ireland and there is another case in respect of which permission to appeal has been given in the Upper Tribunal with similar facts to this appeal (*Martin Perfect*) which has been stayed pending the

> determination of those cases. It is therefore likely that this case would be stayed if the appeal were admitted."

The legislation

12. This appeal is concerned with an assessment to Excise Duty and a related penalty. The legislation is mainly set out in section 16 of the Finance Act 1994 ("FA94"), which provides (in relevant part) as follows:

> "(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision[3]… may be made to an appeal tribunal within the period of 30 days beginning with –
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> > (a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates…
> >
> > …
>
> (1F) An appeal may be made after the end of the period specified in subsection… (1B)… If the appeal tribunal gives permission to do so."

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

The Arguments

14. As Mr Martland was not present or represented at the hearing, he did not develop the arguments which had been included in his original application for permission to appeal (summarised at [9] above above) or in his written representations shortly before the hearing. The latter almost entirely addressed the merits of his underlying appeal to the FTT, rather than his application for permission to notify a late appeal; the only representation which might be considered as addressing the issues before us was his statement that "I am unable to afford legal representation due to low wage and high living costs and I'm also sole carer for my elderly mother."

15. On behalf of HMRC, Mr Luckhurst organised his submissions under six headings:

> (1) Based on comments made by the Supreme Court in *BPP*, he argued that the appellant faced a very high bar in seeking to challenge a decision of the FTT to refuse to admit an out-of-time appeal. It could not be said in this case that the

[3] The "relevant decision" in this case being HMRC's decision to issue and notify the relevant Excise Duty assessment to the appellant – see sections 12 and 13A(2)(b) FA94.

decision of the FTT was outside the range of reasonable decisions it could have made.

(2) The appellant could not rely on his inability to afford legal representation to excuse a 15 month breach of the time limit. Here, he relied on the following passage from *R (Hysaj) v Secretary of State for the Home Department* [2015] 1WLR 2472 at [43] (per Moore-Bick LJ):

> "Mr Benisi sought to explain part of the delay that had occurred in his case by asserting that he did not have sufficient funds at his disposal to enable him to instruct solicitors to file a notice of appeal at the right time. In my view shortage of funds does not provide a good reason for delay. I can well understand that litigants would prefer to be legally represented and that some made be deterred by the prospect of having to act on their own behalf. None the less, in the modern world the inability to pay for legal representation cannot be regarded as providing a good reason for delay. Unfortunately, many litigants are now forced to act on their own behalf and the rules apply to them as well."

Hysaj was a judgement dealing with three cases together. The above comments referred to a case in which there had been an order for costs against a Mr Benisi and his application for permission to appeal against that order was being made some nine months after the relevant deadline under the Civil Procedure Rules.

(3) No special indulgence was to be shown to litigants in person. In *BPP*, the Court of Appeal had made it clear (at [39]) that "even in the Tribunals where the flexibility of process is a hallmark of the delivery of specialist justice, a litigant in person is expected to comply with rules and orders…" This had been endorsed by the Court of Appeal in *Hysaj* at [44], when it had said: "… If proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules. In my view, therefore, being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules." The Supreme Court in *Barton v Wright Hassall LLP* [2018] 1WLR 1119 at [18] had expressed the same sentiment: "Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

(4) Having found that the appellant's breach was significant and serious and that he had not shown a reasonable excuse for the delay, the FTT's decision not to admit the appeal was in accordance with the guidance given by the Court of Appeal in *Denton v TH White Ltd* [2014] 1WLR 3926.

(5) Ground 1 summarised at [9] above was misconceived because the FTT had in fact taken into account the consequences for the appellant of refusing to extend time. It had referred to those consequences as "financially ruinous", and that the appellant "would more than likely be made bankrupt". In a situation where the FTT was required to carry out a balancing exercise after considering

all relevant factors, it was bound to consider both the reasons for the delay and the consequences of failure of the appellant's application.

(6) Ground 2 summarised at [9] above should be dismissed because, in Mr Luckhurst's submission, the underlying merits of the case are "ordinarily irrelevant to the decision whether to admit an out of time appeal". Here, Mr Luckhurst relied on *Global Torch Ltd v Apex Global Management Limited* [2014] 1 WLR 4495, where the Supreme Court said (at [29]) that "… the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues…". The FTT's conclusion that the merits of the appeal seemed "neither very strong or very weak", and therefore carried no significant weight one way or the other, was unimpeachable.

Discussion

The nature of the appeal and the Upper Tribunal's jurisdiction

16. It has been suggested (both in relation to this and other similar appeals) that the issue is a matter of "case management"; as such, it is well established that an appellate tribunal should be slow to interfere with the decision of the original fact-finding tribunal. As Lawrence Collins LJ said in *Walbrook Trustee (Jersey) Limited v Fattal* [2008] EWCA Civ 427 at [33], and endorsed by the Supreme Court in *BPP* at [33]:

> "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."

17. This suggestion also finds some expression in the FTT's decision in this case, when it said (at [24]) that "in considering whether or not to allow the appeal in this case to proceed out of time, the Tribunal are bound in the first instance to apply the overriding objective set out in Rule 2 of the Tribunal Rules, to deal with cases fairly and justly."

18. We respectfully disagree. In deciding whether or not to permit a late appeal, the FTT is exercising a discretion specifically and directly conferred on it by statute to permit an appeal to come into existence at all. It is not exercising some case management discretion in the conduct of an extant appeal. As the Upper Tribunal said in *Romasave Property Services Limited v Revenue and Customs Commissioners* [2015] UKUT 254 (TCC) at [96]:

> "The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have."

19. For this reason, it is not appropriate to regard the exercise of the discretion as involving a direct application of Rule 2 of the FTT Rules (Rule 2 being concerned with

"dealing with a case fairly and justly" in relation to the various procedural matters identified in it – i.e. once proceedings have been properly commenced before the FTT). Nor, it will be noted, does Rule 20 apply to such matters (merely requiring that a late notice of appeal must contain a request for permission pursuant to the relevant enactment, and stating that the appeal must not be admitted unless permission is granted). That said, as will become apparent below, the principle embodied in the overriding objective is a broad one, and one which applies just as much to the exercise of a judicial discretion of the type involved in this appeal as it does to the exercise of such a discretion in relation to more routine procedural matters.

20. The Upper Tribunal's jurisdiction on an appeal from the FTT is conferred by section 11 of the Tribunals, Courts and Enforcement Act 2007, which provides that any party has a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the First-tier Tribunal …". Thus appeals to the Upper Tribunal are limited to questions of law only, that is to say, whether the FTT made an error of law in its decision which needs to be corrected.

21. Errors of law can take a number of forms. In an extreme case, it is even possible for findings of fact to be so perverse that they must be based on an error of law – see Lord Normand in *Commissioners for Inland Revenue v Fraser* [1942] 24 T.C. 498, 501, approved by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14.

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.

The legal principles applicable to applications for permission to submit a late appeal

23. So what law should be applied when exercising a judicial discretion to admit a late appeal?

24. The statutory discretion conferred on the FTT in such cases is "at large", in that there is no indication in the statute as to how the FTT should go about exercising it or what factors it should or should not take into account.

25. The courts and the Upper Tribunal have however stepped in to provide guidance, in order to avoid the obvious unfairness which could arise by the exercise of completely unfettered judicial discretion on an arbitrary case by case basis.

26. The judgment of Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 included a useful analysis of the way in which the judicial discretion to permit the making of late tax appeals ought to be exercised (that case was concerned with section 49 of the Taxes Management Act 1970, a provision with many similarities to section 16(1F) FA94):

"[22] Section 49 is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.

[23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s 49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s 33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late.

[24] Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed, in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those

> considerations will often conflict with one another, for example in a case where there is a reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies."

27. Morgan J in *Data Select Limited v Commissioners for Revenue & Customs* [2012] STC 2195, considering a late VAT appeal (where the relevant provisions are again very similar) said this at [34] to [37]:

> "[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.
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> …
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> [36] … Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Comrs for Aberdeen City* [2005] CSOH 135 at [23] - [24], [2006] STC 1218 at [23] - [24] which is in line with what I have said above.
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> [37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. None the less, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

28. There is clearly a great deal of overlap between the above judgments (and indeed Morgan J in *Data Select* referred to the statements in *Aberdeen* as being "in line" with his own approach). Nonetheless the two passages do read quite differently and a

closer analysis is required in order to synthesise a general approach which can fairly be said to cover the points raised in both judgments.

29. In *Aberdeen*, the preliminary point was made that "the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit." This finds no direct echo in the five points listed in *Data Select*, but we consider it to be uncontroversial. In *Romasave*, the Upper Tribunal said, after a review of the authorities, that "permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely." In other words, the presumption should be that the statutory time limit applies unless an applicant can satisfy the FTT that permission for a late appeal should be granted, but there is no requirement that the circumstances must be exceptional before the FTT can grant such permission.

30. Whilst Morgan J in *Data Select* at [34] only referred to his five "questions" as things which, in the abstract, a court or tribunal asks itself when "asked to extend a relevant time limit", he clearly based his later comments at [37], specific to the extension of the statutory VAT time limit, on those questions. It is therefore appropriate to compare his five questions with the specific points referred to in *Aberdeen*.

31. The first and second of the five specific points in *Aberdeen* were whether there was a reasonable excuse for the delay and then "prompt action" after the reasonable excuse expired. These points found their expression in the *Data Select* judgment as points 2 and 3, "how long was the delay?", and "is there a good explanation for the delay?". The specific reference to "reasonable excuse" in *Aberdeen* can be explained by the terms of the section under consideration in that case, section 49(1) of the Taxes Management Act 1970, which at the time provided as follows:

> "An appeal may be brought out of time if on an application for the purpose an inspector of the Board is satisfied that there was a reasonable excuse for not bringing the appeal within the time limited, and that the application was made thereafter without unreasonable delay, and gives consent in writing; and the inspector or the Board, if not satisfied, shall refer the application for determination by the Commissioners."

32. Clearly therefore *Aberdeen* was concerned with a case where "reasonable excuse" and "unreasonable delay" were specifically referred to as criteria in the statute. As such, we consider the formulation of "good explanation for the delay" in *Data Select* now to be more appropriate than that of "reasonable excuse" and "unreasonable delay".

33. The third point in *Aberdeen* (prejudice arising from grant or refusal of permission) is, in practical terms, a somewhat more concise statement of the fourth and fifth points listed in *Data Select*. However expressed, these points will always reflect the fact that if permission is granted, HMRC will be required to litigate on a matter which they had previously considered closed; and if permission is refused, the taxpayer will lose the right to contest a decision, which will clearly cause him some prejudice. The real enquiry is into the extent of the prejudice in either case.

34. The fourth point in *Aberdeen* (public interest) was considered under three heads. First, there was a recognition of the desirability of finality. Matters should be brought to a head and disposed of once and for all, without the indefinite possibility of being reopened. Clearly this consideration militated against permission being given when there had been a "very long delay". Second, there was a concern that allowing one appeal to be brought late might impact on other cases which had been considered long finished. Third, some wider policy might be discerned from other relevant enactments. These second and third heads were clearly a response to the specific facts in *Aberdeen*, where the appeal was recognised as one of a potentially large number of similar claims which might arise from a change in the general understanding of the relevant law, and where there were other provisions under which the taxpayer could (perhaps more appropriately) have achieved the result he was seeking, but the statutory time limits for doing so had long expired. The first and second of these heads are effectively the first point in the *Data Select* list – the purpose of the time limit is to bring finality, and that is a matter of public interest, both from the point of view of the taxpayer in question and that of the wider body of taxpayers. The third head was specific to the facts of *Aberdeen*.

35. The fifth point in *Aberdeen* (potential staleness of evidence) has no obvious parallel in the *Data Select* list, but this is not surprising, bearing in mind Morgan J was making a general point about "extensions of time limits of various kinds", and was not at that stage addressing the particular issue of extensions of time for bringing appeals. We see it as being part of the consideration of prejudice which might arise if permission is given – both to HMRC (if their evidence has become stale or disappeared altogether) and to the wider justice system (if the FTT would have to decide cases on the basis of inadequate evidence as a result of the delay).

36. Having given his list of five points which generally fall for consideration when "extensions of time limits of various kinds" are being sought, Morgan J went on to confirm that "the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach".

37. It is important to remember that when he made that comment, the list of matters in rule 3.9 of the CPRs to which he was referring read as follows:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
>
> (a) the interests of the administration of justice;
>
> (b) whether the application for relief has been made promptly;
>
> (c) whether the failure to comply was intentional;
>
> (d) whether there is a good explanation for the failure;

> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
>
> (f) whether the failure to comply was caused by the party or his legal representative;
>
> (g) whether the trial date or the likely trial date can still be met if relief is granted;
>
> (h) the effect which the failure to comply had on each party; and
>
> (i) the effect which the granting of relief would have on each party."

38. Subsequently, rule 3.9 has been amended, with a material change to its substance:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

39. Rule 3.9 of the CPRs represents the main point of connection between the authorities considered above (which were specific to the exercise of discretion to admit late tax appeals) and the well-known and wider stream of authority on relief from sanctions and extensions of time in connection with the procedural rules of the courts and tribunals. The key cases for present purposes in that stream of authority are *Denton and others v TH White Limited and others* [2014] EWCA Civ 906, [2014] 1WLR 3926 and *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1WLR 2945.

40. In *Denton*, the Court of Appeal was considering the application of the later version of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [24]):

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case,

> so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"."

41. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered."

42. The Supreme Court in *BPP* implicitly endorsed the approach set out in *Denton*. That case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FTT.

43. In its previous form, the "checklist" of items in CPR rule 3.9 can be seen to bear a number of similarities to the questions identified in *Aberdeen* and *Data Select*; to that extent, it is easy to regard them as little more than an aide memoire to help the judge to consider "all relevant factors" (and indeed, the list was preceded by the general injunction to "consider all the circumstances"). The question that naturally arises is whether the changes to CPR rule 3.9 and the evolving approach to applications for relief from sanctions under that rule also apply to applications for permissions to appeal to the FTT outside the relevant statutory time limit. We consider that they do. Whether considering an application which is made directly under rule 3.9 (or under the FTT Rules, which the Supreme Court in *BPP* clearly considered analogous) or an application to notify an appeal to the FTT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions – especially where the sanction in question is the striking out of an appeal (or, as in *BPP*, the barring of a party from further participation in it). The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".

44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that

applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take 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. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

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.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.

Consideration of the grounds of appeal in the light of the above principles

48. The basis of the FTT's decision is set out at [6] to [8] above.

49. There are two respects in which the FTT is said to have failed to follow the correct approach, as summarised at [9] above. We consider each in turn.

50. First, it is said that the FTT erred in that it "meshed together two questions which it was required to consider separately, namely: (a) the reason for the delay; and (b) the consequences of a refusal to extend time.

51. We can dispose of this point shortly. It is of the essence of exercising a discretion such as this that a tribunal must weigh all the relevant factors in the balance. The FTT clearly considered the reason given for the delay (insufficient funds) at [34] to [38] and concluded that it did not amount to "a reasonable excuse for the delay". It then went on to consider the financial consequences for the appellant of refusing to extend time, and observed (at [46]) that these were "a necessary consequence of a failure to appeal in time". The further words "without no reasonable reason for the delay" appear to include a clerical error, and we read this as "without any reasonable reason for the delay". We do not consider that the addition of this phrase, which simply reflected the FTT's findings in that respect, detracts from the object of the FTT's analysis at this stage, namely that the financial consequences followed, not from the refusal to extend time but from the failure to make a timely appeal. In other words, the FTT clearly considered both these factors separately and then included them both in its overall assessment. We can see no possible error of law in the way it did so.

52. Second, it is said that "in a scenario whereby the state of the law is unsettled such that it is not clear whether or not the manner in which HMRC applied statute is correct, an application for permission to appeal out of time does fall within the 'exception rather than the rule'." Indeed, the appellant went on to submit that "If, in a scenario where it is unclear that HMRC has applied the law correctly, the Tribunal does

not consider the circumstances 'exceptional' it is almost impossible to conjure a situation that might be exceptional."

53. The submission underlying this argument appears to be that if there is genuine uncertainty about the interpretation of the law which is being (or might be) settled in some test case, then appellants in similar circumstances should be allowed to delay making their appeals until that test case has been decided and the law clarified, seemingly on the basis that HMRC cannot possibly be prejudiced by the lateness of an appeal where they are involved in test litigation to clarify the whole issue. Once this is explicitly stated, it becomes clear how unsustainable it is as an argument. The FTT considered the state of the case law and expressed the view that whilst the appellant's case was "not without merit", it seemed "neither very strong nor very weak" and therefore "no significant weight for or against the extension of time should be given to the strength or otherwise of the applicant's case in the substantive appeal." This seems to us to have been a wholly reasonable approach, consistent with our comments on the passage from *Hysaj* set out at [46] above.

54. We should mention at this stage that we do not accept Mr Luckhurst's submission, based on *Global Torch*, that the merits of the underlying appeal are "ordinarily irrelevant" to any decision to admit a late appeal. *Global Torch* was concerned with a very specific case management decision (to strike out an appeal for failure to comply with an "unless" order) and the comment of Lord Neuberger PSC to which Mr Luckhurst referred us (see [15(6)] above) was very specific in its application to "case management issues of the sort which were the subject matter of the decisions of Vos, Norris and Mann JJ in these proceedings." We do not consider it applies to an exercise of judicial discretion such as we are here concerned with, where the point in issue is whether it is appropriate for the FTT to assume jurisdiction over an appeal which has not been the subject of prior judicial consideration.

55. It follows that we do not consider either of the supposed errors of law set out in the appellant's application for permission to appeal to be made out. We would add that in substance the FTT exercised its discretion on a basis entirely consistently with the principles set out at [44] to [47] above. It took into account all relevant matters and did not take into account any irrelevant ones. Nor do we consider its reference to the overriding objective in rule 2 of the FTT Rules affects this; whilst that rule is not in our view directly applicable to the exercise carried out by the FTT, there is no doubt that the principles of fairness and justice underpinning that rule also underpin the general exercise of discretion with which the FTT was concerned (see [19] above).

56. Having established that the FTT approached the exercise of its discretion on the correct legal basis, the only other basis upon which an error of law in its decision might be found is if that decision was nonetheless plainly wrong in the light of the facts found by the FTT. Whilst, as stated at [18] above, we do not consider the FTT's decision to be a case management decision, it is nonetheless an exercise of judicial discretion and we consider the principles set out in *Walbrook Trustee* (see [16] above) to be equally applicable to it; and we can see no basis for characterising the FTT's decision as "plainly wrong".

57. It follows that we can discern no error of law in the FTT's decision and therefore no basis to interfere with it.

Disposition

58. The appeal is therefore DISMISSED.

Costs

59. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

UPPER TRIBUNAL JUDGE ROGER BERNER
UPPER TRIBUNAL JUDGE KEVIN POOLE

RELEASE DATE: 1 June 2018