[2018] UKUT 0254 (TCC)
Appeal number: UT/2018/0036

PROCEDURE – late application for permission to appeal – Tribunal Procedure (Upper Tribunal) Rules 2008, rules 2, 5(3)(a) and 21(6) – whether an extension of time should be granted and application admitted

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TERRY PAUL BELL **Applicant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 18 July 2018

Lynsey Frawley, counsel, and Jeremy Johnson, inTAX, for the Appellant

Hannah Wilce, HM Revenue and Customs, for the Respondents

DECISION

1. An applicant for permission to appeal to the Upper Tribunal from a decision of the First-tier Tribunal ("FTT") must apply for permission to appeal. In the first instance that application is made to the FTT. If that application is refused by the FTT, the applicant may then apply to this Tribunal for permission. There are procedural rules which apply to those steps, including the imposition of time limits for the application. In this case, having been refused permission to appeal by the FTT, the Applicant, Mr Bell, made an application to this Tribunal outside the prescribed time limit, and applied at the same time for an extension of time in which to do so. This is my decision on that application.

The FTT decision

2. To put Mr Bell's application into some context, I first outline the FTT's decision on Mr Bell's substantive appeal to it. This is necessarily a truncated summary: there were four substantive hearings before the FTT (Judge John Walters QC and Mrs Sharwah Sadeque), from 28 March 2014 to 19 October 2016 and the FTT's decision, released on 28 November 2016, ran to some 109 paragraphs.

3. The appeal before the FTT concerned assessments to income tax on Mr Bell in respect of tax for the tax years 1994-95 to 2008-09 and associated penalties. The assessments in question were in aggregate for £437,144.73 of tax and £245,276 in penalties.

4. The assessments to tax were discovery assessments based, according to HMRC, on evidence of deposits in certain bank accounts which had not, at the time of an earlier investigation into Mr Bell's tax return for 2004-05, been disclosed by Mr Bell. In that investigation, Mr Bell had produced certain business records in connection with his trade of buying and selling used cars and statements of an account with Abbey National. He had not, however, disclosed the other bank accounts; indeed, he had untruthfully confirmed that he had no other bank accounts and had signed a false Statement of Assets and Liabilities in which he had omitted to mention the other accounts.

5. The existence of further bank accounts of Mr Bell came to the attention of HMRC and initiated a second investigation, this time by HMRC's Criminal Taxes Unit – Civil Compliance. As a result of that investigation, and having been given relevant mandates by Mr Bell, HMRC obtained bank statements from Alliance & Leicester, Santander and RBS, Guernsey. On the basis of those statements HMRC raised the relevant assessments.

6. The FTT recorded, at [89] to [91], its conclusions in relation to the submissions made by Mr Bell. Rather than summarise those paragraphs, I set them out in full. They show, first, that the approach of Mr Bell had been more focused on seeking to demonstrate that HMRC's assessments were wrong than on asserting what the correct amount of tax was, and secondly that what arguments were put forward by Mr Bell to

explain the source of funds in the RBS, Guernsey account were rejected by the tribunal:

> "89. One of the difficulties of this case is that the thrust of Mr Bell's arguments has been much more vigorous on showing that the assessment is wrong – he has claimed that the figures assessed are fantastic and a product of HMRC's imagination – than on showing what correction should be made in order to adjust the assessments to give a figure which would make good the loss of tax to the Crown.
>
> 90. At many times he has asserted that there has been no loss of tax to the Crown. At other times he has accepted that there has been a loss of tax to the Crown – for example at the hearing before the General Commissioners on 8 November 2007 when he accepted that his 2006 tax return was 'definitely wrong' and in the telephone call to Officer Larkin on 21 January 2010 (see: paragraph 42 above).
>
> 91. The arguments he has advanced to explain the source of the funds in the offshore RBS bank account have been different at different times. First, as noted at paragraph 41 above, on 25 September 2009 Mr Bell said that the source of the funds was the asserted tax-free amounts. Then, on 21 January 2010, as noted in paragraph 42 above, Mr Bell is reported to have said (and we find he did say) that the actual amount of the asserted tax-free amounts was £20,000 to £30,000 and the balance had been built up from business income. On 24 March 2010, as noted in paragraph 47 above, Mr Bell told HMRC that the moneys were 'earmarked for a particular purpose but was not his business profits and was not taxable'. This was a suggestion that the funds were lodgements made from the taxed income of other persons who shared Mr Bell's political views. Mr Bell has produced no evidence confirming this assertion, and we reject it. At a meeting on 30 January 2012, Mr Bell said that the funds in the offshore RBS bank account had been built up by Mr Bell and his wife out of savings at the rate of £50 per week, but provided no evidence to support the assertion (see his letter dated 6 August 2015 to the Tribunal referred to at paragraph 15 above). We reject this explanation as implausible. At the hearing on 28 March 2014 Mr Bell said that a source of the funds was the sale proceeds of his old home. As noted at paragraph 57 above, a credit of £41,050 made into the RBS premium account on 25 May 1995 may be attributed to the sale of the home. We have ignored that payment in calculating the figure of probable sale proceeds appearing in the table at paragraph 64. At the meeting on 23 October 2014, Mr Bell said that only about £80,000 ever went into the accounts (see paragraph 10 above). This statement also, has not been substantiated, and we reject it."

7. Based on those findings, the FTT concluded, at [92], that certain amounts credited to the RBS, Guernsey account were, for the tax years in question (apart from 2007-08), undeclared sales proceeds. There were also undeclared amounts of interest on that account and on the Alliance & Leicester account. The FTT also found, from other credit entries on the RBS, Guernsey account, that two small amounts of employment income were received by Mr Bell in 1994 and 1995. In relation to the undeclared sales proceeds, having found that the state of the evidence as to purchases

(which would be a relevant deduction in computing profit) was unreliable, the FTT turned to an independent source, the Office of National Statistics, to ascertain the average gross profit ratio to be applied to its findings as to the undeclared sales proceeds. That percentage was 20%. The FTT accordingly found, at [93], that the taxable profits arising in Mr Bell's trade over and above those originally returned and self-assessed by him in each of the years 1994-95 to 2006-07 and 2008-09 (2007-08 was nil) was 20% of the figures found by the FTT to have been sales proceeds. The FTT rejected an argument by Mr Bell that the gross profit percentage of 20% did not apply to his business on the basis that Mr Bell had failed to produce any reliable evidence as to what his own gross profit margin was.

8. The FTT then went further. Having found at [87] that, because of their close approximation to the FTT's own findings as to undeclared sales proceeds, the assessments by HMRC in relation to tax years 1994-95, 2001-02, 2004-05, 2005-06 and 2006-07 ("the determined tax years") had been made on an intelligible basis, and having adjourned the hearing so that the question of intelligibility in relation to the other tax years could be considered at a fourth hearing, the FTT concluded, at [103], that on the evidence HMRC had failed to discharge the burden of proof on them of showing that those other assessments had been made "on an intelligible basis, even as an approximation" and that it followed that the assessments for those years ("the set aside tax years") had not properly been made as discovery assessments under s 29 of the Taxes Management Act 1970 ("TMA"). Those assessments were accordingly set aside, and the appeal against the corresponding penalties was allowed. The assessments for the determined tax years were adjusted (downwards) to the figures determined by the FTT, and penalties for those tax years were determined at 55% of the adjusted tax charged.

The appeal application process

9. The FTT's decision was released on 28 November 2016. It included the standard concluding paragraph informing the parties of the right to apply to the FTT for permission to appeal, and the time limit applicable to that application of 56 days from the date of release of the decision. Reference was also made to the guidance note which accompanied the decision.

10. On 19 January 2017 Mr Bell wrote to HMRC to express his dissatisfaction with the FTT's decision and to say that he required to appeal. HMRC responded on 23 January 2017 advising (wrongly) that Mr Bell's letter should have been sent to the Upper Tribunal, but helpfully indicating that they had forwarded Mr Bell's letter to that Tribunal. On 24 January 2017 HMRC wrote again to Mr Bell with regard to the assessments for the determined tax years to advise that the assessed amounts of tax had been revised (in aggregate to £11,863) and that the penalties (at 55%) would be applied to those revised figures. With interest, the total amount due from Mr Bell was stated to be £25,527.

11. On 2 February 2017 HMRC sent Mr Bell new assessments for the set aside tax years. Those assessments included information as to Mr Bell's rights of appeal and his right to have a review.

12. Mr Bell's letter of 19 January 2017 found its way to the FTT, which treated it as an application for permission to appeal. That application was refused by Judge Walters by way of a written decision released on 2 February 2017. That decision contained the following final paragraph:

> "If Mr Bell is dissatisfied with the outcome of the application for permission to appeal the Decision, he has a right to apply to the Upper Tribunal for permission to appeal against the Decision. Such an application must be made in writing to the Upper Tribunal at 5th Floor, Rolls Buildings, Fetter Lane, London, EC4A 1NL no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet *Appealing to the Upper Tribunal (Tax and Chancery Chamber)*."

13. I was not provided with a copy of the guidance booklet referred to in Judge Walters' decision. It is, however, readily and publicly available online. It includes details of how to make an application for permission to appeal, and refers both to the one-month time limit and the requirement to seek an extension of time if a late application is made.

14. Mr Bell wrote to HMRC on 10 February 2017 disputing the new assessments issued on 2 February with respect to the set aside tax years. That letter was accepted by HMRC on 10 March 2017 as an appeal against those assessments. On that date HMRC wrote to Mr Bell to inform him that they were satisfied that the assessments had been correctly calculated and advising him of his right either to ask for the matter to be reviewed or to notify his appeal to the FTT.

15. Mr Bell also wrote to HMRC on 10 March 2017. In that letter he stated that he was intending to apply to the High Court for a judicial review of "this entire case". HMRC responded on 30 March 2017 to say that they were unable to accept Mr Bell's letter as a "letter before claim" or pre-action letter for the purpose of judicial review as it did not conform to the necessary requirements. Reference was made to the relevant Practice Direction.

16. Mr Bell replied on 13 April 2017 with a letter headed and sought by Mr Bell to be accepted as a "pre-action letter". A detailed response was made by HMRC by way of their letter to Mr Bell dated 25 April 2017. That letter strongly advised Mr Bell to seek independent legal advice. It expressed the view that Mr Bell's claim for judicial review was misconceived. As regards those elements of Mr Bell's claim that asserted that the FTT's decision was wrong, HMRC's position was that, first, HMRC had no case to answer, and secondly that as there was an alternative route to challenge the FTT's decision judicial review should not be sought. HMRC said:

> "You had and were made aware of the opportunity to apply directly to the Upper Tribunal for permission to appeal the FTT decision, after the FTT refused permission, but you did not do so. You are now out of time to submit an appeal."

17. Mr Bell addressed the various points made by HMRC in a letter dated 5 May 2017. Responding to what HMRC had said concerning Mr Bell's failure to make an application to the Upper Tribunal for permission to appeal, Mr Bell said:

> "With regard to my not approaching the Second Tier Tribunal for a hearing. As they were instrumental in the decision that led to the final outcome at the First Tier Tribunal, there seemed little point in wasting more public funds in going down that route. After 11 years of this farce it is time to move away from the in house, so called 'independent' tribunals and actually reach a properly formatted public court of law."

18. In making this reference to the Upper Tribunal, Mr Bell was referring to the unsuccessful application he had made to this Tribunal for permission to appeal a decision of the FTT (Judge Mosedale) to refuse to issue witness summonses to a number of HMRC officers whom Mr Bell wished to cross-examine. As the FTT recorded at [17] to [22] of its substantive decision, that application had been refused on the papers by Judge Bishopp in this Tribunal and by me at an oral hearing, at which Mr Bell represented himself. Each of us had made the point to Mr Bell that HMRC would have the burden of showing that the conditions for the issue of discovery assessments under s 29 TMA were met and that there was some material from which the assessing officer could rationally form the opinion that there was an insufficiency of tax, but that the burden of showing that the assessment was excessive would then fall upon Mr Bell, and that Mr Bell would need to provide oral and/or documentary evidence to that effect.

19. Further correspondence ensued, in the course of which Mr Bell continued to maintain his claim that there was a criminal conspiracy by HMRC, the FTT and this Tribunal to defraud him. By letter dated 29 June 2017, Mr Bell was informed by HMRC of an enforceable amount of £79,600 due to HMRC (comprising in aggregate the amounts in respect of the determined tax years and the amounts referable to new assessments for the set aside tax years) and warned of possible bankruptcy action if payment were not made. That was followed by a statutory demand, to which Mr Bell responded on 15 October 2017, with a copy to Chelmsford County Court, to say that he had rejected HMRC's claim in its entirety and had applied to the court to set it aside.

20. In February 2018, Mr Bell instructed inTAX to assist him. Mr Johnson of inTAX who, with Ms Frawley of counsel, appeared before me on behalf of Mr Bell, had a meeting with HMRC to seek to agree a way forward. HMRC then stated, in an email to Mr Johnson of 21 March 2018, that they were prepared to accept a late appeal in respect of the new assessments raised in respect of the set aside tax years but that the question of any appeal in respect of the determined tax years would be a matter for Mr Johnson and Mr Bell. The late application to this Tribunal for permission to appeal followed on 3 April 2018.

Mr Bell's learning difficulties

21. I was provided with an assessment report prepared by Clarity Dyslexia Consultancy with respect to Mr Bell and dated 4 July 2018. That report was accepted by HMRC. In brief, the report found that Mr Bell had average verbal and visual ability but that his reading and writing skills were well below average, as was his ability to hold and manipulate information simultaneously. The diagnosis is of dyslexia, dysgraphia and Attention Deficit Disorder (ADD).

The law

22. Rule 21(6) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") provides as follows:

> "(6) If the appellant provides the application to the Upper Tribunal later than the time required by paragraph (3) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—
>
> (a) the application must include a request for an extension of time and the reason why the application was not provided in time; and
>
> (b) unless the Upper Tribunal extends time for the application under rule 5(3)(a) (power to extend time) the Upper Tribunal must not admit the application."

23. In common with all exercises of power under the Rules, the Tribunal must seek to give effect to the overriding objective of dealing with cases fairly and justly when exercising its power to extend time (see Rule 2).

24. That is all the statutory provision that need be referred to. It is not necessary, for reasons, I shall explain, for me to recite s 149 of the Equality Act 2010 to which I was referred by Ms Frawley.

Application for an extension of time

25. It was common ground before me that the approach to the consideration of an application to extend time in these circumstances should follow that set out by the Upper Tribunal (myself and Judge Poole) in *Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (TCC). That case itself concerned a late appeal to the FTT, rather than an application for an extension of time to make a late application for permission to appeal a decision of the FTT, but the approach adopted followed from a consideration of authorities, including *BPP Holdings v Revenue and Customs Commissioners* [2017] SC 55 in the Supreme Court, which addressed case management decisions generally.

26. Whereas in *Martland*, which concerned the application of a statutory provision outside of the Tribunal's Rules, we took the view that there was no direct application of the overriding objective in Rule 2, in this case there is a clear and direct application to the exercise of the Tribunal's power to extend time in Rule 5(3)(a). However, that is a distinction without a difference. As we went on to say in *Martland*, the principle

of fairness and justice is applicable as a general matter to any exercise of a judicial discretion.

27. Applying the three-stage approach adopted in *Denton and others v T H White Limited and others* [2014] EWCA Civ 906, the Tribunal in *Martland* set out the following staged approach (adapted to the circumstances of this case):

> (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 tribunal is unlikely to need to spend much time on the second and third stages – though this cannot be taken to mean that applications can be granted for very short delays without moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The tribunal 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 reasons given for the delay and the prejudice which would be caused to both parties by granting or refusing the extension of time.

28. There can in my view be no argument but that the delay in Mr Bell making his application for permission to appeal was serious and significant. The latest time for making that application was 2 March 2017. It was actually made on 3 April 2018, one year and one month late. As this Tribunal (myself and Judge Falk) noted in *Romasave (Property Services) Limited v Revenue and Customs Commissioners* [2015] UKUT 0254 (TCC), at [96], in *Secretary of State for the Home Department v SS (Congo) and others* [2015] EWCA Civ 387 the Court of Appeal, at [105], has similarly described exceeding a time limit of 28 days for applying to that court for permission to appeal by 24 days as significant, and a delay of more than three months as serious. That is a particularly apt, and indeed compelling, authority in the context of a late application for permission to appeal of this nature.

29. It was submitted on Mr Bell's behalf that the reason he made the application late was that he did not understand the process. He believed, it is said, that he had already made an application for permission to appeal to the Upper Tribunal and that this had been refused. His confusion was said to have been compounded by the correspondence from HMRC at the material time. His learning difficulties contributed in large part to his failure to make the appropriate application on time.

30. I have sympathy for the learning difficulties suffered by Mr Bell, which have been recently diagnosed. I also understand the challenges faced by litigants in person in bringing and putting their cases to the Tribunal. But I do not accept that the reason why Mr Bell failed to make his application to this Tribunal for permission to appeal within the prescribed time limits was attributable to a failure on his part to understand the process, or any belief on his part that an application had already been dealt with by the Upper Tribunal. Nor was it attributable to any failure on the part of HMRC to provide Mr Bell with relevant information.

31. It is apparent from the correspondence which I have summarised above that, following the refusal by the FTT of permission to appeal, Mr Bell had determined on a different course. He had made a conscious decision, evidenced by his letter to HMRC of 5 May 2017, not to pursue matters through the Tribunal, but instead to embark on a judicial review. That may have been an unwise course for Mr Bell to have taken, but it was a choice he made. Mr Bell cannot, in my judgment, be regarded as being ignorant of the Tribunal processes. He had already been through the process of applying for permission to appeal at an earlier stage in his appeal to the FTT, a process which involved him making a written application to the Upper Tribunal and, when permission was refused on the papers, seeking and attending an oral hearing to pursue his application.

32. I do not accept that Mr Bell was misled in any way by statements made by HMRC. It is true that HMRC wrongly told Mr Bell in January 2017 that his application should initially have been made to the Upper Tribunal, whereas it should have been made in the first instance to the FTT, but HMRC helpfully forwarded Mr Bell's letter to the Upper Tribunal and it was in due course received and dealt with by the FTT. Nor do I consider that HMRC can be criticised for referring, in their letter of 25 April 2017, to Mr Bell being out of time to submit an application for permission to appeal to the Upper Tribunal. That was not an incorrect statement. It did not advise Mr Bell of the possibility that he might be able to make an application for an extension of time, but as Ms Wilce for HMRC submitted, it is not the responsibility of HMRC to proffer such advice, particularly I might add in a formal response to a pre-action letter in the context of a claim for judicial review.

33. As well as being aware, from his previous tribunal experiences, of the process for making an application for permission to appeal, Mr Bell was informed by the FTT's decisions and by the guidance sent to him of the time limits on the making of an application to the Upper Tribunal and the process in the event of an application being made out of time. Although I accept that Mr Bell's learning difficulties presented challenges in non-verbal communication, the evidence is not of him failing to read correspondence sent to him. Instead the evidence is of him responding in detail to each individual point in that correspondence. Despite his learning difficulties, Mr Bell was able, with help, as I was informed, from his wife, and as the extent of the correspondence demonstrates, fully to articulate in substantial correspondence his dissatisfaction with the approach adopted by HMRC and the injustice he perceived in the tribunal proceedings.

34. Having made those findings, I turn to the third stage in the process, that of having regard to all the circumstances and the respective prejudice to Mr Bell and HMRC. In that regard, I accept that if Mr Bell is unable to pursue his application he will not have an opportunity to obtain permission to appeal and potentially challenge the decision of the FTT. I can understand his frustration at what he perceives to have been an injustice or series of injustices. But on the other hand, the courts and tribunals have consistently emphasised the public interest in the finality of litigation, and the purpose of a time limit being to bring finality (see, for example, *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 and *Data Select Limited v Revenue and Customs Commissioners* [2012] STC 2195).

To resurrect proceedings which have become final as a consequence of a conscious choice on the part of a party not to pursue an application, and where the delay is a serious and significant one, as in this case, is clearly prejudicial to the other party.

35. Nor is it in my judgment material to the prejudice to HMRC in this case that HMRC have accepted a late appeal in relation to the set aside tax years. It was argued for Mr Bell that the effect of his being given permission to appeal in respect of the determined tax years would be that those years would be reviewed alongside the set aside years (or the nine of those years that remain under consideration) and that no additional resources would be required to be employed by HMRC in that process. I do not accept that submission. Even if it were the case that such a review would be the natural consequence of the granting of permission, that would not detract from the prejudice to HMRC in re-opening a case which had become final. Nor, in any event, do I consider that it can be assumed that such a review would be the natural outcome: it seems to me that a more natural consequence would be a substantive appeal, were permission to appeal to be granted.

36. This Tribunal in *Martland* made clear, as is apparent from the recent authorities, that the balancing exercise at this stage should take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost and for statutory time limits to be respected. On the other hand, although Ms Frawley made submissions as to the resources of Mr Bell as compared with those enjoyed by HMRC and to Mr Bell's position as a litigant in person as material factors in his favour in the balancing exercise, neither of those factors can carry much weight. As the Tribunal in *Martland* noted, at [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*[1] 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" …"

37. I can also dispose quite quickly with Ms Frawley's submissions that the Tribunal should have regard to the need, enshrined in s 149 of the Equality Act 2010, for a person exercising public functions to have due regard to the need, amongst other things to "remove or minimise disadvantages suffered by persons who share a relevant characteristic that are connected to that characteristic". Section 149 does not apply to the exercise of judicial functions (see paragraph 3 of Schedule 18 to the 2010 Act). In any event, through the balancing exercise, in which all the circumstances of the case are to be taken into account, I have had regard to Mr Bell's learning difficulties and the extent to which, in connection with the application for permission to appeal, I consider him to have been disadvantaged by those.

[1] *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472

38. I conclude therefore that this is not a case where an extension of time should be granted. Mr Bell was informed of the right to apply to the Upper Tribunal and of the relevant time limits for doing so at the time of the decision of the FTT to refuse permission to appeal. He was also at the same time provided with information as to the process in cases where a late application was made to this Tribunal. He consciously chose at the relevant time not to pursue proceedings through the tribunal system, but to seek to engage in an alternative process. His application to this Tribunal, when eventually made, was consequently considerably late. The balance between the prejudice to Mr Bell and the prejudice to HMRC and the administration of justice through the finality of litigation falls firmly on the side of an extension of time being refused.

39. In reaching that conclusion I have taken account also of the fact that I do not consider that Mr Bell's case is an obviously strong one, and that there is nothing therefore in the merits that affects the extent of the prejudice to him in refusing an extension of time. An application for an extension of time to make an application for permission to appeal is not in the nature of the case management issues to which Lord Neuberger was referring when he referred, in *Global Torch Ltd v Apex Global Management Ltd and others (No 2)* [2014] 1 WLR 4495, at [29], to the merits of the underlying case generally being irrelevant. However, in such a case it is, as Moore-Bick LJ said in *Hysaj*, at [46], only where the court (or tribunal) can see without much investigation that the grounds of appeal are either very strong or very weak that the merits will have any significant part to play when it comes to balancing the various factors at stage 3 of the process. That should not involve any detailed analysis of the underlying merits. In any event, having undertaken a more detailed analysis as described in the next section, my conclusion is that Mr Bell does not have any arguable grounds of appeal.

Application for permission to appeal

40. In view of my decision not to extend time, and consequently not to admit Mr Bell's application, it is not necessary for me to give detailed consideration to that application on its merits. However, as I heard argument from Mr Johnson on Mr Bell's behalf in this respect, I should explain why, in any event, I would have refused permission to appeal.

41. An appeal to the Upper Tribunal lies only in respect of a question of law arising out of the decision of the FTT (s 11 of the Tribunals, Courts and Enforcement Act 2007). In her submissions Ms Frawley sought to argue that there were material issues arising out of Mr Bell's inability properly to present his case to the FTT, consequent upon his learning difficulties, and his access to justice, and the impact of the Equality Act 2010 in those respects. That, however, for the reasons I have explained above, cannot be an arguable ground of appeal.

42. Mr Johnson put forward two grounds for an appeal. The first concerned the FTT's decision (at [84] and [87]) that the assessments for the determined tax years had been made on an intelligible basis. Mr Johnson argued that it was inconsistent for the FTT to have reached that conclusion in respect of the determined tax years whilst

at the same time concluding at [102] that in respect of the set aside tax years HMRC had failed to show what evidence of "actual deposits" supported the figures contained in a schedule showing figures for 1994-95 to 2003-04. For 2007-08 and 2008-09, estimated figures had been used, as there had been no substantial evidence of actual deposits (FTT, [100]). On that basis the FTT had found that the assessments for the set aside tax years had not been made on an intelligible basis.

43. I do not accept that the approach of the FTT can arguably amount to an error of law. The FTT concluded that the assessments for the determined tax years had been made on an intelligible basis because they approximated to the FTT's own figures which were based on actual deposits into the previously undisclosed RBS, Guernsey account. By contrast, the assessments for the set aside years were found not to have been based on evidence of actual deposits and consequently not to have been made on an intelligible basis. There is a clear distinction, identified by the FTT, between the two sets of tax years. That was a distinction that the FTT was entitled on the evidence to draw, and it is not one that can arguably amount to an error of law.

44. The second ground of appeal was an argument that the FTT had erred in law by considering the RBS, Guernsey account in isolation. Mr Johnson submitted that it is clear on analysis of all the evidence before the FTT that the deposits into that account could not, on the balance of probabilities, be found to have contained undeclared takings to any extent, or alternatively to the extent found by the FTT.

45. To illustrate this submission, Mr Johnson provided an example calculation for 2005-06. He said that deposits into the Santander account, which he said was used operationally and usually where any non-cash expenses were paid from, and the RBS, Guernsey account totalled £38,016 and £59,565 respectively (excluding transfers between accounts). That was a lower aggregate amount than the declared turnover for the year of £124,930.

46. Mr Johnson also argued that other methods of assessing taxable earnings where records are incomplete had not been considered by HMRC or the FTT, such as evidence as to Mr Bell's means and his lifestyle, including the use (as for example referred to in HMRC's Enquiry Manual at EM3500 et seq) of means tests, capital statements and statements of assets.

47. I do not consider that any of these arguments can amount to an arguable error of law by the FTT. The arithmetical calculation of Mr Johnson suffers from the very flaw in reasoning that he complains of in relation to the FTT. It considers in isolation only the two bank accounts, and assumes – contrary to the conclusion of the FTT - that the RBS, Guernsey account contains no takings other than takings included in the declared turnover. In reaching the contrary conclusion, the FTT, by contrast, considered all the evidence, including the evidence of earlier investigations and the suppression by Mr Bell of the RBS, Guernsey account. The FTT considered all the, sometimes contrary, explanations for the source of funds in the RBS, Guernsey account put forward by Mr Bell. Those explanations, and the FTT's reasons for rejecting them, are set out in paragraph [91] of the FTT's decision which I have reproduced above. It concluded that, at least in part, deposits into the undisclosed

RBS, Guernsey account represented undeclared trading income of Mr Bell. It rejected, at [73] and [74], Mr Bell's submissions that the undeclared accounts were not evidence of undeclared income. It found that they were and that Mr Bell had not provided any credible evidence that they were not.

48. The FTT was aware of Mr Bell's declared turnover, and of the deposits into the various bank accounts. It considered very carefully the source of those deposits, accepting that some, including the proceeds of sale of a former home of Mr Bell and other exceptional credits for which it was prepared to give Mr Bell the benefit of the doubt (FTT, [57], [60], [61] and [64]), did not represent trading income. It is not arguable, in my judgment, that the approach of the FTT displays any error of law.

49. In referring to other possible means of ascertaining taxable earnings in cases where there are no reliable business records, what Mr Johnson is essentially seeking to do is to re-argue Mr Bell's case. That is not a basis for an appeal on a point of law to the Upper Tribunal. It is evident from a consideration of the FTT's decision that Mr Bell was afforded every opportunity to put his case, and that he was given assistance in understanding how he should approach the presentation of his case both by the FTT and, in connection with his earlier application for permission to appeal, by this Tribunal. He was able to make his case extensively over four hearings before the FTT and in correspondence, as referred to by the FTT at [74]. There can be no arguable case that, whether as a result of Mr Bell's own learning difficulties or his position as a litigant in person or otherwise, Mr Bell was denied access to justice.

50. For these reasons, if this had been a case where an extension of time was appropriate to have been granted to Mr Bell, and the application for permission to appeal had been admitted, permission to appeal would have been refused, for the reasons I have explained.

Decision

51. Mr Bell's application for an extension of time to make his application for permission to appeal the decision of the FTT is refused. The application is accordingly not admitted.

UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 2 August 2018
AMENDED UNDER RULE 42: 21 November 2018