UPPER TRIBUNAL **Neutral Citation: [2025] UKUT 00275 (TCC)**

TAX AND CHANCERY CHAMBER

Applicant: Josephine Mary Hayes	Tribunal Ref: **UT-2025-000019**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

RECONSIDERATIN OF APPLICATION FOR PERMISSION TO APPEAL FOLLOWING ORAL HEARING

DECISION NOTICE

JUDGE RUPERT JONES

Introduction

1. The Applicant, Josephine Hayes, applies to the Upper Tribunal (Tax and Chancery) ("UT") for permission to appeal the decision of the First-tier Tribunal (Tax Chamber) ("the FTT"), released on 27 September 2024 ("the Decision"). The Decision was made by the FTT following a hearing conducted on 5 December 2023.

2. The FTT dismissed the Applicant's application to close HMRC's enquiry into her 2019/20 tax return.

3. References in square brackets [] are to paragraphs in the Decision.

4. At [23]-[38] the FTT concluded that HMRC had not extended the deadline for the filing of the Applicant's online tax return to 28 February 2021 as they had not made any conclusive statement that they were so doing in any of their communications. Therefore, HMRC validly opened their enquiry on 7 March 2022 by virtue of s.9A(2)(b) Taxes Management Act 1970 ("TMA 1970").

5. At [39]-[49] the FTT further decided that section 118(2) TMA 1970 did not give HMRC a generic power to grant a general extension of time to the filing deadline in any circumstances. At [50]-[52] the FTT found that section 118 TMA 1970 did not have the effect that, even if there had been an extension of time granted by HMRC, the Applicant's 2019/20 return would have been deemed to have been filed on time for the purpose of opening an enquiry.

6. At [53]-[66] the FTT decided that HMRC had reasonable grounds not to issue a closure notice at that time as they did 'not have the full facts on which to make a reasonable assessment of whether the tax included on the self-assessment tax return is correct'.

7. By a decision dated 30 January 2025 ("the PTA Decision"), the FTT refused the Applicant permission to appeal the FTT's Decision to the Upper Tribunal ('UT') on the various grounds of appeal pursued. The Applicant renewed her application to the UT for permission to appeal in-time within a month thereafter.

8. In a decision dated 27 May 2025 I refused permission to appeal to the UT on the papers on both grounds of appeal pursued. The Applicant requested reconsideration of the permission application at an oral hearing. This took place by video (CVP) on 12 August 2025. The Applicant appeared in person at the hearing and made oral submissions, further to her written submissions dated 11 August 2025. Representatives of HMRC appeared at the hearing but did not participate.

UT's jurisdiction in relation to appeals from the FTT

9. An appeal to the Upper Tribunal from a decision of the FTT can only be made on a point of law (section 11 of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal has a discretion whether to give permission to appeal. It will be exercised to grant permission if there is a realistic (as opposed to fanciful) prospect of an appeal succeeding, or if there is, exceptionally, some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

10. It is therefore the practice of this Chamber of the Upper Tribunal to grant permission to appeal where the grounds of appeal disclose an arguable error of law in the FTT's decision which is material to the outcome of the case or if there is some other compelling reason to do so.

Grounds of Appeal

11. The Applicant submitted two grounds of appeal in her application for permission to appeal to the UT and written submissions dated 11 August 2025, namely:

> 1. The Tribunal misunderstood section 118(2) of the Taxes Management Act 1970, which is a deeming provision, of which the effect in this case is that the Applicant is deemed to have filed her tax return by the statutory filing date. Hence, HMRC's notice sent in March 2022, purporting to open an enquiry, was out of time and invalid. In so far as the Tribunal considered that the case of *Raftopoulou* [2018] EWCA Civ 818 held otherwise, the Tribunal erred.
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> 2. The Tribunal ought to have held that HMRC ought not to be allowed to proceed with the enquiry, and ought to have directed HMRC to cancel the penalties they have purported to impose for not complying with their intrusive demands for information and documents, because it was conspicuously unfair and an abuse of power by HMRC to turn round and insist that the tax return was filed late, as they have done in order to validate the notice they served in March 2022 and the demands they have served since for information and documents and penalties. The Applicant did what they invited or encouraged her to do by the email dated 26 Jan 2021, and they ought not to be permitted to take advantage of it. It turns it into a trap.

Discussion, Analysis and Decision

12. I refuse permission to appeal in respect of both of the Applicant's grounds of appeal as they hold no realistic prospects of success and do not raise any arguably material errors of law in the FTT's Decision.

13. I address the grounds of appeal in the order they appear in the submissions.

Ground 1

14. The FTT made no arguable error of law in deciding that HMRC validly opened an enquiry within time (pursuant to section 9A(2) TMA 1970) on 7 March 2022. This is because the Applicant's online self-assessment return was filed late on 28 February 2021 (28 days after the 31 January 2021 deadline).

15. Firstly, the FTT did not arguably err in finding that that HMRC made no clear or unambiguous statement that the filing date for online returns was extended from 31 January to 28 February 2021. This is for the reasons set out at [31]-[38] of the Decision. HMRC's correspondence neither arguably extended the deadline nor gave rise to any arguable legitimate expectation that they had done so. HMRC's correspondence merely stated that late filing penalties would not be charged so long as taxpayers filed their returns online by 28 February 2021. That was in no sense a statement that the filing deadline would be extended – merely that penalties would be not be applied until after 28 February 2021. Further the correspondence made clear that payment was still required to be made by 31 January 2021 with interest charged from 1 February 2021. While the FTT correctly observed that filing and payment deadlines are not linked (see [25]-[26]), it was some further indication that all HMRC were explaining in their correspondence was that they were suspending the charging of penalties for a month rather than extending the deadline for filing.

16. There is nothing explicit within HMRC's correspondence which states the filing deadline was extended – nor is it obviously or clearly implied. The correspondence only informs the taxpayer that the consequence of the otherwise applicable late penalties was relieved or suspended for a month. At its highest the Applicant's case might rest on the phrase in HMRC's email which states: "We are still encouraging customers to file by 31 January, if they can" which might imply, without expressly stating, that the deadline had been extended. However, that interpretation is not arguable on an objective reading when the phrase is read in context:

> "Earlier this week, HMRC announced that customers will not receive a late filing penalty for completing their 2019-20 tax return after 31 January, as long as they file online by 28 February.
> We are still encouraging customers to file by 31 January, if they can, as this will help to budget and plan for your January payment.
> **You'll still need to pay your Self Assessment tax bill by 31 January**.
> Interest will be charged from 1 February on any outstanding liabilities…"

17. The FTT's conclusion at [37]-[38] is therefore unimpeachable and without arguable error:

> "37. I note the following from the emails:
> (1) the due date or filing date for the return is not expressly referred to as such in the email at all.

(2) There is not a statement, as there was for payment, that the due date for filing remains 31 January.
(3) There is also not a statement that the due date for filing has been extended to 28 February.
(4) The first email "encourages" filing by 31 January but this is expressed specifically as being helpful for the purposes of helping budget and planning for the payment due on 31 January.
38. I do not consider that the emails were clear and unambiguous in providing an extension or change to the filing date. The concessions made in the emails relate to penalties rather than the filing deadline itself."

18. The FTT made no arguable error in deciding that, as a matter of fact, HMRC had not extended the deadline to 28 February 2021 for online returns for all taxpayers by virtue of the correspondence they sent.

19. Secondly, the FTT did not arguably err in deciding (see [39]-[[49]) that s.118(2) TMA 1970 does not have the effect of deeming that the Applicant had filed her tax return by the statutory filing date.

20. Section 118(2) TMA 1970 provides as follows:

> "For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

21. The FTT stated at [41]:

> "41. Ms Hayes argues that the decision on section 118(2) is obiter dicta because it was not determinative of the case. However, Richards LJ expressly states, in paragraph 52 of his judgment that the issue arising under section 118(2) forms part of the ratio of their decision. He also recognised that the interpretation issue has wider ramifications beyond the scenario concerned in *Raftopoulou*. For the same reason, I do not consider that *Raftopoulou* can be distinguished purely on the grounds that it was dealing with a taxpayer claim rather than a self-assessment filing deadline."

22. The FTT made no arguable error in deciding that the judgment at [67]-[68] of *Raftopoulou* was part of the ratio (see [52] of the judgment), applied to the Applicant's case, and could not be distinguished such that s.118(2) did not empower HMRC to grant a general extension to the statutory deadline under the TMA for filing a return. This is for the reasons explained by the Court of Appeal in *Raftopoulou* at [66]-[70]:

> 66. Second, the deeming effect of the second part is of central importance. It does not deem anything to have been done, either within a time limit or at all. It provides only that the person in question shall be deemed "not to have failed to do it". It relieves the person of the consequences of failing to do the thing, which in the context of the TMA 1970 is a financial penalty, but does not go further and provide the benefits of having in fact done the thing which the person has failed to do. I do not accept Mr Thomas' submission that it is the necessary corollary of a provision that a person is deemed not to have failed to do an act that he is deemed to have done that act. The one does not necessarily lead to the other, particularly where the consequences of the two are potentially very different, as is the case where a deemed non-failure will avoid a penalty, but a deemed performance will secure a benefit. As

> Peter Gibson J (giving the only reasoned judgment of this court) said in *Marshall v Kerr* (1995) 67 TC 56 at 79, when considering the correct approach to the construction of deeming provisions, "because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents *inevitably* flowing from or accompanying that deemed state of affairs, unless prohibited from doing so" (emphasis added).
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> 67. Looking at the context of TMA 1970 as a whole further supports, in my judgment, the construction of section 118(2) for which HMRC contends. Although many of the mandatory requirements formerly contained in TMA 1970 have been re-enacted in other legislation, it still contains a number of such provisions. Section 118(2) has a clear purpose to serve in relieving taxpayers of the consequences of failing to comply with those requirements in circumstances where the conditions for the application of the deeming provisions of the sub-section apply.
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> 68. TMA 1970 also contains a number of time limits, including those in schedule 1AB. In some cases, those time limits are coupled with provisions enabling them to be extended. The UT suggested that in such cases the general effect of section 118(2) would cede to the conditions of the particular provision in question. That is a sensible reading of such provisions if it is assumed that section 118(2) has the general effect of extending time. However, it fails to take account of the improbability of specific time extension powers and a general time extension provision co-existing in the same enactment when the general provision contains no clear indication that it is indeed to take effect as a time extension provision. In other words, the presence of the specific provisions tells against section 118(2) having any time extension function at all. If section 118(2) had been intended to have this effect, it is likely in my judgment that it would have been clearly stated.
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> 69. …
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> 70. I accept the submission of Ms McCarthy and Mr Stone that Parliament has set down in the self-assessment system carefully defined time limits for enquiries, assessments and claims which balance the need to give finality and certainty to taxpayers and the Exchequer, with the need to provide sufficient flexibility to ensure fairness in the system. It has created a specific statutory procedure for the extension of certain of those time limits where it has considered it appropriate. The UT's construction cuts across this balance without a clear warrant for doing so in the section.

23. Therefore, the Applicant's central proposition is not arguably correct and *Raftopoulou* cannot be arguably distinguished on the basis that it concerned making a claim out of time for repayment rather than filing a late return. The Court of Appeal at [68] made clear that section 118(2) does not have 'any time extension function at all' in relation to any time limits set by the TMA, which include filing deadlines. Further, the first phrase of Section 118(2) only deems a person not to have failed to do anything by a time limit if they have done it within such further time as HMRC may have allowed. As above, HMRC did not arguably extend the 31 January deadline or allow that returns filed by 28 February 2021 would be filed on time, they simply relieved the taxpayers of the consequence of penalties for late filing for the first month between 31 January and 28 February. The only consequence of late filing which was relieved or cancelled was the imposition of penalties – not the statutory filing deadline nor the extended enquiry window for late returns available to HMRC.

24. Further, and in any event, the FTT did not arguably err in deciding that even if the Applicant could be deemed not to have failed to file her return on time by virtue of an extension granted, this did not mean that she could be deemed to have filed her on return on time for the purposes of the time limits for opening enquiries (see [50]-[52]).

25. This ground of appeal is not arguable and is dismissed.

Ground 2

26. The FTT did not arguably err in law in making its Decision that the application for a closure notice should be dismissed. The application before HMRC was one for a closure notice. The FTT made no decisions regarding the allegations raised against HMRC of abuse of power or conspicuous unfairness because she was in effect 'trapped' into making a late return. However, even though these allegations were raised before the FTT, there is no arguable basis in fact for them. The FTT, without arguable error, found that there was no clear or unambiguous statement that HMRC had extended the deadline. It is inevitable therefore, that there could be no clear and unambiguous statement that could give rise to a legitimate expectation nor abuse of power nor oppressive and unreasonable behaviour by HMRC (such as 'trapping' her into late filing).

27. The UT has considered on a number of occasions the extent of the FTT's jurisdiction to consider public law arguments such as legitimate expectation, for example in the decision in *Caerdav Ltd v Revenue And Customs [2023] UKUT 179 (TCC)* at [152]-[153]

> "152.The starting point is therefore that appeal grounds which concern public law arguments should be pursued in judicial review proceedings rather than before the FTT. However, we, like the FTT, accept that the FTT may have jurisdiction to consider appeal grounds based on public law arguments (such as legitimate expectation) depending on the statutory provisions under consideration.
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> 153.Thus, the statutory context is key, as the UT in *Henryk* [*Zeman*] explains."

28. An example of judicial review being the appropriate avenue to pursue an allegation of abuse of power by HMRC (see the fourth ground) is the claim for judicial review before the UT in *The King (On The Application Of Gloucestershire Hospitals NHS Foundation Trust [2023] UKUT 28 (TCC).*

29. Therefore, the FTT may have a limited 'public law' type of jurisdiction if granted so by statute. As the authorities dictate, it would be a question of statutory construction of s.28A(6) TMA 1970 as to whether the FTT has jurisdiction to consider public law arguments such as legitimate expectation or abuse of power on a closure notice application.

30. However, there is no need to rule on the extent of the FTT's jurisdiction on a closure notice application because even if the Applicant's public law arguments could fall within the FTT's jurisdiction (which is a matter of statutory construction of the tribunal's jurisdiction to issue closure notices in s.28A(6) TMA 1970), there is no arguable basis in fact for them for the reasons set out above.

31. Finally, the question of whether and why the tax return was filed late was a precursor to the question of whether the enquiry should be closed. The FTT made no arguable error in deciding that the return was filed late so that the enquiry was validly opened within time. The public law arguments would not undermine the FTT's findings on the validity of the enquiry once opened and that a closure notice should be refused because there is no arguable merit to the

allegations that the Applicant had been 'trapped' into making a late return (and would better have been taken on a judicial review seeking to quash the notice opening the enquiry).

32. The FTT gave rational and sufficient reasons at [53]-[66] for deciding that it would not direct HMRC to close that enquiry nor issue a closure notice. This was on the basis that the FTT found that HMRC did not have the full facts on which to assess whether the Applicant's self-assessment tax return was correct. It was satisfied that there were reasonable grounds for not issuing the final closure notice.

33. This ground of appeal is not arguable and is dismissed.

Conclusion

34. I refuse permission on both grounds of appeal because they do not raise arguably material errors of law in the FTT's Decision. I am not satisfied that either of these grounds hold realistic prospects of success and there is no other compelling reason to grant permission to appeal to the UT.

35. I know this decision will come as a disappointment to the Applicant, but I am extremely grateful to her for the clear and courteous manner in which she made her written and oral submissions and for doing so in particularly testing circumstances.

Signed: **Date: 14 August 2025**

JUDGE RUPERT JONES

JUDGE OF THE UPPER TRIBUNAL