UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Neutral Citation Number: [2026] UKUT 00259 (TCC)

Applicant: Scott Brothers Limited	**Tribunal Ref: UT/2026/000005**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

RECONSIDERATION OF APPLICATION FOR PERMISSION TO APPEAL FOLLOWING ORAL HEARING

DECISION NOTICE

JUDGE THOMAS SCOTT

1. The Applicant applies to the Upper Tribunal (Tax and Chancery) for permission to appeal against the decision of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 12 September 2025 (the "Decision").

2. The Applicant applied to the FTT for permission to appeal but the FTT refused permission, in a decision dated 12 December 2025 (the "FTT PTA Decision"). In a decision on the papers issued on 10 February 2026 I also refused permission.

3. This is the decision following the Applicant's request for an oral hearing to reconsider my decision. The hearing was held at the Rolls Building, London on 29 June 2026 and was attended by both parties. The Applicant was represented by Alistair Webster KC.

When does an appeal lie?

4. An appeal to this 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 Applicant must demonstrate that it is arguable that the FTT made an error of law in reaching its decision which

was material to that decision. "Arguable" means an argument which carries a realistic as opposed to fanciful prospect of success.

5. In addition, the Decision related to an application for reinstatement of an appeal, which required an exercise by the FTT of its discretionary powers, with which the Upper Tribunal can interfere only if (broadly) the FTT has misdirected itself on the law or has reached a decision which is irrational or which fails to take into account a relevant factor or takes into account an irrelevant factor.

The FTT's decision

6. The Decision summarised the factual background as follows:

> 1. By an assessment dated 6 May 2022, HMRC assessed the appellant (or "the company") to landfill tax of £425,092. A wrongdoing penalty was also issued to the company in the sum of £148,782.20. On 12 August 2022, the appellant appealed against these assessments.
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> 2. The hearing of the appeal ("the hearing") was listed for a four-day hearing between 2- 5 December 2024 before Judge Popplewell and Mr Farooq ("the panel"). The vast majority of the first day of the hearing ("the Monday") was taken up by evidence given by the appellant's expert witness, Mr Luke Prazsky ("LP").
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> 3. On the second morning of the hearing ("the Tuesday") negotiations took place between the parties, following which, at around lunchtime, the company orally withdrew its appeal. This was confirmed in writing by the tribunal to the parties on the following day. The tribunal's letter explained that the company had 28 days in which to apply to reinstate its appeal.
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> 4. An application to reinstate the appeal was made by the company ("the reinstatement application") by way of an email dated 20 December 2024. That application indicated that the appellant "had to withdraw the appeal in challenging personal circumstances. It has now taken advice and wishes to take up the offer in the letter to reinstate the Appeal".
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> 5. This decision deals with the reinstatement application.

7. The FTT began by directing itself as to the law, and followed the guidance given by Mrs Justice Proudman in *Pierhead Purchasing Limited v HMRC* [2014] UKUT 0321, in which she said:

> 23. Although, as I have said, there is no guidance in the rules, the FTT applied the additional principles set out (in the context of delay in lodging an appeal) in *Former North Wiltshire DC v. HMRC* [2010] UKFTT 449 (TC). Those were the criteria formerly set out in CPR 3.9 (1) for relief from sanctions: see the decision of the Court of Appeal in *Sayers v. Clarke Walker* [2002] EWCA Civ 645 at [21]. In *North Wiltshire* (see [56]-[57]) the FTT concluded that it was not obliged to consider these criteria but it accepted that it might well in practice do so. The same reasoning applies to the present case. The criteria were

> • The reasons for the delay, that is to say, whether there is a good reason for it.
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> • Whether HMRC would be prejudiced by reinstatement
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> • Loss to the appellant if reinstatement were refused.
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> • The issue of legal certainty and whether extending time would be prejudicial to the interests of good administration
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> • Consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained.
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> 24. I was asked by Mr Jones to provide guidance as to the principles to be weighed in the balance in the exercise of discretion to reinstate. Because of the view I have formed I do not think it is appropriate to set any views in stone. I agree with the FTT in the *Former North Wiltshire* case that the matters they took into account are relevant to the overriding objective of fairness. I also believe that the guidance given in *Mitchell v. News Group Newspapers Limited* [2013] EWCA Civ 1537 in relation to relief from sanctions is helpful. It is perhaps instructive that CPR 3.9 (which does not of course apply to Tribunals in any event) does not now exist in its original form. Fairness depends on the facts of each case, all the circumstances need to be considered and there should be no gloss on the overriding objective.

8. At [28]-[29], the FTT set out the submissions of the parties in considerable detail. Before giving its view, the FTT set the scene at [30]-[32] as follows:

> 30. We agree with Mr Paulin [counsel for the appellant] that in making this application, the appellant is simply exercising his right under Rule 17 which effectively give an appellant a second bite at the cherry if they have withdrawn an appeal by allowing them to seek reinstatement. And in determining such an application, we are exercising judicial discretion and should carry out a balancing exercise taking into account all of the circumstances and the overriding objective to deal with the application fairly and justly (Rule 2).
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> 31. It is clear from *Pierhead* and *Rolls* that there is no right to reinstatement and the onus is on the appellant to establish that the balance favours reinstatement.
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> 32. We must consider the reasons for the withdrawal; the prejudice to the parties of granting or dismissing the application; and the merits of the appeal (to the extent that they can be conveniently and proportionately ascertained).

9. The FTT discussed and evaluated the prejudice to each party if the reinstatement application were to be granted or refused; the reasons for the withdrawal of the appeal, and the merits of the appeal. It then carried out a balancing exercise, "taking into account the foregoing circumstances and the overriding objective": [53]. Its conclusion was that it would not be appropriate to reinstate the appeal.

Grounds of appeal

10. In the oral renewal, the Applicant had a new representative, Mr Webster, who helpfully filed a short skeleton argument in advance of the renewal hearing. The skeleton stated that the ground of appeal for which permission was now sought is that the FTT erred in law because it reached a decision which was irrational, on the basis that no reasonable tribunal, properly directing itself, could have reached that decision.

11. That ground is supported by a number of arguments. In particular, said Mr Webster:

> (1) The FTT's underlying jurisdictional duty on a tax appeal is to decide the tax properly payable.
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> (2) The appeal involved a substantial sum of money, was very important to the taxpayer both financially and reputationally, and raised serious issues.
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> (3) The FTT found that each side had a reasonable prospect of success. So, the case clearly raised a triable issue and was thus "ripe for a judicial determination".
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> (4) There is a principle that no taxpayer should be compelled to pay tax which is not, in fact, due.
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> (5) The evidential prejudice to HMRC identified by the FTT does not bear the weight which the FTT placed on it. The description of it in the FTT PTA Decision as "profound" is unsustainable and that approach rendered the FTT's decision perverse.

12. Mr Webster's skeleton argument concluded as follows:

> In summary:
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> a. There was clearly a triable issue;
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> b. The importance of the case to the Applicant is significant, both from a financial and (self-evidently) a reputational point of view;
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> c. The alleged prejudice to the Respondents was overstated and given disproportionate weight, to the extent that the decision to refuse was, in the legal sense, perverse.

Discussion

13. The FTT's conclusion was an exercise of its discretionary powers of case management. As Lady Justice Falk said very recently, in *Paul Ward v Gagandeep Rai* [2026] EWCA Civ 816:

> 34. This is a second appeal against a case management decision. It is well-established that appellate courts should not interfere with such decisions simply because they disagree with them or otherwise consider that they would have taken a different course. Rather, as Lewison LJ reiterated in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743 at [51]:
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> > "Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to

> the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."

> 35. Thus, as Lord Neuberger indicated when approving this passage in *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64, [2014] 1 WLR 4495 at [13], the essential question is whether the decision could properly have been made. I would add by way of emphasis that the question is not whether the appellate court considers – however strongly – that it would have made a different decision.
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> …
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> 38. …one of the reasons why appellate courts must exercise caution when reviewing case management decisions is that it is impossible to recreate the situation before the judge. There is an analogy with an appeal on facts, where an appellate court will be island-hopping whereas the judge will have reviewed the sea of evidence (*FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 at [114]). On an appeal against a case management decision an appellate court is simply not in the same position as the judge. It will not have the same perspective of the circumstances as they appeared to the judge "on the ground" at the time, it risks being influenced by hindsight, and (as the submissions in this case have also illustrated) it also risks being influenced by arguments that were simply not made or at least were not developed before the judge, and which have benefited from a lengthy period of gestation.

14. Mr Webster said that there were essentially two errors made by the FTT which rendered its decision perverse. The first was that much greater weight should have been placed on the fact that, as the FTT concluded, the Applicant had an arguable case, which involved a substantial amount and was of great significance to the Applicant. The second was that the FTT overstated and placed far too much weight on the potential evidential prejudice to HMRC which would arise from reinstatement.

15. I will deal first with the FTT's reasoning in relation to prejudice to HMRC.

16. The heart of the FTT's reasoning was as follows:

> 34. However, it is our view that HMRC will be profoundly prejudiced if LP's expert report and evidence given on the Monday is retained, and LP is permitted to consider the attendance note made by Ms Wong of that evidence and permitted to submit a supplemental witness statement to deal with issues raised in that attendance note.
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> 35. This gives LP the opportunity to revisit any weaknesses in his report or oral evidence which were not satisfactorily dealt with in re-examination, and deal with them in the cross-examination of his supplemental witness statement.

> 36. This cannot be right. He is a rehearsed witness. He should not be permitted a second bite at the cherry. He should not be given the opportunity to put right any flaws or weaknesses in the evidence that he gave first time round. To allow to do so would not fair or just to HMRC.
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> 37. The nature of the material which was purportedly disposed of by the appellant, and which attracts the assessment to tax, lies at the heart of the appeal. It is the appellant's case that it was not "waste" and thus could either not be disposed of or that there was no environmental permit required for the material to be placed on the land.
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> 38. LP is an expert on waste. His report is an expert report on inter alia the definition of waste and the end of waste criteria. His evidence therefore is of fundamental and crucial importance to the appellant.
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> 39. He is not a witness of peripheral relevance only. His evidence goes to the heart of the appellant's case.
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> 40. And because of this it is all the more important that the process by which his evidence is adduced is treated with respect and in a proper and fair way. That due process must be fair and just to both parties. By allowing LP to review his evidence and to present it at a new hearing would not be fair and just to HMRC. This cannot be compensated by costs.

17. The Applicant argued that any change of evidence on the part of the Applicant's expert could be challenged and explored by HMRC and the FTT should be capable of assessing the reasons for any change, its effect upon the reliability of the evidence, and whether or not it was relevant to the decision it had to make.

18. Mr Webster described the risks identified by the FTT as "just an ordinary part of litigation and no more". He said that the important question is not what risk would arise from a rehearing, but what the FTT could do to remedy that risk. The FTT did not evaluate that question. It is simply part of the ordinary trial process for the tribunal to be faced with a witness who tries to change their evidence.

19. I remain firmly of the view that the FTT's decision on this issue was comfortably within the range of discretion afforded to it.

20. The context is that the FTT made findings of fact as to the reasons for withdrawal of the appeal. The FTT heard evidence from Mr Borthwick, the managing director of the appellant and on whose instructions the appeal had been withdrawn. It summarised his written and oral evidence in detail. The FTT found "glaring inconsistencies" between his written and oral evidence, relating to "matters of considerable substance" and which, the FTT found, cast doubt on the reliability of his other evidence. The FTT made the following findings of fact, which are not challenged:

> 45. Firstly, we do not accept the only reason for the withdrawal was the sudden realisation of this possible ongoing litigation by HMRC. We think it inherently implausible that during discussions which took place on the Monday evening and the Tuesday morning, the only discussions about the impact of LP's evidence and the appellant's prospects of success appear to be, as reported by

> Mr Borthwick, that the evidence "went well" and counsel gave them a 60:40 chance of success. We think it far more likely that there was a much broader discussion about the merits of the appeal as well as the implications regarding further litigation if that appeal was successful or unsuccessful. And that the decision to withdraw was taken in light of all that advice and not solely on the basis of Mr Borthwick's panicked decision arising from his concern about future litigation by HMRC.
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> 46. We have explained our misgivings regarding the reliability of Mr Borthwick's evidence. He has tendered no corroborating evidence concerning his discussions with counsel or the paralegal (we suspect he could readily have obtained an attendance note from either in which we have no doubt that they recorded the discussions concerning the withdrawal with him), and we consider that the purported basis for the withdrawal is not as he has described.
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> 47. Furthermore, we do not accept that this was an irrational decision. It seems to us entirely rational to be concerned about the prospect of future litigation by HMRC and the time, cost and uncertainty implications (not only about litigation itself but about the future sale of the business) which goes with that litigation. And to decide, on the basis of that, to withdraw the appeal. If that was the basis of the decision that Mr Borthwick made, we can see nothing irrational about it. Finally, even if it was an irrational decision, we cannot see how this supports the application. We accept the Rule 17 gives an appellant the right to apply for reinstatement. This applies as much to a rational as an irrational decision to withdraw in the first place. We do not see why an irrational decision is a "better" reason for withdrawing than a rational one.
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> 48. We accept Ms Brown's submission that it is more likely than not that following LP's evidence at the end of the Monday, he discussed the overall position with his legal team. On the basis of that advice he decided to withdraw. This was for a number of reasons including a realisation that his case was weak (as well perhaps that there may be ongoing litigation with HMRC should the appellant succeed). And what has happened now is that the appellant has been given a more bullish opinion regarding the appeal, and in particular the nature of waste, by Dr Willets.

21. Against this factual background, the FTT's decision as to the potential prejudice to HMRC was both rational and properly reasoned. Given the FTT's findings of fact and the centrality of the expert's evidence to the appeal (as summarised at [37]-[39]), the FTT was fully entitled to decide, at [40]:

> And because of this it is all the more important that the process by which his evidence is adduced is treated with respect and in a proper and fair way. That due process must be fair and just to both parties. By allowing LP to review his evidence and to present it at a new hearing would not be fair and just to HMRC. This cannot be compensated by costs.

22. I do not accept that any steps which the FTT might be able to take to mitigate the prejudice undermine the FTT's reasoning. Serious prejudice does not cease to be serious, and a material breach of due process does not cease to be material, simply because it might be possible to take steps to respond to it. There is no response to the risks summarised at [36] which could

adequately remove the clear prejudice to HMRC, and the trial process, of the risk of doctored or rehearsed witness evidence.

23. Nor do I accept that the situation was "an ordinary part of litigation and no more". An attempt by a witness to change or "improve" their evidence during a trial is certainly not uncommon. But here, a party withdrew its appeal after the first day of a hearing, in which critical evidence was adduced, and then sought a retrial; that gives rise to quite different risks, for the reasons given by the FTT.

24. Mr Webster's skeleton argument also argued in this context that (1) any financial prejudice to HMRC could be catered for by a costs order, and (2) the FTT found that the absence of the original HMRC assessing officer did not cause any relevant prejudice to either party. The first point is correct, but it was specifically recognised and considered by the FTT ([29(12)], [40] and [58]), and the evidential prejudice to a fair trial could not be adequately compensated for in costs. The second point is irrelevant to the Applicant's ground of appeal.

25. It is not arguable with any realistic prospect of success that the FTT's decision on this issue was perverse or irrational[1]. Indeed, in my view it is hard to see how it could reasonably have decided otherwise.

26. I turn now to the complaint relating to the issue of prejudice to the taxpayer.

27. As explained above, the FTT directed itself in law by reference to the guidance in *Pierhead*. This included a need to consider "loss to the appellant if reinstatement were refused" and "consideration of the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained".

28. The FTT then applied those self-directions. As regards potential loss the FTT said this:

> 41. We accept that the appellant will suffer prejudice if the appeal is not reinstated. It will lose the opportunity to contest the assessment and the penalty. It will also suffer financial detriment in connection with the sale of the business and reputational damage. But these were all matters which were known to the appellant when it withdrew its appeal. We do not accept that the financial consequences of dismissing the application will be "catastrophic" as submitted by Mr Borthwick. He has taken no professional advice on this notwithstanding that he has retained professional advisers dealing with the sale. We take judicial notice of the fact that catering for liabilities like this in transactions involving the sale of businesses can readily be catered for in a number of ways and usually affect price rather than the underlying viability of the deal.
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> 42. Any such financial and reputational loss is a result of a conscious decision made by the appellant.

29. As regards merits the FTT concluded as follows:

[1] The Applicant objected to the description in the FTT PTA Decision of the potential prejudice to HMRC as "profound". I need not comment on that, since it is the Decision which is capable of appeal, not the PTA Decision.

> 49. As far as the merits of the appeal are concerned, we reject Mr Paulin's submission that the case is a strong one by dint of the evidence given by LP. LP gave evidence which was challenged in a number of areas and it was up to the tribunal to decide whether or not his evidence (that the material was waste or not) was right. To do this it would need to consider the evidence of HMRC's expert as well as the evidence of fact. The tribunal never heard this evidence and so was in no position to come to any conclusion. All we have is an expert witness who has given evidence. We are, frankly, more inclined to agree with Ms Brown's submission that "it should have been clear to all who attended the hearing that [LP's evidence] did not support [the company's appeal] and it is the effect of that evidence and the fact that the appeal was withdrawn after that unhelpful evidence that HMRC relies upon to assert that the merits are not in [the companies] favour".
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> 50. Indeed this appears to be reflected in Mr Borthwick's oral evidence that counsel had told him that LP's evidence hadn't come across as it should have.
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> 51. For the reasons given above, we are not inclined to accept Mr Borthwick's evidence that he was given a 60:40 chance of success by counsel following LP's evidence given on the Monday.
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> 52. The best we can say about the respective merits is that both parties have respectable technical arguments and reasonable prospects of success.

30. I consider that the FTT correctly directed itself in law, and then applied that law in a way which was clearly reasonably open to it.

31. The complaint that the FTT placed too little weight on the importance of the appeal to the taxpayer is simply a disagreement with the FTT's findings and conclusion. There is, in any event, no authority to support the contention that particular weight should be afforded to this factor in an application for reinstatement, and, indeed, to do so would be inconsistent with the guidance in *Pierhead* set out above.

32. Mr Webster said that "no taxpayer should be compelled to pay tax which is not, in fact, due". However, the consequence of any withdrawal of an appeal is that the taxpayer forfeits the right to argue that issue. At the reinstatement stage, the task of the FTT in considering "the merits of the proposed appeal so far as they can conveniently and proportionately be ascertained" is to ascertain whether the merits are very strong, very weak, or somewhere between those two positions. If the FTT concludes that the merits are very or overwhelmingly strong, then it should afford that factor more weight in the evaluative balancing exercise. But in this case, the FTT did not so conclude. Its conclusion was that "both parties have respectable technical arguments and reasonable prospects of success".

33. Complaints as to the weight to afford a particular factor do not serve to identify an arguable error of law in relation to an exercise of case management discretion.

Decision

34. The Application does not identify any arguable error of law in the Decision. The FTT's decision was meticulous and was not arguably irrational or perverse. Following reconsideration, permission to appeal is refused.

Signed: **Judge Thomas Scott**	**Date: 7th July 2026**
Issued to the parties on: 7th July 2026	