TC02210

Appeal number: TC/2011/00775

PROCEDURE –applications for permission to appeal various income tax and VAT decisions out of time –appellant's explanation for delay considered- HMRC's conduct in asking for further information and in reducing tax demanded in context of collection proceedings did not constitute a good explanation for delay – applications dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

STUART BELL **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
ROGER FREESTON FRICS

Sitting in public on 7 August 2012 at the Employment Tribunal 4th Floor, Byron House, 2A Maid Marian Way, Nottingham.

Mr Carley of Massers Solicitors for the Appellant

Ms Payne-Dwyer for HMRC

DECISION

Introduction

1. The appellant applies for permission to extend the time limit to file its Notice of Appeal against various income tax assessments, penalties and surcharges,VAT assessments, and a VAT penalty determination.

2. The main ground put forward by the appellant is that the appellant had not felt it necessary to lodge a formal appeal with the Tribunal earlier because of HMRC's conduct in continuing to request information from him, review the matters in dispute, and reduce the tax demanded.

3. HMRC oppose the applications on the grounds the appellant disregarded ample reminders and opportunities to submit the appeal to the Tribunal at an earlier date and on the grounds that he has not demonstrated a reasonable excuse for the delay.

4. The assessments, penalties and surcharges relate to payments into the bank account of the appellant and his wife which HMRC say are unrecorded sales from the appellant's livery and horse blanket manufacture business and upon which they have made income tax and VAT assessments.

Evidence

5. We were referred to various pieces of correspondence which had passed between HMRC and the appellant and in addition to print-outs from HMRC's system in relation to the appellant's self assessment record and schedules submitted on behalf of the appellant detailing the date, amount, nature and explanation of account deposits. At the hearing both HMRC and the appellant put various additional pieces of correspondence before us. These were shown to the parties who had not seen them and copies were made available to the parties.

Background

6. A Notice of Appeal dated 1 December 2010 was received by the Tribunal on 16 December 2010. The document enclosed with the notice of appeal related to debt management and bankruptcy proceedings and it was not clear to the Tribunal what decisions were being appealed against. The Tribunal wrote to the appellant to seek clarification.

7. On 24 April 2012 at a hearing which had been listed to hear the appellant's application of 1 December 2010 to extend the time limit in which to make an appeal it was directed that that application be adjourned. The appellant was directed to provide HMRC with precise details of the HMRC decisions which were being

appealed and the details of the grounds substantiating the application for extending the time limit for appeal. In turn HMRC were directed to provide a response.

8. We asked the parties for details of the particular assessments under appeal and were referred by the appellant to a HMRC schedule showing amounts "in tribunal" and "out tribunal". The schedule had been prepared in the context of collection proceedings and we were told it was prepared on 6 October 2011. The appellant submitted to us that the assessments and penalties which were under appeal appeared in the "in tribunal" column (with the exception of a VAT assessment of 28 February 2008 in the amount of £822.00 which was marked in the "out tribunal" column). HMRC suggested that "in tribunal" did not refer to this tribunal but to bankruptcy proceedings. We were doubtful that the reference to "tribunal" made sense in the context of such proceedings but in any event whatever "in tribunal" signifies we proceed on the basis that the amounts for the assessments and penalties as shown in that schedule as marked in the "in tribunal" column (and the VAT assessment referred to above), having been identified by the appellant in their submissions and at the hearing as the amounts which they regarded as the subject matter of the appeal, were the appeals in relation to which the permission to extend time related to. Details of the decisions the appellant seeks to appeal out of time as derived from the schedule are summarised in the annex to this decision.

9. It had been highlighted to the appellant in correspondence with the appellant that to the extent the appellant was purporting to appeal against determinations of interest the Tribunal did not consider such appeal was properly within its jurisdiction. We invited the parties to make submissions on this if they disagreed. No submissions were made and therefore we do not include details of the interest in the attached schedule.

10. It was not disputed by the appellant that the assessments and determinations under appeal had been made in the course of 2008.

11. From the correspondence and records put before us we found the assessment and determinations were issued as follows:

(1) Assessments for Income tax for 2002-3, 2003-4, 2004-5 and 2005-6 and related surcharges were issued on 3 April 2008.

(2) Penalty determinations for the same years were issued on 24 September 2008 and 1st and 2nd surcharges for those years were issued on 12 June 2008 and 21 November 2008 respectively.

(3) VAT assessments in respect of periods 05/04 through to 08/06 were issued on 7 April 2008.

(4) A mis-declaration penalty for periods 05/05, 08/05 and 08/06 was issued on 25 March 2009.

12. On or about 1 February 2010 HMRC served the appellant with a Statutory Demand alleging tax due of £212,297.06.

13. On 2 February 2010 the appellant wrote to HMRC to appeal against the statutory demand and "the sum outstanding".

14. On 8 February 2010 HMRC replied to the appellant set out HMRC's view of what they understood "the sum outstanding" to consist of. The letter stated the time limit to appeal against the decisions in relation to the sum outstanding was 30 days from the date the decision was sent to the appellant. The appellant was advised he had the right to apply to the Tribunal to see if it would accept his late appeal and that he should write to the Tribunal within 30 days of the date of the letter.

15. On 24 February 2010 in a letter to Mrs Evans at HMRC the appellant stated:

> "Following on from our telephone conversation today, I can confirm that I am appealing to the tribunal services against the outstanding issues."

16. The letter went on to ask for suspension of the tax raised and all years concerned and to ask that the appellant be given enough time to engage a new accountant to prepare the missing assessments and to answer outstanding queries. The letter also explained that after having visiting Newark Tax Office and showing them the letter of 8 February 2010 the appellant had been advised to ask for duplicate assessments and that the appellant had now done this.

17. The appellant's submissions refer to him being requested to supply further self assessment returns for the years 2006-7, 2007-8, 2008-9 together with VAT returns for 31 May 2007 and for the period 30 November 2007 to 31 May 2010.

18. On 24 August 2010 the appellant wrote to Mr Shepherd at HMRC to enclose duplicate tax returns as requested and to inform him that the appellant's accountant had now sent in all HMRC's requested information (Tax returns and VAT).

19. In a letter dated 14 October 2010 from Mr Shepherd at HMRC to the appellant, the appellant was informed that a bankruptcy hearing had been adjourned by the court for HMRC to process the 2006-7, 2007-8 and 2008-9 returns. Mr Shepherd stated:

> "… in respect of Self Assessment returns from 2002-3 through to 2005-6 I will be referring these to Mrs C Evans of Local Compliance, Leicester for her further comments."

20. In a letter dated 18 October 2010 letter from HMRC to the appellant, HMRC made it clear that HMRC were not prepared to look further into the self assessment returns 2002-3 to 2005-6 together with the VAT assessments. The letter pointed out that the appellant had not written to the Tribunals service and that this should have occurred within 30 days of the 8 February 2010 letter.

Law

21. The Tribunal was not referred to any statutory provisions by either party but notes the following.

22. Since 1 April 2009, the Tribunal is governed by the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). Under Rule 20 as amended by SI 2010/2653 (with effect from 29 November 2010):

> "(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.
>
> ….
>
> (4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal –
>
> (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
>
> (b) unless the Tribunal gives such permission, the Tribunal must not admit the notice of appeal."

23. Further to Rule 20(4) of the Tribunal Rules the enactments specifying periods for appeal and dealing with permission to extend the time limit are set out as follows in relation to the subject matter and time period relevant to the appeals under consideration.

24. In relation to income tax assessments for 2007-8;

> **31A Taxes Management Act ("TMA 1970") Appeals: notice of appeal**
>
> (1) Notice of an appeal under section 31 of this Act must be given—
>
> (a) …
>
> (b) within 30 days after the specified date,
>
> I to the relevant officer of the Board.
>
> (2) …
>
> (3)…
>
> (4) In relation to an appeal under section 31(1)(d) of this Act [*any assessment to tax which is not a self-assessment]*—
>
> (a) the specified date is the date on which the notice of assessment was issued
>
> **49 Proceedings brought out of time**
>
> (1) An appeal may be brought out of time if on an application for the purpose an inspector or 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.

(2) If there is a right to elect to bring the appeal before the Special Commissioners instead of before the General Commissioners, the Commissioners to whom an application under this section is to be referred shall be the General Commissioners unless the election has been exercised before the application is so referred.

25. In relation to 2008-9 the 30 day time limit and provision for proceedings brought out of time were the same (up until 1 April 2009). The 30 day time limit applied to penalties by virtue of s100B TMA 1970 and to surcharges under s59C TMA 1970.

100B Appeals against penalty determinations

(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to sections 93 and 93A of this Act and the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax.

59C Surcharges on unpaid income tax and capital gains tax

(1) This section applies in relation to any income tax or capital gains tax which has become payable by a person (the taxpayer) in accordance with section 55 or 59B of this Act.

…

(7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.

(8) …the provisions of this Act relating to appeals shall have effect in relation to an appeal under subsection (7) above as they have effect in relation to an appeal against an assessment to tax.

26. In relation to VAT assessments issued on 7 April 2008 and the mis-declaration penalty issued on 25 March 2009 the time limit was set out in Rule 4 of the Value Added Tax Tribunal Rules 1986 ("the VAT Tribunal Rules") which provided that the notice of appeal was required to be served on the tribunal before the expiration of 30 days after the date of the document containing the disputed decision.

27. Under Rule 19 of the VAT Tribunal Rules the VAT Tribunal had the power to:

"…extend the time within which a party to the appeal or application or any other person is required or authorised by these rules…to do anything in relation to the appeal or application…upon such terms as it may think fit."

Appellant's arguments

28. Following the investigation into the appellant's business in 2008 he had supplied the information requested by HMRC. There is a dispute of fact over whether information was received and telephone calls made and received regarding the alleged liability for tax. The appellant has experienced difficulties with regard to the receipt of posted documents and which have been routinely delivered to other properties by Royal Mail.

29. The appellant did not feel it was necessary to lodge a formal appeal because as of 14 October 2010 the appellant believed HMRC were actively considering his objections to the various assessments and that they had actioned a substantial reduction in the tax demanded.

30. The appellant considered HMRC's letter of 18 October 2010 to be their final decision. As late as 18 October 2010 HMRC were communicating with the appellant on the basis that the tax which was the subject of the appeal was being reviewed. They were requesting information from him and indeed had substantially reduced the tax as demanded. By these requests and their conduct HMRC were sending mixed messages.

31. The appellant received conflicting information from HMRC as to the status of his challenge to the tax. In the circumstances it must be in the interests of justice to allow the appellant's appeal to proceed.

32. In the period since December 2010 HMRC have been clearly aware of the basis of the appellant's appeal and the various assessments which he was challenging as evidenced in the schedule produced by them. Accordingly there is no prejudice in allowing the appeal to proceed out of time.

33. In relation to the merits of the substantive dispute the payments into the appellant's account and those of his wife were transfers / payments from his other account. They were introduced as capital and do no represent unrecorded sales and income. As an example the credit of £71,907 on 8 June 2006 was the proceeds of sale from the appellant's property.

34. Until February 2010 there was no indication that the decisions given were final, that there were rights of appeal, or of the timescales for appealing.

Respondents' arguments

35. No appeal was made to HMRC within the relevant periods. The appellant's reasons for not appeal in time were considered and responded to in HMRC's letter dated 8 February 2010. That letter also advised the appellant to make an appeal within 30 days to see if the Tribunal would permit a late appeal. The appellant did not appeal at that time and the appellant has to show he has reasonable excuse for not submitting the appeal then.

36. No information or supporting evidence to show the bank deposits came from sources outside of the business has been received by HMRC.

37. The appellant has disregarded ample reminders and opportunities to submit appeals to the Tribunal at an earlier date than January 2012 and he has demonstrated no reasonable excuse covering the period to January 2012.

38. In terms of prejudice to HMRC the decision maker had retired and certain papers were now no longer available.

Discussion

Tribunal's discretion

39. The Tribunal was not referred by either party to the legislation which governed the relevant time limits.

40. In order to apply Rule 20(4) of the Tribunal Rules it is necessary first to identify the enactment which sets out the time limit and second to establish that the enactment enables the time limit to be extended with the permission of the Tribunal.

41. In relation to VAT decisions which have been notified by HMRC but for which an appeal has not been lodged before 1 April 2009 paragraph 4(2) of Schedule 3 of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 provides that Rule 4(2) of the VAT Tribunals Rules 1986 continues to apply as well as any other enactments that are applicable to the decision. Paragraph 4(4) provides that any reference to an existing tribunal is to be substituted with a reference to the tribunal.

42. Although it may be queried whether the 30 day time limit in Rule 4(1) of the VAT Tribunal Rules, and the ability to extend the time limit in Rule 19 satisfy Rule 20(4) of the current rules in so far as the VAT Tribunal Rules are no longer in existence we consider that given the purpose of according the Tribunal discretion to extend time limits, and the broad wording of Paragraph 4(2)I of Schedule 3 to the Transfer Order which in our view may cover Rules 4(1) and Rule 19 of the VAT Tribunal Rules, this Tribunal does have discretion to extend the time limit.

43. Alternatively, if that is not the case we consider that the reference to "enactment" and "permission", in Rule 20(4) and "rule" in Rule 5 in the current rules are apt to cover the provisions of the VAT Tribunal Rules even if they are revoked. To find otherwise would entail admitting that there is a class of proceedings, namely those where HMRC had made a decision before 1 April 2009 but where the appeal had not been filed until some time after the 30 day time limit at a point in time after 1 April 2009 where the Tribunal was deprived of discretion to extend the time limit. That would be a very odd result in view of the discretion to extend time limits that operated in relation to late appeals made prior to 1 April 2009

and in relation to late appeals made after 1 April 2009 (where the decision was after 1 April 2009) and cannot have been the intention of the legislation.

44. In relation to the Tribunal's discretion to extend time limits for the direct tax matters where the decision was given in 2007-8 we consider that s49 TMA 1970 enables the Tribunal to extend the time limit for appeal.

45. Although that provision does not in terms refer to the Tribunal having permission to extend the time limit we consider that the fact that the General or Special Commissioners were able to determine whether there was a reasonable excuse for bringing the appeal out of time and therefore whether the appeal could be brought out of time, together with the assumption by this Tribunal of the appeal jurisdiction in relation to the penalties and surcharges under consideration mean we should interpret the reference to "with the permission of the Tribunal" in Rule 20(4) of the Tribunal Rules as having been met by s49 TMA 1970. As above we think to hold otherwise would lead to a gap in the discretion of a tribunal to be able to extend a time limit which cannot have been intended.

Exercise of the Tribunal's discretion

46. Under the legislation the Tribunal notes the exercise of its discretion is not framed in terms of whether the appellant has a reasonable excuse as HMRC appear to contend.

47. While the Tribunal was not referred by the parties to any authorities on exercise of its discretion it notes the decision of the Upper Tribunal in *Data Select Limited v Revenue and Customs Commissioners* [2012]UKUT 187 (TCC) which considered the Tribunal's discretion to extend time pursuant to the 30 day time limit in making an appeal to the Tribunal pursuant to s 83G(1) VATA 1994 in which Morgan J set out the questions which courts and tribunals ask themselves when they are asked to extend a relevant time limit:

> 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?
>
> (5) what will be the consequences for the parties of a refusal to extend time.

48. Morgan J considered that the approach of considering the overriding objective and all of the circumstances of the case, including the matters listed in Civil Procedure Rules ("CPR") 3.9 was the correct approach in relation to an application to extend time pursuant to section 83G(6) of VATA 1994. We consider that that approach is equally applicable here.

49. CPR Rule 3.9(1) sets out various factors for consideration. Factors (a),(d),(h) and (i) overlap with the questions above and the overriding objective under the

Tribunal's Rules to deal with cases fairly and justly. While we have considered the additional factors (b),(c),(e),(f) and (g) below we think they are not material in the context of the facts of this application so do not discuss them in any detail :

(a) The interest of the administration of justice
(b) Prompt application for relief
(c) Intentional failure to comply
(d) A good explanation for the failure
(e) Compliance with other rules and directions
(f) Failure caused by legal representative
(g) The trial date could still be met.
(h) Impact of failure to comply on both parties
(i) Effect of granting relief

Purpose of time limits

50. The purpose of the 30 day time limit has been discussed in various decisions of this Tribunal and the Upper Tribunal (Tax and Chancery Chamber) and the High Court either explicitly or by implication when considering the prejudice that arises to HMRC when appeals are allowed to proceed out of time.

51. In *John Wilkins (Motor Engineers) Ltd. V HMRC* [2009] UKUT 175 (TCC); [2009] STC 2485, (overturned by the Court of Appeal but on the basis of a Court of Appeal majority concluding the appeal was in time given their view on when the disputed decision had been made), it was noted:

> "The 30-day time limit is long established and well known, and is there for good reason….there is prejudice to the government (or other taxpayers) in having to meet large, unexpected claims, since they are disruptive of the government's planning of its income and expenditure. The time limit, short though it may be, is justified for that reason, and in the interests of legal certainty, and should not be lightly extended."

52. The amounts involved in this appeal are not large in the context of the government's budget. The appeals deal not with claims against HMRC as in the above case but amounts HMRC say are due from the taxpayer. Nevertheless, we do not think this detracts from the underlying point that there is a general interest in providing for certainty in matters of income and expenditure. The time limit is not expressed to vary according to the amounts at stake. Were it not for the issue of whether the appeals are to be allowed out of time the assessments and determinations on becoming final would lead to tax and sums treated as tax becoming due and payable to HMRC. Income receipts which would in the normal course be otherwise collectible would be disrupted.

53. In *R (oao Cook) v General Commissioners of Income Tax* [2009] EWHC 590 (Admin), the prejudice to HMRC which arises if appeals are sought to be brought out of time was put in terms of it "not being able to close its books". There is a public interest in "promoting the policy that challenges to assessments should be brought within the short period specified by the statute".

54. Further policy reasons why there should be time limits around the appeal arise from the likelihood that as time goes by the availability and quality of evidence available to a tribunal hearing the appeal will diminish. While the time limit is short it should be acknowledged that the steps taken to complete and file a Notice of Appeal are not especially onerous and do not need a party to be represented.

Length of delay – when did time start to run and when were appeals filed?

55. It was not disputed between the parties that the assessments and determinations had been issued during 2008 and from the print outs of records and correspondence the dates of issue are as set out at [11] above.

56. The appellant's submissions mention that he has experienced difficulties with regard to the receipt of posted documents. We were not however referred to any evidence in relation to that submission on behalf of the appellant. HMRC's letter of 8 February 2010 responds to the contention that the appellant had problems with the Post Office. In the letter Mrs Evans states there was no evidence that post had been returned to the office undelivered and that the appellant had not provided copies of his correspondence with the Post Office as requested.

57. In the absence of evidence as to the difficulties with post and taking account of the matters relating to post raised in Mrs Evans' letter we find that on the balance of probabilities it is more likely than not that the assessments and determinations issued by HMRC were received by the appellant. We should point out that the 8 February 2010 letter and HMRC's submissions also refer to Mrs Evans hand delivering a letter of 17 March 2008. However given that letter pre-dates all of the assessments and determinations in issue it is not relevant to the issue of whether assessments and determinations issued by HMRC were received by the appellant.

58. The statutory deadlines for filing the appeals were as follows:

(1) For the income tax assessments 3 May 2008

(2) For the income tax penalty determinations 24 October 2008

(3) For the 1st surcharges 12 July 2008

(4) For the 2nd surcharges 21 December 2008

(5) For the VAT assessment 7 May 2008

(6) For the VAT mis-declaration penalty 24 April 2009

59. HMRC in their submissions refer to the period in issue being up to January 2012. While it is clear from the Tribunal's correspondence seeking clarification on what was being appealed, and the necessity to make further directions on this matter we consider we should work on the basis that the appellant should for the purposes of this application be regarded as having filed a Notice of appeal as of 16 December 2010 being the date of the first date stamp placed on the Notice of Appeal form in the Tribunal's papers.

60. The length of delay therefore ranges from approximately 2 and half years for the income tax assessments to 1 year 7 months for the VAT mis-declaration penalty.

Was there a good explanation for the delay?

61. In relation to the period after the issue of the assessments and determinations in 2008 and 2009 but before HMRC's letter of 8 February 2010 the appellant argues that he was not aware of his appeal rights and the relevant time limits.

62. While the presence of absence of notification of appeal rights and time limits does not in our view affect when the time limit started to run for the purpose of calculating the length of delay it is a factor which we think we ought to take account of in considering whether the appellant has a good explanation for the delay.

63. It was submitted to us by HMRC that the assessments would have gone out in standard form and that they would always show details about the right to appeal.

64. The decision in relation to the mis-declaration penalty issued on 25 March 2009 did set out a right to appeal to the Tribunal and the relevant time limit of 30 days.

65. The VAT Notice of Assessment of 7 April 2008 contains the statement "Your attention is drawn to the notes attached concerning your rights of appeal", and on the balance of probabilities we find that such notes were sent.

66. We have not been provided with any explanation which accounts for why the appellant did not lodge an appeal in relation to the mis-declaration penalty and VAT assessments within the relevant time limits in the period prior to HMRC's 8 February 2010 letter.

67. Although the appellant has referred in submissions to a dispute of fact over telephone calls made received regarding the alleged liability for tax no evidence was put before us on that issue. We do not therefore consider the appellant has a good explanation for not appealing in this period for the VAT mis-declaration penalty and the VAT assessments.

68. In relation to the income tax assessments, surcharges and penalties, beyond HMRC's assertions that notifications of appeal rights and time limits would have been generated and sent automatically we did not have any evidence in the form copies of the notifications of appeal rights or time limits or any example letters in relation to the other appeals and determinations in issue. In circumstances where we have no evidence we do not make any finding on whether the appellant was notified of his appeal rights and time limits in relation to the income tax assessments, penalties and surcharges. However certainly as from receipt of the 8 February 2010 letter from Mrs Evans at HMRC we think the appellant ought to have been aware as to the time limits and appeal rights for those matters.

69. Even if 8 February 2010 is taken as the date when the appellant might reasonably have been expected to lodge an appeal there is still a significant delay of around 9 months which the appellant needs to account for.

70. The appellant argues that it was not until 18 October 2010 that he had a decision from HMRC that he considered he should appeal against. This is however in our view at odds with what the appellant states in his letter of 24 February 2010 which indicates the appellant was appealing to the Tribunal even though it transpires that he did not.

71. The appellant argues that permission to extend time should be granted given his belief that HMRC were communicating with him on the basis that his tax was being reviewed and were requesting information from him. We are not persuaded either of these matters provide a good explanation for the delay. Even if the appellant held that belief at some point during the period in issue his letter of 24 February 2010 indicates to us that he did not hold it at that point in time and was in a position to have made an appeal then. To the extent the appellant refers to having to engage a new accountant we do not consider that this that was a bar to him having lodged an appeal himself (which he did subsequently in December 2010).

72. Further we have had no evidence before us which would lead us to consider that the appellant could reasonably have thought that he should hold off lodging an appeal. We note also that the assessments in relation to which further information was being exchanged were certainly on the income tax side for years which were later than 2005-6 and therefore not relevant to the years under appeal. The reduction of the petition debt of £43,660.05 was clearly stated to be in relation to later years to those in issue in this application and to the years referred to in HMRC's letter of 8 February 2010. The information sought in relation to VAT also appears to be for later periods which the appellant has per the schedule attached to its submissions stated to be under appeal.

73. In any event to the extent HMRC's statement in Mr Shepherd's letter of 14 October 2010 that he would be referring the self-assessment returns from 2002-3 to 2005-6 to Mrs Evans, or indeed any of the other matters relied on by the appellant such as the reduction of the debt created any impression on the appellant's part that it may not be worth appealing until that referral had run its course that impression would have been extremely short lived given HMRC's response of 18 October 2010 shortly thereafter.

74. Although not referred to by the parties we noted that in his grounds of appeal the appellant states:

> "…My intentions were to go down the Tribunal route long ago but that Mrs Evans informed me that this would be unnecessary as returns showed nothing outstanding and that the VAT returns shows credits, and that I should ask that Tax be withheld pending any enquiry – but when I requested this she refused and told me to go down the Tribunal route…If the HMRC were accommodating at an earlier stage and suggested Tribunal instead of stating this was unnecessary, then the amount would be considerably less and may have been resolved…"

75. There was however no evidence put before us which would enable us to make a finding that the appellant was told by HMRC that it was not necessary to go down the Tribunal route and if so when he was told this.

76. Even if the statement in the 14 October 2010 letter could be read as justification for not appealing, there was no evidence which we were referred to which indicated the appellant was led by HMRC to believe he should hold off lodging his appeal before that point in time.

77. We do not regard the fact that HMRC was asking for further information, from the appellant as conduct which could reasonably have led the appellant to think he should not appeal. Some of the information requested appears to have been for years which were not the subject of this application, but even to the extent there was information being requested in relation to matters covered by this application we must take into account the appellant's letter of 24 February 2010. In this letter the appellant confirms that he was appealing to the Tribunal but also refers to his efforts to secure missing information. In our view this does not demonstrate the appellant saw an inconsistency between appealing on the one hand and answering HMRC's requests for information on the other.

78. The fact that HMRC showed willingness to amend the amounts they were seeking in the light of new information in the context of collection proceedings does not in our view indicate that there were not final decisions which generated appeal rights, or that that the time limits for appealing could be regarded as held in abeyance. It was open to the appellant to lodge an appeal as soon as possible after he was aware of that route and the time limits in order to put himself in the best position to preserve his ability to have the assessments and determinations put before the Tribunal while at the same time continuing discussions and negotiations with HMRC. The two routes were not mutually exclusive.

79. We should mention that at the hearing we were informed by HMRC that upon receipt of further information supplied by the appellant as a result of these proceedings a VAT assessment was not being pursued. We do not think that changes which HMRC have made or intend to make and which have taken place after the appeal notice has been filed can be of assistance to the appellant in demonstrating he had a good explanation as to why the appeal notice submitted on 1 December 2010 could not have been filed earlier.

Respective prejudice to parties in granting or refusing extension

80. We must consider the respective prejudice to the parties of granting or not granting the permission to extend time sought. On behalf of the appellant it was submitted to us that if permission to extend the time limits was not granted there was a good chance that the appellant would be made bankrupt, and that this would obviously impact him personally and his family as the family home would have to be sold. While we acknowledge the severity of that possible outcome in our view it would be wrong of us to determine that there is weighty prejudice to the appellant purely because of those possible consequences. Those consequences might equally

follow were permission to be extend the time limit be granted and it turned out the appellant's appeals were unsuccessful.

81. The relevant prejudice is we think the loss of the appellant's right to fight the appeal and in determining the value of that right there should be some consideration of the merits while acknowledging that that consideration ought to be limited given this is not a substantive hearing of the issue. The appellant submits the credits and transfers to his accounts and those of his wife are not unrecorded sales and income but are transfers from his other accounts and were introduced in the business as capital. We were referred to the appellant's schedules which tabulated the dates, value, nature and explanation of the payments. HMRC argue that despite requests they have not been provided with documentation which explains the source of the deposits.

82. It seems to us that the merits of the case would largely turn on the evidence put before the Tribunal as to the sources of the deposits. Given the nature of the hearing on the appellant's application and the fact that the evidence put before us at such a hearing may not encompass the evidence that would be put before a Tribunal at a full substantive hearing we do not think it would be fair to consider the merits of the appellant's case purely on the evidence put before us at the hearing of the appellant's application. In our view the most that can be said, given the submissions of the parties and the documents before us is that the appellant's case is not so hopeless as to make it pointless granting the permission sought. Equally it has not been demonstrated to us that the appellant's case is so strong that the prejudice suffered through not being able to argue it leads to injustice.

83. In relation to the prejudice to HMRC in allowing the appeal to proceed out of time we think there is prejudice to HMRC which stems from the public interest in good administration and legal certainty and in HMRC being able to "close its books". We do not agree with the appellant's submission that there is no prejudice to HMRC because in the period since December 2010 HMRC was aware of the basis of his appeal. While that may be a point which might be relevant to counter an argument by HMRC that a notice of appeal should not be regarded as having been filed until some time after December 2010 it does not in our view get round the prejudice that arises from HMRC's expectation that no appeal having been filed it could regard the assessments and determinations as final in 2008 and 2009 and proceed to collect the sums due. In the meantime officers have moved on, and documentation which might have been retained in a more comprehensive fashion if it were known an appeal before the Tribunal was on foot has not been so retained.

84. There is therefore some degree of prejudice to both parties in either granting permission or refusing it. In our view the balance of prejudice does not by itself point in a particular direction. We return therefore to our considerations on the purpose of the statutory time limits, the length of the delay and whether there is a good explanation for the delay.

85. The purpose of the 30 day time limits is discussed at [51] to [54] above. The length of delay is significant, ranging between well over a year for the most recent

penalty determinations up to over two and a half years for the oldest decision. The appellant was on notice of the need to appeal within a 30 day time limit against the VAT assessments from April 2008 and the VAT mis-declaration penalty from March 2009 but has provided no evidence which persuades us that he had a good explanation for the delay in doing so.

86. Even if the appellant is to be regarded as only having been on notice from 8 February 2010 of the need to appeal income tax assessments, surcharges and penalties there is still a delay of some 9 months. On the evidence before us we were not persuaded that the appellant had a reasonable basis to think that there was no need to lodge an appeal until December 2010 and we do not think he has a good explanation for that delay.

87. In our view taking those matters into account we consider the application to extend time to appeal in each of the appeals before us must be refused.

88. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 22 August 2012

Annex - Decisions appealed

Assessment /determination	**Year / period ended**	**Amount(£)**
Income Tax	2002-3	12935.95
	2003-4	6467.97
	2003-4	6467.98
	2003-4	3401.04
	2004-5	8168.49
	2004-5	8168.50
	2004-5	1075.64
	2005-6	7261.17
	2005-6	7261.17
Penalties	2002-3	7115.00
	2003-4	8985.00
	2004-5	9577.00
	2005-6	7987.00
Surcharge	2002-3	646.79
	2002-3	646.79
	2003-4	816.84
	2003-4	816.84
	2004-5	870.63
	2004-5	870.63
	2005-6	726.11
	2005-6	726.11
VAT	31/05/2004	742.75
	31/08/2004	511.00
	30/11/2004	527.00
	31/05/2005	5268.00
	31/08/2005	3290.00
	30/11/2005	1279.00
	28/2/2006	1787.00
	31/05/2006	1776.00
	31/08/2006	11201.00
	30/11/2006	218.00
	28/2/2008	822.00
VAT Penalties	31/05/2005	790.00
	31/08/2005	493.00
	31/08/2006	1680.00

5