TC03675

Appeal number: TC/2012/03651

VAT – Application for permission to appeal out of time – Value Added Tax Act 1994, s. 83G(1) and (6) – Application allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROMASAVE (PROPERTY SERVICES) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

Sitting in public in London on 21 March 2014

Mr Geraint Jones QC, counsel, instructed by Rainer Hughes, for the Appellant

Ms Rita Paveley, Senior Officer, for the Respondents

DECISION

Introduction

1. The Appellant company applies for permission to appeal out of time, to the extent that such permission is required, against various assessments to VAT and misdeclaration penalties.

2. A notice of appeal was submitted to the Tribunal by the Appellant on 22 February 2012. Supplemental grounds of appeal were subsequently submitted by the Appellant's representatives in respect of additional decisions. At the hearing, it was confirmed on behalf of the Appellant that the final list of assessments and misdeclaration penalties against which the Appellant seeks to appeal is as indicated in the table below. The significance of the column in the table entitled "Address to which sent" will become apparent later.

Decision	**VAT period**	**Amount**	**Date of decision**	**Address to which sent**
Misdeclaration penalty ("Decision 1")	06/08	£1,365	21.11.08	Griffins
VAT assessment ("Decision 2")	09/08	£2,890.70	03.12.08	Ganrids
VAT assessment ("Decision 3")	12/08	£5,666.66	13.03.09	Ganrids
VAT assessment ("Decision 4")	03/06, 06/06, 09/06, 12/06, 03/07, 06/07, 09/07, 12/07, 03/08, 06/08	£109,325.34	15.04.09	Ganrids
Misdeclaration penalty ("Decision 5")	06/08	£3,338	18.05.09	Griffins
Misdeclaration penalty ("Decision 6")	03/06, 06/06, 09/06, 12/06, 03/07, 06/07, 09/07, 12/07, 03/08	£12,941	18.05.09	Griffins
VAT assessment ("Decision 7")	03/09	£1,021.74	21.08.09	Griffin

VAT assessment ("Decision 8")	09/09	£1,099.57	16.03.10	Roxburghe
VAT assessment ("Decision 9")	06/10, 12/10, 03/11	£53,753.39	17.10.11	Griffin

3. The total amount in dispute in the proposed appeal is thus in the region of £200,000.

4. An application to make a late appeal covering much the same ground was determined by the Tribunal in April 2013: *Romasave Property Services Ltd v Revenue & Customs* [2013] UKFTT 267 (TC) (the "April 2013 decision"). In July 2013, the whole of that decision was set aside by the Tribunal on the Appellant's application, on the ground that the Appellant had not received notice of the hearing on that occasion and had not been represented.

5. The Appellant disputes that there was valid service of Decisions 2, 3, 4 and 8 on the ground that they were incorrectly addressed, and argues that because of this, the time limit for appealing against those decisions has not yet begun to run. The Appellant accepts that the misdeclaration penalties in Decisions 5 and 6 were correctly addressed to the Appellant, but contends that they were not validly served because the assessment in Decision 4 which found that there had been a misdeclaration was not validly served. The Appellant accepts that Decisions 1, 7 and 9 were validly served on the Appellant, and that permission to appeal out of time is required in respect of those decisions.

Factual background and evidence

6. The evidence before the Tribunal consisted of material in a joint documents bundle, and a witness statement of Mr Avtar Singh Mann, the sole director of the Appellant company, to which there are various exhibits.

7. The principal documents in the joint documents bundle indicate the following.

8. On 11 September 2008, following a VAT visit to the Appellant, HMRC issued a letter requesting certain further information from the Appellant in relation to VAT period 06/08. That letter also disallowed 10 items of claimed input tax dated between March and September 2008 and totalling £9,103.12. It stated that in consequence the repayment to the Appellant for VAT period 06/08 would be reduced. The letter added that as that repayment had already been made, an assessment would be raised in the immediate future. This letter was addressed to the Appellant at the address which is accepted by the Appellant to be its usual place of business, and is referred to below as the "Griffins" address.

9. In a letter to the Appellant dated 24 October 2008 (to the "Griffins" address), HMRC stated that the remaining repayment for VAT period 06/08 was placed on hold pending a response by the Appellant to the 11 September 2008 HMRC letter. The

letter stated that if a response was not received within 14 days, HMRC would proceed without further notice to issue an assessment based on the input tax that had been allowed by HMRC for periods 03/07 to 03/08.

10. On 21 November 2008, HMRC advised the Appellant (at the "Griffins" address) that in view of the assessments issued, a misdeclaration penalty was being issued for period 06/08 (Decision 1).

11. By a letter dated 3 December 2008, HMRC advised the Appellant that due to the failure to respond to the HMRC letter of 24 October 2008, the repayment due for period 09/08 had been reduced to nil (Decision 2). In this letter, there was an error in the Appellant's address, in that "Griffins Wood House" had been written "Ganrids Wood House". This erroneous version of the address is referred to below as the "Ganrids" address.

12. In January 2009, the Appellant submitted a paper VAT return for period 12/08. That paper return had been issued by HMRC, addressed to the Appellant at the Ganrids address. On the paper return, in handwriting, the word "Ganrids" has been crossed out, and corrected to "Griffins".

13. By a letter dated 6 March 2009 (to the "Griffins" address), HMRC advised the Appellant that unless the Appellant provided within 14 days the information requested in the 11 September 2008 HMRC letter, HMRC would raise an assessment disallowing all input tax reclaimed by the Appellant on the basis that no supporting evidence had been produced.

14. By a letter dated 13 March 2009 (to the "Ganrids" address), HMRC advised the Appellant that due to the failure to submit evidence, the reclaimed input tax for VAT period 12/08 had been reduced to nil, with the result that the return was no longer a repayment return but rather a payment was now due to HMRC (Decision 3).

15. On 15 April 2009, HMRC issued an assessment to the Appellant (at the "Ganrids" address) in a sum of some £100,000 for periods 03/06 to 06/08 (Decision 4).

16. In April 2009, the Appellant submitted a paper VAT return for period 03/09. That paper return had been issued by HMRC, addressed to the Appellant at the Ganrids address.

17. On 18 May 2009, HMRC issued two assessments to the Appellant (to the "Griffins" address) of misdeclaration penalty for periods 03/06 to 06/08, and an increased assessment of misdeclaration penalty for period 06/08 (Decisions 5 and 6).

18. By a letter dated 21 August 2009 (to the "Griffins" address), HMRC advised the Appellant that reclaimed input tax for period 03/09 had been disallowed, with the result that the return was no longer a repayment return but rather a payment was now due to HMRC (Decision 7).

19. On 21 September 2009, the firm of solicitors Anami Law (whose address is also the "Griffins" address) faxed to HMRC a letter of authority signed by Mr Mann, authorising HMRC to deal with a solicitor at Anami Law "in relation to the immediate payment in relation to" the Appellant company's VAT registration number.

20. By a letter dated 22 September 2009, addressed to the Appellant's representatives Anami Law, HMRC provided a ledger breakdown of the then balance of some £130,000. The letter added that if the Appellant addressed issues that had been raised in correspondence, HMRC would review the assessments in the light of the information provided.

21. By a letter dated 1 October 2009, Anami Law replied, stating that the various assessments had never been received by Mr Mann or the Appellant company, and that various correspondence had not been received by Anami Law. The letter stated that the Appellant intended to address the issues, but that they were "slightly in the dark as to the assessments raised, and what the issues were". The letter concluded with a request that all relevant documents be sent to Anami Law. The letter requested that the assessments against Mr Mann be withdrawn, and stated that failing this a Tribunal appeal would be commenced "once I have received the necessary documentation".

22. HMRC responded in a letter dated 2 October 2009, stating that "I did personally post the copies of the earlier correspondence to your address—I enclose them again".

23. By a letter dated 15 October 2009, Anami Law stated that HMRC correspondence from 11 September 2008 to 21 August 2009 had been incorrectly sent to the "Griffins" address, when it should have been sent to the registered office of the Appellant at King & King Accountants, Roxburghe House, London (the "Roxburghe" address). The letter requested that the assessments against the Appellant company and Mr Mann be withdrawn, and stated that failing this a Tribunal appeal would be commenced.

24. A letter dated 9 November 2009 from HMRC to King & King Accountants at the Roxburghe address stated that that letter was enclosing a copy of a letter from Anami Law and stated that "I am enclosing the relevant assessment documents and details of the information we require".

25. In another letter dated 9 November 2009 to Anami Law, HMRC stated that there had been "numerous letters from you in this time" where no mention of an incorrect address was raised.

26. On 7 December 2009, HMRC wrote again to King & King at the Roxburghe address, stating that there had been no response from King & King, and that if no response was provided by 21 December 2009, HMRC debt management would be asked to chase the debt.

27. On 23 December 2009, HMRC wrote again to King & King stating that in the absence of a response, the matter was now being referred to HMRC debt management.

28. On 16 February 2010, HMRC wrote again to King & King stating that there had been no response.

29. In a letter dated 9 March 2010, King & King responded, providing certain information and requesting that the assessment of some £130,000 be cancelled.

30. By a letter dated 16 March 2010, HMRC advised King & King that reclaimed input tax for period 09/09 had been disallowed, with the result that the return was no longer a repayment return but rather a payment was now due to HMRC (Decision 8).

31. By a letter dated 22 March 2010, HMRC advised the Appellant (at the "Griffins" address) that HMRC would wind up the Appellant company if it did not take action within 7 days in respect of the outstanding debt.

32. By a letter dated 29 March 2010, HMRC responded to the 9 March 2010 King & King letter, stating that further documents would need to be provided before the assessment could be withdrawn.

33. By a letter to the Appellant dated 28 April 2010, addressed to the Appellant at King & King at the Roxburghe address, HMRC stated that if the outstanding debt was not paid within 7 days, action to wind up the Appellant would be taken without further notice.

34. King & King responded in a letter dated 29 April 2010 requesting HMRC to withhold any action "until all matters have been sorted out with the VAT".

35. There were further exchanges between HMRC and King & King between 7 June 2010 and 22 October 2010. It appears from this that HMRC offered to visit King & King to inspect the Appellant's paperwork, but that King & King ultimately confirmed that it had no records of the Appellant.

36. In a letter to Anami Law dated 15 November 2010, HMRC stated that "I feel I have come full circle—a year has passed without any records being presented and no further information provided". The letter concluded that "As I result I do not intend to spend any further time dealing with this matter".

37. By a letter to the Appellant dated 4 July 2010, addressed to the Appellant at King & King at the Roxburghe address, HMRC stated that if the outstanding debt was not paid within 7 days, action to wind up the Appellant would be taken without further notice.

38. In a letter to HMRC dated 19 July 2011, Rainer Hughes solicitors (formerly Anami Law) stated on behalf of the Appellant that no assessment or correspondence had been received by the Appellant regarding the claimed debt of some £140,000, and requested that copies be provided.

39. By letters to Rainer Hughes dated 25 July 2011 and 24 August 2011, HMRC stated that they had no authority on file to discuss the Appellant's affairs with Rainer

Hughes (although it appears that Rainer Hughes did provide an authority on 9 August 2011, following the first of these letters).

40. On 29 July 2011, HMRC issued a petition for the winding up of the Appellant company.

41. By letters to the Appellant dated 1 August 2011, 26 August 2011 and 23 September 2011 (sent to the "Griffins" address, save that in one letter "Griffins" is spelled "Griffin"), HMRC requested the Appellant to make contact to arrange a verification visit by HMRC.

42. By a letter dated 17 October 2011, HMRC advised the Appellant that reclaimed input tax for periods 06/10, 12/10 and 03/11 had been disallowed, with the result that the returns were no longer repayment returns but rather nil returns (Decision 9). This letter was addressed to the Appellant at the Griffins address, except that "Griffins" was spelled "Griffin".

43. By a letter dated 8 November 2011 (sent to the "Griffins" address), HMRC advised the Appellant that reclaimed input tax for period 06/11 had been disallowed, with the result that the return was no a longer repayment return but rather a nil return.

44. In letters dated 21 February 2012 sent to the Appellant at the "Roxburghe" address and to Rainer Hughes, HMRC stated that it was enclosing "copies of assessments relating to periods from 03/06".

45. The Appellant filed its notice of appeal in the present appeal before the First-tier Tribunal on 22 February 2012. The Appellant subsequently filed supplemental grounds of appeal.

46. In a letter to Rainer Hughes Solicitors dated 7 March 2012, HMRC took the position that the appeal was brought out of time.

47. An application by the Appellant for permission to appeal out of time was heard and determined by the Tribunal in April 2013, but that determination was subsequently set aside (see paragraph 4 above).

48. The statement of Mr Mann states amongst other matters as follows.

49. HMRC brought a petition for the winding up of the Appellant company on 29 July 2011 (the "first winding up petition"). However, on 26 August 2011, on the application of the Appellant, the Chancery Division of the High Court granted an injunction, prohibiting HMRC from advertising the petition or proceeding further on the petition. On 10 October 2011, the first winding up petition was formally dismissed by the Companies Court. On 25 November 2011, the Companies Court ordered HMRC to pay the Appellant's costs of the application.

50. HMRC then commenced another winding up petition on 25 November 2011 (the "second winding up petition") without giving notice to the Appellant that the petition had been brought. This second petition was advertised, and as a result the

Appellant's banking facilities were frozen. Ultimately the Appellant and HMRC agreed that this winding up petition be stayed behind the Appellant's present appeal to the Tribunal.

51. The registered address of the Appellant company is King & King at the Roxburghe address. The Appellant is represented by Rainer Hughes (formerly Anami Law) whose address is the "Griffins" address. Letters from HMRC addressed to the "Ganrids" address were not received by the Appellant.

52. The Appellant was corresponding with HMRC in relation to the information requested in the 11 September 2008 HMRC letter. There appears to have been some confusion between King & King and HMRC. King & King suggested that HMRC make an appointment to inspect the paperwork, but unfortunately the proposed meeting was cancelled. It was subsequently suggested again by King & King that another appointment should be arranged by HMRC, but no reply was received to this letter. HMRC then wrote to King & King on 4 July 2011, stating that a winding up petition would be brought if payment was not made within 7 days. Despite the 19 July 2011 letter from Rainer Hughes, HMRC then brought the first winding up petition.

53. HMRC have been aware that the Appellant disputes the assessments and that the assessments that they seek to rely on have not been served on the Appellant. This was also made clear in the litigation relating to the winding up petitions. It is clear from the correspondence that the matter was not concluded, that HMRC wanted to inspect the paperwork which it had not done, that HMRC was seeking to rely on documents which had not been served, that HMRC has sought to rely on figures which it knows are incorrect (at least in relation to a property known as River Road, which HMRC has admitted are incorrect as the Appellant never owned that property), and that the Appellant had had to engage unnecessarily in litigation with HMRC.

Legislation

54. Section 72(2) of the Value Added Tax Act 1994 ("VATA") provides:

> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person—
>
> (a) as being a repayment or refund of VAT, or
>
> (b) as being due to him as a VAT credit,
>
> an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.

55. Section 83 VATA provides for an appeal to the Tribunal against certain assessments to VAT or against the amount of such assessments. It is not in dispute that the assessments in this case fall within that provision.

56. Section 83G VATA provides:

> (1) An appeal under section 83 is to be made to the tribunal before—
>
> (a) the end of the period of 30 days beginning with—
>
> (i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or
>
> (ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision, or
>
> (b) if later, the end of the relevant period (within the meaning of section 83D).
>
> (2) But that is subject to subsections (3) to (5).
>
> (3) In a case where HMRC are required to undertake a review under section 83C—
>
> (a) an appeal may not be made until the conclusion date, and
>
> (b) any appeal is to be made within the period of 30 days beginning with the conclusion date.
>
> (4) In a case where HMRC are requested to undertake a review in accordance with section 83E—
>
> (a) an appeal may not be made—
>
> (i) unless HMRC have decided whether or not to undertake a review, and
>
> (ii) if HMRC decide to undertake a review, until the conclusion date; and
>
> (b) any appeal is to be made within the period of 30 days beginning with—
>
> (i) the conclusion date (if HMRC decide to undertake a review), or
>
> (ii) the date on which HMRC decide not to undertake a review.
>
> (5) In a case where section 83F(8) applies, an appeal may be made at any time from the end of the period specified in section 83F(6) to the date 30 days after the conclusion date.
>
> (6) An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so.
>
> (7) In this section *"conclusion date"* means the date of the document notifying the conclusions of the review.

57. Section 98 VATA provides:

> Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person

> or his VAT representative at the last or usual residence or place of business of that person or representative.

58. Section 7 of the Interpretation Act 1978 provides:

> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

59. Rule 5(3)(a) of the Rules of the First-tier Tribunal (Tax Chamber) provides that the Tribunal may, by direction:

> … extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit.

The Appellant's case

60. In relation to the issue of whether decisions 2, 3, 4 and 8 were validly notified to the Appellant, the Appellant's arguments were as follows.

61. The purpose of service is not just to bring a matter to a person's notice but to start the running of time limits for procedural steps. Because service has important legal consequences, the requirements for service must be complied with strictly, bearing in mind that the time limit for appealing against a VAT assessment is very short and the amounts at stake may be very large. There should be exacting requirements for proof (as in the case of allegations of fraud). This consideration is underscored by Article 6 of the European Convention on Human Rights, although the Appellant does not rely on that provision directly. Reliance was placed on *Mucelli v Government of Albania* [2009] UKHL 2, [2009] 1 WLR 276 at [5] and [7]; *Commissioners of Inland Revenue v Collier* [2005] EWHC 2659 (QB).

62. Section 98 VATA, read with s 7 of the Interpretation Act, is a statutory codification of the requirements that must be met where post is chosen as the means to effect service. For valid postal service on a person, s 98 VATA requires that (1) the document must be sent by post; (2) it must be addressed to that person or that person's VAT representative; and (3) it must be sent to the person's last or usual residence or place of business. Additionally, s 7 of the Interpretation Act requires that (1) the document must be "properly" addressed; (2) the letter must be sent by pre-paid postage; and (3) it must be posted. Thus, if a document is incorrectly addressed, it has not been validly served as it does not meet these requirements, and that would be so even if the addressee actually received the document. This is not just a procedural nicety: absent proper service, time does not begin to run. There is a difference between the concept of a person being served with or notified of a document on the one hand, and of simply being "on notice" of the document on the other. Statutory time limits can not be cut down by provisions of the Civil Procedure Rules such as

those dealing with deemed service. The burden of proof is on HMRC, as the party contending that there has been service, to prove that these requirements for service have been met.

63. Thus, HMRC must prove that the notice was posted. HMRC should be expected to do so by presenting evidence, such as a witness statement as to the relevant HMRC procedures for processing outgoing mail. In deciding whether this has been proved, the Tribunal may be entitled to draw inferences from the evidence, but is not entitled to make assumptions. It cannot assume from the fact that a document is in the HMRC file that it was in fact posted.

64. HMRC must also prove that the notice was "properly" addressed within the meaning of s 7 of the Interpretation Act. The Appellant accepts that decisions sent to the "Griffins" address or the "Griffin" address were validly served pursuant to s 98 VATA, as that address was the Appellant's usual place of business. A letter could be considered properly addressed if there is some extremely minor error in the address which no reasonable person could think might influence it being delivered to the intended recipient (such as writing "Griffin" rather than "Griffins"). Writing "Ganrids" rather than "Griffins" is not such a *de minimis* error, and the notices sent to the "Ganrids" address were not "properly" addressed for purposes of s 7 of the Interpretation Act. In any event, an internet search reveals that there are at least 6 properties sharing the same postcode as the "Griffins" address, and it cannot be assumed that a letter addressed to the "Ganrids" address would be delivered to the Appellant merely because the correct postcode was used.

65. Letters to Anami Law and to King & King stated that they were enclosing copies of correspondence, but do not identify precisely which documents they were enclosing or contain the abbreviation "enc", and in the circumstances it cannot be accepted that they enclosed any documents at all. In any event, to the extent that those letters state that they are enclosing "correspondence", it cannot be accepted that they enclosed copies of the assessments against which the Appellant now seeks to appeal: there is a difference between correspondence and an assessment. Furthermore, there is no evidence that Anami Law was entitled to accept service on behalf of the Appellant. The form of authority signed by Mr Mann on 21 September 2009 is ambiguous as to whether it authorises Anami Law to act on behalf of the Appellant company, or only on behalf of Mr Mann personally, and says that the authority is limited to acting "in relation to the demand of immediate payment" by HMRC. Although decision 8 was sent to the registered address of the Appellant, it was not addressed to the Appellant but to King & King. There is no evidence that King & King were authorised to accept service on behalf of the Appellant.

66. Decision 3 is also not valid because it is contradictory upon its face. The first page of that decision states that £5,666.66 is the "net VAT to be reclaimed by you", while page 2 of that decision states that £5,666.66 is "the net amount … properly payable". To be valid, a decision must be internally consistent and it must be plain upon its face what it intends to convey to the recipient.

67. Decisions 5 and 6, which are misdeclaration penalties, are parasitic on the assessment in Decision 4, and cannot be understood in the absence of Decision 4. If Decision 4 was not properly served, Decisions 5 and 6 should be set aside.

68. The Companies Court, in granting the injunctions that it did, was satisfied that a good arguable case existed to the effect that service had not been effected. Pragmatism dictates that appeals against the assessments that were served should also be heard, as these appeals are closely linked.

69. To the extent that there was valid service, the Tribunal should exercise its discretion to allow a late appeal. Although an appeal was not brought within 30 days of service of Decision 9, at the time of service and of filing the notice of appeal in this case, the Court of Appeal had not yet decided *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2013] EWCA Civ 1537, and at that time an extension would ordinarily have been granted.

70. The purpose of revenue law is to arrive at a situation where the correct amount of tax is paid; no more, no less. The Appellant's defence to the assessments was set out in a letter to HMRC from King & King dated 9 March 2010. Thereafter King & King continued to engage with HMRC in relation to the matter. The amount at stake in the appeal is very large. The fact that the Appellant believed that valid service of the assessments had not been made weighs in favour of allowing a late appeal. The proceedings in the High Court were stayed on the basis that the Appellant was pursuing appeals in the Tax Tribunal. It is beyond credence that HMRC would have agreed to such a consent order if it considered that the appeals should not be heard by the Tribunal. There is no prejudice to HMRC. HMRC has all of the relevant documents in its possession, as they were uplifted when a search warrant was executed in December 2010. In ongoing litigation, an injunction has been issued preventing HMRC from looking at the documents, but the Appellant could agree to the injunctive relief being lifted to the extent required.

The HMRC case

71. In relation to the issue of whether decisions 2, 3, 4 and 8 were validly notified, the HMRC arguments were as follows.

72. Section 73(2) VATA required HMRC to "notify" the assessments to the Appellant, not to "serve" them.

73. HMRC records do not show that any correspondence addressed to the "Ganrids" address was ever returned undelivered. HMRC contend that they were delivered. VAT returns for periods 09/08, 12/08 and 03/09 which were sent to the Ganrids address were clearly received as they were completed, signed and returned by the Appellant. Even if correspondence to the "Ganrids" address was not delivered, any irregularity can be cured by subsequent formal notification of the assessment: *Grunwick Processing Laboratories Ltd v Customs and Excise Commissioners* [1986] STC 441. In this case, copies of the documents were sent to Anami Law in

September 2009, and then at the request of Anami Law were sent to the Appellant's registered address on 9 November 2009, and this constituted formal notification.

74. In relation to whether permission to bring a late appeal should be granted as a discretionary matter, the HMRC arguments were as follows.

75. The burden is on the Appellant to establish the existence of exceptional circumstances. The normal 30 day statutory time limit for appealing has an important purpose in producing finality. HMRC letters dated 11 September 2008 and 24 October 2008 stated that in the absence of requested information, reclaimed input tax would not be allowed. By the latest, the Appellant was aware of the assessments by October 2009 when copies of correspondence were sent to Anami Law, who responded on 15 October 2009 that they would appeal to the Tribunal if the assessments were not immediately withdrawn. No reason has been given for the two and a half year delay after October 2009 before the Appellant brought this appeal. Indeed, when the Appellant instituted this appeal in February 2012, it did not include all of the challenged decisions, and some decisions were only challenged in the subsequent supplemental grounds of appeal.

76. The Appellant does not dispute that some of the assessments were validly served and the Appellant ignored them and did not appeal. HMRC is entitled to conclude that those matters are now closed.

77. Reliance was placed on *Data Select v HMRC* [2012] UKUT 187 (TCC) ("*Data Select*"). It is assumed that there is a loss or injury to the Appellant if not able to pursue the appeal. However, the extensions of time requested in this case are for periods between 8 months and 40 months. This would be contrary to the public interest in the finality of litigation. There was an intentional failure to comply with the time limit and no good explanation for the failure, or for the failure to make an application for a late appeal much more promptly. There is prejudice to HMRC in having to reopen the claim after a lengthy period of time, as HMRC has effectively "closed their books".

The Tribunal's findings

78. The Appellant has accepted that Decisions 1, 7 and 9 were validly served on the Appellant. The first question to be determined by the Tribunal is whether the other decisions have been validly notified.

79. The Tribunal notes that the requirement of s 72(2) and 83G(1)(a)(i) VATA is that the assessments in question must be "notified" to the Appellant, rather than "served" on the Appellant. Furthermore, the effect of the latter provision is that the 30 day time limit for appealing runs not from the date of service or notification of the assessment, but from "the date of the document notifying the decision to which the appeal relates". In most cases, this will mean that the time limit for appealing is in practice less than 30 days where notification takes place by post, given that postal delivery will normally occur one or more days after the date of the document giving notice. In some cases, postal delays may mean that delivery does not occur until after

the 30 day time limit has already expired. In such a case it would seem almost inevitable that the Tribunal would exercise its discretion under s 83G(6) VATA to extend the time limit for appealing, provided that an appeal is brought promptly after notification is received. However, this demonstrates that it is not the actual receipt of notification by an appellant that formally sets the clock running for the 30 day period for bringing an appeal.

80. Section 98 VATA provides that notification *may* be served, given or made "by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative". The word "may" in this provision indicates that it is permissive rather than mandatory. The method set out in this provision is not the only method by which notification can be given. Contrary to what the Appellant argues, the Tribunal finds that it is also not the only method by which notification may be given *by post*. Indeed, the Appellant appears to accept that postal service to a company's registered office address could be good service, even if that address is not the company's usual place of business, so that such service would not be in accordance with the strict wording of s 98 VATA. The Tribunal considers that, depending on the circumstances of the case, there may be other addresses to which notification could validly be sent by post to a company, such as to a firm of solicitors or accountants acting for the company, or possibly to the home address of a relevant company officer. The Tribunal considers that proper notification does not depend on strict compliance with specific formalities. Notification given in accordance with s 98 VATA *will* suffice. Notification given by any other means *may* suffice, depending on the circumstances.

81. The Tribunal considers that the question of whether notification has been given is one of fact which, like any other question of fact, must be determined by the Tribunal on the evidence before it on a balance of probability. Where HMRC can establish that s 7 of the Interpretation Act has been complied with, there will be a presumption that notification has been given which the Appellant then has the burden of rebutting.

82. The Tribunal finds it convenient to begin with a consideration of whether Decisions 2, 3 and 4 were notified to the Appellant in October 2009 (on the basis that they were sent to Anami Law) or November 2009 (on the basis that they were sent to King & King).

83. The Tribunal finds on the evidence before it on a balance of probability that the letter of authority dated 21 September 2009 authorised Anami Law to act for the Appellant generally in relation to Decisions 1 to 7 (Decisions 8 and 9 having at that time not yet been given). The letter of authority is signed by the Appellant company's sole director. It specifically states the Appellant company's VAT number. The Appellant argues that the words "in relation to the demand for immediate payment" are ambiguous. However, the letter from Anami Law dated 1 October 2009 states that "I am instructed to appeal on behalf of my client once I have the necessary instructions". The subsequent letter from Anami Law dated 15 October 2009 states that unless the assessments were immediately withdrawn, "we" (that is, Anami Law), would proceed with an application to the Tribunal. The Tribunal is satisfied that

Anami Law had authority to act for the Appellant in relation to the assessments generally, including in relation to a Tribunal appeal against those assessments. With that authority, Anami Law requested in their letter of 1 October 2009 that copies of the assessments be provided to Anami Law. The Tribunal finds that in the circumstances, the sending of copies of the assessments to Anami Law constituted the giving of notification to the Appellant.

84. The Appellant argues that there is no evidence that the assessments were in fact sent to Anami Law. The Appellant argues that the 2 October 2009 letter from HMRC states only that it is sending "correspondence" to Anami law. The Appellant also argues that there is no evidence that the 2 October 2009 letter from HMRC in fact contained any enclosures at all. However, the Tribunal is persuaded that the 2 October 2009 letter from HMRC did contain enclosures, since the 15 October 2009 letter from Anami Law refers to the "correspondence" it had received from HMRC. Furthermore, the Tribunal is persuaded that this "correspondence" included Decisions 1-7. The sequence of the relevant exchanges was as follows. In a letter to Anami Law dated 22 September 2009, HMRC provided a breakdown of the assessments to date. Anami Law responded on 1 October 2009 that they had not received the assessments referred to in the breakdown. HMRC responded in the letter dated 2 October 2009, stating that "copies of earlier correspondence" were being enclosed with that letter. Anami Law responded to this letter on 15 October 2009. In this letter, they did not state that they had still not received the assessments. If they had not, it would be expected that they would have so stated. Rather, this response simply requested "the immediate withdrawal of all assessments", failing which there would be an appeal to the Tribunal, and claimed that the correspondence had been sent by HMRC to the wrong address. Furthermore, the letter from Anami Law states specifically that the copy correspondence that they had received from HMRC was from the period between 11 September 2008 to 21 August 2009, which covers the period of Decisions 1-7, the last date being the date of Decision 7 itself.

85. The Tribunal also finds on the evidence before it on a balance of probability that King & King were authorised to act for the Appellant generally in relation to Decisions 1 to 7, and subsequently in relation to Decision 8 when it was given. HMRC wrote to King & King on 9 November 2009, stating that they were enclosing copies of the assessment documents. King & King thereafter corresponded substantively with HMRC in relation to the assessments. The Tribunal considers that in the circumstances, sending copies of the assessments to King & King constituted the giving of notification to the Appellant.

86. The Tribunal thus finds that all of Decisions 1-7 were notified to the Appellant by October 2009, and that they were again notified to the Appellant in November 2009. The Tribunal finds that Decision 8 was validly notified to the Appellant on 16 March 2010 by sending it to King & King, and the Appellant does not dispute that Decision 9 was validly notified on 17 October 2011. The Appellant has not disputed that Decisions 1 and 7 had already been earlier notified to the Appellant.

87. The Tribunal finds it unnecessary to decide whether Decisions 2, 3 and 4, addressed to the Ganrids address, were in fact received by the Appellant at the time of those decisions.

88. The result of the above findings is that the Appellant's objection in relation to Decisions 5 and 6 (paragraphs 5 and 67 above) cannot be sustained at least from October 2009.

89. The Tribunal also does not accept the complaint in relation to Decision 3 (paragraph 66 above). The error in the assessment is one that should not have been made. However, in the circumstances, at the time that this assessment was notified to the Appellant by sending it to Anami Law and to King & King, there can have been no confusion on anyone's part that this assessment indicated an amount owing by the Appellant, not an amount to be repaid to the Appellant.

90. The question then is whether the Tribunal should exercise its discretion, whether under s 83G(6) VATA or rule 5(3)(a) of the Tribunal's Rules, to permit a late appeal.

91. In *Data Select*, it was said by the Upper Tribunal at [34]-[37] that:

> 34. ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.
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> 35. The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker* [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see *Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc* [2007] STC 1196.
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> 36. I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [23]-[24] which is in line with what I have said above.
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> 37. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters

> listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision.

92. The Tribunal takes into account all of the matters identified in this quote, including the public interest in the finality of tax matters and in the finality of litigation, and that time limits for bringing appeals exist for a good reason. Indeed, that can be considered the starting point of any consideration of an application under s 83G(6). It is for the applicant to show reasons why an application to appeal out of time should be granted. The burden is not on HMRC to establish reasons why the extension should not be granted. However, the strength of the considerations that must be established by the Appellant to justify permission being granted will depend on the strength of the countervailing considerations militating against the grant of permission.

93. The Tribunal finds that each application to appeal out of time turns on its own particular facts and circumstances. The Tribunal will consider the circumstances as a whole, and not merely the soundness of the reasons for the lateness of the appeal.

94. As to Decisions 1 to 7, these had all been notified to the Appellant by October 2009 at the latest (and some of them significantly earlier), yet an appeal was not brought until February 2012, some two years and 4 months later. Given that the time limit is 30 days, this is an extraordinary delay.

95. The Tribunal takes into consideration that if permission to bring a late appeal against Decisions 1-7 is not granted, in that the Appellant will lose the opportunity to challenge assessments totalling some £150,000. The Tribunal takes into account the significance of the amount at stake. The Tribunal does not prejudge the merits of any appeal that might be brought.

96. The Tribunal accepts that if permission for a late appeal is granted, there will be prejudice to HMRC in having to litigate the matter after such a long period of time. Submissions were made by the Appellant that HMRC had all relevant documents in its possession as a result of the execution of a search warrant (paragraph 70 above). The Tribunal is not persuaded that there is sufficient evidence before it to support a conclusion that there will be no prejudice to HMRC in having to litigate the matter after such a delay.

97. The Tribunal has considered the suggestion that a consent order was entered into in the proceedings before the Companies Court on the understanding that these appeals would be heard by the Tribunal. The Tribunal is not persuaded on the material before it that there was an understanding by HMRC when entering into the consent order that permission would necessarily be granted by the Appellant for a late appeal. It is understandable that the parties in the proceedings before the Companies Court might wish to await the outcome of any proceedings before the Tribunal, which would necessarily commence with consideration of an application for a late appeal. However, that is not to prejudge the outcome of any proceedings before the Tribunal.

98. The Tribunal is not persuaded that the Appellant has given any satisfactory reason for such a long delay. In particular, it is not persuaded by the suggestion that there was ongoing engagement between HMRC and Anami Law and/or King & King that was of a nature to justify permission for a late appeal.

99. For the reasons above, the Tribunal is satisfied that the assessments were sent to Anami Law on 2 October 2009. Anami Law's response was to state that the assessments had to be sent to the Appellant's registered office. The Tribunal is not persuaded that Anami Law, who acted for the Appellant, had any legitimate basis for considering that they did not need to commence a Tribunal appeal until the assessments were sent to the Appellant's registered office. In their letter of 1 October 2009, Anami Law had clearly said that they had been instructed to bring a Tribunal appeal once HMRC had provided the documents. They cited no legal provision in support of the suggestion that the documents had to be sent to the Appellant's registered office, and that suggestion is inconsistent with s 98 VATA which the Appellant now invokes.

100. When the assessments were sent to King & King on 9 November 2009, it took them until 9 March 2010, some 4 months, to provide a first response, after being chased by HMRC three times. This engagement eventually petered out. On 15 June 2010, HMRC sent a substantive response to King & King. There was no further substantive reply to this. HMRC chased King & King on 15 September 2010, by which time a further 3 months had passed. On 17 September 2010, King & King said that they were preparing a reply. In a letter dated 13 October 2010, they then admitted that this was in fact a mistake, and instead invited HMRC to make an appointment to view the paperwork. After HMRC sought to make such an appointment, King & King then informed them on 22 October 2010 that in fact they had no paperwork for the company.

101. On a number of occasions throughout this period, HMRC warned the Appellant that it intended to bring winding up proceedings (paragraphs 31, 33 and 37 above). On 15 November 2010, HMRC expressed their frustration to the Appellant and said that no further time would be spent dealing with this matter.

102. In a letter dated 19 July 2011, Rainer Hughes (formerly Anami Law) took the position that no assessments and correspondence had been received by the Appellant. That position is difficult to understand, given that the Appellant accepts in this appeal that Decisions 1 and 5-7 were received by the Appellant at the Griffins address at time

of those decisions. The Tribunal has found that all of Decisions 1-7 were also received by Anami Law in October 2009, and were thereby notified to the Appellant. It has been argued that the Appellant at this point genuinely believed that valid service of Decisions 2-6 had still not yet taken place, and that this is a factor that weighs in favour of granting permission for a late appeal. The Tribunal is not persuaded by this. Decisions 1-7 were sent to Anami Law in October 2009, and to King & King in November 2009 after Anami Law had raised an issue as to the correct address to which they considered the decisions had to be sent. If the Appellant or its advisers did not think that this issue had been rectified to their satisfaction in October-November 2009, they could have raised the matter much earlier than 19 July 2011.

103. The Tribunal is thus not satisfied that the Appellant was in the period from October 2009 "engaging" with HMRC in any kind of way that would weigh in favour of granting a late appeal after the passage of so much time.

104. Having considered all of the circumstances as a whole and having weighed the various considerations, the Tribunal decides not to allow a late appeal in respect of Decisions 1-7.

105. For similar reasons, the Tribunal has decided not to allow a late appeal in respect of Decision 8. The decision dates from March 2010. The Tribunal finds that it was validly notified by sending it to King & King. The delay is less than in the case of Decisions 1-7 but still substantial.

106. As to Decision 9, this dates from October 2011. The amount is substantial: over £50,000. The period of delay is much shorter, but still significant.

107. The Tribunal is not persuaded that any satisfactory reason has been given for this delay, or indeed any reason at all. At the time of that decision, the Companies Court had already dismissed the first winding up petition. By the time that the second winding up petition was brought, the 30 day time period for appealing against Decision 9 had already passed, and in any event, there is no reason why the Appellant should await the bringing of a winding up petition before seeking to appeal against the decision.

108. However, the Tribunal takes into account that permission to bring a late appeal against Decision 9 was granted in the April 2013 decision (see paragraph 4 above). As has been noted, the whole of that earlier determination was set aside, so that the Tribunal is called upon to determine the matter *de novo*. Nevertheless, the earlier determination was set aside on the ground that the Appellant had not been given notice of and was not represented at the hearing. The Tribunal considers that it would be unfair if the Appellant was placed in any worse position than he was at the time of the first determination, absent some new material that would justify a different conclusion. The Tribunal therefore decides to grant permission to bring a late appeal in relation to Decision 9.

109. The Tribunal is satisfied that Decision 9 has been included in the Appellant's supplemental grounds of appeal, and does not have the concerns expressed in the April 2013 decision at [41].

Conclusion

110. For the reasons above, the application to bring a late appeal is allowed in relation to Decision 9, but is otherwise refused.

111. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 3 June 2014