[2018] UKFTT 364 (TC)

TC06578

Appeal number: TC/2010/05696 and TC/2012/10690

PROCEDURE - Application for leave to appeal out of time – whether reasonable excuse – no – application for extension of time refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

IAN ELDER **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in Edinburgh on Friday 15 June 2018 having received written submissions from

Mr Lone of RHK Chartered Tax Advisers for the Appellant

Ms Arden, of HMRC's Solicitor's Office for the Respondents

DECISION

Introduction

1. The issue for the Tribunal is the application lodged with the Tribunal by the appellant's agents on 2 March 2018 seeking an extension of time to lodge an application for costs in terms of Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules").

2. The application for the extension of time is in terms of Rule 5(3)(a) of the Rules and is necessary as the final decision in these appeals was released on 5 April 2017 and Rule 10(4)(a) of the Rules reads:-

> "10.— Orders for costs
>
> (4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—
>
> (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or".

3. HMRC vigorously oppose the application for the extension of time as also the application for costs.

4. I issued Directions on 16 April 2018 and both parties confirmed that in terms of Rule 29 of the Rules, they wish this application to be determined on the basis of the submissions which were lodged by the appellant on 25 May 2018 and by HMRC on 29 May 2018. In terms of Rule 29(1)(b) of the Rules, I confirm that I am able to decide the matter without a hearing.

The background to this application

5. As I indicate above, the decision in these appeals ("the Decision") was issued on 5 April 2017. On 17 January 2018, the appellant's agents wrote informally to the Tribunal asking whether an application for costs could be considered, if submitted. On 16 February 2018 HMRC vigorously objected to that suggestion on the basis that any application would be substantially out of time and requested that, should the appellant intend to proceed with the costs application, a formal out of time application should be submitted. That application was submitted on 2 March 2018.

The appellant's arguments other than on the law

6. The appellant argued that:-

> (1) HMRC sought leave to appeal the Decision on 31 May 2017 and the Tribunal refused permission on 4 August 2017. The appellant's agents were not certain whether or not the Upper Tribunal would give leave to appeal and therefore waited for what they considered to be a reasonable amount of time for "certainty".

(2) The appellant's agents were not aware of the provisions in Rule 10(4) of the Rules since they had limited experience and knowledge of making a costs claim.

(3) A previous costs application in relation to an earlier hearing had been successful but that had been dealt with by the appellant's then legal representative.

(4) The commencement date of 28 day deadline was not clear due to the fact that no confirmation had been received to the effect that HMRC would not be submitting an appeal.

(5) Over the eight years of these appeals, the appellant had complied with all previous time limits.

Discussion on the Law

7. As I indicate above, in terms of Rule 5(3)(a) of the Rules, the Tribunal has discretion as to whether to extend any time limit imposed by the Rules. The parties' Submissions were lodged with each other and the Tribunal before the release of the decision of the Upper Tribunal in *Martland v HMRC*[1] ("Martland") on 1 June 2018. *Martland* reviewed many of the cases to which the parties have referred and the relevant considerations to be addressed when considering application for extensions of time limits.

8. I decided not to seek further Submissions from parties since the impact of *Martland* is to consolidate the plethora of cases on the subject. Whilst restating the applicable principles, Judges Berner and Poole have simplified the approach that the FTT should take when considering applications for extension of time.

9. The relevant provisions for the purposes of this application read:

> "43. …The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for 'litigation to be conducted efficiently and at proportionate cost', and 'to enforce compliance with rules, practice directions and orders'. We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to 'consider all the circumstances of the case'.
>
> 44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton:*
>
> > (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being 'neither serious nor significant'), then the FTT 'is unlikely to need to spend much time on the second and third stages' – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

[1] [2018] UKUT 178 (TCC)

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of 'all the circumstances of the case'. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:

> 'If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them.'

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that 'being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules'; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

What was the length of the delay?

10. Although the appellant's representative argues that the delay is four months and two weeks, HMRC correctly state that the delay was almost 10 months. The Decision was issued on 5 April 2017. As can be seen from paragraph 2 above any application for costs should have been made by 3 May 2017 being 28 days after the Decision was released. The informal approach on 17 January 2017 cannot be considered as a valid application for costs since it was not in any sense compliant with Rule 10(3) of the Rules which reads:

> "(3) A person making an application for an order under paragraph (1) must—
>
> (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
>
> (b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so."

It simply asked if an application would be "considered". Incidentally, the application eventually submitted still does not include a detailed schedule of costs.

11. Since the formal application for costs was dated 2 March 2018, the delay is therefore 303 days which, in the context of a 28 day time limit cannot be considered as anything other than a very serious and significant delay. As Judges Berner and Falk said at paragraph 96 of *Romasave (Property Services) Limited v HMRC*[2], which was endorsed in *Martland,:*

> "… a delay of more than three months cannot be described as anything but serious and significant."

12. I assume that the appellant's agent's calculation of four months and two weeks is predicated on the timing being from the date that the Tribunal refused permission for HMRC to appeal on 4 August 2017 and the informal approach in January 2018. I have explained why the end point must be 2 March 2018 as that was when a vaguely valid application was lodged.

13. The Upper Tribunal is quite distinct from the First-tier Tribunal, as is the Court of Appeal or the Supreme Court had the appeals proceeded further. Whether HMRC appealed or not has no impact on the date of the Decision in the First-tier Tribunal. That can only be 5 April 2017.

What were the reasons for the delay?

14. The primary reasons for the delay appear to be that the appellant's agent was unaware of the time limit and the appellant could not afford specialist representation.

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[2] 2015 UKUT 254

The explanations offered really amount to an argument that the appellant, relying on his agents, was not aware of the time limits.

15. The appellant and his agents should have been aware of the Rules not least because there is explicit reference in the Decision to the Rules on numerous occasions and at paragraph 37 we pointed out that the agents were not conversant with the Rules or Tribunal procedure. That alone should have alerted them to the need to check the position. Ignorance of the law in this instance does not amount to a reasonable excuse for the delay.

16. Lack of funds for specialist representation does not assist the appellant as can be seen from paragraph 47 of *Martland*. Tribunals are designed to be used by unrepresented appellants. In this instance the appellant is represented and by the Personal Tax Manager of a firm of Chartered Tax Advisors. The Rules are readily accessible by simply googling "Tax Tribunal Rules". As can be seen they are written in relatively uncomplicated English and they are certainly less complicated than the tax law that was the subject matter of these appeals.

Evaluation of all of the circumstances of the case

17. None of these reasons for the considerable delay are good grounds for departing from the need "to enforce compliance with rules" (see paragraph 43 of *Martland)* but that must be weighed in the balance with the prejudice that might be caused to parties by granting or refusing an extension of time.

18. Clearly if an extension of time is granted, the appellant would be placed in a position whereby there is the possibility that he might be able to recover what the agents say is a substantial sum of money for costs. On the other hand there would be significant prejudice to HMRC. They had cause to believe that this matter had long since been closed. They would be placed in a position where they would have to devote time and resource to assessing and defending an application for costs that has not, even as yet, been competently lodged.

19. If an extension of time is not granted, clearly the appellant might be significantly prejudiced because he would be unable to pursue the costs application. As far as HMRC are concerned there would be no prejudice since the matter would be at an end.

20. In looking at the merits of the application for costs I note that the appellant argues that the application for costs is well founded because HMRC acted unreasonably in defending the proceedings because their case was fundamentally flawed in that they had issued "nil assessments".

21. The first point that I would make in that regard is whilst the agents cited Judge Cannan in *Elder v HMRC*[3] as stating that "At first sight it is surprising that those assessments showed nil tax due'". They do not go on to confirm that, as Judge Cannan pointed out at

[3] 2014 UKFTT 728 (TC)

paragraph 19, the question of whether nil assessments were valid was one of a number of issues which the appellant sought to have determined as preliminary issues. At paragraph 20 he went on to say that:

> "20. Consideration should be given by the parties, and in due course by the Tribunal as to whether in the present circumstances of these appeals it would be better and more expeditious to determine all issues at the final hearing of the appeals. I have already indicated to the parties a view that some of these issues will require evidence and Findings of Fact to be made".

22. As can be seen from the Decision and, in particular, at paragraphs 232 *et seq* the Tribunal did decide that nil assessments could not make good a loss of tax. However, that is not the issue. The Upper Tribunal in *Distinctive Care Limited*[4] outlined the approach to whether a party has acted unreasonably at paragraphs 44-46 which read as follows:-

> "44. In *Market & Opinion Research International Limited v HMRC* [2015] UKUT 0012 (TCC) ('*Mori')* at [22] and [23], the Upper Tribunal endorsed the approach set out by the FTT in that case to the question of whether a party had acted unreasonably. That approach could be summarised as follows:
>
> (1) the threshold implied by the words 'acted unreasonably' is lower than the threshold of acting 'wholly unreasonably' which had previously applied in relation to proceedings before the Special Commissioners;
>
> (2) it is possible for a single piece of conduct to amount to acting unreasonably;
>
> (3) actions include omissions;
>
> (4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct;
>
> (5) there is no single way of acting reasonably, there may well be a range of reasonable conduct;
>
> (6) the focus should be on the standard of handling the case (which we understand to refer to the proceedings before the FTT rather than to the wider dispute between the parties) rather than the quality of the original decision;
>
> (7) the fact that an argument fails before the FTT does not necessarily mean that the party running that argument was acting unreasonably in doing so; to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary; and
>
> (8) the power to award costs under Rule 10 should not become a 'backdoor method of costs shifting'.
>
> 45. We would wish to add one small gloss to the above summary, namely that (as suggested by the FTT in *Invicta Foods Limited v HMRC* [2014] UKFTT 456 (TC) at [13], questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight.

[4] 2018 UKUT 155 (TCC)

> 46. In assessing whether a party has acted unreasonably, this Tribunal in *MORI* went on to say this (at [49]):
>
> 'It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. That is an imprecise standard, but it is the standard set by the statutory framework under which the tribunal operates. It would not be right for this Tribunal to seek to apply any more precise test or to attempt to provide a judicial gloss on the plain words of the FTT rules.'"

23. The question of nil assessments was by no means the only issue for the Tribunal and it was not the primary reason that the appeals succeeded to the extent that they did. The main reason that the appeals succeeded was because, until the hearing, HMRC and the appellant had focussed on a company controlled by the appellant but which ultimately proved to be the wrong company. This can be seen from paragraphs 202, 203, 209 and 225 :

> "202. It is only in the Closing Submissions that, for the first time, and unsurprisingly in light of the oral evidence adduced, it was argued at paragraph 17 that 'The Appellant contends that the origins of funds transferred were in relation to loans from Hire Services Ltd and not Topcars (Taxis) Ltd.'. That is in stark contrast with the tenor of all of the previous correspondence and meetings and indeed the original Notice of Appeal which stated that '...Our client has explained that the monies deposited in this period were from personal funds and from loans from his employer.' Ostensibly, he has never been employed by Hire, albeit he ran that company.
>
> 203. Further, for most of his oral evidence Mr Elder was clear that the loans were from the Drivers Agency Account. Since that is in the name of Topcar it is obvious why HMRC took the stance that they did.
>
> 209. Undoubtedly, it was tax evasion on a large scale but, very reluctantly, we have to find that the sums not paid out of the Drivers Agency Account were in fact due to Hire and should have been reflected in the accounts for Hire. Topcar were at all times acting as agent for an undisclosed principal.
>
> 225. Shortly put, it was the introduction of Hire and the failure to remit funds to Hire, and or the failure by Hire to draw down those funds, which allowed the manipulation of the funds in the Drivers Agency Account. Regrettably that only became apparent on a close examination of the evidence, and in particular Mr Elder's oral evidence, instead of many years ago."

24. I annex at Appendix 1 a copy of the decision refusing HMRC leave to appeal and draw attention to paragraphs 11, 12, and 17 and 24. The first two deal with nil assessments but I make it explicit at 17 and in particular at 24 ,which reads:

> "24. The key reason that I decline permission to appeal to the Upper Tribunal is because, **on the facts found**, there is no interplay between discovery assessments and Regulation 72 Directions…",

that the appeals succeeded to the extent that they did because of the findings in fact. Some of HMRC's arguments (Regulation 72) on nil assessments could not be considered by the Tribunal because of the factual background which only became apparent at the hearing, and only because of the line of questioning from the Tribunal.

25. In summary, looking at paragraph 44(7) of *Martland* read in conjunction with paragraph 45, I am of the view that had the facts been different, it may well be that HMRC would have been able to appeal the Decision. Judge Cannan declined to deal with the question of nil assessments as a preliminary matter. I considered that it was at least arguable for HMRC. The submissions from HMRC were lengthy. In the words of paragraph 46 of *Martland* (see paragraph 9 above) I am not persuaded that in relation to the application for costs "the merits … are on the face of it overwhelmingly in…" Mr Elder's favour. On the contrary, it was only when the factual basis became apparent towards the end of the hearing, that a large part of HMRC's argument became irrelevant. They could not have anticipated Mr Elder's *volte face* (see paragraph 23 above). If the facts had been different, then the issue of nil assessments and Regulation 12 might now have been before the Upper Tribunal.

26. Therefore my view of the merits of the application is that it is not very likely at all that I would find that HMRC acted unreasonably in defending the appeals.

Decision

27. I have weighed every relevant circumstance in the balance and for the reasons given I decline to exercise any discretion and the application to extend the time for lodging an application for costs is refused.

28. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 02 JULY 2018

APPENDIX 1

Appeal number: TC/2010/05696 and TC/2012/10690

FIRST-TIER TRIBUNAL
TAX CHAMBER

DECISION
ON AN APPLICATION FOR PERMISSION TO APPEAL
IN THE CASE OF

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

- and -

IAN ELDER **Respondents**

29. I considered in accordance with Rule 40 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 whether to review the decision in these appeals ("the decision") but decided not to undertake a review as I was not satisfied that there was an error of law in the decision.

30. However, there are clerical errors on pages 5, 8, 10, 12, 14, 34 and 35 and the Appendix. These have now been corrected in terms of Rule 37 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and the amended decision is annexed hereto.

31. For the avoidance of doubt the appellant does not have a right of response to the application for permission to appeal ("the application"). Therefore the "objection" dated 7 June 2017 is disregarded.

32. The application states at paragraph 2 that:

> "This appeal concerns the validity of nine discovery assessments issued by HMRC in the years 1998-1999 to 2006-07 (**the 'discovery assessments'**) and, in particular, the validity of

discovery assessments where the amount of tax owed is correctly assessed and brought into charge but the assessments contain a cosmetic error."

33. Firstly, the assessments were not issued in those years. They relate to those years. The discovery assessments in question were issued on 16 December 2009 since previous discovery assessments issued on 31 March 2009, and which did charge tax, had been reduced to nil on review and were subsequently discarded.

34. Secondly, although there has been an argument running since December 2009 as to the validity of the discovery assessments this is the first time that it has been suggested that they contained a cosmetic error.

35. All of those assessments stated that the amount charged by the assessment was £0.00 both on the face of the Notice itself and in the calculation that was attached where, although there is a line stating "Income tax due" halfway through the calculation the final line states "Total tax and National Insurance contributions due 0 .00". The references in paragraphs 5 and 12 of the application to the "covering page" are inaccurate. That is the Notice itself and it states that the calculation forms part of the Notice.

36. The application is the first time that HMRC have argued that the tax charged is the figure part of the way through the calculation. From the instant that the appellant's agent contacted HMRC on 5 January 2010 and questioned how a discovery assessment could show a nil liability (and was advised to appeal the assessments) HMRC have vigorously argued that nil assessments are valid.

37. At paragraph 16 of the application HMRC argue that "to hold that the assessments were nil assessments was not a finding open to the FTT". That is in blatant contradiction of their own submissions over many years.

38. When HMRC lodged their Statement of Case in the first appeal, that showed that all of the assessments under appeal were in an amount of nil. Unsurprisingly when the Tribunal acknowledged the Statement of Case on 1 October 2010, it stated "Please confirm within 14 days of the date of this letter whether £nil assessments are being sought." HMRC responded on 5 October 2010 stating "I can confirm that nil assessments are being sought".

39. That first appeal was listed on 1 December 2011 and was adjourned part-heard. At paragraph 6 of his decision issued on 29 April 2013, Judge Tildesley stated:

> "On 1 December 2011 the Tribunal heard HMRC's opening submissions, and the evidence of Mr Charles Bell, Senior Inspector of Taxes, and the Appellant. The Tribunal did not have sufficient time to complete the hearing and adjourned it part-heard until 15 February 2012. The Tribunal also directed HMRC by no later than 1 February 2012 to provide in writing to the appellant and the Tribunal computations of the alleged tax due under the assessments, and the rationale for issuing nil assessments with specific reference to the Tribunal's powers on Appeal."

40. In fact there were a number of submissions by both parties in regard to nil assessments and the final response from HMRC reads at paragraph 7:

> "The Respondents therefore submit that the Tribunal has jurisdiction beyond merely reducing or increasing an assessment and, further, that it has jurisdiction to consider a nil assessment given the terms of Regulation 188".

41. The issue remained live and Judge Cannan in his decision released on 30 July 2014 stated at paragraph 9:

> "In December 2009 the respondents issued discovery assessments against the appellant. At first sight it is surprising that those assessments showed nil tax due".

42. He went on to identify Mr Elder's arguments on nil assessments and those are to be found reproduced at Appendix A to the recent decision. As that decision makes explicit at paragraphs 232 to 240, HMRC continued to argue that it was appropriate to raise nil assessments because the computations correctly included a notional tax credit and they intended to invoke Regulation 72 Income Tax (PAYE) Regulations 2003.

43. I do not accept that the Tribunal fell into an error of law by failing to apply Section 114 TMA. There was no cosmetic error in the assessments. They were precisely what HMRC always intended them to be.

44. Although I will address the other arguments advanced in the application I consider the application to be fundamentally flawed.

45. HMRC seems to have missed the very basic finding in fact in this decision to the effect that the income deposited in the banks was not income from employment. That is in the "keywords" on the cover page and is more extensively set out in a number of paragraphs in the decision such as 206, 209-211, 225-226 and highlighted at paragraph 228 which makes it explicit that:

> "Therefore, any funds that were diverted into the bank accounts were not derived from Topcar or by reason of Mr Elder's employment with Topcar. On that basis there was no reason for PAYE tax to be deducted. Accordingly the appeal must succeed to that extent".

46. (In the interests of consistency, I use the same abbreviations as in the decision.) If the monies appropriated by Mr Elder did not come from Topcar, as we found that they did not, then Regulation 72 has no application. That is why the second appeal succeeded. The Regulation 72 Direction related to Topcar only. That is why the first two substantive issues as agreed by the parties (see paragraph 47 of the decision) encompass employment by, and PAYE deducted, or not, by Topcar. So I cannot accept the argument at paragraph 25 of the application that there was an error of law in that the FTT did not take into account the effect of the Regulation 72 Direction. We did not because it was not appropriate to do so, given the facts found.

47. That raises the obvious point that HMRC have not considered which is quite why, or how, having confirmed twice (see paragraph 237 of the decision) that the assessable benefit as Shadow Director was included in the assessments, the raising of a Regulation 72 Direction relating to a different company would recoup the lost tax on that benefit.

48. At paragraph 11 of the application, HMRC argued that the appellant understood perfectly well the basis on which the discovery assessments were issued. That is entirely correct, in regard to the intention to use Regulation 72, as I indicate at paragraph 237 of the decision.

49. I do not understand the argument at paragraph 14 of the application referring to paragraph 243 of the decision. As HMRC make explicit at 14j the finding of the Tribunal was that there was "undoubtedly a loss of tax fraudulently and deliberately caused by Mr Elder". The statement that "the loss of tax is quantified at nil" is a reference to the assessments and not to anything else.

50. HMRC argue at paragraph 23 of the application that the FTT was wrong in holding in paragraph 243 of the decision that the assessment stands in isolation at the point at which it is issued because Regulation 72 should also have been considered. It is accurate to say that the reasoning behind the discovery assessment including the notional tax credit was because HMRC intended to issue a Direction under Regulation 72. However, as the Court of Appeal held in *HRMC v BUPA Purchasing Limited & Others*[5] at paragraphs 43 to 48, in the context of VAT, the reasoning behind an assessment is completely separate from the assessment itself. The purpose of an assessment is to determine the net amount of tax due.

51. I accept the argument at paragraph 18 of the application in regard to self-assessment. However, this decision does not relate to self-assessment. This decision deals with Section 29 assessments. Therefore the relevant wording is the wording to be found in Section 29 and that is what is discussed in the decision.

52. The key reason that I decline permission to appeal to the Upper Tribunal is because, on the facts found, there is no interplay between discovery assessments and Regulation 72 Directions. Further I do not accept that there was a "cosmetic error" in the assessments and that for the reasons given.

53. If the person who applied for permission to appeal is dissatisfied with the outcome of the application for permission to appeal the decision, that person has a right to apply to the Upper Tribunal for permission to appeal against the decision. Such an application must be made in writing to the Upper Tribunal at 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London, EC4A 1NL no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet *Appealing to the Upper Tribunal (Tax and Chancery Chamber).*

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE:

[5] 2007 EWCA 542