



TC06913

Appeal number: TC/2018/05262

INCOME TAX – application to make a late appeal – whether an appeal can be made directly to the Tribunal – whether an appeal can be made by more than one Appellant in single document – whether a late appeal application to HMRC is valid if it fails to include a submission on reasonable excuse – whether a late appeal application in relation to an assessment also includes the related penalty – application over one year late – Martland considered and applied – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FLASH FILM TRANSPORT LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE REDSTON

**Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue on 13
December 2018**

**Mr David Kandalaft of David Kandalaft Book-keeping and Accountancy
Services, for the Appellant**

**Mr Simon Bracegirdle, of HM Revenue and Customs' Solicitor's Office, for the
Respondents**

DECISION

1. On 23 July 2018 Flash Film Transport Limited (“the Company”) applied to the Tribunal to make late appeals against six assessments totalling £38,127.14, and
5 against a penalty of £8,722.92. The assessments were issued by HM Revenue and Customs (“HMRC”) under Finance Act 1998, Sch 18, para 4 (“discovery assessments”). The penalty was issued under Finance Act 2007, Sch 24.

2. For the reasons set out in the main body of this decision, I refused the Company’s application. By way of preliminary issues, I also considered:

- 10 (1) whether a taxpayer can appeal straight to the Tribunal against a direct tax decision, or whether the appeal has to be made first to HMRC, see §70ff;
- (2) whether the appeals of more than one party can be notified to the Tribunal in a single document, see §79ff;
- 15 (3) whether a late appeal application to HMRC is valid if it fails to include a reasonable excuse for the application being made late, see §109ff; and
- (4) whether a late appeal application against an assessment, which does not mention the related inaccuracy penalty, is to be read as encompassing a late appeal against that penalty, see §116ff.

3. I decided those issues as follows:

- 20 (1) the Tribunal does not have the jurisdiction to hear a direct tax appeal made by the taxpayer; appeals must be made to HMRC;
- (2) two or more parties can notify their appeals in a single document, but this is subject to meeting the requirements in Rule 20(2) and (3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal
25 Rules”);
- (3) to be valid, a late appeal to HMRC does not have to include a reasonable excuse; and
- (4) a late appeal application against an assessment can be read as encompassing a late appeal against a related inaccuracy penalty.

30 **The evidence**

4. HMRC provided the Tribunal with a Bundle of documents, which included:
- (1) correspondence between the parties, and between the parties and the Tribunal;
- 35 (2) the discovery assessments and the penalty the Company was seeking permission to appeal;
- (3) various extracts from Companies’ House website; and
- (4) contemporaneous notes of telephone calls made by Mr Hancox, the HMRC Officer who issued the discovery assessments and the penalty.

5. The following documents were provided on behalf of the Company:

(1) a letter from Mr Kandalajt to the Tribunal, which was received on 26 November 2018. Attached to that letter were emails from the account of Mrs Vesna Saunders, a shareholder in the Company and the wife of Mr Scott Saunders, one of the Company's two directors;

5 (2) an email dated 11 December 2018, from Mr Stephen Porter of Pinsent Masons LLP ("Pinsents"); this was handed up during the hearing;

10 (3) a letter written by Mr Andrew Muir, also of Pinsents, which had been attached to a second email from Mr Porter. Although no hard copy of Mr Porter's second email was available, Mr Saunders had a copy on his mobile phone. With the permission of the Tribunal, Mr Saunders showed that covering email to the Tribunal and to Mr Bracegirdle, and the Tribunal made a handwritten copy.

15 6. Mr Bracegirdle received the letters and emails set out in the previous paragraph only on the day of the hearing. However, he said HMRC had no objection to them being allowed into evidence, and confirmed that he had had sufficient time to consider them.

20 7. The Company's two directors, Mr Saunders and Mr Lorenzo Macchiarola, were in attendance at the hearing. Mr Kandalajt initially said that he did not intend to call them to give evidence. However, during his submissions he made various statements about the actions and beliefs of the Company's directors; I pointed out that these were hearsay, which he accepted. After consultation with Mr Saunders and Mr Macchiarola, Mr Kandalajt decided to call them to give evidence. I explained that he could only ask open questions of his witnesses; that Mr Bracegirdle could ask closed questions; and that the questions could relate to any matter relevant to the Company's application.

30 8. Mr Saunders gave evidence-in-chief led by Mr Kandalajt, was cross-examined by Mr Bracegirdle and answered questions from the Tribunal. He was frequently unable to remember what had happened because of the passage of time, and I accepted that this was the case. I found that evidence he was able to give was reliable, with one exception, see §85ff.

35 9. After Mr Saunders left the witness box, Mr Macchiarola and Mr Kandalajt had a brief discussion, after which Mr Kandalajt said he had changed his mind, and had decided not to call Mr Macchiarola to give evidence. I pointed out that this might make it difficult or impossible for the Tribunal to make findings of fact about Mr Macchiarola's position. Mr Kandalajt acknowledged that this might be a consequence.

10. On the basis of the evidence provided, I find the facts set out in the next following paragraphs. In relation to certain disputed issues, I make further findings of fact later in this decision.

Findings of fact

11. The Company was incorporated on 3 October 2008; its first accounts were made up to 31 March 2010 and annually thereafter. As already noted, Mr Saunders and Mr Macchiarola were (and remain) its directors.
- 5 12. Initially Mr Saunders and Mr Macchiarola each owned 50% of the shares, but around December 2012 Mr Saunders transferred a 10% shareholding to his wife.
13. The Company's tax agent was originally Christopher Lunn & Co ("CLAC"); which traded from The Pines, Boars Head, Crowborough. Mr Saunders (but not Mr Macchiarola) was also a CLAC client. The Company's registered office was located
10 at CLAC's address.
14. On 29 December 2008, HMRC opened an enquiry into Mr Saunders' 2006-07 tax return. On 22 June 2010, CLAC's offices were raided by HMRC's Criminal Investigation Group; client documents were seized, including those relating to Mr Saunders and the Company.
- 15 15. On 25 November 2010, HMRC decided they would no longer deal with CLAC as the agent of any taxpayer, and shortly afterwards HMRC informed CLAC's clients this was the position. CLAC sought judicial review of HMRC's decision, and on 16 February 2011, Parker J agreed that HMRC had acted unlawfully by failing to give
20 CLAC the opportunity to make representations before that decision was made, see *R (oao Denis Lunn, Christopher Lunn & Co and CLAC v HMRC* [2011] EWHC 240 (Admin).
16. On 10 September 2012, Mr Hancox informed Mr Saunders that he was suspected of tax fraud, and was being investigated under Code of Practice 9 ("COP9"). Because HMRC were refusing to deal with CLAC, responsibility for
25 dealing with Mr Hancox's questions was passed to the Aileen Barry Tax Consultancy.
17. On 21 January 2013, a meeting was held between Mr Hancox, Mr Saunders, Ms Barry, and Mr Vickers, another HMRC officer. Its purpose was to discuss Mr Saunders' tax affairs and those of entities connected to him. At that meeting, Mr Saunders agreed to commission a disclosure report, which Ms Barry was to prepare.
30 However, Mr Saunders subsequently changed his mind, and Ms Barry informed Mr Hancox that no disclosure report would be produced.
18. On 29 July 2013, Mr Hancox wrote to Ms Barry, heading his letter "Mr Saunders", but including within that letter questions about the Company, the "Saunders Partnership", "Saunders Productions Limited" and the "Macchiarola and
35 Saunders Partnership". No response was received, and Mr Hancox issued a formal notice under FA 2008, Sch 36. The Notice was addressed to the Company at Mr Saunders' home address; the information and documents requested included pages headed "Mr S Saunders"; the "Macchiarola and Saunders Partnership"; Saunders Productions Limited" and "Mr S Saunders" as well as a page headed with the
40 Company's name.

19. On 29 November 2013, the Company changed its registered office to FTR Accountants Limited (“FTR”). This accountancy firm operated from the same address as CLAC. Under cross-examination Mr Saunders accepted that, when he made this decision, he knew CLAC was “at war with the Inland Revenue”; that FTR was linked to CLAC; and that Mr Lunn was being prosecuted for tax offences. The Company’s registered office remained at the same address until 15 September 2016, when it was changed to Mr Kandalaft’s business address.

20. On 21 February 2014, Mr Hancox wrote again to Ms Barry; the letter was headed “Mr S Saunders and connected entities”, and contained questions about the Company, Mr Saunders, Saunders Productions Limited and the partnerships. A further meeting was set up to take place on 23 September 2014. However, on 17 September 2014, Ms Barry informed Mr Hancox that Mr and Mrs Saunders would not be attending the meeting, and that her firm was to be replaced by FTR as the authorised tax agent.

21. On 17 June 2015, Mr Hancox sent Mr Saunders a ten page letter, setting out his concerns. In relation to the Company, he said he was investigating the Company’s earliest accounting periods, namely from incorporation to 2 October 2009 and the following period, which ended on 31 March 2010:

“I requested whatever documents you had to support the labour charges claimed in the accounts to 2 October 2009 and 31 March 2010. I have been provided with invoices that total approximately £30,000 whilst the recorded labour charges total £83,722.32. It has been suggested that there are no further invoices. No business records should have been destroyed...”

22. Mr Hancox proposed disallowing 31% of the labour costs claimed in the Company’s tax return. This was the same percentage as Mr Saunders had already agreed in relation to labour costs claimed in his 2006-07 self-assessment return.

23. In the same letter, Mr Hancox said that the claimed partnership between Mr and Mrs Saunders did not exist, because:

- (1) Mr Saunders had been unable to remember when the partnership had come into being;
- (2) an email to Mr Saunders from CLAC dated 6 October 2008 referred to backdating the partnership’s start date to 1 April 2007;
- (3) although HMRC had been provided with a spreadsheet showing partnership sales, the partnership had no business records, no sales invoices, no expenditure invoices and no bank statements; and
- (4) a handwritten note next to two of the columns on the spreadsheet read “moved to Ltd”.

24. Mr Hancox said he was therefore disallowing the £50,987 deduction claimed by the Company as “partnership income”; he added that “any allowable expenses claimed in the partnership accounts will also be allocated to the company”.

25. Mr Hancox also carried out a detailed analysis of the claimed expenditure, disallowing some amounts for which there was no documentary evidence, such as “clothing and cleaning £1,413”. He increased the private use adjustment for Mr Saunders’ use of car and phone from 5% to 25%, these increases were agreed by Mr
 5 Saunders. He noted that the original schedule of expenses contained handwritten amendments increasing certain figures, with computer costs going up by £500 and labour costs by £5,000. He said those increases were unjustified, and disallowed them. He attached a spreadsheet of the Company’s turnover, which totalled
 10 £522,044.66, significantly greater than the declared figure of £466,194. Having set out a number of other detailed adjustments, Mr Hancox then concluded that the Company’s profits needed to be increased by 23.46%, and VAT of £14,724 paid. He suggested that the same percentage of 23.46% be applied to the reported profits of the following four years.

26. On 16 September 2015, Mr Hancox wrote to the Company’s registered office
 15 essentially repeating the points in his letter of 17 June 2015. He concluded by saying:

“CLAC clearly played a leading part in the submission of the incorrect returns. I consider their actions to have been deliberate. I consider the actions of the company to have been careless and the disclosure to be prompted.”

20 27. Mr Hancox’s view was that the 30% maximum penalty for carelessness should be reduced by 0% (out of 30%) for telling; by 0% (out of 40%) for helping; and by 20% (out of 30%) for giving access to records, making a total reduction of 3%. The penalty was thus 27% of the tax, or £8,772.92.

28. On 15 October 2015, Mr Hancox issued discovery assessments for the periods
 25 under investigation. This was as previously proposed, but with one further adjustment to reflect the fact that HMRC had decided not to collect the VAT. He issued discovery assessments for the four later years on the basis that the profits were increased by the 23.46% suggested earlier.

29. The following assessments were then sent to the Company at its registered
 30 office:

Accounting period	Original tax	Extra tax
3/10/08 to 2/10/09	£19,634	£8,341
3/10/09 to 31/3/10	£11,663	£2,095
y/e 31/3/11	£27,606	£6,476
y/e 31/3/12	£35,444	£8,315
y/e 31/3/13	£15,938	£3,739
y/e 31/3/13	£15,027	£3,525

30. On 12 November 2015, Mr Saunders completed the standard form which allows appellants to authorise non-legal representatives to act on their behalf in an

appeal before the Tribunal. By that form, Mr Saunders authorised FTR to “act on my behalf in this appeal”. The form said “the Appellant” was “Flash Film Transport/Saunders PTP/Mr S Saunders”. It was common ground that “Saunders PTP” referred to the disputed partnership between Mr and Mrs Saunders.

- 5 31. On 2 December 2015, Ms Jane Wooler of FTR sent that form to the Tribunal together with a Notice of Appeal. The first part of the Notice is headed “Appellant’s details”. Ms Wooler completed it as follows:

Title or company or organisation	Flash Film Transport Ltd/Saunders Ptp/Mr Scott Saunders
First Name (if individual)	Scott
Surname (if individual)	Saunders
Address (including postcode)	[Mr Saunders’ home address]
email address	[Mr Saunders’ personal email]
tax reference number relevant to your appeal, eg NI Number, VAT reference number, corporation tax reference (if applicable)	[Mr Saunders’ NI number]

- 10 32. Mr Saunders described this Notice as “a blanket appeal” covering himself, the Company and the partnership with his wife. He said he and FTR had taken this approach because HMRC’s letters had dealt with all the entities “on one page”, and he hadn’t realised they might need to be separated.

33. On the second page of the Notice of Appeal, the “date of decision” is given as “17 June 2015 and 27 October 2015”. Under the heading “Grounds of Appeal”, the text reads (typography as in original):

15 “Enquiry opened into 2006-07 year ended accounts, this was prior to the Appellant becoming a client of CLAC. CLAC held no records of previous accounting periods so could not deal with this enquiry. Going forward concerns regarding the Appellants relationship with CLAC are based on HMRC’s clouded vision of CLAC. To date no evidence has
20 been shown to prove the COP9 was warranted. It seems the COP9 has now been downgraded into an enquiry but still not concrete evidence to show irregularities. FTR is appealing on behalf of the Appellant against the fines, penalties and revised tax. The Appellant has always maintained honest and accurate accounts, this was verified by the
25 COP9 specialist at their last meeting during 2014. The Appellant has co-operated fully with this enquiry and feels that HMRC’s decision was biased against his association with CLAC.”

- 30 34. The following day, 3 December 2015, Christopher Lunn was convicted of cheating the public revenue. On 11 January 2016, he was sentenced to five years imprisonment.

35. On 11 December 2015, HMRC issued the penalty assessment of £8,772.92, as previously proposed by Mr Hancox. It was addressed to the Company and sent to its registered office.

5 36. On 18 December 2015, the Tribunals Service forwarded a copy of the Notice of Appeal to HMRC. On 6 January 2016, Mr Bracegirdle emailed the Tribunal, copying Ms Wooler at FTR, saying:

10 “Three entities are listed in the title box of the Notice of Appeal...it would appear that the appellant here is Mr Scott Saunders...if Flash Film Transport wish to appeal their assessments, they should make a separate appeal...”

37. At some point before 12 January 2016, Mr and Mrs Saunders attended a meeting with Pinsents. When Mr Saunders was being cross-examined by Mr Bracegirdle, the following exchange took place:

15 SB: Who went to the meeting?
SS: Me and my wife, that’s all
SB: Mr Macchiarola was a company director
SS: Yes
SB: It wasn’t important to take him to the meeting?
20 SS: No-one asked for him to be at the meeting. I went to the meeting with my wife.
SB: To represent Flash Films?
SS: No, I wasn’t addressing Flash Films.

38. On 12 January 2016, Mr Hancox was called by Mr Hardman of Pinsents. His contemporaneous file note is headed “Saunders” and begins:

25 “Hardman called to say they had been appointed to act for Saunders. He said a 64-8 would be sent shortly. Hardman said he wished to go back to the beginning by making appeals if Hancox would now accept them. Hancox said that some appeals had been made but no postponement applications had been made as yet. It was agreed that
30 Hardman would submit appeals against all charges raised and make postponement applications...Hardman mentioned that some of the work on the case would be undertaken by Jane Wooler. She is likely to leave FTR in the very near future.”

35 39. On 18 January 2016, the Tribunal emailed Ms Wooler, saying that Judge Dean had reviewed the recent correspondence and had asked “can FTR please confirm whether or not Flash Film intend to appeal and if so, whether FTR want the appeals to be joined”. The email was copied to Mr Bracegirdle.

40. Ms Wooler responded the same day, also copying Mr Bracegirdle, saying (typography as in original):

5 “I attended a meeting last week with Scott Saunders/Flash Film Transport Ltd where it was decided that the appeal to First Tier Tribunal would be withdrawn on the grounds that instruction has now been given to Pinsent Mason, Fiona Fernie, to deal with the COP9/enquiry. I am aware that Ms Fernie has contacted Mr Hancox HMRC. please take this email as our withdrawal of Scott Saunders, Saunders Productions, Flash Film Transport and all other entities pertaining to this client from First Tier Tribunal.”

10 41. Ms Wooler signed herself as “Jane Wooler, Legal Advisor, Legal Department, The FTR Accountants Company Limited”.

15 42. The following day, Mr Bracegirdle emailed the Tribunal and Ms Wooler, saying
“If Mr Saunders withdraws his appeal then his assessments become final and the enquiry is over. As Mr Saunders has engaged a new firm to deal with his enquiry, it strikes me that this may not be his intention.”

20 43. Mr Bracegirdle suggested that a stay might be appropriate to allow Pinsents to consider whether or not a settlement could be reached between Mr Saunders and HMRC. The appeal was not withdrawn, and on 2 February 2016 the Tribunal wrote to Mr Saunders, granting a stay of 90 days. I was informed by the parties that Mr Saunders’ appeal remains live, and has not yet been heard by the Tribunal.

25 44. On 22 February 2016, HMRC sent the Company a “Final Notice to Pay” in relation to the £8,772.82 penalty. That Notice was sent to Mr Saunders’ home address. On 15 March 2016, Mrs Saunders forwarded the Notice to Mr Muir at Pinsents, with a covering email which said “Hi Andrew. This demand arrived for Flash. Thanks. Vesna”.

30 45. Mr Muir forwarded the demand to Mr Hancox on the same day, with a request that he ask HMRC’s Debt Management and Banking department to “put this matter on hold”. On 29 March 2016, after his return from holiday, Mr Hancox called Mr Muir. In relation to the Company, his contemporaneous file note records:

35 “Hancox explained that assessments and a penalty notice had been issued some time ago but appeals and postponement applications had not been made by the company or FTR. He suggested that late appeals be made if this was considered appropriate. He said that any appeals would need to specify why they were being made late. Hancox said he would also need authority from the company to discuss matters with Pinsent Manson. Muir said he would attend to this.”

40 46. On the same day, Mr Muir emailed Mrs Saunders and told her that Mr Hancox:
“wants another signed mandate, this time to cover our dealings on behalf of Flash Film Transport Ltd. Can you print off another copy of the attachment I sent to [you] recently and head it for the Ltd Company and sent it back to me as soon as possible.”

47. I consider at §85ff whether or not that mandate was sent to Pinsents, and whether Pinsents became the Company's authorised agent for tax purposes.

48. In relation to HMRC's Final Notice to Pay for £8,772.82, Mr Muir wrote in the same email of 29 March 2016:

5 “Hancox stated that this demand related to assessments raise by HMRC on 15 October 2015 for which no appeal had been submitted. A late appeal is now needed together with an explanation of why its being submitted outside the designated time periods. Can you also please deal with this as soon as possible.”

10 49. On 30 March 2016, the following day, Mr Muir sent a further email to Mrs Saunders, which read:

 “Following on from my email of yesterday. I spoke with John Hardman about this issue and I will file the appeal and postponement against the penalty of £8,772.92 on your behalf.”

15 50. On 11 December 2018, a few days before this application hearing, Mr Kandalaft emailed Pinsents, asking for a copy of the appeal. Mr Stephen Porter responded by return, saying that Mr Muir was no longer with the firm, and he had been unable to find “the penalty appeal document”. However, he subsequently sent a further email, saying:

20 “I have managed to locate a copy of the appeal letter in respect of the penalty submitted by Mr Muir on your client's behalf. Pls find this attached. As a minimum it is evidence that [Pinsents] submitted an appeal against the penalty promptly on receipt.”

25 51. The document attached to Mr Porter's email is dated 30 March 2016. It is a letter from Mr Muir to Mr Hancox, but is not on Pinsents' headed notepaper and it is unsigned. In this decision, I have called it “the Disputed Letter”. It reads:

 “**Mr S Saunders. Appeal and request for postponement**

30 Please accept this correspondence as the formal appeal against the penalty for the period ended 31/3/2014 in the sum of £8,772.92 on the grounds that it is excessive and does not represent the true position.

35 I would draw your attention to John Hardman's letter of the 20 January 2016 when he submitted a formal appeal against the assessments raised on the 19/9/2015 for the tax years 2007/08 to 2013/14 inclusive, and the associated penalties. We wish to apply for a full postponement of the new penalty on the basis that an agreed payment on account of £10,000 has already been made to HMRC.”

52. The parties disagreed as to whether Pinsents sent the Disputed Letter to HMRC and I deal with that issue at §90ff. HMRC have no record of receiving any appeal from Pinsents in relation to the Company.

40 53. During August 2016, the Company and Mr Saunders instructed Mr Kandalaft to act for them. On 13 October 2016, HMRC sent the Company a statement of liability

totalling £52,035.16. That figure was made up of the discovery assessments, the penalty, and interest.

54. On 23 January 2017, Mr Kandalaft wrote to HMRC, setting out a list of “observations” seeking to challenge the adjustments Mr Hancox had made to the Company’s turnover, purchases, travelling and motor costs, labour costs and capital allowances. He also said that assessing later years using the principle of continuity was without “foundation or justification”, and that no further tax was due.

55. Mr Kandalaft did not address his letter to Mr Hancox, and it did not reach him. On 5 June 2017 Mr Kandalaft called Mr Hancox and referred to the letter sent in January. Mr Hancox asked whether it was “in relation to the collection of the company debt, or if it was an appeal against the assessments raised”. Mr Kandalaft said it was an appeal. The conversation continued:

“SH advised DK that the appeal may not be accepted as the assessments had been issued. DK asked if the company had been advised as to how the figures had been arrived at. SH confirmed that they had. DK said that the company had advised that they knew nothing about the assessments until October 2016.”

56. On 7 June 2017, Mr Hancox and Mr Kandalaft had a further conversation. Mr Hancox disputed Mr Kandalaft’s assertion that the Company knew nothing of the assessments until October 2016, and I return to this at §99ff. Mr Hancox also summarised the communications between HMRC and the Company in relation to the discovery assessments and the penalty.

57. On 26 June 2017, Mr Hancox responded to Mr Kandalaft’s letter, saying that his files were in storage, and that HMRC considered the appeals to be final and conclusive.

58. On 16 August 2017, Mr Kandalaft wrote to Mr Hancox saying: “the directors understood that their agents had appealed on the extra assessments and the penalties raised”. On 6 October 2017, Mr Hancox confirmed that no appeals had been received from Pinsents in relation to the discovery assessments or the penalty.

59. On 10 November 2017, Mr Kandalaft told Mr Hancox that he was “thinking of making an appeal to the Tribunal for permission to make a late appeal”. Mr Hancox responded by saying that “in the first instance any late appeal should be made to HMRC rather than the Tribunal”.

60. On 14 November 2017, Mr Hancox sent Mr Kandalaft a copy of the email received from Pinsents on 15 March 2016 (see §44), and a copy of his note of the subsequent telephone conversation which took place on 29 March 2016, in which he pointed out that the Company could make late appeals (see §45). He added that “the matter of the assessments and the penalty notice issued to the company were not raised again by Pinsent Mason in any subsequent correspondence or telephone conversations”.

61. On 2 January 2018, Mr Kandalajt informed Mr Hancox that “the directors have asked me to appeal to the Tribunal for a late appeal if your final decision is to reject our late appeal”.

5 62. On 10 January 2018, Mr Hancox said that Mr Kandalajt’s letter of 23 January 2017 had not been a late appeal, because “it did not contain all the information I would have needed to consider a late appeal”, and that if the Company now wanted to make a late appeal, it should do so without delay. On 6 March 2018, Mr Hancox advised Mr Kandalajt that any late appeal application “needed to specify why an appeal had not been made within 30 days” and from his recollection the letter of 23
10 January 2017 did not contain that information. Immediately after that call Mr Kandalajt wrote to Mr Hancox, reiterating his view that his earlier letter was a late appeal, and giving reasons why the appeal was late.

63. On 9 April 2018, Mr Hancox refused the Company’s application to make a late appeal, but said that the Company could make an application to the Tribunal.

15 64. On 23 July 2018, the Tribunal received the application. Mr Kandalajt said this further delay had come about because he had consulted with his client and taken external advice as to whether to make the application.

Outline of the parties’ positions

65. Mr Kandalajt made a number of submissions in the alternative:

- 20 (1) the Company had appealed on 2 December 2015, when Ms Wooler filed a Notice of Appeal with the Tribunal;
- (2) Pinsents sent the Disputed Letter to Mr Hancox on 30 March 2016, and this constituted a late appeal;
- 25 (3) Mr Kandalajt made a late appeal on 23 January 2017, when he wrote to HMRC challenging the assessments; or
- (4) he made a late appeal when he wrote to Mr Hancox on 6 March 2018.

66. Mr Kandalajt submitted that, whichever of these were correct, the Company should be allowed to make a late appeal because:

- 30 (1) the assessments and the penalty had been sent to FTR, and the directors were unaware of them; and
- (2) HMRC had run a single investigation covering both Mr Saunders and the Company, and the directors had not realised they needed to make a separate appeal for the Company.

35 67. Mr Bracegirdle’s starting point was that the appeal was made on 6 March 2018, and not on any earlier date. He said that the permission should not be given, because the tests set out by the Upper Tribunal (“UT”) in *Martland v HMRC* [2018] UKUT 0178 (TCC) (“*Martland*”) had not been met.

Preliminary issues and the relevant law

68. In order to decide whether to give permission to allow the Company to appeal late, I first needed to consider a number of preliminary issues. They included questions of law; questions of fact, and mixed questions of fact and law, and were as follows:

- 5 (1) whether an HMRC direct tax decision can be appealed to the Tribunal without first being made to HMRC;
- (2) whether a single document can notify the appeals of more than one appellant;
- 10 (3) whether the Notice of Appeal was made on behalf of the Company;
- (4) whether Pinsents were the Company's authorised agent for tax purposes;
- (5) whether Pinsents made a late appeal against the penalty;
- (6) whether Pinsents made late appeals against the discovery assessments;
- 15 (7) whether the Company "knew nothing about the assessments until June 2016";
- (8) whether an application for a late appeal to HMRC is invalid if it does not include a reasonable excuse;
- (9) whether Mr Kandalajt's letter of 23 January 2017 was an application for a late appeal against the discovery assessments; and
- 20 (10) whether that letter was a late appeal against the penalty.

69. Part V of the Taxes Management Act 1970 ("TMA") contains the legislation about making late appeals against assessments. The same provisions apply to the inaccuracy penalty, because the right to appeal against those penalties is given by FA 2007, Sch 24, para 15, which sits within Part 3 of that Schedule. Para 16 (also within Part 3) provides:

- 25 "An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal)."
- 30

Whether an HMRC decision can be appealed directly to the Tribunal

70. Mr Kandalajt's opening position was that the Company's appeal had been made when the Notice of Appeal was filed with the Tribunal on 2 December 2015. He accepted that no appeal had been made to HMRC.

35 71. TMA s 49D is headed "Notifying an appeal to the Tribunal", and reads:

- (1) This section applies if notice of appeal has been given to HMRC.
- (2) The appellant may notify the appeal to the tribunal.
- (3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

- (4) Subsections (2) and (3) do not apply in a case where
- (a) HMRC have given a notification of their view of the matter in question under section 49B, or
 - (b) HMRC have given a notification under section 49C in relation to the matter in question.
- (5) In a case falling within subsection (4)(a) or (b), the appellant may notify the appeal to the tribunal, but only if permitted to do so by section 49G or 49H.

72. The section therefore provides that a person can only notify his appeal to the Tribunal if he has first appealed to HMRC. However, Mr Bracegirdle did not argue the Tribunal lacked jurisdiction to rule on the Company's appeal as a result of that failure. In taking that position, he was following HMRC's Appeals Reviews and Tribunals Guidance Manual at ARTG2440, which is headed "Reviews and appeals for direct taxes: Appealing to tribunal: Customer sends appeal to tribunal without appealing to HMRC", and begins:

"Where a customer wants to appeal against HMRC's decision, they must send an appeal to HMRC within 30 days of the date they receive our formal decision notice, such as the notice of assessment, amendment, closure notice or determination.

If the decision maker receives notification from the Tribunals Service that the customer has sent them an appeal form the decision maker should check first whether the customer has already appealed to HMRC.

If the customer has not done so it may be possible to treat this as an appeal to HMRC.

If the decision maker thinks it is appropriate and does not suspect any abuse of the appeal process they may, in the particular circumstances of that case, treat this as an appeal to HMRC.

Otherwise the decision maker should contact the customer and ask them to submit an appeal to HMRC. If they do not the decision maker should apply to the Tribunals Service for the proceedings to be struck out."

73. But it is not for the parties to agree on the scope of the Tribunal's jurisdiction, and the Tribunal cannot ignore a question of jurisdiction because it has not been raised as an issue. In *R (oao TN (Vietnam)) v First-tier Tribunal (Immigration and Asylum Chamber)* [2018] EWHC 3546 (Admin) Singh LJ gave the only judgment¹ and said at [32] :

"...questions of jurisdiction cannot be determined by consent, still less by default. The question whether or not a tribunal has jurisdiction to determine a question is a question of law. The answer to it depends

¹ The court was, unusually, made up of the Court of Appeal judges who were hearing TN's substantive appeal see [2] of the decision cited.

upon the correct interpretation of the legislation creating its jurisdiction and cannot depend on the conduct of one of the parties.”

74. I therefore considered whether HMRC were able, as a matter of law, to treat a direct tax appeal² made to the Tribunal as if it had been made to HMRC, so that the Tribunal has the necessary jurisdiction to decide the dispute. In *Patel v HMRC* [2018] UKFTT 185 (TC), the Tribunal (Judge Brannan) considered a similar issue, namely whether HMRC’s care and management powers allowed them to accept a self-assessment return filed by a taxpayer on a voluntary basis, so they could dispense with the requirement at TMA s 8(1) that HMRC must serve a notice to a taxpayer requiring the filing of the return³. Judge Brannan considered the case law on HMRC’s care and management powers, including *R (oao Wilkinson) v IRC* [2005] UKHL 30 at [21] and *IRC v National Federation of Self-Employed and Small Businesses* [1981] STC 260, before deciding at [112]:

“...it is not open for HMRC to dispense with the requirement that it must serve a notice under s.8(1) in order for a taxpayer's return to be a return ‘under s.8’. This is an express statutory requirement that cannot be waived by the exercise of HMRC's discretion.”

75. In my view, the position is the same in relation to TMA s 49D, which provides that an appellant can only notify his appeal to the Tribunal if he has first appealed to HMRC. HMRC’s care and management powers do not allow them to override that statutory requirement, and it follows that the Tribunal has no jurisdiction to decide a direct tax appeal, unless it has first been made to HMRC.

76. The same conclusion has previously been reached in other Tribunal judgments, see *Fiorni v HMRC* [2017] UKFTT 0610 (TC) (Judge Beare), and *Thuishyanthan v HMRC* [2016] UK FTT 0186 (TC) (Judge Clark). That it is correct was recently confirmed, albeit *obiter*, in *R(oao PML Accounting) v HMRC* [2018] EWCA (Civ) 2231, where Longmore LJ said at [56] that:

“...HMRC must be asked to agree to a late appeal before any question of applying to the tribunal for permission can arise. That is for the (perhaps obvious) reason that any tribunal would wish to know, before considering whether to grant permission for a late appeal, the view of HMRC about the reasonableness of the excuse for not giving notice before the 30 days had expired.”

77. There are also other reasons why appeals have to be made first to HMRC: the Officer receiving the appeal may consider the reasons and change his position, and the appellant has the opportunity to ask for, or accept, a statutory review carried out by a different HMRC Officer. Appeals made first to HMRC may thus be settled between the parties without reference to the Tribunal.

² The position is different for Value Added Tax, see Part V of the Value Added Tax Act 1994: the appellant in a VAT dispute must appeal directly to the Tribunal, although he can ask for an HMRC review, or accept one if offered.

³ The position for voluntary returns is to be amended with retrospective effect, see Finance Bill 2018, clause 86

78. However, my conclusion on this point may be *obiter*, because I have also found that the Notice of Appeal does not in any event relate to the Company, for the reasons explained at §82 below.

Whether a single document can notify appeals of more than one appellant

5 79. Under the heading “Appellant’s details”, the Notice of Appeal included three names in the box which asked for “Title or company or organisation”. These were Flash Film Transport Ltd, Saunders Partnership and Mr Saunders. Mr Bracegirdle’s view was that the Company could not combine its appeal in the same document with Mr Saunders. Mr Kandalajt submitted that there was no reason to treat the Notice as
10 relating only to Mr Saunders.

80. The requirements for notifying an appeal to the Tribunal are set out at Rule 20(2) and (3) of the Tribunal Rules:

“(2) The notice of appeal must include

- (a) the name and address of the appellant;
- 15 (b) the name and address of the appellant's representative (if any);
- (c) an address where documents for the appellant may be sent or delivered;
- (d) details of the decision appealed against;
- 20 (e) the result the appellant is seeking; and
- (f) the grounds for making the appeal.

(3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or
25 can reasonably obtain.”

81. As long as those requirements are complied with, there is no reason why two or more appellants cannot notify their appeals using the same document. But as a matter of practicality, it is often very difficult to do this using the standard Tribunal Notice of Appeal form, unless the issue in dispute, the grounds of appeal, the amounts at issue
30 and the contact details are identical. However, the Tribunal Rules do not require that notification be carried out using the Tribunal’s standard form. Some people simply write to the Tribunal, and those more informal notifications are valid, providing they comply with Rule 20.

Whether the Notice of Appeal was made on behalf of the Company

35 82. Mr Kandalajt’s position was that the Notice of Appeal was made on behalf of the Company, because:

- (1) its name was included in the first box on the form;
- (2) Ms Wooler’s email of 18 January 2016 to the Tribunal (see §40) referred to the appeal made by “Scott Saunders, Saunders Productions, Flash Film
40 Transport and all other entities pertaining to this client”;

(3) the Company's application to the Tribunal to make a late appeal included the statement that "the directors assumed that [the Notice of Appeal] applied Flash Transport as well"; and

5 (4) Mr Saunders' oral evidence was that he thought "the appeal was for all of it", including decisions made by HMRC about his own position; decisions made about the Company; and decisions about the partnership with his wife.

83. Mr Bracegirdle said that, whatever Mr Saunders understood, it was clear from the Notice of Appeal read as a whole that it related only to the Company.

10 84. I find that the Notice of Appeal was not made on behalf of the Company, because:

15 (1) Rule 20(2)(d) of the Tribunal Rules requires that an appellant inform the Tribunal of the decision appealed against. The Notice of Appeal states that it relates to decisions made on 17 June 2015 and 27 October 2015. The discovery assessments made on the Company were issued on 15 October 2015, and the Notice of Appeal makes no reference to those decisions. I infer that 17 June 2015 and 27 October 2015 are, instead, the dates of assessments raised on Mr Saunders personally, although nothing turns on that;

20 (2) the Notice of Appeal cannot relate to the penalty, because it was issued on 11 December 2015, and the Notice of Appeal was received by the Tribunal on 2 December 2015;

(3) Rule 20(3) requires the appellant to attach, to the Notice of Appeal, a copy of the decision appealed against. The discovery assessments issued to the Company were not attached to the Notice (and neither, of course, was the penalty, as it had not yet been issued); and

25 (4) Rule 20(2)(f) requires the appellant to set out the grounds on which he is challenging the HMRC decision(s). The grounds in the Notice of Appeal open by saying "enquiry opened into 2006-07 year ended accounts, this was prior to the Appellant becoming a client of CLAC". In that sentence, "the Appellant" cannot be the Company, as it was not incorporated until 3 October 2008; instead, "the Appellant" must be Mr Saunders. The grounds also refer only to a single Appellant (emphases added):

35 "...FTR is appealing on behalf of the Appellant against the fines, penalties and revised tax. The Appellant has always maintained honest and accurate accounts, this was verified by the COP9 specialist at their last meeting during 2014. The Appellant has co-operated fully with this enquiry and feels that HMRC's decision was biased against his association with CLAC."

Whether Pinsents were the Company's authorised agent for tax purposes

40 85. Mr Kandalajt asked the Tribunal to find that the Company had authorised Pinsents to be its agent for tax purposes. He relied on:

(1) the email from Mr Muir dated 29 March 2016 to Mrs Saunders, asking her to print off another copy of the mandate and “head it for the Ltd Company and sent it back to [Mr Muir] as soon as possible”, see §46;

5 (2) Mr Hancox’s discussions about the Company with Pinsents, see §45. In his submission, Mr Hancox would only have held those discussions, had Pinsents had been authorised as the Company’s tax agent; and

(3) Mr Saunders’ evidence under cross-examination that he was “sure” Pinsents had been authorised to act on behalf of the Company.

86. Mr Bracegirdle relied on the absence of any such authorisation in HMRC’s records, which instead show that FTR was replaced as the Company’s authorised agent by Mr Kandalaft. He also asked the Tribunal to find that Mr Saunders’ evidence that he was “sure” on this issue, to be unreliable.

87. I find as follows:

15 (1) it is for the Company to show that the authorisation mandate was sent to Pinsents, and from Pinsents to HMRC;

(2) Mrs Saunders has provided evidence that she was asked by Mr Muir to print off a copy of the authorisation mandate, head it with the Company’s name, and send it back to Pinsents, but neither she, nor any other person, has provided documentary evidence that she carried out those actions, such as a copy of her email to Mr Muir with the authorisation attached. Mrs Saunders also did not provide a witness statement or oral evidence at this hearing;

20 (3) if Pinsents had been authorised, they would have submitted a 64-8 (New) to HMRC, and no copy of that form has been provided as evidence by the Company, and HMRC have no record of receiving that authorisation request from Pinsents; and

25 (4) although it is true that Mr Hancox spoke to Mr Muir about the Company on 29 March 2016, he made it clear during the conversation that he had not received authorisation, and asked for it to be provided, see §45.

88. I also agree with Mr Bracegirdle that Mr Saunders’ evidence on this issue is unreliable, for two reasons. First, he said that when he met with Pinsents in January 2016, he “wasn’t addressing Flash Films”, but instead was dealing with his own affairs, see §37. Second, he was unable to remember numerous facts because of the passage of time. For example, he could not recall whether he authorised FTR as the Company’s agent for tax purposes with HMRC, and he could not remember whether he authorised FTR to act on behalf of the Company at the Tribunal. When Mr Bracegirdle asked if he had changed the Company’s registered office to Pinsents’ address, he said only “they sent me forms and I signed them”. In the context of Mr Saunders’ very poor recall, it is not credible that he was able to be “sure” that Pinsents had been authorised to act.

89. I therefore find as a fact that Pinsents were not authorised to act as the Company’s tax agent.

Whether Pinsents appealed against the penalty

90. Mr Kandalaft submitted that Pinsents made a late appeal against the penalty on 30 March 2016. He relied on (a) Mr Muir’s email of the same date, in which he told Mrs Saunders “I will file the appeal and postponement against the penalty of £8,772.92 on your behalf”, and (b) the Disputed Letter.

91. Mr Bracegirdle submitted that Pinsents could not have made an appeal because (a) they were not authorised as the Company’s tax agent; (b) it was clear from Mr Hancox’s letters that no appeal had been received by HMRC; and (c) a professional firm making an appeal would normally include both the name and the tax reference number of the relevant taxpayer, but the Disputed Letter did not refer to the Company in its heading, only to Mr Saunders, and it also did not include the Company’s tax reference number.

92. It follows from my finding of fact that Pinsents were not appointed as tax agent for the Company, that no late appeal can have been made by that firm on the Company’s behalf. However, as significant reliance was placed on the Disputed Letter, I confirm that I agree with Mr Bracegirdle that an appeal made by a professional firm, such as Pinsents, would contain the name and tax reference number of the appellant, and neither are included in the Disputed Letter. I also note that, although Pinsents continued to be instructed by Mr Saunders for a further four months, that firm did not contact Mr Hancox to ask for a response to the appeal, as would commonly be the position after an appeal has been made. I find as a fact that the Disputed Letter was not sent to HMRC.

93. Furthermore, TMA s 49 requires that a notice of appeal be “given” to HMRC. The meaning of “given” is provided by the Interpretation Act 1978 s 7, which reads:

“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”.

94. In *Calladine-Smith v SaveOrder Ltd* [2011] EWHC 2501 at [33], Morgan J said:

“my interpretation of Section 7 when it uses the phrase ‘unless the contrary is proved’ is that this requires a court to make findings of fact on the balance of probabilities on all of the evidence before it.”

95. Thus, even if Pinsents had sent the Disputed Letter to HMRC on 30 March 2016, it will not have been “given” if HMRC can prove that it was not received. Mr Hancox has repeatedly stated that he did not receive a letter of appeal in relation to the Company. The Draft Letter is addressed to Mr Hancox, at his correct address. It is therefore very unlikely to have been delivered to a different part of HMRC. Mr Hancox was a meticulous and careful HMRC officer: he kept detailed contemporaneous notes and returned calls promptly. It is reasonable to infer that he would have been conscientious in dealing with incoming post. Thus, even if Pinsents

had sent the disputed letter on 30 March 2016, it was not “given” to HMRC, and thus TMA s 49 was not satisfied.

Whether Pinsents appealed against the discovery assessments

96. In addition to submitting that Pinsents had appealed the penalty to HMRC, Mr Kandalraft also said that they had appealed the discovery assessments. There is, however, little to support this submission. Not only have I found as a fact that Pinsents were not appointed as the Company’s agent for tax purposes, but the Disputed Letter does not refer to the discovery assessments at all: its second paragraph refers to appeals made by Mr Hardman on 20 January 2016 against “assessments raised on the 19/9/2015 for the tax years 2007/08 to 2013/14 inclusive”, see §51. The discovery assessments were issued on 15 October 2015 for (a) the accounting period ending 2 October 2009 and (b) accounting periods ending 31 March 2010 through to 31 March 2014.

97. The only evidence is that of Mr Saunders, who said that “as far as he was concerned it was done”. However, under cross-examination he accepted that:

- (1) there was no documentary evidence that Pinsents had made an appeal against the discovery assessments;
- (2) the email from Mr Muir to Mrs Saunders of 30 March 2016 referred only to appealing the penalty, see §49; and
- (3) the Disputed Letter did not mention the discovery assessments.

98. Taking all relevant evidence into account, I find as a fact that Pinsents did not appeal against the discovery assessments.

Whether the Company “knew nothing about the assessments until June 2016”

99. It is not in dispute, see §44, that in October 2016 Mr Saunders received the Statement of Liability for £52,035.16. On 5 June 2017, Mr Kandalraft told Mr Hancox that “the Company had advised that they knew nothing about the assessments until October 2016”, when that Statement was received. Mr Bracegirdle said this was self-evidently wrong.

100. I have already found as facts that:

- (1) on 16 September 2015, Mr Hancox wrote to the Company at its registered office, explaining the assessments he was about to make, and the related penalty; and
- (2) on 15 October 2015, Mr Hancox sent the discovery assessments to the Company’s registered office, and on 11 December 2015, he sent the penalty to that address.

101. Mr Kandalraft has not sought to argue that the discovery assessments and the penalty were not received at the registered office. Instead, he has submitted that they were not received there by the Company. However, s 86 of the Companies Act 2006 states that “a company must at all times have a registered office, to which all communications and notices may be addressed”. Section 1139 provides that “a

document may be served on a company registered under this Act by leaving it at, or sending it by post to, the company's registered office". Thus, service on a company at its registered office means that the document has been received by that company, as happened in this case.

5 102. During the hearing, Mr Kandalaft amended his position, saying that it was not the Company but the directors who were unaware of the assessments until October 2016. In relation to Mr Saunders, Mr Bracegirdle disagreed.

103. In deciding when Mr Saunders was aware of the discovery assessments, I took into account the following findings of fact:

- 10 (1) on 12 November 2015, Mr Saunders completed the Tribunal form authorising FTR to "act on my behalf in this appeal";
- (2) the first of the three names listed under "Appellant" on that authorisation form was "Flash Film Transport";
- (3) the Notice of Appeal included the Company's name as an Appellant; and
- 15 (4) at some point before 18 January 2016, Ms Wooler met with Mr Saunders, and together they agreed to withdraw the Notice of Appeal.

104. From the above, I make the further finding of fact that Mr Saunders was aware of the discovery assessments on or before 12 November 2015, the date on which he signed the authorisation form.

20 105. In relation to the penalty notice, I have already found as facts that:

- (1) on 22 February 2016 HMRC sent a "Final Notice to Pay" to Mr Saunders' home address;
- (2) Mrs Saunders forwarded that Notice to Pinsents; and
- 25 (3) on 29 March 2016, Mr Muir emailed Mrs Saunders, saying that the £8,772.82 shown on the Notice "related to assessments raise by HMRC on 15 October 2015 for which no appeal had been submitted".

106. I make the reasonable inference that Mrs Saunders informed her husband about the Notice to Pay and Mr Muir's response, and that he was therefore aware of the penalty by 29 March 2016.

30 107. Thus, Mr Saunders was aware of the discovery assessments by 12 November 2015, and of the penalty by 29 March 2016. Mr Bracegirdle accepted that the position was different in relation to Mr Macchiarola. HMRC had never written directly to Mr Macchiarola: he was not a CLAC client, and his affairs did not form part of the investigations into that firm's client base. Mr Bracegirdle said that HMRC

35 did not know when Mr Macchiarola became aware of the discovery assessments or the penalty.

108. As Mr Macchiarola declined to take the witness stand, I am unable to make a finding as to when he became aware of the discovery assessments and the penalty. I return to Mr Macchiarola's position later in this decision.

Legal requirements for a late appeal application to HMRC

5 109. TMA s 49 is headed "Late notice of appeal" and reads:

- (1) This section applies in a case where
 - (a) notice of appeal may be given to HMRC, but
 - (b) no notice is given before the relevant time limit.
- (2) Notice may be given after the relevant time limit if
 - 10 (a) HMRC agree, or
 - (b) where HMRC do not agree, the tribunal gives permission.
- (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
- (4) Condition A is that the appellant has made a request in writing to
15 HMRC to agree to the notice being given.
- (5) Condition Bracegirdle is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
- (6) Condition C is that HMRC are satisfied that request under
20 subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
- (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

25 110. HMRC's position was that a letter only constitutes a late appeal within the meaning of TMA s 49 if it includes the basis on which the taxpayer believes he has a reasonable excuse for the lateness. If that reasonable excuse has come to an end, the letter must also include the basis on which the taxpayer believes the appeal has been made "without unreasonable delay after the reasonable excuse ceased".

30 111. Mr Kandalaft disagreed. In his submission, all that was required to satisfy TMA s 49 is that the taxpayer should make it clear, whether by including the word "appeal" or not, that he was challenging the decision.

112. I agree with Mr Kandalaft. TMA s 49 provides that the taxpayer can give notice after the relevant time limit if HMRC agree, and if HMRC do not agree, if the
35 Tribunal gives permission. It does not lay down any rules or conditions that the taxpayer must follow if he makes a late appeal to HMRC, other than that the application must be in writing. The other conditions are imposed only on HMRC, who cannot allow a late appeal unless "satisfied that there was reasonable excuse for not giving the notice before the relevant time limit" and, if that excuse has come to an
40 end by the date of the application, that the appeal "was made without unreasonable delay after the reasonable excuse ceased".

113. Specifically, there is no statutory requirement that the grounds for the reasonable excuse be provided by the taxpayer in his application for a late appeal; instead, it is only necessary for HMRC to be “satisfied” that the grounds exist. This permits HMRC to allow a late appeal application if they are aware of the reason for the delay from some other source: for example, if they knew that the delay had been caused by a third party or by HMRC’s own action (or inaction).

Whether Mr Kandalaft’s letter of 23 January 2017 was a late appeal application against the discovery assessments

114. HMRC’s position was that Mr Kandalaft’s letter of 23 January 2017 was not an application to make a late appeal because he did not include a reasonable excuse defence in that letter.

115. For the reasons set out above, that is not correct. Although his letter does not include the word “appeal”, it clearly challenges the substance of HMRC’s discovery assessments. I find that it was a late appeal against those assessments.

Whether Mr Kandalaft’s letter of 23 January 2017 was a late appeal application against the penalty

116. The next question is whether his letter was also a late appeal against the penalty, although it does not mention the penalty.

117. Section 49D(3) provides that, when an appeal is notified to the Tribunal, it is “to decide the matter in question”. In a case such as this, where a person has challenged an assessment but not mentioned the related penalty, does the “matter in question” encompass that penalty?

118. Neither party addressed the Tribunal on that issue. I noted that the Upper Tribunal ruled in *Birkett v HMRC* [2017] UKUT 89 (TCC) that where a person had appealed against a penalty for failure to comply with an information notice issued under FA 2008, Sch 36, the Tribunal had no jurisdiction to consider whether the underlying information notice had been “reasonably required”, because that issue had never been appealed. Sir Ross Cranston J came to the same conclusion in *R(oao PML Accounting) v HMRC* [2017] EWHC 733 (Admin), saying that “any appeal against the validity of an information notice is decided at an earlier stage than the penalty appeal and under separate statutory provisions”. His conclusion was endorsed by Longmore LJ and Jackson LJ when *PML* reached the Court of Appeal, although Henderson LJ disagreed, see [46]-[48],[114] and [95]-[104] respectively.

119. However, in my judgment there is a fundamental difference between:

- (1) a taxpayer who fails to appeal the assessment, and later seeks to appeal the penalty on the basis that the assessment was flawed; and
- (2) a taxpayer who appeals the assessment, but fails to refer to an inaccuracy penalty which was been issued on the basis of the assessment.

120. Although a penalty *may* be flawed because of a mistake in the underlying assessment, an inaccuracy penalty *must* be wrong if the assessment is incorrect. Thus,

even where the letter of appeal does not refer to the penalty, it is to be read as including an appeal against the penalty. I emphasise that I am here considering only inaccuracy penalties; the position may be different for other types of penalty. I therefore find that Mr Kandalafi's letter of 23 January 2017 is to be read as encompassing an application to appeal against the penalty as well as against the discovery assessments.

The case law on giving permission to appeal late

121. The law on giving permission for a late appeal was recently clarified in *Martland*. The UT said at [44] that the starting point is that "permission should not be granted unless the FTT is satisfied on balance that it should be", and at [26] the UT endorsed the words of Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 ("*AG v GC for Aberdeen*") at [22]:

15 "The central feature of [provisions which allow a person to make a late appeal] is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament."

122. The UT said that this Tribunal should follow a three stage approach when deciding whether to give permission,:

- 25 (1) establish the length of the delay and whether this is serious and/or significant;
- (2) establish the reason(s) why the delay occurred; and
- (3) evaluate all the circumstances of the case, using a balancing exercise to 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. In doing so the Tribunal 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".

123. The UT went on to say at [46]:

35 "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...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

5 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
10 not do so unless there are exceptional circumstances."

124. I now apply those principles to the present case.

The length of the delay

15 125. The discovery assessments were issued on 15 October 2015; the time limit for
appealing was 14 November 2015. Mr Kandalajt appealed on 23 January 2017, more
than 14 months late.

126. The penalty was issued on 11 December 2015; the time limit for appealing was
10 January 2016. Mr Kandalajt appealed on 23 January 2017, just over one year late.

20 127. In *Romasave Property Services v HMRC* [2015] UKUT 254 (TCC), the UT said
at [96] that:

"In the context of an appeal right which must be exercised within 30
days from the date of the document notifying the decision, a delay of
more than three months cannot be described as anything but serious
and significant."

25 128. The Company's delays were four times longer than the three month period
considered in *Romasave*, so are clearly serious and significant.

The reasons for the delays

129. Mr Kandalajt made a number of submissions about delay. In his letter of 3
March 2018 he said to Mr Hancox:

30 "Their previous agent changed and the one who took over soon went
into liquidation. All correspondence went to the agent address and
because of the confusion of change and liquidation the client did not
receive the HMRC raised assessment at the appropriate time."

130. In the same letter, he said:

35 "the original letter about the Company was combined with the
investigation of Mr Scott which gave the impression that it is one and
the same investigation and when the appeal for Mr Saunders went in,
the directors assumed that applied Flash Transport as well."

40 131. He repeated those submissions in his application to the Tribunal, adding that Mr
Macchiarola "had not received any correspondence regarding himself or the
Company". He expanded that point during the hearing, saying that HMRC's failure

to contact Mr Macchiarola meant that he was unaware of the assessments and so could not initiate the appeal process.

Evaluation

5 132. In order to decide whether to give permission to make a late appeal I have evaluated the relevant factors, as set out below.

Confusion arising from use of FTR's address as the registered office

10 133. I have found as a fact that Ms Wooler of FTR informed Mr Saunders of the discovery assessments by 12 November 2015, see §104. If an appeal had been made on that date, it would not have been late. Thus, no part of the delay in appealing the discovery assessments can be attributed to the use of FTR's address as the Company's registered office.

134. I have also found as a fact that Mr Saunders was aware of the penalty notice by 22 February 2016, around six weeks after the appeal deadline. In the context of the eventual 12 month delay, six weeks is a relatively short period.

15 135. In any event, even if Mr Kandalaft is correct, and the delay was caused by confusion following Mr Lunn's conviction on 3 December 2015, this argument has little merit. The Company decided on 29 November 2013 to locate its registered office at FTR's address, which was the same as CLAC's address, rather than using the home address of one of the directors; around September 2014 it decided to appoint FTR as
20 its agent for tax purposes rather than continuing to use Ms Barry or another tax adviser. When those decisions were made, Mr Saunders knew CLAC was "at war with the Inland Revenue"; that FTR was linked to CLAC, and that Mr Lunn was being prosecuted for tax offences. Mr Bracegirdle submitted that, in using FTR's address, the Company was acting in full knowledge of the risk it was running, and
25 should have been aware that there might be difficulties if Mr Lunn was convicted. I agree.

Single investigation

30 136. It is clear from my findings of fact that Mr Hancox carried out a single investigation which covered Mr Saunders and the Company. Included in his letter of 29 July 2013 were questions about the Company, the "Saunders Partnership", "Saunders Productions Limited" and the "Macchiarola and Saunders Partnership", and the same approach was adopted in subsequent correspondence. I also accept that this investigative approach confused Mr Saunders, and is the reason why a single Notice of Appeal was filed on 2 December 2015, purporting to cover the Company,
35 Mr Saunders, and his disputed partnership with Mrs Saunders.

137. However, I have also found as facts that:

- (1) on 6 January 2016, Mr Bracegirdle advised Ms Wooler that "if Flash Film Transport wish to appeal their assessments, they should make a separate appeal";
- 40 (2) on 18 January 2016, the Tribunal asked FTR to "please confirm whether or not Flash Film intend to appeal";

(3) on 29 March 2016, Mr Hancox informed Mr Muir of Pinsents that “assessments and a penalty notice had been issued some time ago but appeals and postponement applications had not been made by the company or FTR”. He suggested that “late appeals be made if this was considered appropriate”;

5 (4) on the same day, Mr Muir informed Mrs Saunders of that conversation, and she told her husband; and

(5) on 13 October 2016, HMRC sent the Company a statement of liability totalling £52,035.16, itemising the discovery assessments and the related penalty.

10 138. Despite all those reminders and suggestions, the Company failed to appeal until 13 January 2017. This was over a year after Mr Bracegirdle had advised FTR that it was necessary, and nine months after Mr Saunders was told by Mr Muir via his wife that an appeal was required.

15 139. Although Mr Saunders initially had a reasonable basis for misunderstanding the appeal position, there was no reasonable basis for that confusion continuing after he received clarificatory communications from HMRC and the Tribunal.

Mr Macchiarola’s position

20 140. I have found as a fact that Mr Macchiarola “had not received any correspondence regarding himself or the Company” from HMRC. However, HMRC were under no legal obligation to inform Mr Macchiarola directly about either the assessments and the penalty. HMRC were fully entitled to serve these on the Company at its registered office, which was also the address of its authorised agent.

25 141. Mr Saunders was aware of the discovery assessments by 12 November 2015, and aware of the penalty by 29 March 2016. I was unable to make a finding as to when Mr Macchiarola was informed of these liabilities. If FTR and Mr Saunders delayed telling Mr Macchiarola, that is a matter for them. It does not provide a good reason to grant the Company permission to make a late appeal.

Merits

30 142. During the hearing, Mr Kandalajt referred to his letter of appeal dated 23 January 2017, which said that the discovery assessments on the Company for the period investigated by Mr Hancox were too high because:

(1) HMRC should not have adjusted the turnover figure; instead they should have placed reliance on the Company’s VAT returns;

35 (2) due regard had not been paid to allowing the expenses claimed by the partnership; these would negate the extra profit created by transferring the partnership income to the Company;

(3) HMRC should have accepted the figures for purchases, travelling and motor costs shown in the Company’s books and records;

(4) in relation to HMRC's disallowance of certain labour costs, "documents and schedules" had been provided in support, but not been taken into account; and

(5) deductions had not been given for all capital allowances claimed.

5 143. Given the serious flaws which Mr Hancox identified in the Company's record keeping, Mr Kandalajt's suggestion that reliance should have been placed on its books and records is without merit. His statement that "due regard had not been paid to allowing the expenses claimed by the partnership" is simply incorrect, see §24. Although he asserts that capital allowances have not been deducted, he gives no
10 detail, and he provides none of the "documents and schedules" relating to labour costs to which he makes reference; he also fails to explain the lack of invoices for those costs, see §21. The general impression given by his submissions is that the Company's case on the merits is weak.

15 144. In relation to the later years, Mr Kandalajt said that "there is no foundation or justification to support the arbitrary figures used to add additional assessments to the above years"; he added that it was "grossly unjust" of HMRC to investigate initial periods, and then base later assessments on the errors identified in those periods.

20 145. Mr Bracegirdle submitted that the assessments had been based on Mr Hancox's careful and detailed evaluation of the evidence provided for those initial periods, and that reliance on the presumption of continuity in relation to later periods was entirely reasonable and appropriate. In *Jonas v Bamford* [1973] STC 519 Walton J said (emphasis added):

25 "Once the inspector comes to the conclusion that, on the facts which he has discovered, the taxpayer has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer."

30 146. I agree with Mr Bracegirdle that Mr Kandalajt failed entirely to meet that burden: he put forward no figures to challenge Mr Hancox's assumptions as to the position for those later years.

Prejudice to the parties

35 147. If I refuse the Company's application, it will suffer significant prejudice, because the discovery assessments and the penalty will stand. If I allow the application, there is some prejudice to HMRC: they will have to defend their assessments and the penalty. This will require them to set aside time from other tasks to prepare the Statement of Case, liaise on document disclosure and attend the hearing. However, I accept that the balance of prejudice favours the Company.

Finality and the public interest

40 148. HMRC reasonably believed that the appeals were finally determined: Mr Hancox had informed Pinsents in March 2016 that late appeals could be made, but

heard nothing further until January 2017. In *AG v GC for Aberdeen*, Lord Drummond Young referred at [23], to the public interest, saying that this includes “the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened”. If the Tribunal were to give permission for a late appeal in response to applications made over a year late, this would run counter both to that general policy and to HMRC’s reasonable expectation that the matter had been concluded.

Efficiency and the time limits

149. In *Martland*, the UT emphasised that the Tribunal should place particular importance on “the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected”.

150. The Company’s appeals were very significantly late in the context of a 30 day time limit, which was “the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case”.

151. Moreover, the Company was clearly informed by HMRC on 9 April 2018 that its late appeal application had been refused, but it was not until 23 July 2018 that the Tribunal received the application. It therefore took a further three and half months to notify its appeal. Mr Kandalaft said this was because he needed to consult with his client and take external advice. But representatives always have to consult their clients, and they frequently need to take external advice: neither provides a good reason for this further delay.

Conclusion and appeal rights

152. Having considered and balanced all the above factors, I have no doubt that permission should not be given. The Company’s application to make a late appeal is refused.

153. This document contains full findings of fact and reasons for the decision. If the Company is dissatisfied with this decision, it has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. 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 REDSTON
TRIBUNAL JUDGE**

RELEASE DATE: 02 JANUARY 2019