



TC06984

Appeal number: TC/2017/01332

VALUE ADDED TAX – permission to make late appeals to the Tribunal against a VAT assessment and inaccuracy penalty for 05/15 and an inaccuracy penalty for 11/14 – whether appeals made late: yes in case of penalties, no in case of assessment – Martland & NT-ADA Ltd considered – permission granted.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PRAMUKH ENTERPRISES LTD

Appellant

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Taylor House, London EC1 on 1 February 2019

No director of the appellant was present and they were not represented

Ms Sharon Wilcox, litigator, for the Respondents

1. This was the hearing of an application by the appellant for permission to appeal to the Tribunal in relation to two penalty assessments and a VAT assessment.

Non-attendance

2. Shortly before the day set for the hearing and after I had refused HMRC's application for the case to dealt with on the papers, the Tribunal was informed that the directors of appellant would not be attending nor was it to be represented by its accountant because they could not afford to pay him.

3. It was of course obvious that the appellant was aware of the hearing, and so it fell to me to decide whether it was in the interests of justice to proceed. I had regard to the fact that this was a case where the appellant was applying for permission to notify late appeals to the Tribunal and that it had been required by the Notice of Appeal to set out its reason for lateness. It seemed to me unlikely that the appellant, if not represented, would be in a position to conduct any postponed appeal and nothing would be gained by a postponement.

Facts

4. There are four decisions by HMRC against which the appellant seeks to appeal, although two of them arise in the same period but from the different matters, and given that one is a penalty of £10 and the relevant dates are all the same I consider these two together.

Penalty assessment for VAT period 11/14

5. For this period HMRC issued a penalty assessment under Schedule 24 Finance Act ("FA") 2007 (inaccuracies in a document, in this case a VAT return). There was also an assessment to recover the VAT underdeclared but there has been no appeal against that assessment (at least none referred to in the papers).

6. On 24 April 2015 Ms Vicky Leung, an officer of Revenue and Customs, wrote to the appellant setting out her decision to make VAT assessments to recover input tax which she said had been wrongly claimed in the VAT return. In the same letter she said that where an inaccuracy is found "we may charge a financial penalty". She provided factsheets and asked for an explanation of the reasons for the errors.

7. On 15 May 2015 Ms Leung said she had processed the penalties based on information received from the appellant's agent on 12 May 2015.

8. On 2 July 2015 a Mr P S Adcock sent the appellant an explanation of the penalties HMRC intended to charge. The notice of assessment to two penalties, £7,230.74 and £10.23 was dated 31 July 2015 and gave the recipient three options: to explain why it was considered that the penalty was wrong; to request a review or to appeal to the Tribunal.

9. On 13 August 2015 Doshi & Co, accountants, wrote to Ms Leung asking for a breakdown of the penalties of £7,230 and £10 and stating that the appellant disagreed with the assessment as it was "based on assumptions and not facts". Doshi & Co also hoped that on receipt of the letter "you will do the needful under intimation to us and our client".

10. On 24 August 2015 Ms Leung wrote to Doshi & Co explaining the basis of her assessment and the associated penalties and gave the appellant a further opportunity to ask for a review or appeal to the tribunal within 30 days of "this letter".

11. By a letter dated 24 September 2015 Doshi & Co wrote to the respondents enclosing a Statement of Account for the appellant showing the £7,240 as due and asked again for a breakdown of the assessment with copies of correspondence and restated that the appellant disagreed with the assessment. On 9 October 2015 copies of the correspondence relating to the penalties were sent to Doshi & Co.

12. On 15 December 2015 Doshi & Co wrote and asked for a full breakdown of the “potential lost revenue” (“PLR”) of £13,328.60 on which the penalties had been calculated.

13. On 22 December 2015 Ms Leung reissued a copy of her letter of 15 May 2015 which explained the PLR.

14. At this point the appellant’s director decided to dispense with the services of the accountant and nothing further was heard regarding these penalties until they were appealed by the appellant in the Notice of Appeal dated 2 February 2017.

Tax Assessment for VAT period 05/15

15. On 21 January 2016 Ms Leung recounted the appellant’s failure to provide her with the information needed to enable her to check the 05/15 repayment claim and informed them that an assessment to VAT for the period 05/15 had been issued in the amount of £16,031.

16. On 12 February 2016 Ms Leung told the appellant that they would need to write within 30 days of the date of the notice of assessment if they wished to disagree with her decision to provide her with the documents she had asked for. Alternatively they could ask for a review or appeal directly to the Tribunal within 30 days of the date of the notice of assessment.

17. On 17 February 2016 the appellant requested a review of the decision and subsequently provided documents to support a reduction in the assessment.

18. On 17 February 2016 Ms Leung replied saying that the appellant would need to supply her with the documents requested if they would like her to review her decision.

19. On 31 March 2016 Ms Leung emailed the appellant to say she had received the documents and they were currently under review.

20. On 8 April 2016 Ms Leung wrote to the appellant reducing the assessment from £11,221 to £6,236. She said that if the appellant disagreed with her adjustment to the 05/15 return they needed to say why and provide the supporting documents. Alternatively they could ask for a review or appeal directly to the Tribunal within 30 days of the date of the letter

21. The assessment was appealed against in the Notice of Appeal dated 2 February 2017.

Penalty assessment for VAT period 05/15

22. On 29 January 2016 Ms Leung issued a penalty explanation letter notifying the appellant that she intended to issue a penalty in the amount of £11,221.70 based on the PLR £16,031 assessed on 21 January 2016 (see §15). This letter gave the appellant until 27 February 2016 to provide any relevant information that might lead to a reduction of the penalty.

23. On 10 February 2016 the appellant e-mailed Ms Leung asking for an explanation of the penalty.
24. On 12 February 2016 Ms Leung replied, explaining the reasons for the assessment and enclosing a copy of her letter of 21 January 2016 (see §16) and further explaining that, in relation to the level of penalty, she considered the appellant's behaviour to have been deliberate.
25. On 1 March 2016 a penalty assessment under Schedule 24 FA 2007 was issued in the sum of £11,221.70 for the accounting period 1 March 2015 to 31 May 2015.
26. A further penalty explanation letter was issued on 12 April 2016 showing a proposed penalty of £4,256.72 for 05/15. This letter said:

“If we send you a notice of penalty assessment, you will be able to appeal or ask for a review then. We will tell you more about this in the notice”.
27. A notice of *amended* penalty assessment was issued on 11 May 2016 in the sum of £4,256.72. The notice did not refer to any appeal or review rights.
28. On 12 May 2016 the appellant acknowledged receipt of the letter with the penalty notice and requested an independent review.
29. On 13 May 2016 Ms Leung replied explaining that as the notice had been issued the appellant needed to provide reasons with evidence why they disagreed with the penalty in order for them to have an independent review.
30. On 16 June 2016 the appellant's director emailed Ms Leung saying she was still waiting for her documents as she didn't agree with the penalty and would like to “appeal for independent review”. She asked to know the procedure for appeal as she had not heard anything from HMRC.
31. On 4 July 2016 Ms Leung told the appellant that they had been given advice on how to request a review in the mail of 13 May 2016. The appellant was given a further 30 days in which to provide information that would allow the penalty to be reviewed.
32. On 4 August 2016 at 12.34 (31 days later) the appellant e-mailed Ms Leung asking for the penalties to be reviewed.
33. On 4 August 2016 at 12.42 Ms Leung replied enquiring whether the appellant wished to appeal to the tribunal or have an “internal” review.
34. At 13.27 Ms Leung sent a further e-mail asking that the appellant reply by 5pm in order to meet the 30 day deadline for request of a review.
35. On 15 September 2016 the appellant replied asking for an “internal” review.
36. Ms Leung replied the same day informing the appellant that the review request would not be accepted as it was too late.
37. Notice of Appeal was given to the Tribunal on 2 February 2017.

Appeals against all assessments

38. On 2 February 2017 Doshi Accountants Ltd submitted a Notice of Appeal to the Tribunal referring to tax and penalties of £17,695.19. HMRC accept that this amount refers to the assessments referred to above.

39. In answer to the question “Has there been a Review by HMRC?” the notice shows “No”. And to the question “Has the period for a Review ended” it says “Yes”.

40. In relation to whether the appeal was late, Doshi & Co say the latest time by which the appeal should have been made was 15 June 2015, and there was a request to appeal outside the time limit. The grounds for lateness were given in the reply about hardship where Doshi & Co said that Mrs B Patel, the director, had no experience in VAT assessments, appeals or reviews. She had requested Doshi & Co to look into the matter around 15 December 2015 but thereafter she decided to deal with the matter herself. I note here that in fact Doshi & Co were corresponding with HMRC on this case from May 2015 onwards.

41. They added that she failed to appeal and it was only when HMRC made an attempt to enforce the assessments did she seek professional advice and instructed us for further assistance.

42. On 15 August 2017 HMRC lodged an objection to the late appeal (an application to proceed without paying the VAT on grounds of hardship having been granted). They include within this an application for the striking out of the appeal on the grounds that it was not submitted within the prescribed time limits.

43. The Tribunal then listed the permission application for hearing as a preliminary matter, with no question of a hearing of the appeal following.

Law

44. The law relating to VAT appeals against assessments is in Part 4 Value Added Tax Act 1994 (“VATA”) and in particular:

“83A Offer of review

- (1) HMRC must offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision.
- (2) The offer of the review must be made by notice given to P at the same time as the decision is notified to P.
- (3) This section does not apply to the notification of the conclusions of a review.

83C Review by HMRC

- (1) HMRC must review a decision if—
 - (a) they have offered a review of the decision under section 83A, and
 - (b) P notifies HMRC accepting the offer within 30 days from the date of the document containing the notification of the offer.
- (2) But P may not notify acceptance of the offer if P has already appealed to the tribunal under section 83G.
- ...
- (4) HMRC shall not review a decision if P ... has appealed to the tribunal under section 83G in respect of the decision.

83D Extensions of time

(1) If under section 83A HMRC have offered P a review of a decision, HMRC may within the relevant period notify P that the relevant period is extended.

...

(3) If notice is given the relevant period is extended to the end of 30 days from—

- (a) the date of the notice, or
- (b) any other date set out in the notice or a further notice.

(4) In this section “relevant period” means—

...

- (b) if notice has been given under subsection (1) ..., that period as extended (or as most recently extended) in accordance with subsection (3).

83E Review out of time

(1) This section applies if—

- (a) HMRC have offered a review of a decision under section 83A and P does not accept the offer within the time allowed under section 83C(1)(b) or 83D(3);

...

(2) HMRC must review the decision under section 83C if—

- (a) after the time allowed, P ... notifies HMRC in writing requesting a review out of time,
- (b) HMRC are satisfied that P ... had a reasonable excuse for not accepting the offer or requiring review within the time allowed, and
- (c) HMRC are satisfied that P ... made the request without unreasonable delay after the excuse had ceased to apply.

(3) HMRC shall not review a decision if P ... has appealed to the tribunal under section 83G in respect of the decision.

83F Nature of review etc

(1) This section applies if HMRC are required to undertake a review under section 83C or 83E.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review—

- (a) by HMRC in reaching the decision, and
- (b) by any person in seeking to resolve disagreement about the decision.

(4) The review must take account of any representations made by P ... at a stage gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that the decision is to be—

- (a) upheld,
- (b) varied, or

(c) cancelled.

(6) HMRC must give P, or the other person, notice of the conclusions of the review and their reasoning within—

(a) a period of 45 days beginning with the relevant date, or

(b) such other period as HMRC and P, or the other person, may agree.

(7) In subsection (6) “relevant date” means--

(a) the date HMRC received P’s notification accepting the offer of a review (in a case falling within section 83A), or

...

(c) the date on which HMRC decided to undertake the review (in a case falling within section 83E).

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that the decision is upheld.

(9) If subsection (8) applies, HMRC must notify P ... of the conclusion which the review is treated as having reached.

83G Bringing of appeals

(1) An appeal under section 83 is to be made to the tribunal before—

(a) the end of the period of 30 days beginning with—

(i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or

..., or

(b) if later, the end of the relevant period (within the meaning of section 83D).

(2) But that is subject to subsections (3) to (5)

(3) In a case where HMRC are required to undertake a review under section 83C—

(a) an appeal may not be made until the conclusion date, and

(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

(4) In a case where HMRC are requested to undertake a review in accordance with section 83E—

(a) an appeal may not be made--

(i) unless HMRC have notified P ... as to whether or not a review will be undertaken, and

(ii) if HMRC have notified P ... that a review will be undertaken, until the conclusion date;

(b) any appeal where paragraph (a)(ii) applies is to be made within the period of 30 days beginning with the conclusion date;

(c) if HMRC have notified P ... that a review will not be undertaken, an appeal may be made only if the tribunal gives permission to do so.

(5) In a case where section 83F(8) applies, an appeal may be made at any time from the end of the period specified in section 83F(6) to the date 30 days after the conclusion date.

(6) An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so.

(7) In this section “conclusion date” means the date of the document notifying the conclusions of the review.

45. In relation to penalties under Schedule 24 FA 2007 paragraph 16(1) provides:

“(1) 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).”

46. Questions relating to late actions by persons seeking to appeal VAT decisions are covered in the Tribunal’s rules. Rule 20 provides:

“Starting appeal proceedings

20.—(1) Where an enactment provides for a person to make or notify an appeal to the Tribunal, the appellant must start proceedings by sending or delivering a notice of appeal to the Tribunal within any time limit imposed by that enactment.

...

(4) If the appellant provides the notice of appeal to the Tribunal later than the time required by paragraph (1) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—

(a) the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Tribunal must not admit the notice of appeal.

47. The effect of these provisions is this. Section 83G VATA imposes time limits within which an appeal to the Tribunal must be notified, and that time limit and the date from which it runs vary according to the circumstances. They are:

(1) Where an offer of a review is accepted by the appellant and the review is carried out and leads to the issue of a conclusion letter, the deadline is 30 days from the date of the document notifying the conclusion of the review. This is the limit in these circumstances whether or not the acceptance of the review offer was in time.

(2) Where an offer of a review is accepted by the appellant and the review is carried out but no conclusion letter is given within the time allowed for the review (whether extended by agreement or not), the notice of appeal may be given at any time within the period starting with the end of the period allowed for the review up until 30 days after the date on the letter notifying the appellant of the deemed conclusion of the uncompleted review. This is the limit in these circumstances whether or not the acceptance of the review offer was in time.

(3) Where an offer of a review is not accepted, and HMRC do not extend the time for accepting the offer, the deadline is 30 days from the date of the document notifying the appealable decision.

(4) Where an offer of a review is not accepted after HMRC have extended the time for accepting the offer, the deadline is the end of the period as so extended.

48. If the relevant deadline is not met, then s 83G(6) requires the appellant to obtain permission from the Tribunal before it will accept the notice of appeal, and the notice of appeal must itself contain the application for permission with the reasons for missing the deadline.

49. I should mention here the Upper Tribunal decision in *HMRC v NT-ADA Ltd (formerly NT Jersey Ltd)* [2018] UKUT 59 (TCC) (“*NT-ADA*”). In that case it was held (at [47]) that in VAT cases the precise wording of the “offer” of a review was not determinative, so long as it was clear that the appellant was being offered a real choice between a review that will be carried out and an immediate appeal to the Tribunal.

50. The Upper Tribunal also considered the consequences of a failure to offer a review. Contrary to the submissions of the appellant and the decision of the First-tier Tribunal, the Upper Tribunal held that the failure did not invalidate the assessment being appealed against. As to whether there was any sanction on HMRC for non-compliance with s 83A VATA the Tribunal said (at [37]):

“We do not think it is surprising that an obligation placed on a public body such as HMRC does not bring with it an obvious sanction for non-compliance. Parliament simply expects obligations that it places on HMRC to be fulfilled. In practice, any failure to offer a review is highly likely to be remedied when pointed out, and if it was not then an aggrieved taxpayer would in principle have recourse to judicial review proceedings to compel the offer of a review. *As already indicated, a failure by HMRC to provide adequate notification of appeal or review rights in the decision letter could also influence the exercise of the FTT’s discretion to admit a late appeal.*” [My emphasis]

51. The “indication” already given was at [34] where the Upper Tribunal said:

“The effect of Mr Gordon’s approach is that a notification which fails to offer a statutory review would be invalid, but a notification which offers a review but omits to mention that there is a right of appeal to a tribunal within a certain period would be valid. We do not think that Parliament can be taken to have intended there to be such a distinction. A more rational approach is to have regard to the discretion of the tribunal to admit late appeals, the exercise of which could undoubtedly be influenced by a failure by HMRC to include important information of this nature, particularly about appeal rights but potentially (and depending on the circumstances) about the right of review as well.”

Discussion

Strike out?

52. HMRC asked the Tribunal to strike out the appeals on the grounds the appellant failed to apply reasonable due diligence in the bringing of the appeal and that it was not submitted within the time limits. They do not say under which provision of Rule 8 of the FTT Rules they make this application, but I can only assume from the reference to due diligence and the inapplicability of any other rule that it is because they say that the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the appeal fairly or justly.

53. This application seems to me to be misguided. The appellant is required to seek permission to bring the appeals to the Tribunal, so there is nothing to strike out, proceedings on the appeals not having begun. And striking out the appeals on the grounds of lateness is effectively what I will be doing if I refuse permission. If I give permission then I will be allowing the appeals to proceed even though they are outside the time limits, so HMRC's objection on those grounds necessarily falls away as I will have ruled contrary to their objection. Perhaps a charitable reading would be that HMRC are merely asking me to refuse permission on grounds of lack of due diligence.

54. At the hearing Ms Wilcox did not pursue the strike out application and I say no more about it.

Was the appeal for the 11/14 penalty late?

55. There is no need to seek permission to make a late appeal if it is not late. The narrative of the facts in relation to each of the assessments shows a complex position and it is in my view necessary to examine what happened and what didn't happen in some detail before concluding that all appeals are out of time.

56. The 11/14 penalty assessment was issued on 31 July 2015. On 13 August 2015 within time Doshi & Co expressed their disagreement with the assessment, but did not mention the penalty explicitly, except to ask for a breakdown of them. They asked HMRC to "do the needful", but what the needful was was not explained.

57. Ms Leung's reply, still within the 30 days given in the penalty notice for a review or notice to the Tribunal, explained the basis of her assessments including to penalties and extended the time for requesting a review or giving notice to the Tribunal, to 23 September. Doshi & Co replied on 24 September but did not accept a review and in further correspondence did not do so. Nor did they appeal to the Tribunal until 2017.

58. This then is a case where a review was offered and the time for a review was extended. By s 83G(1)(b) VATA the deadline for giving notice of appeal to the Tribunal was 23 September 2015, the end of the "relevant period" within s 83D. The appeal was therefore late.

Was the appeal for the 05/15 VAT assessment late?

59. Turning now to the VAT assessment for 05/15 the appellant, now acting without the assistance of Doshi & Co, requested a review within 30 days of the date of the notice of assessment. The exact words (spelling apart) in Mrs Patel's email were "I would hereby like you to review the decision". The words of Ms Leung to which they were a response were "you can ask for an internal review within HMRC".

60. For some reason Ms Leung took the appellant's request as one for a review by Ms Leung of her own decision. Ms Leung did then review her own decision and following receipt of documents from the appellant she amended the assessment reducing it by nearly half. She then offered a(nother) review and told the appellant that alternatively they could appeal to the tribunal within 30 days. Read with a pedantic eye the letter could be said to put no time limit on the acceptance of the review offer, only on the direct application to the Tribunal, but there is no indication that the appellant read it that way as the next step taken by them over nine months later was to go the Tribunal.

61. The offer of a review of an *amendment* to an assessment, especially one made after the supply of information and documents which has the result that the assessment

is reduced, is, to my mind, odd. It was also something which the compiler of HMRC's skeleton argument for the hearing of the permission application obviously thought was wrong, as in relation to the 05/15 penalty (see below) they said as regards an amended penalty assessment "No appeal rights were offered in this notice as this was not a new decision".

62. I do not intend to seek an answer to the question whether an amendment to an assessment is an appealable decision. I did not receive or seek any arguments on the point. The original assessment was accompanied by an offer of a review (in terms satisfying the Upper Tribunal in *NT-ADA*) which was accepted within the time limit. A review was then purportedly carried out by Ms Leung

63. I struggle to understand why she did this. Perhaps she was under the mistaken impression that because s 83Aff VATA 1994 ("the VAT review provisions") do not spell out that a review is to be carried out by an officer other than the decision maker she was able to review her own decision under the VAT review provisions. Simply reading the VAT review provisions might give that impression as they refer throughout to HMRC not to officers.

64. In my view what Ms Leung did was not a review within the meaning of the VAT Review provisions. While there is, as I have said, nothing in those provisions which lays down that a review must be carried out by someone other than the decision-maker, a purposive interpretation of the VAT review provisions shows that a review by the original decision-maker is not a "statutory" review, as HMRC like to call it.

65. The considerations that lead me to this conclusion are as follows.

66. In the consultation document ("condoc") "Tax Appeals against decisions made by HMRC" published on 9 October 2007, Chapter 4 is headed "Impartial internal review", and contains at 4.14 this:

"4.14 Review by an external body would be costly, and would to some extent duplicate the work of the tribunal. However, it is recognised that there is a risk of internal reviews not being regarded as sufficiently impartial. For this reason the intention is that reviews would be conducted by someone other than the immediate line manager and who was not involved in the original decision."⁵¹_{SEP}

67. In the Summary of Responses to the condoc paragraph 3.12 says:

"On impartiality, respondents felt that an internal review would never be seen as entirely impartial as HMRC employees had a particular role and responsibility. A small minority of respondents thought that reviews would be valuable only if conducted by an entirely independent body. However, most considered that internal review need not be entirely impartial to be valuable as it would bring benefits such as a fresh pair of eyes, the absence of preconceptions about the case and a risk free environment within which to resolve differences. ..."

68. Paragraph 3.13 added:

"Most respondents said that for internal reviews to be credible there must be sufficient distance between the decision maker and the review officer. Some respondents advocated an independent unit within HMRC, others suggested a system where reviewers were outside the line management chain and, where possible, geographically separate. ..."

69. Chapter 7, dealing with the way forward, did not in relation to reviews specifically refer to the impartiality issue but referred to a person who was to be a “review officer”, the person carrying out the review.

70. In the Regulatory Impact Assessment for the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56), the Order which inserted sections 83A to 83G into VATA, the “Costs and benefits to customers” include customers getting “a fresh pair of eyes” to look at their case.

71. Published material available to Ms Leung makes it clear that HMRC’s policy is and has always been that a review under the VAT review provisions is carried out by an officer in a special section of HMRC whose job it is to carry out reviews. For example paragraph 1030 of the HMRC Appeals, Reviews and Tribunals Guide (ARTG) says:

“Customers are entitled, by law, to a review by HMRC of its appealable tax decisions, that is, decisions (other than restoration decisions) where any appeal would be to the Tax Chamber of the tribunal, see ARTG1010.

So where customers disagree with HMRC’s decision or assessment and want a review, HMRC must carry out a review of its decision, see ARTG4030.

This review will be carried out by a review officer, who is, in most cases, outside the direct line management chain of the decision maker and was not involved in making the decision.

...

The aim of the review is to provide an additional opportunity to resolve the dispute without the need for a tribunal hearing.

Since review officers have not been involved in the decision, they provide a fresh viewpoint. Reviews help make sure both that the decision has been properly made and that, in HMRC’s view, it is legally correct and one which we would defend at tribunal.

HMRC has a Quality Assurance process to make sure that the reviews

- are consistent
- are carried out to the required standard, and
- provide feedback to review officers and to business areas so that guidance and training for decision makers is improved.”

72. The position then is in my view that the appellant made an in time request (to be treated as an acceptance of a offer) for a review of the decision to make the assessment but HMRC did not carry out the review. This is not a case where s 83G(3) VATA applies because although there has been a request for a review there is no conclusion date because no conclusion letter has been issued by a review officer. Section 83G(4) is inapplicable because the request for a review was not out of time. Section 83G(5) may be applicable: it applies if s 83F(8) does. That subsection says:

“Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that the decision is upheld.”

73. It might plausibly be argued that this subsection applies only where a review has actually been started, but ignoring that question, it applies here to deem the assessment

to be upheld (notwithstanding that Ms Leung varied it). The time limit for notifying the appeal to the Tribunal is therefore that given by s 83G(5) VATA and is 30 days after the “conclusion date” given by s 83G(7), the date of the document notifying the conclusions of the review. There was no such document and so no time limit prevents the making of the appeal. Accordingly no permission is required of the Tribunal.

Was the appeal for the 05/15 penalty late?

74. As to the penalty assessment for 05/15 an offer of a review was made and information about appealing to the Tribunal was given in the original notice of assessment of 1 March 2016. On 12 May 2016 the appellant, having received an *amended* notice of assessment with no reference to a review, made a request for one. This was 42 days late. Ms Leung replied asking to be supplied with the reasons for the review request, and when the appellant repeated their request for a review Ms Leung said on 4 July 2016 that they had already been told. But she relented when told by the appellant that they had not received the notice by extending the period to make a review request to 3 August 2016. When the appellant made a further request for a review on 15 September 2016 this was turned down as late.

75. This narrative of events reveals total confusion within HMRC and in Ms Leung’s mind. Where as here an offer of a review was made an extension of time to accept the offer may be allowed by HMRC on giving notice of the extension (s 83D VATA). Ms Leung purported to do that on 4 July 2016: but she could only offer an extension within the “relevant period”. That period is the period of 30 days starting with an *in time* acceptance of an offer (s 83D(4)(a)(i) VATA read with s 83C(1)(b)). There was no in time acceptance of the offer: that was given 42 days too late. So the extension was extra-statutory. What should have happened is that Ms Leung should have informed the appellant that the acceptance of the offer (ie the request for a review – see *NT-ADA*) was out of time, and should have informed the appellant of their right under s 84E to make a request for an out of time review. It seems that Ms Leung may have accepted the request because she was offering to put the matter to review several months after the out of time acceptance and purporting to extend the time. Eventually she put her foot down and said that the appellant’s *fourth* request for a review was out of time!

76. Trying the best I can to cut through the thickets here it seems that HMRC were not obliged to carry out a review as the request was late and the appellant did not notify HMRC of their reasons for the lateness. Section 83G(3) VATA does not apply as there has been no conclusion date of a review requested. But does s 83B(5)? I do not think so because it applies where HMRC are required to undertake a review and by s 83C(1)(b) they were not (because the acceptance was out of date). Thus s 83G(1)(a)(i) applies and an application for permission to appeal is required by s 83G(6).

Permission to appeal out of time

77. This is required for the two penalty assessments but not the VAT assessment.

78. In considering the application I am told by the Upper Tribunal decision in *Martland v HMRC* [2018] UKUT 178 (TC) (“*Martland*”) that I should go through the three “Denton” stages and that by doing so I will be in effect answering the well known “Data Select” questions which were asked in the context of late VAT appeals.

79. As to the 11/14 penalty I find that the delay was over 18 months, by any standards a delay which is serious and significant (the first Denton stage question).

80. The reasons for the delay (the second Denton stage question) according to Doshi & Co's grounds of appeal were that although they had been asked around December 2015 to look into the matter, thereafter the appellant's director took over but she failed to appeal until she re-engaged Doshi & Co.

81. This is a travesty of the correct position. Doshi & Co were acting for the appellant before, when and after the assessment to penalties was made in July 2015 as is shown by their letters of 29 May and 13 August 2015. They had ample time to make a valid request for a review or to appeal to the Tribunal but failed to do so. There was no good reason given for the delay.

82. Notwithstanding the answers to the questions at the first two stages, *Denton*¹ at [31] tells me that I should still consider all the circumstances. These include the prejudice to the parties should my decision be against them. There will be prejudice to the appellant because they will not be able to contest the penalties, but as was pointed out in *Martland* that would simply be the result of the failure to act in time. There would be prejudice to HMRC as they would have to prepare a statement of case to deal with the appeal and devote resources to any hearing.

83. I am also permitted to consider the merits of the appeal, so long as I do not conduct a mini-trial. As far as the PLR amount is concerned then it seems to me that I would have to conduct at least a "mini" trial to establish whether the PLR is correct, and I would have to consider in that connection whether the unappealed amount shown in the assessment is determinative (ie whether *res judicata* or similar doctrines apply to penalties based on assessments, in which context see for example *King v Walden (HM Inspector of Taxes)* [2001] EWHC Ch 219) and even if I could I can see no basis on which I could determine whether disallowed input tax was correctly disallowed without examining the facts in detail. Thus I cannot say that the merits are strong either way.

84. But the crucial circumstance that has weighed with me is the conduct of Doshi & Co. Their conduct has been deplorable, and I consider it is in the interests of justice to give permission to the appellant, notwithstanding the long delay. The appellant through Mrs Patel had no means of knowing that Doshi & Co were not doing what they should have done, and given my decision on the 05/15 assessment which raises very similar points to those on the 11/14 assessment, I grant permission to the appellant to appeal out of time against this penalty.

85. As to the 05/15 penalty I find that the delay was 10 months or possibly less given the chaotic state of Ms Leung's handling of the case, but in circumstances could not be less than four months, either way being a delay which is serious and significant.

86. The reasons for the delay according to Doshi & Co's grounds of appeal were that the appellant's director failed to appeal until she re-engaged Doshi & Co. This, by contrast with what they say about the 11/14 penalty, is true. But it seems to me that the appellant had a good reason for not appealing until at least September 2016 but has given none for the delay of four months thereafter.

87. Looking at all the circumstances the prejudice issue for HMRC is the same as it is in relation to 11/14. But for the appellant there is the point that they are able to contest the assessment because the appeal was in time and so if the assessment was reduced on appeal there would arise a question about whether the penalty can be

¹ *Denton & ors v TH White Ltd & ors* [2014] EWCA Civ 906

amended accordingly when it is not under appeal. If it could not be amended there would be a more serious prejudice to the appellant than might otherwise be the case.

88. As to the merits, it seems to me on the face of the documents I have seen that the appellant would have a very good case indeed for at least reducing the penalty by getting it reclassified from “deliberate” to “careless”. I have noted that the 11/14 penalty is for careless behaviour while the 05/15 is for deliberate behaviour, when the circumstances in which the inaccuracies came about appear to be identical.

89. I have also reminded myself of what the Upper Tribunal said in *NT-ADA* about taking HMRC errors into account when considering permission to make a late appeal. In this case the errors are manifold including the ignoring of three requests for a review.

90. In my view the point about behaviour, the HMRC errors, and the non lateness of the underlying assessment significantly outweigh the delay and prejudice to HMRC. I grant permission to appeal this penalty.

Summary of decisions

91. I grant permission to the appellant to make late appeals against the penalties for 11/14 and 05/15.

92. I hold that the appeal against the assessment for 05/15 is not late, so the Tribunal’s permission is not required.

93. 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.

**RICHARD THOMAS
TRIBUNAL JUDGE**

RELEASE DATE: 16 FEBRUARY 2019