[2019] UKFTT 0247 (TC)

TC07093

Appeal number: TC/2018/00973

PROCEDURE – application for permission to make a late appeal – Appellant's failure to understand the statutory requirements – wording of HMRC's communications – obvious errors in HMRC's calculation methodology – significant prejudice if permission not given – permission granted.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANGEL BEAUTY PARLOUR LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS HELEN MYERSCOUGH

Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue on 8 November 2018 and 7 February 2019

Mr Ben Elliott of Counsel, instructed by Mills Chody LLP for the Appellant,

Mr Dave Lewis, Litigator of HM Revenue and Customs' Solicitor's Office for the Respondents

DECISION

Summary

1. Angel Beauty Parlour Ltd ("the Company") operates beauty salons, some from shop premises and some from kiosks within shopping centres. The Company applied to the Tribunal to notify its appeal after the statutory time limit; its appeal was against assessments and penalties totalling £897,695.90 made up as follows:

(1) assessments under Regulation 80 of the Pay As You Earn Regulations 2003 ("Reg 80") for the five years 2012-13 to 2016-17, totalling £528,056.42; and

(2) penalties under Finance Act 2007, Schedule 24, calculated as 70% of the Reg 80 assessments, on the basis that the Company's behaviour had been "deliberate" and disclosure "prompted"; the penalties totalled £369,639.48.

2. HMRC issued a statutory review letter on 28 July 2017 ("the Review Letter"). The Company had 30 days from that date to notify an appeal to the Tribunal, see Taxes Management Act 1970 ("TMA"), s 49G. The Company's Notice of Appeal was filed with the Tribunal on 2 February 2018, over five months late. The Notice of Appeal contained both an appeal and an application to notify the appeal after the statutory time limit. HMRC objected to the Company's application.

3. For the reasons set out in the main body of this decision, the Tribunal allowed the Company's application. We gave our decision orally after the end of the hearing, and on 13 February 2019, issued a short decision notice. On 27 February 2019, the Company asked for a full decision, as it is entitled to do, and this is that full decision.

The evidence

4. HMRC provided a Bundle containing:

(1) the correspondence between the parties, including the Reg 80 determinations and the penalties;

(2) internal emails relating to the Company between HMRC Officers;

(3) the Company's Notice of Appeal, and HMRC's objection; and

(4) notes made by HMRC Officers who carried out "test purchases" at the Company's salons in Hatfield, Milton Keynes, Croydon and Basildon. After the hearing, the Tribunal noticed that the Review Letter refers to test purchases also having been carried out at the Company's Cambridge salon, and to "walk-bys" of the Newmarket salon, but the Tribunal was not provided with the Officers' notes relating to either Cambridge or Newmarket.

5. The Company provided several Bundles containing witness statements from (a) Mr Chiragkumar Kansara, director and owner of the Company, and (b) Mr Jaymeen Shah, the Company's accountant, together with exhibits, which included

(1) details of licence and tenancy agreements allowing the Company to operate in the various locations;

(2) pictures of the shops and kiosks;

(3) menus of services provided by the salons;

(4) a copy of the standard employment contract used for the Company's staff;

(5) various listings of employees, including for each employee: start and (where appropriate) end dates; PAYE position (P45, P46 or "First Job"); work location; National Insurance numbers; and home addresses. There are 140 employees on the listings, although during the relevant period some had left and some had joined;

(6) a sample payment summary for November 2016, showing total gross pay of £38,722.87 for 54 employees, including Mr Kansara and his wife, Mrs Mital Kansara; PAYE of £1,940.86; employee NICs of £2,220.48 and net pay of £34,561.53;

(7) payslips for the same month, for each employee;

(8) a copy of the Company's bank statement, for the same month, showing payment of the listed wages to each employee by BACs;

(9) the same documents as in (6) to (8) above, for December 2016 through to March 2017;

(10) copies of correspondence with HMRC;

(11) extracts from Mr Kansara's telephone records;

(12) a winding-up petition filed by HMRC at the High Court on 1 December 2017 in respect of the Company;

(13) correspondence between the Company and a firm of licensed insolvency specialists;

(14) a list of the Company's shops and kiosks, giving their start date and (where applicable) their closing dates, and the number of treatment chairs;

(15) the Company's statutory accounts covering the period from 29 February 2012 to 28 February 2018.

6. Mr Kansara and Mr Shah both provided witness statements, gave oral evidence led by Mr Elliott, and were cross-examined by Mr Lewis. We found them to be honest and credible witnesses. HMRC did not tender any witnesses.

7. On the basis of the evidence before the Tribunal, we make the findings of fact set out in the following part of this decision. Only one part of the evidence was in dispute, and we discuss and resolve that point at §22-23 below.

The facts

8. The Company was originally owned by Mr Kansara and his wife as equal shareholders. In 2016 Mr Kansara acquired his wife's shares. The Company operated a number of beauty parlours from shops or kiosks in shopping centres in Cambridge, Basildon, Oxford, Crawley, Newmarket, Hatfield, Milton Keynes and Croydon. During the relevant period, some locations opened and some closed.

9. Mr Kansara's unchallenged evidence was that the company made profits of between £25k to £30k per annum during the relevant period. HMRC has not enquired into the related corporation tax returns, and Mr Lewis confirmed that HMRC were not contending that the Company's profits were understated.

The investigation and test purchases

10. On 8 July 2015, HMRC informed the Company that it was opening a check into its tax position. Attempts to meet with Mr Kansara failed, and on 20 November 2015, HMRC issued the Company with a Notice under Finance Act 2008, Sch 36 to obtain information and documents. The Company did not comply with the Notice, and HMRC issued penalties. These also did not result in the delivery of the required information, and HMRC decided to send a number of Officers to carry out "test purchases" at some of the Company's salons and kiosks.

11. On 11 June 2016, Officer Jenkins visited the Company's kiosk in Milton Keynes. Her report includes the following information:

(1) the kiosk was located in an open area between shops, and consisted of four chairs grouped together, surrounded by screens carrying the Company's logo;

(2) there were two women working in the kiosk;

(3) Officer Jenkins asked one of the employees if there was a more private place where she could have another treatment. She was told that there was no other area, but that "the screens would provide enough privacy and they could turn the chairs around";

(4) Officer Jenkins was in the salon for 15 minutes; during that time, no-one else came in. During the 15 minutes which followed her treatment she walked around the shopping centre near the kiosk, and saw no other customers in the salon;

(5) her treatment cost £6; she paid with a £10 note and received £4 in change. She did not receive a receipt, but we infer from her report that she also did not ask for one; and

(6) The money was put into a drawer; Officer Jenkins was unable to see how much money was in the drawer.

12. On 24 August 2016, Officers Wibey and Holness visited the Company's kiosk in Hatfield. This also had four chairs and two members of staff who were "easily identifiable because they wore a uniform", although Officer Wibey observed that a third woman had been present around an hour earlier. The Officers had treatments at around 1pm for about 15 minutes, during which time they were the only customers. They paid in cash, which was put in a drawer; no receipt was requested or offered. Two more customers came in as they left.

13. On 25 August 2016, Officer Mankad visited the Company's salon in Croydon. This was a shop not a kiosk. It had four chairs for facials, three chairs for pedicures and three chairs for manicures. Two other customers were present, and four members

of staff. The position of Officer Mankad's treatment chair prevented her from being able to see whether the payment made by another customer had been entered into the till; however, her own payment was keyed in. Although she "couldn't see whether the money went into the drawer" she recorded that "the till was placed on a large…round-top reception desk in the middle of the shop".

14. On 26 August 2016, Officers Faldu and Purnell visited the Company's salon in Basildon together. They reported as follows:

(1) Officer Purnell said she "observed five female members of staff"; that there were nine customers during her own treatment, and that her payment had been keyed into the till.

(2) Officer Faldu said there were "7 members of staff, 2 working in the mall threading, 2 were set up to do acrylic nails, 2 chairs for full pedicure, 2 chairs for threading and waxing, 1 lady came out of the back…so they may have had a treatment room in the back, but I did not see any staff coming out with her".

The assessments

15. On 2 December 2016, HMRC informed the Company that it had calculated underpayments of PAYE for the years 2012-13 through to 2016-17. The assumptions and methodology were as follows:

(1) The number of staff required for each salon was estimated at seven for Basildon; five for Oxford, Cambridge and Crawley; four for Croydon and two for the other locations, including Hatfield and Milton Keynes.

(2) All the salons were estimated to be open for between 60 and 70 hours per week, apart from Newmarket, which was estimated to be open for 51 hours a week.

(3) The total number of employees was 37 in 2012-13, 47 in 2013-14 and 55 from 2014-15 through to 2016-17; the different figures reflected the dates on which various salons were opened/closed;

(4) Each member of staff was assumed to work full-time, for 35 hours a week, for 365 days a year, and to have been paid the national minimum wage for each hour worked.

(5) Personal allowances were not deducted from the earnings so calculated, because HMRC had not been provided with evidence that this was the "main employment" of the Company's employees.

(6) The unpaid PAYE was instead calculated by:

(a) applying the basic rate tax rate of 20% to the total earnings which HMRC had calculated, for each tax year; and

(b) from the total earnings so calculated, HMRC deducted the actual PAYE paid in relation to the employees on the payroll.

16. On 11 January 2017, Mr Kansara met with Mrs Beck, an HMRC Compliance Officer. She informed Mr Kansara that, in addition to the tax amounts already

notified, National Insurance Contribution ("NICs") assessments would also be issued. Mr Kansara said that:

(1) the Company had 38 employees, all of whom were paid via BACs. The payroll was run by Mr Shah, who informed Mr Kansara of the amounts which needed to be deducted from the wages for PAYE purposes;

(2) most employees were on zero hours contracts, and were paid at least the minimum wage;

(3) all but two of the salons opened for less than 60 hours a week; Mr Kansara provided HMRC with the opening hours for all salons except Milton Keynes;

(4) Basildon closed in December 2016 and Crawley closed in August 2016; those in Milton Keynes and Newmarket were about to be closed as they were not making enough money.

17. On 7 March 2017, Mrs Beck issued assessments for each tax year, based on total undisclosed earnings of £2,740,914 over the five year period. The earnings and the tax were calculated on the assumptions set out at §15.

18. On 11 April 2017, Mrs Beck issued penalties on the basis that the Company's behaviour had been "deliberate" and disclosure "unprompted". No mitigation was given, so the maximum penalty of 70% was charged. The positon for each year was therefore as follows:

	Extra pay	**Reg 80**	**Penalty**
2012-13	420,875	84,128.48	58,889.93
2013-14	547,884	106,560.94	74,592.65
2014-15	660,660	122,541.80	85,779.26
2015-16	695,695	131,665.20	92,165.64
2016-17	415,800	83,160.00	58,212.00
Totals	**2,740,914**	**528,056.42**	**369,639.48**

19. On 28 July 2017, Officer Cawley carried out a statutory review of those decisions and changed Officer Beck's categorisation of the disclosure from "unprompted" to "prompted". That made no difference to the penalties, which had been assessed at the maximum level of 70%. He did not consider the methodology of the calculation, but decided that Officer Beck had used "best judgement" in working out the amount of underpaid PAYE.

20. At the end of his Review Letter, he said:

> "If you do not agree with my conclusions, you can appeal to an independent tribunal to decide the matter…if you want to appeal to the tribunal you must notify your appeal to the tribunal (enclosing a copy of this letter) within 30 days of the date of this letter…if you do not appeal to the tribunal within 30 days of the date of this letter the matter will be treated as settled by agreement under s54 of the Taxes Management Act 1970.

> You may also want to consider another option, which may help to clarify the issues and resolve this dispute without need for further litigation. This option is known as Alternative Dispute Resolution… [details of how to apply].
>
> Your statutory appeal rights are not affected by an application for ADR. But if you do decide to apply for ADR you must still appeal to the tribunal within the 30 day time limit, so that if either the panel does not accept your application for ADR, or your application is accepted but the dispute is not resolved following ADR, the tribunal will still hear your appeal. When appealing to the tribunal you should tell them you have applied to HMRC for ADR."

Receipt of the Review Letter, and afterwards

21. The Review Letter arrived when Mr Kansara was on holiday, so he only received it when he returned at the end of August 2017. His evidence was that he had called Mrs Beck, and been told he had three options: speak to Debt Management, apply for ADR or appeal to the Tribunal, and that Mrs Beck had given Mr Kansara the phone number for HMRC's Debt Management department.

22. Mr Lewis challenged that evidence, saying that (a) there was no HMRC record of a call with Mrs Beck, and (b) Mr Kansara had not provided a phone log or similar supporting evidence. However, it was not in dispute that:

(1) Mr Kansara contacted Debt Management soon after he received the Review Letter;

(2) when Mrs Beck later emailed Mr Kansara, she gave him similar advice about having "options", one of which was to notify his appeal to the Tribunal;

(3) Mr Kansara gave oral evidence, and we found him to be a credible witness; HMRC did not call Mrs Beck to give evidence.

23. We find as facts that (a) Mr Kansara called Mrs Beck, and (b) she gave him the advice set out at §21.

24. Mr Kansara said he considered the three options and decided to contact Debt Management, because he thought they would "review the case and see the mistakes that had been made". He added that "the mistake was so obvious to me that I thought I would be able to explain this to HMRC".

25. He called Debt Management and set out his position. The Debt Management department took some time to respond, but when they did, they did not accept his position. Mr Kansara then wrote setting out the detail of the Company's case, and ending his letter "so please accept my appeal against this decision".

26. On 18 October 2017, an Officer in HMRC's Debt Management department forwarded Mr Kansara's letter to Mrs Beck, and on 19 October 2017 Mrs Beck emailed Mr Kansara. She referred him to the Review Letter, and then said:

> "If you want to make a further appeal you will need to send your appeal to the tribunal, you must notify your appeal to the tribunal (enclosing a copy of the letter dated 28 July 2017 from Mr Cawley).
>
> You will find a link to the website at [website ref] or alternatively you can apply for ADR [website ref]."

27. Mr Kansara's evidence was that, in reliance on this email and his earlier conversation with Mrs Beck, he thought ADR was an alternative to notifying the Tribunal. He wanted to "sort the matter out without going to court". He thought he had 30 days to make that application, and applied online for ADR on 13 November 2017. In parallel, he continued to contact Debt Management, making phone calls and sending letters. On the same day as he applied for ADR, he emailed HMRC's Debt Management department, making a payment offer "to resolve the issue", and adding:

> "I am not happy with the HMRC decision because they have calculated few of my mall space kiosk as a shop and according to them it is 5-6 staff working there but it's only 1-2 staff we need to run kiosk. So please review it again as the outstanding money which one I need to pay its more than my company 6 years profit so please do some reasonable review please."

28. On 23 November 2017, an ADR Facilitator wrote to Mr Kansara ("the ADR Letter"), saying that the Company's appeal could not be accepted into ADR because its "circumstances do not fit within the published criteria", and continuing:

> "You do not currently have an appeal that has been accepted by the Tribunal. Should you choose to take your appeal to the Tribunal in the future please do not hesitate to submit a second application for ADR."

29. On 1 December 2017, HMRC filed a winding-up petition at the High Court, claiming £990,514.29 from the Company. That figure included not only the Reg 80 assessments and penalties, but miscellaneous smaller amounts of PAYE, NICs and interest. Neither party was able to explain the basis for these further amounts and Mr Kansara denied that the Company owed any of these further sums.

30. Mr Kansara was "extremely worried and stressed" by the winding-up petition. He searched the internet for companies which could help him to sort out the problem, and identified a firm of insolvency specialists. He met the firm's practitioners on 20 December 2017; following that meeting he was informed that his only option was to put the Company into voluntary liquidation.

31. Mr Kansara was not happy with that advice, and spoke to friends who suggested he contact Mills Chody LLP; he met with them on 22 January 2018. Mills Chody instructed tax Counsel on 29 January 2018. On 1 February 2018, Mr Kansara was advised to notify his appeal to the Tribunal, together with an application to make a late appeal. The appeal and application were filed the following day.

The law

32. It was common ground that the Tribunal should apply the three stage approach set out by the Upper Tribunal ("UT") in *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*"). This is to:

(1) establish the length of the delay and whether it 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".

33. The UT said at [46] of *Martland*:

> "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 the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

The length of the delay

34. The Company's appeal should have been notified to the Tribunal under TMA s 46G within 30 days of the date of the Review Letter, so by 27 August 2017. It was notified on 2 February 2018, five months and six days late. In *Romasave 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."

35. The Company's delay was much longer than the three month period considered in *Romasave*, so is clearly serious and significant.

The reasons for the delay

36. There was an initial one month delay because the Review Letter arrived while Mr Kansara was on holiday, and his return coincided with the deadline for notifying the Tribunal.

The Review Letter

37. Mr Kansara read the Review Letter at the end of August. Although it advised that there is a 30 day time limit for notifying an appeal to the Tribunal, we agree with Mr Elliott that the wording is not as clear as it might be. In particular, the use of the words "you may also want to consider another option…known as ADR", could reasonably be read as suggesting that ADR is an alternative to appealing to the Tribunal. However, ADR is only "another option" if an appellant has first either (a) notified his appeal to HMRC by the statutory time limit, or (b) received permission to make a late appeal after that time limit.

38. The Review Letter also included this paragraph (emphasis added):

> "But if you do decide to apply for ADR you must still appeal to the tribunal within the 30 day time limit, **so that** if either the panel does not accept your application for ADR, or your application is accepted but the dispute is not resolved following ADR, the tribunal will still hear your appeal."

39. That passage could be read as meaning that the reason why an appellant needs to appeal to the Tribunal is to give him another opportunity of resolving the issue if the ADR fails. Instead, an appellant must appeal to the tribunal within 30 days because that is what the law requires.

40. We find as a fact that Mr Kansara did not understand, on reading the Review Letter, that the 30 day time limit was a strict requirement. We further find that it was reasonable, for a person in the position of Mr Kansara, who does not speak English as a first language, to have been unclear from the wording of the Review Letter that this time limit was a statutory requirement.

Contacting Mrs Beck and Debt Management

41. After reading the Review Letter, Mr Kansara called Mrs Beck. Having understood from that conversation that he had three options, he decided to explain the position to Debt Management. He asked that HMRC "please accept my appeal against this decision", and we find from this that he had not understood what he needed to do to progress his appeal.

42. On 19 October 2017, Mr Kansara received an email from Mrs Beck, in which she said "you must notify your appeal to the tribunal", but also went on to say "or alternatively you can apply for ADR". It is not surprising that Mr Kansara continued to think that (a) applying for ADR and (b) notifying the appeal to the Tribunal, were alternatives.

43. Mr Kansara also mistakenly thought he had a further 30 days to make that ADR application. This was not based on anything he had been told by Mrs Beck; it was an incorrect inference from the reference in the Review Letter to a 30 day time limit.. We find that this inference was not reasonable, and it caused the further delay from 19 October to 13 November 2017.

The ADR Letter

44. On 13 November 2017 Mr Kansara applied for ADR; he also wrote again to Debt Management, still believing they could change the decision: his letter ends "so please do some reasonable review please".

45. On 23 November 2017, the Company received the ADR Letter. This did not explain that (a) the Company must notify its appeal to the Tribunal and (b) now needed to obtain permission to make that notification, because the time limit had been exceeded. Instead, the ADR Letter said that that the Company did "*not currently* have an appeal that has been accepted by the Tribunal", and "should *you choose* to take your appeal to the Tribunal in the future please do not hesitate to submit a second application" (our emphases). It is unsurprising that Mr Kansara was still unaware he was now long past the statutory deadline.

The insolvency practioners and Mills Chody

46. Around a week later, Mr Kansara was informed of the winding-up petition. He finally realised that his efforts to resolve the dispute had been fruitless, and sought professional help. Unfortunately, he took advice from an insolvency specialist who failed to advise the Company to make an application for a late appeal; instead, he was told to put the Company into voluntary liquidation. Once he had obtained sound professional representation from Mills Chody LLP, they sought urgent advice from Counsel, and Mr Kansara implemented that advice without delay.

All the circumstances

47. We start from the UT's confirmation in *Martland* that we 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".

48. On behalf of Mr Kansara, Mr Elliott said that, although the delay was serious and significant, Mr Kansara had been actively doing his best to settle the dispute throughout that period.

49. For HMRC, Mr Lewis submitted that, given the length of the delay, the Tribunal should refuse the application. To do otherwise would give a message that time limits could be ignored with impunity. He also said the Company had had plenty of opportunities to co-operate with HMRC before the Reg 80 assessments had been made, but had consistently and repeatedly failed to provide the requested information and/or to attend meetings.

50. Although the delay was serious and significant, we agree with Mr Elliott that Mr Kansara acted reasonably for almost all of the delay period, with the exception of that from 19 October to 13 November 2017. We place particular weight on (a) the

lack of clarity in the communications he received from HMRC and (b) his continued efforts to resolve the dispute.

51. Even had that not been the position, the obvious merits of the Company's appeal weigh particularly heavily in the balancing exercise we have to undertake. In that context Mr Elliott made the following submissions, which Mr Lewis sensibly did not resist.

(1) There were significant errors in HMRC's assumptions and methodology, as set out below:

(a) It was unreasonable to assume that all the salons were open for 365 days a year.

(b) Despite assuming that all staff work full time, HMRC did not accept that this was their main employment; as a result no employee was given the benefit of a personal allowance.

(c) This failure to take personal allowances into account was significant, because almost no PAYE is due when employee works for 35 hours a week at the minimum wage; when the same work is covered by two part-time employees, there is no PAYE at all, because their earnings are below the personal allowance.

(d) HMRC assumed that all employees worked full-time, despite being aware from the Company's PAYE records that many worked part-time.

(e) HMRC did not properly take into account the employees for whom HMRC received detailed PAYE information on a monthly basis. Instead of deducting those employees' gross *earnings* from the calculated total of *earnings*, HMRC first calculated basic rate tax at 20% on the total earnings, and then deducted the PAYE actually paid from the tax so calculated. The distortive effect of this methodology could be seen by using the November 2017 pay run as an example: total gross pay was £38,722.87 for 54 employees, and PAYE was only £1,940.86, because many employees were part-time workers whose earnings were below their personal allowances, and others were only a little above that threshold. Under HMRC's approach, the £38,722.87 was first taxed 20%, making £7,744.57; the PAYE actually paid was deducted from that total, so that the Company was required to pay a further £5,803.71. This methodology therefore had the effect of removing the benefit of all the personal allowances previously issued to the Company by HMRC.

(2) HMRC also failed to use the available evidence as to the number of staff and the salons' opening hours, but purported to rely on the test purchases. In particular:

(a) Mr Kansara informed Mrs Beck of the salon's opening hours when they met on 11 January 2017, but none of that information was used to amend the draft calculations. Instead, HMRC continued to use a higher number of hours;

(b) the test purchases were all made at lunchtime, which can reasonably be expected to be the busiest time for salons such as this;

(c) the Officers who carried out HMRC's test purchases in Hatfield and Croydon saw two and four members of staff respectively; this is the same as the figure provided to them by Mr Kansara at the meeting. In other words. HMRC have independently proved that his evidence on staff numbers was correct;

(d) HMRC's calculation was based on seven full time staff at Basildon, but Officer Purnell saw only five members of staff; although Officer Faldu said there were seven, she came to this number as the result of counting the number of available treatment chairs, not because she saw two more staff members who were overlooked by Officer Purnell: both Officers were in the same shop at the same time.

(3) The total of supposedly unpaid PAYE was unreasonable, even ludicrous. The company's corporation tax returns were not under challenge. Yet in order to make these further cash payments to supposed "ghost" employees, the Company would have needed extra income of £2.7m over the five year period, or between £400,000 and £700,000 a year, all of which had supposedly been passed to the employees in cash. This level of extra income would have been extraordinary, given the scale of the Company's operations.

(4) None of the test purchases provided any basis for a finding that takings were being suppressed, let alone on a scale sufficient to fund these alleged extra cash earnings: the money paid by the Officers for treatments was keyed into the tills or placed in the money drawer.

52. We agree with all of those submissions. This is a case where the appeal has obvious merits, and to borrow the words of the UT in *Martland*, the Company would suffer significant prejudice were it to lose the opportunity of putting forward its "really strong case".

53. Mr Elliott also submitted that, if permission was not given, the Company would be insolvent; the employees would lose their jobs; HMRC would receive an entirely unjustified windfall and might then take steps to seek to pursue Mr Kansara for any outstanding balance. The penalty was charged on the basis of deliberate behaviour and so might cause the Company to be "named and shamed" as a defaulter. However, if permission was given, the prejudice to HMRC was slight. They would have to defend the appeal, but this would have happened in any event had Mr Kansara properly understood the appeal process at the time he received the Review Letter. Moreover, HMRC should have known that the Company did not consider the position to be final, because Mr Kansara had never stopped informing HMRC that he wanted to challenge their decisions, albeit he was not doing this by the procedurally correct route.

54. We agree with Mr Elliott for the reasons he gives. This is not a case where allowing a late appeal will give the wrong message, as Mr Lewis submitted was the

position. It is, instead, in the interests of justice to give the Company permission to make a late appeal because:

(1) Mr Kansara reasonably misunderstood HMRC's communications, and actively sought to challenge the decisions from the time he received the Review Letter; and

(2) HMRC's Reg 80 assessments were fundamentally flawed.

Decision and appeal rights

55. We give the Company permission to make its appeal against the Reg 80 assessments and the penalties.

56. This document contains full findings of fact and reasons for the decision. If HMRC is 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 HMRC. 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: 12 APRIL 2019