



[2019] UKFTT 653 (TC)

TC07428

VAT – application for permission to make a late appeal – assessment for £1.86m – Appellant in prison and then deported to Bulgaria – HMRC obtaining restraint order over Bulgarian apartment – contemporaneous evidence that appeal being considered soon after issuance of assessment – five year delay — Martland applied – merits considered but found to be weak - application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/01016

BETWEEN

IVAN YANEV

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at the Tribunal Centre, Rosebery Avenue, London on 15 October 2019

Adrian Eissa QC, instructed by Carson Kaye, Solicitors, for the Appellant

Mr Paul Eyles, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

Introduction

1. On 1 May 2014, HM Revenue & Customs (“HMRC”) issued a letter addressed to Mr Yanev, assessing the amount of tax payable by him as £1,867,349.83.
2. On 4 September 2014, Mr Yanev received a 22 month prison sentence for cheating the public revenue, of which he served 11 months. On his release, he was given a deportation order; he was deported to Bulgaria in October 2015.
3. On 8 February 2019, Mr Yanev’s solicitors, Carson Kaye, made an application for him to be allowed to make a late appeal. Mr Yanev attended the hearing by video link.
4. For the reasons set out in the main body of this Decision, the Tribunal refused the application.

The evidence

5. The Tribunal was provided with a Bundle prepared by HMRC, which contained:
 - (1) the letter sent to Mr Yanev by HMRC on 1 May 2014. The status of this letter is disputed, so I have called it simply “the Letter”;
 - (2) HMRC’s records of telephone conversations with Mr Yanev’s accountant, Mr Christopher Salmon, a partner in Francis James & Co, a firm of Chartered Accountants, between 12 and 18 June 2014;
 - (3) letters from HMRC, dated 4 and 25 October 2016, addressed to Mr Yanev at his mother’s home in Bulgaria;
 - (4) HMRC’s record of a telephone conversation with Mr Yanev on 30 December 2016;
 - (5) an email from Mr Brown, the solicitor at Carson Kaye acting for Mr Yanev, to Mr Wagg of HMRC, dated 7 February 2019, and Mr Wagg’s reply of 8 February 2019, attaching the Letter and a “Table showing output tax calculations in respect of Mr Ivan Yanev” (“the Schedule”); and
 - (6) Mr Yanev’s grounds of appeal, dated 8 February 2019.
6. On 30 July 2019, Mr Yanev signed an affidavit. This was filed and served on 14 October 2019, the day before the application hearing. Mr Eissa said his instructing solicitors thought it had been filed and served previously, but by oversight this had not happened. Mr Eyles confirmed that he had had time to consider Mr Yanev’s affidavit, and had no objection to it being admitted. I too had had time to read it, and I admitted it into evidence.
7. Mr Yanev also gave evidence in chief, was cross-examined by Mr Eyles and answered questions from the Tribunal. He was an honest witness who accepted that he did not have a clear recollection of some of the facts, given the passage of time. Where his evidence conflicted with other contemporaneous documentary evidence, I have therefore found the latter to be more reliable.
8. On 2 October 2019, Mr Brown signed an affidavit; this was also filed and served on 14 October 2019. Mr Eyles confirmed that he had read the affidavit, and had no objection to its admission; I too had read it, and admitted it into evidence. Mr Brown attended the hearing and expanded one point in his affidavit by way of oral evidence. I found him to be an honest witness.

9. Mr Salmon signed a witness statement on 13 October 2019, two days before the hearing and it was filed and served on the following day. The covering email read:

“The Applicant does not intend to call this witness to give live evidence but communicated to the firm as soon as possible so that the necessary arrangements can be made.”

10. Neither HMRC nor the Tribunal responded to that email. Mr Salmon did not attend the hearing. Mr Eyles did not object to the witness statement being admitted into evidence, but as it had been filed and served very late, he had no realistic opportunity to consider it until shortly before the hearing.

11. Although I accepted the witness statement into evidence, I pointed out to Mr Eissa that Mr Salmon’s absence might mean that less weight would be accorded to his evidence. HMRC had not given advance notice that the witness’s evidence was not in dispute, and there was no reasonable basis on which Mr Yanev’s lawyers could have assumed that HMRC would not want to cross-examine Mr Salmon.

12. Mr Eissa responded by saying that the evidence of a professional person such as an accountant should be accepted without challenge. I do not agree. As is clear from the facts found below, Mr Salmon was closely involved in the events leading up to Mr Yanev making this application to the Tribunal, and HMRC was entitled to be able to ask him questions by way of cross-examination. Moreover, Mr Salmon’s witness statement is based on recollection, because his notes were lost in a computer crash in 2015. As is clear from my findings later in this decision, I have found some of his evidence to be inconsistent with (a) other contemporaneous evidence and (b) Mr Yanev’s evidence, see §29 to §31 and §16. As a result, I have not accepted some of the evidence in Mr Salmon’s witness statement.

13. On the basis of the evidence before the Tribunal, and taking into account the points made above about that given by Mr Salmon, I make the findings of fact set out in the next following part of this decision.

The facts

Starting up

14. Mr Yanev came to the UK from Bulgaria in the year 2000. In around 2007 or 2008 he and a friend set up a company called I&I Trade Limited (“the Company”). The Company imported scrap catalytic converters into the UK and sold them to refiners, who extracted the precious metals. It was a lucrative business.

15. The Company was VAT registered, completed VAT returns and issued VAT invoices to its customers. The address HMRC held for Mr Yanev (Unit 13, Kencot Way, Erith) was also the business address of the Company.

16. At some point, Mr Yanev began a similar trade in catalytic converters in his own name. This started as a small side-line but grew significantly. Mr Salmon’s witness statement said that “at no point did Mr Yanev make any supplies to a business or individual who was not registered for VAT”. However, Mr Yanev told Mr Eissa that he “simply didn’t know” the VAT position of his customers. Given that conflict, and the fact that Mr Salmon is relying on recollection of a period over five years ago, I make no finding as to whether all of Mr Yanev’s customers were VAT registered.

17. Mr Eissa invited me to find that his customers were all VAT registered, but there was no reliable evidence before me which allowed me to make such a finding.

18. Mr Yanev did not register for VAT, so did not issue VAT invoices; he also did not report the profits to HMRC for income tax purposes.

The HMRC raid, the indictments and the Letter

19. On 13 December 2012, HMRC raided Mr Yanev's property and other linked properties including the Company's business premises. Mr Yanev was subsequently arrested and charged with evading VAT. He instructed Mr Salmon to advise him.

20. On 7 January 2014, the Crown Prosecution Service ("CPS") changed the indictment to cheating the public revenue; the new charges related to income tax evasion, not VAT.

21. On 1 May 2014, HMRC sent the Letter. It was addressed to Mr Yanev at Unit 13, Kencot Way, Erith, and began:

"I have to inform you that on the basis of the information you have provided you were required to notify your liability to be registered for Value Added Tax no later than 01/10/09 and you were required to be registered for the periods from 01/10/09 to 31/12/12.

Because you have failed to make the return(s) of Value Added Tax which you were required to make in respect of the period(s) from 01/10/09 to 31/12/12 in accordance with the Value Added Tax Regulations 1995, regulation 25, made under the Value Added Tax Act 1994, Schedule 11, paragraph 2(1), the Commissioners of HM Revenue & Customs, by virtue of the powers conferred upon them by the Value Added Tax Act 1994, section 73, assess the amount of tax payable by you in respect of the whole of the above periods as being £1,867,349.83.

Instead of accepting this assessment, you may make a single return and pay any tax shown on the return as being due. If you wish to do this you may obtain the appropriate form from this office...Provided the return and remittance are satisfactory the Commissioners will withdraw this assessment.

If you make a return but the Commissioners do not consider it satisfactory, you will be advised accordingly."

22. The Letter went on to advise Mr Yanev that he could ask for a statutory review, but must do so within 30 days. It continued by saying "if you want to appeal to the tribunal you should send them your appeal within 30 days of the date of this letter".

23. The Letter was signed by Mrs Allisson, of HMRC's "Liable No Longer Liable Team" based at Grimsby. As its name suggests, this team deals with cases where the trader used to be liable to VAT, but this is no longer the position. In Mr Yanev's case, he ceased trading soon after the HMRC raid.

24. The parties disagreed as to whether the Letter was accompanied by the Schedule. The latter was prepared by Mr Colin Fretwell, based in HMRC's Croydon Office, and it sets out the sales and VAT for each quarter from 31/12/09 through to 31/12/12. The sales total £11,719,852 and the VAT comes to £1,867,349.83, the same figure as in the Letter. The text explains that the figures have been taken from "sales spreadsheets supplied to me by the case team", and it concludes:

“given the value of sales in October 2009, I am of the view that Mr Yanev should have adopted ‘the forward view’ and registered for VAT purposes immediately. That is, the effective date of registration should have been 1 October 2009”.

25. Mr Eyles submitted that the Schedule had been attached to the Letter, because when Mr Wagg provided Mr Brown with a copy of both documents on 8 February 2019, his covering email said “please find attached an assessment letter and the calculations sent on 1 May 2014”. Although Mr Eissa accepted that the two documents were “probably contemporaneous”, he said that there was no reliable evidence that they had been sent out at the same time, pointing out that (a) the Letter written by Mrs Allisson, based in Grimsby, whereas the Schedule was written by Mr Fretwell, based in Croydon, and (b) the Letter does not refer to any accompanying attachments. The evidence on whether the Schedule was attached to the Letter is therefore in dispute. I make no finding of fact as to whether or not the Schedule was sent out with the letter, but return to this point at §78(5)(b).

Whether Mr Yanev and/or Mr Salmon received the Letter

26. The next issue was whether Mr Yanev received the Letter. His affidavit said:

“I certainly never received any VAT assessment for the period 01/9/12¹ to 31/12/12 before entering prison. If my accountant Mr Salmon received such an assessment on my behalf, its existence was certainly not communicated to me. Before I ceased to be a director [of the Company] in May 2014 I had no knowledge of any assessment sent to the address in Erith.”

27. However, HMRC have a contemporaneous record in the form of an extract from the “Action History”. I find that this relates specifically to the VAT set out in the Letter, both because it has the same reference number as on the Letter, and because the first item on the extract reads “Asst 1,867,349.83”, the same sum as is on the Letter.

28. The Action History recorded as follows:

(1) On Thursday 12 June 2014, Mr Salmon called HMRC; Mr Yanev was with him when the call was made. Mr Salmon told HMRC that “this is subject to an appeal and court proceedings” but advised that he “did not have all the info to hand”.

(2) Mr Salmon called HMRC back later the same day, and said he would call again with all the details the following day, Friday 13 June 2014, but he did not do so.

(3) On Tuesday 17 June 2014, HMRC made the following note (text as in original and emphasis added):

“further call made to agent chris salmon [number] have left message on voicemail. mr salmon was due to call bac on friday with details of his client’s appeal. If no call back by end of today recovery action to continue.”

29. Mr Salmon states that he had assumed, from the withdrawal of criminal charges in relation to VAT, that the VAT issues had been resolved, and that “no further action was required in this respect of issuing an Appeal to an assessment, of which neither myself nor my client had seen”. However, he also says (emphasis added):

¹ The Letter covered the period from 01/10/09 to 31/12/12. Given the text which follows, I have assumed that the affidavit contains a typographical error, and the first date was intended to read 01/10/09 and not 01/9/12.

“other than the letter of 1 May 2014...and the letter sent to an address in Bulgaria [see §37], I have not had sight of any formal Assessments”.

30. Having considered all that evidence, I find HMRC’s contemporaneous Action History Notes to be most reliable, and accept them as an accurate record. I therefore find as a fact that Mr Yanev was aware of the Letter at least by 12 June 2014, as he was with Mr Salmon when the call was made to HMRC and he was also aware that an appeal was required. I also find that before 12 June 2014, HMRC had already initiated recovery action to collect the VAT amount shown on the Letter and I make the reasonable inference that both Mr Yanev and Mr Salmon were aware of that action at the time of the call.

31. I do not accept Mr Salmon’s evidence that in 2014 he had assumed from the withdrawal of criminal charges in relation to VAT that the VAT issue had been dropped, because:

- (1) the indictment was changed from VAT to income tax four months before the Letter was issued, so he cannot have assumed that the HMRC had abandoned collection of the VAT stated in the Letter as a consequence of the change to the indictment;
- (2) on 14 June 2014, Mr Salmon called HMRC about appealing the VAT in the Letter; and
- (3) by that date HMRC had already initiated recovery action to collect the VAT stated in the Letter.

VAT only invoices

32. At some point in the period before Mr Yanev’s case came to court, Mr Salmon suggested to Carson Kaye that Mr Yanev issue VAT-only invoices to his customers, who could then claim the input VAT on their returns. Mr Salmon’s recollection is that Carson Kaye discussed this with HMRC and that “this suggestion was dismissed by HMRC”. HMRC had no opportunity to challenge this evidence, or provide their own witness, because of the very late delivery of Mr Salmon’s witness statement, so I make no finding as to how HMRC responded to the suggestion, but I accept that it was considered and raised by Mr Salmon.

Prison, deportation and Bulgaria

33. Mr Yanev pleaded guilty to cheating the public revenue, and on 4 September 2014 received a 22 month custodial sentence. During his incarceration he was served with a deportation order, which he appealed. After 11 months he was released; his appeal against the deportation was lost and he was removed to Bulgaria in October 2015.

34. HMRC did not have an address in Bulgaria for Mr Yanev and Mr Yanev did not make contact with HMRC. He told Mr Eyles in cross-examination that he didn’t realise he still had a VAT debt, and I accept that he believed that was the position.

35. On 4 October 2016, HMRC’s Debt Management Office sent a letter to Mr Yanev, addressed to his mother’s apartment in Bulgaria, stating that they had been trying to make contact to discuss the £1,867,943.83 owed to HMRC, and asking him either to pay immediately, or contact Debt Management if he wanted to discuss the matter. On 25 October 2016, Debt Management sent a second letter to the same effect.

36. One or both these letters reached Mr Yanev. On 30 December 2016 he called Debt Management and said he had thought the matter had been dropped, but was told this was not correct. HMRC’s contemporaneous note of that call records that “customer is not happy and

will write in and appeal and complain". I find that this was an accurate record of what was said.

37. At some point between 30 December 2016 and 16 August 2018, the Bulgarian authorities placed a "restraint" on the flat where Mr Yanev's mother lives, and in which Mr Yanev has a beneficial interest. Mr Yanev accepted under cross-examination that a key reason for initiating these application and appeal proceedings was that he was seeking to have the restraint removed.

Mr Salmon and Carson Kaye

38. In early 2017 Mr Yanev contacted Mr Salmon, and he in turn contacted HMRC. He was told to submit a new 64-8 form authorising him to act as agent for Mr Yanev.

39. Mr Yanev signed the 64-8 on 7 March 2017² and it was then submitted to HMRC. However, according to Mr Salmon's witness statement it "has not yet appeared on HMRC portal, which is an on line system for confirm [sic] which clients are registered with HMRC that we are their agents".

40. Mr Salmon's evidence does not provide any information as to whether he contacted HMRC in order to get this sorted out and, if so, why it was not resolved. His witness statement does not exhibit any notes of calls to HMRC. Mr Yanev's evidence was that he called Mr Salmon "every two weeks" but was told that HMRC would not disclose any information to him. On the basis of the evidence, I find that Mr Salmon had conduct of Mr Yanev's case for over a year, but took no substantive action other than making an attempt to file a 64-8.

41. Mr Yanev's affidavit says:

"Ultimately Chris told me he was unable to help me...it seemed Chris just couldn't obtain the necessary paperwork from HMRC to enable him to properly challenge the assessment in the usual way and act on my behalf. As a result I made contact with my previous criminal law solicitors in the UK on 19 February 2018."

42. When Mr Yanev made contact with Carson Kaye on 19 February 2018, he initially instructed Mr Kaye. The Tribunal had no information as to what happened between February 2018 and 12 July 2018. On that date, Mr Brown took over conduct of Mr Yanev's case. He immediately organised an 64-8, and on the following day, 12 July 2018, contacted Mr Moore of HMRC.

43. Mr Moore said that Mr Yanev was "well out of time to appeal as it was communicated to [him] in 2014". He also told Mr Brown that collection of the debt had been passed to the Bulgarian authorities, who had taken "some restraint steps", and that he had no further paperwork or information at the present time.

44. On 25 July 2018, Mr Brown emailed Mr Moore, saying:

"You informed me that [Mr Yanev] had an unpaid VAT assessment which had led to restraint against him. You also informed me that the VAT assessment was out of time for any appeal. Despite this, an application for permission to make an out of time appeal, and a subsequent appeal, are considered.

² The witness statement says 7 March 2018 but I have assumed that this is a typographical error for 2017, given that Mr Salmon was contacted by Mr Yanev in early 2017, and by May 2018, Mr Yanev had instructed Carson Kaye.

Please will you provide me with information to how to go about applying for permission to appeal out of time and where to make appeal representations.”

45. On 26 July 2018 Mr Moore called back, and said he was hoping to find “a home for your query”. Mr Brown chased for a response on 1 August 2018. Mr Wagg replied by phone and then by email the same day. He provided Mr Brown with a hyperlink giving guidance on appealing out of time, and a copy of the Schedule.

46. On 9 August 2018, Mr Brown asked Mr Wagg for “a copy of the files or declarations” from which the figures in the Schedule had been derived. No reply was received.

47. On 17 August 2018, a Notice of Appeal was filed with the Tribunal, in the name of the Company, although the covering letter was headed “Ivan Yanev”. On 21 August 2018, that Notice was returned by the Tribunal because it did not comply with Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”), which reads:

“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 can reasonably obtain.”

48. On 30 August 2018, Mr Brown made contact with Mr Moore, and told him that without further information he was “unable to progress the VAT case”. Mr Moore responded by return, saying that, to the best of his knowledge, the assessment had been made on the basis of the same information as used in the criminal case for income tax evasion and that “the spreadsheets and copy invoices were all served on [Carson Kaye]”, but he would do his best to see if there was any further information. Mr Brown then waited for “HMRC to provide [him] with the material directly, reasoning that as it was their assessment they would be best placed to provide me with that which they based it on”.

49. Mr Wagg called Mr Brown on 21 January 2019, apologising for the delay. On 7 February 2019, Mr Brown sent a chaser email. The following day, Mr Wagg sent the email attaching the Letter and the Schedule.

50. The Notice of Appeal was resent to the Tribunal the same day, with the Letter and Schedule attached, but the Notice was still in the name of the Company. On 22 February 2019, Carson Kaye filed a new Notice of Appeal in Mr Yanev’s name, and asked that it replace the one previously sent on 8 February 2019.

51. The Notice of Appeal included an application to make a late appeal, which said that Mr Yanev “only became aware that HMRC were actively seeking money from him when it became apparent to him that his assets outside the UK were subject to Restraint”. HMRC objected to the permission application, and this hearing was directed to determine that issue.

The law

52. Mr Eyles submitted, and I agree, that in deciding this application the Tribunal should apply the three stage approach set out in *Martland v HMRC* [2018] UKUT 0178 (TCC) (“*Martland*”), namely:

- (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”.

53. The Upper Tribunal (“UT”) said in *Martland* at [46]:

“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

54. The statutory time limit is 30 days after HMRC have issued a notice of assessment. 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.”

55. In this case, the Letter was issued on 1 May 2014 and the Notice of Appeal was filed on 22 February 2019, almost five years later. The delay is thus around fifteen times longer than that described in *Romasave* as serious and significant.

The reasons for the delay

56. The delay can be divided into several periods:

- (1) Between 31 May 2014 and 4 September 2014, namely from 30 days after the Letter was issued to the date Mr Yanev was imprisoned.
- (2) Between 4 September 2014 and August 2015, when Mr Yanev was in prison.
- (3) Between August 2015 and 30 December 2016, after Mr Yanev’s release, when he was living in the UK and then in Bulgaria.
- (4) Between 30 December 2016 when Mr Yanev called HMRC about the Debt Management letter sent to his mother’s house, through to 19 February 2018 when he decided to instruct Carson Kaye instead of Mr Salmon.
- (5) Between 19 February 2018 and 22 February 2019, during the period Carson Kaye was instructed.

The first period: the Letter to imprisonment

57. I have already found as facts that:

- (1) before 17 June 2014
 - (a) both Mr Yanev and Mr Salmon saw the Letter; and
 - (b) HMRC had already commenced recovery action in relation to the VAT set out in the Letter;
- (2) Mr Yanev was present on 17 June 2014 when Mr Salmon had told HMRC that:
 - (a) the VAT in that letter was “subject to appeal”;
 - (b) he would call back with more details “of his client’s appeal”; but
 - (c) no such call was made; and
- (3) Mr Salmon did not assume from the withdrawal of criminal charges in relation to VAT, that the VAT issues had been resolved.

58. As a result, no credible reason has been given for the failure to appeal during this period.

The second and third periods: imprisonment, challenging deportation, and Bulgaria

59. Mr Eissa submitted that Mr Yanev’s imprisonment, his challenge to the deportation order, and the deportation itself were all good reasons for the delay during this period. I agree in relation to (a) the imprisonment, and (b) the time following this when Mr Yanev was seeking to challenge the deportation order. However, once Mr Yanev arrived in Bulgaria, the reason he did nothing was that he assumed that the issue had gone away. He did not check that his belief was correct by contacting HMRC.

The fourth period: after receiving the Debt Management letter

60. When Mr Yanev received one or both of the Debt Management letters, he knew HMRC were still pursuing collection of the VAT shown in the Letter. On 30 December 2016, he told HMRC that he “will write in and appeal and complain”, but did not appeal.

61. Instead, Mr Yanev instructed Mr Salmon, but other than trying unsuccessfully to file a 64-8, nothing happened. Mr Yanev says that Mr Salmon “couldn’t obtain the necessary paperwork from HMRC to enable him to properly challenge the assessment”. That is an entirely unsurprising outcome, given the lack of a 64-8. Why Mr Salmon allowed over a year to pass without ensuring that the 64-8 was filed is unexplained.

The fifth period: Carson Kaye

62. Mr Brown ended his affidavit by saying that Carson Kaye “has acted without undue delay in this appeal”. I accept that Mr Brown was trying to obtain information from HMRC for some part of this period, and that his efforts were in the end successful. However, no reason has been given for the lack of any action between 19 February 2018, when Mr Yanev instructed that firm, and 12 July 2018, when Mr Brown contacted HMRC for the first time.

63. Although HMRC told Mr Brown that the documents needed to file the appeal were in the Carson Kay archives, he did not look for them, but instead waited for HMRC to find them. As a result, nothing happened between 31 August 2018 and 21 January 2019.

Was there a good reason for the delay(s)

64. As is clear from the foregoing, the Tribunal has been provided with no reason, or no good reason, for the following periods of delay:

- (1) the whole of the first period, namely the three month period before Mr Yanev was imprisoned;
- (2) the whole of the fourth period, which lasted over 13 months, despite Mr Yanev telling HMRC that he would appeal and instructing Mr Salmon; and
- (3) almost ten months of the fifth period, namely:
 - (a) 19 February to 12 July 2018, and
 - (b) 31 August 2018 to 21 January 2019.

65. Taken together, this is 26 months. In addition, between October 2015 and December 2016 Mr Yanev took no steps to check his VAT position but simply assumed HMRC had abandoned their earlier efforts to collect this liability.

All the circumstances

66. The third step in the *Martland* approach is to consider all the circumstances, including the merits of the case on the basis explained at §53. .

The need for time limits to be respected

67. Particular weight must be placed as a matter of principle on the need for statutory time limits to be respected. This was described as “a matter of particular importance” in *HMRC v Katib* [2019] UKUT 189 (TCC) at [17], following *BPP Holdings Limited v HMRC* [2017] UKSC 55; the same point is made in *Martland* at [46].

68. The statutory time limit which applies to VAT assessments is 30 days. The total delay was around 5 years. As already noted, this was around fifteen times longer than the period described in *Romasave* as serious and significant. Moreover, no reason, or no credible reason has been given for more than two years of that five year period (26 months). This factor weighs heavily against Mr Yanev.

Reliance on third parties

69. Mr Eissa submitted that Mr Yanev had relied on his professional advisers to take the appropriate steps, and it was reasonable of him to do so. I accept that there were delays by Mr Salmon and, to a lesser extent, by Carson Kaye. However (a) Mr Yanev was with Mr Salmon when he called HMRC about the Letter on 12 June 2014; and (b) when Mr Yanev called HMRC on 30 December 2016, he said he was going to appeal. Although Mr Yanev relied on his advisers, he knew that an appeal was required.

70. In *Katib* the UT said at [49] (their emphasis):

“We accept HMRC’s general point that, in most cases, when the FTT is considering an application for permission to make a late appeal, failings by a litigant’s advisers should be regarded as failings of the litigant.”

71. The UT returned to that point at [54]:

“It is precisely because of the importance of complying with statutory time limits that, when considering applications for permission to make a late appeal, failures by a litigant’s adviser should generally be treated as failures

by the litigant. In *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666, when considering the analogous question of whether a litigant's case should be struck out for breach of an 'unless' order that was said to be the fault of counsel rather than the litigant itself, Ward LJ said, at 1675:

'Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent...were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself.' [emphasis added]."

72. In accordance with that guidance, I place very little weight on the fact that some responsibility for the delays lies with Mr Yanev's professional advisers.

The balance of prejudice

73. Mr Eissa submitted that the prejudice to Mr Yanev if the application was refused was vastly greater than the prejudice to HMRC if the application were allowed. Mr Yanev will be liable for nearly £2m of VAT, and his mother's house in Bulgaria is at risk.

74. Mr Eyles said that there was also prejudice to HMRC: the long delay means HMRC will be unable to call all the Officers who might have been able to give relevant evidence, and the passage of time will have significantly impaired the recollection of those who are available.

75. I agree that the balance of prejudice favours Mr Yanev, but there is also significant prejudice to HMRC, for the reasons given by Mr Eyles. Moreover, I am required by *Martland* and *Katib*, both of which followed *BPP*, to place "particular importance" on "the need for litigation to be conducted efficiently and at proportionate cost". The Letter was issued in May 2014. It is not efficient for the parties to be required to collect relevant evidence more than five years after the events in question. Mr Eyles recognised that this would be difficult for HMRC, but I also note that Mr Brown did not search his firm's archives, because it was more efficient to wait and see if HMRC provided the information. In other words, he recognised that an archive search would take significant time and resources.

Finality

76. A closely linked issue is finality. In *Martland* at [26] and [34] the UT cited *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218, where Drummond Young said that an important factor was:

"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. That may be a reason for refusing leave to appeal where there has been a very long delay."

77. Given the "very long delay" in Mr Yanev's application to appeal, this factor is clearly in favour of HMRC.

The merits

78. Mr Eissa submitted the merits of Mr Yanev's case were strong, and that if permission were given, the following arguments would be put forward:

(1) *Failure to register*: Mr Yanev did not charge VAT because he was not registered and so did not have a liability. Mr Eyles said this was a hopeless argument and I agree. Value Added Taxes Act 1994 ("VATA") s 3(1) defines a "taxable person" for VAT purposes as a person "who is or required to be registered under this Act" (emphasis added).

(2) *No loss to HMRC*: Mr Yanev's customers were all VAT registered and thus there was no loss to the Treasury from his failure to register. However, there is no finding of fact as to the VAT position of his customers, see §16-§17, and in any event Mr Yanev was required to register. There is no legal basis on which such a person can succeed in an appeal against an assessment on the basis that there was no loss to the Treasury.

(3) *VAT-only invoices*: There would have been no loss of tax if VAT-only invoices had been issued. This possibility was raised by Mr Salmon before Mr Yanev was imprisoned; he recalls that HMRC "dismissed" it. Whether or not that is the case, Mr Yanev did not need HMRC's permission to issue VAT-only invoices. Mr Yanev may have a cause of action against his advisers for not pursuing this method of reducing his liability, but that would be a civil claim. It does not affect the merits of his case before the Tribunal.

(4) *Not an assessment*: The Letter was not a valid assessment because it did not comply with the description given by Blackburne J in *Courts v R&C Commrs* [2004] STC 690, which was upheld on appeal, see [2005] STC 27. However, I agree with Mr Eyles that this submission ignores the fundamental difference between an assessment, which is an internal matter for HMRC, and notification of that assessment to the taxpayer. The Letter was a notification, and it satisfied all the necessary requirements for a notification,. In *Queenspice v C&E Commrs* [2010] UKUT 111, Lord Pentland followed the Court of Appeal's decision in *Courts* and May J's judgment in *House v C&E Comrs* [1994] STC 211 and concluded that:

(a) the assessment of the amount of tax due under VATA s 73(1), and the notification to the taxpayer, are separate operations, see [27] and [28];

(b) a notification may legitimately be given in more than one document, see [25(ii)]; and

(c) in judging whether a notification is valid, the test is whether the relevant documents contain between them, in unambiguous and reasonably clear terms, a notification to the taxpayer containing (i) the taxpayer's name, (ii) the amount of tax due, (iii) the reason for the assessment, and (iv) the period of time to which it relates, see [25(iii)].

(5) *Failure to particularise the quantum*: The assessment was not valid because the Letter did not include a breakdown or analysis of the VAT, but simply said that Mr Yanev was required to pay £1,867, 349.83, and the Schedule explaining how that figure was made up was not attached to the Letter. However:

(a) as *Queenspice* makes clear:

(i) a notification is valid if it sets out "the amount of tax due". That requirement was clearly satisfied; and

(ii) a notification can legitimately be given in more than one document; and

(b) the evidence as to whether the Schedule was attached to the Letter was in dispute, so even if that point was relevant (which in my judgment it is not), the UT in *Martland* warned that “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”; there are no such circumstances here.

(6) *Failure to meet the time limits:* If HMRC had made an assessment, it was out of time because it did not meet either of the requirements in VATA, s 73(6). This subsection requires that an assessment be made no later than:

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

Mr Eissa did not refer to any evidence or case law to support this submission, but asked the Tribunal to infer that there was communication between the CPS and HMRC, so that both were aware of the relevant facts before 30 April 2013, one year before the date of the Letter.

Mr Eyles submitted that both of the statutory conditions were met:

(c) in relation to s 73(6)(a) Mr Yanev had not submitted a VAT return, so had a single VAT period. This had ended in December 2012. The assessment was made in May 2014, so within two years of the end of the single accounting period; and

(d) in relation to s 73(6)(b), HMRC was not in a position to make the assessment before 1 May 2013.

I considered both subsections. In relation to s 73(6)(a) Mr Eissa had not referred to or relied on any of the case law relating to global assessments in order to defeat Mr Eyles’s submission on the single VAT period. In relation to s 73(6)(b), there was no relevant evidence before the Tribunal to support Mr Eissa’s submission that, by 1 May 2013 HMRC had “evidence of facts, sufficient...to justify the making of the assessment”.

(7) *Failure to serve:* The Letter had been addressed to Mr Yanev at Unit 13, Kencot Way, Erith. That was not a valid address for service, because Mr Yanev had left that premises by the time the Letter was sent, and he did not receive it. No legislation or case law was cited in support of this submission. VATA s 98 provides that a notice may be served on a person by sending it by post in a letter addressed to that person at the last or usual place of business of that person. Since Unit 13 was Mr Yanev’s last place of business, I am unable to see any merit in this argument. Moreover, Mr Yanev had clearly received the Letter by 14 June 2014, when the call was made to HMRC.

Weighing the circumstances

79. Once the circumstances have been identified, they must be considered together. Significant weight must be given to the very serious and significant delay of nearly five years in making this application, and the lack of any good reason for 26 months of that five year period. Although the balance of prejudice favours Mr Yanev, I am also required to give particular weight to the need for litigation to be conducted efficiently, and that factor favours HMRC, as does the need for finality. I place very little weight on the fact that part of the delays were caused by Mr Yanev’s professional advisers. The merits of the case are extremely weak.

80. Before coming to my conclusion I also considered Mr Eissa’s submission that, as the Tribunal was a public body, it was obliged to act fairly, and it would be unfair to Mr Yanev if he were denied permission his appeal. Mr Eissa sought to rely on *Oxfam v. HMRC* [[2010]

STC 686, but he also accepted that in *Trustees of the BT Pension Scheme v R&C Commrs* [2015] EWCA Civ 713 the Court of Appeal had held that *Oxfam* should not be “treated as authority for any wider proposition”.

81. In deciding whether or not to give permission to make a late appeal, the Tribunal is not exercising a public law jurisdiction (and for that reason, among others, *Oxfam* is not a relevant authority). As the UT said in *Martland* at [18], the jurisdiction is the exercise of a discretion “specifically and directly conferred...by statute to permit an appeal to come into existence at all”.

82. It is true, as the UT went on to say at [19]:

“the principle embodied in the overriding objective is a broad one, and one which applies just as much to the exercise of a judicial discretion of the type involved in this appeal as it does to the exercise of such a discretion in relation to more routine procedural matters.”

83. In exercising the discretion given to me by the statute, I must therefore act “fairly and justly”. But this requires me to consider the interests of both parties, and also the position of other Tribunal users. In *Chartwell Estate Agents Ltd v Fergies Properties* [2014] EWCA Civ 506 Davis LJ (with whom Sullivan LJ and Laws LJ agreed) said at [28] that the purpose of the Jackson reforms was:

“to change a litigation culture...with a view to protecting the wider interests of justice including the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases by reason of non-compliance.”

84. If a person is allowed to notify his appeal late, despite breaching the statutory time limits, he will be able to appeal to the Tribunal on the substantive issues. This will absorb judicial and administrative resources which could otherwise have allowed another taxpayer to have his appeal heard more expeditiously.

85. I therefore reject Mr Eissa’s submission that there is an overriding principle of “fairness” which requires that the Tribunal gives Mr Yanev the opportunity to have his appeal heard.

86. Instead, I have exercised my statutory jurisdiction fairly and justly, and considered all the circumstances. Having done so, it is clear that Mr Yanev’s application must be dismissed.

Right to apply for permission to appeal

87. This document contains full findings of fact and reasons for the decision. If Mr Yanev is dissatisfied with this decision, he has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ANNE REDSTON
TRIBUNAL JUDGE**

RELEASE DATE: 29 OCTOBER 2019