[2015] UKUT 254 (TCC)

Appeal numbers: FTC/100/2014
FTC/115/2014

VAT – whether assessments were duly notified to the taxpayer – VATA 1994, s 73(2), s 83G and s 98 – Interpretation Act, s 7 – Companies Act 2006, s 1139(1) – whether notification of assessment invalidated by error on the face of the notice of assessment – whether FTT made an error of law in taking into account an earlier decision of the tribunal that had been set aside in permitting an appeal to proceed out of time

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ROMASAVE (PROPERTY SERVICES) LIMITED	**Appellant/ Respondent to cross-appeal**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents/ Appellants in cross-appeal**

TRIBUNAL: JUDGE ROGER BERNER
JUDGE SARAH FALK

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 17 April 2015

Geraint Jones QC, instructed by Rainer Hughes, for the Appellant/Cross-Respondent

Laura Poots, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents/Cross-Appellants

DECISION

1. This is the appeal by Romasave (Property Services) Limited ("Romasave"), and the cross-appeal of HMRC, from the decision of the First-tier Tribunal ("FTT") (Judge Staker) which was released on 3 June 2014. By that decision the FTT considered applications by Romasave to bring late appeals in relation to nine decisions of HMRC concerning liability to value added tax ("VAT") and misdeclaration penalties. The FTT found that the appeals, which had been lodged on 22 February 2012, had been made late. It refused permission to appeal out of time in eight of those cases, and gave permission in one. With permission of the FTT, Romasave now appeals in respect of the FTT's refusal in six of the cases and HMRC cross-appeals in the one case in which the FTT allowed the late appeal to proceed.

2. The FTT referred to the relevant decisions of HMRC numerically as Decisions 1 to 9. It is helpful for us to do likewise. We set out in the Appendix to this decision details of the nine HMRC decisions in question. Those that are the subject of Romasave's appeal are Decisions 2, 3, 4, 5, 6 and 8. HMRC's appeal is in respect of Decision 9. There is no appeal before us in respect of Decisions 1 and 7.

3. In the case of Romasave's appeal, in relation to Decisions 2, 3, 4 and 8, the question is whether the relevant VAT assessments were notified to Romasave as required by the applicable statutory provisions in 2009 or (in the case of Decision 8) 2010. If and to the extent they were not, then Romasave's appeal in those respects will succeed, since in that event those decisions will not have been notified before 21 February 2012, and accordingly its appeals against those decisions will not have been made late. This question turns primarily on the steps that were taken by HMRC to notify the assessments to Romasave, but in relation to Decision 3 there is a separate question whether an admitted error on the face of the notification of the assessment in any event invalidated it. If Romasave's appeal in these respects fails, with the result that the relevant appeals will have been made late, there is no appeal against the decision of the FTT to refuse permission for those appeals to proceed out of time.

4. In relation to Romasave's appeal in respect of Decisions 5 and 6, those decisions relate to misdeclaration penalties referable to the VAT assessment which is Decision 4. It is accepted by Romasave that assessments in relation to those penalties were properly notified to Romasave in May 2009. Romasave's argument in respect of Decisions 5 and 6 is that those decisions are dependent on Decision 4, and that to the extent that the substantive appeal in respect of Decision 4 can proceed, appeals in relation to Decisions 5 and 6 should also do so. Accordingly, if Romasave's appeal in respect of Decision 4 does not succeed, its argument on Decisions 5 and 6 will fall away. On the other hand, if the appeal in relation to Decision 4 succeeds, HMRC have confirmed that, in this particular case, HMRC will not object to the appeal against Decisions 5 and 6 also being permitted to proceed in the FTT.

5. HMRC's cross-appeal is in relation to Decision 9. HMRC say that the FTT erred in law in the way it exercised its discretion to permit a late appeal in respect of

Decision 9, and that this Tribunal should re-make the decision in that respect and refuse to allow a late appeal to be made.

Background

6. At all material times, the usual place of business of Romasave was at an address in Essex the first line of which was "Griffins Wood House" ("the Griffins address").

7. Anami Law was a firm of solicitors who acted for Romasave. Their address was also the Griffins address.

8. The registered office of Romasave was an address in London the first line of which was Roxburghe House ("the Roxburghe address"). This was also the address of Romasave's accountants, King & King.

9. Decisions 2, 3 and 4 were originally sent by HMRC to Romasave with an error in the address. The address used referred to "Ganrids Wood House" ("the Ganrids address") instead of to Griffins Wood House.

10. Before the FTT, Romasave contended that it did not receive Decisions 2, 3 and 4 when they were sent to the Ganrids address. The FTT made no finding of fact as to whether Romasave did in fact receive those Decisions at that time. The FTT considered that, in view of its conclusions on other issues, it was unnecessary for it to make such a finding (FTT decision, at [87]).

11. Copies of Decisions 2, 3 and 4 were subsequently sent by HMRC to Anami Law (at the Griffins address) with a covering letter dated 2 October 2009.

12. Copies of those Decisions were also sent by HMRC to King & King (at the Roxburghe address) under cover of a letter dated 9 November 2009. Decision 8 was sent to King & King on 16 March 2010.

13. On 21 February 2012, HMRC sent copies of assessments relating to periods from 03/06 (so including copies of Decisions 2, 3, 4 and 8) under cover of a letter addressed to Romasave at King & King at the Roxburghe address, together with copies of the corresponding notifications of the misdeclaration penalties.

14. On 22 February 2012, Romasave lodged its appeal with the FTT.

The law

15. Decisions 2, 3 and 4 were VAT assessments relating to payments or credits to Romasave which HMRC say ought not to have been paid or credited. HMRC's power to make those assessments derives from s 73(2) of the Value Added Tax Act 1994 ("VATA"):

> "In any case where, for any prescribed accounting period, there has been paid or credited to any person—
>
> (*a*) as being a repayment or refund of VAT, or

(*b*) as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly."

16. An appeal against an assessment lies to the First-tier Tribunal under s 83 VATA (see s 83(1)(p)). So far as is material, s 83G provides:

"(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 …

(6) An appeal may be made after the end of the period specified in subsection (1) … if the tribunal gives permission to do so."

The reference to P in s 83G(1) is to the person to whom, or to which, the decision of HMRC has been notified (see s 83A). In the context of s 73(2), this is the person being assessed for the VAT, in this case Romasave.

17. It is worth noting briefly that s 83G came into force with effect from 1 April 2009, a date after the dates of Decisions 2 and 3. Before that date the timing of appeals was governed by rule 4 of the Value Added Tax Tribunal Rules 1986 (SI 1986/590) which was worded differently. Transitional rules in paragraph 4 of Schedule 3 to The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56) provided for the previous rules to continue to apply in some circumstances if HMRC notified a decision prior to the 1 April 2009 commencement date. However, the earliest date that HMRC is now arguing that Decisions 2 and 3 were notified is 2 October 2009, a date falling after s 83G came into force, so it is not necessary to consider the previous rules.

18. No special provision regarding notification is contained in s 73(2). However, s 98 VATA provides generally for service of notices for the purposes of VATA as follows:

"Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative."

19. Even more general in scope are the provisions of s 7 of the Interpretation Act 1978 ("IA"):

"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly

> addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

20. Finally, in relation to the service of documents on a company, s 1139(1) of the Companies Act 2006 ("CA 2006") provides:

> "A document may be served on a company registered under this Act by leaving it at, or by sending it by post to, the company's registered office."

The FTT's decision on notification

21. The FTT held, at [80], contrary to the submission made to it on behalf of Romasave, that in relation to service by post s 98 VATA was not exhaustive of the manner in which such service could be effected. The provision was permissive rather than mandatory. The FTT considered that proper notification does not depend on strict compliance with specific formalities. Notification given in accordance with s 98 *will* suffice. Notification given by any other means, which the FTT considered could include notification sent by post to a firm of solicitors or accountants acting for the company, *may* suffice, depending on the circumstances.

22. The FTT began, therefore, by considering whether Decisions 2, 3 and 4 were notified to Romasave when they were sent to Anami Law in October 2009, or when they were sent to King & King in November 2009. The FTT found, at [83], that Anami Law had authority to act for Romasave in relation to the assessments generally, including in relation to an appeal to the tribunal against those assessments, and that in those circumstances the sending of copies of the assessments to Anami Law constituted the giving of notification to Romasave. Likewise, at [85], the FTT found that King & King were authorised to act generally in relation to the relevant Decisions, including Decision 8, and accordingly that the sending of copies of the assessments to King & King constituted the giving of notification to Romasave.

Were Decisions 2, 3, 4 and 8 duly notified to Romasave?

23. The jurisdiction of this tribunal on an appeal from the FTT lies only on questions of law (s 11 of the Tribunals, Courts and Enforcement Act 2007). In this case, although the FTT had, at [81], described the question of whether notification had been given as one of fact, there was no dispute before us on the question of jurisdiction. In our view, such a question is one of mixed fact and law, the questions of law including those of construction of the relevant statutory provisions, and questions of agency and authority to accept notification on behalf of another.

Effect of statutory provisions as to notification by post

24. In its grounds of appeal, and Mr Jones' skeleton argument for this appeal, the position originally adopted by Romasave was that, although it was accepted that s 98 VATA did not prescribe notification by post as the only method by which a taxpayer could be notified of an assessment (so that, for example, notice of an assessment

could be delivered personally to the taxpayer), if postal notification was the chosen method, the requirements of s 7 IA had to be complied with, and if they were not, then it was not possible for there to have been a valid notification by post. That required the notification to be properly addressed to the taxpayer; the only exception provided for by s 98 was that an assessment could be notified to a VAT representative which, as was common ground, is not relevant in this case.

25. During the course of his submissions to us, Mr Jones clarified Romasave's position in this regard. He accepted that postal notification could be given to a business such as Romasave in three circumstances: (a) where the notification was sent by post to the taxpayer, properly addressed to the taxpayer's place of business (complying with s 98 VATA and, according to Mr Jones, s 7 IA); (b) where the notification was properly addressed to an agent of the taxpayer who had been expressly authorised by the taxpayer to receive such notification; and (c) in the case of a taxpayer that is a company within the Companies Acts, where the notification was properly addressed to the company at its registered office.

26. As it was accepted by HMRC that none of Decisions 2, 3, 4 and 8 could be treated by s 7 IA as having been notified to Romasave itself, and there was no suggestion that we should seek to make a finding as to whether Romasave had in fact received notice of those Decisions (no such finding having been made by the FTT), the question before us resolved essentially into whether the receipt by Anami Law or by King & King of copies of the assessments amounted to proper notification for the purpose of s 83G VATA. However, we believe it might be helpful if we first briefly discuss the statutory mechanism for postal notification.

27. The starting point is that for time to run for the making of an appeal, s 83G(1), read with s 73(2), requires the relevant decision to have been notified to the taxpayer. Although the FTT discussed the question of the point at which time started to run for this purpose, deciding, at [79], that it was the date of the document giving notice and not the date of notice having been received, the precise point at which time began to run is not material in this appeal. Romasave's grounds of appeal included a challenge to the FTT's finding in this respect, arguing that, on a purposive construction time must run, not from the date printed on the document, but the date when notice is given in accordance with any permissible means. As resolution of this issue is not material to this appeal, and the point was not argued before us, we do not think it would be right for us to come to a decided view. We should say, however, that we should not be taken to have endorsed either the view adopted by the FTT in this respect or the position put forward by Romasave.

28. In the circumstances of this case, the principal provision requiring an assessment to be notified to the taxpayer is s 73(2) VATA. Section 73 itself, however, prescribes no requirements for the method by which notification may be given. The only provision which does so is s 98, and then only in respect of postal notification. That provision, as both parties now accept, is permissive and not mandatory. That accords with authority: *Grunwick Processing Laboratories Ltd v Customs and Excise Commissioners* [1986] STC 441.

29. In *Grunwick*, in the High Court on appeal from the VAT Tribunal, Macpherson J upheld the Tribunal's conclusion that, in a case where notice of an assessment had originally been given to a taxpayer's solicitor, that did not amount to proper notification, even though the taxpayer had received the assessment through its solicitors, but that the assessment was not thereby invalid and had subsequently been properly notified to the taxpayer company itself. The Tribunal (Lord Granchester) had found that s 46 of the Value Added Tax Act 1983 (which, with the exception only that there is no reference to a VAT representative, is in the same terms as s 98 VATA) was permissive and not mandatory. Nonetheless, on the facts of that case, which included evidence from the solicitor that at the material time he had no authority to accept the assessment or any process on behalf of the company, the Tribunal found that notification to the solicitor did not satisfy the statutory obligation to notify the company.

30. Thus, s 98 is relevant only in relation to one method of notification, but it does not preclude any other method. We agree with the FTT when it found, at [80], that s 98 was not exhaustive of the methods by which notification could be given by post. As Romasave accepted, a different method of postal notification could be prescribed by other statutory rules, such as s 1139(1) CA 2006; and there is nothing to prevent postal notification by other means, with or without express statutory authority, being effective. That, we consider, follows from a literal construction of s 98, which is expressed in permissive and not mandatory terms by the use of the word "may" and not "must", and by the absence of any indication that the method described in s 98 is exhaustive. If the draftsman had intended that to be the effect of s 98 he could, and in our judgment would, have made that clear. There is no statutory limitation on the way in which, outside the terms of s 98 (and thus of s 7 IA), an assessment may be notified by post. We do not therefore accept the submission of Mr Jones that postal notification is valid only in the three circumstances he has described.

31. The effect of s 98, and in our view its purpose, is to bring into play s 7 IA. That provision applies only where another Act authorises or requires a document to be sent by post. Section 98 does not require postal notification of an assessment, but it does authorise it. What s 98 does is to enable s 7 IA to have effect in the circumstances it describes, namely where notice is sent by post in a letter addressed to the relevant person or his VAT representative at the last or usual business address of that person or his VAT representative.

32. The effect of s 7 IA is not to prescribe a method of achieving postal service or notification, or to preclude the possibility of valid service or notification if its provisions are not satisfied. Its effect is limited to the evidential requirements of proving such service or notification by the postal method required or authorised by the particular statute. It achieves that by deeming service or notification to be effected if a letter containing the relevant document is properly addressed, pre-paid and posted as so required or authorised. Proof of those matters is proof of service or notification, and unless the contrary is proved such service or notification is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

33. On the other hand, the second half of s 7 IA expressly recognises that the actual state of affairs may be different from what is deemed to be the case. It admits the possibility of it being proved that, despite the requirements of s 7 IA having been met, service or notification has not in fact been effected, or not effected in the usual course of postal delivery. In the event that the intended recipient proves, according to the evidence and on the balance of probability, that he did not receive the relevant document, service or notification of it will not be deemed under s 7 IA to have been effected: see *R v County of London Quarter Sessions Appeals Committee ex parte Rossi* [1956] 1 QB 682 in the Court of Appeal as discussed in *Calladine-Smith v Saveorder Ltd* [2011] EWHC 2501 (Ch). (These cases also make it clear that, although only the second part of s 7 is expressly qualified by the words "if the contrary is proved", if it is in fact proved that a document was not served or notified, then in any case where it is necessary to decide whether the notification was actually received by a certain time, it is open to the court to find that the document was not served at all, despite the deeming language in the first half of s 7. See also *Customs and Excise Commissioners v Medway Drafting and Technical Services Ltd* [1989] STC 346 for an example of this in a VAT context.)

34. In any case where the requirements of s 7 IA are not met, for example if it is not proved that the letter was properly addressed or that the relevant document was posted, the effect is not to deem service or notification not to have been effected; the effect is only that service or notification cannot be deemed to have been effected. In such a case, instead of the intended recipient being required to prove, on the balance of probability, that he did not receive the document, the burden falls on the sender to prove that service or notification was indeed effected.

35. We agree with Mr Jones, and Ms Poots did not argue to the contrary, that a material error in the address to which notice of an assessment is sent means that the letter will not be properly addressed for the purpose of s 7 IA, and that in this context any error that is not *de minimis* will be a material error. In our view Mr Jones was right to accept, in relation to Decisions 7 and 9, that addressing notice of that decision to "Griffin Wood House" instead of to "Griffins Wood House" was a *de minimis* error and could not prevent the notification of that decision from having been deemed under s 7 IA to have been given.

36. On the other hand, addressing notices of Decisions 2, 3 and 4 to "Ganrids Wood House" instead of to the Griffins address was in our view a material error, and a letter addressed in that manner cannot be regarded as having been properly addressed for the purpose of s 7 IA. That was accepted by HMRC; it was not argued by them either before the FTT or before us that notification to the Ganrids address in respect of Decisions 2, 3 and 4 could be deemed to have been effected under s 7 IA. But in those circumstances it would have remained possible for HMRC as the sender to prove that notification had in fact been effected.

37. As we have described, the FTT did not decide whether Decisions 2, 3 and 4 had in fact been notified to Romasave itself by post despite the failure to properly address the notices of those assessments. It did not need to do so because it decided that notification had been effected in other ways, such that the relevant appeals were out

of time. Although, because HMRC do not seek to rely on there having been actual notification in that way to Romasave, nothing turns on that issue in this appeal, we should sound a note of caution. In certain cases the question of the precise timing of notification may not be material, but in others it will. Even if an appeal may be out of time whichever of two or more possible dates of notification are at issue, the exercise of discretion in permitting an appeal to be made out of time requires all relevant circumstances to be taken into account, and that will include the length of any delay. It may be important therefore that the tribunal properly understands the date from which time for appealing has started to run and makes all appropriate findings in that respect.

Correspondence with Anami Law and King & King

38. In this case, it is accepted for the purpose of this appeal that Decisions 2, 3 and 4 were not notified to Romasave when they were sent to the Ganrids address, but that notification of those Decisions, along with Decision 8, by post to an agent with the requisite authority could amount to such notification. The FTT found that the receipt of Decisions 2, 3 and 4 by each of Anami Law and King & King, and the receipt by King & King of Decision 8, constituted notification to Romasave for the purpose of s 83G VATA. In reaching that conclusion, Mr Jones submits that the FTT made errors of law.

39. Before considering the relevant facts in this connection, we make the initial point that s 7 IA could at most play only a limited part in this analysis. Postal delivery to an agent, with the exception of a VAT representative which is not relevant in this case, is not specifically authorised or required by s 98 or elsewhere in the VATA, although it is, as we have described, not precluded. In the context of service on an agent, therefore, section 7 IA is not engaged at all. Where it could be engaged, however, is if notification were to be given to a company under s 1139(1) CA 2006; that section authorises service by post to the company's registered office, and accordingly s 7 IA could apply to such a notification. The application of s 7 IA to postal deliveries addressed to Romasave at its registered office is not, however, an issue in this appeal.

The facts

40. On 21 August 2009, an officer of HMRC, Ms Debbie Murfitt, wrote to Romasave (at the Griffins address). The letter followed up certain visits in June 2009, and dealt with issues of input tax recovery and partial exemption. It also referred to disallowance of VAT recovery for the period 03/09, in respect of which notice of assessment (Decision 7) was sent to Romasave on the same day. The letter explained that Ms Murfitt would not be working for HMRC from 28 August 2009, and suggested that Romasave write to a Ms Wood, the original assessing officer. The letter ended: "I regret that until the matter is resolved, the business has an outstanding debt of £132,310."

41. On 21 September 2009, and following a telephone discussion with Romasave, Mr Mike Chapman, the Team Manager of Local Compliance, Small & Medium

Enterprises at the same HMRC office as Ms Murfitt had written from, sent to Romasave a copy of the letter of assessment in respect of period 03/09.

42. Also on 21 September 2009, Mr Avtar Singh Mann, the sole director of Romasave, signed a letter of authority which authorised HMRC to "deal with my Solicitor Mr S Panesar, of Anami Law [at the Griffins address] in relation to the demand of immediate payment in relation to [Romasave's VAT registration number]". That authority was on the same day faxed by Anami Law to Mr Chapman.

43. The following day, 22 September 2009, and following a telephone conversation on the previous day between Mr Panesar and Mr Chapman, Mr Chapman sent to Anami Law a ledger breakdown of the then current balance of £133,422. The ledger covered assessments for the quarterly periods from 3/06 to 3/09. Mr Chapman referred to periods 3/06 to 6/08 as having been the subject of notices of assessment issued by Ms Wood. The letter also stated that Mr Chapman would send by post copies of the relevant correspondence that had been sent to Romasave by both Ms Wood and Ms Murfitt.

44. On 1 October 2009, Mr Panesar replied to Mr Chapman acknowledging receipt of the ledger breakdown, but saying that he had not received the additional copies of relevant correspondence. He referred to "periods of 06-08" as having been the "apparent subject" of notices of assessment issued by Ms Wood and said that they had not been received. He said that it was Romasave's intention to address "the property liability, and partial exemption issues" but that there was uncertainty as to the assessments raised, and what the issues were. Mr Panesar then referred to the demand for immediate payment made to Romasave, and requested that a similar demand sent to Mr Mann personally be withdrawn.

45. On 2 October 2009 Mr Chapman sent further copies of the correspondence to Anami Law.

46. On 15 October 2009, Anami Law wrote to Mrs Finola Tuohy of HMRC's Essex Business Centre, to whom the case had been passed, referring to the correspondence sent to Anami Law by Mr Chapman and saying that letters dated 11 September 2008 to 21 August 2009 had been "incorrectly sent to Griffins Wood House". The letter went on to say: "The registered office of [Romasave] is in fact King and King Accountants, Roxburghe House …" The letter sought immediate withdrawal of all assessments raised against Romasave and Mr Mann, and stated that, failing this, an application would be made to the tribunal.

47. On 9 November 2009, Mrs Tuohy wrote a letter to "King and King Accountants" at the Roxburghe address. The body of the letter is headed with the company name of Romasave and Romasave's VAT registration number, but there is no reference to Romasave in the address. Mrs Tuohy enclosed a copy of the letter from Anami Law of 15 October 2009 and copies of the relevant assessment documents and details of the information required by HMRC.

48. In due course, after a further letter from HMRC to King & King had gone unanswered, on 23 December 2009 HMRC wrote again to King & King to say that the matter was being referred to HMRC's debt management unit. King & King responded to Mr Chapman by letter dated 9 March 2010, thanking him for forwarding the copies of the correspondence and making certain representations with a view to the assessment on Romasave of £130,000 being cancelled and replaced with one for £458.06.

49. During 2010 and into 2011, further correspondence ensued between HMRC and King & King and between HMRC and Anami Law and its successor firm, Rainer Hughes. HMRC issued a petition for the winding up of Romasave on 29 July 2011. That petition was dismissed by the Companies Court on 10 October 2011, but a fresh petition was issued on 25 November 2011 which we understand is currently stayed behind these proceedings.

50. On 21 February 2012, in a letter addressed to Romasave at "King and King" at the Roxburghe address, HMRC sent Romasave copies of the assessments relating to periods "from 03/06".

51. Notice of appeal to the FTT was given by Romasave on 22 February 2012.

The FTT's findings of fact

52. The FTT found, at [84] and [85], that the letter from HMRC dated 2 October 2009 received by Anami Law had contained Decisions 1 to 7, and that King & King had received copies of those assessments and of Decision 8 under cover of HMRC's letter of 9 November 2009.

53. There is no appeal against those findings of fact. The only question is whether such receipt amounted to notification to Romasave of the relevant Decisions.

Discussion

54. Mr Jones submitted that neither Anami Law nor King & King had any actual or ostensible authority to accept notification of assessments on behalf of Romasave. He argued that the FTT had erred in law when it found first, at [83], that Anami Law had authority to act for Romasave "in relation to the assessments generally" and secondly, at [85], that King & King were "authorised to act for [Romasave] generally" in relation to the relevant Decisions.

55. In this connection Mr Jones referred us to an authority of some antiquity, namely *Saffron Walden Second Benefit Building Society v Rayner* (1880) 14 Ch D 406, in the Court of Appeal, and in particular the principle described by James LJ at pp 408 - 409:

> "In this case it is my misfortune to differ from the conclusion at which the Vice-Chancellor has arrived. In the first place, his Lordship appears to have been of opinion that the notice given on behalf of the Plaintiffs to *Messrs. Stevens & Bawtree*, who were persons acting as solicitors

> for the executors and to some extent for the trustees, was in itself sufficient notice to create a priority and to make the trustees liable to the same consequences as if the notice had been given to them personally. That appears to me a startling proposition. It would be imposing a most tremendous burden upon trustees to say that merely because they have employed a solicitor in effecting an investment of the trust funds upon mortgage, they have made him their agent to receive any notices of subsequent incumbrances or dealings by the cestuis que trust of that trust fund. I cannot see any principle leading to such a conclusion. I have had occasion several times to express my opinion about the fallacy of supposing that there is such a thing as the office of solicitor, that is to say, that a man has got a solicitor not as a person whom he is employing to do some particular business for him, either conveyancing, scrivening, or conducting an action, but as an official solicitor, and that because the solicitor has been in the habit of acting for him, or been employed to do something for him, that solicitor is his agent to bind him by anything he says, or to bind him by receiving notices or information. There is no such officer known to the law. A man has no more a solicitor in that sense than he has an accountant, or a baker, or butcher. A person is a man's accountant, or baker, or butcher, when the man chooses to employ him or deal with him, and the solicitor is his solicitor when he chooses to employ him and in the matter in which he is so employed. Beyond that the solicitorship does not extend, and a man is not an agent for the purpose of receiving notice of an incumbrance created by a cestui que trust because he was the solicitor employed to invest the moneys, or even because afterwards he, for convenience, received from the mortgagor the interest and handed it by direction of the trustees to the different persons entitled to receive it."

56. That principle has, in recent times, been described as fundamental in being "as good law in 2007 as it was in 1880" (*Glen International Limited v Triplerose Limited* [2007] EWCA Civ 388, per Munby J). In the *Glen International* case, one question was whether, if a letter sent to a firm of solicitors had been in a form capable of constituting a notice under s 48 of the Landlord and Tenant Act 1987, the solicitors would have had authority to receive the notice. It was held, applying *Saffron Walden*, that they would not. There was no holding out by the tenant of the solicitors to do anything other than act in relation to specific matters which were the subject of correspondence, in that case dilapidations and insurance. Even though there was nothing in the correspondence limiting the authority of the solicitors to those matters, on a sensible reading of that correspondence the solicitors were acting in relation to the dilapidations and insurance and did not hold themselves out nor were they held out by the tenant as acting in any wider or general capacity.

Receipt of copy assessments by Anami Law

57. It is clear from the authorities that the mere fact of Anami Law acting as solicitors of Romasave did not give them authority to accept service or notification of the assessments. The question is whether the evidence was capable of showing that Anami Law had been given authority by Romasave to receive notification of the

assessments on its behalf. We put it that way because, if the evidence was such as to entitle the FTT to come to that view, that would not be something that, on an appeal of this nature, we could properly interfere with. But if the evidence is not capable of supporting that conclusion, that will be an error of law on the part of the FTT which is within our jurisdiction to cure.

58. In our judgment it is clear that the evidence could point in only one direction, and that it could not support a finding that Anami Law either had or were held out to have authority to act for Romasave in relation to the assessments generally such that the sending of copies of the assessments to Anami Law constituted the giving of notification to Romasave.

59. We agree with the submission of Mr Jones that it is necessary to consider the precise scope of the letter of authority dated 21 September 2009. It was limited to dealings with HMRC in relation to the demand for immediate payment in connection with Romasave's VAT affairs. That could be understood only in terms of notices of assessment having already been given to Romasave (which would have been the justification for the payment demands), and not the authorisation of Anami Law to receive any such notification on Romasave's behalf.

60. That was the extent of the authority held out to HMRC by Anami Law. The fax sent by those solicitors to HMRC on 21 September 2009 merely attached a copy of the letter of authority and made no other representations as to authority. Anami Law's subsequent correspondence with HMRC cannot be regarded as having held Anami Law out as having any more extensive authority. The letter of 1 October 2009 argued that assessments for "06-08" had not been notified to Romasave and merely asked for copies of relevant correspondence. It is not, in our view, possible to infer from that an authority to receive notification on behalf of Romasave. The statement in that letter that Anami Law had instructions to appeal once the necessary documentation was received (which was relied on by the FTT, at [83], although it misquoted the letter) does not support the existence of an authority to accept notification and appears in fact to relate to the demand for payment issued to Mr Mann personally. Furthermore, the statement in Anami Law's letter of 15 October 2009 that an application would be made to the VAT Tribunal if HMRC did not confirm that the assessments had been withdrawn, on the basis that they had been sent to the incorrect address, runs counter to any inference of that nature.

61. We do not accept Miss Poots' submission that in circumstances where a taxpayer's solicitor has requested copies of assessments and has received those assessments in response to that request, the taxpayer has been notified as required by s 73 VATA. That proposition in our view runs contrary to the authorities which make it clear that a solicitor has no such general authority to receive such notification on behalf of his client. It is only if there is authority that extends to the receipt of such notification that it will be capable of constituting notification for the purpose of s 73. Nor does the fact that Anami Law dealt with the assessments once copies had been sent to them give any indication that they had authority to receive notification of them on behalf of Romasave; to the contrary, Anami Law sought withdrawal of the assessments on the ground that they had not been properly notified.

62. In summary, we agree with Mr Jones that the letter of authority did not provide Anami Law with the general authority which the FTT found they had, and that the whole tenor of the correspondence between Anami Law and HMRC points away from the existence of authority to receive notification on behalf of Romasave. The FTT made an error of law in deciding that the sending of copies of the assessments to Anami Law constituted the giving of notification to Romasave.

Receipt of copy assessments by King & King

63. It is equally clear that the mere fact that King & King acted as accountants for Romasave did not give them authority to receive notification of the assessments on behalf of Romasave. Unlike in the case of Anami Law, there was no evidence of the scope of authority given by Romasave to King & King. The FTT inferred that King & King had been authorised to act for Romasave generally in relation to the relevant Decisions because, as the FTT said at [85], HMRC wrote to King & King on 9 November 2009 stating that they were enclosing copies of the assessment documents and King & King had thereafter corresponded substantively with HMRC in relation to the assessments.

64. There is no basis on which the FTT could have concluded from those circumstances that King & King had been authorised to act for Romasave so as to have authority to receive notification of the assessments. The mere receipt of copies of the assessments, followed by the carrying out of work in relation to them, cannot suffice to support such a finding.

65. Miss Poots submitted that when Anami Law had argued, in their letter of 15 October 2009 to HMRC, that correspondence had been wrongly addressed to Romasave, and had notified HMRC of the registered address of Romasave as being "King and King, Accountants, Roxburghe House …" that had represented authority given by Anami Law on behalf of Romasave. Romasave's solicitors, argued Miss Poots, who were acting on behalf of Romasave, expressly stated to HMRC that the relevant correspondence should be addressed to a stated address. That instruction was complied with by HMRC. That Miss Poots argued was sufficient for there to have been notification to Romasave.

66. We do not agree. Although we accept that a taxpayer may direct that notification may be given to him by sending the relevant documents to a particular address, and that an agent with authority to receive notification may provide an alternative address for notification to the agent itself, the necessary authority is lacking when an agent merely provides an address of a third party, and the relevant correspondence is sent to that third party, unless that third party is itself authorised to receive notification. There was no evidence that Romasave had given any such authorisation to King & King.

67. Whether or not Anami Law had informed HMRC of the registered office of Romasave, if HMRC had sent the notices of assessment to *Romasave* at that address that would have been capable of constituting notification within s 73 VATA. But in this case, the correspondence was addressed, not to Romasave, but to King & King.

The requirements of s 73 for notification to the person who has been paid or credited with the overpayment, that is to say Romasave, were not met unless King & King had been authorised to accept notification on behalf of Romasave. In our judgment, on the evidence, King & King could not be found to have been so authorised. The FTT made an error of law in that respect.

Conclusion in relation to notification of Decisions 2, 3, 4 and 8

68. We therefore conclude that the FTT was wrong to find that Decisions 2, 3 and 4 had been notified to Romasave on 2 October 2009 and again on 9 November 2009, and that Decision 8 had been notified on 16 March 2010.

69. The correct analysis, in our view, and subject to the further issue in relation to Decision 3, is that the Decisions were notified to Romasave only on 21 February 2012. The appeal made on 22 February 2012 was therefore in time, and no permission for a late appeal was required in those respects.

Was Decision 3 invalid?

70. Decision 3 is a VAT assessment for the period 1 October 2008 to 31 December 2008. The notice of assessment is on two pages. On page 2 it is stated:

> "The net amount considered on present evidence to be properly payable in respect of this Period (subject to outstanding debits or credits in respect of other period(s)) is thus £5,666.66 and your account at the VAT Central Unit at Southend will be adjusted accordingly."

71. The word "thus" refers back to the amendments made to Romasave's VAT return for the relevant period. Those are set out on pages 1 and 2 of the notice of assessment. Box 1 is the VAT due in the period on sales and other outputs; it is expressed to be "unchanged" at £5,666.66. Box 4 is VAT reclaimed in this period on purchases and other inputs; this states that it is "Changed to" NIL. Box 5 is described as "Net VAT to be reclaimed by you"; this states that it is "Changed to" £5,666.66. Box 7 is the total value of purchases and all other inputs excluding any VAT; it is stated to be "Changed to" NIL. The basis of the amendments is expressed as follows:

> "As you have been notified, the Commissioners consider that the amounts shown should properly be amended as follows and as per Liz Woods's (sic) letter of 6th March 2009 advising of the reduction in claims due to the non submission of evidence."

72. The letter of 6 March 2009 to which the notice of assessment refers is a letter from Ms Wood of HMRC to Romasave. It stated that if certain information previously requested had not been provided by 13 March 2009, an assessment would be raised against the company disallowing all input tax reclaimed by the company on the basis that no supporting evidence had been supplied.

73. There is no dispute that an error was made by HMRC in the notification of Decision 3. The notice should have described Box 5 as having been changed so as to refer, not to an amount of net VAT to be reclaimed, but to an amount of VAT to be

paid, in the sum of £5,666.66. That would then have correctly reflected the effect of the netting of the amended Box 4 amount (nil) against the output tax of £5,666.66 recorded in Box 1 and thus the disallowance of Romasave's input tax claim for the relevant period.

74. Before the FTT, it was argued for Romasave that Decision 3 was invalid because it was contradictory on its face. It stated at the same time that £5,666.66 was the net VAT to be reclaimed by Romasave and that £5,666.66 was the net amount payable. It was submitted that to be valid a decision must be internally consistent and it must be plain upon its face what it intends to convey to the recipient. The FTT rejected those arguments. It found, at [89], that in the circumstances, at the time of what the FTT considered to have been notification to Romasave through Anami Law and King & King, there could not in the circumstances have been any confusion on anyone's part that the assessment indicated an amount owed by Romasave. Mr Jones submitted that the FTT was wrong to have reached this conclusion.

75. In *P J House t/a P & J Autos v Customs and Excise Commissioners* [1996] STC 154, the Court of Appeal considered whether a global assessment for a number of accounting periods, with supporting schedules specifying in detail how the assessed amount had been arrived at, but without a single figure of tax assessed for each accounting period being stated, constituted valid notification of assessments for the individual accounting periods.

76. The provision concerning notification that was relevant in *House* was paragraph 4 of Schedule 7 to the Value Added Tax Act 1983, a precursor to s 73 VATA. The only reasoned judgment was given by Sir John Balcombe, with whom Stuart-Smith LJ and Pill LJ agreed. At p 161, Sir John Balcombe notes that neither the 1983 Act, nor the associated regulations, required any specified form of notification, but that, as Woolf J had said in *International Language Centres Ltd v Customs and Excise Commissioners* [1983] STC 394, at p 398:

> "… the taxpayer is entitled to be informed in reasonably clear terms of the effect of the assessment …"

77. On the facts of the case in *House*, it was held that the taxpayer had been relevantly informed. The notice of assessment had not referred in terms to the accompanying schedules, but those schedules showed, with complete clarity, how the sum of the global assessment had been made up. It was all a matter of simple arithmetic, and there was no reason why common sense should not be applied in holding that the taxpayer had been given proper and adequate notification of the basis upon which he had been assessed.

78. In this case it is not simply about adding up figures in schedules to arrive at the total said to be due. But in a similar way, the amount stated on page 2 of the notice of assessment to be due can readily be arrived at simply by recognising that there is no longer any Box 4 deduction to be made from the output tax recorded in Box 1. The error in Box 5, in describing the result of the deduction of a nil amount at Box 4 from the amount of £5,666.66 due as input tax in Box 1 as "Net VAT to be reclaimed" of £5,666.66, instead of that amount being described there, as it was on page 2, as net

VAT payable, was one that could readily be understood as a simple mistake. As was made clear in *House*, in determining whether a taxpayer has been informed of the effect of the assessment in reasonably clear terms, an element of common sense must be applied. No reasonable person, knowing the circumstances under which the notice of assessment had come to be issued, and having regard to the terms of the notice as a whole, could have failed to understand that the description of Box 5 was an error, and that the true position, as evidenced by Boxes 1, 4 and 7, the simple arithmetical calculation required in arriving at an amount to be included as payable in Box 5 and the page 2 description of the amount of £5,666.66 as being payable in respect of period 12/08 was that this was notice of an assessment in that sum. In those circumstances, agreeing with the FTT in this respect, we consider that Romasave was, at the time it was properly notified of Decision 3, given proper and adequate notification of both the effect of the assessment and of the basis upon which it had been assessed for the relevant accounting period.

79. We therefore find that Decision 3 was properly notified to Romasave on 21 February 2012. As with Decisions 2, 4 and 8, the appeal made on 22 February 2012 was in time.

Decision 9: HMRC's cross-appeal

80. It was accepted before the FTT that Decision 9 was properly notified to Romasave on 17 October 2011. The appeal to the FTT on 22 February 2012 was thus a little over three months late.

81. The question whether Romasave should be permitted to bring a late appeal in respect of Decision 9 was first considered by the First-tier Tribunal (Judge Poole and Mrs Hewett) on 22 April 2013. By their decision ("the April 2013 decision"), released on 26 April 2013, the tribunal, amongst other things, gave Romasave permission to bring a late appeal in relation to Decision 9.

82. Romasave had not been present or represented at the hearing on 22 April 2013. The April 2013 decision was therefore set aside by the First-tier Tribunal (Judge Herrington) on 16 July 2013, and directed to be re-heard. It is the decision of the FTT on that re-hearing that is the subject of this appeal and cross-appeal.

83. In relation to Decisions 1 to 8, the FTT decided, on the basis of its own determination of the relevant dates of notification of those decisions, not to permit late appeals to be made. In relation to Decision 9, it found at [106] that the delay in making the appeal was much shorter than for the other Decisions, but was "still significant", and that the amount in issue (£53,753.39) was substantial. It was not persuaded that any satisfactory reason had been given for the delay, or indeed any reason at all. But it went on to give permission for a late appeal, saying at [108]:

> "However, the Tribunal takes into account that permission to bring a late appeal against Decision 9 was granted in the April 2013 decision (see paragraph 4 above). As has been noted, the whole of that earlier determination was set aside, so that the Tribunal is called upon to determine the matter *de novo*. Nevertheless, the earlier determination

> was set aside on the ground that the Appellant had not been given notice of and was not represented at the hearing. The Tribunal considers that it would be unfair if the Appellant was placed in any worse position than he was at the time of the first determination, absent some new material that would justify a different conclusion. The Tribunal therefore decides to grant permission to bring a late appeal in relation to Decision 9."

84. Ms Poots submitted that the reliance placed by the FTT on the April 2013 decision betrayed an error of law. The FTT should not have taken into account the decision of the earlier tribunal which had been set aside, but should have reached its own independent conclusion. Not only did the FTT take the April 2013 decision into account as a major relevant factor, it treated it effectively as a trump card, having first described factors – the significance of the delay and the absence of any reason for it – that would have militated against the giving of permission.

85. We agree with Ms Poots. We do not accept the submission of Mr Jones that the April 2013 decision was a relevant factor for the FTT to have taken into account. The FTT was effectively saying that, absent new material, it would be unfair for the FTT to exercise its own judgment on the matter but that it should defer to the earlier tribunal. That is not the nature of jurisdiction the FTT on a re-hearing of an appeal or application following the setting aside of an earlier decision. The FTT is not in those circumstances tasked with reviewing the earlier decision. That earlier decision is of no effect; it is a matter for the tribunal on the re-hearing to reach its own independent conclusions untrammelled by the decision that has been set aside.

86. In our judgment, therefore, in reaching its conclusion based on the unfairness it perceived to Romasave if it were to come to a different view to that of the earlier tribunal, the FTT made an error of law, and its decision in respect of Decision 9 must be set aside.

87. Having decided to set aside that part of the FTT's decision, it is open to us either to remit the case to the FTT with directions for its reconsideration, or to re-make the decision ourselves. Neither party urged us to do the former, and we consider that we are able ourselves, on the information before us, to decide whether permission should be given for Romasave to make a late appeal in respect of Decision 9.

88. We had little argument on the principles to be applied. In recent times there has been some debate, both in this tribunal and in the courts, as to the correct approach to application for relief from sanctions, which approach has translated across to applications of this nature as well. That debate was initiated by changes to the Civil Procedure Rules in 2013. Although those procedural changes did not directly affect the tribunals, the impact of judgments of the courts in that regard, such as *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624 and *Denton v T H White Ltd (and related appeals)* [2014] EWCA Civ 906, have been considered by this tribunal, first in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] STC 973 and, more recently, post-*Denton*, in *Leeds City Council v*

Revenue and Customs Commissioners [2014] UKUT 0350 (TCC) and *Revenue and Customs Commissioners v BPP Holdings Ltd and others* [2014] UKUT 0496 (TCC).

89. It is not necessary for us to describe the history of this debate. The outcome, in our view, is that in this tribunal, and in the FTT, the factors identified by the courts in the revised form of CPR r 3.9 as having particular weight or importance, that is to say the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders, are relevant factors, but have no special weight or importance. The weight or significance to be afforded to those factors, along with all other relevant factors, in applying the overriding objective to deal with cases fairly and justly, will be a matter for the tribunal in the particular circumstances of a given case.

90. Otherwise, we can perceive no material difference of principle between the approach of the courts and that of the tribunals in this regard. In *Leeds City Council* and in *BPP Holdings*, this tribunal has endorsed the approach described by Morgan J in *Data Select Ltd v Revenue and Customs Commissioners* [2012] STC 2195, in a case that is particularly apposite, as it concerned whether a late appeal in relation to VAT could be made to the First-tier Tribunal. Mr Justice Morgan described the approach in the following way:

> "**[34]** … Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions.
>
> …
>
> **[37]** In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. None the less, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeal against a judicial decision."

91. The reference made by Morgan J to CPR r 3.9 was to the version of that rule before the reforms we referred to above. Essentially, the matters listed in that former version are examples of factors that, depending on the nature of the case, might be relevant for the tribunal to consider. They do not represent a checklist to which a tribunal must adhere slavishly. The obligation remains simply to take into account, in the context of the overriding objective of dealing with cases fairly and justly, all relevant circumstances, and to disregard factors that are irrelevant.

92. If that is the approach adopted by the tribunal, there is no need to be over-prescriptive of the way in which it applies that approach. Nonetheless, helpful guidance can be derived from the three-stage process set out by the Court of Appeal in *Denton* in order to provide first instance judges with a "clear exposition of how the provisions of rule 3.9(1) should be given effect". Although the third stage of that guidance, as set out by the majority, includes the requirement to give particular weight to the efficient conduct of litigation and the compliance with rules etc, and to that extent, for the reasons we have explained, would not have application in this tribunal or in the First-tier Tribunal, everything else said by the Court of Appeal translates readily into useful guidance on the approach to be adopted, in these tribunals as well as in the courts.

93. By way of summary, the majority in the Court of Appeal in *Denton* described the three-stage approach in the following terms, at [24] (the references to "factors (a) and (b)" being to the particular factors referred to in CPR r 3.9):

> "We consider that the guidance given at paras 40 and 41 of *Mitchell* remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]". …"

94. Once the factors (a) and (b) are afforded no special weight or significance, that approach is no different in principle to that set out in *Data Select*. The seriousness and significance of the relevant failure has always been one of the factors relevant to the tribunal's determination. That is encompassed in the reference in *Data Select*, at [34], to the purpose of the time limit and the length of the delay. The reason for the delay is a common factor in *Denton* and *Data Select*, as is the need to evaluate the circumstances of the case so as to enable the tribunal to deal with the matter justly.

95. It was in this context that Mr Jones focused his arguments in favour of the appeal against Decision 9 being permitted to proceed. He submitted that the failure on the part of Romasave to make its appeal in respect of Decision 9 was neither

serious nor significant. It was, he argued, of minimal effect, and HMRC would suffer no prejudice.

96. We do not agree. The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. 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. We note, although judgment was given only after we had heard this appeal, that in *Secretary of State for the Home Department v SS (Congo) and others* [2015] EWCA Civ 387 the Court of Appeal, at [105], has similarly described exceeding a time limit of 28 days for applying to that court for permission to appeal by 24 days as significant, and a delay of more than three months as serious. Although each case must be considered in its own context, we can find nothing in this case which would alter our finding in this respect. As the court in *SS (Congo)* observed, one universal factor in this respect is the desirability of finality in litigation, a factor that is present in this case: see *Data Select* at [37] above. We are also mindful of the comments of Sir Stephen Oliver, sitting in the First-tier Tribunal, in *Ogedegbe v Revenue and Customs Commissioners* [2009] UKFTT 364 (TC) (discussed in *Markland v Revenue and Customs Commissioners* [2011] UKFTT 559 (TC) and by this tribunal in *O'Flaherty v Revenue and Customs Commissioners* [2013] UKUT 0161 (TCC)) that permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely.

97. No reason has been put forward for the delay in appealing Decision 9. The failure to do so must be regarded as intentional on the part of Romasave; there was no suggestion that Romasave had been misled in any way as to whether an appealable decision in that respect had been made or believed that it had lodged an appeal.

98. On the question of prejudice to the parties, we accept that, if the appeal is not permitted to proceed, Romasave will be prejudiced by the fact that it will not be able to challenge a decision involving a substantial sum. We heard no argument from either party on the arguable merits of such an appeal so we have assumed for these purposes that Romasave would have an arguable case. We do not accept Ms Poots' submission that permitting the appeal to proceed would prejudice HMRC because they would not then be able to proceed with the winding-up petition against Romasave on the basis of the debt arising in respect of Decision 9. There was no evidence as to HMRC's intentions in this regard. No such proceedings had been pursued in respect of the Decisions (Decisions 1 and 7) that were not subject to this appeal, and it is not possible for us to infer what steps HMRC might take with regard to Decision 9. An inability to enforce a debt, it seems to us, is no more than an incident of the finality of litigation, and as such adds nothing further to the prejudice argument. But the prejudice to the finality of litigation is itself a material factor in our determination.

99. We have reached the conclusion that in the circumstances of a delay of such significance and seriousness in making an appeal to the FTT with no good reason it

would not be in the interests of justice to permit the appeal in relation to Decision 9 to proceed out of time. In weighing the respective prejudices of the parties we consider that the need for finality of litigation, and the prejudice to the proper operation of the appeals process, allied to the significant and serious delay of Romasave in making its appeal, and the absence of any good reason for failing to do so on time, together clearly outweigh the undoubted prejudice to Romasave in not being allowed to pursue its appeal in this respect.

100. We have considered whether the fact that Romasave will, according to our decision on the other issues in this appeal, be able to pursue its appeals against Decisions 2 – 6 and 8, is a material factor in determining whether an appeal should be permitted in relation to Decision 9. Whilst to add such an appeal to those otherwise able to proceed would not involve much, if any, additional time and expense in conducting the proceedings, the time and expense of such proceedings was not a factor to which we consider any particular weight should be given in the circumstances of this case. In principle, it seems to us that the question whether permission should be granted should be determined independently of the position on other appeals and that they are of limited, if any, relevance. If a clear conclusion is reached that it is not appropriate to grant permission to bring a particular appeal on its own merits, taking account of all the circumstances relating to that appeal, we do not think it right that the result should change solely because, as a result of our decision on the other appeals, it could conveniently be heard with them. The existence or otherwise of related appeals ought not to be a material factor. If it were, then the question whether an appeal that would otherwise not be permitted to proceed could be allowed to do so could turn on the happenstance that, at the time the application is considered, there are appeals to which it might be joined. That would be capable of operating unfairly as between taxpayers in otherwise identical situations, some of whom have concurrent appeals and others of whom do not.

101. The position can also be tested this way: if we were wrong on this point then, even if the FTT judge had applied the correct test and reached an otherwise unassailable decision on this point to refuse permission, that decision could be overturned on appeal simply by virtue of the outcome of appeals in relation to the other Decisions, since the FTT judge would have made an error of law in failing to recognise that the other appeals could proceed. The same process could continue if our own decision was appealed, and the outcome would logically also change if Romasave withdrew its appeals in relation to the other Decisions (which it could choose to do at any time). Effectively, the parties' own actions on other appeals, well after the time when the delay in appealing occurred, could continue to affect the decision whether to grant permission.

102. Overall, we do not consider, therefore, that the fact that there are other appeals by Romasave on the same issue should outweigh the prejudice to the finality of litigation in respect of the particular Decision in question that arises when, for no good reason, Romasave was guilty of such a significant and serious delay in making its appeal in that respect.

103. In respect of Decision 9, therefore, we refuse Romasave permission to appeal to the FTT out of time.

Determination

104. Romasave's appeal in relation to Decisions 2, 3, 4 and 8 is allowed.

105. HMRC have agreed that if the appeal in relation to Decision 4 is allowed, the appeals to the First-tier Tribunal in respect of Decisions 5 and 6 should also be permitted to proceed. As a formal matter, therefore, we allow Romasave's appeal in respect of Decisions 5 and 6.

106. HMRC's cross-appeal in respect of Decision 9 is allowed. We set aside the FTT's decision in that respect and, having re-made it, we refuse Romasave permission to appeal to the First-tier Tribunal out of time in respect of Decision 9.

ROGER BERNER

SARAH FALK

UPPER TRIBUNAL JUDGES

RELEASE DATE: 27 May 2015

APPENDIX

Summary of Decisions 1 - 9

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Decision No	Description	VAT Period	Amount	Date of Decision
1.	Misdeclaration penalty	06/08	£1,635.00	21 November 2008
2.	VAT assessment	09/08	£2,890.70	3 December 2008
3.	VAT assessment	12/08	£5,666.66	13 March 2009
4.	VAT assessment	03/06 – 06/08	£109,325.34	15 April 2009
5.	Misdeclaration penalty	06/08	£3,338.00	18 May 2009
6.	Misdeclaration penalty	03/06 – 03/08	£12,941.00	18 May 2009
7.	VAT assessment	03/09	£1,021.74	21 August 2009
8.	VAT assessment	09/09	£1,099.57	16 March 2010
9.	VAT assessment	06/10 – 03/11	£53,753.39	17 October 2011