



[2022] UKFTT 00004 (TC)

**TC 08356/V**

*Application for permission to bring late appeal – three decisions – appeals lodged seriously and significantly late – lack of collection by HMRC – ongoing discussions with HMRC - encouragement by HMRC to appeal – significant sums involved – prejudice to Company if not allowed – application successful*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/06257  
& TC/2019/06258**

**BETWEEN**

**TRANSWASTE RECYCLING AND AGGREGATES LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE ALASTAIR J RANKIN  
MR LESLIE BROWN**

The hearing took place on 30 November 2021. With the consent of the parties, the form of the hearing was V (video) with all parties attending remotely using the Tribunal video platform. A face to face hearing was not held due to the current Covid-19 pandemic. The documents to which we were referred are an electronic bundle entitled Bundle for Application to determine Permission for Late Appeal containing 319 numbered pages, an electronic copy containing three pages entitled Index for Application Hearing to determine Permission for Late Appeals, an electronic Authorities Bundle containing 193 numbered pages. At the start of the hearing we were sent electronically the Appellant's Submissions containing 22 pages and the Respondent's Submissions containing 9 pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Ms Charlotte Brown BL for the Appellant company instructed by Pannu Tax Ltd

Mr Christopher Kerr BL, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

## DECISION

### INTRODUCTION

1. This is an application by Transwaste Recycling and Aggregates Limited (the Company) for permission to commence two late appeals against the following decisions made by the Respondents:

- 1.1 A decision, contained in a letter from HMRC dated 8 February 2016 (“the first decision”), to refuse the Company the entitlement to deduct input tax totalling £255,238.01 claimed on the purchase of silver grain in its quarterly Value Added Tax (“VAT”) periods 03/14 and 06/14. This decision was made on the basis that the transactions were connected with the fraudulent evasion of VAT, and the Company knew or should have known of the connection, pursuant to the principles of domestic and EU law set out in the cases of *Kittel* and *Mobilx*.
  - 1.2 A decision, contained in a letter from HMRC dated 2 March 2017 (“the second decision”), to issue a Notice of Penalty Assessment of £133,999.42, pursuant to Schedule 24 of the Finance Act 2007, on the basis that the inaccuracies on the VAT returns for the periods 03/14 and 06/14 were as a result of deliberate behaviour by the Company, such sum being a percentage of the potential lost revenue.
  - 1.3 A decision, contained a letter from HMRC dated 29 June 2018 (“the third decision”), to refuse the Company the entitlement to deduct input tax totalling £242,311 claimed on the purchase of waste disposal services in its quarterly Value Added Tax (“VAT”) periods 06/16, 09/16, 12/16, 03/17 and 06/17. This decision was made on the basis that the transactions were connected with the fraudulent evasion of VAT, and the Company knew or should have known of the connection, pursuant to the principles of domestic and EU law set out in the cases of *Kittel* and *Mobilx*. A consequential Notice of Assessment for VAT totalling £242,311 was issued on 10 August 2018.
2. It can be seen that the total amount demanded by HMRC was £631,548.43.
3. The Company issued two Notices of appeal dated 24 September 2019. Appeal reference TC/2019/06258 was in respect of the first and second decisions and Appeal reference TC/2019/06257 was in respect of the third decision.
4. The statutory time limit for appealing the first decision expired on 10 March 2016. The appeal against this decision was therefore 3 years 6 months and 14 days late. The statutory time limit for appealing the second decision expired on 24 May 2017. The appeal against this decision was therefore 2 years and 4 months late. The statutory time limit for appealing the third decision expired on 29 July 2018. The appeal against this decision was therefore 1 year 1 month and 26 days late.

### BACKGROUND

5. Ms Brown in her written submission helpfully set out the history of this appeal.
6. The First Decision, made by Officer Sarah Lill on 8 February 2016, notified the Company of HMRC’s refusal to deduct input tax. The letter is addressed FAO Mr Paul Hornshaw followed by the Company’s name and address. At the end of the letter is the heading, “Further information, reconsiderations and appeals,” with the following explanation:

“If you have any further information that you want me to consider, please send it to me within 30 days of the date of this letter.

If you do not agree with this decision, you can ask for it to be reviewed by an HMRC officer not previously involved in the matter, or appeal to an independent tribunal. If you opt for a review you can still appeal to the tribunal after the review has finished.

If you want a review you should write to me at the above address within 30 days of the date of this letter, giving your reasons why you do not agree with my decision. Where the decision has resulted in an assessment for tax due, the Commissioners will not take any action to collect the disputed tax while the review of the decision is being carried out.

If you want to appeal to the tribunal you should send the completed appeal papers to your nearest tribunal centre within 30 days of the date of this letter. Please note that tribunal appeal papers should not be sent to HMRC.”

Reference is then made to guidance on appeals and reviews on HMRC’s website.

7. The Company’s then accountants, Derede Associates Ltd (Derede), responded 23 days later, on 3 March 2016 stating:

“We should be grateful if you would accept this letter as our client’s appeal to have the 30 day response time duly extended to 30 April 2016 ...”

This was on the basis of separate, unrelated, enquiries relating to Landfill Tax and the fact that the Company and the accountant no longer had the relevant documentation following a Production Order from HMRC. The letter goes on to raise points of dispute with Officer Lill’s decision.

8. Officer Lill responded to Derede’s letter on 16 March 2016 explaining that whilst she was “unable to formally agree an extension to the 30 day response time, I can advise that HMRC will look favourably on a late review request where there are reasonable grounds for this.” Officer Lill then responded to the various points of dispute raised in the letter.

9. On 2 March 2017 Officer Lill issued the Second Decision. The letter was simply addressed to the Company. Under the heading, “What to do if you disagree,” it states:

“If you disagree with my decision, you can send me any new information relating to the matter and I will look at it again.

Also, you can:

- ask for an HMRC officer not previously involved in the matter to carry out a review of my decision
- appeal to a tribunal which is independent of HMRC to decide the matter

If you want a review, you should write to me by 1<sup>st</sup> April 2017, telling me why you think my decision is wrong, and send me any new information that you want me to consider.

If you ask for a review and you are not satisfied with the outcome of that review, you can still appeal to the tribunal.

If you do not want a review, you can appeal to the tribunal, but you must make sure they receive your appeal by 1<sup>st</sup> April 2017. You should attach a copy of this letter to your appeal.”

10. Also on 2 March 2017, a Personal Liability Notice was sent to the Company’s Director, Paul Hornshaw, at his home address, imposing liability for the totality of the penalty imposed in the Second Decision. By letter dated 16 March 2017, 14 days after the Second Decision, Derede wrote to Officer Lill, referring to the Second Decision and the Personal Liability Notice. The letter states:

“We should be grateful if you would accept this correspondence as our clients’ appeal against the penalties charged upon them.”

Derede's letter goes on to give five reasons why a review was requested.

11. HMRC issued two Review letters on 26 April 2017, one cancelling the Personal Liability Notice and the other upholding the second decision. The former letter was addressed to Mr Hornshaw at his home address while the latter was simply addressed to the Company and includes the following under the heading "What happens next?":

"If you do not agree with my decision, you can appeal to an independent tribunal to decide the matter. At the tribunal hearing, HMRC will ask the tribunal to uphold HMRC's view as set out in this letter.

If you want to appeal to the tribunal, you must notify your appeal to the tribunal (enclosing a copy of this letter) within 30 days of the date of this letter. You can find out how to do this on the HM Courts and Tribunal Service website [www.justice.gov.uk](http://www.justice.gov.uk) or you can phone them on 0845 223 8080.

You may also want to consider another option, which may help to clarify the issues and resolve this dispute without need for further litigation. This option is known as Alternative Dispute Resolution, or ADR. You would need to make an application for ADR, which should include any further information that you do not think has been taken into account so far and this would be considered by a panel who would decide whether this approach is appropriate in your case.

I enclose HMRC's factsheet FS21 which tells you about this process and you can find further details online at <https://www.gov.uk/tax-disputes-alternative-dispute-resolution-adr>, including how to apply for ADR.

Your statutory appeal rights are not affected by an application for ADR. But if you do decide to apply for ADR you must still appeal to the tribunal within the 30 day time limit, so that if either the panel does not accept your application for ADR, or your application is accepted but the dispute is not resolved following ADR, the tribunal will still hear your appeal. When appealing to the tribunal you should tell them that you have applied to HMRC for ADR.

You can find further information about appeals on the HMRC website <http://www.hmrc.gov.uk/dealingwith/appeals.htm> or you can phone the number on this letter if you require further clarification in relation to this review decision, your appeal rights, or ADR."

12. HMRC Officer Chris Williams issued the third decision on 29 June 2018, addressed simply to the Company in which he explains that he has been replaced by Officer Tosta as the officer dealing with the Company. Under the heading "Further information, reconsiderations and appeals" Officer Williams states:

"If you have any further information that you want to be considered, please send it to Mr Tosta within 30 days of the date of this letter.

If you do not agree with this decision, you can ask for it to be reviewed by an HMRC officer not previously involved in the matter, or appeal to an independent tribunal. If you opt for a review you can still appeal to the tribunal after the review has finished.

If you want a review you should write to Mr Tosta at the above address within 30 days of the date of this letter, giving your reasons why you do not agree with my decision. Where the decision has resulted in an assessment for tax due, the Commissioners will not take any action to collect the disputed tax while the review of the decision is being carried out.

If you want to appeal to the tribunal you should send the completed appeal papers to your nearest tribunal centre within 30 days of the date of this letter. Please note that tribunal appeal papers should not be sent to HMRC. 71 Case Ref CFS-1157107 Case Ref CFS-1157107 105654 3

Further information about appeals and reviews can be found on the HMRC website <http://www.hmrc.gov.uk/dealingwith/appeals.htm> or you can phone the number on this letter. Further information concerning tribunals, including ways to contact the tribunal, can be found on the Tribunals Service website [www.tribunals.gov.uk/tax/](http://www.tribunals.gov.uk/tax/).

13. By letter dated 1 August 2018 the Company's new accountants cbaSadofskys Ltd (Sadofskys) requested documentation in order to consider the matter further. They also stated:

“We should state at this stage that our client company does not agree with this decision.”

14. HMRC issued a VAT assessment addressed to the Company on 10 August 2018 relating to the input VAT denied in the third decision. Under the heading “What to do if you disagree” the assessment stated:

“If you disagree with our decision, you need to write to us within 30 days of the date of this notice, telling us why you think our decision was wrong and we will look at it again. If you prefer, we will arrange for a review by an HMRC officer not previously involved in the matter. You will then have the right to appeal to an independent tribunal. Alternatively you can appeal direct to the tribunal within 30 days of this notice. If you choose to appeal to HM Courts and Tribunal Service you'll need to attach a copy of this letter with your appeal. If you don't then they may reject your appeal.

You can find more information about appeals and reviews in factsheet HMRC1, ‘HM Revenue & Customs decisions – what to do if you disagree’. You can get this factsheet from our website. Go to [www.gov.uk](http://www.gov.uk) and search ‘what to do if you disagree’ or you can phone our orderline on 0300 200 3610. You can find out more about tribunals on the Tribunals Service website. Go to [www.gov.uk/tax-tribunal](http://www.gov.uk/tax-tribunal)”

15. On 10 September 2018 HMRC Officer StefanTosta visited the Company along with Jayne Wood where they met with Paul Hornshaw, one of the Company's three directors and Alan Drant and Graham Williamson from Sadofskys. The lengthy minute of this meeting recorded by Officer Tosta included the following:

“ST referred back to the metals deals stating [Sarah Lill] (SL) had denied the input tax regarding the silver transactions in 2014 using Means of Knowledge. This was done February 2016 and there was an outstanding debt of approximately £356k. PH thought this was under appeal and his previous accountant, Bob Thompson of Derede Associates had submitted this. ST informed PH that there was no appeal and the amount was due. PH stated he had done everything requested by SL such as contacting Wigan (validation unit) and stated SL had told him the companies Transwaste Recycling dealt with regarding silver were okay, then the company had the input tax denied. JW stated HMRC would not inform anyone another company was okay to trade with, it would be a commercial decision once all factors had been into account.”

16. Sadofskys requested a review of the third decision providing reasons for the request in a letter dated 27 September 2018. HMRC's review dated 5 November 2018 upheld the third decision. In their letter HMRC included the following under the heading “What happens next”:

“As I have now completed my review I am not in a position to reconsider any further information you may provide. The responsibility of the case has now reverted back to Officer Tosta. If you have any questions or queries please contact him on 03000 565 191.

If you do not agree with my decision, you can appeal to an independent tribunal to decide the matter. At the tribunal hearing, HMRC will ask the tribunal to uphold HMRC's view as set out in this letter.

If you want to appeal to the tribunal, you must notify your appeal to the tribunal (enclosing a copy of this letter) within 30 days of the date of this letter. You can find out how to do this on the HM Courts and Tribunal Service website [www.justice.gov.uk](http://www.justice.gov.uk) or you can phone them on 0300 123 1024. If you choose to appeal to HM Courts and Tribunal Service you will need to attach a copy of this letter with your appeal. If you do not then they may reject your appeal.

I must also remind you that interest – calculated on a daily basis – is charged on the tax. To avoid any interest charge, you may want to pay the tax now even if you are proceeding with your appeal. If you pay it and your appeal succeeds, we will repay the tax and pay you interest for the period from when you paid it until we repay you.”

17. On 4 September 2018 HMRC Officers Stuart Knowles and Kevin Straughair met with Paul Hornshaw and Mike Kemish who had been appointed the Company's finance director. HMRC's record of the meeting included the following:

“SK said that the assessment raised against TW was still unpaid. PH said he was in the process of seeing a solicitor and the assessment was totally wrong and will not be paying it. PH said that he provided all the relevant information. SK said he could not discuss the assessment in any detail because another colleague worked it. SK advised PH to follow the appeal procedure. SK also said that as the tax is unpaid and if no appeal is received HMRC will attempt to collect the outstanding debt.”

18. On 25 June 2019 HMRC Officers Stuart Knowles and Andy Pollock met with Paul Hornshaw and Mike Kemish. HMRC's record of this meeting includes the following:

“SK advised that the Kittel assessment raised by an officer who previously worked the case has been upheld at review therefore could not be discussed further during the meeting. If they still disagree the decision, an appeal should be lodged with the Tribunal.

PH stated that he has spoken to a solicitor, believes they can prove TW are not responsible for any tax loss, and cannot see what they have done wrong as TW carried out checks including lorry registrations and company checks. They are also taking legal advice from an accountant and will not be paying the debt. PH continued to say that he feels it is unfair that we have not visited the other business when carrying out the review of our decision to raise a Kittle assessment.

SK reminded TW of the debt on file and that debt collection action may commence if this remains unpaid. SK advised that any appeal to tribunal should be made sooner rather than later and that the debt may need to be settled prior to any appeal being accepted unless they apply for hardship.

SK then went on to discuss the assessment he raised for the period ended 09/18, confirming the balance had been paid and there were no further issues with this assessment as he was happy with the explanations provided. SK stated that a penalty had also been raised and asked if this had been received.”

19. By email dated 13 August 2019 Mr Richard Alderson of Pannu Tax informed Stuart Knowles that he had been instructed to act on the Company's behalf in relation to HMRC enquiries raised resulting in the disallowance of input tax. On 4 September 2019 Mr Alderson submitted a letter to HMRC appealing the first decision. In his covering email Mr Alderson states:

“In a previous telephone call you suggested that the outstanding issues could be discussed as part of your forthcoming site visit to the company. However, I understand that, following your advice, the company are in the process of submitting a Freedom of Information Act request to obtain copies of notes of meetings and other documents etc.

It would seem sensible to defer any discussion until those documents have been received and I will contact you following a review of those papers.”

20. HMRC replied to Mr Alderson by letter dated 10 September 2019 enclosing copies of documents in connection with the first and third decisions. The letter included the following under the heading “Going Forward”:

“Please instruct your client to make payment towards the above noted assessments, interest and penalties.

If you are still in disagreement you can appeal direct to the tribunal. If you choose to appeal to HM Courts and Tribunal Service you’ll need to attach a copy of this letter and the notices of VAT assessments I have attached to this document with your appeal. You will also have to provide details of why the appeal is being made later than 30 days after receipt of the attached documents. If you don’t then they may reject your appeal.

You can find more information about appeals and reviews in factsheet HMRC1, ‘HM Revenue & Customs decisions – what to do if you disagree’. You can get this factsheet from our website. Go to [www.gov.uk](http://www.gov.uk) and search ‘what to do if you disagree’ or you can phone our orderline on 0300 200 3610.”

21. By letter dated 13 September 2019 HMRC’s Debt Management wrote to the Company requesting payment of the amounts due under all three decisions within seven days, otherwise they would issue proceedings to wind up the Company.

22. By letter dated 18 September 2019 HMRC refused the Company’s Freedom of Information Act request.

23. By emails dated 19 September Mr Alderson expressed his concern regarding the change in attitude of HMRC and requested the suspension of the winding up proceedings until the appeal proceedings were resolved.

24. On 24 September 2019 two electronic Notices of appeal in respect of all three decisions were issued. HMRC objected to these appeals being allowed to proceed as they were out of time.

25. On 8 November 2019 Mr Alderson wrote to Officer Knowles expressing concerns at the conduct of the case and set out at length (7 pages) his views.

#### **LEGISLATION**

26. Mr Kerr, in his Notice of Objection dated 21 October 2020 provided a helpful resume of the relevant legislation:

“3. Section 83B of the Value Added Tax Act 1994 (“the Act”) provides that a notification that a person requires a statutory review must be made within 30 days (the “relevant period”) of that person becoming aware of the decision.

4. Section 83D of the Act provides that HMRC may, within the relevant period, notify the person that the relevant period is extended, and if so the relevant period is extended to the end of 30 days from the date of the notice, or any other date set out in the notice, or a further notice.

5. Section 83E of the Act provides that HMRC must review the decision if the person requests a review out of time, if HMRC is satisfied that the person had a reasonable excuse for requiring the review within time, and HMRC is satisfied that the request was made without unreasonable delay after the excuse had ceased to apply.

6. Section 83F of the Act provides that the nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances. HMRC must in particular have regard to steps taken before the beginning of the review by HMRC in reaching the decision, and by any person in seeking to resolve disagreement about the decision. The review must take account of any representations made by the person at a stage which gives HMRC a reasonable opportunity to consider them. HMRC must give the person notice of the conclusions of the review, and their reasoning, within 45 days beginning with the relevant date, or such other period as HMRC and the person may agree.

7. Section 83G of the Act provides that an appeal is to be made to the tribunal before the end of the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates. But in a case where HMRC are requested to undertake a review, an appeal may not be made unless HMRC have notified the person as to whether or not a review will be undertaken, and if HMRC have notified the person that a review will be undertaken, until the conclusion date; in which case the appeal is to be made within the period of 30 days beginning with the conclusion date. An appeal may be made after the specified period if the tribunal gives permission to do so.”

#### RELEVANT CASELAW

27. The leading case concerning late appeals is *William Martland v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 0178 (TC) where Judges Roger Berner and Kevin Poole said:

“44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that 17 applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially 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.

45. That balancing exercise 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. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT’s deliberations artificially by reference to those factors. The FTT’s role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.



46. In doing so, 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. In Hysaj, Moore-Bick LJ said this at [46]:

“If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them.”

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). 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.”

28. In *Romasave (Property Services) Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0254 (TCC) Judges Roger Berner and Sarah Falk said:

“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.”

29. Judges Roger Berner and Sarah Falk in another Upper Tribunal decision *The Commissioners for Her Majesty's Revenue and Customs and NT ADA Limited* [2018] UKUT 59 (TCC) said:

“37. The conclusion that a failure to offer a review does not affect the validity of a decision or the ability to appeal it obviously leads to the question of what, if any, consequences there would be of a failure to offer a review, and whether Parliament can sensibly be taken to have intended that they should be no sanction. We do not think it is surprising that an obligation placed on a public body such as HMRC does not bring with it an obvious sanction for non-compliance. Parliament simply expects obligations that it places on HMRC to be fulfilled. In practice, any failure to offer a review is highly likely

to be remedied when pointed out, and if it was not then an aggrieved taxpayer would in principle have recourse to judicial review proceedings to compel the offer of a review. As already indicated, a failure by HMRC to provide adequate notification of appeal or review rights in the decision letter could also influence the exercise of the FTT's discretion to admit a late appeal."

#### **THE COMPANY'S ARGUMENTS**

30. Ms Brown, on behalf of the Company, accepted that the delays in appealing the three decisions were serious and significant but submitted that the appeals should be allowed to proceed out of time due to three substantive reasons:

- (1) The Company had a genuine belief that its advisers had submitted appeals on its behalf;
- (2) The procedural requirements for challenging the decisions were not made clear by HMRC; and
- (3) HMRC's conduct supported the Company's (mis)understanding of the correct process.

31. Mr Hornshaw provided a witness statement and was called as a witness by Ms Brown. He said that he disputed the accuracy of some of the minutes and he had only seen those HMRC letters which were addressed either to him or the Company which he passed to his accountants upon receipt. He was not experienced in tax disputes.

32. HMRC were made aware that the decisions were being challenged. The first decision was appealed by letter dated 3 March 2016, 23 days after the decision letter. The second decision was challenged by letter dated 16 March 2017, 14 days after the decision letter. The third decision was appealed by letter dated 27 September 2018 90 days after the third decision letter and 47 days after the date of the associated assessment. The Company's then accountants erroneously thought that notifying HMRC of the Company's challenges to the disputed decisions was sufficient to engage the appeal process. This confusion and misunderstanding appears to have continued and, to some degree, been shared by HMRC.

33. Although Ms Brown accepted that the failure of an agent cannot amount to a reason for the delay, the reasons for the failure are a relevant factor. The failure to follow the proper procedure was due to confusion created and supported by the terms of HMRC's communications and its willingness to engage in discussions about the appeals as late as September 2019. This was compounded by the fact that HMRC did not enforce the assessed liabilities until September 2019.

34. Ms Brown asserted that HMRC's correspondence explaining the ways that the three decisions could be challenged was confusing and misleading. She submitted that the relevant decisions could be read as meaning that an appeal to the Tribunal was only another opportunity of resolving the issue if providing further information to the decision maker or an independent review fails. She claimed it was not clear that the 30 day limit in relation to appealing to the Tribunal was a strict requirement; it merely appears to be an alternative to a reconsideration request or a review request.

35. Ms Brown identified clear deficiencies and misstatements in HMRC's correspondence notifying the Company of the options available. The first decision letter suggested that the Company had three possible routes (see paragraph 6 above). The Company could send further information to the decision maker within 30 days, ask for a review within 30 days or appeal to the Tribunal within 30 days. The second decision letter and review letter suggest the same three

possibilities (see paragraphs 9 and 11 eleven above). Likewise, the third decision letter suggests the same three possibilities.

36. Ms Brown submitted that it was not clear from the wording of these letters that the Company only had two actual options: request a review which may then be appealed or appeal directly to the Tribunal. On the wording of these letters it was perfectly reasonable and understandable that THE Company and/or its agents thought that it was able to enter into ongoing dialogue with HMRC in order to challenge the decisions without recourse to the Tribunal.

37. Section 38A of the Value Added Tax Act 1994 states that HMRC must offer a review of a decision if an appeal lies to the Tribunal and the offer must be by notice given to the Company at the same time as the decision was notified to the Company. Ms Brown maintained that stating “can ask for a review” does not fulfil the statutory requirement, a view which she claimed was supported by the Upper tribunal in *NT ADA* (paragraphs 27 to 32).

38. While Ms Brown accepted that a failure to formally offer reviews does not invalidate the decisions it is relevant to the issue of whether the Company’s appeal should be permitted to proceed out of time. This failure to make it clear that an appeal to the Tribunal was a strict requirement supports the Company’s assertion that it was led to believe that HMRC knew the three decisions were being challenged and HMRC was willing to enter into ongoing communication and reconsider the position without formal action. This is further evidenced by the letter dated 10 September 2019 (see paragraph 20 above) from Officer Knowles where he accepts that an appeal had been made against the third decision and he implies that an appeal to the Tribunal in relation to the third decision would be in time.

39. Ms Brown then referred to HMRC’s conduct during the period from 8 February 2016 when the first decision was issued until the formal Notices of appeal dated 24 September 2019 were lodged. Throughout this period HMRC continued to engage with the Company and its advisers to discuss the matters in dispute. Although Officer Lill informed Mr Hornshaw during a telephone conversation on 9 March 2017 that no appeal had been made it was not until April 2019 that Mr Hornshaw was informed that an appeal to the Tribunal was required. Officer Lill’s note of the telephone conversation on 9 March 2017 includes the following:

“Following this conversation, I have asked DMB to suspend collection action until the situation regarding a potential appeal becomes clearer. I have asked for the appeal indicator to be reset.”

40. Ms Brown submitted that if there was no appeal then collection of the first and second decisions should have started 30 days after the decisions were issued but in fact HMRC’s Debt Management took no action until 17 September 2019. Neither during the telephone conversation on 9 March 2017 nor the meeting on 12 September 2018 was it explained to Mr Hornshaw that an appeal must be made to the Tribunal.

41. As a result of the foregoing Ms Brown maintained that until April 2019 there was ongoing confusion regarding the correct process caused by HMRC’s correspondence and willingness to discuss the three decisions.

42. The third limb of the *Martland* criteria requires the Tribunal to consider all the circumstances of the case. The Company and its advisers did explicitly notify HMRC that they wished to appeal the first and second decisions and this was done within 30 days (see paragraphs 7 and 10 above). In relation to the third decision HMRC were informed that the Company did “not agree with this decision”. Ever since the first decision was issued Mr Hornshaw has claimed at his meetings and during his telephone conversations with HMRC that he did not

agree with any of the decisions. HMRC could not have been under any doubt that Mr Hornshaw thought appeals had been lodged.

43. Ms Brown advised the Tribunal that if the Company was denied the right to challenge the decisions it would be liable for £631,548.43 which is a significant sum that would have a serious impact on the Company. This prejudice outweighs the prejudice to HMRC of having to divert resources to defend the appeal. While there is a need for finality to litigation HMRC has not considered the matter closed as they have continued to engage with the Company.

44. Finally, Ms Brown refuted the suggestion by HMRC that the Company's case was weak. The Company had not yet provided disclosure or witness evidence in relation to the substantive appeals.

#### HMRC'S ARGUMENTS

45. HMRC's Notice of Objection rehearsed the history of the appeal. Mr Kerr maintained that Mr Hornshaw was informed at the various meetings he had with HMRC officers that no formal appeals had been received.

46. Pannu Tax, on behalf of the Company, had sent a letter of complaint to HMRC dated 8 November 2019, after the formal appeals to the Tribunal had been lodged. The grounds of complaint were that the discussions which had taken place between HMRC officers and the Company had raised the legitimate expectation that the three decisions would be considered again by HMC following the presentation of the relevant facts. HMRC had replied by letter dated 29 November 2019 rehearsing the history and rejecting the complaint.

47. Turning to the three stage approach suggested in *Martland* Mr Kerr submitted that the delays in submitting the Notices of appeal with regard to the three decisions were serious and significant. The appeal against the first decision was 3 years, 6 months and 14 days after the expiry of the 30 day time limit; the appeal against the second decision was 2 years and 4 months after the expiry of the 30 day time limit; and the appeal against the third decision was 1 year, 1 month and 26 days after the expiry of the 30 day time limit.

48. Mr Kerr submitted that the reasons given by the Company for the delays – the ongoing discussions between the Company and HMRC officials – did not provide any sufficient explanation for the lateness. Even if the Company was missing relevant information, which he did not concede, the Company must have been able to decide within time whether to issue requests for reviews or appeals. The substantive decisions were on the basis that the Company knew or should have known that the transactions were connected to fraud. Mr Kerr denied that any legitimate expectation had been created. HMRC officers were obliged to keep the decisions under review in the light of any new information which became available and no further information was ever provided by the Company.

49. Mr Kerr referred specifically to paragraph 45 of *Martrland* and highlighted the need for litigation to be “conducted efficiently and at proportionate cost, and for statutory time limits to be respected.”

50. In *HMRC v MuhammedKafeez Katib* [2019] 0189 UKUT (TCC) (“Katib”), the Upper tribunal held at [17], that the First tier Tax Tribunal had made an error of law “in failing to...give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion”.

51. The Court of Appeal in *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121 (“BPP”) also found that compliance ought to be expected unless there was “good reason to the contrary.”

52. Mr Kerr submitted that if the application was allowed HMRC would be prejudiced in that they would have to divert resources to defend the appeal which they were entitled to

consider closed, especially given the significant length of delay. Further, other taxpayers would be prejudiced as HMRC's and the Tribunal's resources which would otherwise have been used in respect of those appeals made in accordance with the statutory time limits would be diverted to consider the Company's appeals.

53. Mr Kerr submitted that allowing a late appeal in this instance was inconsistent with the principles of good administration of justice which require litigation to be conducted efficiently and at proportionate cost. HMRC should be entitled to rely on the time limits for the purpose of allocating resources in administering the tax system and should not normally be required to defend appeals after an excessive gap between the expiration of the time limit and the appeal.

54. Mr Kerr referred to paragraph of *Martland* and submitted that the Company's case was weak. The first decision was on the basis that the Company knew or should have known that its purchases of silver grain were connected with the fraudulent evasion of VAT; its due diligence was minimal; the deals were back to back; there were no written contracts with the counter-parties; the deal were of a much higher value than the Company's usual business of waste disposal; and were unusual. The Company did not advertise this business on its website unlike its other trading activities.

55. The third decision was also on the basis that the Company knew or should have known that its waste disposal transactions were connected with the fraudulent evasion of VAT; the deals were connected with fraudulent tax losses; its suppliers were two connected defaulting traders; due diligence was again minimal; payments to the suppliers were made on the same day as, or within a few days of, the invoice dates, in contrast to the Company's other business; and the destinations for some of the waste were illogical given the Company's location.

56. In his written submissions for this appeal Mr Kerr maintained that HMRC was under a duty to continue to engage with the Company as decisions have to be reviewed in the light of any further information which may be available. Mr Kerr denied that HMRC failed to clarify the position until 2019 and the egregious delay was not the result of any resulting confusion. Whether or not any enforcement action was on hold was not relevant to the issues of why the Company delayed issuing the appeals. Finally Mr Kerr submitted that observations about the merits of the case included in the Notice of Objection were included for completeness. The merits of the substantive appeal have no significant relevance to the application for permission to appeal out of time.

## **DISCUSSION**

57. Both Ms Brown and Mr Kerr accept that the Notices of appeal were lodged very late and that the delay was both serious and significant.

58. Ms Brown relied on the confusion caused by the correspondence from HMRC and the actions of the HMRC officers.

59. The first and third decision letters state that HMRC will consider any further information received within 30 days. The second decision letter states the Company can send any new information without any time limit. Neither the first or third decision letters make it clear what the Company can or must do. They offer three alternatives but do not indicate that the Company can opt for the first alternative (send further information), the second alternative (ask for a review) or the third alternative (appeal to the Tribunal.)

60. The first and third decision letters state that HMRC "will not take any action to collect the disputed tax while the review of the decision is being carried out." The Company received no correspondence about the tax liabilities until HMRC's Debt Management wrote to it on 13 September 2019. The Company therefore believed that the tax assessments were on hold pending the ongoing discussions with HMRC.

61. During the various discussions with HMRC, either in person or by telephone, the Company was advised that no appeals had been lodged but the HMRC Officers involved encouraged the Company to lodge appeals but did not specify that there was a statutory time limit.

62. Mr Kerr maintained HMRC was under a duty “to keep matters under continuing review”. The Tribunal accepts that this is correct but finds it at odds with the position taken by HMRC that time limits must be strictly adhered to and the application for permission to appeal out of time must be opposed. During the meetings and telephone calls the Company was encouraged to lodge appeals but no indication was given that HMRC would oppose such appeals being allowed to proceed.

63. Mr Kerr also claimed that allowing the appeals to proceed would involve the diversion of resources by HMRC to defend the appeals. The Tribunal is unable to support this argument as if the appeals had been lodged within time HMRC would have had to divert the same resources to defend them. There is an argument that by opposing the current application HMRC has incurred additional resources.

64. Ms Brown explained that the Company had not provided disclosure or witness evidence in relation to the substantive appeals. She claimed that MTIC appeals are fact specific. The Tribunal therefore has insufficient information to determine the strength or weakness of the Company’s appeals.

#### **DECISION**

65. The Tribunal is influenced by the final sentence of paragraph 37 of the Upper Tribunal’s decision in *NTADA* already quoted at paragraph 27 above:

“As already indicated, a failure by HMRC to provide adequate notification of appeal or review rights in the decision letter could also influence the exercise of the FTT’s discretion to admit a late appeal.”

66. We consider the advice given by HMRC in their decision letters was confusing. The encouragement to lodge appeals given by HMRC officers during the meetings and telephone calls led the Company to believe that its agents had lodged appeals. This is supported by the fact that HMRC’s Debt Department did not write to the Company until 13 September 2019. HMRC had advised the Company that it would not take any action to collect the disputed tax while the reviews of the decisions were being carried out. In the absence of any demands from HMRC the Company was entitled to believe the decisions were under appeal.

67. The amount of VAT at stake is considerable (£631,548.43). We consider the prejudice to the Company if the appeals are not allowed to proceed outweighs any prejudice to HMRC

68. The application to allow the two appeals dated 24 September 2019 is successful.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

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

**ALASTAIR J RANKIN MBE  
TRIBUNAL JUDGE**

**Release date: 04 JANUARY 2022**