



Neutral Citation: [2022] UKFTT 411 (TC)

Case Number: TC08635

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2018/05638

*PROCEDURE – application for permission to make a late appeal – principles in Martland v The Commissioners for Her Majesty’s Revenue and Customs applied – application refused*

**Heard on: 15 and 16 August 2022  
Judgment date: 7 September 2022**

**Before**

**TRIBUNAL JUDGE JONATHAN CANNAN**

**Between**

**SAMUEL AND HELEN MOORE  
T/A MOORE FARMS**

**Applicant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Lowry Grant of FPM Accountants

For the Respondents: Isabel McArdle of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

**This is a redacted version of the decision published following a direction of the Tribunal pursuant to Tribunal Rule 14**

### INTRODUCTION

1. This is an application for permission to make a late appeal against a decision dated 23 July 2013 (“the Decision”). In the Decision, HMRC cancelled the Applicants’ Agricultural Flat Rate Scheme certificate (“the Certificate”). The Certificate had been issued pursuant to section 54 Value Added Tax Act 1994 (“VATA 1994”). I set out below the provisions pursuant to which such certificates may be granted and cancelled by HMRC.

2. The Applicants says that the underlying decision to cancel the Certificate was wrong. It is accepted that in the usual course the Applicants would have had until 22 August 2013 to make an appeal to the FTT against the Decision. In fact, the appeal was not made until 22 August 2018.

3. In summary, the Applicants say that the reason the appeal was not made in time was because they were told by an HMRC officer in July 2013 that HMRC was closing the Agricultural Flat Rate Scheme (“the AFRS”) and there would be no point in appealing the Decision. Further, it was not until a decision of the Court of Justice of the European Union (“the CJEU”) in late 2017 that the Applicants considered an appeal was likely to succeed.

### BACKGROUND

4. The Decision was made in the context of the AFRS. I shall briefly summarise the relevant provisions and associated legal framework.

5. Where HMRC have issued a certificate under section 54 VATA 1994, a farming business is exempted from the need to account for VAT in the normal way. Instead of registering for VAT and accounting for the difference between output tax and input tax, it is permitted to charge a flat rate of VAT on its sales which it may then retain in lieu of claiming input tax on its purchases. In 2013, the flat rate was 4%.

6. The UK domestic provisions comprise section 54 and regulations 202 to 211 of the VAT Regulations 1995 (“the Regulations”). Those provisions implement Articles 295 to 305 of the EU Principal VAT Directive (“the PVD”). The Regulations make provision for HMRC to cancel a certificate in certain defined circumstances. Regulation 206(1)(i) provided that HMRC could cancel a certificate in any case where they considered it necessary to do so for the protection of the revenue. The effect of cancellation is that the trader must register and account for VAT in the normal way.

7. In 2016, the Upper Tribunal in *Shields & Sons Partnership v HM Revenue & Customs Excise* [2016] UKUT 142 (TCC) was concerned with a taxpayer’s argument that HMRC could not cancel a trader’s certificate on the grounds that the trader recovered substantially more input tax under the AFRS than it would otherwise be required to pay under normal VAT accounting. The FTT had held that HMRC could cancel the certificate on those grounds in a decision released on 8 October 2014. In the event, the Upper Tribunal referred the issues arising to the CJEU for a preliminary ruling.

8. Article 296(2) PVD provided as follows:

Each Member State may exclude from the flat-rate scheme certain categories of farmers, as well as farmers for whom application of the normal VAT arrangements, or of the simplified procedures provided for in Article 281, is not likely to give rise to administrative difficulties.

9. The judgment of the CJEU was given on 12 October 2017. The two questions referred to the CJEU were reformulated by the CJEU as follows:

(1) Whether Article 296(2) of the PVD must be interpreted as defining exhaustively all the cases in which a Member State may exclude a farmer from the flat-rate scheme or whether Article 299 of that directive, the principle of fiscal neutrality or other grounds may form the basis of such an exclusion.

(2) Whether Article 296(2) of the PVD must be interpreted as meaning that farmers who are found to be recovering substantially more as members of the flat-rate scheme than they would if they were subject to the normal VAT arrangements or the simplified VAT arrangements can constitute a category of farmers within the meaning of that provision.

10. The CJEU ruled that the answer to the first question was that Article 296(2) was to be interpreted as laying down exhaustively all the cases in which a Member State may exclude a farmer from the flat-rate scheme. The answer to the second question was that farmers who are found to be recovering substantially more as members of the flat-rate scheme than they would if they were subject to the normal VAT arrangements cannot constitute a category of farmers within the meaning of that provision. The effect was that the taxpayer in that case had been unlawfully excluded from the AFRS.

11. Where a taxpayer has its certificate cancelled pursuant to section 54 VATA 1994, section 83(1)(m) VATA 1994 provides for an appeal against the cancellation. In the alternative, the taxpayer has a right to require a statutory review. Both options are subject to 30-day time limits. In relation to statutory reviews, Section 83E provides for a review out of time where HMRC are satisfied that there is a reasonable excuse for not requiring a review within that time.

12. The time limit for an appeal is set out in Section 83G(1) which provides as follows:

(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,...

13. Section 83G(6) provides for an appeal to be made after the 30 day period where the tribunal gives permission.

#### LEGAL PRINCIPLES

14. The Upper Tribunal in *William Martland v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 0178 set out the approach that should be taken to applications for permission to make a late appeal at [44] to [46]:

[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 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... 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...

... 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...

15. The first stage is to consider whether the delay is serious and significant. As to what amounts to a serious and significant delay, the Upper Tribunal in *Romasave (Property Services) Limited v Commissioners for HM Revenue & Customs* [2015] UKUT 254 (TCC) referred to a delay of 3 months as serious and significant. It also emphasised that permission to appeal out of time should not be granted routinely.

16. At the second stage it is necessary to consider the reasons for the delay, which is a question of fact, to be determined on the evidence.

17. At the third stage, it is necessary to consider all the circumstances of the case and to decide whether, on balance, time should be extended. At this stage, I must take into account the particular importance of (a) the need for litigation to be conducted efficiently and at proportionate cost, and (b) the need for statutory time limits to be respected. The factors to be taken into account will include the quality of the reasons for the delay, the prejudice to the applicant if time is not extended and the prejudice to HMRC if time is extended.

18. In considering the reasons for the delay, the fact that the applicant was not aware of a legal right is not necessarily a good reason. In *Leeds City Council v HMRC* [2015] EWCA Civ 1293, the taxpayer argued that a time limit for making claims to repayment of VAT should be disapplied based on the EU law principles of effectiveness, equivalence, proportionality, legal certainty and legitimate expectation. It said that (i) the relevant provisions of the VAT Sixth Directive were difficult to understand and apply and (ii) HMRC had published a position that was wrong in law and which led the taxpayer “down the wrong path”. The Court of Appeal rejected those reasons and explained that ignorance of one’s legal rights did not justify the disapplication of the limitation period in that case:

[42] ...the fact that a piece of European legislation is difficult to understand or apply cannot justify an extension of the limitation period. If the meaning of a piece of European legislation is unclear it can be referred to the CJEU which sometimes manages to clarify its meaning. If and in so far as there was a perceived problem it arose because of uncertainties about the law,

and had nothing to do with any shortcomings in domestic procedure for claims for repayment of VAT.

[43]... [T]here is no rule of EU law requiring the running of a limitation period to be deferred until the existence of a right to recover the payment has been judicially established. It is not uncommon for a claim to repayment to have become time-barred in national law while proceedings are still in progress to determine whether the member state was in breach of EU law: FII at [151] (Lord Sumption). Thus the fact that HMRC advanced a view of the law which is now conceded to be wrong does not preclude reliance on the limitation period. If a taxpayer is dissatisfied with HMRC's view of the law, the proper course is to appeal to the appropriate tribunal. That course has always been open to Leeds. Mr Ghosh accepted that not every contested case would justify an extension of the limitation period. Ignorance of one's legal rights is not a ground for disapplying a limitation period: *British Telecommunications plc v HMRC* [2014] EWCA Civ 433, [2014] STC 1926 at [106] and [123]. But Mr Ghosh argued that he was complaining not merely that HMRC were wrong, but that they had thrown Leeds off the scent by failing to mention article 4.5 at all and focussing on what turned out to be legally irrelevant arguments. I cannot see that this makes any difference. The provisions of the Sixth Directive were readily available and were (and were known to be) directly effective. If (as was the case) HMRC were barking up the wrong tree, Leeds could readily have identified the right tree: *British Telecommunications plc v HMRC* at [123]...

19. The context in *Leeds City Council* is different to the present context, which includes a discretion on the part of the FTT to extend the time limit for appealing. However, the same reasoning was considered by the Upper Tribunal in *Hewitt v HM Revenue & Customs* [2021] UKUT 0231 (TCC). That case also concerned an appeal against the FTT's refusal to permit a late appeal against cancellation of an AFRS certificate. The trader sought to appeal several years late in light of the CJEU decision in *Shields & Sons*. The FTT applied the *Martland* approach and refused permission for a late appeal. In doing so, it noted that the trader had put forward no reason for the delay, other than the decision of the CJEU.

20. There was only one ground of appeal in *Hewitt*, which was that the FTT had failed to give full effect to the EU law principle of effectiveness, which it was argued required Mr Hewitt to be given an effective remedy to enforce his EU law right to remain in the AFRS. It was said that the principle of effectiveness meant that there should be no time limit on the enforcement of EU law rights when those rights had not been properly transposed into national law.

21. The Upper Tribunal reviewed the authorities on the principle of effectiveness in the context of domestic time limits, including *Leeds City Council*. It concluded that there was no breach of the principle of effectiveness and stated at [57]:

57. ... [I]n the context of an appeal against the cancellation of an AFRS certificate, it seems to us that a relatively short period of 30 days in which to appeal is reasonable. The issue or cancellation of a certificate has an immediate effect on the tax status of the person in question and is relevant to transactions with third parties, which are continuing on day-to-day basis. It is important that disputes concerning the issue or cancellation of certificates are identified and resolved promptly. Furthermore, this is not a case in which a taxpayer does not know that circumstances have arisen that they might wish to challenge. The taxpayer will ordinarily be on notice that the decision has been made to cancel a AFRS certificate and be able to raise a challenge to that decision promptly. In cases where the strict application of the 30-day time limit would be unjust, there remains the possibility for the Tribunal to permit a late appeal in appropriate cases. The time limit does not make the enforcement of Mr Hewitt's rights impossible or excessively difficult.

22. The case before the FTT had been argued on the basis that Mr Hewitt was not aware that he had good prospects of challenging HMRC's decision until the CJEU decision in *Shields & Sons*. That was put forward as a factor relevant to the FTT's consideration at stage 3 of the

*Martland* approach, rather than as part of an argument that Mr Hewitt was being deprived of an effective remedy. There was no challenge before the Upper Tribunal to the FTT's general approach to stage 3. There was therefore no consideration of the weight which should be attached to the fact that an appeal was being brought out of time because a subsequent decision had demonstrated that there was merit in an appeal. That is a matter I must address when I come to consider the present application in more detail.

23. I was also referred to a number of FTT decisions relating to late appeals and also reasonable excuse and special circumstances on appeals against penalties (*B & J Shopfitting Services v HM Revenue & Customs* [2010] UKFTT 78 (TC), *Transwaste Recycling & Aggregates Ltd v HM Revenue & Customs* [2022] UKFTT 00004 (TC) and *Hampel v HM Revenue & Customs* [2021] UKFTT 120 (TC)). Some of those decisions considered circumstances where a taxpayer had been misled by HMRC. All turn on their own facts, and in some cases were concerned with a different statutory context. Whilst I have considered those decisions they are not binding and they do not assist in the present case where the principles to be applied have been authoritatively stated in *Martland*.

24. Prejudice to an applicant if permission for a late appeal is not granted will involve losing the ability to challenge the decision which it seeks to appeal. In assessing that prejudice, I must form a general impression of the strength or weakness of the Applicants' case and weigh that in the balance. I must also take into account prejudice to HMRC. Such prejudice was recognised by the Upper Tribunal in *Data Select Ltd v HM Revenue & Customs* [2012] UKUT 187 (TCC) at [37] where it stressed:

...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 appeals against a judicial decision.

25. Such prejudice was also described by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [23] where he stated:

The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened.

26. I shall apply all these principles in determining the present application

#### **FINDINGS OF FACT**

27. The Applicants are general stock farmers trading together in partnership as Moore Farms. The business specialises in the finishing of beef cattle, purchasing animals which are then matured for 100-120 days before slaughter. They were granted AFRS certification on 8 February 2010 with effect from 24 December 2009.

28. In 2012, HMRC was considering the eligibility of businesses certified to use AFRS. The lead project manager was Mr Aidan McDonnell and his team included Mr Mel Amos, a senior avoidance investigator. Mr Amos was highly experienced, having been employed by HMRC and formerly HM Customs & Excise for some 44 years. Questionnaires were sent out to a number of businesses identified as having a significant turnover and possibly obtaining a financial advantage from using AFRS. It is not clear how many questionnaires were sent out, but nothing turns on that. By 2012, approximately 1600 UK businesses had been certificated in the AFRS. On 13 April 2012, HMRC asked the Applicants to complete a questionnaire which they did, and returned to HMRC on 30 April 2012.

29. Mr Amos wrote to the Applicants in a letter dated 6 June 2013 stating that based on the information provided the Applicants would no longer qualify to use AFRS with effect from 8 June 2013. The reason given was that the Applicants were making a "substantial net gain" from

using the AFRS compared to normal VAT accounting. As such, HMRC considered that it was necessary to cancel the Certificate for the protection of the revenue. The letter detailed the Applicants' right to request a review of the decision by an independent officer or to appeal directly to the tribunal. By way of alternative, the Applicants were informed that Mr Amos would also consider the decision further if there was any other information they wished to provide. The letter identified that Mr Amos was a senior avoidance investigator.

30. At some stage, it is not clear when, Moore Farms registered for VAT because the Certificate had been cancelled.

31. The Applicants' representative was and is Mr Lowry Grant of J L Grant & Co Accountants, now FPM Accountants. He is a fellow of the Chartered Association of Certified Accountants and has acted as the Applicants' accountant since 1999. Mr Grant assisted the Applicants when they obtained the Certificate. He has many years' experience of farming accounts and taxation, a large number of farming clients and he speaks professionally in relation to tax matters.

32. Mr Grant telephoned Mr Amos on 11 June 2013. Mr Amos' contemporaneous note of the telephone conversation shows that Mr Moore was present with Mr Grant during the conversation. Mr Grant and Mr Moore used a speakerphone. Mr Grant expressed his disappointment with the decision and asked if Mr Amos was willing to postpone cancellation of the Certificate whilst further information and representations were provided. Mr Amos stated that he could not do this, but that if he was satisfied from any further information and representations that the decision was incorrect then the Applicants would be able to apply the AFRS retrospectively to 8 June 2013. Matters were left for Mr Grant to provide further representations and information in a week or so which Mr Amos would consider once he had returned from leave on 3 July 2013.

33. On 28 June 2013, Mr Grant wrote to Mr Amos stating that he had been asked to appeal Mr Amos' decision. In fact this was taken, correctly it seems to me, as a request for Mr Amos to conduct a re-consideration of his decision. The principal point of criticism, which was set out in detail, was that the decision took no account of input tax recoverable on capital expenditure, including expenditure covered by an insurance claim following a fire in September 2011. When that expenditure was taken into account, it was said that there was no financial benefit to the Applicants in using the AFRS, indeed there was a "loss".

34. Mr Amos acknowledged Mr Grant's letter in a letter dated 8 July 2013.

35. Mr Amos decided that he should uphold his original decision. On 15 July 2013 Mr Grant telephoned Mr Amos and left a message to be called back. Exactly what prompted that call was not explored in evidence. In any event, Mr Amos called Mr Grant back shortly afterwards. Again, Mr Moore was in the office with Mr Grant and the conversation was on speakerphone. There is a dispute as to the content of this telephone conversation which lies at the heart of the Applicants' case on this application.

36. Mr Amos made a file note of the conversation. I am satisfied from Mr Amos' evidence that his file note was made on 15 July 2013. It was incorporated into an internal document dated 17 July 2013.

37. Mr Amos' file note records the following:

- (1) He advised Mr Grant that he was content to accept Mr Grant's figures for capital expenditure, but he maintained that the Applicants would still obtain a significant benefit from AFRS.

(2) A detailed discussion in relation to the figures for each year and the issue of input tax on the insurance claim.

(3) Mr Grant then accepted that the Applicants were obtaining a financial benefit from the AFRS and that he would find it very difficult to argue against the decision.

(4) Mr Grant explained that the Applicants would find it very difficult to continue trading as they would be competing against other farmers on AFRS.

(5) Mr Amos explained that HMRC were keen to ensure that farmers are able to trade on an equal basis and were actively seeking to identify businesses using AFRS who were no longer eligible to do so in order to remove them from the AFRS. He stated that approximately 30 businesses had been removed from AFRS.

(6) Mr Amos asked Mr Grant to send him copies of the Moore Farms accounts for the year-ending 31 March 2012 so that he could confirm his calculations and finalise his review.

38. Mr Amos' file note also recorded as follows:

Mr Lowry (sic) now appeared resigned to the fact that I would be unable to amend or withdraw my decision to removing his clients' from the AFRS. He stated he advise his clients' of this [Redacted].

...

Reminded Mr Lowry that after receiving my letter advising them of the outcome of my reconsideration his clients' would still have the opportunity to request a "review", which would be undertaken by an officer not previously involved in the case, or to appeal to an independent VAT Tribunal.

Mr Lowry stated that he would not be encouraging his client's to appeal.

39. There is no record in Mr Amos' file note that Mr Moore was a party to the conversation, but it is not disputed that he was present with Mr Grant and I find that he was present.

40. The Applicants rely on what Mr Grant says is his contemporaneous note of the telephone conversation. There is an issue as to whether this was in fact a contemporaneous note. It is handwritten by Mr Grant, but it is dated 15 July 2019. It was put to Mr Grant that in fact the note was made in 2019 based on his recollection at that time. The note records, very briefly, that there was a review of points raised by Mr Grant in his letter dated 28 June 2013, with Mr Amos disagreeing with Mr Grant's conclusions and maintaining that the Applicants were benefiting from the AFRS. Mr Grant's note then records as follows:

Mr Amos stated that there was little point in appealing (but we could if we wished) since the scheme was ending.

Sam stated that if it ended and a level playing field was in place, he had no problem.

Mr Amos stated that they were in the process of excluding all farms from AFRS.

Sam said, he would be happy with that.

[Redacted]

We agreed that an appeal was not beneficial in light of above and that we would send back the AFRS certificate.

We thanked Mr Amos for taking the call.



41. At this stage, Mr Grant understood that Mr Amos was a “senior inspector” with HMRC who was an expert in relation to AFRS and was managing the ending of the scheme. Mr Grant’s evidence was that he relied wholeheartedly on what Mr Amos had said about the scheme ending and as a result there was no point in appealing the Decision. He understood that the AFRS was ending imminently. He maintained that on the basis of the HMRC Charter, which was given a statutory basis in Finance Act 2009, he was entitled to consider that Mr Amos had given them accurate, consistent and clear information in this regard. He therefore advised the Applicants not to appeal the Decision.

42. Mr Moore’s evidence was to the same effect. He said that Mr Amos stated there was no point appealing “*since the scheme was ending*” and “*that all farms were being excluded from the scheme*”. [Redacted] On the basis of what Mr Amos had said, he and Mr Grant considered it to be a waste of time continuing his appeal.

43. Mr Amos wrote to the Applicants on 23 July 2013 and copied the letter to Mr Grant. He set out his calculations which he said showed that the Applicants had gains from using AFRS that were substantially more than any benefit envisaged by the legislation. The letter stated:

I have discussed the above figures and the issue of the VAT incurred on the replacement building and paid by your insurers, in some detail with Mr Grant during a telephone conversation with him on 15 July 13.

...

HMRC policy is to remove businesses from the AFRS, who are gaining substantially more by way of amounts of FRA charged than the input tax they would have been entitled to recover.

Having completed my reconsideration I have to inform you that I remain of the view that you are not eligible to use the AFRS and therefore must advise you that I am upholding my decision to cancel your AFRS certificate with effect from 8 June 2013, as notified in my letter of 6 June 2013.

44. The letter went on to explain that the Applicants had the right to request a statutory review of the Decision by an independent officer or to appeal directly to the tribunal. In each case the time limit of 30 days from the date of the letter was clearly identified.

45. Mr Amos’ letter ought to have alerted Mr Grant and the Applicants to the possibility that they had misunderstood Mr Amos in believing that the scheme was due to end imminently. If the AFRS was due to end imminently I cannot see why Mr Amos would have referred to HMRC’s policy of removing businesses from the AFRS without also referring to the fact that the AFRS was itself ending.

46. Mr Grant emailed Mr Amos on 26 July 2013 and said as follows:

Thank you for your letter of the 23<sup>rd</sup> July 2013, I have discussed this with Mr and Mrs Moore and they are content with your decision.

Thank you for taking the time to review this. this was very much appreciated.

When we chatted I explained that the notion of the playing field being level was important since some in and some out represented a considerable disadvantage to my clients.

[Redacted]

47. Again, it is difficult to see why Mr Grant would be concerned about the level playing field going forward if the AFRS was due to end imminently. [Redacted]

48. [Redacted]

49. [Redacted]

50. The Applicants allege that during the telephone conversation on 15 July 2013, Mr Amos specifically told Mr Grant and Mr Moore that there would be little point in appealing because the AFRS scheme was ending.

51. Mr Grant says that in light of what they had been told by Mr Amos about the AFRS ending, he advised the Applicants that a formal appeal would be futile. Mr Grant says that he relied upon the following matters in giving that advice:

- (1) His understanding that Mr Amos was a senior HMRC inspector who was managing the end of the AFRS and was in a clear position to guide him as to the future of the AFRS.
- (2) His long experience of dealing with HMRC officers who were open, transparent, helpful and accurate.
- (3) His belief that Mr Amos was the HMRC expert on AFRS and that the AFRS was ending imminently.
- (4) That HMRC would provide accurate consistent and clear information in accordance with the HMRC Charter.

52. I must resolve the significant factual dispute between the parties as to what was said by Mr Amos during the telephone conversation on 15 July 2013. In doing so, it is well established that I should have regard to the observations of Leggatt J (as he then was) about the fallibility of memory in *Gestmin SPGS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 at [15] – [22] and particular weight should be placed on the documentary evidence. Leggatt J said as follows at [21] and [22]:

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

53. Ms McArdle invites me to find that Mr Grant's file note was in fact prepared sometime in 2019 rather than 2013. Not, I hasten to add, as a false document or with any intention to deceive, but as a subsequent record of the telephone conversation by Mr Grant, based on his memory in 2019. I cannot accept that submission. I accept that Mr Grant's note focuses almost exclusively on the representations said to have been made by Mr Amos and which are now relied on in making this application for a late appeal. That is certainly consistent with the note being prepared in 2019, when the issue was whether a late appeal should be permitted. However, Mr Grant was adamant that it was a contemporaneous note. It was not suggested that Mr Grant was being untruthful in his evidence. I do not consider it likely that Mr Grant would

have forgotten preparing a subsequent note in 2019 to record his memory at that time if that is what he had done. I find therefore that Mr Grant's note was a contemporary note of the telephone conversation, albeit containing an error in the date which was stated as 2019.

54. At one stage, Mr Grant seemed to suggest that Mr Amos' note was not contemporaneous because it included information about 30 businesses being excluded from AFRS when that information was not available until 2018. Indeed, he was adamant in his evidence that Mr Amos did not refer in the conversation to 30 businesses being excluded. He said "*I don't think, I know that 30 businesses being removed was not mentioned. If it had been, it would have been very important to Sam and I*". There is nothing in this point. The information became publicly available in 2018 when it was identified in the Treasury's written answer to a Parliamentary question. However, it was clearly information that would be available to Mr Amos in 2013 from HMRC's records. This is an illustration, if one were needed, that Mr Grant's recollection of the conversation is not perfect, despite his conviction that it is.

55. In those circumstances, I am left with two contemporaneous notes of the conversation. I must put them together to reveal the full extent of what was said. However, simply because something is recorded does not mean that it was said in those terms. On the evidence before me I consider that both notes were an honest attempt to record the conversation, but there was also scope for misunderstanding.

56. I take into account that Mr Grant and Mr Moore both say they have a specific recollection of what they were told by Mr Amos, which is consistent with Mr Grant's note of the conversation. I take into account that Mr Moore had particular reason to remember the conversation because it was so significant for the future of his business. He considered at that time that if the AFRS continued and he was excluded from it then his business had no future.

57. I am satisfied that Mr Amos was not responsible for "running" the AFRS. In all his correspondence he was identified as a "Senior Avoidance Investigator". From that title, and the work Mr Amos was doing in seeking to identify whether Moore Farms and other businesses were eligible for the AFRS, it ought to have been clear to Mr Grant that Mr Amos was not involved at a policy level. Mr Grant now accepts with the benefit of Mr McDonnell's evidence that Mr Amos was not involved at a policy level. It is now known and I find that Mr Amos was part of a team of investigators led by Mr McDonnell. Mr Grant accepted that there was no document he could point to which suggested that Mr Amos was in charge of the AFRS. I am satisfied that Mr Grant wrongly inferred that Mr Amos was in charge of the AFRS.

58. I am also satisfied that Mr Amos is an honest, highly experienced officer. He readily accepted that his recollection of the actual conversation was "very vague". That is not surprising given the passage of time. However, Mr Amos did categorically deny telling Mr Grant and Mr Moore that there was no point in appealing because the AFRS was ending, or that all farmers were being excluded from the AFRS. It is clear that any decision as to legislative changes to the AFRS was outside his responsibility. The project he was working on was to identify only those businesses which were gaining a tax advantage. He had no knowledge of any other group of farmers that were likely to be excluded from the AFRS or that the AFRS was ending. In the light of those findings, it is unlikely that Mr Amos would have told Mr Grant and Mr Moore that the AFRS was ending, whether imminently or not, or that all farmers were being excluded from the AFRS.

59. Mr Grant submitted that it was inconsistent for Mr Amos to be vague as to his recollection of the conversation and at the same time adamant that certain things were not said. I do not accept that submission. Mr Amos did not have any responsibility for AFRS beyond his role as an investigator seeking to identify certified businesses who, based on HMRC's understanding of the law at that time, were not eligible to be certified. He had no knowledge that the AFRS

was coming to an end. That would be a policy decision and would require legislation to repeal or amend section 54 VATA 1994. There is no evidence that such a change was being considered at any level within HMRC. The evidence is simply that Mr Amos was an investigator on a project, being led by Mr McDonnell.

60. I am satisfied that the AFRS was not coming to an end and there were no plans for it to be terminated. Based on all the evidence, I accept that Mr Amos did not tell Mr Grant and Mr Moore that the AFRS was coming to an end or that all farmers were being excluded from the AFRS.

61. Mr Amos was clear and confident in his evidence that he would never offer a taxpayer his view as to the merits of an appeal against one of his decisions. It was not his position to do so. He is a highly experienced officer and I accept that evidence.

62. [Redacted]

63. [Redacted]

64. On the balance of probabilities I am satisfied that the telephone conversation on 15 July 2013 included a detailed discussion about Mr Amos' role in investigating businesses using AFRS with a view to excluding businesses that were not eligible. Mr Amos stated that approximately 30 business had been excluded from AFRS. However, he did not state that the AFRS was ending. He confirmed his decision that the Certificate be cancelled and informed Mr Grant and Mr Moore of their appeal rights. He did not offer any view as to the merits of an appeal [Redacted].

65. Unfortunately, Mr Grant and Mr Moore were left believing that the AFRS was ending. Mr Grant therefore inferred that even if Mr Amos' calculation of the benefit Moore Farms obtained from the AFRS was wrong, there was little point in appealing. In the same way that each thought Mr Amos was "in charge" of the AFRS, they both misunderstood what Mr Amos had told them about excluding farmers from the AFRS. Mr Amos told them that he was seeking to exclude farmers who were not eligible. Mr Grant and Mr Moore understood that he was excluding all farmers from the AFRS with the AFRS being brought to an end. That was a misunderstanding on their part. I am not satisfied that Mr Amos was responsible for that misunderstanding. Mr Grant in particular ought to have realised that the AFRS was a statutory scheme which could only end if the relevant statutory provisions were revoked or amended by Parliament. At no stage was there any consultation about ending the AFRS and no public announcement that HMRC or Parliament intended to terminate the AFRS.

66. Mr Amos' letter dated 23 July 2013 makes no reference to the AFRS as a whole coming to an end. In the circumstances, that letter ought to have led Mr Grant to confirm with Mr Amos that the AFRS was ending. That would have cleared up Mr Grant's misunderstanding. However, he did not seek any confirmation.

67. In the years after the Certificate was cancelled the profitability of Moore Farms steadily declined. Mr Grant's evidence was that following a discussion with Mr Moore it became apparent that most of the Applicant's farming competitors had remained in the AFRS and that the AFRS had not ended. Moore Farms was therefore at a competitive disadvantage.

68. In the months following July 2013 it became apparent to Mr Moore based on his dealings at cattle markets that many of his competitors had remained in AFRS. This was based partly on anecdotal evidence, including the prices being paid by his competitors for beef cattle. His competitors had a margin on each head of cattle purchased and sold which Mr Moore calculated was £50-60 more than the margin Moore Farms could achieve whilst VAT registered.

69. It is not clear from the evidence that the fall in profitability was caused by competitors remaining in the AFRS. The most I can say is that I am satisfied that both Mr Grant and Mr Moore believed that to be the case.

70. I am satisfied that when Mr Moore and Mr Grant came to consider the business accounts for the year ended 31 March 2014, in or about November 2014, Mr Grant was told by Mr Moore that the reason profitability had fallen in 2014 was because Moore Farms had been excluded from AFRS and its competitors had not been excluded. Both were therefore aware by November 2014 that the AFRS was in fact continuing. However, they did not challenge HMRC or Mr Amos about the ending of AFRS until some years later when the CJEU judgment in *Shields & Sons* was released.

71. At no stage did Mr Grant ask Mr Amos to confirm in writing that the AFRS was coming to an end. Nor, when it became apparent that the AFRS had not come to an end, did he challenge Mr Amos to say that he had been misled. I would have expected Mr Grant to contact Mr Amos in November 2014 at the latest to ask why the AFRS had not come to an end, and to confirm when it was due to come to an end.

72. Mr Grant accepted that the reason he did not advise the Applicants in 2014 that they should seek to appeal the Decision out of time was because until the judgment of the CJEU in *Shields & Sons* he, along with every other accountant, believed that there was a legal basis for businesses to be removed from the AFRS. At that stage, he considered that if they were permitted to make a late appeal then it was unlikely they would succeed. In Mr Grant's words, "*even if there was a late appeal, the substance of the case would still work against us*". This is consistent with the fact that the FTT decision in *Shields & Sons* dismissing the trader's appeal had been released on 8 October 2014.

73. When *Shields & Sons* appealed the FTT decision, the Upper Tribunal referred various questions to the CJEU for a preliminary ruling. The Upper Tribunal decision to make a reference was released on 16 March 2016. The CJEU judgment was released on 12 October 2017 and the Upper Tribunal released a decision on 21 December 2017 in which the trader's appeal was allowed. The Upper Tribunal directed that the trader's AFRS certificate should be reinstated retrospectively. These decisions were all published on the date of release.

74. Mr Grant and Mr Moore both stated in their witness statements that they became aware in April 2018 that *Shields & Sons* had been reinstated in the AFRS. In fact, both accepted in oral evidence that they were mistaken about the date and that they were aware of the *Shields & Sons* decision by October 2017 in the case of Mr Moore and by December 2017 in the case of Mr Grant. Again, this is an illustration of the fallibility of memory. Mr Moore first became aware of the case and informed Mr Grant. When Mr Grant became aware of the case it appeared to him that the circumstances in *Shields & Sons* were the same as Moore Farms and he advised the Applicants to seek a late appeal of the Decision. It was the judgment of the CJEU in *Shields & Sons* which prompted Mr Grant to try and re-open and appeal the Decision.

75. Mr Grant wrote to HMRC on 23 January 2018 asking for the Decision to be reversed in light of the CJEU decision that farmers could not be excluded from the AFRS on grounds of financial gain. Mr Grant said in this letter that the Applicants did not appeal further in 2013 because Mr Amos insisted that the AFRS was closing. The letter also stated, wrongly:

We raised the points addressed in the *Shields* case in June 2013 but were refused any reconsideration of Mr Amos decision.

76. Mr Amos responded in a letter dated 1 March 2018, taking issue with the claim that the Applicants had been refused a further reconsideration of his decision. Mr Grant's letter was treated as a request for a statutory review out of time pursuant to section 83E VATA 1994, but

Mr Amos considered there was no reasonable excuse for the applicants not requesting a review in 2013 within the 30-day time limit. He advised the Applicants that they could seek to appeal to the Tribunal out of time.

77. On 16 March 2018 Mr Grant wrote to Mr Amos to say that the Applicants intended to make a formal complaint against Mr Amos with a view to reopening the Decision.

78. At about this time, the Applicants took up their case with Mr Jim Allister, their representative in the Northern Ireland Assembly. Mr Allister wrote to the Financial Secretary to the Treasury. The enquiry was passed to HMRC and the Director General of HMRC wrote to Mr Allister on 12 April 2018 to say that HMRC were looking at what changes were necessary to the AFRS following the decision in *Shields & Sons*.

79. Mr McDonnell of HMRC wrote to the Applicants on 23 April 2018. He stated that HMRC was urgently reviewing its policy on the AFRS following the CJEU judgment in *Shields & Sons* and would update the Applicants by 31 May 2018.

80. Mr McDonnell wrote again to the Applicants on 31 May 2018 stating that HMRC were unable to reinstate the Certificate. This was because the Applicants were out of time to request a statutory review. He drew attention to the fact that the Applicants could lodge an appeal with the tribunal and that the tribunal had discretion to give permission for a late appeal.

81. In July 2018 a written question was tabled in the House of Commons seeking information about how many farmers had been excluded from the AFRS. The Treasury answer was that by 2013 28 farmers had been excluded from the AFRS, with 3 more subsequently excluded. A separate answer recorded that 1,742 businesses had been certificated under the AFRS between 1993 and 2017. It appears that the vast majority of farmers excluded from the AFRS were based in Northern Ireland.

82. The Applicants lodged their notice of appeal with the tribunal on 22 August 2018, seeking permission to make a late appeal. The substantive grounds of appeal may be summarised as follows:

- (1) The applicants obtained no financial gain from the AFRS, alternatively
- (2) The basis of their exclusion from the AFRS was incorrect based on the decision in *Shields & Sons*.

#### **DISCUSSION**

83. I must consider this application for permission to make a late appeal by reference to the three stage approach described by the Upper Tribunal in *Martland*. I do so taking into account my findings of fact described above.

#### **Period of delay**

84. Ms McArdle submits that the period of delay in making the appeal is serious and significant. The Decision was made on 23 July 2013 and the 30-day time limit to appeal therefore expired on 22 August 2013. No appeal to the Tribunal was made until 22 August 2018, meaning that the appeal was exactly 5 years late.

85. Mr Grant did not seek to persuade me that the period of delay was anything other than serious and significant. His case on behalf of the Applicants was that there were good reasons for that delay. That is the second stage of the approach. I therefore proceed on the basis that there has been a serious and significant delay in seeking to appeal the decision.

### **Reasons for the delay**

86. The grounds on which the Applicants seek permission to make a late appeal are set out in their notice of appeal. The Applicants say that they were wrongly informed by Mr Amos in the telephone conversation on 15 July 2013 that:

- (1) It was pointless appealing since the AFRS was ending.
- (2) All current members of the AFRS were being removed.
- (3) [Redacted]

87. At this stage I must identify the reasons for the delay. Whether these amounted to good reasons not to appeal together with all other relevant circumstances, are matters for the third stage.

88. One of the FTT decisions to which I was referred is the case of *Hampel v HM Revenue & Customs* [2021] UKFTT 120 (TC). In that case, incorrect information provided by HMRC led to the late filing of a return. Judge Mosedale stated as follows in the context of an appeal against penalties and whether there was a reasonable excuse:

60. It is often said that ignorance of the law is no excuse; however, that is not the case where the ignorance arises from misinformation provided by the very government body which imposes the obligation, in this case HMRC.

89. The case is not relevant here because, based on my findings of fact, HMRC did not mislead the Applicants. Mr Amos did not tell Mr Grant and Mr Moore that it was pointless appealing because the AFRS was ending, or that all businesses in the AFRS were being removed. [Redacted]

90. Further, during the course of Mr Grant's evidence it became apparent that the alleged misinformation said to have been provided by Mr Amos only covered the period from 22 August 2013 to November 2014. By that time, Mr Grant and Mr Moore were aware that the AFRS had not ended and that not all businesses in the AFRS had been removed. The reason there was no appeal at that time was because Mr Grant and Mr Moore did not consider that an appeal was likely to succeed. They believed, based on the law as it was then understood, that HMRC were entitled to cancel an AFRS certificate if the trader gained a significant financial benefit from using the AFRS.

### **All the circumstances**

91. I must now consider all the circumstances of the case, including the extent to which the reasons the Applicants did not appeal at any time before 22 August 2018 amount to good reasons. I should pay particular regard to the need for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected. I must also consider prejudice to the Applicants if a late appeal is not permitted and prejudice to HMRC if a late appeal is permitted.

92. The reason the Applicants did not appeal in the period August 2013 to November 2014 was because they were under the misapprehension that the AFRS was imminently coming to an end and all farmers were being removed from the AFRS. Whilst Mr Grant ought to have known that was not the case, he held an honest belief to that effect.

93. The only operative reason the Applicants had for not appealing after November 2014 was that they considered it was unlikely an appeal would succeed. It was only in December 2017 that Mr Grant realised that HMRC were not entitled to cancel an AFRS certificate on the grounds of protection of the revenue. That realisation came from the judgment of the CJEU in *Shields & Sons*.

94. Ms McArdle submitted that an incorrect understanding of the law is not a good reason for not appealing in time. The authorities she relied on, including the Court of Appeal in *Leeds City Council* and the Upper Tribunal in *Hewitt*, are not authority for that proposition. Both were concerned with the principle of effectiveness. *Leeds City Council* was not concerned with a time limit that involved the exercise of a discretion. *Hewitt* was concerned with the same 30-day time limit that is relevant in this application, but it was not concerned with a challenge as to how the FTT had exercised its discretion under *Martland*. It was concerned only with the principle of effectiveness.

95. In my view, the publication of a new authority which prompts an appeal out of time might have some weight in the balancing exercise at stage three. However, it is not in itself a good reason for not appealing in time. If it was, then it would nullify to a large extent the benefit of finality recognised in *Data Select* and *Aberdeen City*. It seems to me that the longer the delay, the less weight that should be attached to the fact that the law was in effect misunderstood or misconstrued. In the present application there is a period of more than 4 years between August 2013 and October 2017 before the judgment of the CJEU was published in *Shields & Sons*. It is also relevant that it was in the public domain during that period that *Shields & Sons* had appealed the decision of the FTT and that the Upper Tribunal had referred the validity of the domestic provisions to the CJEU for a preliminary ruling. There was no reason the Applicants could not have appealed the decision and then sought a stay of proceedings in the FTT pending the decision of the CJEU.

96. Having said that, it is not simply a question of whether the reason for not appealing in time is a good reason or a bad reason. It is a matter of degree. I take into account therefore the quality of the reasons why the Applicants did not appeal in time. That includes the fact that the UK domestic legislation wrongly provided for a certificate to be cancelled on the grounds of protection of the revenue. Further, even where there is no good reason for a delay, other factors may swing the balance in favour of permitting a late appeal, such as prejudice to the Applicants if permission is not granted.

97. Ms McArdle also argued that even when the Applicants became aware following the CJEU judgement in *Shields & Sons* that there would be merit in an appeal, it took from December 2017 to August 2018 before an appeal was lodged. I do not accept that this period should be treated as delay. Mr Grant wrote on 23 January 2018 asking HMRC for the Decision to be reversed in light of *Shields & Son*. Whilst HMRC refused that request in a letter dated 2 March 2018, there was then correspondence in April 2018 involving the Applicants representative in the Northern Ireland Assembly. It was not until 31 May 2018 that Mr McDonnell wrote stating that HMRC were unable to reinstate the Certificate.

98. It is true that the Applicants did not lodge their appeal until 22 August 2018, some 3 months later. However, during that period there were questions asked and answered in the House of Commons in relation to the AFRS. In those circumstances, I accept that the period between December 2017 and August 2018 should not be treated as a delay. I shall therefore treat the period of delay as a period of some 4 years from August 2013 to December 2017. For part of that period the Applicants were under a misapprehension as to the future of the AFRS. For the most part, however, they considered that an appeal was unlikely to succeed.

99. I turn now to the question of prejudice. In assessing prejudice to the Applicants if permission is not granted, I must form a view as to the merits of the underlying appeal, without carrying out a detailed evaluation of the case or the evidence. The appeal itself seeks reinstatement of Moore Farms into the AFRS and compensation for losses occasioned by its exclusion from the AFRS since 2013. It seems to me that the Applicants have a strong case that the Decision was wrong in law. It is clear from *Shields & Sons* that HMRC had no power to



cancel a Certificate on the grounds of protection of the revenue. Ms McArdle accepted that was the case, but argued that there may have been other grounds on which HMRC could have cancelled the Certificate. Those grounds were not specified, beyond a passing reference to the possibility that the Certificate could have been cancelled if normal VAT accounting was unlikely to give rise to administrative difficulties. In those circumstances I shall proceed on the basis that an appeal against cancellation of the Certificate would have a very high likelihood of success. On the other hand, I am not satisfied that the tribunal would have any jurisdiction to award compensation as such. In any event, a figure of £685,000 put forward by Mr Grant as the loss occasioned to the Applicants as a result of the Certificate being cancelled is untested and unproved. It is not clear to me to what extent that figure includes commercial losses arising from not being in the AFRS. Further, Mr Grant was arguing in 2013 that there was no substantial financial benefit from Moore Farms being in the AFRS. Overall, I am satisfied that if permission for a late appeal is not granted then the Applicants will suffer significant prejudice, albeit not at the level of £685,000.

100. I also accept that if permission for a late appeal is granted, HMRC will suffer significant prejudice. HMRC were entitled to assume throughout the period from August 2013 to January 2018 that the Decision was final and settled. As pointed out in *Data Select Ltd*, it is not desirable to re-open matters after a lengthy delay. The delay here has been extremely lengthy.

101. I must also 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.

102. Overall, taking all these factors into account, I am fully satisfied that permission for a late appeal should not be granted. It would be unfair for HMRC to be deprived of the finality they were entitled to expect when there was no appeal in August 2013.

103. Mr Grant submitted that I should take into account the unfairness of Moore Farms being excluded from the AFRS when its competitors who were in the same situation as Moore Farms were not excluded. I am not satisfied on the evidence that competitors in the same position as Moore Farms did remain in AFRS. Even if that fact had been established then in my view it would not sway the balance in favour of permitting a late appeal.

#### **CONCLUSION**

104. For all the reasons given above, I refuse this application for permission to make a late appeal.

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

105. 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.

**JONATHAN CANNAN  
TRIBUNAL JUDGE**

**Release date: 7 September 2022**