



Neutral Citation: [2022] UKFTT 00423 (TC)

Case Number: TC08642

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal reference: TC/2021/07702

Income tax – late appeal – Martland applied – whether Appellant should be permitted to notify late appeal - No

Heard on: 5 September 2022

Judgment date: 21 November 2022

Before

TRIBUNAL JUDGE BEDENHAM

Between

PROFESSOR DAVID BARRETT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondent

For the Appellant: Hartley Foster instructed by Fieldfisher LLP

For the Respondent: John Tallon KC and Sarah Black instructed by the General Counsel and Solicitor for HMRC.

DECISION

INTRODUCTION

1. This is a decision on the Appellant's application for permission to notify an appeal to the tribunal after the expiry of the statutory deadline for such notification. In support of the application, the Appellant relies, *inter alia*, on advice he was given by a law firm and, in particular, a specific partner in that firm. I have decided not to name the law firm or the partner. It seems to me it is unnecessary to do so and unfair in circumstances where they were not before me and have not, therefore, had an opportunity to respond to the matters raised as part of this application. Accordingly, I refer to the firm of solicitors as "X LLP" and the partner concerned as "Mr Y".

2. Notwithstanding the submissions which were eloquently put on behalf of the Appellant by Mr Foster, I have decided, for the reasons set out below, that permission to notify a late appeal should be refused.

PROCEDURAL BACKGROUND TO THIS APPLICATION

3. On 22 March 2019, HMRC issued to the Appellant a discovery assessment under s 29 of the Taxes Management Act 1970 ("TMA 1970") in relation to the tax year ending 5 April 2015 ("the Discovery Assessment"). The Discovery Assessment was in the amount of £2,117,221.61.

4. On 2 April 2019, the Appellant's accountants ("the Accountants"), appealed the Discovery Assessment to HMRC on behalf of the Appellant.

5. Between April 2019 and October 2019, there was ongoing correspondence between the Appellant's representatives and HMRC.

6. On 9 October 2020, HMRC issued their "view of the matter" letter by which HMRC stood by the Discovery Assessment and offered the Appellant a statutory review.

7. On 9 November 2020, X LLP, on behalf of the Appellant, accepted HMRC's offer of a statutory review.

8. Between November 2020 and March 2021, there was ongoing correspondence between the Appellant's representatives and HMRC.

9. On 31 March 2021, HMRC sent a review conclusion letter by which HMRC upheld the decision to issue the Discovery Assessment. This letter was sent both to X LLP and to the Appellant directly. This letter stated (under the heading "what happens next"):

"If you do not agree with my conclusion, you can ask an independent tribunal to decide the matter. You must notify your appeal to the Tribunal in writing. The statutory appeal period is 30 days from the date of this letter. However, in light of Covid-19, HMRC will not object to late appeals made to the Tribunal where the appeal has been made within 3 months of the end of the 30-day appeal period."

10. On 12 May 2021, HMRC and Mr Y exchanged emails as follows:

HMRC stated:

"I refer to the Review Conclusion letter of 31 March 2021 that was issued to your client which upheld HMRC's decision to issue a discovery assessment for the 2014/15 tax year. I am wanting to know what your client now intends to do regarding this matter.

Has the appeal of the discovery assessment yet been notified to the Tribunal?
If it has not, then is it intended that it will be notified soon or is your client

accepting HMRC's position on this matter? I would be grateful for your clarification.

If the appeal has been notified to the Tribunal then I am sure you are aware that it can take a while for the Tribunal to notify HMRC of this. I would appreciate if you could provide me with a copy of the T240 appeal form."

Mr Y replied:

"We are still considering the review and we are in the process of drafting a reply. This should be with you in the next 2 to 3 weeks. Given the time it has taken for HMRC to deal with this I would have thought that this is acceptable.

HMRC replied:

"There is no issue with you requiring more time to consider the review. I only contacted you as I know it can take the Tribunal a while to inform HMRC of any appeals. Para 9.1 of the Review Conclusion letter explains that HMRC will not object to late appeals made to the Tribunal within 3 months of the statutory 30-day appeal period ending. If the appeal is notified to the Tribunal by 30 July 2021 then there should be no issues. If for any reason more time than that was needed, then I would simply ask you to contact me to discuss."

Mr Y replied:

"Thank you and noted"

The Appellant was copied into this email exchange.

11. On 12 July 2021, HMRC and Mr Y exchanged emails as follows:

HMRC stated:

"I refer to the Review Conclusion letter of 31 March 2021 and our emails of 12 May 2021. I am wanting to know what your client now intends to do regarding this matter.

Has the appeal of the discovery assessment yet been notified to the Tribunal? If it has not, then is it intended that it will be notified soon or is your client accepting HMRC's position on this matter? I would be grateful for your clarification.

If the appeal has been notified to the Tribunal then I am sure you are aware that it can take a while for the Tribunal to notify HMRC of this. I would appreciate if you could provide me with a copy of the T240 appeal form.

Please do not hesitate to contact me should you wish to discuss."

Mr Y replied:

"Thank you for your email. We plan to get back to you by the end of next week once we have had a chance to consider all the options"

HMRC replied:

"Thank you for the update."

The Appellant was copied into this email exchange.

12. On 4 August 2021, HMRC emailed Mr Y (copying in the Appellant) stating:

"Please can you confirm if an appeal has been notified to the Tribunal? If it has then please can you provide a copy of the T240 appeal form. If it has not, then please can you fully explain why.

The 30 day statutory appeal period has long since expired and the 3 month period in which HMRC would not object to a late appeal has also recently expired.

Please do not hesitate to contact me should you wish to discuss.”

13. On 13 August 2021, Mr Y replied to HMRC (copying in the Appellant) stating:

“Thank you for your email. I shall revert back to you by the end of this week.”

14. On 21 August 2021, Mr Y emailed HMRC (copied to the Appellant) stating:

“Just to let you know I have a meeting with David Berrett and his accountant late Monday afternoon. We shall be in a position to revert back to you after that meeting.”

15. On 24 August 2021, HMRC emailed Mr Y (copied to the Appellant) stating:

“I refer to your email of 21 August 2021 where you advised that you would be meeting with Professor Barrett yesterday afternoon.

Please can you let me know the outcome of the meeting.

I feel I must remind you that the 30 day statutory period, as per s49G(3) TMA 1970, for notifying the appeal to the Tribunal has long passed. Furthermore, the 3 month period in which HMRC would not object to a late appeal has also passed. As per s49G(3) TMA 1970, your client will only be able to notify the appeal to the Tribunal if the Tribunal gives them permission. It is possible that HMRC could object to a late appeal which would mean that your client would possibly need to have a hearing to permit a late appeal then a further hearing to determine the tax issues.

If your client is intending on appealing to the Tribunal then this should be done as a matter of urgency.”

16. On 24 August 2021, X LLP wrote to HMRC setting out why the Appellant disagreed with the Review decision. This letter concluded by stating:

“We would prefer to agree these last few remaining items between ourselves without having to resort to going through the appeals process which will both be timely and costly to HMRC and our client.”

17. On 25 August 2021, HMRC emailed Mr Y (copied to the Appellant) as follows:

“I refer to your email yesterday afternoon where you provided a response to the letter that Natasha Henshaw sent on 31 March 2021. The issue here is that there are set issues that statute requires that have not been followed.

Appeals Process

In the final paragraph of your letter of 24 August 2021, you state the following: “We would prefer to agree these last few remaining items between ourselves without having to resort to going through the appeals process which will both be timely and costly to HMRC and our client.” I am not fully understanding your comment here as we are already going through the appeals process. HMRC issued an assessment and this was appealed. HMRC then issued its view of the matter and a statutory review was requested. The review officer upheld HMRC’s decision. Therefore the only option now open to your client is to notify their appeal to the Tribunal. That has been made clear from the correspondence referred to above. You make reference that there was an 18 month delay in HMRC responding to your letter of 24 April 2019 and I can only apologise for this. However the current timescales in appealing to the Tribunal are statutory timescales which HMRC has no power to extend. The

legislation at s49G(3) TMA 1970 is clear that once the post review period (30 days from date of the review conclusion) has ended an appeal may be notified to the Tribunal only if the Tribunal gives permission. HMRC can object to late appeals which can lead to Tribunal hearings to determine whether a late appeal can be allowed. Due to Covid-19, HMRC made a concession that it would not object to late appeals as long as they were made within 3 months of the 30 day appeal period ending. Ultimately, it would be for the Tribunal to determine whether it was prepared to accept a late appeal.

Next Steps

It is my view that your client must notify his appeal to the Tribunal and that this should be done as a matter of urgency. Once that is done, then informal discussions can continue. The following link - <https://www.gov.uk/taxtribunal/appeal-to-tribunal> - explain how to appeal to the Tribunal.

If you are not going to notify the appeal to the Tribunal then section 49F(2) TMA 1970 would apply such that HMRC would treat the review conclusions as if they were an agreement in writing under section 54(1) TMA 1970 for the settlement of the matter in question. That would resolve the appeals in HMRC's favour and the tax due would be released for collection.

If your client does not agree with the review conclusion then it is imperative that they notify their appeal to the Tribunal as soon as possible. If the appeals are notified to the Tribunal then I would be grateful if you could provide me with a copy of the T240 appeal form"

18. On 2 September 2021, Mr Sked of HMRC and Mr Y spoke on the telephone. Mr Sked's note of the call records that Mr Y stated that he was on holiday but believed that there were only a couple of issues in dispute and he was hopeful of getting an agreement. Mr Sked's note records that he (Mr Sked) stated that it was not up to him whether HMRC objected to a late appeal but "there had been a lot of delay caused by HMRC and as such [he] would recommend that there is no objection to a late appeal".

19. On 7 September 2021, X LLP filed a Notice of Appeal on behalf of the Appellant. The reasons for the late appeal were stated to be as follows:

"Mr [Y], the solicitor corresponding with HMRC, was a tax advisor and was not a litigation specialist. During the last few months he has been particularly preoccupied by a major deal with a consideration in excess of £450 million that he has been advising on. He assumed that it was open to HMRC to agree to an extension and that HMRC would not object to relatively short further delays. He had this impression because the review letter indicated that HMRC would not raise any objections if an appeal was made in 3 months. In an email exchange on 12 May 2021, Officer Jamie Sked also wrote "If for any reason more time than that was needed, then I would simply ask you to contact me to discuss". As was mentioned in his letter of 24 August 2021 to HMRC, he also assumed HMRC would have no objections given the fact that HMRC did not reply to a letter sent to them on 24 April 2019 until 9th October 2020 and have frequently asked for extensions including in relation to the review letter. Mr [Y] was on holiday in Greece with no access to emails when Officer Jamie Sked replied by an email on 25 August highlighting the need to lodge a formal appeal. The firm has sought to submit this appeal as quickly as possible in Mr [Y]'s absence. It took some time to review the legal and factual issues in the absence of Mr [Y]. We have then sought to review the issues with both the Appellant and Mr [Y] (who as indicated was on holiday abroad with his family and not always easily contactable but despite those facts has sought to assist

in drafting the grounds once he became aware of the issue). As will be apparent from this notice the tax in issue is significant. For the reasons indicated in the grounds, there are also good grounds for disputing the liability. Mr Sked has since indicated by telephone to Mr [Y] that it is unlikely that HMRC will object to the appeal being late.”

20. HMRC objected to the Appellant’s application.

SUMMARY OF THE UNDERLYING DISPUTE AND OTHER DECISIONS MADE BY HMRC

21. The following summary is taken from the Appellant’s skeleton argument (under the hearing “background facts”), the evidence of Professor Barrett and the documents that I was provided with. In their skeleton, HMRC state that these “background facts” are largely irrelevant to the present application and so have not been responded to (but failure to respond should not be taken as acceptance of those facts if this matter proceeds to a substantive hearing). For the purposes of this application only, then, I proceed on the following basis:

- (1) In or around 2003, the Appellant began providing design and development advice on partial and full knee joint replacements to DePuy Products Inc (“DePuy”).
- (2) On 10 May 2006, the Appellant entered into a Product Development Agreement with DePuy (“the PDA”) pursuant to which he was entitled to future royalties.
- (3) The PDA contains a governing law clause that provides it is the intention of the parties that the PDA shall be governed by and construed in accordance with the laws of the State of Indiana.
- (4) Section 13 of the PDA deals with payments of royalties. Section 13 comes into effect from the Commercialization Date which is defined as “the date of the first royalty-bearing sale of a Royalty Bearing Product”.
- (5) In or around January 2006, the Appellant decided to transfer his consultancy business to a limited company.
- (6) On 11 July 2016, Professor David Barrett Limited (“PDBL”) was incorporated. At all times the Appellant has been the sole director and shareholder of PDBL.
- (7) By the “2011 Amendment to the 2006 Product Development Agreement”, DePuy, PDBL and the Appellant agreed to amend the PDA, The amendments including adding PDBL as a party to the PDA, seeking to impose obligations that arose under the PDA on PDBL and introducing changes to the Commercialization Date (including by the introduction of a “Primary Commercialization Date”). In his evidence before me, the Appellant stated his belief it was the “aim of all the parties that, by the amendments to the PDA, the entirety of that agreement was transferred to PDBL”.
- (8) By letter dated 12 August 2013, DePuy informed PDBL that the Primary Commercialization Date was 1 July 2013 and that royalty payments would be calculated on a quarterly basis.
- (9) In April 2014, the Appellant met with Mr Y and two other lawyers from X LLP. They indicated to the Appellant that there was some doubt as to whether the 2011 Amendment had transferred to PDBL the rights and obligations arising from the PDA and that, in any event, the 2011 Amendment may be invalid for lack of consideration.
- (10) Subsequently, Mr Y advised the Appellant that he should enter into another transfer agreement. On the basis of that advice, the Appellant entered into the Business Transfer Agreement (“BTA”) with PDBL. The BTA was dated 7 October 2014 but was said to have an effective date of 1 July 2013.

(11) By the BTA, the Appellant agreed to transfer to PDBL his knee joint engineering consultancy business as a going concern for consideration of £4,500,000.

(12) The Appellant received a credit in the sum of £4,500,000 to his director's loan account.

(13) The Appellant declared a capital gain of £4.46 million in his self-assessment return for the year ended 5 April 2014 (on the basis that, as a result of the BTA, there was a transfer on 1 July 2013 that gave rise to a capital gains tax liability).

(14) On 4 November 2015, HMRC opened an enquiry into the Appellant's tax return for the year ended 5 April 2014. The opening letter stated "I only intend to look at the Capital Gain declared. However, when I look at this aspect I may find that I need to extend my check."

(15) Between November 2015 and 2021, HMRC and X LLP on behalf of the Appellant corresponded in relation to the enquiry and the Appellant's tax liability.

(16) On 31 July 2017, HMRC wrote to X LLP setting out in considerable detail their then position in relation to the taxation of royalty income and the payment of £4.5 million under the BTA. By way of conclusion, HMRC stated that their then current view was:

"neither the 2011 amendment to the PDA, nor the 2014 Business Transfer Agreement, achieved the intended result of transferring liability to income tax on royalties to Professor Barrett. As such, I believe he should have declared, and should continue to declare, all royalties received as income liable to income tax.

Should this be the case, the company accounts would need to be amended and overpayment relief claims submitted in respect of corporation tax paid on those amounts. The £4.5 million consideration given as part of the 2014 BTA would need to be unwound, as nothing of value was in fact transferred.

If this is not correct, and PDBL is legally entitled to and so taxable on royalty income, my position is that the Transfer of Income Stream legislation would then apply.

... "

(17) In a letter dated 8 December 2017, having considered representations made by X LLP, HMRC stated that, for the time being, they were willing to proceed on the basis that whilst the burden to provide services under the PDA had not changed, the entitlement to receive royalties had, such that Professor Barrett did not remain taxable on royalties from DePuy. However, HMRC went on to say that they may wish to revisit this issue depending on the outcome of discussions concerning the Transfer of Income Streams Legislation.

(18) On 26 March 2018, HMRC notified the Appellant of an assessment to tax for the year ended 5 April 2012. By letter dated 12 April 2018, the basis for the assessment was said to be that the Appellant "is taxable on additional income of £4.5m in the 2011/12 tax year, as a result of the application of the transfer of income streams legislation at s809AZB ITA 07". It was made clear that this was a "protective" assessment and that "in the event we are able to agree that the transfer did occur on 1/7/13, I would give effect to any necessary tax consequences upon closing my open enquiry into [2013/14], and vacate the enclosed assessment for 2011/12".

(19) On 9 May 2018, the Appellant notified an appeal to HMRC against the 2011/12 assessment. On 17 August 2022, the Appellant filed an appeal with the Tribunal against the 2011/12 assessment. The Notice of Appeal was not in the hearing bundle (and had not yet been provided to HMRC) but was emailed to me (and HMRC) during the course of the hearing by the Appellant's legal team.

(20) Between May 2018 and March 2019, the parties exchanged correspondence about the correct tax treatment and in particular the applicability of the Transfer of Income Stream legislation.

(21) On 22 March 2019, HMRC notified the Appellant of an assessment for the 2014/15 tax year (this is the Discovery Assessment referred to at paragraph 3 above). HMRC explained that the assessment was raised on a protective basis and, whilst they had previously raised an assessment for 2011/12 and anticipated amending the Appellant's 2013/14 return, these were all alternative assessments "and it is not my intention that more than one of these would ultimately be upheld by the tribunal".

(22) On 22 March 2019, HMRC wrote to X LLP stating their view that the "right to income under the PDA was transferred on 5/1/12, the date the 2011 amendment was signed". HMRC acknowledged "the position may be different under Indiana law" and stated:

"If, under Indiana law, it were the case that no right existed until the first commercialisation date, then it is possible that the right to royalties may not have transferred to Professor Barrett until that date, 1 July 2013. If that were the case, my view would be that the Transfer of Income Streams legislation applied to the assignment of the right at that date instead. As such, when I close my enquiries, it will likely be necessary to amend the 2013/14 tax return to include a charge under the transfer of income rules as an alternate position to the assessment have already raised for 2011/12.

...

A further alternative could be that under Indiana Law the 2011 amendment on its own did not achieve a transfer of the right to income on either 5/1/12 or 1/7/13. My understanding is that this is your position, on the basis that the 2011 amendment lacked sufficiency of consideration.

If this were the case, then the transfer of income would be the result of the 2014 Business Transfer Agreement, in which it was agreed to transfer the whole of Professor Barrett's business, including any remaining rights to royalties, for consideration of £4.5million.

...

...my view is that if any transfer of income was achieved by the 2014 BTA, rather than the 2011 amendment, then the transfer did not occur until 7/10/14. The resulting tax charge would therefore fall in 2014/15.

For this reason, I have today raised a further protective assessment...on the basis that the £4.5m was taxable as income in 2014/15.

For the avoidance of doubt, this is an alternate assessment. As discussed above, I also intend to include a similar charge in my closure notice to my 2013/14 enquiry, which would be a further alternate assessment. It would not be my intention to uphold more than one of the assessments for 2011/12, 2013/14 or 2014/15 upon conclusion of any appeals, however, due to the significant differences of opinion over certain key facts in this case, it is

necessary to raise multiple assessments now in order to protect HMRC's ability to collect any tax which may ultimately found to be due."

(23) On 2 April 2019, the Appellant's accountants filed with HMRC an appeal against the Discovery Assessment.

(24) On 20 April 2019, the Accountants wrote to HMRC stating:

"...we are enclosing a letter from [the Appellant] to your good selves confirming that in effect both [the Accountants] and [X LLP] are acting for him with regard to the present outstanding matter. Correspondence should therefore be addressed to whoever writes to you. For the present [the Accountants] will only be dealing with compliance issues, such as notices of appeal and the like, whereas [X LLP] will be dealing with issues arising as the principal purpose of your enquiries".

22. On 24 April 2019, X LLP replied to HMRC's 22 March 2019 letter including by stating:

"We would like to re-iterate that [certain factors set out in the letter] cast further doubt as to the validity of the 2011 Amendment Agreement, it clearly did not reflect the Professor's wishes nor did it reflect the agreement with De-Puy as set out in the letter of 30 November 2011. This added to the fact that the 2011 Amendment Agreement was not executed as a deed and the fact that no consideration was given by the Professor clearly does raise concern as to the validity of the 2011 Amendment Agreement. It did not reflect the parties' intentions and it failed by reason of sufficiency of consideration. As we have stated on a number of occasions, the 2014 Business Transfer Agreement was put in place to rectify this..."

23. On 15 May 2019, HMRC wrote to X LLP confirming receipt of the 24 April 2019 letter and stating that its contents would be considered and a "final position" notified by 27 June 2019.

24. Between 15 May 2019 and 24 April 2020, HMRC sent to X LLP a number of holding letters whereby it was said that HMRC was unable to send a full response as the matter was still being considered.

25. On 30 July 2020, Jamie Sked of HMRC wrote to X LLP stating that the HMRC officer that previously had conduct of the Appellant's case had retired and that HMRC hoped to be in a position to respond to X LLP's letter of 24 April 2019 by 4 September 2020 (subsequently extended to 12 October 2020).

26. On 9 October 2020, HMRC (through Jamie Sked) wrote to the Appellant setting out HMRC's view of the matter as follows:

(1) The right to receive royalty income under the PDA was effectively transferred from the Appellant to PDBL under the BTA on 2014 (and not under the 2011 Amendment Agreement).

(2) The Transfer of Income Streams legislation applied to impose an Income Tax charge on that transfer.

(3) The Income Tax charge under the Transfer of Income Streams legislation applied to the 2014/15 tax year as it was during that tax year that the BTA was signed.

Enclosed was a letter to X LLP (dated 12 October 2020) which was said to contain the reasons for HMRC's view of the matter.

27. By letter dated 12 October 2020 to X LLP, HMRC explained their position that the tax charge arose in the 2014/15 tax year and stated:

“...with regards to the 2011/12 appeal, as HMRC are no longer seeking to argue that the transfer arose due to the 2011 agreement should we have to proceed to tribunal and HMRC’s position is agreed we will seek to have the 2011 assessment vacated. In addition we would propose at this time to leave the 2013/14 enquiry open pending the outcome of any tribunal case at which time a closure notice would be issued in line with the findings of the tribunal.”

28. By letter dated 22 October 2020 (emailed to HMRC on 2 November 2020), X LLP replied to HMRC’s view of the matter correspondence.

29. On 9 November 2020, HMRC (through an email from Jamie Sked) stated that the matters raised in X LLP’s letter of 22 October 2020 were still being considered and highlighted that in the view of the matter letter an offer of a review by a different officer had been made.

30. The Appellant having accepted HMRC’s offer of a statutory review, the conclusion of that review was notified on 31 March 2021. The review officer upheld the decision to issue the Discovery Assessment.

X LLP AND MR Y

31. The parties agreed, and I proceed on the basis, that X LLP was a “large and experienced law firm” and that Mr Y (the partner with conduct of the Appellant’s case) was a very experienced solicitor who held himself out as an expert in tax matters (and had been ranked in legal directories as such an expert).

THE APPELLANT’S EVIDENCE

32. The Appellant provided a witness statement and gave live evidence before me. In summary, he set out his expertise and explained the background to the arrangement with DePuy and the contractual documents entered into in that regard including that the reason the BTA was entered into was because Mr Y had advised that the Amendment Agreement was ineffective. The Appellant then went on to state:

(1) Mr Y advised that as a result of the BTA, the Appellant has a capital gains tax liability. The Appellant declared that Capital Gain in his self-assessment return for the 2013/14 tax year.

(2) the “general tenor” of Mr Y’s advice was that the dispute with HMRC “would be resolved via correspondence” and that the dispute would not proceed to an appeal before the Tribunal.

(3) he did not take “any particular notice of communications with HMRC” as he understood Mr Y had these in hand, and he was not asked to review any communications before they were sent to HMRC. In cross-examination, he accepted that he read the communications that were copied to him post the review decision in relation to the Discovery Assessment.

(4) he recognised that the communications from HMRC that he had been copied into indicated there was a time limit for filing an appeal with the Tribunal in relation to the Discovery Assessment but Mr Y’s advice throughout was “that this was not an issue” and HMRC would not object to a late appeal.

(5) During cross-examination, the Appellant stated that he asked Mr Y about the time limit for appealing and was told not to worry about it and that the best course was to “delay as much as possible” as this was a “tactic” that would assist in achieving a settlement.

(6) An email dated 4 August 2021 from HMRC “raised an alarm bell” as he understood it to mean that “HMRC now would or may no longer allow a late appeal to be made”.

Accordingly, he contacted Mr Y and asked for urgent advice. Mr Y told him not to worry. A video call with Mr Y took place on 23 August 2021 (the earliest date Mr Y was available). Mr Y said that an appeal should be made to the Tribunal but that HMRC would agree to a late appeal being admitted.

(7) Mr Y “advised me that that HMRC officer has assured him that HMRC would not object to a late appeal”. During cross-examination, the Appellant clarified that Mr Y said “I don’t think [HMRC] are going to object” but that Mr Y did not say that he had received a guarantee from HMRC that they would not object.

(8) In his witness statement: after the video call on 23 August 2021 he had the impression that an appeal would be filed shortly thereafter. During cross-examination, the Appellant clarified that from the video call he understood that Mr Y would shortly thereafter be writing to HMRC to try to achieve a settlement not that he would shortly thereafter be filing an appeal “because the tactic was not to appeal”.

(9) The Appellant has no experience of litigation and trusted Mr Y who he understood to be an expert,

(10) The Accountants did not give the Appellant any advice on time limits for appealing.

33. The Appellant then went on to explain his financial position. In cross examination he accepted he was the sole beneficial owner of PDBL and that the company had approximately £1million of cash.

34. I accept the Appellant’s evidence as summarised above.

SUBMISSIONS ON BEHALF OF THE APPELLANT

35. The Appellant submitted that in deciding whether to permit this late appeal, I should apply the three-stage test in *Martland v HMRC* [2018] UKUT 178 TCC.

36. The Appellant further referred me to *Katib v HMRC* [2019] STC 2106 from which, it was submitted, the following could be drawn:

(1) The general rule is that failures by a taxpayer’s adviser should be treated as if they were failures by the taxpayer.

(2) A failure of an adviser to submit a timely appeal on behalf of a taxpayer will rarely provide the taxpayer with a good reason for the deadline having been missed.

(3) There are exceptions to the general rule.

(4) If a taxpayer was misled by his adviser, that is a relevant consideration (at stage 3 of the *Martland* test).

(5) If there were “warning signs” that should have alerted the taxpayer that the adviser was “not equal to the task”, but which were not acted upon, that is a factor that would support the general rule applying.

37. As to the length of the delay (stage 1 of *Martland*), the Appellant submitted:

(1) The appeal was filed 4 months and 7 days after the statutory time limit has expired.

(2) The appeal was filed 38 days after the expiration of the 3-month period in which HMRC said they would not object to late appeals.

(3) The delay was “serious and significant”.

38. As to the reasons for the delay (stage 2 of *Martland*), the Appellant submitted that the reasons for the delay were:

- (1) The Appellant understood, from the advice given to him by X LLP, that the dispute would be resolved via correspondence with HMRC and would not proceed to an appeal before the Tribunal.
- (2) The Appellant understood, from the advice given to him by X LLP, that HMRC could allow a late appeal to be made and that HMRC had given an assurance that they would not object to an appeal being notified to the Tribunal late.
- (3) Due to the misleading advice from X LLP, the Appellant did not appreciate, particularly at any time prior to 4 August 2021, the seriousness and significance of his appeal not being notified timeously to the Tribunal.

39. As to stage 3 of *Martland* (evaluation of all the circumstances of the case), the Appellant submitted:

- (1) Whilst it was accepted that weight must be placed on the need for statutory time limits to be respected, that factor is outweighed by the other factors in this case all of which point toward permission to file a late appeal being granted.
- (2) The reasons for the delay were “good” or “at the very least understandable” given:
 - (a) It was reasonable for the Appellant to have accepted as accurate X LLP’s advice that the dispute would be resolved via correspondence and would not need to proceed to an appeal before the Tribunal given:
 - (i) The experience and expertise of X LLP and Mr Y.
 - (ii) As at 31 March 2021, the parties had “engaged in discursive correspondence for over 5 years (during which time HMRC’s position fluctuated considerably) with the aim of resolving the matter without need for a Tribunal hearing” and “it could not be said that it was obvious that the review conclusion “had the consequence of ending that approach”.
 - (b) X LLP misled the Appellant and, but for that advice, there would have been no delay in notifying the appeal to the Tribunal. X LLP’s advice was of a “fundamentally different type to the ‘common’ incompetence of an adviser...nor was the advice...akin to the extraordinary advice provided in *Katib* that would (or should) have given rise to “warning signs” as to the competence of the adviser and his advice”.
- (3) As to the merits of the case:
 - (a) Quoting from *Martland* at [46], the Tribunal can properly take into account “obvious strength or weaknesses of the applicant’s case”;
 - (b) HMRC’s case, as set out in the review conclusion, in support of a transferred income stream arising in the 2014/15 tax year is a very weak one given:
 - (i) “HMRC must demonstrate that the statutory pre-conditions for raising a ‘discovery assessment’ are met...in particular, the question of whether the hypothetical officer could reasonably have been expected to be aware of an insufficiency ...based on the information made available...”. The Appellant accepted that this was not an argument that was pleaded in the Grounds of Appeal.

(ii) “HMRC’s case proceeds on the assumption that the Amendment Agreement was not legally effective, but without HMRC having any view as to whether or not that assumption is correct...by contrast, HMRC’s case in relation to the assessment for the year to 5 April 2012 is based on the Amendment Agreement being legal effective”. The Appellant also said that HMRC’s position had shifted at various points during the investigation and assessment process.

(iii) Resolution of the appeal will require consideration of Indiana law. The Appellant has “recently obtained” Indiana law advice to the effect that the Amendment Agreement was legally effective.

(iv) For the Discovery Assessment (for the 2014/15 year) to be valid, it must be the case that the “effective date” (1 July 2013) stated in the BTA “has no legal effect”. HMRC’s position that “the evidence presented [does not] suggest that the transfer took place at 1 July 2013 as opposed to 7 October 2014” has “no legal support”.

(c) At various point in the investigation and assessment process, HMRC has put forward “such a multitude of alternative analyses” as to demonstrate how “very weak” their case is.

(4) There was no prejudice to HMRC in permitting the late appeal to be filed. This is not a case where HMRC has diverted resources. Nor is this a case where HMRC can properly rely on “finality of litigation” given they engaged in discussion with the Appellant for some 6 years and clearly “considered that notification of the appeal to the Tribunal was no more than an administrative step”. Further, because HMRC’s case is very weak, they would obtain a windfall if the late appeal is not admitted.

(5) Allowing the Appellant to bring the late appeal would further the efficient and proportionate management of litigation because the issues that fall to be determined in this appeal will, in any event, need to be determined by the Tribunal in other litigation namely the appeal against the 2011/12 assessment (which appeal was notified to the Tribunal on 17 August 2022) and any appeal against any penalties that might be issued.

(6) If the late appeal is not admitted, there will be significant prejudice to the Appellant. The amount in issue is significant and, a claim against X LLP/Mr Y is unlikely to provide a full indemnity for that liability and associated interest.

SUBMISSIONS ON BEHALF OF HMRC

40. HMRC agreed with the Appellant that, in deciding whether to permit this late appeal, I should apply the three-stage test in *Martland*.

41. HMRC submitted that the starting point under *Martland* is that permission should not be granted where there has been serious and significant delay, without good reason, unless on the balance of all relevant considerations, the Tribunal considers permission should be granted. In exercising its discretion, the Tribunal should give particular weight to the need for litigation to be conducted efficiently and at proportionate cost.

42. As to the length of the delay (stage 1 of *Martland*), HMRC submitted: the delay was over 4 months (and over 1 month beyond the period in which HMRC said it would not object to late appeals). That was significant and serious.

43. As to the reasons for the delay (stage 2 of *Martland*), HMRC submitted that the reasons are as set out in the Notice of Appeal – namely that Mr Y, who was not a litigation specialist, was “pre-occupied” with another case and “assumed that it was open to HMRC to agree an

extension” and that HMRC would do so. In short, Mr Y fell short in the performance of his professional duties towards the Appellant.

44. HMRC submitted that the extent and reasonableness of the Appellant’s reliance on X LLP and Mr Y is not the *reason* for the delay but is a separate consideration to be given due regard at stage 3 of the *Martland* test.

45. As to stage 3 of *Martland* (evaluation of all the circumstances of the case), HMRC submitted:

- (1) The reasons for the delay – as set out in the Notice of Appeal – are not “good”.
- (2) Consistent with *Katib*, as a general rule failure by a litigant’s adviser should generally be treated as failures by the litigant. There is nothing about the present case to justify a departure from the general rule, specifically given:
 - (a) The Appellant was sent (directly) a copy of the review letter which sets out clearly the appeal deadline.
 - (b) The Appellant was copied into the email exchanges between HMRC and Mr Y in the period from the review letter until submission of the appeal. That correspondence emphasised the deadline, as well as the need for urgency once the deadline had passed.
 - (c) Even on the Appellant’s own case, he was aware from 4 August 2021 that action needed to be taken to file the appeal and yet the appeal was not filed until 7 September 2021.
 - (d) The Appellant has not provided a detailed (and documented) account of the steps he took to follow up with X LLP and Mr Y.
 - (e) The Appellant has not established that he was “misled” by Mr Y. Rather, Mr Y appears to have given him bad advice and did not do his job properly – just like the adviser in *Katib*.
 - (f) There were “warning signs” (in the form of the correspondence from HMRC following the review) that the Appellant failed to act on timeously.
- (3) As to the merits of the case:
 - (a) Only *obvious* strength or weakness should be taken into account. Even on the basis on the case now articulated by the Appellant (which is not pleaded in the grounds of appeal), determination of the appeal would require detailed consideration of Indiana law, an in-depth analysis of contractual documents, the application of complex legal provisions, and consideration of witness evidence from both parties. The Appellant has not established that HMRC’s case is obviously weak.
 - (b) As to the hypothetical officer challenge:
 - (i) This was raised for the first time in the Appellant’s skeleton argument.
 - (ii) The Appellant will need to apply to amend its grounds of appeal to advance this argument and it cannot be presumed that application would be successful given the delay in raising the point.
 - (iii) Beyond stating that the Appellant does not accept the pre-conditions for a discovery assessment were met, there was no elaboration of this argument.

(c) Throughout the enquiry, the Appellant's representatives assumed in correspondence that the effect of Indiana law was the same as English law. The Appellant's then stated position was that the Amendment Agreement was ineffective (for want of consideration) and the transfer of royalty income only occurred as a result of the BTA. It was not unreasonable of HMRC to apply this analysis put forward by the Appellant when determining when any tax charge arose.

(d) It has been made clear that the Discovery Assessment (for the 2014/15 year) is HMRC's preferred position, and that the 2011/12 assessment and amendments to the Appellant's 2013/14 return were alternative positions.

(e) It is not uncommon for HMRC's analysis of a given tax position to evolve during the course of an enquiry. The position is now clear. The Discovery Assessment (2014/15) is HMRC's preferred position and the basis for that has been clearly set out.

(4) HMRC would suffer prejudice if the late appeal was admitted given the Appellant is now seeking to advance a very different case to that set out in his grounds of appeal. HMRC will need to obtain witness evidence including in relation to Indiana law. HMRC have been "ambushed" by the substantially new case that the Appellant now seeks to advance. The change in scope and focus of the appeal will have resource and costs implications for HMRC.

(5) The Appellant's reliance on efficient and proportionate management of litigation and reference to the 2011/12 assessment appeal and appeals against potential penalties is misguided. If the late appeal against the Discovery Assessment is not admitted such that the Discovery Assessment stands, HMRC will:

(a) withdraw the 2011/12 assessment;

(b) not issue any penalties; and

(c) close the enquiry into the Appellant's 2013/14 return without making any amendment other than to give the Appellant credit for the capital gains tax previously paid on the basis that the transfer of royalty income occurred as a result of the BTA.

(6) The only prejudice that the Appellant will suffer is having to pay tax that has been assessed and not appealed against. This is something that will be common to many late appeal applications. Credit will be given for the capital gains tax already paid by the Appellant. To the extent the Appellant says he will not be fully indemnified by a claim against X LLP/Mr Y, that is not something the Tribunal can properly assess. Given the Appellant's sole ownership of PDBL the Appellant will not be caused undue hardship

DISCUSSION AND DECISION

46. I agree with the parties that I should apply the 3-stage approach in *Martland*.

47. As to the first stage: the appeal to the Tribunal was filed 4 months and 7 days late (and 38 days after the 3 month "extension" period in which HMRC stated that would not oppose late appeals). I agree with the parties that such a delay is serious and significant.

48. As to the second stage: I agree with HMRC's submissions on this point. The "reasons" for the delay are as set out in the Notice of Appeal namely Mr Y, who was not a litigation specialist, was "pre-occupied" with another case and "assumed that it was open to HMRC to agree an extension" and that HMRC would do so. I further find, on the basis of the Appellant's evidence, that another reason for the appeal not being filed on time was that Mr Y considered

that there was a tactical advantage to not filing an appeal. That the Appellant relied on Mr Y is not a “reason” for the delay but should, of course, be taken into account at the third stage.

49. As to the third stage:

- (1) The reasons for the delay (as set out above) are not “good” ones.
- (2) I should, and do, give particular regard to the importance of statutory time limits being respected such as to mean that the starting point is that a late appeal will not be admitted unless I am satisfied on the facts that, in all the circumstances, a late appeal should be permitted.
- (3) I accept that the Appellant relied on Mr Y whom he understood to have appropriate expertise. However, that as may be, I do not consider that this is a factor to which I should give particular weight given:
 - (a) *Katib* (and the cases cited therein) make clear that the “general rule” is that failures by a taxpayer’s adviser should be treated as if they were failures by the taxpayer and a failure of an adviser to submit a timely appeal on behalf of a taxpayer is unlikely to provide the taxpayer with a good reason for the deadline having been missed.
 - (b) Whilst there are exceptions to the general rule, I do not consider that there is anything about the facts of this case to justify the application of an exception given:
 - (i) The Appellant’s complaint about Mr Y is that he did not do his job properly. As stated at paragraph 58 of *Katib*, this is not as uncommon as it should be.
 - (ii) To the extent the Appellant says he was “misled” that was simply the consequence of the poor advice. This was not, for example, a case where the advisor said the appeal had been filed (when in fact it had not been). In many (if not all) cases of poor advice, the client will have been “misled” as to the correct position but that cannot mean that in all such cases an exception to the general rule should be applied.
 - (iii) Nor do I consider that the fact that Mr Y held himself out as having appropriate expertise (and was listed in the legal directories) alters the position. The fact remains that Mr Y agreed to advise and represent the Appellant and fell short in so doing - there is nothing about that to make it exceptional.
 - (iv) There were “warning signs” that the Appellant should have picked up on such as to mean that the Appellant is not himself without some blame in this matter. In particular, the Appellant was copied into correspondence (see paragraphs 9-17 above) from which he should properly have understood that there was a statutory deadline for filing the appeal with the Tribunal, that HMRC would not object to a late appeal *if* it was filed within 3 months and 30 days of the decision and, once that extended period had ended, it was not (regardless of what Mr Y was saying) a given that HMRC would consent to a late appeal being filed, in particular:

(A) On 12 July 2021, Mr Sked asked:

“Has the appeal of the discovery assessment yet been notified to the Tribunal? If it has not, then is it intended that it will be notified soon or is your client accepting

HMRC's position on this matter? I would be grateful for your clarification."

clearly indicating that if the Appellant was not accepting HMRC's position then an appeal needed to be made to the Tribunal regardless of the fact that there had previously been lengthy exchanges of correspondence between the parties.

(B) On 4 August 2021, Mr Sked stated:

"Please can you confirm if an appeal has been notified to the Tribunal? If it has then please can you provide a copy of the T240 appeal form. If it has not, then please can you fully explain why.

The 30-day statutory appeal period has long since expired and the 3 month period in which HMRC would not object to a late appeal has also recently expired.

Please do not hesitate to contact me should you wish to discuss."

clearly indicating that the period in which HMRC would not object to a late appeal had now passed. Despite this, the appeal was not filed for more than a month thereafter. Once this correspondence was received, a taxpayer in the position of the Appellant should reasonably have sought advice from another professional on an urgent basis, especially when Mr Y advised that he was not free for a meeting until 23 August 2021 and there was nothing to worry about (which advice could not be readily reconciled with the plain words used in HMRC's correspondence).

(4) As to the merits of the case: I am not satisfied the Appellant has shown that HMRC have an obviously weak case. In particular:

(a) The Appellant has not satisfied me that HMRC has an obviously weak case in relation to the statutory pre-conditions for issuing a discovery assessment. Not only was this a point that is not pleaded in the grounds of appeal (and it is not a given that the Appellant will be successful in obtaining permission to amend his grounds of appeal), the Appellant did not, beyond stating that the Appellant does not accept the pre-conditions were met advance any further submissions or provide any further detail in support of this contention.

(b) The Appellant has not satisfied me that HMRC's case (which proceeds on the basis that the Amendment Agreement was not legally effective) is obviously weak. That the Amendment Agreement was not legally effective was a position that the Appellant himself (through X LPP) argued in the course of correspondence. The Appellant now says that the Amendment Agreement was legally effective. That is something that I cannot determine on the evidence before me. It would involve, amongst other things, consideration of the law of Arizona.

(c) The Appellant referred to advice on Indiana law that he had recently obtained and which he submitted undermined HMRC's position as to whether the Amendment Agreement was effective. That Indiana law advice was not shown to me and nor was I addressed on the relevant provisions of Indiana law. The Appellant has not, then, satisfied me that on the basis of Indiana law, HMRC's case is obviously weak.

(d) The Appellant has not persuaded me that that HMRC's position in relation to the operative date for the BTA has "no legal support". That is something that I would need to hear detailed submissions on – no such submissions were made to me by either party.

(e) I am not satisfied that the fact that HMRC (1) put forward various analysis of the correct position in correspondence and (2) has issued an assessment for 2011/12 based on a different analysis, means that HMRC's case is obviously weak. It is often the case that a party's analysis of the correct tax position will evolve during the course of an enquiry (indeed, the Appellant's own position was previously that the Amendment Agreement was not effective). In relation to the 2011/12 assessment, HMRC has made clear that is issued on an alternative basis and that the Discovery Assessment (2014/15) is HMRC's primary position.

I do not, then, attach any weight to this factor in determining whether to permit a late appeal.

50. I do not accept that there is no prejudice to HMRC. Admitting this late appeal will have cost and resource implications for HMRC especially given that the Appellant now seeks to advance a case that is somewhat different to that previously advanced in correspondence and which will involve consideration of foreign law. That said, I accept that the prejudice to HMRC is relatively minimal. On the facts of this case, I consider this to be a neutral factor in determining whether to permit a late appeal.

51. I do not accept that allowing the Appellant to bring this late appeal will further the efficient and proportionate management of litigation. HMRC made clear that if this application is dismissed such that the Discovery Assessment stands, they will withdraw the 2011/12 assessment, not issue any penalties and will close the enquiry for 2013/14 (and the only change that will be made to the 2013/14 return will be to give the Appellant credit for the capital gains tax he has paid). There is not, then, any other litigation in this Tribunal in which the issues arising on the present appeal will in any event be litigated.

52. I accept that the Appellant will suffer prejudice if the late appeal is not admitted. He will lose the ability to challenge an assessment to tax that he says is not due, and that assessment is for a significant sum. However, as stated at paragraph 60 of *Katib*, that is a relatively common feature of late appeal applications. Nor do I consider that the Appellant may not be able to obtain a complete indemnity by way of a claim against X LLP/Mr Y (about which I am not able to reach a concluded view) materially alters the position. The case law does not suggest that a litigant is only to be bound by the acts of his lawyers to the extent he can obtain an indemnity from them. Accordingly, whilst I take prejudice to the Appellant into consideration, it is not a factor to which I give any particular weight.

53. In summary, having weighed up all of the circumstances of this case, I am not satisfied that they justify permission being given to bring a late appeal. Accordingly, permission to notify this late appeal is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. 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.

**DAVID BEDENHAM
TRIBUNAL JUDGE**

Release date: 21st NOVEMBER 2022